A GUIDE TO THE MASSACHUSETTS PUBLIC EMPLOYEE COLLECTIVE BARGAINING LAW

ELEVENTH EDITION

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

19 STANIFORD STREET, 1ST FLOOR
BOSTON, MA 02114

436 DWIGHT STREET, ROOM 206
SPRINGFIELD, MA 01103

A Guide to the Massachusetts Collective Bargaining Law (*Guide*) is a publication of the Massachusetts Department of Labor Relations (DLR). This is the eleventh edition to be published over a span of thirty-eight years and the first edition to be published since the former Labor Relations Commission, Board of Conciliation and Arbitration and Joint Labor Management Committee for Municipal Police and Fire were consolidated into the Department of Labor Relations in 2007.

This updated guide is possible because of the DLR staff's hard work and dedication. Each member of the staff contributed to make this possible. Special thanks to Kerry Bonner the "captain" and to Edward Srednicki the glue that keeps the DLR going.
Unlike past editions of this guide, this edition will not be published in hard copy format. This edition is a searchable all-electronic version available in an online and printer-friendly (PDF) format with interactive links to cited laws, regulations and cases.

This *Guide* cites DLR Hearing Officer and CERB decisions that are codified and published monthly in *Massachusetts Labor Cases* by © Landlaw, Inc., 675 VFW Parkway, #354, Chestnut Hill, MA 02467 and are reproduced with its permission. Please contact Landlaw, Inc. directly regarding any other use of material produced by it or to subscribe to Massachusetts Labor Cases or the Massachusetts Labor Relations Reporter: http://www.landlaw.com/massachusetts-employment-law-reporters.asp

Uncodified copies of DLR Hearing Officer and CERB decisions are published monthly on the DLR's website: http://www.mass.gov/lwd/labor-relations/recent-decisions/

Although we have made every effort to verify the accuracy of the information in the *Guide*, please do not rely on this information without first checking an official edition of the Massachusetts General Laws or other listed Acts, and the Code of Massachusetts Regulations. If you need legal advice or counsel, please consult an attorney.

Please visit the DLR's web site at www.mass.gov/dlr to check for updates to this guide.

A GUIDE TO THE MASSACHUSETTS PUBLIC EMPLOYEE COLLECTIVE BARGAINING LAW

Table of Contents

I. Evolution of Public Employee Collective Bargaining and FAQs 12

A. Evolution of Public Employee Collective Bargaining 12

B. Frequently Asked Questions 15

II. Procedures 22

A. Unfair Labor Practice Procedures 22

1. Initiation of Unfair Labor Practice Cases 22

a. Prefiling Assistance/Officer of the Day 22

b. Filling Out the Charge 22

c. Time Limit for Filing Charges 23

d. Filing a Charge 23

e. Service of a Charge 23

f. Case Docketing 24

g. Classification of the Charge 27

h. Initial Notice to Parties of Pending Charge 27

i. Respondent's Response. 28

j. Amendments to the Charge 28

k. Postponements 28

2. The Investigation 29

a. Purpose of the Investigation 29

b. Role of the Hearing Officer 29

c. Representation by Counsel 29

d. Burden of Proof 29

e. Documents 30

f. Default Procedure 30

g. What to Expect at the Investigation 31

h. Motions 31

i. The Record 31

j. Post-Investigation Activity 32

k. Expected Timing of Probable Cause Determination 34

3. Complaint Litigation 34
a. Pre-hearing 34
b. Hearing 41
c. Post-Hearing 46
B. Representation Case Procedures 49
1. Petitions 49
a. There are five different kinds of Representation Petitions that can be filed at the DLR. 49
b. Filing Representation Petitions 50
c. Showing of Interest 51
d. Petition Bars 53
e. Written Majority Authorization Bars 55
f. Potential Petition Processing Pitfalls and Problems 55
2. Initial Contacts with the DLR 56
a. Notice of Hearing 56
b. Employer must post the Notice of Hearing 56
c. Initial Communications with the Parties 57
d. Consent Election Agreements 58
e. Motions to Intervene 59
f. Failure to Reach Agreement 59
3. Written Majority Authorization 59
a. Initiating a Written Majority Authorization (WMA) Petition 59
b. Representatives to Contact 59
c. Showing of Interest 59
d. Initial DLR Steps 60
e. Written Majority Authorization Bars 60
f. Processing of the Petition 61
g. Challenge Determination 64
h. Final Verification and Certification 64
i. Appeal 65
4. Hearings (see also Prohibited Practice Hearing Procedures Section II(A)(3)(b)). 65
a. DLR Staff Assigned to the Case 65
b. Pre-Hearing 65
c. Role of the Hearing Officer 65

d. Nature of the Hearing 66
e. Order of Presentation 66
f. Written Briefs 66
5. Post-Hearing 66
a. The Record 66
b. Hearing Officer Report to the CERB 66
c. The Decision 67
d. There is no Judicial Review of Representation Decisions 67
6. Elections 67
a. Types of Elections 67
b. Designation of Organizations on the Ballot 67
c. Order of Choices on the Ballot 67
d. Form of Ballot 68
e. Ballots for Professional Employees (Globe Ballots) 68
f. Withdrawal from Ballot 68
g. Election Hours 69
h. Election Date 69
i. Eligibility Cut-Off Date 70
j. Voter Eligibility List 70
k. Pre-Election Disputes Concerning the Eligibility List 70
l. Election Notice 70
m. Amended Notice of Election 71
n. Multiple Polling Sites 71
o. Observers 71
p. DLR Agent Responsibilities 71
q. Pre-Election Conference 72
r. Setting Up the Election Site 72
s. Role of the Observers 72
t. Opening the Polls 72
u. Late Opening of the Polls 73
v. Electioneering 73
w. Conduct of the Polling 73
x. Spoiled Ballots 73

y. Challenged Ballots 73
z. DLR Challenges 73
aa. Party Challenges and Standard for Eligibility 74
bb. Challenge Ballot Procedure 74
cc. Security of the Ballots 74
dd. Language Problems During Voting 75
ee. Disabled Voters 75
ff. Closing the Polls 75
gg. Ballot Tabulation 75
hh. Mail-Ballot Elections 77
ii. Post-Election Procedures 79
jj. Objections to the Election 80
kk. Runoff Elections 81
ll. Re-Run Elections 82
mm. Certification 83
nn. Reinvestigation of Certification 83
oo. Revocation of Certification 83
7. Clarification/Amendment Petitions (CAS) 84
a. General Information 84
b. Timeliness 84
c. Parties 84
d. Procedure 84
C. Arbitration and Mediation Services 86
1. Interest Mediation Services 86
a. Filing the Petition 87
b. DLR Initial Steps – Scheduling the Initial Investigation/Mediation 87
c. Mediator Confidentiality 87
d. Mediator Role 88
e. Mediator Report to the DLR Director 88
f. Designation of a Fact-Finder 88
g. Fact-Finder Appointment 89
h. Fact Finder Costs 89
i. Fact-Finder Role 89

j. Fact-Finder Hearing 89
k. Fact-Finder Report 89
l. Post Fact-Finding Mediation 90
m. Certification of Completion of the Collective Bargaining Process 90
2. Grievance Mediation Services 90
a. Services Provided 90
b. Initiating a Case 90
c. DLR Initial Steps 91
d. Mediator Confidentiality 91
e. Mediator Role 91
3. Grievance Arbitration Services 91
a. Services Provided 91
b. Initiating a Case 91
c. DLR Initial Steps 92
d. Classification of the Petition 92
e. Mediation 92
f. Notice to Parties of Pending Petition 92
g. Arbitrator Appointment 94
h. Subpoenas 94
i. Hearing 94
j. Arbitration Awards 94
k. Clarification, Modification or Award Correction 95
l. Publication of Award and Opinion 95
D. The Joint Labor Management Committee 95
1. Services Provided 95
2. Initiating a Case 96
a. Filing the Petition 96
b. DLR/JLMC Initial Steps – Scheduling the Initial Investigation/Mediation 96
3. First Meeting (Investigation and Certifying the Issues) 96
4. Jurisdiction 97
5. The 3(a) Process 97
a. Vote to 3(a) 97
b. The Purpose of the 3(a) Hearing 97

c. Parties' Pre-Hearing Submission 98
d. The 3(a) Hearing 98
e. After the 3(a) Hearing 98
6. Interest Arbitration 99
7. After the Interest Arbitration Award is Issued 99
8. Case Closed by JLMC 99
E. Miscellaneous Case Procedures 100
1. Request for Binding Arbitration 100
2. Strike Investigation 100
3. Request for Advisory Rulings 100
III. Summary of Law 100
A. Jurisdiction 100
1. Federal Preemption 100
2. Parallel Jurisdiction 101
3. Primary Jurisdiction/Exhaustion of Administrative Remedies 101
B. Definitions 102
1. Employer 102
a. State Employees 102
b. County Employees 103
c. School Departments 103
d. Housing Authorities 104
e. Chapter 150A 104
f. Other Employers 104
2. Employee 105
3. Employee – Exceptions 106
a. Explicit Exceptions 106
b. Managerial Employees 107
c. Confidential Employees 109
d. Independent Contractors 109
4. Employee Organization 110
C. Employee Rights to Organize and Bargain Collectively 110
1. Concerted, Protected Activities 110
a. Union Activities 111

b. Grievances or Complaints 112
c. The Right to Representation at an Investigatory Interview 112
d. Other Concerted, Protected Activities 112
2. Unprotected Activities 113
D. Appropriate Bargaining Units 113
1. Statutory Criteria 113
a. Community of Interest 114
b. Efficiency of Operations and Effective Dealings 115
c. Safeguarding Employee Rights to Effective Representation 115
E. Determining Bargaining Representatives 125
1. Voluntary Recognition 125
2. Representation Petition and Hearing 126
a. Notice 126
b. Showing of Interest 126
c. Status as "Employee Organization" 127
d. Employer's Duty of Neutrality 128
e. Employer-Initiated Representation Petitions 128
f. Decertification Petition 128
g. Intervention and Disclaimer of Interest 128
h. Consent Election Agreement 129
i. Deferral to AFL-CIO "No Raiding" Procedure 129
3. Written Majority Authorization 129
4. Bars to Processing Petition 130
a. Certification Bar 130
b. Contract Bar 130
c. Withdrawal/Disclaimer Bar 134
d. Election Year Bar 134
e. Recognition Year Bar 134
f. Blocking Charges 135
5. Elections: Procedures, Challenges, and Objections 137
a. Type of Election 137
b. Eligibility to Vote 137
c. Challenges to Eligibility List 137

d. Objections to the Conduct of an Election 138
6. Affiliations 140
a. Continuity 140
b. Due Process 140
F. Prohibited Practices 141
1. Employer Prohibited Practices 141
a. Section 10(a)(1) 141
b. Section 10(a)(2) 146
c. Section 10(a)(3) 147
d. Section 10(a)(4) 151
e. Section 10(a)(5) 152
f. Section 10(a)(6) 174
2. Union Prohibited Practices 174
a. Section 10(b)(1) 174
b. Section 10(b)(2) 182
c. Section 10(b)(3) 182
G. Impasse 182
1. Section 9 182
2. JLMC 183
H. Final and Binding Grievance Arbitration 184
1. Threshold Questions 184
2. Refusal to Participate or Comply with Award 185
3. Waiver 185
I. Strikes 185
1. Prohibited Conduct 185
a. Withholding Services - In General 185
b. Inducement, Encouragement, and Condonation 188
2. Work to Rule 190
3. Threatened Strikes 192
4. Remedial Orders 192
5. Constitutional Issues 193
6. Employer Responses to Alleged Strike Activity 194
a. Lockouts 194

b. Employee Discipline 195
J. Remedial Authority 195
1. Make Whole 195
a. Back Pay 195
b. Reinstatement 198
c. Bargaining Orders 198
d. Front Pay 199
e. Other Affirmative Action 199
f. Independent Section 10(a)(1) Violations 200
g. Duty of Fair Representation Violations 200
h. Notice Posting 200

I. Evolution of Public Employee Collective Bargaining and FAQs

A. Evolution of Public Employee Collective Bargaining

1935
The Wagner Act (National Labor Relations Act) is enacted, granting collective bargaining rights to private sector employees in companies engaged in interstate commerce.

1937
M.G.L. c. 150A, a so-called "Baby Wagner Act," is enacted, extending bargaining rights to private sector employees within the Commonwealth. The Labor Relations Commission (LRC) is established to administer the new law. M.G.L. c. 23, § 90, *et seq.*

1958
All public employees (except police officers) in Massachusetts are granted the right to join unions and to "present proposals" to public employers. M.G.L. c. 149, § 178D.

1960
M.G.L. c. 40, § 4C is enacted, giving city and town employees the right to bargain, provided that the local city or town adopts the law. However, there are no specific procedures for elections and no provisions covering the subject matter or method of bargaining.

1962
The Massachusetts Turnpike Authority, the Massachusetts Port Authority, the Massachusetts Parking Authority, and the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority become subject to the representation and unfair labor practice provisions of M.G.L. c. 150A. Section 760 of the Acts of 1962.

1964
State employees are granted the right to bargain with respect to working conditions (but not wages). M.G.L. c. 149, § 178F.

Chapter 150A is amended to include private health care facilities as "employers" and nurses as "employees."

1965
Municipal employees are granted the right to bargain about wages, hours, and terms and conditions of employment. M.G.L. c. 149, §§ 178G-N (repealing Chapter 40, § 4C).

1968
M.G.L. c. 150A is amended to expressly include private nonprofit institutions as "employers" and nonprofessional employees of a health care facility or of private nonprofit institutions (except members of religious orders) as "employees."

1969
The Legislature establishes the Mendonca Commission to revise the public employee bargaining laws.

1973
M.G.L. c. 150E is enacted, granting full collective bargaining rights to most state and municipal employees.

Binding arbitration of interest disputes is established for police and fire employees. Chapter 1078 of the Acts of 1973.

1974
M.G.L. c. 150E is amended to: 1) strengthen the enforcement powers of the Labor Relations Commission; 2) modify union unfair labor practices; and 3) modify the standards for the exclusion of managerial employees.

1975
The Labor Relations Commission issues standards for appropriate bargaining units affecting 55,000 state employees in more than 2,000 job classifications. Ten statewide units are created—five non-professional and five professional.

M.G.L. c. 150E is amended to provide for a separate bargaining unit for state police. Chapter 591 of the Acts of 1975.

1977
M.G.L. c. 150E is extended to court employees in the judicial branch; two state-wide units are established for judicial branch employees (except court officers in Middlesex and Suffolk Counties). Chapter 278, § 3 of the Acts of 1977.

The Representation and prohibited practice provisions of M.G.L. c.150E are extended to housing authorities and their employees.

The Joint Labor-Management Committee is established to oversee collective bargaining negotiations and impasses involving municipal police officers or firefighters. Chapter 730 of the Acts and Resolves of 1977.

Agency service fee provisions are clarified to require that employee organizations provide a rebate procedure and to indicate which expenditures may be rebated to employees.

1980
"Proposition 2 1/2" is enacted, repealing final and binding arbitration for police and firefighter contract negotiations.

1982
The LRC issues comprehensive regulations setting forth agency service fee procedures, including requirements for unions to collect a fee pursuant to M.G.L. c. 150E, § 12 and for employees to challenge the amount or validity of the fee.

1983
M.G.L. c. 150A is amended to specifically cover private vendors who contract with the state or its political subdivisions to provide certain social and other services.

1986
M.G.L. c. 150E is amended to forbid employers from unilaterally changing employees' wages, hours and working conditions until the collective bargaining process (including mediation, fact-finding, and arbitration, if applicable) has been completed.

1987
Interest arbitration is reinstituted for police and firefighter contract negotiations, with arbitration awards subject to funding by the legislative body.

1990
LRC Revises Regulations.

1993
The Education Reform Act of 1993 (Chapter 71 of the Acts of 1993) impacts public employees by making major changes concerning the demotion and dismissal of teachers and principals.

1996
For cases in which the LRC issues a complaint of prohibited practice and orders a hearing, Chapter 151, § 577 of the Acts of 1996 allows the parties to elect to submit the case to arbitration at any time up to thirty days prior to the commencement of the hearing ordered by the Commission.

1999
LRC Revises
Regulations.

2000
LRC Revises Regulations.

2006
Chapter 268 of the Acts of 2006 defines personal care attendants (PCA) as public employees, employed by the PCA Quality Home Care Workforce Council, for certain limited purposes, including the right to organize and bargain under M.G.L. c. 150E.

2007
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.

Chapter 145 of the Acts of 2007 reorganizes the Commonwealth's neutral labor relations agencies under the Division of Labor Relations (Division). The Division has all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the LRC, JLMC and BCA.

2010
DLR revises regulations to implement M.G.L. c. 120 and M.G.L. c.145 of the Acts of 2007.

2011
Chapter 3 of the Acts of 2011 changes the Division of Labor Relations' name to the DLR.

M.G.L. c. 150E , § 7(a) is amended to allow an employer and exclusive representative to agree to extend a collective bargaining agreement beyond three years until a successor agreement is negotiated.

2012
Chapter 189 of the Acts of 2012 defines qualified family child care providers who offer subsidized early education and child care services to children in the Commonwealth as public employees, giving them the right to organize and bargain with the state over subsidy rates, reimbursement and payment procedures, recruitment and retention of providers and professional development opportunities under M.G.L. c. 150E.

2013
DLR revises Regulations.

B. Frequently Asked Questions

GENERAL INFORMATION

What does the law do?

The Massachusetts public employee collective bargaining law gives most public employees at the state, county, and municipal levels the right to: (1) form, join, or participate in unions; (2) bargain collectively over terms and conditions of employment; (3) engage in other concerted activities for mutual aid and protection; and (4) refrain from participating in any or all of these activities.

When did the law take effect?

The law was signed on November 26, 1973, and became effective on July 1,1974.

Who administers the law?

The Massachusetts Department of Labor Relations (DLR), which has offices at 19 Staniford Street, 1st Floor, Boston, Massachusetts 02114 and 436 Dwight Street, Room 206, Springfield, Massachusetts 01103.

Who is covered by the law?

State, county and municipal employees in the executive and judicial branches of government and employees of certain Authorities. Managerial and confidential employees are specifically excluded from coverage. Employees may be designated as managerial only if they participate to a substantial degree in the formulation of policy; assist to a substantial degree in collective bargaining; or have a substantial, independent, appellate role in personnel or contract administration. Employees may be designated as confidential only if they directly assist and act in a confidential capacity to a person excluded from the Law's coverage.

What is the Commonwealth Employment Relations Board?

The Commonwealth Employment Relations Board (CERB) is the three-member appellate body within the DLR that was created as part of the 2007 reorganization of the Commonwealth's labor relations agencies. The CERB consists of one full-time Chair and two per-diem members appointed by the governor from names submitted to the governor by the Advisory Council. The CERB is responsible for issuing decisions and final orders on appeal of dismissals of prohibited practice charges and hearing officer decisions. Depending on the posture of the case, the CERB also determines appropriate bargaining units in representation, written majority and CAS matters. M.G.L. c. 23, Section 9R.

What is the Advisory Council?

The Advisory Council advises the DLR concerning policies, practices and specific actions that the DLR might implement to better discharge its labor relations duties. It consists of 13 members appointed by the governor, five of whom shall be members or representatives of public sector labor unions, five of whom shall be representatives of public sector managers, including the director of employee relations for the Commonwealth, and three of whom shall be at-large members. M.G.L. c. 23, Section 9Q.

REPRESENTATION RIGHTS

How do employees select an exclusive bargaining agent?

By majority action. The procedures for doing so include: a) through the DLR's written majority process (card-check) a majority of employees in a petitioned-for, appropriate bargaining unit may designate an employee organization as their exclusive representative by signing authorization cards, petitions, or other suitable written evidence; b) an employer may voluntarily recognize an employee organization designated by the majority of all the employees in an appropriate bargaining unit; and c) the DLR is authorized to direct an election by secret ballot to determine the exclusive representative whenever:

1) one or more employee organizations claim to represent a substantial number of employees in an appropriate unit;

2) an employee organization petitions the DLR alleging that a substantial number of employees wish to be represented by the petitioner; or

3) a substantial number of employees in a bargaining unit allege that the exclusive representative no longer represents a majority of the employees.

Who determines an appropriate bargaining unit and on what basis is the decision made?

The DLR and the Commonwealth Employment Relations Board (CERB), depending on the posture of the case, are authorized to determine appropriate bargaining units giving due regard to such criteria as community of interest, efficiency of operations, and safeguarding effective representation.

What rights and obligations does a recognized or certified employee organization have?

The exclusive representative is authorized to negotiate agreements covering all employees in a bargaining unit and must represent all such employees fairly in contract negotiation and administration.

Under what circumstances may an employee organization seek an election?

Generally, an employee organization filing a petition for certification must show the DLR that at least 30% (50% if the employees are currently represented by another employee organization) of the affected employees desire to be represented by that organization.

How will representation disputes be resolved?

An appropriate petition must be filed with the DLR asking that it direct an election to be held. All employees vote in secret and the choice is made by a majority of valid votes cast.

May employees decide to terminate representation by an employee organization or change representatives?

Yes. A petition may be filed with the DLR by or on behalf of a substantial number of employees in a unit alleging that the exclusive representative no longer represents a majority of the employees within the unit and asking the DLR to hold an election to determine the exclusive representative.

Are there specific times during which a representation petition may be filed?

Yes. Generally, the DLR will not entertain a petition during the term of a valid collective bargaining agreement, unless the petition is filed no more than 180 days and no fewer than 150 days (no more than 90 days and no fewer than 60 days for petitions filed pursuant to M.G.L. c. 150A) prior to the expiration of the agreement. The DLR also will not entertain petitions filed during the first twelve months after an election, certification, and certain voluntary recognition agreements. It also will not entertain petitions filed by employee organizations within the first six months following the withdrawal of a petition or a disclaimer of interest in the employees.

What is an "agency service fee" and how does it work?

An "agency service fee" is a monetary amount that an employee organization may charge employees in its bargaining unit who are not members of the organization for their proportionate share of the costs of collective bargaining and contract administration. A nonmember who believes the amount of the service fee demanded by the employee organization exceeds that "proportionate share" may file a prohibited practice charge with the DLR. The fee payer may also challenge the validity of the demand on certain grounds set forth in DLR regulations or case law.

THE COLLECTIVE BARGAINING PROCESS

What is collective bargaining?

Collective bargaining is the mutual obligation of employers and employees' representatives to meet at reasonable times and confer in good faith with respect to wages, hours, standards of productivity and performance, and other terms and conditions of employment. This includes the mutual obligation to negotiate an agreement and bargain over questions arising under an agreement.

Who may represent the respective parties in the actual bargaining process?

The parties may be represented by a person or persons of their own choosing at the bargaining table.

What if the provisions of the collective bargaining agreement conflict with applicable law?

If there is a conflict between the provisions of a collective bargaining agreement and certain statutes enumerated in Section 7(d) of the Law, the terms of the agreement prevail. The enumerated statutes deal essentially with wages and/or "working conditions." If there is a conflict between the provisions of a collective bargaining agreement and a statute not enumerated in Section 7(d) of the Law, the statute prevails, but an employer generally must still bargain over the impacts of the statute on any mandatory subjects of bargaining.

Must an employer negotiate with the bargaining unit's representatives?

Yes. The employer and exclusive bargaining representative must, upon demand, negotiate in good faith with respect to wages, hours, standards of productivity and performance, and other terms and conditions of employment. No public employer may exempt itself from the operative provisions of the law. However, if a term or condition of employment is addressed in a collective bargaining agreement, generally the employer is not obligated to bargain over that topic during the life of the agreement.

Is either side required to agree?

No, but both sides must bargain in good faith to agreement or impasse. If an agreement is reached, it should be reduced to writing and executed by the parties.

IMPASSE

What if the public employer and labor organization fail to reach an agreement on a new or successor collective bargaining agreement?

The Law prohibits public employees from striking. It also prohibits public employers from unilaterally changing terms and conditions of employment. The DLR administers procedures for resolving collective bargaining impasses under the public employee collective bargaining law. These procedures comprise mediation, fact-finding, and interest arbitration. Impasse resolution services for police and firefighters are provided by the DLR through the Joint Labor-Management Committee (JLMC).

How does the mediation process work?

After a reasonable period of negotiation, the parties acting individually or jointly may petition the DLR for an impasse determination and the initiation of mediation. The DLR will investigate whether the parties have negotiated for a reasonable period of time and if an impasse exists.

Once an impasse is found, the DLR appoints a mediator to assist the parties in reaching agreement. In some instances, the parties themselves agree upon a mediator.

Suppose the parties still cannot agree? Will a neutral third party be brought in to make findings of fact?

If, despite the best efforts of the mediator, the impasse continues, the mediator will recommend to the DLR Director that the case be certified to fact-finding.

A fact-finder will generally be selected from a list sent to the parties by the DLR. If the parties cannot agree, the DLR will appoint the fact-finder. The fact-finder's primary responsibility is to preside at fact-finding hearings and issue a written report with recommendations for resolving all issues in dispute. The fact-finder has the authority to mediate the dispute at the request of both parties.

At the conclusion of fact-finding, the fact-finder must submit his or her report to the parties and the DLR. The recommendations contained in the report are advisory and do not bind the parties. If the impasse remains unresolved ten days after the receipt of the findings, the DLR is required to make them public.

If the fact-finding procedure fails to resolve the dispute, what can the parties do?

Normally, if the impasse continues after the publication of the fact-finder's report, the issues in dispute go back to the parties for further mediation. If, after further mediation the parties are still at impasse, either or both parties may request the DLR to certify to the parties that the collective bargaining process, including mediation, fact-finding, or arbitration, if applicable, has been completed. If the DLR determines that the dispute resolution mechanisms provided for in Section 9 of the Law have been exhausted, it will certify to the parties that the collective bargaining process has been completed.

Once an agreement is reached, may the parties specify procedures to be used to settle disputes concerning its interpretation?

Yes. The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration to be invoked in the event of any dispute concerning the interpretation of the agreement. The parties may include in the contract the name of the arbitrator and/or the organization from which they will select an arbitrator. The parties may agree to provide for arbitration through the DLR. The DLR charges a fee for arbitration and grievance mediation services.

If a collective bargaining agreement does not include final and binding grievance arbitration, the DLR may order binding arbitration of any grievance arising under the terms of the agreement upon the request of either party to the agreement.

JOINT LABOR MANAGEMENT COMMITTEE

What is the Joint Labor Management Committee?

The JLMC is composed of twelve members, plus a chairperson. The twelve members are appointed by the governor: three from nominations by firefighter unions; three from nominations by police unions; and six from nominations by the governor's Local Government Advisory Committee. The JLMC nominates the chair. In addition to overseeing police and firefighter negotiations, the JLMC may, at its discretion, take jurisdiction in any dispute over the negotiation of the terms of a collective bargaining agreement involving municipal firefighters or police officers.

The JLMC, or its representatives, may meet with the parties to a dispute, conduct formal and informal conferences, and take other steps to encourage the parties to agree on the terms of a contract or procedures to resolve the dispute. Some of these procedures include mediating, monitoring negotiations, conducting hearings, and ordering arbitration.

What happens if impasse exists with police and firefighters?

Chapter 589 of the Acts of 1987 gives the JLMC the power to resolve collective bargaining impasses through interest arbitration award.

What happens at Interest arbitration in a JLMC case?

There are different formats for interest arbitration, but the JLMC's cases are usually decided by a tripartite panel (though there are instances when the parties choose to have a single arbitrator). The JLMC tells the arbitration panel what issues they are authorized to decide. The issues normally consist of wages, duration of the contract, and up to five separate issues for each party. The parties will appear before the arbitration panel and present evidence through witnesses and/or exhibits. The law creating the JLMC lists the criteria the arbitration panel/arbitrator should consider in reaching a decision, including: 1. What can the employer afford to pay, given its demographics? 2. How does the employer pay other employees, especially police (in a fire case) and fire (in a police case), both historically and in the present? 3. How do communities demographically comparable to this community pay? The parties will generally submit post-hearing briefs about a month after the arbitration hearing, and the arbitration panel generally will issue its decision about a month after that.

Is a JLMC Interest Award binding?

After the interest arbitration award is issued, the arbitration panel's award is binding upon the union and the executive branch of the employer. However, to the extent that the contract needs to be funded, it is binding only if and when the legislative branch of the government (i.e., the Council or Town Meeting) votes to appropriate such funding.

II. Procedures

A. Unfair Labor Practice Procedures

1. Initiation of Unfair Labor Practice Cases

a. Prefiling Assistance/Officer of the Day

The DLR provides assistance to the public through its officer of the day. DLR agents are available once a week on Thursday afternoon from 1:00 to 5:00 p.m. to answer inquiries and assist members of the public in filing Prohibited Practice Charges (Charge). The DLR agents answer public inquiries regarding the DLR and the laws it enforces, but at no time provide legal advice.

b. Filling Out the Charge

A Charge must be in writing and signed by the party making the Charge and include a declaration that it is signed under the penalties of perjury and that its contents are true and correct to the best of his or her knowledge and belief. Parties must use DLR Charge forms. Charges challenging the amount or the validity of an agency service fee are filed on a separate form.

A Charge must contain the following information:

- The full name and address of the individual, employer, employee, or employee organization making the Charge and his or her official position, if any.

- The full name and principle place of business of the employer or employee organization against whom the Charge is made (Respondent).

- An enumeration of the subdivision of the Law claimed to have been violated and a clear and concise statement of all relevant facts which cause the Charging Party to believe that the Law has been violated.

- Agency Service Fee Charges must also include the date on which the Employee Organization made a written demand for payment of the service fee, the amount of the regular membership dues, the amount of the service demanded and the beginning and expiration dates of the collective bargaining contract under which the service fee was demanded.

- Agency Service Fee Charges that challenge the amount of the service fee must also state whether the charging party has placed the disputed amount of the service fee into a joint escrow account. If the charging party has deposited the amount of the disputed service fee in a joint escrow account, evidence that the account has been established must be submitted with the Charge. If the charging party has not deposited the amount of the disputed service fee in a joint escrow account, a statement explaining why it has not must be included with the Charge.

c. Time Limit for Filing Charges

1) The Charging Party must submit a Charge on the DLR's Charge of prohibited practice form with the DLR within six months from the date the Charging Party knew or should have known of the alleged prohibited practice, unless good cause is shown.

2) Any employee required to maintain union membership as a condition of employment who files a Charge pursuant to M.G.L. c. 150A, s. 6A, must file such Charge no more than 15 days after notice that the union has requested the employee's discharge or other adverse action for failure to maintain union membership.

d. Filing a Charge

The DLR encourages the parties to file Charges electronically. There are two ways to electronically initiate a case at the DLR and links to both of them can be found on the DLR's website.

Parties may also file Charges by hand-delivery, mail delivery or facsimile transmission. Charge forms can be found on the DLR's website and are available at the DLR. www.mass.gov/DLR

e. Service of a Charge

The Charging Party is responsible to serve the Respondent at the same time the Charge is filed with the DLR. At the time of filing, Parties are required to provide a certificate of service or other indication of service.

Parties who file electronically on the DLR website will be offered the opportunity to automatically serve the Respondent.

f. Case Docketing

When the DLR receives the Charge, the docketing staff assigns the Charge a case number. If the Charging Party is a union, the docketing staff also reviews DLR records to determine whether the union is in compliance with M.G.L. c. 150E, Sections 13 and 14. The Charging Party is notified that if the DLR authorizes the issuance of a complaint or notice of hearing then no complaint issues until the employee organization has complied with the applicable provisions of M.G.L. c. 150E, Sections 13 and 14 and 456 CMR 15.05(8).

The Director then reviews the Charge to ensure that it complies with the filing requirements described above and to review whether the case should be considered for deferral to the parties' grievance and arbitration contractual provision. For those cases that meet the filing requirements and are not eligible for deferral, the Director then classifies the Charge using the DLR's Impact Analysis System.

1) Procedure should the Charging Party fail to allege specific facts.

   The Charging Party is required to allege specific facts in the Charge so that the Respondent may fully respond to the allegations. If the DLR determines that the Charge fails to provide sufficient information, the DLR sends a letter asking the parties to show cause (show cause letter) why the Charge shouldn't be dismissed for failure to provide sufficient information. The DLR promptly considers the responses to the show cause letter, including amplification of the Charge by the Charging Party, and determines whether the Charge should be dismissed.

2) Procedure should the DLR determine that the case should be considered for deferral.

   a) If the Charging Party checked the box on the Charge form indicating that a grievance concerning the subject of the Charge has been filed, the DLR sends a show cause letter to the parties asking them for their position on whether the DLR should defer the case to arbitration.[1] The parties are asked to address whether the grievance(s) were filed prior to the expiration of the collective bargaining agreement, whether the grievance remains pending, and any other issues the parties feel are relevant to the deferral determination.

[1] *Cohasset School Committee*, MUP-410 (1973); M.G.L. c. 150E, Section 11 as amended by Chapter 145 of the Acts of 2007 (the Law or 150E).

b) If it appears from the face of the Charge that the allegations are essentially questions of contract interpretation, the DLR sends a show cause letter to the parties asking for their position on whether the DLR should defer the case to arbitration, even if the Charging Party did not indicate on the Charge that a grievance had been filed. The show cause letter in these cases also asks the employer whether it is willing to waive any timeliness defense in order to allow for deferral.

c) The DLR will give the parties 30 days to respond to the show cause letter. If the Charging Party fails to respond within 30 days, the DLR, after sending one reminder letter, dismisses the Charge with prejudice and without further notice. If the Respondent fails to respond, the DLR makes a deferral determination without the Respondent's response.

d) The DLR promptly considers the responses to the show cause letter to determine whether the allegations in the Charge should be deferred to arbitration. In making this determination, the DLR considers if: 1) the issues posed by the Charge are essentially a question of contract interpretation; 2) the statutory issues raised by the case are well settled; and 3) the resources of the DLR and the parties can be conserved through deferral.[2]

[2] *Town of Ware*, 17 MLC 1565 (1991) (citing *Whittier Regional School Committee*, 13 MLC 1325 (1986)).

e) The DLR promptly notifies the parties of the DLR's deferral decision.

When the DLR determines to defer a case to arbitration, the DLR retains jurisdiction over the allegations in the Charge in order that it may act under any of the following circumstances: a) if the grievance is not resolved with reasonable promptness by the grievance-arbitration process; b) if the grievance and arbitration procedures have not been fair or regular; or c) if the result of the grievance and arbitration procedure is repugnant to 150E. The parties are also directed to notify the DLR within 30 days of the steps taken to comply with the Notice of Deferral, including forwarding the name of the arbitrator selected and the date of the scheduled hearing. The parties are further directed to forward to the DLR copies of any arbitration awards rendered within ten days of its issuance.

When the DLR determines that a Charge should not be deferred to arbitration, it then is handled as a regular Charge under the DLR's Impact Analysis classification system.

f) After an arbitrator award issues, if the Charging Party believes the Charge should be reinstated, it may request that the DLR review the arbitrator's award. The request must be filed within ten days of the arbitrator's issuance of the Award and follow DLR filing requirements.[3] The request must address whether the arbitration process was fair and regular, whether the unfair labor practice allegations in the Charge were considered by the arbitrator, and whether the award is clearly repugnant to 150E.[4]

---

[3] 456 CMR 12.12.

[4] *Boston School Committee*, 1 MLC 1287 (1975) (*adopting Spielberg Mfg. Co.*, 112 NLRB 1080 (1955)); *City of Cambridge*, 7 MLC 2111 (1981).

g. Classification of the Charge

The Director reviews any Charge that is not subject to a show cause letter to determine whether it should be considered a Level I or Level II case, using the DLR's Impact Analysis Classification system. Cases where resolution of the dispute has the greatest urgency are processed first and the time frame for completion of the investigation is 14 to 45 days, depending on the level of urgency. Level II cases with less urgency are investigated between 30 and 90 days from the filing date. Although it is difficult to provide an exhaustive list of Level I and Level II cases, as a general rule the following types of cases are considered Level I cases: all representation-related cases, post-election cases, all blocking Charges (blocking a JLMC, Section 9 or representation Petition), 10(a)(3), (4) or (5) cases involving the permanent or indefinite loss of employment, 10(a)(6) and 10(b)(3) allegations, and cases involving novel legal issues that impact a significant number of cases.

h. Initial Notice to Parties of Pending Charge

After the initial docketing procedures discussed above, the DLR sends the parties a Notice of Investigation, notifying the parties of the pending Charge, its Impact Analysis classification, and the scheduling procedures.

1) Level I scheduling procedures.

The parties are required to confer and agree to three proposed dates for the investigation of the Charge that fall within thirty days of the Notice of Investigation. The Charging Party is required to notify the DLR of those dates within five days of the Notice of Investigation. If after reasonable attempts to secure dates, the Charging Party notifies the DLR that the parties are unable to agree on a date to schedule the investigation, the DLR schedules the investigation and notifies the parties of same. If the Charging Party fails to submit dates or submit a written statement explaining why it has been unable to submit mutually agreed upon dates, the Charge is dismissed, absent extraordinary circumstances.

2) Level II scheduling procedures.

The parties are required to confer and agree to three proposed dates for the investigation of the Charge that fall within thirty to ninety days of the Notice of Investigation. The Charging Party is required to notify the DLR of those dates within ten days of the Notice of Investigation. If the Charging Party fails to submit dates or submit a written statement explaining why it has been unable to submit mutually agreed upon dates, the Charge is dismissed, absent extraordinary circumstances.

i. Respondent's Response.

The Respondent has the right to file an answer to the Charge within fourteen days after it receives notice of the Charge. The response should be labeled "Respondent's Response" and include the docket number.

j. Amendments to the Charge

The Charging Party may amend a Charge as of right before the DLR receives Respondent's Response. A Charging Party seeking to amend a Charge after Respondent has filed its response must first seek permission from the DLR to amend the Charge.

The DLR does not allow a Charging Party to amend a Charge if the amendment does not relate to the underlying allegations.

A Charge is amended by typing "Amended" before the word Charge on the regular Charge form and by rewriting the contents of the Charge to include the desired changes.

k. Postponements

As detailed in 456 CMR 12.07, requests for postponement of an investigation are not granted unless good and sufficient cause is shown and the following requirements are met:

1) The request must be in writing to the Director or Hearing Officer.

2) The grounds for the request must be set forth in detail.

3) The requesting party must specify alternate dates for rescheduling the investigation.

4) The position of all parties concerning both the postponement request and the proposed alternate dates must be provided in the request.

5) Copies of the request must be served contemporaneously on all parties and that fact must be noted on the request.

6) The request must be signed by the party making the request

7) In considering a postponement request, a "good and sufficient" reason may include a showing to the satisfaction of the DLR that a postponement results in the settlement of the case.

8) Absent compelling circumstances, no request for postponement is granted on any of the three days immediately preceding the investigation date.

9) Absent compelling circumstances, the DLR does not grant more than one postponement request.

2. The Investigation

The DLR investigates prohibited practice Charge allegations through an In-Person Investigation procedure.

a. Purpose of the Investigation

The purpose of the In-Person Investigation is to provide the parties a full and fair opportunity to present to the Hearing Officer the relevant facts and law regarding the prohibited practice Charge so that the Hearing Officer can determine whether or not there is probable cause to believe that the Respondent violated the Law as alleged.

b. Role of the Hearing Officer

The Hearing Officer is an impartial Hearing Officer. At the investigation the Hearing Officer explains to the parties the purpose of the investigation. Hearing Officers does not provide advice to the parties and must remain neutral. Hearing Officers identify and discuss the legal theories and underlying facts upon which the theories are based with the parties at the investigation. This may be particularly true for individual charging parties who may not have any expertise in the Law and DLR procedures. If the Hearing Officer believes that an allegation is mistakenly alleged, the Hearing Officer provides the Charging Party the opportunity to withdraw or amend the allegations, if the facts are clearly identified in the Charge.

c. Representation by Counsel

Any party required to be present at the In-Person investigation may be represented by counsel or by an authorized representative, if they choose.

d. Burden of Proof

The Charging Party presents its case first and has the burden of presenting sufficient facts to support a finding of "probable cause" to believe that the Respondent violated the Law as alleged.[5]

[5] M.G.L. c. 150E, Section 11; 456 CMR 15.07.

e. Documents

The DLR does not require parties to submit documents as part of their case, but if a party wishes to submit documents, they should try their best to do so at least three days before the investigation. Additionally, the written material should be submitted in electronic form by e-mailing the documents to the DLR at Efile.DLR@massmail.state.ma.us and served on all other parties in accordance with 456 CMR 12.02. While affidavits are considered, they are not encouraged, as the parties should bring all individuals with first-hand knowledge of the relevant facts to the investigation.

f. Default Procedure

1) Charging Party fails to appear

After waiting for 30 minutes, and after the Hearing Officer attempts to contact the Charging Party, should the Charging Party fail to appear for an In-Person investigation on the pre-scheduled day, the Hearing Officer issues a show cause letter, seeking the Charging Party's position on case dismissal. If in its show cause response, the Charging Party demonstrates to the DLR sufficient cause for its failure to appear, it is the Charging Party's responsibility to reschedule the In-Person investigation, using the DLR's scheduling directions. If in its show cause response the Charging Party fails to demonstrate sufficient cause for failure to appear, the Charge is dismissed. The Charging Party may appeal the DLR's decision to dismiss the Charge.

