COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2017-P-0784

BEN BRANCH, WM. CURTIS CONNER,
DEBORAH CURRAN, AND ANDRE MELCUK,

CHARGING PARTIES-APPELLANTS,

AND

DEPARTMENT OF LABOR RELATIONS,
COMMONWEALTH EMPLOYMENT RELATIONS BOARD,

AGENCY-APPELLEE.

ON APPEAL FROM A DECISION OF THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD OF THE DEPARTMENT OF LABOR RELATIONS
(Nos. ASF-14-3744, ASF-14-3919, ASF-14-3920)

CHARGING PARTIES-APPELLANTS, BRANCH, CONNER, CURRAN AND MELCUK'S

APPELLANTS' BRIEF

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ISSUES PRESENTED FOR REVIEW

1. Is the imposition of any agency fee a prohibited practice under G.L.c.150E, §§ 2, 10(a)(1) & (3), 10(b)(1), and 12, because compulsory union fees are unconstitutional under the First and Fourteenth Amendments of the U.S. Constitution?

2. Is G.L.c.150E, § 12 unconstitutional under the First and Fourteenth Amendments of the U.S. Constitution because it structures the default choice of nonmembers to pay for the union's political and ideological costs?

3. Appellant Educators are barred by their union from having a voice and a vote on the terms and conditions of their employment because they refuse to support the union's viewpoint on political activities: is it a violation of the First and Fourteenth Amendments of the U.S. Constitution for the state, pursuant to G.L.c.150E, §§ 2, 4, 5 & 12, to grant exclusive representation to an organization that uses such authority to muzzle the speech of nonmembers?

4. The current process, pursuant to G.L.c.150E, § 12, for separating the agency fee into collective

bargaining and political costs draws the line on how much of the Educators' speech can be forced: is this expensive and complex process a violation of the First and Fourteenth Amendment requirement that burdens on speech be minimized?

5. The government is party to the agreement that imposes compulsory union fees on the Educators: does the government bear responsibility for violation of the Educators' constitutional rights?

6. Should this Court consider the affidavits of Professors Michael Podgursky and George Nerren as evidence to determine the constitutional claims before this Court?

7. Was the decision of the Board on the foregoing issues in error?

STATEMENT OF THE CASE

This case presents a First Amendment (speech and association) challenge to the current system of compulsory union fees for public employees. The United States Supreme Court has twice recently cast grave doubt both on the constitutionality of forcing public employees to pay any compulsory union fees and

the previously accepted procedures for challenging the amount of those fees.

In the summer and fall of 2014, Educators Ben Branch, Wm. Curtis Conner, Deborah Curran and Andre Melcuk filed a series of prohibited practice charges with the Commonwealth Employment Relations Board of the Department of Labor Relations ("Board") against the University of Massachusetts and the Hanover School Committee (collectively "Employer") and the Massachusetts Teachers Association and the National Education Association and their affiliates (collectively "Union"). (R.A.I 19-38.)

The Board held two investigations, and on November 18, 2014, Investigator Susan L. Atwater consolidated the charges and issued a decision dismissing all of the Educators' charges. (R.A.III 171.) The Educators filed a timely Notice of Appeal on November 24, 2014, (R.A.III 185.), and the Board upheld the dismissal decision on February 23, 2015. (R.A.III 253.) Since the Board is bound by constitutional decisions of the Massachusetts Supreme Judicial Court and the United States Supreme Court,

the Educators conceded below that a dismissal was consistent with existing case law. (R.A.III 261.)

On February 26, 2015, the Educators filed a timely notice of appeal. (R.A.III 263.) The Board notified the Appeals Court on May 31, 2017 that the record was assembled and the Educators received notice of this on June 5, 2017. This appeal was timely docketed on June 14, 2015.

FACTS

Educators Ben Branch, Wm. Curtis Conner and Andre Melcuk are employees of the University of Massachusetts. Dr. Branch is Professor of Finance at the University of Massachusetts in the Isenberg School of Management. (R.A.III 73.) Dr. Conner is Professor of Chemical Engineering at the University of Massachusetts. (R.A.III 78.) Dr. Melcuk is Director of Departmental Computing at the Silvio O. Conte National Center for Polymer Research at the University of Massachusetts. (R.A.I 100.) Educator Deborah Curran is a middle school teacher in the Hanover Public Schools. (R.A.I 93.)

None of the Educators is a union member, but each of them is included in a collective bargaining unit represented by the Union and is compelled to join or financially support the Union as a condition of employment. (R.A.III 173-75.)

The Educators submitted evidence to the Hearing Officer regarding their desire to stand apart from the Union based on conflicts with the Union's goals and methods that have adversely impacted them. The Educators do not want to be represented by the Union, much less be compelled to financially support it. (R.A.III 73-74, 78-79, 82-83; R.A.I 97-98, 101, 103-105.)

A. The Educators' Objections

Branch: Dr. Branch has taught at the university for thirty-eight years. He opined that the Union is a force that weakens the university. Not only does the Union make it more difficult to "weed out ineffective and unproductive faculty," it "places additional burdens on the most effective and productive faculty" by favoring and protecting "the least productive and least effective faculty." Dr. Branch opposes placing

the interests of "Union members ahead of the interests of our students and university." (R.A.III 73-74, ¶¶1, 6-7.)

"For literally decades," Dr. Branch has "filed objections every year to [his] compulsory union fees being used for political and ideological purposes." (R.A.III 77, ¶9.) Instead of accepting that Dr. Branch has said, "No" to supporting the Union's political and ideological views, the Union switches his "no" to a "yes" each year. Dr. Branch recites "If I did not file an objection, I would be charged the amount of the Union's agency fee demand, and would not be allowed to pay the lowest agency fee amount." (*Id*.)

Melcuk: Dr. Melcuk was born in the Soviet Union and when he was young moved to Canada. His experiences in the Soviet Union and Canada have caused him to prefer the rights of individuals and to develop a "distaste for collectivist organizations," with their notions of what is supposedly the "collective good." (R.A.I 101, ¶¶ 3-5.) Dr. Melcuk believes that without Union representation his work at the university would be "more satisfying, less stressful and more

financially rewarding." (R.A.I 105, ¶12.) He has "philosophical, political, emotional, ethical, and psychological objections" to labor unions. (R.A.I 103-04. ¶ 8.)

The agency fee procedure currently in place in Massachusetts has caused Dr. Melcuk repeated problems. A prior union (SEIU, Local 509) would, without his authorization, fill in his forms to "make me a union member" and "deduct my dues directly"— which required him to contact the university payroll department to remove the automatic deduction from his paycheck. (R.A.I 102, ¶ 7(a)& (b).)

The current Union sends him information about his agency fee obligations. Theoretically, the Union sends this annually because it requires him to object to the fee each year. Dr. Melcuk considers the material to be carelessly created, thus requiring him to "closely study hundreds of pages of verbiage," and "to perform unpaid accounting and bookkeeping work on the Union's behalf." (R.A.I 106-07, ¶16.)

The Union is not reliable in sending the agency fee material. For example, in 2011 it belatedly

demanded its fee for the 2008-2009 year. When Dr. Melcuk challenged the Union's agency fee demand through its internal arbitration process, the Union instructed him to deposit the full amount of its demand in an escrow account, but then never sent his challenge to an arbitrator. After waiting two years, he discovered that not only had the Union done nothing with his challenge, but his escrowed fees were drained due to bank charges. (R.A.I 107, ¶17.)

Conner: Dr. Conner held the Fulbright Distinguished Chair in Alternate Energy Technology at the University of Massachusetts. He does not believe Union representation is in his best interest. Not only is he barred from directly presenting his views to university administration, but the Union refused to consult with him prior to bringing litigation against the faculty elected departmental personnel committee, of which he is a part. (R.A.III 78-80, ¶¶ 1, 3-5.)

Dr. Conner believes that being forced to support the totality of the Union's activities is contrary to his own political and ideological preferences. (R.A.III 80-81, ¶¶ 7-9.) Many years ago, he

independently tried to challenge the amount of the Union's fee claims. He felt that he knew something about the law because his father was a Judge of the U.S. Federal District Court in New York. He became part of the *Belhumeur* litigation, which involved 53 days of trial spanning 23 months. He won his challenge, but with appeals, resolution took over ten years and during that time his money was tied up in escrow. (R.A.III 81-82, ¶¶ 10-14.)

Dr. Conner, after reciting in his affidavit his distinguished career at the university, the Union's opposition to his views on political and ideological matters (including bargaining matters), and the burden and difficulty of attempting to extract himself from support of the Union's politics, states, "Why would I want or need a labor union to represent me?" (R.A.III 82-83, ¶15.)

Curran: Ms. Curran teaches in the Hanover Public Schools and has done so for twenty-five years. She found the behavior of the Union to be unseemly and even brutal towards those unwilling to "march in lock

step with the Union's philosophies," thus she resigned many years ago. (R.A.I 93, ¶¶ 1-4.)

Later, Ms. Curran was promoted to the position of "District Wide Coordinator" for an innovative program to mentor new teachers. When the Union learned of this, it attempted to have her removed from the position. When that failed, the following year the Union tried a new tactic. It "guarantee[d]" it would help her to make more money in her new position if she would join the Union. Ms. Curran refused, citing her religious and political beliefs. In the next negotiations, the existence of Ms. Curran's new position became such a point of conflict that the school decided to dissolve her position and discontinue the program. (R.A.I 94-95. ¶¶ 6-7.)

In 2010, the Union sought to have Ms. Curran disciplined for being absent from school due to illness. It pressed her principal to demand that she produce a physician's note. Ms. Curran complied. Her Principal, satisfied, chose to drop the matter. The Union, in what must be unusual behavior for an agent that is supposed to represent Ms. Curran, then

demanded that the Superintendent conduct an investigation. Despite her medical evidence, she was suspended for five days and denied sick leave for four days. Believing that the Union's unique behavior was premised on the fact she was refusing to become a member, she hired an attorney. Her attorney negotiated a restoration of all of her sick leave pay and a reduction of her suspension to two days. Unsatisfied, Ms. Curran commenced litigation before the Board, which issued a complaint against the Union for its behavior. (R.A.I 95-97, ¶¶ 10-14; R.A.III 174, n.6.) The litigation ultimately cost Ms. Curran nearly $35,000. The outcome is confidential (discussion of the resolution has been redacted from Ms. Curran's affidavit due to Union objection). (R.A.I 97.)

B. Expert Opinion Backs the Educators.

The Educators' experiences show the great diversity in the reality of union representation. The Educators' experience in that regard is bolstered by

two affidavits they submitted from experts in the field.[1]

Professor Michael Podgursky, Professor of Economics at the University of Missouri-Columbia, is a nationally-known expert on the economics of education. In addition to being on the Board of editors of several academic journals, he is a co-investigator at two national research centers funded by the U.S. Department of Education. (R.A.III 162, ¶¶ 1-2.) His affidavit confirms the conclusions of the Educators that some teachers are disadvantaged by collective bargaining. (R.A.III 163-65, ¶¶ 4-9.) Students in economically challenged areas are deprived of more experienced, and in many cases more effective, teachers as a result of collective bargaining. (R.A.III 164. ¶ 7.)

Dr. Podgursky's affidavit also demonstrates that unions create financial viability problems for government. Teacher pension plans nationwide currently have over $300 billion in unfunded liabilities. Not

[1] The Board did not formally accept these affidavits because, as is discussed later, they concerned constitutional claims.

only does the structure of those current plans harm certain teachers, particularly young teachers and those recruited to urban or charter schools, but teachers' unions are strong supporters of those plans. (R.A.III 165-66. ¶¶ 10-12.)

