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Legal Issues in Higher Education - Handout: SUP-16-5218 SUPL-16-5149 CERB Review of PC Dismissals

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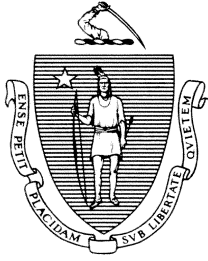
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January 20, 2017

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Re: SUP-16-5218, Board of Higher Education/Department of Higher Education and Ely Dorsey

SUPL-16-5149, Massachusetts Community College Council, MTA/NEA and Ely Dorsey and Michael Marks

Dear Mr. Lang, Mr. Murray and Ms. Davidson:

Ely Dorsey (Dorsey) seeks review of a Department of Labor Relations (DLR) Investigator's dismissal of the above-referenced charges of prohibited practice.¹ Both charges relate to a teaching provision in a successor collective

¹ The Investigator granted Michael Marks' (Marks) motion to intervene in Case No. SUPL-16-5149 on June 17, 2016. Marks also seek review of the dismissal

bargaining agreement that the Massachusetts Community College Council, MTA/NEA (MCCC or Union) negotiated in 2015-2016 with the Board of Higher Education (Employer) on behalf of the bargaining unit of full-time and part-time day faculty and professional staff it represents at the Commonwealth's fifteen community colleges (Day Unit). After reviewing the investigative records and the parties' arguments on review, the Commonwealth Employment Relations Board (CERB) affirms both dismissals for the reasons explained below.²

Background Common to Both Charges³

The Parties

The Employer is the employer for collective bargaining purposes for all employees of the state's public community colleges. The Union, who is the Respondent in SUPL-16-5149, represents two bargaining units of employees employed at these colleges: the Day Unit described above and the Division of Continuing Education (DCE) Unit, which is comprised of professional employees teaching in the Employer's DCE. Dorsey and Marks, the Charging Parties in SUPL-16-5149, are members of the DCE Unit and are employed at Bristol Community College (Bristol).

Collective Bargaining between the Employer and the Union

The DCE and Day units bargain separately and are parties to two different collective bargaining agreements (CBAs) with the Employer. It is undisputed, however, that the same union, i.e., the MCCC, represents both units. Both units are subject to the same by-laws and are governed by the same Board of Directors and officers.⁴ Under the by-laws, the Union's President and

of that charge. With respect to SUPL-16-5149, Dorsey and Marks are collectively referred to as the "Charging Parties."

² The charges were investigated and dismissed separately. Because they arise out of the same facts and circumstances, however, the CERB has decided to consolidate them for review.

³ These facts are taken from the Investigation record, including the parties' investigation exhibits and the dismissal letter.

⁴ The twenty-one member Board of Directors is comprised of four officers, fifteen chapter representatives that represent both Day and DCE Unit members, and two at-large DCE representatives. On review, Dorsey claims that the Investigator erroneously found that twelve out of twenty-one Board of Director members are DCE representatives. He claims that the Board contains only two DCE representatives. Dorsey is correct that the make-up of the Board includes two at-large DCE representatives. However, the Investigator found that during

Vice President serve as ex officio members of each unit's negotiating teams. The Day Unit's negotiating team is comprised of a minimum of five Day Unit members. During the successor negotiations at issue here, Tom Kearns (Kearns), who is a member of both units, was appointed as a Day Unit bargaining team member. Likewise, the DCE negotiating team is comprised of a minimum of five DCE Unit members. All negotiating team members are appointed by the Board of Directors.

2015-2016 Day Unit Negotiations/Teaching Hours

The Day Unit's collective bargaining agreement (CBA) expired on June 30, 2015. The Union and the Employer began exchanging proposals for a successor agreement sometime in July 2015. At the July 16, 2015 negotiating session, the Employer proposed amending Section 12.03 B.3⁵, of the Day Unit CBA to add a provision that "No Day Division programs or courses shall be scheduled to begin after 6:30 p.m." At the time of the proposal, Section 12.03.B.3 defined the instructional workload of Day Unit members as follows:

The workload for faculty members shall include instructional workload and non-instructional workload. . . The faculty customary work week shall be Monday through Friday, but in no case shall a faculty member be required to work more than five (5) days in any seven (7) consecutive day period [except in exceptional cases].

