

## Initiation of Unfair Labor Practice Cases

### Prefiling Assistance/Officer of the Day

The DLR provides assistance to the public through its officer of the day. DLR agents are available once a week on Thursday afternoon from 1:00 to 5:00 p.m. to answer inquiries and assist members of the public in filing Prohibited Practice Charges (Charge). The DLR agents answer public inquiries regarding the DLR and the laws it enforces, but at no time provide legal advice.

### Filling Out the Charge

A Charge must be in writing and signed by the party making the Charge and include a declaration that it is signed under the penalties of perjury and that its contents are true and correct to the best of his or her knowledge and belief. Parties must use DLR Charge forms. Charges challenging the amount or the validity of an agency service fee are filed on a separate form.

A Charge must contain the following information:

- The full name and address of the individual, employer, employee, or employee organization making the Charge and his or her official position, if any.
- The full name and principle place of business of the employer or employee organization against whom the Charge is made (Respondent).
- An enumeration of the subdivision of the Law claimed to have been violated and a clear and concise statement of all relevant facts which cause the Charging Party to believe that the Law has been violated.
- Agency Service Fee Charges must also include the date on which the Employee Organization made a written demand for payment of the service fee, the amount of the regular membership dues, the amount of the service demanded and the beginning and expiration dates of the collective bargaining contract under which the service fee was demanded.
- Agency Service Fee Charges that challenge the amount of the service fee must also state whether the charging party has placed the disputed amount of the service fee into a joint escrow account. If the

charging party has deposited the amount of the disputed service fee in a joint escrow account, evidence that the account has been established must be submitted with the Charge. If the charging party has not deposited the amount of the disputed service fee in a joint escrow account, a statement explaining why it has not must be included with the Charge.

#### Time Limit for Filing Charges

- 1) The Charging Party must submit a Charge on the DLR's Charge of prohibited practice form with the DLR within six months from the date the Charging Party knew or should have known of the alleged prohibited practice, unless good cause is shown.
- 2) Any employee required to maintain union membership as a condition of employment who files a Charge pursuant to [M.G.L. c. 150A, s. 6A](#), must file such Charge no more than 15 days after notice that the union has requested the employee's discharge or other adverse action for failure to maintain union membership.

#### Filing a Charge

The DLR encourages the parties to file Charges electronically. There are two ways to electronically initiate a case at the DLR and links to both of them can be found on the DLR's website.

Parties may also file Charges by hand-delivery, mail delivery or facsimile transmission. Charge forms can be found on the DLR's website and are available at the DLR. [www.mass.gov/DLR](http://www.mass.gov/DLR)

#### Service of a Charge

The Charging Party is responsible to serve the Respondent at the same time the Charge is filed with the DLR. At the time of filing, Parties are required to provide a certificate of service or other indication of service.

Parties who file electronically on the DLR website will be offered the opportunity to automatically serve the Respondent.

#### Case Docketing

When the DLR receives the Charge, the docketing staff assigns the Charge a case number. If the Charging Party is a union, the docketing staff also reviews DLR records to determine whether the union is in compliance with [M.G.L. c. 150E, Sections 13 and 14](#). The Charging Party is notified that if the DLR authorizes the issuance of a complaint or

notice of hearing then no complaint issues until the employee organization has complied with the applicable provisions of [M.G.L. c. 150E, Sections 13 and 14](#) and [456 CMR 15.03\(2\)](#).

The Director then reviews the Charge to ensure that it complies with the filing requirements described above and to review whether the case should be considered for deferral to the parties' grievance and arbitration contractual provision. For those cases that meet the filing requirements and are not eligible for deferral, the Director then classifies the Charge using the DLR's Impact Analysis System.

- 1) Procedure should the Charging Party fail to allege specific facts.

The Charging Party is required to allege specific facts in the Charge so that the Respondent may fully respond to the allegations. If the DLR determines that the Charge fails to provide sufficient information, the DLR sends a letter asking the parties to show cause (show cause letter) why the Charge shouldn't be dismissed for failure to provide sufficient information. The DLR promptly considers the responses to the show cause letter, including amplification of the Charge by the Charging Party, and determines whether the Charge should be dismissed.

