

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

In the Matter of

CITY OF BOSTON/BOSTON PUBLIC
LIBRARY

and

PROFESSIONAL STAFF ASSOCIATION

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Case No. CAS-19-7093
Date issued: May 27, 2021

CERB Members Participating:

Marjorie F. Wittner, Chair
Joan Ackerstein, CERB Member
Kelly Strong, CERB Member

Appearances:

Robert Boyle, Esq. - Representing the City of Boston
James A.W. Shaw, Esq. - Representing the PSA

1 CERB DECISION IN FIRST INSTANCE

2 Summary

3 On January 18, 2019, the Professional Staff Association (PSA or Union) filed a unit
4 clarification petition with the Department of Labor Relations (DLR) seeking to accrete
5 individuals who perform metadata and digital imaging assistance to the bargaining unit of
6 librarians and other employees it represents at the City of Boston Public Library (BPL or
7 Library). The PSA contends that these individuals have been misclassified as
8 independent contractors in violation of M.G.L. c. 150E (the Law) and should be accreted

1 to its unit because they perform substantially the same duties as many different
2 bargaining unit members. Procedurally, the Library argues that the petition is contract-
3 barred. Substantively, it opposes accreting these individuals on grounds that they are
4 independent contractors and not employees within the meaning of Section 1 of the Law.
5 The Library further asserts that because it has reserved its right to contract out work to
6 non-bargaining unit members pursuant to Article V, Section 2 of its collective bargaining
7 agreement (CBA) with the Union, the Union cannot seek to include them in its unit via the
8 accretion process.

9 The DLR held an informal conference regarding the petition on April 24, 2019. The
10 parties provided position statements, affidavits, and documentary evidence in response
11 to the DLR's information requests before and after the conference.

12 On August 13, 2020, the DLR sent the parties a letter asking them to show cause
13 why the petition should not be resolved based upon the information summarized therein.
14 Both parties filed responses containing additional information, corrections and suggested
15 changes. After reviewing the responses and incorporating additional information and
16 suggested changes as necessary, the Commonwealth Employment Relations Board
17 (CERB) has determined that there are no material disputes of fact and dismisses the
18 petition for the reasons set forth below.

19 Background

20 Professional Staff Association

21 The PSA has represented a unit of professional and pre-professional employees
22 of the Library since approximately 1973. The recognition clause of the parties' most
23 recent collective bargaining agreement (CBA) describes the unit as: "All employees

1 classified in the Pre-Professional Library Service, all Professional Library Service
2 employees in grades P-1 through P-4, all employees in grades LA-IO, M-IO and C-IO.”
3 The unit also includes all positions accreted into the bargaining unit pursuant to unit
4 clarification petitions that the Union filed in Case Nos. CAS-08-3727 and CAS-13-3100.

5 Most bargaining unit members are professional librarians who hold a master’s
6 degree in Library and Information Sciences (MLIS). As of May 2019, all PSA members
7 were full-time, except for eight part-time Grade P1 Floater Librarians who work 18 hours
8 a week, and a part-time PS2 Youth Education Specialist. These part-time employees
9 receive some pro-rated benefits under the CBA.¹

10 Collective Bargaining Agreement

11 On January 18, 2019, the PSA and the City signed two memoranda of agreement
12 (MOA) extending the terms of the 2013-2016 CBA from October 1, 2016 to September
13 30, 2017, and from October 1, 2017 to September 30, 2020, respectively.² Both MOAs
14 stated that they would not take effect until “the Union has ratified, the mayor has
15 approved, and the City Council” has funded them. The MOAs were ratified on February
16 16, 2019 and funded at some unspecified point thereafter.

17 Article V, Section 2 of the CBA, the Management Rights clause, states in pertinent
18 part:

19
20 The Municipal Employer reserves and retains the right to contract out work
21 or subcontract out work. Pursuant to the exercise of such right, no

¹ The CBA provides that the number of part-time positions “shall not exceed ten percent (10%) of the employees in the entire bargaining unit.”

² The DLR’s records reflect that the Union electronically filed this petition at 12:09 p.m. on January 18, 2019. The Union asserts and the City does not dispute that the MOAs that yielded the new CBAs were signed shortly before 10 p.m. on January 18, 2019.

1 employee shall be laid off if there is available work in the same position or
2 in a similar position which the employee is qualified to fill.³

3
4 The Union asserts that the primary use of contractors pursuant to this article is in
5 the cataloguing department, where the Library works with several independent vendors
6 on a specific “catalog retroconversion project.” The Union states that this is a large project
7 that could not be done by bargaining unit members without contractors.

8 Metadata, Generally

9
10 Metadata is the information included with the record of an item in a library or similar
11 institution, such as the item’s title, creator, format, subject and subject analysis. The
12 Library’s goal for metadata creation is to create a digital record of the item that is
13 comprehensive, consistent and searchable within and across collections. Metadata can
14 be sourced from catalog card records, original objects, and “catalogue raisonné,” which
15 are chronological catalogs of works of a particular artist that include descriptions of each
16 piece of the artist’s work, incorporating scholarly commentary and outside research.

17 Digital Commonwealth

18 According to the website “www.digitalcommonwealth.org,” (*last accessed January*
19 *22, 2021*) Digital Commonwealth is a nonprofit collaborative organization, founded in
20 2006, that provides resources and services to support the creation, management, and
21 dissemination of cultural heritage materials held by Massachusetts libraries, museums,
22 historical societies, and archives. The BPL manages the Digital Commonwealth’s
23 website. As part of its functions as the “Library for the Commonwealth,” the BPL also

³ This provision has been in the parties’ CBA since at least the 2002-2006 integrated CBA.