The Union initially rejected this proposal due to concerns that it might be unlawful⁶ and because of the negative effect it might have on both the Day Unit's and DCE Unit's workload. The Union proposed instead that Day Unit faculty teach evening courses only if the member requested the class and the supervisor agreed, and if the purpose of the extension was to meet bona fide

the relevant time period, twelve of the twenty-one 2015-2016 Board members were DCE Unit *members*, not *representatives*. This means, that in addition to the two-at large members, there were ten other representatives, either Chapter representative or officers, who also were members of the DCE unit. We therefore decline to disturb the finding.

⁵ Section 12.03 is titled "Workload of Full-Time Faculty." Section B is titled "Instructional Workload."

⁶ The Investigator noted that there was no further information in the record regarding what law the proposal might violate. She further noted, however, that M.G.L. c. 15A, 26 provides in relevant part that, "[e]ach public institution of higher education may conduct evening classes, provided such classes are operated at no expense to the commonwealth."

programmatic needs.⁷ As negotiations extended through the fall, the Employer continued to advance an extended teaching schedule proposal and, in November, indicated that such a proposal was one of its “must haves.”⁸ It nevertheless modified its proposal on November 12, 2015 by proposing assigning Day Unit faculty to classes that began no later than 5:45 p.m. upon mutual agreement between the faculty member and the college president. The Union in turn advanced counterproposals that were aimed at limiting the times and conditions under which Day Unit faculty could be assigned classes after 4:00 p.m. For example, on November 24, 2015, the Union made a counterproposal that Day Unit faculty could be assigned courses with start times between 4:00 and 5:15 p.m.; any classes that began after 5:15 p.m. could only be assigned for a bona fide programmatic reason. In response, the Employer proposed that it assign Day Unit faculty courses that started between 4:00 and 5:30 p.m. The Union rejected this proposal. On December 21, 2015, the Union proposed allowing a Day Unit member to be assigned courses with start times between 4:00 and 5:00 p.m. only upon mutual written agreement, except that the Employer could assign courses after 4:00 p.m. for bona fide programmatic needs. The Employer then proposed having unrestricted authority to assign classes beginning on or after 4:00 p.m. to new faculty hires. The Union also rejected this proposal.

Throughout negotiations, the Union kept members of both units apprised of its negotiations with the Day Unit, including information regarding the teaching time extension proposal, through newsletters and bargaining updates well as in other communications and meetings that are described in detail in the dismissal letter.⁹ For example, in a September 4, 2015 “Talking Points” memo that was sent to Chapter leaders, the Employer’s proposal to expand the full-time faculty workload to include classes beginning up to 6:30 was listed as one of the “Lowlights from Management’s Proposals.” The December 5, 2015 Update indicates that one of the issues “under active discussion” is “class start times as part of the day unit workload.” In early February 2016, the Union posted a newsletter on its website and also mailed the newsletter to both Day Unit and DCE Unit members, stating that the “Day bargaining team is mindful of how agreements reached might impact adjunct faculty and is determined to protect their rights as well.”

⁷ These conditions already existed at certain colleges.

⁸ Earlier, on September 30, 2015, the Employer told the Day Unit bargaining team that it had three priorities for the successor agreement: on-line teaching, student learning outcomes and expanding the Day Unit members’ teaching time.

⁹ Dorsey does not dispute that the communications described in the dismissal letter took place.

On February 15, 2016, the Day Unit and the Employer reached a tentative agreement that included the following amendment to Section 12.03 B.3:

- a. Upon mutual agreement between the faculty member and the College President or President's designee a faculty member may be assigned courses that have start times commencing on or after 4 p.m. and as late as 5:00 p.m. as part of the faculty member's day unit workload.
- b. To meet bona fide programmatic needs, such as accreditation, and upon written mutual agreement between the faculty member and the college President or President's designee, a faculty member may be assigned courses that have start times commencing on or after 4 p.m. as part of the faculty member's day unit workload.
- c. Within two (2) weeks of assignment, the MCCC Chapter shall be notified whenever a faculty member is scheduled to teach a course that commences on or after 4 p.m. as part of the faculty member's day unit workload.¹⁰

The Union insisted on the third requirement in order to monitor evening class assignments and to address issues that arose for Day or DCE Unit members.

On February 16, 2016, the chair of the Day Unit negotiating team distributed the tentative agreement and a summary to the Board of Directors. The Board discussed the tentative agreement, including the class time issue, and no Board member raised objections. All but one Board member, who abstained, recommended that it be ratified.