2) Respondent fails to appear

After waiting for 30 minutes, and after the Hearing Officer attempts to contact the Respondent, should the Respondent fail to appear for an In-Person investigation on the pre-scheduled day, the Hearing Officer proceeds with the investigation, allowing the Charging Party to present its case. After the investigation, the Hearing Officer issues a show cause letter, seeking the Respondent's position on closing the record. If in its show cause response, the Respondent demonstrates to the DLR sufficient cause for its failure to appear, it is the Respondent's responsibility to reschedule the In-Person investigation, using the DLR's scheduling directions. If in its show cause response, the Respondent fails to demonstrate sufficient cause for its failure to appear, the record is closed and the Hearing Officer makes his or her probable cause determination based on the evidence presented.

g. What to Expect at the Investigation

Although any party may appear through counsel or an authorized representative, the Hearing Officer expects the parties to bring individuals with first-hand knowledge of the facts and circumstances related to the Charge.

Because this is an investigation and not a hearing, the witnesses are not sworn and there is no direct or cross examination. Rather, the parties have the opportunity to present information themselves and in response to the Hearing Officer's questions. A party may seek clarification or ask questions of the other party, but only through the Hearing Officer.

Generally, each party is limited to 45 minutes to present information, and 15 minutes for rebuttal, if necessary.

In most cases, the Hearing Officer closes the record immediately after the investigation. In the rare case where the Hearing Officer determines that additional information is necessary to make a probable cause determination, the Hearing Officer may keep the record open after the investigation and accept written submissions. This is not encouraged, however, since parties are expected to provide all facts, evidence and legal theories at the investigation. Should the Hearing Officer permit/request written submissions, the parties then receive a specific date by which to provide such written submissions to the Hearing Officer.

h. Motions

Parties must file all motions made before or after an In-Person Investigation in writing in accordance with 456 CMR 12.12. The DLR reviews all such motions and either rule on the motion in the first instance or, where appropriate, defers the motion to the Hearing Officer.

i. The Record

The record of the In-Person Investigation includes the Charge, Respondent's answer, if any, evidence presented at the investigation, and any written submissions presented before, during, or with permission, after the investigation.

j. Post-Investigation Activity

1) Dismissing the Charge

The Hearing Officer may dismiss the Charge if the Hearing Officer finds no probable cause to believe that a violation of M.G.L. c. 150E has occurred or if he or she otherwise determines that further proceedings would not effectuate the purposes of M.G.L. c. 150E. 456 CMR 15.04

The Charging Party may request review of the Hearing Officer's dismissal decision, by filing a request for review with the CERB within ten days from the date of receipt of the Hearing Officer's dismissal decision. The request must contain a complete statement setting forth the facts and reasons upon which such request is based.[6] The CERB does not consider new information or case theories presented for the first time on review.

The record for reconsideration includes the documents referenced in Section II(A)(2)(i) and the dismissal letter.

Within seven days of service of the request for review, any other party to the proceeding may file a response with the CERB.[7]

2) Deferring the Charge to Arbitration

The Hearing Officer may determine that the Charge should be deferred to the parties' contractual grievance and arbitration provision. This occurs if, after the investigation, it appears to the Hearing Officer that the allegations raised in the Charge are essentially questions of contract interpretation.[8]

If the Hearing Officer makes this determination, the DLR issues a letter explaining the deferral decision and the parties' rights and obligations concerning this decision. See Procedures, Section 6(b) (2).

The DLR does not consider a deferral decision to be a final order. Accordingly, the initial decision to defer is not subject to CERB review. However, a party may seek reconsideration of the Hearing Officer's deferral decision to the Director. The Director reviews the decision to ensure that the DLR's deferral policy is consistently applied.

---

[6] 456 CMR 15.05 (9).
[7] 456 CMR 15.05 (9).
[8] 456 CMR 15.05 (1).

After an arbitration award issues, if the DLR determines not to reinstate the case, the Charging Party may ask the CERB to reconsider the deferral decision, by filing a request for review with the CERB within ten days from the date of receipt of the DLR's decision not to reinstate the Charge. The request must contain a complete statement setting forth the facts and reasons upon which such request is based.

Within seven days of service of the request for review, any other party to the proceeding may file a response with the CERB.[9]

3) Referring the Charge to Mediation

The Hearing Officer may determine that the allegations in the Charge are best handled through the DLR mediation procedure.

If the Hearing Officer makes this determination, the DLR issues a letter explaining the referral decision and the parties' rights and obligations concerning this decision. The DLR also appoints a mediator to the case, who provides the parties with dates for the mediation.

If the parties are unable to reach a settlement agreement on their own or through mediation, the DLR reinstates the Charge and the Hearing Officer issues the probable cause determination at that time. If the Hearing Officer referred the case before the In-Person investigation was completed, the DLR asks the parties to schedule a date for an In-Person Investigation, following the DLR's In-Person scheduling procedures, Section II(A)(1)(h).

The DLR does not consider a decision to refer a case to mediation to be a final order. Accordingly, the decision to refer a case to mediation is not subject to CERB review.

The Hearing Officer may refer charges involving police or fire fighters to the JLMC to promote resolution of the issues described in the charge.

4) Issuing a Complaint or Partial Dismissal.

If the Hearing Officer determines that there is probable cause to believe that Respondent violated the Law as alleged, the Hearing Officer prepares a complaint. Should the Hearing Officer believe that there is probable cause to believe that Respondent violated the Law with respect to some of the allegations, but not others, the Hearing Officer issues one document that includes a complaint and a partial dismissal decision.

[9] 456 CMR 15.05 (9).

If the Charging Party is a union, the Hearing Officer checks the DLR records to be sure that the employee organization has complied with the applicable provisions of M.G.L. c. 150E, Sections 13 and 14 and 456 CMR 15.05 (8). If the Hearing Officer discovers that the employee organization has not complied with this statutory mandate, the DLR sends a letter to the union informing the union of its obligations and that no probable cause determination can issue until these obligations are met.

The Charging Party may request review of the Hearing Officer's partial dismissal decision by filing a request for review with the CERB within ten days from the date of receipt of the Hearing Officer's partial dismissal decision. The request must contain a complete statement setting forth the facts and reasons upon which such request is based.[10] The CERB does not consider new information or case theories presented for the first time on review.

The record for reconsideration includes the documents referenced in Section II(A)(2)(i) and the partial dismissal letter.
Within seven days of service of the request for review, any other party to the proceeding may file a response with the CERB.[11]

k. Expected Timing of Probable Cause Determination

The Hearing Officer issues a determination following the Impact Analysis guidelines. Cases where resolution of the dispute has the greatest urgency are classified as Level I cases and generally are completed within 14 to 45 days of filing the Charge, depending on the level of urgency. Level II cases with less urgency will generally be investigated and completed between 30 and 90 days from the date the investigation is completed.

3. Complaint Litigation

a. Pre-hearing

1) Classification of the Complaint

After a Hearing Officer prepares the Complaint, the Director reviews the Complaint to determine classification and scheduling issues. She does not review the Complaint for substance.

[10] 456 CMR 15.05 (9).
[11] 456 CMR 15.05 (9).

Cases may change classification status after investigation. Accordingly, similar to the procedure outlined in the Charge Classification description discussed in Section II(A)(1)(g) using the DLR's Impact Analysis Classification system, the Director determines whether the hearing is classified as a Level I or Level II hearing. Cases where resolution of the Complaint allegations have the greatest urgency are heard first. The DLR schedules Level I hearings within three to six months from when the Complaint issues, depending on the level of urgency and the decision typically issues within three months from when the record is closed. The DLR schedules Level II hearings within six months to a year from when the Complaint issues and the decision typically issues within six months from when the record is closed.

2) Mediation

Mediation is mandatory for all Level I cases. The mediation is generally scheduled to take place on the same day as the pre-hearing conference and is conducted prior to the pre-hearing conference. The parties must bring to the mediation individuals with settlement authority, or if that is impossible, ensure that those with settlement authority are available by telephone that day. Although not required in Level II cases, mediation is strongly encouraged, and the DLR provides mediators to assist the parties when they wish to mediate cases.

3) Notice of Complaint

Once the Director classifies the Complaint, the DLR sends the parties the Complaint, together with a Notice of Complaint and Procedure for Scheduling Hearing.

a) Level I Hearing Scheduling Procedures

The parties are required to confer and agree to three proposed dates for the hearing that fall within the period specified on the scheduling form. It is the responsibility of the Charging Party to initiate discussions with the Respondent and to provide the DLR the agreed-upon dates within **seven days** of the Notice of Complaint and Scheduling Procedure. If after reasonable attempts to secure dates, the Charging Party notifies the DLR that the parties are unable to agree on a date for the hearing, the DLR schedules the hearing and notify the parties of same. If the Charging Party fails to submit dates or a written statement explaining why the parties have been unable to agree upon dates, the DLR dismisses the charge and withdraws the Complaint, absent extraordinary circumstances.

b) Level II Hearing Scheduling Procedures

The parties are required to confer and agree to three proposed dates for the hearing that fall within the period specified on the scheduling form. It is the responsibility of the Charging Party to initiate discussions with the Respondent and to provide the DLR the agreed-upon dates within **30 days** of the Notice of Complaint and Scheduling Procedure. If after reasonable attempts to secure dates, the Charging Party notifies the DLR that the parties are unable to agree on a date for the hearing, the DLR schedules the hearing and notifies the parties of same. If the Charging Party fails to submit dates or a written statement explaining why the parties have been unable to agree upon dates, the DLR dismisses the charge and withdraws the Complaint, absent extraordinary circumstances.

4) Amendments to the Complaint

a) Filing the Motion

Within ten (10) days after the DLR issues a complaint, if a party believes that the Complaint should be amended to correct an error or omission; the party files a Motion to Amend Complaint with the Investigating Hearing Officer who issued the Complaint. A party does not have a right to appeal the Hearing Officer's decision to issue a Complaint or to file a motion to include new allegations it failed to raise at investigation. Should a party file a Motion to Amend Complaint after the hearing opens, it is up to the Hearing Officer to determine whether to Amend the Complaint or not or whether to remand the Complaint to the Investigating Hearing Officer.

b) Appeal

A Hearing Officer's dismissal of a pre-hearing Motion to Amend is subject to Appeal to the CERB, but under no circumstances does the CERB consider such an Appeal if it is filed less than fourteen days before hearing. The CERB rules on all such motions within seven days.

Appeals of a Hearing Officer's decision concerning Motions to Amend made at hearing should be filed as Interlocutory Appeals.[12]

[12] 456 CMR 13.04.

5) The Answer

As described in 456 CMR 15.07 (1), the Respondent files an Answer to the Complaint or Amended Complaint within ten days from the date of service, unless otherwise notified by the DLR. The Respondent specifically admits, denies, or explains each of the facts alleged in the Complaint, unless the Respondent is without knowledge, in which case the Respondent so states, such statement operating as a denial. All allegations in the Complaint or Amended Complaint not specifically denied or explained in an Answer filed, unless the Respondent states in the Answer that it is without knowledge, is deemed to be admitted to be true and is so found by the DLR, unless good cause to the contrary is shown.

6) Notice of Hearing

After the Charging Party submits the three agreed-upon dates for hearing or an explanation concerning why the parties have been unable to reach agreement, the Director assigns a Hearing Officer to the case. The Hearing Officer then chooses the date(s) for hearing from the submitted dates and picks a pre-hearing conference date. Once the Hearing Officer chooses the pre-hearing conference and hearing dates, the DLR then issues a Notice of Hearing to the parties, ordering the parties to attend a hearing and pre-hearing conference.

7) Unilateral Settlement

The DLR encourages the parties to settle cases at every case stage, including before hearing. In addition to mandatory mediation in Level I cases, and offering the parties DLR mediators to assist them at every stage of their case, a Respondent willing to fully remedy the Complaint allegations may propose a unilateral settlement to the Director. The details of the DLR's Unilateral Settlement Procedure can be found here. www.mass.gov/lwd/labor-relations/procedures

8) Petitioning the CERB to Hear a Case in the First Instance

Either party to the case or both jointly, may file a Petition asking the CERB to hear the case in the first instance. The CERB may grant such a Petition in its discretion, and for good cause shown.[13]

Generally, the CERB does not grant such a Petition unless the parties submit a stipulated record, in which the parties have agreed to all material facts, and exhibits in the case, and the CERB can issue a decision without a hearing.

[13] M.G.L. c. 150E, Section 11(f).

9) Stipulated Records

Occasionally, the parties may agree on all case facts, but not on the applicable law. In this situation, the parties are strongly encouraged to seek permission from the Hearing Officer to stipulate to all facts and receive a decision without a hearing. If the parties wish to receive a decision from the CERB in the first instance, as mentioned above, they may seek permission from the CERB to submit a stipulated record and receive a CERB decision without a hearing. The parties who wish to submit a stipulated record in lieu of a hearing may be required to enter into a written Statement of Stipulated Facts and Exhibits that includes:

(a) A statement of agreement that the parties agree to waive a hearing;

(b) A statement reciting the agreed contents of the entire record;

(c) A statement of agreement that any conflict of fact between the statement of Stipulated Facts and Exhibits and the findings contained in the Complaint of Prohibited Practice or within the Respondent's Answer, shall be resolved in favor of the Statement of Stipulated Facts and Exhibits; and

(d) A statement that the parties agree not to submit additional facts or exhibits.

The parties signing such a waiver do not waive their right to object to relevancy of any stipulated facts.

10) Motions

All motions made prior to or subsequent to the hearing are filed in writing with the Hearing Officer and states the order or relief applied for and the grounds for the motion. (See 456 CMR 12.12 for filing instructions). Within seven days of service of the motion, any other party to the proceeding may file a response with the Hearing Officer, unless otherwise directed by the Hearing Officer. The Hearing Officer may defer ruling on any motions until the close of the hearing, and may direct the parties to proceed with the hearing while the motion is pending. All motions made at the hearing are stated orally, unless otherwise directed by the Hearing Officer and are included in the hearing record.[14]

[14] 456 CMR 13.08.

11) Joint Pre-Hearing Memorandum

The DLR requires parties to engage in pre-hearing discussions in order to narrow the issues for hearing and to enable the parties to agree to as many stipulations as possible. As they are instructed to do in the Notice of Hearing, the parties are required to submit a Joint Pre-Hearing Memorandum (Joint Memo) no later than three days prior to the scheduled pre-hearing conference. The Joint Memo must include the following information:

a) Proposed stipulations of fact.

b) List of agreed-upon joint exhibits and copies of the exhibits.

c) List of prospective witnesses, including the witness' title, the specific subject matter on which the witness will testify and the expected duration of their testimony.

d) List of documents each party intends to introduce at the hearing.

e) List of any subpoena issues (including who may be subpoenaed and a brief description of the documents/testimony requested).

f) Brief description of any pending motions.

g) Any other pertinent information.

The parties must cooperate fully in drafting the Joint Memo. The Charging Party is responsible for producing the initial draft and forwarding same to the Respondent. The Joint Memo is signed by both parties or their legal representatives. If the parties are unable to file a Joint Memo, each party files its own memorandum and includes a reason for the failure to file jointly.

The Joint Memo and all proposed exhibits should be e-filed before the pre-hearing conference to the DLR at its filing address efile.dlr@massmail.state.ma.us.

12) The Pre-Hearing Conference

The Hearing Officer holds a pre-hearing conference (Conference) to ensure that the time spent in the upcoming hearing is used as efficiently as possible.[15] At the Conference, the Hearing Officer explores potential issues, including all possible stipulated facts, joint exhibits, and subpoena issues. The parties are strongly encouraged to agree to as many facts in the form of stipulations as possible to enable the parties to use hearing time for witness testimony on disputed facts.

13) Subpoenas

A party may request the issuance of a subpoena to compel the attendance of witnesses or the production of books, records, documents or correspondence at a hearing.

For details on Subpoena requests, see 456 CMR 13.14 (2), (3) and (4).

For details on Motions to Quash a Subpoena see 456 CMR 13.14 (5).

For information on failing to comply with a Subpoena see 456 CMR 13.14 (6).

14) Postponement Requests

Requests for postponement of a pre-hearing conference or hearing are generally treated the same as investigation postponements discussed above in Section II(A)(1)(k) and detailed in 456 CMR 12.07. Postponement of a pre-hearing conference or hearing is not granted unless good and sufficient cause is shown and the following requirements are met:

a) The request must be in writing to the Director or Hearing Officer.

b) The grounds for the request must be set forth in detail.

c) The requesting party must specify alternate dates for rescheduling the hearing or conference.

d) The position of all parties concerning both the postponement request and the proposed alternate dates must be provided in the request.

[15] 456 CMR 13.07 (7).

e) Copies of the request must be served contemporaneously on all parties and that fact must be noted on the request.

f) The request must be signed by the party making the request.

g) In considering a postponement request, "good and sufficient" reason may include a showing to the satisfaction of the Hearing Officer that a postponement results in the settlement of the case.

h) Absent compelling circumstances, no request for postponement is granted on any of the three days immediately preceding the conference or hearing date.

i) Absent compelling circumstances, the DLR does not grant more than one postponement request in the case.

b. Hearing

1) Burden of Litigating the Complaint Allegations

Although the DLR issues the Complaint in its own name and must authorize all Complaint allegations, the Charging Party is responsible for litigating the case.

2) Burden of Proof

The facts that must be proven to support or defend against the Complaint depend on the allegations contained in the Complaint. Generally, the Charging Party has the burden to prove, by a preponderance of the evidence, any allegation that the Respondent has denied. For a fuller discussion of the elements of different types of charges, see the Summary of Decisions Section, below.

3) Role of the Hearing Officer

The Hearing Officer conducting the hearing assists the parties by answering questions about the DLR procedures, though the Hearing Officer cannot act as the representative of a party or give legal advice. The Hearing Officer may ask questions of the parties and witnesses to clarify testimony, issues, or positions.

The role and authority of the Hearing Officer are detailed in 456 CMR 13.03 (2) and 456 CMR 13.07.

4) Exhibits

a) DLR Exhibits

The Record always includes the underlying Prohibited Practice Charge, the Complaint, Notice of Hearing, and the Answer. These documents are marked as DLR Exhibits 1-4.

b) E-Filing Exhibits

Documents or records expected to be introduced in evidence should be e-filed before hearing to the DLR at its filing address efile.dlr@massmail.state.ma.us. The Hearing Officer may ask the parties to e-file additional exhibits after the hearing is completed. Parties should also bring sufficient hard copies to the hearing for the Hearing Officer and all other parties and a witness copy.

5) Reporter and Transcript of Testimony

The Hearing Officer records the hearing and offers the parties a digital recording or computer disc of the recording.

Parties who wish to pay for the services of a stenographer to record and transcribe a hearing may request permission of the Hearing Officer. A party may further request that the Hearing Officer designate a written transcript of the proceeding as the official record subject to the following requirements listed in 456 CMR 13. 12:

a) The transcript is made available to all parties.

b) All have the opportunity to object to the accuracy of the transcript.

c) A copy of the transcript is made available for purchase to all other parties for a reasonable fee.

d) A copy of the transcript is provided without charge to the DLR.

6) Open to the Public

Except in extraordinary circumstances, a hearing is open to the public.

7) Opening Statements

The parties are given the opportunity to present opening statements to the Hearing Officer to set the context of the case, explain why certain elements and evidence are relevant to the case, and offer the party's legal theories on the Complaint allegations. The Respondent may choose to wait to present its opening statement until before it presents its case.

8) Witness Testimony Live and Video

Witnesses are examined orally under oath or affirmation, except if they reside outside of the Commonwealth or because of illness or other cause are unable to testify at the DLR. In such situations, the DLR may direct that the testimony be taken by video.[16] A party requesting video testimony must provide all necessary video conferencing equipment. That party may also be required to retain a stenographer to ensure that the video testimony is accurately recorded.

In determining whether video testimony is appropriate the DLR considers the following:

a) Significance of the testimony.

b) Proximity of witness to the hearing site.

c) Circumstances leading to the request.

d) Number, length, and types of documents to be moved into evidence through witness testimony.

e) Number of witnesses who would testify by video and expected length of testimony.

f) Availability and adequacy of video conferencing equipment.

g) Position of the parties.

[16] 456 CMR 13. 10.

9) Sequestration of Witnesses

The Hearing Officer may grant a party's motion to issue a Sequestration Order or may on her own order sequestration. This means that all persons who are going to testify, with certain exceptions, may be present in the hearing room only when they are giving testimony. In addition, witnesses may not discuss testimony with any other witnesses or potential witness during the course of the hearing. Parties can select one individual to remain in the hearing, even if they are a potential witness, if they deem the person essential to the presentation and management of the case.

10) Examination of Witnesses and Introducing Exhibits

The Charging Party presents its evidence first, by calling its witnesses and submitting any documentary evidence that it has to support the allegations in the Complaint. The Respondent has the opportunity to cross-examine the Charging Party's witnesses. The goals of cross-examination include impeaching the witness' testimony and gaining admissions of fact. The Charging Party should "rest" its case in chief after it is done calling witnesses, subject to its right to present rebuttal witnesses after the Respondent has finished calling witnesses and rests its case.

Rebuttal testimony is limited to testimony offered to refute evidence provided by the Respondent's witness. It may not be used to offer evidence that the Charging Party should have offered in its case in chief. Surrebuttal testimony is limited to testimony offered by Respondent to refute evidence that Charging Party offered in Rebuttal testimony.

Voir dire is an examination into the authenticity of an exhibit that an opposing party offers and the competence of the witness to authenticate the exhibit or to be an expert witness. Voir dire is used to explore whether to object to the witness or document. Counsel may use leading questions in voir dire examination, but must limit the questions to authenticity and are not allowed to ask general cross examination questions. Voir dire must be conducted at the time an exhibit is offered into evidence and is untimely after the exhibit is accepted into the record.

11) Objections

A party should object to questions posed on direct or cross examination to keep improper evidence from being included in the record and considered, and to make a record for the Hearing Officer and possible appellate review. Objections are made in a timely manner by voicing the objection as soon as the question is posed. The Hearing Officer rules on all objections at the hearing. A party may file an Interlocutory Appeal of a Hearing Officer's ruling on the objection.[17] The CERB applies an abuse of discretion standard when ruling on interlocutory appeal.[18]

12) The Rules of Evidence

The Hearing Officer is not bound by the technical rules of evidence prevailing in courts.[19] However, the Hearing Officer uses these rules as a guide to ensure that only relevant and reliable evidence is introduced at hearing.

13) Oral Arguments or Briefs

The parties are entitled to present oral arguments at the close of the hearing or more typically, with the Hearing Officer's permission, to file briefs. Briefs must be filed within ten days after the close of the hearing, unless the Hearing Officer directs the parties to do otherwise.[20]

Any request for additional time to file a brief must be filed with the DLR no later than three days before the date the brief is due.[21]

No reply briefs may be filed without permission.[22]

14) Motion to Reopen the Hearing

A Hearing Officer has discretion to reopen a hearing and receive further evidence prior to the issuance of a final decision, but is only done so in extraordinary circumstances.

---

[17] 456 CMR 13.04.
[18] *City of Cambridge*, 30 MLC 31 (2003); *Commonwealth of Massachusetts*, 7 MLC 1477 (1980).
[19] 456 CMR 13. 03.
[20] 456 CMR 13. 15(1) and (2).
[21] 456 CMR 13. 15(3).
[22] 456 CMR 13. 15(4).

Absent extraordinary circumstances, a record is not reopened.[23] The reason for this standard is to protect the finality of the proceedings and to conserve limited public resources. To do otherwise would discourage parties from securing and presenting all available evidence at the hearing.

The party seeking to reopen the hearing must show that it was excusably ignorant of the existence of the evidence at the time of the hearing despite the exercise of due diligence.[24]

c. Post-Hearing

1) The Record

The Hearing Officer only considers the case record in deciding the case. The record consists of the evidence submitted at the hearing submitted through joint stipulations, exhibits (including DLR exhibits) or witness testimony. Evidence previously submitted at the investigation is not considered part of the record at the hearing unless it is independently submitted at the hearing.

2) The Decision

The Hearing Officer's ultimate decision on the merits is based on full consideration of the record. After the close of hearing and submission of briefs, the Hearing Officer issues a decision that sets forth findings of fact, legal conclusions and a remedial order, should the Hearing Officer find a violation of the Law.[25]

As mentioned above in the "Classification of the Complaint" section, in Level I cases the DLR anticipates the decision to issue within three months from when the record is closed. In Level II cases, the DLR anticipates the decision to issue within six months from when the record is closed.

The Hearing Officer's decision is final and binding on the parties unless within ten days of notice of the decision, one of the parties requests CERB review.[26]

---

[23] *Commissioner of Administration and Finance Alliance*, 21 MLC 1198 (1994) (citing *City of Haverhill*, 17 MLC 1215 (1990)).
[24] *City of Haverhill*, 17 MLC 1215 (1990); *Boston School Committee*, 17 MLC 1118 (1990); *Boston City Hospital*, 11 MLC 1065 (1984).
[25] M.G.L. c. 150E, Section 11; 456 CMR 13. 03 (1) (k).
[26] 456 CMR 13. 19 (1).

3) Appeal of Hearing Officer's Decision

A party must file with the DLR its notice of appeal of a Hearing Officer's decision, together with a supplementary statement within ten days of receiving notice of the decision. The Notice of Appeal must be in writing and contain the case name and number, the date of the Hearing Officer's decision and a statement that the party requests CERB review. Supplementary statements must state with specificity the basis of the appeal.

The record on CERB review consists of the Hearing Officer's decision, the parties' supplementary statements, portions of the record before the Hearing Officer as are necessary to resolve factual disputes and such other evidence from the hearing as the CERB may require.[27]

For detailed information on Hearing Officer Decision appeals to the CERB, see 456 CMR 13. 19. Failure to provide the information described in this section may result in summary dismissal of the appeal.[28]

The CERB's Appeal decision is final and binding on the parties. Filing a Judicial Appeal of the CERB's decision and order does not excuse compliance with the CERB's order.[29]

4) Judicial Appeal

Any party seeking review of a CERB decision may institute proceedings for judicial review in the Appeals Court within thirty days after receipt of said order.[30]

The appealing party need not file a Notice of Appeal with the Appeals Court. Rather, to pursue an appeal, the appealing party must file a Notice of Appeal with the DLR within thirty days from when it receives the CERB decision.

Once the DLR receives the Notice of Appeal, it sends the appealing party a letter explaining next steps, including the appealing party's obligations with respect to producing a transcript of the hearing. Failure to provide a transcript leaves the DLR unable to assemble the record. Accordingly, after proper notice is given to the parties, should the appealing party fail to provide a transcript, the DLR may dismiss the appeal.

---

[27] 456 CMR 13.19(4).
[28] 456 CMR 13.19(3)(c).
[29] M.G.L. c. 150E, Section 11.
[30] M.G.L. c. 150E, Section 11.

The DLR is considered the lower court for purposes of the Appeals Court process and is responsible for assembling the record. The Chief Counsel notifies the appealing party when the record is in fact assembled so that the appealing party may docket the appeal in the Appeals Court. It is incumbent upon the appellant to enter the case in the Appeals Court within ten (10) days of receiving the Notice of Assembly of Record.[31] If the appellant does not take the required steps to enter the case in the Appeals Court, the DLR issues a notice requesting that the appellant show cause why the DLR should not dismiss the appeal with prejudice and permanently close the file for failure to comply with Mass. R.A.P. 10(a)(1).[32] If the appellant fails to respond accordingly, the appeal is dismissed with prejudice.

5) Mediation

The parties are encouraged to settle cases at all stages, including post-hearing. The Chief Counsel will identify cases that are likely to settle at the Judicial Appeals stage and inform the DLR Mediation Manager, so that she may assign a mediator to pursue mediation. The parties are also encouraged to contact the DLR if they believe mediation will be helpful.

6) Compliance and Enforcement

After a decision is final and binding, if the Hearing Officer or CERB ordered the Respondent to remedy the prohibited practice, it is Respondent's responsibility to inform the DLR of the steps that it has taken to comply with the remedial order.

If a Charging Party claims that a Respondent has not done everything that the decision ordered, the Charging Party should notify the DLR in writing, following the process outlined in 456 CMR 16.08.

Based on the information provided, the DLR determines whether to institute enforcement proceedings in Superior Court, decline to seek enforcement, or in the case of a genuine dispute as to compliance, order that a compliance hearing be held. At any hearing concerning the alleged non-compliance, the party required to comply with the DLR's order has the burden of proving such compliance by preponderance of evidence.

For detailed information about the parties' responsibilities with respect to compliance and enforcement see 456 CMR 16.08(7) and (8).

---

[31] Mass. R.A.P. 10(a).
[32] *See also* Mass. R.A.P. 10(c).

B. Representation Case Procedures

1. Petitions

a. There are five different kinds of Representation Petitions that can be filed at the DLR.

1) A Union Representation Petition – When employees wish to be represented by a union for the purposes of collective bargaining, a union can file a Union Representation Petition. This Petition can be filed when there has been no prior or current union representation or where employees have union representation but wish to be represented by a different union.

2) Petition for Certification by Written Majority – When employees who wish to be represented by a union for the purposes of collective bargaining, a labor organization can seek to forego a DLR run secret election and can instead seek certification based on a Written Majority Authorization (WMA). This Petition can only be filed when no other employee organization has been, or currently is, recognized or certified as the exclusive representative of the employees.

For detailed information concerning the DLR's WMA processing, see Section II(B)(3) below.

3) Petition for Union Decertification – When an employee or employees wish to decertify the incumbent union, the employee or employees can file a Petition requesting that the DLR conduct an election at which employees choose between no union or continued representation by the incumbent union.

4) Employer Petition – An employer may file a representation petition when one or more unions claim to represent a substantial number of employees in a bargaining unit.

5) Unit Clarification Petition – When the employer of one or more unions seek clarification of the bargaining unit placement of certain employees or amendment of an existing certification, the employer or one or more unions may file a Unit Clarification Petition. Individual employees may not file a Unit Clarification Petition.

For detailed information concerning the DLR's Unit Clarification processing, see Section II(B)(7) below.

6) Parties petitioning for an add-on election or to sever employees from an existing bargaining unit may use a Representation Petition form. For further analysis of Add-on and Severance petitions, see the Summary of Law Section III(D)(2) below.

b. Filing Representation Petitions

1) The Forms

Petition forms are available on the DLR website (www.mass.gov./lwd/labor-relations/). The Petition must be entirely completed, including Petitioner's name and address, Certification of Service on all parties, date and signature. For detailed information on filling out the Petition see 456 CMR 14.02 – 456 CMR 14.04 and 456 CMR 14.19.

The Petitioner may file its Petition electronically, however, the showing of interest and evidence of written majority authorization, i.e., authorization cards, may not be filed electronically or by facsimile transmission.[33]

2) DLR Initial Steps

The DLR date-stamps the Petition and all authorization cards when it receives them. The DLR dockets and assigns the Petition a case number. The DLR examines the Petition for apparent defects. If the Petition is materially defective, it sends a notice to the Petitioner. In those cases, a DLR agent is not assigned and no further action is taken on the case unless the Petitioner corrects the defect within the time period for filing. Defects may include an inadequate showing of interest, lack of jurisdiction when apparent from the face of the Petition, or insufficient information on the Petition.

[33] 456 CMR 12.12 (5).

c. Showing of Interest

1) What is it?

The term "showing of interest" means the percentage of employees in a proposed bargaining unit or a unit deemed to be appropriate who have designated a union as their exclusive representative or have signed a petition seeking decertification of an incumbent union. The showing of interest can be in the form of individual cards or a petition individually signed and dated by the employees, authorizing the named employee organization to represent them for the purpose of collective bargaining or seeking to decertify the incumbent employee organization. Any such cards or petitions must be signed and individually dated by employees within six months of Petition filing.[34] As noted below in the WMA Section, WMA cards are valid for 12 months.[35] The name of the card signer should also be printed so that the signature may be readily recognizable.

As mentioned above, a showing of interest may not be filed electronically or by facsimile transmission.[36]

The number of authorization cards and the identity of the employees who have signed cards or a petition are confidential. The DLR returns the showing of interest to the Petitioner and any Intervenors when the case is closed. See 456 CMR 14.05(3) and Sections II(B)(2)(c)(2) and II(B)(2)(e) for detailed information on Intervention. The DLR does not consider the showing of interest to fall within the public records statute.[37]

2) Showing of Interest Required

Petitioners filing Union Representation Petitions and Union Decertification Petitions are required to file a Showing of Interest when filing a Petition. Unions that wish to intervene in such cases, other than the incumbent union, are also required to file a showing of interest as discussed below. The DLR may require the Employer to submit a payroll or personnel list to assist the DLR in determining whether the Petitioner has provided a sufficient showing of interest.[38]

---

[34] 456 CMR 11.03.
[35] M.G.L. c. 150E, Section 1.
[36] 456 CMR 12. 12(5).
[37] M.G.L. c. 4, Section 7, cl. 26.
[38] 456 CMR 14.05(6).

If the DLR finds that the Petitioner failed to submit a sufficient showing of interest, the DLR notifies it of that finding and allows it 7 days to submit a further showing of interest. If after 7 days, the Petitioner fails to provide a sufficient showing of interest, the DLR may dismiss the Petition.

Within 30 days of the date of the DLR's Notice of Hearing, other interested unions may file a Motion to Intervene in the Petition. With the exception of an incumbent's Motion, an intervention motion must be accompanied by the required showing of interest.[39]

If the parties agree to a larger unit than the bargaining unit proposed on the Petition, or the CERB issues a decision and direction of election in a unit larger than that requested by the Petitioner, the Petitioner or an Intervenor must indicate its willingness to participate in such an election. Further processing of the Petition is then conditioned on the Petitioner or an Intervenor having an adequate showing of interest in the enlarged unit. As is the case discussed above, when a Representation Petition is initially filed, the DLR gives the Petitioner and/or the Intervenor seven days to provide a sufficient showing of interest.

a) Union Representation Petition

A Petitioner seeking to represent a proposed bargaining unit of employees who are not currently represented must submit a showing of interest of 30%.[40]

A Petitioner seeking to represent a bargaining unit of employees who are currently represented must submit a showing of interest of 50%.[41]

Should an additional union, other than the petitioning union, wish to intervene in a Union Representation case, it must submit a showing of interest of 10%, together with its Motion to Intervene, although an incumbent union need not submit a showing of interest with its Motion.[42] For more information on Motions to Intervene, see 456 CMR 14.18 and Sections II(B)(2)(c)(2) and II(B)(2)(e) below.

[39] 456 CMR 14.05(4); 456 CMR 14.18.
[40] 456 CMR 14.05(2).
[41] 456 CMR 14.05(3).
[42] 456 CMR 14.05(4).

b) Petition for Union Decertification

A Petitioner seeking to decertify the incumbent collective bargaining representative must submit a showing of interest of 50%.[43]

3) Challenging the Showing of Interest

The sufficiency of the showing of interest is an administrative determination made by the DLR and is not subject to litigation by the parties.[44] However, a party who wishes to challenge the showing of interest may request that the DLR investigate it. When presented with supporting evidence that gives the DLR reasonable cause to believe that the showing of interest may be invalid, the DLR conducts a further administrative investigation.

d. Petition Bars

There are five bars that prohibit the DLR from processing a Representation Petition.

1) Contract Bar

Except for good cause, the DLR does not process a Petition during the term of a valid collective bargaining agreement unless the Petition is filed no more than 180 days and no fewer than 150 days prior to the termination date of the contract.[45] This is generally referred to as the "open period."

No collective bargaining agreement operates as a bar for a period of more than three years.[46]

The open period of a Petition filed under M.G.L. c. 150A is no more than 90 days and no less than 60 days prior to the contract's expiration.[47]

For further information on contracts, see Section III (E)(4)(b) below.

---

[43] 456 CMR 14.05(3).
[44] *Commonwealth of Massachusetts*, 10 MLC 1557 (1984).
[45] 456 CMR 14.06(1).
[46] 456 CMR 14.06(1).
[47] *Hudson Bus Lines*, 4 MLC 1630 (1977).

2) Withdrawal/Disclaimer Bar

Except for good cause, the DLR does not process a Petition in any bargaining unit if, after the approval of a consent election agreement or the close of a hearing, but before the election is held, the Petitioner withdrew from a prior Petition for the same unit within the preceding six months, or disclaimed interest in continued representation of the bargaining unit within the preceding six months, or, withdrew a written majority authorization petition after the designation of a neutral, but before the start of the verification process within the preceding six months.[48]

3) Election Year Bar

Except for good cause, the DLR does not conduct an election if an election has been conducted among the petitioned-for employees in the previous 12 months, or, if a neutral has conducted a written majority authorization verification process in the previous 12 months. See 456 CMR 14.19 for more detailed information on Written Majority Authorization.[49]

4) Certification Year Bar

Except for good cause, the DLR does not process a Petition within the 12 month period after the DLR certifies a bargaining representative, either by election or the written majority authorization process.[50]

5) Recognition Year Bar

Except for good cause, the DLR does not process a Petition for any existing bargaining unit for which a voluntary recognition agreement has been executed in the preceding 12 months. See 456 CMR 14.06(5) for more detailed recognition year bar information.

For further information on employer recognition, see the Green Book legal discussion section below.

[48] 456 CMR 14.06 (2).
[49] 456 CMR 14.06(3).
[50] 456 CMR 14.06(4).

e. Written Majority Authorization Bars

1) Withdrawal Bar

Except for good cause, the DLR does not process a WMA Petition, if within the preceding six months, the Petitioner withdrew a WMA Petition or a Representation Petition in the same or similar bargaining unit, after the selection or designation of a neutral, but before the verification process.

2) Verification/Election Year Bar

Except for good cause, the DLR does not process a WMA Petition in the same or similar bargaining unit within which a neutral conducted a WMA Authorization Verification in the preceding 12 months, or within which a valid election has been held in the preceding 12 months.

3) Certification Year Bar

Except for good cause, the DLR will not process a WMA petition in the same or a similar bargaining unit represented by a union certified through a WMA process or a valid election process in which the DLR has issued a certification within the preceding 12 months.

f. Potential Petition Processing Pitfalls and Problems

1) Deferral to AFL-CIO "no raiding" Procedure

If an employee organization affiliated with the AFL-CIO petitions to represent a bargaining unit currently represented by another AFL-CIO affiliated union, any party may request the DLR to defer processing of the Petition for 30 days to permit the employee organizations to pursue the settlement provisions of the AFL-CIO "no-raiding" procedure.[51]

2) Blocking Charges

Any party to a Representation Petition may file a motion requesting that a pending prohibited practice charge block an election.[52] The party seeking to block the Petition from going forward must produce evidence that establishes probable cause to believe that the conduct alleged in the prohibited practice charge occurred and violated M.G.L. c. 150E or c. 150A. The party seeking to block processing of the Petition must also establish that the alleged unlawful conduct may interfere with the conduct of a valid election.

---

[51] 456 CMR 14.17.
[52] 456 CMR 15. 11.

For further information on blocking charges, see the Summary of Law Section III(E)(4)(f) below.

2. Initial Contacts with the DLR

a. Notice of Hearing

Once the DLR determines that the Petitioner has filed the appropriate showing of interest and that there is no impediment to processing the Petition, the DLR assigns a Hearing Officer to the case.

The DLR then issues a Notice of Hearing, informing the parties of the Petition. The Notice of Hearing provides dates for a pre-hearing conference and hearing and the name of the Hearing Officer assigned to the case. The Hearing is scheduled approximately six weeks from the date the Petition was filed. A copy of the Petition is served on all parties with the Hearing Notice.[53]

Despite the Notice of Hearing, the Hearing Officer continually encourages the parties to enter into a Consent Election Agreement.