Professor George Nerren, prior to teaching in higher education, had experience on both sides of the bargaining table. He was the chief negotiator for an affiliate of the National Education Association, the parent Union here. Dr. Nerren also conducted training sessions for school Board negotiators. (R.A.III 155-56, ¶¶ 4-6.) Dr. Nerren researched the annual statistical report of the Tennessee Department of Education over a twenty-year period to compare the effect of collective bargaining on the salaries of Tennessee public school teachers. (R.A.III 156, 159-61, ¶ 7 and attached article.)[2]

At the beginning of the Nerren study, nine of the top twenty school systems with the highest teacher

[2] Such a study would not be possible in Massachusetts where almost all school districts collectively bargain, including all large districts. However, in Tennessee there is substantial diversity. In the year of publication, 91 out of 138 Tennessee school systems bargained (R.A.III 159.)

salaries engaged in collective bargaining. Twenty years later, however, only three of those systems remained in the top twenty in pay, and only five of the top twenty bargained. (R.A.III 157, ¶ 12 & 161.) In 1978 a difference of only $318 existed between the average salaries of teachers in bargaining and non-bargaining systems, but by 1998 the difference had increased to $1,680 annually, thus widening the negative impact of bargaining on salaries. (R.A.III 157, ¶ 9.)

The Educators' negative view of the impact of Union representation upon them is bolstered by expert studies.

C. Barriers Burdening the Educators' Constitutional Rights

Notwithstanding the viewpoints of the Educators, state law and Union practice create several factual conditions (barriers or burdens) that impact their First Amendment rights.

The burden of the default: Massachusetts agency fee statute G.L. c. 150E § 12 requires that nonmembers pay an agency fee in the amount of union dues and then

seek a rebate for non-chargeable fees. The chargeable fees are "collective bargaining costs" and the non-chargeable fees are "political costs." (The actual description and segregation are much more complex.) The Union imposes a variation on the statute, largely consistent with the gloss imposed by *School Committee of Greenfield v. Greenfield Education Ass'n*, 385 Mass. 70 (1982), in which the Educators are required to take the affirmative action of filing prohibited practice charges with the Board to change the status quo and receive the lowest fee the Union will accept. (456 CMR 17.06(1); R.A.III 77, ¶ 14.)

The statute does not require the Union to charge only the lowest amount it is willing to accept, and solicit more from nonmembers if it wants more.

The question of how this default is set is central. The Educators presented scientific evidence from Dr. John Balz, lead researcher for the New York Times best-selling book, *Nudge*,[3] on the science of defaults ("choice architecture"). Dr. Balz opined what should be obvious—the default option is important

[3] RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2009).

because there is a human tendency toward inertia or non-action. (R.A.I 142-44, ¶¶ 16, 19.) Section 12 of the statute creates a default that favors Union speech. If the Educator does nothing, the Union keeps for itself the entire amount claimed. (R.A.I 142, ¶17.)

The Union's variation on the statute creates two default decision points. The first defaults nonmembers into the same non-union status they held the prior year. The second default point addresses whether the nonmember will accept the Union's unilateral calculation of the "appropriate" amount of the agency fee. The Union sets the default at this second point to accept its unilateral decision. (R.A.I 142, ¶18). For the last ten years, if the nonmember takes the affirmative action of filing a prohibited practice charge, the Union reduces the amount it accepts to 55% of dues; otherwise the employee pays a higher fee to the Union. (R.A.III 77, ¶ 14.)

The power of the default option has been shown in a number of scientific studies. The seminal study, according to Dr. Balz, involves employee enrollment in

a retirement program of a Fortune 500 firm. When the default was set to "opt-in" (meaning the employee had to take an affirmative step to enroll), only 37.4% joined. However, when the default was switched to "opt-out" (enrollment took place if the employee did nothing), 85.9% enrolled. (R.A.I 144, ¶ 20.)

The Union's unilateral decision as to the appropriate amount of the fee concerns money in which, undisputedly, both the Union and the employee have an interest. The Union sets the default to an annual "opt-in" (acceptance of its calculation) such that the employee forfeits his or her interest in the potentially contested amount, and his or her right to pay the lowest amount the Union will accept. The Union sets the default this way even if, like Dr. Branch, the nonmember has been objecting for more than ten years. (R.A.III 77, ¶ 14.)

Accordingly, as Dr. Balz explains, nonmembers give up their legal interest in the contested fee (and their right to pay the lowest amount), which is a result based not on employee preference, but on the

way the Commonwealth and the Union have structured employee choice. (R.A.I 144-46, ¶¶ 21, 25, 26.)

The burden of a complex procedure: The default setting assumes even greater importance, according to Dr. Balz, when the decision is complex and the outcome uncertain. (R.A.I 146, ¶¶ 26 & 27.) Dr. Melcuk, a Ph.D in Physics (R.A.I 100, ¶ 1), found the challenge procedure he went through "burdensome and time consuming," requiring "close[] study [of] hundreds of pages of verbiage." (R.A.I 106, ¶ 16.) Dr. Balz found the documents in the Union procedure "daunting by virtue of their length and language." (R.A.I 146, ¶ 27; the document referred to is R.A.II 3-301.)

The Union bolsters the uncertainty of any employee's fee decision by prefacing its disclosure documents with threats. It warns employees who are considering declining membership of the risk of financial disaster. The Union will not help defend them against discharge or a child abuse claim. (R.A.II 6-9; R.A.I 147, ¶ 28.)

Emily Pitts Dixon's affidavit reveals that the prominent agency fee challenges brought before the

Supreme Judicial Court or the U.S. Supreme Court, individually involved thousands of attorney hours. (R.A.I 111-14, ¶¶ 2-10.) A Massachusetts' challenge involved 8,058.40 attorney hours, 7,177.30 support staff hours, and $161,680.80 in court costs, expert fees and travel expenses. (R.A.I, 114 ¶ 10.) The transcript alone cost $54,000.00 (R.A.I 113, ¶ 6.) Dr. Balz reviewed the Dixon affidavit, and on the issue of employee aversion to uncertainty, opined that these agency fee challenges are "horror stories." (R.A.I 147, ¶ 30.)

No expert contested Dr. Balz's conclusion that the default setting for agency fee challenges, the complexity and threatening nature of the Union's disclosure, and the uncertainty of challenging the Union's unilateral calculations, are a "tool that nudges employees toward membership and refraining from challenging [Union] agency fee calculations." And that that results in "an unknown number of employees ... giving up their legal interests and political money that they would not otherwise give." (R.A.I 148, ¶ 31.)

The burden of the gag: Although the current system requires nonmembers to pay for collective bargaining costs, the Union has an official policy barring them from a voice or vote in their workplace conditions. "Apart from the ratification of the contract, nonmembers do not participate in the collective activities and decision-making of the association that influences the terms and conditions of their employment." (R.A.II 6-7.) The Union is forced by G.L. c 150E § 12 to allow nonmembers to vote on a final contract containing a compulsory union fee provision.

The Educators must give up both their voice and vote in workplace conditions if they wish to avoid supporting Union political speech.

SUMMARY OF ARGUMENT

School Committee of Greenfield v. Greenfield Education Ass'n, 385 Mass. 70 (1982) announced the first Massachusetts revolution in the law on compulsory union fees. A second revolution is now called for. In 2014 the U.S. Supreme Court announced a change in the level of scrutiny applied to union fee

challenges. No longer will "rational basis" or "intermediate level" scrutiny suffice. *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014) now requires "exacting First Amendment scrutiny" for compulsory union fees (pp. 43-44).

A related prop for compulsory fees, now consigned to the dustbin of history, is the "free-rider" justification (pp. 27-29).

While government cannot favor the view point of one speaker over another, the Commonwealth does just that when it constructs a default wherein employees hand money over to a union for it to use to promote its political views at their expense (pp. 30-35, 42). Even when the employee repeatedly challenges the default by saying, "No," the Commonwealth and the Union annually flip that answer to "Yes, I'll pay what the Union demands" (pp. 35-36).

When employees defy the default to retain their own political autonomy, the Commonwealth and Union create several barriers that impermissibly burden employee speech rights. Those burdens include denying employees a vote and a voice in their workplace

conditions, (pp. 36-39), imposing standards so vague that even Justices of the U.S. Supreme Court have trouble applying them, (p. 39), and creating a prolix process for drawing the line on free speech wherein an employee would have to be part of the reputed "1%" to pay for the thousands of lawyer hours required (pp. 39-41). The established system for sorting out union fees imposes a prior restraint by letting the union initially draw the free speech line and making employees chase after their money, (pp.41-42), in a process that literally requires employees to waive their privacy of opinion on thousands of union positions. (pp. 42-43).

Finally, it is the government that has created and authorized this disorder in free speech rights, and it should not be permitted to pass sole liability onto the shoulders of labor unions. (pp. 45-46.)

ARGUMENT

I. *Introduction.*

More than sixty years ago, the U.S. Supreme Court embarked on an experiment with compulsory union fees. In *Railway Employes' v. Hanson,* 351 U.S. 225 (1956),

the Court acknowledged the controversial nature of that compulsion: "The ingredients of industrial peace" are not only "numerous and complex," but they "may well vary from age to age," with the result that what "would be needful one decade might be anathema the next." *Id.*, at 234.

Last year, the U.S. Supreme Court in *Harris* announced that the time had arrived to consider whether compulsory union fees continue to be appropriate for public employees. The *Harris* Court described *Hanson*'s analysis for upholding the constitutionality of compulsory union fees as "a single, unsupported sentence that its author essentially abandoned a few years later." 134 S. Ct. at 2632.

The original justification for compulsory fees sat on a very narrow perch: the legislative judgment that eliminating "free riders" is necessary for "labor peace." *Knox v. Serv. Employees Int'l Union, Local 1000,* 132 S. Ct 2277, 2290 (2012).

According to the Court, the validity of this original legal justification no longer exists because

"free rider arguments are generally insufficient to overcome First Amendment objections." *Id.* at 2289. "The mere fact that nonunion members benefit from union speech is not enough to justify an agency fee...." *Harris,* 134 S. Ct. at 2636.

The extent of the justification for compulsory fees is constrained by the evidence in this case. The Educators submitted a twenty-year study of public school teachers represented by affiliates of the National Education Association showing that teachers represented by an exclusive bargaining representative, in directly comparable districts, earned less than those who were not union-represented.[4] The Educators also submitted the affidavit of a national expert in the economics of education that shows that collective bargaining actually harms the pay of some categories of teachers.[5]

[4] R.A.III 156-61, ¶¶ 7-13 and attached article.

[5] R.A.III 162-64, ¶¶ 1, 2, 5-7. The Hearing Officer and Commonwealth Employee Relations Board did not accept into evidence either the Nerren or Podgursky affidavits because they address the factual issues underlying the constitutionality of compulsory union fees, and the Board was not passing on the constitutional issues. (R.A.III 259 and 259 n.11.) The Educators made a formal offer of proof for both

Not only is the justification for compulsory fees evaporating, a new standard for measuring that justification is now required. In *Abood*, the Court wrote of "important government interests" as being sufficient to overcome the nonunion teachers' speech rights. 431 U.S. at 225. However, in *Harris*, the Supreme Court said that *Abood* was not controlling, and instead applied "generally applicable First Amendment standards," which resulted in the application of exacting scrutiny to compulsory union fees. 134 S. Ct. at 2639 ("exacting First Amendment scrutiny," quoting *Knox*, 132 S. Ct. at 2289).