¹⁰ On review, the Charging Parties argue that the Investigator erroneously overlooked the fact that the MCCC admitted at the investigation that it "transferred and sacrificed DCE work for Day Unit retroactive and future raises." The CERB is unable to tell from the investigation record whether the MCCC made such an admission during the in-person investigation and we therefore decline to add it. In its response to the Charging Parties' request for review, however, the Union notes that:

By February 2016, the Day unit was under the gun to conclude negotiations so that the contract could be funded in FY 2016. If that didn't occur, the Day unit would lose any retroactive pay and their first year wage increase. Accordingly, it accepted an extremely limited proposal concerning classes after 4 pm that was designed to protect the DCE unit as much as possible.

Thereafter, the Union posted the tentative agreement on its website and mailed Day Unit members a summary of it and a cover letter containing the website link. The Union also held question and answer sessions at the fifteen chapter sites. Dorsey attended the meeting held in Bristol. During this meeting, he protested about the extension of Day Unit class times. The record does not reflect that concerns about this provision were raised by members at any other information sessions.

On February 2, 2016, Dorsey asked the Union about the right of DCE Unit members to vote on the Day Unit contract. On March 9, 2015, at a meeting held for all Day Unit and DCE Unit members, a Union field representative informed those present that DCE Unit members could not participate in the Day Unit's ratification vote. Dorsey and other unidentified bargaining unit members objected, complaining that the Union had violated their rights. On March 14, 2016, MTA General Counsel Ira Fader (Fader) wrote a letter to Union President Joseph LeBlanc (LeBlanc) stating that he was responding to LeBlanc's question of whether DCE members were entitled to vote on the tentative Day Unit agreement.¹¹ Fader's "short answer" to the question was that there was no right for members in one bargaining unit to participate in a ratification vote for another bargaining unit's contract. Fader opined: "The fact that the contract to be ratified has an impact on or explicitly mentions another bargaining unit does not create a voting right for members of the second unit."

Fader's "longer answer" was that it was not unusual for one unit's bargaining agreement to have an impact on the rights of members of another unit. Fader indicated that the teaching time provision at issue in this case was one such provision. Specifically, Fader stated that this provision, "affect[ed] DCE's interests because DCE has traditionally taught courses after 4:00 p.m." Fader further indicated in the letter that the DCE Unit's contract was silent on the right to teach all courses after 4:00 p.m., but that the DCE unit had the right to demand to bargain over any change in existing practice and that the Employer would be "well-advised to work with the DCE unit to resolve an issues that arise in connection with post-4:00 p.m. assignments to Day Unit members."

On March 23, 2016, the Day Unit members ratified the tentative agreement, with 965 members in favor and 91 opposed.

¹¹ The investigation record contains no information about LeBlanc's actual inquiry, e.g., when it was made, whether it was oral or in writing, etc.

Prohibited Practice ChargesSUP-16-5218

On May 2, 2016, Dorsey filed a prohibited practice charge against the Employer alleging that:

The . . . [Employer], by failing to bargain and negotiate in good faith, by dominating, interfering, restraining, and coercing the Day Unit into reaching an agreement that violates the terms of the DCE Unit agreement, the [Employer] has engaged in prohibited practices in violation of M.G.L. c. 150E, §§6, 10(a)(1), (2), & (5).

In an attachment to the Charge, Dorsey further alleged that the “proposed additions to the [collective bargaining agreement] between the Day unit and the Employer stand to significantly and negatively impact the DCE unit members' wages, hours, and workload and the terms of the collective bargaining agreement between the DCE unit and [the Employer].” The charge further asserted that the Employer “failed to take into account the terms of [the collective bargaining agreement with DCE] in its negotiations with the Day unit.”

On July 11, 2016, the Employer filed a Motion to Dismiss the Charge (Motion to Dismiss) and Memorandum of Law arguing that Dorsey has no standing “to assert rights and interests under the law and collective bargaining agreement.” On July 29, 2016, Dorsey filed an Opposition to the Motion to Dismiss contending that he did have standing.

