

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

In the Matter of

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MAHAR TEACHERS ASSOCIATION

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and

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MICHAEL MAGEE

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Case Nos.: ASF-14-3675
MUPL-14-3671

Date Issued: February 28, 2017

CERB Members participating

Marjorie F. Wittner, Chair
Katherine G. Lev, CERB Member

Appearances:

Amy Laura Davidson, Esq. - Representing the Mahar Teachers
Association

Michael Magee - Pro Se

CERB Decision on Appeal of Hearing Officer Decision

Summary

1 At issue in this appeal is whether a demand made by the Mahar Teachers
2 Association (Association) for an agency service fee for contract administration and
3 collective bargaining expenses incurred by its parent/affiliate unions but not for its own
4 expenses was valid under Sections 12 and 10(b)(1) of M.G.L. c. 150E (the Law) in
5 circumstances where the Association: 1) did not demand a local fee; and 2) was a party
6 to a collective bargaining agreement that set the service fee at one hundred percent of
7 Association dues. The Commonwealth Employment Relations Board (CERB) affirms

1 the Hearing Officer's conclusion that the demand was valid. None of Magee's
2 arguments on appeal persuade us otherwise.

3 Facts

4 The Hearing Officer's factual findings are not in material dispute and we
5 summarize them below.¹ Further reference may be made to the Hearing Officer's
6 decision, which is reported at 42 MLC 346 (2016).

7 The Charging Party Michael Magee (Magee) is employed by the Mahar School
8 Committee as a history teacher in the Mahar public schools. In August or September of
9 2013, he resigned his Association membership.²

10 The Association is an affiliate of the Massachusetts Teachers Association (MTA)
11 and the National Education Association (NEA). This affiliation carries with it certain

¹ Magee's supplementary statement contains numerous allegations that the Hearing Officer's rulings and decision were biased. As a preliminary matter, we address Magee's claims that the Hearing Officer displayed bias when, in the introductory section of her decision, she stated that she had made findings and rendered a decision based upon her review of the entire record, including the "demeanor of the witnesses." Magee claims that the Law did not permit the Hearing Officer to assess witness demeanor and that she never indicated how that assessment factored in her decision. However, Section 11 of the Law and the Department of Labor Relations' (DLR) regulations authorize hearing officers to issue written findings of fact and render decisions. See M.G.L. c. 150E, §11; 456 CMR 13.03(k). One aspect of the fact-finding process of an administrative procedure is the resolution of conflicts in testimony by evaluating witness credibility, including assessing their demeanor. The Hearing Officer therefore acted appropriately and without bias when she referenced this authority in her introductory remarks. See Bayer Corporation v. Commission of Revenue, 436 Mass. 302, 303 (2002). Further, although hearing officers are permitted to assess witness demeanor, they are not required to do so, unless there is conflicting witness testimony on material issues. Salem v. Massachusetts Commission against Discrimination, 404 Mass. 170, 175 (1999). Magee points to no such conflicts here and thus, without more, the Hearing Officer's failure to make any additional reference to witness demeanor in her decision was reasonable and not indicative of bias. We address the remainder of Magee's bias allegations below.

² At the time of the hearing, Magee was the only bargaining unit member who was not a member of the Association.

responsibilities. The MTA's 2013-2014 Bylaws, Standing Rules and Regulations, require the local unions to include in their bylaws a provision for unification of the local union, the MTA and the NEA's memberships. Further, under the bylaws, the local union acts as the collection agent for the dues that its members pay, as well as the agency service fees (ASF) paid by bargaining unit members who, like Magee, decline to join the Association. In the 2013-2014 school year, professional full-time local union affiliate members, including Association members, were required to pay \$486.00 in dues to the MTA and \$182.00 to the NEA.

