

STATE OF MARYLAND  
STATE LABOR RELATIONS BOARD

IN THE MATTER OF: \*  
STATE LAW ENFORCEMENT \*  
OFFICERS LABOR ALLIANCE, \*  
APPELLANT \* SLRB Case No. UC 2016-03  
v. \*  
MARYLAND STATE POLICE. \*

\* \* \* \* \*

**DECISION AND ORDER**

**I. INTRODUCTION AND PROCEDURAL BACKGROUND**

On June 2, 2016, the State Law Enforcement Officers Labor Alliance (“Petitioner” or “SLEOLA”) filed a Clarification/Contest of Unit Designation Petition (“Petition”) with the Maryland State Labor Relations Board (“SLRB”) asserting that the Maryland State Police (“MSP”) officers assigned to the Executive Protection Section, the Legislative Security Section, and/or the Recruitment Section were not properly classified as “confidential employees,” and, thus, were improperly excluded from collective bargaining rights. *See* Code of Maryland Regulations (“COMAR”) 14.32.03.05A(1)(b). On June 30, 2016, the MSP submitted a response to the Petition.

On December 19, 2016, the Executive Director of the SLRB determined that the SLRB had jurisdiction over this matter under Sections 3-102 and 3-205(c) of the State Personnel and Pensions Article (“SPP”) of the Annotated Code of Maryland and “request[ed] that the SLRB consider the petition and response filed, and determine whether it would like to dismiss the matter or hold a hearing (or delegate to the Office of Administrative Hearings [(OAH)].” *See* COMAR 14.32.01.03A.

In a letter dated January 29, 2018, and pursuant to COMAR 14.32.01.03C(3) and the Contested Case Hearing Agreement/Contract between the OAH and the SLRB, the SLRB delegated this matter to the OAH for a hearing and to render proposed findings of fact and proposed conclusions of law, and to address the following questions:

- (1) Whether or not Maryland State Police officers assigned to the Recruitment Section,<sup>1</sup> Executive Protection Section, and Legislative Security Section are

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<sup>1</sup> The MSP later designated members of the Recruitment Section as members of the bargaining unit represented by SLEOLA and the Petitioner withdrew its Petition in this regard.

“confidential” employees pursuant to MD Code, State Personnel and Pensions, § 3-102(b)(11); and, therefore,

- (2) Whether these officers must be excluded from the bargaining unit represented by SLEOLA.

In its delegation letter, the SLRB also stated, “[t]he delegation for proposed findings of fact and/or conclusions of law includes any other proposed finding of fact and/or conclusion of law requested by a party and determined relevant by the Administrative Law Judge.”

The parties submitted Pre-Hearing Statements and a Telephone Pre-Hearing Conference was conducted before an Administrative Law Judge (“ALJ”) on February 15, 2018. On February 21, 2018, the ALJ held a hearing in this matter at the OAH in Hunt Valley, Maryland.

On May 3, 2018, the ALJ issued a Proposed Decision.

On May 29, 2018, SLEOLA filed exceptions to the ALJ’s Proposed Decision.

On February 5, 2019, the SLRB requested additional briefing from the parties.

On March 11, 2019, the parties submitted briefs in response to the SLRB’s February 5, 2019, request.

## **II. ALJ’s PROPOSED DECISION<sup>2</sup>**

### **a. Framework of the ALJ’s Proposed Decision**

The ALJ’s Proposed Decision included a statement of the case (“Statement of the Case”), an outline of the issues involved in this dispute (“Issues”),<sup>3</sup> a summary of the evidence submitted to the ALJ (“Summary of the Evidence”), proposed findings of fact (“Proposed Findings of Fact”), a section entitled “Discussion,” proposed conclusions of law (“Proposed Conclusions of Law”), and a proposed order (“Proposed Order”).

The section entitled “Discussion” was divided into subsections: an analysis of the burden of proof (“Burden of Proof”), a discussion of the positions of the parties (“Positions of the Parties”), a discussion of Maryland’s collective bargaining law (“Legal Framework of Maryland Collective Bargaining Act”), a discussion of the Government House exception to Maryland’s collective bargaining law and whether the application of that exception was properly before the ALJ (“Whether ‘Assigned to the Government House’ is an Issue Before Me”), a discussion of the guidelines of statutory construction (“Guidelines of Statutory Construction”), and the ALJ’s analysis (“Analysis”). The section “Analysis” was divided into further subsections: an analysis of the Government House exception under Section 3-102(b)(4) of the State Personnel and

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<sup>2</sup> A copy of the ALJ’s May 3, 2018, Proposed Decision is attached hereto.

<sup>3</sup> The ALJ characterized the issues as follows:

1. Whether MSP officers assigned to the Executive Protection Section must be excluded from the bargaining unit represented by SLEOLA because they are assigned to the Government House?
2. Whether MSP officers assigned to the Executive Protection Section and Legislative Security Section must be excluded from the bargaining unit represented by SLEOLA because they are confidential employees pursuant to Section 3-102(b)(11) of the SPP?

Pensions Article, and its application to officers of the Executive Protection Section (“Assignment to Government House”), and an analysis of the definition of “confidential employee” within the meaning of Section 3-102(b)(11) and its application to officers of the Executive Protection Section and the Legislative Security Section (“Meaning of Confidential Employee”).

### **III. ANALYSIS**

#### **a. THE SLRB ADOPTS IN PART AND REJECTS IN PART THE ALJ’S PROPOSED DECISION**

##### **i. STATEMENT OF THE CASE**

The SLRB adopts the ALJ’s Statement of the Case, which is summarized and incorporated into Section I (“Introduction and Procedural Background”) above.

##### **ii. ISSUES**

The SLRB adopts the issues as presented by the ALJ in the Proposed Decision.

##### **iii. SUMMARY OF THE EVIDENCE**

The SLRB adopts the ALJ’s Summary of the Evidence as set forth in the Proposed Decision.

##### **iv. FINDINGS OF FACT**

The SLRB adopts the ALJ’s Proposed Findings of Fact as set forth in the Proposed Decision.

##### **v. DISCUSSION**

The SLRB adopts the ALJ’s Discussion as it pertains to the subsections “Burden of Proof,”<sup>4</sup> “Positions of the Parties,” “Legal Framework of Maryland Collective Bargaining Act,” “Whether ‘Assigned to the Government House’ is an Issue Before Me,” and “Guidelines of Statutory Construction.”

Under the subsection “Analysis,” the SLRB accepts the ALJ’s analysis of the Government House exception and its application to the officers assigned to the Executive Protection Section; however, as explained more fully below, it rejects those portions of the ALJ’s analysis applying the definition of “confidential employee” to the officers assigned to the Executive Protection Section and the Legislative Security Section.

##### **vi. CONCLUSIONS OF LAW**

As explained above, in the ALJ’s Proposed Conclusions of Law, the ALJ found:

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<sup>4</sup> We adopt the rule that the burden of proof is on the party seeking to exclude an employee from collective bargaining as a “confidential employee.” We shall apply the same rule when a party seeks to exclude an employee from collective bargaining as a supervisory or managerial employee under SPP Section 3-102 (b)(11). See NLRB v. Kentucky River Community Care Inc., 532 U.S. 707, 711-712 (2001) [finding National Labor Relations Board (“NLRB”) rule requiring party asserting supervisory status to bear burden of proof is supported by general rule of statutory construction.]

Based on the foregoing discussion, I conclude as a matter of law that the Maryland State Police officers assigned to the Executive Protection Section must be excluded from the State Law Enforcement Officers Labor Alliance because they are assigned to the Government House. Md. Code Ann., State Pers. & Pens. § 3-102(b)(4).

