In the Matter of SPRINGFIELD EDUCATION ASSOCIATION, MASSACHUSETTS TEACHERS ASSOCIATION, NATIONAL EDUCATION ASSOCIATION, et al.

and

JAMES J. BELHUMEUR et al.[1]

Case Nos. ASF-2143 et al.

54.5711 agency service fee
72.3 agency service fee

April 23, 1997
Robert C. Dumont, Chairman
William J. Dalton, Commissioner
Claudia T. Centomini, Commissioner

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DECISION AND ORDER

Statement of the Case

James Belhumeur, and numerous others (collectively referred to as the Charging Parties), filed charges with the Labor Relations Commission (Commission). The charges alleged that affiliates of the Massachusetts Teachers Association/National Education Association had demanded agency service fees for fiscal years 1987-88, 1988-89, 1989-90, 1990-91, and 1991-1992, in excess of the amounts permitted by M.G.L. c. 150E (the Law), in violation of Section 10(b)(1) of the Law.

In 1992, the Charging Parties (including *Pro Se* Challenger Conner), and the Massachusetts Teachers Association (MTA), the National Education Association (NEA) and the local union affiliates (Unions) executed a settlement agreement concerning the disposition of the issues relating to the agency service fees demanded for the contested fiscal years. The parties agreed that the lawful amount of the MTA portion of the agency service fees demanded from the Charging Parties for each of the five fiscal years in dispute would be based on the MTA's actual expenditures for fiscal year 1990-91. The settlement stipulated that the lawful amount of the NEA portion of the fees demanded would be ten percentage points less than the final chargeable percentage determined for the MTA. The parties reached no agreement concerning the amount of local fees.

The Commission ordered that the hearings regarding the local portions of the fees be bifurcated from a consolidated hearing involving the MTA and the NEA fee portions.[2] Pursuant to 456 CMR 17.13, the Charging Parties had a full opportunity to engage in pre-hearing discovery at the MTA offices in July and August of 1992.

Pursuant to 456 CMR 13.02, a formal hearing commenced on February 8, 1993 and continued intermittently for fifty-three (53) days thereafter, concluding on December 14, 1994. To expedite the litigation, the Commission modified its hearing procedures during the course of the proceedings. The Commission issued an Order on July 1, 1993 directing the parties to prepare and submit detailed affidavits from each witness, in lieu of direct examinations. Cross and re-direct examinations, however, were conducted in the presence of the Commission's designated hearing officer, thereby preserving the hearing officer's ability to render credibility determinations. All parties had a full opportunity to produce documentary and testimonial evidence. All parties filed post-hearing briefs and reply briefs.

Commission Hearing Officer Tammy Brynie issued Recommended Findings of Facts and Recommended Conclusions of Law on March 21, 1996.[3] The parties filed objections to the Recommended Decision on or before April 24, 1996 and filed reply briefs on or before May 20, 1996.

DECISION

Introduction

The parties filed extensive objections to the Recommended Decision. The Charging Parties broadly challenge virtually all aspects of the decision and its analytical foundation. They argue that the Commission must utilize the strictest levels of scrutiny in reviewing the Recommended Decision because it involves constitutional considerations, and that the Recommended Decision should be accorded little weight or deference. Accordingly, we must initially address the charging parties' objections to the evidentiary standards applied and their objections to the burden of proof applied by the hearing officer.

The Commission is a quasi-judicial, administrative agency with specialized expertise in labor relations matters. Consistent with the instruction in *School Committee of Greenfield* v. *Greenfield Education Association*, 385 Mass. 70, 76 (1982), the Charging Parties' challenges to the amount of the Union's demand have been treated as a prohibited labor practice charge, pursuant to M.G.L. c. 150E, Section 10(b)(1). The instant hearing has been conducted in accordance with the Commission's standard rules, codified at 456 CMR 10.00 *et. seq*. Therefore, the Charging Parties' have received

1. Cases consolidated for this proceeding are listed at Appendix A. [A copy of this list may be ordered from Landlaw in its original format if required.]

2. With the exception of Conner, the *pro se* challengers filed settlements agreeing to be bound by the outcome of the case *sub judice*.

3. The Commission designated Tammy Brynie as Commission Counsel, pursuant to Chapter 23, Section 9R and 456 CMR 18.04. The Recommended Decision is Appendix B. [A copy of this decision may be ordered from Landlaw in its original format if required.]

the benefit of the Commission's quasi-judicial procedures, rules and practices. The Charging Parties, however, suggest that, because there are constitutional issues involved, the Commission must adhere to judicial rules of evidence and procedure. Contrary to the Charging Parties' suggestions, however, the United States Supreme Court has indicated that it "do[es] not agree ... that a full-dress administrative hearing, with evidentiary safeguards" is constitutionally required to determine an appropriate agency service fee rate. *Chicago Teachers Union, Local 1* v. *Hudson*, 475 U.S. 292, 307 (1986). Instead, the *Hudson* Court indicated that a challenger's right to a reasonably prompt decision by an impartial decision maker may even be satisfied through the more informal arbitration process. Therefore, significant aspects of the Charging Parties' objections concern judicial and evidentiary process that, although substantially afforded by the Commission, they were not necessarily due.

After an exhaustive review of the parties' objections and the record, we conclude that the Recommended Decision accurately reflects the protracted record, renders appropriate and comprehensive findings of fact that are supported by the weight of credible record evidence, properly applies the correct analytical frameworks and relevant authorities and precedent, and reaches substantially correct conclusions. Therefore, except where specifically delineated below, we adopt the attached Recommended Findings of Fact and Recommended Conclusions of Law.[4]

It is not necessary to iterate every determination made in the Recommendation Decision here, which would affectively require a *de novo* review of all aspects of the Recommended Decision. Rather, we will focus on material challenges raised by the parties concerning the analytical framework applied by the hearing officer, the chargeability of various categories of expenses, and the chargeability determinations made on the record evidence. Based on our careful consideration of the parties' challenges, we have decided to modify the final fee calculations for the reasons discussed below.

Charging Parties' Motion for Judgment

As a threshold matter, the Charging Parties object to the hearing officer's recommendation that their Motion for Judgment be denied. Relying on *Belhumeur* v. *Labor Relations Commission*, 411 Mass. 142 (1991), the Charging Parties renew their claim that the MTA was required to "carefully craft" the instant demand and that the MTA has forfeited its right to collect any fee because of alleged defects in its demand.

We concur with the hearing officer's alternate rationales for recommending that the Charging Parties' Motion for Judgment be denied. We consider the present charging parties to be either precluded from re-raising the sufficiency of the identical demand deemed adequate in the previous *Belhumeur* litigation or, in the alternative, that clear language in *Belhumeur* substantively disposes of the Motion for Judgment.

The Charging Parties contend that the hearing officer failed to specify the legal doctrine applied in reaching her recommendation that they should be precluded from recontesting the sufficiency of the instant demand. The initial *Belhumeur* litigation focused on the accuracy of the present demand, and the Supreme Judicial Court determined that the demand is adequate. Under the doctrines of *res judicata* or issue preclusion, the governing rationales are identical: the stability and finality of decisions and judicial economy. The Charging Parties' objections to the recommendation that *Belhumeur* precludes further challenges to the accuracy, or to the crafting, of the current demand are not compelling because the court has already found the demand adequate.

Therefore, the recommendation that the current claim is precluded is adopted.

In the alternative, by its clear language, *Belhumeur* substantively disposes of the Motion for Judgment. The Charging Parties argue that, because they are constitutionally protected from assuming too great a litigation burden when a union does not carefully craft its agency fee demand, the union is not entitled to a full-blown trial to justify the amount of the fee demanded. However, *Belhumeur* does not support the charging parties' argument on that point.

> The information that the union must provide under the *Hudson* opinion is not intended to be dispositive of any dispute. That information is designed only to permit an agency service fee payer to decide whether to oblige the union to prove that the agency fee charged was properly determined. *Belhumeur*, 411 Mass. at 146.

Accordingly, the Charging Parties' Motion for Judgment is denied.

Burden of Proof/Prima Facie Case

We are persuaded that the analytical model and concomitant burdens of proof and persuasion articulated by the hearing officer in her Recommended Decision are appropriate. She correctly noted that M.G.L. c. 150E, Section 12, as limited by the First Amendment to the United States Constitution, permits a public sector union to collect a service fee from non-members to cover its *pro rata* share of the costs of collective bargaining and contract administration. *Lyons* v. *Labor Relations Commission*, 397 Mass. 498, 501 (1986). For a union expenditure to be constitutionally charged to an objecting non-member, it must: 1) be germane to collective bargaining activity; 2) be justified by the government's vital policy interest in labor peace and avoiding free riders; and 3) not significantly add to the burden of free speech that is inherent in the allowance of an agency or union shop. *Lehnert* v. *Ferris Faculty Association*, 500 U.S. 507 (1991).[5] A union that demands an excessive fee violates M.G.L.c. 150E, Section 10(b)(1). *School*

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4. Challenger Conner argues that a union is required to classify its chargeable expenses according to the categories outlined in Commission Rule 17.04. We adopt the hearing officer's recommended conclusion that the MTA was not obligated to specifically enumerate and categorize its costs according to 456 CMR 17.04. Challenger Conner's remaining objections substantially parallel those filed by the Charging Parties.

5. We recognize the delineation of permissible and impermissible expenditures contained within the Commission's regulations, 456 CMR 17.04, to be outdated in light of *Lehnert*. We also apply the more widely recognized chargeable and nonchargeable terminology here, rather than the earlier permissible and impermissible categories.

Committee of Greenfield v. *Greenfield Education Association*, 385 Mass. 70, 76 (1982).

Public employees who object to the amount of a fee demanded are responsible for voicing their objections. *Chicago Teachers Union, Local 1* v. *Hudson*, 475 U.S. 292 (1986), *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 238 (1977). An employee who objects to the amount of the fee must voice that objection by filing a prohibited practice charge with the Commission. However, once the fee is challenged, the union bears the burden of producing sufficient evidence to persuade us that the fee reflects the fee-payer's proportionate share of the union's chargeable expenditures. *Greenfield*, *Id*. at 85; 456 CMR 17.15(2).[6]

This does not mean, however, that a union must present exhaustive evidence in its case-in-chief about every single union expenditure and every specific union activity during the period for which the fee is claimed. Instead, as the Commission has previously indicated, a union may rely on a *prima facie* showing that its service fee calculations are correct. *Dailey and Woburn Teachers Association*, 13 MLC 1555, 1564 (1987); *Pultz and Milford Teachers Association*, 13 MLC 1568, 1577 (1987); *Newton Teachers Association and Roman (Newton I)*, 13 MLC 1589, 1595 (1987); *Brown and Chicopee Fire Fighters*, 14 MLC 1241, 1251 (1987). Therefore, a union's initial burden is to produce enough credible detail to warrant a finding that identified expenditures are chargeable. Unless an included expenditure is inherently related to collective bargaining, like grievance arbitration fees, a union must show by detailed documentary or reliable testimonial evidence that a particular expense is chargeable. *Dailey and Woburn Education Association*, 13 MLC at 1564-65.

