

1 Logan Eichelser (Petitioner or Eichelser) filed in Case No. CR-22-9430 (Motions). The
2 UFCW is exclusive bargaining representative for all agricultural employees employed by
3 Berkshire Roots, Inc. in its Pittsfield, Massachusetts cannabis facility (Berkshire Roots or
4 Employer). The Commonwealth Employment Relations Board (CERB) grants the
5 UFCW's Motions for the reasons set forth below.

6 Statement of the Case

7 Representation Petition

8 On July 12, 2022, Cameron J. Howard (Howard) filed a petition with the
9 Department of Labor Relations (DLR) seeking decertification of the UFCW as the
10 exclusive collective bargaining unit representative for agricultural employees employed
11 by Berkshire Roots who are currently represented by the UFCW. The DLR docketed the
12 petition as Case No. CR-22-9430. On August 3, 2022, the UFCW filed a Motion to
13 Intervene, which the DLR granted on August 3, 2022. On August 17, 2022, Eichelser
14 filed an amended petition that was essentially identical to the one that Howard filed,
15 except that Eichelser was now the named petitioner.

16 Prohibited Practice Charges

17 On May 31, 2022, the UFCW filed a prohibited practice charge in Case No. UP-
18 22-9339 alleging that Berkshire Roots had engaged in prohibited practices within the
19 meaning of Sections 4(1) and 4(5) of M.G.L. c. 150A (the Law). Pursuant to Section 6 of
20 the Law and Section 15.05 of the DLR's Regulations, 456 CMR 15.05, a DLR Investigator

1 (Investigator) investigated the charge on August 24, 2022. On September 20, 2022, the
2 Investigator issued a three-count Complaint of Prohibited Practice (Complaint).¹

3 Count I of the Complaint alleges that the Employer failed to bargain in good faith
4 by transferring bargaining unit work to non-bargaining unit personnel without first
5 providing the Union with notice and an opportunity to bargain to resolution or impasse
6 over the decision and the impact of its decision to contract with an outside cleaning
7 company to provide sanitation services to its facility from February through May 2022.
8 Count II of the Complaint alleges that the Employer failed to bargain in good faith by
9 transferring bargaining unit work to non-bargaining unit personnel when the Employer
10 contracted with an outside company to perform bargaining unit trim work during April
11 2022, without first providing the Union with notice and an opportunity to bargain to
12 resolution or impasse over the decision and the impact of its decision on bargaining unit
13 members' terms and conditions of employment. Count III of the Complaint alleges that
14 the Employer failed to bargain in good faith by eliminating bargaining unit employees' paid
15 breaks without giving the Union prior notice and an opportunity to bargain to resolution or
16 impasse over the decision and the impacts of that decision on bargaining unit members'
17 terms and conditions of employment.

18 On July 1, 2022,² the UFCW filed a prohibited practice charge in Case No. UP-22-
19 9404 alleging that Berkshire Roots had engaged in prohibited practices within the
20 meaning of Sections 4(1) and 4(5) of the Law. Pursuant to Section 6 of the Law and

¹ The Investigator dismissed one count of the charge in UP-22-9339. The Union did not file a request for review of the dismissed count.

² The Union amended this charge on September 2, 2022. The investigative record does not include any objections to the amendment.

1 Section 15.05 of the DLR's Regulations, 456 CMR 15.05, an Investigator investigated the
2 charge on August 24, 2022. On October 4, 2022, the Investigator issued a one-count
3 Complaint but dismissed three other allegations (Partial Dismissal). The Union filed a
4 request for review of the Partial Dismissal on October 21, 2022. On December 6, 2022,
5 the CERB affirmed the dismissal of one count of the Partial Dismissal but remanded two
6 counts to the Investigator to issue an amended complaint (Amended Complaint). Count I
7 of the Amended Complaint alleges that the Employer failed to provide the Union with
8 information that is relevant and reasonably necessary to perform its role as the exclusive
9 collective bargaining representative. Count II of the Amended Complaint alleges that
10 Employer failed to bargain in good faith by increasing the minimum starting wage rate for
11 all new Cultivation Associates to \$17.00 an hour without giving the Union prior notice and
12 an opportunity to bargain to impasse or resolution over its decision and the impacts of its
13 decision on bargaining unit members' terms and conditions of employment. Count III of
14 the Amended Complaint alleges that Employer failed to bargain in good faith by granting
15 pay increases to fifteen out of its eighteen employees without giving the Union prior notice
16 and an opportunity to bargain to impasse or resolution over its decision and the impacts
17 of its decision on bargaining unit members' terms and conditions of employment.