I further conclude as a matter of law that the Maryland State Police officers assigned to the Executive Protection Section and the Legislative Security Section must be excluded from the State Law Enforcement Officers Labor Alliance because they are confidential employees. Md. Code Ann., State Pers. & Pens. § 3-102(b)(11); COMAR 01.01.1996.13; and COMAR 14.32.03.05C.

The SLRB adopts the ALJ's proposed conclusion that, "the Maryland State Police officers assigned to the Executive Protection Section must be excluded from the State Law Enforcement Officers Labor Alliance because they are assigned to the Government House."

However, for the reasons described below, the SLRB rejects the ALJ's proposed conclusions that "the Maryland State Police officers assigned to the Executive Protection Section and the Legislative Security Section must be excluded from the State Law Enforcement Officers Labor Alliance because they are confidential employees."

#### 1. Definition of "Confidential Employee"

Officers in the MSP are entitled to participate in collective bargaining pursuant to SPP § 3-102(a)(1)(i) by virtue of the MSP's position as a principal department within the Executive Branch of State government. As explained by the ALJ,

The Maryland Collective Bargaining Act excludes 'any supervisory, managerial, or confidential employee of a unit of State government listed in subsection (a)(1)(i) through (iv) and (vi) through (x) of this section, as defined in regulations adopted by the Secretary.' SPP § 3-102(b)(11) (Supp. 2017). The regulation on this issue provides that '[t]he Board's decision with respect to disputes based upon supervisory, managerial, and confidential status shall be based upon these terms as defined in Executive Order 01.01.1996.13 or as subsequently defined by new regulations promulgated by the Secretary of Budget and Management.' COMAR 14.32.03.05C. Executive Order 01.01.1996.13 in turn provides that 'confidential employee' means an employee:

- (a) Who has access to confidential or discretionary information regarding the formulation of policies or procedures;
- (b) Whose functional responsibilities or knowledge concerning employee relations makes the employee's membership in an employee organization incompatible with the employee's duties; or

- (c) Who is the personal secretary of the chief administrative or executive officer of an agency.

COMAR 01.01.1996.13.<sup>5</sup>

In the absence of precedent of the SLRB or Maryland courts regarding the meaning of a “confidential employee” under the SPP and its regulations, the Union argues that we should apply the “labor nexus” test fashioned by the NLRB under the National Labor Relations Act (“NLRA”). As the ALJ found, the labor nexus test was developed by the NLRB because the NLRA does not include a definition for what constitutes a confidential employee. In contrast, Maryland law specifically excludes confidential employees from collective bargaining, and the regulations, which rely on Executive Order 01.01.1996.13, provide a specific definition of that term. We are obligated to interpret “confidential employee” under Maryland law and regulations, and therefore decline to apply the NLRB’s labor nexus test.

Therefore, in determining whether or not an employee is a “confidential employee” under Section SPP § 3-102(b)(11), three questions must first be answered: (1) What constitutes “access” as that term is used in Executive Order 01.01.1996.13; (2) What constitutes “confidential or discretionary information” as those terms are used within the meaning of Executive Order 01.01.1996.13; and (3) What is meant by “formulation of policy or procedures” as those terms are used within the meaning of Executive Order 01.01.1996.13?<sup>6</sup>

- a. What constitutes “access” within the meaning of Executive Order 01.01.1996.13?

Neither the SPP nor Executive Order 01.01.1996.13 defines the term “access.” Under principles of statutory construction, when the legislature has not defined a term, it should be given its natural and ordinary meaning. Polek v. J.P. Morgan Chase Bank, N.A., 424 Md. 3333, 351 (2012); Tucker v. Fireman’s Fund Insurance, Co. 308 Md. 69 (1986). Courts have looked to the relevant dictionary definition of that term to help determine its plain meaning. Montgomery County v. Deibler, 423 Md. 54 (Md. 2011) (explaining that a dictionary definition provides a useful starting point for determining what a statutory term means, and that, although dictionary definitions do not provide dispositive resolutions of the meaning of statutory terms, it is proper to consult a dictionary or dictionaries for a term’s ordinary and popular meaning). See, Nielsen v. PREAP et al., \_\_\_\_\_ U.S. \_\_\_\_\_ ( March 19, 2019) (use of dictionary definition.) Merriam-Webster defines “access” as “freedom or ability to obtain or make use of something.” Merriam-Webster, <https://www.merriam-webster.com/dictionary/access> (last accessed April 25, 2019).

Applying these principles, and taking into account the employment related purposes of the statute, we construe “access” to mean the ability of an employee to obtain confidential or

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<sup>5</sup> We note that the only question relevant to the instant dispute is whether the officers at issue have “access to confidential or discretionary information regarding the formulation of policies or procedures” under COMAR 01.01.1996.13 E (3)(a).

<sup>6</sup> In answering these questions, and as explained in the ALJ’s decision, we must apply the rubrics of statutory construction. See ALJ Decision at 13-16 (“Guidelines of Statutory Construction”).

discretionary information in the course of his or her job duties. Establishing “access” requires more than the mere possibility that an employee may obtain confidential or discretionary information. Otherwise, employees may be excluded from collective bargaining even if access to confidential or discretionary information is not included in their job duties and their chance of obtaining such information is remote.<sup>7</sup> We shall therefore require the party asserting confidential status to prove that (i) the employee actually obtains confidential or discretionary information regarding the formulation of policy or procedures in the course of his or her job duties or (ii) that it is foreseeable and likely that the employee will obtain such information in the course of his or her job duties.<sup>8</sup>

b. What constitutes “confidential or discretionary information” within the meaning of Executive Order 01.01.1996.13?

Neither the SPP nor Executive Order 01.01.1996.13 defines “confidential or discretionary information.” We look to the natural and ordinary meaning of the words. Merriam-Webster defines “confidential” as “private” or “secret” and defines “discretionary” as “left to individual choice or judgment: exercised at one's own discretion.” Merriam-Webster, <https://www.merriam-webster.com/dictionary/confidential> (last accessed April 25, 2019). See also, *Amster v. Baker*, 453 Md. 68 (2017) (Holding that commercial information is “confidential”, and therefore exempt from MPIA disclosure, if it “would customarily not be released to the public by the person from whom it was obtained (citation omitted)”). We therefore construe “confidential” information to mean information that the employer would customarily not make publically available and “discretionary” information to mean information that is within the sole judgment of the employer to disclose.

As explained above, under Executive Order 01.01.1996.13, “confidential employee” means an employee who has access to confidential or discretionary information regarding the formulation of policy or procedures. Employees may have access to a variety of confidential or discretionary information, but they cannot be “confidential employees” unless the information is regarding the formulation of policy or procedures.

b. What is meant by “policy or procedures” within the meaning of Executive Order 01.01.1996.13?

In determining what is meant by “policy or procedures” within the meaning of Section 3-102(b)(11) (as set forth in Executive Order 01.01.1996.13), we must look to the relevant statutory provisions of the SPP.

It is evident that the purpose and intent of SPP Title 3 is to establish a comprehensive framework for collective bargaining and labor-related activities between state employees of certain departments and agencies and their employers. The title of the law is “Collective

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<sup>7</sup> An employee whose job duties do not include access to confidential or discretionary information regarding the formulation of policy or procedures does not become a confidential employee merely by receiving a misdirected email containing discretionary information or overhearing a discussion of confidential information in the copy room.

