

Commonwealth of
Massachusetts
Department of Labor Relations

FY2018 ANNUAL REPORT



July 1, 2017 - June 30, 2018

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EXECUTIVE SUMMARY

On November 14, 2007, pursuant to Chapter 145 of the Acts of 2007, the Legislature reorganized the Commonwealth's neutral labor relations agencies into the Division of Labor Relations (DLR). On March 11, 2011, under Chapter 3 of the Acts of 2011, "An Act Reorganizing the Executive Office of Labor and Workforce Development," the DLR's name was changed from the Division of Labor Relations to the Department of Labor Relations.

The DLR protects employees' rights to organize and choose bargaining representation and ensure that employers and unions benefit from, and comply with, the Commonwealth's collective bargaining statutes. To carry out this mission, the DLR conducts elections, hears representation cases, investigates and hears unfair labor practice cases, resolves labor disputes through mediation and arbitration, and issues orders in cases that parties are unable to resolve through alternative dispute resolution methods. The DLR comprises (1) hearing officers, arbitrators, mediators and support staff, (2) the Commonwealth Employment Relations Board (CERB), an appellate body responsible for reviewing hearing officer orders and issuing final decisions, and (3) the Joint Labor Management Committee (JLMC), a committee including labor and management representatives, which uses its procedures to encourage municipalities and their police officers and fire fighters to agree directly on terms to resolve their collective bargaining disputes or on a procedure to resolve these disputes.

As reflected in the charts found later in this report, during the past fiscal year, the DLR opened 619 new cases and closed 649 cases. The majority of those cases are unfair labor practice cases. The inventory of cases on the DLR's open docket has remained below historical averages during FY 18. At the end of FY 18, the DLR had approximately 400 open cases at various stages of case processing, including administrative and judicial appeals. The DLR has maintained its ability to issue timely probable cause determinations and hearing officer decisions. In FY 18, the DLR issued probable cause determinations in an average of 5.33 weeks and hearing officer decisions in an average of 28.00 weeks. With consistent funding and staffing levels, the DLR will strive to improve one these averages in the next fiscal year.

The DLR continued to use its mediation services to facilitate settlements in all case classifications. In addition to contract mediation, grievance mediation and traditional unfair labor practice mediation, mediators continue to provide expedited mandatory mediation services in all ULP Level I cases. The DLR's continued use of mediation facilitates the parties' relationships and provides significant cost-savings to them. During this past fiscal year, DLR mediators conducted 159 contract mediation sessions, 8 grievance mediations and 133 unfair labor practice mediation sessions.

During the past fiscal year, the CERB published 7 Hearing Officer Appeal decisions; 4 representation case decisions, and decided 19 requests for review of Investigator pre-hearing dismissals.

During the past fiscal year, there were 57 JLMC cases filed. The DLR mediators, working under the JLMC's oversight, conducted 100 contract mediations. The JLMC conducted 7 Section 3(a) hearings.

The DLR offers a myriad of services to accomplish its mission, including those listed below.

- Processing Prohibited Practice Charges
- Representation Petitions and Elections
- Written Majority Authorization Petitions
- Unit Clarification Petitions
- Interest Mediation
- Mediation of Prohibited Practice Charges
- Grievance Mediation
- Grievance Arbitration
- Investigation, Prevention and Termination of Strikes
- Litigation

In FY 2018 the DLR began the process of reviewing the next generation of cloud based software to replace its current case management system, with the ultimate goal of continuing to use technological advances to provide better service to our stakeholders. The key objective of this initiative is to integrate the DLR's web based forms and document e-file application with its case and document management system into a single unified software system. Improving the functionality of the DLR's web based public documents search system, which gives the public and stakeholders the ability to search the DLR's case management system and retrieve frequently request public documents and online dashboards that provide real time case management information are also included in this review.

OVERVIEW OF DLR SERVICES

In order to provide prompt and fair resolution of labor disputes, the DLR provides the following services:

1. Initial Processing and Investigation of Prohibited Practice Charges

The majority of DLR cases are unfair labor practice cases filed pursuant to G.L. c. 150A or G.L. c. 150E. Charges of prohibited practice may include various allegations, including for example, allegations that an employer discriminated or retaliated against an employee because the employee had engaged in activities protected by law; allegations that an employer or employee organization has failed to bargain in good faith; or allegations that an employee organization has failed to properly represent a member of the bargaining unit.

After an initial review to determine if the case is properly before the DLR and that it meets the DLR filing requirements, the Director will first determine whether the case should be deferred to the parties' own contractual grievance procedure. If the Director determines that the case is properly before the DLR, s/he will classify the case as a Level I or Level II case based on the case's relative impact to the public. Cases where resolution of the dispute has the greatest urgency will be processed first and the time frame for completion of the investigation will be 60 days, depending on the level of urgency. Level II cases with less urgency will be investigated between 60 and 90 days from the filing date.

At the investigation, the investigator is statutorily obligated to explore whether settlement of the charge is possible. If such discussions do not result in settlement, the investigator will proceed with the investigation. The investigator will expect the parties to present evidence from individuals with first-hand knowledge during the probable cause investigation. The intent of the probable cause in-person investigation is to have both parties present all the evidence at the investigation, and therefore, most investigations have the record closed at the end of the in-person investigation.

After the record is closed, the investigator will issue the probable cause determination, which is generally a written dismissal or a Complaint of Prohibited Practice. The investigator may also direct the charge to an alternative dispute resolution mechanism (including deferral to the parties' grievance/arbitration procedure). Cases dismissed following an investigation may be appealed to the Commonwealth Employment Relations Board (CERB). If affirmed by the Board, appeals can be made to the Massachusetts Appeals Court.

If the probable cause determination is a Complaint of Prohibited Practice, the case will be scheduled for a hearing on the merits to determine whether the respondent violated the law as alleged in the Complaint. The DLR will once again evaluate and differentiate the cases as Level I or Level II cases. Cases identified as Level I Complaint cases will be scheduled for hearing as soon as practicable, given caseload and staffing, depending on the level of urgency. In addition, because the DLR mandates mediation in all Level I cases, mediation will take place before the hearing. Cases identified as Level II cases will be scheduled within six months to a year from the Complaint.

2. Hearings and Appeals

After the hearing is scheduled, before a hearing takes place, the DLR requires that the parties file a Joint Pre-Hearing Memorandum and attend a Pre-Hearing Conference in order to clarify the issues for hearing.

