STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DISTRICT DEPARTMENT OF HEALTH NO. 2,
Public Employer-Petitioner,

-and-

Case No. UC11 J-020
Docket No. 12-000008-MERC

PROFESSIONAL MANAGEMENT ASSOCIATION,
Labor Organization.
____/

APPEARANCES:

Cohl, Stoker & Toskey, P.C., by Sherry Katz-Hedrington, for the Employer-Petitioner

Max Tobin, Director of Home Health, for the Labor Organization

DECISION AND ORDER ON PETITION FOR UNIT CLARIFICATION

Pursuant to § 13 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.213, this case was heard at Lansing, Michigan on June 14, 2012, by Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission. Based on the entire record, including post-hearing briefs filed on or before July 18, 2012, we find as follows:

The Petition and Positions of the Parties:

On October 27, 2011, District Health Department No. 2 (the Employer) filed this petition to clarify a bargaining unit of its employees represented by the Professional Management Association (the Union). On or about November 22, 2010, the Employer voluntarily recognized the Union as the bargaining representative for a unit consisting of five previously unrepresented positions: administrative secretary, home health director, public health director, environmental health director, and finance director. The Employer's petition seeks to remove two positions from this unit, finance director and administrative secretary.

The Employer argues that the finance director is inappropriately included in the unit because she is an executive and/or confidential employee. The Union asserts that the finance director, although she heads the Employer's five-person finance department, is not an executive because she does not make policy. It asserts that the finance director is not a confidential employee because she does not participate in formulating labor relations policies or contract proposals or have access to confidential labor relations information.

At the start of the hearing, the Employer moved for a summary order to remove the administrative secretary from the unit on the grounds that: (1) the administrative secretary serves as confidential secretary to its executive director, Health Officer Lynnette Benjamin; (2) under Commission precedent, including *Lapeer Co*, 1998 MERC Lab Op 611, the Employer is entitled, without a showing of necessity, to designate one clerical employee as confidential and exclude that employee from participating in collective bargaining; and (3) the Employer has designated the administrative secretary to be that confidential employee. The Union did not oppose the motion. The ALJ granted the motion and held that no testimony needed to be placed on the record regarding the duties of the administrative secretary.

<u>Findings of Fact:</u>

The Employer provides health services, including health promotion and disease prevention, to Alcona, Iosco, Ogemaw, and Oscoda Counties. The Employer receives its funds from county appropriations; state and federal grants for public health; fees collected for specific purposes, e.g., fees for well and septic tank applications collected for environmental health services; and fees collected, on a sliding scale, from recipients of health services such as vaccinations. Most of the Employer's funding is designated for specific programs and can be used only for the services provided by those programs. The Employer's governing body consists of an eight member board comprised of two county commissioners from each of its four service counties. The Employer's Health Officer serves as its executive director. Lynnette Benjamin has been the Employer's Health Officer since early 2009.

The Employer has fifty-six full and part-time employees, including Benjamin. Fifty employees are in a bargaining unit represented by AFSCME. The remaining five represented employees are in the Union's bargaining unit. Except for the administrative secretary, all of the employees in the Union's bargaining unit are considered department directors. Each of the four department directors, on a rotating basis, serves as acting Health Officer when Benjamin is absent.

As noted above, in 2010, the Employer voluntarily recognized the Union as the bargaining representative for the five positions in its unit. At the time of the hearing in this case in 2012, the Union and the Employer were still attempting to bargain their first collective bargaining agreement. The Employer's most recent negotiations with AFSCME culminated in the signing of a collective bargaining agreement in May 2012.

The finance director is responsible for planning and directing the Employer's accounting and management information systems. She heads the finance department, which consists of the finance director and four positions that she supervises: the payroll coordinator, the finance coordinator, and two billing clerks. The finance director is responsible for preparing and submitting financial and other reports, including Medicaid/Medicare cost reports, to Benjamin and the Employer's Board. As head of the finance department, the finance director has access to all employee payroll records, attendance reports, and deferred compensation data as well as financial data.

