

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS  
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

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In the Matter of

COMMITTEE FOR PUBLIC COUNSEL  
SERVICES,

and

SEIU, LOCAL 888

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Case No. WMAP-15-4647

Date Issued: August 31, 2015

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CERB Members Participating:

Marjorie F. Wittner, Chair  
Elizabeth Neumeier, CERB Member  
Harris Freeman, CERB Member

Appearances:

James M. Pender, Esq. - Representing CPCS  
Jennifer Springer, Esq. Representing SEIU, Local 888

DECISION

SUMMARY

1 On June 23, 2015, SEIU, Local 888 (SEIU or Union) filed a petition for written  
2 majority authorization with the DLR seeking to form a bargaining unit of lawyers and  
3 administrative staff employed by the Committee for Public Counsel Services (CPCS),  
4 the state agency charged with the responsibility "to plan, oversee, and coordinate the  
5 delivery of criminal and certain noncriminal legal services [. . .] throughout the

1 Commonwealth.” M.G.L. c. 211D, sec. 1. The petition was filed pursuant to M.G.L. c.  
2 150A, that part of the Commonwealth's collective bargaining law that extends the right  
3 to form unions and collectively bargain to certain private sector employees who are not  
4 within the jurisdiction of federal labor law. Chapter 150A also covers certain public  
5 employees of authorities who are not granted the right to bargain by Chapter 150E, but  
6 who have by express legislative directives been included within the reach of Chapter  
7 150A.<sup>1</sup> SEIU and CPCS have both filed letters responding to the DLR's request that  
8 they show cause why the DLR should not dismiss the petition based on the fact that  
9 CPCS is a state agency that is not expressly designated as an employer within Chapter  
10 150A. The CERB dismisses the petition for reasons explained below.

11 Opinion<sup>2</sup>

12 As acknowledged by both parties, this is the third time that the CERB has been  
13 asked to determine whether Massachusetts law permits CPCS employees to form a  
14 union and collectively bargain. On two previous occasions, we dismissed petitions that  
15 were filed under M.G.L. c. 150E requesting that the CERB authorize an election for a  
16 bargaining unit of certain employees of CPCS and its statutory predecessor, the  
17 Massachusetts Defenders Committee (MDC). See, respectively, Committee for Public  
18 Counsel Services and National Association of Government Employees, 20 MLC 1201,

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<sup>1</sup> Pursuant to Section 19A of M.G.L. c. 161A, as amended in 1970, the provisions of Section 5 of M.G.L. c. 150A apply to the Massachusetts Bay Transportation Authority (MBTA) and its employees with certain exceptions. Pursuant to Chapter 760 of the Acts of 1962, certain specified provisions of M.G.L. c. 150A apply to the Massachusetts Turnpike Authority, Massachusetts Port Authority, Massachusetts Parking Authority, and Woods Hole, Martha's Vineyard and Nantucket Steamship Authority (Steamship Authority).

<sup>2</sup> The CERB's jurisdiction is not contested.

1 SCR-2212 (Sept. 29, 1993) (CPCS and NAGE); Massachusetts Chief Administrative  
2 Justice and Massachusetts Defenders Staff Association, 5 MLC 1699, SCR-2121  
3 (March 9, 1979) (MCAJ and MDSA). We dismissed those petitions despite the fact that  
4 the petitioned-for employees of the Commonwealth's judicial branch were beyond  
5 question state employees whose salaries, benefits and pensions were provided by the  
6 Legislature. The CPCS employees that SEIU now seeks to represent are similarly  
7 situated. Despite their status as public employees, for reasons that are consistent with  
8 our rulings in 1993 and 1979, the CERB is compelled to dismiss the instant petition  
9 because the CPCS is not a statutory employer as defined by Chapter 150A. We review  
10 the governing case law, explain our reasoning, and address the parties' arguments  
11 below.

12 In 1979, six years after the enactment of Chapter 150E, the Labor Relations  
13 Commission (LRC), the CERB's statutory predecessor, dismissed a petition seeking a  
14 unit of lawyers and staff employed by the MDC. MCAJ and MDSA, 5 MLC at 1706.  
15 After describing in great detail the judicial rulings and legislation that paved the way for  
16 collective bargaining by certain employees of the judicial branch, Id. at 1700-1703, the  
17 LRC concluded that the MDC is treated as part of the judicial branch of government, Id.  
18 at 1703, but rejected MDSA's argument that the Legislature intended Chapter 150E to  
19 apply to employees of the MDC. Id. at 1704. The LRC acknowledged legislation that  
20 amended Chapter 150E in 1978 to identify the Chief Administrative Justice of the  
21 judicial branch as the statutory employer of certain judicial employees and to establish  
22 statutorily defined bargaining units of only certain judicial branch employees.<sup>3</sup> Id. at

