

Commonwealth of
Massachusetts
Department of Labor Relations

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EXECUTIVE SUMMARY

On November 14, 2007, pursuant to [Chapter 145 of the Acts of 2007](#), the Legislature reorganized the Commonwealth's neutral labor relations agencies into the Department of Labor Relations (DLR). On March 11, 2011, under Chapter 3 of the Acts of 2011, "An Act Reorganizing the Executive Office of Labor and Workforce Development," the DLR's name was changed from the Division of Labor Relations to the Department of Labor Relations.

The DLR protects employees' rights to organize and choose bargaining representation and ensure that employers and unions benefit from, and comply with, the Commonwealth's collective bargaining statutes. To carry out this mission, the DLR conducts elections, hears representation cases, investigates and hears unfair labor practice cases, resolves labor disputes through mediation and arbitration, and issues orders for cases that parties are unable to resolve through alternative dispute resolution methods. The DLR includes 1) hearing officers, mediators and support staff, 2) the Commonwealth Employment Relations Board (CERB), an appellate body responsible for reviewing hearing officer orders and issuing final decisions, and 3) the Joint Labor Management Committee (JLMC), a committee including labor and management representatives, which uses its procedures to encourage municipalities and their police officers and fire fighters to agree directly on terms to resolve their collective bargaining disputes or on a procedure to resolve these disputes.

As reflected in the charts found later in this report, during the past fiscal year, the DLR opened 886 new cases and closed 1,197 cases. The majority of those cases are unfair labor practice cases. During this past year, the DLR continued to customize its case processing system, allowing the DLR to provide more specific case-tracking information, including the average number of weeks it takes the DLR to complete specific case stages. Using this targeted information, targeted staffing, and a new impact analysis system, the DLR continued to increase its efficiency by differentiating cases based on relative impact to the public and attaching specific deadlines depending on the impact.

On November 19, 2012, the DLR launched the new impact analysis scheduling system. As mentioned, the DLR uses the Impact Analysis system to differentiate prohibited practice cases based upon their relative impact to the public. Cases where resolution of the dispute has the greatest urgency will be processed first and the time frame for completion of the investigation will be 14 to 45 days, depending on the level of urgency. These cases are classified as Level I cases. Level II cases with less urgency are investigated between 30 and 90 days from the filing date. After a case is investigated, should a complaint issue, the case is again evaluated and differentiated. Cases identified for hearing as Level I cases are scheduled for hearing within three to six months of the Complaint, and it is anticipated that the decision will issue within three months from when the record is closed. Cases identified for hearing as Level II cases will be scheduled within six months to a year from the Complaint and it is anticipated that the decision will issue within six months from the time that the record closed. The CERB processes probable cause and full hearing officer decision appeals within the same general timeframes. The DLR also requires mediation in all Level I

hearing cases. These scheduling changes, together with specific time-targets and mandatory mediation, have greatly reduced the DLR backlog and the DLR hopes to report in next year's report that there is no Hearing Officer or CERB backlog.

Also contributing to the DLR's improved efficiency is its transition to a paperless case processing system. After months of public announcements and written communications during this fiscal year, explaining that the DLR would start communicating with the parties strictly by e-mail, the DLR made this change shortly after the fiscal year ended. Also during this fiscal year, the DLR held a public hearing concerning regulation changes providing, among other things, that the public can formally electronically file cases with the DLR. See 456 CMR 12.11 for filing information.

On June 10, 2013, the DLR implemented its new arbitration procedure to better serve our stake holders. The DLR now schedules arbitrations based on a priority system; in much the same way as the DLR processes its prohibited practice charges. This enables the DLR to provide more efficient scheduling to parties that use our arbitration services.

The DLR continued to use its mediation services to facilitate settlements in all different case classifications. In addition to contract mediation, grievance mediation and traditional unfair labor practice mediation, because of the DLR's new mandatory mediation in all Level I cases, mediators are providing expedited mediation services at the DLR. The DLR's continued use of mediation facilitates the relationships of the parties and provides significant cost-savings to the parties.

During the past fiscal year, the CERB published 15 Hearing Officer Appeal decisions; one prohibited practice decisions in the first instance, 9 unit clarification and representation decisions, ten miscellaneous rulings, and decided 29 requests for review of Investigator pre-hearing dismissals.

During the past fiscal year, there were 63 JLMC cases filed. The DLR mediators, working under the JLMC's oversight conducted 155 contract mediations. The JLMC conducted 31 3(a) hearings.

The DLR offers a myriad of services to accomplish its mission, including those listed below.

- Processing Prohibited Practice Charges
- Representation Petitions and Elections
- Written Majority Authorization Petitions
- Unit Clarification Petitions
- Interest Mediation
- Mediation of Prohibited Practice Charges
- Grievance Mediation
- Grievance Arbitration
- Investigation, Prevention and Termination of Strikes
- Litigation

In FY 2014 the DLR plans to continue using technological advances to provide better service to our stake holders. In this regard, we will be transitioning to a simpler method for recording hearings that will assist our Hearing Officers by providing bare bones transcripts for their use. We also hope to publish a new “green book,” or as it is more formally entitled “A Guide to the Massachusetts Public Employee Collective Bargaining Law.” The new green book will include updated policies and procedures for the DLR and the JLMC.

OVERVIEW OF DLR SERVICES

In order to provide prompt and fair resolution of labor disputes, the DLR provides the following services:

1. Prohibited Practice Charges Initial Processing and Investigation

As mentioned above, the majority of DLR cases are unfair labor practice cases filed pursuant to G.L. c. 150A or G.L. c. 150E. Charges of prohibited practice may include various allegations, including for example, allegations that an employer discriminated or retaliated against an employee because the employee had engaged in activities protected by law; allegations that an employer or employee organization has failed to bargain in good faith; or allegations that an employee organization has failed to properly represent a member of the bargaining unit.

After an initial review to determine if the case is properly before the DLR and that it meets the DLR filing requirements, the Director will first determine whether the case be deferred to the parties' own contractual grievance procedure. If the Director determines that the case is properly before the DLR, she will classify the case as a Level I or Level II case based on the case's relative impact to the public. Cases where resolution of the dispute has the greatest urgency will be processed first and the time frame for completion of the investigation will be 14 to 45 days, depending on the level of urgency. Level II cases with less urgency will be investigated between 30 and 90 days from the filing date.