<sup>8</sup> An employee’s job duties may provide access to confidential or discretionary information in a variety of forms and media, including print, digital, electronic and oral communications.

Bargaining” and the section headings relate to collective bargaining and labor-related matters. In addition, under Section 3-205 the SLRB “is responsible for administering and enforcing provisions of this title...” (emphasis added), and Section 3-206 provides that the SLRB “shall adopt and enforce regulations, guidelines, and policies to carry out this title, including establishing permissible labor-related activities on the work site.” (Emphasis added).

Based on the purpose, intent, structure and language of Title 3, we construe “policies and procedures” to mean policies and procedures related to collective bargaining as defined under SPP Title 3.<sup>9</sup> Under Section 3-101(c), “collective bargaining” means:

- (1) good faith negotiations by authorized representatives of employees and their employer with the intention of: (i) reaching an agreement about wages, hours, and other terms and conditions of employment...and (ii) clarifying terms and conditions of employment;
- (2) administration of terms and conditions of employment;<sup>10</sup>

Applying this definition, we conclude that an employee who has access to confidential or discretionary information regarding the formulation of policy or procedures related to collective bargaining negotiations under §3-101(c)(1), including development of the employer’s bargaining strategy, is a “confidential employee” under Executive Order 01.01.1996.13.<sup>11</sup> We further conclude that an employee who has access to confidential or discretionary information regarding the formulation of policy or procedures related to administration of terms and conditions of employment under §3-101(c) (2), is a “confidential employee” under Executive Order 01.01.1996.13.

## 2. Application of Definition of Confidential Employee to Members of the Executive Protection Section and the Legislative Security Section

In determining that members of the Executive Protection Section and the Legislative Security Section were “confidential employees,” and therefore, excluded from coverage under Maryland’s collective bargaining law, the ALJ explained, in relevant part:

I conclude, that the Maryland Legislature determined that certain groups of employees, some by virtue of their position and some by virtue of their

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<sup>9</sup> The Merriam-Webster definitions of “policy” and “procedures” include:

Policy: a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions; a high-level overall plan embracing the general goals and acceptable procedures especially of a governmental body.

Procedures: a particular way of accomplishing something or of acting.

The definitions of “formulate” include: to devise or plan to obtain or bring about.

<sup>10</sup> The definition of “confidential employee” also includes “(3) the voluntary adjustment of a dispute or disagreement between authorized representatives of employees and their employer that arises under a memorandum of understanding or other written understanding.” We defer discussion of this subsection because it is inapplicable to the facts of this case.

<sup>11</sup> Proof that disclosure of such information would jeopardize the employer’s negotiating position with the union is not required.

location, were in such close proximity to policy makers, that it made their participation in collective bargaining inappropriate.

Merely because members of the Executive Protection Section and the Legislative Security Section have not yet encountered a discussion on the policy or negotiation of a collective bargaining agreement does not mean that the potential does not exist...

The Governor and members of the Legislature formulate policies and procedures, both with respect to collective bargaining and on numerous other issues. The members of the Executive Protection Section and Legislative Security Section have unfettered access to these people, and are charged with protecting them, and therefore have access to confidential or discretionary information regarding the formulation of policy or procedures. *See* COMAR 01.01.1996.13...

Therefore, I conclude that the MSP properly excluded these officers from SLEOLA.

We reject the ALJ's conclusion that these officers were properly excluded from SLEOLA as confidential employees.

The officers of the Executive Protection Section and Legislative Security Section do not themselves participate in the formulation of policy or procedures or assist others that do. The officers do, however, have access to confidential discussions of members of the executive and legislative branches. The ALJ found that officers in the Legislative Security Section have regularly overheard conversations of protected individuals that include proposed legislation, legislative policies and budget and that officers of the Executive Protection Section regularly overhear conversations of the individuals they protect and the content of conversations. It is reasonable to infer that these conversations include non-public confidential or discretionary information to which the officers have access as a result of their job duties. To be classified a "confidential employee", however, the officers must have access to confidential or discretionary information regarding the formulation of policy or procedures related to collective bargaining.

The uncontradicted evidence is that the officers have not overheard anything to do with collective bargaining, collective bargaining strategy, labor relations, wages or the terms and conditions of employment of the MSP. Nor is there sufficient evidence that the officers are likely to overhear confidential or discretionary information regarding the formulation of policy or procedures related to collective bargaining. We are not persuaded that the "potential" to overhear discussions on the policy or negotiation of collective bargaining establishes confidential employee status.

The employer bears the burden of proving that the officers are confidential employees to exclude them from SEOLA. We find that the employer failed to sustain its burden of proof that these officers had access to confidential or discretionary information regarding the formulation of policy or procedures related to collective bargaining, as defined herein.



We conclude, therefore, that the Maryland State Police officers assigned to the Executive Protection Section and the Legislative Security Section are not confidential employees, and reject the ALJ's Proposed Conclusions of Law that "the Maryland State Police officers assigned to the Executive Protection Section and the Legislative Security Section must be excluded from the State Law Enforcement Officers Alliance because they are confidential employees."

**vii. ORDER**

In its Proposed Order, the ALJ stated:

I **PROPOSE** the Clarification/Contest of a Unit Designation Petition filed by the State Law Enforcement Officers Labor Alliance asserting that Maryland State Police officers assigned to the Executive Protection Section and the Legislative Security Section were improperly excluded from collective bargaining rights be DENIED.

The SLRB adopts the ALJ's Proposed Order that, "the Clarification/Contest of a Unit Designation Petition filed by the State Law Enforcement Officers Labor Alliance asserting that Maryland State Police officers assigned to the Executive Protection Section... be DENIED."<sup>12</sup>

However, for the reasons explained above, the SLRB rejects the ALJ's Proposed Order that, "the Clarification/Contest of a Unit Designation Petition filed by the State Law Enforcement Officers Labor Alliance asserting that Maryland State Police officers assigned to the... Legislative Security Section were improperly excluded from collective bargaining rights be DENIED," and grants SLEOLA's Petition with regard to these officers.

Issue Date: June 7, 2019

**For The State Labor Relations Board:**



Richard A. Steyer, Chair



Mark A. Gardner, Vice-Chair

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<sup>12</sup> We adopt this part of the Order on the sole basis that MSP officers assigned to the Executive Protection Section must be excluded from collective bargaining because they are assigned to the Government House.



LeRoy A. Wilkison, Member



Doris S. Mason, Member



Nancy J. Courson, Member

**APPEAL RIGHTS**

Any party aggrieved by this action of the SLRB may seek judicial review in accordance with Title 10, Subtitle 2 of the State Government Article, Annotated Code of Maryland, Sec. 10-222 (Administrative Procedure Act—Contested Cases), and Maryland Rules CIR CT Rule 7-201 *et seq.* (Judicial Review of Administrative Agency Decisions).

STATE LAW ENFORCEMENT  
OFFICERS LABOR ALLIANCE,  
APPELLANT

v.

MARYLAND STATE POLICE

\* BEFORE DEBORAH S. RICHARDSON,  
\* AN ADMINISTRATIVE LAW JUDGE  
\* OF THE MARYLAND OFFICE OF  
\* ADMINISTRATIVE HEARINGS  
\* OAH No.: SLRB-X-02-18-03687

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**PROPOSED DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
PROPOSED FINDINGS OF FACT  
DISCUSSION  
PROPOSED CONCLUSIONS OF LAW  
PROPOSED ORDER

**STATEMENT OF THE CASE**

On June 2, 2016, the State Law Enforcement Officers Labor Alliance (Petitioner or SLEOLA) filed a Clarification/Contest of a Unit Designation Petition (Petition) with the Maryland State Labor Relations Board (SLRB) asserting that Maryland State Police (MSP) officers assigned to the Executive Protection Section, the Legislative Security Section, and/or the Recruitment Section were not properly classified as “confidential employees,” and, thus, were improperly excluded from collective bargaining rights.<sup>1</sup> See Code of Maryland Regulations (COMAR) 14.32.03.05A(1)(b). On June 30, 2016, the MSP submitted a response to the Petition.

