Complaint Litigation

Pre-hearing

1) Classification of the Complaint

After a Hearing Officer prepares the Complaint, the Director reviews the Complaint to determine classification and scheduling issues. She does not review the Complaint for substance.

Cases may change classification status after investigation. Accordingly, similar to the procedure outlined in the Charge Classification description discussed in Section II(A)(1)(g) using the DLR's Impact Analysis Classification system, the Director determines whether the hearing is classified as a Level I or Level II hearing. Cases where resolution of the Complaint allegations have the greatest urgency are heard first. The DLR schedules Level I hearings within three to six months from when the Complaint issues, depending on the level of urgency and the decision typically issues within three months from when the record is closed. The DLR schedules Level II hearings within six months to a year from when the Complaint issues and the decision typically issues within six months from when the record is closed.

2) Mediation

Mediation is mandatory for all Level I cases. The mediation is generally scheduled to take place on the same day as the pre-hearing conference and is conducted prior to the pre-hearing conference. The parties must bring to the mediation individuals with settlement authority, or if that is impossible, ensure that those with settlement authority are available by telephone that day. Although not required in Level II cases, mediation is strongly encouraged, and the DLR provides mediators to assist the parties when they wish to mediate cases.

3) Notice of Complaint

Once the Director classifies the Complaint, the DLR sends the parties the Complaint, together with a Notice of Complaint and Procedure for Scheduling Hearing.

a) Level I Hearing Scheduling Procedures

The parties are required to confer and agree to three proposed dates for the hearing that fall within the period specified on the

scheduling form. It is the responsibility of the Charging Party to initiate discussions with the Respondent and to provide the DLR the agreed-upon dates within **seven days** of the Notice of Complaint and Scheduling Procedure. If after reasonable attempts to secure dates, the Charging Party notifies the DLR that the parties are unable to agree on a date for the hearing, the DLR schedules the hearing and notify the parties of same. If the Charging Party fails to submit dates or a written statement explaining why the parties have been unable to agree upon dates, the DLR dismisses the charge and withdraws the Complaint, absent extraordinary circumstances.

b) Level II Hearing Scheduling Procedures

The parties are required to confer and agree to three proposed dates for the hearing that fall within the period specified on the scheduling form. It is the responsibility of the Charging Party to initiate discussions with the Respondent and to provide the DLR the agreed-upon dates within **30 days** of the Notice of Complaint and Scheduling Procedure. If after reasonable attempts to secure dates, the Charging Party notifies the DLR that the parties are unable to agree on a date for the hearing, the DLR schedules the hearing and notifies the parties of same. If the Charging Party fails to submit dates or a written statement explaining why the parties have been unable to agree upon dates, the DLR dismisses the charge and withdraws the Complaint, absent extraordinary circumstances.

4) Amendments to the Complaint

a) Filing the Motion

Prior to the opening of the hearing, if a party believes that the Complaint should be amended to correct an inadvertent error or omission; the party files a Motion to Amend Complaint with the Investigating Hearing Officer who issued the Complaint. A party does not have a right to appeal the Hearing Officer's decision to issue a Complaint or to file a motion to include new allegations it failed to raise at investigation. Should a party file a Motion to Amend Complaint after the hearing opens, it is up to the Hearing Officer to determine whether to Amend the Complaint or not or whether to remand the Complaint to the Investigating Hearing Officer.

b) Appeal

A Hearing Officer's dismissal of a pre-hearing Motion to Amend is subject to Appeal to the CERB, but under no circumstances does the CERB consider such an Appeal if it is filed less than fourteen days before hearing. The CERB rules on all such motions within seven days.

Appeals of a Hearing Officer's decision concerning Motions to Amend made at hearing should be filed as Interlocutory Appeals.[1]

[1] 456 CMR 13.03.

5) The Answer

As described in 456 CMR 15.06(1), the Respondent files an Answer to the Complaint within ten days from the date of service, unless otherwise notified by the DLR. The Respondent specifically admits, denies, or explains each of the facts alleged in the Complaint, unless the Respondent is without knowledge, in which case the Respondent so states, such statement operating as a denial. All allegations in the Complaint not specifically denied or explained in an Answer filed, unless the Respondent states in the Answer that it is without knowledge, is deemed to be admitted to be true and is so found by the DLR, unless good cause to the contrary is shown.