The finance director position requires a bachelor's degree in accounting or computer science plus five years of relevant experience in information technology, or any equivalent combination of education, training, and experience. The current finance director has a bachelor's degree in finance. Benjamin does not have a background in finance or accounting. Unlike some previous health officers, Benjamin cannot retrieve financial information from the Employer's computer system and relies on information provided by the finance director when making budget decisions or sending budget proposals to the Board.

The directors of the home health, public health, and environmental health departments, in conjunction with program coordinators within each department, are responsible for developing and monitoring the budgets for their departments and programs. However, the finance director plays an important role in the budget process. The process begins with the finance director and the finance coordinator meeting with the department directors and program coordinators to review their expenditures for the current fiscal year and obtain information for the next year. The finance coordinator and finance director ask the department directors and program coordinators to identify the programs for which each of their employees will do work in the upcoming year, and what percentage of his or her time each employee is going to spend on each program. They also ask the department directors to let them know how much money they think they will need for supplies, how many miles they expect their staff to travel, and if there have been any changes in their programs that might affect their budget. They may also ask program coordinators if they expect increases or decreases in the amount of fees collected from their programs.

The finance director and finance coordinator use the information from the department directors and program coordinators to calculate expected expenditures for each department for the next fiscal year. The finance director also estimates departmental revenues for the next year based on the prior year's revenue and information provided by the State about expected increases or decreases in grant funding. The finance director shares these calculations with the department directors, who submit departmental budgets based on these calculations. The finance director, with the assistance of the finance coordinator, prepares a proposed overall budget for the agency. While the finance director is meeting with the department directors, she meets periodically with Benjamin to update her on progress. Two to four weeks before the budget is to be presented to the Board for approval, the finance director and Benjamin meet to discuss the overall budget. Benjamin approves the proposed budget, which is then submitted by her and the finance director to the Board for approval.

For the last several years, the budget presented to the Board has not balanced expenditures and revenues. The finance director testified that she advised the Board in each of these years that if it wanted to adopt this budget, it would have to use monies from its fund balance. The Board asked her if the budget could be "tweaked" to avoid this. She explained why it could not and the Board voted to use monies from the fund balance to balance the budget.

The Employer sometimes obtains new grants, or increased funding from an existing grant, during a fiscal year. In that case, the finance director is responsible for preparing a budget amendment and presenting it to the Board. As noted above, department directors and program coordinators are responsible for monitoring the expenditures of the programs they administer. They are also responsible for recommending cuts in their budgets if expenditures rise too much during the fiscal year or if funding is cut for their programs during the year. The directors and program coordinators may ask the finance director for advice on how to cut their budgets. However, particularly if they are considering staffing changes, they may go directly to Benjamin. In any case, the finance director, with the assistance of the finance coordinator, is responsible for determining whether the cuts proposed by the directors or program coordinators will bring the budget back into balance, and may provide the directors with suggestions on how to save money. Benjamin makes the final decision on the cuts that are to be implemented.

The finance director is responsible for interpreting financial data as necessary to Board members, auditors, local and state agencies, and departmental employees. The finance director presents a report on expenditures and revenue to the Board each month and is normally present at every Board meeting to answer questions from the Board. The finance director sometimes talks directly with Board members outside of meetings, although she does not call Board members without talking to Benjamin first. Similarly, when a Board member wants information from the finance director, the Board member generally contacts Benjamin and tells Benjamin that he needs to speak to the finance director.

There is no evidence that the finance director has any role in managing investments or borrowing for the Employer. The finance director does make recommendations on fiscal operations, including formulating and recommending policies on employee travel and the use of credit cards. As discussed below, the finance director, at least in the past, has been responsible for compiling information on, and making recommendations with respect to, health insurance plans.

The Employer's bargaining committee, for both its negotiations with the Union and with AFSCME, consists of Benjamin and two members of its Board. During the Employer's last contract negotiations with AFSCME in 2012, it hired outside counsel to serve as its chief spokesperson. Prior to that, the Health Officer served as chief spokesperson. The finance director has never been part of the bargaining committee.