- 2) Procedure should the DLR determine that the case should be considered for deferral.
  - a) If the Charging Party checked the box on the Charge form indicating that a grievance concerning the subject of the Charge has been filed, the DLR sends a show cause letter to the parties asking them for their position on whether the DLR should defer the case to arbitration.<sup>1</sup> The parties are asked to address whether the grievance(s) were filed prior to the expiration of the collective bargaining agreement, whether the grievance remains pending, and any other issues the parties feel are relevant to the deferral determination.
  - b) If it appears from the face of the Charge that the allegations are essentially questions of contract interpretation, the DLR sends a show cause letter to the parties asking for their position on whether the DLR should defer the case to arbitration, even if the Charging Party did not indicate on the Charge that a grievance had been filed. The show cause letter in these cases also asks the employer whether it is

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<sup>1</sup> *Cohasset School Committee*, MUP-410 (1973); [M.G.L. c. 150E](#), Section 11 as amended by Chapter 145 of the Acts of 2007 (the Law or 150E).

willing to waive any timeliness defense in order to allow for deferral.

- c) The DLR will give the parties 30 days to respond to the show cause letter. If the Charging Party fails to respond within 30 days, the DLR, after sending one reminder letter, dismisses the Charge with prejudice and without further notice. If the Respondent fails to respond, the DLR makes a deferral determination without the Respondent's response.
- d) The DLR promptly considers the responses to the show cause letter to determine whether the allegations in the Charge should be deferred to arbitration. In making this determination, the DLR considers if: 1) the issues posed by the Charge are essentially a question of contract interpretation; 2) the statutory issues raised by the case are well settled; and 3) the resources of the DLR and the parties can be conserved through deferral.<sup>2</sup>

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<sup>2</sup> *Town of Ware*, [17 MLC 1565](#) (1991) (citing *Whittier Regional School Committee*, [13 MLC 1325](#) (1986)).

- e) The DLR promptly notifies the parties of the DLR's deferral decision.

When the DLR determines to defer a case to arbitration, the DLR retains jurisdiction over the allegations in the Charge in order that it may act under any of the following circumstances: a) if the grievance is not resolved with reasonable promptness by the grievance-arbitration process; b) if the grievance and arbitration procedures have not been fair or regular; or c) if the result of the grievance and arbitration procedure is repugnant to 150E. The parties are also directed to notify the DLR within 30 days of the steps taken to comply with the Notice of Deferral, including forwarding the name of the arbitrator selected and the date of the scheduled hearing. The parties are further directed to forward to the DLR copies of any arbitration awards rendered within ten days of its issuance.

When the DLR determines that a Charge should not be deferred to arbitration, it then is handled as a regular Charge under the DLR's Impact Analysis classification system.

- f) After an arbitrator award issues, if the Charging Party believes the Charge should be reinstated, it may request that the DLR review the arbitrator's award. The request must be filed within ten days of the arbitrator's issuance of the Award and follow DLR filing requirements.<sup>3</sup> The request must address whether the arbitration process was fair and regular, whether the unfair labor practice allegations in the Charge were considered by the arbitrator, and whether the award is clearly repugnant to 150E.<sup>4</sup>

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<sup>3</sup> [456 CMR 12.11](#).

<sup>4</sup> *Boston School Committee*, [1 MLC 1287](#) (1975) (*adopting Spielberg Mfg. Co.*, 112 NLRB 1080 (1955)); *City of Cambridge*, [7 MLC 2111](#) (1981).

## Classification of the Charge

The Director reviews any Charge that is not subject to a show cause letter to determine whether it should be considered a Level I or Level II case, using the DLR's Impact Analysis Classification system. Cases where resolution of the dispute has the greatest urgency are processed first and the time frame for completion of the investigation is 14 to 45 days, depending on the level of urgency. Level II cases with less urgency are investigated between 30 and 90 days from the filing date. Although it is difficult to provide an exhaustive list of Level I and Level II cases, as a general rule the following types of cases are considered Level I cases: all representation-related cases, post-election cases, all blocking Charges (blocking a JLMC, [Section 9](#) or representation Petition), [10\(a\)\(3\)](#), [\(4\) or \(5\)](#) cases involving the permanent or indefinite loss of employment, [10\(a\)\(6\)](#) and [10\(b\)\(3\)](#) allegations, and cases involving novel legal issues that impact a significant number of cases.