On its own initiative or upon proper cause shown by the Respondent, the DLR may extend the time within which the Answer is filed.[2]

6) Notice of Hearing

After the Charging Party submits the three agreed-upon dates for hearing or an explanation concerning why the parties have been unable to reach agreement, the Director assigns a Hearing Officer to the case. The Hearing Officer then chooses the date(s) for hearing from the submitted dates and picks a pre-hearing conference date. Once the Hearing Officer chooses the pre-hearing conference and hearing dates, the DLR then issues a Notice of Hearing to the parties, ordering the parties to attend a hearing and pre-hearing conference.

7) Unilateral Settlement

The DLR encourages the parties to settle cases at every case stage, including before hearing. In addition to mandatory mediation in Level I cases, and offering the parties DLR mediators to assist them at every stage of their case, a Respondent willing to fully remedy the Complaint allegations may propose a unilateral settlement to the Director. The details of the DLR's Unilateral Settlement Procedure can be found here. www.mass.gov/lwd/labor-relations/procedures

8) Petitioning the CERB to Hear a Case in the First Instance

Either party to the case or both jointly, may file a Petition asking the CERB to hear the case in the first instance. The CERB may grant such a Petition in its discretion, and for good cause shown.[3]

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[2] 456 CMR 15.06(2).
[3] M.G.L. c. 150E, Section 11(f).

Generally, the CERB does not grant such a Petition unless the parties submit a stipulated record, in which the parties have agreed to all material facts, and exhibits in the case, and the CERB can issue a decision without a hearing.

9) Stipulated Records

Occasionally, the parties may agree on all case facts, but not on the applicable law. In this situation, the parties are strongly encouraged to seek permission from the Hearing Officer to stipulate to all facts and receive a decision without a hearing. If the parties wish to receive a decision from the CERB in the first instance, as mentioned above, they may seek permission from the CERB to submit a stipulated record and receive a CERB decision without a hearing. The parties who wish to submit a stipulated record in lieu of a hearing are asked to sign an agreement that provides as follows:

> The parties agree that this statement of Stipulated Facts [***which includes factual statements and a list of documentary exhibits***], the Charge of Prohibited Practice filed with the Department of Labor Relations, the Complaint of Prohibited Practice, and Respondent's Answer to the Complaint, and relevant motions, responses and rulings, shall constitute the entire record of this case and hereby waive their right to a hearing. If there is a conflict of fact between this statement of Stipulated Facts and the findings contained in the Complaint of Prohibited Practice or within the Respondent's Answer, such conflict shall be resolved in favor of this statement of Stipulated Facts.

The parties signing such a waiver do not waive their right to object to relevancy of any stipulated facts.

10) Motions

All motions made prior to or subsequent to the hearing are filed in writing with the Hearing Officer and states the order or relief applied for and the grounds for the motion. (See 456 CMR 12.11 for filing instructions). Within seven days of service of the motion, any other party to the proceeding may file a response with the Hearing Officer, unless otherwise directed by the Hearing Officer. The Hearing Officer may defer ruling on any motions until the close of the hearing, and may direct the parties to proceed with the hearing while the motion is pending. All motions made at the hearing are stated

orally, unless otherwise directed by the Hearing Officer and are included in the hearing record.[4]

11) Joint Pre-Hearing Memorandum

The DLR requires parties to engage in pre-hearing discussions in order to narrow the issues for hearing and to enable the parties to agree to as many stipulations as possible. As they are instructed to do in the Notice of Hearing, the parties are required to submit a Joint Pre-Hearing Memorandum (Joint Memo) no later than three days prior to the scheduled pre-hearing conference. The Joint Memo must include the following information:

a) Proposed stipulations of fact.

b) List of agreed-upon joint exhibits and copies of the exhibits.

c) List of prospective witnesses, including the witness' title, the specific subject matter on which the witness will testify and the expected duration of their testimony.

d) List of documents each party intends to introduce at the hearing.

e) List of any subpoena issues (including who may be subpoenaed and a brief description of the documents/testimony requested).

f) Brief description of any pending motions.

g) Any other pertinent information.

The parties must cooperate fully in drafting the Joint Memo. The Charging Party is responsible for producing the initial draft and forwarding same to the Respondent. The Joint Memo is signed by both parties or their legal representatives. If the parties are unable to file a Joint Memo, each party files its own memorandum and includes a reason for the failure to file jointly.

The Joint Memo and all proposed exhibits should be e-filed before the pre-hearing conference to the DLR at its filing address efile.dlr@massmail.state.ma.us.

[4] 456 CMR 13.07.

12) The Pre-Hearing Conference

The Hearing Officer holds a pre-hearing conference (Conference) to ensure that the time spent in the upcoming hearing is used as efficiently as possible.[5] At the Conference, the Hearing Officer explores potential issues, including all possible stipulated facts, joint exhibits, and subpoena issues. The parties are strongly encouraged to agree to as many facts in the form of stipulations as possible to enable the parties to use hearing time for witness testimony on disputed facts.