The practice of the Employer has been to reach agreement with AFSCME on health insurance benefits and then provide these same benefits to its nonorganized employees. The finance director has in the past been responsible for researching and compiling information on health insurance plans, including the cost of these plans and the differences between their benefits. The finance director works with the Employer's insurance agent/broker, but has also collected information on her own. Until the most recent AFSCME negotiations, the finance director held meetings with the Employer's bargaining committee before negotiations began to provide the committee with information on a range of plans and to answer questions. According to Benjamin's uncontradicted testimony, the finance director "winnowed out" plans that she felt did not meet the Employer's needs and the plans she presented to the bargaining committee represented her recommendations as to the best plans available within the Employer's budget. The bargaining committee is responsible for determining what proposals, including health insurance proposals, the Employer will present at the bargaining table; it is not clear from the record whether the bargaining committee routinely accepted the finance's director's recommendations on health insurance.

During the last round of AFSCME negotiations, the finance director's role was different than that described above. It was not clear whether this was because the finance director was now part of a bargaining unit or because the Employer needed to make substantial reductions in its health costs in these negotiations. Before the most recent negotiations with AFSCME began, the finance director contacted the Employer's insurance agent, told him that the Employer needed to reduce costs, and asked him for options. The insurance agent selected a number of different options and provided benefit summaries and premium information for each plan based on employee census information, which the agent already had. The finance director then simply calculated the cost of each plan by multiplying the premium by the number of employees. She also prepared a spreadsheet, with color coded benefit summaries, comparing the costs and benefits of the plan options the agent had provided, gave it to Benjamin, and also left it out on a conference table for employees to review. Instead of meetings between the finance director and the bargaining committee, the insurance agent held meetings with the Employer's entire staff, including members of the AFSCME unit, to answer questions about the plans he had suggested. As negotiations progressed, the finance director served as the primary contact person between the Employer and the insurance agent. For example, she testified that during the negotiations she contacted the insurance broker, gave him the name of a plan the parties at the table were considering and the deductible and co-pay, and asked him to provide a summary of benefits and cost figures based on the Employer's demographics. However, she also testified that both the AFSCME bargaining spokesperson and Benjamin also had direct contact with the agent during these negotiations.

As noted above, the bargaining committee decides what proposals, including but not limited to health plans, the Employer will present at the bargaining table. These proposals are also presented to the full Board for approval before negotiations begin. Before the bargaining committee formulates its proposals, the finance director provides the bargaining committee with information about the financial status and situation of the Employer. She is also responsible, at the bargaining committee's request, for costing out proposals. In the past, the finance director has provided the bargaining committee with cost estimates for proposals before bargaining began, i.e., proposals that the committee was considering, but may not have actually presented to AFSCME at the table. In the most recent negotiations with AFSCME, however, the finance director did not do this. It was unclear whether this was because she was now a member of a bargaining unit or because the Employer proposed in these negotiations to freeze all wages and benefits other than health insurance. In addition, before 2010, when she became a member of the Union's bargaining unit, the finance director participated in the bargaining committee's discussions of the Employer's proposals. However, she was excluded from these discussions for the last AFSCME negotiations, as well as for the Employer's negotiations with the Union.

The finance director has continued to provide cost estimates for proposals made at the bargaining table by AFSCME or the Union during negotiations. The finance director also attends negotiation sessions, including bargaining sessions with the Union, when she is asked by the Employer's bargaining committee to be there.

<u>Discussion and Conclusions of Law</u>:

As we first stated long ago in *City of Detroit*, 1969 MERC Lab Op 187, 193, executives are those employees "so intrinsically connected with the determination of policy that their engaging in concerted activities would damage, not enhance, the statutory purpose." The determination of whether an individual is an executive is made on a case-by-case basis. *Detroit v DOT Foreman's Ass'n*, 109 Mich App 141 (1981).