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<sup>3</sup> To create a consistent statutory scheme, in 1978, the Legislature passed the Court

1 1705-1706. The LRC's decision further explained, among other things, that the Chief  
2 Administrative Justice did not set MDC employees' working conditions, had no ability to  
3 control them, and consequently could not function as an effective bargaining partner for  
4 a union representing MDC employees. The LRC further described other problems that  
5 might result if the Chief Administrative Justice were to bargain with MDC employees  
6 and concluded that, absent "clear indication that the Legislature considered MDC staff  
7 to be employees of the Chief Administrative Justice," "[a] collective bargaining  
8 relationship between the MDC employees and the Chief Administrative Justice would  
9 engender problems too substantial and far-reaching for us to reconcile with the general  
10 principles underlying the enactment of Chapter 150E." Id. at 1709. The LRC therefore  
11 dismissed the petition. Id.

12 In 1993, after the enactment of M.G.L. c. 211D, which created CPCS to replace  
13 and restructure the MDC, NAGE filed a petition with the LRC seeking to represent only  
14 the non-legal staff of CPCS. In an effort to avoid the result reached in MCAJ and  
15 MDSA, NAGE argued that the petitioned-for-employees were public employees, but not  
16 judicial employees and did not work for the Chief Administrative Judge. CPCS and  
17 NAGE, 20 MLC at 1202. The LRC rejected NAGE's argument that the statutory  
18 restructuring of the Commonwealth's public defender system demonstrated a legislative  
19 intent to include the non-legal staff of CPCS (who were employed and paid by the  
20 Commonwealth) as "presumably employees of the Commissioner of Administration and  
21 Finance," a designated statutory employer of public employees as set forth in M.G.L. c.

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Reorganization Act that created the position of Chief Administrative Justice and designated this position as the employer of employees of the judiciary. See MCAJ and MDSA, 5 MLC at 1702.

1 150E, section 2.” Id. at 1204. The LRC rejected NAGE’s argument because it offered  
2 “scant evidence” showing that the CPCS employees were employed by the  
3 Commissioner of Administration. Id. at 1205. Rather, Chapter 211D established that  
4 these employees were controlled only by CPCS, whose members were appointed by  
5 the Supreme Judicial Court. Id. at 1205-1206. Accordingly, the LRC concluded that the  
6 sought-after bargaining unit was comprised solely of state employees who lacked a  
7 statutory employer as defined by Chapter 150E. Id.

8       Given the rulings in MCAJ and MDSA and CPCS and NAGE, it is not surprising  
9 that the instant petition was filed pursuant to Chapter 150A and not Chapter 150E.  
10 Indeed, SEIU initially filed a petition for the CPCS unit under Chapter 150E and  
11 withdrew it after the DLR issued a show cause letter asking why the petition should not  
12 be dismissed given the holdings in MCAJ and MDSA and CPCS and NAGE. The  
13 instant petition filed by SEIU, consequently, makes no argument that CPCS is a  
14 statutory employer as defined by Chapter 150E. Rather, SEIU argues that CPCS is  
15 akin to other public entities, e.g., the Steamship Authority and the MBTA, which are  
16 permitted to bargain with their public employees pursuant to Chapter 150A. For the  
17 reasons set forth below, and consistent with the reasoning as to legislative intent and  
18 the statutory framework of our Law set forth in MCAJ and MDSA and CPCS and NAGE,  
19 we find that Chapter 150A does not provide the CERB with statutory authority to grant  
20 the Union’s petition.

21       SEIU presents three arguments to support its view that CPCS is a statutory  
22 employer under Chapter 150A. First, it contends that CPCS has similar characteristics  
23 to other public entities that are subject to Chapter 150A. Second, it contends that any

1 grounds for opposing collective bargaining for CPCS employees based on the fact that  
2 CPCS employees were under the control of the judiciary have been resolved by the  
3 2011 amendments to Chapter 211D. Those amendments restructured CPCS by having  
4 the fifteen member Committee (CPCS) be appointed by representatives of all three  
5 branches of government - two by the Governor, two by the Speaker of the House of  
6 representatives, two by the President of the Senate, and nine by the Supreme Judicial  
7 Court. M.G.L. c. 211D, section 1 (as amended in 2011). Third, SEIU claims that the  
8 public policy set forth in Chapter 150A supports granting collective bargaining rights to  
9 CPCS employees. As we explain below, these arguments are not persuasive.