The foundation for compulsory union fees has crumbled. Consequently, the burdens imposed by the Union on the Educators no longer can stand.

With the U.S. Supreme Court announcing a new level of scrutiny for compulsory union fees, and with its rejection of the "free-rider" justification for compulsion, the time has come for the Massachusetts

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affidavits to ensure they were in the record. (R.A.I 51.) Since this Court *is* looking at the constitutionality of union fees, those opinions are not simply relevant, but assume great importance and they should be accepted into the record.

judiciary to decide if these substantial changes require a second revolution in its agency fee jurisprudence.

II. *The Government Cannot Create a Default Favoring Union Speech*

The First Amendment does not countenance discrimination based on the identity of the speaker, *Citizens United v. FEC,* 558 U.S. 310,341 (2010), or permit limitations based on the identity of the interests represented by the speaker. *Id.* at 347; *Sorrell v. IMS Health Inc.,* 131 S. Ct. 2653, 2664 (2011). Even laws that appear to be neutral as to content and speaker, can burden one side of speech by the procedures employed. 131 S. Ct. at 2664.

Calculating the amount of the compulsory union fee draws the line between what speech nonmembers will retain, and what speech they will be forced to make on behalf of the Union. The current system, as explained in the recitation of facts, heavily favors Union speech.

Chapter 150E § 12 sets nonmember union service fees equal to union dues. This statute then provides

that if (and only if) an employee demands a return of his money, must the union provide a rebate of the political portion of the union dues. Dr. Balz, an expert in the science of defaults ("choice architecture"), opined on what should be obvious (and here factually undisputed)— Section 12 creates a default that favors Union speech. If the Educator does nothing, the Union keeps for itself the entire dues amount. (R.A.I 142-44, 146, ¶¶ 18-19, 25-26.)

In *School Committee of Greenfield*, this Court softened the impact of Section 12 and stated that the nonmembers' rights in the agency fee, as here, are constitutional, while the union's rights are only statutory and contractual. 385 Mass. at 84. The result is that Section 12 not only tilts in favor of Union speech, it tilts *against* the constitutionally protected speech rights of the Educators.

Although affirmative objection has long been required, according to the Supreme Court, its constitutionality is currently in play. *Knox* explained that the historic "dissent is not to be presumed" language was only an "offhand remark" that did not

"consider the broader constitutional implications of an affirmative opt-out requirement." 132 S. Ct. at 2290. The Court went on to write that "our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate." *Id.* at 2291. As mentioned above, the line of toleration has changed. The judicial measuring stick for the constitutionality of compulsory union fees now requires exacting scrutiny. A closer look shows that requiring affirmative dissent cannot pass that level of scrutiny.

Machinists v. Street, 367 U.S. 740 (1961) is the case that "stated in passing that 'dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee.'" *Knox,* 132 S. Ct. at 2290 (quoting *Street,* 367 U.S. at 774). Context is critical to understanding the meaning of Street's dicta and the nature of the issue actually resolved in that case. There, in the court below, the Georgia Supreme Court noted that all employees, as a condition of employment, were compelled "to join the unions of their respective crafts and pay dues, fees, and

assessments to the unions" that were used for political activities to which some "members" objected. *Machinists v. Street,* 108 S.E.2d 796, 807 (1959).

Thus, every employee in *Street* was deemed a union "member." Having no way to determine who *wanted* to be a union member and who was *coerced* into union membership, the Court was faced with the question of how to sort this out. The result, "dissent is not to be presumed," was meant to be a pragmatic rule applied to union members only. It makes some sense to assume that union members support the union's political choices and activities, unless the union is told otherwise. However, to presume that nonmembers support union politics makes no sense and is counterintuitive. Unions have no more power over nonmembers than they have "over the man in the street." *NLRB v. Granite State Joint. Bd.*, 409 U.S. 213, 217 (1972). That confirms *Knox*'s finding that the phrase "dissent is not to be presumed," when applied to nonmembers, is not a constitutional rule, but "more [of] a historical accident." *Knox*, 132 S.Ct. at 2290.

Even more recent cases are consistent with the idea that members, rather than nonmembers, are the only individuals for whom consent can be presumed. *Abood v. Detroit Bd. of Educ.,* 431 U.S. 207 (1977), tied the dissent obligation to union members. It wrote that individual dissent, rather than a sweeping injunction against the union, is the correct approach, "because those *union members* who do wish part of their dues be used for political purposes have a right to associate to that end 'without being silenced by the dissenters.'" 431 U.S. at 238 (emphasis added) (*quoting Street*, 367 U.S. at 772-73).

It is often overlooked that the plaintiff objectors in *Abood* included union members. 431 U.S. at 212 n.2. ("Some of the plaintiffs ... joined the Union and paid the fees without any apparent protest."). That the Court was referring to actual union members is clear from the concern about being "silenced by dissenters." When nonmembers insist on their right to refuse to support union politics, they do not silence members. Such political money belongs to the nonmember. It is not the property of the union or its

members, but is "*other people's* money." *Davenport v. Wash. Educ. Ass'n,* 551 U.S. 177, 187, 187 n.2 (2007)(emphasis in original).

III. *Annual Objection Multiplies the Error in the Default Setting.*

The government cannot establish a default system that favors union speech at the expense of employee speech when the employee's speech is constitutionally protected and the union's is not. It naturally follows then, that the government certainly cannot repeatedly reset the default to favor union speech. No matter how many times the Educators tell the Union they do not want to support its political speech, the Union does not allow them to pay the lowest fee the Union will accept unless they annually file a formal prohibited practice charge. (R.A.III 75, ¶ 9.)

In *Shea v. International Ass'n of Machinists,* 154 F.3d 508 (5th Cir. 1998), the court struck down annual union fee objections. "Certainly the procedure that least interferes with an employee's exercise of his First Amendment rights is the procedure by which an

employee can object in writing on a continuing basis." *Id.* at 515.

Here, the Educators can obtain a partial reduction, but they are required to institute litigation to achieve the lowest fee the Union will routinely accept.

IV*. The Grant of Exclusive Representation Is Unconstitutional if Used to Coerce Speech.*

The government cannot require public employees to support a specific political party to either retain their jobs (*Branti v. Finkel,* 445 U.S. 507 (1980)), or avoid employment discrimination (*Rutan v. Republican Party*, 497 U.S. 62, 69, 74 (1990)). Reason being that "'political belief and association constitute the core of those activities protected by the First Amendment ....'" *Rutan,* 497 U.S. at 69 (citation omitted).

The Union requires that the Educators become full members, and thus support all of it political, religious and ideological positions, as the price of having a voice and a vote in the Educators' working conditions. The government "'*may not deny a benefit to a person on a basis that infringes on his*

constitutionally protected interests—especially, his interest in freedom of speech.'" Id, at 72 (citation omitted).

Barring the Educators from a voice and a vote in their working conditions is the most extreme form of discrimination, and it arises from one thing only, the Educators' refusal to join the Union and thus be saddled with supporting its controversial views. Thus, the Educators are experiencing punishing discrimination for exercising their fundamental right to freedom of political speech and association. While this kind of political blackmail might pass under the lower level of scrutiny applied in prior union fee cases, it cannot survive exacting scrutiny.

V*. The Existing System for Allocating Speech Is Too Burdensome.*

"The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content based bans." *United States v. Playboy Entm't Grp.,* 529 U.S. 803, 812 (2000). Several times in *School Committee of*

Greenfield the Supreme Judicial Court expressed concern about limiting the procedural burden on nonmembers forced to pay compulsory fees. 385 Mass. at 76 n.3, 78 n.4, 82. The SJC was hampered in reaching the right result because *Abood*, with its obsolete standard, was the North star (385 Mass. at 80) at the beginning of the Commonwealth's experiment with compulsory union fees.

That experiment has not turned out well. In *Citizens United,* the Court rejected the idea that a statute that limited speech could be saved through an interpretation "that force[s] speakers to retain a campaign finance attorney" to interpret "an amorphous regulatory interpretation." 558 U.S. at 324. "Prolix laws chill speech for the same reason that vague laws chill speech...."*Id.* If protecting speech against a statute requires "substantial litigation over an extended time .... [t]he interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech...." *Id.* at 326-27.

That perfectly describes what this experiment has inflicted upon employees who object to a union's agency fee calculation, as the following demonstrates.

A. *Vague standards*

In *Board of Regents v. Southworth,* 529 U.S. 217 (2000), the Supreme Court admitted its inability to create clear standards. In drawing the free-speech line on expenses of labor unions "whose functions are, or so we might have thought, well known and understood," and even after a "long history" of judicial involvement, the Court confessed that "we have encountered difficulties in deciding what is germane [meaning chargeable] and what is not."*Id.* at 231-32.

B. *Excessive cost*

The Educators submitted the Emily Pitts Dixon affidavit to the Board to reveal the expenses incurred for some of the most prominent union fee challenges. That evidence shows that thousands of lawyer hours were spent in the endeavor to refrain from supporting union politics. *CWA v. Beck*, 487 U.S. 735 (1988) was filed in 1976 and decided by the Supreme Court in

1988. It consumed 4,502.40 hours of attorney work, and 2,030.20 hours of support staff work. (R.A.I 113-14, ¶ 8.) A federal court described the litigation as "4,000 pages of testimony, the introduction of over 3,000 documents, and innumerable hearings, and adjudication of motions." *Beck v. CWA*, 776 F.2d 1187, 1194 (4th Cir. 1985), *aff'd*, 487 U.S. 735 (1988). *Belhumeur v. Springfield Education Ass'n*,[6] which utilized the specific procedure suggested in *School Committee of Greenfield*, was filed in 1988 and settled in 2004. It consumed 8,058.40 attorney hours, 7,177 support staff hours, $161,680.80 in court costs, expert fees and travel expenses, and 5,019.44 hours of Westlaw research, all for the purpose of defining the free speech rights of the objecting teachers. (R.A.I 112-14 ¶¶ 3-11.)

The attorneys' fee award in the previously mentioned *Knox* decision was over one million dollars!

[6] *Belhumeur*, a case involving a 53-day trial before the Massachusetts Labor Relations Commission, and various appeals, is reported at: *Belhumeur v. Labor Relations Commission,* 432 Mass. 458 (2000); *Wareham Education Ass'n. v. Labor Relations Commission,* 430 Mass. 81 (1999); *Belhumeur v. Labor Relations Commission,* 411 Mass. 142 (1991).

Knox v. Chiang, 2013 WL 2434606 (E.D. Cal. June 5, 2013).

In *Citizens United,* the Court held that when a citizen is required to engage in complex and prolix litigation to vindicate speech, the statute creating such a burden cannot stand. 558 U.S. at 324-27. As exemplified by the cases above, the *Abood* experiment requiring employees to object and challenge a union's fee calculations to protect their political autonomy cannot withstand exacting scrutiny.

C. *Prior restraint*

In the typical prior restraint case, the speaker obtains a permit for speech from an agency that essentially provides an advisory opinion as to what type of speech is permitted. *See, e.g., Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton,* 536 U.S. 150 (2002). Here, the Union, in the role of a government censor, unilaterally determines what part of the Educators' speech will be protected (the fee amount returned or not collected) and what part will not (the fee amount retained by the Union). No prior hearing is required; the Educator must

thereafter "apply" for a hearing. The best the Educator can do is chase after the Union before the Board to recoup his speech. The chase, as just discussed, comes at a very high price and, therefore, restrains speech to a much greater degree than anything involved in *Watchtower*.

