

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

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In the Matter of	*	
	*	
MASSACHUSETTS DEPARTMENT OF	*	
TRANSPORTATION	*	Case No. SUP-14-3576
	*	SUP-14-3640
	*	
and	*	Date Issued: August 21, 2018
	*	
UNITED STEELWORKERS, LOCAL 5696	*	
	*	

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Board Members Participating:

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

Appearances:

James F. Norton, Esq.	Representing Massachusetts Department of Transportation
Alfred Gordon O'Connell, Esq.	Representing United Steelworkers, Local 5696

**CERB DECISION ON APPEAL OF HEARING OFFICER'S COMPLIANCE DECISION**

- 1 Summary
- 2       The Massachusetts Department of Transportation (Employer) appeals from a
- 3 decision on compliance (Decision) that a Department of Labor Relations (DLR) Hearing
- 4 Officer (Hearing Officer) issued on May 25, 2018, arguing that the Hearing Officer's
- 5 decision was based on erroneous findings of fact. The Commonwealth Employment

1 Relations Board (CERB) denies the appeal because it is based on information that the  
2 Employer submitted for the first time on review.

3 Background

4 On July 31, 2017, the CERB issued a Decision and Order that, among other  
5 things, directed the Employer to post a two-page Notice to Employees. The United  
6 Steelworkers Local 5696 (Union) filed a request for enforcement of the Order on  
7 February 13, 2018, pursuant to DLR Rule 16.08, 456 CMR 16.08. On April 13, 2018,  
8 the DLR determined that there was a genuine dispute as to compliance and ordered a  
9 compliance hearing pursuant to DLR Rule 16.08.

10 The parties agreed that a full compliance hearing was not necessary and  
11 submitted a Joint Stipulated Record to the Hearing Officer on May 14, 2018, which, in  
12 accord with the Hearing Officer's instructions, addressed only those portions of the  
13 Order at issue in the Union's enforcement request. The Joint Stipulated Record stated  
14 in pertinent part:

15 5. On May 11, 2018, the Union notified MassDOT of the following:

- 16
- 17 • At 185 Kneeland St. in Boston, the Notice is posted in a locked,  
18 glass bulletin board and only first page is posted.
  - 19 • In the Driscoll Building in Weston, the Notice is posted in a locked,  
20 glass bulletin board and only first page is posted.
  - 21 • There is no posting at 10 Park Plaza, 3<sup>rd</sup> floor.
  - 22 • There is no posting at the Chelsea Engineering location.

23 In response to this notice from the Union, MassDOT Labor  
24 Relations Office notified the MassDOT District 6 office and the  
25 liaison in that office for the purpose of coordinating the posting, and  
26 has requested that the posting at 185 Kneeland Street and in the  
27 Driscoll Building be examined to determine if the allegations are  
28 true, and to rectify the allegations if true.

1 A notice was posted at 10 Park Plaza, 3<sup>rd</sup> Floor, with a notation that  
2 the Notice was posted on May 11, 2018.

3  
4 A notice was posted in the Chelsea offices where District 6  
5 Engineering personnel sign in each day, with a notation that the  
6 notice was posted on May 14, 2018.

7 Neither party filed any additional documents or pleadings with the Hearing Officer  
8 or the DLR before May 25, 2018, when the Hearing Officer issued her Decision. In that  
9 decision, the Hearing Officer found that, "although it has taken quite some time for the  
10 Employer to post complete and signed notices in all necessary locations, the only  
11 locations for which the Employer has not been able to establish its current compliance  
12 with [the notice-posting] portion of the Order are 185 Kneeland Street in Boston and the  
13 Driscoll Building in Weston." Based on this finding, the Hearing Officer ordered the  
14 Employer to post the CERB's two-page Notice to Employees at the two locations and to  
15 post a second Notice to Employees stating that it would do so.

16 On June 4, 2018, pursuant to DLR Rule 13.19, 456 CMR 13.19, the Employer  
17 filed a notice of appeal of the Hearing Officer's decision, along with a supplementary  
18 statement that contained four newly-submitted exhibits. The exhibits included an  
19 affidavit dated May 31, 2018 from Sheilah Johnson (Johnson), the administrator for the  
20 Driscoll Building in Weston, and a photograph of the glass-doored cabinet where  
21 Johnson states that she posted the notice.

22 Also on June 4, 2018, the Employer filed a request to reopen the record. The  
23 Hearing Officer denied this request on August 9, 2018 pursuant to DLR Rule 13.16, 456  
24 CMR 13.16, which states that a hearing officer may reopen the hearing and receive  
25 further evidence "prior to the issuance of a final decision."

1 On June 5, 2018, the Employer filed an amended supplementary statement,  
2 correcting certain information it had provided the previous day about the posting at  
3 Kneeland Street, and attaching an affidavit dated June 5, 2018 from Linda Wallace, the  
4 Administrator for MassDOT District 6 at 185 Kneeland Street. The Union did not file a  
5 response to either supplementary statement.