18 On August 24, 2022, the UFCW filed a motion pursuant to 456 CMR 15.11 to have
19 the pending prohibited practice charge in Case No. UP-22-9339 block further proceedings
20 in Case No. CR-22-9430. On September 13, 2022, the UFCW filed a second motion
21 pursuant to 456 CMR 15.11 to have the pending prohibited practice charge in Case No.
22 UP-22-9404 block further proceedings in CR-22-9430. On November 10, 2022, two
23 attorneys from the National Right to Work Legal Defense Foundation entered notices of

1 appearance on behalf of Eichelser. On November 11, 2022, Eichelser filed an opposition
2 to the motion on his own behalf.³ On November 14, 2022, the Employer filed a response
3 opposing the blocking of the election. On November 15, 2022, Eichelser's attorney also
4 filed an opposition on Eichelser's behalf and filed a corrected version on November 17.⁴
5 On December 7, 2022, the UFCW submitted a reply to the Petitioner's oppositions to the
6 motions. The Employer filed a supplemental response to the UFCW's motions on January
7 20, 2023. After reviewing the record, including the parties' submissions, the CERB issues
8 the following ruling.⁵

9 Ruling

Petitioner's Challenges To the Blocking Charge Doctrine

10 As a threshold issue, we address the Petitioner's argument that the DLR lacks the
11 authority to block representation elections because Chapter 150A is silent as to blocking
12 charges and that generally, blocking charges impede employees' right to free choice
13 afforded by G.L. c. 150A, Section 3. We disagree.

14 First, the Petitioner fails to address the fact that the blocking charge procedures it
15 seeks to invalidate are set forth in a regulation, 456 CMR 15.11, and thus not subject to
16 amendment or repeal without providing interested parties the requisite notice and

³ Eichelser signed the Opposition.

⁴ There were no objections to having Eichelser's and his attorneys' oppositions filed and considered.

⁵ DLR Rule 456 CMR 15.11(2) states that upon receipt of a blocking charge motion, the DLR may "investigate the matter, issue a notice to the other parties to the election to show cause why the motion should not be granted, or conduct further proceedings to dispose of the matter."

1 opportunity for comment set forth in Section 3 of the Massachusetts Administrative
2 Procedures Act, M.G.L. c. 30A. See, e.g., Carey v. Commissioner of Correction, 479
3 Mass. 367, 373 (2018) (Department of Correction required to comply with notice and
4 comment requirements of M.G.L. c. 30A, §3 before it could introduce a new requirement
5 subjecting prison visitors to searches by drug sniffing dogs).

6 Second, Petitioner's argument that the blocking charge "regime" is unauthorized
7 by the DLR's statutory mandate is belied by the broad rulemaking authority granted to the
8 DLR both in its enabling statute and in Section 5 of the Law, which addresses the DLR's
9 role in representation proceedings.⁶ Pursuant to M.G.L. c. 150A, §5(c), the DLR "may
10 establish such rules or regulations as it deems appropriate to effectuate the policies of
11 this chapter for the filing of petitions for investigation and certification by employers or
12 employees or their representatives." The DLR's authority to effectuate the purposes of
13 the Law is also set forth in its enabling statute, M.G.L. c. 23, §9T, which grants the director
14 "the authority, pursuant to chapter 30A and after consultation with the advisory council
15 and the members of the Commonwealth Employment Relations Board, to issue any
16 regulations for the enforcement and administration of ...chapters 150, 150A and 150E."
17 See also Goldberg v. Bd. of Health of Granby, 444 Mass. 627, 633 (2005) ("administrative
18 agencies are charged, implicitly or explicitly, with the task of crafting regulations that are
19 more detailed than statutes and tailored to more situations than the legislation specifies").

⁶ References to the DLR include the former Labor Relations Commission (LRC). See Section 8 of Chapter 145 of the Acts of 2007, granting to the DLR all the powers formerly bestowed upon the LRC.

