

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

In the Matter of:

CITY OF BOSTON

and

AFSCME COUNCIL 93, AFL-CIO

Case Number: WMAM-23-10204

Date Issued: August 16 2024

CERB RULING ON REQUEST TO REINVESTIGATE CERTIFICATION BY
WRITTEN MAJORITY AUTHORIZATION

SUMMARY

On August 30, 2023, AFSCME Council 93, AFL-CIO (AFSCME) filed a Written Majority Authorization (WMA) petition with the Department of Labor Relations (DLR) pursuant to M.G. L. c. 150E, Section 1 (the Law) and DLR Regulations 456 CMR 14.19 seeking to represent a bargaining unit comprised of City of Boston (City) employees who work in the Mayor's Office for Immigrant Advancement (MOIA). On October 5, 2023, the DLR became the Neutral in this case. On June 21, 2024, the Department of Labor Relations (DLR) certified that AFSCME Council 93 (Union) had been selected by a majority of employees to serve as their exclusive representative for purposes of collective bargaining in the following unit:

All full-time and regular part-time employees employed by the City of Boston in the Office of Immigrant Advancement Department in the positions of policy advisor, strategic communications manager, program manager, civic engagement coordinator, special project manager for new arrivals, constituent services manager, legal access project coordinator and finance and administrative manager, but excluding all managerial, confidential,

1 casual, and security employees and all other employees employed by the
2 City of Boston.

3 On July 8, 2024, the City filed a request with the DLR pursuant to 456 CMR 14.15
4 and 46 CMR 14.19(15) to reinvestigate this certification based on changes in MOIA's
5 employee complement and structure that occurred after the petition was filed. The City
6 asserts that, based on these changes, it has new information that warrants reinvestigating
7 the certification. For the following reasons, the Commonwealth Employment Relations
8 Board (CERB) denies the request.

9 Background

10 After the Union filed the petition, on September 23, 2023, the DLR issued a Notice
11 of Petition to the parties that inadvertently omitted the position of Finance and
12 Administration Manager from the petitioned-for unit description. On October 5, 2023, the
13 DLR became the Neutral in this case. On October 16, 2023, the City provided a list of six
14 employees in the above-described seven-person unit, noting that the position of Strategic
15 Communications Manager was vacant. Also on October 16, 2023, the City submitted its
16 first set of challenges to the unit. The City challenged: 1) what it claimed was the Union's
17 attempt to add the petitioned-employees to its existing City of Boston bargaining unit; 2)
18 the overall appropriateness of the unit; and 3) the inclusion of the Policy Advisor position,
19 whom the City argued should be excluded from collective bargaining as a managerial
20 employee.

21 On December 19, 2023, the Neutral confirmed that the Finance and Administrative
22 Manager had inadvertently been omitted from the DLR's Notice of Petition. On December
23 20, 2023, the City challenged the inclusion of that position on grounds that its duties

1 included preparing finance and budget reports and managing human resource processes,
2 and it did not share a community of interest with the rest of the petitioned-for unit.

3 The Neutral investigated the challenges pursuant to 456 CMR 14.19 (15).¹ On
4 June 21, 2024, the Neutral² issued a WMA confidential inspection results report that
5 included an attachment indicating that the challenges that the City filed during the
6 verification process were outcome determinative. On the same day, the Neutral issued
7 a dismissal letter that addressed those challenges. After dismissing the challenge to the
8 appropriateness of the petitioned-for unit, the Neutral reviewed the challenges to the
9 inclusion of the Policy Advisor and the Finance and Administrative Manager in the
10 bargaining unit. She dismissed both challenges. She ruled that the Policy Advisor was
11 not a managerial employee and that the Finance and Administrative Manager shared a
12 community of interest with others in the petitioned-for unit and was not a confidential or
13 managerial employee within the meaning of Section 1 of the Law.

14 the DLR certified the Union based on the Neutral's report.

15 Request for Reinvestigation

16 This request for reinvestigation followed. In its request, the City contends that on
17 or about September 2023, MOIA began reclassifying positions, reorganizing its unit, and

¹ 456 CMR 14.19(15) states:

Within seven days after the Department certifies the bargaining unit, the employer may seek review of any previous challenges the neutral had dismissed as non-outcome determinative. The employer may obtain such review by filing a request to reinvestigate the certification pursuant to the procedure outlined in 456 CMR 14.15.

² Around June 12, 2024, the DLR assigned a different Neutral to inspect the WMA evidence and resolve challenges.

1 hiring new employees.³ Based on these changes, the City asserts that there is new
2 information that justifies reinvestigating and amending the certification. The information
3 the City now seeks to provide includes a new MOIA organization chart,⁴ and job
4 descriptions that the Neutral did not consider during the inspection process. Among other
5 things, the City asserts that this “newly-available” evidence will support its continued claim
6 that the Policy Advisor and the Finance and Administrative Manager are confidential and
7 managerial employees. The City requests a hearing to allow it to present the new
8 evidence.