13) Subpoenas

A party may request the issuance of a subpoena to compel the attendance of witnesses or the production of books, records, documents or correspondence at a hearing.

For details on Subpoena requests, see 456 CMR 13.12 (2), (3) and (4).

For details on Motions to Quash a Subpoena see 456 CMR 13.12 (5).

For information on failing to comply with a Subpoena see 456 CMR 13.12 (6).

14) Postponement Requests

Requests for postponement of a pre-hearing conference or hearing are generally treated the same as investigation postponements discussed above in Section II(A)(1)(k) and detailed in 456 CMR 12.06. Postponement of a pre-hearing conference or hearing is not granted unless good and sufficient cause is shown and the following requirements are met:

a) The request must be in writing to the Hearing Officer.
b) The grounds for the request must be set forth in detail.

c) The requesting party must specify alternate dates for rescheduling the hearing or conference.

d) The position of all parties concerning both the postponement request and the proposed alternate dates must be provided in the request.

[5] 456 CMR 13.06 (7).

e) Copies of the request must be served contemporaneously on all parties and that fact must be noted on the request.

f) The request must be signed by the party making the request.

g) In considering a postponement request, "good and sufficient" reason may include a showing to the satisfaction of the Hearing Officer that a postponement results in the settlement of the case.

h) Absent compelling circumstances, no request for postponement is granted on any of the three days immediately preceding the conference or hearing date.

i) Absent compelling circumstances, the DLR does not grant more than one postponement request in the case.

Hearing

1) Burden of Litigating the Complaint Allegations

Although the DLR issues the Complaint in its own name and must authorize all Complaint allegations, the Charging Party is responsible for litigating the case.

2) Burden of Proof

The facts that must be proven to support or defend against the Complaint depend on the allegations contained in the Complaint. Generally, the Charging Party has the burden to prove, by a preponderance of the evidence, any allegation that the Respondent has denied. For a fuller discussion of the elements of different types of charges, see the Summary of Decisions Section, below.

3) Role of the Hearing Officer

The Hearing Officer conducting the hearing assists the parties by answering questions about the DLR procedures, though the Hearing Officer cannot act as the representative of a party or give legal advice. The Hearing Officer may ask questions of the parties and witnesses to clarify testimony, issues, or positions.

The role and authority of the Hearing Officer are detailed in 456 CMR 13.02 (2) and 456 CMR 13.06.

4) Exhibits

a) DLR Exhibits

The Record always includes the underlying Prohibited Practice Charge, the Complaint, Notice of Hearing, and the Answer. These documents are marked as DLR Exhibits 1-4.

b) E-Filing Exhibits

Documents or records expected to be introduced in evidence should be e-filed before hearing to the DLR at its filing address efile.dlr@massmail.state.ma.us. The Hearing Officer may ask the parties to e-file additional exhibits after the hearing is completed. Parties should also bring sufficient hard copies to the hearing for the Hearing Officer and all other parties and a witness copy.

5) Reporter and Transcript of Testimony

The Hearing Officer records the hearing and offers the parties a digital recording or computer disc of the recording.

Parties who wish to pay for the services of a stenographer to record and transcribe a hearing may request permission of the Hearing Officer. A party may further request that the Hearing Officer designate a written transcript of the proceeding as the official record subject to the following requirements listed in 456 CMR 13.11:

a) The transcript is made available to all parties.

b) All have the opportunity to object to the accuracy of the transcript.

c) A copy of the transcript is made available for purchase to all other parties for a reasonable fee.

d) A copy of the transcript is provided without charge to the DLR.

6) Open to the Public

Except in extraordinary circumstances, a hearing is open to the public.

7) Opening Statements

The parties are given the opportunity to present opening statements to the Hearing Officer to set the context of the case, explain why certain elements and evidence are relevant to the case, and offer the party's legal theories on the Complaint allegations. The Respondent may choose to wait to present its opening statement until before it presents its case.

8) Witness Testimony Live and Video

Witnesses are examined orally under oath or affirmation, except if they reside outside of the Commonwealth or because of illness or other cause are unable to testify at the DLR. In such situations, the DLR may direct that the testimony be taken by video.[6] A party requesting video testimony must provide all necessary video conferencing equipment. That party may also be required to retain a stenographer to ensure that the video testimony is accurately recorded.