1 Here, procedures applicable to alleged blocking charges were codified as 456
2 CMR 15.12 in revised regulations promulgated in 1990.⁷ See Commonwealth of
3 Massachusetts, 17 MLC 1650, 1651, SCR-2201 (April 9, 1991) (describing history of
4 blocking charge regulations). There is no evidence, and the Petitioner does not argue,
5 that these regulations were improperly promulgated. Indeed, since 1990, the CERB and
6 its predecessor agency, the Labor Relations Commission, have issued numerous rulings
7 pursuant to this regulation without legal challenge or legislative response. See, e.g., Town
8 of Palmer, 49 MLC 14, MCR-22-9034 (2022); Springfield School Committee, 27 MLC 20,
9 MCR-4773 (2000). Accordingly, the Petitioner has a heavy burden to meet in attacking
10 the validity of the regulation, for he must show that it has no rational relationship to the
11 goals or policies of the DLR's enabling statute. David B. Miller v. Labor Relations
12 Commission, 33 Mass. App. Ct. 404, 406-407 (1992) (citations omitted). The Petitioner
13 fails to meet this burden for the reasons set out below.

14 The Petitioner's arguments regarding legislative history are not persuasive. The
15 blocking charge doctrine has been in effect since 1976 and was modeled on a similar
16 National Labor Relations Board (NLRB) policy that has been in effect since at least 1959.
17 Commonwealth of Massachusetts, 17 MLC at 1651 (citing Town of Wareham, 2 MLC
18 1547, 1556, n. 8, MUP-2114, MCR-2092 (June 9, 1976) (adopting NLRB's blocking
19 charge rule and citing Brown and Root Caribe, Inc., 123 NLRB 1817 (1959)). The

⁷ Since 2016, the last time that the DLR revised its regulations, these procedures have, without substantive change, been codified, as 456 CMR 15.11. Although 456 CMR 15.11 references petitions filed pursuant to G.L. c. 150E, it also applies to Chapter 150A petitions through application of 456 CMR 2.05, which states that the provisions of 456 CMR 15.00, with exceptions not pertinent here, apply to proceedings arising under Chapter 150A.

1 Petitioner argues that because the NLRB's policy has been in effect for so many years,
2 the Massachusetts Legislature must have been aware of this policy when it enacted
3 Chapter 150A. Petitioner thus claims that the absence of any reference to the blocking
4 charge policy in Chapter 150A demonstrates that the Legislature deliberately intended to
5 exclude it.

6 This argument fails for several reasons. First, Chapter 150A was enacted in 1937,
7 and not 1973, as the Petitioner contends. See Mass. Nurses Ass'n v. Lynn Hospital, 361
8 Mass. 502, 507 (1974) (detailing legislative history of Chapter 150A and its initial
9 enactment by St. 1937, c. 436). This timing renders it unlikely that the Massachusetts
10 Legislature was even aware of the NLRB's blocking charge doctrine when first enacting
11 Chapter 150A.

12 Second, the DLR's blocking charge policy has been in effect for nearly fifty years
13 and, in that period, the Legislature has amended both Chapter 150A and 150E multiple
14 times without addressing the blocking charge doctrine in any way. Further, the NLRB's
15 blocking charge policy is set forth in a rule and has never been embodied in the National
16 Labor Relations Act (NLRA), the federal labor statute, despite the NLRB's application of
17 the doctrine for over fifty years. Under these circumstances, the fact that the Legislature
18 has not amended the state's collective bargaining laws to address the blocking charge
19 doctrine in any way is most reasonably viewed as tacit approval, rather than
20 condemnation, of the doctrine and no significance should be accorded the fact that the
21 Legislature did not seek to embody this doctrine when enacting or amending Chapter
22 150A and Chapter 150E.

1 The Petitioner's contention that the doctrine improperly interferes with employee
2 free choice ignores the applicable statutory scheme. The provisions of G.L. c. 150E,
3 Section 10(a)(1) and G.L. c. 150A, Section 4(1) are expressly aimed at preventing
4 employer interference with employees' free choice because these provisions make it a
5 prohibited practice for an employer to interfere with, restrain or coerce them in the
6 exercise of their rights under these laws, including their rights to bargain collectively
7 through representatives of their own choosing or to refrain from such activities. As
8 explained below, in circumstances where, as here, a prohibited practice complaint alleges
9 that an employer's conduct interferes with such rights, the blocking charge doctrine exists
10 to ensure that employees can exercise their right to vote in a representation election freely
11 and without coercion or interference. As such, the safeguards established by Section
12 4(1) and Section 10(a)(1) serve to protect employee free choice, not interfere with it.
13 Stated another way, the policies underlying blocking charges, unfair labor practice
14 hearings, and representation petitions are not in conflict. Rather, these provisions work
15 together and are rationally related to the Law's public policy to "protect the exercise by
16 workers of full freedom of association, self-organization and designation of
17 representatives of their own choosing for the purpose of negotiating the terms and
18 conditions of their employment or other mutual aid or protection." M.G.L. c. 150A, §1.