## Initial Notice to Parties of Pending Charge

After the initial docketing procedures discussed above, the DLR sends the parties a Notice of Investigation, notifying the parties of the pending Charge, its Impact Analysis classification, and the scheduling procedures.

### 1) Level I scheduling procedures.

The parties are required to confer and agree to three proposed dates for the investigation of the Charge that fall within thirty days of the Notice of Investigation. The Charging Party is required to notify the DLR of those dates within five days of the Notice of Investigation. If after reasonable attempts to secure dates, the Charging Party notifies the DLR that the parties are unable to agree on a date to schedule the investigation, the DLR schedules the investigation and notifies the parties of same. If the Charging Party fails to submit dates or submit a written statement explaining why it has been unable to submit mutually agreed upon dates, the Charge is dismissed, absent extraordinary circumstances.

### 2) Level II scheduling procedures.

The parties are required to confer and agree to three proposed dates for the investigation of the Charge that fall within thirty to ninety days of the Notice of Investigation. The Charging Party is required to notify the DLR of those dates within ten days of the Notice of Investigation. If the Charging Party fails to submit dates or submit a written statement explaining why it has been unable to submit

mutually agreed upon dates, the Charge is dismissed, absent extraordinary circumstances.

#### Respondent's Response.

The Respondent has the right to file an answer to the Charge within fourteen days after it receives notice of the Charge. The response should be labeled "Respondent's Response" and include the docket number.

#### Amendments to the Charge

The Charging Party may amend a Charge as of right before the DLR receives Respondent's Response. A Charging Party seeking to amend a Charge after Respondent has filed its response must first seek permission from the DLR to amend the Charge.

The DLR does not allow a Charging Party to amend a Charge if the amendment does not relate to the underlying allegations.

A Charge is amended by typing "Amended" before the word Charge on the regular Charge form and by rewriting the contents of the Charge to include the desired changes.

#### Postponements

As detailed in [456 CMR 12.06](#), requests for postponement of an investigation are not granted unless good and sufficient cause is shown and the following requirements are met:

- 1) The request must be in writing to the Director.
- 2) The grounds for the request must be set forth in detail.
- 3) The requesting party must specify alternate dates for rescheduling the investigation.
- 4) The position of all parties concerning both the postponement request and the proposed alternate dates must be provided in the request.
- 5) Copies of the request must be served contemporaneously on all parties and that fact must be noted on the request.
- 6) The request must be signed by the party making the request.
- 7) In considering a postponement request, a "good and sufficient" reason may include a showing to the satisfaction of the DLR that a postponement results in the settlement of the case.

- 8) Absent compelling circumstances, no request for postponement is granted on any of the three days immediately preceding the investigation date.
- 9) Absent compelling circumstances, the DLR does not grant more than one postponement request.

## The Investigation

The DLR investigates prohibited practice Charge allegations through an In-Person Investigation procedure.

### Purpose of the Investigation

The purpose of the In-Person Investigation is to provide the parties a full and fair opportunity to present to the Hearing Officer the relevant facts and law regarding the prohibited practice Charge so that the Hearing Officer can determine whether or not there is probable cause to believe that the Respondent violated the Law as alleged.

### Role of the Hearing Officer

The Hearing Officer is an impartial Hearing Officer. At the investigation the Hearing Officer explains to the parties the purpose of the investigation. Hearing Officers does not provide advice to the parties and must remain neutral. Hearing Officers identify and discuss the legal theories and underlying facts upon which the theories are based with the parties at the investigation. This may be particularly true for individual charging parties who may not have any expertise in the Law and DLR procedures. If the Hearing Officer believes that an allegation is mistakenly alleged, the Hearing Officer provides the Charging Party the opportunity to withdraw or amend the allegations, if the facts are clearly identified in the Charge.

### Representation by Counsel

Any party required to be present at the In-Person investigation may be represented by counsel or by an authorized representative, if they choose.

### Burden of Proof

The Charging Party presents its case first and has the burden of presenting sufficient facts to support a finding of “probable cause” to believe that the Respondent violated the Law as alleged.<sup>5</sup>

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<sup>5</sup> [M.G.L. c. 150E, Section 11](#); [456 CMR 15.07](#).