In determining whether video testimony is appropriate the DLR considers the following:

a) Significance of the testimony.

b) Proximity of witness to the hearing site.

c) Circumstances leading to the request.

d) Number, length, and types of documents to be moved into evidence through witness testimony.

e) Number of witnesses who would testify by video and expected length of testimony.

f) Availability and adequacy of video conferencing equipment.

g) Position of the parties.

[6] 456 CMR 13.09.

9) Sequestration of Witnesses

The Hearing Officer may grant a party's motion to issue a Sequestration Order or may on her own order sequestration. This means that all persons who are going to testify, with certain exceptions, may be present in the hearing room only when they are giving testimony. In addition, witnesses may not discuss testimony with any other witnesses or potential witness during the course of the hearing. Parties can select one individual to remain in the hearing, even if they are a potential witness, if they deem the person essential to the presentation and management of the case.

10) Examination of Witnesses and Introducing Exhibits

The Charging Party presents its evidence first, by calling its witnesses and submitting any documentary evidence that it has to support the allegations in the Complaint. The Respondent has the opportunity to cross-examine the Charging Party's witnesses. The goals of cross-examination include impeaching the witness' testimony and gaining admissions of fact. The Charging Party should "rest" its case in chief after it is done calling witnesses, subject to its right to present rebuttal witnesses after the Respondent has finished calling witnesses and rests its case.

Rebuttal testimony is limited to testimony offered to refute evidence provided by the Respondent's witness. It may not be used to offer evidence that the Charging Party should have offered in its case in chief. Surrebuttal testimony is limited to testimony offered by Respondent to refute evidence that Charging Party offered in Rebuttal testimony.

Voir dire is an examination into the authenticity of an exhibit that an opposing party offers and the competence of the witness to authenticate the exhibit or to be an expert witness. Voir dire is used to explore whether to object to the witness or document. Counsel may use leading questions in voir dire examination, but must limit the questions to authenticity and are not allowed to ask general cross examination questions. Voir dire must be conducted at the time an exhibit is offered into evidence and is untimely after the exhibit is accepted into the record.

11) Objections

A party should object to questions posed on direct or cross examination to keep improper evidence from being included in the record and considered, and to make a record for the Hearing Officer and possible appellate review. Objections are made in a timely manner by voicing the objection as soon as the question is posed. The Hearing Officer rules on all objections at the hearing. A party may file an Interlocutory Appeal of a Hearing Officer's ruling on the objection.[7] The CERB applies an abuse of discretion standard when ruling on interlocutory appeal.[8]

12) The Rules of Evidence

The Hearing Officer is not bound by the technical rules of evidence prevailing in courts.[9] However, the Hearing Officer uses these rules as a guide to ensure that only relevant and reliable evidence is introduced at hearing.

13) Oral Arguments or Briefs

The parties are entitled to present oral arguments at the close of the hearing or more typically, with the Hearing Officer's permission, to file briefs. Briefs must be filed within ten days after the close of the hearing, unless the Hearing Officer directs the parties to do otherwise.[10]

Any request for additional time to file a brief must be filed with the DLR no later than three days before the date the brief is due.[11]

No reply briefs may be filed without permission.[12]

14) Motion to Reopen the Hearing

A Hearing Officer has discretion to reopen a hearing and receive further evidence prior to the issuance of a final decision, but is only done so in extraordinary circumstances.

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[7] See 456 CMR 13.03.
[8] *City of Cambridge*, 30 MLC 31 (2003); *Commonwealth of Massachusetts*, 7 MLC 1477 (1980).
[9] 456 CMR 13.02.
[10] 456 CMR 13.13(1) and (2).
[11] 456 CMR 13.13(3).
[12] 456 CMR 13.13(4).

Absent extraordinary circumstances, a record is not reopened.[13] The reason for this standard is to protect the finality of the proceedings and to conserve limited public resources. To do otherwise would discourage parties from securing and presenting all available evidence at the hearing.

The party seeking to reopen the hearing must show that it was excusably ignorant of the existence of the evidence at the time of the hearing despite the exercise of due diligence.[14]

Post-Hearing

1) The Record

The Hearing Officer only considers the case record in deciding the case. The record consists of the evidence submitted at the hearing submitted through joint stipulations, exhibits (including DLR exhibits) or witness testimony. Evidence previously submitted at the investigation is not considered part of the record at the hearing unless it is independently submitted at the hearing.

2) The Decision

The Hearing Officer's ultimate decision on the merits is based on full consideration of the record. After the close of hearing and submission of briefs, the Hearing Officer issues a decision that sets forth findings of fact, legal conclusions and a remedial order, should the Hearing Officer find a violation of the Law.[15]

As mentioned above in the "Classification of the Complaint" section, in Level I cases the DLR anticipates the decision to issue within three months from when the record is closed. In Level II cases, the DLR anticipates the decision to issue within six months from when the record is closed.