1 offers free digitization services of these materials for upload into the Digital
2 Commonwealth repository.

3 Content Discovery Department

4 The Metadata and Imaging Assistants⁴ at issue in this proceeding work in the
5 Library's Content Discovery Department, which is headed by Content Discovery Manager
6 Tom Blake (Blake). The Content Discovery Department is within the Library's Collections
7 division, which is headed by Chief of Collections, Laura Irmischer (Irmischer). As
8 described further below, Special Collections Cataloguing Manager Danielle Pucci (Pucci)
9 and Statewide Metadata Coordinator Nicole Shea (Shea) are two bargaining unit
10 librarians who work in Content Discovery. Both Shea and Pucci recruit and oversee the
11 services performed by the Metadata Assistants. Another bargaining unit member, Digital
12 Imaging Projection Coordinator Bahadir Kavlakli (Kavlakli), assigns projects to the
13 Imaging Assistants. Kavlakli also oversees the steps necessary to digitize the images
14 and reviews the Imaging Assistants' final product.

15 Metadata Assistants - Duties, Qualifications and Recruitment

⁴ The City objected that the Show Cause letter referred to the individuals in the disputed positions as Metadata or Digitization "Specialists" on grounds that "Specialists" are not an official BPL title. The City also objected that the Show Cause letter described these individuals as occupying "positions" because the individuals did not work in "budgeted positions." The CERB notes that the City itself used the term "Specialists" when referring to the disputed positions in its June 20, 2018 email correspondence with the Union. Nevertheless, for ease of reference, because it appears that the disputed positions have no official title within the Library, we refer to the individuals at issue in this proceeding who perform metadata assistance either as Metadata Assistants, or collectively, as the Metadata Mob, an informal term that the Library uses when referring to them. We refer to persons performing image digitization assistance as Digitization or Imaging Assistants. Collectively, we refer to them as the "Assistants" or the "disputed positions." We will continue to use the term "position" in a generic manner without regard to where the funds to pay these individuals come from.

1 Since 2009, the Library has utilized Metadata Assistants to generate metadata for
2 items in the Library and statewide collections for upload into the Digital Commonwealth
3 repository. The Metadata Assistant prepare the metadata according to standardized
4 metadata formats or in accordance with detailed guidelines for specific collections that
5 Pucci and/or Shea have created.⁵ They enter the metadata they generate into Excel
6 spreadsheets and create barcodes containing the metadata for each item. Pucci and
7 Shea then review and proof their work as necessary.⁶ Once approved, they upload the
8 metadata into the Digital Commonwealth repository.

9 As of April 2019, five Metadata Assistants performed services for the Content
10 Discovery Department. Of those five, one had performed these services for the BPL since
11 November 2016, three had performed services since 2017, and one other had been there
12 since January 2019.

13 All Metadata Assistants have, or are in the process of obtaining, a MLIS from
14 Simmons College. Other requirements include a specific interest in cataloging and the
15 ability to perform meticulous, highly detailed work.

⁵ The record contains several different examples of guidelines provided to the Metadata Assistants, including the Anna Maria College Postcard Collection guidelines, which is fourteen pages long. It describes the various data entry fields and contains detailed instructions of how data should be entered. The 20-page guidelines for the Henri Fantin-Latour Collection include notes about the collection, where the source information comes from, and detailed instructions about how to enter data into the data entry fields.

⁶ As one would expect, the newer Metadata Assistants require more oversight than the more experienced ones.

1 The Library pays them from \$17-\$25 per hour. The Library has increased this
2 hourly rate when projects are completed and when they receive their graduate degree.⁷

3 Prior to the COVID-19 pandemic, the Metadata Assistants performed all of their
4 work onsite at the BPL's Main Branch during regular Library hours. Since the pandemic,
5 the Metadata Assistants have been able to perform some of their work on already digitized
6 materials remotely.

7 In general, based on emails that Pucci sent to prospective candidates in 2017 and
8 other information adduced during the investigation, Metadata Assistants are generally
9 expected to work between two to three days or 15-20 hours per week, but this can and
10 does vary depending on workflow and their own availability. According to Blake,
11 Metadata Assistants may skip a week entirely and work more than twenty hours the next
12 week to make up for the hours that they missed.⁸ All Metadata Assistants schedule their
13 hours using a shared Google calendar.

14 The Library does not publicly advertise for Metadata Assistants. Rather, the Library
15 recruits them based on recommendations from professors in the Simmons University
16 Library Information Science department, with whom the Library has a professional

⁷ The Union claims that these increases roughly track the pay increases reflected in the pay scales for pre-professionals in the CBA.

⁸ Pursuant to Article X, Section 1, Paragraph 2 of the parties' CBA, PSA employees "may request in writing, flexible scheduling for library related programs or activities, professional meetings or personal reasons" subject to Library approval and other provisos, including that the schedule shall not in the Library's judgment, unreasonably limit operations and that the requested schedule total seventy hours within the two week payroll period.

1 relationship. The hiring process consists of Pucci or Shea emailing the candidates they
2 are interested in,⁹ and following up, as appropriate and necessary.

3 Imaging Assistants, Duties, Qualifications and Recruitment

4 Imaging Assistants prepare art, print, and photographs for cataloging by utilizing
5 specialized equipment on the Library's photo lab to scan and create an archival digital
6 image of each item. They work in the Library's photo lab, where there are three
7 workstations. Unlike the Metadata Mob, they are not recruited from a particular school or
8 program but begin providing these services as a result of knowing people in the Content
9 Discovery Department.¹⁰ Like the Metadata Mob, their hours are flexible and self-
10 scheduled through Google Calendar.