D. *Viewpoint discrimination*

The First Amendment prohibits discrimination based on the identity of the speaker, *Citizens United*, 558 U.S. at 341, and prohibits limitations based on the identity of the interests represented by the speaker, *id.* at 346-47; *Sorrell,*131 S. Ct. at 2664. These prohibitions bar the preference for union-side speech inherent in allowing the Union, absent a fee challenge, to conclusively determine the parameters of its own speech and that of nonmembers. Even laws that appear to be neutral as to content and speaker can burden one side of speech by the procedures employed. *Sorrell*, 131 S. Ct. at 2664.

E. *Compulsory union fees invade privacy*

Government may not force citizens to disclose the nature of their beliefs. *Abood*, 431 U.S.at 241, 241

n.42. About a decade later, that constitutional right died on the altar of expediency. In *Air Line Pilots Ass'n v. Miller,* 523 U.S. 866 (1998), the Supreme Court required nonmembers to disclose their opinions on "thousands of expenditures," because otherwise unions would be required to prove that all expenditures for which they claimed reimbursement were actually chargeable. *Id.* at 878. "[A]n objector can be expected to point to the expenditures or classes of expenditures he or she finds questionable." *Id.* The Board's rules on this are consistent. *Springfield Educ. Assn and* Belhumeur, 23 MLC 233, 235-36 (1997).

VI. *Strict Scrutiny Would Mandate a Different Result.*

Abood recognized that public employee collective bargaining is "political," an "attempt to influence governmental policymaking." 431 U.S. at 230-31. *Abood* justified passing these political expenses on to nonmembers based on its prior rulings in *Railway Employes' Department v. Hanson*, 351 U.S. 225 and *Street.* 431 U.S. at 232. Only *Hanson* passed on whether collective bargaining expenses were constitutionally chargeable and, in so holding,

applied the rational basis test. 351 U.S. at 234 ("The task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises."). The Court even admitted that forcing employees to pay union fees "may not be the wisest course." *Id.* at 235. *Abood* referred back to *Hanson* and *Street* to justify "important government interests" as sufficient to overcome the First Amendment infringement. "Important" governmental interest is the intermediate scrutiny standard. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

Harris and *Knox* require that "exacting First Amendment scrutiny" be applied, requiring the state to show a "compelling interest." *Harris*, 134 S.Ct. at 2638 & 2639. The Supreme Court now requires that the most exacting scrutiny be applied to compulsory union fees, while past precedent upholding compulsory fees relied on a lesser standard of scrutiny. As previously shown, compulsory union fees and the procedures for determining them cannot pass strict scrutiny.

VII. *The Government Must Answer for Violating Constitutional Rights.*

It defies imagination that the government would have any basis for escaping liability where it both authorized compulsory union fees by statute, and then as employer specifically agreed to impose these forced fees on the Educators. Yet, that is exactly what the Board's Investigator decided here based on *Hogan v. Labor Relations Commission*, 430 Mass. 611 (2000). (R.A.III 177-78.)

Hogan is inapplicable for two reasons. First, unlike the employee in *Hogan*, here the Educators are asking the Board to find prohibited practices against their employers when the existing procedures for imposing compulsory union fees are eliminated (or modified) based on the application of exacting constitutional scrutiny. *Hogan* determined that the existing procedures protected the employees in that case (430 Mass. at 613-14), whereas here the Educators challenge the constitutionality of the existing procedures.

Second, *Hogan* correctly found that constitutional claims are the province of the judiciary. *Id*. at 615. Just as the affidavits of Drs. Podgursky and Nerren become relevant once this case comes before the judiciary, so also the constitutional constraints on the government become relevant when the underlying procedures are under attack before this Court.

The U.S. Supreme Court is unambiguous about the liability of public employers when compulsory union fee procedures are under constitutional attack: "the government and the union have a responsibility to provide procedures that minimize that impingement [on employees' constitutional rights.]" *Chicago Teachers, Local 1 v. Hudson*, 475 U.S. 292, 307 n.20 (1986). More recently, the Supreme Court referred to public employee agency fees as "state-created harm." *Davenport*, 551 U.S. at 189.

The Educators' public employers failed to protect the Educators' First Amendment interests when they agreed to impose compulsory union fees upon them.

CONCLUSION AND DESIRED RELIEF

Compulsory union fees and the default assumption that nonunion employees consent to supporting union politics fail strict scrutiny. Therefore, G.L.c.150E, § 12 should be declared unconstitutional. The Union is empowered to force nonmembers to choose between a voice and a vote in their working conditions and their political autonomy due to the grant of exclusive representation under G.L.c.150E §§ 4, & 5. Therefore, G.L.c.150E, §§ 4, & 5 should be declared unconstitutional when applied for the purpose of blackmailing nonmembers to give up their political autonomy. Governmental employers who agree to impose compulsory union fees should be held equally culpable with their union partners in creating these constitutional violations.

As to the record, the expert affidavits of Drs. Podgursky and Nerren are relevant to this Court's consideration of the constitutional claims raised by the Educators, and should be accepted into the evidentiary record.

This consolidated case should be remanded to the Board for consideration of the Educators' prohibited practice charges, in light of the modifications to G.L.c.150E, §§ 4, 5, & 12 declared by this Court.

Respectfully submitted,

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DATED: July 24, 2017

Certificate of Compliance

I, Bruce N. Cameron, Counsel for the Charging Parties- Appellants, hereby certify that this brief complies with the rules of Court that pertain to the filing of briefs, including, but not limited to, Mass. R. A. P. 16(a) (6), Mass. R. A. P. 16(e), Mass. R. A. P. 16(f), Mass. R. A. P. 16(h), Mass. R. A. P. 18, and Mass. R. A. P. 20.

/s/ Bruce N. Cameron
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Certificate of Service

I, Bruce N. Cameron, attorney for the Charging Parties-Appellants, hereby certify that on July 24, 2017, a copy of the foregoing Appellants' Brief was sent by first class pre-paid mail to: Jane Gabriel, Chief Counsel, Commonwealth Employment Relations Board, Department of Labor Relations, Charles F. Hurley Building, 19 Staniford Street, 1st Floor, Boston, MA 02114; Amy Laura Davidson, Esq., Sandulli Grace PC, 44 School Street, Suite 1100, Boston, MA 02108 (counsel for Union parties).

/s/Bruce N. Cameron
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Addendum

G.L.c. 150E, § 12

The commonwealth or any other employer shall require as a condition of employment during the life of a collective bargaining agreement so providing, the payment on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, of a service fee to the employee organization which in accordance with the provisions of this chapter, is duly recognized by the employer or designated by the commission as the exclusive bargaining agent for the unit in which such employee is employed; provided, however, that such service fee shall not be imposed unless the collective bargaining agreement requiring its payment as a condition of employment has been formally executed, pursuant to a vote of a majority of all employees in such bargaining unit present and voting.

Prior to the vote, the exclusive bargaining agent shall make reasonable efforts to notify all employees in the unit of the time and place of the meeting at which the ratification vote is to be held, or any other method which will be used to conduct the ratification vote. The amount of such service fee shall be equal to the amount required to become a member and remain a member in good standing of the exclusive bargaining agent and its affiliates to or from which membership dues or per capita fees are paid or received. No employee organization shall receive a service fee as provided herein unless it has established a procedure by which any employee so demanding may obtain a rebate of

that part of said employee's service payment, if any, that represents a pro rata share of expenditures by the organization or its affiliates for:

(1) contributions to political candidates or political committees formed for a candidate or political party;

(2) publicizing of an organizational preference for a candidate for political office;

(3) efforts to enact, defeat, repeal or amend legislation unrelated to the wages, hours, standards of productivity and performance, and other terms and conditions of employment, and the welfare or the working environment of employees represented by the exclusive bargaining agent or its affiliates;

(4) contributions to charitable, religious or idealogical causes not germane to its duties as the exclusive bargaining agent;

(5) benefits which are not germane to the governance or duties as bargaining agent, of the exclusive bargaining agent or its affiliates and available only to the members of the employee organization.

It shall be a prohibited labor practice for an employee organization or its affiliates to discriminate against an employee on the basis of the employee's membership, nonmembership or agency fee status in the employee organization or its affiliates.

Department of Labor Relations, Commonwealth Employment Relations Board: Decision of February 23, 2014

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RE: ASF-14-3744, Massachusetts Society of Professors/MTA/NEA, the University of Massachusetts and Ben Branch and William Curtis Conner, Jr.

ASF-14-3919, Hanover Teachers Association/MTA/NEA, Hanover School Committee and Deborah Curran

ASF-14-3920, Professional Staff Union/MTA/NEA, the University of Massachusetts, and Andre Melcuk

Dear Ms. Davidson, Mr. Cameron, Mr. Mutschler and Ms Bryant:

The Commonwealth Employment Relations Board (CERB) has reviewed the dismissal letter that a Department of Labor Relations (DLR) Investigator (Investigator) issued in the above-captioned matters on November 18, 2014. After reviewing the investigation record, the dismissal and the Charging Parties' arguments on review, the CERB affirms the dismissal in its entirety.

Background

The three charges set forth above were consolidated for dismissal and review.[1] Although each charge was brought by different charging parties (Charging Parties)[2] against different unions (Unions)[3] and employers,[4] the charges raise identical allegations and arguments, i.e., that the agency service fee demands the Union made violate Sections 2, 12, and 10(b)(1), of M.G. L. c. 150E (the Law) and the U.S. Constitution. The charges also allege that their respective employers violated Sections 2, 12, 10(a)(1) and 10(a)(3) of the Law and the U.S. Constitution by entering into collective bargaining agreements (CBAs) that contain agency service fee provisions. The Charging Parties do not allege, however, that the specific 2013-2014 demands that the Unions made were excessive or deficient under Chapter 150E and its regulations. See, generally, Section 12 of the Law; 456 CMR 17.00, et. seq. Nor are any of the Charging Parties facing discipline in connection with an agency service fee demand.

The same Investigator investigated all three charges. She conducted an in-person investigation of ASF-14-3744 (Branch/Conner charge) on August 21, 2014, and ASF-14-3920 (Melcuk charge) and ASF-14-3919 (Curran charge) on October 22, 2014. She issued the dismissal letter addressing all three charges on November 18, 2014. The Charging Parties filed a single appeal and supporting supplementary statement on November 25, 2014

[1] The November 18, 2014 dismissal letter sets forth the exact dates on which the various charges were filed or amended.

[2] Ben Branch (Branch) and William Conner (Conner), who are both professors at the University of Massachusetts (University) and represented by the Massachusetts Society of Professors/MTA/NEA (MSP); Deborah Curran (Curran), a teacher employed by the Hanover School Committee (School Committee) and represented by the Hanover Teachers Association/MTA/NEA (HTA); and Andre Melcuk, who is employed by the University and represented by the Professional Staff Union/MTA/NEA (PSU).

[3] The MSP, HTA and PSU.

[4] The University and the School Committee (collectively, the Respondents).

pursuant to DLR Rule 456 15.04(3).[5] After requesting and receiving an extension of time in which to reply to the appeal, the Unions filed an opposition to the request for reconsideration on December 12, 2014. On the same day, they filed a motion for the CERB to consider affidavits and portions of affidavits that the Investigator did not consider for reasons described below. The Charging Parties filed a motion to strike the Unions' motion on December 16, 2014 and the Unions filed an opposition to the motion to strike on December 18, 2014. The Respondent Employers did not file responses to any of post-dismissal pleadings filed by the Unions or the Charging Parties.