## Documents

The DLR does not require parties to submit documents as part of their case, but if a party wishes to submit documents, they should try their best to do so at least three days before the investigation. Additionally, the written material should be submitted in electronic form by e-mailing the documents to the DLR at [Efile.DLR@massmail.state.ma.us](mailto:Efile.DLR@massmail.state.ma.us) and served on all other parties in accordance with [456 CMR 12.02](#). While affidavits are considered, they are not encouraged, as the parties should bring all individuals with first-hand knowledge of the relevant facts to the investigation.

## Default Procedure

### 1) Charging Party fails to appear

After waiting for 30 minutes, and after the Hearing Officer attempts to contact the Charging Party, should the Charging Party fail to appear for an In-Person investigation on the pre-scheduled day, the Hearing Officer issues a show cause letter, seeking the Charging Party's position on case dismissal. If in its show cause response, the Charging Party demonstrates to the DLR sufficient cause for its failure to appear, it is the Charging Party's responsibility to reschedule the In-Person investigation, using the DLR's scheduling directions. If in its show cause response the Charging Party fails to demonstrate sufficient cause for failure to appear, the Charge is dismissed. The Charging Party may appeal the DLR's decision to dismiss the Charge.

### 2) Respondent fails to appear

After waiting for 30 minutes, and after the Hearing Officer attempts to contact the Respondent, should the Respondent fail to appear for an In-Person investigation on the pre-scheduled day, the Hearing Officer proceeds with the investigation, allowing the Charging Party to present its case. After the investigation, the Hearing Officer issues a show cause letter, seeking the Respondent's position on closing the record. If in its show cause response, the Respondent demonstrates to the DLR sufficient cause for its failure to appear, it is the Respondent's responsibility to reschedule the In-Person investigation, using the DLR's scheduling directions. If in its show cause response, the Respondent fails to demonstrate sufficient cause for its failure to appear, the record is closed and the Hearing Officer makes his or her probable cause determination based on the evidence presented.

## What to Expect at the Investigation

Although any party may appear through counsel or an authorized representative, the Hearing Officer expects the parties to bring individuals with first-hand knowledge of the facts and circumstances related to the Charge.

Because this is an investigation and not a hearing, the witnesses are not sworn and there is no direct or cross examination. Rather, the parties have the opportunity to present information themselves and in response to the Hearing Officer's questions. A party may seek clarification or ask questions of the other party, but only through the Hearing Officer.

Generally, each party is limited to 45 minutes to present information, and 15 minutes for rebuttal, if necessary.

In most cases, the Hearing Officer closes the record immediately after the investigation. In the rare case where the Hearing Officer determines that additional information is necessary to make a probable cause determination, the Hearing Officer may keep the record open after the investigation and accept written submissions. This is not encouraged, however, since parties are expected to provide all facts, evidence and legal theories at the investigation. Should the Hearing Officer permit/request written submissions, the parties then receive a specific date by which to provide such written submissions to the Hearing Officer.

## Motions

Parties must file all motions made before or after an In-Person Investigation in writing in accordance with [456 CMR 12.11](#). The DLR reviews all such motions and either rule on the motion in the first instance or, where appropriate, defers the motion to the Hearing Officer.

## The Record

The record of the In-Person Investigation includes the Charge, Respondent's answer, if any, evidence presented at the investigation, and any written submissions presented before, during, or with permission, after the investigation.

## Post-Investigation Activity

### 1) Dismissing the Charge

The Hearing Officer may dismiss the Charge if the Hearing Officer finds no probable cause to believe that a violation of [M.G.L. c. 150E](#) has occurred or if he or she otherwise determines that further proceedings would not effectuate the purposes of [M.G.L. c. 150E. 456 CMR 15.04](#)

The Charging Party may request review of the Hearing Officer's dismissal decision, by filing a request for review with the CERB within ten days from the date of receipt of the Hearing Officer's dismissal decision. The request must contain a complete statement setting forth the facts and reasons upon which such request is based.<sup>6</sup> The CERB does not consider new information or case theories presented for the first time on review.

The record for reconsideration includes the documents referenced in Section II(A)(2)(i) and the dismissal letter.