1) Employer's Duty of Neutrality

When a rival union files a petition and proper showing of interest to represent a bargaining unit of employees currently represented by a union, the Petition raises a question concerning representation. Once the Employer receives the DLR's Notice of Hearing, it is on notice of the rival union's Petition. The Employer must then maintain strict neutrality, which includes not bargaining with the incumbent union during the pendency of the Representation Petition.[54]

After the DLR issues its Notice of Hearing, the parties should communicate exclusively with the Hearing Officer on all related matters.

b. Employer must post the Notice of Hearing

When the Employer receives the Notice of Hearing, it should post the Notice and the Petition in a place readily accessible to the employees. This is to ensure that employees affected by the filing of the Petition are aware of it.[55]

---

[53] 456 CMR 14.08.
[54] *Town of Wakefield*, 10 MLC 1016 (1983); *Commonwealth of Massachusetts (Alliance)*, 7 MLC 1228 (1980).
[55] 456 CMR 14.08(3).

c. Initial Communications with the Parties

The Hearing Officer generally e-mails the parties asking for information approximately three to five days after the Notice of Hearing issues.

1) Employer

The Hearing Officer seeks certain information from the Employer concerning the issues raised by the Petition, and copies all parties on the information request. Examples of information the Hearing Office may seek include the following:

- A list of all positions in the department, school or agency in which the Petitioner is seeking to represent a bargaining unit of employees and an indication of which positions are represented by a union.
- Current job descriptions for each of the petitioned-for positions.
- The case numbers and dates of any prior petitions or DLR elections in the petitioned-for bargaining unit.
- A description of the Employer's legal position regarding the appropriateness of the petitioned-for bargaining unit, and the factual basis for the position.

2) Incumbent Union

- Motion to Intervene

If the Hearing Officer learns that there is an incumbent union representing the employees in the proposed bargaining unit, the Hearing Officer notifies the incumbent union that it has 30 days from the date of the DLR's Notice of Hearing to file a Motion to Intervene.[56] As noted above, the incumbent need not file a showing of interest.[57] If an incumbent files a Motion to Intervene, other parties to the Petition have seven days to file an opposition.[58] After the seven-day period, the DLR decides whether to allow the Motion to Intervene and notifies the parties of its decision.

[56] 456 CMR 14.18.
[57] 456 CMR 14.05(4).
[58] 456 CMR 13.08.

- Disclaimer of Interest

  If the incumbent union indicates to the Hearing Officer that it does not wish to intervene, the Hearing Officer sends a letter to the incumbent union, with copies to the Employer and the Petitioner, confirming that the incumbent union has decided not to intervene.

  The failure of an incumbent union to file a timely Motion to Intervene is treated as a disclaimer of interest in representing the petitioned-for bargaining unit employees and the incumbent union is not on any ballot or is considered a necessary party to any consent agreement for election.[59]

d. Consent Election Agreements

The Hearing Officer contacts the parties to determine whether the parties can work out a Consent Election Agreement (Agreement). If they agree, the Agreement must include the following information:

- The full and correct names of the parties involved in the manner in which the parties wish to be designated on the ballot.

- A complete and accurate description of the bargaining unit.

- Agreement on the appropriateness of the Petition (i.e., that the Union is a labor organization, the Employer is subject to the DLR's jurisdiction, that the Petition was filed at a proper time).

- The date that employees must be on the payroll in order to be eligible to vote, which is generally the last day of the payroll period preceding the execution of the Consent Election Agreement.

- An agreement that the Employer files two copies of an election eligibility list, containing the names and addresses of all eligible voters with the DLR no later than seven days from the date the Agreement is approved by the DLR.

If the agreement does not include the time, date and hours of the election, the DLR consults with the parties prior to the preparation of the Notice of Election in making these determinations.

The Agreement is subject to the DLR's approval because the DLR must be satisfied that the agreed-upon bargaining unit is appropriate within the meaning of M.G.L. c. 150E, Section 3. For further information on Consent Election Agreements, see 456 CMR 14.11.

[59] 456 CMR 14.18(1).

e. Motions to Intervene

As noted above, an incumbent labor organization wishing to intervene may file its motion without evidence of a showing of interest. Other labor organizations seeking to intervene in a representation case must provide with their Motion to intervene a 10% showing of interest.

f. Failure to Reach Agreement

If the parties are unable to agree to a Consent Election Agreement, the DLR conducts an Investigatory Hearing to enable the CERB to decide any questions raised by the petition.

3. Written Majority Authorization

a. Initiating a Written Majority Authorization (WMA) Petition

See Section II(B)(1) for basic information on initiating a representation petition.

b. Representatives to Contact

1) The petitioner must name and provide contact information for its representative. The representative must have knowledge of the positions included in the petitioned-for unit and any other bargaining units that include other employees of the Respondent. The representative must be prepared to respond to phone calls, letters, and/or emails from the DLR.

2) The petitioner must also name and provide contact information for a representative for the employer that, to the best of his/her knowledge, has knowledge of the petitioned-for positions and is available to respond to phone calls, letters, and/or emails from the DLR.

c. Showing of Interest

1) For general information, see Section II(B)(1)(c) above.

2) Written Majority Authorization Evidence

Written Majority Authorization Evidence may be in card or petition form and must be signed and individually dated and include the following language:

WRITTEN MAJORITY AUTHORIZATION

- I, **(FULL NAME & Job Classification/Title)**, designate **(PRINT OR TYPE NAME OF EMPLOYEE ORGANIZATION)** as my representative for the purposes of collective bargaining. I certify that this designation is my free act and deed and is given without consideration.

  SIGN & DATE

- If the petitioned-for unit consists of both professional and non-professional employees, all professional employees must include an additional statement (either on the card/petition itself or on an accompanying signed & dated document) that they agree to be included in a collective bargaining unit consisting of both professional and nonprofessional employees

- Signatures must be dated within 12 months of the filing of the petition

- The DLR and the outside neutral, if any, maintains the confidentiality of the written majority authorization evidence. The written majority authorization evidence is not furnished to or examined by any of the parties or any other individual or entity (except insofar as the petitioner was in possession of the written majority evidence prior to submission).

d. Initial DLR Steps

1) The DLR contacts the petitioner to clarify the scope of the petitioned-for unit or correct minor discrepancies prior to taking any further action on the petition.

2) The DLR notifies the parties when the petition is docketed. The Notice includes a description of the petitioned-unit and an explanation of the written majority authorization procedure and associated timeframe.

e. Written Majority Authorization Bars

The three WMA bars to filing a petition are discussed in Section II(B)(1)(e).

f. Processing of the Petition

1) The DLR performs an initial review of the petition for apparent defects and to determine if the Petitioner has submitted sufficient written majority evidence. If the petition is not materially defective and sufficient evidence of written majority authorization has been submitted, the DLR notifies the parties that the DLR docketed the petition.

2) Within 10 days from the date that the DLR has docketed the Petition, the petitioning employee organization notify the DLR whether the employee organization and the employer have agreed upon an outside neutral or whether the DLR will act as the neutral for the purpose of conducting a confidential inspection of the written majority authorization evidence and verifying the employee organization's majority support. If the employee organization fails to provide this notice to the DLR or the parties cannot agree on a neutral, the DLR assumes the role without further notice. If the parties agree upon an outside neutral, the employee organization notifies the DLR of the outside neutral's name and contact information including e-mail.[60] If an outside neutral is retained, the outside neutral performs his or her function pursuant to 456 CMR 14.19(11).

3) Employer Written Response to the Petition

No later than three days after the selection of the neutral, the employer provides the petitioning employee organization and the Neutral with a written response to the Petition. The written response contains the following:

[60] 456 CMR 14.19(6).

a) List of Employees in Petitioned-for Unit

The employer must provide a list containing the full names and titles or classifications of the employees in the petitioned-for bargaining unit. The list must be provided regardless of whether the employer is filing any challenges. This list includes all employees who were employed on the filing date of the Petition. **If the employer does not supply this information within the specified timeframe, the employer is precluded from filing any challenges or exceptions and the DLR, or outside neutral, if any, determines the sufficiency of the written majority authorization based upon information provided by the petitioning employee organization.** If the employer does not provide this information within three days after the selection or designation of the neutral, the petitioning employee organization provides this information to the Neutral within two business days from the date that the employer's information was due.

b) Challenges and all Evidence in Support Thereof

The employer must include all evidence it intends to produce in support of its challenges in its Response. Potential challenges include:

- A claim that the petitioner's evidence regarding the written majority authorization evidence is invalid and does not conform to the requirements of 456 CMR 14.19 (1)(a) though (3)(g). The challenge includes factual disputes concerning the validity of the written majority authorization evidence including, for example, whether an employee was employed on the date that the petitioning employee organization filed the Petition of Certification for Written Majority Authorization.

- A claim that the petitioned-for bargaining unit is inappropriate. If the employer challenges the appropriateness of the unit, in addition to any evidence in support of its challenge, the employer must also describe with particularity what it considers to be an appropriate unit.

- A claim that the petitioned-for unit includes managerial, confidential or casual employees who are not employees within the meaning of M.G.L. c. 150E, § 1. See the Summary of Law Section III(B)(3) for further discussion of managerial, confidential and casual employee status. Evidence in support of a challenge that certain employees are managerial or confidential include job descriptions, organizational charts, and affidavits from persons with first-hand knowledge of the challenged individuals and specific examples of duties they perform that meet the statutory criteria.

- A claim that the union engaged in fraud or coercion in obtaining the written majority authorization evidence. Such an allegation is alleged with particularity and the party or employee alleging fraud or coercion must provide its evidence of fraud or coercion in the form of a sworn affidavit. The employer filing the written opposition containing an allegation of fraud or coercion must provide some evidence that it has made an independent investigation into the veracity of the fraud or coercion claim prior to raising the claim in the written opposition. If no such evidence is provided, the employer is precluded from raising claims of fraud or coercion during the pendency of the Petition.

c) Statement Regarding Other Unions or Petitions

A statement that no other employee organization has been or currently is lawfully recognized as the exclusive representative of the employees in the appropriate bargaining unit and that there are no outstanding petitions, filed pursuant to M.G.L. c. 150E § 4, by any other employee organization which includes any of the employees, titles, or classifications in the petitioned-for unit.

d) Any Other Issues Raised by the Petition

4) Within three days of receiving the employer's written submission, the petitioner files a response including any challenges regarding specific employees or job titles included in the employer's list of employees.[61] If the petitioner provides the neutral with a list of the employees in the petitioned-for unit because the employer failed to supply this information, the employer can challenge the inclusion or exclusion of a name on the list within three days of presentation of the petitioner's list to the neutral.[62]

[61] 456 CMR 14.19(8).
[62] 456 CMR 14.19(8).

g. Challenge Determination

The Neutral (at the DLR the neutral agent making this determination is a Hearing Officer) makes a determination regarding the employer's challenges based on written submissions. There is no hearing.

1) Challenges that Affect the Determination of Majority Status

If the number of challenged employees would potentially result in the petitioner's inability to show that a majority of the petitioned-for unit supported certification, the Neutral rules on the challenges.

If the Neutral determines that the employer's challenges are without merit or if the employer failed to provide evidence in support of its challenges, the Neutral dismisses the challenges and verifies the petitioner's majority support.

If the Neutral determines that the challenges have merit, the Neutral dismisses the petition.

2) Challenges that do not Affect the Determination of Majority Status

If the number of positions/employees within the scope of the employer's challenges would not change the determination of the petitioner's majority status, the Neutral dismisses the challenges.

3) The Neutral's decision regarding the employer's challenges is based solely on the parties' written submissions. The Neutral requests further information from either party if necessary.

h. Final Verification and Certification

If after ruling on all challenges, the Neutral determines that the petitioner has supplied sufficient evidence verifying majority support of the petitioned-for unit, the DLR issues a certification of the bargaining unit.

The DLR completes the verification process within 30 days.[63] The regulations describe two specific circumstances that permit the verification process to extend beyond 30 days: 1) the neutral must resolve the employer's challenges and 2) allowing the petitioner to become compliant with G.L. c. 150E sec. 13 and 14. However, the regulations do not limit "exceptional circumstances" to those specifically listed.

[63] 456 CMR 14.19 (14).

i. Appeal

There is no judicial review of a representation decision and that includes WMA decisions. However, after the DLR certifies the petitioned-for bargaining unit, a party may seek review of the certification through the Reinvestigation of Certification procedure outlined in 456 CMR 14.15. Additionally, should the DLR dismiss the WMA Petition, the DLR's decision to dismiss is subject to its reconsideration procedure outlined in 456 CMR 15. 05. Thus, after the DLR declines to issue a Certification based on WMA, the labor organization seeking Certification can file a request for review of such dismissal by filing a request with the CERB within ten days from the date of receipt of notice of such refusal. For further guidance, see 456 CMR 15.05 (9).

4. Hearings (see also Prohibited Practice Hearing Procedures Section II(A)(3)(b)).

a. DLR Staff Assigned to the Case

The Hearing Officer initially assigned to investigate the Petition processes the case through the Hearing. In addition, in most cases, the DLR assigns a mediator to meet with the parties in a continued effort to assist the parties in reaching a Consent Election Agreement.

b. Pre-Hearing

The Hearing Officer holds a pre-hearing conference (Conference) to ensure that the parties litigate the issues as efficiently as possible. At the Conference, the Hearing Officer discusses potential issues, including all possible stipulated facts and joint exhibits. The parties are strongly encouraged to agree to as many facts in the form of stipulations as possible. The parties should be able to agree to all facts that are not in dispute.

c. Role of the Hearing Officer

The Hearing Officer's role is to guide, direct, and control the presentation of evidence at the Hearing. It is also the Hearing Officer's job to keep the record as concise and complete as possible. The Hearing Officer calls and questions witnesses; introduces or requires the parties to produce relevant documentary evidence; solicits stipulations from the parties; takes administrative notice of evidence in related proceedings before the DLR; and excludes unnecessary evidence.

The role and authority of the Hearing Officer is detailed in 456 CMR 14.08(4)(c).

d. Nature of the Hearing

The Hearing is an investigatory hearing to enable the CERB to determine whether the petitioned-for unit is an appropriate unit under the Law. Although it is investigatory in nature and not adjudicatory, it is a formal proceeding and many of the unfair labor practice hearing procedures apply.[64] It is open to the public.[65]

e. Order of Presentation

There is no set order of presentation. In most cases, the employer proceeds first, since it can provide an overview of its operations that may be helpful to the Hearing Officer and to the parties. If the parties are unable to agree on the order of presentation, the Hearing Officer directs the order of testimony.

f. Written Briefs

The parties generally file written briefs after the conclusion of the Hearing. The briefs must be submitted within ten days after the close of the hearing. Requests for additional time to file briefs are granted only in extraordinary circumstances or to permit parties an opportunity to obtain a recording of the hearing, provided that the time period for filing briefs, including any extensions that are permitted do not exceed 21 days.[66]

5. Post-Hearing

a. The Record

The investigatory hearing record includes the Petition, Notice of Hearing, Motions, Rulings and Orders, digital recording or computer disc of the recording, stipulations, exhibits, and documentary evidence.[67]

b. Hearing Officer Report to the CERB

Generally, within 30 days of the parties submitting their briefs, the Hearing Officer meets with the CERB to inform the CERB of the factual findings ascertained during the Hearing.

---

[64] 456 CMR 14.08(4).
[65] 456 CMR 14.08(4)(b).
[66] 456 CMR 14.08(d).
[67] 456 CMR 14.09.

c. The Decision

The CERB issues its decision generally within 30 days of receiving the Hearing Officer's factual findings. The CERB bases its decision on the Hearing Officer's report and the Hearing Record. The CERB decides to dismiss the Petition or to direct an election by secret ballot among the employees in a bargaining unit determined to be appropriate.[68]

d. There is no Judicial Review of Representation Decisions

CERB representation decisions are not adjudicatory and are not subject to judicial review.[69] Therefore, an employer that wishes to challenge the CERB's decision in a representation case must do so by refusing to bargain and raising the issue as a defense to a prohibited practice charge.[70]

6. Elections

a. Types of Elections

After a Direction of Election or a Consent Agreement, the DLR prepares to conduct a secret ballot election. It directsObject that an election take place at or near the employees' work locations or by mail ballot.[71]

b. Designation of Organizations on the Ballot

The name of the employee organization(s) on the ballot is the name designated by the employee organization on its Petition unless the employee organization wishes to appear on the ballot with a shortened designation. The shortened designation must not confuse or mislead the voters.

c. Order of Choices on the Ballot

The parties determine the order of the choices on the ballot. If the parties cannot agree, a coin toss or random drawing decides the placement on the ballot. The incumbent is not entitled to the left side of the ballot or any other preference. The order of the choices on the ballot cannot be litigated.

---

[68] 456 CMR 14.10.
[69] *Collective Bargaining Reform Association v. Labor Relations Commission*, 436 Mass. 197 (2002).
[70] *Town of Wenham v. Labor Relations Commission*, 44 Mass. App. Ct. 195 (1998).
[71] 456 CMR 14.12.

d. Form of Ballot

Under DLR letterhead, the ballot sets forth the voters' choices. It also notifies the employee that he/she should not sign the ballot and that any signed ballot or ballot marked to indicate the identity of the voter is void.

e. Ballots for Professional Employees (Globe Ballots)

M.G.L. c. 150E, Section 3 provides that professional employees have the right to vote to be included in a unit of non-professional employees or to be represented in a separate unit. If there are professional and non-professional employees included in the same unit, a special ballot must be prepared for the professional employees asking them: 1) whether they wish to be included in the unit of non-professional employees; and 2) whether they wish to be represented by [**name of employee organization]** for the purpose of collective bargaining.[72] If the majority of the professional employees vote to be included with the non-professional employees, their ballots are counted with the non-professionals. If a majority of the professional employees vote not to be included in a bargaining unit with non-professional employees, their votes are counted separately.

f. Withdrawal from Ballot

The DLR permits an employee organization to withdraw in writing from the ballot before the printing of the ballot and the posting of the election notice. Any incumbent employee organization seeking to withdraw from the ballot must give timely notice in writing and disclaim interest in continuing to represent the petitioned-for bargaining unit.[73]

[72] *Globe Machine & Stamping Co*., 3 NLRB 294 (1937).
[73] 456 CMR 14.12(1).

1) Petitioner

If the Petitioner seeks to withdraw from the ballot and there is no intervenor, the DLR allows the Petitioner's request and cancels the election. However, as noted above, if the Petitioner withdraws, the DLR does not entertain any petition for the same unit or any part thereof for a period of up 6 months.[74] If the Petitioner seeks to withdraw and there are one or more intervenors, in order for the election to be held, one of the intervenors must have either a 30 or 50 percent showing of interest, depending on whether there is an incumbent employee organization, in order to hold an election.[75] Thus, if the Petitioner withdraws, each intervening organization is given 10 days to submit the needed showing of interest. If one of the intervenors has already submitted a sufficient showing of interest, the case may continue uninterrupted.

2) Intervenor

In determining whether to allow an intervenor to withdraw, the DLR considers whether a late withdrawal will confuse the voters.

g. Election Hours

When the DLR schedules an on-site election, no ballots are permitted by mail. There are no absentee ballots. The voting hours (during, before, or after working hours) are arranged so that all eligible employees on all shifts and at all locations have an adequate opportunity to vote. If there is **one shift** and all employees work the same hours, the voting time is scheduled to allow employees to vote at the start or close of the workday, or on a lunch break. If there are **two shifts**, the most convenient method is to open the polls over a period that straddle the shifts.

h. Election Date

The DLR schedules elections to maximize employee participation and minimize employer operational problems. The DLR also avoids days preceding or following a holiday. The selected date allows the Employer to post the DLR's Notice of Election, as discussed below, for at least 10 days so that employees have sufficient notice of the time, date, and location of the election.

[74] 456 CMR 14.06 (2).
[75] 456 CMR 14.05(1) and (2).

i. Eligibility Cut-Off Date

Employees are eligible to vote if they are on the Employer's payroll on the last day of the payroll period immediately preceding the execution of the consent agreement, or the issuance of the direction of election.

j. Voter Eligibility List

Prior to an election, the DLR directs the Employer to provide to the DLR and the labor organizations election an alphabetical list of the names and addresses of employees within the bargaining unit. The list ensures that all the unions have an opportunity to communicate with voters prior to the election. The date for submission of the list is seven days after the execution of the consent agreement or seven days after the issuance of a direction of election. The Employer's failure to timely produce an accurate voter eligibility list may be grounds for setting aside an election.[76]

k. Pre-Election Disputes Concerning the Eligibility List

If, prior to the election, any party disputes the accuracy of the eligibility list, the DLR contacts the Employer to resolve any disputes. If the disputes cannot be resolved prior to the election, the party disputing the list has the right to file post-election objections based on the eligibility list. If the eligibility list is modified prior to the election, each party is served with the updated list. If there is insufficient time for the parties to agree to add names to the eligibility list, the potentially-eligible voters may appear at the election and vote by challenged ballot. The issue is resolved after the election is concluded.

l. Election Notice

The Notice of Election informs potential voters of the method, time, date, and location(s) of the election, the conditions under which it is conducted, and a description of the bargaining unit. Notices are posted for as long as possible, usually ten days preceding the election, to promote maximum communication of this essential information.

Attached to the Notice of Election is a sample ballot showing the question and choice(s). To avoid problems, actual ballots are a different color than the sample. The Employer should post Notices of Election in the normal and usual places where notices or information for employees are posted.

[76] *City of Springfield*, 14 MLC 1010 (1987).

m. Amended Notice of Election

In case of an error in a Notice of Election, or a modification in the terms and conditions of the election, if time permits, an amended Notice of Election is drafted and posted.

n. Multiple Polling Sites

In any election where it is necessary to have more than one polling site, the following procedures apply.

- The DLR requests the employer to prepare the eligibility lists with the names and addresses of eligible voters for each specific site. Voters cast their ballots once, in only one of the sites.

- The Notice of Election informs voters at which site they should cast their ballots.

- If voters appear at the wrong location, they are permitted to vote under challenge. The DLR agent challenges the voter because his/her name is not on the eligibility list for that location.

o. Observers

Each party may pick an observer to the election. The parties should avoid picking a supervisor or manager because they may intimidate the employees. Should a party insist on an observer that may be viewed as intimidating, the election proceeds, but the DLR agent advises the party that its observer may constitute grounds for objections to the election.

p. DLR Agent Responsibilities

The DLR agent who conducts and oversees the election has the following responsibilities:

- Maintain order and laboratory conditions at the election site.

- Instruct observers.

- Preserve the secrecy of the voting process.

- Attempt voluntary resolution of voting disputes.

- Remove unruly observers and voters.

- Open and close the polls and also change conditions of the election should the need arise.

q. Pre-Election Conference

The DLR agent usually arrives at least one-half hour prior to the opening of the polls to inspect the polling area to ensure that laboratory conditions are maintained throughout the conduct of the election. The agent also meets with the parties and their observers to check for changes in the voting list, instructs the parties and answers any questions, sets up the voting booths, and seals the ballot box. The agent may ask the parties or their observers whether they anticipate any challenges to the voter eligibility list and may attempt to resolve them before the election.

r. Setting Up the Election Site

The polling area is set up to protect the secret ballot election objectives. Voting booths are used so that the voter may mark his/her ballot in secrecy. Ideally, the voting area is one where access may easily be controlled. In determining the location of voting booths, check off tables, and entrances and exits from the voting area, the DLR agent tries to avoid any situations where voters who have already voted pass by those waiting to vote. Observers whose function is to identify voters and check their names off on the eligibility list are seated with the DLR agent in an area where the voters must pass in order to vote.

s. Role of the Observers

DLR agents and the parties' observers wear identifying badges. Each observer is given a copy of the DLR's Observer Instructions, and the agent explains these requirements. Observers are instructed not to communicate directly with voters and not to electioneer in the immediate area of the polls. All challenges are directed to the DLR agents. The observers may bring a list of voters whom they challenge, but this is the only document, other than the DLR's official voting list, that is used to check off voters. The observers are instructed that the voting list **DOES NOT** leave the table at any time and is collected at the conclusion of the election.

t. Opening the Polls

Prior to the opening of the polls, if the parties cannot agree on an official time piece, the DLR agent selects a clock or watch as the official timepiece. The agent may permit voters to line up in an orderly fashion prior to the opening of the polls. Voters are reminded to have their photo identification ready to show to the DLR agent. At the appointed time, according to the official timepiece, the agent announces that the polls are open and asks all unauthorized persons to leave.

u. Late Opening of the Polls

If the polls open later than the scheduled polling time, the DLR agent notes the time and whether any voters have left the polling area due to the delay. The agent should write a statement explaining the reason(s) for the late opening of the polls and have the observers sign it. Unless the parties stipulate in writing, the DLR agent does not extend the closing time because the polls opened late.

v. Electioneering

The DLR agent removes all campaign literature from the polling area. No electioneering is permitted in the voting area during voting hours, including conversations between voters or between the observers and the voters. Observers may not wear any kind of button or insignia that relates to the election.

w. Conduct of the Polling

As voters approach the check off table, the DLR agent, not the observers, ask the voter for his or her name and for identification. The observers are entitled to inspect identifying material. If there is no question of eligibility, the observers for each party may check off the voter's name on their copies of the eligibility list. The DLR agent then hands the voter a ballot and instructs them on voting procedures.

x. Spoiled Ballots

If a voter marks his/her ballot in error, the ballot contains instructions that the voter return the ballot to the DLR agent for a new ballot. The DLR agent destroys the "spoiled" ballot in the presence of the observers.

y. Challenged Ballots

The DLR agent or an observer for any party may challenge the eligibility of any voter. All challenges are directed to the DLR agent.[77]

z. DLR Challenges

The DLR agent challenges any voter whose name does not appear on the eligibility list but who appears at the polls to vote.[78] The parties may not ask the DLR agent to make challenges on their behalf.

---

[77] 456 CMR 14.12(2).
[78] *Town of Whitman,* 16 MLC 1248 (1989).

aa. Party Challenges and Standard for Eligibility

Observers seeking to challenge the eligibility of a voter must do so at the time the person's name is announced and the voter receives a ballot. No challenge is accepted after the ballot is cast, or once the polls are closed.[79] The reason for the challenge is stated when the challenge is made and marked on the challenged ballot envelope by the DLR agent. A party who fails to make challenges at the proper time cannot remedy its oversight by raising the challenge as an objection to the election.

An employee who has a reasonable expectation of continued employment on the eligibility cutoff date set forth in the consent election agreement or direction of election is eligible to vote. This includes employees who were ill, on vacation, or temporarily laid off. Employees who have quit or been discharged for cause prior to the election date are not eligible to vote.

bb. Challenge Ballot Procedure

When an Observer challenges a voter, the DLR agent notes on the challenge ballot envelope the job title, work location, and reason for the challenge. The name of the challenged voter is noted on the DLR's official copy of the eligibility list. The agent informs the voter that: 1) one of more of the parties to the election has challenged his/her eligibility; 2) his/her ballot is placed in an envelope having a perforated stub; 3) if counting the challenged ballots is necessary to determine the outcome of the election, the information on the stub is used to determine eligibility; 4) if it is found that the voter is not eligible, the ballot is destroyed unopened. The DLR agent then gives the voter a ballot and a challenge envelope and directs the voter to go to the voting booth, mark his/her ballot, fold the ballot, insert it in the long part of the envelope, seal the envelope, and drop it in the ballot box.

cc. Security of the Ballots

All ballots remain in the DLR agent's possession at all times. Only DLR agents may handle blank ballots. All voters must place their ballot in the ballot box themselves. When there is more than one polling time or more than one polling site, the DLR agent secures the ballots by: 1) sealing the ballot box with tape and having each of the parties present sign across the tape; 2) sealing the blank ballots in the election envelope; and 3) taking the sealed ballot box and sealed election envelope and maintaining it in his/her possession at all times.

[79] *City of Springfield*, 24 MLC 109 (1998).

dd. Language Problems During Voting

If voters need translation services, the DLR agent instructs the translator to read only the information on the ballot, and, if necessary, the Notice of Election to the voter. However, the translator is not permitted to accompany the voter to the voting booth or to mark the ballot for the voter.

ee. Disabled Voters

If a voter is disabled and unable to vote without assistance, the voter is permitted to have someone accompany them to the voting booth and assist them if necessary. If a disabled voter needs assistance and does not have someone to accompany them to the voting booth, the DLR agent may assist the disabled voter after notifying the observers. However, neither the parties nor their observers are allowed to assist a voter to mark the ballot.

ff. Closing the Polls

The DLR agent notifies the observers a few minutes prior to the close of the polls of the amount of time remaining for voting and that all persons currently in line will have the opportunity to vote. The agent closes the polls early if all eligible voters have cast a ballot and the parties consent in writing. The agent closes the polls by announcing, "The polls are closed." A late start for the election does not extend the time for voting, unless the parties stipulate in writing to extend the hours of the election. After the agent announces the end of the polling time, the DLR agent does the following:

- If the ballots are not counted on-site, secure and seal the ballot box in the presence of the observers.
- Ask the observers to sign the Certification of Conduct of Election.
- Attempt to get a written agreement from the parties resolving any challenges prior to opening the ballot box. A party may withdraw any challenge before the ballots are counted.
- Explain the ballot tabulation procedure.

gg. Ballot Tabulation

After all attempts to resolve the challenges have been exhausted, the tallying process begins.

1) Preparation for Ballot Tabulation

If the election has been run at multiple polling sites or times, the DLR agent does not begin the ballot tabulation until all ballot boxes have arrived. The agent has all parties inspect the tape covering the ballot box to ensure that the seals are not broken. After inspection, the agent opens the ballot boxes and separates the challenged ballot envelopes from the other ballots. Any resolved challenges are opened and intermingled with the other ballots.

2) Observers

Each party is permitted one observer at the count. The DLR agent allows spectators to observe the tabulation of the ballots from a reasonable distance.

3) Tabulation Process

For elections with over 50 voters, the ballots are arranged in blocks of 50 ballots each and numbered sequentially. The DLR agent recounts the ballots in the block to ensure that there are 50. After a block is counted, each ballot is turned over, examined by the agent, and called for one of the choices on the ballot, or called "blank" or "void." The intent of the voter must be clearly evident.

4) Tabulation in Special Elections

In a Globe ballot election for professional employees, the self-determination question is counted first. Ballots with two questions are separated from those with a single question. If the DLR simultaneously conducts an election for two separate bargaining units, the ballots for each unit are different colors. The DLR agent sorts the ballots by color, with the ballots face down, and then counts them.

5) Protested Ballots

Only the DLR agent calls the ballot. If the DLR agent cannot identify or determine the voter's intent, the agent declares the ballot void. As the call is made, the agent lays the ballot on the count table face up and allows sufficient time for the observers to see how it is marked. If an observer believes that the DLR incorrectly interpreted the voter's intent, the observer may protest. The back of the ballot will then be "stamped" or marked with the following information:

- The name of the party protesting the ballot.
- The reason for the protest.

- The choice for which the ballot was called.
- The choice for which the protesting party wants the ballot called.
- The number of the block of ballots from which the ballot came, if applicable.

The protested ballot is then set aside. The DLR agent marks the tally sheet with the choice called by the agent and a notation that the ballot is protested.

6) Post-Tabulation Process

After the tabulation process has been completed, each party's chief representative signs the Official Tally of Ballots. The DLR agent retains the original and provides a copy to each party. To be certified as the exclusive bargaining representative, an employee organization must receive a majority of the valid votes cast in an election. If the results of the election are determinative and not affected by challenged or protested ballots, the ballots are sealed in an envelope containing the case name and number, the date of the election, and the tally. If challenges and protests are sufficient to affect the outcome of the election, these ballots are segregated and placed in a sealed envelope along with all copies of the eligibility list used at the election.

hh. Mail-Ballot Elections

In many cases, the DLR determines that a mail ballot election is more appropriate than an on-site election. The procedures in a mail ballot election differ from an on-site election.

1) Mailing Process

a) Ballot and Instructions

Each envelope includes a ballot, a ballot envelope, a return envelope and voter instructions. The label on the reverse side of the return envelope also contains a code to help identify the voter and expedite the verification process.

b) Mailing Period

At least 2 ½ weeks are allotted for the voters to receive and return their ballots. This permits an adequate time for delivery and return of initial, as well as secondary ballots.

2) Election Questions

At least one DLR employee is available to answer phone calls about the election at the time designated on the Notice of Election.

3) Mail Related Problems

a) Failure to Receive a Ballot

Employees who call the DLR to report that they have not received a ballot are placed on color coded lists (with corresponding mailing labels). The callers' names, addresses, and I.D. #'s (if applicable) are recorded. Different color codes are used to distinguish between: 1) employees who are on the eligibility list but who did not receive a ballot; 2) employees whose ballot was destroyed; and 3) individuals who are not on the eligibility list, but who believe that they are eligible to vote.

b) Undeliverable Ballots

Each day a DLR agent picks up ballots that have been returned to the post office and marked "undeliverable" due to a change of address or name, or where the address is incorrect. A list of undeliverable ballots is compiled and given to the parties to correct or amend. New ballots are sent immediately to those individuals whose ballots have been returned.

4) Prior to the Mail Mailing Period Closing

Before the mail period closes, a DLR agent contacts the parties and informs them of their opportunity to have an observer at the count and to inform them of the time and date on which the agent will pick up the ballots at the post office, so that the parties may accompany the agent if they so desire. In addition, the DLR agent explains how the ballots are verified, sorted, and counted. The parties submit the names of the observers to the DLR agent in writing.

5) Ballot Tabulation

- Sorting

Using a numerical code, the ballots are sorted at the counting tables.

- Verification

  Each envelope is checked for a signature that matches the name on the label. Any challenged vote is set aside. Every color coded ballot is automatically challenged by the DLR agent. In the event both the original and duplicate ballots are received, only the ballot the DLR sent first is counted. If two ballots are returned in one envelope, both ballots are challenged. If the parties agree, one is counted, provided the secrecy of the ballot is maintained. Duplicate ballots that are not counted are not entered in the tally as challenged or voided ballots, but preserved for display to the parties as duplicates. The stubs of the envelope or postmark are returned and attached to the duplicate ballot. All envelopes without signatures are void. An envelope with a signature different from the mailing label is acceptable provided the name is not substantially different (i.e., Jack Douglas, signed, although label reads John Douglas). Any ballot that identifies the voter is void.

- Tabulation Process

  The verified envelopes are mixed after the DLR agent tears off the signature and label sections. The envelopes are slit and the ballots are placed faced down in blocks of 50. DLR agents call and tabulate the ballots. The intent of the voter must be clearly evident. The parties may protest any ballot where the intent is unclear. If the DLR agent cannot identify the intent of the voter, the agent declares the ballot void. The tallies are placed on sheets in the blocks of 50. The DLR agent announces the result when the tabulation process is completed.

ii. Post-Election Procedures

There are three kinds of post-election issues that may determine the outcome of the election: 1) protested ballots; 2) challenged ballots; and 3) objections to the conduct of the election or to campaign conduct affecting the outcome of the election.

1) Protested Ballots

If the parties are unable to resolve protested ballots before the ballot count and those votes determine the election outcome, the DLR schedules a conference with the parties as soon as possible after the election. At the conference, the protested ballots are numbered with copies given to all of the parties. The parties are allowed seven days to submit a statement of position about the protested ballots. If objections and challenges are also pending, the time for submission of the parties' positions is extended until the close of the investigation into those matters. After the DLR receives the parties' positions, the DLR decides whether any of the protested ballots are counted.

2) Challenged Ballots

If the number of challenged ballots is sufficient to determine the outcome of the election, within seven days after the tally of the ballots, each party must file a position statement with the DLR concerning the eligibility of each challenged voter.[80] The DLR reviews the consent agreement or direction of election, the notice of election, and the parties' position statements to decide whether to reject the challenged ballots or schedule a hearing. If any challenge presents no factual dispute, is frivolous, or has already been determined by the DLR, the challenge is denied without a hearing, and the ballot counted if required to determine the outcome of the election. If the challenge is clearly valid, as determined by the election documents or prior decision, the challenge is allowed without a hearing and the ballot is destroyed unopened.

jj. Objections to the Election

Objections are complaints by one or more of the parties that a DLR agent or one of the other parties to the election engaged in conduct that prevented a fair election. Within seven days after the tally of the ballots, any party to an election may file objections to the conduct of the election or to conduct affecting the result of the election.[81] The objections must include a statement that describes the objectionable conduct, including the nature of the conduct, the identity of persons involved, and the date, time, and place of the alleged conduct.[82] Requests to amend objections must conform to the evidence and may not raise additional allegations. If another party objects to a requested amendment, the DLR rules on whether to allow the amendment.

---

[80] 456 CMR 14.12(2).
[81] 456 CMR 14.12(3).
[82] 456 CMR 14.12(3).

1) Objections Investigation and/or Hearing

After the DLR receives objections and the other parties' responses to the objections, the DLR determines whether the objections merit further proceedings.[83] The DLR may dismiss some or all of the objections if it does not find probable cause to believe that the alleged conduct occurred or that the alleged conduct materially interfered either with the conduct of the election or with the results of the election.[84] If the DLR concludes that probable cause exists, it investigates further or schedules a hearing to take place before a DLR agent. In addition to the documents identified in 456 CMR 14.08 and 14.09, the record in an objections hearing, should the DLR order that one occur, is the statement of objections or the statement concerning the eligibility of challenged voters, the responses and the tally of ballots.[85] If there are undisputed material facts, the DLR may issue a decision without further fact-finding.[86]

If, after hearing, the DLR finds that the objections have merit, it sets aside the results of the election and directs that the election be re-run. However, if the DLR concludes that the objections are without merit, it issues a Certification of the Results of the Election.

The DLR's objections and challenges decision is administrative and not subject to appeal to the CERB or to the courts.

See the Summary of Law Section III(E)(5)(d) for objectionable conduct examples.

kk. Runoff Elections

When there are three or more choices on the ballot and none of the choices on the ballot receives a majority of the valid votes cast, a runoff election is required. The DLR does not conduct a runoff election while objections to the election are pending.[87] The DLR does not conduct a second runoff election absent evidence that it would produce different results.[88]

[83] 456 CMR 14.12(3).
[84] 456 CMR 14.12(3).
[85] 456 CMR 14.12 (5).
[86] 456 CMR 14.12(3).
[87] 456 CMR 14.13(1).
[88] 456 CMR 14.13(1).

1) Voter Eligibility

Unless the DLR determines otherwise, employees who were eligible to vote in the initial election are eligible to vote in the runoff election.[89]

2) Ballots

The two choices on the ballot that received the highest total of votes in the original election are on the run-off election ballot, whether those choices were employee organizations or no union.[90]

3) Scheduling

A runoff election is held as soon as possible after the first election, but is not scheduled during the seven-day period during which a party may file objections to the conduct of the election. Usually, runoff elections are conducted at the same location and during the same hours as the original election.

II. Re-Run Elections

The DLR conducts a Re-Run Election in each of the following circumstances:

- There were two or more employee organization choices on the ballot and the votes were equally divided among the employee organizations.
- The number of ballots cast for one choice equals the number for another choice but less than the number for a third choice (which did not receive a majority of valid votes cast).
- The DLR set aside an election because of objectionable conduct.[91]

1) Eligibility Cut- Off Date

The eligibility cut-off date for the re-run election is specified in the Direction of Election and is usually the last day of the payroll period that precedes the Direction of Election issuance date.

2) Voter Eligibility

A new eligibility list is required for the re-run election.

---

[89] 456 CMR 14.13(2).
[90] 456 CMR 14.12(3).
[91] 456 CMR 14.14(1).

3) Election Notice

If a re-run election is the result of objectionable conduct by one of the parties, the DLR has discretion on whether to state this fact in the Notice of Election.

4) Run-off and Re-run Elections Procedures

Any employee organization on the ballot of a re-run election must receive a majority of the votes cast to be certified. A re-run election may result in a subsequent runoff election.

Election and tabulation procedures for a re-run election are the same as for any other election. See Section II(B)(6). Objections are filed, following the same standards and procedures for a regular election. See Section II(B)(6)(jj).

mm. Certification

When a labor organization wins an election, the DLR certifies that it is the exclusive bargaining representative of the unit.

nn. Reinvestigation of Certification

The DLR retains the right for good cause shown to reinvestigate any matter concerning any certification it issues and after an appropriate hearing, may amend, revise, or revoke such certification.[92]

oo. Revocation of Certification

The DLR revokes a labor organization's certification if it loses a decertification election.

The DLR also revokes a labor organization's certification if the labor organization requests this in writing accompanied by a statement that the labor organization disclaims all interest in continued representation of the bargaining unit. A copy of the request must be served on the employer of the bargaining unit.[93]

[92] 456 CMR 14.15.
[93] 456 CMR 14.16.

7. Clarification/Amendment Petitions (CAS)

a. General Information

An employer or labor organization can file a Clarification and Amendment Petition (CAS) to clarify whether particular employees are included in or excluded from an existing bargaining unit.