Once a union makes its *prima facie* showing of chargeability, the objecting fee payer assumes a limited burden of production to probe the union's evidence and produce some evidence to rebut the union's *prima facie* showing. In meeting this limited burden of production, an objecting fee-payer is aided by 456 CMR 17.13, which affords an opportunity for pre-hearing discovery.[7] However, at all times, a union retains the ultimate burden of persuasion.

In their challenges to the Recommended Decision, the Charging Parties argue that, at all times, the MTA bears the total and unavoidable burden to demonstrate that every expenditure is chargeable. They contend that, no burden, not even a limited burden of production, may be imposed upon objecting non-members. Charging Parties argue that the analytical framework and burdens of production and persuasion employed in the Recommended Decision are so egregiously wrong that a *de novo* review and an entirely new decision is required.

The litigation model advanced by the Charging Parties portends chaos. Absent the ability to develop a *prima facie* case, the MTA would have been required to produce evidence about every one of its approximately 15,000 expenditures. Neither Commission personnel, nor the MTA, would have known which expenditures were at issue, or why, until the post-hearing submissions were received. Moreover, every MTA employee would have had to testify about every undertaken activity while the charging parties sat silently. The procedure apparently advocated by the Charging Parties would entail receiving into evidence an encyclopedic array of material, regardless of whether it directly relates to an expenditure the non-members ultimately contest. The collection and analysis of the mountain of material could delay the Commission's ability to expeditiously identify any truly nonchargeable expenditures and could be unduly burdensome to all parties.

Contrary to the Charging Parties' assertions, it is useful to recall that the original burden of proof allocation in agency fee matters was dictated by common sense principles, not constitutional mandates. Because a union "possess[es] the basic facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion." *Railway Clerks* v. *Allen*, 373 U.S. 113, 122 (1963). However, through 456 CMR Rule 17.13, the Commission has equalized the parties' access to the books and records upon which a fee is based.[8] Thus, it is equitable for charging parties to bear a limited burden of production, to probe a union's evidence and produce some evidence to rebut a union's *prima facie* showing because the objecting fee payers have full access to all of a union's pertinent books and records prior to a hearing on the amount of the fee.

The Charging Parties provide scant supporting authority for their argument that a *prima facie* case model transgresses constitutional mandates. The Charging Parties have cited no cases to show that the burdens of proof *and* production in agency fee challenges are constitutionally required to remain with a union at all times. The decision of the U.S. District Court in *Lehnert*, 643 F. Supp. 1306, 1327 (W.D.Mich. 1986), cited by the Charging Parties for the proposition that they bear no litigation burden, is not persuasive. There, the court expressed concerns with requiring challengers to sort through unidentified but assumed chargeable expenses. Here, in contrast, the MTA identified its chargeable expenses in MTA #1 and provided the underlying books and records in accord with 456 CMR 17.13, thus enabling the objecting non-members to probe the union's evidence. Therefore, charging parties with service fee

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6. To demonstrate that its fee includes only the employee's *pro rata* share of collective bargaining expenses, the union must demonstrate those expenses that are chargeable as well as the total number of employees represented. *Woburn Teachers Association*, 13 MLC 1555(1987); 456 CMR 17.04.

7. Rule 17.13 provides, in pertinent part:

> At least seven (7) days before hearing the bargaining agent upon request shall make available to the charging party the books and records on which the bargaining agent relies to justify the amount of the service fee demanded.

8. Here, the overwhelming majority of exhibits submitted were produced during the pre-hearing discovery process.

cases in Massachusetts have full access to the information they need to respond to a union's *prima facie* case.[9]

In contrast, the paradigm we adopt mirrors the analogous burdens of persuasion and production assumed by 10(a)(3) litigants in discrimination cases. The standard proposed and applied in the Recommended Decision required the Union to carry the ultimate burden of persuasion concerning the chargeability of its expenditures, a burden like that borne by an alleged discriminatee. *See*, *e.g.*, *Trustee of Forbes Library* v. *Labor Relations Commission*, 384 Mass. 559, 566 (1981); *Wheelock College* v. *Massachusetts Commission Against Discrimination*, 371 Mass. 130 (1976).

The *prima facie* case analytical model promotes sound labor policy. We must recognize and, ultimately, accommodate seemingly divergent interests. The right of objecting non-members not to pay significant amounts for the support of union activities unrelated to collective bargaining necessarily coexists with the right of a union to be reimbursed for the service it provides such fee payers. *School Committee of Greenfield* v. *Greenfield Education Association*, 385 Mass. 70, 85 (1982). The right of fee payers to insist that the agency service fee calculations have an adequate evidentiary basis must be harmonized with the *Hudson* charge that all parties to the fee determination should have a reasonably prompt decision. *Hudson*, 475 U.S. at 307. Likewise, the proceedings adjudicating the amount of an agency service fee should not be so complex and burdensome that they consume an inordinate amount of the litigants' funds or exhaust the limited resources of the Commission or the appellate courts. Therefore, the *prima facie* case framework strikes an appropriate and careful balance between the compelling competing interests.

The MTA's prima facie case

We conclude the MTA met its *prima facie* burden concerning the chargeability of its programs. The MTA introduced evidence concerning its membership numbers and the *per capita* basis upon which it based its agency service fee demand. All five regional managers within the Affiliate Services division and managers within every other division that performed services for which the MTA seeks to charge non-members testified about their activities. Divisional quarterly reports outlining the division's activities were introduced, and witnesses provided substantial supporting details concerning the nature of their activities. All routine MTA publications and the minutes from the Board of Directors and Executive Committee meetings were introduced into the record. The MTA submitted a complete financial chronology of its activities for Fiscal Year 1991, in the form of its general ledger, as well as detailed information about its accounting system. Finally, the MTA's demand, including relevant budget information, is part of the record. Therefore, the MTA's testimonial and documentary evidence were sufficient to meet its *prima facie* burden concerning the chargeability of its programs. *See Dailey and Woburn Teachers Association*, 13 MLC at 1564-65; *Pultz and Milford Teachers Association*, 13 MLC at 1576.

After the MTA met its *prima facie* burden, the Charging Parties met their production burden by calling into question aspects of the Union's *prima facie* case.[10] The Charging Parties challenged the reliability of the MTA's time keeping system and provided examples of activity the MTA considered chargeable to non-members that the Charging Parties argued the MTA spent on political events. In response, the MTA's witnesses acknowledged documentary evidence that it had misallocated some time to the incorrect account.[11] In addition, the MTA submitted a report by Auditor Joel Aronson (Aronson) concerning the overall trustworthiness of the MTA's time accounting system.[12]

At hearing, the MTA conceded that certain nonchargeable activities were misallocated to chargeable program codes. The Charging Parties contend that it is not plausible that staff misallocated only the hours that the MTA identified and suggest that the Commission infer that further significant misallocated nonchargeable activity was occurring. However, the record does not support the Charging Parties' hypothesis. Despite the exhaustive evidence about the MTA's activities, the evidence contains no hint that the MTA concealed nonchargeable activity. Therefore, we conclude that the Charging Parties' argument on this point is merely speculative. Absent evidence to the contrary, we are persuaded that the instances of significant misallocated activity identified by the MTA are the only ones that occurred, and the assessed amount of the fee has been reduced to reflect those misallocations.

Finally, contrary to the Charging Parties' repeated contentions, the undisputed fact that individual MTA staff members allocated identical activities to different program codes does not render the Union's entire time reporting system unreliable. Instead, we are persuaded that, in a service industry, there are obstacles to precisely describing and labeling the activities of employees. The approach apparently advanced by the Charging Parties, to have all employees attending a staff meeting, for example, identify the meeting and code the event as "staff meeting," casts no light upon the chargeable or nonchargeable content or nature of the meeting. Instead, it is more appropriate to look at the overall purpose of an activity, or the individual's purpose in engaging in the activity, when ascribing an activity code and evaluating the activities' chargeable or nonchargeable character.

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9. Although the charging parties rely on *Knowles* v. *Gilman*, 362 Mass. 642 (1972) in support of their position that they bear no burden of proof or production, that case is inapposite. Unlike agency service fee challenges, *Knowles* involved a bailor/bailee relationship where there is no discovery available to a bailor to enable it to determine what occurred while an item was in the possession of a bailee.

10. Although the Charging Parties' argued that all litigation burdens remain unalterably on the MTA, they produced extensive evidence, including approximately 1,400 exhibits, largely secured during the pre-hearing discovery process, pursuant to 456 CMR 17.13, in an effort to undermine the Union's chargeability assertions.

11. For example, the MTA offered detailed charts accompanying Janet Strecker's affidavits correcting misallocation of nonchargeable activities within the Affiliate Service Division.

12. The Charging Parties criticize, at some length, aspects of the design and implementation of Aronson's test of the time keeping system. They object to the admission of Aronson's report into evidence and argue that the hearing officer should not have relied on his conclusions. However, we need not determine whether Aronson's report was properly admitted into evidence because the record contains sufficient evidence, apart from Aronson's report, to support our finding that the MTA's record keeping was reliable overall.

The standard of reasonableness

It is well-established that absolute precision in calculating an agency service fee is not and should not be expected or required. *See*, *e.g.*, *Allen*, 373 U.S. at 122; *Abood*, 431 U.S. at 234, n. 40; *Hudson*, 475 U.S. at n. 18. In their objections, the Charging Parties contend that, to pass constitutional muster, union employee expenses must be allocated directly to the underlying activity. Instead, the MTA allocates an employee's expenses in proportion to the individual's time allocations. Although the MTA's expense system may occasionally result in allocating political expenses to chargeable programs, it is equally likely, based on the record evidence, that collective bargaining expenses may sometimes be assigned to nonchargeable programs. Overall, we consider the MTA's expense allocation methodology to be reasonable. We are not persuaded that a union must separately detail and track each individual expense to an isolated underlying activity with the rigidity and specificity suggested by the Charging Parties.