10 We begin with Chapter 150A, Section 2, which expansively defines an employer  
11 as “any person acting in the interest of an employer, directly or indirectly [..].” But  
12 Section 2 also explicitly states that the definition of employer under Chapter 150A “shall  
13 not include the commonwealth or political subdivision thereof.” See Geriatric Authority  
14 of Holyoke, 12 MLC 1571, 1575, MCR-2911, 2917, 2929 (Jan. 27, 1986) (Chapter 150A  
15 excludes only two employers, the Commonwealth and its political subdivisions). CPCS  
16 is unquestionably a statutory agency of the Commonwealth in the context of  
17 employment disputes, see German v. Commonwealth, 410 Mass. 445, 447 (1991)  
18 (addressing whether furlough of CPCS employee constitutes an unconstitutional taking  
19 of property), and the plain language of Section 2 is straightforward in its exclusion of the  
20 Commonwealth from its definition of employer. We find this interpretation of Section 2  
21 to be controlling.

22 SEIU does not directly contest Chapter 150A’s definition of employer. It  
23 nevertheless contends that CPCS should be considered an employer under Chapter

1 150A because its "governance structure and independence," is like that of other public  
2 entities that are recognized as employers under M.G.L. c. 150A, section 2. There is no  
3 merit to this line of reasoning.

4 First, CPCS is legally distinguishable from those public entities that are deemed  
5 Chapter 150A statutory employers, i.e., the Steamship Authority, the MBTA and others,  
6 which are considered bodies politic and corporate, and political subdivisions of the  
7 Commonwealth. Daviega v. Boston Public Health Commission, 449 Mass. 434, 441-  
8 442 (2007). The Court has repeatedly explained that such entities are "neither the  
9 Commonwealth nor parts thereof" and distinct from, i.e., "not merely," a board or  
10 commission of the State government. Id. (citing Miller v. Secretary of the  
11 Commonwealth, 428 Mass. 82, 86-87 (1998) (further citations omitted). The SJC has  
12 contrasted "bodies politic and corporate" with the Commonwealth itself and its various  
13 constituent agencies that have a high degree of connection with, or political or financial  
14 dependence on, the Commonwealth. See Daviega, 449 Mass. at 441 (noting that the  
15 Alcoholic Beverages Control (ABC) Commission, which is funded by legislative  
16 appropriations, with members who are appointed and removable by the Treasurer, and  
17 who in turn report to the Governor, Treasurer and Legislature, is a part of the  
18 Commonwealth). The ABC Commission, like CPCS, is funded by legislative  
19 appropriations and its leadership reports to various branches of the government. SEIU  
20 has not presented any facts that would allow us to distinguish the structural relationship  
21 that CPCS has to the Commonwealth (i.e., its status as a state agency) from other  
22 agencies or commissions that are closely connected to and funded by the state and,  
23 thus, excluded from the definition of employer in Chapter 150A.

1 Other aspects of the statutory scheme governing public sector labor relations  
2 also preclude our finding that CPCS is an employer under Chapter 150A. First and  
3 foremost, the MBTA and the Steamship Authorities are considered employers under  
4 Chapter 150A because the statutes that created these entities, see n. 1 above, contain  
5 provisions that expressly state that these institutions are subject to DLR jurisdiction  
6 pursuant to Chapter 150A. MBTA v. Labor Relations Commission, 356 Mass. 563, 568  
7 (1970) (finding express statutory language necessary to subject public authority to DLR  
8 jurisdiction pursuant to 150A). In contrast to the language now contained in the statutes  
9 establishing the MBTA and the Steamship Authority, the 2011 amendments to Chapter  
10 211D do not contain any language indicating that CPCS is a Chapter 150A employer.

11 SEIU also asks that we consider the fact that the 2011 amendments to Chapter  
12 211D established shared control of CPCS by all three branches of state government.  
13 This does not, however, bring this state agency within the definition of employer set  
14 forth in Chapter 150A. We do find however that the 2011 amendments significant in  
15 that the Legislature recently altered the governance structure of CPCS, but at that time  
16 did not choose to place CPCS under the definition of employer in Chapter 150A or, for  
17 that matter, in Chapter 150E. This undercuts any argument that the Legislature had the  
18 specific intent of granting statutory employer status to CPCS. MCAJ and MDSA, 5 MLC  
19 at 1706. See also MBTA v. Labor Relations Commission,<sup>4</sup> 356 Mass. at 568 (absence  
20 of language that MBTA was a Chapter 150A employer in statute establishing MBTA was  
21 significant to holding that LRC was without jurisdiction over MBTA).