9 The Union opposes the request. While the Union acknowledges that MOIA’s
10 composition has changed since it first filed this petition, it states that those changes do
11 not constitute “good cause” to reinvestigate the certification under 456 CMR 14.15. The
12 Union further contends that pursuant to 456 CMR 14.19(10), the City is not entitled to any

³ The City summarized these changes as follows:

- Elimination of the Program Manager position;
- Elimination of the Civic Engagement Coordinator position;
- Elimination of the Special Project Manager for New Arrivals position;
- Elimination of the Chief of Staff position;
- Finance and Administration manager now reports directly to the Executive Director instead of to the Chief of Staff;
- Creation of the Director of Constituent Services;
- Creation of the Civic Engagement Manager position;
- Creation of the Legal Access Project manager position;
- Creation of the Civic Engagement Manager position.

⁴ The City states that four of the eight positions in the certified unit have been eliminated and that two positions, the Finance and Administrative Manager and Strategic Communications Manager, are currently vacant.

1 administrative review of matters that the Neutral addressed during the WMA process. We
2 agree with the Union for the following reasons.

3 Ruling

4 Section 3 of the Law requires the DLR to “prescribe rules and regulations and
5 establish procedures for the determination of appropriate bargaining units which shall be
6 consistent with the purposes of providing for stable and continuing labor relations.” The
7 DLR has promulgated two regulations pertaining to reinvestigation of certifications: 1) 456
8 CMR 14.15, which permits the DLR to “reinvestigate any matter concerning any
9 certification issued by it,” but only for “good cause shown”; and 2) 456 CMR 14.19(15),
10 which pertains specifically to reinvestigation of certifications by written majority
11 authorization and permits an employer to seek review of any previous challenges that the
12 neutral dismissed as “non-outcome determinative.”

13 Here, because the Neutral did not dismiss any non-outcome determinative
14 challenges, 456 CMR 14.19(15) does not apply. Therefore, the only issue before the
15 CERB is whether “good cause” exists under 456 CMR 14.15 to reinvestigate the
16 certification. We hold that it does not for several reasons.

17 First, as the CERB explained in Southeastern Massachusetts Regional 911
18 District, 47 MLC 66, 67, WMAM-20-8054 (October 14, 2020), there is nothing in Chapter
19 150E or its regulations that grants a party the right to obtain administrative review of any
20 challenges that a neutral has investigated and resolved during the WMA verification
21 process. Therefore, to establish “good cause” under 456 CMR 14.15, a party must do
22 more than simply dispute the neutral’s findings or conclusions or seek a second
23 opportunity to prove its claims. Id. at 67. Yet, by requesting a hearing on the issue of

1 whether the Policy Advisor and the Finance and Administration Manager should be
2 excluded from the unit, that is precisely what the City is doing here. We therefore do not
3 find good cause to reinvestigate the record based on those challenges or the outcome
4 determinative challenges that the Neutral addressed.

5 Nor do we find good cause to reinvestigate the certification based on purported
6 changes to the unit after the petition was filed. Here, as required by the WMA regulations,
7 the Neutral's determination of majority status in this case was based upon a list of
8 employees who were employed on the day the petition was filed pursuant to 456 CMR
9 14.19(8), and her rulings on timely-filed, outcome-determinative challenges to the
10 inclusion or exclusion of names on that list pursuant to 456 CMR 14.19(6). Accordingly,
11 as the WMA regulations require, the Neutral in this case appropriately verified the Union's
12 majority status *based on the circumstances that existed at the time the petition was filed*.
13 Although an employer is permitted, within prescribed time-limits, to file challenges to
14 address any changes to the unit that may have occurred between the time the employees
15 signed cards and the union filed the petition pursuant to 456 CMR 14.19 (8), nothing in
16 the regulations or the WMA statute permits an "open-ended window of challenge" as the
17 City seems to be seeking here. See City of Somerville, 37 MLC 161, 162, WMAM-10-
18 1049 (February 10, 2011) (citing Town of Wareham, 36 MLC 76, 80, WMAM-08-1017
19 (October 28, 2009) (barring employer from raising new issues for the first time on a motion
20 to reinvestigate certification – an "open-ended window of challenges, as based on future
21 changes to the workforce . . . is contrary to existing regulations."))

22 Even if this motion did not concern a WMA petition, we would decline the request.
23 The City's motion for reinvestigation is, in essence, a motion to reopen the WMA record.

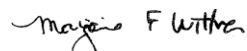
1 However, as both parties point out, such motions are not granted unless the proffered
2 evidence is “newly-discovered evidence, which was in existence at the time of the
3 hearing, but of which the moving party was excusably ignorant, despite the exercise of
4 reasonable diligence.” Boston City Hospital, 11 MLC 1065, 1075, MUP-4893 (July 25,
5 1984). Here, given the pendency of this petition since August 2023, and the City’s
6 statement that the MOIA began reclassifying positions, reorganizing its unit, and hiring
7 new employees in or around September 2023, the City has provided no evidence
8 demonstrating why it was excusably ignorant about changes in one of its departments
9 that occurred while the WMA petition was still pending. We therefore decline to
10 reinvestigate the certification on this alternative ground.

11 Conclusion

12 For the foregoing reasons, the CERB denies the City’s request to reinvestigate this
13 certification. The City’s concerns may potentially be addressed through bargaining or the
14 unit clarification process.

15 **SO ORDERED**

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



MARJORIE F. WITTNER, CHAIR



KELLY B. STRONG, CERB MEMBER



VICTORIA B. CALDWELL