Likewise, we are not persuaded by the Charging Parties' objections to the value per hour methodology used by the MTA and relied on by the hearing officer in determining the value of staff time misallocated to chargeable activities. Instead of determining the individual hourly wage rate for each of its professional staff, the MTA calculated the mean personnel cost for each regional or divisional office. The root of the Charging Parties' complaint is that the resulting value per hour figures lack precision. We conclude, however, that the value per hour figure is a reasonable and appropriate accounting method. The MTA's value per hour for its divisional staff is higher than any individual employee's hourly rate, because it builds the support staffs' salary into the equation. Therefore, using the value per hour figure, as opposed to an individual's salary, favors the Charging Parties.

We cannot achieve certainty, complete accuracy, or absolute precision in setting an agency service fee. An agency fee calculation cannot be made with mathematical exactitude because it is largely based on human components. We will not require a union's employees to document their activities with unerring meticulousness and will not require absolute precision concerning the costs of undertaken activities and their corresponding, distinct expenses. It is sound labor policy, as well as plain common sense, to accept reasonable, good faith estimates instead of the precision suggested by the Charging Parties.

Deviations from the MTA's Initial Demand

The MTA argues that, in certain instances, the Charging Parties should be charged more than it originally demanded of them. The MTA represents that there have been increases in areas where a portion of total costs had been erroneously omitted when calculating the initial demand, or where charges were sought for activities that had been originally, and mistakenly, designated nonchargeable. We conclude that Charging Parties had an opportunity to explore evidence of the intended charge and we permit the MTA, in some instances, to increase portions of its demand provided that the chargeable costs of each division does not exceed the original demand. Because the Charging Parties had sufficient notice of and an opportunity to explore evidence concerning the intended change, we conclude that the Charging Parties were not unduly prejudiced by any deviations from the MTA's initial demand.[13]

Therefore, the MTA is permitted to restore gross figures to its expenditure baseline and is permitted to fully charge for Administration and Personnel 2.0 — the property management account. The MTA is permitted to restore gross costs to programs and divisions because including the gross amounts provides a more complete and accurate picture of the MTA's overall costs for the year at issue. Moreover, we perceive no *Hudson* issues that are implicated here. Finally, because outside sources of revenue were fully reviewed and classified through the hearing process, there was no prejudice to the Charging Parties by permitting the MTA to insure total costs in certain areas over the costs in the original demand.

We are not persuaded by the Charging Parties' argument that, by permitting NEA revenues or grants to be restored to the demand, they are being "double billed" by the MTA and the NEA. The Charging Parties argue that, it is possible that the NEA charged fee payers for its grants to the MTA, while the MTA now seeks to also charge for the same revenue. However, the record evidence does not indicate that non-members are being billed twice because no evidence concerning the NEA's expenditures has been introduced. Instead, the parties agreed that the NEA portion of the fee would be ten percentage points less than the MTA's final chargeable fee.

Commission precedent indicates that the chargeability of union expenditures should be examined at the point of expenditure. *Brown and Chicopee Fire Fighters*, 14 MLC at 1252, n.8. Accordingly, local grant monies originally deemed nonchargeable are appropriately removed from the MTA agency fee equation. By determining that local support costs should be demonstrated at the local hearings, we recognize that, in this instance, we may effectively be raising the MTA fee, but we leave open the possibility of recovery of some of the money at the local hearings. Finally, we concur with the hearing officer's recommendation that the MTA be permitted to restore revenues from non-union sources. In contrast to union expenditures, whose chargeability must be determined at some point, outside revenues should be considered here because they are overall assets available to the MTA, and provide a complete picture of the MTA's finances.

Contrary to the Charging Parties' assertions, our May 11, 1993 Ruling does not preclude a union from ever varying from a dollar figure delineated in its demand. Instead, our prior ruling notes that unions are not required to "calculate the fee which they demand be paid by fee payers with absolute precision at the time of the

13. The Charging Parties' access to the Union's underlying books and records provides an opportunity to discover or explore possible discrepancies between the figures cited by, or calculated by, the MTA in its demand and its general ledger.

demand." Implicit in the Ruling is the notion of good faith mistakes in calculating the fee. Instead of prohibiting any variation from a demand, our ruling only acknowledged that variations create "a potential for prejudice that, depending on the circumstances of the case, might not be cured by permitting the fee payers ample time to prepare their rebuttal of the union's evidence." Therefore, our Ruling held that the MTA could not seek to charge for an extensive Legal Services program originally deemed nonchargeable, where discovery had not been undertaken, and where the Union had represented, at hearing, that it was not seeking to charge for the program.

Because we are persuaded that the Charging Parties would be unduly prejudiced by their consideration at this time, we will preclude the MTA from seeking to charge for costs in Communications program 1.4, Communications program 2.2, and Research program 1.2. In addition, as we more fully detail, *infra*, we will not permit the MTA to charge for the Communications Division Administration Program, 2.3.

We now review the parties' significant chargeability challenges by MTA Division. As previously indicated, unless otherwise detailed below, we adopt the findings of fact and recommended conclusions contained in the Recommended Decision.

Division of Affiliate Service

The Charging Parties argue that the MTA's Affiliate Services Division was the heart of the MTA's political machine. In support of their argument, the Charging Parties objected to the finding that "reenergizing local leaders was a priority." However, virtually all regional managers decried the lack of energetic leadership at the local level during their testimony. Therefore, compensating for the weak local leadership significantly burdened the Affiliate Service field staff.

The record reflects that there were collective bargaining difficulties encountered during the year in question, including the profound effect of the economic recession, the emergence of health insurance coverage as a significant and complex bargaining issue, and the protracted nature of the difficult negotiations; none of which are challenged. The MTA's quarterly division reports, even during the period of the Union's Question-3 campaign, confirm that field staff were enmeshed in contract or mid-term negotiations, grievance filing and processing, lay-off and other budget cutting disputes, and a myriad of other representational responsibilities. The Charging Parties' contention that the Question-3 campaign took priority over the division's collective bargaining activities is not supported by the weight of credited record evidence.

It is uncontroverted that Affiliate Services Director Bonazzi was responsible for coordinating the Union's Question-3 campaign. There is also no dispute that the Affiliate Services field staff performed campaign functions. However, the Charging Parties challenge the findings that the field staff had a finite campaign role and that the division's campaign activities consisted primarily of the actions of Bonazzi, his meetings with a few others and some larger scale meetings. Despite the Charging Parties' continued objections to the contrary, the credited testimony from sequestered witnesses subject to extensive cross-examination reveals that Bonazzi's paper production and campaign enthusiasm out-stripped the field staff's political involvement. Therefore, the hearing officer's credibility determinations are entitled to substantial deference, and we decline to disturb them. *See*, *e.g.*, *United Water & Sewer Workers Local 1* v. *Labor Relations Commission*, 28 Mass. App. Ct. 359, 360 (1990).

Nonetheless, the Charging Parties continue to argue that it is simply not credible that field staff felt free to disregard Bonazzi's campaign wishes. Logically, according to the Charging Parties' apparent theory, the Affiliate Services field staff must have been engaging in immense amounts of political activity, about which all of the sequestered witnesses lied. However, no contemporaneous time sheet notations hint at any secret campaign activity. Further, we find no pattern of deception from our review of the time sheets. No trace of secret campaign activity has been noted in the thousands of submitted exhibits. No hint of a covert Affiliate Services field staff campaign is present in the testimony. To the contrary, all of the record evidence supports a finding that the Affiliate Service field staff played a limited role in the MTA's political activity.

The field staff's political activity was isolated and enumerated by Janet Strecker, whose affidavit forms a basis for the adjustments for misallocated nonchargeable time undertaken in the Recommended Decision. We find that, on this record, the MTA met its burden of persuasion that its political time and activities can be isolated and segregated. We are persuaded that Strecker's testimony, including the charts contained in her affidavit, contain a reasonable, good faith ledger of the Affiliate Service staffs' primary political activities.

The hearing officer, who had the full and protracted opportunity to observe Janet Strecker's manner and demeanor, found her testimony credible and persuasive, and that finding is entitled to substantial deference. *United Water & Sewer Workers Local 1* at 360. Further, we do not find that the evidence identified by the Charging Parties dictates a contrary result.

We are not persuaded that the Office of Campaign and Finance reports filed by the MTA materially undermine Strecker's credibility. We reject the Charging Parties' assertion that the filed reports are proof positive that the MTA has "cooked its books" because that claim is not supported by the credited evidence. The Charging Parties' concern is that political hours attributed to MTA employees in the campaign forms do not comport with the time sheet totals. Only a portion of the MTA's employees keep time sheets. The hours of administrative and support staff, who do not keep time sheets, are included in the campaign form totals. Therefore, by their very nature, the campaign reports would be expected to lead to different political activity time totals than the time sheets. Moreover, our independent review indicates that the time records kept by the MTA staff recorded more political or other nonchargeable hours on their time sheets than they recorded on the campaign finance forms. Therefore, the Charging Parties' suggestion that the MTA disclosed its full range of Question-3 activity to comply with campaign finance laws, but engaged in a cover-up of that activity for agency fee purposes, is not supported by the record.

Next, the Charging Parties contend that the political activities conceded by the MTA in Strecker's affidavit and supplemented in the Recommended Decision, are grossly underinclusive. Instead, in Appendix D to their Challenges to the Recommended Decision, the Charging Parties propound their view of the political time that should have been excluded from the MTA's chargeable costs. We are not persuaded, however, that Appendix D has probative value.

We reject the notion, implicit in the listing of events in Appendix D, that any gathering at which a nonchargeable topic is referenced becomes a fully nonchargeable event.[14] For example, the Charging Parties include TASC meetings, staff meetings, and management meetings in their proposed list of nonchargeable events. However, the record evidence discloses that the political content of any TASC meeting was incidental to its overall function. We also find that the staff and management meetings the Charging Parties reference in Appendix D were chargeable because the overriding purpose of those meetings was related to the overall mission of the MTA as bargaining representative.