At the investigation, the investigator is statutorily obligated to explore whether settlement of the charge is possible. If such discussions do not result in settlement, the investigator will proceed with the investigation. The investigator will expect the parties to present evidence from individuals with first-hand knowledge during the probable cause investigation. The intent of the probable cause in-person investigation is to have both parties present all the evidence at the investigation, and therefore, most investigations have the record closed at the end of the in-person investigation.

After the record is closed, the investigator will issue the probable cause determination, which is generally a written dismissal or a Complaint of Prohibited Practice. The investigator could direct the charge to an alternative dispute resolution mechanism (including deferral to the parties' grievance/arbitration procedure). Cases dismissed following an investigation may be appealed to the Commonwealth Employment Relations Board (Board or CERB). If affirmed by the Board, appeals can be made to the Massachusetts Appeals Court.

If the probable cause determination is a Complaint of Prohibited Practice, the case will be scheduled for a hearing on the merits to determine whether the respondent violated the law as alleged in the Complaint. The DLR will once again evaluate and differentiate the cases as Level I or level II cases. Cases identified as Level I Complaint cases will be scheduled for hearing within three to six months of the Complaint, depending on the level of urgency. In addition,

because the DLR mandates mediation in all Level I cases, mediation will take place before the hearing. Cases identified as Level II cases will be scheduled within six months to a year from the Complaint.

2. Hearings and Appeals

After the hearing is scheduled, before a hearing takes place, the DLR requires that the parties file a Joint Pre-Hearing Memorandum and requests that the parties attend a Pre-Hearing Conference in order to clarify the issues for hearing.

The prohibited practice hearing is a formal adjudicatory process. Parties to the proceedings have the right to appear in person, to examine and cross-examine witnesses, to produce evidence and otherwise support or defend the Complaint. Additionally, the sworn testimony is recorded and preserved electronically. At the close of the hearing, the parties often provide the Hearing Officer with post-hearing legal briefs. The Hearing Officer then issues a written decision, determining whether a violation of the Law has occurred. In Level I cases, generally the Hearing Officer issues the decision within three months from when the record is closed. In Level II cases, the decision generally issues within six months from the time the record is closed.

A party who disagrees with the Hearing Officer's decision can appeal to the CERB by filing a Request for Review. In most cases, both sides file briefs with the CERB in support of their respective positions. After review of the record and consideration of the issues, the CERB then issues its decision, following the general impact timeframe. Once the CERB issues its decision, the decision is final and can be appealed to the Massachusetts Appeals Court.

The DLR attorneys are authorized by statute to defend the CERB decisions at the Appeals Court.

3. Representation Issues

In all cases that involve representation issues, i.e. representation (or decertification) petitions, written majority authorization petitions, and unit clarification cases, the DLR is statutorily mandated to determine an "appropriate" bargaining unit. To make that determination, the CERB considers community of interest among the employees, the employer's interest in maintaining an efficient operation, and the employees' interest (or lack thereof) in representation.

In all cases, the DLR assists and encourages the parties to reach agreement concerning an appropriate unit. In FY13, the DLR resolved 54% of its representation cases through voluntary agreement over the scope of the bargaining unit. When no agreement is reached, however, a DLR hearing officer conducts a hearing after which the hearing officer issues a written decision either dismissing the petition or defining the bargaining unit and directing an election. These decisions can be appealed to the CERB but there is no court appeal.

a. Representation Petitions and Elections

The DLR conducts secret ballot elections for employees to determine whether they wish to be represented by a union. Elections are conducted whenever: 1) an employer files a petition alleging that one or more employee organizations claim to represent a substantial number of employees in a bargaining unit; 2) an employee organization files a petition accompanied by an adequate showing of interest, alleging that a substantial number of employees wish to be represented by the petitioner; or 3) an individual files a petition accompanied by an adequate showing of interest, alleging that a substantial number of employees in the bargaining unit no longer wish to be represented by the current employee organization. Depending on the size of the unit and the relative cost, the DLR conducts elections either on location or by mail ballot.

In FY13, the DLR docketed 66 representation petitions and conducted 22 elections, involving 748 voters. A graph detailing these representation elections is available in the Case Statistic section of the Report.

b. Written Majority Authorization Petitions

On December 27, 2007 the Written Majority Authorization (“WMA” or “card check”) legislation became law. [Chapter 120 of the Acts of 2007](#). The card check law provides for an alternative to the traditional representation petition to certify an exclusive bargaining representative for unrepresented employees. The law provides that the DLR “shall certify to the parties, in writing, and the employer shall recognize as the exclusive representative for the purposes of collective bargaining of all the employees in the bargaining unit, a labor organization which has received a written majority authorization...” Therefore, a union which provides the DLR (or a designated neutral) with proof of majority support (50% plus one) of an appropriate bargaining unit will be certified by the DLR as that bargaining unit’s exclusive bargaining representative without an election. The DLR issued regulations which provide respondents with the right to file objections and challenges prior to a certification. Since the card check law requires certification within 30 days, the DLR seeks to work with the parties to expedite all WMA petitions.

In FY13, 22 written majority authorization petitions were filed. The DLR issued certifications in 12 of those petitions that were supported by 2,164 written majority authorization cards. A graph detailing the written majority authorization certifications issued in FY13 is available in the Statistical Reports section of the Report.

c. Unit Clarification Petitions (CAS)

A party to an existing bargaining relationship may file a petition with the DLR seeking to clarify or amend an existing bargaining unit or a DLR certification. Currently, the DLR investigates such petitions through a written investigation procedure and the CERB issues decisions resolving such cases. The information that an employer or employee organization must include in a CAS petition is specified in 456 CMR 14.04(2) and 14.03(2). An individual employee has no right to file a CAS petition. 456 CMR 14.04(2). Any CAS petition found to

raise a question of representation must be dismissed and the question of representation addressed by filing a representation petition.

In FY13, the DLR received twenty-six (26) CAS petitions.