In December 2013, the School Committee and the Association agreed on a successor collective bargaining agreement for the period between July 1, 2013 and June 30, 2016 (Agreement). The Agreement contained an ASF provision (Article XX) that states in relevant part:

The Committee agrees to require as a condition of employment that all teachers, except those certified as members to the Committee by the Association, pay annually or by dues deduction to the Association as of the thirtieth (30th) day subsequent to each employment, or the thirtieth day (30th) subsequent to the effective date of this Agreement, whichever is later, an agency service fee which shall be commensurate with the cost of collective bargaining and contract administration as determined solely by the Association and which amount shall be at one hundred percent (100%) of the Association dues.

On January 17, 2014, the Association sent an email message to members indicating that the Agreement had not been properly ratified and, that before the second ratification vote could take place, they would have to vote on certain changes to the Association's by-laws. The votes were scheduled for February 3 and 4, 2014. The email also included a notice that stated in pertinent part:

The proposed agreement contains a provision for an agency service fee. If the proposed settlement is ratified by the members of the bargaining unit

1 and by the School Committee, the agreement will require the payment of
2 an agency service fee. The agency service fee for 2013-2014 was
3 \$390.60.
4

5 You are hereby informed that:
6

7 A. All members of the teachers' bargaining unit are eligible to vote on the
8 proposed agreement; and
9

10 B. The Mahar Teachers' Association's most recent financial report in the
11 form of a balance sheet and operating statement listing all receipts and
12 disbursements for the previous financial year is available for inspection.
13

14 C. The Mahar Teachers' Association is an affiliate of the Massachusetts
15 Teachers Association and the National Education Association.

16 On February 4, 2014, bargaining unit members voted to ratify the Agreement.

17 On February 3 or 4, 2014, Association members also voted to approve the Association's
18 amended by-laws, which included provisions relating to the payment of agency service
19 fees. These provisions required that any demand for an agency service fee "comply in
20 all respects with 456 CMR 17.04."³ The by-laws set out the processes for non-members
21 to follow if they objected to the amount of an agency service fee, including the
22 establishment of a joint escrow account into which the objecting member could deposit
23 the full amount of the agency service fee demanded by the Association or for arbitration
24 of any fee amount objection disputes.

³ At the time the by-laws were amended, DLR Rule 17.04, 456 CMR 17.04 listed permissible and impermissible costs in computing an ASF. See note 7, *infra*. On September 23, 2016, after the Hearing Officer issued her decision, the DLR issued amended regulations that changed the numbering and made some minor, non-substantive changes to certain of its regulations, including the ASF regulations. DLR Rule 17.04 is now DLR Rule 17.03. For ease of reference and consistency, the body of this decision will reference the number of the regulation that was in effect when the Hearing Officer issued her decision.

1 Approximately two months later, on March 27, 2014, the Association sent Magee
2 a letter demanding payment of a prorated ASF in the amount of \$189.59 (Demand
3 Letter). The Demand Letter stated in pertinent part:

4 According to our records, you have not become a member of the Mahar
5 Teachers Association/Massachusetts Teachers Association
6 ("MTA")/National Education Association ("NEA") or paid a service fee
7 required by Article XX of the collective bargaining agreement with the
8 Ralph C. Mahar School Committee. The prorated service fee for the
9 2013-2014 school year is as follows:

10
11 MTA \$158.01

12 NEA \$31.58

13
14 **Total \$189.59**

15
16 The amount for this year was calculated after a review of the most recent
17 financial reports available to the Mahar Teachers Association, MTA and
18 NEA. A detailed explanation of the way the MTA and NEA portions of the
19 agency fee were calculated is enclosed, including the MTA and NEA
20 audits. The amounts of the NEA and MTA agency fee have been prorated
21 based on the clarification date of the Mahar Teachers Association contract
22 and a detailed explanation is included.

23
24 The Demand Letter included two attachments: 1) the "MTA and NEA Combined
25 Agency Fee Explanation for 2013-2014" (Combined Agency Fee Explanation); and 2)
26 the "MTA and NEA Prorated Agency Fee Explanation for 2013-2014: (Prorated Agency
27 Fee Explanation).⁴ The Demand Letter notified Magee that the Combined Agency Fee
28 Explanation included information about its rebate procedure as well as the DLR's rules
29 and regulations.