11 The Imaging Assistants do not create metadata for the images they create. They
12 nevertheless create a standardized and detailed file-naming system, know how to set up
13 the camera correctly, and do appropriate color correction and lighting.

⁹ For example, on July 29, 2017, Pucci emailed Jessica Purkis (Purkis) with the subject line "*Are you interested in working with Boston Public Library's Digital Services team?*" After introducing herself as the "Lead Digital Projects Librarian in the Library's Digital Services Department," Pucci stated that:

We are currently looking for someone who can work 15-20 hours/week this fall preparing materials held in our Print Department for ingest into our digital repository, Digital Commonwealth . . .

[CS] gave us your name and said you might be interested in this work. I'm wondering if you would like to come in and meet the other members of the Digital Services Team.

¹⁰ For example, Bruce Myren (Myren), a current Imaging Specialist, used to work with Blake and Kavlakli at Boston Photo Imaging, a private lab that the Library used before it established an in-house photo studio. Pucci also worked at Boston Photo Imaging before working at the Library.

1 Since 2016, four individuals have provided imaging assistance to the Library. As
2 of 2019, only Myren was still active. Myren's LinkedIn profile¹¹ states that since 2012, he
3 has worked as an "Independent Contractor" for the BPL as an "Imaging Specialist,
4 digitizing archived collections." Myren has both a BFA and an MFA in photography. As
5 of 2019, Myren earned \$32.00 an hour and worked for the BPL up to twenty-five hours a
6 week.

7 Nicole Armand (Armand) provided digital imaging assistance for the Library from
8 2012 to 2018. According to the Library, she stopped working for the Library because
9 there was not enough work to support her. Armand's 2019 LinkedIn profile reflects that
10 from 2014 to "present," she also worked for the Library as an "Internet Archive
11 Scanner/imaging editing," another non-bargaining unit position. The listing further
12 indicates that Armand has taught mixed media art at a public school in Dorchester from
13 2014 - "present." Armand has a BFA in photography.

14 Metadata and Imaging Assistants – Common Requirements/Method of Pay/Performance
15 Evaluations

16
17 To perform their services, all Assistants must pass a City of Boston criminal
18 background check and be registered as a City vendor.

19 Both Metadata Assistants and Imaging Assistants submit biweekly invoices to
20 Blake to be paid.¹² Funds to pay them come from two different sources. Work done on

¹¹ In the absence of formal job descriptions and in an effort to demonstrate the Metadata Mob's and Imaging Assistants' duties, skills, work history and educational background, the Union provided these individuals' profiles on the social media site, LinkedIn. The Union appears to have accessed and printed the profiles on February 15, 2019.

¹² The two invoices in the record are not standardized and appear to have been prepared by the Metadata and Imaging Assistants themselves. For example, Myren's invoice

1 collections from the Library's Print Department is paid for by a grant¹³ and work done on
2 all other collections is paid for from a line in the Massachusetts state budget entitled "State
3 Aid to Regional Libraries."¹⁴

4 At several points during the budget cycle, Library staff members submit purchase
5 orders to pay the Metadata and Digital Assistants in amounts that are based on their
6 anticipated hours. The record contains several examples of such purchase orders,
7 including one dated December 29, 2017 and approved on May 23, 2019 in the amount of
8 \$7,395.00 for Jessica Purkis for "metadata assistance for statewide digitization." Another
9 purchase order in the amount of \$18,844 was submitted on July 14, 2017 and approved
10 on June 19, 2018 for Samantha Driscoll for "Metadata Assistance for print dept. inventory
11 project." The Library's Digital budgets for FY 18 and FY 19 reflected the amounts paid to
12 each of the Assistants as well as how much money remained in the budget line to pay
13 them. These budgets contain separate worksheets, one for the "Mob," which includes
14 the Metadata Assistants and one for the "Contractors," which includes the Imaging
15 Assistants.

indicates that he can be paid using a credit card on-line, but Metadata Specialist Connie Coburn's does not.

¹³ The grant that pays for Print Department projects comes from several different sources gathered and reallocated to the BPL from the Associates of the Boston Public Library, which is an independent 501(c)(3) organization that solicits donations in support of the preservation and digitization of BPL special collections.

¹⁴ A subsection of this line, "Library for the Commonwealth" (LFC), is allocated directly to the BPL and is overseen by the Massachusetts Board of Library Commissions (MBLC). According to Blake, the MBLC has imposed a restriction that prevents LFC funds from being used to pay employee salaries, but not to pay contractors.

1 The Assistants are not on the City's payroll. The Library pays them on an hourly
2 basis. The Library does not take any deductions or withholding from these payments.
3 The Assistants are not covered by Workers' Compensation insurance. They receive no
4 benefits. With but one exception, for tax purposes, the Library issues 1099 tax forms to
5 the Assistants, not W-2s.¹⁵

6 Neither the City nor the Library issues requests for proposals (RFPs) for the
7 Assistants' services.¹⁶ The Assistants do not enter into employment contracts with the
8 City or the Library. The Library does not issue or require the Assistants to sign any
9 handbooks or policies before or during their service. The Assistants are not subject to
10 formal performance reviews or evaluations, nor are they disciplined.