4. Labor Dispute Mediation

One of the most important services offered by the DLR is labor dispute mediation in both the public and the private sectors. The DLR's mediation services can be categorized as follows:

a. Interest Mediation

Interest mediation is contract negotiation mediation. The DLR provides mediators to assist parties from the public and private sectors who are involved in such disputes. The DLR jurisdiction extends to all public sector labor contract disputes, though contract disputes involving municipal police and fire fighters are mediated through the procedures and rules adopted by the JLMC. The DLR places a high priority on interest mediation because the prevention and prompt settlement of labor contract disputes benefits not only the negotiating parties but the delivery of core services to both the local community and the Commonwealth. As such, the DLR's mediation services are one of the most cost efficient and valuable forms of local aid provided by the Commonwealth. In the event that there are prohibited practice charges pending when a DLR mediator is involved in a contract dispute, the mediator attempts to resolve the charges as part of the overall settlement. The laws the DLR enforces provide a roadmap of what occurs if negotiations breakdown. In all public sector cases, except those involving police and fire, the next step is fact finding and the DLR maintains a panel of private neutrals to provide fact-finding services. In JLMC cases, the next step is arbitration and the JLMC maintains a panel of private neutrals to provide private arbitration services.

b. Mediation of Prohibited Practice Charges

The formal mediation of prohibited practices charges is one of the most important features of the reorganization statute. Prior to the reorganization, there was no regular communication between the BCA, the JLMC and the LRC. Since the reorganization, the DLR affords the parties numerous opportunities, both formal and informal, to avail themselves of the DLR's mediation services. The DLR requires mediation of all Level 1 prohibited practice hearings.

c. Grievance Mediation

The DLR provides mediation services to parties who desire to mediate grievances arising out the collective bargaining agreement. The DLR offers grievance mediation to all parties who file for grievance arbitration. In some cases, DLR mediators assist parties on an ongoing basis to settle numerous grievances.

5. Grievance Arbitration

The DLR provides grievance arbitration services that are utilized by all sectors of the Commonwealth's labor relations community. In the past fiscal year, the DLR has received grievance arbitration petitions from a variety of employer and employee representatives involving state, county and municipal government, including police departments, fire departments, public works departments and school departments. Many of the disputes are settled before a hearing is held. If the disputes are not settled, then DLR arbitrators hold evidentiary hearings, hear arguments and accept briefs. After the close of the hearing and submission of briefs, if any, the DLR arbitrator issues an award. The DLR has recently instituted changes to enhance this service to the parties and we look forward to reporting on those changes in next year's report.

6. Investigation, Prevention and Termination of Strikes

Strikes by public employees in Massachusetts are illegal. G.L. c. 150E, § 9A. When a public employer believes that a strike has occurred or is imminent, the employer may file a petition with the DLR for an investigation. The DLR immediately schedules an investigation of the allegations contained in the petition and the CERB decides whether an unlawful strike has occurred or is about to occur. If the CERB finds unlawful strike activity, the CERB issues a decision directing the striking employees to return to work. The CERB may issue additional orders designed to help the parties resolve the underlying dispute. Most strikes end after issuance of the CERB's order, but judicial enforcement of the order sometimes necessitates Superior Court litigation. Such litigation can result in court-imposed sanctions against strikers and/or their unions.

7. Litigation

As noted above, parties in prohibited practice cases issued by the DLR may appeal the final decision of the Commonwealth Employment Relations Board to the Massachusetts Appeals Court. In those cases, in addition to serving as the lower court—responsible for assembling and transmitting the record for appellate review—the CERB is the appellee and the DLR's Chief Counsel defends the CERB decision on appeal. Although a rare occurrence, M.G.L. c.150E also authorizes the DLR to seek judicial enforcement of its final orders in the Appeals Court or of its interim orders in strike cases in Superior Court. DLR attorneys represent the DLR and the CERB in all litigation activities.

8. Other Responsibilities

a. Requests for Binding Arbitration (RBA)

A party to a collective bargaining agreement that does not contain a grievance procedure culminating in final and binding arbitration may petition the DLR to order grievance arbitration.

These “Requests for Binding Arbitration” (RBA) are processed quickly by the DLR to assist the parties to resolve their grievances.

b. Information on Employee Organizations

Pursuant to M.G.L. c. 150E, §§ 13 and 14, the DLR maintains files on employee organizations. Those files include: the name and address of current officers, an address where notices can be sent, date of organization, date of certification, and expiration date of signed agreements. Every employee organization is also required to file an annual report with the DLR containing: the aims and objectives of such organization, the scale of dues, initiation fees fines and assessments to be charged to the members, and the annual salaries to its officers. Although M.G.L. c. 150E authorizes the DLR to enforce these annual filings by commencing an action in the Superior Court, the DLR’s current resources prohibit such action. Instead, by regulation, the DLR employs various internal case-processing incentives to ensure compliance with the filing requirements.

c. Constituent Outreach

In an effort to foster better labor relations, the DLR is always willing to make presentations before assembled labor and/or management representatives in order to speak about the latest developments at the DLR. For instance, each spring, the Director, the CERB and the DLR’s Chief Counsel participate in the planning and presentation of the Annual Workshop for Public Sector Labor Relations Specialists sponsored by the Labor & Employment Law Section of the Boston Bar Association. Additionally, throughout the year, the DLR makes formal and informal presentations before various bar associations, union meetings, and employer association groups.

**Selected CERB Decisions
July 1, 2012 – June 30, 2013**

Section 10(a)(5) – Duty to Bargain

Town of Stoneham and Stoneham Police Association, Local 266, Mass. Coalition of Police, AFL-CIO, - MUP-09-5606, 39 MLC 1 (July 6, 2012).

The CERB decided this case in the first instance at the parties' request on a fully-stipulated record. The issue was whether the Town of Stoneham was required to bargain with the union representing its police officers before transferring shared 911 dispatching work to civilian, non-bargaining unit dispatchers. The Town raised three defenses: 1) that there had been no calculated displacement of work; 2) that, as a matter of public safety, it had a managerial prerogative to relieve a uniformed officer of dispatching duties and assign him to street duty; and 3) that the union waived by contract its right to bargain over transfer. The CERB found there had been a calculated displacement of bargaining unit work and rejected the contract waiver argument. As to the second issue, the CERB agreed that the Town had the right, as a matter of public safety, to assign an officer to perform street patrol instead of dispatching duties. However, it was required to bargain over the decision to replace the reassigned patrol officer with a civilian non-bargaining unit employee and not with another bargaining unit member because that was a financially motivated decision that did not implicate the level of services the Town provided to its residents. *Judicial appeal pending.*

Town of Hull and Hull School Committee and Hull Teachers Association, MUP-10-5951, MUP-10-5952, MUP-10-5952, MUP-10-5954, 39 MLC 27 (August 15, 2012).