30 The Prorated Agency Fee Explanation stated in pertinent part:

⁴ The Association had previously sent Magee an identical letter on March 18, 2014, but failed to enclose the Combined Agency Fee Explanation and the Prorated Agency Fee Explanation.

Under Article XII of the Mahar Teachers Association Bylaws, the membership year for the Mahar Teachers Association is from August 1 through July 31.

The full 2013-2014 agency fee for the MTA and NEA are listed as follows:

MTA \$325.84
NEA \$64.76⁵

The Contract Between the Ralph C. Mahar Regional School Committee and the Mahar Teachers Association dated July 1, 2013 through June 30, 2016 was ratified on February 4, 2014.

Based on the date of the February 4, 2014 ratification, 177 days remain in the 2013-2014 membership year. The agency fee for the MTA and the NEA have been prorated based on the 177 days left in the membership year resulting in the following:

MTA \$158.01
NEA \$31.58
Total \$189.59

After Magee received the demand, he notified the Association that he wanted to challenge it and open an escrow account with the Association to deposit the amount of the ASF payment. The Association and Magee subsequently opened a joint escrow account.

The DLR Proceedings

Magee filed the instant charges on May 6, 2014, alleging that the Association's ASF demand violated Sections 12 and 10(b)(1) of the Law. After investigation, a DLR

⁵ The MTA's fee of \$325.84 equals 67.045% of the \$486.000 in dues that professional, full-time local union affiliate members pay to the MTA. The NEA's fee of \$64.76 equals 36.180% of the \$182.00 in dues that professional, full-time local union affiliate members, including Association members, pay to the NEA, minus \$3.00, which union members contribute to an NEA special fund whose stated purpose is "to advance the goal of great public schools for all students." Together these fees equal \$390.60, which is the exact amount of the ASF set forth in the January 17, 2014 member ratification notice.

1 Investigator issued a one-count Complaint alleging that the Association had violated
2 Sections 12 and 10(b)(1) of the Law by demanding that Magee pay agency service fees
3 to the MTA and the NEA when the Association did not demand that Magee pay an ASF
4 to the Association and the Agreement only provided for payment of an ASF to the
5 Association.⁶ In a footnote in the Complaint, the Investigator explained that although
6 Magee had indicated in his charge that he was challenging the *amount* of the service
7 fee, the allegation had been pleaded in the Complaint as a challenge to the *validity* of
8 the fee rather than the amount because: 1) in Magee's attachment to the charge and at
9 the investigation, he had specified that he was challenging the Association's demand
10 because the Agreement did not provide for payment to the MTA and NEA; and 2)
11 Magee had not challenged any of the fees demanded as "impermissible costs" under
12 456 CMR 17.04(1).⁷ Magee did not seek review of this aspect of the dismissal letter,
13 nor did he seek to amend the Complaint at hearing.

⁶ The Investigator dismissed certain other allegations relating to the validity of the demand, including that the demand violated Section 12 of the Law because: a) the contract ratification vote was not held at a "reasonable time and place" as required by 456 CMR 17.03(2)(now Rule 17.02(2)); b) the Association did not give the requisite notice under its by-laws before voting to amend them; and c) the Association's by-laws prohibited Magee from voting in the contract ratification vote. She also dismissed allegations that the Association violated Section 10(b)(1) of the Law by the conduct of: a) then-Association President Greg Scotland on September 4 and 6, 2013; and b) Association Executive Board member Matthew Parsons in May 2014. Pursuant to 456 CMR 15.04(3), (now Rule 15.05(9)), Magee filed a request for review of the partial dismissal. On November 13, 2014, the CERB affirmed the dismissal. No judicial appeal was filed. See M.G.L. c. 150E, §11.