Before turning to the merits of the appeal, the CERB addresses the evidentiary issues raised by the Unions and the Charging Parties.

Unions' Motion to Consider Affidavits

The Unions ask the CERB to include in the investigatory record and consider the affidavits it submitted from HTA President Stephen Lovell (Lovell), PSU Consultant Maura Sweeney (Sweeney), MSP Consultant Michele Gallagher (Gallagher) and MTA General Counsel Susan Lee Weissinger (Weissinger). The Investigator accepted certain portions of the Gallagher and Weissinger affidavits and excluded others, but declined to accept the Lovell and Sweeney affidavits at all. For the reasons set forth below, the CERB upholds the Investigators' rulings on the affidavits in question.

Background

During the in-person investigation of the Branch/Conner charge on August 21, 2014, the Charging Parties submitted affidavits from Branch and Conner, as well as two individuals who are not charging parties, economist Dr. John Balz

[5] DLR Rule 15.04 (3) states in pertinent part:

> If, after a charge has been filed the [DLR] declines to issue a complaint, it shall so notify the parties in writing by a brief statement of the procedural or other ground for its determination. The charging party may obtain a review of such declination to issue a complaint by filing a request therefor with the [CERB] within ten days from the date of receipt of notice of such refusal. Within seven days of service of the request for review, any other party to the proceeding may file a response with the CERB. . . .

(Balz) and Emily Pitts Dixon (Dixon).[6] The Investigator accepted the affidavits over the objection of the MSP and the University,[7] but allowed them time to file a response. The MSP filed a motion to strike the Charging Parties' affidavits on September 23, 2014. Branch and Conner filed a response. The Investigator issued a ruling denying the motion to strike on October 16, 2014 and the MSP did not ask for reconsideration or review.

The Investigator separately notified the parties that she was leaving the record open until November 14, 2014 for the Union to provide counter affidavits to the Dixon and Balz affidavits. The Unions submitted the Sweeney, Lovell, Gallagher and Weissinger affidavits on November 14, 2014. The Charging Parties did not object to the submission of any of these affidavits.

On November 17, 2014, the Investigator notified the parties by email that she was allowing those parts of the Weissinger and Gallagher affidavits that pertained to the Dixon and Balz affidavits[8] and excluding the remainder of the affidavits.

The Investigator also notified the parties that she was excluding the Lovell and Sweeney affidavits. These affidavits relate to the charges filed by Curran and Melcuk. The Investigator stated and the Unions do not dispute that Curran

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[6] As described in the Ruling on the Motion to Strike, Balz's affidavit contains his "professional" opinion that the default "opt out" choice structures at issue in this case affects agency fee payers' conduct such that "an unknown number of employees are giving up their legal interests and political money that they would not otherwise give."

Dixon works for the National Right to Work Legal Foundation (Foundation), which represents the Charging Parties in this case. The Foundation also represented the charging parties in Springfield Educ. Association, MTA/NEA, et. al. and James J. Belhumeur et. al, 23 MLC 233, AFS-2143 et. seq. (April 23, 1997) aff'd in part, rev'd in part, sub. nom., Belhumeur v. Labor Relations Commission, 432 Mass. 458 (2000) (Belhumeur). Belhumeur was a challenge to an agency service fee imposed by the MTA and its local affiliate that, as the SJC described, involved "a large number of factual and legal issues involving voluminous evidence." Id. at 463-464. Dixon's affidavit detailed the number of attorney hours, support staff hours and expenses incurred in various cases brought by the Foundation, including Belhumeur. The Investigator expressly declined to rely on any of the facts or opinions in the Dixon affidavit and, thus, gave it no weight.

[7] The Investigator made clear, however, that she gave no weight to the Balz affidavit because she did not consider it to be outcome determinative.

[8] The Investigator listed the numbered paragraphs she was accepting into the record.

and Melcuk had submitted affidavits "well before" the October 22, 2014 in-person investigation into their charges. Because both Lovell and Sweeney were present at the in-person investigation, the Investigator reasoned that Lovell and Sweeney could have provided the information contained in their affidavits at the investigation. The email further indicated that the record was now closed. The Investigator issued the dismissal letter the next day.

The Unions request that the CERB consider all the evidence presented to the Investigator. They specifically assert that the Charging Parties' stated goal is to exhaust their administrative remedies and have their matters reviewed in a federal appeals court. The Unions therefore argue that the record should be as complete as possible for this review. The Unions further argue that it was unfair or improper for the Investigator to:

1) Deny their motion to strike the Charging Parties' affidavits but exclude the Unions' affidavits, to which no party has objected;

2) Deny Lovell and Sweeney's affidavits on grounds that they were present at the in-person investigation, but accept affidavits from parties who were also present at the investigation, i.e., Curran, Melcuk, Branch and Conner;

3) Exclude portions of Gallagher and Weissinger's affidavits. The Unions claim that their affidavits "refute many of the allegations" submitted by the Charging Parties and therefore the appellate body should have an opportunity to review all the evidence.

In response, the Charging Parties claim that the Unions' motion is untimely because it was not filed within ten days of the Investigator's dismissal as required by DLR rules.[9] The Unions reply that they did not file an appeal from the dismissal because the Investigator dismissed all of the Charging Parties' allegations and there was, therefore, nothing for them to appeal.

Ruling

Preliminarily, the CERB agrees with the Unions that their motion is not untimely but rather was appropriately raised after the Charging Parties filed their

[9] The Charging Parties mistakenly cite the operative rules as 456 CMR 13.15 (1) and (3). However, these rules relate to appeals of full hearing officer decisions, not pre-complaint dismissals of charges for lack of probable cause. As set forth in n. 5, and in the appeals language at the bottom of the dismissal letter, the rule governing appeals of an investigator's refusal to issue a complaint is Rule 15.04 (3). In both situations, however, the aggrieved party has ten days in which to file an appeal with the CERB.

request for review. On the merits, however, the CERB has reviewed the Investigator's rulings and finds no error.

The DLR has established procedures that govern the conduct of in-person investigations (Investigation Procedures).[10] Part B.1 of the Investigation Procedures states that "the purpose of the In-Person investigation is to determine whether or not probable cause exists to issue a Complaint." Part B. 5 states that the investigator expects the parties at an investigation "to appear accompanied by individuals with first-hand knowledge of the facts and circumstances related to the charge." Part C.1, "Documentary Evidence," states, in part, that "parties are NOT REQUIRED to provide sworn affidavits from witnesses with personal knowledge of the facts alleged in the initial charge." (Emphasis in original). Part B.6 states that parties "may submit relevant documents for consideration by the Investigator" and that parties who do so "should do so well in advance of the In-Person Investigation." Part B.6 finally states that, "[a]bsent good cause, the Investigator will not accept or consider additional submissions after she or he has declared the Investigation is closed."

Here, when the Charging Parties submitted the Balz and Dixon affidavits for the first time at the Branch/Conner investigation, the Investigator reasonably allowed the Unions time to respond to them. The Unions responded with a motion to strike. Although the Investigator denied the motion, she then reasonably, if not generously, left the record open for another four weeks to allow the Unions time to file their responsive affidavits. Upon receiving them, and consistent with the grounds on which she left the record open, the Investigator allowed into the record only those portions that she found pertained to information in the Balz and Dixon affidavits and excluded the rest. Although the Unions claim, generally, that the excluded portions refute "many allegations" made by the Charging Parties, they do not contend that the excluded portions pertain specifically to the Balz and Dixon affidavits. Under these circumstances, the CERB finds no basis to overturn the Investigator's decision to exclude those portions of the affidavits that did not comport with her instructions. The possibility that there will be judicial review of the dismissal decision exists in every matter that comes before the DLR and the CERB. See c. 150E, § 11(f) ("Any party aggrieved by a final order of the board may institute proceedings for judicial review in the appeals court within 30 days after receipt of the order."). Therefore, the Unions' general assertion that the Gallagher and Weissinger affidavits contain additional information that should be before the appellate body does not constitute good cause to allow parties to submit affidavits that exceed the express purpose for which the record was left open.

[10] Available at: http://www.mass.gov/lwd/labor-relations/procedures/investigation/ (last accessed on February 20, 2015).

Lovell and Sweeney affidavits

Similar considerations inform our denial of the Unions' motion to admit the Lovell and Sweeney affidavits. The DLR's procedures make clear that parties are expected to make all of their arguments and provide all relevant evidence before or at the in-person investigation. Here, where the Charging Parties submitted the Melcuk and Curran affidavits before the in-person investigation, the Investigator did not err by excluding the Unions' counter affidavits that were filed months later and contained facts that could have been provided through live witnesses at the in-person investigation.

Finally, to the extent the Unions argue that the Investigator unfairly accepted the Charging Parties' affidavits but improperly excluded theirs, the CERB finds generally that the Investigator's thoughtful and reasoned basis for all of her rulings dispel any claims of unfairness. Further, the Investigator also rejected two affidavits that the Charging Parties submitted from Dr. Michael Podgursky (Podgursky) and Dr. George Nerren (Nerren). As explained below, the CERB rejects the Charging Parties' assertion that this was improper.

Exclusion of Podgursky and Nerren Affidavits

The Charging Parties sought to submit these affidavits in connection with the Curran and Melcuk charges. As set forth in footnote 3 of the dismissal letter, the Investigator did not accept the affidavits because she concluded that neither one contained any information concerning agency service fee payment, issues or procedures in Massachusetts. She also rejected the Charging Parties' subsequent offers of proof and did not consider either the Unions' motion to exclude the affidavits or the Charging Parties' reply to that motion. [11]

The Charging Parties claim the Investigator's ruling was improper and argue that the information contained in the affidavits is relevant to their argument that avoiding the problem of free riders is no longer a valid justification for agency service fees. As the Investigator noted, however, neither affidavit addressed whether the respondents' actions violated specific provisions of the Law. Because the Investigator appropriately limited her investigation to that issue, and not to whether agency service fee demands violated the Charging Parties' constitutional rights, see Town of W. Springfield, 21 MLC 1216, 1222-1223,

[11] Although the Charging Parties do not specifically appeal from the Investigator's refusal to consider their offers of proof, the CERB agrees with the Investigator that she was not required to do so. In-person investigations are informal, non-adjudicatory proceedings. See Investigation Procedures, Part B.4, ("The In-Person Investigation is an informal conference...."); Educational Association of Worcester/MTA/NEA, 14 MLC 1238, 1240, MUPL-3063-71/MUPL-3104 (October 20, 1987).

MUP-7465 (August 19, 1994), the Charging Parties' arguments provide no basis to overturn this ruling.

Request for Reconsideration

Challenge to Facts

The Charging Parties challenged one of the Investigator's factual conclusions. During the in-person investigation, the Charging Parties argued that the Unions' exclusion of non-members from participation in certain Union activities was unconstitutional under the First and Fourteenth amendments because it conditioned non-members having a voice in their terms and conditions of employment on their having to pay union dues to support speech with which they disagree. The Investigator appropriately treated this argument as alleging a violation of Section 10(b)(1) of the Law, see Town of West Springfield, 21 MLC at 1222-1223, and concluded, among other things, that because non-members participate in ratification votes, their involvement is "no more limited than that of any union member who is not on the bargaining team." The Charging Parties acknowledge that a different finding would not result in the issuance of a complaint. They nevertheless challenge this statement, claiming that it ignores the fact that the written explanation provided by the Unions to fee payers explicitly sets forth a number of other activities from which non-members are excluded, i.e., vote on election of officers, by law modifications, and contract proposals or bargaining strategy. The written explanation further states, "[t]herefore apart from the ratification of the contract, nonmembers do not participate in the collective activities and decision-making of the association that influences the terms and conditions of employment."