The CERB decided this case in the first instance at the parties' request on a fully stipulated record. The issue was whether the respondents were required to bargain with the union representing its school employees before unilaterally reducing the percentage contribution it made to retired non-Medicare-eligible employees' health insurance premiums. The respondents defended the complaint on grounds that it had reduced its premium contribution from 75% to 50% in order to correct an accounting error. In particular, the Town argued that, under M.G.L. c. 32B, §9E, even after Town Meeting had voted to authorize the Town to provide for more than fifty percent of retiree health insurance premiums, the Board of Selectmen, as the "appropriate public authority" was still required to vote to set the additional contributory rate and in the absence of such a vote, the rate was improper.

Consistent with its decision in City of Somerville and Somerville School Committee, 38 MLC 91 (2011), the CERB first held that the future retirement benefits of existing bargaining unit members are a mandatory subject of bargaining. As to the Town's statutory defenses, citing Anderson v. Board of Selectmen of Wrentham, 406 Mass. 508 (1990), the CERB found that although the "appropriate public authority" is required to select the rate, the statute does not set forth the manner in which it must do so. Rather, consistent with Anderson, the CERB held that the Board of Selectmen's or Town Manager's role in setting subsidiary health insurance rates included bargaining over changes to premium contribution rates that affect unionized employees' compensation packages. The CERB therefore found that the Town violated the law when it

unilaterally reduced its premium contribution. The CERB ordered the Town to bargain, restoration of the status quo ante and a make-whole remedy but only as to those employees who were active employees when the Town made the change, but who retired thereafter. *Judicial appeal pending.*

Sheriff's Office of Plymouth County and NAGE, MUP-05-4475, 39 MLC 41 (September 10, 2012).

The CERB decided this case in the first instance under the Labor Relations Commission's rules in effect prior to 2007. This was a two-count complaint alleging violations of Section 10(a)(3) and Section 10(a)(5) of Chapter 150E. The issue with respect to the Section 10(a)(5) allegation was whether the Sheriff had changed its method of calculating seniority when it refused to credit unit seniority to two bargaining unit members who had been transferred to a different bargaining unit. The Sheriff argued that it acted in accordance with the terms of a memorandum of understanding that it had negotiated with a different union. The CERB rejected the Sheriff's defense on grounds that when an employer is faced with conflicting obligations between two unions, such conflicts must be resolved through negotiating with all affected units and not by unilateral action. The CERB also rejected the Sheriff's waiver by contract argument because the language the Sheriff relied upon was not in effect at the time of the unilateral change.

Town of West Springfield and West Springfield Fire Fighters Association, Local 2212, IAFE, MUP-07-4951, 39 MLC 61 (September 10, 2012), *aff'd in part, remanded in part*, 39 MLC 190 (January 25, 2013).

The CERB affirmed a Hearing Officer's decision that the West Springfield Fire Fighters Association (Union) had waived by contract its right to bargain over a decision to assign certain fire hydrant duties. The CERB rejected the Union's arguments on appeal that other, more general contract clauses superseded the one provision that specifically permitted the assignments at issue.

On appeal, and in the case below, the Union also argued that it had not waived its right to impact bargain over the assignment. Although the complaint did not specifically allege an impact bargaining obligation, both parties' post-hearing briefs demonstrated that the matter had been argued and litigated at hearing and, thus, properly placed before the Hearing Officer for decision. Because the Hearing Officer's decision failed to address the Town's impact bargaining obligations, if any, the CERB remanded the case for the Hearing Officer to address the parties' factual and legal arguments.

Section 10(a)(3)

Commonwealth of Massachusetts, Department of Correction and New England Police Benevolent Association, SUP-07-5341, 39 MLC 162 (December 20, 2012) *aff'd* 39 MLC 324 (April 12, 2013).

The CERB affirmed the Hearing Officer's conclusion that the Commonwealth discriminated against a bargaining unit member on the basis of union activity when it denied his request for a

vacation day, but that it had not engaged in unlawful discrimination when it denied the same bargaining unit member's request for a day shift.

On appeal, the New England Police Benevolent Association (Union) argued that the Hearing Officer erred by failing to conclude that the same animus motivated both decisions, even though different supervisors had made them. The CERB rejected this argument where the evidence showed that the second supervisor had not simply rubber stamped the first supervisor's recommendations but had imposed his own decision. The Union also urged the CERB to overturn the dismissal based on the possibility of future retaliation. The CERB declined to do so - the potential for future unlawful activity cannot form the basis of a finding that the Law has been violated.

Section 10(a)(1)

Suffolk County Sheriff's Department and AFSCME Council 93, MUP-06-4774, 38 MLC 256 (April 27, 2012), *aff'd* 39 MLC 143 (November 29, 2012).

In a case of first impression, the CERB considered whether an employer violates an employee's Weingarten rights if it prevents an employee from consulting with a union representative before answering a question, if the employer otherwise permits the union representative to attend and speak on the employee's behalf. The CERB affirmed the Hearing Officer's determination that prohibiting an employee from consulting with a union representative before answering a disciplinary interview question violated Section 10(a)(1) of the Law. The CERB held that the Hearing Officer's analysis was consistent with CERB precedent holding that an employer may not relegate a union representative to the role of a passive observer or otherwise preclude the representative from assisting the employee or clarifying facts during the interview.

The CERB also affirmed the Hearing Officer's conclusion that the employee had adequately communicated his desire for union assistance during the investigatory interview when he responded to a question by stating that he would "defer" to his union representatives and attorney. Employees are not required to use specific words for a demand for union assistance to be recognized.

Boston School Committee and Boston Teachers Union, MUP-09-5543, 39 MLC 213 (February 22, 2013) *aff'd* 39 MLC 366 (June 6, 2013).

In this case decided in favor of the Charging Party on cross-motions for summary judgment, the issue was whether certain statements made by a School Committee member in a memorandum responding to an article written by a bargaining unit member and published in the Boston Teachers Union's (BTU) newsletter violated Section 10(a)(1) of the Law.

The School Committee's appeal raised a number of issues including agency, whether the memo was directed at the content of the letter or to the act of writing the letter, and restrictions on speech. The CERB upheld the Hearing Officer's determination that bargaining unit members could reasonably conclude that the School Committee member was acting on the School Committee's behalf where the member put his title in the memorandum's heading and next to his

name at the end of it; emailed the Memorandum to various schools and asked that it be distributed; and handed out copies before the start of a School Committee meeting.