⁷ Rule 17.04 (1), "Impermissible and Permissible Costs" (now Rule 17.03(1)) states in part:

(1) Costs attributable to the following shall be impermissible in computing a service fee:

1 After a one-day hearing, the Hearing Officer issued an opinion concluding that
2 the Association had not violated the Law as alleged. Citing Harrison v. Massachusetts
3 Society of Professors/Faculty Staff, 405 Mass. 56, 64 (1989) (Harrison), the Hearing
4 Officer held that the Association's failure to provide an audit report of its own expenses
5 did not render the demand invalid because the purpose of providing an audit is to
6 provide potential objectors with sufficient information to determine whether to challenge
7 a fee. She thus reasoned that, because the only fees charged were for the MTA and
8 the NEA, the Association was obliged only to attach the MTA's and NEA's independent
9 audit reports to its Demand Letter, which it did. Magee does not appeal from this aspect
10 of the decision.

11 Rather, Magee's arguments on appeal center on the Hearing Officer's conclusion
12 that the fact the Association sought an ASF only for the MTA and NEA expenses, but
13 not its own, did not render its demand invalid. In particular, the Hearing Officer found
14 that although Section 12 permitted the Association to charge Magee a pro rata share for
15 expenses that it incurred as the exclusive bargaining representative, it does not compel
16 the Association to do so. The Hearing Officer similarly stated that, although Section 12
17 and Article XX authorized the Association to demand a service fee, those provisions did
18 not mandate how the Association must apportion the service fee. Magee argues that in

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- a) Expenditures for political candidates or political committees formed for a candidate or political party;
 - b) Establishing and publicizing of an organizational preference for a candidate for political party;
 - c) Lobbying or efforts to enact, defeat, repeal or amend legislation or regulations unrelated toterms and conditions of employment ...;
 - d) Expenditures for charitable, religious or ideological causes not germane to a bargaining agent's duties as the exclusive representative;

* * *

1 so holding, the Hearing Officer improperly ignored language in Section 12 of the Law
2 and Article XX of the Agreement that he claims require the Association to seek a fee
3 that includes the Association's portion of the fee and/or that is equal to 100% of
4 Association dues. We disagree. For the reasons explained below, we find that the
5 Hearing Officer's decision was based on a reasoned application of the Law to the facts
6 of this case and affirm the decision.

7 Opinion⁸

8 Section 12 of the Law, as limited by the First Amendment to the United States
9 Constitution, permits public sector unions to collect service fees from non-members to
10 cover their pro rata share of the costs of collective bargaining and contract
11 administration. Springfield Education Association v. James Belhumeur et. al., 432
12 Mass. 458 (2000) (Belhumeur); Lyons v. Labor Relations Commission, 397 Mass. 498
13 (1986).⁹ An employee organization that coerces an employee in the exercise of that
14 right violates Section 10(b)(1) of the Law. Gloucester Teachers Association and

⁸ The CERB's jurisdiction is not contested.

⁹ Section 12 of the Law states in pertinent part:

Service fee; imposition; amount; discrimination

Section 12. The commonwealth or any other employer shall require as a condition of employment during the life of a collective bargaining agreement so providing, the payment on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, of a service fee to the employee organization which in accordance with the provisions of this chapter, is duly recognized by the employer or designated by the commission as the exclusive bargaining agent for the unit in which such employee is employed; provided, however, that such service fee shall not be imposed unless the collective bargaining agreement requiring its payment as a condition of employment has been formally executed, pursuant to a vote of a majority of all employees in such bargaining unit present and voting.

1 Richard L. Chane, 6 MLC 1739, 1740, MUPL-2128 (January 11, 1980). There has been
2 considerable statutory and constitutional jurisprudence regarding the procedure that
3 unions must follow in demanding and collecting these service fees. See e.g., Chicago
4 Teachers Local No. 1 v. Hudson, 475 U.S. 292, 294 (1986); Abood v. Detroit Bd. of
5 Education, 431 U.S. 209, 225-226 (1977); Belhumeur, 432 Mass. at 458. At the time
6 the Association sent its Demand Letter to Magee in 2014, the requirements for
7 Massachusetts public sector unions were well-established.

