

1 to dismiss. On October 27, 2020, SEIU, Local 509 filed a brief in support of the
2 Commonwealth's motion to dismiss, and the NEPBA submitted a memorandum in
3 support of its claim of extraordinary circumstances. On October 28, 2020, the
4 Commonwealth submitted its Department of Personnel Administration's (DPA) job
5 specifications for the positions. The parties' representatives attended the pre-hearing
6 conference on October 28, 2020, where it was agreed that the parties would have ten
7 days to submit additional position statements and any supporting documents. On
8 November 6, 2020, the Commonwealth submitted its second motion to dismiss; the
9 NEPBA submitted a statement in support of its position that an evidentiary hearing was
10 needed and thus, the motion to dismiss should be denied; and SEIU, Local 509 submitted
11 a further response in support of the Commonwealth's motion to dismiss. For the reasons
12 explained below, we grant the Commonwealth's motions to dismiss

13 Background

14 Statewide Units, Generally

15 In 1975, the former Labor Relations Commission (former Commission) created the
16 statewide bargaining units after conducting a rulemaking hearing. See Labor Relations
17 Commission: Notice of Determination of State Employee Bargaining Units (Notice of
18 Determination), 1 MLC 1318 (1975). The ten units created at that time were divided into
19 non-professional (statewide units 1-5) and professional employees (statewide units 6-10).
20 The non-professional employee units included Unit 5, "Law Enforcement," which was
21 defined as "including all employees with power to arrest, whose work involves primarily
22 the enforcement of statutes, ordinances and regulations, and the preservation of public
23 order." 1 MLC at 1319. The professional units included Unit 8, which was described as

1 “Social and Rehabilitative.” See Notice of Determination, 1 MLC at 1341. The DLR’s
2 regulations continue to use these original descriptions. 456 CMR 14.07(1).

3 The Petitioned-for Positions

4 The seven petitioned-for positions are all in statewide bargaining unit 8, which
5 contains more than 8,100 members. There are approximately 285 employees in the
6 petitioned-for positions, 220 of which are Correctional Program Officers. Nineteen of the
7 employees are clinical Social Worker Ds.² These individuals work for the Department of
8 Corrections (DOC), Department of Youth Services (DYS), and the Parole Board, and are
9 collectively referred to as the “COPS” Chapter of SEIU, Local 509.³ As reflected in the
10 DPA Performance Specifications and Form 30 summaries of these positions, the
11 Correction Program Officer A/B/C/D titles provide non-therapeutic counseling,
12 rehabilitation and custodial care and treatment to inmates, perform classification duties,
13 collect and analyze assessment information and interview inmates. Clinical Social
14 Worker Ds provide clients with clinical social work services. Youth Services Program
15 Officers provide “counseling, rehabilitation or custodial care and treatment to juvenile
16 offenders; gather and disseminate information obtained from the Criminal/Juvenile
17 Justice Community, [and] the Social Service Network.” The Transitional Parole Officer

² The remaining Clinical Social Worker D positions work at the Chelsea Soldier’s Home, the Department of Mental Health, the Department of Development Services, and the Department of Children and Families (DCF).

³ The COPS Chapter bears a similar name to the acronym for the Coalition of Public Safety (C.O.P.S), the exclusive representative for statewide unit five, but is unrelated to that group. According to an affidavit from SEIU, Local 509 President Peter MacKinnon, SEIU, Local 509 has other Chapters, including a Department of Transitional Assistance Chapter and a Department of Mental Health Chapter. Each Chapter elects stewards and officers, including Chapter President, Regional Vice President, Joint Executive Board Member and Chapter Executive Board members.

1 facilitates parolee reentry into the community by providing guidance and promoting
2 responsible conduct, analyzing risks and case management responsibilities, making
3 recommendations relating to parolee eligibility and ensuring compliance with parole board
4 policies.

5 None of the petitioned-for employees are sworn police officers or institutional
6 security personnel. They are not issued firearms by the Commonwealth. Only ten of the
7 petitioned-for employees, the Youth Services Officers, who act as DYS apprehension
8 officers, have the power to arrest. The DYS Apprehension Officers can detain, arrest and
9 transport juveniles who escape from DYS custody or juvenile parole violators. The
10 remaining 275 petitioned-for employees do not have powers of arrest. Additionally,
11 although the Correctional Program Officers and the DYS Apprehension Officers are
12 required to wear uniforms, the individuals in the remaining positions do not.⁴

13 Summer/Fall 2020

14 According to the emails, magazine articles and blogs that the parties provided, in
15 the summer and fall of 2020, the leadership of SEIU, Local 509 asked its members to
16 urge their legislators to pass police reform and launched a “Divest from Police Budgets,
17 Invest in Communities” campaign. Around the same time, an organization of rank and
18 file SEIU members across the country formed a group called “SEIU Drop Cops,” which
19 sought to persuade SEIU to disaffiliate from SEIU locals comprised of sworn police
20 officers.