11 Career Path

12 As of 2019, all of the bargaining unit members working in the Content Discovery
13 Department, including Pucci, Shea and Kavlakli, were former Metadata or Imaging
14 Assistants. Pucci worked in this capacity beginning in August 2009 and was hired as a
15 full-time employee (FTE) in October 2011.¹⁷ Shea began providing metadata assistance

¹⁵ Danielle Pucci was the exception. In its response to the Show Cause letter, the Library explains that when she was a contractor, she was paid directly by the Associates of the Boston Public Library.

¹⁶ In its response to the Show Cause letter, the City indicated that contractors are brought on in a variety of ways, including RFP, direct bid or purchase order. The Library claims that it did not issue RFPs or direct bids for the contractors due to the amount of money involved.

¹⁷ Pucci has held a number of positions in the Library. Before she was Special Collections manager, she served as the Lead Digital Projects Librarian from November 2012-February 2019. This is a grade P4 PSA position with an official title of "Digital Projects Metadata Coordinator IV." Pucci began working for the Library in April 2008 as a "Digital

1 in January 2013 and was hired as an FTE in January 2016. Monica Shin (Shin), now a
2 bargaining unit member classified as a Digital Projects Librarian II, was a member of the
3 Metadata Mob from 2009 until April 2010, and from November 2011 until she was hired
4 as an FTE in May 2013. Kavlakli was an Imaging Assistant for the Library starting in April
5 2007 and was hired as an FTE in June 2013. Jake Sadow (Sadow), a Statewide Digital
6 Assistant, began as an unpaid Simmons College intern in the fall semester of 2011, was
7 brought on as an Imaging Assistant in February 2012, and was hired as an FTE in
8 February 2014.

9 Union's Knowledge of the Assistant Positions and Bargaining History

10 The Library has used Imaging Assistants since at least 2007 and Metadata
11 Assistants since at least 2009.

12 The Union does not dispute that it has been generally aware that non-bargaining
13 unit members were performing the work described above. It claims, however, that it did
14 not know about the specific positions at issue in this proceeding until late spring 2018,
15 because the Library had always referred to them as "student interns" and not contractors.

16 The Union, through Local President Karen Shafts (Shafts), further asserts that it
17 was not until the PSA made an information request regarding "Content Discovery/Digital
18 Services Contractor" in June 2018 that the Library referred to them as "contractors" and
19 identified the seven Metadata and Imaging Assistants at issue in this proceeding by their
20 name and hourly rate.

Imaging and Metadata Technician," which the Library describes as a part-time BPL position-non-Union.

1 The City disputes Shafts' claim that the Library referred to the Metadata and
2 Imaging Assistants as "student interns," asserting that the Library had always been open
3 with the Union about the identity, status and work of the "contractors." In support of this
4 claim, Blake asserts that he has had conversations with Shafts regarding contractors in
5 Digital Services before 2018. Blake also provided an email that he sent in 2012 to then-
6 BPL Director of Human Resources described further below, in which he provided details
7 about the contractors and interns in the Digital Services Department. Blake's letter
8 indicated that Shin was an "Associate of the Boston Public Library paid contractor
9 assigned to Digital services working 20 hours a week." It also indicated that Kavlakli was
10 an "LSTA grant (statewide digitization) paid contactor (non-intern)."

11 The Union agrees that the parties have generally had discussions about
12 contractors but disputes that they ever specifically discussed the positions at issue in this
13 proceeding before it filed this petition. There is no dispute, however, that the parties have
14 not bargained over the unit placement of these particular positions or the terms under
15 which they provide services to the Library.

16 Contractor Positions in the Collections Department¹⁸

17 There is also no dispute that since at least 2017, the Union has known that the
18 Library has used independent contractors in other departments. In September and
19 October 2016, the Union made an information request to Irmischer for all current and

¹⁸ The CERB provides information about these contractors only to provide a complete picture of the Library's use of contractors in the Collections Department and the Union's knowledge thereof, and not to consider whether those positions should be accreted to the PSA's unit. The Show Cause letter and the Union's petition are clear that this petition relates only to the Metadata and Imaging Assistants described above.

1 active contract positions in a proposed “Special Collections” department. The requested
2 information included RFPs from 2014, which was the date that the underlying project
3 “warranting the contract position” would be completed and executed contracts between
4 the City of Boston/Library and successful bidders. The Library responded in 2017 with
5 charts, emails and RFPs showing that at least five contractors and eight student interns
6 have worked in the Collections division since 2015. Several of these interns also
7 separately provided part-time metadata assistance in the Digital Services Department.

8 The RFPs reflect that the Library sought contracts for three separate projects in
9 the 2015-2017 timeframe. First, the Library sought a consultant from 4/1/15 to 4/30/16 to
10 provide accurate descriptions of works of art in the John D. Merriam Collection Print
11 Department. The Library contracted with Martha Mahard (Mahard) to be the Project
12 Manager for this position. Near the end of this period, the Library discovered two missing
13 prints and issued a second RFP for a Project Manager for a Print Inventory project.¹⁹
14 Mahard responded to this RFP and was hired.

15 In her capacity as Project Manager for the Print Inventory project, Mahard recruited
16 paid interns and contractors who were mostly from Simmons College. Mahard selected
17 supervisors from among the interns and contractors and worked with these supervisors
18 to oversee the day to day work of the other interns and contractors. The interns and
19 contractors wore nametags indicating that they were vendors, and, like the positions at
20 issue here, their schedules varied depending on open workstations and worker
21 availability.

¹⁹ The RFP indicated that this project was for a year, but Irmischer’s affidavit indicated that it lasted from June 2015 to December 2019.