The information that an employer or labor organization must include in a CAS petition is specified in 456 CMR 14.02(2) and 14.03(2). An individual employee has no right to file a CAS petition.[94] Any CAS petition found to raise a question of representation must be dismissed and the question of representation addressed by filing a representation petition.

b. Timeliness

CAS petitions that seek to accrete or sever positions that were in existence prior to the execution of a current collective bargaining agreement must be filed during the time for filing a representation petition unless the other party agrees to waive the contract bar and submit the issue to the DLR. However, CAS petitions seeking to accrete or sever newly-created positions of positions whose duties have been substantially changed from the bargaining unit may be filed at any time.[95]

c. Parties

Normally, the only parties to a CAS petition are the employer and the certified or recognized employee organization. In certain cases, however, other employee organizations may have an interest, or claim the same employees sought by the petition. When identified, those employee organizations are notified immediately and added to the interested parties list. No showing of interest is required for CAS petitions.

d. Procedure

After the DLR receives the CAS Petition, it assigns a Hearing Officer to investigate the Petition and sends a letter to the parties providing them with two options for case processing.

[94] 456 CMR 14.04(2).
[95] 456 CMR 14.06(1)(b).

1) Option 1 – Traditional Approach

Parties must schedule a conference at the DLR for mediation and investigation. Parties must confer and provide three dates in the quarter provided from which the DLR picks the conference date. Prior to the conference and no later than seven days before the conference, the parties must confer and e-file the following documents to the DLR:

- Position papers including facts and arguments regarding the disputed unit placement issues.
- Sworn affidavits from those with first-hand knowledge supporting any facts included in the position paper.
- Petitioned-for position(s) job description(s), or if none exists, the most recent job posting, including actual duties, qualifications, hours, supervision exercised and received. A statement explaining if the parties agree to accuracy of the job description and, if not, identifying areas of disagreement.
- The date the position was created.
- An organizational chart showing the position.
- A list of all bargaining unit titles.
- A copy of the most recent collective bargaining agreement.

Parties coordinate document production to avoid submitting duplicate copies and to clarify areas of disagreement. They then serve the other party with copies of all materials submitted to the DLR.

Parties should bring decision-makers to the conference in order to participate in mediation. If the parties are unable to resolve the dispute, the Hearing Officer holds the conference in order to clarify the issues raised in the position papers and submitted documents. The Hearing Officer may ask the parties to submit additional documents after the conference. At the Hearing Officer's discretion, parties are allowed to briefly present argument concerning their positions.

After the Hearing Officer reviews the parties' submissions and the information presented at the conference, the Hearing Officer determines if there are disputed material facts. If the Hearing Officer determines that there are no disputed facts, the Hearing Officer issues a notice to the parties to show cause why the case should not be decided based on the parties' submissions. This show cause letter generally is sent to the parties within two months of the conference.

The CERB reviews the show cause responses and either issues a decision based on the parties' written submissions or directs the Hearing Officer to hold a hearing to resolve any material disputed fact. Generally the CERB issues its decision within one month of receiving the show cause responses. If there is a hearing, it is conducted as other representation case hearings are conducted. See Section II(B)(4) and 456 CMR 14.08(2) for further information.

2) Option 2 – Expedited Hearing

This option provides the parties a decision within forty-eight hours of the Hearing but only is used in the following circumstances.

- The parties mutually elect this procedure and sign an agreement prepared by the DLR describing their agreement.

- Parties agree to waive any and all rights of appeal to the CERB, the courts or by testing certification.

Once the agreement is signed, the DLR expeditiously schedules the hearing and a Hearing Officer issues a brief decision within 48 hours of the hearing.

C. Arbitration and Mediation Services

1. Interest Mediation Services

Municipal Police and Fire procedures are discussed separately below under JLMC Process.

a. Filing the Petition

1) The Form

Petition for Mediation and Fact-Finding (Petition) forms are available on the DLR website (www.mass.gov./lwd/labor-relations/). Parties may file jointly or unilaterally.[96] The Petition must be entirely completed, including Petitioner name and address, Certification of Service (for unilateral petitions), date and signature.

2) Filing Fee

The filing fee for a Mediation Petition is currently $1,000. The cost is equally divided between the parties.[97]

b. DLR Initial Steps – Scheduling the Initial Investigation/Mediation

After the DLR receives a Petition, it dockets it and assigns a case number and mediator. The DLR then sends the parties a letter informing them of the mediator assignment and the procedure to schedule the initial investigation/mediation. The parties are required to confer and agree to three proposed dates for the initial investigation/mediation that fall within 45 days of the date of the docketing notice. The Petitioner is required to notify the DLR of those dates within fourteen days of the date of the docketing notice. If the petition is filed jointly, either party may notify the DLR of the three dates agreed upon by the parties. If after reasonable attempts to secure dates, the Petitioner notifies the DLR that the parties are unable to agree on a date to schedule the initial investigation/mediation, the DLR will schedule the initial investigation/mediation and notify the parties of same. If the Petitioner fails to submit dates or submit a written statement explaining why it has been unable to submit mutually agreed upon dates, the Petition will be dismissed, absent extraordinary circumstances.

The mediator assigned to the case will make every effort to schedule the initial investigating/mediation on one of the days agreed upon by the parties.

The DLR promptly bills the parties if the filing fee has not been paid at the time of filing.

c. Mediator Confidentiality

The mediator is not required to disclose any files, records, documents, notes, or other papers or be required to testify with regard to any information obtained while functioning as a mediator.[98]

---

[96] 456 CMR 21.03.
[97] 456 CMR 21.05(5).
[98] 456 CMR 21.02.

d. Mediator Role

At the mediator's first meeting with the parties, the mediator investigates whether the parties have negotiated for a reasonable period of time and whether an impasse exists. If the mediator determines that impasse does exist, the mediator sets up additional meetings for the purpose of helping the parties break the impasse in negotiations.

The mediator may order the parties to bring individuals who have the authority to settle a collective bargaining agreement to all mediation sessions.[99]

The mediator retains ultimate control over mediation scheduling.

e. Mediator Report to the DLR Director

After concluding mediation, the mediator reports to the DLR Director (Director) the status of the parties' impasse.[100] The mediator's confidential report includes the following:

- The number of mediation sessions.
- A brief description of the unresolved issues which existed at the beginning of mediation.
- A statement of issues that have been resolved through mediation and a statement of issues that remain unresolved.
- A recommendation as to whether the DLR Director should invoke fact finding.

f. Designation of a Fact-Finder

If, after reviewing the mediator's report, the Director determines that an impasse continues to exist and that further mediation is unlikely to resolve the matter within a reasonable period of time, the DLR notifies the parties of its conclusion and of its decision to institute fact-finding. This notification letter also provides the parties with the names of seven randomly chosen fact-finders from the DLR's fact-finder list. The letter asks the parties to return the list within ten days, striking no more than three names and ranking the remaining names. After the DLR receives the parties' rankings, the DLR attempts to match the preference of each party. If a party fails to provide the ranking within ten days, the DLR assumes that all persons named on the list are acceptable.[101]

---

[99] 456 CMR 21.06.
[100] 456 CMR 21.08.
[101] M.G.L. c. 150E, Section 9; 456 CMR 21.09.

g. Fact-Finder Appointment

Once the DLR receives the parties' fact-finder rankings, it attempts to match their preference. The DLR then contacts the parties' preferred fact finder to make sure the fact finder is available and not disqualified. A fact finder is disqualified if he/she has represented a party to the case within the last 12 months.[102] The DLR also asks the fact finder to disclose to the DLR and the parties any circumstances likely to create a presumption of bias or which the fact-finder believes might disqualify him or her as an impartial fact-finder.

The DLR sends the fact finder an appointment letter, explaining the process and reminding the fact-finder to transmit his/her findings and any recommendations for the resolution of the impasse to the DLR and to both parties within 30 days after the record is closed.

h. Fact Finder Costs

The cost for fact-finding is equally divided between the parties unless they agree otherwise. The parties must make payment directly to the fact-finder. The fact-finder sets his/her fee directly with the parties.

i. Fact-Finder Role

The fact-finder has authority and responsibility for the fact-finding proceedings, and sole discretion in deciding any issues of procedure. The fact-finder immediately advises the DLR if a work stoppage has occurred or is imminent. The fact-finder has authority to mediate the dispute. Fact-finding and mediation are not open to the public.[103]

j. Fact-Finder Hearing

Details of a fact-finder's hearing are described in 456 CMR 21.13.

k. Fact-Finder Report

Details concerning the fact-finder's report (report) are described in 456 CMR 21.14. The report remains private while the parties attempt to reach an agreement after receiving the report. If the impasse remains unresolved ten days after the DLR's receipt of the report, the DLR makes it public. Accordingly, if asked about the report or for a copy of the report, after ten days, the DLR makes it available.

[102] 456 CMR 21.09(4).
[103] 456 CMR 21.12.

l. Post Fact-Finding Mediation

If the parties are unable to reach agreement after the fact-finder issues his/her report, the DLR mediator contacts the parties and schedules additional mediation to assist them in resolving the dispute. The mediator notifies the Director within 30 days whether any additional mediation is likely to resolve the impasse. If the DLR Director believes that no additional mediation will resolve the impasse, the mediator no longer works with the parties on the impasse.

m. Certification of Completion of the Collective Bargaining Process

Either or both parties may request that the Director certify to the parties that the collective bargaining process, including mediation, fact-finding, or arbitration, if applicable, has been completed. This is in the form of a motion or letter.

If the Director determines that the dispute resolution mechanisms provided for in M.G.L. c. 150E, Section 9 have been exhausted, the Director certifies to the parties that the collective bargaining process has been completed.

2. Grievance Mediation Services

a. Services Provided

The DLR offers grievance mediation services to public sector and private sector parties. Generally, parties using DLR services have agreed in their collective bargaining agreement to DLR grievance mediation services, though parties may also agree to request DLR grievance mediation services even if their contract does not specifically provide for this.

b. Initiating a Case

1) Filing the Petition

A party seeking grievance mediation must file a Petition for Grievance Mediation (OGM Petition). Forms are available on the DLR website. (www.mass.gov./lwd/labor-relations/). A party making such a request must file a petition in accordance with 456 CMR 12.12 .

2) Filing Fee

The filing fee for an OGM Petition is currently $300.00. The cost is equally divided between the parties.[104]

[104] 456 CMR 22.04(2).

c. DLR Initial Steps

The DLR assigns the OGM Petition a case number and mediator. The DLR then sends the parties a letter informing them of the mediator assignment. The mediator contacts the parties within five days to schedule mediation sessions.

d. Mediator Confidentiality

The mediator is not required to disclose any files, records, documents, notes, or other papers or be required to testify with regard to any information obtained while functioning as a mediator.[105] No discussions, offers of compromise, or proposed settlements generated during a grievance mediation are admissible as evidence in an arbitration proceeding.

e. Mediator Role

The mediator decides whether to hold separate or joint conferences in an attempt to assist the parties in reaching a voluntary settlement of the dispute prior to grievance arbitration. An agreement to mediate does not alter a scheduled arbitration date unless both parties agree to do so.

3. Grievance Arbitration Services

a. Services Provided

The DLR offers grievance arbitration services to public sector and private sector parties. Generally, parties using DLR arbitration services have agreed to use the DLR in their collective bargaining agreement, though parties may also agree to request DLR arbitration services even if their contract does not specifically provide for this.

b. Initiating a Case

1) Filing the Petition

An employer or labor organization, or both, may petition the DLR to initiate grievance arbitration using the DLR arbitration form. Forms are available on the DLR website. (www.mass.gov./lwd/labor-relations/). A party seeking arbitration must file a petition in accordance with 456 CMR 12. 12.

[105] 456 CMR 22.02.

2) Filing Fee

The filing fee for arbitration services is currently $1,000 for public sector parties and $1,500 for private sector parties. The cost is equally divided between the parties.

c. DLR Initial Steps

When the DLR receives the petition, the docketing staff assigns the petition a case number. The Director, or her designee, then classifies the petition using the DLR's Arbitration Impact Analysis System, discussed below.

d. Classification of the Petition

Arbitrations are scheduled on a priority system, in much the same way as the DLR processes its unfair labor practice cases. This enables the DLR to provide more efficient scheduling to parties. Arbitration Impact I cases are those involving terminations, suspensions of five (5) days or more, layoffs, class action cases, and any case affecting the health and safety of employees. These cases are scheduled for hearing within one to three months, depending on the level of urgency, and it is anticipated that the decision generally issues within one month from the date that the parties' briefs are received. The remaining cases are classified as Impact II, and are scheduled within three to six months. It is anticipated that the decision generally issues within three months from the time that the parties' briefs are received.

e. Mediation

A mediator is assigned to all Impact I cases to assist the parties in resolving the underlying grievance. After the DLR sets an arbitration date, a mediator contacts the parties to discuss mediation. Mediators are also available for Impact II cases at the request of the parties.

f. Notice to Parties of Pending Petition

After the DLR dockets and classifies the petition, the DLR notifies the parties of the pending petition, its Impact Analysis classification and the scheduling procedures.

1) Impact I scheduling procedures

The parties are required to confer and agree to three proposed dates for the arbitration hearing that fall within the assigned quarter. The petitioner must provide the dates within fourteen days of receiving the DLR notice. If the petitioner fails to submit dates or submit a written statement explaining why the parties have been unable to submit mutually agreed upon dates, the petition is dismissed, absent extraordinary circumstances.

2) Impact II scheduling options

- Option one – traditional arbitration

  The parties are required to confer and agree to three proposed dates for the arbitration hearing that fall within the assigned quarter. The petitioner must provide the dates within fourteen days of receiving the DLR notice. If the petitioner fails to submit dates or submit a written statement explaining why the parties have been unable to submit mutually agreed upon dates, the petition is dismissed, absent extraordinary circumstances.

- Option two – general expedited procedure

  Parties are given the option to utilize the DLR's general expedited procedure that moves an Impact II case to the front of the calendar and provides the parties an immediate decision after the arbitration hearing. In order to participate in this program, both parties must agree to the process set out in a General Expedited Arbitration Agreement (Agreement). If both parties agree to the terms, the parties are asked to sign, date and return the Agreement to the DLR with three proposed hearing dates within the assigned quarter. This is a summary of how the expedited arbitration procedure works:

  - The arbitration hearing takes seventy minutes: the labor organization and the employer each receive up to twenty five minutes to present their positions and ten minutes for rebuttal. Time frames may be extended at the arbitrator's discretion. There are no cross examination; however, either side may ask clarification questions through the arbitrator.

  - Each party should bring one person to present the case and one additional representative. The employer and/or the labor organization may request the attendance of other necessary witnesses, and the arbitrator will not unreasonably deny such requests.

- The employer and/or the labor organization may submit a written position statement of not more than five pages to the arbitrator before the arbitration.

- The arbitrator's Award is no more than one page in length and is transmitted to the parties the next regular business day.

- The arbitrator's Award is final and binding on the parties and there is no right to appeal the arbitrator's decision in any court or tribunal. The Award does not set precedent.

- Both parties have, either present at the arbitration hearing or immediately available by phone, a person(s) with full settlement authority in the event a settlement is proposed.

g. Arbitrator Appointment

The DLR Director appoints a single arbitrator who hears and determines the case on one of the dates provided by the parties. All pre-arbitration hearings and motions and issues are directed to the appointed arbitrator.

h. Subpoenas

Any party may request a subpoena from the arbitrator to compel the attendance of witnesses, or the production of documents. A request for a subpoena is allowed unless it is overbroad, oppressive, or otherwise legally defective. The party requesting the subpoena is responsible for service of the subpoena.

i. Hearing

The arbitrator has authority and responsibility for the conduct of the arbitration proceedings and has sole discretion in deciding any procedural issues. For further information about the arbitration hearing, see 456 CMR 23.07.

j. Arbitration Awards

In Impact I cases, the arbitrator generally issues an Award within one month from the time briefs are submitted. In all other cases, the arbitrator generally issues an Award within three months from the time briefs are submitted.

k. Clarification, Modification or Award Correction

1) A joint request for clarification, modification, or correction of an Award must be submitted to the DLR within 14 days after the parties have received the Award. The arbitrator promptly determines whether to grant the request and notifies the parties in writing of the decision.

2) A unilateral request for clarification, modification, or correction of an Award must be submitted to the DLR within 14 days after the parties have received the Award. Such a request must be served upon the opposing party in accordance with the DLR's Service requirements.[106] The opposing party must respond within seven days of service. The arbitrator promptly determines whether to grant the request and notifies the parties in writing of the decision.

l. Publication of Award and Opinion

The arbitrator's Award and Opinion (decision) is treated as a public record. The DLR publishes arbitration decisions. If either party to the proceeding gives written notice to the DLR within 30 days that it objects to publication, the DLR considers such requests and notifies the parties within 30 days of its decision.

D. The Joint Labor Management Committee

1. Services Provided

Collective bargaining disputes involving municipalities and their police officers and fire fighters (police and fire) are subject to the Joint Labor Management Committee's procedures. It is the interest mediation process for police and fire. While parties use the same DLR mediators in an attempt to break successor collective bargaining impasse, the JLMC has its own procedures outlined in Chapter 589 of the Acts of 1987 and the Rules enacted pursuant to the statute. One major difference in JLMC cases is that parties unable to break an impasse will be ordered to arbitration.

[106] 456 CMR 12.02.

2. Initiating a Case

   a. Filing the Petition

   When parties in municipal police or fire negotiations believe that they have reached an impasse in negotiating a collective bargaining agreement and think mediation is warranted, either or both parties jointly may file a petition requesting that the JLMC intervene and assist. One or both of the parties must believe that the process of bargaining has been exhausted in order to file a petition. The JLMC Petition form is available on the DLR website. (www.mass.gov./lwd/labor-relations/).

   b. DLR/JLMC Initial Steps – Scheduling the Initial Investigation/Mediation

   After the DLR/JLMC receives a Petition, it dockets it and assigns a case number and mediator. The DLR/JLMC then sends the parties a letter informing them of the mediator assignment and the procedure to schedule the initial investigation/mediation. The parties are required to confer and agree to three proposed dates for the initial investigation/mediation that fall within 45 days of the date of the docketing notice. The Petitioner is required to notify the DLR of those dates within fourteen days of the date of the docketing notice. If the petition is filed jointly, either party may notify the DLR/JLMC of the three dates agreed upon by the parties. If after reasonable attempts to secure dates, the Petitioner notifies the DLR/JLMC that the parties are unable to agree on a date to schedule the initial investigation/mediation, the DLR/JLMC will schedule the initial investigation/mediation and notify the parties of same. If the Petitioner fails to submit dates or submit a written statement explaining why it has been unable to submit mutually agreed upon dates, the Petition will be dismissed, absent extraordinary circumstances.

   The mediator assigned to the case will make every effort to schedule the initial investigating/mediation on one of the days agreed upon by the parties.

3. First Meeting (Investigation and Certifying the Issues)

   The mediator meets with both parties in an attempt to resolve the outstanding issues or to assist the parties in narrowing the issues separating the parties. One of the important roles for the mediator is to identify the issues that the parties have bargained about and over which they are at impasse. This is known as certifying the issues. Parties will often raise different issues during the mediation process, but the JLMC holds the parties to these identified issues as the JLMC process progresses.

4. Jurisdiction

If the parties cannot resolve the dispute through the mediator or through continued negotiations on their own, the mediator requests that the JLMC take jurisdiction of the dispute. The mediator makes this recommendation at a JLMC meeting. The JLMC generally meets twice a month and posts the cases it expects to discuss on the DLR and JLMC websites in accordance with the Open Meeting Law.

If the JLMC votes to take jurisdiction, it then assigns two volunteer Committee members to assist the mediators and the parties -- one member from the labor volunteers (fire volunteers for fire and police volunteers for police) and one management representative

The DLR notifies the parties of the JLMC's jurisdiction decision.

The mediator assigned to the case continues to work with the parties in trying to resolve the impasse. The mediator may choose to involve the committee level volunteers and schedule Committee Level Mediation (CLM), using the volunteers experience to aid the parties as they mediate the impasse.

5. The 3(a) Process

a. Vote to 3(a)

If CLM mediation fails and the parties are unable to resolve the dispute on their own, the JLMC votes on whether to schedule a 3(a) hearing (named after the section of the law that describes this process). The JLMC votes to hold a 3(a) hearing if it finds that the issues in negotiations have remained unresolved for an unreasonable period of time, resulting in the apparent exhaustion of the collective bargaining process.

The JLMC vote on whether to order a 3(a) hearing is posted in the same manner as the jurisdiction votes.

The DLR notifies the parties of the JLMC's decision on whether to order a 3(a) hearing.

b. The Purpose of the 3(a) Hearing

The purpose of the 3(a) Hearing is to allow the JLMC to identify the following:

- The issues that remain in dispute;
- The current positions of the parties;
- The views of the parties as to how the dispute should be resolved; and

- The preferences of the parties as to the mechanism to be followed in order to reach a final agreement. (Generally the parties choose issue-by-issue arbitration by a tripartite panel).

c. Parties' Pre-Hearing Submission

The parties must submit the issues they intend to present at the 3(a) hearing to the mediator assigned to the case at least 48 business hours prior to the scheduled 3(a) hearing. These lists must be submitted electronically. Upon receipt, the mediator forwards the issues to the other party, 24 business hours in advance of the 3(a) hearing. The JLMC limits the parties from presenting issues to the 3(a) panel that were not certified issues.

d. The 3(a) Hearing

A subcommittee of the JLMC, also called the 3(a) panel, presides over the 3(a) hearing. The JLMC chair is generally the chair of the 3(a) panel and the other two members of the panel are the JLMC volunteers assigned to the case.

The parties make their presentation to the 3(a) panel, which then reports and makes a recommendation to the full committee at the next regularly scheduled JLMC case meeting.

e. After the 3(a) Hearing

If the committee finds that there is an apparent exhaustion of the processes of collective bargaining which constitutes a potential threat to public welfare, it votes to move the case forward to be resolved. In most cases, this means interest arbitration. The format most commonly invoked is the tripartite panel, though there are instances when the parties chose to have a single arbitrator.

The Chair of the interest arbitration panel is a neutral arbitrator chosen by the parties from a random lists that the JLMC sends out. The other two members of the panel are the JLMC volunteers assigned to the case.

The JLMC tells the arbitration panel what issues they are authorized to decide, which normally consists of wages, duration of the contract, and up to 5 separate issues for each party.

6. Interest Arbitration

   Sometimes cases settle after the 3(a) Hearing but prior to interest arbitration. However, if the matter does not settle, the parties appear before the arbitration panel and present evidence through witnesses and/or exhibits. The neutral arbitrator controls the procedural hearing, such as the date, time and data that is needed, once the case is moved to interest arbitration.

   The law creating the JLMC lists what criteria the arbitration panel should consider in reaching a decision. The basic questions are:

   - What can the employer afford to pay given the demographics?
   - What does the employer pay other employees, especially police and fire, both historically and present?
   - How do communities demographically comparable to this community pay?

   The parties generally submit post-hearing briefs about a month after the arbitration hearing and the arbitration panel generally issues its decision about a month after that.

7. After the Interest Arbitration Award is Issued

   The arbitration panel's decision is binding upon the union and the executive branch of the employer. However, in order for the contract to be funded, it is binding only if and when the legislative branch of the government votes to appropriate such funding. The JLMC statute requires the executive branch of the municipality and the exclusive representative of the employees to support the award in the same manner as it would any other decision agreed to by the parties.

   Most awards are funded by the legislative branch, but if they are not, the decision is no longer binding and the parties are sent back to the table. The JLMC may get involved once again at that point.

8. Case Closed by JLMC

   A JLMC case is closed once an agreement in dispute has been funded. If the matter settles prior to arbitration, the JLMC tracks the tentative agreement through ratification and then funding. If an arbitration award is issued, the case is closed once the legislative branch has funded the decision.

E. Miscellaneous Case Procedures

1. Request for Binding Arbitration

The DLR orders the parties to a written collective bargaining agreement to submit an unresolved grievance to arbitration if the parties' collective bargaining agreement does not contain a final and binding arbitration procedure.[107] For information on filing a request for binding arbitration, see 456 CMR 16.02.

2. Strike Investigation

Section 9A(a) of the Law prohibits public employees and employee organizations from striking or inducing, encouraging, or condoning a work stoppage by public employees. When a strike occurs or is about to occur, a public employer may petition for a strike investigation pursuant to Section 9A(b). Generally, the DLR promptly schedules an investigation. For further information on strike investigations, see 456 CMR 16.03.

3. Request for Advisory Rulings

The CERB issues an advisory ruling when a party to collective bargaining negotiations challenges the negotiability of a written proposal submitted to it by the opposing party. For information on petitioning for an advisory ruling, see 456 CMR 16.06.

III. Summary of Law

A. Jurisdiction

1. Federal Preemption

The National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (NLRA), covers employers engaged in interstate commerce and, therefore, generally preempts any state labor relations law. However, Section 2(2) of the NLRA specifically excludes states and other "political subdivisions" from coverage. Federal law determines whether an entity is a political subdivision.[108]

---

[107] M.G.L. c. 150E, Section 8.

[108] *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600 (1971).

Section 14(c)(1) of the NLRA permits the National Labor Relations Board (NLRB) to decline to assert jurisdiction over any class or category of employers "where, in the opinion of the [NLRB], the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction." In these cases, the DLR may assert jurisdiction under Chapter 150A.[109] Examples of this include:

- Horse and dog racing industries.[110]
- Day care centers with less than $250,000 in gross annual revenues.[111]

2. Parallel Jurisdiction

The DLR has parallel jurisdiction with the Civil Service Commission (CSC) in certain limited areas. For example, the Supreme Judicial Court has held that the CSC vindicates a private right of a complaining employee, while the DLR acts as a public prosecutor to test a public right.[112] Therefore, even if the CSC had previously found that a public employer had just cause for disciplining an employee, the DLR may examine the facts to determine whether the discipline was imposed in retaliation for the employee's participation in protected activities.[113]

3. Primary Jurisdiction/Exhaustion of Administrative Remedies

Generally, courts defer action on cases in which the subject matter is within the jurisdiction and expertise of an administrative agency, such as the DLR, to permit the agency to first decide the case.[114]

---

[109] M.G.L. c. 150A, § 10(b); *Operations and Maintenance Service Westover Jobs Corps. Center/G.E. v. Labor Relations Commission,* 405 Mass. 214 (1989).
[110] *NLRB Rules and Regulations,* Part 103.3; *Plainridge Race Course*, 28 MLC 185 (2001).
[111] *Salt & Pepper Nursery School & Kindergarten No. 2,* 222 NLRB 1295, 91 LRRM 1338 (1976); *Greater New Bedford Infant Toddler Center,* 12 MLC 1131 (H.O. 1985), *aff'd*, 13 MLC 1620 (1987).
[112] *Town of Dedham v. Labor Relations Commission,* 365 Mass. 392 (1974).
[113] *Board of Selectmen of Natick v. Labor Relations Commission,* 16 Mass. App. Ct. 972 (1983).
[114] *Leahy v. Local 1526, American Federation of State, County and Municipal Employees*, 399 Mass. 341 (1987) (duty of fair representation cases should ordinarily be decided by the DLR in the first instance); *School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70 (1982) (challenges to a union's assessment of an agency service fee are within the DLR's primary jurisdiction).

B. Definitions

1. Employer

Section 1 of the Law defines "employer" and "public employer" as the Commonwealth, acting through the commissioner of administration, or any county, city, town, district, or other political subdivision acting through its chief executive officer. Section 1 excludes authorities created pursuant to M.G.L. c. 161A (Massachusetts Bay Transportation Authority (MBTA)), and those authorities included under the provisions of Chapter 760 of the Acts of 1962.[115]

a. State Employees

Subject to certain statutory exceptions, the Commonwealth, acting through the commissioner of administration, is the "employer" of all state employees.[116] The exceptions include:

- The Board of Higher Education is the employer of the system of public institutions of higher education employees, except that the Board of Trustees of the University of Massachusetts is the employer for University of Massachusetts employees.
- The Court Administrator of the Trial Court is the employer of judicial employees.
- The State Lottery Commission is the employer of State Lottery Commission employees.
- The Massachusetts Water Resources Authority is the employer of the Massachusetts Water Resources Authority employees.
- The Massachusetts Department of Transportation is the employer of Massachusetts Department of Transportation employees.
- The State Treasurer is the employer of Alcoholic Beverage Control Commission employees.
- The Department of Early Education and Care is the employer of family child care providers defined in M.G.L. c. 15D, § 17.[117]

---

[115] For further information on the applicability of Chapter 150A to these authorities, see Section III(B)(1)(e) below.

[116] *Massachusetts Probation Ass'n v. Commissioner of Administration*, 370 Mass. 651 (1976); *Commonwealth of Massachusetts*, 23 MLC 117 (1996).

[117] Family child care providers are considered public employees for limited purposes, as further detailed in M.G.L. c. 15D, § 17.

- The PCA Quality Healthcare Council is the employer of personal care attendants defined in M.G.L. c. 118E, § 70.[118]

- Each county sheriff is the employer of the respective county sheriff office employees.[119]

b. County Employees

With certain exceptions, referenced below, the county is the employer for all county employees. When two independently elected county officials (or boards) exercise control over the terms and conditions of employment, those officials (or boards) are "joint chief executive officers."[120] The exceptions include:

- The Secretary of the Commonwealth is the employer of the employees in the abolished counties of Franklin, Middlesex, Suffolk, Hampden, Worcester, Hampshire, Essex, and Berkshire. [121]

- The county sheriff is the employer of each county sheriff office's employees.[122]

c. School Departments

Pursuant to Section 1 of the Law, the municipal employer of school employees is represented by the school committee. Therefore, a municipality and a school committee are a single entity and share responsibility for making and fulfilling contractual obligations.[123]

---

[118] Personal care attendants are considered public employees for limited purposes, as further detailed in M.G.L. c. 118E, § 70.
[119] Chapter 48, Section 14 of the Acts of 1997, as amended by Chapter 300 of the Acts of 1998.
[120] *Essex County*, 22 MLC 1556 (1996) (county commissioners and county sheriffs are joint chief executive officers); *Essex Agricultural and Technical Institute*, 4 MLC 1755 (1978) (county commissioners and trustees of county agricultural and technical school are joint chief executive officers).
[121] Chapter 48 of the Acts of 1997, as amended by Chapter 300 of the Acts of 1998; M.G.L. c. 35B, § 1.
[122] Chapter 48, Section 14 of the Acts of 1997, as amended by Chapter 300 of the Acts of 1998.
[123] *City of Malden*, 23 MLC 181 (1997).

A regional school committee is the public employer of the regional school district's employees. In school districts comprised of more than one school committee, the district may function as a "single" employer for the purposes of collective bargaining.[124] Members of a collaborative, through their respective school committees, have a single-employer relationship with employees of the collaborative.[125]

d. Housing Authorities

Housing authorities are the public employers of their employees.[126]

e. Chapter 150A

Chapter 150A, which generally covers private sector employees, covers employees of certain public authorities.

- Section 5 of Chapter 150A applies to Massachusetts Bay Transportation Authority employees.[127]

- Certain sections of Chapter 150A apply to the Massachusetts Port Authority; Massachusetts Parking Authority; and the Woods Hole, Martha's Vineyard, and Nantucket Steamship Authority.[128]

f. Other Employers

With regard to employers not referenced above, the DLR generally defers action until the NLRB specifically declines jurisdiction. The DLR will then decide whether to apply Chapter 150A or 150E by analyzing whether the employer is a public or private employer. To determine whether an enterprise is a "public employer," and subject to Chapter 150E, the DLR considers the following factors:

- The identity and control of the enterprise's board of managers;

- The nature of the employer's corporate structure; and

- The identity of the titleholder to the enterprise's real property.[129]

---

[124] *Freetown-Lakeville School Committee*, 11 MLC 1508 (1985); *Nauset Regional School District*, 5 MLC 1453 (1978).
[125] *Shore Collaborative*, 7 MLC 1351 (1980).
[126] M.G.L. c. 121B § 29; *Springfield Housing Authority v. Labor Relations Commission*, 16 Mass. App. Ct. 653 (1983).
[127] M.G.L. c. 161A § 26.
[128] Chapter 760 of the Act of 1962.
[129] *Bourne Recreation Authority*, 28 MLC 98 (2001); *Franklin Institute of Boston*, 12 MLC 163 (1985).

The DLR also determines whether the particular entity is the actual "employer" of the employees at issue by considering whether the entity:

- Hired the employees;
- Had authority to unilaterally discipline, transfer and/or discharge the employees;
- Set the wage rates;
- Determined job assignments;
- Paid the employees; and
- Was liable for reporting and remitting tax deductions.[130]

Using a similar analysis, the CERB has concluded that certain retirement boards that operate with complete fiscal and administrative autonomy from the city in which they are located are separate employers of their own employees.[131]

2. Employee

Section 1 of the Law defines "employee" or "public employee" as "any person in the executive or judicial branch of a government unit employed by a public employer," with certain exceptions, discussed below. The CERB has broadly interpreted the terms "employee" and "public employee" to include all individuals employed by a public employer, except those specifically excluded.[132] For example, the CERB has defined "employee" to include:

- Regular part-time employees.[133]
- Part-time reserve police officers.[134]
- Per diem substitute teachers.[135]

---

[130] *Higher Education Coordinating Council*, 23 MLC 194 (1997) (council exercises sufficient control over certain individuals to establish that it is employer); *Commonwealth of Massachusetts*, 23 MLC 117 (1996) (Commonwealth not the employer of security and law enforcement personnel assigned to certain military installations jointly operated by the United States government and Commonwealth); *Hudson Bus Lines*, 4 MLC 1630 (1977) (private bus company was employer of bus drivers who transport school children).
[131] *City of Malden*, 28 MLC 130 (2001); *City of Brockton*, 19 MLC 1139 (1992).
[132] *City of Gloucester*, 26 MLC 128 (2000); *City of Fitchburg*, 2 MLC 1123 (1975).
[133] *Board of Regents*, 14 MLC 1123 (1988).
[134] *Town of Newbury*, 14 MLC 1660 (1988).
[135] *Boston School Committee*, 7 MLC 1947 (1981).

- Call fire fighters.[136]
- Visiting lecturers.[137]
- Full-time students who perform part-time work for an employer separate and apart from their educational responsibilities.[138]
- Graduate teaching and research assistants.[139]
- Undergraduate resident assistants and community development assistants.[140]
- Probationary and provisional employees.[141]
- Employees classified as temporary or provisional under civil service law.[142]
- Seasonal employees.[143]

3. Employee – Exceptions

a. Explicit Exceptions

Section 1 of the Law specifically excludes the following from the definition of "employee:"

- Elected officials.
- Appointed officials.[144]
- Members of any board or commission.

---

[136] *Town of Wenham*, 23 MLC 82 (1996), *aff'd sub nom. Town of Wenham v. Labor Relations Commission*, 44 Mass. App. Ct. 195 (1998).
[137] *Board of Regents*, 11 MLC 1486 (1985).
[138] *Quincy Library Department*, 3 MLC 1517 (1977).
[139] *Board of Trustees, University of Massachusetts*, 20 MLC 1453 (1994).
[140] *Board of Trustees of the University of Massachusetts*, 28 MLC 225 (2002).
[141] *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983).
[142] *Boston School Committee*, MUP-9067 (March 2, 1994), *aff'd sub nom. School Committee of Boston v. Labor Relations Commission*, 40 Mass. App. Ct. 327 (1996).
[143] *Town of Wellfleet*, 11 MLC 1238 (1984); *Cf. County of Dukes County/Martha's Vineyard Airport Commission*, 25 MLC 153 (1999) (certain seasonal employees do not have sufficient continuing expectation of employment).
[144] *Cf. Bristol County Sheriff's Office*, 35 MLC 149 (2009) (Sheriff's appointment of canine officers as deputy chiefs did not preclude them from coverage under the Law).

- Representatives of any public employer, including the heads, directors and executive and administrative officers of departments and agencies of any public employer.

- Militia or National Guard members.[145]

- DLR employees.

- Departments of the State Secretary, State Treasurer, State Auditor, and Attorney General officers and employees.[146]

The Law also specifically excludes managerial and confidential employees from the definition of "employee."

b. Managerial Employees

Employees are designated as managerial only if they satisfy any of the following criteria:

- "Participate to a substantial degree in formulating or determining policy." In interpreting this, the CERB has held that:

  - The employee must make policy decisions and determines the objectives, unlike supervisory personnel who transmit policy directives to lower level staff and, within certain areas of discretion, implement the policies.[147]

  - Participation in the decision-making process and attending or participating in policy-making discussions is not sufficient to consider an employee managerial if the input is merely informational or advisory.[148]

---

[145] *Cf. Commonwealth of Massachusetts*, 7 MLC 1740 (1981) (CERB concludes that "armorers," which are essentially civilian janitors and custodians, are employees within the meaning of the Law because M.G.L. c. 33, § 4 defines "militia" as enlisted personnel).
[146] *Cf.* Chapter 110, Section 269(b) of the Acts of 1993 (certain employees transferred from the Department of Labor and Industries to the Office of the Attorney General are considered public employees within the meaning of Section 1 of the Law); *Commonwealth of Massachusetts/Office of the Attorney General*, 26 MLC 139 (2000).
[147] *Wellesley School Committee*, 1 MLC 1389 (1975), *aff'd sub nom., School Committee of Wellesley v. Labor Relations Commission*, 376 Mass. 112 (1978); *In the Matter of the Board of Trustees of the University of Massachusetts*, 37 MLC 67 (2010).
[148] *Id.*

- A managerial employee's authority includes not only the authority to select and implement a policy alternative, but also regular participation in the policy decision-making process.[149]

- The policy decision must be of major importance to the mission and objectives of the public employer.[150]

➢ "Assist to a substantial degree in the preparation for or the conduct of collective bargaining on behalf of a public employer." In this regard, the CERB has held that a managerial employee:

- Must have a voice in determining bargaining strategy or the conditions for settlement.[151]

- Be directly involved in preparing and formulating proposals or positions in collective bargaining.[152]

➢ 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. Considering this, the CERB has decided:

- Judgment is independent when it lies within the employee's sole discretion, without consultation or approval.[153]

- The judgment exercised must be significant.[154]

- Appellate authority must be exercised beyond first step in a grievance and arbitration procedure. Exercise of supervisory authority to ensure compliance with the provisions of a collective bargaining agreement is insufficient standing alone to satisfy this criterion.[155]

---

[149] *Local 888, Service Employees International Union*, 33 MLC 47 (2006); *Town of Plainville*, 18 MLC 1001 (1991).
[150] *Wellesley School Committee*, 1 MLC 1389 (1975), *aff'd sub nom., School Committee of Wellesley v. Labor Relations Commission*, 376 Mass. 112 (1978); 33 MLC 47 (2006).
[151] *Town of Easton*, 31 MLC 132 (2005).
[152] *Town of Agawam*, 13 MLC 1364 (1986).
[153] *Barnstable County*, 26 MLC 183 (2000).
[154] *Id.*
[155] *Board of Trustees (UMass Dartmouth*), 39 MLC 275 (2013).

c. Confidential Employees

Employees are designated as confidential employees only if they "directly assist and act in a confidential capacity to a person or persons otherwise excluded from coverage" under the Law. The exclusion is narrowly interpreted to exclude as few employees as possible, while not unduly hindering the employer's operations.[156] An employee who has significant access or exposure to confidential information concerning labor relations matters or management's position on personnel matters, or advance notice of the employer's collective bargaining proposals will be excluded as confidential.[157]

In determining that an employee is not confidential, the CERB has found:

- A managerial employee's reliance upon another employee for policy advice and personnel recommendations does not, standing alone, render the employee confidential.[158]

- Access to sensitive information, such as financial data, personnel records, or medical records and audits, without more, does not necessarily make an employee confidential.[159]

- Occasionally substituting for an absent employee and performing confidential functions does not make the employee confidential.[160]

d. Independent Contractors

Independent contractors are not employees. However, there is a rebuttable presumption that individuals are employees where they perform a service for a public employer for compensation.[161] The presumption can be rebutted by evidence that the employer does not retain control over the worker. [162] The CERB looks at:

- Duties of the worker;

- The type of supervision the worker receives;

---

[156] *Town of Greenfield*, 32 MLC 133 (2006).
[157] *Town of Tyngsborough,* 38 MLC 140 (2011).
[158] *University of Massachusetts*, 3 MLC 1179 (1976).
[159] *Wellesley School Committee*, 1 MLC 1389 (1975), *aff'd sub nom., School Committee of Wellesley v. Labor Relations Commission*, 376 Mass. 112 (1978); *Springfield Housing Authority*, 36 MLC 61 (2009) (Computer IT technicians non-routine access to sensitive labor materials did not make them confidential employees).
[160] *Town of Wellfleet*, 11 MLC 1238 (1984).
[161] *University of Massachusetts*, 32 MLC 58 (2005).
[162] *Id.*

- The method in which the worker is paid; and
- The manner in which they are treated by the employer.[163]

The CERB considers individuals compensated from the Commonwealth's "03" account on a case-by-case basis.[164]

4. Employee Organization

The Law defines an employee organization as "any lawful association, organization, federation, council, or labor union, the membership of which includes public employees, and assists its members to improve their wages, hours, and conditions of employment." The definition is purposely broad and does not require any specific kind of organizational structure.[165] The DLR considers whether the organization:

- Assists the public employees in improving their wages, hours, and conditions of employment;
- Is able to adequately and independently represent employees in those concerns; and
- Is not the product of employer domination or control.[166]

C. Employee Rights to Organize and Bargain Collectively

Section 2 of the Law provides that employees have the following rights:

- The right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing;
- The right to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion; and
- The right to refrain from such activities.