21 SCR-09-2281

⁴ The NEPBA contends that the other youth service program officers can wear uniforms if they choose, and that the transitional parole officers want uniforms, but SEIU, Local 509 has not made proposals to get them uniforms.

1 On February 12, 2009, the NEPBA filed a petition with the DLR in Case No. SCR-
2 09-2281 seeking to sever the same positions that it seeks to sever here with the exception
3 of the Clinical Social Worker Ds. On April 23, 2009, the CERB dismissed the petition
4 without holding a hearing on grounds that the NEPBA had failed to demonstrate the
5 requisite extraordinary circumstances required to create a new statewide bargaining unit.⁵
6 Commonwealth of Massachusetts, 35 MLC 255, SCR-09-2281 (April 23, 2009). The DPA
7 Job Specifications for the petitioned-for positions have not changed since the CERB
8 issued this decision.⁶

9 Opinion

10 The CERB has the authority, either through rulemaking or through an adjudicatory
11 decision, to add to or alter the existing structure of the statewide bargaining units, should
12 it find sufficient justification to do so. Commonwealth of Massachusetts, Secretary of
13 Administration and Finance, 18 MLC 1381, 1384, SCR-2202 (April 24, 1992). The

⁵ In that case, the NEPBA provided three reasons for its claim of extraordinary circumstances: an expired servicing agreement that SEIU, Local 509 had with Local 5000 NAGE to serve as the collective bargaining representative for the three petitioned-for titles; the specialized responsibilities the petitioned-for titles had for the care, custody and control of incarcerated people or sought by the DOC or DYS; and finally, that the petitioned-for employees are professional employees who have a statutory right to be placed in a bargaining unit without non-professional employees. 35 MLC at 255-256. Although the NEPBA relies on different arguments here, it still broadly contends that the petitioned-for titles are distinct enough from other SEIU, Local 509 unit members to warrant their separate representation.

⁶ The NEPBA submitted an affidavit from COPs Chapter President John Cunningham (Cunningham) who provided a number of examples in support of the NEPBA's claim that SEIU, Local 509 had "essentially abandon[ed] their representation of COPS." SEIU, Local 509 disputes these assertions. As described below, we conclude that even if the NEPBA's assertions are true, it still has not demonstrated that extraordinary circumstances exist to create a new statewide bargaining unit.

1 required justification is described in DLR Rule 14.07(1), 456 CMR 14.07(1), which
2 provides in pertinent part:

3 With respect to employees of the Commonwealth, excepting only
4 employees of community and state colleges and universities, no petition
5 filed under the provisions of M.G.L. c. 150E, s. 4, shall be entertained,
6 except in extraordinary circumstances where the petition seeks certification
7 in a bargaining unit not in substantial accordance with the provisions of this
8 section.⁷

9 This rule does not define the term “extraordinary circumstances,” and, over the
10 years, the CERB has defined it only in terms of when extraordinary circumstances do *not*
11 exist to create a new statewide bargaining unit. See, e.g., Commonwealth of
12 Massachusetts, 35 MLC 255 , supra. See also Commonwealth of Massachusetts, 37
13 MLC 167, WMAS-10-1005 (declining to create a separate unit of Massachusetts Air
14 National Civilian Security Guards employed at Otis Air National Guard base and Barnes
15 Air National Guard base); Commonwealth of Massachusetts, 18 MLC 1381, supra,
16 (declining to create a separate statewide supervisory unit composed of currently excluded
17 employees employed on the Commonwealth’s managerial pay scale); Commonwealth
18 of Massachusetts, 6 MLC 1918, SCR-2127 (February 14, 1980) (reversing hearing officer
19 and declining to create a separate unit of statewide labor mediators).

20 Some guidance as to the meaning of the term “extraordinary circumstances” may
21 also be found in Supreme Judicial Court decisions arising in a different representation
22 context, in which the SJC declined to create an exception to the long-established principle
23 that representation decisions are not subject to direct judicial review in the absence of an

⁷ DLR Rule 14.07 lists and describes the ten statewide units that the former Commission created through rulemaking.