1 The job description for the inventory interns associated with the print inventory
2 project included duties similar to those performed by the Metadata Assistants, including
3 examining contents of collections, barcoding items, and creating and maintaining records.
4 The interns were asked to commit to working a minimum of fifteen hours per week, from
5 mid-June through mid-August (with the possibility of continuing in the fall) and required
6 familiarity with “non-MARC metadata scheme and proficiency in the use of Excel
7 spreadsheets.” Some of the Metadata Assistants at issue in this proceeding worked on
8 materials related to the Print Inventory project. Also, some of the interns and contractors
9 hired for the Print Inventory project, including Michael Wilkerson (Wilkerson), who is
10 currently a PSA Visual Materials Cataloguer, worked as a member of the Metadata Mob
11 in Digital Services.

12 The third RFP was for an architectural consultant to inventory a pilot collection of
13 architectural drawings by the firm of Peabody and Stearn. This RFP was for a one-year
14 period (2016-2017) with a BPL option for two one-year renewals.²⁰ The Union was not
15 aware of any contractors who worked on the architectural drawing inventory.

16 Student Interns

17 At some point between 2006 and 2009, the Library promulgated internship
18 guidelines.²¹ The guidelines provided, among other things, that the internships needed
19 to be pre-screened by an Internship Committee, be unpaid and comply with the U.S.
20 Department of Labor’s six criteria for internships.

²⁰ This finding has been supplemented with information that the Library provided in response to the Show Cause letter

²¹ The Union states that these guidelines were negotiated with the Library.

1 In 2011, then PSA President Steven Dunhouse made an information request
2 regarding internships, including the names of those currently enrolled in internships,
3 whether they were being paid, and the source of the funding. The final question was:

4 We understand that currently there are positions as Assistant Conservator
5 and as Metadata Specialist in the Rare Books Department and two positions
6 as Digital Services Technicians in the Digital Photograph laboratory. Are
7 the individuals filling those positions interns? If not, what is their status? If
8 they are being paid, please indicate the source of the funding, the rate of
9 pay and the length of the funding period.

10
11 Flaherty forwarded the request to Blake, who sent Flaherty a response listing six unpaid
12 Digital Services Interns as of 1/13/12, two "Associates of the Boston Public Library paid
13 contractors assigned to Digital Services (non-interns)" and three "LSTA grant paid
14 contractors assigned to Digital Services." As noted above, Kavlakli and Shin were among
15 those listed as the paid contractors. The description of the services that Shin and Kavlakli
16 provided were consistent with the descriptions provided about the Metadata and Imaging
17 Assistants. The record does not reflect whether anyone at the Library forwarded Blake's
18 response to the Union. The Union states that it is "unfamiliar" with this letter.

19 Comparator Positions

20 There is no dispute that many bargaining unit members perform work similar to the
21 Metadata Imaging Assistants. Although the level of experience required is different, the
22 educational qualifications, a Masters in Library Science, is the same.²² Within the Content
23 Discovery Department, these positions include:

²² In response to a request to provide a list and job description of all bargaining unit members who currently perform or have performed any of the duties performed by the disputed titles, the Library provided job descriptions for fourteen different PSA positions. This information is taken from those job descriptions.

1 1) Statewide Metadata Coordinator – P3. This is Shea's position. Shea reports to
2 Pucci. According to its job description, this position works to assist in the creation of
3 standardized, authorized, well-formed metadata in order to create a high level of
4 accessibility usability and interoperability within the digital object repository of the Library
5 for the Commonwealth's statewide digitization program. According to the job description,
6 the responsibilities include training library staff and "assisting in supervising and training
7 professional, pre-professional, non-professional and part-time staff, students and
8 interns." The position requires an MLIS or its equivalent with coursework in digital libraries
9 and standards-based non-MARC metadata schemas as well as four years of relevant
10 experience and two years of supervisory experience.

11 2) Digital Imaging Production Coordinator – P4. This is Kavlakli's position.
12 According to the job description, the incumbent functions as the primary production
13 photographer and creator of high-quality digital image files from a wide variety of original
14 source materials. The incumbent supervises the day to day operations of digital imaging
15 production and file management and supervises and coordinates the workflow of BPL
16 and statewide imaging projects. The position requires a Bachelor's degree in photography
17 from a recognized college or university and an MLIS, with a minimum of five years of
18 experience in reproduction photography and digital imaging applications and techniques
19 for libraries, museum archives, etc., as well as appropriate technical knowledge.

20 3) Special Collections Cataloging Manager – P5. This is Pucci's position. The job
21 description states that the incumbent is expected to provide leadership to ensure superior
22 bibliographic access to the Library's holdings in Special Collections. Responsibilities
23 include oversight of both traditional cataloging and the creation of metadata. They also

1 include overseeing and performing advanced descriptive and subject cataloging;
2 overseeing the production and/or updating of metadata for legacy special collection files;
3 and directing, delegating and participating in the selection, training, supervision and
4 evaluation of professional and support staff. The position requires an MLIS, seven years
5 of appropriate Library experience and experience with various formatting and content
6 standards and metadata schemas.

7 4) Visual Material Cataloger – P3. According to the job description, this position is
8 responsible for performing complex and original cataloging and classification of the
9 Library's major collection of visual materials. The listed duties include creating robust,
10 standards-based extensive and sharable descriptive records for visual materials including
11 prints, drawings, watercolors, photographs, paintings and other non-textual materials.
12 The position requires a minimum of an MLIS and four years of recent professional
13 experience.