On December 19, 2016, the Executive Director of the SLRB determined that the SLRB had jurisdiction over this matter under sections 3-102 and 3-205(c) of the State Personnel and Pensions Article (SPP) of the Annotated Code of Maryland and “request[ed] that the SLRB

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<sup>1</sup> The MSP later designated members of the Recruitment Section as members of SLEOLA and the Petitioner withdrew its petition in this regard.

consider the petition and response filed, and determine whether it would like to dismiss the matter or hold a hearing (or delegate to the Office of Administrative Hearings [(OAH)]).” See COMAR 14.32.01.03A. On January 29, 2018, pursuant to COMAR 14.32.01.03C(3) and the Contested Case Hearing Agreement/Contract between the OAH and the SLRB, the SLRB delegated this matter to the OAH for a hearing and to render proposed findings of fact and proposed conclusions of law.

The parties submitted Pre-Hearing Statements and I conducted a Telephone Pre-Hearing Conference on February 15, 2018. On February 21, 2018, I issued a Pre-Hearing Conference Report and Order. On March 19, 2018, I held a hearing in this matter at the OAH in Hunt Valley, Maryland. Abigail V. Carter, Esquire, and April H. Pullium, Esquire, represented the Petitioner. Mark H. Bowen, Assistant Attorney General, represented the Respondent.

This case is governed by Title 3 of the SPP Article (2015 and Supp. 2017); the Rules of the SLRB, COMAR 14.32.01 *et. seq.*, as well as the provisions of the Administrative Procedure Act, Md. Code Ann., State Gov’t §§ 10-201 through 10-226 (2014 & Supp. 2017) and the Rules of Procedure of the OAH, COMAR 28.02.01.

### ISSUES

1. Whether MSP officers assigned to the Executive Protection Section must be excluded from the bargaining unit represented by SLEOLA because they are assigned to the Government House?
2. Whether MSP officers assigned to the Executive Protection Section and Legislative Security Section must be excluded from the bargaining unit represented by SLEOLA because they are confidential employees pursuant to section 3-102(b)(11) of the SPP?

## SUMMARY OF THE EVIDENCE

### Exhibits

The SLRB sent a delegation letter dated January 29, 2018 from Erica Snipes, Executive Director, SLRB to Chief Judge Dewberry, attaching the record of this matter established before the SLRB. I incorporated the letter and attachments into the record, which included:

- Executive Director’s Determination of Jurisdiction, December 19, 2016;
- Clarification/Contest of Unit Designation Petition, June 2, 2016;
- Reasons for the proposed clarification or unit or contest of unit designation, undated;
- MSP Personnel Directive PER 14.01, January 1, 2013;
- Excerpt from Maryland Department of Budget and Management Presentation, 2013 – “Collective Bargaining What Supervisors Should Know”; and
- Letter from Donald Lewis, Director Human Resources, MSP, to Ms. Snipes, June 30, 2016.

I admitted the following exhibit into evidence on the Petitioner’s behalf:

Pet. Ex. 1: Clarification/Contest of Unit Designation Petition, June 2, 2016 with the following attachments:

Reasons for the proposed clarification or unit or contest of unit designation, undated;

MSP Personnel Directive PER 14.01, January 1, 2013;

Excerpt from Maryland Department of Budget and Management Presentation, 2013 – “Collective Bargaining What Supervisors Should Know”.

The Respondent did not offer any exhibits for admission into evidence.

### Testimony

The following witnesses testified on behalf of the Petitioner: First Sergeant Jimmy Dulay, President of SLEOLA, and Corporal Richard Nevy, Executive Protective Section of the MSP.

The following witnesses testified on behalf of the Respondent: Lieutenant Jeff Ferreira, Commander of the Executive Protection Section of the MSP; First Sergeant George White, Commander of Legislative Security Section of the MSP; and Donald Lewis, Chief of Staff, MSP.

**PROPOSED FINDINGS OF FACT**

I find the following facts by a preponderance of the evidence:

1. SLEOLA is the exclusive representative for state law enforcement officers for purposes of collective bargaining in the State of Maryland. Approximately 1,300 officers from the MSP are included in SLEOLA. SLEOLA covers MSP officers from the rank of First Sergeant and below.

2. Assignments to the Executive Protection Section and the Legislative Security Section are made after an officer undergoes a competitive application and interview process or by volunteering during the legislative session for temporary assignment.

3. Every month SLEOLA receives a list from the State of the employees it represents, which excludes confidential employees, as determined by the State.

4. The Governor's official office is in the State House, but there is also an office for the Governor in the Governor's mansion.

5. The Executive Protection Section maintains its office in the ground floor of the Governor's mansion.

6. The Executive Protective Section of the MSP provides physical protection of the Governor's mansion, and security protection for the Governor, spouse of the Governor, Lieutenant Governor, Comptroller, Attorney General, and Treasurer of Maryland.

7. Officers from the Executive Protection Section travel with the Governor and the Governor's spouse twenty-four hours a day. The Executive Protection Section officers are with the remaining protected individuals during business-related events and hours.

8. The Executive Protection Section officers provide transportation to protected individuals and travel with them in vehicles.

9. The Executive Protection Section officers at times attend meetings while protecting individuals; at other times officers are stationed outside the meeting-room door. Officers in the Executive Protection Section regularly overhear the conversations of the protected individuals, both personal and business-related.

10. The first floor of the Governor's mansion is dedicated to staff. The second floor is open to the public and is where a meeting with the Governor and a member of the public would take place. The third and fourth floors of the Governor's mansion are the Governor's personal residence.

11. If there is a meeting on the second floor of the Governor's mansion, it would be held in an open area where there is no opportunity to shut a door. In the case of such a meeting, the officers of the Executive Protection Section would overhear the contents of the conversations.

12. The officers in the Executive Protection Section do not read the mail of their protected individuals unless it involves a threat.

13. The Legislative Security Section of the MSP provides personal protection and security for the President of the Maryland Senate, the Speaker of the Maryland House of Delegates, and the remaining elected legislators in Maryland.

14. The office for the Legislative Security Section is located in the Legislative Services building.

15. The officers in the Legislative Security Section are with the President of the Maryland Senate and the Speaker of the House of Delegates twelve to sixteen hours a day, year round. The Legislative Security Section provides transportation services and personal protection to these individuals any time they are not at home, while they are performing their job duties.

16. The officers in the Legislative Security Section provide protection for other elected legislators during the legislative session when there are large-scale events. They do not provide personal protection to these officials.

17. Officers in the Legislative Security Section have been inside and stood outside the door of meetings ranging from majority caucus meetings to ethics committee meetings.

18. Officers in the Legislative Security Section have regularly overheard conversations of their protected individuals in meetings, cars, and when walking and standing with them. Officers in the Legislative Security Section have overheard conversations ranging from weather and sports to proposed legislation, legislative policies and the budget.

19. There are four officers permanently assigned to the Legislative Security Section. During the legislative session, ten additional officers are assigned to the Legislative Security Section. The primary job of the officers temporarily assigned to the Legislative Security Section is to protect individuals while in meetings and at events. The temporary officers rarely drive the protected individuals.