1. Concerted, Protected Activities

The following sections provide further detail on situations in which the CERB has found that employees were engaged in concerted, protected activity:

---

[163] *Board of Regents,* 11 MLC 1486 (1985).
[164] *Id.*
[165] *Commonwealth of Massachusetts (Unit 6)*, 10 MLC 1554 (1984).
[166] *Franklin County Sheriff's Office*, 36 MLC 125 (2010).

a. Union Activities

- Being an active union president, member of executive board and negotiating committee, and filing/processing/participating in grievances.[167]

- Sending an email to encourage picketing, attending a school committee meeting, and voting to abstain on reports relative to a core subject of the ongoing contract dispute.[168]

- Discussing union activities during work time when an employer permitted discussion of other non-work topics during work.[169]

- Writing a letter to supervisors to complain about terms and conditions of employment and working conditions.[170]

- Publicly protesting working conditions.[171]

- Asking a union vice president about using vacation time.[172]

- Soliciting union authorization cards.[173]

- Non-disruptive picketing of school committee meetings, homes and businesses of school committee members, and distributing leaflets to parents in support of union organizational or bargaining objectives.[174]

- Wearing union insignia during work hours.[175]

- Conducting a vote of no-confidence in a supervisor by mail ballot among union membership and membership of interested union, where the vote was clearly directed at improving terms and conditions of employment.[176]

---

[167] *Sheriff's Office of Plymouth County*, 39 MLC 41 (2012).
[168] *Andover School Committee*, 40 MLC 1 (July 2, 2013).
[169] *Bristol County Sheriff's Department*, 31 MLC 1 (2004).
[170] *Suffolk County Sheriff's Department*, 27 MLC 155 (2001).
[171] *Town of Bolton*, 32 MLC 20 (2005).
[172] *Commonwealth of Massachusetts,* 24 MLC 106 (1998).
[173] *Town of Wareham*, 3 MLC 1334 (1976).
[174] *Southern Worcester County Regional Vocational School District*, 2 MLC 1488 (1976), *aff'd sub nom. Southern Worcester County Regional Vocational School District v. Labor Relations Commission*, 377 Mass 897 (1979).
[175] *Dighton School Committee*, 8 MLC 1303 (1981).
[176] *City of Lawrence*, 15 MLC 1162 (1988).

b. Grievances or Complaints

- Initiating a grievance under the collective bargaining agreement.[177]
- Filing grievances and publicly criticizing how the school committee handled employee complaints.[178]
- Meeting with and asking a union for help with a grievance.[179]
- Prosecuting a grievance outside of the context contractual grievance procedure.[180]
- Acting in an intemperate manner while presenting a grievance if provoked by employer.[181]
- Appealing a disciplinary action to the Civil Service Commission.[182]
- Voicing an individual complaint about working conditions which have an impact on the bargaining unit as a whole.[183]
- Joining together to investigate wages through the Department of Labor and Industries.[184]

c. The Right to Representation at an Investigatory Interview

An employee is engaged in protected activity when requesting union representation at an investigatory interview that the employee reasonably believes will lead to discipline.[185] For further information on an employee's Weingarten rights, see Section III(F)(1)(a)(2).

d. Other Concerted, Protected Activities

- Testifying at a DLR proceeding.[186]

---

[177] *Newton School Committee*, 35 MLC 9 (2008).
[178] *Athol-Royalston Regional School Committee*, 28 MLC 204 (2002).
[179] *Quincy School Committee*, 27 MLC 83 (2000).
[180] *Harwich School Committee*, 2 MLC 1095 (1975).
[181] *Town of Westborough*, 5 MLC 1116 (1979); *compare City of Boston*, 6 MLC 1096 (1979) (egregious and offensive conduct can lose its protected status).
[182] *City of Newton*, 32 MLC 37 (2005).
[183] *Id.*
[184] *Luana's Mexican Hat Restaurant*, 8 MLC 1207 (1981) (CERB found violation under Chapter 150A).
[185] *Town of Hudson*, 29 MLC 52 (2002), *aff'd sub nom. Town of Hudson v. Labor Relations Commission*, 69 Mass. App. Ct. 549 (2007).
[186] *City of Boston*, 4 MLC 1033 (1977).

- Speaking out at a town meeting against the town's proposed budget.[187]

2. Unprotected Activities

The following are examples of conduct which the CERB has determined is not protected under the Law:

- Discussions with employer about working conditions absent evidence that the employee was acting on the authority of, or in concert with, other employees.[188]

- Improper tactics intended to coerce the employer into accepting the union's position, or illegal activities, such as vandalism.[189]

- Conduct which is physically intimidating, egregious, or disruptive of the employer's business.[190]

- Threatening behavior toward a union member who speaks out against a union.[191]

D. Appropriate Bargaining Units[192]

1. Statutory Criteria

Section 3 of the Law requires that the DLR proscribe rules and regulations and establish procedures for appropriate bargaining unit determinations, which must be consistent with the purpose of providing for stable and continuing labor relations.

---

[187] *Town of Tewksbury*, 19 MLC 1808 (1993).
[188] *Massachusetts Port Authority*, 35 MLC 61 (2008); *Town of Southborough*, 21 MLC 1242 (1994).
[189] *City of Fitchburg*, 2 MLC 1123 (1975).
[190] *City of Boston*, 6 MLC 1096 (1979) (CERB will balance the rights of employees to engage in concerted activities, and the rights of employers not to be subjected to egregious, insubordinate, or profane remarks that disrupt the employer's business or demean workers or supervisors).
[191] *Town of Bolton*, 32 MLC 13 (2005).
[192] Both the DLR and the CERB, depending on the posture of the case, are authorized to determine appropriate bargaining units giving due regard to such criteria as community of interest, efficiency of operations, and safeguarding effective representation, as further described below. For efficiency, the references to the DLR in this section will include the CERB.

Voluntary recognition and a stipulation of the parties as to the appropriate unit are not dispositive.[193] Rather, the DLR makes its appropriate bargaining unit determinations based upon the following statutory criteria.[194]

a. Community of Interest

The employees in a bargaining unit must share a "community of interest," which is common working conditions and interests that would be involved in collective bargaining.[195] The touchstone of community of interest is a demonstration that the employees who seek representation requested comprise a coherent group with employee interests sufficiently distinct from those of excluded employees to warrant separate representation.[196] The factors to consider include:

- Common supervision.
- Similar pay and work conditions.
- Job requirements.
- Similar skills and functions.
- Education.
- Training and experience.
- Job interchange and work contact.[197]

The DLR does not rely solely on an employee's job title in determining unit placement. Evidence of actual duties is required.[198] Generally, job descriptions alone are not sufficient evidence unless the parties stipulate that the description accurately and completely describes the position.[199]

---

[193] *City of Springfield*, 24 MLC 50 (1998).
[194] *City of Worcester*, 5 MLC 1332 (1978).
[195] *Board of Trustees, University of Massachusetts (Lowell)*, 23 MLC 273 (1997); *City of Malden*, 9 MLC 1073 (1982).
[196] *Greater Lawrence Sanitary District*, 34 MLC 87 (2008); *Massachusetts Board of Regional Community Colleges*, 1 MLC 1426 (1975).
[197] *University of Massachusetts (Boston)*, 40 MLC 315 (2014); *Boston School Committee*, 2 MLC 1557 (1976).
[198] *Massachusetts Water Resources Authority*, 37 MLC 29 (2010).
[199] *Id.*; *Town of Tisbury*, 30 MLC 77 (2003).

Community of interest does not require an identity of interest. Represented employees need only to be similarly situated with no inherent conflict among consolidated employees.[200] Differences in work locations, hours worked or supervision do not necessarily destroy community of interest.[201]

b. Efficiency of Operations and Effective Dealings

The DLR's policy is to place employees in the largest practicable bargaining unit.[202] It considers whether separate units fragment the work force and adversely impact the employer's efficiency of operations.[203] The DLR also analyzes the employer's:

- Structure.
- Delivery of services.
- Fiscal administration.[204]

c. Safeguarding Employee Rights to Effective Representation

Chapter 150E prohibits the creation of a unit structure which would impair employees' statutory rights.[205] Therefore, the DLR avoids establishing units with a diversity of employment interests so marked as to produce inevitable conflicts in negotiation and administering collective bargaining agreements.[206] Most importantly, the DLR avoids creating units in which conflict is inherent because of a lack of community of interest among the employees.[207]

---

[200] *Cambridge Health Alliance*, 38 MLC 234 (2012); *Franklin Institute of Boston*, 12 MLC 1091 (1985).
[201] *Boston School Committee*, 25 MLC 160 (1999); *Mass. Board of Regents*, 14 MLC 1589 (1988) (department chairpersons, part-time faculty, and librarians were found to share a community of interest with full-time faculty); *Mass. Board of Community Colleges*, 1 MLC 1426 (1975) (professional faculty of the statewide network of community colleges placed in one overall unit).
[202] *Greater Lawrence Sanitary District*, 34 MLC 87 (2008).
[203] *Greater Lawrence Sanitary District*, 34 MLC 87 (2008); *Mass. Board of Regional Community Colleges*, 1 MLC 1426 (1975).
[204] *University of Massachusetts*, 3 MLC 1179 (1976).
[205] *Statement in Support of Adoption of Amendment to Rules and Regulations of the Commission Creating Statewide Occupational Units*, 1 MLC 1319 (1975).
[206] *Town of South Hadley*, 35 MLC 122 (2008); *University of Massachusetts*, *Union of Student Employees*, 4 MLC 1384 (1977).
[207] *Statement in Support of Adoption of Amendment to Rules and Regulations of the Commission Creating Statewide Occupational Units*, 1 MLC 1319 (1975).

1. Policy Considerations

a) DLR's Broad Discretion

- The DLR has broad discretion to determine appropriate bargaining units.[208]

- Where the union's petition describes an appropriate unit, the DLR does not reject that unit because it is not the most appropriate unit, or because there is an alternative unit that is more appropriate.[209]

b) Comprehensive Units Favored

- The DLR favors broad, comprehensive units over small, fragmented, diverse units.[210]

- The DLR declines to certify small, separate units when there are other employees who share a community of interest with the employees seeking the separate unit.[211]

- Bargaining units limited to departments or other administrative divisions are too narrow to be appropriate if the employees share a community of interest with a larger group of employees sufficient to create a broad, comprehensive bargaining unit.[212]
- The DLR rejects a one-person unit when there is a larger appropriate unit.[213]

c) Stipulated Units

When the employer and employee organization agree on the positions to include in a bargaining unit, the DLR adopts their agreement if it does not conflict with either the Law or established policy.[214]

---

[208] *City of Lowell*, 35 MLC 300 (2009).
[209] *Id.*
[210] *City of Worcester*, 36 MLC 151 (2010).
[211] *Greater Lawrence Sanitary District*, 34 MLC 87 (2008).
[212] *Town of Dartmouth*, 29 MLC 204 (2003).
[213] *Town of Berkley,* 35 MLC 266 *(2009).*
[214] *Town of Manchester-By-The-Sea*, 24 MLC 76 (1998); *Cf. Barnstable County,* 26 MLC 183 (2000) (DLR rejected parties' stipulation that the switchboard operator should be included in the proposed bargaining unit because of established policy to not place clerical employees in the same unit as maintenance employees).

2. Supervisory Units

Generally, the DLR establishes separate bargaining units for supervisors and the employees whom they supervise since individuals who possess significant supervisory authority often owe their allegiance to their employer, particularly in the areas of discipline and productivity.[215] However, separate supervisory unit placement is a policy determination and is not always required.[216] To be considered supervisory, an employee must possess:

- Independent authority to make personnel decisions like hiring, transfers, promotion, discipline and discharge;
- Effective ability to recommend such personnel decisions; or
- Independent authority to assign and direct the work of their subordinates.[217]

The DLR also considers whether the employee has the authority to:

- Adjust grievances.
- Take charge in emergency situations.
- Assign off-duty employees to work overtime.
- Command a department in the absence of higher ranking supervisory authority.[218]

3. Professional Employees

A "professional employee" is engaged in work that meets all of the following criteria:

- Predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work.

---

[215] *Town of Falmouth*, 39 MLC 376 (2013); *Burlington Educators Association*, 33 MLC 31 (2006) (department heads and team leaders excluded from bargaining unit of teachers); *Town of Provincetown*, 31 MLC 55 (2004) (rule applies with no less force to unit determinations involving police departments).
[216] *Town of Wareham*, 36 MLC 76 (2009) (DLR declines to create a single person bargaining unit for supervisor).
[217] *Bristol County Sheriff's Office*, 35 MLC 149 (2009).
[218] *Id.*

- Involving the consistent exercise of discretion and judgment in its performance.

- Of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

- Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes.[219]

In cases involving groups of employees where some, but not all, possess the stated educational requirements, the DLR looks at whether a majority of the employees in the title possess the requisite education. If they do, the DLR presumes that this level of education is actually needed to perform the job and confers professional status even on those employees who do not possess the requirements. Conversely, if a majority of employees do not have the level of education stated, the DLR concludes that the work does not require the use of advanced knowledge.[220]

Section 3 of the Law specifies that professional employees may not be included in a bargaining unit with non-professional employees unless the majority of the professional employees vote for inclusion in the unit.

4. Technical Employees

Although technical employees have some of the characteristics of professional employees, they do not meet the specific requirements for qualification as a professional employee.[221] To determine whether an employee is technical, the DLR considers the following factors:

- Specialized training and knowledge.

- Performing work of a predominantly intellectual character requiring the use of independent judgment.

- Higher levels of skill and pay.

---

[219] M.G.L. c. 150E, § 1; *City of Boston*, 36 MLC 29 (2009).
[220] *City of Boston*, 38 MLC 157 (2011).
[221] *Massachusetts Turnpike Authority*, 31 MLC 87 (2004).

- In most cases, licensing or certification by a state or private agency.[222]

5. Statewide Units

DLR regulations identify the appropriate bargaining unit standards for Commonwealth employees as follows:[223]

Nonprofessional Employees

- Unit 1: Administrative and Clerical, including all nonprofessional employees whose work involves the keeping or examination of records and accounts or general office work.

- Unit 2: Service, Maintenance and Institutional, excluding building trades and crafts and institutional security.

- Unit 3: Building Trades and Crafts.

- Unit 4: Institutional Security, including the correctional officers and other employees whose primary function is the protection of the property of the employer, protection of persons on the employer's premises, and enforcement of rules and regulations of the employer against other employees.

- Unit 4A: Supervisory employees of the Department of Correction in the title of Captain.

- Unit 5: Law Enforcement, including all employees with power to arrest, whose work involves primarily the enforcement of statutes, ordinances, and regulations, and the preservation of public order.

- Unit 5A: Sergeants and Troopers. [224]

Professional Employees

- Unit 6: Administrative, including legal, fiscal, research, statistical, analytical and staff services.

- Unit 7: Health Care.

---

[222] *Id.*

[223] The statewide units do not apply to community and state college and university employees. 456 CMR 14.07.

[224] Unit 5A is not included in the DLR regulations, but was certified in Case No. SCR-2090 (1976). The state police ranks of lieutenant and above are prohibited from bargaining collectively under the Law. M.G.L. c. 150E, § 3; *Commonwealth of Massachusetts, Secretary of Administration and Finance*, 36 MLC 108 (2009).

- Unit 8: Social and Rehabilitative.
- Unit 9: Engineering and Science.
- Unit 10: Education.

6. Statutorily Mandated Units

In addition to defining the appropriate state police bargaining unit, Section 3 of the Law defines other "appropriate bargaining units" as follows:

- State Lottery Commission employees below the rank of assistant director.
- For judicial employees covered by Chapter 150E, there is a public safety professional unit composed of all probation officers and court officers, and a unit composed of all nonmanagerial or nonconfidential staff and clerical personnel.
- Court officers in the superior court department for Suffolk and Middlesex counties are represented by such other bargaining units as they may elect.

7. Employees Other Than Regular Full-Time Employees

a) Part-Time Employees

- It is the DLR's well-established policy to include all regular part-time employees in the same bargaining unit as full-time employees with whom they share a community of interest.[225]
- The DLR excludes from coverage those employees who lack a sufficient interest in their wages, hours and other terms and condition of employment to warrant collective bargaining.[226]

b) Seasonal Employees

- Seasonal employees may be included in a bargaining unit with regular employees if the seasonal employees have a community of interest with the other employees, and there is substantial stability in the seasonal work force from year to year.[227]

---

[225] *Town of Grafton*, 28 MLC 388 (2002).
[226] *Town of Lee*, 34 MLC 39 (2007).
[227] *Town of Wellfleet*, 11 MLC 1238 (1984).

- In determining the appropriateness of including seasonal employees in a bargaining unit with regular employees, the DLR considers the seasonal employees' expectation of continuing employment.[228]

c) Casual Employees

- Casual employees are excluded from coverage under the Law because they lack a sufficient interest in their wages, hours, and other terms and conditions of employment to warrant collective bargaining.[229]

- To determine if an employee is casual, the DLR considers factors such as:

  - Continuity of employment.

  - Regularity of work.

  - The relationship of the work performed to the needs of the employer.

  - The amount of work performed by the employee.[230]

d) Police and Fire

- Generally, call firefighters are entitled to collective bargaining rights where they are a municipality's sole source of fire protection, and the scope of the unit is otherwise easily identifiable because the municipality imposes certain requirements upon them.[231]

---

[228] *Id.; Compare County of Dukes County Martha's Vineyard Airport Commission*, 25 MLC 153 (1999) (seasonal employees not included in bargaining unit) *with City of Gloucester*, 1 MLC 1170 (1974) (season summer employees returning year after year had collective bargaining rights, and it would be inappropriate for them to constitute a separate bargaining unit).
[229] *Town of Lee*, 34 MLC 39 (2007).
[230] *Town of Wenham*, 22 MLC 1237 (1995), *aff'd sub nom., Town of Wenham v. Labor Relations Commission*, 44 Mass. App. Ct. 195 (1998).
[231] *Town of Leicester*, 9 MLC 1014 (1982).

- The DLR has also found mixed units of call and regular firefighters appropriate, where, even though the call firefighters were not a municipality's sole source of fire protection, the municipality exerted some control over their employment.[232]

- In cases where a municipality does not assign call firefighters to specific shifts or exert some quantifiable measure of control over their employment, the DLR has granted bargaining rights to at least some of these employees, where there was a clear and close relationship between the employees' work and the employers' firefighting needs.[233]

- The DLR has found that special police officers are not regular part-time employees when there is an absence of regular assignment to shift work, coupled with a minimal number of total shift hours worked over a 12-month period.[234]

---

[232] *Town of Sturbridge* (*Sturbridge I*), 18 MLC 1416 (1992) (DLR included call officers, but not call firefighters, in a unit of full-time firefighters because town required two out of four officers to work weekend shifts); *Town of Sturbridge* (Sturbridge II), 29 MLC 156, 161 (2002) (call firefighters had a sufficient interest in their employment relationship where town regularly assigned them to work weekend shifts and required them to perform monthly drills).

[233] *Town of Wenham*, 22 MLC 1237, *aff'd sub nom., Town of Wenham v. Labor Relations Commission*, 44 Mass. App. Ct. 195 (1998) (unit of call firefighters appropriate for collective bargaining where there was a stable demand for the call firefighters and the town depended on them entirely to fight fires); *Town of Boxford*, 35 MLC 113 (2008) (following *Town of Wenham,* held that call firefighters who had responded to at least 33% of all alarms sounded in a year had a sufficient continuity of employment to entitle them to collective bargaining rights).

[234] *Town of Lee*, 34 MLC 39 (2007).

8. Modification of Existing Bargaining Units

A CAS, or unit clarification, petition is a petition for clarification or amendment of the bargaining unit, which only the employer or the employee organization may file. In general, it is the appropriate vehicle to determine whether newly-created positions should be included (accretion) or excluded (severance) from a bargaining unit, and to determine whether substantial changes in the job duties of existing positions warrant either their inclusion or exclusion from a bargaining unit.[235] A unit clarification petition is also appropriate if the outcome sought by the petition is clearly supported by an apparent deficiency in the scope of the existing unit and must be, at least arguably, within the realm of what the parties intended when the unit was first formulated.[236]

a) Severance

Traditionally, the DLR has not looked favorably upon severance petitions and has declined to use them to fix imperfectly constructed bargaining units.[237] In rare cases, a unit clarification petition may be used to exclude positions from a certified bargaining unit if:

- The original description of the unit lacked specificity; or
- The duties of the position at issue have changed since the certification.[238]

Under certain rare circumstances, the DLR has entertained a severance petition on its merits, even where the duties of the position(s) at issue have not changed since recognition or certification, to determine whether the unit remained appropriate in light of certain significant operational changes, and where the disputed positions are held to be either managerial or confidential employees.[239] The DLR modifies a bargaining unit structure under these circumstances only where it determines that the existing unit is inappropriate as a matter of law.[240]

---

[235] *City of Gloucester*, 40 MLC 359 (2014).
[236] *Id.*
[237] *Town of Marblehead*, 27 MLC 142, 145 (2001).
[238] *Weston School Committee*, 37 MLC 224 (2011).
[239] *Board of Trustees (UMass Dartmouth*), 39 MLC 275 (2013).
[240] *Id.; See also Massachusetts Bay Transportation Authority*, 37 MLC 146 (2011) (DLR finds that licensed plumbers are craft employees subject to Chapter 150A, § 5(b) and orders election to determine if they desire to be included in a bargaining unit of craft and non-craft employees); *City of Boston*, 36 MLC 29 (2009) (professionals included in a mixed unit who have not previously had an opportunity to vote over inclusion in unit with

b) Accretion

When determining whether an employee should be accreted into an existing bargaining unit, the DLR uses a three-part test:

- First, the DLR determines whether the position was originally included in the certification or recognition of the bargaining unit. Absent a material change in job duties and responsibilities, the DLR does not accrete a position into a bargaining unit if it existed at the time of the original certification.

- If the above inquiry produces an inconclusive result, the DLR next examines whether the parties' subsequent conduct, including their bargaining history, indicates that they considered the position to be included in the same bargaining unit.

- If this inquiry is also inconclusive, the DLR then considers whether the position sought to be accreted shares a community of interest with the existing positions. [241]

c) Stipulation by the Parties

The DLR adopts the parties' stipulation where the issues raised by a petition are resolved by agreement of the parties, and the stipulation does not appear to conflict with the Law or with established DLR precedent or policy.[242] If both parties have agreed to include a position, one party generally may not subsequently seek to exclude the position absent changed circumstances.[243]

---

non-professionals were permitted self-determination election to determine whether they wished to remain in mixed unit or be represented in a stand-alone unit of professionals).

[241] *Hull Teachers Association*, 37 MLC 144 (2011); *but see City of Gloucester*, 40 MLC 359 (2014) (without determining whether the disputed position shared a community of interest with the unit positions, the DLR held that it is inappropriate to accrete a school committee position into a unit of municipal employees because the employees have different employers).

[242] *Onset Water Department*, 36 MLC 25 (2009) (DLR removed Superintendent position from unit pursuant to parties' stipulation that the position was managerial).

[243] *Sheriff of Worcester County*, 30 MLC 132 (2004).

d) Self-Determination or Add-On Election

In cases where accretion is not permitted, the DLR may, under special circumstances, permit a self-determination or add-on election among employees holding the disputed titles. A self-determination election may be ordered where:

- The union files a petition and a sufficient showing of interest;
- There is sufficient community of interest between the employees in disputed titles and employees in the existing unit;
- The petition seeks to include all such employees; and
- The reasons for the original exclusion no longer exist.[244]

If the DLR directs that such an election be held, the employees in the disputed titles have a choice of being represented by the incumbent representative of the existing unit or no employee organization. If a majority of the employees vote for no representative, they are not added to the unit.[245]

9. Judicial Review

The courts do not review the DLR's certification of a bargaining unit until the CERB has issued a decision based upon an unfair labor practice charge, absent extraordinary circumstances.[246]

E. Determining Bargaining Representatives[247]

1. Voluntary Recognition

Section 4 of the Law allows a public employer to recognize an employee organization designated by a majority of the employees in the bargaining unit as the exclusive bargaining representative without the DLR conducting an election.

---

[244] *Town of Falmouth*, 27 MLC 27 (2000); *City of Quincy Library Department*, 3 MLC 1517 (1977).
[245] *Id.*
[246] *Collective Bargaining Reform Association v. Labor Relations Commission*, 436 Mass. 197 (2002); *Sullivan v. Labor Relations Commission*, 5 Mass. App. Ct. 532 (1977).
[247] For more information on the DLR's procedures in determining bargaining representatives, see Section II(B).

If an employer and an employee organization have accomplished a voluntary recognition according to DLR Regulation 456 CMR14.06(5), it bars an election (except for good cause shown) in that bargaining unit or a portion of it for 12 months. For further information, see Section III(E)(4)(e).

An employer may voluntarily recognize an employee organization that represents a majority of employees without following DLR regulations, but such voluntary recognition does not bar an election within 12 months after the voluntary recognition.[248]

2. Representation Petition and Hearing

a. Notice

The DLR requires that all interested parties be given notice of representation proceedings. The petitioner must provide the DLR with information regarding other organizations that may represent any employees affected by the petition.[249]

b. Showing of Interest

In Union Representation Petitions, the following showing of interest is required:

- A petitioner seeking to represent a proposed bargaining unit of employees who are not currently represented must submit a showing of interest of 30%.[250]

- A petitioner seeking to represent a bargaining unit of employees who are currently represented must submit a showing of interest of 50%.[251]

- If an additional union, other than the petitioning union or incumbent, wishes to intervene, it must submit a showing of interest of 10%.[252]

---

[248] *Franklin County Sheriff's Office*, 36 MLC 125 (2010); *Town of East Longmeadow*, 14 MLC 1555 (1988).
[249] 456 CMR 14.02(1)(f)-(g); 14.02(2)(e).
[250] 456 CMR 14.05(2).
[251] 456 CMR 14.05(3).
[252] 456 CMR 14.05(4).

The sufficiency of the showing of interest is a DLR administrative determination and the parties to a representation petition cannot litigate it.[253] Once the DLR has made its showing of interest determination, it does not allow bargaining unit members to revoke their authorization.[254]

c. Status as "Employee Organization"

The definition of "employee organization" in Section 1 of the Law is purposely broad and does not require any specific type of organizational structure.[255] Instead, the CERB analyzes whether the organization:

- Assists public employees in improving their wages, hours and conditions of employment;
- Is able to adequately and independently represent employees in those concerns; and
- Is not the product of employer domination or control.[256]

The CERB has found that the following do not undermine an organization's status as an employee organization:

- The organization does not have by-laws, constitution, officers, dues, or any prior history of bargaining.[257]
- The organization has not complied with Sections 13 and 14 of the Law (although compliance is required before the DLR allows it to appear on the ballot).[258]
- The petitioning organization is financially supported, or dominated, by another employee organization.[259]

---

[253] *Bristol County Retirement Board*, 27 MLC 124 (2001).
[254] *City of Cambridge*, 29 MLC 134 (2003) (if bargaining unit members have changed their minds, they will have the opportunity to vote for the representative of their choice in the election).
[255] *Commonwealth of Massachusetts (Unit 6)*, 10 MLC 1557 (1984).
[256] *Franklin County Sheriff's Office*, 36 MLC 134 (2010).
[257] *Id.*
[258] 456 CMR 14.12(1); *West Barnstable Fire District*, 17 MLC 1076 (1990).
[259] *Commonwealth of Massachusetts (Unit 6)*, 10 MLC 1557 (1984).

d. Employer's Duty of Neutrality

When an employer receives the DLR's Notice of Hearing in a representation case, it is on notice that there is a question of representation. The employer must then maintain strict neutrality, which includes not bargaining with the incumbent union during the pendency of the representation petition.[260] The failure to comply with this duty is a violation of Section 10(a)(2) of the Law.[261]

e. Employer-Initiated Representation Petitions

An employer may file a representation petition when one or more unions claim to represent a substantial number of employees in a bargaining unit.[262]

f. Decertification Petition

Employees who wish to decertify the incumbent union may file a petition requesting that the DLR conduct a decertification election.[263] The DLR requires:

- A petitioner seeking to decertify the incumbent collective bargaining representative must submit a showing of interest of 50%.[264]

- The appropriate unit in cases involving employee petitions to decertify an existing bargaining unit must correspond with either the unit previously certified by the DLR or the one recognized by the parties.[265]

g. Intervention and Disclaimer of Interest

If an employee organization wishes to intervene, the following showing of interest is required:

- An incumbent employee organization may intervene without filing a showing of interest.[266]

---

[260] *Quincy School Committee*, 20 MLC 1306 (1993); *Commonwealth of Massachusetts (Alliance)*, 7 MLC 1228 (1980).
[261] *Id.*
[262] M.G.L. c. 150E, § 4; *University of Lowell*, 3 MLC 1468 (1977).
[263] M.G.L. c. 150E, § 4.
[264] 456 CMR 14.05(3).
[265] *Hingham Municipal Lighting Plant,* 29 MLC 175 (2003); *Town of Acton*, 36 MLC 99 (2009) (may not decertify portion of existing unit).
[266] 456 CMR 14.05(4).

- Any other intervenor employee organization must file a 10% showing of interest.[267]

The failure of an incumbent employee organization to timely file a motion to intervene is treated as a disclaimer of interest in representing the petitioned-for employees, and the incumbent organization will not be on any ballot or be considered a necessary party to a consent agreement for election.[268]

h. Consent Election Agreement

The parties to a representation petition may waive a hearing and stipulate to a bargaining unit by executing a Consent Election Agreement, which must be approved by the DLR.[269] The DLR generally accepts the Consent Election Agreement unless the stipulated unit conflicts with the Law or established policy.[270]

i. Deferral to AFL-CIO "No Raiding" Procedure

If an employee organization affiliated with the AFL-CIO petitions to represent a bargaining unit currently represented by another employee organization affiliated with the AFL-CIO, any party may request the DLR to defer processing of the petition for 30 days to permit the employee organizations to pursue the settlement provisions of the AFL-CIO procedures.[271]

3. Written Majority Authorization

A majority of employees in a petitioned-for, appropriate bargaining unit may designate an employee organization as their exclusive representative by signing authorization cards, petitions, or other suitable written evidence.[272]

---

[267] *Id.*
[268] 456 CMR 14.18(1).
[269] 456 CMR 14.11.
[270] *Town of Manchester-By-The-Sea*, 24 MLC 76 (1998); *Cf. Barnstable County,* 26 MLC 183 (2000) (DLR rejected parties' stipulation that the switchboard operator should be included in the proposed bargaining unit because of established DLR practice to not place clerical employees in the same unit as maintenance employees).
[271] 456 CMR 14.17.
[272] M.G.L. c. 150E, § 4; 456 CMR 14.19.

4. Bars to Processing Petition

a. Certification Bar

Except for good cause shown, the DLR does not process a petition for an election in any bargaining unit represented by a certified bargaining representative when the DLR has issued a certification of representative within the preceding 12 months.[273] The certification year begins on the date of initial certification.[274]

The principle purpose of the one-year certification bar is to insulate a newly-certified union from the disruptive pressure of outside organizing or petitions for decertification, giving the certified union time to establish a new bargaining relationship with the employer.[275] In cases applying the certification year bar, the DLR balances the right of the newly-certified bargaining representative to a reasonable period of good faith negotiations, with the right of employees to freely choose their representative.[276]

b. Contract Bar

1) Open Period

The contract bar doctrine prohibits the DLR from entertaining an election petition if a valid collective bargaining agreement is in effect, except for good cause, unless the petition is filed during the "open period" of no more than 180 days and no fewer than 150 days prior to the expiration date of the collective bargaining agreement.[277] The purpose of the contract bar rule is to establish and promote the stability of labor relations and to avoid instability of labor agreements.[278]

The following are guidelines regarding the open period:

- A successor contract that is negotiated and ratified prior to the open period for filing petitions under the existing valid collective bargaining agreement does not operate as a bar to a petition that is timely filed under the existing contract.[279]

---

[273] 456 CMR 14.06(4).
[274] *Springfield Housing Authority*, 37 MLC 106 (2010).
[275] *Commonwealth of Massachusetts*, 19 MLC 1069 (1992).
[276] *Springfield School Committee*, 27 MLC 20 (2000).
[277] 456 CMR 14.06(1)(a). For petitions filed under Chapter 150A, the open period is no more than 90 days and no less than 60 days prior to the contract's expiration. *Hudson Bus Lines*, 4 MLC 1630 (1977).
[278] *City of Springfield*, 35 MLC 56 (2008).
[279] *City of Springfield*, 35 MLC 56 (2008).

- A petition must actually be received at the DLR's office within the 180-to-150 day open period.[280] A petition filed on the 150th day is considered timely.[281]

- Petitions filed during the open period may be amended after the end of the open period if the amendment does not claim a unit larger or substantially different from the unit originally sought.[282]

- The petition is not considered filed until it is accompanied by an adequate showing of interest.[283]

- Generally, the DLR allows a petitioner to amend its petition to correct any defects, but such amendments do not enlarge the open period for contract bar purposes.[284]

A CAS petition that was filed at a time when no contract was in effect is not barred by the subsequent execution of a collective bargaining agreement that retroactively covers the time period when the petition was filed.[285] The DLR entertains a CAS petition filed outside of the 180-to-150 day open period when it seeks to alter the composition or scope of an existing unit by adding or deleting job classifications that have been created or whose duties have been substantially changed since the effective date of the collective bargaining agreement.[286]

2) Complete and Final Agreement

For a collective bargaining agreement to bar the processing of a petition, the evidence must establish the existence of a complete and final agreement signed by all parties prior to the filing date of a rival petition.[287] Specifically:

- To be complete, an agreement must contain substantial terms and conditions of employment and may not be conditioned upon further negotiations.[288]

---

[280] *City of Boston*, 35 MLC 53 (2008); *City of Springfield*, 1 MLC 1446 (1975).
[281] *Town of North Reading*, 5 MLC 1209 (1978).
[282] *Commonwealth of Massachusetts* (Unit 4), SCR-2100 (1977) (unpublished).
[283] *Chief Administrative Justice of the Trial Court*, 6 MLC 1195 (1979).
[284] *Commonwealth of Massachusetts (Trial Court)*, 10 MLC 1162 (1983).
[285] *Massachusetts Organization of State Engineers and Scientists*, 19 MLC 1778 (1993).
[286] 456 CMR 14.06(1)(b).
[287] *City of Boston*, 35 MLC 53 (2008).
[288] *Id.*; *Cf. Town of Burlington*, 14 MLC 1632 (1988) (side letter negotiations that were tangential, rather than integral, to the main contract need not necessarily have been completed for a contract to be a bar).

- If an agreement is contingent upon ratification, it must be ratified before the rival petition is filed for the DLR to determine that the agreement is final.[289]

- Informal memoranda may suffice to show the contractual terms, so long as the evidence establishes the existence of a complete and final agreement to which all parties have acquiesced by their written signatures or initials.[290]

- A contract need not have been funded by the legislative body in order to constitute a bar.[291]

3) Appropriate Unit

A contract must cover an appropriate unit in order to serve as a bar to a petition. However, the DLR does not test the appropriateness of the unit by the same community of interest standards it considers initially to determine an appropriate bargaining unit.[292]

If the petition seeks an appropriate unit, the DLR does not dismiss it merely because some of the petitioned-for employees also share a community of interest with other employees (not petitioned-for) who are covered by an existing contract.[293]

4) Contract Filing

A copy of any executed written collective bargaining agreement or Memorandum of Agreement (MOA) must be electronically filed with the DLR within 30 days of its execution by the employer, exclusive bargaining representatives or any other person. The copy of any MOA must include an electronic copy of the agreement it amends. For more information about contract filing, please see 456 CMR 12.12 (7).

5) Good Cause Exception

The DLR's application of the contract bar doctrine is discretionary.[294] Exceptions to the contract bar rule are rarely found and generally require evidence of substantial disruption in bargaining relationships and threats to labor stability.[295]

---

[289] *Id.*; *Commonwealth of Massachusetts*, 7 MLC 1825 (1981).
[290] *City of Boston*, 36 MLC 194 (2010).
[291] *Bristol County Sheriff*, 37 MLC 132 (2010).
[292] *Boston Water and Sewer Commission*, 6 MLC 1601 (1979).
[293] *University of Massachusetts Medical Center*, 12 MLC 1643 (1986).
[294] *Chief Justice of the Administration and Management of the Trial Court*, 29 MLC 10 (2002).
[295] *Town of Saugus*, 28 MLC 80, 83 (2001).

A party may waive the contract bar doctrine, and the DLR decides whether to apply it or waive it depending on the facts of each case with a view toward fairness for the parties and the stability of bargaining agreements.[296]

The contract bar will not apply unless the parties have complied with the DLR rules requiring that they file an electronic copy of the contract with the DLR and the employee organization has properly filed its Forms 1 and 2. For more information on Employee Organization Information Reports (Form 1) and Employee Organization Financial Reports (Form 2), see 456 CMR 16.05 (1), 456 CMR 16.05 (2) and 456 CMR 14.06 (1)(c).

There is a good cause exception that allows the incumbent employee organization and/or the employer, after notification by DLR, 30 days to cure the failure to comply with these requirements. 456 CMR 14.06 (1)(e).

6) Three-Year Limit

No collective bargaining agreement may operate as a bar to a petition for a period of more than three years.[297] The three-year limit serves both to protect a public employer and the incumbent employee organization from too-frequent challenges and to preserve the opportunity for employees to re-examine their choice of bargaining representative at least every three years.[298] The following are guidelines in considering the three year limitation:

- A successor contract that is negotiated and ratified prior to the open period under the existing valid collective bargaining agreement does not bar a petition that is timely filed under the existing contract.[299]

---

[296] *Easton School Committee*, 2 MLC 1111 (1975); *Compare Chief Administrative Justice of the Trial Court*, 6 MLC 1195 (1979) (the initiation of reorganization during the certification year did not lead to such a massive frustration of the collective bargaining processes that would justify waiver of the usual contract bar rules) *with Chief Justice of the Administration and Management of the Trial Court*, 29 MLC 10 (2002) (good cause to waive the contract bar rule where a different party had previously filed a CAS petition over the same position, and that petition was pending during the term of the contracts affected by resolution of the unit placement issue).
[297] 456 CMR 14.06(1); *City of Springfield*, 35 MLC 56 (2008) (if a valid contract exceeds a fixed term of three years, the DLR treats that contract as one that is fixed for a term of three years).
[298] *City of Springfield*, 35 MLC 56 (2008).
[299] *Id.*

- An incumbent employee organization's expressed desire to negotiate changes and revisions in the existing contract, which is received by the employer immediately preceding the automatic renewal date provided for in the contract, prevents that contract's renewal for contract bar purposes.[300]

- An expired contract does not bar a representation petition even though the parties agree to continue its terms during negotiations.[301]

c. Withdrawal/Disclaimer Bar

For information regarding the Withdrawal/Disclaimer Bar, please see 456 CMR 14.06(2) and Section II(B)(1)(d)(2). There is no case law that further clarifies this regulation.

d. Election Year Bar

For information regarding the Election Year Bar, please see 456 CMR 14.06(3) and Section II(B)(1)(d)(2).

e. Recognition Year Bar

The DLR does not process a petition for an election in any bargaining unit where a recognition agreement that complies with the requirements set forth in 456 CMR 14.06(5) has been executed in the preceding 12-month period, except for good cause shown.[302]

Because the recognition year bar rule places some limitations on employee free choice, there must be some evidence that the employer has recognized the employee organization as the exclusive representative of an appropriate bargaining unit of employees.[303] Specifically, the DLR requires that the employer:

- Have a good faith belief that the employee organization has been designated as the freely chosen representative of a majority of the employees in an appropriate bargaining unit;

[300] *Town of Agawam*, 31 MLC 61 (2004); *City of Somerville*, 1 MLC 1312 (1975).
[301] *University of Massachusetts, Boston,* 2 MLC 1001 (1975).
[302] 456 CMR 14.06(5).
[303] *Franklin County Sheriff's Office*, 36 MLC 125 (2010).