14 5) Digital Imaging Production Assistant – P2. This position reports to Kavlakli.
15 The incumbent functions as a production photographer and creator of high-quality digital
16 image files from a wide variety of original source materials. It requires a Bachelor's
17 Degree in photography with a Master's preferred, and two years of relevant reproduction
18 photography and digital imaging experience.

19 Within other Library departments, these positions include:

20 1) Digital Projects Librarian II – P2. This position assists in the planning and
21 implementation of activities related to metadata and imaging production of the Library's
22 digital library project. Under a recent reorganization, this position falls under the Digital
23 Services Department and reports to Pucci. It was formerly held by Shin but was vacant

1 as of the fall of 2020. The position requires an MLIS or an equivalent degree and a
2 minimum of two years' experience with metadata work on digital projects in a library
3 setting.

4 2) Digital Projects Metadata Coordinator IV – P4. This title falls under the Division
5 of Resources Services/Information Technology and reports to the Digital Resources
6 Manager. The incumbent is responsible for providing expertise and leadership in the
7 creation of standardized, authorized, well-formed metadata to be used in the digital object
8 repository. The position requires an MLIS and at least five years' experience with
9 metadata work on digital projects in a library setting.

10 3) Cataloger and Classifier II – P2. This title is responsible for performing original
11 and complex copy cataloging including bibliographic descriptions, subject analysis,
12 classification and authority control for materials in all formats in accordance with
13 established local and national policies, procedures and standards. The position is in the
14 Content Discovery Department and reports to Pucci when working on rare books or rare
15 music material.

16 Opinion²³

17 Contract Bar

18 Before reaching the merits of the Union's petition, we address the Library's
19 argument that the petition should be dismissed pursuant to the DLR's contract bar rule,
20 456 CMR 14.06(1)(b). That rule states:

21 Except for good cause shown, no petition filed under the provisions of
22 M.G.L. c. 150E, §4 shall be entertained during the terms of an existing valid
23 collective bargaining agreement unless such petition is filed no more than
24 180 days and no fewer than 150 days prior to the termination date of said

²³ The CERB's jurisdiction is not contested.

1 agreement, provided that a petition to alter the composition or scope of an
2 existing unit by adding or deleting job classifications created or whose
3 duties have been substantially changed since the effective date of the
4 collective bargaining agreement may be entertained at other times.

5 As we explained in a different Library matter, for a collective bargaining agreement to bar
6 the processing of a petition, the evidence must establish the existence of a complete and
7 final agreement signed by all parties. City of Boston/BPL, 36 MLC 194, 197, CAS-07-
8 3692, CAS-07-3708 (May 14, 2010) (citing Town of Westminster, 23 MLC 153, 155, MCR-
9 4501 (December 30, 1996) (further citations omitted)). In cases like this one, where
10 ratification is a condition of a new or successor CBA, the CERB considers an agreement
11 to be final and complete when it is both signed and ratified. City of Boston/BPL, 36 MLC
12 at 197.

13 The Library argues that the petition is contract-barred because the Union filed this
14 petition *after* the parties signed the two MOAs that extended the terms of the 2013-2016
15 CBA. This is wrong for two reasons. First, although the MOAs were signed on January
16 18, 2019, the same day that the Union filed the charge, the DLR's records reflect that the
17 Union filed the petition approximately ten hours *before* it signed the MOAs. Second, the
18 MOAs were not ratified until February 16, 2019, nearly a month after the petition was filed.
19 Therefore, pursuant to 456 CMR 14.06(1)(b) and the decisions cited above, this matter is
20 not contract-barred.

21 The fact that the 2013-2016 CBA contained an evergreen clause that maintained
22 its terms until a successor agreement was reached does not change this result. The
23 DLR's regulations clearly state that, "No collective bargaining agreement shall operate as
24 a bar for a period of more than three years." 456 CMR 14.06(1)(a). Pursuant to this
25 regulation, the 2013-2016 CBA ceased being a bar when it expired by its terms in 2016.

1 For all these reasons, we reject the City's arguments that the MOAs barred the
2 processing of this petition and address the unit placement issue below.

3 Accretion

4 A unit clarification petition is the appropriate procedural vehicle to determine
5 whether newly-created positions should be included or excluded from a bargaining unit
6 or to determine whether substantial changes in the job duties of existing positions warrant
7 either their inclusion or exclusion from a bargaining unit. Sheriff of Worcester County, 30
8 MLC 132, 136, CAS-03-3543 (April 7, 2004) (citing North Andover School Committee, 10
9 MLC 1226, 1230, CAS-2525 (September 27, 1983)). Further, a unit clarification petition
10 is appropriate if the outcome sought by the petition is "[c]learly supported by an apparent
11 deficiency in the scope of the existing unit and must be, at least arguably, within the realm
12 of what the parties intended when the unit was first formulated." Sheriff of Worcester
13 County, 30 MLC at 136-137. However, the CERB will not allow a petitioner in a unit
14 clarification proceeding to accomplish what it cannot gain at the bargaining table. North
15 Andover School Committee, 10 MLC at 1230.

16 In analyzing whether employees should be accreted into an existing bargaining
17 unit, the CERB uses a three-step test. University of Massachusetts (Boston), 46 MLC
18 121, 128, CAS-17-6267 (December 27, 2019). First, the CERB determines whether the
19 position was included in the original certification or recognition of the bargaining unit.
20 Absent a material change in job duties and responsibilities, the CERB will not accrete a
21 position into a bargaining unit if it existed at the time of the original certification but was
22 neither sought nor included in the unit. Town of Granby, 28 MLC 139, 141, CAS-3477
23 (October 10, 2001). Second, if that examination is inconclusive, the CERB will examine

1 the parties' subsequent conduct, including bargaining history, to determine whether the
2 employee classifications were considered by the parties to be included in the unit. If that
3 inquiry is also inconclusive, the CERB finally examines whether the positions sought to
4 be included in the unit share a community of interest with the existing positions. If the
5 CERB determines that the requisite community of interest exists, it accretes the
6 petitioned-for position into the existing bargaining unit. Id.