Moreover, we are not persuaded of the accuracy of the items detailed in Appendix D. The Charging Parties contend that a graphic example of the Recommended Decision's failure to identify and account for all MTA political activity is the asserted failure to deduct staff time for a Question-3 campaign staff appreciation luncheon held in Boston on November 28, 1990. Appendix D lists a limited and disparate group of Affiliate Service staff members the Charging Parties' Union attended the luncheon. For the afternoon in question, however, alleged attendee J. Reilly's time sheets reflect five hours of negotiation and Commission activity performed in Boston on behalf of the Sandwich local association. Two other alleged attendees were higher education staff members E. Suarez and Manager Tony Ross, whose routine work site is at the MTA's Boston headquarters. For the afternoon in question, Suarez recorded six hours of contract maintenance and grievance processing activity involving the Massachusetts Society of Professors and the Massachusetts Community College Council on her time sheets, while Ross recorded six afternoon hours to the higher education special constituency group. Except for the time sheets, we find no other evidence indicating the activities or whereabouts of employees Ross, Suarez and Reilly for the afternoon of November 28, 1990. Therefore, the evidence does not demonstrate that the cited individuals were at a staff luncheon at the Boston Holiday Inn. Instead, an inference arises that the November 28 luncheon entry in Charging Parties' Appendix D recounts nothing more than a list of MTA field staff employees who happened to be working in Boston on the afternoon in question.

The unreliability of Appendix D is further illustrated by exploring the second entry in the "miscoded hours" chart, Appendix D, Tab B, concerning the staff crisis team. Strecker's chart details the July 17, 1990 staff crisis team's meeting as a political activity and attending staff members' time was duly isolated and detailed. Costs attributable to that meeting were deleted from chargeable costs in the Recommended Decision. However, the Charging Parties assert that the failure to deduct the value of 2.5 hours of employee Devlin's time was in error because an internal MTA memo indicates that he was invited to the meeting. However, Devlin's time sheet reveals that he was working in the MTA's Northeast Regional office during the time in question, not attending the meeting in the Central Regional office in Auburn. Therefore, we find that the information contained in Appendix D does little to answer our inquiry into the Union's chargeable costs.

Finally, the Charging Parties challenge the hearing officer's calculation of misallocated political costs within the Affiliate Service Division. We have reviewed the hearing officer's calculations in the Recommended Decision and have determined that they are based on the comprehensive Strecker affidavit and charts, supplemented by her independent review of employees' time sheets. We are satisfied that the calculations are sound and reasonable.

We reject the Charging Parties' assertion that the Commission should be bound by the figures and calculations proffered by the MTA in its post-hearing brief. Contrary to the Charging Parties' position, the MTA's post-hearing calculations are not admissions. Instead, any admission made by the MTA is contained in Strecker's affidavit and the related testimonial and documentary evidence. Moreover, although the Charging Parties object to the hearing officer's $1,870 variance from the MTA's figures in the Affiliate Services program 1-4 totals, we note that the variance from the MTA's calculations in program 5 by $4,968 is, in this instance, to the Charging Parties' benefit.

We now examine significant objections to individual chargeability recommendations within the Affiliate Services program areas. Under program 1.3, the Charging Parties assert that "Beat CLT Day" time was inconsistently treated by deleting instructors' time but permitting time charges for staff either attending the course or the Williamstown conference in general. Adopting the Charging Parties' suggestion, that all staff time during "Beat CLT Day" be considered nonchargeable, is unwarranted. The record suggests that, except for the designated presenters, only one staff member signed in for the Beat CLT seminars and there is no evidence about how long that person stayed. The record also demonstrates that the central purpose of the Williamstown conference was to discuss matters related to collective bargaining matters. Moreover, the record is clear that the Williamstown conference is an annual event attended by the majority of MTA staff. Therefore, attendance at that conference was not an additional Question-3 campaign expense. Therefore, unlike the designated presenters, the weight of the evidence shows that no staff members attending the Williamstown conference spent an identifiable amount of time at the Beat CLT seminars, rather than other legitimately chargeable activities. Accordingly, deleting the time and costs for presenters

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14. The Charging Parties rely on *Schneider* v. *Colegio de Abogados de Puerto Rico*, 917 F. 2d 620, 633-34 (1st Cir. 1990) for the proposition that activities or expenditures that involve both chargeable and nonchargeable matters must be considered wholly nonchargeable. In *dicta*, that court observed: "[W]here the permissible and impermissible are intertwined beyond separation, the objector should be entitled to a full rebate for the cost of the function." This hypothesis is not inconsistent with our approach: whenever chargeable and nonchargeable costs may reasonably be separated, the costs, attributable to nonchargeable activity will be deleted from the otherwise chargeable costs.

at Beat CLT seminars but including other time for other staff at the Williamstown conference that day as a chargeable conference expense, is a fair and reasonable estimate of the day's chargeable/nonchargeable activities.

Both the Charging Parties and the MTA lodge objections to the hearing officer's program 1.4 recommendations. First, the MTA challenges the recommended conclusion that the meetings of the Statewide Crisis Committee concerning a state-wide strike are nonchargeable. The MTA argues that an internal union debate about the desirability of a state-wide strike, involving no actual strike preparation, does not reach the point of implicating M.G.L. c. 150E, Section 9A. Therefore, the meetings are lawful, and chargeable, concerted activity.

However, because strikes by public employees are prohibited by Section 9A, we conclude that discussion about the desirability of a state-wide strike is not a legitimate activity undertaken in furtherance of the MTA's collective bargaining agreement. Therefore, we find that the discussion about potential strike activity are not germane to collective bargaining within the meaning of *Lehnert*. Therefore, we also reject the MTA's companion argument that the $2,657 travel costs of NEA-affiliated personnel who came to the June Affiliate Service Retreat for the sole purpose of discussing their state's experiences with state-wide strikes should be chargeable.

Contrary to the Charging Parties' contentions, however, we do not find that the hearing officer improperly deleted the speakers' travel costs while permitting charges for staff time at the Affiliate Service Retreat. There is no indication that the MTA incurred any additional costs or expenses due to its staff's presence at the strike-related presentation because the record demonstrates that the staff would have been present at the Annual Retreat and incurred substantially the same charges and costs, regardless of the isolated strike presentation. Overall, the record demonstrates the chargeable nature and purpose of the retreat. The hearing officer credited testimony concerning the multi-faceted chargeable benefits of such a gathering, including the opportunity for professional interchange with similarly situated colleagues, and we decline to disturb that credibility finding. *See*, *United Water & Sewer Workers Local 1*. Therefore, deleting the additional costs for the presenters' travel, while permitting charges for staff time, is a fair and reasonable chargeable/nonchargeable allocation for a portion of the overall chargeable Affiliate Services Retreat activity.[15]

Under program 1.4, the MTA also challenges the conclusion that April 17 and 18, 1991 activity at the University of Massachusetts was nonchargeable as an unlawful withholding of services, arguing that, with the employer's consent, routine activities were not expected on those days. Regardless of whether the activities constituted a withholding of services, they were public relations exercises designed primarily to influence the higher education budget within the political process. Therefore, we find that related staff activity is nonchargeable.

However, we reject the Charging Parties' assertions that *Lehnert* prohibits charges for virtually all forms of informational picketing and we decline to adjust charges for other higher education informational picketing activity. We have consistently recognized that informational picketing in furtherance of a union's bargaining position, is an activity protected by Section 2 of the Law, *City of Fitchburg*, 2 MLC 1123 (1975), and, absent evidence that picketing is for general political purposes, we find it to be permissible.

We also decline to disturb the hearing officer's conclusions concerning the September 25, 1990 Worcester protest march. The record fully supports the finding that the march was a method of communicating a position concerning local working conditions; namely, an effort to avert immediate lay-offs. The pay voucher of the relevant MTA employee provides no support for the contention that the march was in any way related to the Question-3 campaign. The voucher clearly delineates three separate activities on the date in question, including the march, anti-CLT work, and a Worcester City Council meeting.

The Charging Parties assert that *Lehnert* prohibits the charging of activities concerning the Commission under Affiliate Services 1.5 because litigation must be brought "on behalf of" a bargaining unit to be chargeable. *Lehnert* indicates that "litigation that does not concern the dissenting employees' bargaining unit" is nonchargeable. *Lehnert*, 500 U.S. at 528. In this, *Lehnert* appears to follow the United States Supreme Court's instruction in *Ellis* v. *Railway Clerks*, 466 U.S. 435 (1984) that "litigation before agencies or courts that concerns bargaining unit employees" was chargeable, and "litigation not having such a connection with the bargaining unit" was not. *Ellis*, 466 U.S. at 453. Moreover, the nonchargeable litigation referred to in *Ellis* and *Lehnert*, including employment discrimination, bankruptcy actions, and a challenge to the airline industry's mutual aid pacts, is markedly different from Commission proceedings. Because resorting to the Commission's proceedings is an essential extension of the collective bargaining process, and is analogous to grievance processing, a union's activities at the Commission must be chargeable.

The Charging Parties file numerous objections to the chargeability assessments involving program 1.0 direct costs. However, we find that the record supports the recommended charges for all items and the recommendations are adopted.

The MTA, on the other hand, contends that expenses concerning the Salisbury override campaign should be fully chargeable. The MTA does not challenge the standard recommended when reviewing override campaigns: that, to be chargeable, the revenues generated by an override must necessarily be committed to funding extant collective bargaining agreements. Instead, the Union argues that the standard is met in the Salisbury situation.

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15. An amount hearing of this magnitude necessarily involves drawing lines. As the courts have recognized, that process is imprecise. Sound labor policy and the *Hudson* requirement for a reasonably prompt decision sometimes require the use of reasonable estimates, fair approximations and, on occasion, a common sense approach. Otherwise, the process will be mired in accounting minutia and technicalities: an audit by litigation approach that will overburden the Commission and the courts, while unnecessarily delaying the fair adjudication of the rights being raised by the agency fee objectors.

The record demonstrates that the Salisbury override was initiated exclusively for the purpose of rehiring teachers who had been laid off in mid-year and mid-contract. The record further demonstrates that all override revenues were used to restore teaching positions. Although, apparently by agreement, the override revenues were used to restore school funds, they flowed into the general municipal budget and were not necessarily committed to benefit the school contract. Accordingly, the Salisbury override costs are nonchargeable.