The Hearing Officer's decision is final and binding on the parties unless within ten days of notice of the decision, one of the parties requests CERB review.[16]

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[13] *Commissioner of Administration and Finance Alliance*, 21 MLC 1198 (1994) (citing *City of Haverhill*, 17 MLC 1215 (1990)).
[14] *City of Haverhill*, 17 MLC 1215 (1990); *Boston School Committee*, 17 MLC 1118 (1990); *Boston City Hospital*, 11 MLC 1065 (1984).
[15] M.G.L. c. 150E, Section 11; 456 CMR 13.15(1).
[16] 456 CMR 13.15(2).

3) Appeal of Hearing Officer's Decision

A party must file with the DLR its notice of appeal of a Hearing Officer's decision, together with a supplementary statement within ten days of receiving notice of the decision. The Notice of Appeal must be in writing and contain the case name and number, the date of the Hearing Officer's decision and a statement that the party requests CERB review. Supplementary statements must state with specificity the basis of the appeal.

The record on CERB review consists of the Hearing Officer's decision, the parties' supplementary statements, portions of the record before the Hearing Officer as are necessary to resolve factual disputes and such other evidence from the hearing as the CERB may require.[17]

For detailed information on Hearing Officer Decision appeals to the CERB, see 456 CMR 13.15. Failure to provide the information described in this section may result in summary dismissal of the appeal.[18]

The CERB's Appeal decision is final and binding on the parties. Filing a Judicial Appeal of the CERB's decision and order does not excuse compliance with the CERB's order.[19]

4) Judicial Appeal

Any party seeking review of a CERB decision may institute proceedings for judicial review in the Appeals Court within thirty days after receipt of said order.[20]

The appealing party need not file a Notice of Appeal with the Appeals Court. Rather, to pursue an appeal, the appealing party must file a Notice of Appeal with the DLR within thirty days from when it receives the CERB decision.

Once the DLR receives the Notice of Appeal, it sends the appealing party a letter explaining next steps, including the appealing party's obligations with respect to producing a transcript of the hearing. Failure to provide a transcript leaves the DLR unable to assemble the record. Accordingly, after proper notice is given to the parties, should

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[17] 456 CMR 13.15(5).
[18] 456 CMR 13.15(4).
[19] M.G.L. c. 150E, Section 11.
[20] M.G.L. c. 150E, Section 11.

the appealing party fail to provide a transcript, the DLR may dismiss the appeal.

The DLR is considered the lower court for purposes of the Appeals Court process and is responsible for assembling the record. The Chief Counsel notifies the appealing party when the record is in fact assembled so that the appealing party may docket the appeal in the Appeals Court. It is incumbent upon the appellant to enter the case in the Appeals Court within ten (10) days of receiving the Notice of Assembly of Record.[21] If the appellant does not take the required steps to enter the case in the Appeals Court, the DLR issues a notice requesting that the appellant show cause why the DLR should not dismiss the appeal with prejudice and permanently close the file for failure to comply with Mass. R.A.P. 10(a)(1).[22] If the appellant fails to respond accordingly, the appeal is dismissed with prejudice.

5) Mediation

The parties are encouraged to settle cases at all stages, including post-hearing. The Chief Counsel will identify cases that are likely to settle at the Judicial Appeals stage and inform the DLR Mediation Manager, so that she may assign a mediator to pursue mediation. The parties are also encouraged to contact the DLR if they believe mediation will be helpful.

6) Compliance and Enforcement

After a decision is final and binding, if the Hearing Officer or CERB ordered the Respondent to remedy the prohibited practice, it is Respondent's responsibility to inform the DLR of the steps that it has taken to comply with the remedial order.

If a Charging Party claims that a Respondent has not done everything that the decision ordered, the Charging Party should notify the DLR in writing, following the process outlined in 456 CMR 16.08.

Based on the information provided, the DLR determines whether to institute enforcement proceedings in Superior Court, decline to seek enforcement, or in the case of a genuine dispute as to compliance, order that a compliance hearing be held. At any hearing concerning the alleged non-compliance, the party required to comply with the DLR's order has the burden of proving such compliance by preponderance of evidence.

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[21] Mass. R.A.P. 10(a).

[22] *See also* Mass. R.A.P. 10(c).

For detailed information about the parties' responsibilities with respect to compliance and enforcement see 456 CMR 16.08(8) and (9).