7 Ordinarily, in unit clarification matters where the parties dispute whether the
8 petitioned-for individuals are employees within the meaning of Section 1 of the Law, the
9 CERB rules on this issue as a threshold matter before turning to the question of whether
10 the position is appropriately placed in the petitioner's bargaining unit. See, e.g., City of
11 Lawrence, 13 MLC 1632, 1639, CAS-2705 (April 24, 1987) (first analyzing whether
12 petitioned-for employees were legislative branch employees excluded from the Law's
13 coverage). We treat this petition differently, however, because the Union has agreed to
14 a management rights clause that allows the City to contract or subcontract out work
15 provided certain conditions are met. Because, as explained below, this provision
16 implicates the second prong of the accretion analysis, we begin with the accretion
17 analysis.

18 First Prong

19 There is no evidence, and no party claims, that the Assistants existed at the time
20 of certification or recognition. The first prong of the accretion analysis is therefore
21 inconclusive.

22 Second Prong

1 Under the second prong, the CERB examines how the parties have treated the
2 disputed positions in their dealings with each other and in collective bargaining. City of
3 Malden, 32 MLC 97, 100, CAS-04-3599 (November 2, 2005). The CERB will not accrete
4 a position into an existing bargaining unit if the parties have executed a collective
5 bargaining agreement demonstrating their intent to exclude the petitioned-for positions
6 unless the job duties of the position have changed materially. Boston Public Health
7 Commission (BPHC), 39 MLC 218, 229, CAS-11-1091, 1092 (February 28, 2013);
8 Commonwealth of Massachusetts, 30 MLC 156, 157, CAS-03-3539, 3540 (May 27, 2004)
9 (citing Board of Trustees, University of Massachusetts, 8 MLC 1385, 1389 (1981)
10 (additional citations omitted)).

11 The Library contends that the petition must be dismissed based on Article V,
12 Section 2 of the CBA, which states:

13 The Municipal Employer reserves and retains the right to contract out work
14 or subcontract out work. Pursuant to the exercise of such right, no
15 employee shall be laid off if there is available work in the same position or
16 in a similar position which the employee is qualified to fill.

17
18 The Library claims that by this provision, the Union assented to its contracting out work
19 and thus, the Union “waived by contract” its right to accrete the Assistants at issue. The
20 Union disagrees, asserting that the Assistants are not independent contractors, but
21 statutory employees under CERB law and other state laws, and thus, by agreeing to this
22 provision, it did not agree to allow the City to treat such employees as contractors, thereby
23 denying them collective bargaining rights.

24 We agree with the City that the management right clause permitting the employer
25 to contract out work renders the second prong of the accretion analysis conclusive. As
26 explained in greater detail below, in at least three decisions, the CERB has dismissed

1 accretion petitions based on CBA provisions that the CERB found demonstrated the
2 parties' intent to exclude the petitioned-for positions. See e.g., University of
3 Massachusetts, 41 MLC 305, CAS-14-3424 (April 10, 2015); Plymouth County Sheriff's
4 Department, 40 MLC 238, CAS-11-1442 (February 21, 2014); BPHC, 39 MLC at 230.

5 Thus, in University of Massachusetts, the CERB dismissed a CAS petition seeking
6 to accrete unrepresented Continuing and Professional Education (CPE) faculty to a
7 faculty unit where the parties' CBA contained a provision specifically allowing the
8 employer to contract with individuals outside the unit to develop and/or teach CPE
9 courses if no member of the bargaining unit was willing or qualified to do so. 41 MLC at
10 310.

11 Similarly, in Plymouth County Sheriff's Department, the CERB determined that the
12 petitioning union could not use the accretion process to add part-time Deputy Sheriffs
13 who transported certain Immigration and Customs Enforcement Service (ICE) inmates
14 and detainees, where the CERB held that a provision concerning "temporary employees"
15 in the parties' CBA demonstrated that the parties considered part-time Deputy Sheriffs
16 who performed such transportation duties to be outside of its unit. 40 MLC at 242. See
17 also Board of Higher Education, 45 MLC 195, CAS-17-6266 (June 27, 2019) (dismissing
18 CAS petition at second prong where CBA and other agreements demonstrated parties'
19 intent to exclude three new/reclassified positions that the union was seeking to accrete).

20 In this case, the parties agreed that the City had the managerial right to contract
21 or subcontract work. The Union seeks to distinguish this provision from those in the
22 Plymouth and University of Massachusetts decisions on grounds that they reflected that
23 the parties had bargained and agreed to exclude the *specific* positions and work at issue.

1 Here, in comparison, the Union asserts that it never bargained over the Assistants, and
2 in fact did not even know that the Library was treating them as contractors until the spring
3 of 2018. Even assuming this is true, this argument ignores that the Union has known for
4 years that the Library has used contractors to perform work similar to that performed by
5 bargaining unit members and the Assistants. Moreover, by permitting the City to contract
6 out or subcontract out work but not to lay off employees pursuant to the exercise of that
7 right if “there is available work in the same position or in a similar position that the
8 employee is qualified to perform,” the management rights clause of the CBA expressly
9 contemplates that the Library will contract out bargaining unit work.