Although the Investigator did not explicitly address the influence that participating in certain union activities other than contract ratification votes could have on the Charging Parties' terms and conditions of employment, the CERB agrees that the Unions' membership rules do not violate Section 10(b)(1) of the Law. First, as the Investigator pointed out, non-members have the right to vote in contract ratification elections. Second, as the Unions point out, non-members may influence terms and conditions of employment in other ways that are not dependent on union membership, including, through having a right to speak out in the workplace, file grievances and seek union representation for workplace issues related to terms and conditions of employment. Indeed, the CERB has held that employees who speak out and distribute literature urging employees not to ratify a contract proposed by a union's bargaining team are engaged in protected, concerted activity. See Salem School Committee, 35 MLC 199, 214, MUP-04-4008 (April 14, 2009) (citing City of Lawrence, 15 MLC 1162, 1165, MUP-6086 (September 13, 1988)(the protection to be accorded this conduct is determined by what the Law authorizes, rather than by what the union membership or its leadership authorizes)). An employer or union that interferes with or retaliates against such employees violates the Law. Id.

Merits

Except as described above, the Charging Parties do not challenge the Investigator's findings, nor do they claim that the Investigator erroneously applied relevant Chapter 150E precedent to the facts before her. Indeed, for the most part, the Charging Parties' arguments, all of which are grounded in their view of the First Amendment of the U.S. Constitution, do not address the particular facts of this case and could have been made in any jurisdiction that, like Massachusetts, requires public employees who elect not to join or maintain membership in the union that represents them for purposes of collective bargaining to pay an agency service fee to that union to support the chargeable costs of the bargaining process, contract administration and grievance adjustment, provided certain pre-conditions are met. Belhumeur, 432 Mass. at 461-462 (citing Chicago Teachers Union Local No. 1 v. Hudson, 475 U.S. 292, 306 (1986) ("a union must implement certain procedures before it may validly demand payment of an agency service fee")); See generally, M.G.L. c. 150E, §12; 456 CMR 17.05. Rather, the Charging Parties expressly state in the introduction to their Supplementary Statement that the purpose of their appeal to the CERB is to exhaust their administrative remedies so as to preserve their constitutional arguments on appeal. While acknowledging that the DLR is bound by existing precedent and without the authority to declare unconstitutional the statute it is mandated to enforce, the Charging Parties' stated goal is to change the existing precedent. Thus, they say that it is their full expectation that the CERB will affirm the Investigator's dismissal.

They are correct. The CERB has reviewed the Investigator's analysis of applicable Chapter 150E precedent and finds no error. Further, although the Charging Parties may wish to change existing law, they do not contend that any of the recent Supreme Court decisions to which they allude hold that Section 12 of the Law or similar legislation is unconstitutional insofar as it applies to the public employees at issue here. See Harris v. Quinn, 134 S.Ct. 2618, 2638 (2014) (Confining reach of Abood v. Detroit Bd. of Education, 431 U.S. 209, 97 S. Ct. 1782 (1977) to "full-fledged state employees"). The CERB therefore summarily affirms the dismissal of Charging Parties' allegations for the reasons set forth in the dismissal letter.

Conclusion

For these reasons and those stated in the Investigator's dismissal, the

Board affirms the Investigator's dismissal of these charges.

Very truly yours,
COMMONWEALTH EMPLOYMENT
RELATIONS BOARD

Edward B. Srednicki
Executive Secretary

APPEAL RIGHTS

Pursuant to the Supreme Judicial Court's decision in Quincy City Hospital v. Labor Relations Commission, 400 Mass. 745 (1987), this determination is a final order within the meaning of M.G.L. c. 150E, § 11. Any party aggrieved by a final order of the Board may institute proceedings for judicial review in the Appeals Court pursuant to M.G.L. c.150E, §11. **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.

Department of Labor Relations, Commonwealth Employment Relations Board: Investigator Decision of November 18, 2014

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RE: ASF-14-3744, Massachusetts Society of Professors/MTA/NEA, the University of Massachusetts and Ben Branch and William Curtis Conner, Jr.

ASF-14-3919, Hanover Teachers Association/MTA/NEA, Hanover School Committee and Deborah Curran

ASF-14-3920, Professional Staff Union/MTA/NEA, the University of Massachusetts, and Andre Melcuk

Dear Ms. Davidson, Ms. Bryant, Mr. Cameron, and Mr. Mutschler:

On June 2, 2014, Ben Branch (Branch) filed a charge with the Department of Labor Relations (DLR), alleging that the Massachusetts Society of Professors/MTA/NEA (MSP) had demanded an agency service fee from him that exceeded his pro-rata share of the costs of collective bargaining and contract administration ("amount allegation").

On August 6, 2014, Branch filed an amended charge to rescind the amount allegation and substitute an allegation that the MSP had demanded an invalid agency service fee, and his amended charge included three other charging parties: William Curtis Conner, Jr. (Conner), Deborah Curran (Curran), and Andre Melcuk (Melcuk)(collectively, the Charging Parties).[1] All four Charging Parties allege that the unions representing them violated Massachusetts General Laws, Chapter 150E (the Law), Sections 12 and 10(b)(1), and the United States Constitution. They also allege that by virtue of their contractual agreement to an agency service fee provision, their employers have violated Sections 2, 12, 10(a)(3), 10(a)(1), and the United States Constitution.

Procedural Background

Because Branch's and Conner's positions are both in the MSP bargaining unit, the DLR separated their allegations from those that Curran and Melcuk raised. Pursuant to Section 11 of the Law, as amended by Chapter 145 of the Acts of 2007, and Section 15.04 of the DLR's Rules, I investigated the Branch/Conner allegations on August 21, 2014, and investigated the Curran/Melcuk allegations on October 22, 2014.[2]

The Charging Parties submitted affidavits from Branch, Conner, Curran, Melcuk, and four experts: John Balz (Balz), Emily Pitts Dixon (Dixon), Michael Podgursky (Podgursky), and George Nerren (Nerren).[3] The Unions and the University objected to all of the affidavits. I admitted the Charging Party and Balz/Dixon affidavits, but gave all of the Respondents time to file a response to the Balz/Dixon affidavits. The Unions

[1] Branch, Conner and Melcuk are employed by the University of Massachusetts (University). Branch and Conner are in a bargaining unit represented by the MSP, and Melcuk is in a bargaining unit represented by the Professional Staff Union/MTA/NEA (PSU). Curran works for the the Hanover School Committee (HSC) and her position is in a bargaining unit represented by the Hanover Teachers Association/MTA/NEA (HTA).

[2] Curran and Melcuk subsequently filed separate charges (ASF-14-3919/ASF-14-3920 respectively) but confirmed at the October 22 investigation that they were raising the same issues and arguments as did Branch and Conner.

[3] The Charging Parties only submitted the Podgursky and Nerren affidavits in the Curran/Melcuk case. I did not accept those affidavits into the record because neither one contained any information concerning agency service fee payment, issues, or procedures in Massachusetts. I also denied the Charging Parties' request to accept them as an offer of proof. The DLR's rules and procedures for in-person investigations do not require acceptance of offers of proof for rejected evidence, and the in-person investigation was not an adjudicatory proceeding under G.L. c.30A. See Educational Association of Worcester/MTA/NEA, 14 MLC 1240, MUPL-3063-71/MUPL-3104 (October 20, 1987). Nevertheless, the Charging Parties filed a post-investigation written offer of proof on October 23, 2014. The PSU and the HTA opposed inclusion of the Podgursky and Nerren affidavits in the record as an offer of proof and, on October 27, 2014, submitted a Motion to Exclude the affidavits. The Charging Parties filed a Reply to the Motion to Exclude that same day. I have not reconsidered either decision.

subsequently filed a Motion to Strike the Affidavits, which the Charging Parties opposed. I issued a ruling on October 16, 2014, denying the Unions' Motion to Strike. The Unions subsequently filed responsive affidavits on or about November 14, 2014.[4]

Additionally, all Respondents filed separate motions to dismiss, and the Charging Parties filed oppositions to each motion. Because I have incorporated the arguments contained in the motions and oppositions into this dismissal letter, I do not address these motions separately.

Factual Background

Branch and Conner

Branch and Conner are professors employed at the University of Massachusetts and their positions are in the MSP bargaining unit. The collective bargaining agreement between the University and the MSP, which was in effect by its terms from July 1, 2012 through June 30, 2014, contains an agency service fee provision which requires that each bargaining unit member who elects not to join or maintain membership in the MSP shall be required to pay an agency service fee to the MSP as a condition of employment.

In the 2013-2014 school year, as in prior years, Branch and Conner have declined to join the MSP. Conner believes that union representation is not in his best interests, and he does not need or want the MSP to represent him. He believes that the MSP advocates for political causes which are inconsistent with his views, supports political candidates whom he does not support, and he opposes supporting activities that are contrary to his political and ideological preferences. Conner participated in an earlier agency service fee case at the Labor Relations Commission (LRC),[5] (Springfield Education Association et. al. and James J. Belhumeur et. al., 23 MLC 233, ASF-2143 et. al. (April 23, 1977), aff'd in part, rev'd in part, sub nom., Belhumeur v. Labor Relations Commission, 432 Mass. 458 (2000), cert. denied 532 U.S. 904 (2001) (Belhumeur)), and is aware of the duration of the litigation of that case. Similarly, Branch believes that he and the MSP have dissimilar views on political causes, political

[4] On November 14, 2014, the Unions submitted affidavits from Susan Lee Weissinger, Esq., Michelle Gallagher, Stephen Lovell, and Maura Sweeney. Because I had only left the record open at that point for affidavits to respond to the Balz/Dixon affidavits, I only accepted into the record the portions of the Weissinger and Gallagher affidavits that corresponded to information in the Balz/Dixon affidavits. I excluded the remainder of the Weissinger and Gallagher affidavits, as well as the Lovell and Sweeney affidavits.

[5] The LRC was the predecessor agency to the DLR. Pursuant to Chapter 145 of the Acts of 2007, the DLR has all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the LRC. The Commonwealth Employment Relations Board (CERB) is the DLR agency charged with deciding adjudicatory matters, and references to the CERB include the LRC.

candidates, approaches to compensation, and rules for work, promotion and tenure. Branch was also involved in the Belhumeur litigation.

Branch and Conner have filed agency service fee charges with the DLR in prior years and have settled those cases with the MSP. In their settlements, Branch and Conner have agreed to pay a fee that constitutes 55% of the MSP dues. This amount is less than the agency service fees that the MSP had initially demanded in those years.

On April 14, 2014, the MSP demanded that Branch and Conner pay an agency service fee for the 2013-2014 school year. The demands were apportioned as follows: MSP: $203.90; MTA: $325.84; NEA: $64.76.

Curran

Deborah Curran is a middle school teacher in the Hanover public school system. In or about 2002, Curran discontinued her membership in the HTA because she opposes its politics and policies and believes that they clash with her religious and political beliefs. In 2010, she had a dispute with the HTA surrounding her use of sick time. This dispute prompted Curran to file a prohibited practice charge at the DLR against the HTA alleging that the HTA had breached its duty to represent her fairly in that situation.[6]

Although the HTA had sought the inclusion of an agency service fee provision in prior successor contract negotiations, the 2012-2015 collective bargaining agreement between the HSC and the HTA is the first contract that contains a provision requiring non-members to pay an agency service fee. The HSC agreed to it as part of a package of proposals that settled that contract, and there was no connection between the HSC's decision to accept the proposal and Curran. The agency service fee provision states that: "[t]he Committee shall not be obligated to take any action in regard to the employment of employees delinquent in the payment of such fees. Bargaining unit members who fail to pay the agency service fee shall not be subject to dismissal or suspension, but the Association may pursue payment through whatever legal means it deems appropriate."