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<sup>4</sup> Indeed, it was immediately following the SJC's ruling in this case that the Legislature amended Chapter 161A to bring the MBTA under the jurisdiction of the LRC pursuant to 1412, CR-3689 (May 8, 1994).

1           Second, the plain language of Chapter 150A, Section 5(c) establishes that, with  
2 respect to representation matters, this part of the Commonwealth's labor law governs  
3 employers engaged in industry, trade or health care.<sup>5</sup> The Union does not contend and  
4 we do not find that CPCS falls within any of these categories. In particular, the services  
5 and functions that CPCS performs are funded by the Legislature, governed by persons  
6 appointed by the Commonwealth and provided by CPCS employees, whom both parties  
7 admit are public employees. Nor does SEIU argue that CPCS is like a private law firm  
8 that receives a fee for service from its clients. Cf. Foley, Hoag & Eliot and United File  
9 Room Clerks, Messengers, and Library Personnel of Foley, Hoag & Eliot, 2 MLC 1303,  
10 1310, CR-3488 (January 13, 1976) (law firm providing legal services was engaged in  
11 industry and trade by providing clients a product for which it was compensated).

12           Finally, since the amendments to Section 1 of Chapter 150E in 1981, those  
13 institutions, such as housing authorities, that are considered bodies politic and  
14 corporate, and political subdivisions of the Commonwealth (other than those set forth in  
15 note 1, which are expressly excluded from Chapter 150E) have been recognized as  
16 employers under Chapter 150E and excluded from Chapter 150A as political  
17 subdivisions.<sup>6</sup> Boston Housing Authority v. Labor Relations Commission, 398 Mass.

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<sup>5</sup> Section 5(c) states:

Whenever a question affecting industry, trade or health care arises concerning the representation of employees, the [DLR] may investigate such controversy and certify to the parties, in writing, the name or names of the representatives who have been designated or selected.

<sup>6</sup> The definition of "employer" in M.G.L. c. 150E, Section 1, states in pertinent part:

"Employer" or "public employer", the commonwealth acting through the commissioner of administration, or any county, city, town, district, or other

1 715 (1986) (citing Fall River Housing Authority, 7 MLC 1722 (1981) (“There is no doubt  
2 that housing authorities. . . are ‘public employers’ within the meaning of M.G.L. c. 150E,  
3 Section 1, amended in 1981”) and Geriatric Authority of Holyoke, 12 MLC at 1575-1576  
4 (amendment to Chapter 150E, which added the term “political subdivision” was intended  
5 to add housing authorities)). Consequently, even if we were to consider CPCS as  
6 somehow akin to these authorities, it is clear that since 1981, “Chapter 150A excludes  
7 ‘political subdivisions’ and 150E now includes them.” Geriatric Authority of Holyoke, 12  
8 MLC at 1576.

9 Given the text and purpose of the Commonwealth’s statutory scheme for  
10 governing collective bargaining, we find no grounds for CPCS to be considered an  
11 employer under 150A. In concluding that we must dismiss SEIU’s petition, we are  
12 mindful, as SEIU correctly points out, that the policies underlying Chapter 150A  
13 encourage the establishment of collective bargaining as a public good. However, the  
14 decision to grant or deny certain public employees collective bargaining rights rests with  
15 the Legislature. See generally, M.G.L. c. 150A, Section 1. Without the Legislature  
16 expressly granting the DLR and the CERB the authority to define an excluded state  
17 agency as a statutory employer, the CERB lacks jurisdiction over this matter. MBTA v.  
18 Labor Relations Commission, 356 Mass. at 568.

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political subdivision acting through its chief executive officer, and any individual who is designated to represent one of these employers and act in its interest in dealing with public employees, but excluding authorities created pursuant to chapter one hundred and sixty-one A and those authorities included under the provisions of chapter seven hundred and sixty of the acts of nineteen hundred and sixty-two.

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Conclusion

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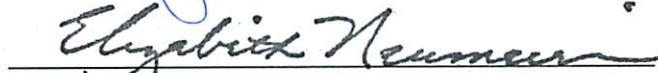
For the reasons set forth above, we dismiss the petition.

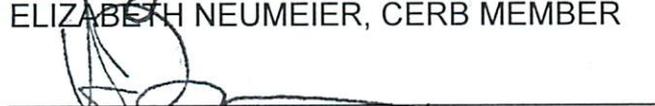
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SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

  
\_\_\_\_\_  
MARJORIE F. WITTNER, CHAIR

  
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ELIZABETH NEUMEIER, CERB MEMBER

  
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HARRIS FREEMAN, CERB MEMBER