The prohibited practice hearing is a formal adjudicatory process. Parties to the proceedings have the right to appear in person, to examine and cross-examine witnesses, to produce evidence and otherwise support or defend against the Complaint. Additionally, the sworn testimony is recorded and preserved electronically. At the close of the hearing, the parties often provide the Hearing Officer with post-hearing legal briefs. The Hearing Officer then issues a written decision, determining whether a violation of the Law has occurred. Depending on caseload and staffing, it is the DLR's goal to issue decisions in Level I cases within three months from when the record is closed. In Level II cases, the DLR's goal is to issue a decision within six months from the time the record is closed.

A party who disagrees with the Hearing Officer's decision can appeal to the CERB by filing a Request for Review. In most cases, both sides file briefs with the CERB in support of their respective positions. After review of the record and consideration of the issues, the CERB then issues its decision, following the general impact time frame. Once the CERB issues its decision, the decision is final and can be appealed to the Massachusetts Appeals Court.

The DLR attorneys are authorized by statute to defend the CERB decisions at the Appeals Court.

3. Representation Issues

In all cases that involve representation issues, i.e. representation (or decertification) petitions, written majority authorization petitions, and unit clarification cases, the DLR is statutorily mandated to determine an "appropriate" bargaining unit. To make that determination, the CERB considers community of interest among the employees, the employer's interest in maintaining an efficient operation, and the employees' interest (or lack thereof) in representation.

In all cases, the DLR assists and encourages the parties to reach agreement concerning an appropriate unit. In FY 18, the DLR resolved 40.9% of its representation cases through voluntary agreement over the scope of the bargaining unit. When no agreement is reached, however, a DLR hearing officer conducts a hearing after which the hearing officer issues a written decision either dismissing the petition or defining the bargaining unit and directing an election. These decisions can be appealed to the CERB but there is no court appeal.

a. Representation Petitions and Elections

The DLR conducts secret ballot elections for employees to determine whether they wish to be represented by a union. Elections are conducted whenever (1) an employer files a petition alleging that one or more employee organizations claim to represent a substantial number of employees in a bargaining unit, (2) an employee organization files a petition, accompanied by an adequate showing of

interest, alleging that a substantial number of employees wish to be represented by the petitioner, or (3) an individual files a petition accompanied by an adequate showing of interest, alleging that a substantial number of employees in the bargaining unit no longer wish to be represented by the current employee organization. Depending on the size of the unit and the relative cost, the DLR conducts elections either on location or by mail ballot.

In FY18, the DLR docketed 32 representation petitions and conducted 11 elections, involving 433 voters. A graph detailing these representation elections is available in the Case Statistic section of the Report.

b. Written Majority Authorization Petitions

The card check law provides that the DLR “shall certify to the parties, in writing, and the employer shall recognize as the exclusive representative for the purposes of collective bargaining of all the employees in the bargaining unit, a labor organization which has received a written majority authorization....” Therefore, a union that provides the DLR (or a designated neutral) with proof of majority support (50% plus one) of an appropriate bargaining unit will be certified by the DLR as that bargaining unit’s exclusive bargaining representative without an election. The DLR issued regulations which provide respondents with the right to file objections and challenges prior to a certification. Since the card check law requires certification within 30 days, the DLR seeks to work with the parties to expedite all WMA petitions.

In FY18, 13 written majority authorization petitions were filed. The DLR issued certifications in 10 of those petitions that were supported by 324 written majority authorization cards. A graph detailing the written majority authorization certifications issued in FY18 is available in the Statistical Reports section of the Report.

c. Unit Clarification Petitions (CAS)

A party to an existing bargaining relationship may file a petition with the DLR seeking to clarify or amend an existing bargaining unit or a DLR certification. Currently, the DLR investigates such petitions through a written investigation procedure and the CERB issues decisions resolving such cases. The information that an employer or employee organization must include in a CAS petition is specified in 456 CMR 14.04(2) and 14.03(2). An individual employee has no right to file a CAS petition. 456 CMR 14.04(2). Any CAS petition found to raise a question of representation must be dismissed and the question of representation addressed by filing a representation petition.

In FY18, the DLR received 17 CAS petitions.

4. Labor Dispute Mediation

One of the most important services offered by the DLR is labor dispute mediation in both the public and the private sectors. The DLR’s mediation services can be categorized as follows:

a. Interest Mediation

Interest mediation is contract negotiation mediation. The DLR provides mediators to assist parties from the public and private sectors who are involved in such disputes. The DLR jurisdiction extends to all public sector labor contract disputes, though contract disputes involving municipal police and fire fighters are mediated through the procedures and rules adopted by the JLMC. The DLR places a high priority on interest mediation because the prevention and prompt settlement of labor contract disputes benefits the negotiating parties, and stable labor relations benefit the local community and the Commonwealth. As such, the DLR's mediation services are one of the most cost efficient and valuable forms of local aid provided by the Commonwealth. In the event that there are prohibited practice charges pending when a DLR mediator is involved in a contract dispute, the mediator attempts to resolve the charges as part of the overall settlement. The laws the DLR enforces provide a roadmap of what occurs if negotiations breakdown. In all public sector cases, except those involving police and fire, the next step is fact finding and the DLR maintains a panel of private neutrals to provide fact-finding services. In JLMC cases, the next step is arbitration and the JLMC maintains a panel of private neutrals to provide private arbitration services.

b. Mediation of Prohibited Practice Charges

The formal mediation of prohibited practices charges is one of the most important features of the reorganization statute. Prior to the reorganization, there was no regular communication between the BCA, the JLMC and the LRC. Since the reorganization, the DLR affords the parties numerous opportunities, both formal and informal, to avail themselves of the DLR's mediation services. The DLR requires mediation of all Level 1 prohibited practice hearings.

c. Grievance Mediation

The DLR provides mediation services to parties who desire to mediate grievances arising out the collective bargaining agreement. The DLR offers grievance mediation to all parties who file for grievance arbitration. In some cases, DLR mediators assist parties on an ongoing basis to settle numerous grievances. The DLR received 8 requests for grievance mediation during FY18.