The CERB also upheld the Hearing Officer's determination that a number of the statements in the letter were statements directed at the bargaining unit member's protected act of writing the article and not just to its contents. The CERB focused in particular on the School Committee member's statement that he found it "particularly interesting and insulting ...that the BTU leadership picked a Latino to attack" him. The CERB agreed with the Hearing Officers that this statement was "particularly troublesome," especially when contained in a memorandum that the CERB characterized having an "angry, sarcastic and demeaning tone."

The CERB finally rejected the School Committee's assertion that the Hearing Officer's decision restricted the member's free speech rights. The CERB reiterated the principle that the School Committee's rights of expression do not include making statements that would tend to interfere with employees in the exercise of their Section 2 rights under the Law.

Section 10(b)(1)

Massachusetts Teachers Association and Anthony Swiercz, MUPL-08-4631, 39 MLC 84 (October 10, 2012), *aff'd* 39 MLC 233 (February 28, 2013).

The CERB affirmed the Hearing Officer's conclusion that the Charging Party's charge was timely filed and that the Massachusetts Teachers Association (Union) had engaged in gross negligence and therefore violated its duty of fair representation to the Charging Party when, despite previous promises, it failed to sign a memorandum of agreement (MOA) amending its collective bargaining agreement and to submit it to the Massachusetts Teachers Retirement System. A signed and submitted MOA would have enabled the charging party's extended longevity buyout (ELBO) payments to be regular compensation for purposes of calculating his retirement benefits.

On appeal, the Union argued that the Hearing Officer: 1) incorrectly failed to start the running of the six-month limitations period when the charging party actually became aware of the harm to him and when a reasonable person would have become aware; 2) misapplied the gross negligence standard to the Union's actions; and 3) misapplied the burden of proof, inferring wrongdoing in the absence of evidence. The CERB affirmed the Hearing Officer's decision in its entirety.

As to timeliness, the CERB held that the Hearing Officer correctly commenced the six-month period when the Charging Party first knew or had reason to know of the conduct alleged to be an unfair labor practice. This was not when the Charging Party first learned that his ELBO benefit was in violation for purposes of retirement usage, as the Union argued, but in 2008, when he learned that the Union had failed to submit a signed Memorandum of Agreement to the MTRS, as promised. The CERB further affirmed the Hearing Officer's conclusion that the combined inaction of two Union representatives to obtain the MOA for its North Brookfield members constituted gross negligence analogous to that found in Raul Goncalves v. Labor Relations Commission, 43 Mass. App. Ct. 389 (1997).

The CERB disagreed with the Union's claim that the Hearing Officer had improperly shifted the burden of proof to the Union to demonstrate that it had, in fact, submitted the signed MOA to the MTRS. The CERB disagreed. At hearing, the Union attempted to defend itself against the charge by presenting testimony that the Union had in fact submitted the MOA. Once the Hearing Officer rejected this testimony, a finding the CERB declined to disturb, she was justified in rejecting the Union's defense that was premised on such testimony.

Representation/CAS Decisions

Town of Norton and AFSCME Council 93, CAS-12-2010, 39 MLC 102 (October 26, 2012).

The CERB granted the Town's motion to dismiss the a unit clarification petition filed by AFSCME Council 93 (Union). The Union sought to represent the Town's Water and Sewer Department employees in a separate bargaining unit. The Union was originally certified as the exclusive representative of the Town's Highway Department employees. In 1993, the parties entered into a Memorandum of Agreement that added the Town's Water and Sewer Department employees to the unit and, as subsequent collective bargaining agreements reflect, the Union has bargained on behalf of both departments since that date. During the investigation, the Union argued that a misplaced comma rendered the CBA's recognition clause unclear and justified the CERB's reviewing the appropriateness of the unit. The CERB declined to do so. Given the parties' bargaining history, and in the absence of any evidence of material change to job duties or that the existing unit is no longer appropriate as a matter of law, the CERB concluded that the misplaced comma was merely a transcription error. The Union could not, therefore, use the CAS procedure as a vehicle to alter its existing, bargained-for bargaining unit.

Boston Public Health Commission and Salaried Employees of North America, CAS-11-1091, CAS-11-1092, 39 MLC 218 (February 28, 2013).

The Salaried Employees of North America (Union or SENA) filed two CAS petitions seeking to accrete sixteen newly-created positions into the Employer's Finance Department to its bargaining unit of administrative and salaried employees. Since 2001, the recognition clause of the parties' CBA expressly excluded all Finance Department and other central, administrative office employees. After analyzing the language and the parties' bargaining history, as relayed through exhibits and hearing testimony, the CERB concluded that, subject to a number of exceptions set forth in the decision, by agreeing to the provision, the Union agreed to exclude not only all existing Finance and other central administrative office employees, but also all newly-created Finance Department employees.

In CAS-11-1091, the Union argued that the new Finance Department positions should be accreted for several reasons including that the titles were created when the Employer returned certain fiscal duties that it had outsourced to Boston Medical Center to the BPHC. The Union argued that it did not anticipate that these job duties would return to the BPHC when it entered into the 2001 recognition clause. The BPHC moved to dismiss the petition on grounds that the recognition clause unequivocally excluded all present and future Finance Department employees.

In deciding whether to accrete the titles, the CERB focused on the second part of the accretion analysis, i.e., how the parties treated the disputed titles in the dealings with each other and in collective bargaining. To conduct this analysis under the unusual facts of the case, the CERB first examined whether the disputed titles were created as a result of the unanticipated changes within the Finance Department and the return of the outsourced fiscal duties. If they were not, then there was no merit to the Union's argument that changed circumstances overrode the recognition clauses' exclusion of the Central Office's existing and future employees and the petition would be dismissed as to the titles. If the answer was yes, the Board nevertheless examined whether including or excluding such titles would be within the realm of what the parties intended when they agreed that all Finance Department employees would be excluded. The Board therefore examined whether the new positions performed the types of duties that the Union should reasonably have anticipated in 2001 would exclude them as Finance Department employees. If the titles did perform "typical" Finance Department duties, then the petition was dismissed as to those titles. If they did not, the CERB then examined, under the third part of the accretion analysis, whether they shared a community of interest with the rest of SENA's bargaining unit. Applying this test, the CERB accreted three titles and dismissed the petitions as to the other thirteen titles, including the one title that the Union sought to accrete in CAS-11-1092.