In *City of Detroit (Police Dep't)*, 1996 MERC Lab Op 84, 106, and most recently in *Leelanau Co & Leelanau Co Sheriff*, 24 MPER 18 (2011), we defined an executive as an employee who:

> (1)[I]s a policy making head of a major department of a public employer; or (2) in the case of employers with 1,000 or more employees, is a chief deputy to a department head, or is the head of a section or division of a major department who reports directly to a chief deputy and who exercises substantial discretion in formulating, determining, and effectuating management policy; or (3) pursuant to statutory or charter provision, exercises a substantial degree of autonomy in carrying out his or her public services and who has direct access to or direct influence upon the governing body of a public employer in a policy making role; or (4) formulates, determines and effectuates management policy on an employer-wide basis.

In *Leelanau Co & Leelanau Co Sheriff*, we further explained:

> The most significant factors in determining whether a position is an executive are the scope of its responsibilities, the extent of its authority, and the interchangeability of its functions with other executives. *UAW v Sterling Heights*, 163 Mich App 8 (1987); *Leelanau Co & Leelanau Co Sheriff*; *City of Ishpeming,* 25 MPER 80 (2012); *Carman-Ainsworth Cmty Schs,* 16 MPER 28 (2003). Within these categories, we consider factors such as the number of executive positions relative to the size of the organization, the extent of budget responsibilities, responsibility for preparation of departmental rules and regulations, the degree of

> interchangeability of functions between the employee and his or her immediate supervisor, and the degree of participation in labor relations or the formulation of collective bargaining policy. *Muskegon Co Prof'l Command Ass'n v Muskegon Co (Sheriff's Dep't)*, 186 Mich App 365 (1990); *Detroit v Foreman's Ass'n*, 109 Mich App 141 (1981); *Arenac Co*, 2001 MERC Lab Op 208; *City of Detroit (Police Dep't)*, 1996 MERC Lab Op 84.

We have repeatedly noted that bargaining unit exclusions based on executive or confidential status must be applied cautiously so as to fulfill PERA's purpose of providing employees with an opportunity to be represented and bargain collectively. *Delta Twp*, 24 MPER 4 (2011); *Pontiac Sch Dist*, 1997 MERC Lab Op 173; *City of Saginaw (City Attorney)*, 1991 MERC Lab Op 253.

Applying these principles, we have repeatedly found individuals who have overall responsibility for a public employer's financial affairs to be executives, especially when they have a significant role in formulating collective bargaining policy. *Carmen-Ainsworth Cmty Sch*, (director of business for a school district); *Bay Co*, 1997 MERC Lab Op 327, (county finance director). See also *City of Grand Rapids*, 1992 MERC Lab Op 339; 5 MPER 23051, (budget officer); *City of St Clair Shores*, 1987 MERC Lab Op 426, (finance director); *Howell Pub Sch*, 1983 MERC Lab Op 277, (director of business/comptroller); and *Muskegon Heights Sch*, 1977 MERC Lab Op 807 (business manager of a school district).

In addition to the ratio of executives to non-executive positions, one of the factors we have always considered in determining executive status is the total size of the employer, in recognition of the fact that the locus of decision-making in small organizations and large organizations is likely to be different. *Detroit Bd of Ed*, 1978 MERC Lab Op 575. In the instant case, the Employer is substantially smaller than all the public employers in the above cited cases. For example, the smallest employer in this group, the City of St Clair Shores, had almost six times as many employees as the Employer.

In this case, the finance director is the only person within the Employer's organization with the professional expertise to prepare the Employer's financial reports and compile the comprehensive financial information needed to make policy decisions. However, the fact that the finance director is solely responsible for collecting this information and interpreting it for the Health Officer and Board does not mean that she formulates, determines, or effectuates policy on a sufficiently high level to qualify as an executive. The finance director formulates and, insofar as the record discloses, effectively recommends policies having to do with fiscal operations, such as travel and credit card use. However, there is no evidence that the finance director effectively makes significant budget or other financial decisions. The department directors, with technical assistance and advice from the finance director, make all budget recommendations, including recommendations on how to cut the budget when necessary. Although the finance director provides advice and helps explain the budget recommendations to the Board, budget decisions are made by the Health Officer and the Board. The finance department is a "major department" of the Employer. However, we conclude that the finance director is not a "policy-making head" of this department.