The HTA distributes surveys to all bargaining unit members, including non-union members, prior to successor collective bargaining negotiations. Curran has only received one such survey, and that was during the most recent round of negotiations.

[6] The HTA asked me to take administrative notice of the record in Curran's prohibited practice case (MUPL-10-4676, HTA), and Curran did not oppose this request. Curran charged the HTA with breaching its duty of fair representation when the HTA president notified the Hanover school superintendent that Curran was allegedly using sick leave in a contractually improper way and asked the Superintendent to intervene. The DLR issued a complaint of prohibited practice which the parties subsequently settled.

On April 10, 2014, the HTA demanded a fee from Curran that it apportioned as follows: HTA: $0[7]; MTA: $325.84; NEA: $64.76.

Melcuk

Melcuk is employed as Director of Departmental IT at UMass Amherst and is in the PSU bargaining unit. Melcuk has declined to join or financially support the PSU because he has "philosophical, political, emotional, ethical, and psychological" objections to labor unions. Melcuk believes that he earns a lower salary because his position in a bargaining unit, and that the contract between the University and the PSU has hindered salary increases for him. The PSU challenges Melcuk's claim that he could negotiate a higher salary if his position was not in the PSU bargaining unit because there is an "equity review" procedure in the contract by which unit members can advocate for a salary increase directly with the University. The initial step in the equity review process does not require PSU involvement, but if the University denies the requested increase, the PSU must participate in any appeal. The PSU acknowledged at the investigation that some department managers have cited the PSU contract as a reason for denying requested salary increases.

The PSU distributes surveys to all bargaining unit members, including non-union members, prior to successor collective bargaining negotiations.[8] The PSU also holds bargaining status update meetings for bargaining unit members, and those meetings are open to non-members.

The collective bargaining agreement between the PSU and the University contains a provision requiring non-members to pay an agency service fee. Melcuk has objected to the amounts that the PSU has demanded in previous years, and he and the PSU have resolved the disputes by agreeing to a 55% reduction from full dues – an amount which is less than what the PSU initially demanded. On March 7, 2014, the PSU demanded a fee that was apportioned as follows: PSU: $106.36; MTA: $325.84; NEA: $64.76.

Common Facts

The MTA maintains a rule stating that that if bargaining unit members elect to pay an agency fee rather than become a member of the local association, MTA, and NEA, the non-member will not be entitled to certain services and benefits which are available only to MTA/NEA members, such as attendance at union meetings or involvement in any other union activities. These activities and meetings include participating on local bargaining teams; and voting on the election of officers, bylaw modifications, contract proposals and/or bargaining strategy.

[7] The HTA did not demand a fee because it did not conduct the requisite independent audit of its revenue and expenses.

[8] Melcuk did not recall receiving this survey.

None of the Charging Parties are facing discipline from their employer in connection with the agency service fee demands.[9]

General Allegations

The Charging Parties acknowledge that the Law mandates dismissal of their charges; their goal here is to change the Law. Their charges are a facial challenge to the system of compulsory service fees contained in Section 12 of the Law, which they argue is unconstitutional for various reasons.[10] They also challenge the constitutionality of the scheme of exclusive representation embodied in Section 5. The Charging Parties recognize that the DLR can only rule on allegations that the Respondents violated G.L. c.150E and cannot separately address their constitutional allegations. See Town of West Springfield, 21 MLC 1216, 1222-1223 MUP-7465 (August 19, 1994) (not all constitutional claims arising out of agency fee disputes are properly brought before the CERB; CERB's role is to determine the effect of conduct on an employee's rights guaranteed under Chapter 150E and not on an employee's constitutional rights.) Consequently, I limit my analysis to whether the Unions' demands violated G.L. c.150E.

As a threshold issue, I address the Respondents' claim that the DLR has no jurisdiction over the Charging Parties' charges. As previously noted in my ruling on the Motion to Strike, I disagree. Although the Charging Parties readily admit that their charges are a facial challenge to the constitutionality of Section 12, they raised allegations at the investigation that the service fees demanded violate specific provisions of the Law, i.e. that prohibiting non-members from joining a union negotiating team, while simultaneously requiring service fees, violates Section 10(b)(1) of the Law by coercing employees in the exercise of their rights to non-membership; and that the employers' agreement to a contractual service fee provision violated Section 10(a)(3) by unlawfully retaliating against employees for non-membership. Further, the fact that the Charging Parties raise constitutional issues does not necessarily divest the DLR of jurisdiction because the CERB's practice is to apply Section 12 of the Law constitutionally, using decisions of the United States Supreme Court to guide its construction of the Law. See Malden Education Association, 15 MLC 1429, 1432, MUPL-2951 (February 2, 1989). Despite a preference for judicial resolution of certain claims, see Harrison v. Massachusetts Society of Professors, 405 Mass. 56, 60 n.5 (1989), the SJC has not held that the DLR has no jurisdiction to handle cases that

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[9] The University raises the disciplinary issue to argue that the charges are prematurely filed against it since the University has not sought to discipline Conner, Branch, or Melcuk. However, DLR Rule 17.16(2), 456 CMR 17.16(2) prohibits employers from sanctioning fee payers for failing to pay the fee once they file a charge and establish any necessary escrow account. Also, as previously noted, the 2012-2015 contract between the HTA and the HSC does not require the HSC to impose sanctions on fee payers who fail to pay the fee demanded.

[10] The Charging Parties do not allege that the 2013-2014 demands were excessive or deficient in any other way, and presented no evidence to that effect.

challenge service fees on constitutional and statutory grounds. Finally, these cases contain factual issues that are appropriate for the agency's consideration, i.e. the extent to which the unions allow or prohibit fee payers from participating in the negotiations process, or Melcuk's ability to seek a salary increase directly from his employer through the equity review process.

I also dismiss the Employers' arguments that the charges are untimely. All four charges were filed within six months of the date of the service fee demand, and the period of limitations runs from the date of the demand, not the date that the contractual service fee provision was ratified. See DLR Rule 17.06(2), 456 CMR 17.06(2).

1. Specific Allegations against the Employers

In Chicago Teachers Union, Local 1, AFT, AFL-CIO v Hudson, 475, U.S. 292, 307, n. 20 (1986), the U.S. Supreme Court stated that since the agency shop itself is a significant impingement on 1st Amendment rights, *the government and union* have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights (emphasis added). The Charging Parties cite this language to argue that employers share a union's obligation to ensure the lawfulness of any agency service fee demanded and also share liability for unlawful conduct. The Charging Parties argue that without an employer's contractual agreement to an agency service fee provision, unions could not demand a fee, and they note that including a fee provision in a collective bargaining agreement empowers a union to initiate a debt suit against a non-member for non-payment. Consequently, the Charging Parties contend that the Employers here have violated Sections 2, 12, 10(a)(1), 10(a)(3) of the Law, and the 1st and 14th Amendments to the U.S. Constitution.

I disagree. In Mary Hogan v. Labor Relations Commission, 430 Mass. 611 (2000), a decision that issued after the Hudson decision, the SJC addressed the question of whether the employer violated G.L. c.150E by proposing to suspend an employee for nonpayment of a fee that the union unlawfully sought to collect. Mary Hogan specifically cited the Hudson reference to joint employer/union liability, yet the SJC decided that an employer does not violate G.L. c.150E by following the agency service fee provisions of its collective bargaining agreement. Hogan v. LRC, 430 Mass at 615. In Town of West Springfield, 21 MLC at 1222, the CERB similarly and expressly rejected the Charging Parties' argument that Hudson's "government and union" language makes public employers liable for a union's unlawful agency service fee collection procedures. Therefore, even if I found probable cause to believe that the Unions violated the Law by the fees they demanded for the 2013-2014 school year, I would dismiss the allegations against the University and the HSC.

Further, the charging parties in Hogan and West Springfield alleged, like the Charging Parties here, that the Employers' actions violated Sections 10(a)(3) and 10(a)(1) of the Law. But even if those decisions were not controlling, the Charging Parties did not provide evidence here to establish that the Employers' involvement in the agency service fee demand was specifically motivated by a desire to penalize or

discourage the Charging Parties from engaging in protected, concerted activity. The HSC presented evidence that there was no nexus between Curran and the new agency service fee provision in its 2012-2015 collective bargaining agreement, and that the service fee provision was part of a package of proposals that the HSC accepted to conclude the contract. Thus, the Charging Parties have not established a prima facie case of unlawful discrimination. See generally, Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559 (1981).

2. Specific Allegations against the Unions

A. Exclusive Representation

The Charging Parties challenge the concept of exclusive representation as a burden on their 1st Amendment right of association, and argue that they should not be encumbered by the collective bargaining agreement or otherwise prohibited from negotiating terms and conditions of employment unilaterally and individually with their employers. However, Section 5 of the Law expressly gives unions the power of exclusive representation, which the SJC has characterized as a "basic building block of labor law policy under G.L. c.150E." Service Employees International Union, AFL-CIO, Local 509 vs. Labor Relations Commission, 431 Mass. 710, 715 (2000). Consequently, I dismiss this allegation.[11]

B. Compulsory Agency Service Fees

The Political Nature of Public Sector Collective Bargaining

The Charging Parties argue that Section 12 of the Law is unconstitutional under the 1st Amendment because it requires the Charging Parties to pay compulsory union fees as a condition of employment even though they have decided not to join or financially support the union. They contend that forced payments severely impinge on their 1st Amendment rights because the Unions' chargeable expenses concern matters of great public importance due to the inherently political character of collective bargaining in the public sector.

I summarily dismiss this allegation because the SJC recognizes that the statutory agency service fee requirement burdens fee payers' 1st amendment rights, yet still requires fee payers to pay their fair share of certain political expenses. James J. Belhumeur et. al. v. Labor Relations Commission, 432 Mass. at 469, 472 (funds used to

[11] Also, Section 5 of the Law allows employees to present disputes over contractual terms and conditions of employment to the employer and have such disputes heard without union intervention, provided that the union receives the opportunity to be present at such conferences, and that any adjustment made is not inconsistent with the collective bargaining agreement between the employer and the union. See Avon School Committee, 7 MLC 2106, MUP-3864 (May 6, 1981). Consequently, the statutory scheme of exclusive representation does not prohibit all direct communication between individual employees and the employer regarding terms and conditions of employment.

reimburse the local union for expenses incurred in connection with a local Proposition 2 1/2 override campaign were chargeable because the union sought to obtain the public money necessary to fund the teachers' collective bargaining agreement; overhead expenses such as rent and accounting fees pose no additional burden on the non-member's 1st Amendment rights other than that imposed by the agency shop itself.) Nevertheless, "it is well settled that public employees who are not union members may be required, as a condition of their employment, to pay an agency fee to their collective bargaining representative to support the costs of the bargaining process, contract administration, and grievance adjustment." Id. Because the SJC acknowledges that there are political overtones to public sector collective bargaining that are properly reflected in certain chargeable expenses, there is no probable cause to believe that the Unions violated the Law in the manner alleged, and I dismiss this allegation.