5. Grievance Arbitration

The DLR provides grievance arbitration services that are utilized by all sectors of the Commonwealth's labor relations community. In the past fiscal year, the DLR has received 41 grievance arbitration petitions from a variety of employer and employee representatives involving state, county, and municipal government, including police departments, fire departments, public works departments, and school departments. Many of the disputes are settled before a hearing is held. If the disputes are not settled, then DLR arbitrators hold evidentiary hearings, hear arguments and accept briefs. After the close of the hearing and submission of briefs, if any, the DLR arbitrator issues an award.

6. Investigation, Prevention and Termination of Strikes

Strikes by public employees in Massachusetts are illegal. G.L. c. 150E, § 9A. When a public employer believes that a strike has occurred or is imminent, the employer may file a petition with the DLR for an investigation. The DLR immediately schedules an investigation of the allegations contained in the petition and the CERB decides whether an unlawful strike has occurred or is about to occur. If the CERB finds unlawful strike activity, the CERB issues a decision directing the striking employees to return to work. The CERB may issue additional orders designed to help the parties resolve the underlying dispute. Most strikes end after issuance of the CERB's order, but judicial enforcement of the order sometimes necessitates Superior Court litigation. Such litigation can result in court-imposed sanctions against strikers and/or their unions.

7. Litigation

As noted above, parties in prohibited practice cases issued by the DLR may appeal the final decision of the Commonwealth Employment Relations Board to the Massachusetts Appeals Court. In those cases, in addition to serving as the lower court—responsible for assembling and transmitting the record for appellate review—the CERB is the appellee and the DLR's Chief Counsel defends the CERB decision on appeal. Although a rare occurrence, M.G.L. c.150E also authorizes the DLR to seek judicial enforcement of its final orders in the Appeals Court or of its interim orders in strike cases in Superior Court. DLR attorneys represent the DLR and the CERB in all litigation activities.

8. Other Responsibilities

a. Requests for Binding Arbitration (RBA)

A party to a collective bargaining agreement that does not contain a grievance procedure culminating in final and binding arbitration may petition the DLR to order grievance arbitration. These "Requests for Binding Arbitration" (RBA) are processed quickly by the DLR to assist the parties to resolve their grievances.

b. Information on Employee Organizations

Pursuant to M.G.L. c. 150E, §§ 13 and 14, the DLR maintains files on employee organizations. Those files include the name and address of current officers, an address where notices can be sent, date of organization, date of certification, and expiration date of signed agreements. Every employee organization is also required to file an annual report with the DLR containing: the aims and objectives of such organization, the scale of dues, initiation fees, fines and assessments to be charged to the members, and the annual salaries to its officers. Although M.G.L. c. 150E authorizes the DLR to enforce these annual filings by commencing an action in the Superior Court, the DLR's current resources prohibit such action. Instead, by regulation, the DLR employs various internal case-processing incentives to ensure compliance with the filing requirements.

c. Constituent Outreach

In an effort to foster better labor relations, the DLR is always willing to make presentations before assembled labor and/or management representatives in order to speak about the latest developments at the DLR. For instance, each spring, the Director, the CERB and the DLR's Chief Counsel participate in the planning and presentation of the Annual Workshop for Public Sector Labor Relations Specialists sponsored by the Labor & Employment Law Section of the Boston Bar Association. Additionally, throughout the year, the DLR makes formal and informal presentations before various bar associations, union meetings, and employer association groups.

**Selected Decisions and Rulings of the Commonwealth Employment Relations Board
(CERB)
FY2018
July 1, 2017 – June 30, 2018**

Unfair Labor Practices

Section 10(a)(3)

Massachusetts Department of Transportation (MassDOT) and United Steelworkers, Local 5696,
44 MLC 1, SUP-14-3576, SUP-14-3640 (July 31, 2017).

The CERB affirmed a Hearing Officer decision holding that MassDOT violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of M.G.L. c. 150E (the Law) by retaliating against two employees because they had engaged in protected, concerted activity. The Hearing Officer concluded that the Union had established a *prima facie* case of retaliation and that MassDOT had failed to meet its burden of producing evidence stating a lawful reason for its decision not to promote either employee. At the hearing, MassDOT defended its decision not to promote the two employees on grounds that they did not have the highest interview scores in their respective districts. MassDOT reiterated this defense on appeal, and claimed that the Hearing Officer had erred in two ways: first, when she concluded that the Union had established the knowledge element of its *prima facie* case with respect to one of the employees, and second, when she concluded that MassDOT's decision was unlawfully motivated. The CERB rejected both arguments.

The CERB agreed with the Hearing Officer that the Union had shown by both direct and circumstantial evidence that the individuals involved in the non-selection process were aware of the employees' protected, concerted activity. The Employer argued that the Hearing Officer improperly relied on circumstantial evidence to infer that a particular interviewer knew that one of the charging party's had filed several grievances. However, the Employer did not dispute its general awareness that the charging party had filed grievances. Further, because the interviewer worked in the human resources department, through which the grievances had been processed, the CERB found it reasonable to infer the interviewer's knowledge of this activity. The CERB also affirmed the Hearing Officer's conclusion that the Union had established a *prima facie* case of unlawful motivation based on the shifting and inconsistent reasons that MassDOT gave for not selecting the two employees. It further affirmed that MassDOT did not meet its burden of producing evidence stating a lawful reason for its decision by presenting evidence at hearing that the two employees did not receive the highest interview scores in their respective districts. The CERB agreed that this evidence was not sufficient to meet MassDOT's burden because MassDOT failed to provide any witness testimony at hearing supporting why they scored the applicants lower than other less-qualified applicants, and further failed to show that its stated reasons were actually a motive in the decision.

Judicial Appeal: None

Section 10(a)(5)

Spencer-East Brookfield Regional School District and Spencer-East Brookfield Teachers Association, 44 MLC 96, MUP-15-4847 (December 5, 2017) (Member Lev, concurring in part and dissenting in part).

The issue raised by this appeal is whether an employer has a duty to bargain before changing the terms and conditions of employment of bargaining unit members who perform the duties of an extra duty position that was neither exclusively performed by bargaining unit members nor expressly listed in the recognition clause of the CBA, but which was listed elsewhere in the CBA as an extra duty position along with its negotiated rate of pay. The Hearing Officer found, as a threshold matter that the after-school program Co-Director position was a bargaining unit position based upon the ways the parties had treated that position. She thus held that the Employer violated the Law when it unilaterally changed the method of paying the Co-Director, and increased its workload when it reduced the number of Co-Directors from two to one.