- Conspicuously post a notice on bulletin boards where notices to employees are normally posted for a period of at least 20 consecutive days advising all persons that it intends to grant such exclusive recognition without an election to a named employee organization in a specified bargaining unit. If the employer usually communicates to its employees by intranet or email, the employer should forward a copy of the notice to all affected employees using those methods;

- Not extend recognition to an employee organization if another employee organization has within the 20-day period notified the employer of a claim to represent such employees and has prior to or within the 20-day period filed a valid petition for certification that is pending before the DLR; and

- Set forth in writing the recognition and a description of the bargaining unit, which is to be signed and dated by the employer's representative and the employee organization's representative.

The employee organization also must be in compliance with the applicable filing requirements set forth in Sections 13 and 14 of the Law and the employer must verify compliance with the DLR.[304]

Once the employer and union have negotiated and executed a recognition agreement, a copy of that agreement must be filed with the DLR no later than seven days after its execution.

If a petition is filed challenging the recognition bar because of a failure to comply with these requirements, the Department will notify the voluntarily recognized employee organization and the employer of the pending petition and of the non-compliance. The employer will have a period of no more than 30 days to cure this failure to comply. If the employer cures its failure to comply within the 30 period, the recognition bar will then attach as if there had been compliance.

There is a good cause exception to the above requirements.[305]

f. Blocking Charges

Any party to a representation petition may file a motion requesting that a pending prohibited practice charge block the conduct of an election.[306] The moving party must show:

- The conduct alleged in the prohibited practice charge has occurred;

[304] 456 CMR 14.06(5).
[305] Id.
[306] 456 CMR 15. 11.

- The alleged conduct violates the Law; and
- The alleged conduct may interfere with the conduct of a valid election.[307]

In determining whether a prohibited practice charge should block an election, the DLR considers the following factors:

- The character and scope of the charge and its tendency to impair the employees' free choice;
- The size of the working force and the number of employees involved in the events on which the charge is based;
- The entitlement and interest of the employees in an expeditious expression of their preference for representation;
- The relationship of the charging parties to the labor organizations involved in the representation case;
- The showing of interest, if any, presented in the representation case by the charging party; and
- The timing of the charge.[308]

If the DLR decides that a prohibited practice charge blocks a representation petition, the following occurs:

- The pending representation petition is "inactive" until resolution of the underlying prohibited practice complaint.
- While inactive, the petition is not considered to raise a question concerning representation and does not bar the employer and the incumbent union from fulfilling their statutory obligation to bargain in good faith.
- If the prohibited practice complaint is dismissed or withdrawn without issuance of a remedial bargaining order or settlement agreement requiring bargaining, the petitioner may file a motion requesting that the representation petition be reactivated.

---

[307] *New England Police Benevolent Association*, 37 MLC 27 (2010).
[308] *Id.*

- If the prohibited practice complaint results in issuance of a remedial order or settlement agreement that requires the employer to bargain with the incumbent, the petition is dismissed.[309]

5. Elections: Procedures, Challenges, and Objections

a. Type of Election

The DLR directs that a secret ballot election take place either in person or by mail.[310]

b. Eligibility to Vote

An employee who has a reasonable expectation of continued employment on the eligibility cutoff date specified in the DLR's order directing an election and on the date of the election is eligible to vote.[311]

To determine whether an employee is a *regular* employee and eligible to vote, the CERB examines the employee's work history for the 13 weeks preceding the eligibility date.[312]

c. Challenges to Eligibility List

Any party may challenge, for good cause, the eligibility of any person to vote in the election. The following guidelines apply:

- The DLR impounds the ballots of the challenged voters.

- If the number of challenged ballots is sufficient to determine the outcome of the election, then within seven days after the tally of ballots has been furnished, each party must file a short statement of its position concerning the eligibility of each challenged voter. Such statement shall include a recitation of the facts alleged by the party to be determinative of the challenged voter's eligibility.

- The DLR may require the parties to submit further evidence or argument, in order to determine whether a hearing is warranted.[313]

---

[309] *Id.*
[310] 456 CMR 14.12.
[311] *Town of Tisbury*, 6 MLC 1673 (1979); *Franklin Institute of Boston*, 12 MLC 1568 (1986) (employee on approved medical leave with an expectation of reemployment is eligible to vote).
[312] *Town of Sturbridge*, 29 MLC 156 (2003); *Town of Millville,* 11 MLC 1641 (1985).
[313] 456 CMR 14.12(2).

d. Objections to the Conduct of an Election

Within seven days after the DLR furnishes the tally of the ballots, any party to an election may file objections to the conduct of the election or to conduct affecting the result of the election.[314] A party cannot avoid the seven day time limit by amending previously filed objections more than seven days after the tally of ballots to add allegations that could have been timely raised.[315] Absent extraordinary circumstances, a party may not subsequently raise objections in a collateral proceeding at the DLR.[316]

Upon receipt of a party's objections, the DLR takes the following steps:

- Determines if any of the objections merit further proceedings.
- Dismisses some or all of the objections if there is not probable cause to believe either that the alleged conduct occurred, or that the alleged conduct materially interfered with the conduct of the election or election results.[317]
- If the DLR does find probable cause, conducts further investigation and/or hearing as appropriate.[318]

The following are specific examples of election objections:

1) Misrepresentation

- The DLR does not set aside an election on the ground of misrepresentation unless a party has substantially misrepresented a highly material fact, the truth of which lies within the special knowledge of the party making the misrepresentation.[319]
- Even if there is misrepresentation, the DLR does not set aside an election if it finds that the voters have independent knowledge with which to evaluate the misrepresentation, or if there was no substantial impact on the election.[320]

---

[314] 456 CMR 14.12(3).
[315] *Commonwealth of Massachusetts*, 16 MLC 1293 (1989).
[316] *Labor Relations Commission v. The Clover Leaf Corporation*, 372 Mass. 73 (1977).
[317] 456 CMR 14.12(3).
[318] *Id.*
[319] *Quincy School Committee*, 20 MLC 1306 (1993).
[320] *Id.*

- The DLR overturns an election because of misrepresentation if either the timing or nature of the statement precludes an effective response by another party, and the statement is likely to have interfered with the outcome of the election.[321]

2) Access to Campaign Literature; No Solicitation/Distribution Rules

- Employees have the right to distribute union literature and the right to observe and read that material.[322]

- Although an employer may promulgate rules regulating the distribution of union literature, the rules must be neutral and non-discriminatory so that employee access to union information is not improperly restricted.[323]

- Although employers are not required to grant union access to the employer's premises for union meetings, objections based upon the employer's denial of access is evaluated to determine whether the employer's policy unduly restricted union access to employees and thereby interfered with the election.[324]

3) Circumstances Surrounding the Conduct of the Election

- DLR does not permit campaigning in the polling areas.[325] However, the presence of non-observers at an election site is objectionable only when there is evidence that their conduct could have affected the employees' votes.[326]

- The DLR dismisses objections where there is no substantial evidence of sustained conversation and campaigning with prospective voters in the polling area.[327]

4) Eligibility List Inaccuracies

- An inaccurate voter eligibility list may constitute cause for setting aside an election.[328]

---

[321] *Commonwealth of Massachusetts*, 22 MLC 1569 (1996).
[322] *Salem School Committee*, 35 MLC 225 (2009).
[323] *Id.*
[324] *Hampshire Educational Collaborative*, 36 MLC 25 (2009); *Commonwealth of Massachusetts (Unit 7)*, 9 MLC 1842 (1983).
[325] *City of Boston*, 2 MLC 1275 (1976).
[326] *Vinfen Corp.*, 11 MLC 1484 (1985).
[327] *City of Methuen*, 35 MLC 295 (2009).
[328] *Compare City of Springfield*, 24 MLC 109 (1998) (DLR finds that 12% error rate in voters' addresses is not so substantial as to set aside election where there is no evidence of bad faith) *with City of Springfield*, 14 MLC 1010 (1987) (DLR set aside election where

- The DLR examines the potential harm to employees, and not the prejudice to competing unions.[329]

5) Altered/Reproduced Ballots

- The DLR may sustain objections to an election that was preceded by the distribution of an altered ballot that could have suggested to voters that the DLR endorsed one ballot choice in preference to another.[330]

- On a case-by-case basis, the DLR examines whether the reproduced ballot could have reasonably misled employees to believe that the DLR favored a particular election choice.[331]

6. Affiliations

An employer is required to bargain with a union that has affiliated or disaffiliated with another organization when the following conditions are met:

a. Continuity

The affiliation or disaffiliation does not significantly disrupt the existing bargaining relationship. The DLR examines whether changes have occurred in the rights and obligations of the union's leadership and membership, and in the relationships between the bargaining agent, its affiliates, and the employer.[332]

b. Due Process

The affiliation was undertaken with safeguards to ensure that the employees freely chose to affiliate or disaffiliate. In so determining, the DLR considers the procedures the union used, such as proper notice to all bargaining unit members, ample time for discussion, an orderly balloting process, and reasonable precautions taken to ensure the secrecy of the ballot.[333]

14% of eligible voters' names were omitted from list reasoning that omissions are more serious than incorrect addresses).

[329] *City of Springfield*, 24 MLC 109 (1998).

[330] *Town of Barnstable*, 15 MLC 1069 (1988); *Commonwealth of Massachusetts (Unit 7)*, 10 MLC 1053 (1983).

[331] *Town of Barnstable*, 15 MLC 1069; *Boston Water and Sewer Commission*, 13 MLC 1071 (1986).

[332] *Belmont School Committee*, 9 MLC 1343 (1982); *See also Town of Randolph*, 33 MLC 143 (2007) (CERB considers same factors in determining that change in affiliation does not constitute good cause to waive the contract bar rule in representation case).

[333] *Id.*

F. Prohibited Practices

1. Employer Prohibited Practices

a. Section 10(a)(1)

1) In General

Generally, Section 10(a)(1) violations are most commonly found as derivative violations of other Section 10(a) violations because violations of other subsections of the Law also interfere with, restrain and coerce employees in the exercise of their rights under the Law. However, independent of other subsections, an employer violates Section 10(a)(1) of the Law when it engages in conduct that may reasonably be said to tend to interfere with, restrain, or coerce employees in the free exercise of their rights under Section 2 of the Law.[334]

The focus of an independent Section 10(a)(1) violation analysis is the effect of the employer's conduct on reasonable employees exercising their Section 2 rights.[335] In analyzing a case:

- The CERB does not consider the motivation behind the conduct.[336]
- The CERB does not consider whether the coercion succeeded or failed.[337]
- The CERB considers the objective impact that the employer's conduct would have on a reasonable employee under the circumstances.[338]
- The subjective impact of the employer's conduct is not determinative.[339]

---

[334] *Town of Bolton*, 32 MLC 13 (2005).
[335] *Id.*
[336] *Town of Chelmsford*, 8 MLC 1913 (1982), *aff'd sub nom. Town of Chelmsford v. Labor Relations Commission*, 15 Mass. App. Ct. 1107 (1983).
[337] *Groton-Dunstable Regional School Committee*, 15 MLC 1551 (1989).
[338] *Quincy School Committee*, 27 MLC 83 (2000).
[339] *City of Fitchburg*, 22 MLC 1286 (1995).

Expressions of anger, criticism or ridicule directed to employees' protected activities have been recognized to constitute interference, restraint and/or coercion of employees.[340] Even without a direct threat of adverse consequences, the CERB has found a violation when an employer makes disparaging remarks about an employee's exercise of protected activities.[341] However, the prohibition against making statements that would tend to interfere with employees in the exercise of their rights under the Law does not impose a broad "gag rule" that restricts employers from publicly expressing their opinion about matters of public opinion.[342]

Examples of independent Section 10(a)(1) violations include:

- Admonishment of an employee for choosing not to discuss the merits of a grievance with the employer or tell the employer before moving it to Level 3 of the grievance procedure.[343]
- Administrative inquiry coupled with threatening remarks.[344]
- Announcement of intent to promulgate a restrictive policy aimed at union communications.[345]
- Application of a different manner and method of interrogation for union president.[346]
- Coercive interrogation regarding union activities.[347]
- Criticism of an employee for alleged misconduct in the course of engaging in protected activity where the employee is innocent.[348]
- Demeaning and disparaging remarks.[349]

---

[340] *Groton-Dunstable Regional School Committee*, 15 MLC 1551 (1989).
[341] *Athol-Royalston School Committee*, 26 MLC 55 (1999).
[342] *City of Lowell*, 29 MLC 30 (2002).
[343] *Groton-Dunstable Regional School Committee*, 15 MLC 1551 (1989).
[344] *City of Lawrence*, 15 MLC 1162 (1988).
[345] *Board of Regents*, 14 MLC 1397 (1987).
[346] *City of Boston*, 21 MLC 1154 (1994).
[347] *Lawrence School Committee*, 33 MLC 90 (2006); *Plymouth County House of Correction,* 4 MLC 1555 (1977).
[348] *Board of Regents*, 13 MLC 1697 (1987).
[349] *Boston School Committee*, 39 MLC 366 (2013).

- Direct and indirect statements indicating the employer's willingness to have bargaining unit members arrested for publicly airing their views about collective bargaining matters.[350]

- Implementation of a discriminatory rule.[351]

- Non-explicit threats where the language used can be reasonably construed as threatening.[352]

- Overbroad directive to bargaining unit members regarding performance of duties that employer issued in response to teachers work-to-rule action.[353]

- Removal of union literature posted on the employer's bulletin board based solely upon the content of the literature.[354]

- Surveillance of union activities.[355]

- Threat of layoffs if grievances or prohibited practice charges are filed.[356]

- Threat of suspension for bringing union representation to meeting.[357]

- Threats regarding a grievance, even though employees continued to file grievances after the threat.[358]

- Threat to lower budget appropriations and implement layoffs if the union failed to support the budget committee's strategy and sought an increase in a department's appropriation.[359]

The following are examples of employer conduct that did not violate Section 10(a)(1):

- Critical expression of opinion without anger either in tone or language that did not demean employees.[360]

---

[350] *Salem School Committee*, 35 MLC 199 (2009).
[351] *Id.*
[352] *Board of Regents*, 14 MLC 1397 (1987).
[353] *Lenox School Committee*, 7 MLC 1761 (1980).
[354] *Board of Regents*, 14 MLC 1397 (1987).
[355] *Plymouth County House of Correction*, 4 MLC 1555 (1977).
[356] *Town of Chelmsford*, 8 MLC 1913 (1982).
[357] *City of Peabody*, 25 MLC 191 (1999).
[358] *Bristol County House of Correction*, 6 MLC 1582 (1979).
[359] *Town of Tewksbury*, 19 MLC 1808 (1993).
[360] *Town of Winchester*, 19 MLC 1591 (1992).

- Letter criticizing police officers for conduct following a sexual harassment incident referred to matters outside or beyond the protection of the Law.[361]

- Letter does not disparage, ridicule, or criticize the union or employees' exercise of protected rights.[362]

- Providing compensation for employer witnesses at a CERB proceeding but not union witnesses.[363]

- Statement about "swimming with piranhas" where, in the context of the entire conversation, did not "chill employees from exercising their Section 2 rights.[364]

2) Weingarten

A public employer that denies an employee the right to union representation at an investigatory interview that the employee reasonably believes will result in discipline interferes with the employee's Section 2 rights, in violation of Section 10(a)(1) of the Law.[365] In determining whether an employer has unlawfully denied union representation to an employee during an investigatory interview, the CERB has been guided by the general principles set forth in *NLRB v. Weingarten*, 420 U.S. 251 (1975).[366]

Investigatory Interview

- A meeting is investigatory in nature if the employer's purpose is to investigate the conduct of an employee and the interview is convened to elicit information from the employee or to support a further decision to impose discipline.[367]

- If the employer's sole purpose of the meeting is to inform an employee of, or to impose previously determined discipline and no investigation is involved, then the employee does not have a right to union representation.[368]

---

[361] *City of Lowell*, 29 MLC 30 (2002).
[362] *Town of Bolton*, 32 MLC 13 (2005).
[363] *Board of Regents*, 11 MLC 1532 (1985).
[364] *Commonwealth of Massachusetts*, 28 MLC 250 (2002).
[365] *Town of Hudson*, 29 MLC 52 (2002), *aff'd sub nom. Town of Hudson v. Labor Relations Commission*, 69 Mass. App. Ct. 549 (2007).
[366] *Suffolk County Sheriff's Department*, 28 MLC 253 (2002).
[367] *Commonwealth of Massachusetts*, 26 MLC 139 (2000).
[368] *Id.*

- The test for whether an employee reasonably believes that an investigation will result in discipline is whether a reasonable person in the employee's situation would have believed that adverse action would follow.[369]

Request for Representation

- The right to union representation arises when the employee reasonably believes that the investigation will result in discipline, and the employee makes a valid request for union representation.[370]

- Nothing in the Law requires that an employee use certain specific words to invoke Weingarten rights; the determination must be contextual and fact-specific.[371]

Union Representative's Role

- If an employee invokes his or her right to have a union representative present at an investigatory interview, the representative's role is to "clarify the facts," "elicit favorable facts," and to otherwise assist an employee "who may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors."[372]

- In examining the role of a union representative during the course of an investigatory interview and the extent to which an employer may lawfully regulate that role, the CERB balances the right of an employer to investigate alleged employee misconduct and the right of an employee to union assistance.[373]

- The ultimate issue is whether an employer's conduct unlawfully interfered with, restrained or coerced an employee in the exercise of rights guaranteed under Section 2 of the Law.[374]

---

[369] *Commonwealth of Massachusetts*, 8 MLC 1287 (1981).
[370] *Town of Hudson,* 29 MLC 52 (2002), *aff'd sub nom. Town of Hudson v. Labor Relations Commission*, 69 Mass. App. Ct. 549 (2007).
[371] *Suffolk County Sheriff's Department*, 39 MLC 143 (2012).
[372] *Commonwealth of Massachusetts*, 9 MLC 1567 (1983).
[373] *Commonwealth of Massachusetts*, 21 MLC 1198 (1994) *aff'd sub nom. Massachusetts Correction Officers Federated Union v. Labor Relations Commission*, 424 Mass. 191 (1997).
[374] *Id.*

- Although an employer has no duty to bargain with a union representative at an investigatory interview, an employer may not relegate a union representative to the role of a passive observer, nor may the employer preclude the representative from assisting the employee or clarifying the facts.[375]

- An employer may not inform a union representative during an investigatory interview that he cannot speak because he is only present as a witness.[376]

b. Section 10(a)(2)

Section 10(a)(2) of the Law makes it a prohibited practice to dominate, interfere or assist in the formation, existence or administration of any employee organization. To establish a violation of Section 10(a)(2), the evidence must demonstrate that the employer's conduct significantly interfered with the existence and administration of the Union.[377] Situations in which the CERB has found that the employer violated the Law include:

- Refusing to implement authorized union dues deduction increases absent a written confirmation from the union that the dues would not be used for dental insurance premiums.[378]

- Unilaterally determining the amount of a union's agency service fee coupled with refusing to fulfill the terms of the contract with respect to service fees.[379]

- Failing to remit dues payments to a union deducted pursuant to written authorization.[380]

- Bargaining with an incumbent union after a question of representation has been raised by a rival union.[381]

---

[375] *Massachusetts Correction Officers Federated Union v. Labor Relations Commission*, 424 Mass. 191 (1997); *Suffolk County Sheriff's Department*, 28 MLC 253 (2002) (a union representative at an investigatory interview is not a potted plant).
[376] *Suffolk County Sheriff's Department*, 28 MLC 253 (2002); *Suffolk County Sheriff's Department*, 39 MLC 143 (2012) (an employer may not prevent a union representative from immediately clarifying a question during an investigatory interview, even where the employer permits the union representative to speak later in the meeting).
[377] *Commonwealth of Massachusetts Commissioner of Administration and Finance*, 27 MLC 11 (2000) (the employer's solicitation of volunteers for a parking committee does not violate Section 10(a)(2) of the Law).
[378] *Town of North Attleboro*, 26 MLC 84 (2000).
[379] *Whittier Regional School Committee*, 13 MLC 1325 (1987).
[380] *City of Boston*, 14 MLC 1606 (1988).
[381] *Springfield School Committee*, 27 MLC 15 (2000) (the obligation of strict employer neutrality arises when an employer has notice that the DLR has made its initial

- Establishing a "house union."[382]

c. Section 10(a)(3)

Section 10(a)(3) of the Law states that an employer may not discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization. To establish a prima facie case of discrimination, a charging party must establish the following:

- An employee was engaged in activity protected by Section 2 of the Law;
- The employer knew of that conduct;
- The employer took adverse action against the employee; and
- The employer took the adverse action to discourage the protected activity.[383]

1) Concerted, Protected Activity

Section 2 of the Law requires that the employee demonstrate he or she is engaged in "concerted" activity for the activity to be protected. An employee's activity is protected if it focuses on generally applicable terms and conditions of employment that impact the collective bargaining unit as a whole.[384] To be concerted, the evidence must demonstrate that the employee is acting with other employees, or on the authority of other employees, rather than acting out of self-interest.[385] Examples of concerted, protected activity may also include an individual seeking to enforce rights in a collective bargaining agreement, such as:[386]

- Filing and processing of a grievance.[387]

---

determination that a rival union's petition and showing of interest are adequate to raise a question of representation); *Town of Wakefield*, 10 MLC 1016 (1983).

[382] *Blue Hills Regional Technical School District*, 9 MLC 1271 (1982).

[383] *Town of Mashpee*, 36 MLC 163 (2010); *Quincy School Committee*, 27 MLC 83 (2000).

[384] *City of Boston*, 8 MLC 1872 (1982); *Town of Shrewsbury*, 5 MLC 1519 (1978).

[385] *Town of Southborough*, 21 MLC 1242 (1994); *Compare Commonwealth of Massachusetts*, 14 MLC 1743 (1988) (probationary employee's complaints with other employees about unhealthy working conditions constituted concerted activity) *with Town of Athol*, 25 MLC 208 (1999) (employee's safety and work complaints did not constitute concerted activity because the employee was acting alone and without the authority of other employees).

[386] For additional examples of concerted, protected activity, as well as examples of activity that is not protected, please see Section III(C).

[387] *Boston City Hospital*, 11 MLC 1065 (1984).

- Filing a contract-based civil service classification appeal.[388]

2) Employer Knowledge

A charging party may prove an employer's knowledge of an employee's union activities by direct or circumstantial evidence.[389] Factors that the CERB consider in determining whether circumstantial evidence of knowledge exists include the following:

- Timing of the alleged discriminatory actions.
- The employer's general knowledge of its employee's union activities.
- The employer's animus against the union.
- The pretextual reasons given for the adverse personnel actions.[390]

Employer knowledge of protected activity also may be inferred in a "small plant" where union activities were carried on in a manner which made it likely that the employer had an opportunity to observe them.[391]

3) Adverse Action

Adverse action has been defined as an adverse personnel action, such as the following:

- Suspension.
- Discharge.
- Involuntary transfer.
- Reduction in supervisory authority.[392]

---

[388] *Commonwealth of Massachusetts*, 24 MLC 116 (1998).
[389] *Richard Fowler v. Labor Relations Commission et al. (Fowler)*, 56 Mass. App. Ct. 96 (2002); *Bristol County*, 26 MLC 105 (2000).
[390] *Fowler*, 56 Mass. App. Ct. 96 (2002).
[391] *Plymouth County House of Correction and Jail*, 4 MLC 1555 (1977).
[392] *City of Boston*, 35 MLC 289 (2009); *Town of Dracut*, 25 MLC 131 (1999).

The mere assignment of additional responsibilities, though possibly inconvenient or even undesirable, does not constitute an adverse employment action unless it materially disadvantages the affected employee in some way.[393] Because there must be real harm, subjective feelings of disappointment and disillusionment will not suffice.[394] Other examples of adverse action include:

- An engineering professor's assignment to teach all math courses and no engineering course.[395]
- A police sergeant's permanent assignment to desk duty.[396]
- An involuntary transfer to a less preferable position.[397]

4) Motivation

A charging party may proffer direct or indirect evidence to establish improper employer motivation.[398]

Direct Evidence Defined

Direct evidence is evidence that, if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace.[399] Stray remarks in the workplace, statements by people without the power to make employment decisions, and statements made by decision makers unrelated to the decisional process itself are not sufficient to establish direct evidence.[400]

---

[393] *City of Boston*, 35 MLC 289 (2009).
[394] *City of Holyoke*, 35 MLC 153 (2009).
[395] *Board of Higher Education*, 32 MLC 181 (2006).
[396] *Town of Holbrook*, 15 MLC 1221 (1988).
[397] *Boston City Hospital,* 11 MLC 1065 (1984); *Cf. City of Holyoke*, 35 MLC 153 (2009) (subjective opinions of co-workers expressed in casual office banter do not demonstrate that the transfer was adverse within the meaning of the Law).
[398] *Town of Brookfield*, 28 MLC 320 (2002), *aff'd sub nom. Town of Brookfield v. Labor Relations Commission*, 443 Mass. 315 (2005).
[399] *Town of Andover*, 40 MLC 1 (20130 (School Committee admitted that employee's termination was for activity that CERB determined was protected); *City of Easthampton*, 35 MLC 257 (2009) (supervisor's statements to employee who filed grievance, and act of tearing up and throwing away grievance, was direct evidence of anti-union animus).
[400] *Town of Brookfield*, 28 MLC 320 (2002).

Direct Evidence: Two-Step Analysis

Where a charging party proffers direct evidence of discrimination as part of its prima facie case, the CERB applies the following two-step analysis to determine if an employer has retaliated against an employee for concerted, protected activity:[401]

- The charging party must first prove by a preponderance of the evidence that a proscribed factor played a motivating factor in the challenged employment decision.

- The burden of persuasion then shifts to the employer who may prevail by proving that it would have made the same decision even without the illegitimate motive.[402]

Indirect Evidence Defined

Absent direct evidence of improper motivation, unlawful motivation may be established through circumstantial evidence and reasonable inferences drawn from that evidence.[403] Factors considered in determining the existence of improper motivation include:

- The timing of the adverse action in relation to the protected activity.[404]

- The employer's general hostility toward the union or toward concerted activity.[405]

- Inconsistent or shifting reasons for the adverse action.[406]

- Sudden resurrection of previously condoned transgressions.[407]

- Departure from longstanding practices.[408]

---

[401] *Town of Dennis*, 29 MLC 79 (2002).
[402] *Andover School Committee*, 40 MLC 1 (2013).
[403] *Suffolk County Sheriff's Department,* 27 MLC 1515 (2001).
[404] *Labor Relations Commission v. Blue Hills Spring Water*, 11 Mass. App. Ct. 50 (1980); *Town of Somerset*, 15 MLC 1523 (1989); *Bristol County*, 26 MLC 105 (2000) (timing alone is insufficient to establish unlawful employer motivation).
[405] *Town of Halifax*, 1 MLC 1486 (1975).
[406] *Lawrence School Committee*, 33 MLC 90 (2006).
[407] *Board of Trustees, University of Massachusetts Medical Center*, 5 MLC 1272 (1978).
[408] *Town of Mashpee,* 36 MLC 163 (2010).

- The insubstantiality of the reasons given for the adverse action.[409]

Indirect Evidence: Three-Step Analysis

In cases where the charging party proffers indirect evidence of discrimination, the CERB applies the following three-step analysis to determine if an employer has retaliated against an employee for concerted, protected activity:[410]

- A charging party must first establish a prima facie case of retaliation.

- The employer may rebut the prima facie case by producing evidence that it had a legitimate, non-discriminatory motive for taking the adverse action.[411]

- The charging party must then prove by a preponderance of the evidence that "but for" the protected activity, the employer would not have taken the adverse action.[412]

d. Section 10(a)(4)

It is a prohibited practice for a public employer to discharge or otherwise discriminate against an employee for engaging in concerted, protected activity that specifically includes signing or filing an affidavit, petition or complaint, or giving testimony as part of a DLR proceeding; or forming, joining, or choosing to be represented by an employee organization.[413] Otherwise, the same elements of proof apply to alleged violations of both Sections 10(a)(3) and 10(a)(4) of the Law.[414]

---

[409] *Commonwealth of Massachusetts,* 14 MLC 143 (1988).
[410] *Southern Worcester County Regional Vocational School District v. Labor Relations Commission*, 386 Mass. 414 (1982); *Trustees of Forbes Library v. Labor Relations Commission (Trustees of Forbes Library)*, 384 Mass. 559 (1981).
[411] *Higher Education Coordinating Council,* 23 MLC 90 (1996); *Town of Clinton*, 12 MLC 1361 (1985); *cf. Trustees of Forbes Library*, 364 Mass. 559 (1996).
[412] *Athol-Royalston Regional School Committee*, 28 MLC 204 (2002); *Town of Athol,* 25 MLC 208 (1999).
[413] *Commonwealth of Massachusetts*, 25 MLC 44 (1998); *Metropolitan District Commission*, 14 MLC 1001 (1987) (employer violated Law by taking certain actions against employee for attending DLR proceeding).
[414] *Commonwealth of Massachusetts*, 25 MLC 44 (1998).

The DLR considers the protection of Section 10(a)(4) so critical to its ability to investigate complaints and keep channels of information open that its protection has been interpreted to extend to employees not covered by Section 1.[415]

e. Section 10(a)(5)

It is a violation of Section 10(a)(5) of the Law for an employer to refuse to bargain in good faith as required by Section 6. Section 6 of the Law obligates employees and employee organizations to "negotiate in good faith with respect to wages, hours, standards of productivity and performance, and any other terms and conditions of employment…. but such obligation shall not compel either party to agree to a proposal or make a concession."[416]

1) Scope of Bargaining

Either party commits a prohibited practice when it refuses a demand to negotiate over a mandatory subject of bargaining. Section 7(d) of the Law provides that the terms of a collective bargaining agreement supersede the conflicting terms of municipal personnel ordinances, by-laws, rules or regulations, and any of the enumerated statutes, rules, and regulations; therefore, an employer is not excused from the obligation to bargain collectively concerning a mandatory subject of bargaining.[417]

Mandatory Subjects

Generally, mandatory subjects of bargaining are those which directly impact terms and conditions of employment. The following are examples of mandatory subjects of bargaining:

- Ability of union to address members during roll call.[418]
- Ability to take a work vehicle home.[419]

---

[415] *Michael J. Curley*, 4 MLC 1124 (1977).
[416] *But see Quincy City Employees Union, H.L.P.E.*, 15 MLC 1340 (1989), *aff'd sub nom. Pattison v. Labor Relations Commission*, 30 Mass. App. Ct. 9 (1991) (an individual employee has no standing to pursue a refusal to bargain charge against his or her employer under Section 10(a)(5)).
[417] *Town of Lee,* 11 MLC 1274 (1984), *aff'd sub nom. Town of Lee v. Labor Relations Commission,* 21 Mass. App. Ct. 166 (1985); *Weymouth School Committee,* 9 MLC 1091 (1982) *aff'd sub nom. National Association of Government Employees v. Labor Relations Commission,* 17 Mass. App. Ct. 542 (1984).
[418] *Bristol County Sheriff's Department*, 31 MLC 6 (2004).
[419] *Town of Dedham*, 16 MLC 1275 (1989).

- Adding an unpaid block of time during the workday.[420]
- Administration of a grievance procedure.[421]
- Agency service fee.[422]
- Allocation of costs for copying information reasonably relevant to a union's role as a bargaining agent.[423]
- Block scheduling.[424]
- Catastrophic illness leave bank.[425]
- Class size.[426]
- Compensation for added duties.[427]
- Conducting union business during work hours.[428]
- Decision to achieve a reduction in force by layoffs, and the means and method of implementing layoffs.[429]
- Domestic violence policy.[430]
- Dress code, appearance and grooming standards.[431]
- Drug testing.[432]

---

[420] *Peabody School Committee*, 28 MLC 19 (2001).
[421] *City of Boston,* 15 MLC 1191 (1988); *City of Boston,* 3 MLC 1450 (1977).
[422] *Board of Regents*, 10 MLC 1048 (1983); *Leominster School Secretaries Association,* 7 MLC 1953 (1981).
[423] *Bristol County Sheriff's Department*, 31 MLC 6 (2004); *Commonwealth of Massachusetts,* 9 MLC 1824 (1983).
[424] *Taunton School Committee*, 28 MLC 378 (2002).
[425] *Commonwealth of Massachusetts,* 22 MLC 1459 (1996).
[426] *Peabody School Committee*, 13 MLC 1313 (1986), *aff'd sub nom. Peabody Federation of Teachers, Local 1289, AFT, AFL-CIO v. Peabody School Committee*, 26 Mass. App. Ct. 1107 (1988).
[427] *Id.*
[428] *Athol-Royalston Regional School Committee*, 28 MLC 204 (2002).
[429] *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983); *Revere School Committee*, 10 MLC 1245 (1983).
[430] *City of Lowell*, 28 MLC 126 (2002).
[431] *Sheriff of Worcester County*, 27 MLC 103 (2001); *Town of Dracut,* 7 MLC 1342 (1980).
[432] *Town of Plymouth*, 26 MLC 220 (2000).

- Eligibility for paid injured-on-duty leave.[433]
- Eliminating a split shift.[434]
- Employee and employee exchange of tours.[435]
- Employee use of non-active working time.[436]
- Employer contributions to health and welfare trust funds.[437]
- Employer-imposed restrictions upon the right of employees to accept outside employment.[438]
- Granting of leave.[439]
- Free employee parking.[440]
- Health insurance benefits.[441]
- Health insurance buyout.[442]
- Initial wages for new positions.[443]
- Involuntary deductions from employees' paychecks.[444]
- Job duties.[445]

---

[433] *Town of Harwich*, 32 MLC 27 (2005).
[434] *Town of Mansfield*, 25 MLC 14 (1998).
[435] M.G.L. c. 150E, § 7.
[436] *City of Taunton*, 11 MLC 1334 (1985); *City of Everett*, 2 MLC 1471 (1976).
[437] *Commonwealth of Massachusetts,* 19 MLC 1069 (1992).
[438] *Board of Trustees, University of Massachusetts,* 7 MLC 1557 (1980); *Town of Pittsfield,* 4 MLC 1905 (1978).
[439] *Commonwealth of Massachusetts*, 21 MLC 1637 (1995); *Town of Hull*, 19 MLC 1780 (1993).
[440] *Commonwealth of Massachusetts*, 27 MLC 11 (2000).
[441] *Medford School Committee*, 4 MLC 1450 (1977); *aff'd sub nom. School Committee of Medford v. Labor Relations Commission*, 380 Mass. 932 (1980); *Town of Dennis*, 28 MLC 297 (2002).
[442] *Commonwealth of Massachusetts*, 24 MLC 113 (1998).
[443] *Melrose School Committee,* 3 MLC 1302 (1976).
[444] *Suffolk County Sheriff's Department*, 28 MLC 253 (2002); *Millis School Committee*, 23 MLC 99 (1996).
[445] *Commonwealth of Massachusetts*, 28 MLC 36 (2001).

- Length of school day.[446]
- Method for payback of early retirement incentive.[447]
- Method of calculating seniority.[448]
- Number of employees on a piece of firefighting apparatus while responding to an alarm to the extent that a question of safety is raised.[449]
- On-premise access to employees for union business.[450]
- Paid details.[451]
- Payday schedules.[452]
- Percentage of employer contribution to group insurance.[453]
- Performance evaluation systems.[454]
- Physical examination by an employer-designated physician in order to qualify for disability leave.[455]
- Promotional procedures.[456]
- Policies that provide for the discipline and/or discharge of employees who violate them.[457]
- Recoupment of workers compensation payments.[458]

---

[446] *Holliston School Committee*, 23 MLC 211 (1997).
[447] *Millis School Committee*, 23 MLC 99 (1996); *Brockton School Committee*, 23 MLC 43 (1996).
[448] *Brockton School Committee*, 23 MLC 43 (1996).
[449] *Town of Bridgewater*, 12 MLC 1612 (1986); *City of Newton,* 4 MLC 1282 (1977).
[450] *Bristol County Sheriff's Department*, 31 MLC 6 (2004).
[451] *Town of Winthrop*, 28 MLC 200 (2002).
[452] *Lawrence School Committee,* 3 MLC 1304 (1976).
[453] *Medford School Committee,* 4 MLC 1450 (1977), *aff'd sub nom. School Committee of Medford v. Labor Relations Commission,* 380 Mass. 932 (1980).
[454] *Commonwealth of Massachusetts*, 18 MLC 1161 (1991).
[455] *City of Medford*, 28 MLC 136 (2002); *Town of Avon,* 6 MLC 1290 (1979).
[456] *Town of Danvers,* 3 MLC 1559 (1977).
[457] *City of Lowell*, 28 MLC 126 (2001); *City of Peabody*, 9 MLC 1447 (1982).
[458] *Suffolk County Sheriff's Department*, 28 MLC 253 (2002).

- Regularly scheduled overtime.[459]
- Residency requirements for continued employment and promotion of unit members.[460]
- Return to work after leave.[461]
- Smoking policies.[462]
- Teaching load.[463]
- Time clocks and surveillance systems.[464]
- Union dues check-off.[465]
- Wage reopener provisions.[466]
- Work load.[467]

---

[459] *City of Peabody,* 9 MLC 1447 (1982); *but see Town of West Bridgewater*, 10 MLC 1040 (1983), *aff'd sub nom. West Bridgewater Police Association v. Labor Relations Commission*, 18 Mass. App. Ct. 550 (1984) (unscheduled overtime not a mandatory subject of bargaining); *City of Boston*, 32 MLC 4 (2005).
[460] *Boston School Committee,* 3 MLC 1603 (1977).
[461] *City of Newton*, 35 MLC 296 (2009).
[462] *Town of Lexington*, 22 MLC 1676 (1996); *Abington School Committee,* 21 MLC 1630 (1995).
[463] *Andover School Committee*, 40 MLC 1 (2013).
[464] *University of Massachusetts*, 7 MLC 2090 (1981).
City of Taunton, 38 MLC 96 (2011); *but see Duxbury School Committee,* 25 MLC 22 (1998)(CERB held that use of video surveillance in this case was merely a more efficient and dependable means of enforcing existing work rules and did not affect an underlying term or condition of employment).
[465] *Town of North Attleboro*, 26 MLC 84 (2000).
[466] *Medford School Committee,* 3 MLC 1413 (1977).
[467] *Commonwealth of Massachusetts*, 28 MLC 36 (2001).

Permissive Subjects

Permissive subjects of bargaining involve core governmental decisions.[468] Either the employer or union may refuse to negotiate over a permissive subject. If the parties do bargain, neither party may insist on bargaining to impasse.[469] However, once the parties agree on permissive subject, neither party may unilaterally alter its terms during the life of the collective bargaining agreement.[470] Examples of permissive subjects of bargaining include:

- Abolishing or creating positions.[471]
- Addition of a third party as a condition precedent to a collective bargaining agreement.[472]
- Conforming the method of calculating retirement benefits to the requirements of M.G.L. c.32.[473]
- Description and scope of the bargaining unit.[474]
- Hiring additional employees to perform unit work.[475]
- Holding grievance hearings in open session.[476]
- Level of services decisions.[477]

---

[468] *Town of Danvers,* 3 MLC 1559 (1977).
[469] *IAFF, Local 1009,* 2 MLC 1238 (1975).
[470] *City of Chelsea,* 13 MLC 1144 (1986); *but see City of Boston v. Boston Police Superiors Federation*, 466 Mass. 210 (2013) (assignment and transfer are nondelegable police commissioner statutory powers and cannot be subject of valid collective bargaining provision). In addition, Chapter 589 of the Acts of 1987 outlines specific non-arbitrable subjects for police and fire unions and employers because they are inherent management rights, e.g., the right to appoint and promote
[471] *School Committee of Braintree v. Raymond,* 369 Mass. 689 (1976); *School Committee of Hanover v. Curry,* 369 Mass. 683 (1976).
[472] *Fall River Housing Authority*, 8 MLC 2038 (1982).
[473] *City of Springfield,* 12 MLC 1021 (1985).
[474] *Boston Police Patrolmen's Association*, 8 MLC 1993 (1982), *aff'd sub nom. Boston Police Patrolmen's Association*, 16 Mass. App. Ct. 953 (1983).
[475] *Town of Plymouth*, 34 MLC 13 (2007); *Town of Andover,* 3 MLC 1710 (1977).
[476] *Falmouth School Committee*, 12 MLC 1383 (1985).
[477] *Commonwealth of Massachusetts*, 25 MLC 201 (1999); *Town of Danvers*, 3 MLC 1554 (1977).