20. The officers temporarily assigned to the Legislative Security Section have not been removed from SLEOLA.<sup>2</sup>

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<sup>2</sup> There was testimony from Jimmy Dulay, President of SLEOLA, that there are two members of the Executive Protection Section who were listed as members of SLEOLA at the time of the hearing, and had not been designated as confidential employees for at least a year. Mr. Lewis testified in rebuttal that was an oversight and would be fixed the day of the hearing.



## DISCUSSION

### Burden of Proof

When not otherwise provided by statute or regulation, the burden of proof in a hearing before the OAH is by a preponderance of the evidence, and rests with the party making an assertion or a claim. Md. Code Ann., State Gov't § 10-217 (2014); *Comm'r of Labor and Ind. v. Bethlehem Steel Corp.*, 344 Md. 17, 34 (1996) (“[T]he burden of proof is generally on the party asserting the affirmative of an issue before an administrative body.”). To prove an assertion or a claim by a preponderance of the evidence means to show that it is “more likely so than not so” when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

In this case, the burden of proof is on the Respondent, as the party asserting that officers assigned to the Executive Protective Section and the Legislative Security Section should be excluded from SLEOLA because of their assignment to the Government House or by virtue of their status as confidential employees. *Cf. N.L.R.B. v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-12 (2001) (“The burden of proving the applicability of the supervisory exception . . . should thus fall on the party asserting it.) In addition, it is easier to prove an employee’s authority to exercise [one of the] listed supervisory functions than to disprove an employee’s authority to exercise any of those functions, and practicality therefore favors placing the burden on the party asserting supervisory status.”); *John Crane, Inc. v. Scribner*, 369 Md. 369, 395 (2002) (stating, in a personal injury case, “it is the usual rule that a party who seeks exemption from a statute has the burden of justifying the exemption.”).

### Positions of the Parties

The MSP argues officers in the Executive Protection Section are properly excluded from collective bargaining by virtue of their assignment to Government House pursuant to SPP § 3-102(b)(4) (Supp. 2017). Furthermore, the MSP argues that officers in both the Executive Protection Section and the Legislative Security Section are excluded because they are confidential employees, pursuant to SPP § 3-102(b)(11) (Supp. 2017). The MSP argues that confidential employee is defined by COMAR 14.32.03.05C and 01.01.1996.13 and includes someone who “has access to confidential or discretionary information regarding the formulation of policy or procedures.” As that term is specifically defined in Maryland law, the MSP argues there is no need to resort to case law interpreting the meaning of confidential employee from the National Labor Relations Board (NLRB) interpreting the National Labor Relations Act (NLRA).

SLEOLA argues that exclusion on the basis of assignment to Government House pursuant to § 3-102(b)(4) is not an issue in this case because it was not included in the MSP’s Pre-Hearing Statement or in my Pre-Hearing Conference Report and Order as an issue to be addressed in this hearing. As to whether the officers are properly designated as confidential employees, SLEOLA argues that I should apply the labor-nexus test developed in case law interpreting the NLRA. *See B.F. Goodrich Co.*, 115 NLRB 722, 724 (1956) (excluding from collective bargaining confidential employees who “assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.”). Applying this test, SLEOLA argues that while the officers assigned to the Executive Protection Section and Legislative Security Section are in close physical proximity to policymakers who possess confidential information, the officers themselves lack meaningful access to the information, including information related to labor relations policy. SLEOLA

argues that the SLRB has relied on precedent from the NLRB before. See *AFSCME v. Calvert Cty. Dep't of Social Servs.*, SLRB Case No. 12-U-03 (2012). In addition, SLEOLA relies on a presentation on the website of the Office of Personnel Services and Benefits of the Department of Budget and Management entitled “Collective Bargaining What Supervisors Should Know” which states the labor-nexus test. (Pet. Ex. 1).

### Legal Framework of Maryland Collective Bargaining Act

The Maryland Collective Bargaining Act (Act) sets out the rights of employees of the State of Maryland to enter into collective bargaining with the State concerning wages, hours, and other terms and conditions of employment. SPP §§ 3-101 through 3-602 (2015 and Supp. 2017).

Employees have the right to:

- (1) take part or refrain from taking part in forming, joining, supporting, or participating in any employee organization or its lawful activities;
- (2) be fairly represented by their exclusive representative, if any, in collective bargaining; and
- (3) except as provided in §§ 3-303 and 3-305 of this subtitle, engage in other concerted activities for the purpose of collective bargaining.

SPP § 3-301 (2015). “Collective bargaining” includes “good faith negotiations by authorized representatives of employees and their employer with the intention of . . . reaching an agreement about wages, hours, and other terms and conditions of employment; and . . . incorporating the terms of the agreement in a written memorandum of understanding or other written understanding.” SPP § 3-101(c) (Supp. 2017). The Act further outlines the rights of the State, SPP § 3-302 (2015), prohibits strikes and lockouts, SPP §§ 3-303 and 3-304 (2015), regulates the election and certification of the exclusive representative of a bargaining unit, SPP §§ 3-401 through 3-407 (2015), governs the collective bargaining process, SPP § 3-501 through 3-502 (2015), and prohibits unfair labor practices. SPP §3-306 (2015).

The Act establishes a State Labor Relations Board to administer and enforce the title. SPP §§ 3-201 through 3-210 (2015 and Supp. 2017). Section 3-206 provides: “The Board shall adopt and enforce regulations, guidelines, and policies to carry out this title, including establishing permissible labor-related activities on the work site.” SPP § 3-206 (2015).

Section 3-102 of the SPP provides that the Act applies to the MSP, as a principal department within the Executive Branch of State government. SPP § 3-102(a)(1)(i) (Supp. 2017). However, the Act does not apply to an employee who is:

- (i) a special appointment in the State Personnel Management System; or
- (ii) 1. directly appointed by the Governor by an appointment that is not provided for by the Maryland Constitution;
- 2. appointed by or on the staff of the Governor or Lieutenant Governor; or
- 3. assigned to the Government House or the Governor’s Office.

SPP § 3-102(b)(4) (Supp. 2017).

The Act also does not apply to “any supervisory, managerial, or confidential employee of a unit of State government listed in subsection (a)(1)(i) through (iv) and (vi) through (x) of this section, as defined in regulations adopted by the Secretary.” SPP § 3-102(b)(11) (Supp. 2017). The regulation on this issue provides that “[t]he Board’s decision with respect to disputes based upon supervisory, managerial, and confidential status shall be based upon these terms as defined in Executive Order 01.01.1996.13 or as subsequently defined by new regulations promulgated by the Secretary of Budget and Management.” COMAR 14.32.03.05C.

Executive Order 01.01.1996.13 provides that “confidential employee” means an employee:

- (a) Who has access to confidential or discretionary information regarding the formulation of policy or procedures;

- (b) Whose functional responsibilities or knowledge concerning employee relations makes the employee's membership in an employee organization incompatible with the employee's duties; or
- (c) Who is the personal secretary of the chief administrative or executive officer of an agency.

COMAR 01.01.1996.13.

MSP Personnel Directive 14.01 exists to "establish and maintain a process by which the MSP and its employees engage in collective bargaining." MSP PER 14.01.01. The stated policy is that MSP "will permit and participate in collective bargaining with its employees to the extent permitted by statute." MSP PER 14.01.02. The directive defines a confidential employee as "an employee who has access to confidential or discretionary information regarding the formulation of policy or procedures and is designated as such by the Director of the Human Resources Division (HRD)." MSP PER 14.01.03. The directive includes "confidential employees" under "exempt employees." MSP PER 14.01.06.B.3. Further, it states that members of the Executive Protection Section and the Legislative Security Section are included within the category of confidential employees. MSP PER 14.01.06.B.3.c & d.