A majority of the CERB affirmed the Hearing Officer's decision but on different grounds. The CERB found that, under the circumstances of the case, it did not have to decide whether the Co-Directors of the after-school programs were included or excluded from the bargaining unit. The fact that the Employer's conduct affected the wages and workload of bargaining unit members who were given preference for these extra duty jobs by virtue of their status as bargaining unit members triggered the Employer's obligation to give the Union notice and an opportunity to bargain before making those changes.

Concurring/Dissenting CERB Member Lev concurred that a bargaining obligation arose when the changes at issue affected bargaining unit members' terms and conditions of employment. She disagreed, however, that the Director position was included the bargaining unit and therefore dissented from that portion of the Order requiring the Employer to cease and desist from hiring only one Director without first bargaining with the Union over the impacts of the decision on bargaining unit members' terms and conditions of employment.

Judicial Appeal: None

Town of Billerica and Billerica Municipal Employees Association, 44 MLC 106, MUP-14-4234 (December 26, 2017).

The CERB affirmed a hearing officer decision dismissing a complaint alleging that the Town violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to give the Union notice and an opportunity to bargain to resolution or impasse over its decision to eliminate the second, third and weekend shifts at its Wastewater Treatment Plant. The Hearing Officer found that the Town had given the Union proper notice and an opportunity to bargain, and that the parties had bargained to impasse. The CERB agreed that the Town had given the union notice and an opportunity to bargain, but disagreed that the parties had bargained to impasse. Rather, because the record showed that the Union did not make any proposals or counterproposals after the fourth bargaining session and had not otherwise protested the Town's announced implementation date the following month, the Union had waived its right to bargain.

In so holding, the CERB rejected the Union's claim that it was unable to make any proposals because the Town had not provided it with sufficient information. The CERB found that the Union failed to identify with any specificity what information it had requested that was still lacking as of the final bargaining session, or how this purported lack of information prevented the Union from making any proposals whatever prior to implementation.

City of Somerville and Somerville Police Employees Association, MUP-16-5023 (January 30 2018).

This case involved a grievance that had been presented twice to the City of Somerville's Police Chief: first, by an individual, and second by the Somerville Police Employees Association (Association). The Association disagreed with the grievance and submitted it to the Chief along with a written explanation of why it disagreed and a request to meet to discuss it. A Deputy Chief wrote back to the Association granting the individual's grievance. The Deputy Chief stated that, because the Association's grievance had been resolved at Step 1 of the grievance procedure, there was no need to meet.

The Hearing Officer found that the parties had a past practice of bypassing Step 1 of the grievance procedure and going directly to Step 2 to process grievances that the Association filed in writing with the Police Chief. Because resolution of grievances filed at Step 2 required meeting with the Association, the Hearing Officer concluded that the City violated the Law when it resolved the grievance at Step 1 without meeting with the Association. As a remedy, she ordered the City to restore its past practice of bypassing Step 1 of the grievance procedure for grievances filed by the Association in writing with the Police Chief.

The City appealed to the CERB, arguing that, in relying on the past practice, the Hearing Officer had "nullified" explicit contract language that required the parties' "mutual agreement" to bypass Step 1 and go directly to Step 2. Because there was no evidence of mutual agreement here, the City claimed that the contract permitted it to resolve the Association's grievance at Step 1.

The CERB affirmed the Hearing Officer's decision but modified her reasoning and remedy. The CERB agreed with the City that past practice could not override explicit contract terms. It nevertheless found that the City had unilaterally altered other aspects of the grievance procedure in violation of the Law. Where the contract only permitted "senior captains designated by the Chief" to handle such grievances, the CERB found that the City had made a unilateral change when it allowed the Deputy Chief to process and resolve the Association's grievance at Step 1. The grievance procedure also allowed individuals to file grievances directly with the Police Chief provided the City gave the Association notice and an opportunity to meet and confer with it over the grievance. The CERB held that the City also unilaterally changed this aspect of the grievance procedure when it resolved the grievance without first meeting with the Association.

Because the CERB did not base its decision on the parties' past practice, it did not adopt the Hearing Officer's Order that the City restore the past practice of bypassing Step 1 of the grievance procedure for grievances filed by the Association in writing with the Police Chief. Rather, it ordered the City to cease and desist from engaging in the unilateral conduct at issue here.

Judicial Appeal: None

Section 10(b)(1)

OPEIU, Local 6, AFL-CIO and John F. Murphy, 44 MLC 196, SUPL-14-3628 (March 21, 2018).

The Union filed an appeal with the CERB challenging a Hearing Officer's decision holding that it breached its duty of fair representation (DFR) to the charging party when it failed to submit a timely request for arbitration that resulted in the arbitrator dismissing the grievance as procedurally inarbitrable. Applying the shifting burdens of proof set forth in Quincy City Employees Union, H.L.P.E., 15 MLC 1340, 1355, MUPL-2883, MUP-6037 (January 24, 1982) (Quincy City), aff'd sub. nom., Pattison v. Labor Relations Commission, 30 Mass. App. Ct. 9 (1991), further rev. den'd, 409 Mass. 1104 (1991) (Pattison), and cases following Pattison, the Hearing Officer also concluded that the charging party had met his burden of proving that his grievance was not clearly frivolous. Because the Union elected to present evidence on the merits of the underlying grievance at the hearing, rather than bifurcate that issue, the Hearing Officer also analyzed whether the Union had met its burden of demonstrating that the grievance clearly lacked merit, i.e., that it would have "been lost for reasons not attributable to the union's misconduct." Berkley Employees Association, 19 MLC 1647, 1650 MUPL-3724 (January 28, 1993). She concluded that the Union had not met this burden and thus ordered the Union to, among other things, make the charging party whole for the loss of compensation he suffered as a direct result of his termination.

On appeal, the CERB agreed that the Union had violated its DFR to the charging party, concluding that under well-established precedent, the Union's conduct was perfunctory and inexcusably negligent. The CERB also declined the Union's invitation to abandon the Pattison analysis in favor of one in which the burden of proving that the grievance had merit remained with the charging party. Where, as here, the opportunity for an employee to bring a grievance before an arbitrator has been lost due to a union's conduct, the CERB has made a judicially-approved policy determination that it is the union, and not the employee, who must bear the ultimate risk of any uncertainty regarding the merits of the grievance. The CERB finally agreed that the Union did not meet its burden of proving the grievance lacked merit. It found that the Union failed to demonstrate that the charging party had engaged in most of the conduct that formed the basis of his termination, or that there was just cause to terminate him based on the remaining conduct. The CERB adopted the Hearing Officer's remedy and ordered the Union to make the charging party whole for the loss of compensation he suffered as a direct result of his termination.