Within seven days of service of the request for review, any other party to the proceeding may file a response with the CERB.<sup>7</sup>

### 2) Deferring the Charge to Arbitration

The Hearing Officer may determine that the Charge should be deferred to the parties' contractual grievance and arbitration provision. This occurs if, after the investigation, it appears to the Hearing Officer that the allegations raised in the Charge are essentially questions of contract interpretation.<sup>8</sup>

If the Hearing Officer makes this determination, the DLR issues a letter explaining the deferral decision and the parties' rights and obligations concerning this decision. See Procedures, [Section 6\(b\)\(2\)](#).

The DLR does not consider a deferral decision to be a final order. Accordingly, the initial decision to defer is not subject to CERB review. However, a party may seek reconsideration of the Hearing Officer's deferral decision to the Director. The Director reviews the

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<sup>6</sup> [456 CMR 15.04 \(3\)](#).

<sup>7</sup> [456 CMR 15.04 \(3\)](#).

<sup>8</sup> [456 CMR 15.04 \(1\)](#).

decision to ensure that the DLR's deferral policy is consistently applied.

After an arbitration award issues, if the DLR determines not to reinstate the case, the Charging Party may ask the CERB to reconsider the deferral decision, by filing a request for review with the CERB within ten days from the date of receipt of the DLR's decision not to reinstate the Charge. The request must contain a complete statement setting forth the facts and reasons upon which such request is based.

Within seven days of service of the request for review, any other party to the proceeding may file a response with the CERB.<sup>9</sup>

### 3) Referring the Charge to Mediation

The Hearing Officer may determine that the allegations in the Charge are best handled through the DLR mediation procedure.

If the Hearing Officer makes this determination, the DLR issues a letter explaining the referral decision and the parties' rights and obligations concerning this decision. The DLR also appoints a mediator to the case, who provides the parties with dates for the mediation.

If the parties are unable to reach a settlement agreement on their own or through mediation, the DLR reinstates the Charge and the Hearing Officer issues the probable cause determination at that time. If the Hearing Officer referred the case before the In-Person investigation was completed, the DLR asks the parties to schedule a date for an In-Person Investigation, following the DLR's In-Person scheduling procedures, Section II(A)(1)(h).

The DLR does not consider a decision to refer a case to mediation to be a final order. Accordingly, the decision to refer a case to mediation is not subject to CERB review.

### 4) Issuing a Complaint or Partial Dismissal.

If the Hearing Officer determines that there is probable cause to believe that Respondent violated the Law as alleged, the Hearing Officer prepares a complaint. Should the Hearing Officer believe that there is probable cause to believe that Respondent violated the Law with respect to some of the allegations, but not others, the Hearing

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<sup>9</sup> [456 CMR 15.04 \(3\)](#).

Officer issues one document that includes a complaint and a partial dismissal decision.

If the Charging Party is a union, the Hearing Officer checks the DLR records to be sure that the employee organization has complied with the applicable provisions of [M.G.L. c. 150E, Sections 13 and 14](#) and [456 CMR 15.03\(2\)](#). If the Hearing Officer discovers that the employee organization has not complied with this statutory mandate, the DLR sends a letter to the union informing the union of its obligations and that no probable cause determination can issue until these obligations are met.

The Charging Party may request review of the Hearing Officer's partial dismissal decision by filing a request for review with the CERB within ten days from the date of receipt of the Hearing Officer's partial dismissal decision. The request must contain a complete statement setting forth the facts and reasons upon which such request is based.<sup>10</sup> The CERB does not consider new information or case theories presented for the first time on review.

The record for reconsideration includes the documents referenced in Section II(A)(2)(i) and the partial dismissal letter.

Within seven days of service of the request for review, any other party to the proceeding may file a response with the CERB.<sup>11</sup>

#### Expected Timing of Probable Cause Determination

The Hearing Officer issues a determination following the Impact Analysis guidelines. Cases where resolution of the dispute has the greatest urgency are classified as Level I cases and generally are completed within 14 to 45 days of filing the Charge, depending on the level of urgency. Level II cases with less urgency will generally be investigated and completed between 30 and 90 days from the date the investigation is completed.

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<sup>10</sup> [456 CMR 15.04 \(3\)](#).

<sup>11</sup> [456 CMR 15.04 \(3\)](#).