1 unfair labor practice, or absent “extraordinary circumstances making certification
2 questions of vital significance or of questions relating to the [DLR’s] jurisdiction.”
3 Collective Bargaining Reform Association v. Labor Relations Commission, 436 Mass.
4 197, 201-202 (2002) (citing City Manager of Medford v. Labor Relations Commission, 353
5 Mass. 519, 523 (1968)) (further citing Jordan Marsh Co. v. Labor Relation Commission,
6 312 Mass. 597, 601-602 (1942)). When considering the same issue in Jordan Marsh, the
7 SJC indicated that, ordinarily, resort may not be had to “extraordinary remedies” “if the
8 law provides adequate remedies by other methods.” Id. at 599 (citing Mayor of Medford
9 v. Judge of First District Court of Eastern Middlesex, 249 Mass. 465, 468 (1924); Maher
10 v. Commonwealth, 291 Mass. 343, 345, 346 (1934)). The SJC did, however, leave open
11 the possibility that cases might exist “where the effect of a mere certification might be so
12 immediately and completely disastrous . . . that the Legislature must be presumed to
13 leave open some escape other than the review provided in the statute.” Id. at 602.

14 Here, the NEPBA makes the broad assertion that “the extraordinary times” have
15 given rise to extraordinary circumstances that would satisfy the requirement to make
16 changes to the statewide units. The NEPBA posits that extraordinary circumstances exist
17 because the larger SEIU national union (SEIU), of which SEIU, Local 509 is a part, has
18 become “hostile” to law enforcement, which includes discussing the possible expulsion of
19 law enforcement members, and supporting various “defund the police” movements. In
20 support of this argument, the NEPBA submitted various emails and copies of blogs, some
21 from SEIU rank and file members and some from outside entities, encouraging the
22 expulsion of police locals from SEIU and/or the transfer of funds from police organizations

1 to other groups.⁸ However, we agree with the Commonwealth that the petitioned-for job
2 titles are not law enforcement positions. They are not sworn police officers, do not carry
3 guns, not all wear uniforms, and only ten out of 275 have any powers of detainment or
4 arrest. See, generally, Notice of Determination, 1 MLC at 1338-1339, describing “unique”
5 character of statewide unit 5 including that its members are “by and large, armed and
6 uniformed, and subject to a rigid chain of command and quasi-military discipline.”
7 Furthermore, none of the statements made in the documents that the NEPBA relies upon
8 come from SEIU, Local 509 leadership.

9 The NEPBA then argues that even if the petitioned-for titles are not actually law
10 enforcement personnel, they work with law enforcement personnel. However, the
11 Commonwealth points out that the petitioned-for positions are just some of the many
12 statewide unit 8 positions that work with law enforcement, including DCF social workers
13 and other DYS employees, whom the NEPBA is not seeking to represent. Although the
14 NEPBA argues that the job duties of the petitioned-for positions have changed since 1975
15 when the statewide units were created and are now more akin to policing duties than
16 social work duties, the NEPBA provided no facts in support of this statement. Further, as
17 the Commonwealth notes, the DPA job specifications for those positions have not
18 changed since before 2009 when the CERB dismissed Case No. SCR-09-2281, and the
19 job duties for those positions have remained the same since before 2009.

⁸SEIU, Local 509 submitted its own documents from SEIU, Local 509 President Peter MacKinnon and a prior statement from SEIU President Mary Kay Henry to support its argument that although SEIU, Local 509 supports police reform, it is not seeking to expel law enforcement from its union membership. However, we need not resolve any dispute about whether SEIU, Local 509 is hostile to law enforcement as we find that the petitioned-for employees are not law enforcement personnel.

1 In the same vein, the NEPBA contends that because SEIU, Local 509 has
2 advocated for police reform and a reduction in police budgets, SEIU, Local 509 is seeking
3 to have the employees in the petitioned-for positions lose their jobs, a contention that
4 SEIU, Local 509 denies. The NEPBA posits that police reform will cause fewer individuals
5 to be incarcerated, resulting in less need for employees in the petitioned-for positions who
6 work for the DOC and the Parole Board. However, this argument is far too tenuous to
7 constitute extraordinary circumstances. Moreover, the CERB has long recognized that,
8 “as is so of any democratic institution, a bargaining unit includes many different voices
9 with varying ideas, interests and needs.” Marion Town Employees Association and Polly
10 Church, 35 MLC 173, MUPL-04-4486 (January 30, 2009) (citing Fitchburg School
11 Committee, 9 MLC 1399, 1414, MUP-4511, MUPL-2447, (September 1, 1982)). Thus,
12 while employees in the petitioned-for positions may have philosophical differences with
13 SEIU, Local 509’s leadership, members, and/or other unit 8 members,⁹ such differences
14 are to be expected and do not constitute extraordinary circumstances to alter the
15 longstanding statewide bargaining unit structure. As we stated in the 2009 NEPBA
16 decision, the right to choose a bargaining representative does not include the right to
17 choose a unit. 35 MLC at 256.