Under program 3.3, the Charging Parties assert that employee Pippo's computer literacy training, in the total amount of $1,251, must be proportionally charged, due to his current role as a union organizer. The Charging Parties appear to argue that Pippo's ideologically neutral computer literacy training is not fully chargeable because the acquired skill may be used for nonchargeable organizing activity. We reject this speculative and unworkable "ultimate use" test. The record reveals the MTA's overall on-going emphasis in field staff computer literacy, as well as its attempt to create a collective bargaining database and contract retrieval system. Further, as the hearing officer correctly noted, the record indicates that Pippo performs routine field representative functions, including crisis activities and grievance arbitrations.

The MTA concurs with the Charging Parties that the chargeability of the MTA's grant of a salary to the President of the USA local, a program 3.0 direct cost, is difficult to assess on this record. However, we do not adopt the Charging Parties' further contention that the grant is fully nonchargeable. Instead, consistent with the treatment of other grant items to local associations, the grant is more appropriately analyzed at the local hearing. The $16,310 expenses, like other local support items, will be removed from consideration in this proceeding.

The MTA objects to the hearing officer's recommendation concerning the program 3.0 direct cost for a UMass flyer. However, we concur with her conclusion that the flyer runs afoul of *Lehnert*'s prohibition against charging for general public relations costs that are not germane to collective bargaining.

In addition to their overall objections to the deletion of misallocated political time, the Charging Parties contend that, under program 4.1, misallocated political time cannot be deleted, because the higher education manager indicated that higher education staff used programs 4.1 and 4.2 interchangeably. However, misallocations to 4.1 and 4.2 were tracked and corrected in the Recommended Decision, in accord with the information contained in Strecker's affidavits. The record does not suggest that further reductions in the chargeability of higher education staff time are warranted.

The Charging Parties file several objections to the divisional management and administrative program. First, the recommendation that TASC meetings be considered fully chargeable is challenged. However, the record, supports the hearing officer's findings concerning the nature, role and purpose of the meetings. Therefore, we find that any political content is incidental to the TASC's overall representational function. As the MTA correctly notes, of the over two hundred agenda items covered by the 1990-91 TASC meetings, less than twenty concerned political topics.

Finally, the Charging Parties challenge the recommendation that program 5.0 costs be apportioned according to the division's overall chargeable / nonchargeable costs. The apportionment of administrative or management expenses is consistent with the Commission precedent articulated in *Newton I*, 13 MLC 1589, 1596 (1987) and *Brown and Chicopee Fire Fighters*, 14 MLC 1241, 1253 (1987). Divisional management costs are proportionally charged due to the reasonable presumption that management and administrative costs correspond to, and are reflective of, the activities undertaken by a division as a whole. Here, the Charging Parties called into question the presumption of proportional chargeability of Affiliate Services program 5.0 and argued that Affiliate Services' management costs were not reflective of the division's overall activities. The evidence adduced concerning Bonazzi's Question-3 campaign involvement and his time sheet errors in the early stages of the campaign suggested that his management costs may contain a disproportionate level of political activity. Therefore, the costs of Bonazzi's and the regional managers' political meeting involvement, originally allocated to program 5.0, were deleted from the management program cost total, before the remainder was proportionally charged. We endorse and adopt the hearing officer's recommendation in this regard.

We specifically reject the Charging Parties' contention that the proportional charge for program 5.0 is flawed because of Bonazzi's asserted further political activity. The nature of a proportional administrative charge assumes a degree of political or otherwise nonchargeable activity, and the program is proportionally chargeable because of that activity, not despite it. The costs of the exclusively, and arguably disproportionate, political activity, originally misallocated to the division's management program, as identified in Strecker's reliable affidavit, have been deducted from program 5.0 costs. The remaining program 5.0 costs are further reduced by 22.4%, to reflect the division's overall chargeable/ nonchargeable ratio, thereby protecting the non-members' rights and interests.[16]

The Charging Parties' contention that the Affiliate Services divisional management program was uniquely treated is correct. We concur with the hearing officer that only in Affiliate Services was disproportionate political or other nonchargeable activity arguably demonstrated. Therefore, in Affiliate Services, isolated political costs were deducted before the management and administrative costs were apportioned.

MODIFIED TOTAL COSTS OF AFFILIATE SERVICES	$5,613,075
MODIFIED CHARGEABLE COSTS OF AFFILIATE SERVICES	$4,500,950

16. This figure is unaffected by the deletion of the $16,310 grant to the USA local from the division's overall and chargeable cost totals.

Division of Legal Services

At the outset of their objections to the recommendations concerning the Legal Services Division, the Charging Parties renew their Motion for Sanctions due to the MTA's asserted dilatory discovery tactics. The Commission has previously considered the Motion, indicating that the MTA had complied with Rule 17.13 by having legal service materials available for review. Because we find that the MTA complied with Rule 17.13, the Charging Parties' request that the evidence relating to divisional programs 2 and 3 be excluded is not warranted. Therefore, the renewed Motion is denied.

The Charging Parties contend, that, under program 2.1 MTA management meetings are largely political and nonchargeable and that General Counsel Clarke's meeting attendance costs must be excised from the chargeable totals. After an independent review of the totality of the management meeting agendas in the record, we find that political discussion is incidental to the overall purpose and function of the meetings. The evidence does not support the Charging Parties' perspective that political activity was either a chief or primary component of the MTA's management meetings.

The Charging Parties' further suggestion that managers be required to segregate their time into chargeable and nonchargeable categories, topic by topic, minute by minute, during every meeting, is unwarranted and unworkable. The level of detail urged by the Charging Parties could adversely affect the conduct of the Union's representational work by giving rise to endless debate about the chargeability and exact duration of each meeting discussion topic.

We find that Clarke's legal updates to MTA staff and local Union Presidents are fully chargeable. The updates are largely neutral presentations of current legal developments, including descriptions of legislative enactments and court cases affecting the collective bargaining and educational environment. We concur with the MTA that the allegedly nonchargeable political update cited by the Charging Parties, a memo advising staff and elected Union leaders of the federal legislation extending FICA taxes to public employees, provides advice to Union representatives about a possible area of future impact bargaining.

The Charging Parties object to charging for agency service fee litigation for two reasons: 1) it is considered nonchargeable extra-unit litigation; and 2) nonmembers should not be required to subsidize arbitrary and excessive demands. Extra-unit litigation, as defined in the *Lehnert* and *Ellis* decisions, was not at issue here, because program 1.0 activities, including the representation of individual educators, were not considered. We regard agency service fee litigation to be part of union governance/contract administration, which is analogous to processing grievances. Therefore, because agency service fee litigation involves pursuing collective bargaining rights as the exclusive bargaining representative, we believe it is fully chargeable. Moreover, the MTA and NEA portion of any fee affects all MTA bargaining units. Finally, the record does not support the Charging Parties' contention that the Union's fee demand here was arbitrary. In the first full-dress, state-wide amount hearing, the MTA successfully demonstrated that over 80% of its assessed fee was chargeable.

The recommendation that Clarke's two hours of activity at a Health Care for All conference is chargeable is challenged by the Charging Parties because the gathering was sponsored by a political advocacy group. The record demonstrates that health insurance was a paramount and on-going collective bargaining concerning during the year in question. In addition, as General Counsel, Clarke supervised related Commission litigation, including litigation concerning health care coverage. *See*, *e.g.*, *Board of Regents*, 19 MLC 1248 (1992). In this context, we permit the limited charge for the General Counsel's health care conference attendance.

Despite the Charging Parties' objection, we find that Clarke's work on behalf of the higher education bargaining units is chargeable. The Charging Parties assert that the record is devoid of evidence that Clarke's work in the higher education arena related to funding or ratifying a specific, previously-negotiated contract. However, Clarke's testimony indicates that she attended the Higher Education Conference to speak about the governor's refusal to fund the newly negotiated collective bargaining agreement. The MTA's response to the ongoing refusal to fund the contract is chargeable lobbying performed in the limited context of contract ratification or implementation. *Lehnert*, 500 U.S. at 522.

The MTA objects to the recommendation that staff time spent successfully representing the MTA in connection with a strike petition filed by the Winchester School Committee is nonchargeable. We concur and, absent a finding that the MTA engaged in unlawful conduct in violation of no strike prohibition in M.G.L. c.150E, §9A, we consider defending against an unwarranted strike petition to be chargeable activity. Accordingly, the $418 value of the expended staff time will be added to program 2.1 chargeable costs.

MODIFIED CHARGEABLE COSTS OF LEGAL SERVICES $56,454[17]

Division of Communications

The MTA poses an overall objection to the analytical framework the hearing officer employed with respect to the MTA's publications. The hearing officer considered MTA TODAY to be a members-only benefit and declined to consider it chargeable under Commission Rule 17.04(1)(e). The MTA argues that, under Rule 17.04, its publication is a vital internal communication device, not merely a tangential benefit.

The record, however, does not support the MTA's contention that MTA TODAY is merely an internal union communication. Instead, the paper's circulation includes courtesy copies to some legislators, school committee members and Department of

17. The chargeable/nonchargeable divisional percentage, 3.5%, is unaffected by the addition of $418 in chargeable costs in program 2.1. Therefore, the chargeable costs in program 3.0 are unchanged.

Education personnel. More fundamentally, the MTA stipulated that the publication is sent to members only. Nonmembers are being double-billed for the publication, by being assessed an agency fee for its production and by being charged a surcharge for its distribution. *See*, *Dolan and East St. Louis Federation of Teachers*, 10 PERI 1078 (1992). *Compare Lehnert*, 643 F. Supp. 1306, 1328 (W.D. Mich. 1986) *aff'd*, 881 F.21 1388, 1392 (6th Cir. 1989), *aff'd in part* 500 U.S. 517 (1991) (union publication available to all unit members chargeable to the extent it chronicles chargeable activity.) Therefore, because we conclude that the MTA TODAY is a nonchargeable members-only benefit, we need not review any individual articles.

The MTA also objects to the nonchargeable designation of several articles in *Frontline*, the internal union leadership publication. Having reviewed the challenges and the articles, we conclude that the record supports finding the Washington State strike article, the "Controlling the Crisis" segment and the Communications Ideas promotional piece are nonchargeable.