8 First, the union must provide an escrow procedure for all amounts charged
9 and a rebate procedure, at the time the fee is demanded, which provides for prompt
10 adjudication before a neutral arbitrator. Second, the service fee demand must conform
11 to the requirements of DLR Rules 17.03, Ratification and 17.05, Demand for Payment of
12 a Service Fee,¹⁰ and must be accompanied by sufficient information to allow the fee
13 payer to determine whether to challenge the fee. Finally, the amount of the fee
14 must be calculated correctly based on chargeable expenses. Wareham Education

Prior to the vote, the exclusive bargaining agent shall make reasonable efforts to notify all employees in the unit of the time and place of the meeting at which the ratification vote is to be held, or any other method which will be used to conduct the ratification vote. The amount of such service fee shall be equal to the amount required to become a member and remain a member in good standing of the exclusive bargaining agent and its affiliates to or from which membership dues or per capita fees are paid or received. No employee organization shall receive a service fee as provided herein unless it has established a procedure by which any employee so demanding may obtain a rebate of that part of said employee's service payment, if any, that represents a pro rata share of expenditures by the organization or its affiliates for [impermissible charges].

* * *

¹⁰ Rule 17.03 and 17.05 are now, respectively, Rules 17.02 and 17.04.

1 Association, 24 MLC 23, 29, ASF-2097 et. al. (October 19, 1997), *aff'd sub nom.*
2 Wareham Education Association v. Labor Relations Commission, 430 Mass. 81(1999)
3 (Wareham) (citing School Committee of Greenfield, 385 Mass. 70; Malden Education
4 Association, 15 MLC 1429, MUP-2951 (February 2, 1989)).

5 Here, the evidence shows that the Association had both an escrow and a rebate
6 procedure.¹¹ Further, the Association's second ratification notice contained the current
7 amount of the service fee and notified employees that it was affiliated with the MTA and
8 NEA¹² as required by 456 CMR 17.03(5)(c), (f).¹³ The Association's written demand
9 also comported with DLR Rule 17.05 by enclosing a copy of the DLR's regulations, and
10 including the amount of the service fee, the period for which the fee was assessed, the
11 method by which payment was to be made and to whom; and by enclosing a copy of
12 the DLR's regulations. See 456 CMR 17.05(1) and (2).¹⁴

13 The Law also requires that a union's demand be accompanied by sufficient
14 information to allow an employee to determine whether to challenge the fee. In
15 Wareham, the SJC ruled that a local union, no matter the size, must provide an
16 independent audit report of its major expenses when seeking a service fee for those
17 expenses. 430 Mass. at 87-89. As Magee points out in his supplementary statement,

¹¹ Magee does not argue that these procedures were faulty in any way. He does, however, challenge the Hearing Officer's directive that his 2014 escrow payment be released to the Association for remittance to the MTA and NEA. We discuss that issue below.

¹² Although as noted above, Magee challenged the ratification vote in his charge, on November 13, 2014, the CERB affirmed the dismissal of this aspect of the charge and Magee did not appeal from that decision.

¹³ DLR Rules 17.03 (5)(c) and (5)(f) are now DLR Rules 17.02 (5)(c) and (5)(f).

¹⁴ DLR Rules 17.05 (1) and (2) are now DLR Rules 17.04(1) and (2).

1 the Association's failure to provide an audit of its own expenses was a "central issue" in
2 his case. On appeal, however, Magee does not challenge the Hearing Officer's
3 conclusion, with which we agree, that this omission did not render the demand invalid.
4 Because the Association was not seeking a service fee for its local expenses, it was not
5 required to provide an audited accounting of those expenses to the fee payer. See
6 Harrison v. Massachusetts Society of Professors/Faculty Staff, 405 Mass. at 64.
7 Rather, Magee raises the audit issue only in the context of arguing that the Hearing
8 Officer erred when she stated that the Complaint in this case did not concern a
9 challenge to the *amount* of the demand. We address that argument below.