10 The Union’s knowledge that the City was using other contractors is critical,
11 because in analyzing whether a party is precluded from using the CAS procedure as a
12 vehicle to exclude positions under the second prong of the accretion analysis, the CERB
13 considers not only whether the parties have agreed to exclude the specific titles at issue
14 but whether the workers are performing the type of work that the parties agreed to
15 exclude. This is evident in the BPHC decision, where the CERB held that because the
16 parties had agreed to exclude all existing and *future* Finance Department employees from
17 their bargaining unit, the union could not use the accretion process to accrete newly-
18 created Finance Department employees who performed the type of work that Finance
19 Department employees performed when the union agreed to exclude them. 39 MLC at
20 231-232. Notably, the CERB reached this conclusion without regard to whether the
21 parties had previously bargained over the new positions at issue in the petition. Id.

22 We conduct a similar analysis here. The record reflects that before entering into
23 the most recent MOAs, the Union was aware that the Library had contracted out services

1 in other departments. Specifically, the record shows that the Union made an information
2 request in 2016 for all current and active contract positions in the proposed “Special
3 Collections” department. The Library responded in 2017 with charts, emails and RFPs
4 showing that at least five contractors and eight student interns had worked on three
5 projects in the Collections Division since 2015. The evidence shows that on the Print
6 Inventory project, the contractors and interns performed tasks similar to those performed
7 by Pucci and Shea, i.e., overseeing contractors and interns who themselves performed
8 duties similar to those performed by bargaining unit members engaged in visual materials
9 cataloguing, classifying and metadata work. Indeed, some of the contractors in these
10 projects also worked as Metadata Assistants, demonstrating that they had a similar skill
11 set. Thus, when the Union entered into the 2019 MOAs, it was aware that the Library was
12 using contractors to perform tasks similar to those performed by bargaining unit members
13 in the Collections Department. Because the same can be said of the Assistants, we
14 conclude that excluding those titles is within the realm of what the parties intended when
15 they entered into the MOAs.

16 The Union argues that the disputed titles here are different from the other
17 contractors it knew about, in that this work was either of finite duration or so voluminous
18 that Library employees could not perform it without outside assistance. We do not believe
19 that the distinctions are as stark as the Union paints them. The Print Inventory project
20 described above lasted for four years – although it is for a finite period, it is still a lengthy
21 period of time. Regarding the volume of the work performed – because the Assistants
22 work not only on Library collections, but on collections that other individuals and
23 institutions provide to the Library to describe, image and upload into *Digital*

1 *Commonwealth.com*, the amount of work that the Assistants perform can vary widely
2 depending on need and worker availability, just as the Library's use of contractors on the
3 Print Inventory project. As evident in BPHC, therefore, the positions need not be identical
4 or spelled out in the contract for the CERB to determine that the parties agreed to exclude
5 them from the bargaining unit under the second prong of the accretion analysis. Rather
6 the relevant question is whether the outcome that the petitioner seeks is within the realm
7 of what the parties intended when they entered into the agreement. BPHC, 39 MLC at
8 230. Cf. Massachusetts Board of Regents, 15 MLC 1265, SUP-2959 (November 18,
9 1988) (where union represented a bargaining unit that included janitors and head
10 housekeepers, contract provision that granted employer the right to "contract out work"
11 provided no bargaining unit employees were laid off and excluded part-time employees
12 constituted a waiver of union's right to bargain over employer's decision to hire sixteen
13 part-time, non-bargaining unit ,janitors).

14 Having concluded that the accretion analysis is conclusive at the second prong,
15 we need not address the remainder of the parties' arguments, e.g., whether the Assistants
16 are employees under Chapter 150E or independent contractors; whether the CERB
17 should continue to use the "right to control" test it has historically used to determine
18 whether workers are employees within the meaning of the Law, see, e.g., City of Boston,
19 24 MLC 73, 75, MCR-4447, CAS-3147 (February 24, 1998) (citing Massachusetts Board
20 of Regents of Higher Education (Southeastern Massachusetts University (SMU)), 11 MLC
21 1486, 1496, SCR-2171 (March 1, 1985); or whether City of Boston, 24 MLC 73, correctly
22 held that the non-represented student hearing officers at issue in that case were
23 independent contractors. We note only that City of Boston, which was decided in 1998,

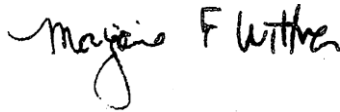
1 and has not been overturned, supports our view that when entering into successor CBAs,
2 the parties reasonably would have believed that workers who performed bargaining unit
3 work under working conditions similar to those of the Assistants would be excluded from
4 the Union's bargaining unit.

5 Conclusion

6 For the foregoing reasons, the accretion analysis is conclusive at the second prong
7 and we dismiss the petition on those grounds.²⁴

SO ORDERED

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



MARJORIE F. WITTNER, CHAIR



JOAN ACKERSTEIN, CERB MEMBER



KELLY STRONG, CERB MEMBER

²⁴ Our holding that a CAS proceeding is not the appropriate vehicle to add these titles to the unit does not forever deprive the Assistants of collective bargaining rights, as the Union argues. In situations where accretion is not allowed, the DLR may permit a self-determination election or add-on election among employees holding the disputed titles. Boston Public Health Commission, 39 MLC at 233. Should the Union decide to proceed in this manner, the issue of whether the Assistants are employees or independent contractors will be a threshold issue.