Judicial Appeal: Pending

Compliance

City of Boston and BPPA, 44 MLC 56, MUP-10-5895 (August 30, 2017).

The Boston Police Superior Officers Federation (Union) appealed from a Hearing Officer decision dismissing its petition for enforcement of an order that the CERB issued in 2014 on appeal of a Hearing Officer decision (Order). The Union sought to enforce that portion of the Order requiring the City of Boston (City) to, "upon request, bargain in good faith with the Union to resolution or impasse concerning the impacts of the May 1, 2010 decisions to eliminate the position of SSI [Street Sweeping Initiative] supervisor and discontinue the practic[e] of assigning unit members to that position on a regularly-scheduled overtime basis." The Union claimed that the City violated the Order by eliminating the SSI

position on October 1, 2015, without first bargaining to resolution or impasse. The City opposed the petition, arguing, among other things, that it had complied with the Order by giving the Union notice and an opportunity to bargain and that it had bargained with the Union to impasse, or, alternatively, that the Union waived its right to bargain by inaction. After holding a hearing, the Hearing Officer issued a decision holding that the Union had waived its right to bargain by inaction and dismissed the petition for compliance. The Union appealed to the CERB citing material errors of fact and law.

The CERB affirmed the Hearing Officer’s ruling. In compliance cases, the party against whom enforcement is sought has the burden of proving that it complied with the order by a preponderance of the evidence. The CERB found the City had met its burden of proving by a preponderance of the evidence that it gave the Union notice and a reasonable opportunity to bargain but that the Union had inexplicably and unreasonably failed to make any bargaining proposals. The Union’s argument that it was precluded from making bargaining proposals due to the City’s “untimely and insufficient” responses to its information requests did not persuade the CERB otherwise, where the City informed the Union in December 2014 that it believed it had provided all of the requested information, but the Union did not make a proposal based on those requests or tell the City that it believed that its responses were inadequate until October 1, 2015, the date that the City ultimately eliminated the position after providing the Union with notice and an opportunity to bargain prior to that date.

Judicial Appeal: None

Representation and CAS Petitions

Springfield School Committee and Springfield Federation of Paraprofessionals, Local 4098, AFT, AFL-CIO, 44 MLC 7, CAS-16-5059 (August 1, 2017).

The CERB (Chair Wittner, Member Ackerstein) considered a petition to accrete a number of different tutor titles to a bargaining unit of paraprofessionals, licensed practical nurses, health assistants and other non-professional employees. The tutors, who became Springfield Public School Employees in the 2015-2016 academic year, provided academic assistance to individual students and to small groups of students mostly outside of the classroom based on a centralized curriculum. The Springfield School Committee opposed the petition on the grounds that the tutors did not share a community of interest with the other members of the union. It also argued that because the tutors had not expressed an interest in union representation, they should not be accreted to the unit without an election.

The CERB rejected these arguments. It concluded that the tutors shared a community of interest with the other members of the paraprofessionals bargaining unit because both groups consisted of non-professional employees who worked directly with students in a school setting to provide a mix of instructional, physical and other types of adaptive, social or behavioral assistance and support to the student’s education program. The CERB also determined that the tutors shared a community of interest with the paraprofessionals based on similar educational requirements, rate of pay, hours, work location and work contacts. Further finding that the petition raised no question concerning representation, the CERB accreted the tutors into the bargaining unit.

Town of Auburn and Teamsters Union, Local 170, 44 MLC 101, MCR-17-5712 (December 5, 2017).

Teamsters, Local 170 (Union) filed a petition with the DLR seeking to represent one full-time and two part-time custodians employed by the Town of Auburn (Town). The custodians had been Town employees since 2012 and were supervised by the superintendent of the Highway Department.

The Town opposed the petition on grounds that a small custodial unit would be counter to the DLR's policy favoring broad, comprehensive units instead of small, fragmented ones. The Town also argued that the custodians were more appropriately placed in an existing Highway Department unit that was represented by a different union. That union, however, did not intervene in the proceedings, and had never sought to include the custodians in its unit or bargain with the Town over their unit placement.

Based on the record adduced at hearing, the CERB concluded that the unit was appropriate under the three criteria set forth in Section 3 of the Law: community of interest, efficient employer operations and effective dealings and safeguarding employee rights to effective representation. The CERB concluded that the custodians shared a community of interest amongst themselves. Further, where the union representing the Highway Department was not a party to the proceedings and had not otherwise sought to include the custodians in its unit via bargaining or accretion, the public policy interest of ensuring effective representation for the three custodians, should a majority vote in favor of unionization, outweighs concerns over small, fragmented units.

Board of Higher Education and AFSCME, Council 93, AFL-CIO and Massachusetts Community College Council, 44 MLC 209, CAS-16-2027, CAS-16-5211 (March 29, 2018).

The issue before the CERB was whether the position of Help Desk Technician/User Services Technician (HDT) at Roxbury Community College (RCC) should be accreted into the bargaining unit represented by AFSCME Council 93 (AFSCME) or remain in the bargaining unit represented by the Massachusetts Community College Council (MCCC). The HDT classification had been expressly included in the MCCC's bargaining unit since 1999. However, six AFSCME bargaining unit members holding the title of EDP Systems Analyst at RCC had performed duties similar to those described in the HDT classification until 2016, when RCC decided to reorganize its Information Technology Department, lay off the EDPs, and replace them with HDTs. Although the CERB concluded that the HDT position at RCC was performing essentially the same duties as the AFSCME help desk employees, where the HDT title was neither newly-created nor changed, and where the HDT's continued inclusion in MCCC's unit did not render that unit inappropriate as a matter of Law, the CERB concluded that a CAS petition was not the appropriate vehicle for AFSCME to accrete the HDT title into its unit.