10 Under the final element of the requirements set out above, the amount of the fee
11 must be calculated correctly based on chargeable expenses. Magee claims that his
12 argument that Article XX does not permit the Association to demand less than 100% of
13 membership dues is, in fact, a challenge to the "amount" of the fee and the Hearing
14 Officer erred when she held otherwise. We disagree based on DLR Rule 17.06(1).¹⁵
15 There, a challenge to the "amount" of a service fee is expressly and narrowly defined as
16 "whether some or all of the service fee demanded by an exclusive representative is
17 impermissible under 456 CMR 17.04(1)." As noted above, this regulation lists the costs
18 that are impermissible and permissible in calculating a service fee. Both the Complaint
19 and the Hearing Officer's decision accurately state that Magee has never challenged
20 the "amount" of the MTA and NEA fees demanded from him on these grounds. There is
21 therefore no basis to conclude that the Hearing Officer mischaracterized Magee's

¹⁵ DLR Rule 17.06(1) is now DLR Rule 17.05(1).

1 challenge in any way.¹⁶ Further, based on the foregoing, there is no basis to conclude
2 that the Association's demand violated any of the requirements that public sector unions
3 must follow in Massachusetts for seeking and collecting service fees.

4 Magee nevertheless claims that because the Association did not make a demand
5 for "100% of [the Association's] portion of the fee," the demand was unlawful because
6 Section 12 of the Law requires that the demand "be equal to the amount required to
7 become a member and remain a member in good standing of the exclusive bargaining
8 agent and its affiliates." M.G.L. c. 150E, §12 (hereinafter, "dues clause"). Magee
9 argues that the ASF demanded by the Association was not equal to the amount that
10 was required for him to become an Association member in good standing. He therefore
11 claims that the Hearing Officer erred when she held that "although Section 12 of the
12 Law permitted the Association to charge Magee for the pro rata share for expenses that
13 it incurred as the exclusive bargaining representative, it did not compel it to do so."¹⁷

¹⁶ Magee also claims that the Complaint, which he refers to as "the July 7, 2014 ruling" makes it clear that he "challenged and won a decision" on the issue of the amount of the service fee. This is not accurate. First, as we explain above, the Investigator clearly pleaded this matter as a validity claim. Second, the fact that the Investigator issued a Complaint as to certain of Magee's allegations demonstrates only the Investigator's belief that there was probable cause to believe that the Law has been violated as to those violations. 456 CMR 17.09(1) (now DLR Rule 17.08(1)); DLR Rule 17.10(1)(now DLR Rule 17.09(1)). It is well-settled that the mere issuance of a complaint by the DLR does not indicate a prejudgment of the merits of the case; it only reflects the DLR's determination that there is probable cause to believe the conduct could violate the Law. School Committee of Stoughton v. Labor Relations Commission, 4 Mass. App. Ct. 262, 272-273 (1976); Quincy City Employees Union, H.L.P.E., 15 MLC 1340, 1368 n. 54, MUPL-2883, MUP-6037 (January 24, 1989) aff'd sub nom Pattison v. Labor Relations Commission, 30 Mass App. Ct. 9 (1991), further rev. den'd, 409 Mass. 1104 (1991).

¹⁷ Magee also argues that the Hearing Officer's failure to quote Section 12 in its entirety or to enter into evidence his stipulations containing the full text of certain statutes and regulations demonstrates her desire to "craft a biased decision." We disagree. The Hearing Officer properly referenced those sections of Section 12 that were relevant to

1 We disagree. Although the SJC has not specifically ruled on the meaning of the
2 dues clause,¹⁸ it has consistently construed Section 12 in light of constitutional
3 requirements prohibiting an employee organization from assessing an ASF in excess of
4 an employee's proportional share of collective bargaining, contract administration and
5 grievance expenses. School Committee of Greenfield, 385 Mass. at 76. Magee's
6 assertion that the dues clause compels the Association to charge him 100% of the
7 amount necessary for him to remain a member in good standing, without regard to
8 whether or not that fee includes non-chargeable expenses, conflicts with this well-
9 established, constitutionally-tested interpretation of the Law. We therefore decline to
10 interpret it in this manner.¹⁹ Rather, in accord with prior CERB decisions, we view

the arguments that Magee made in his post-hearing brief. Further, there was no need for the DLR's regulations and statutes to be made part of a hearing record because they constitute the rules and law that must be applied to the facts of the case, not the evidence needed to prove those facts. See generally, M.G.L. c. 150E, §11 (d) ("At the conclusion of the hearing, the hearing officer shall issue written findings of fact and shall determine whether a practice prohibited under Section 10 has been committed...").