**Whether "Assigned to the Government House" is an Issue Before Me**

On February 15, 2018, I held a Telephone Pre-Hearing Conference in this matter. During that conference I read the two questions that were included in the delegation letter from the SLRB, which are as follows:

- a. Whether or not MSP officers assigned to the Recruitment Section, Executive Protection Section, and Legislative Security Section are "confidential" employees pursuant to MD Code, State Personnel and Pensions, § 3-102(b)(11); and, therefore,
- b. Whether these officers must be excluded from the bargaining unit represented by the SLEOLA.

I asked the parties whether this was a fair representation of the issues presented in this case; neither party disagreed.

At the hearing, in addition to arguing that the MSP officers were excluded from collective bargaining because they were confidential employees, the MSP argued that members of the Executive Protection Section are properly excluded from collective bargaining by virtue of their assignment to the Government House pursuant to SPP § 3-102(b)(4) (Supp. 2017). SLEOLA argued that exclusion on the basis of section 3-102(b)(4) is not an issue before me because it was not included in the MSP's Pre-Hearing Statement or in my Pre-Hearing Conference Report and Order as an issue to be addressed in this hearing.

SLEOLA is correct that I did not specifically mention section 3-102(b)(4) in my Pre-Hearing Conference Report and Order. Nevertheless, SLEOLA has been aware for quite a while that was an issue in this case. While the MSP did not specifically cite section 3-102(b)(4) in its Pre-Hearing Statement, in its "statement in defense of the claim," the MSP stated "Members of the Executive Protection Section are assigned to the protection of the Governor and are assigned to Government House. The Executive Protection Section maintains security stations in both Government House and the Governor's Office. As such the Department believes these employees are correctly excluded from union membership." Moreover, as early as June 30, 2016, the MSP made clear that its position to exclude the officers in the Executive Protection Section from membership in SLEOLA was based on 3-102(b)(4) in its response letter to the SLRB to SLEOLA's petition.

Although the delegation letter from the SLRB does not reference section 3-201(b)(4), in addition to the two specific issues identified, the letter states, "The delegation for proposed findings of fact and proposed conclusions of law also includes any other proposed finding of fact

and/or proposed conclusion of law requested by a party and determined relevant by the Administrative Law Judge.” Letter from Erica Snipes, Executive Director, SLRB to Chief Judge Dewberry, January 29, 2018. The MSP has requested that I address this issue. While the SLRB specifically delegated the authority to address whether the officers here are confidential employees, the broader issue is whether these officers were properly excluded from collective bargaining. The MSP has provided two explanations for this exclusion: assignment to Government House and status as confidential employees. Thus, the issue of assignment to Government House is relevant and I will address it on its merits in this Proposed Decision.

### Guidelines of Statutory Construction

To determine both the issue of assignment to the Government House and the meaning of confidential employee requires me to apply the rubrics of statutory construction. The Court of Appeals addressed statutory construction at length in *Kaczorowski v. Mayor and City Counsel of Baltimore*, 309 Md. 505 (1987). In that case the Court wrote, “We are faced with a battle between contending canons of construction. Just as in the science of Physics every action has an equal and opposite reaction, so it seems that every canon of statutory construction has an equal and opposite canon.” *Id.* at 512 (footnote omitted). The Court referred to discussion in a prior case that set forth some canons of construction, and then it wrote, “The purpose [of the statute], in short, determined in light of the statute's context, is the key. And that purpose becomes the context within which we apply the plain-meaning rule.” *Id.* at 516.

The prior case to which the Court referred in the *Kaczorowski* case was *Tucker v. Fireman's Fund Insurance Co.*, 308 Md. 69 (1986). In that case the Court wrote:

In construing the meaning of a word in a statute, the cardinal rule is to ascertain and carry out the real legislative intention. The primary source of legislative intent is, of course, the language of the statute itself. When the legislature has not defined a term, it should ordinarily be given its usual and natural meaning. Of

course, where statutory provisions are clear and unambiguous, no construction or clarification is needed or permitted, it being the rule that a plainly worded statute must be construed without forced or subtle interpretations designed to extend or limit the scope of its operation.

*Id.* at 73 (citations omitted); *see also Whiting-Turner Contracting Co. v. Fitzpatrick*, 366 Md. 295, 301 (2001) (“The paramount object of statutory construction is the ascertainment and effectuation of the real intention of the Legislature.”).

In *Witte v. Azarian*, 369 Md. 518 (2002), the Court of Appeals construed wording in a statute and, with regard to the statutory construction process, wrote that its goal was to ascertain the legislative intent:

[W]e look first to the words of the statute, on the tacit theory that the Legislature is presumed to have meant what it said and said what it meant. If the true legislative intent cannot readily be determined from the statutory language alone, however, we may, and often must, resort to other recognized indicia—among other things, the structure of the statute, including its title; how the statute relates to other laws; the legislative history, including the derivation of the statute, comments and explanations regarding it by authoritative sources during the legislative process, and amendments proposed or added to it; the general purpose behind the statute; and the relative rationality and legal effect of various competing constructions.

*Id.* at 525-26.

To determine that “real intention,” of the legislature, courts do so “by looking to the plain language of a statute, giving the words their natural and ordinary meaning.” *Polek v. J.P.*

*Morgan Chase Bank, N.A.*, 424 Md. 333, 351 (2012) (citation omitted). The inquiry ends there if the language is clear and unambiguous on its face. *Id.* If the language is ambiguous, the court will then seek the legislature's intent in the legislative history or other extraneous sources.

*Whiting-Turner*, 366 Md. at 302.



In *Kushell v. DNR*, 385 Md. 563 (2005), the Court noted again that the legislature is presumed to say what it means:

If statutory language is unambiguous when construed according to its ordinary and everyday meaning, then we give effect to the statute as it is written. If there is no ambiguity in that language, either inherently or by reference to other relevant laws or circumstances, the inquiry as to legislative intent ends; we do not need to resort to the various, and sometimes inconsistent, external rules of construction, for the Legislature is presumed to have meant what it said and said what it meant.

*Id.* at 577 (citations and quotations omitted).

The plain meaning of a statute cannot be analyzed in a vacuum, but must be interpreted within the context of its statutory scheme. *Polek*, 424 Md. at 351; *Lockshin v. Semsker*, 412 Md. 257, 275 (2010). This means that “the statute as a whole must be construed, interpreting each provision of the statute in the context of the entire statutory scheme.” *Whiting-Turner*, 366 Md. at 302. In interpreting the language of the statute, it is important to be mindful that a proper reading of the statute should not render words or language within the statute meaningless or mere surplusage. *Lowery v. State*, 430 Md. 477, 496-98 (2013); see also *Whiting-Turner*, 366 Md. at 303 (“[S]tatutes on the same subject are to be read together and harmonized to the extent possible, reading them so as to avoid rendering either of them, or any portion, meaningless, surplusage, superfluous or nugatory.”) (quotations omitted). Courts must “neither add nor delete words to a clear and unambiguous statute to give it a meaning not reflected by the words the Legislature chose to use or engage in forced or subtle interpretation in an attempt to extend or limit the statute's meaning.” *Whiting-Turner*, 366 Md. at 302. “[T]he statute must be given a reasonable interpretation, not one that is absurd, illogical, or incompatible with common sense.” *Lockshin*, 412 Md. at 276.