REMEDY

City of New Bedford and AFSCME, Council 93, MUP-09-5582, 38 MLC 205 (March 21, 2012) *aff'd in part, rev'd in part*, 39 MLC 126 (November 15, 2012).

The CERB affirmed a Hearing Officer's decision concluding the City had unlawfully failed to bargain over its decision to transfer a laid-off Clerk Typist's duties to non-bargaining unit members and over the impacts of the elimination of the position, but modified her remedy.

The Clerk Typist's layoff arose in the context of the City's decision to lay off numerous employees, including most, if not all of the clerical employees in the Police Department. The Hearing Officer's remedy for the unlawful transfer included an order to return the work to the bargaining unit and full reinstatement and back pay. Because the remedy for the unlawful transfer already included reinstatement and full backpay for the Clerk Typist, the Hearing Officer declined to reach the extent of the remedy for the impact bargaining obligation. On appeal, the City argued that under Civil Service Law, the Clerk Typist had no legal right to reinstatement. Although the CERB found this argument improperly raised for the first time on appeal, it nevertheless found that in the context of multiple layoffs, the record did not permit it to determine which employee would have been performing the Clerk Typist's duties had the City complied with its bargaining obligation in the first instance. The CERB therefore ordered the Clerk Typist's work restored to the unit, but declined to order the City specifically to reinstate or award full back pay to the Clerk Typist. Because CERB's modified remedy with respect to the transfer of bargaining unit work count did not necessarily result in reinstatement or backpay to the Clerk Typist, the CERB considered the scope of the impact bargaining remedy that the Hearing Officer had declined to address. It ordered the City to make the Clerk Typist whole for the period of bargaining being ordered to address the impacts associated with her layoff.

City of Lawrence and National Conference of Firemen and Oilers, Chapter 3, SEIU, Local 615, MUP-11-6144, 39 MLC 68 (September 19, 2012), *aff'd in part, remanded in part*, 39 MLC 187 (January 17, 2013).

The CERB affirmed a Hearing Officer's determination that the City violated Sections 10(a)(5) and (1) of the Law by unilaterally changing the practice of recalling laid off bargaining unit employees by seniority and by filling vacant bargaining unit positions with bargaining unit employees rather than temporary, non-unit employees.

Both parties appealed the remedy. The CERB upheld the Hearing Officer's decision to award one bargain unit member back pay for the twelve-day period between the time the Hearing Officer found that the City should have first recalled the bargaining unit member and the actual recall offer, which the bargaining unit member rejected. The CERB rejected as speculative the City's suggestion that the bargaining unit member would have turned down a timely recall offer. In the absence of evidence either way, the CERB upheld the remedy.

The CERB also denied the Charging Party Union's request for an alternative, extraordinary remedy because it does not award attorney's fees and because the Union did not identify any further relief that would be appropriate under the circumstances.

City of Lawrence and SEIU, Local 888, MUP-11-6279, 39 MLC 152 (December 12, 2012), *aff'd in part, remanded in part*, 39 MLC 400 (June 28, 2013).

The Charging Party appealed from a remedial portion of a Hearing Officer decision holding that the City had unlawfully transferred bargaining unit work previously performed by Thomas Knightly (Knightly). Because Knightly had retired at the time of the hearing, the Hearing Officer declined to order the City to reinstate him and cut off the City's backpay liability as of Knightly's retirement date.

On appeal, SEIU, Local 888 (Union) argued that reinstatement is required when an employee has lost a job due to the employer's unlawful behavior unless the employer proves that the employee has voluntarily retired or resigned. The Union claimed that the Employer had not met this burden of proof. It alternatively asked the CERB to remand the matter to the Hearing Officer for further proceedings concerning the effect Knightly's retirement should have on the remedy.

The CERB held that in order to exclude reinstatement from a make-whole remedy that would otherwise be warranted because an employee was separated from work as a result of an unfair labor practice, evidence must be presented that permits a fact finder to find that the employee would have retired even if the unfair labor practice had not taken place. Because the fully-stipulated record contained no facts regarding this issue, the CERB vacated the relevant section of the order and remanded the matter to the Hearing Officer for further fact-finding consistent with its decision.

Miscellaneous Rulings

Blocking Charges

Town of Plymouth and COBRA and AFSCME, Council 93, AFL-CIO, MCR-12-2024, 2025, 2027, 2036, 39 MLC 83 (October 5, 2012).

The CERB blocked further processing of representation petitions filed by COBRA after finding that the Town's alleged failure to engage in bargaining by limiting the number of successor bargaining sessions with AFSCME could have resulted in employees perceiving it as ineffective and improperly influencing the elections.

Independent Steamship Authority Workers Union and Woods Hole, Martha's Vineyard and Nantucket Steamship Authority and District No. 1-PCD Marine Engineers Beneficial Association, AFL-CIO (MEBA), UP-12-1873, CR-12-2219, 39 MLC 103 (October 31, 2012).

The CERB denied MEBA's motion to treat a prohibited practice charge alleging an unlawful failure to impact bargain about minimum manning changes as a blocking charge to a rival union's representation petition. The CERB considered whether the impacts and consequences of the alleged prohibited practice outweighed the employees' interest in having an opportunity to vote in a representation election as quickly as possible. The CERB decided not to block the election based on the membership's repeated rejection of contracts that MEBA presented for ratification before and after the alleged prohibited practice occurred.