19 We thus reject the Petitioner's arguments regarding the validity of the blocking
20 charge doctrine and proceed to analyze the parties' remaining arguments under the
21 guidance of 456 CMR 15.11.

22 Application of the Blocking Charge Doctrine

1 “Any party to a representation petition filed with the DLR pursuant to Section 4 of
2 the Law may file a motion requesting that a pending prohibited practice charge block the
3 conduct of an election. The purpose of the blocking charge policy is to ensure that
4 prohibited practices that interfere with certain employee rights under the Law also do not
5 interfere with a representation election.” City of Everett, 47 MLC 313, MCR-20-8331 (June
6 30, 2021) (citing Commonwealth of Massachusetts, 17 MLC 1650). No purpose would be
7 served by proceeding with an election when there exists unremedied, alleged conduct
8 that would tend to interfere with the free electoral choice of employees. Commonwealth
9 of Massachusetts, 17 MLC at 1652.

10 As noted above, the DLR’s procedure for processing alleged blocking charges is
11 set forth in 456 CMR 15.11. This regulation requires the moving party to submit with its
12 motion evidence sufficient to establish probable cause to believe that: a) the conduct
13 alleged in the prohibited practice charge has occurred; b) the alleged conduct violated the
14 Law; and c) the alleged conduct may interfere with the conduct of a valid election. Here,
15 the UFCW has satisfied the first two elements of this analysis as multiple count
16 Complaints were issued in UP-22-9339 and UP-22-9404.

17 “In determining whether a prohibited practice charge could interfere with the
18 conduct of a valid election, the CERB considers the following factors: the character and
19 scope of the charge and its tendency to impair the employees' free choice; the size of the
20 work force and the number of employees involved in the events on which the charge is
21 based; the entitlement and interest of the employees in an expeditious expression of their
22 preference for representation; the relationship of the charging parties to the labor
23 organizations involved in the representation case; the showing of interest, if any,

1 presented in the representation case by the charging party, and the timing of the charge.”
2 New England Police Benevolent Association, 37 MLC 27, 28, SCR-10-2283, SCR-10-
3 2285, SCR-10-2294 (August 6, 2010) (citing Commonwealth of Massachusetts, 21 MLC
4 1713, 1717, SCR-2219, 2220, 2221 (April 9, 1995)).

5 Several factors persuade us that the prohibited practice charges in Case No. UP-
6 22-9339 and UP-22-9404 should block further processing of this decertification petition.
7 In terms of the timing of the petition, it was filed within six months of each of the unfair
8 labor practices alleged in both complaints, including the subcontracting and elimination
9 of paid breaks allegations contained in UP-22-9339, and the unilateral increases to
10 starting wages for new Cultivation Associates and pay increases contained in UP-22-
11 9404. Compare Springfield Housing Authority, MCR-10-5391, slip. op. at 8 (February 4,
12 2011) (motion to block allowed when decertification petition was filed only weeks after the
13 employer unlawfully disciplined the union president) with North Attleborough Electric
14 Department, 35 MLC 54, 55, MCR-08-5330 (July 9, 2008) (insufficient nexus between an
15 employer’s alleged unlawful conduct and the filing of a decertification petition almost two
16 years later).

17 With respect to the number of employees affected, the information contained in the
18 investigation file in UP-22-9404 reflects that the wage increases that the Employer
19 allegedly granted in January 2022 affected the majority of bargaining unit members (15
20 out of 18). The investigation record in UP-22-9339 similarly reflects that the allegations
21 pertaining to transferring Trim Associates’ bargaining unit work outside the unit affected
22 a majority of bargaining unit members (11 out of 17). The alleged elimination of paid
23 breaks affected all bargaining unit members.