**Selected Litigation
July 1, 2017 – June 30, 2018**

APPEALS COURT DECISIONS ON APPEALS OF CERB DECISIONS

Justin B. Chase v. Commonwealth Employment Relations Board, 92 Mass. App. Ct. 1105, (unpublished opinion) (September 25, 2017) fur. rev. den'd, 478 Mass. 1105 (2017)

DLR Case Justin Chase and AFSCME Ruling on Motion for Clarification of CERB's Order, MUPL-07-4581 (unpublished) (March 31, 2016)

The Appellant, Justin B. Chase (Chase or Appellant) appealed from a March 31, 2016 CERB *Ruling on Motion for Clarification of CERB's Order* (Ruling) clarifying its own May 18, 2012 Order (Order) that was part of a decision it issued on the same date. The 2012 Decision (Decision) and Order was affirmed by the Appeals Court in an earlier appeal. Chase and AFSCME, 38 MLC 280, MUPL-07-4581 (2012) aff'd sub nom. Chase v. Commonwealth Employment Relations Bd., 88 Mass. App. Ct. 1103 (2014) fur. rev. den'd 473 Mass. 1104 (2015). After briefing and oral argument in the immediate matter, the Appeals Court issued a memorandum and order pursuant to Mass. R. App. Proc. 1:28 affirming the CERB's Ruling.

Ann Marie O'Keefe v. School Committee of Boston and Commonwealth Employment Relations Board, 92 Mass.App.Ct. 1117 (unpublished opinion) (2017)

DLR Case Boston School Committee and Ann Marie O'Keefe MUP-14-4096 (unpublished) (04/29/2015)

After briefing, but without scheduling oral argument, the Appeals Court issued a memorandum and order pursuant to Mass. R. App. Proc. 1:28 finding no flaw with the CERB's decision to affirm a Department of Labor Relations (DLR) Investigator's dismissal of a prohibited practice charge brought by Ann Marie O'Keefe for lack of probable cause. (O'Keefe).

O'Keefe filed a charge at the DLR alleging that the Boston School Committee violated G.L. c. 150E, § 10(a)(4) by terminating her employment in retaliation for her filing of an earlier charge with the DLR. After an In-Person Investigation, the Investigator found a lack of probable cause and dismissed the charge. O'Keefe appealed to the CERB, who reviewed and affirmed the dismissal pursuant to G.L. c. 150E, § 11 and 456 CMR 13.19 where O'Keefe had not established three of the four elements necessary to establish a *prima facie* case of unlawful retaliation. In affirming the CERB the Court noted the deferential standard of review of a probable cause dismissal and concluded that O'Keefe had not met her burden of showing that the CERB's decision was invalid.

On May 4, 2018 the SJC denied O'Keefe's application for further appellate review of Ann Marie O'Keefe, Ann Marie O'Keefe vs. Boston School Committee and Commonwealth Employment Relations Board No. FAR-26016.

The following cases were withdrawn or dismissed either after the DLR provided notice that the record was assembled and filed with the Court, or while record assembly was pending at the DLR:

JUDICIAL APPEAL OF CERB DECISION ON APPEAL OF HEARING OFFICER DECISIONS

City of Lawrence v. Commonwealth Employment Relations Board

DLR Case Firemen & Oilers Local 3, SEIU and City of Lawrence, 43 MLC 238, MUP-14-3753 (05/26/2017)

Appeal withdrawn. (07/24/2017)

Springfield Organization of Library Employees v. Commonwealth Employment Relations Board

DLR Case: Springfield Organization of Library Employees and City of Springfield, 41 MLC 342, MUP-09-5623 ISSUED MAY 29 2015

Appeal withdrawn after the DLR sent notice to the Court that the record was assembled. (08/11/2017)

AFSCME Council 93 v. Commonwealth Employment Relations Board

DLR Case: AFSCME and City of Springfield, 41 MLC 383, MUP-12-2466 ISSUED 6/18/2015

Appeal withdrawn. (08/11/2017)

City of Worcester v. Commonwealth Employment Relations Board

DLR Case: Thomas C. Duffy and City of Worcester, 42 MLC 142, MUP-12-2131 ISSUED 11/30/2015

Appeal withdrawn. (11/8/2017)

Town of Arlington v. Commonwealth Employment Relations Board

Arlington Police Patrol Association and Town of Arlington, 42 MLC 97, MUP-14-3750 (September 30, 2015)

Appeal Withdrawn after the DLR sent notice to the Court that the record was assembled. (04/09/2018)

JUDICIAL APPEAL OF CERB DECISION ON APPEAL OF PROBABLE CAUSE DISMISSALS

Davood Golmohammadi v. Commonwealth Employment Relations Board

DLR Case: Davood Golmohammadi and Faculty Staff Union/MTA/NEA, SUPL-16-5659 (unpublished)

Appeal Withdrawn. (03/16/2018)

DEPARTMENT OF LABOR RELATIONS

FY2018 CASES RECEIVED

JULY 1, 2017 – JUNE 30, 2018

MONTHLY BY CASE TYPE WITH TOTALS AND AVERAGES

CASES OPENED

CASE TYPE	JUL.	AUG.	SEPT.	OCT.	NOV.	DEC.	JAN.	FEB.	MAR.	APR.	MAY	JUN.	TOTAL	AVG	% YTD
Unfair Labor Practice	26	23	34	37	28	25	33	30	17	32	28	60	373	31.08	60%
Representation Cases	3	6	1	4	6	3	5	5	4	2		3	42	3.50	7%
Unit Clarification (CAS)	1	1	1	3	2	3	2	1	1		1	1	17	1.42	3%
Other (SI, AO, RBA)									1				1	0.08	0%
Grievance Arbitration	3	4	2	5	3	3	7	3	1		7	3	41	3.42	7%
Grievance Mediation		3	1	1	2				1				8	0.67	1%
Contract Mediation	3	12	7	7	10	4	6	4	4	4	7	12	80	6.67	13%
JLMC	10	9	6	4	3	5	3	1	5	5	3	3	57	4.75	9%
TOTAL	46	58	52	61	54	43	56	44	34	43	46	82	619	51.58	100.00%

DEPARTMENT OF LABOR RELATIONS
FY2018 CASES CLOSED
 JULY 1, 2017 – JUNE 30, 2018
 MONTHLY BY CASE TYPE WITH TOTALS AND AVERAGES