6 Opinion<sup>1</sup>

7 Based on information that it acquired and submitted for the first time to the CERB  
8 after the Hearing Officer issued her decision, the Employer argues that it was in  
9 compliance with the CERB's order at the Kneeland and Driscoll Building locations as of  
10 May 11, 2018. The Employer thus argues that the Hearing Officer's contrary  
11 determination was based upon "erroneous findings of fact." We disagree.

12 The DLR's regulations regarding the Employer's burden at compliance hearings  
13 are clear – "At any hearing concerning the alleged non-compliance, the party required to  
14 comply shall have the burden of proving such compliance by a preponderance of the  
15 evidence." 456 CMR 16.08(5). Here, the parties agreed to present this case to the  
16 Hearing Officer on a fully-stipulated record. The Hearing Officer accurately found based  
17 on this record that, "the only locations for which the Employer has not been able to  
18 establish its **current compliance** with this portion of the Order are [the postings at] 185  
19 Kneeland Street in Boston and the Driscoll Building in Weston." (emphasis added). The  
20 Employer cannot now be heard to complain that those findings were erroneous based  
21 upon information that was not before the Hearing Officer when she issued her decision.

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<sup>1</sup> The CERB's jurisdiction is not contested.

1           Moreover, given that the Hearing Officer refused the Employer's request to  
2 reopen the record after the decision issued, the basis for this appeal runs afoul of the  
3 well-established principle that the CERB will not consider information that is provided for  
4 the first time on review. See Anderson v. Commonwealth Employment Relations Board,  
5 73 Mass. App. Ct. 908, 909 n. 7 (2009) (citing McCormick v. Labor Relations  
6 Commission, 412 Mass. 164, 170 (1992)).

7           Accordingly, while it may be the case that the Employer has finally achieved full  
8 compliance with the CERB's July 31, 2017 Order, its appeal provides no basis to  
9 overturn the Hearing Officer's determination that it could not establish such compliance  
10 based on the evidence before her.

11                                       Conclusion

12           For the foregoing reasons, we affirm the Hearing Officer's decision.

13                                       ORDER


14           WHEREFORE, based upon the foregoing, it is hereby ordered that MassDOT  
15 shall:

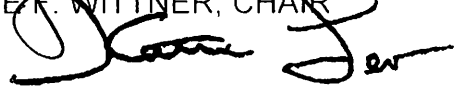
- 16
- 17           1) Post immediately in all conspicuous places where members of the Union's  
18 bargaining unit usually congregate and where notices to these employees are  
19 usually posted, at 185 Kneeland Street, Boston and at the Driscoll Building,  
20 Weston, and maintain for a period of thirty (30) consecutive days thereafter,  
21 signed copies of the CERB's 2-page Notice to Employees from its 2017  
22 Decision and Order; and  
23
- 24           2) Post immediately in all conspicuous places where members of the Union's  
25 bargaining unit usually congregate and where notices to these employees are  
26 usually posted, including electronically, if the Employer customarily  
27 communicates to its employees via intranet or email, and maintain for a  
28 period of thirty (30) consecutive days thereafter, signed copies of the  
29 attached Notice to Employees; and  
30

1           3) Notify the DLR within ten days of this decision of the steps taken to comply  
2           herewith.

3   **SO ORDERED**

COMMONWEALTH OF MASSACHUSETTS  
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

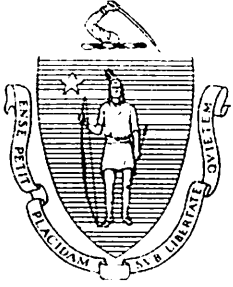
  
MARJORIE F. WITTNER, CHAIR

  
KATHERINE G. LEV, CERB MEMBER

  
JOAN ACKERSTEIN, CERB MEMBER

**APPEAL RIGHTS**

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



COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS  
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

# **NOTICE TO EMPLOYEES**

**POSTED BY ORDER OF THE COMMONWEALTH  
EMPLOYMENT RELATIONS BOARD  
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

The Commonwealth Employment Relations Board (CERB) has held that the Massachusetts Department of Transportation has failed to comply with a 2017 CERB decision and order in Case No. SUP-14-3576 and SUP-14-3640. MassDOT posts this Notice to Employees to comply with the CERB'S compliance order.

WE WILL COMPLY with the CERB's decision in Case No. SUP-14-3576 and SUP-14-3640 by posting the CERB's Notice to Employees at 185 Kneeland Street, Boston and at the Driscoll Building, Weston.

\_\_\_\_\_  
Massachusetts Department of Transportation

\_\_\_\_\_  
Date

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED**

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Charles F. Hurley Building, 1<sup>st</sup> Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).