

MEMORANDUM

TO: Mayor Gary Christenson
FROM: Jaime Kenny, Esq., David Kouroyen, Esq., City Labor Counsel
DATE: June 24, 2022
RE: Teamsters Supervisory Union Voluntary Recognition

This Memorandum aims to address the concerns recently raised by members of the Malden City Council regarding the City's voluntary recognition of the Teamsters Local 25 Supervisory Union for several City employees. In that regard, I would like to relay the following:

I. General Background and City Involvement in Union Recognition

Chapter 120 of the Acts of 2007 allows a majority of employees in an appropriate bargaining unit to designate an employee organization as its representative for the purpose of collective bargaining through written majority authorization. It is a fundamental principal within of G.L. c. 150E and the Rules and Regulations of the Commonwealth of Massachusetts, Department of Labor Relations, 456 CMR 14.00 that employees are allowed to form a representative organization whether or not there is consent from the employer. Furthermore, there are extremely limited circumstances and grounds in which an employer may even seek to oppose or prevent the formation of a union.

One limited exemption to joining a representative union is positions which are established to be managerial and/or confidential employees within the meaning of G. L. c. 150E § 1. Employees shall be designated as managerial employees only if they:

- a. participate to a substantial degree in formulating or determining policy, or
- b. assist to a substantial degree in the preparation for or the conduct of collective bargaining on behalf of a public employer, or
- c. have a substantial responsibility involving the exercise of independent judgment of an appellate responsibility not initially in effect in the administration of a collective bargaining agreement or in personnel administration.

The policy decisions must be of major importance to the mission and objectives of the public employer. *See* Wellesley School Committee, 1 MLC at 1403. Additionally, the employee must participate in the policy decision-making process on a regular basis. *See* Town of Plainville, 18 MLC 1001, 1009, MCR-4019 (June 12, 1991). To be considered policy, the decision must impact a significant part of the public enterprise. *See* Worcester School Committee, 3 MLC 1653, 1672, MUP-2044 (April 29, 1977). To meet the standards established in the first part of the test, it must also be shown that the employee functions at levels of administration where decisions and opinions **will not be screened by another layer of administration** before being implemented. *Id.* (emphasis supplied).

In order to be designated as a confidential employee, an employee must directly assist and act in a confidential capacity to a person or persons otherwise excluded from coverage under G.L. c. 150E. Furthermore, a confidential employee must have a continuing and substantial relationship with an excluded employee that creates a legitimate expectation of confidentiality in their routine and recurrent dealings. *See* Town of Medway, 22 MLC 1261, 1269 (1995). Only employees who have significant access or exposure to confidential information **concerning labor relations matters**, management's position on personnel matters or advance knowledge of the employer's collective bargaining proposals are excluded as confidential. *See* Fall River School Committee, 27 MLC 37, 39 (2000) (emphasis supplied). This exception has been narrowly construed to preclude as few employees as possible from collective bargaining rights while not unduly hampering the employer's ability to manage its operations. *See* Town of Plainville, 18 MLC at 1009 (*citing* Silver Lake Regional School District, 1 MLC 1240, 1243 (1975)); Town of Medway, 22 MLC 1261, 1269 (1995).

The City, as the employer, cannot unilaterally determine whether or not a position constitutes a managerial or confidential employee, but rather, must petition and argue as such at a hearing before the Department of Labor Relations, at which it point the determination will be made by the presiding authority. The burden is placed upon the City to establish the elements as detailed above not only through the positions' job description, but the duties, responsibilities, and functions actually performed by the employee(s). As detailed above, it's a rather high bar to establish that a position should be classified as managerial and/or confidential given the repeated standard of "substantial" participation, preparation, and responsibility and regular access to confidential bargaining information. *See* G. L. c. 150E § 1.

In December of 2021, Director of Organizing for Teamsters Local 25 Christopher Smolinsky ("Mr. Smolinsky") reached out to the City informing of the intent of multiple employees to form a new Supervisory Union ("Union") which was to include all City employees with the following titles:

Parking Director, Chief Strategy Officer, Treasurer Collector, Senior Center Coordinator, Assessor, Public Facilities Director, City Engineer, Director of ISD, Director of Veterans Services, Teen Center Coordinator, Director of Public Health, Director of IT, Director of OSPCD, Superintendent of Cemeteries, Recreation Coordinator and City Clerk.

Initially, the Union sought to also include the Building Commissioner and Mr. Smolinsky expressed an intent to amend the member list to also include the City Solicitor.¹ My office then coordinated with the City to conduct an analysis into whether or not any of the initially proposed seventeen (17) positions could credibly be established to be a managerial and/or confidential employee within the parameters of G. L. c. 150E § 1. Our analysis established that despite often

¹ I raised concerns over the City Solicitor's access to confidential bargaining information. I sought to exclude the Building Commissioner because that position is supervised by the Director of ISD, and it is improper to have both a supervisor and a position that they supervise in the same bargaining unit. *See Sheriff of Worcester County*, 30 MLC 132, CAS-03-3543 (April 7, 2004).

involving the title of “director” or “coordinator” none of the proposed positions, except for the Building Commissioner, were involved at-the-table in collective bargaining, had substantial participation or authority to determine policies (without screening by another layer of the organization), or had access to confidential information concerning labor relations matters. It was my office’s determination, therefore, that the City did not have a legitimate credible basis to seek to exclude the majority of the positions.