CASES CLOSED

CASE TYPE	JUL.	AUG.	SEPT.	OCT.	NOV.	DEC.	JAN.	FEB.	MAR.	APR.	MAY	JUN.	TOTAL	AVG	% YTD
Unfair Labor Practice	24	36	41	34	33	24	42	14	31	32	39	35	385	32.08	59.32%
Representation Cases	4	5	2	3	2	3	6	7	1	5	6	1	45	3.75	6.93%
Unit Clarification (CAS)	2	3	1		2	1	2			2	4	3	20	1.67	3.08%
Other (SI, AO, RBA)											1		1		0.15%
Grievance Arbitration		2	5	8	4	3	1	2	4	3	4	3	39	3.25	6.01%
Grievance Mediation		2	1	1	3	2		2				1	12	1.00	1.85%
Contract Mediation		4	5	7	8	6	8	4	4	1	13	9	69	5.75	10.63%
JLMC	4	13	2	6	6	4	3	6	2	5	25	2	78	6.50	12.02%
TOTAL	34	65	57	59	58	43	62	35	42	48	92	54	649	54.00	100.00%

DEPARTMENT OF LABOR RELATIONS
FY2018 CASE PROCESSING DATA
 JULY 1, 2017 – JUNE 30, 2018
 MONTHLY WITH TOTALS AND AVERAGES

PROBABLE CAUSE	JUL.	AUG.	SEPT.	OCT.	NOV.	DEC.	JAN.	FEB.	MAR.	APR.	MAY	JUN.	TOTAL	AVG
Investigations Held	7	19	10	15	9	10	14	10	12	8	13	15	142	11.83
Dismissals Issued	6	6	3	3	9	2	1	3	3	4	4	2	46	3.83
Complaints Issued	3	5	10	14	9	1	10	8	5	7	14	9	95	7.92
Total Probable Cause	9	11	13	17	18	3	11	11	8	11	18	11	141	11.75
Avg. # Wks Invest. To PC	3.20	4.90	3.75	3.93	5.46	4.71	8.13	5.34	4.26	9.43	6.03	3.37	64.18	5.33

HEARINGS	JUL.	AUG.	SEPT.	OCT.	NOV.	DEC.	JAN.	FEB.	MAR.	APR.	MAY	JUN.	TOTAL	AVG
Pre-Hearing Conferences Held		4	8	8	4	4	4	7	5	6	4	6	60	5.00
Hearings Held	2	1	1	4	6	3	6	1	1	3		4	32	2.67
Misc. Rulings/R-Case Dec./CAS Dec.									2		1		3	0.27
HO Decisions Issued		4	1				1	2	3	3	2	2	18	1.50
Avg. # Wks Ripe to HO Dec.		17.90	8.90				61.70	44.35	25.30	16.97	17.50	55.70	248.27	28.00

DEPARTMENT OF LABOR RELATIONS
FY2018 CASE PROCESSING DATA
 JULY 1, 2017 – JUNE 30, 2018
 MONTHLY WITH TOTALS AND AVERAGES

CERB	JUL.	AUG.	SEPT.	OCT.	NOV.	DEC.	JAN.	FEB.	MAR.	APR.	MAY	JUN.	TOTAL	AVG
Admin. Appeals Filed - PC		4	1	2	3	3	2	2	2	2	3	5	29	2.42
Admin. Appeals Filed - HO Dec.		3	1	1					2			2	9	0.75
PC Decision Issued & Remands		1	2	2	2		2	2		1	5	2	19	1.73
HO Appeal Decision Issued	2	1				2	1		1				7	0.58
CERB Dec. 1st Inst. RCase or CAS Dec.						1			2		1		4	0.33
Misc. Rulings								1		1			2	0.17
Avg. # Wks to Issue PC Decision		11.70	22.00	16.05	21.00		20.20	14.90		23.50	15.94	18.64	163.93	17.70
Avg. # Wks Ripe to HO App. Dec.	3.60	28.10				29.50	20.14		28.20				109.54	29.90

MEDIATION & ARBITRATION	JUL.	AUG.	SEPT.	OCT.	NOV.	DEC.	JAN.	FEB.	MAR.	APR.	MAY	JUN.	TOTAL	AVG
Arbitrations Held			1	2		1	1	3		2	3	2	15	1.25
Arbitration Decision Issued				2	1	1		1	2			1	8	0.73
Grievance Mediations Held		1		2		1		2			1	1	8	0.73
Contract Mediations Held	10	13	9	15	13	4	20	17	8	13	19	18	159	13.25
ULP Mediations Held	7	9	15	12	9	4	15	10	8	14	14	16	133	11.08
Avg. # Wks Initial Contract Invest./Mediation to Close		51.60	12.40	12.90	18.50	21.00	18.10	21.00	19.20	70.14	24.02	13.50	282.36	23.53
Avg. # Wks Ripe to Arbitration Decision				7.75	12.00	2.57		1.00	12.98			28.60	64.90	10.72

DEPARTMENT OF LABOR RELATIONS
FY2018 CASE PROCESSING DATA
 JULY 1, 2017 – JUNE 30, 2018
 MONTHLY WITH TOTALS AND AVERAGES

JLMC	JUL.	AUG.	SEPT.	OCT.	NOV.	DEC.	JAN.	FEB.	MAR.	APR.	MAY	JUN.	TOTAL	AVG
Contract Mediations Held	12	15	18	16	12	14	13	14	13	13	14	13	167	13.92
3A Hearings Held				1	2	3					1		7	0.58
Tentative Agreements	7	3	4		4	2	2	4	7	2	4	1	40	3.33
Tentative Agreements Ratified	5	4	3	2	3	6		4	5	7		1	40	3.33
Arbitration Awards Issued		1		3			2	1	3	1		1	12	1.00
Avg. # Wks Initial Investigaiton/Mediation to TA	27.55	29.59	27.67	43.79	8.23	45.71	10.70	14.80	28.94	40.86	27.00	29.14		26.89
Avg. # Wks Initial Investigaiton/Mediation to Arb. Award		58.00		111.20			69.57	96.00	69.80			124.20		86.60

JUDICIAL APPEALS	JUL.	AUG.	SEPT.	OCT.	NOV.	DEC.	JAN.	FEB.	MAR.	APR.	MAY	JUN.	TOTAL	AVG
Probable Cause Appeals Filed						2	1		1				4	0.33
CERB-HO Decision Appeals Filed									1				1	0.08
Records Assembled	1		1		1		1		1			2	7	0.58
Avg. # Wks Ripe to Rec. Assembled	109.00		134.00		108.10		117.85		99.42			12.50	580.87	48.41

FY 2018 REPRESENTATION ELECTIONS*
(EXCLUSIVE OF WRITTEN MAJORITY AUTHORIZATION PETITIONS)

Unit Size	MUNICIPAL		STATE		PRIVATE		TOTAL	
	No. of Elections	No. of Voters	No. of Elections	No. of Voters	No. of Elections	No. of Voters	No. of Elections	No. of Voters
<10	4	29	1	5			5	34
10-24	3	38	2	29			5	67
25-49	1	35					1	35
50-74	1	74					1	74
75-99	1	79					1	79
100-149	1	145					1	145
150-199								
200-499								
> 500								
Total	11	400	3	34			14	434

* NOTE: In FY 2018, parties filed 32 representation petitions. The above chart contains information only on elections conducted by the DLR in FY2018.