DEPARTMENT OF LABOR RELATIONS
FY2013 CASES RECEIVED
 JULY 1, 2012 – JUNE 30, 2013
 MONTHLY BY CASE TYPE WITH TOTALS AND AVERAGES

CASES OPENED

CASE TYPE	JUL.	AUG.	SEPT.	OCT.	NOV.	DEC.	JAN.	FEB.	MAR.	APR.	MAY	JUN.	TOTAL	AVG	% YTD
Unfair Labor Practice	47	31	39	61	30	26	29	27	42	31	40	28	431	35.92	48.65%
Representation Cases	12	5	6	3	3	5	13	7	3	4	2	3	66	5.50	7.45%
Unit Clarification (CAS)	2	2	1	1	3	0	5	3	0	4	2	3	26	2.17	2.93%
Other (SI, AO, RBA)	5	3	1	0	0	0	0	0	0	0	1	0	10	0.83	1.13%
Grievance Arbitration	5	12	9	12	3	7	8	6	6	10	8	8	94	7.83	10.61%
Grievance Mediation	10	5	7	7	1	4	7	3	6	12	4	8	74	6.17	8.35%
Contract Mediation	16	13	14	22	11	11	3	5	7	6	4	10	122	10.17	13.77%
JLMC	5	7	5	3	4	2	8	5	6	7	7	4	63	5.25	7.11%
TOTAL	102	78	82	109	55	55	73	56	70	74	68	64	886	73.83	100.00%

DEPARTMENT OF LABOR RELATIONS
FY2013 CASES CLOSED
 JULY 1, 2012 – JUNE 30, 2013
 MONTHLY BY CASE TYPE WITH TOTALS AND AVERAGES

CASES CLOSED

CASE TYPE	JUL.	AUG.	SEPT.	OCT.	NOV.	DEC.	JAN.	FEB.	MAR.	APR.	MAY	JUN.	TOTAL	AVG	% YTD
Unfair Labor Practice	43	51	45	54	57	88	65	49	54	37	48	98	689	57.42	57.56%
Representation Cases		2	1	6	7	7	1	4	13	5	12	5	63	5.25	5.26%
Unit Clarification (CAS)			2	3	2	1		2	3	3	4	3	3	26	2.17
Other (SI, AO, RBA)				1		2			1		2	2	8	0.67	0.67%
Grievance Arbitration	2	2	10	13	6	12	7	5	9	15	9	5	95	7.92	7.94%
Grievance Mediation		1	1	4	6	2	6		9	7	18	9	63	5.25	5.26%
Contract Mediation	19	11	13	22	15	7	14	6	7	6	21	22	163	13.58	13.62%
JLMC	3	9	8	11	6	7	15	1	5	5	8	12	90	7.50	7.52%
TOTAL	67	78	81	113	98	125	110	68	101	79	121	156	1197	99.75	100.00%

DEPARTMENT OF LABOR RELATIONS
FY2013 CASE PROCESSING DATA
 JULY 1, 2012 – JUNE 30, 2013
 MONTHLY WITH TOTALS AND AVERAGES

PROBABLE CAUSE	JUL.	AUG.	SEPT.	OCT.	NOV.	DEC.	JAN.	FEB.	MAR.	APR.	MAY	JUN.	TOTAL	AVG
Investigations Held	11	17	15	17	17	25	14	15	25	17	10	20	203	16.92
													0	
Dismissals Issued	6	2	2	4	8	1	4	1	8	2	6	12	56	4.67
Complaints Issued	86	9	13	16	12	14	10	3	19	13	6	14	215	17.92
													0	
Total Probable Cause	92	11	15	20	20	15	14	4	27	15	12	26	271	22.58
Avg. # Wks Invest. To PC	5.35	11.5	4.19	5.01	5.94	5.72	6.58	2.5	3.63	3.87	5.33	8.52	68.14	5.68

HEARINGS	JUL.	AUG.	SEPT.	OCT.	NOV.	DEC.	JAN.	FEB.	MAR.	APR.	MAY	JUN.	TOTAL	AVG
Pre-Hearing Conferences Held	8	15	20	10	7	34	11	15	7	11	11	12	161	13.42
Hearings Held	1	11	15	9	5	1	2	6	9	3	3	5	70	5.83
Misc. Rulings Issued	3	1	8	1	1	1	1	1	1	28	1	0	47	3.92
HO Decisions Issued	2	0	3	2	3	6	3	4	2	4	2	3	34	2.83
Avg. # Wks Ripe to HO Dec.	44.10	0.00	37.00	11.60	29.00	3.00	136.00	76.00	65.70	63.40	57.60	45.80	569.20	47.43

CERB	JUL.	AUG.	SEPT.	OCT.	NOV.	DEC.	JAN.	FEB.	MAR.	APR.	MAY	JUN.	TOTAL	AVG
Admin. Appeals Filed - PC	5	1	0	2	5	3	1	2	0	3	2	5	29	2.42
Admin. Appeals Filed - HO Dec.	3	1	2	0	1	0	2	2	2	2	0	2	17	1.42
PC Decision Issued & Remands	1	3	3	2	5	1	2	2	0	3	4	3	29	2.42
HO Appeal Decision Issued	1	1	0	2	2	2	2	1	1	1	0	2	15	1.25
CERB Decision 1st Instance	0	4	1	0	0	0	0	2	0	2	0	1	10	0.83
Misc. Rulings	2	0	0	7	0	0	0	0	0		1	0	10	0.91
Avg. # Wks to Issue PC Decision	11.4	14.6	8.05	28.57	11.4	2.57	11.28	8	0	18.05	10.11	10.05	134.1	11.17
Avg. # Wks Ripe to HO App. Dec.	15.29	16	0	10.21	23.58	10.14	12.64	11	0	11	0	17.14	127	10.58
Avg. # Wks Ripe to Dec.1st Inst.	0	16.8	13.86	0	0	0	0	19.28	35.14	5.29	0	14.57	104.9	8.75

MEDIATION & ARBITRATION	JUL.	AUG.	SEPT.	OCT.	NOV.	DEC.	JAN.	FEB.	MAR.	APR.	MAY	JUN.	TOTAL	AVG
Arbitrations Held	1	1	2	0	1	2	3	1	0	0	1	1	13	1.08
Arbitration Decision Issued	4	1	2	3	2	0	1	0	5	3	0	1	22	1.83
Grievance Mediations Held	2	5	0	3	7	11	7	2	10	0	14	4	65	5.42
Contract Mediations Held	44	50	28	32	33	34	46	40	43	44	41	25	460	38.33
ULP Mediations Held	13	5	8	12	85	10	13	11	8	15	33	9	222	18.50

JLMC	JUL.	AUG.	SEPT.	OCT.	NOV.	DEC.	JAN.	FEB.	MAR.	APR.	MAY	JUN.	TOTAL	AVG
Contract Mediations Held	17	7	7	17	7	9	8	10	12	13	20	28	155	12.92
3A Hearings Held	1	2	1	2	4	4	4	3	3	3	2	2	31	2.58

FY 2013 REPRESENTATION ELECTIONS*
(EXCLUSIVE OF WRITTEN MAJORITY AUTHORIZATION PETITIONS)

Unit Size	Municipal		State		Private		Total	
	No. of Elections	No. of Voters						
<10	2	13					2	13
10-24	8	121	2	32			10	153
25-49	4	118			1	44	5	162
50-74	3	176					3	176
75-99								
100-149								
150-199					1	164	1	164
200-499								
Above 500								
Total	17	428	3	112	2	208	22	748

* NOTE: In FY 2013, parties filed 44 Representation petitions. The above chart contains information only on elections conducted by the DLR in FY2013.