Thus, the plain and unambiguous language of a statute will control, as long as it is unambiguous within the context of the entire statute as a whole, and in the context of the intention

of the statute. To determine the intent of the legislature requires an analysis of legislative history. See generally Theo I. Ogune, Esq., *Judges and Statutory Construction: Judicial Zombism or Contextual Activism?* 30 U. Balt. L.F. 4 (2000).

## Analysis

### Assignment to Government House

Officers in the MSP are entitled to participate in collective bargaining pursuant to SPP § 3-102(a)(1)(i) (Supp. 2017) by virtue of the MSP's position as a principal department within the Executive Branch of State government. However, section 3-102(b)(4) specifically excludes an employee assigned to the Government House or the Governor's Office. SPP § 3-102(b)(4)(ii)(3). The evidence established conclusively that the Executive Protection Section of the MSP has its office at the Governor's mansion. Not only does the Executive Protection Section maintain its office at the Governor's mansion, the officers assigned to the Executive Protection Section spend a significant portion of their time guarding the Governor and the Governor's spouse at the mansion, and guarding the physical mansion itself. While not specifically defined within the Maryland Collective Bargaining Act, the Governor's home is known as the Government House. Md. Code Ann., State Gov't § 9-601-9-606 (2014 and Supp. 2017); *Office of the Governor v. Washington Post Co.*, 360 Md. 520, 537 (2000) (the State provides a home for the Governor and his or her family named "Government House.").

The exclusion based on assignment to the Government House is different from the exclusion for confidential employees. Confidential employees, as discussed more fully below, are defined by their access to certain people and to confidential information. The exclusion based on assignment to the Government House is based on physical proximity to the Governor's mansion. Had the Legislature intended those exclusions to be synonymous, it would not have

used two entirely different terms in two different places within the statutory scheme. Were I to interpret the exclusion based on assignment to the Government House the same as the exclusion of confidential employees, it would have the effect of rendering the exclusion based on assignment to the Government House meaningless, or mere surplusage, an outcome prohibited by proper statutory construction.

Likewise, it is inappropriate for me to parse the statute for some hidden meaning about assignment to the Government House, or to impose some additional restrictions on that section. The language in this statute is clear and unambiguous. The Legislature intended to exclude certain persons from participation in collective bargaining. Some of those employees were designated by position (i.e. supervisory or confidential), some by title, and some by physical location. It is not for me to question the wisdom of the Legislature, but only for me to interpret the statute it has passed. The MSP Personnel Directive excluding members of the Executive Protection Section is consistent with section 3-102(b)(4). MSP PER 14.01.06.B.3.c. Therefore, I conclude that the MSP properly excluded officers assigned to the Executive Protection Section from SLEOLA.

#### **Meaning of Confidential Employee**

In addition to the exclusion of members of the Executive Protection Section based on their assignment to the Government House, the MSP argues that members of both the Executive Protection Section and the Legislative Security Section are excluded from collective bargaining because they are confidential employees. SLEOLA argues that confidential employee must be defined using the labor-nexus test developed by the NLRB when interpreting the NLRA. The labor-nexus test, excludes a confidential employee from the term employee, within the NLRA. The labor-nexus test defines a confidential employee as one who “assist[s] and act[s] in a

confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.” *B.F. Goodrich Co.*, 115 NLRB 722, 724 (1956).

SLEOLA argues that it is appropriate to use the NLRB’s interpretation of confidential employee because the NLRA is very similar to the Maryland Collective Bargaining Act.

SLEOLA also points out that the SLRB has turned to NLRB decisions to aid in interpreting the Maryland Collective Bargaining Act. *See AFSCME v. Calvert Cty. Dep’t of Social Servs.*, SLRB Case No. 12-U-03 (2012).

SLEOLA asserts that the Department of Budget and Management has already been using the labor-nexus test. Specifically, the Office of Personnel Services and Benefits of the Department of Budget and Management has on its website a presentation entitled “Collective Bargaining What Supervisors Should Know.” In this document is a slide containing the following information, which appears to mirror the NLRB labor-nexus test:

Who is a “confidential” employee?

An employee who has access to confidential or discretionary information regarding the formulation of policies or procedures with a nexus to labor relations in State government or whose access to confidential or discretionary information is used to formulate the budget; or  
Whose functional responsibilities or knowledge concerning employee relations makes membership in an employee organization incompatible with the employee’s duties; or

An employee who is the personal secretary of the chief administrative or executive officer of an agency.

(Pet. Ex. 1).

SLEOLA argued that after applying the labor-nexus test to the officers assigned to the Executive Protection Section and the Legislative Security Section, it is apparent that these officers, while in close physical proximity to policymakers, are not in close physical proximity to policymakers with respect to labor relations. To that end, Lieutenant Jeff Ferreria, Commander

of Executive Protection, testified that to his knowledge he had never been in or overheard a collective bargaining negotiation, or anything to do with collective bargaining policy or strategy. Likewise, Corporal Richard Nevy, currently assigned to the Executive Protection Section, has overheard numerous conversations in his job but never anything related to collective bargaining, labor relations, wages or the terms and conditions of employment of the MSP. First Sergeant George White, Commander of the Legislative Security Section, testified he did not know what a collective bargaining agreement was; never heard his protected individuals negotiate a contract with SLEOLA; and had never heard anyone in the legislative branch discuss bargaining strategy with SLEOLA.

SLEOLA also presented testimony which established that the Executive Director of the Department of Budget and Management is the lead negotiator for the State of Maryland on collective bargaining. Additionally, SLEOLA established that none of the individuals protected by the officers in the Executive Protection Section and the Legislative Security Section negotiate with SLEOLA.

As to the use of case law developed by the NLRB, I first point out that the same case cited by SLEOLA to support my use of NLRB case law, *AFSCME v. Calvert Cty. Dep't of Social Servs.*, also states that the SLRB is an independent agency in the State of Maryland and is not bound by the precedent of the NLRB. Moreover, while it may be appropriate to turn to NLRB case law in the absence of a definition in Maryland, or where the state and federal statutes on this issue are similar, that is not the case here. The NLRA does not define the term confidential employee. Instead, the Act defines the term employee, and NLRB case law has developed the labor-nexus test to exclude from the term employee only those individuals considered confidential employees. See *NLRB v. Hendricks Cty. Rural Elec. Membership Corp.*,

454 U.S. 170 (1981); *Bakersfield Californian*, 316 NLRB 1211 (1995); *B.F. Goodrich Co.*, 115 NLRB 722 (1956). The Maryland law specifically excludes confidential employees, and the regulations provide a very specific definition of that term, albeit one not favored by SLEOLA.

I am left with a Maryland statute, Maryland regulations, and an MSP Personnel directive defining confidential employee. As discussed above, I am bound by the plain and unambiguous language of the statute and regulation, provided it is plain and unambiguous within the statutory scheme and when analyzed in light of the legislative intent. To determine the legislative intent, I conducted an extensive search of the legislative history of section 3-102(b)(11), which excludes confidential employees from collective bargaining, to no avail. There is simply no information available to shed light, beyond the language of the statute itself, as to why the Legislature sought to exclude certain groups of employees from collective bargaining.