- Limiting the number unit members who appear at arraignments.[478]
- Loss of ad hoc or unscheduled overtime opportunities.[479]
- Matters of educational policy.[480]
- Method of prioritizing paid details.[481]
- Minimum manning per apparatus while responding to mutual aid cases where there is no safety issue.[482]
- Minimum manning per shift.[483]
- Placing an article on the town warrant seeking to rescind a local option law not enumerated in Section 7(d) of M.G.L. c.150E.[484]
- Reassigning district court prosecutor's duties from police officers to town counsel.[485]
- Reorganization of an employer's operations.[486]
- Using a polygraph examination in the investigation of criminal activity by police officers.[487]

---

[478] *Town of West Bridgewater,* 10 MLC 1040 (1983), *aff'd sub nom. West Bridgewater Police Association v. Labor Relations Commission,* 18 Mass. App. Ct. 550 (1984).
[479] *Town of West Bridgewater,* 10 MLC 1040 (1983), *aff'd sub nom. West Bridgewater Police Association v. Labor Relations Commission*, 18 Mass. App. Ct. 550 (1984); c*f. City of Peabody,* 9 MLC 1447 (1982) (regularly scheduled overtime equivalent to a wage item, and therefore a mandatory subject of bargaining).
[480] *Lowell School Committee*, 26 MLC 111 (2000).
[481] *City of Boston*, 31 MLC 25 (2004).
[482] *Town of Reading,* 9 MLC 1730 (1983).
[483] *Town of Danvers,* 3 MLC 1559 (1977).
[484] *Weymouth School Committee,* 9 MLC 1091 (1982), *aff'd sub nom. National Association of Government Employees v. Labor Relations Commission,* 17 Mass. App. Ct. 542 (1984).
[485] *Town of Burlington v. Labor Relations Commission,* 390 Mass. 157 (1983).
[486] *Cambridge School Committee,* 7 MLC 1026 (1980).
[487] *Town of Ayer,* 9 MLC 1376 (1982), *aff'd sub nom. Local 346, IBPO v. Labor Relations Commission,* 391 Mass. 429 (1984).

Impact Bargaining

In cases where the employer is not required to bargain over a core governmental decision, it may still have an obligation to bargain over the impacts of its decision on employees' wages, hours, and other terms and conditions of employment.[488] For example, the CERB has found that employers must bargain about the impacts of the following decisions:

- A reduction in force.[489]
- Assigning non-unit employees to perform auxiliary services.[490]
- Discontinuing the prior practice of allowing employees to choose the effective date of their retirement and to receive a lump sum payment upon retirement instead of accrued unused vacation even though the decision was made by an independent third party.[491]
- Implementing a new tax withholding requirement for parking fringe benefits.[492]
- Implementing a policy that changes the level of services offered.[493]
- Reassigning prosecution duties from police prosecutors to town counsel.[494]
- Requiring unit members to use specialized shotguns and ammunition as part of a less lethal force policy.[495]
- Good Faith

---

[488] *City of Worcester v. Labor Relations Commission*, 434 Mass. 177 (2002); *Newton School Committee,* 5 MLC 1016 (1978), *aff'd sub nom. School Committee of Newton v. Labor Relations Commission,* 388 Mass. 557 (1983); *Board of Regents of Higher Education,* 19 MLC 1248 (1992); *but see Chief Justice for Administration and Management of the Trial Court v. Commonwealth Employment Relations Board,* 79 Mass. App. Ct. 374 (2011) (there must be evidence of actual impacts to the bargaining unit to support a bargaining obligation).
[489] *Newton School Committee,* 5 MLC 1016 (1978), *aff'd sub nom. School Committee of Newton v. Labor Relations Commission,* 388 Mass. 557 (1983).
[490] *City of Boston,* 16 MLC 143 (1989).
[491] *City of Malden,* 20 MLC 1400 (1994).
[492] *Secretary of Administration and Finance v. Commonwealth Employment Relations Board*, 74 Mass. App. Ct. 91 (2009).
[493] *Commonwealth of Massachusetts Commissioner of Administration and Finance/Department of Social Services*, 25 MLC 201 (1999).
[494] *Town of Burlington v. Labor Relations Commission*, 390 Mass. 157 (1983).
[495] *City of Boston*, 30 MLC 23 (2003).

In General

The "good faith" requirement of bargaining concerns the parties' behavior. Parties to negotiations must bargain with an open and fair mind, have a sincere purpose to find a basis of agreement, and make reasonable efforts to compromise their differences.[496] In assessing the good faith requirement, the CERB does not look merely to isolated, specific instances of bad faith, but to the totality of the parties' conduct, including acts away from the bargaining table.[497]

Refusal to Negotiate

The CERB has determined that the following conduct violates the duty to bargain in good faith:

- Refusing to meet with the union when it has requested a negotiating session.[498]
- Refusing to negotiate a new contract with a newly-created unit when the legislature enacts emergency legislation severing part of a unit covered by a contract.[499]
- Failing or refusing to process grievances that arose out of a collective bargaining agreement with a predecessor union.[500]
- Imposing unilateral conditions on a pilot school conversion vote beyond those contained in collective bargaining agreement.[501]

---

[496] *Massachusetts Correction Officers Federated Union*, 31 MLC 1 (2004).
[497] *King Phillip Regional School Committee*, 2 MLC 1393 (1976); *cf. Boston Teachers Union*, 37 MLC 214 (2011) (union's obligation to bargain mirrors the employer's obligation).
[498] *City of Chelsea,* 3 MLC 1169 (1976).
[499] *Commonwealth of Massachusetts,* 5 MLC 1405 (1978).
[500] *Commonwealth of Massachusetts,* 20 MLC 1087 (1993).
[501] *Boston Teachers Union*, 37 MLC 214 (2011).

Attempts to Bypass Union/Direct Dealing

An employer may not deal directly with employees in the bargaining unit on matters that are properly the subject of negotiations with the bargaining unit's exclusive representative.[502] Surveys of employees regarding mandatory subjects of bargaining constitute direct dealing if bargaining discussions have begun or are imminent.[503]

Section 5 of the Law permits an employee to meet with the employer to resolve a grievance as long as the union has the opportunity to be present.[504]

Effect of Pending Litigation

A party cannot refuse to bargain because a prohibited practice charge has been brought against it. Similarly, bargaining may not be contingent upon the withdrawal or resolution of pending prohibited practice charges or any other pending litigation.[505]

Employer Negotiator

The CERB considers the powers of the employer's bargaining representative in determining whether it has bargained in good faith. The employer must appoint a bargaining representative that possesses sufficient authority to make commitments on substantive provisions of a proposed agreement.[506]

Open Meetings and Disclosure

The CERB has determined the following with regard to bargaining and grievance meetings:

- The open meeting law does not require open sessions for collective bargaining.[507] However, the parties may agree to negotiate in public.[508]

---

[502] *Service Employees International Union*, 431 Mass. 710 (2000); *cf. City of Marlborough*, 34 MLC 72 (2008) (there is no direct dealing violation if the parties' contract contains a provision that allows direct discussions with employees over the matter at issue).
[503] *Service Employees International Union*, 431 Mass. 710 (2000).
[504] *Avon School Committee,* 7 MLC 2106 (1981).
[505] *Town of Dracut,* 14 MLC 1127 (1987); *Town of Hopedale,* 11 MLC 1413 (1985).
[506] *Boston School Committee*, 25 MLC 181 (1999).
[507] *Ghiglione v. School Committee of Southbridge,* 376 Mass. 70 (1978).
[508] *City of Attleboro,* 3 MLC 1408 (1977).

- No party may insist to impasse that grievance hearings be conducted in open session.[509]

- Neither party may require disclosure of the composition of the other side's bargaining team as a condition precedent to negotiations or coerce the other party in its choice of a bargaining representative.[510]

Process of Negotiations

The following are guidelines regarding the process of negotiations:

- Refusing to meet is a *per se* violation of the Law and does not require an affirmative demonstration of bad faith.[511]

- Withdrawing an offer made in earlier bargaining sessions may constitute unlawful regressive bargaining.[512]

- Merely attending a prescribed number of meetings without engaging in meaningful discussions is not good faith bargaining.[513]

- The CERB views with disfavor a party that causes long lapses between bargaining sessions.[514]

- An employer may lawfully propose a 0% wage increase for economic or philosophical reasons, but may not refuse to discuss wages.[515]

- Failing to correct misrepresentations of material facts made during negotiations after learning such statements were false is unlawful.[516]

---

[509] *City of Marlborough,* 34 MLC 72 (2008); *Bristol County Sheriff's Department*, 32 MLC 159 (2003).
[510] *Southern Worcester County,* 2 MLC 1488 (1976), *aff'd sub nom. Southern Worcester County v. Labor Relations Commission*, 377 Mass. 897 (1979).
[511] *Springfield School Committee*, 27 MLC 15 (2000).
[512] *County of Norfolk,* 12 MLC 1005 (1985); *but see Chief Justice for Administration and Finance of the Trial Court*, 37 MLC 181 (2011) (employer may withdraw economic offer due to changed economic circumstances).
[513] *Southern Worcester County,* 2 MLC 1488 (1976).
[514] *Middlesex County,* 3 MLC 1594 (1977).
[515] *Brockton School Committee,* 19 MLC 1120 (1992).
[516] *Woods Hole, Martha's Vineyard & Nantucket Steamship Authority,* 12 MLC 1531 (1986) (violation of Chapter 150A).

- After an alleged impasse, the duty to bargain is revived when either party indicates a desire to negotiate in good faith over previously deadlocked issues.[517]

- Neither party may establish an artificial or unreasonable deadline for completing negotiations in an effort to foreshorten bargaining.[518]

Finalizing the Agreement

The duty to bargain in good faith extends to finalizing the negotiated agreement:

- When the parties have reached agreement on all substantive issues to a contract, the agreement must be reduced to writing.[519]

- Neither party may refuse to execute an agreed-upon collective bargaining agreement.[520]

- Where the employer has bargained and reached an agreement incorporating permissive and mandatory subjects of bargaining, the employer is obligated to reduce to writing and execute the entire agreement.[521]

- An employer may not go to the end in negotiating the terms of an agreement, and then confront the union with a condition of third party approval which could frustrate any bargain or set off a new round of negotiations.[522]

- A party may not enter negotiations with the declaration that it would decline to agree to any contract unless it contained a term making its binding effect contingent upon third-party approval.[523]

- Both parties may lawfully agree, as part of the negotiations, that the agreement between them include a third-party approval provision.[524]

---

[517] *City of Boston*, 21 MLC 1350 (1994).
[518] *Town of Natick,* 19 MLC 1753 (1993).
[519] M.G.L. c. 150E, Section 7.
[520] *City of Cambridge*, 35 MLC 183 (2009).
[521] *Town of Ipswich,* 11 MLC 1403 (1985), *aff'd sub nom. Town of Ipswich v. Labor Relations Commission,* 21 Mass. App. Ct. 1113 (1986).
[522] *Springfield Housing Authority,* 9 MLC 1068 (1982), *aff'd sub nom. Springfield Housing Authority v. Labor Relations Commission,* 16 Mass. App. Ct. 653 (1983).
[523] *Id.*
[524] *Id.*

- Oral modifications of a written contract are effective and such orally modified terms may supersede the provisions of statutes listed in Section 7(d) of the Law.[525]

- Ground rules that require parties to reduce all tentative agreements to writing may preclude oral agreements.[526]

Duty to Support the Agreement

The obligation to bargain in good faith includes the duty to support the agreed-upon proposals in order to obtain any necessary funding. This requirement includes an obligation to express support for the funding request, particularly in the face of any expressed opposition.[527] A public employer that fails to take all necessary steps to secure funding for the cost items of a collective bargaining agreement violates the Law.[528] If the employer does not receive the required action from the legislature, the parties return to the bargaining table.[529]

In cases regarding the employer's duty to support, the CERB has further held:

- Where the chairperson of the Board of Selectmen made a sincere but erroneous attempt to explain the legal implications of a collective bargaining agreement, such behavior did not indicate insufficient support of the collective bargaining agreement.[530]

- Newly-elected successor public officials cannot be required to endorse publicly the terms of a collective bargaining agreement negotiated by their predecessors if such endorsement involves the exercise of independent judgment.[531]

- State contract funding requires an appropriation approved by both the legislature and the Governor, but a successor Governor cannot be forced to support funding for a contract negotiated by his predecessor.[532]

---

[525] *Service Employees International Union, Local 509 v. Labor Relations Commission,* 410 Mass. 141 (1991); *Chief Justice for Administration and Management of the Trial Court*, 35 MLC 171 (2009).
[526] *Town of Hanson*, 39 MLC 158 (2012).
[527] *Mendes v. Taunton*, 366 Mass. 109 (1974); *Town of Rockland*, 16 MLC 1001 (1989).
[528] *Mendes v. Taunton*, 366 Mass. 109 (1974); *City of Melrose*, 28 MLC 53 (2001).
[529] *Commonwealth of Massachusetts,* 4 MLC 1869 (1978).
[530] *Town of North Attleboro,* 4 MLC 1585 (1977).
[531] *Labor Relations Commission v. Board of Selectmen of Dracut,* 374 Mass. 619 (1978).
[532] *Alliance, AFSCME/SEIU, AFL-CIO v. Secretary of Administration,* 413 Mass. 377 (1992).

- If a public employer adopts a method of securing funding that it knows will fail, it has an obligation to find alternative methods,[533] including funding an agreement through existing appropriations.[534]

- Where an advisory board or finance committee is not the employer's bargaining representative, that body need not support the contract.[535]

- Employers and exclusive employee representatives to support JLMC interest arbitration awards in the same way and to the same extent as they are required to support any other decision or determination that they agree to pursuant to the Law.[536]

- Employers are obligated to submit an appropriation request to fund a JLMC award regardless of their concerns about the sufficiency of the funding sources.[537]

School committees in cities and towns in which the provisions of M.G.L. c. 71, Section 34 are operative are not required to submit requests for appropriations to fund collective bargaining agreements to their legislative bodies.[538] Accordingly, school committees may not refuse to execute or implement a negotiated agreement merely because the legislative body has not funded it.[539]

Duty to Provide Information

The duty to bargain encompasses the duty of an employer to disclose to a union information that is relevant and reasonably necessary to the union's execution of its duties as exclusive bargaining representative.[540] Once a union has shown that the requested information is relevant and reasonably necessary to its duties as bargaining agent, the employer has the burden of demonstrating that its concerns about disclosure of the information are legitimate and substantial.[541] In addition, the following guidelines are instructive in such cases:

---

[533] *Worcester School Committee*, 5 MLC 1080 (1978).
[534] *Town of Rockland,* 16 MLC 1001 (1989).
[535] *Town of Rockland,* 12 MLC 1740 (1986); *Town of Webster,* 4 MLC 1543 (1977).
[536] *City of Melrose*, 28 MLC 53 (2001).
[537] *Id.*
[538] M.G.L. c. 150E, Section 7.
[539] *Lawrence School Committee,* 19 MLC 1167 (1992).
[540] *Board of Higher Education*, 26 MLC 91 (2000).
[541] *Adrian Advertising,* 13 MLC 1233 (1986), *aff'd sub nom. Despres v. Labor Relations Commission,* 25 Mass. App. Ct. 430 (1988).

- The standard for determining relevancy is a liberal one, similar to the standard for determining relevancy in discovery proceedings in civil litigation.[542]

- The employer must establish that it has made reasonable efforts to provide the union with as much of the requested information as possible, consistent with the employer's expressed concerns.[543]

- The employer must discuss (but the union is not required to negotiate) alternative methods of providing the union access to the information.[544]

- The fact that information is available from another source, e.g., information that is a matter of public record, is not a sufficient defense to a request for information.[545]

- Where the employer raises statutory defenses to its failure to produce information, such as the protections of the Fair Information Practices Act (FIPA) or the Commonwealth's privacy laws, the CERB must read Chapter 150E and those laws together to protect legitimate interests under the statutes.[546]

- The CERB may order an *in camera* review of the information at issue to determine whether the employer has a legitimate and substantial need for nondisclosure. If the CERB orders the employer to disclose the information, it may require certain safeguards.[547]

An employer also may not unreasonably delay providing requested information that is relevant and reasonably necessary to the employee organization's responsibilities as the exclusive collective bargaining representative.[548] The CERB considers a variety of factors in determining whether an employer's delay is unreasonable, including:

---

[542] *Board of Higher Education*, 26 MLC 91 (2000).
[543] *Boston School Committee,* 37 MLC 140 (2011).
[544] *Boston Public Health Commission,* 38 MLC 6 (2011).
[545] *Commonwealth of Massachusetts*, 12 MLC 1590 (1986).
[546] *Bristol County Sheriff's Office*, 28 MLC 113 (2001), *aff'd sub nom. Sheriff of Bristol County v. Labor Relations Commission*, 62 Mass. App. Ct. 665 (2004) (CERB ordered employer to provide information exempt from disclosure to union with certain restrictions); *Sheriff's Office of Middlesex County*, 30 MLC 91 (2003); *but see Plymouth County Sheriff's Department*, 34 MLC 58 (2007) (it is unlikely that the CERB or its agents will conduct an *in camera* review where a party that has the requested information fails to set forth adequately its justifications for non-disclosure).
[547] *City of Boston v. Labor Relations Commission*, 61 Mass. App. Ct. 397 (2004).
[548] *Boston Public School Committee,* 24 MLC 8 (1997).

- Whether the delay diminishes the employee organization's ability to fulfill its role as the exclusive representative.[549]

- The extensive nature of the request.[550]

- The difficulty of gathering the information.[551]

- The period of time between the request and the receipt of information.[552]

- Whether the employee organization was forced to file a prohibited practice charge to retrieve the information.[553]

Transfer of Bargaining Unit Work

The Law requires a public employer to give the exclusive collective bargaining representative of its employees prior notice and an opportunity to bargain before transferring bargaining unit work to non-bargaining unit personnel.[554] To determine whether an employer has unlawfully transferred bargaining unit work, the CERB considers the following factors:

- Whether the employer transferred bargaining unit work to non-unit personnel.

- Whether the transfer of unit work to non-unit employees has an adverse impact on individual employees or the unit itself.

- Whether the employer gave the bargaining representative prior notice and an opportunity to bargain over the decision to transfer the work.[555]

---

[549] *Id.*
[550] *University of Massachusetts Medical Center*, 26 MLC 149 (2000).
[551] *Id.*
[552] *Higher Education Coordinating Council*, 23 MLC 266 (1997).
[553] *Board of Higher Education*, 26 MLC 91 (2000).
[554] *Commonwealth of Massachusetts v. Labor Relations Commission*, 60 Mass. App. Ct. 831 (2004).
[555] *Id.*

In situations where the work is considered shared work that is traditionally performed by both bargaining unit and non-bargaining unit personnel, the work in question is not recognized as exclusively bargaining unit work.[556] In these shared work situations, the employer must bargain only when there is a calculated displacement of bargaining unit work.[557]

Contract Repudiation

Section 6 of the Law requires public employers and unions to meet at reasonable times to negotiate in good faith regarding wages, hours, standards of productivity and performance, and any other terms and conditions of employment. Repudiating a collectively-bargained agreement by deliberately refusing to abide by or to implement an agreement's unambiguous terms violates the duty to bargain in good faith.[558] Specifically:

- In order for the parties to have an agreement, there must be a meeting of the minds on the actual terms of the agreement.[559]
- To achieve a meeting of the minds, the parties must manifest assent to the terms of the agreement.[560]
- If the evidence is insufficient to find an agreement or if the parties hold differing good faith interpretations of the language at issue, the CERB concludes that no repudiation has occurred.[561]
- If the language is ambiguous, the CERB examines applicable bargaining history to determine whether the parties reached an agreement.[562]
- There is no repudiation of an agreement if the language of the agreement is ambiguous, and there is no evidence of bargaining history to resolve the ambiguity.[563]

---

[556] *City of Boston*, 26 MLC 144 (2000); *Higher Education Coordinating Council*, 23 MLC 90 (1996).
[557] *Id.*
[558] *Town of Falmouth*, 20 MLC 1555 (1994), *aff'd sub nom*. *Town of Falmouth v. Labor Relations Commission*, 42 Mass. App. Ct. 1113 (1997); *Commonwealth of Massachusetts*, 36 MLC 65 (2009).
[559] *Town of Ipswich*, 11 MLC 1403 (1985), *aff'd sub nom. Town of Ipswich v. Labor Relations Commission*, 21 Mass. App. Ct. 1113 (1986).
[560] *Suffolk County Sheriff's Department*, 30 MLC 1 (2003).
[561] *City of Boston*, 26 MLC 215 (2000).
[562] *Commonwealth of Massachusetts*, 16 MLC 1143 (1989).
[563] *Commonwealth of Massachusetts*, 28 MLC 8 (2001); *Town of Belchertown*, 27 MLC 73 (2000).

Unilateral Change

An employer is obligated to provide the exclusive representative an opportunity to negotiate before changing an existing condition of employment or implementing a new condition of employment involving a mandatory subject of bargaining.[564] The employer's obligation to bargain extends to working conditions established through past practice as well as those specified in a collective bargaining agreement.[565] To establish a violation, a union must demonstrate the following:

- The employer altered an existing practice or instituted a new one.
- The change affected a mandatory subject of bargaining.
- The change was established without prior notice and an opportunity to bargain.[566]

Change to an Existing Practice or Instituting a New Practice

To determine whether a practice exists, the CERB analyzes the combination of facts upon which the alleged practice is predicated, including whether the practice has occurred with regularity over a sufficient period of time so that it is reasonable to expect that the practice will continue.[567] The CERB also analyzes whether the practice:

- Is unequivocal.
- Existed substantially unvaried for a reasonable period of time.
- Is known and accepted by both parties.[568]

In addition, a condition of employment may be found despite sporadic or infrequent activity only where a consistent practice that applies to rare circumstances is followed each time that the circumstances preceding the practice recur.[569]

---

[564] *Commonwealth of Massachusetts v. Labor Relations Commission,* 404 Mass. 124 (1989); *Commonwealth of Massachusetts,* 30 MLC 63 (2003), *aff'd sub nom. Secretary of Administration and Finance v. Commonwealth Employment Relations Board*, 74 Mass. App. Ct. 91 (2009).

[565] *Town of Burlington*, 35 MLC 18 (2008), *aff'd sub nom. Town of Burlington v. Commonwealth Employment Relations Board*, 85 Mass. App. Ct. 1120 (2014); *Commonwealth of Massachusetts*, 27 MLC 1 (2000).

[566] *Town of Shrewsbury,* 28 MLC 44 (2001).

[567] *Commonwealth of Massachusetts,* 23 MLC 171 (1997).

[568] *City of Newton* 32 MLC 37 (2005).

[569] *City of Boston*, 41 MLC19, MUP-13-3371 et al., (November 7, 2014); *Town of Winthrop*, 28 MLC 200 (2002).

In determining whether there has been a change in a practice or condition of employment, the CERB has held:

- A mere change in the procedure for administering a condition of employment where the actual condition remains intact does not amount to a unilateral change.[570]

- When an employer develops a new method for measuring existing performance criteria, no duty to bargain attaches unless the actual evaluation criteria are changed.[571]

- The fact that the CERB finds that no existing practice has been altered does not foreclose the possibility of finding that a new practice has been unilaterally instituted by an employer.[572]

Mandatory Subject of Bargaining

The change must impact a mandatory subject of bargaining.[573] See above for examples of mandatory subjects of bargaining.

Notice and Opportunity to Bargain

The employer must notify the union of potential changes before they are implemented. Specifically:

- The information conveyed to the union must be sufficiently clear to make a judgment as to an appropriate response, and far enough in advance of implementation to allow for effective bargaining.[574]

- The employer's duty is not satisfied by presenting the change as a *fait accompli*, where the employer's conduct has progressed to a point that a demand to bargain would be fruitless, and then offering to bargain.[575]

---

[570] *City of Boston,* 8 MLC 1001 (1981).
[571] *Commonwealth of Massachusetts* 13 MLC 1717 (1987).
[572] *City of Boston,* 26 MLC 177 (2000).
[573] *City of Boston,* 20 MLC 1603 *(1994*).
[574] *Taunton School Committee,* 28 MLC 378 *(2002)*.
[575] *Town of East Bridgewater*, 38 MLC 164 (2012); *Town of Hudson*, 25 MLC 143 (1999).

Impasse

After good faith negotiations have exhausted the prospects of concluding an agreement, an employer may implement changes in terms and conditions of employment that are reasonably comprehended within its pre-impasse proposals.[576] The factors that the CERB weighs to determine whether an impasse exists include:

- Bargaining history.
- The good faith of the parties in negotiations.
- The length of the negotiations.
- The importance of the issue or issues as to which there is disagreement.
- The contemporaneous understanding of the parties as to the state of the negotiations.[577]

The CERB also assess the likelihood of further movement by either party, and whether they have exhausted all possibility of compromise.[578] Where one side indicates that their position is not fixed, but rather is flexible, the declaration of impasse by the other is premature.[579]

[576] *City of Leominster,* 23 MLC 62 (1996).
[577] *New Bedford School Committee*, 8 MLC 1472 (1981), *aff'd sub nom. School Committee of New Bedford v. Labor Relations Commission*, 15 Mass. App. Ct. 172 (1983)*; Ashburnham-Westminster Regional School District,* 29 MLC 191 (2003).
[578] *City of Worcester,* 39 MLC 271 (2012).
[579] *Id*.

Section 9 of Chapter 150E prohibits public employers from implementing unilateral changes during successor negotiations after a Section 9 petition for mediation has been filed with the DLR until those procedures have been completed.[580] However, participation in Section 9 proceedings may not preclude an employer from making unilateral changes before completing the collective bargaining process if the employer is able to demonstrate that externally imposed circumstances required unilateral action by a date certain.[581]

Waiver of the Right to Bargain by Contract

An employer may argue that the union waived its right to bargain by contract. The following guidelines are relevant:

- A waiver must be knowing, conscious, and unequivocal.[582]
- The matter waived was fully explored and consciously yielded.[583]
- A broad management rights clause is not an effective waiver.[584]
- Specific language in a management rights clause that relates to a disputed issue is sufficient to constitute a waiver.[585]
- While a "zipper clause" (a provision making the contract the exclusive statement of the parties' rights) may support a finding of a waiver, a broadly formed clause is too vague to infer a clear and unmistakable waiver.[586]
- The absence of a provision does not prove waiver.[587]

---

[580] *Cambridge Public Health Commission d/b/a Cambridge Health Alliance*, 37 MLC 39 (2010) (Ruling on Motion for Summary Decision) (ruling leaves open question of whether or not Section 9 bans unilateral action in the context of successor negotiations absent a petition); *but see Town of Stoughton*, 19 MLC 1149 (1992) (Section 9 is inapplicable to police and fire negotiations, which are under the jurisdiction of the JLMC. In such cases, the CERB will evaluate whether the parties were at impasse at the time of the unilateral change).
[581] *Cambridge Health Alliance*, 37 MLC 39 (2010).
[582] *Commonwealth of Massachusetts*, 28 MLC 308 (2002); *Melrose School Committee,* 3 MLC 1299 (1976).
[583] *City of Newton*, 29 MLC 135 (2003).
[584] *Massachusetts Port Authority,* 36 MLC 5 (2009); *City of Boston,* 3 MLC 1450 (1977).
[585] *City of Newton,* 35 MLC 142 (2008).
[586] *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983).
[587] *Bristol County Sheriff's Office,* 31 MLC 6 (2004).

- If the questioned language is ambiguous, the CERB looks to the bargaining history between the parties to determine whether a contractual waiver has taken place.[588]

Waiver of the Right to Bargain By Inaction

An employer may also assert that the union waived its right to bargain by its inaction. To do so, an employer must establish that the union:

- Had actual knowledge or notice of the proposed change.
- Had a reasonable opportunity to negotiate over the subject.
- Unreasonably or inexplicably failed to bargain or request bargaining.[589]

In addition, in cases involving the affirmative defense of waiver by inaction, the CERB has held:

- The filing of a charge, after protesting a unilateral change, does not constitute a waiver even though there has been no formal request to bargain.[590]
- It will not apply the waiver by inaction doctrine in cases where a union refuses to bargain about a mandatory subject of bargaining apart from impending or ongoing successor negotiations.[591]
- The doctrine of waiver by inaction should not be applied where the union is presented with a *fait accompli.* In such cases, the union is not required to make a demand to bargain in order to preserve its rights.[592]

Defense of Economic or Other Exigency

When an employer raises the affirmative defense of exigency, which would permit it to unilaterally implement changes in certain circumstances, the CERB employs a three-part test:

---

[588] *Central Berkshire Regional School Committee,* 31 MLC 191 (2005).
[589] *Town of Watertown*, 32 MLC 54 (2005); *Commonwealth of Massachusetts,* 28 MLC 239 (2002).
[590] *City of Everett,* 2 MLC 1471 (1976).
[591] *City of Boston*, 31 MLC 25 (2004).
[592] *Ashburnham-Westminster Regional School District,* 29 MLC 191 (2003); *Town of Hudson,* 25 MLC 143 (1999).

- Circumstances beyond the employer's control must require the imposition of a deadline for negotiations.
- The union must be notified of these circumstances.
- The deadline imposed must be reasonable and necessary.[593]

f. Section 10(a)(6)

Section 10(a)(6) of the Law requires that employers participate in good faith in the mediation, fact-finding, and arbitration procedures set forth in Sections 8 and 9 of the Law.[594] An individual does not have standing to attempt to enforce an employer's duty to bargain under Section 10(a)(6) of the Law.[595]

2. Union Prohibited Practices

a. Section 10(b)(1)

1) In General

Generally, the CERB does not interfere with union rules or actions that are within the legitimate domain of internal union affairs.[596] However, a union's freedom to regulate its internal affairs must give way to certain overriding interests implicit in the Law.[597] The CERB has found overriding interests outweighing a union's freedom to act in the following situations:

---

[593] *Cambridge Public Health Commission*, 37 MLC 47 (2010) (employer may also raise exigency defense where Section 9 petition has been filed); *Holliston School Committee,* 23 MLC 211 (1996).

[594] *City of Boston*, MUP-13-3371 et al., 41 MLC 19 (November 7, 2014) (employer violated Section 10(a)(6) of the Law by failing to provide requested information while JLMC proceedings were pending); *City of Melrose*, 28 MLC 53 (2001) (employer violated the Law by failing to comply with the legal obligation to submit an appropriation request to fund a JLMC-ordered arbitration award); *cf. Chief Justice for the Administration and Management of the Trial Court*, 37 MLC 181 (2011) (employer did not violate the Law when it withdrew economic proposals it made to a fact-finder because changed economic circumstances negatively impacted its ability to fund the proposals).

[595] *Quincy City Employees Union, H.L.P.E.*, 15 MLC 1340 (1989), *aff'd sub nom.*, *Pattison v. Labor Relations Commission*, 30 Mass. App. Ct. 9 (1991).

[596] *Switzer v. Labor Relations Commission*, 36 Mass. App. Ct. 565 (1994) (the question of whether the union violated its constitution and by-laws is a matter for the courts, not the CERB); *National Association of Government Employees*, 13 MLC 1525 (1987).

[597] *Id.*

- Testimony on behalf of an employer at a CERB proceeding;[598]
- Determining appropriate bargaining units;[599] and
- Prohibiting strikes.[600]

2) Duty of Fair Representation

Pursuant to Section 5 of the Law, a union has an obligation to represent all bargaining unit members without discrimination, and without regard to employee organization membership.[601] Although unions are permitted a wide range of reasonableness in fulfilling their statutory obligations, a union breaches this duty if its actions towards an employee are:

- Unlawfully motivated;
- Arbitrary;
- Perfunctory; or
- Reflective of inexcusable neglect.[602]

The CERB reviews the circumstances of each case to determine whether a union's investigation or inquiry was sufficient for it to make a reasoned judgment in deciding whether to pursue or abandon a grievance.[603] The CERB finds a violation under the following circumstances:

- A union ignores a grievance, inexplicably fails to take some required step, or gives the grievance merely cursory attention.[604]
- A union fails to investigate, evaluate, or pursue an arguably meritorious grievance without explanation.[605]

---

[598] *Brockton Education Association*, 12 MLC 1497 (1986) (union violated Law by moving to censure members who voluntarily testified on behalf of employer).
[599] *Johnson and McNulty*, 8 MLC 1993 (1982), *aff'd sub nom. Boston Police Patrolmen's Association v. Labor Relations Commission*, 16 Mass. App. Ct. 953 (1983).
[600] *Luther E. Allen, Jr.*, 8 MLC 1518 (1981).
[601] *American Federation of State, County and Municipal Employees*, 35 MLC 300 (2009).
[602] *Quincy City Employees Union, H.L.P.E.*, 15 MLC 1340 (1989), *aff'd sub nom. Pattison v. Labor Relations Commission*, 30 Mass. App. Ct. 1340 (1989).
[603] *American Federation of State, County, and Municipal Employees*, 35 MLC 300 (2009).
[604] *Independent Public Employees Association, Local 195,* 12 MLC 1558 (1986).
[605] *NAGE*, 20 MLC 1105 (1993), *aff'd sub nom. National Association of Government Employees v. Labor Relations Commission*, 38 Mass. App. Ct. 611 (1995).

- There is an absence of a rational basis for a union's decision and egregious unfairness or reckless omissions or disregard for an employee's rights.[606]

A finding of honest mistake or ordinary or simple negligence, standing alone, does not constitute a breach of the duty of fair representation.[607]

As a remedy to an employee organization's unlawful refusal to process a grievance to arbitration, the CERB does not order the employer to proceed to arbitration. Rather, the CERB orders the employee organization to take all affirmative steps to request that the employer waive the time limits contained in the parties' contractual arbitration provisions. If the employer agrees to do so, the union must diligently process the grievance to arbitration. If the employer does not agree, the union remains liable for the employee's monetary losses resulting from the union's failure to process the grievance.[608]

3) Agency Service Fee

In General

Section 12 of the Law provides that public employees may be charged an agency fee by the exclusive bargaining representative as a condition of employment if the fee is required by a collective bargaining agreement ratified by a vote open to all members of the bargaining unit. It is a prohibited practice for a union to charge an objecting nonmember an amount in excess of the nonmember's pro rata share of the costs of collective bargaining and contract administration.[609]

---

[606] *Quincy Food Serv. Employees Ass'n & Hosp., Library & Pub. Employees Union*, 407 Mass. 601 (1990).
[607] *Pattison v. Labor Relations Commission*, 30 Mass. App. Ct. 1340 (1989) (citations omitted); *Cf. Amherst Police League*, 35 MLC 239 (2009) (a union's gross negligence is a breach of its duty of fair representation).
[608] *United Steelworkers of America*, 31 MLC 122 (2005), *aff'd sub nom. United Steelworkers of America v. Commonwealth Employment Relations Board*, 75 Mass. App. Ct. 656 (2009); *Amherst Police League*, 35 MLC 239 (2009).
[609] *School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70 (1982); *Cf. Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

Whether a collective bargaining agreement will contain an agency service fee provision, and the substantive provisions regarding the fee, are mandatory subjects of bargaining.[610] An employer may violate Section 10(a)(5) of the Law if it refuses to impose upon a fee payer a contractually agreed-upon penalty, where the fee payer has not filed a charge with the DLR.[611]

DLR regulations detail the procedures a union must follow in order to ratify an agency service fee provision and to demand payment of the fee.[612] Failure to follow the procedures invalidates a union's demand for a fee.[613]

Validity of Demands

Ratification

A demand for a service fee is not valid unless the contract requiring its payment has been executed and ratified by a majority tally in a vote open to all bargaining unit members.[614] The following guidelines regarding ratification apply:

- A written record of the vote must be taken, but it is not necessary that a union take an individual count of the vote or keep a written record of each individual vote or the number of votes cast.[615]

- The union must provide notice, which strictly conforms to DLR Regulation 17.03(5), to all bargaining unit members that a ratification procedure will take place.[616]

- At the time of ratification, the union must make available for inspection, upon request, a copy of its Form 2, or an equivalent statement of financial receipts and disbursements for the previous fiscal year.[617]

---

[610] *Massachusetts Board of Regents*, 10 MLC 1048 (1983); *Leominster School Secretaries Association*, 7 MLC 1953 (1981).
[611] *Whittier Regional School Committee v. Labor Relations Commission*, 401 Mass. 560 (1988).
[612] 456 CMR 17. 02, 17.04.
[613] 456 CMR 17.05(1).
[614] 456 CMR 17.02(1) – (2).
[615] 456 CMR 17.02(3); *Woburn Teachers Association*, 10 MLC 1426 (1984).
[616] 456 CMR 17.02(5); *United Steelworkers of America*, 10 MLC 1080 (1983).
[617] 456 CMR 17.02(4); *Fairhaven Educators Association*, 13 MLC 1275 (1986) (requirement will be satisfied if the union makes its most current statement available, and can prove that it could not have prepared a more current one).

Content of Demand

The union seeking a fee must serve a written demand on the employees. The following guidelines apply to the written demand:

- The demand must include the amount of the fee, the period for which the fee is assessed, the method by which payment should be made, the person to whom payment should be made, and the consequences for failure to pay.[618]

- The union must also notify the fee payer of the opportunity to challenge the fee through an adequate rebate procedure and provide certain financial information.[619]

- The union must attach to the demand a copy of the entire text of the DLR's agency service fee regulations.[620]

Service of Demand

A union violates the Law if it pursues payment or penalties for nonpayment of a service fee if the nonmember has not received the demand.[621] A union may rebut a nonmember's evidence that it did not receive the demand by establishing that:

- The nonmember was given the demand in person;

- The nonmember or another competent adult residing with the nonmember signed a return receipt confirming delivery;

- The demand was left at the nonmember's last and usual residence;

- A demand was mailed to a nonmember or left in the nonmember's school mailbox; or

- The nonmember deliberately evaded receipt.[622]

---

[618] 456 CMR 17.04(1).
[619] *Malden Education Association*, 15 MLC 1429 (1989).
[620] 456 CMR 17. 04(2). For additional information regarding invalid or deficient demands, please see *Malden Education Association*, 15 MLC 1029 (1988) and *Fairhaven Educators Association*, 13 MLC 1275 (1986).
[621] *Massachusetts Society of Professors*, 15 MLC 1683 (1989).
[622] *Id.*

Access to Union Expenditure Information

At the time of the demand, the union must have Forms 1 and 2 on file at the DLR.[623] The union also must provide nonmembers with an adequate explanation of the basis of the service fee. At a minimum, this must include for the fiscal year preceding the period for which the fee is demanded:

- A copy of an independent auditor's financial statement of revenue and expenses;
- A list of the major categories of the union's expenses; and
- A demonstration that none of the expenses listed in a particular category were used to subsidize nonchargeable activities, or an explanation of the share that was so used.[624]

Rebate Procedure

A union demanding a service fee must make available to nonmembers an internal procedure by which they may obtain a rebate of the fee that is in excess of the amount permitted by the Law. Unions must notify fee payers in writing of this procedure at the time the fee is demanded. The procedure must provide:

- A prompt adjudication before an arbitrator not chosen exclusively by the union; and
- An escrow or equivalent arrangement that guarantees that an objecting fee payer's agency fee will not be used even temporarily for nonchargeable purposes.[625]

Providing Required Information

Any information that a union is required to provide as part of making a valid demand may be delivered electronically. 456 CMR 17.04 (4).

---

[623] 456 CMR 17. 04(3); *Malden Education Association*, 11 MLC 1500 (1985) (the fee payer must show by a preponderance of the evidence that, at the time the union demanded the fee, it had not filed the required information with the DLR).
[624] *Malden Education Association*, 15 MLC 1429 (1989); *Cf. Wareham Education Association et al. v. Labor Relations Commission*, 430 Mass. 81 (1999) (no exception to the independent audit requirement for small local union affiliates).
[625] *Malden Education Association*, 15 MLC 1429 (1989).