The Charging Parties challenge the hearing officer's assessment of the chargeability of program 1.6, Internal Communications/ Division Support, arguing that Manager Wollmer's testimony concerning his staff's activities should be excluded from the record. As in other divisions, the divisional manager was permitted to provide evidence concerning the nature of the division's activities and the staff's corresponding role. We overrule the Charging Parties' renewed hearsay and best evidence objections to Wollmer's testimony. The hearing officer found Manager Wollmer's testimony credible, and we will defer to that finding. *United Water & Sewer Workers Local 1* at 359. The hearing officer also reviewed Wollmer's chargeable time designations and calculations in conjunction with relevant time sheets and, in certain instances, modified Wollmer's calculations.[18] We have reviewed the hearing officer's chargeable time recommendations, and we adopt them in their entirety. As a result, approximately 23% of hours and expenses originally allocated to program 1.6 are being charged to nonmembers.

The Charging Parties challenge the chargeability of staff member Polidori's higher education assignments. The record reveals Wollmer's testimony that Polidori assisted higher education locals with their collective bargaining situation and their furloughs. Polidori's contemporaneous time sheets are in accord with Wollmer's recollections. It is beyond dispute that higher education personnel were furloughed. *See Massachusetts Community College Council* v. *Commonwealth*, 420 Mass. 126, 130 (1995). The Charging Parties' repeated claims that Polidori was working full-time on the "Question 3" campaign does not comport with the credited testimonial and documentary evidence.

Clear and substantial record evidence supports finding that Polidori was involved with the legislature in connection with the higher education contracts. The Charging Parties assert that Polidori's time in this regard is nonchargeable because the legislature failed to vote on specific funding for a collective bargaining agreement. The legislatures's failure to act on the newly-negotiated contracts was precisely the issue, and the successor agreements remained unfunded. *See*, *e.g. Alliance, AFSCME/SEIU* v. *Secretary of Administration*, 413 Mass. 377 (1992). Finally, we concur with the manner in which the Recommended Decision identifies the segregated and deleted the value of Polidori's nonchargeable work on the Weld budget issue.

The Charging Parties' final Communication Division objection concerns program 2.3. The Charging Parties correctly note that the program, which includes, among other things, division management and other administrative activities, was originally deemed nonchargeable in the MTA's demand. Outside of the Union's post-hearing brief, we find no indication that the Charging Parties received notice of the MTA's intention to charge for the program. By proportionally charging the program, the hearing officer treated it in a manner consistent with all other division management and administrative expenses. However, we conclude that, under these circumstances, program 2.3 will be entirely nonchargeable. The $8,881 program 2.3 total, representing 5% of the program's overall costs, will be deducted from the division's chargeable total.

MODIFIED CHARGEABLE COSTS OF PROGRAM 2.3	$0
MODIFIED CHARGEABLE COSTS OF COMMUNICATIONS	$33,529

Division of Professional Development

The standard recommended by the hearing officer for assessing the chargeability of professional development activities was whether activities related to improving the working conditions or improving the professional competence of members or represented bargaining units. The Charging Parties object to the hearing officer's calculations in this Division on the ground that activities broadly relating to improving the profession in general were deemed chargeable. However, we find that the standard was not applied as broadly as the charging parties contend. Rather, the hearing officer determined chargeability based on whether the professional development activities at issue improved the working conditions or professional skills of the particular teachers represented by the MTA. *See*, *e.g.*, *Antry* v. *Illinois Educational Labor Relations Board*, 552 N.E.2d 313, 348.

The Charging Parties argue that the costs of a special education survey should be nonchargeable because the survey was ultimately used in connection with the political process. Unlike the charging parties, we do not believe that the chargeability of the questionnaire should turn on how the results may ultimately be used but whether it was designed to elicit information about working conditions. In our view, therefore, questionnaires of the kind at issue here are chargeable when they are used to determine the needs of the employees in the bargaining unit, although any subsequent political

18. We note that numerous hours of chargeable activity, not so designated by Wollmer, were revealed during the hearing officer's review. *See*, *e.g.*, Recommended Decision, n. 67. Where Wollmer's chargeable designations were overinclusive, the non-members' rights were protected by the deletion of the nonchargeable hours. However, the hearing officer declined to add chargeable costs revealed during her independent review.

activity relying on that kind of questionnaire may ultimately be nonchargeable at the time it is used for political purposes. Here, the internal union survey comprehensively questioned special educators about their working conditions and was fully chargeable.[19] Further, Todd's legislative testimony concerning special education matters was appropriately considered nonchargeable. Accordingly, we conclude that the cost of surveys conducted to research or ascertain the professional development interests or needs of bargaining unit members are chargeable.

The MTA objects to the recommendation that certain credit courses sponsored by the division are nonchargeable. The record reflects that a nonmembers' surcharge was advertised in connection with certain professional development course offerings. The surcharge indicates that, at least to some extent, the MTA is seeking to double-charge nonmembers for the course offerings, rendering them nonchargeable.

Relying upon excerpts of Manager Andelman's testimony and an aspect of an internal memo, the Charging Parties argue that workshops sponsored by the division are nonchargeable members only benefits. However, the internal report relied upon by the Charging Parties does not contradict the totality of Andelman's testimony. We conclude that the finding that workshops are inclusive, rather than exclusive, is supported by the record.

Under program 4.1, the Charging Parties object to charges for staff support to MTA designees to the Massachusetts Board of Education and to the Massachusetts Advisory Commission on Educational Personnel, a body considering teacher preparation and certification. The MTA has seats on the boards due to its role as a bargaining representative for educational personnel. The MTA's costs are chargeable because the bodies' subject matter affect bargaining unit members' terms and conditions of employment, thereby implicating the Union's representational responsibilities. The Charging Parties' objection, that the record does not establish that the MTA is an exclusive representative to anyone, overlooks the MTA's uncontested affiliation and unified dues structure. Moreover, the Charging Parties have posed no objection to the initial recommended finding: The MTA is a public employee organization that represented 60,276 full-time equivalent employees of municipal and regional school systems and the Massachusetts higher education system. Recommended Decision, at p. 12.

Objections are also lodged to charges for activity relating to the Joint Task Force on Teacher Preparation because the Charging Parties consider the entity an advisory body concerned with education reform. However, it is uncontested that the task force proposal on teacher certification would have statewide effect on bargaining unit employees' working conditions. Therefore, the record supports finding a sufficient nexus between the task force and the MTA's representational role to permit charges for its oversight.

The Charging Parties maintain that the development of "issues papers" addressing major and/or topical educational issues are nonchargeable because they concern issues in play in the legislative process. The record, however, supports finding that the papers were internal discussion pieces, developed to familiarize staff and Union leaders with aspects of educational policy debate. In addition, the credited testimony reveals that the papers were related to enhancing the representatives' collective bargaining skills.

In their challenges, the Charging Parties seem to suggest that the Commission is bound by any individual MTA employee's opinion about the chargeability of Union activities. The hearing officer considered the internal analysis of the Massachusetts Business Alliance for Education (MBAE) education reform proposal chargeable because the proposal dealt with matters affecting working conditions and had collective bargaining implications, including certification requirements, job security, tenure and seniority. The MTA's Director of Research, however, considered the MBAE proposal to be political. The Charging Parties seem to argue that his opinion is dispositive and that, as a consequence, the Professional Development Division's analysis of the proposal is nonchargeable. In our judgment, informed by our expertise in collective bargaining matters, the proposal has clear collective bargaining implications, rendering its internal analysis chargeable.

The Charging Parties assert that massive political activity occurred within program 6.3, while the MTA argues that the program should be fully chargeable. Program 6.3 contains only $3,742 in expenses, incurred for one joint local Union president and superintendents' conference. The record supports the finding that the joint conference had dual purposes and mixed content. The estimate that the conference is 1/2 chargeable, due to its informational aspects and its benefit to collective bargaining relationships, is reasonable and appropriate.[20]

Finally, the Charging Parties challenge proportionally charging the division's management, due to the manager's political activity. The record reveals that, as in other divisions, some of the management activities and related expenses would be considered nonchargeable, a fact assumed in the proportionally chargeable paradigm. However, the record does not establish disproportionate nonchargeable activity within program 7.0.

Accordingly, we make no modifications to the hearing officer's chargeability recommendations in the Professional Development Division.

Division of Research

The Charging Parties assert that the hearing officer erroneously credited the testimony of Research Manager Zollo, especially concerning his stated lack of interest, or involvement, in MTA political campaigns. However, we conclude that the hearing officer's Research Division findings fully comport with the record

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19. We express no opinion as to any program that might be developed as a result of the answers to the survey.

20. The Charging Parties challenge program 6.7 recommendations, arguing that charges relating to a school administrators' conference should have been reduced by one-half. However, the record demonstrates that the administrators' conference under 6.7 is separate and distinct from the program 6.3 joint conference.

evidence, and we decline to disturb her determination concerning Zollo's credibility. *United Water & Sewer Workers Local 1* at 359.

There is no basis for the Charging Parties' continuing claim that Research Employee Danning assisted in Proposition 2 1/2 override efforts. The record reveals that the division answered questions about how Proposition 2 1/2 worked and conducted sessions on how to interpret the financial profiles developed for the MTA Research Division by the Department of Revenue. The contention that the division held workshops on Proposition 2 1/2 overrides is unfounded. Instead, the record supports the finding that divisional staff discussed the provisions of Proposition 2 1/2 and the constraints that the law imposes on the collective bargaining process.

The Charging Parties also argue that the division management program should be nonchargeable, due to Zollo's asserted political activity. The record does not reflect that the political, or otherwise nonchargeable, content of the management program was disproportional to the division's nonchargeable activity. Nonetheless, the hearing officer deducted the cost of Zollo's election day poll-watching activity from the management program before proportionally charging the remaining costs, and we concur with this approach.

We decline to make any adjustments to the recommended chargeability calculations for the Division of Research.

Division of Governance

We adopt the analytical approach and standards articulated and applied in the Recommended Decision concerning the MTA's governance expenses. To summarize: Activities that are necessary to a union's existence, which would take place whether or not the union engaged in nonchargeable activity, are presumptively chargeable. When considering any governance expense, the initial inquiry is whether the activity relates to sustaining, perpetuating or managing a union as an entity. If so, the activity is presumed to be chargeable, unless evidence reveals expenditures related to exclusively nonchargeable activity. *See*, *e.g.*, *Ellis*, 466 U.S. at 448; *Antry*, 552 N.E. 2d at 344. Then, when possible, such exclusively nonchargeable expenses are isolated and deleted from the remaining costs.

With respect to union officers, a union must first establish by credible record evidence that its officers have roles in governing the organization or otherwise sustaining its existence as a collective bargaining representative. If that initial burden is met, union officers' costs are apportioned according to the union's overall chargeable expenditures, unless either party overcomes the presumption by proving a different allocation in fact.