1 As to the scope and character of the allegations -- compensation, paid breaks and
2 the potential erosion of a bargaining unit by using outside contractors -- are clearly matters
3 of major significance to the bargaining unit. The alleged unilateral elimination of certain
4 benefits after a union is certified when coupled with alleged wage increases that are
5 simultaneously being negotiated at the table could lead employees to believe, as
6 Eichelser states in his opposition to the Motions, that there is no “true benefit to having a
7 union,” and is thus likely to taint the election process or interfere with employee free
8 choice. Compare Commonwealth of Massachusetts, 21 MLC 1718, SCR-
9 2219,2220,2221 (1995) (dismissing motion to block election based upon single
10 allegations in three complaints, each of which alleged a change to a single working
11 condition that affected only a small number of employees in a large, diverse bargaining
12 unit) to Commonwealth of Massachusetts 17 MLC 1650, SCR-08-5330 (1991) (complaint
13 alleging that employer’s refusal to bargain in good faith during certification year by
14 delaying submitting wage increase for eight months and terminating certain health and
15 welfare trust fund coverage treated as blocking charge).

16 The Employer’s claim that the alleged unfair labor practices were limited to a finite
17 six-month period ignores the fact that they occurred during the certification year when the
18 parties were attempting to achieve a first contract. The Employer’s claim that its wage
19 increases did not harm its employees ignores the fact that granting benefits can have the
20 same coercive effect as denying benefits. Town of Natick, 2 MLC 1086, MUP-2098, 2102
21 (August 26, 1975). As the CERB has noted, “[t]he danger inherent in well-timed increases
22 in benefits is the suggestion of a fist inside the velvet globe. Employees are not likely to
23 miss the inference that the source of benefits now conferred is also the source from which

1 future benefits must flow and which may dry up if it is not obliged.” City of Boston, 9 MLC
2 1664, 1668, MUP-4926 (February 18, 1983) (quoting NLRB v. Exchange Parts Co., 375
3 U.S. 45 (1964) and further citing Medo Photo Supply Corp. v. Labor Board, 321 U.S. 678,
4 686 (1944) and Republic Aviation Corp. v. Labor Board, 324 U.S. 793, 798 (1945)).

5 The Employer’s claim that employees were merely bystanders and not the target
6 of the charges, even if true, ignores the fact that in determining whether an employer has
7 interfered with, restrained or coerced employees in the exercise of their rights, the CERB
8 does not require there to be actual harm – rather, it examines the objective effect of the
9 employer’s actions on a reasonable employee. See, e.g., Groton-Dunstable Regional
10 School Committee, 15 MLC 1551, 1555-1556, MUP-6748 (March 20, 1989).

11 As to claims that the Union deliberately filed these charges to thwart an election,
12 we note that the Union filed the charges before the decertification petition and within the
13 six-month period of limitations set forth in 456 CMR 2.06(2). There are many reasons that
14 a charging party may choose to wait until the end of that period before filing a charge and
15 such motives are irrelevant to the analysis of whether the conduct alleged in the pending
16 prohibited practice charges could interfere with the conduct of a valid election.

17 Finally, the Employer’s claim that its conduct did not actually violate the Law
18 because it acted in accordance with its past practice is an argument that is appropriately
19 made to the Hearing Officer at hearing. For purposes of this ruling and pursuant to 456
20 CMR 15.11, it suffices that there is probable cause to believe that the Law has been
21 violated in the manner alleged.

22 For all the foregoing reasons, we grant the Union’s motion to treat the charges in
23 UP-22-9339 and UP-22-9404 as blocking charges. The parties are advised that pending

1 representation petitions that are blocked by a prohibited practice charge will be held in
2 “inactive status” until the resolution of the prohibited practice complaints at issue.
3 Commonwealth of Massachusetts, 17 MLC at 1658. During its pendency in inactive
4 status, the petition will not be considered to raise a question concerning representation
5 and will not bar the Employer and the UFCW from fulfilling their statutory obligation to
6 bargain in good faith. New England Police Benevolent Association, 37 MLC at 28. The
7 final disposition of the representation petition will depend on the outcome of the prohibited
8 practice charges that rendered the petition inactive. Id.

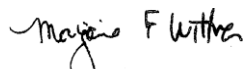
9 In accordance with the above, the DLR will not schedule an election in the
10 bargaining unit until the final disposition of Case Nos. UP-22-9339 and UP-22-9404. The
11 DLR shall nevertheless list Eichelser as an interested party in both of these cases for the
12 sole purpose of receiving copies of any orders that dispose of these matters.

13 Conclusion

14 For the above-stated reasons, we ALLOW the UFCW’s Motions and block further
15 processing of Case No. CR-22-9430. CR-22-9430 will be held in inactive status. As a
16 result, there is no pending question concerning representation.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



MARJORIE F. WITTNER, CERB CHAIR



KELLY STRONG, CERB MEMBER



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