¹⁸ The closest the Court has come to construing the dues clause was in School Committee of Greenfield, where it described the paragraph containing that clause as "*apparently* setting the agency fee equal to membership dues but disqualifying organizations without rebate procedures from receiving them." 385 Mass. at 80 (emphasis added). With no further mention of the dues clause, however, the remainder of the decision focused on the rebate procedure, with the Court ultimately declining to construe Section 12 as requiring resort to the union's rebate procedure because the construction would render the statute "constitutionally suspect on First Amendment grounds." Id. at 79. We similarly construe the dues provision in light of the constitutional concerns articulated in Greenfield and Wareham.

¹⁹ Magee also states that the term "pro rata" share, as used by the Hearing Officer when she stated that Section 12 permitted, but did not compel, the Association to charge a pro rata share for expenses it incurred as the exclusive bargaining representative, applies only to the time period for which the fee is demanded. However, Magee may be confusing the two types of "pro rata" fees referenced in the decision. Magee appears to be referencing the reduced or "pro-rated" share of the MTA and NEA annual agency service fees that the Association charged him because there were only 177 days left in

1 Section 12 as merely expressing the “outer limits on the scope of negotiations over
2 agency service fees.” Massachusetts Board of Regents of Higher Education, 10 MLC
3 1048, 1050, AO-8, (July 14, 1983). It neither mandates a specific service fee provision
4 nor prevents the negotiation of a service fee that is less than the amount of union dues
5 and the service fee payers’ proportional share of the cost of collective bargaining and
6 contract administration. Id. at 1050-1051 (citing Leominster School Secretaries
7 Association, 7 MLC 1953, MUPL-2290 (March 23, 1981)). Based on this, we affirm the
8 Hearing Officer’s conclusion that the Association did not violate Section 12 by
9 assessing only its parent unions’ portion of the fee.

10 We next consider Magee’s argument that the Association’s failure to make a
11 demand for a local fee violated the Law because Article XX of the Agreement sets the
12 ASF at 100% of dues.²⁰ We disagree. In Gloucester Teachers Association, the CERB
13 held that not every imperfection in the administration of a contractual agency fee
14 provision of a collective bargaining agreement is a prohibited practice. Gloucester
15 Teachers Association, 6 MLC at 1741. In that decision, the CERB reasoned that:

16 Any other reading of the Law would convert the [CERB] into an arbitral
17 forum in which it reviewed all decisions relating to agency fee provisions
18 against a contractually agreed upon standard. Were the [CERB] to adopt

the membership year when the Agreement containing the ASF was ratified. The Hearing Officer, however, was referring more generally to the pro rata share of union expenditures for permissible activities that are chargeable to a non-member under Section 12 of the Law. See Lyons v. Labor Relations Commission, 397 Mass. at 501; Harrison, 405 Mass. at 61.

²⁰ We reject Magee’s assertion that the Hearing Officer displayed bias when she did not quote all of Article XX when opining that neither Section 12 of the Law nor Article XX mandates how the Association must apportion the service fee. However, the Hearing Officer set out Article XX in its entirety in her findings. There was no need to reiterate it. Although Magee may disagree with the conclusion that the Hearing Officer reached on this point, his accusations of bias are unfounded.

1 this role, we would be interpreting the contract, not at the request of one of
2 the parties to it, but at the instigation of a non-party individual. We would
3 do so not to vindicate the statutory rights of any such individual, but to
4 examine a claim that they are being charged less than the statute permits,
5 but more than they should be paying under the contract. We [would]
6 vindicate not principle but economic self-interest. There is no legal or
7 policy reason why the [CERB] should voluntarily adopt such a role.
8

9 Id. Accordingly, when viewing agency service fees alleged to violate a CBA provision,
10 the CERB's inquiry is two-fold: First, does the agency service fee violate the statute?
11 Second, is the administration of the contract (specifically the agency service fee
12 provision) arbitrary, capricious or in bad faith? Id. at 1742.