Permissible Use of the Opt-out System

The Charging Parties next argue that Section 12 is unconstitutional on its face because it requires non-members to pay an agency fee unless the employee affirmatively and annually objects. At the investigation, the Charging Parties characterized this as an "opt-out" system, because the employees must take affirmative action to avoid paying monies that support the Unions' political activities.[12]

In Knox et. al. v. Service Employees International Union, Local 1000, 567 U.S. _, 132 S. Ct. 2277, 2291 (2012), the U.S. Supreme Court noted that its prior decisions had permitted the use of an opt-out system for the collection of fees to cover non-chargeable expenses. In School Committee of Greenfield v. Greenfield Education Association, 385 Mass. 70, 85 (1981), the SJC stated that "[w]e construe Section 12 to give the dissenting employee the option of bringing a prohibited practice complaint before the [CERB] if the employee wishes to challenge the fee amount." Because these cases uphold the practice of requiring non-members to take affirmative action to avoid payment of non-chargeable expenses, there is no probable cause to believe that the

[12] The Charging Parties characterize the existing agency service procedure as an opt-out system because non-union members must pay the fee demanded unless they file a charge to challenge the fee and any non-chargeable expenses that they believe it contains. The Charging Parties contend that under an opt-in system, they would not be required to pay anything or challenge anything unless the Unions first establish at the DLR that the fee does not include any non-chargeable expenses. At the investigation, the Unions questioned the characterization of the current procedure as an opt-out system. However, there is no dispute that a non-member is obligated to pay the amount of the fee unless the fee payer challenges the fee at the DLR. Consequently, I assume for purposes of this probable cause dismissal that the existing procedure is what the Charging Parties characterize as an "opt-out" system.

Unions violated the Law by requiring that they do so here.[13]

Nor did the Union violate the Law by settling prior agency service fee cases with the Charging Parties for less than the fee initially demanded. The Charging Parties argue that this practice requires them to not only object to the fee demanded, but initiate litigation to procure the lowest possible payment. Questions of timeliness aside, there is no probable cause to believe that this process or result is unlawful. An employee who objects to the amount of the fee must voice that objection by filing a prohibited practice charge with the DLR; it is the minimal burden necessary to signal their complaint. There is nothing unlawful about offering and accepting a lesser amount to compromise claims and avoid litigation and thereby ensure that disputed fees are not tied up any longer than necessary in escrow.

The Complex Nature of Agency Service Fee Litigation

The Charging Parties next argue that the agency fee demand is a prohibited practice under Sections 2, 12, and 10(b)(1) of the Law and is unconstitutional under the 1st and 14th Amendments because it requires public employees who oppose joining or financially supporting the union to pay the amount of fees demanded unless the employee engages in expensive and protracted litigation to challenge it.

In Belhumeur, 432 Mass. at 463, the SJC noted that the CERB had issued its initial decision nearly eight years after the fee payers in that case had filed their prohibited practice charges. The SJC issued its decision three years after the CERB decision, noting that the litigation required the CERB to receive and examine a "great deal" of evidence: approximately 1,400 documents from the Charging Parties alone. Id. at 464. I take administrative notice of the fact that the parties subsequently sparred over compliance issues for an extended period of time before the case was finally concluded and payments were released from escrow in or about 2002.[14] However, the Belhumeur Court ultimately found that the eight year time span from charge to CERB decision was

[13] My conclusion that the Law permits the use of an opt-out system renders any consideration of the Balz affidavit unnecessary. Consequently, I have not relied on any facts or opinions that it contains and have given it no weight. For the same reason, I have not considered the counter affidavits that the Unions submitted in response.

[14] The SJC's commentary as well as the DLR's own records adequately demonstrates the complexity of the Belhumeur case; consequently, I need not consider the facts and opinions expressed in the Dixon affidavit regarding that case. I also need not and have not relied on the facts and opinions expressed regarding the U. S. Supreme Court cases cited. The complexity of an agency service case largely depends on the issues raised, i.e. the procedures surrounding ratification of a contract with a service fee provision, the information provided with the demand, the expenses that a union seeks to charge, as well as those that a fee payer decides to challenge, and not every case requires or involves agency or judicial resolution. Consequently, I have not relied on any facts or opinions in the Dixon affidavit and have given it no weight. For the same reason, I have not considered the counter affidavits that the Unions submitted in response.

a "reasonably prompt" decision, and did not find that the complexity of the litigation rendered the fees unconstitutional. Id. at 463. The Charging Parties have cited no case, and I know of none, that holds that the time and expense of litigation to challenge particular conduct renders the conduct unlawful under G.L. c.150E.[15] Consequently, I find that the administrative procedures necessary for challenging a service fee are not unlawful.

The Union's Membership Rules

Finally, the Charging Parties argue that Section 12 is unconstitutional as applied under the 1st and 14th Amendments because it requires the Charging Parties to pay fees to the Unions for collective bargaining and contract administration even though they cannot participate in Union activities such as having a voice or a vote on selecting bargaining representatives, contract proposals or bargaining strategy that influences their terms and conditions of employment.[16] Because the DLR only adjudicates alleged violations of G.L. c.150E and not constitutional claims, I consider whether the Union's practice of excluding the Charging Parties from bargaining teams, or meetings that address contract proposals or bargaining strategy violates Section 10(b)(1) of the Law.

Generally, the CERB will not interfere with union rules or actions that are within the legitimate domain of internal union affairs. National Association of Government Employees, 13 MLC 1525, 1526, SUPL-2343, 2344, 2345, 2346 and 2347 (March 12, 1987); Bertram Switzer v. Labor Relations Commission, 36 Mass. App. Ct. 565, 568 (1994). However, a union's freedom to regulate its internal affairs must give way to certain overriding interests implicit in the Law. NAGE, 13 MLC at 1526. The CERB has found such an overriding statutory policy in: testimony on behalf of an employer at a DLR proceeding, Brockton Education Association, 12 MLC 1497, MUPL-2740, 2777, 2778 (January 7, 1986); the CERB's role in determining appropriate bargaining units, Johnson and McNulty, 8 MLC 1993, MUPL-2049, 2050 (March 23, 1982), aff'd sub nom. Boston Police Patrolmen's Association v. Labor Relations Commission, 16 Mass.

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[15] Melcuk states that in 2013, the PSU demanded service fees for four years at one time, and he asserts that this practice makes service fee payment unconstitutionally burdensome. I decline to consider the lawfulness of the earlier 2013 demand because challenges to it are untimely. See DLR Rule 17.06(2), 456 CMR 17.06(2).

[16] The PSU and the HTA presented evidence that they distribute surveys to all bargaining unit members, including non-union members, prior to successor collective bargaining negotiations. The PSU also holds bargaining status update meetings for bargaining unit members, and those meetings are open to non-members. However, even if Curran and Melcuk could have communicated their views by returning the survey form, or if Melcuk had attended a bargaining status update meeting, they still could not have participated on the team that made strategic decisions during the give and take of negotiations.

App. Ct. 953 (1983); and prohibiting strikes, Luther E. Allen, Jr., 8 MLC 1518, 1524, SUPL-2024, 2025 (November 13, 1981). The legitimacy of a union's action turns on the relative weight to accord the various issues at state. NAGE, 13 MLC at 1527.

Here, the MTA's membership rules may interfere with the Charging Parties' right not to join the Unions because those rules prohibit non-members from participating on the Unions' bargaining teams and thereby having a voice in determining their terms and conditions of employment. The Unions have an interest in managing their internal affairs, including restricting the roles and positions available to non-members. See N.L.R.B. v. Financial Institution Employees of America, Local 1182, 475 U.S. 192, 205 (1986) (union members may properly control the shape and direction of their organization, and non-member employees have no voice in the affairs of the union); see also, Southern Worcester County Regional Vocational School District vs. Labor Relations Commission, 377 Mass. 897, 904 (1979) (selection of the union negotiating team was an internal union matter.) Thus, the MTA's rules prohibiting non-members from joining its bargaining team are within the legitimate domain of internal union affairs. Although an employee's right to refrain from joining the union free from interference, restraint or coercion is an important policy consideration under the Law, it does not override the Unions' interests in maintaining this membership rule.

The Union interests that its membership rules seek to protect is selecting the team that plays a pivotal role in the bargaining process by assembling proposals; determining priorities and strategies; and accepting or rejecting individual proposals and tentative agreements, subject to ratification by the membership. To prioritize the Charging Parties' interests over the Unions' interests would effectively require the Unions to cede the discretionary, decision-making power of the committee that governs their primary representational role to employees who either oppose the Unions or decline to support them financially. The Law does not compel this result.

In NAGE, supra, the CERB balanced the charging parties' right to file a decertification petition against the union's interest in promulgating rules to preserve its status as the exclusive representative, and held that the union could lawfully exclude employees who had filed a decertification petition from membership. Though the Charging Parties here have not filed a decertification petition, their perspectives are comparable to the charging parties who opposed the union in NAGE. Conner believes that Union representation is not in his best interests and rhetorically questions why he would need or want a labor union to represent him. Branch states that he and the MSP have dissimilar views on political causes, political candidates, approaches to compensation, and rules for work, promotion and tenure. Melcuk has philosophical, political, emotional, ethical, and psychological objections to labor unions. Curran has similar concerns, and has charged the HTA with breaching its duty to represent her fairly because of her non-membership. Here as in NAGE, the Unions' interests in establishing membership rules governing the composition of the committee that determines the parameters, strategic direction, and results of bargaining outweighs the interests of non-members. See generally, Daniel A. George vs. Local Union No. 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of

America, AFL-CIO, 134 L.R.R.M. 3241(1990) aff'd in part and rev'd in part on other grounds, 100 F. 3d 1008 (D.C. Cir.1996) (union did not breach duty of fair representation by failing to appoint a self-proclaimed dissident to its negotiating committee); see also, Minnesota State Board for Community Colleges et. Al. v. Leon Knight et. al. v. Minnesota Community College Faculty Association et. al., 465 U. S. 271, 289 (1984) (union could lawfully refuse to appoint non-members to "meet and confer" committees to discuss non-mandatory subjects of bargaining with the employer). Section 2 of the Law allows the Charging Parties to decline Union membership, but it does not simultaneously entitle them to assume a leadership role in the Union.

Finally, I note that the Charging Parties are not shut out of the process altogether since they can vote on whether or not to ratify the collective bargaining agreement that a union's bargaining team negotiates. See DLR Rule 17.03(1), 456 CMR 17.03(1). Consequently, their involvement in determining their terms and conditions of employment is no more limited than that of any union member who is not on the bargaining team.

Therefore, the Charging Parties' interests in declining Union membership do not prevail over the Unions' interests in setting membership rules restricting non-member participation on bargaining teams. Accordingly, there is no probable cause to believe that the MTA's membership rule unlawfully interferes with, restrains or coerces the Charging Parties in the exercise of their rights under the Law.

Conclusion

For the reasons stated above, there is no probable cause to believe that the Unions' demands for an agency service fee from the Charging Parties for the 2013-2014 school year violated the Law. Nor is there probable cause to believe that any action of the Employers violated the Law. Accordingly, I dismiss all of the allegations in the Charging Parties' charges.

Very truly yours,
DEPARTMENT OF LABOR RELATIONS

Susan L. Atwater, Esq.
Investigator

APPEAL RIGHTS

The charging party may, within ten (10) days of receipt of this order seek a review of the dismissal by filing a request with the Commonwealth Employment Relations Board, pursuant to Department Rule 456 CMR 15.04(3). The request shall contain a complete statement setting forth the facts and reasons upon which such request is based. The charging party shall include a certificate of service indicating that it has served a copy of its request for review on the opposing party or its counsel. Within seven (7) days of receipt of the charging party's request for review, the respondent may file a response to the charging party's request.