Challenges to the Amount of an Agency Service Fee

Union's Burden of Proof

A union can meet its burden of proving that the amount of an agency service fee is equivalent to the nonmember's pro rata share of the costs of collective bargaining and contract administration with the following evidence:

- Evidence of all the amounts the union has spent permissibly and the total number of employees represented in the bargaining unit; or
- Evidence that the membership dues for a particular year represented the members' pro rata share of the anticipated union expenses for that year, and that particular proportion of those expenses were chargeable.[626] To qualify as a chargeable expense, the union expenditure must:
    - Be germane to collective-bargaining activity;
    - Be justified by the government's vital policy interest in labor peace and avoiding "free riders;" and
    - Not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.[627]

Sufficiency of the Union's Evidence at Hearing

At a minimum, the evidence a union must proffer to meet its burden of proof in an amount challenge should include audited financial records or equally reliable evidence itemizing the union's expenditures and demonstrating how they relate to the categories in DLR Regulation 456 CMR 17.03.[628] A union may rely on a prima facie showing that its service fee calculations are correct. Its initial burden is to produce enough credible detail to warrant a finding that identified expenditures are chargeable.[629]

---

[626] *Woburn Education Association*, 13 MLC 1555 (1987); *Newton Teachers Association*, 13 MLC 1589 (1987); *Cf. James J. Belhumeur et al. v. Labor Relations Commission*, 432 Mass. 458 (2000) (the union is not required to use the formula that results in the lowest fee).

[627] *James J. Belhumeur et al. v. Labor Relations Commission*, 432 Mass. 458 (2000).

[628] *Woburn Education Association*, 13 MLC 1555 (1987).

[629] *Springfield Education Association et al.*, 23 MLC 233 (1997), *aff'd in part, rev'd in part, sub nom. James J. Belhumeur et al. v. Labor Relations Commission*, 432 Mass. 458 (2000) (unless a related expense is inherently related to collective bargaining, a union must show by evidence that a particular expense is chargeable).

Summaries of union expenditures are only admissible when they meet the following criteria:

- They are based on audited or equally reliable financial records;
- They are organized according to the categories in Regulation 17.04;
- They are introduced through witnesses who can knowledgeably testify about the nature and accuracy of the underlying expense data and who can sufficiently detail the summarized testimony to persuade the CERB that the summary is reliable; and
- The underlying financial data must be made available to an objecting employee who requests the opportunity to examine it.[630]

Generally, the CERB may presume that the following expenses are chargeable:

- Overhead expenses that are necessary to maintain the union's existence.[631]
- Contributions to union candidates for national union office.[632]
- Certain union meetings and board of directors' expenses.[633]

Other administrative costs are chargeable in proportion to the union's over-all chargeable expenses.[634]

The fact that chargeable and nonchargeable activities are combined at a union meeting or conference does not render all the expenses nonchargeable. The evidence that the union has to produce in order to meet its burden of persuasion depends on the following factors:

- The nature and purpose of the event;
- The types of attendees at the event and their level of participation; and
- The nature and extent of political activity at the meeting.[635]

---

[630] *Milford Teachers Association*, 13 MLC 1568 (1987).
[631] *James J. Belhumeur v. Labor Relations Commission*, 432 Mass. 458 (2000); *Newton Teachers Association*, 13 MLC 1598 (1987).
[632] *Chicopee Fire Fighters*, *Local 1701, IAFF*, 14 MLC 1241 (1987).
[633] *James J. Belhumeur et al. v. Labor Relations Commission*, 432 Mass. 458 (2000).
[634] *Id.; Newton Teachers Association*, 13 MLC 1598 (1987).
[635] *James J. Belhumeur et al. v. Labor Relations Commission*, 432 Mass. 458 (2000).

To prove the permissibility of payments to a local union's national, state, or regional affiliates, the local union must present evidence of how those payments were spent by the affiliates.[636]

Once a union makes its prima facie showing of chargeability, the fee payer assumes a limited burden of production to probe the union's evidence and produce some evidence to rebut the union's prima facie showing. At all times, the union retains the ultimate burden of persuasion.[637]

b. Section 10(b)(2)

A union violates Section 10(b)(2) of the Law when it refuses to bargain in good faith. In general, a union's obligation to bargain in good faith mirrors an employer's good faith bargaining obligation under Section 10(a)(5) of the Law.[638] For additional information regarding a party's duty to bargain in good faith, see Section III(F)(1)(e).

c. Section 10(b)(3)

Section 10(b)(3) corresponds to the employer's Section 10(a)(6) requirement to participate in good faith in mediation, fact-finding, and arbitration.[639] For further discussion regarding good faith participation in these processes, please see Section III(F)(1)(f).

G. Impasse

1. Section 9

Section 9 of the Law establishes a mechanism for the resolution of bargaining impasse through mediation, fact-finding, and voluntary interest arbitration. Section 9 impasse resolution procedures may be used for initial and successor collective bargaining agreement impasse, but not for deadlocks that occur during the term of an agreement.[640]

---

[636] *Chicopee Fire Fighters*, *Local 1701, IAFF*, 14 MLC 1241 (1987).
[637] *Id.*
[638] *Boston School Committee*, 37 MLC 214 (2011) (union violated Section 10(b)(2) by unilaterally imposing pre-conditions on a bargained-for procedure and practice); *North Middlesex Regional School District Teachers Association*, 28 MLC 160, 163 (2001).
[639] *NAGE*, 8 MLC 1484 (1981) (union refused to participate in fact-finding); *Worcester Police Officials Association*, 4 MLC 1366 (1977) (union violated Law by presenting improper wage and benefit proposal to fact-finder).
[640] *Massachusetts Board of Regents of Higher Education*, 13 MLC 1540 (1987), *aff'd sub nom. Massachusetts Community College Council MTA/NEA v. Labor Relations Commission*, 402 Mass. 352 (1988); *Cambridge Health Alliance*, 37 MLC 168 (2011).

If the parties are unable to reach agreement and break their impasse after participating in the Section 9 impasse resolution procedures, the Director may certify that the parties have completed the collective bargaining process. It is only at this time that the employer may implement its last best final offer. The last best final offer is the offer that was proposed by the employer before the Section 9 proceedings were initiated.[641]

It is a violation of Sections 10(a)(6) and 10(b)(3) of the Law to refuse to participate in good faith in the Section 9 impasse procedures.[642] The good faith requirement contemplates compliance with the DLR's rules, as well as reasonableness, integrity, honesty of purpose and a desire to seek a resolution of the impasse consistent with the respective rights of the parties.[643] Where one or both parties have filed a Section 9 petition, an employer may not make unilateral changes to any matters encompassed by contract negotiations until the Section 9 process is complete.[644]

2. JLMC

Chapter 489 of the Acts of 1987 (JLMC statute) provides for impasse resolution procedures in municipal police and fire cases.[645] An employer who refuses to participate in good faith in the impasse procedures invoked by the JLMC violates Section 10(a)(6) of the Law.[646]

Unlike the situation where one or both parties have filed a Section 9 petition, as described above, it is not a per se violation of Chapter 150E for a municipal police or fire employer to implement a bargaining proposal prior to exhaustion of JLMC procedures.[647] Rather, the union must provide additional evidence showing that the employer otherwise refused to participate in good faith in the JLMC's procedures.[648]

---

[641] *Cambridge Health Alliance*, 40 MLC 320 (2014).
[642] *NAGE,* 8 MLC 1484 (1981); *Worcester Housing Authority*, 5 MLC 1459 (1978).
[643] *Framingham School Committee*, 4 MLC 1809 (1978).
[644] *Cambridge Health Alliance*, 37 MLC 39 (2010).
[645] *Town of Bellingham v. Local 2071, IAFF*, 64 Mass. App. Ct. 446 (2005), *mandate vacated on other grounds*, 67 Mass. App. Ct. 502 (2006).
[646] *City of Boston*, 41 MLC 19, MUP-13-3371 et al. (November 7, 2014); *City of Melrose*, 28 MLC 53 (2001).
[647] *City of Boston*, 41 MLC 19, MUP-13-3371 et al. (November 7, 2014); *Town of Stoughton*, 19 MLC 1149 (1992).
[648] *Id.*

H. Final and Binding Grievance Arbitration

1. Threshold Questions

Section 8 of the Law provides that parties may include in a written agreement a grievance procedure with binding arbitration. The DLR may order binding grievance arbitration under Section 8 of the Law upon the union or employer's request if the following criteria are met:

- There is a written collective bargaining agreement in effect at the time of the alleged event.
- There is a dispute over the interpretation or application of the written agreement.
- The agreement does not provide for final and binding arbitration.[649]

The DLR orders binding arbitration when the dispute is "arguably arbitrable."[650]

If an employee elects to arbitrate a grievance involving a suspension, dismissal, removal, or termination, arbitration is the exclusive procedure available to the employee notwithstanding any rights the employee may have under M.G.L. c. 31 (Civil Service), M.G.L. c. 32 (Retirement Board), and M.G.L. c. 71 (Tenured Teachers).[651] Where the grievance does not involve one of these issues, the DLR may order binding arbitration even if the aggrieved employee is pursuing other remedies.[652]

---

[649] M.G.L. c. 150E, Section 8; *Essex County Sheriff's Department*, 29 MLC 75 (2002); *cf. Town of East Longmeadow*, 3 MLC 1046 (1976) (an order under Section 8 of the Law is not appropriate where there is contractual binding arbitration); *Swampscott Fire Fighters, Local 1459*, 8 MLC 1354 (1981) (party seeking to enforce contractual arbitration should proceed in Superior Court pursuant to M.G.L. c. 150C); *see also Wales School Committee*, 11 MLC 1330 (1985) and *Sturbridge School Committee*, 11 MLC 1037 (1984) (CERB rejects employers' arguments that it does not have statutory authority to order binding arbitration and that Section 8 is unconstitutional).

[650] *Essex County Sheriff's Department*, 29 MLC 75 (2002) (the DLR's review is limited to whether the contract arguably covers the dispute and leaves questions concerning whether the grievance is procedurally and substantively arbitrable to the arbitrator, and whether arbitration on the subject is contrary to law or public policy to the courts).

[651] M.G.L. c. 31, Section 8.

[652] *Board of Trustees of State Colleges*, 1 MLC 1474 (1975).

2. Refusal to Participate or Comply with Award

Under Sections 10(a)(6) and 10(b)(3) of the Law, it is a prohibited practice for employers or employee organizations to refuse to participate in good faith in the grievance procedure agreed to by the parties or ordered by the DLR. The following are examples of Section 10 violations:

- An employer's refusal to comply with an arbitrator's unambiguous award, forcing other employees to serially file identical grievances.[653]

- An employer's unreasonable delay in processing grievances to arbitration.[654]

- An employer's continued refusal to comply with the procedural grievance arbitration provisions of a duly executed contract is a *per se* violation of the Law.[655]

3. Waiver

An employee organization may expressly waive its Section 8 right to request binding arbitration for a specific and narrow class of disputes.[656] The waiver must be clear and unmistakable, and the absence of a binding arbitration provision in the contract does not constitute a waiver of the right to a Section 8 order.[657]

I. Strikes

Section 9A(a) of the Law prohibits public employees and employee organizations from striking or inducing, encouraging, or condoning a work stoppage by public employees.

1. Prohibited Conduct

a. Withholding Services - In General

To determine whether public employees are engaged in a strike or withholding services the CERB considers three factors:

---

[653] *Suffolk County Sheriff's Department*, 28 MLC 253 (2002); *City of Lynn*, 9 MLC 1049 (1982).
[654] *Everett Housing Authority*, 8 MLC 1818 (1982) (employer's conduct violated Section 10(a)(5) of the Law); *cf. City of Peabody*, 29 MLC 115 (2002) (employer's duty to bargain in good faith does not compel it to settle the dispute underlying the grievance).
[655] *City of Chelsea*, 3 MLC 1384 (1977).
[656] *Swampscott Firefighters Local 1459*, 8 MLC 1354 (1981).
[657] *Town of Athol*, 4 MLC 1137 (1977).

- Whether the service is one which employees must perform as a condition of employment.

- Whether the service was in fact withheld or is about to be withheld.

- The party responsible for the withholding of the service.[658]

1) Service as a Condition of Employment

Conditions of employment are defined as "not only those duties specifically mentioned in an existing or recently expired collective bargaining agreement (or personnel policies in effect for more than one year), but also those practices not unique to individual employees which are intrinsic to the position or which have been performed by employees as a group on a consistent basis over a sustained period of time."[659]

The CERB has also held the following regarding conditions of employment:

- The refusal to work overtime is not a strike where an existing collective bargaining agreement or past practice specifically authorizes the refusal.[660]

- A concerted refusal to perform a task that is purely voluntary or within employees' discretion is not a strike.[661]

- An employee's failure or refusal to maintain a current professional certification required to perform employment duties may be a strike or unlawful withholding services.[662]

- The expiration of a collective bargaining agreement specifying the reporting date for schoolteachers does not eliminate the teachers' obligation to report to work on the first scheduled day of the school year.[663]

---

[658] *Town of Danvers,* 31 MLC 76 (2004); *Newton School Committee,* 9 MLC 1611 (1983).
[659] *Town of Danvers,* 31 MLC 76 (2004); *Lenox School Committee,* 7 MLC 1775 (1980), *aff'd sub nom. Lenox Education Association v. Labor Relations Commission*, 393 Mass. 276 (1984).
[660] *City of Newton,* 13 MLC 1462 (1987); *City of Beverly,* 3 MLC 1229 (1976); *but see Town of Arlington,* 3 MLC 1276 (1976) (where overtime is required by contract or is emergency in nature, concerted refusal to work such overtime may constitute a violation).
[661] *City of Boston*, 35 MLC 91 (2008); *Town of Danvers,* 31 MLC 76 (2004).
[662] *Town of Walpole,* 12 MLC 1039 (1985).
[663] *Peabody School Committee,* 15 MLC 1147 (1988).

- Where the employer has failed to consistently enforce a written requirement that employees perform a certain task or the manner in which they perform it, the failure to perform the task does not constitute unlawful withholding of services.[664]

- Where the activity alleged by the employer to violate the Law consists of a reduction in employee productivity, the CERB does not necessarily infer from statistical data that employees are unlawfully withholding services, even if coupled with evidence that the employees were dissatisfied with the progress of negotiations.[665]

2) Evidence of Withholding Services

Where there is no direct evidence of a strike, the CERB may make its findings based upon the available facts and the reasonable inferences drawn from them.[666] Factors the CERB has considered in finding a strike include:

- The absence without excuse of virtually 100% of the employees in the context of a dispute over a collective bargaining agreement; and

- The fact that employees picketed outside their place of employment during work hours.[667]

Other facts that may lead to an inference of a strike include:

- An abnormally high rate of absenteeism.

- The similarity of employee absence excuses.

- The timing of absenteeism coincides with expressed labor relations frustration.[668]

---

[664] *University of Massachusetts*, 28 MLC 91 (2001).
[665] *Town of Danvers,* 31 MLC 76 (2004) (CERB declined to infer that a strike was occurring from statistical data where evidence showed that officers were free to exercise their discretion whether to issue complaint citations, and there was no evidence that the town communicated to officers that they were expected to issue complaint citations within the 65% annual average).
[666] *Town of Abington,* 12 MLC 1084 (1985).
[667] *Hanover School Committee,* 15 MLC 1182 (1988); *Tewksbury School Committee,* 12 MLC 1353 (1985); *but see Shrewsbury School Committee,* 26 MLC 103 (2000) (the absence of picketing by employees during work hours is not fatal to a showing that a strike is occurring).
[668] *Shrewsbury School Committee,* 26 MLC 103 (2000) (CERB concluded that a strike existed based on the fact that over 50% of workforce was absent and that the "Crisis Team" recommended that bargaining unit members report in sick); *Boston School*

b. Inducement, Encouragement, and Condonation

Section 9A(a) also prohibits public employees or employee organizations from inducing, encouraging, or condoning a strike. Evidence of a violation includes:

- The failure of union officers to report to work.
- Union officials' remarks indicating the existence of a strike vote by union members.
- Picketing by union officials during work hours.[669]
- Information regarding the work action on the union's website, including announcements or steps taken by the union's executive board regarding an upcoming strike vote.[670]

If an employer alleges that a union's parent or affiliate organization has also violated Section 9A(a), it must introduce sufficient facts to establish such involvement.[671] In considering such cases, the CERB has held:

- An affiliated organization's representative on an informational picket line during non-work hours is alone insufficient evidence to warrant a conclusion that the affiliated organization was condoning or encouraging a subsequent strike. However, evidence of the representative's picketing during the strike may be sufficient.[672]

Committee, 14 MLC 1406 (1987); *Wakefield Municipal Light Dept.*, 13 MLC 1521 (1987); *Town of Abington,* 12 MLC 1084 (1987) (100% of employees absent from same shift claiming illness); *cf. King Phillip Regional School Committee*, 37 MLC 81 (2010) (CERB declined to infer that there had been an unlawful withholding of services with respect to teachers writing letters of recommendation where there was no clear evidence that any teachers had actually stopped writing recommendations or spent less time on them, and no mutually understood practice as to the time teachers were expected to spend writing recommendations or their content); *City of Medford,* 11 MLC 1042 (1984) (where a small number of employees reported to work and signed out ill, and no additional evidence was introduced from which the CERB could infer that the illnesses were feigned, or that the absences were unusual in number, the CERB dismissed a strike investigation petition).

[669] *Hanover School Committee,* 15 MLC 1185 (1988); *Northeast Metropolitan Regional Vocational School Committee,* 13 MLC 1213 (1986); *but see Quincy School Committee,* 12 MLC 1675 (1986); *City of Medford,* 11 MLC 1107 (1984).

[670] *Boston Teachers Union, Local 66,* 33 MLC 133 (2001), *aff'd sub nom. Commonwealth Employment Relations Board v. Boston Teachers Union, Local 66*, 74 Mass. App. Ct. 500 (2009); *University of Massachusetts*, 28 MLC 91 (2001).

[671] *Lowell School Committee,* 15 MLC 1151 (1988); *Everett School Committee,* 14 MLC 1284 (1987).

[672] *Medford School Committee,* 14 MLC 1213 (1987).

- The mere presence of an affiliate's representative at bargaining sessions where local union officials indicate that a strike vote will be taken by the local membership is not sufficient to impose liability on the affiliate.[673]

- Statements made by an affiliate's representative do not amount to encouragement of a strike where the remarks referred only to an *understanding* that there arose a "spontaneous illness" among bargaining unit members.[674]

- A union did not induce, encourage, or condone a strike where the union did not advocate on its website that employees call in sick (unlike another job action that union was advocating for at the same time), and union president told at least one other union official that he thought a sick-out was a "bad idea."[675]

The Supreme Judicial Court held that union officials have an affirmative duty to oppose a strike and to ensure union compliance with an injunction.[676] The CERB has further found:

- The union's participation in picketing or demonstrations, or the distribution of leaflets announcing the cancellation of a work day during a work stoppage or explaining the reasons for the work stoppage, is evidence of inducing and encouraging a strike.[677]

- The union's establishment of a strike headquarters is evidence of a violation of the Law.[678]

- The absence of a picket line or lack of a formal union endorsement of the strike does not shield the union from liability for condoning the alleged activity.[679]

- The union is held responsible for the actions of its officers and leaders.[680]

---

[673] *Revere School Committee,* 14 MLC 1177 (1987).
[674] *Quincy School Committee,* 12 MLC 1675 (1986).
[675] *University of Massachusetts (Amherst)*, 28 MLC 91 (2001).
[676] *Labor Relations Commission v. Boston Teachers Union, Local 66,* 374 Mass. 79 (1977).
[677] *Peabody School Committee,* 15 MLC 1147 (1988); *Seekonk School Committee,* 14 MLC 1198 (1987).
[678] *Lowell School Committee,* 15 MLC 1151 (1988).
[679] *City of Lawrence,* 11 MLC 1284 (1984).
[680] *Quincy School Committee*, 12 MLC 1774 (1986).

- A union's failure to present evidence to rebut evidence of its involvement, or to show that its officials took some affirmative steps to discourage unit members from striking, allows the CERB to draw an adverse inference of union inducement, encouragement, or condonation.[681]

- The CERB may infer union inducement and condonation where the work stoppage was 90% effective, union officers failed to appear for work, and the strike started and stopped on cue, all of which occurred during a period of labor unrest.[682]

- E-bulletins and articles in a union newspaper criticizing employer's bargaining strategy and proposals, announcing executive board's approval to take a motion to hold a strike vote before the membership, and other preparation for "exigencies" amply supported, "if not compelled" the CERB's conclusion that the union unlawfully induced, encouraged and condoned a strike.[683]

2. Work to Rule

Employees are engaged in a strike in violation of Section 9A(a) of the Law if they abstain in whole or in part from the performance of duties:

- Specifically mentioned in an existing or recently expired contract.

- That are not unique to individual employees because they are either intrinsic to the position or have been performed by employees as a group on a consistent basis over a substantial period of time.[684]

When an employer fails to establish, communicate and/or enforce rules governing the duties that employees are obligated to perform, employees or unions who withhold, or urge or condone the withholding of those services have not engaged in an illegal work stoppage within the meaning of Section 9A(a).[685] The CERB also held:

---

[681] *Brockton School Committee,* 13 MLC 1545 (1987).
[682] *City of New Bedford,* 4 MLC 1001 (1977).
[683] *Commonwealth Employment Relations Board v. Boston Teachers Union*, 74 Mass App. Ct., 500 (2009).
[684] *Lenox School Committee,* 7 MLC 1761 (1980), *aff'd sub nom. Lenox Education Association v. Labor Relations Commission,* 393 Mass. 276 (1984).
[685] *Andover School Committee*, 40 MLC 1 (2013).

- The concerted withholding of services, which are not duties as so defined, is protected activity.[686] A Section 9A(a) violation cannot be based on concerted conduct that would be permissible if done alone.[687]

- Teachers' refusal to teach summer school classes and attend professional development program at the end of the school year was not an unlawful strike because there was no express or implied contract between the school committee and the union requiring teachers to teach classes, there was no evidence that the school committee required teachers to teach these classes, and the duties were not intrinsic to the position.[688]

- Police officers failing to issue traffic citations was not a strike where personnel manual made clear that issuing citations was within officer's discretion and did not establish a quota.[689]

- Graduate students' refusal to turn grades in by noon on a specific day was not an unlawful withholding of services where, although various memos and the school calendar specified the noon deadline, evidence showed that graduate students had not met the deadline in the past without being disciplined, and other graduate students who were not participating in grade "embargo" also turned in grades late.[690]

- Teachers' alleged refusal to perform certain tasks, such as entering grades into grade database, writing recommendations, and teaching independent studies was not a violation where the evidence failed to show that teachers consistently used the grade database, were required to do so, or that they had stopped actually writing recommendations. Evidence also showed that teaching independent studies was a voluntary task that was not intrinsic to the position.[691]

- Where the contract made clear that acceptance of on-call assignments was purely voluntary, the concerted refusal of housing inspectors to perform on-call assignments did not constitute an unlawful strike or withholding of services.[692]

---

[686] *Andover School Committee*, 40 MLC 1 (2013); *Southeastern Regional School Committee,* 7 MLC 1801 (1981).
[687] *Andover School Committee*, 40 MLC 1 (2013); *Town of Plymouth*, 18 MLC 1191 (1991); *City of Newton*, 13 MLC 1462 (1987).
[688] *Lawrence School Committee*, 26 MLC 3 (1999).
[689] *Town of Danvers*, 31 MLC 76 (2004).
[690] *University of Massachusetts*, 28 MLC 91 (2001).
[691] *King Philip Regional School Committee*, 37 MLC 81 (2010).
[692] *City of Boston*, 35 MLC 91 (2008).

3. Threatened Strikes

Section 9A(b) permits a public employer to petition the CERB to investigate allegations that a strike is about to occur. In such cases:

- The CERB traditionally limited the application of this provision to situations where no further union action is necessary before a strike begins, e.g., when an actual strike vote has taken place.[693]

- Where waiting for an actual strike vote to take place does not leave sufficient time for the employer to meaningfully engage the process set forth in Section 9A to prevent a strike from occurring, the CERB does not require a strike vote as a per se prerequisite to its finding that a strike is about to occur. Instead, it considers evidence short of an actual strike vote demonstrating that an actual threat of strike, work stoppage or slowdown exists. Such evidence has included the bargaining unit members' unanimous approval of a motion approved by the union's executive board to authorize a strike vote scheduled to take place five weeks later, the fact that the union's bylaws contained a provision stating, "A general membership meeting is the only body which may accept or reject contracts or call a work stoppage," and other evidence that the union was advocating and preparing for a strike.[694]

- The CERB also takes into account whether the deprivation of services causes both financial and non-financial "irreparable harm" on the employer and its constituents.[695]

- Where the evidence of a threatened strike was speculative, occurred several months before the petition was filed, and there was no evidence that the strike preparations had continued, the CERB dismissed the strike petition.[696]

4. Remedial Orders

If the CERB concludes that a union has violated Section 9A(a), the CERB issues an interim order directing the end of the work stoppage. The following situations involve interim orders:

---

[693] *City of Worcester,* 13 MLC 1627 (1987); *Boston School Committee,* 10 MLC 1289 (1983).
[694] *Boston School Committee*, 33 MLC 133 (2007), *aff'd sub nom. Commonwealth Employment Relations Board v. Boston Teachers Union, Local 66*, 74 Mass. App. Ct. 500 (2009).
[695] *Id*.
[696] *Peabody School Committee*, 31 MLC 50 (2004).

- The interim order may also address some of the issues underlying the work stoppage, especially where related prohibited practice charges are involved and require the parties to participate in bargaining, mediation, or fact-finding.[697]

- The CERB has not excused an employer from continuing to negotiate because the union is on strike.[698]

- The CERB lacks the authority to order binding arbitration of the dispute.[699]

- The CERB also often requires a striking union to inform its members of the provisions of Section 9A(a) of the Law and of the contents of the interim order.[700]

- The CERB may require the union to take necessary action to rescind and publicly disavow votes leading up to a strike vote.[701]

- The CERB routinely retains jurisdiction to set further appropriate requirements.[702]

- The CERB may retain jurisdiction to further investigate allegations against named respondents who were not served with notice of the investigation.[703]

An unlawful work stoppage designed to affect the conduct of collective bargaining may also violate Section 10(b)(2) of the Law.[704]

5. Constitutional Issues

Public employees have no constitutional right to strike.[705] Specifically, the courts have held:

---

[697] *Hanover School Committee,* 15 MLC 1182 (1988).
[698] *Hudson School Committee,* 14 MLC 1403 (1987); *Lexington School Committee,* 14 MLC 1343 (1987).
[699] *Director, Division of Employee Relations v. Labor Relations Commission,* 370 Mass. 162 (1976); *Labor Relations Commission v. Fall River Educators' Association,* 382 Mass. 465 (1981).
[700] *Boston School Committee*, 33 MLC 138 (2007), *aff'd sub nom. Commonwealth Employment Relations Board v. Boston Teachers Union, Local 66*, *AFT, AFL-CIO*, 74 Mass. App. Ct. 500 (2009); *Peabody School Committee,* 15 MLC 1147 (1988).
[701] *Boston School Committee*, 33 MLC 138 (2007).
[702] *Id.*, *Shrewsbury School Committee,* 26 MLC 103 (2000)*; Sharon School Committee,* 14 MLC 1410 (1988).
[703] *City of Medford,* 11 MLC 1107 (1984).
[704] *Local 285, SEIU,* 17 MLC 1610 (1991).
[705] *Commonwealth Employment Relations Board v. Boston Teachers Union*, 74 Mass. App. Ct. 500 (2009).

- An injunction that, among other things, ordered a union, its executive board, and its officers to disavow an executive board vote that scheduled a strike vote did not place a prior restraint upon the union to engage in public speech or debate, but rather prohibited it from engaging in actions that were properly prohibited under Section 9A of the Law.[706]

- Even assuming that public employees have a constitutional right to strike notwithstanding the limitations set forth in Section 9A, the employees cannot exercise that right until they have followed the impasse procedures set forth in Section 9 of the Law, or on a showing that the imposition of those procedures would be unconstitutional under the circumstances.[707]

6. Employer Responses to Alleged Strike Activity

   a. Lockouts

      Section 9A(b) does not require a public employer to file a strike petition with the CERB in order to implement emergency measures to protect public services threatened by illegal job actions. As long as it acts in good faith, a public employer is permitted to take emergency actions to protect essential public services when those services are threatened, including locking out employees until the employer determines that it can operate its facilities securely. However, an employer seeking administrative or judicial relief from an illegal work stoppage must follow the procedures of Section 9A(b).[708]

---

[706] *Id.* ("To the extent that the conduct regulated by Section 9A includes both "speech" and "non-speech" elements, the purpose of the statute is entirely unrelated to the suppression of free expression. The CERB has a substantial interest in preventing a strike by the union members, and '[a]ny incidental limitation of First Amendment freedoms' is justified.")

[707] *Labor Relations Commission v. Chelsea Teachers' Union, Local 1340,* 400 Mass. 120 (1987).

[708] *Town of Braintree,* 8 MLC 1825 (1982), *aff'd sub nom. Utility Workers of America, Local 466 v. Labor Relations Commission,* 389 Mass. 500 (1983).

b. Employee Discipline

Section 15 of the Law prohibits public employers from compensating employees for any day, or part thereof, when the employees are engaged in a strike. Section 15 also permits the employer to invoke employee discipline and discharge proceedings without first petitioning the CERB under Section 9A(b) of the Law.[709] The employer's action may be reviewed by the CERB in the context of a prohibited practice charge.[710]

J. Remedial Authority

Section 11 of the Law grants the CERB discretion in formulating remedies that will best effectuate the policies of the Law.[711] The CERB's remedy places successful charging parties in the position they would have been in but for the unfair labor practice.[712]

The following sections detail the various remedies the CERB may order.

1. Make Whole

The CERB may order make whole remedies to compensate employees who suffer economic losses due to a party's unlawful action.[713] Economic losses must be actual and not speculative, so as not to give employees a windfall or place them in a better position than they would have been in but for the wrongdoer's unlawful conduct.[714] In addition to lost wages, a make whole remedy may include benefits such as sick and vacation pay.[715]

a. Back Pay

Back pay is determined by using the following formula:

Net pay = gross back pay – [interim earnings – expenses][716]

---

[709] *Lenox Education Association v. Labor Relations Commission,* 393 Mass. 276 (1984).
[710] *Lenox School Committee*, 7 MLC 1761 (1981), *aff'd sub nom. Lenox Education Association v. Labor Relations Commission,* 393 Mass. 276 (1984); *School Committee of Leominster v. Labor Relations Commission,* 21 Mass. App. Ct. 245 (1985).
[711] *Labor Relations Commission v. City of Everett*, 7 Mass. App. Ct. 826 (1979).
[712] *Commonwealth of Massachusetts*, 29 MLC 132 (2003); *but see Commonwealth of Massachusetts*, 27 MLC 70 (2000) (CERB will not order payment for increased workload) and *City of Boston v. Labor Relations Commission*, 15 Mass. App. Ct. 122 (1983) (CERB not authorized to award attorney's fees).
[713] *Town of Shrewsbury*, 15 MLC 1230 (1988).
[714] *Town of Marion*, 30 MLC 11 (2003).
[715] *City of Malden*, 20 MLC 1400 (1994); *Adrian Advertising a/k/a Advanced Advertising*, 13 MLC 1233 (1986).
[716] *Greater New Bedford Infant Toddler Center*, 15 MLC 1653 (1989).

1) Gross Pay

Gross pay includes such items as:

- Overtime.
- Bonuses.
- Vacation pay.
- Holiday pay.
- Retirement benefits.
- Insurance benefits.
- Tips.
- Clothing allowance.[717]

The CERB orders a broad make whole remedy, therefore, the charging party may need to file a request for a compliance hearing to calculate any specific dollar amount owed.[718]

2) Interim Earnings

Interim earnings include only income earned as a result of the unlawful discharge or other adverse action, such as unemployment compensation.[719]

3) Expenses

Expenses are generally those incurred while receiving interim earnings.[720]

---

[717] *Newton School Committee*, 8 MLC 1538 (1981), *aff'd sub nom. School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983); *Greater New Bedford Infant Toddler Center*, 15 MLC 1653 (1989); *Plymouth County House of Correction*, 6 MLC 1523 (1979).
[718] *City of New Bedford*, 39 MLC 126 (2012).
[719] *Boston School Committee*, 29 MLC 143 (2003).
[720] *Greater New Bedford Infant Toddler Center*, 15 MLC 1653 (1989).

4) Mitigation

Employees discharged in violation of Chapter 150E have an obligation to mitigate back pay liability by seeking appropriate interim employment. However, the burden of proof on the issue of mitigation is on the employer.[721] To meet that burden, an employer must demonstrate the following:

- One or more discoverable opportunities for comparable employment were available in a location as convenient as, or more convenient than, the place of former employment.
- The employee unreasonably made no attempt to apply for the comparable jobs.
- It was reasonably likely that the employee would have obtained one of those jobs.[722]

5) Interest

The CERB has the authority to order interest on a back pay award.[723] Make whole remedies generally include an interest award to ensure that the respondent is not rewarded for its use of the injured party's finances.[724] The interest rate is the statutory floating rate found in M.G.L. Chapter 231, Section 6I.[725]

In an agency service fee challenge, the interest on amounts that the union must refund to the employee from a joint-interest bearing escrow account should include all applicable interest at the rate paid upon sums in the joint escrow account.[726]

---

[721] *School Committee of Newton vs. Labor Relations Commission*, 388 Mass. 557 (1982); *City of Lawrence*, 39 MLC 400 (2013).
[722] *Boston School Committee*, 29 MLC 143 (2003); *Commonwealth of Massachusetts*, 16 MLC 1455 (1989).
[723] *Town of Brookfield v. Labor Relations Commission*, 443 Mass 315 (2005); *Newton School Committee*, 8 MLC 1538 (1981), *aff'd sub nom. School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983).
[724] *Worcester County Sheriff's Department*, 28 MLC 1 (2001), *aff'd sub nom. Worcester County Sheriff's Department v. Labor Relations Commission*, 61 Mass. App. Ct. 1105 (Rule 1:28 decision) (2004); *but see City of Boston*, 8 MLC 2111 (1982), *aff'd sub nom. Boston Public Library Professional Staff Association v. Labor Relations Commission*, 15 Mass. App. Ct. 1110 (Rule 1:28 Decision) (1983) (the CERB will not order interest where it is too speculative, such as when there is no evidence of a sum certain or a definite period of time).
[725] *Ashburnham-Westminster Regional School District*, 29 MLC 191 (2003).
[726] *Melvin A. Brown*, 15 MLC 1206 (1988).

b. Reinstatement

The CERB may order that the employer reinstate an employee. The following cases address reinstatement:

- Where an unlawfully discharged employee's former job is no longer available, the employer must offer reemployment to a substantially equivalent position.[727]

- Reinstatement is appropriate even if it results in a teacher obtaining tenure,[728] or an employee being reinstated to a managerial position.[729]

- Where an employee retires after an unlawful job loss, whether the make whole remedy will include reinstatement depends on whether the employee would have retired even if the employee had not lost his or her job.[730]

c. Bargaining Orders

In cases where the employer has unilaterally altered wages, hours or other terms or conditions of employment, the CERB typically orders the employer to restore the status quo ante until it fulfills its bargaining obligation.[731] If the bargaining obligation involves only the impacts of a decision to alter a mandatory subject of bargaining, the CERB typically limits its bargaining order, restoring the economic equivalent of the status quo ante for a period of time sufficient to permit good faith bargaining to take place.[732]

In cases where the CERB had determined that the employer has committed independent and substantial unfair labor practices which undermine majority strength and impede the election process, the CERB may issue a "Gissel bargaining order," which requires that the employer bargain with the union as the exclusive bargaining representative without the need for an election.[733]

---

[727] *Greater New Bedford Infant Toddler Center*, 15 MLC 1653 (1989).
[728] *Southern Worcester County Regional Vocational School District v. Labor Relations Commission*, 386 Mass 414 (1982).
[729] *Town of Burlington*, 9 MLC 1139 (1982), *aff'd sub nom. Town of Burlington v. Labor Relations Commission*, 17 Mass. App. Ct. 402 (1984).
[730] *City of Lawrence*, 39 MLC 400 (2013).
[731] *City of Boston*, 38 MLC 201 (2012); *Town of Weymouth*, 23 MLC 70 (1996).
[732] *Lowell School Committee*, 26 MLC 111 (2000); *City of Malden*, 20 MLC 1400 (1994).
[733] *Plainridge Race Course*, *Inc.*, 28 MLC 185 (2001) (citing *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969)); *Sulrain, Inc.*, 2 MLC 1358 (1976).

d. Front Pay

Front pay compensates a party for the loss of future earnings resulting from the respondent's unlawful conduct in situations when reinstatement is not appropriate. Front pay cases raise questions of how long the payment should continue, and whether the amount owed should be reduced to its present value.[734]

e. Other Affirmative Action

- In cases involving the repudiation of a collectively bargained agreement, the CERB gives the injured party the benefit of the bargain.[735]

- In a challenge to an agency service fee, a union must cease and desist from attempting to collect a fee based on an invalid fee demand.[736]

- In unlawful parity cases, the employer must cease and desist from implementing the unlawful clause.[737] In the absence of evidence that any employee suffered any monetary loss, the employer is not ordered to pay the "profits" realized by the bargaining unit that enjoyed the benefits of the clause, as such an order would, in effect, impose punitive damages.[738]

- In cases where an employer has unlawfully granted an economic benefit to an employee, the employee does not need to return the benefit. Rather, the employer must prospectively rescind the economic benefit.[739]

- Where a charging party's loss is compensable and quantifiable, but there are multiple ways to make employees whole, the CERB may suggest other options to allow the parties to choose the option that they want.[740]

---

[734] *Commonwealth of Massachusetts*, 36 MLC 65 (2009).
[735] *Commonwealth of Massachusetts*, 26 MLC 212 (2000).
[736] *Malden Education Association*, 15 MLC 1429 (1989).
[737] *Medford School Committee*, 3 MLC 1413 (1977).
[738] *Town of Shrewsbury*, 15 MLC 1230 (1988).
[739] *Millis School Committee*, 23 MLC 99 (1996).
[740] *Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 14 MLC 1518 (1988), (CERB suggested options for restoring a lost pension plan, which included reinstatement of the pension plan, creation of a comparable annuity benefit package, or paying the full value of all pension benefits).

f. Independent Section 10(a)(1) Violations

The traditional remedy for an employer's independent violation of Section 10(a)(1) of the Law is a cease and desist order; however, the CERB may broaden that remedy under certain circumstances.[741]

g. Duty of Fair Representation Violations

In cases where a union has breached its duty of fair representation by failing to pursue a grievance, the union must take any and all steps necessary to have the grievance resolved, including requesting arbitration or making the employee whole for damage sustained as a result of the union's unlawful conduct.[742] However, if the union can show that the individual employee would have lost the underlying grievance regardless of the union's misconduct,[743] the CERB only orders the union to post a notice to employees.[744]

h. Notice Posting

The requirement that a respondent post a notice to employees of its violation(s), including electronic posting, constitutes a means of effectuating the purposes and policies of Chapter 150E.[745] A posting that takes place during a time when most employees are not working is ineffective. For example, in cases involving school employees, the CERB has ordered that remedial orders be posted during the school year.[746]

---

[741] *Salem School Committee*, 35 MLC 199 (2009); *cf. Bristol County Sheriff's Department*, 33 MLC 107 (2007) (CERB ordered employer to revoke employee discipline it issued in violation of Section 10(a)(1) of the Law); *Commonwealth of Massachusetts/Commissioner of Administration and Finance*, 18 MLC 1020 (1991) (CERB ordered reinstatement of employee where termination was linked to information received during interview that violated employee's Weingarten rights).

[742] *United Steelworkers of America*, 31 MLC 122 (2005), *aff'd sub nom. United Steelworkers of America v. Commonwealth Employment Relations Board*, 74 Mass. App. Ct. 659 (2009); *Quincy City Employee's Union, H.L.P.E.*, 15 MLC 1340 (1989).

[743] The union may request to bifurcate the hearing to allow it to present evidence regarding the merits of the underlying grievance at a subsequent proceeding, if necessary. *See Quincy City Employees Union, H.L.P.E.*, 15 MLC 1340 (1989), *aff'd sub nom. Pattison v. Labor Relations Commission*, 30 Mass. App. Ct. 9 (1991).

[744] *United Steelworkers of America*, 31 MLC 122 (2005), *aff'd sub nom. United Steelworkers of America v. Commonwealth Employment Relations Board*, 74 Mass. App. Ct. 659 (2009).

[745] *Commonwealth of Massachusetts*, 26 MLC 218 (2000); *Billerica School Committee*, 6 MLC 1824 (1980).

[746] *Hudson Education Association*, 15 MLC 1126 (1988).