We did, however, assert that it would be the City’s position that the Building Commissioner and the proposed City Solicitor should be excluded as members of the Union. My office relayed this position to Mr. Smolinsky and it was agreed upon that the Union would voluntarily withdraw both the Building Commissioner and City Solicitor as members of the unit.

II. Purpose and Benefit of the Voluntary Recognition Process

As detailed above, the only two positions that the City could even potentially establish as being eligible for exclusion from the Union were already voluntarily removed from the Union’s petition. Therefore, the City had no credible legal basis to deny or hinder the Union’s formation. In fact, any attempts to do so may have been illegal violations of G.L. c. 150E and 456 CMR 14.00. Additionally, not only would those efforts have been unproductive and potentially illegal, but it would also have created a negative and contentious precedent between the Union and City in future negotiations.

Having met the rather limited procedural requirements, the Union was free to seek certification through the DLR as detailed in 456 CMR 14.00. The City had no legitimate grounds to oppose that process, and rather, coordinated with Mr. Smolinsky and the DLR to voluntarily recognize the Union through the provisions of G.L. c. 150E and 456 CMR 14.06(5). This was conducted for three primary reasons: to incentive the Union to remove the Building Commissioner

and City Solicitor positions from the Union, to avoid unnecessary cost and expenses expected in the certification process, and to foster a positive working relationship with the Union. If the City elected not to voluntarily recognize the Union, then the Union's members would have petitioned the DLR in accordance with 456 CMR 14.00, which would have yielded the same result but would have necessitated multiple hearings and meetings before the DLR over a period of months. The City would then have been required to attend multiple hearings and provide a myriad of employee information and materials as petitioned by the DLR and the Union.

The City's only active involvement in the voluntary recognition process included the posting of a twenty-day notice of the City's intent to voluntarily recognize the Union. The City complied with the express provisions of 456 CMR 14.06(5)(b), which requires that the notice be emailed to all affected employees and be posted in a "conspicuous place" and "where notices to these employees are usually posted." The notice of voluntary recognition was openly and visibly displayed in compliance with 456 CMR 14.06(5)(b). The notice of voluntary recognition was not issued to the public *per se*, although it was readily available for anyone who wished to view it, because **such publication is not required under 456 CMR 14.06(5)(b)**. The purpose of the notice of voluntary recognition and twenty-day waiting period is to allow employee organizations the opportunity to notify the City of a claim to represent any of the employees involved the proposed bargaining unit, and a public notice of the recognition, therefore, is irrelevant and immaterial.

III. CONCLUSION

My office coordinated with Union representatives and the Department of Labor Relations to voluntarily recognize the Teamsters Local 25 Supervisory Union. We did so because our analysis into the proposed union positions established that the City did not have a sufficient factual or legal basis to exclude the vast majority of the proposed positions. My office worked in conjunction with

the Union to exclude the Building Commissioner and City Solicitor as members of the unit. Despite it being the City's burden to establish its concerns at a hearing, the Union agreed to remove the two positions without any evidentiary hearings or pleadings in order to facilitate the unit formation. The voluntary recognition process was not only the motion rationale one, but assisted in fostering a positive working relationship with the Union and avoided unnecessary expense and legal liability upon the City. Should any members of the City Council have any specific concerns or questions on this matter, we may certainly schedule a call or meeting to address and discuss those concerns or questions.

Sincerely,

/s/ Jaime Kenny
Jaime Kenny, Esq.
David K. Kouroyen, Esq.
Labor Counsel

VOLUNTARY RECOGNITION AGREEMENT

Pursuant to the provisions of G.L. c. 150E and the Rules and Regulations of the Commonwealth of Massachusetts, Department of Labor Relations, 456 CMR 14.06(5), the City of Malden ("Employer") hereby agrees to voluntarily recognize, without an election, Teamsters Local 25 ("Union") (together, "the Parties") as the recognized, exclusive bargaining representative for a bargaining unit consisting of all full-time and regular part-time employees in the City of Malden with the job titles of Parking Director, Chief Strategy Officer, Treasurer Collector, Senior Center Coordinator, Assessor, Public Facilities Director, City Engineer, Director of ISD, Director of Veterans Services, Teen Center Coordinator, Director of Public Health, Director of IT, Director of OSPCD, Superintendent of Cemeteries, Recreation Coordinator and City Clerk and excluding all other employees within the City of Malden. The Employer, in good faith believes that the employee organization has been designated as the freely chosen representative of a majority of the employees in an appropriate bargaining unit.

- A. The Employer has complied with the 20 day posting requirement for voluntary recognition described in 456 CMR 14.06(5)(b), posting a Notice of Voluntary Recognition starting January 12, 2022, which was emailed to all bargaining unit members by the Employer on the same date.
- B. The Union has filed the Employee Organization Information Report (Department Form 1) and an Employee Organization Financial Report (Department Form 2) pursuant to MGL c. 150E, §§13 and 14;
- C. The Employer shall file a signed copy of this Voluntarily Recognition Agreement with the Department of Labor Relations within seven (7) days of execution by both parties.

The Parties agree that signatures by fax and/or scanned and sent via email are acceptable as originals.


City of Malden:



Gary Christenson, Mayor

Date: 02/05/2022

Teamsters Local 25:



Christopher Smolinsky
Director of Organizing

Date: 2/2/2022