While I was not able to discover anything of the Legislature's intent beyond the plain words of the statutes and regulation at issue, I was able to discern the origins of the definition of confidential employee. The Maryland Collective Bargaining Act excludes "any supervisory, managerial, or confidential employee of a unit of State government listed in subsection (a)(1)(i) through (iv) and (vi) through (x) of this section, as defined in regulations adopted by the Secretary." SPP § 3-102(b)(11) (Supp. 2017). The regulation on this issue provides that "[t]he Board's decision with respect to disputes based upon supervisory, managerial, and confidential status shall be based upon these terms as defined in Executive Order 01.01.1996.13 or as subsequently defined by new regulations promulgated by the Secretary of Budget and Management." COMAR 14.32.03.05C. Executive Order 01.01.1996.13 in turn provides that "confidential employee" means an employee:

- (a) Who has access to confidential or discretionary information regarding the formulation of policy or procedures;

- (b) Whose functional responsibilities or knowledge concerning employee relations makes the employee's membership in an employee organization incompatible with the employee's duties; or
- (c) Who is the personal secretary of the chief administrative or executive officer of an agency.

COMAR 01.01.1996.13.

While the statute points to the regulation, which in turn points to the Executive Order, the origin of this scheme was in the reverse order. Governor Glendening issued Executive Order 01.01.1996.13 on May 24, 1996. *McCulloch v. Glendening*, 347 Md. 272 (1997). It provided:

employees of the principal departments within the Executive Branch, the Maryland Insurance Administration, the State Department of Assessments and Taxation, and the State Lottery Agency, the right to: (1)[o]rganize, form, join or assist any employee organization; (2) [b]argain collectively through representatives of their own choosing; (3)[e]ngage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by any other law of the State of Maryland or this Executive Order.

*Id.* at 276-277 (citations and footnotes omitted). The responsibility for the initial determination of bargaining units and the assignment of employees to them was given to the then-Secretary of Personnel. 347 Md. at 278. It was within that 1996 Executive Order that we find the definition of "confidential employee," which is excluded from the term "Employee," and is therefore excluded from the rights provided in the Executive Order. *McCullough* is the only case directly addressing the Executive Order. It dealt, however, with the constitutionality of the Executive Order and made no mention of the specific definition of confidential employee. It held that the Order did not violate Maryland's separation of powers doctrine; *id.* at 287; was not invalid as in conflict with then-existing State Personnel Management Reform Act; *id.* at 290; and did not require express legislative authority nor abdicate the governor's statutory or gubernatorial authority. *Id.* at 294-295.

The change from Executive Order to statute is detailed by the Court of Appeals in *Ehrlich v. Maryland State Employees Union, AFSCME*, 382 Md. 597 (2004):

In an effort to provide a more solid base for a collective bargaining regime and not have it rest solely on an Executive Order that could be modified or revoked by subsequent Governors, Governor Glendening proposed legislation to the 1999 Session of the General Assembly. The bill, which was enacted as 1999 Md. Laws, ch. 298, and took effect July 1, 1999, incorporated some features and provisions of the Executive Order but was far more extensive. In a thoroughly rewritten title 3 to the State Personnel and Pensions Article (SPP), it provided collective bargaining rights for Executive Branch employees, reserved certain rights to the State, prohibited employees from engaging in strikes and the State from engaging in lockouts, set forth procedures for the election and certification of exclusive bargaining representatives and for the collective bargaining process, and created a State Labor Relations Board (SLRB) as a unit within the Department of Budget and Management (DBM) to administer and enforce the law.

*Id.* at 601.

Despite understanding its origin, I am ultimately left only with what appears plainly in the words of the statute: “In Title 3 of the S.P.P Article, the Legislature granted and denied, expressly, certain groups the right to bargain collectively.” *Maryland Transportation Authority v. Maryland Transportation Authority Police Lodge #34 of the Fraternal Order of Police*, 420 Md. 141, 166 (2011). I conclude, that the Maryland Legislature determined that certain groups of employees, some by virtue of their position and some by virtue of their location, were in such close proximity to policy makers, that it made their participation in collective bargaining inappropriate.

Merely because members of the Executive Protective Section and the Legislative Security Section have not yet encountered a discussion on the policy or negotiation of a collective bargaining agreement does not mean that the potential does not exist. *Ehrlich* touches upon the very danger that Maryland’s statutory and regulatory scheme, establishing a broad definition of confidential employee, may avoid. At issue in *Ehrlich* was whether two memoranda



of understanding, that were approved by a staff member in the Governor's office, but not explicitly ratified by the Governor, were effective and therefore enforceable against a subsequent administration. 382 Md. at 599. The *Ehrlich* Court pointed out that SPP § 3-601 required that the Governor ratify a memorandum of understanding before it is effective. Moreover, section 3-501 required "[i]n the budget bill submitted to the General Assembly, the Governor shall include any amounts in the budgets of the principal units required to accommodate any additional cost resulting from the negotiations . . ." *Id.* at 607. Thus, the Legislature will ultimately have to consider legislation to cover the costs resulting from collective bargaining negotiations. Both of these sections in the Maryland Collective Bargaining Act still exist today. SPP § 3-501(c)(2)(ii) (2015); SPP § 3-601(c)(1) (2015).

The Governor and members of the Legislature formulate policy and procedures, both with respect to collective bargaining and on numerous other issues. The members of the Executive Protection Section and the Legislative Security Section have unfettered access to these people, are charged with protecting them, and therefore have access to confidential or discretionary information regarding the formulation of policy or procedures. *See* COMAR 01.01.1996.13.

I recognize that the definition of confidential employee in Maryland is broader than the one proffered by SLEOLA and utilized by the NLRB. But that was within the prerogative of the Maryland Legislature, and the SLRB, which chose to incorporate the definition of confidential employee from the 1996 Executive Order that preceded the Maryland Collective Bargaining Act. There is nothing ambiguous about the language of the statute or regulation. The MSP Personnel Directive excluding members of the Executive Protection Section and Legislative Security Section is consistent with section 3-102(b)(11). MSP PER 14.01.06.B.3.c. & d. Therefore, I conclude that the MSP properly excluded these officers from SLEOLA.

**PROPOSED CONCLUSIONS OF LAW**

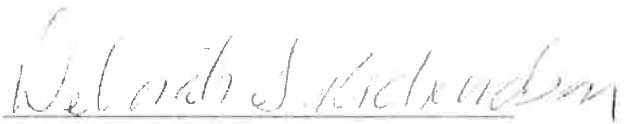
Based on the foregoing discussion, I conclude as a matter of law that the Maryland State Police officers assigned to the Executive Protection Section must be excluded from the State Law Enforcement Officers Labor Alliance because they are assigned to the Government House. Md. Code Ann., State Pers. & Pens. § 3-102(b)(4).

I further conclude as a matter of law that the Maryland State Police officers assigned to the Executive Protection Section and the Legislative Security Section must be excluded from the State Law Enforcement Officers Labor Alliance because they are confidential employees. Md. Code Ann., State Pers. & Pens. § 3-102(b)(11); COMAR 01.01.1996.13; and COMAR 14.32.03.05C.

**PROPOSED ORDER**

I **PROPOSE** the Clarification/Contest of a Unit Designation Petition filed by the State Law Enforcement Officers Labor Alliance asserting that Maryland State Police officers assigned to the Executive Protection Section and the Legislative Security Section were improperly excluded from collective bargaining rights be **DENIED**.

May 3, 2018  
Date Decision Mailed

  
Deborah S. Richardson  
Administrative Law Judge

DSR/emg  
#173277

**NOTICE OF RIGHT TO FILE EXCEPTIONS**

Any party may file exceptions, in writing, to this Proposed Decision with the State Labor Relations Board, in accordance with Md. Code Ann., State Gov't § 10-216 (a)(2)(2014). The Office of Administrative Hearings is not a party to any review process.

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