**FY 2018
WRITTEN MAJORITY AUTHORIZATION
CERTIFICATIONS***

Size of Unit	Municipal		State		Private		Total	
	CERTS	CARDS	CERTS	CARDS	CERTS	CARDS	CERTS	CARDS
Under 10	5	28					5	28
10-24	2	29					2	29
25-49								
50-74	2	127					2	127
75-99								
100-149	1	140					1	140
150-199								
200-499								
Above 500								
TOTAL	10	324					10	324

* Note: The number of certifications represents the number of petitions filed that resulted in the Department issuance of a certification. In FY 2018 a total of 13 written majority authorization petitions were filed. The DLR did not issue a certification in 3 cases either because the DLR dismissed the petition or the petitioner withdrew the petition.

DEPARTMENT OF LABOR RELATIONS STAFF LISTING
AS OF JUNE 30, 2018

EMPLOYEES, FUNCTIONAL TITLES AND PAYROLL TITLES

Last Name	First Name	Functional Title	Payroll Title	FTE
Ackerstein	Joan	Board Member, CERB	Per Diem	
Atwater	Susan	Hearing Officer/Arbitrator/Mediator	Counsel II	1.00
Bevilacqua	Heather	Mediator	Program Coordinator III	0.50
Bonner	Kerry	Hearing Officer/Arbitrator/Mediator	Counsel II	1.00
Cummings	Donald	JLMC Staff Rep./Labor	Program Coordinator III	0.50
Davis	Kendrah	Hearing Officer/Arbitrator/Mediator	Counsel II	1.00
Driscoll	George	JLMC Staff Rep./Management	Program Coordinator III	0.50
Eustace	Kimberly	Program Coordinator	Program Coordinator III	1.00
Evans	Will	Hearing Officer/Arbitrator/Mediator	Counsel II	1.00
Feldman	Erica	Hearing Officer/Arbitrator/Mediator	Counsel II	0.50
Gabriel	Jane	Chief Counsel	Program Manager VIII	1.00
Goodberlet	Kathleen	Hearing Officer/Arbitrator/Mediator	Counsel II	1.00
Gookin	Carol	Mediator	Program Coordinator III	1.00
Griffin	Joseph	Hearing Officer/Arbitrator/Mediator	Counsel II	0.50
Hanson	John	Chair, JLMC	Per Diem	
Hatfield	Timothy	Hearing Officer/Arbitrator/Mediator	Counsel II	1.00
Hubley	Joseph	JLMC Staff Rep./Labor	Program Coordinator III	0.50
Lev	Katherine	Board Member, CERB	Per Diem	
Maldonado-Ong	Jennifer	Hearing Officer/Arbitrator/Mediator	Counsel II	1.00
Morgado	Daniel	JLMC Staff Rep./Management	Program Coordinator III	0.50
Murray	Kevin	Hearing Officer/Arbitrator/Mediator	Counsel II	0.50
Siciliano	Shirley	Election Specialist	Collective Barg. Elect. Spec. II	0.40
Singh	Samantha	Election Specialist	Collective Barg. Elect. Spec. II	1.00
Skibski	Sara	Hearing Officer/Arbitrator/Mediator	Counsel II	1.00
Srednicki	Edward	Acting Director/Executive Secretary	Administrator IX	1.00
Sullivan	Margaret	Hearing Officer/Arbitrator/Mediator	Counsel II	1.00
Sunkenberg	James	Hearing Officer/Arbitrator/Mediator	Counsel II	1.00
Wittner	Marjorie	Chair, CERB	Administrator IX	1.00

There shall be an advisory council to advise the DLR concerning policies, practices, and specific actions that the DLR might implement to better discharge its labor relations duties. Chapter 145 of the Acts of 2007.

DLR Advisory Council Membership

Labor

Kathrine Shea, Esq.	Pyle, Rome, Ehrenberg, PC
Brian McMahon	Executive Vice President, NEPBA
Sheryl Pace-Webb	National Association of Government Employees (NAGE)
John Mann	National Association of Government Employees (NAGE)

Management

Nicholas Anastasopoulos, Esq.	Mirick, O'Connell, DeMallie & Lougee, LLP
Denise Casey	Assistant Town Manager, Town of Wilmington
Jodi Ross	Town Manager, Town of Westford
John Marra	General Counsel, Human Resources Division

At-Large

Jay Siegel	Arbitrator
William Hayward	Arbitrator
David Lucchino	Co-Founder/ CEO Frequency Therapeutics

DEPARTMENT OF LABOR RELATIONS
FY18 EXPENDITURES BY APPROPRIATION
AND OBJECT CLASS

Object Class	Description	7003-0900 Amount Expended	7003-0902 Amount Expended	Total Amount Expended
AA	Employee Compensation	\$1,993,736	\$115,260	\$2,108,996
BB	Employee Travel Reimbursement	\$19,313	\$5,330	\$24,643
CC	Contracted Services	\$30	\$4	\$34
DD	Medicare, Unemployment, Univ. Health, Workers Comp.	\$28,528	\$1,6622	\$30,190
EE	Administrative Expenses	\$41,805	\$556	\$42,360
FF	Facility Operational Expenses	\$43	\$0	\$43
GG	Space Rental	\$7,287	\$0	\$7,287
HH	Consultant Service Contracts	\$2	\$0	\$2.
JJ	Programmatic Operational Services	\$13,879	\$0	\$13,879
KK	Equipment Purchases	\$10	\$2	\$12.
LL	Equip. Lease, Maintenance, Repair Expenses	\$10,087	\$49	\$10,136
NN	Infrastructure	\$12	\$0	\$12.
UU	Information Technology	\$44,934	\$1,26	\$46,197
Total Expended		\$2,159,664	\$124,127	\$2,283,791