The Employer asserts that the finance director should be excluded from the Union's unit because she is a confidential employee as well as an executive. A confidential employee is an employee who assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations. *Riverview Cmty Sch*, 1968 MERC Lab Op 419; *Sanilac Co*, 22 MPER 73 (2009). The confidential exclusion is not limited to clerical employees, but extends to other employees who have regular access to information that is relevant to collective bargaining and not made available to the union. *Oakland Cmty Coll*, 2000 MERC Lab Op 77, 79 (director of financial services); *Benton Harbor Bd of Ed*, 1967 MERC Lab Op 743 (director of budget, finance, and accounting); *Saginaw Twp Cmty Sch*, 1972 MERC Lab Op 937 (supervisor of accounting). While mere access to financial information is not a basis for excluding an individual as confidential, we have held that employees who cost out employer proposals in preparation for negotiations, including proposals that may never actually be presented to the union, are performing confidential labor relations duties because this gives them access to information about the employer's bargaining strategy. *Oakland Cmty Coll*; *Swartz Creek Cmty Sch*, 1988 MERC Lab Op 848. Cf. *River Valley Sch Dist*, 17 MPER 39 (2004) (merely providing wage data used in costing out proposals is not a function with a critical labor relations nexus).

Prior to the most recent set of negotiations with AFSCME in 2012, the finance director assisted the Employer's bargaining committee in formulating its bargaining proposals by researching and making recommendations on health insurance and doing cost estimates of proposals the bargaining committee was considering presenting to the union. The finance director also participated in the bargaining committee's discussions of the Employer's bargaining proposals. The above duties made the finance director privy to confidential information about the AFSCME negotiations.

Our longstanding policy, reaffirmed in *33rd Dist Ct*, 19 MPER 75 (2006), has been to permit a public employer to designate one clerical employee as confidential and exclude that employee from the bargaining unit so the employer may have available an employee who can directly assist in the preparation and handling of bargaining proposals during negotiations. *City of Bay City*, 1966 MERC Lab Op 271, 278-79. We have held that an employer is entitled to exclude that employee from participating in collective bargaining even if that employee has never performed any confidential labor relations work. *Dickinson Co Rd Comm*, 1973 MERC Lab Op 745; *Carsonville-Port Sanilac Sch*, 1982 MERC Lab Op 1075; *Village of Kalkaska*, 1997 MERC Lab Op 481. We have also held that an employer's employment of an outside labor consultant does not eliminate the employer's right to exclude a clerical employee as confidential unless the record shows that all confidential clerical work is or will be performed by the consultant at his or her office. *Pentwater Pub Sch*, 1978 MERC Lab Op 389.

However, an employer, regardless of size, bears the burden of showing justification for excluding additional employees as confidential, and administrative convenience alone cannot justify their exclusion. *River Valley Sch Dist*; *Shelby Twp*, 2001 MERC Lab Op 84, 85; *Williamston Sch*, 1994 MERC Lab Op 1062, 1064; *City of Riverview*, 1983 MERC Lab Op 400, 402. When an employer seeks to exclude more than one employee as confidential, the additional individual(s) must have actually performed confidential labor relations work and the employer must show that such work cannot feasibly be reassigned to minimize the total number of confidential exclusions. *Monroe Co Probate Ct*, 1990 MERC Lab Op 880. We conclude that the Employer has not demonstrated a need to assign more than one employee to assist Benjamin and the Board with the preparation and handling of bargaining proposals.

The Employer indicated at the hearing that it has designated the administrative secretary as the employee to provide confidential assistance to Benjamin in labor relations matters, even though the administrative secretary had not previously performed these duties. The Employer also argued, however, that the finance director should be separately excluded as an executive, an argument that we have found to lack merit. Because the evidence indicates that the finance director has in the past performed confidential labor relations duties, our order in this case will allow the Employer to choose to exclude either the administrative secretary or the finance director as confidential.

ORDER

Based upon the findings of fact and conclusions of law set forth above, the collective bargaining unit represented by the Professional Management Association is hereby clarified to exclude as a confidential employee either the position of finance director or the position of administrative secretary, as the Employer shall designate.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Robert S. LaBrant, Commission Member

Dated: ____________