18 Additionally, the NEPBA argues that extraordinary circumstances exist that justify
19 the severance petition because SEIU, Local 509 has engaged in a “pervasive violation”
20 of its duty of fair representation towards the employees in the petitioned-for positions. In
21 support of this assertion, the NEPBA submitted an affidavit from Cunningham, a former

⁹ The NEPBA noted that when an employee in a petitioned-for position objected to emails (so-called blasts) that they received from SEIU, Local 509 encouraging police reform, they were told to simply unsubscribe from receiving those blasts.

1 COPS Chapter Chair for SEIU, Local 509, listing certain grievances that SEIU, Local 509
2 allegedly failed to process properly. SEIU, Local 509 responded by noting that it had
3 settled most of those grievances. Further, John McDonald (McDonald), also a former
4 COPS Chapter official for SEIU, Local 509, raised concerns in emails about whether he
5 could continue to attend health and safety meetings between the Commonwealth and its
6 various unions, including SEIU, Local 509, and receive paid union leave. However, the
7 parties' submissions reflect that McDonald resigned from his leadership position with
8 SEIU, Local 509 and withdrew his dues deduction authorization. A union does not breach
9 its duty of fair representation when it prevents nonmembers from participating in the
10 selection of bargaining committees or bargaining proposals. Branch v. Commonwealth
11 Employment Relations Board, 481 Mass. 810, 828-829 (2019).

12 Even if the NEPBA's claims of SEIU Local 509's "pervasive violation" of the duty
13 of fair representation are treated as true, and even if those claims may be actionable as
14 prohibited practice charges if timely filed, we do not find that they constitute extraordinary
15 circumstances to alter the statewide unit structure. We have previously held that a
16 statewide bargaining representative's disinterest in representing a new group of
17 bargaining unit members does not create extraordinary circumstances to allow those
18 employees to form a new unit. See Commonwealth of Massachusetts, 37 MLC at 167-
19 168.

20 Moreover, despite its assertion, the NEPBA has cited to no prohibited practice
21 charges that employees in the petitioned-for positions have filed either at the DLR or in
22 court alleging that SEIU, Local 509 had violated its duty of fair representation towards
23 them. Where Chapter 150E expressly permits the aggrieved employees to file a charge

1 under Section 10(b)(1) of the Law to remedy their concerns but they have not done so,
2 and the record before us contains no evidence as to why filing such charges would not
3 adequately address their concerns, we will not consider allegations of this kind to be
4 extraordinary circumstances.¹⁰ Cf. Jordan Marsh, 312 Mass. at 599.

5 Finally, the NEPBA also cites to: a) SEIU, Local 509's request that the DOC take
6 down a computer bulletin board on the DOC intranet that employees in the petitioned-for
7 positions used; b) SEIU, Local 509's request that the Commonwealth allow statewide unit
8 members to work from home during the pandemic, even though many of the employees
9 in the petitioned-for positions did not want to work from home and ultimately, did not work
10 from home; and c) Cunningham's claim that as the COPS Chapter Chair for Local 509,
11 he had to process grievances at the lower steps of the contractual grievance procedure
12 rather than the paid SEIU, Local 509 representatives processing those grievances.
13 However, even if those events happened as portrayed, which SEIU, Local 509 disputes
14 in part, those events do not comprise extraordinary circumstances that either raise
15 certification questions of vital significance or are so "immediately and completely
16 disastrous" as to warrant the creation of a new statewide bargaining unit.

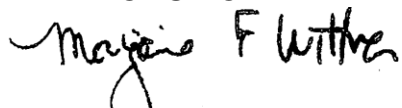
CONCLUSION

17 Accordingly, we find no basis for proceeding further with the petition because the
18 NEPBA has failed to demonstrate extraordinary circumstances in this case, and we grant
19 the Commonwealth's motions to dismiss the petition.

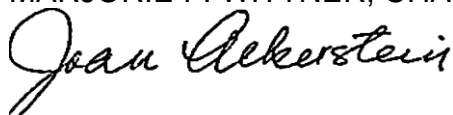
¹⁰ As set forth in the Commonwealth's motions, the petitioned-for employees' remedies may also include filing a request to be reclassified into a different statewide unit, e.g., Unit 5.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT
RELATIONS BOARD



MARJORIE F. WITTNER, CHAIR



JOAN ACKERSTEIN, CERB MEMBER



KELLY STRONG, CERB MEMBER