**FY 2013
WRITTEN MAJORITY AUTHORIZATION
CERTIFICATIONS***

Size of Unit	Municipal		State		Private		Total	
	CERTS	CARDS	CERTS	CARDS	CERTS	CARDS	CERTS	CARDS
Under 10	7	41					7	41
10-24	2	32					2	32
25-49								
50-74								
75-99								
100-149	1	115					1	115
150-199								
200-499								
Above 500	1	1943					1	1943
Total	12	2164					12	2164

* Note: The number of certifications represents the number of petitions filed that resulted in the Department issuance of a certification. In FY 2013 a total of 22 written majority authorization petitions were filed. The DLR did not issue a certification in 10 cases either because the DLR dismissed the petition or the petitioner withdrew the petition.

DEPARTMENT OF LABOR RELATIONS STAFF LIST

EMPLOYEES, FUNCTIONAL TITLES AND PAYROLL TITLES

Last Name	First Name	Functional Title	Payroll Title	FTE
Atwater	Susan	Hearing Officer/Arbitrator/Mediator	Counsel II	1.00
Bevilacqua	Heather	Mediator	Program Manager V	1.00
Bonner	Kerry	Hearing Officer/Arbitrator/Mediator	Counsel II	1.00
Bowler	Helen	Hearing Officer/Arbitrator/Mediator	Counsel II	1.00
Chalupa	Nicholas	Investigative Hearing Officer	Counsel I	1.00
Crystal	Erica	Director/ Interim Chair JLMC	Administrator IX	1.00
Davis	Kendrah	Hearing Officer/Arbitrator/Mediator	Counsel II	1.00
Eng	Whitney	Investigative Hearing Officer	Counsel I	1.00
Eustace	Kimberly	Program Coordinator	Program Coordinator III	0.92
Freeman	Harris	Board Member, CERB	Per Diem	
Goodberlet	Kathleen	Hearing Officer/Arbitrator/Mediator	Counsel II	1.00
Gookin	Carol	Mediator	Program Manager V	1.00
Griffin	Joseph	Hearing Officer/Arbitrator/Mediator	Counsel II	0.50
Harrington	Brian	Hearing Officer/Arbitrator/Mediator	Program Manager V	1.00
Hatfield	Timothy	Mediator/Arbitrator	Program Manager VII	1.00
Neumeier	Elizabeth	Board Member, CERB	Per Diem	
See,	Zachary	Investigative Hearing Officer	Counsel I	1.00
Siciliano	Shirley	Election Specialist	Collective Bargaining. Elect. Spec. II	0.40
Spinosa	Shauna	Investigative Hearing Officer	Counsel I	1.00
Srednicki	Edward	Executive Secretary	Administrator VII	1.00
Sullivan	Margaret	Hearing Officer/Arbitrator/Mediator	Counsel II	1.00
Wittner	Marjorie	Chair, CERB	Administrator IX	1.00

DLR ADVISORY COUNCIL

There shall be an advisory council to advise the DLR concerning policies, practices, and specific actions that the DLR might implement to better discharge its labor relations duties. [Chapter 145 of the Acts of 2007](#).

DLR Advisory Council Membership

Labor

Kate Shea, Esq.	Pyle, Rome, Ehrenberg, PC
Amy Davidson, Esq., Chair	Sandulli, Grace PC
Ira Sills, Esq.	Segal, Roitman LLP
Jen Springer, Esq.	SEIU, Local 888
Ira Fader, Esq.	Massachusetts Teachers Association

Management

Nicholas Anastasopoulos	Mirick, O'Connell, DeMallie & Lougee, LLP
Mark D'Angelo	Director - Commonwealth of Massachusetts Office of Employee Relations
Jim Hardy	Field Director – Policy Massachusetts Association of School Committees
Brian Magner	Deutsch Williams Brooks DeRensis & Holland, P.C.

Neutrals

Gary Altman, Esq.	Arbitrator
John Cochran, Esq.	Arbitrator

DEPARTMENT OF LABOR RELATIONS
BUDGET

HISTORICAL BUDGET LEVELS (\$000)

<i>ACCOUNT</i>		FY2009	FY2010	FY2011	FY2012	FY2013
		GAA	GAA	GAA	GAA	GAA
7002-0900	Department of Labor Relations	2,329	1,839	1,839	1,806	2,006
TOTAL		2,329	1,839	1,839	1,806	2,006

FY 2012 APPROPRIATION SUMMARY

Governor's Budget Recommendation - House 1	\$1,993,958
General Appropriation Act	\$2,005,872
9C Reductions and Planned Savings	\$30,000
Total Available	\$1,975,872
Expenditures	\$1,855,778
Reversion	\$120,094

FY 2011 EXPENDITURES

Total Available		\$1,975,872
AA	Employee Compensation	\$1,581,695
BB	Employee Travel Reimbursement	\$29,566
DD	Medicare, Unemployment, Univ. Health, Workers. Comp.	\$20,404
EE	Administrative Expenses	\$37,274
FF	Facility Operational Expenses	\$55,352
GG	Space Rental	\$7,786
HH	Consultant Service Contracts	\$314
JJ	Programmatic Operational Services	\$18,237
LL	Equipment Lease, Maintenance, Repair Expenses	\$7,103
UU	Information Technology	\$97,423
Operating Transfer		624
Total Expended		\$1,855,778
Reversion		\$120,094

FISCAL YEAR 2014 GOALS

In FY 2014 the DLR plans to continue using technological advances to provide better service to our stake holders. In this regard, we will be transitioning to a simpler method for recording hearings that will assist our Hearing Officers by providing bare bones transcripts for their use. In addition, the DLR will explore alternate methods for conducting collective bargaining unit elections. We also hope to publish a new “green book,” or as it is more formally entitled “A Guide to the Massachusetts Public Employee Collective Bargaining Law.” The new green book will include updated policies and procedures for the DLR and the JLMC. Finally, the DLR anticipates continuing to provide a more efficient arbitration process for the parties.