13 We have just answered the first question in the negative. To answer the second
14 question, we turn to the language of the provision. Although this provision sets the ASF
15 at 100% of dues, it is immediately preceded by language that permits the Association to
16 charge a fee that is "commensurate with the cost of collective bargaining and contract
17 administration as determined solely by the Association." As discussed above, given
18 that any mandated setting of an ASF at 100% of dues, without regard to whether those
19 dues included impermissible charges, would run afoul of the Law, as limited by the First
20 Amendment, there is no basis for us to conclude that the Association's setting of that
21 fee for a lesser amount that is commensurate with the MTA and NEA's audited costs of
22 collective bargaining and contract administration was arbitrary, capricious or unlawfully
23 motivated. Rather, demanding such a fee fell well within the discretion that Article XX
24 accords the Association.²¹

²¹ To the extent that Magee argues in his supplementary statement that the absence of any reference in the CBA to the MTA and the NEA rendered a demand for those fees invalid, we summarily affirm the Hearing Officer's analysis of this argument.

1 Based on the foregoing, and for all the reasons stated in the Hearing Officer's
2 decision, we conclude that the Association's demand for an agency service fee that was
3 less than 100% of the Association dues and that was for the MTA and the NEA's portion
4 of the service fee, but not its own, did not render the demand invalid under the
5 Constitution, the Law or the DLR's regulations or otherwise constitute a violation of
6 Section 10(b)(1) of the Law.

7 Escrow Fund

8 As a final matter, we reject Magee's claim that the Hearing Officer exceeded her
9 authority when she directed that Magee's Spring 2014 service fee be released from
10 escrow to the Association for remittance to the MTA and NEA. Judicial precedent and
11 our regulations are clear that once a hearing officer or the CERB issues a final decision
12 on a challenge to a service fee, there is no longer a reason to hold the challenged
13 amounts in escrow and the DLR or the CERB may require their release either to the
14 union or back to the charging party, depending on the outcome of the case. School
15 Committee of Greenfield. 432 Mass. at 85; DLR Rule 17.07 (5).²² The Hearing Officer's
16 directive was therefore proper at the time she issued it.²³ Pursuant to M.G.L. c. 150E,
17 §11(e), however, once Magee filed a timely appeal, the Hearing Officer's decision was
18 no longer a "final order," and the parties were not obliged to release the funds until the

²² DLR Rule 17.07(5) is now DLR Rule 17.06(5).

²³ Magee's claim that the Hearing Officer displayed "obvious bias" by ordering the release of the escrow money is therefore unfounded.

1 CERB issued its final order on appeal, which we do today.²⁴ Compare M.G.L. c. 150E,
2 §11(i) (the commencement of proceedings by any party aggrieved by a final [CERB]
3 order "shall not, unless specifically ordered by the court, operate as a stay of the
4 [CERB's] order.")

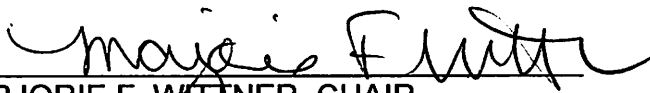
5 Therefore, having affirmed the Hearing Officer's decision in its entirety, we order
6 the parties to release Magee's Spring 2014 service fee payment from the escrow
7 account for remittance for the Association to remit to the MTA and the NEA.

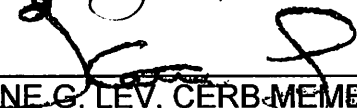
8 Conclusion

9 For the reasons stated above and in the Hearing Officer's decision, we conclude
10 that the Association did not violate Sections 12 and 10(b)(1) of the Law by its conduct.

11 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD


MARJORIE F. WITTNER, CHAIR


KATHERINE G. LEV, CERB MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

²⁴ M.G.L. c. 150E, §11(e) states in pertinent part that: "Any order issued pursuant to this section shall become final and binding unless, within 10 days after notice thereof, any party requests a review by the [CERB]."