The Charging Parties argue that these standards are inconsistent with Commission and court precedent. However, the standards applied in the Recommended Decision, and affirmed here, are in accord with view of governance expenses detailed in *Newton I*, 13 MLC 1589 (1987). At that time, the Commission indicated:

> We will presume that overhead expenses necessary to maintain an organization's existence are permissible, provided the union has produced some evidence that the expense was incurred in connection with the union's function as a collective bargaining agent.
>
> It would be difficult, if not impossible, to determine whether or to what extent expenses are affected by the amount of impermissible activity undertaken by the union. Indeed, as the court recognized in *Ellis*, the union would presumably incur such expenses in essentially the same amount to operate at all... a charging party could rebut the presumption of permissibility only with evidence that the expenditure was actually incurred in furtherance of an exclusively impermissible activity.

Newton I, 13 MLC at 1596.

The Charging Parties argue that *Brown and Chicopee Fire Fighters*, 14 MLC 1241 (1987), requires the MTA to demonstrate, on the basis of adequate time records, how much time was spent by each officer on chargeable activities. In the absence of officers' time sheets, they contend that the MTA is not entitled to any officers' fee. In *Brown and Chicopee Fire Fighters*, however, the Commission indicated that the officers' salaries were proportionally chargeable expenses. The details of officers' time and expense allocations are largely irrelevant if the officers' salaries are truly proportionally charged. Therefore, the absence of detailed officers' activity and expense records, in this instance, is without consequence.

Therefore, we find that the governance standards have been applied appropriately when considering the Annual Meeting charges of program 1.1. Among other items, delegates at the MTA's Annual Meeting elect the MTA officers, Executive Committee and Board members, set the Union's budget and amend the Union's bylaws. Therefore, the vital expenses are presumptively chargeable. However, we concur with the hearing officer that the costs attributable to an exclusively nonchargeable fundraising event held in conjunction with the Annual Meeting must be deleted from the meetings' costs.

We decline to adopt the Charging Parties' view that the MTA is not entitled to any fee for its Annual Meeting due to a political press conference held at the meeting site. The record reveals, and the Recommended Decision correctly found, that MTA presidents customarily arrive at the annual meeting site on the Wednesday before the meeting's commencement. On Thursday, the date of the political press conference here, the uncontroverted evidence demonstrates that, as is customary, MTA President Bacon hosted intensive pre-convention governance meetings in her hotel room and incurred a related room service charge. Therefore, the record demonstrates that the hotel expenses challenged by the Charging Parties were a function of the annual meeting preparation, not the press conference.

The Charging Parties also contend that *Ellis* cannot be relied upon for the proposition that nonmembers may be charged for all union convention costs. In *Ellis*, the Supreme Court deemed the union's governance convention to be fully chargeable because "if a union is to perform its statutory functions, it must maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult members about overall bargaining goals and policy." *Ellis*, 466 U.S. at 488. In reaching that conclusion, the *Ellis* Court rejected the concern expressed by

Justice Powell that the convention, considered fully chargeable by the court's majority, contained major addresses by prominent politicians. Therefore, the *Ellis* Court recognized that all convention costs are fully chargeable, even if they include some political or ideological speeches or other incidental actions. Therefore, the costs of the MTA's Annual Meeting are fully chargeable.

The Charging Parties contest the fee recommendations relating to Union Board and Executive Committee Meetings, due to the political discussions undertaken at various meetings. The record establishes that the Board and Executive Committee are the Union's governing bodies. The groups' minutes reveal their comprehensive participation in governing and perpetuating the Union as an entity. It is undisputed that political discussions also occurred during Board and Executive Committee meetings. We are persuaded, however, that the overall presumption of chargeable expenses was not rebutted. In accord with the hearing officer's recommendations, we delete certain direct expenses incurred by Board and Executive Committee members with respect to exclusively nonchargeable activity.[21]

The Charging Parties object to proportionally allocating the MTA officers' salaries, based on the chargeable percentage of the MTA's overall costs, arguing that it is undisputed that the officers engaged in nonchargeable activity for the year in question. Again, a presumption of proportionality assumes nonchargeable activity within a union program or expense area. Therefore, the presumption is not rebutted merely by evidence of nonchargeable activity. Instead, the record must demonstrate disproportionate nonchargeable activity.

Here, the MTA met its initial burden of establishing that its officers have a role in governing the organization.[22] On this record, the MTA officers' costs will be proportionally reduced by approximately 47%. The totality of the present record does not indicate that the officers' nonchargeable activity and expenses were disproportionate to the MTA's overall nonchargeable endeavors and costs for the year in question. Therefore, we conclude that the officers' costs should be charged proportionally.

We accept the hearing officer's chargeability recommendations concerning the various MTA governance committees and councils. Although the hearing officer considered the Statewide Membership Committee nonchargeable, the Charging Parties assert that she erroneously and egregiously failed to account for and deduct the committee's expenses. No Statewide Membership Committee charges were deducted because, as indicated in the Recommended Decision, none were incurred during the year in question.[23] No Statewide Membership Committee entries are recorded in the MTA's general ledger. Moreover, it would be imprudent to conclude that charges for all of the policy councils should be forfeited because the hearing officer failed to isolate and delete the costs of the MTA's Statewide Membership Committee.

The Charging Parties challenge the recommendation that, with the exception of "Beat CLT Day," the Summer Leadership Conference is chargeable. Summer Leadership Conference activities are germane to collective bargaining functions and skills. The gathering also fosters an awareness of issues relating to the terms and conditions of employment of educational personnel. The hearing officer estimated the costs of "Beat CLT Day" to be one-fifth of the five day conference total, and that amount was deleted from the total conference cost.[24] In addition, the hearing officer estimated the costs for other nonchargeable conference programs based on their percentage of a day's activities. Contrary to the Charging Parties' view, we find these approximations to be reasonable and well-founded. The remaining Summer Leadership costs are fully chargeable.

The Charging Parties object to considering the conference administration program, program 7.2, fully chargeable because some MTA conferences contained political content. The Charging Parties also appear to argue that program 7.2 should be treated like other divisional administrative program areas and proportionally charged. However, the record confirms that the MTA's conference administrator, whose costs are allocated to program 7.2, devotes most of her time to fully chargeable activities, including the Annual Meeting, the NEA convention and governance meetings. Therefore, we accept the recommendation that, after deleting the expense related to a nonchargeable Teachers Trust Fund activity, the remainder of program 7.2 is chargeable.

Finally, we reject the contention that the Governance Division Manager's admission to allocating approximately thirteen hours of political activity to the division's management and administrative program affects the program's proportional chargeability. The record reveals no suggestion that nonchargeable activity allocated to program 8.1 was disproportionate to that of the division as a whole.

Administration and Personnel/Building Operations

The Union produced evidence that certain expenses, including rent, insurance, building maintenance, audits and accounting, were incurred in connection with the Union's function as a collective

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21. The Charging Parties imply that the hearing officer overlooked the parties' stipulations to specific nonchargeable officers' expenses. However, the record contains no agreement concerning the chargeability of Executive Committee and Board member expenses. Instead, the parties entered stipulations concerning the amount of various expenses to reduce the duration of the cross-examination of the relevant MTA governance witness. The Recommended Decision indicates that the stipulated amount totals were subjected to the hearing officer's independent chargeability assessment. Therefore, the expenses pertaining to exclusively nonchargeable activity have been appropriately identified and the costs deleted.

22. Contrary to the Charging Parties' assertion, the Union need not demonstrate that its officers have a direct role in helping a local with a collective bargaining problem.

23. The Statewide Membership Committee is absent from the list of policy committees that incurred expenses for the year in question. Recommended Decision, at p. 204.

24. The MTA objects to the hearing officer's failure to use gross conference costs, including the cost of room and board, in this equation. We concur with the hearing officer that room and board costs are not true MTA costs for the event because conference attendees reimbursed the MTA for the charges.

bargaining agent. We find that the hearing officer's recommendation that the expenses are fully chargeable is in accord with Commission precedent. *Newton I*, 13 MLC at 1596. This prescription that overhead expenses are fully chargeable comports with the *Ellis* court's rationale that a union would presumably incur essentially the same expenses to operate at all. *Ellis*, 466 U.S. at 448. As we stated in *Newton I*: "It would be difficult, if not impossible, to determine whether or to what extent such expenses are affected by the amount of [nonchargeable] activity undertaken by the union." *Newton I*, 13 MLC at 1596. Therefore, we find that the MTA's overhead and administrative costs are fully chargeable.[25]

The Charging Parties contend that only proven, discrete, chargeable expenses can be levied against them, and that no union expense or staff cost may be presumed to be either fully or proportionally chargeable. The Charging Parties would require, in all instances, specific proof of how much time employees spend on chargeable activity. Therefore, the Charging Parties challenge the assessment of proportional charges for Executive Director-Treasurer Sullivan arguing that, without specific proof about how he spent his time, his time and expenses are not chargeable.

The record establishes that Sullivan's responsibilities and activities reflected the activities of the MTA as a whole. Sullivan was the Union's chief financial and operating officer. His demonstrated job responsibilities and activities included, among other items, supervising and evaluating management staff, recommending the annual budget, monitoring the organization's finances, and providing information and advice to the MTA's officers, Board and Executive Committee. Sullivan was also involved in all staff employment decisions, he bargained with the internal staff union, and he was involved in property management matters. In addition, Sullivan was involved in nonchargeable activities, including supervising the Division of Governmental Relations' activities. In sum, Sullivan's role involved managing the entire MTA, and his activities mirrored the organization's endeavors. We are not persuaded, on this record, that Sullivan's political activity was disproportionate to the MTA's overall nonchargeable activity. Therefore, proportionally charging this management expense, based on the MTA's overall percentage of chargeable activity, is fair and appropriate.

The Charging Parties challenge the recommendations concerning the Building Operations Costs. Upon review of the Recommended Decision, we conclude that the charging parties are not unduly prejudiced by permitting the MTA to adjust its property management and building expenses from a proportionally chargeable to a fully chargeable basis. However, the Charging Parties correctly note that the Recommended Decisions's total property management figure is in error, and we reduce it to $64,070.[26]

We conclude that the hearing officer's recommendation that the percentage of building operational costs devoted to MTA space should be applied to overall property management charges incurred in program 2.0 is fair and reasonable. The appropriate calculations contained in the Recommended Decision, at p. 227-228, indicate that 85.4% of the overall building operational costs relate to MTA activities. Therefore, the total costs of program 2.0 will be reduced by 14.6%.

MODIFIED TOTAL COSTS OF PROGRAM 2.0	$ 64,070
x proportion of MTA only costs (85.4%)	
MODIFIED CHARGEABLE COSTS IN PROGRAM 2.0	$ 54,716
MODIFIED CHARGEABLE COSTS IN PROGRAMS 2.0 AND 3.0	$263,359

Division of Finance and Accounting

The record indicates that finance and accounting staff engaged in a total of approximately fourteen hours of nonchargeable activities during the year in question. Approximately two hours of staff time was devoted to administering the Professional Rights Fund, ten hours to administering the VOTE account, and two hours were spent in connection with the campaign reporting forms. In their challenges to the hearing officer's recommendations, the Charging Parties argue that due to this political activity, the MTA is entitled to no finance and accounting fee.[27] However, we regard the fourteen hours of activity here, in a division with a half a million dollar budget, as incidental and *de minimis*. Therefore, in accord with Commission precedent, we consider the finance and accounting expenses to be fully chargeable. *See Newton I*, 13 MLC at 1596; *Brown and Chicopee Fire Fighters*, 14 MLC at 1253, n.9.

Printing and Mailing

The Charging Parties assert that the hearing officer erroneously failed to account for and offset the income from print jobs the MTA performed for outside organizations. To obtain a complete picture of the MTA's overall costs for the year in question, we have consistently permitted outside revenues to be restored to other budget program areas. Therefore, we find the Charging Parties' objection to be without merit.

We are not persuaded by the Charging Parties' further argument, that the MTA should forfeit its printing and mailing fee due to its

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25. Recently, a case cited with approval by the hearing officer, *Bromley* v. *Michigan Education Association*, 843 F. Supp. 1147 (E.D.Mich. 1994), has been remanded to the District Court. After an opportunity for discovery, the District Court is to reconsider whether administrative costs, including, among other items, liability insurance, building renovations, and bill paying are properly treated as chargeable in their entirety or whether they should be allocated in proportion to the union's overall chargeable and nonchargeable activities. *Bromley* v. *Michigan Education Association*, 82 F. 3d. 686 (6th Cir. 1996). Here, however, the hearing followed extensive discovery, and the developed record reveals no factual basis for challenging the fully chargeable presumption, as applied, in Administrative and Personnel programs 2.0 and 3.0, Building Operations and Finance and Accounting.

26. We note that the figure utilized by the hearing officer is identical to the one presented by the MTA in its post-hearing brief, not the figure found in the MTA's demand, MTA #1. However, we are not persuaded by the Charging Parties' claim, that the Union's brief was blindly adopted. Rather, we are satisfied that the costs identified by the hearing officer as chargeable are based on the record and not merely accepted as fact based on the MTA's brief. For example, the MTA asserted in its brief that is was entitled to 97% of the property management cost, but the hearing officer found that the amount reflected in the record was only 85.4%.

27. In their post-hearing brief, however, the Charging Parties argued that the division was chargeable in proportion to the MTA's overall chargeable activity. Charging Parties' Brief, Vol. III, p. 175.

in kind printing campaign donations. As stated in the Recommended Decision, a total printing and mailing contribution valued at $9,564.65 was disclosed in the MTA's campaign finance forms. The amount of the contribution from the program budget was deleted and the remaining costs were charged in proportion to the MTA's overall chargeable activity. We endorse this approach and accept the recommended printing and mailing fee amount.

Objections to Final Calculations

The Charging Parties challenge three aspects of the final calculations contained in the Recommended Decision. First, they object to designating the majority of governance costs as service items, to be used in the calculation of the overall percentage of MTA chargeable activity, rather than as administrative costs. However, we conclude that, to provide a fair percentage of the Union's overall chargeable costs, the majority of activities of the Governance Division are appropriately grouped with other service divisions. The nature and substance of the division's activities are not akin to those found in the administrative divisions, like printing and mailing or telephone and supplies. Instead, governance activities clearly influence the chargeability of the administrative or support groups, such as word and data processing, or printing and mailing. Next, the Charging Parties contend that, although the Commission has indicated that there are two acceptable methods of calculating an agency fee, when both methods are available, the objecting fee-payers' constitutional interests require the Commission to charge the nonmembers the lower amount. However, we find no support for this proposition. In *Woburn Teachers' Association* we indicated that: "[t]he MTA could divide its total permissible expenditures by the number of employees represented by the MTA to determine the portion of the fee payable to the MTA." *Woburn Teachers' Association*, 13 MLC 1555, 1564 (1987). The hearing officer's fee calculation comports with this methodology and will be adopted.

Finally, the Charging Parties criticize the hearing officer's use of the MTA's full-time equivalent figure in the fee calculation. The record reveals that the MTA represents in excess of 69,000 individuals, some of whom pay less than full dues or agency fees. For example, the MTA represents part-time employees, clerical employees and bus drivers. The number of represented individuals is translated into a full-time equivalent number, a number used by the MTA in its internal calculation of its share of dues and its agency fee.[28] It is reasonable and appropriate to use a full-time equivalent figure to calculate the per capita cost for nonmembers here.

Constitutionality of Escrow Requirement

The Charging Parties conclude their objections to the Recommended Decision by renewing their contention that the Commission's escrow requirement and M.G.L. c. 150E, Section 12 are unconstitutional because they arbitrarily deprive nonmembers of their property. We have considered and rejected variants of this challenge numerous times. In addition, *School Committee of Greenfield* v. *Greenfield Education Association*, 385 Mass. 70, 85 (1982), is adverse to the Charging Parties' central argument and is dispositive.

We adopt, without further comment, all other chargeability recommendations contained within the Recommend Decision. After making the modifications outlined above, we now total the Union's chargeable and nonchargeable costs.

CHARGEABLE COSTS OF THE MTA

SERVICE DIVISIONS	TOTAL COSTS	CHARGEABLE COSTS
AFFILIATE SERVICES	$5,813,075	$4,500,950
LEGAL SERVICES	$1,610,896	$56,454
GOVERNMENTAL SERVICES	$1,427,844	$0
COMMUNICATIONS	$784,603	$33,529
PROFESSIONAL DEVELOPMENT	$507,487	$261,469
RESEARCH	$252,081	$209,649
GOVERNANCE	$933,448	$871,158
(Excluding Program 4.1)		
SUBTOTALS	**$11,329,434**	**$5,933,209 (52.4%)**
Proportionally Chargeable Administative Divisions and Programs:		
GOVERNANCE 4.1	$253,781	$132,981
PRINTING & MAILING	$616,689	$323,145
M.I.S.	$657,613	$344,589
TELEPHONE & SUPPLIES	$191,862	$100,536
TERMINATION & SEVERANCE	$224,905	$117,850
DEPRECIATION	$158,527	$ 83,068
ADMINISTRATION & PERSONNEL		
Program 1.0	$386,220	$202,379
SUBTOTALS	**$2,489,597**	**$1,304,548**

The chargeable costs in each of these administrative divisions and programs equals 52.4.% of the total costs. This percentage is based on the percentage of total costs for the service divisions listed above that are chargable.

CHARGEABLE COSTS OF THE MTA

Other Divisions and Programs:		
ADMINISTRATION & PERSONNEL		
2.0 and 3.0	$292,209	$263,359
FINANCE & ACCOUNTING	$565,908	$565,908
BUILDING OPERATIONS	$711,941	$608,229
FINAL TOTALS	**$15,389,089**[29]	**$8,675,253**

CONCLUSION

During 1990-91, the MTA had a total of 60,276 full-time equivalent members and agency fee payers. The total chargeable expenses for 1990-91 established in this proceeding are $8,675,253, for a per capita cost of $143.93. This per capita cost was $26.77 less than

28. The contention that the MTA used a larger number of employees in its original fee calculation is not supported by this record.

29. This figure corrects a calculation error noted in the Recommended Decision.

the amount of the agency service fee the Union demanded of the Charging Parties. Therefore, the MTA violated Section 10(b)(1) of the law by demanding that the Charging Parties pay an agency service fee that was $26.77 more than their pro rata share of the MTA's costs of collective bargaining and contract administration for fiscal year 1990-91.

ORDER

WHEREFORE, based on the foregoing, it is ORDERED, that the Massachusetts Teachers Association shall:

1. Cease and desist from demanding that the Charging Parties pay an agency service fee for 1990-91, in excess of $143.93.

2. Not seek the discharge of or any other sanction against any Charging Party for failing to pay an agency service fee for fiscal year 1990-91, in excess of $143.93.

3. Release to the Charging Parties $26.77 of the monies held in joint escrow, plus all accrued interest allocable to the $26.77 to the date of dissolution of the escrow account for the agency service fee 1990-91.

4. Implement the terms of the settlement agreement (Joint Exhibit #1), thereby calculating the appropriate agency service fees for the MTA and the NEA for each year between, and including, 1987-1988 through 1991-1992, releasing from escrow to the Charging Parties the excess fees, plus all accrued interest allocable to the excess fees to the date of dissolution of the escrow accounts.

5. Post in all places where notices are normally posted for employees represented by the Massachusetts Teachers Association, and leave posted for a period of not less than thirty (30) days, copies of the attached Notice to Employees.

6. Notify the Commission in writing within ten (10) days of receipt of this decision of the steps taken to comply therewith.

SO ORDERED.

Appeal Rights

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

NOTICE TO EMPLOYEES

After a hearing, the Labor Relations Commission has determined that the Massachusetts Teachers Association violated Section 10(b)(1) of the Law by demanding an agency service fee from employees it represents for 1991-92 from certain Charging Parties that is $26.77 in excess of the amount permitted by Section 12 of the Law.

WE WILL NOT demand an agency service fee in excess of $143.93 from individuals who have filed a timely agency service fee challenge for 1991-92.

WE WILL NOT in any like or similar manner interfere with, restrain, or coerce employees in the exercise of their rights under the Law.

WE WILL NOT seek any sanction against any Charging Party for failing to pay an agency fee in excess of $143.93 for 1991-1992.

WE WILL refund to the Charging Parties $26.77 of the monies held in escrow plus interest allocable to that amount accrued to the date of dissolution of the escrow account.

[signed]
President, Massachusetts Teachers Association

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