On August 1, 2016, the Investigator, without conducting an in-person investigation, issued a ruling granting the Employer's Motion to Dismiss on both procedural and substantive grounds. She dismissed the Section 10(a)(5) and (2) allegations on grounds that Dorsey, as an individual, had no standing to bring such charges. The Investigator found that Dorsey had standing to bring an independent Section 10(a)(1) allegation, but dismissed the allegation on its merits.¹²

Dorsey filed a request for review with the CERB pursuant to DLR Rule 456 CMR 15.04(3) challenging virtually all aspects of the Investigator's analysis. We affirm the dismissal of charge against the Employer for the reasons set forth below, addressing the Section 10(a)(2) allegations first.

¹² The Investigator reasoned that holding an investigation with respect to Dorsey's Section 10(a)(1) allegation that the Employer interfered, restrained and coerced employees by bargaining with the exclusive bargaining representative of another unit would “serve no practical purpose and would not effectuate the purposes of the Law.”

The Investigator dismissed this aspect of the charge for lack of standing based on the CERB's statement in Commonwealth of Massachusetts and Joseph F. Poitras, Jr. (Poitras), 6 MLC 1054, 1055, n. 1, SUP-2150 (May 15, 1979) that Section 10(a)(2) allegations "inherently relate to organizations and not individuals." Dorsey challenges this conclusion on review claiming that Johnston v School Committee of Watertown, 404 Mass. 23 (1989), which issued after the Poitras decision, accords individuals standing to bring charges that are typically brought by unions in situations where the individual has first attempted to seek relief under the grievance procedure. Dorsey claims that he filed an "informal grievance" with the MCCC claiming that DCE Unit members should have the right to vote on the ratification of the Day Unit agreement and that their "statutory collective bargaining rights" had been and continued to be violated. Dorsey also claims that the other CERB Section 10(a)(2) decisions cited by the Investigator are inapposite. In response, the Employer, argues that Johnston is inapposite because, among other things, Dorsey did not file a formal grievance. It also claims Dorsey's assertions that the Employer dominated the Day Unit's bargaining team are "fanciful" and "untrue" and thus, the Investigator properly dismissed this allegation. We affirm this aspect of the dismissal for the following reasons.

First, Dorsey cites to no decisions arising under Chapter 150E that, explicitly or implicitly recognize the right of an individual employee to bring a charge alleging a Section 10(a)(2) violation. Indeed, since Poitras issued in 1979, the DLR has consistently dismissed Section 10(a)(2) charges brought by individual employees. See, e.g., Fitchburg School Committee and William P. Caron 9 MLC 1399, MUP-4511 (September 1, 1982); City of Holyoke and Arthur Therrien, 23 MLC 121, 122, n. 5, MUP-9468 (January 31, 1995); City of Boston and John McSweeney, 22 MLC 1488, n.1, MUP-9967 (February 9, 1996); Boston Water and Sewer and Richard Fowler, 26 MLC 61, n. 1, MUP-1677 (December 16, 1999); Commonwealth of MA and Jan Pacheco, SUP-06-5254 (*Order of Dismissal*, July 16, 2005).

Dorsey's reliance on Johnston does not change this result. Johnston issued before the Appeals Court issued a decision addressing the standing issue raised here. In Pattison v. Labor Relations Commission (Pattison), 30 Mass. App. Ct. 9 (1991) *further rev. den'd* 409 Mass. 1104 (1991) the Court upheld the CERB's determination that individuals do not have standing to assert a union's bargaining rights under Chapter 150E, even in the face of a union's breach of a duty of fair representation.¹³ The Court agreed that a "contrary rule

¹³ Dorsey claims that he filed an "informal grievance" with the MCCC. As noted above, the Employer disputes this fact. We need not resolve this dispute however. Even if we were to assume that Dorsey's complaints to the MCCC about the Day Unit's negotiations constitute a grievance, and even if there were probable cause to believe that MCCC violated its duty of fair representation to him (which there is not, see below), under the Pattison decision, Dorsey and

would interfere with the union's general prerogative to decide what it will do about alleged bargaining violations, and would interfere also with the employer's natural and justified reliance on having one partner in the bargaining process rather than a multitude." Id. at 23 (citing Peabody Federation of Teachers v. Peabody School Committee, 28 Mass. App. Ct. 410, 414-415 (1990)). Notably, in so holding, the Court expressly rejected Pattison's argument that Johnston supported her right to bring a claim against her employer. 30 Mass. App. Ct. at 24, n. 18. We likewise reject Dorsey's argument that Johnston confers standing upon him to bring a Section 10(a)(2) claim or any claim that inherently relates to the rights of exclusive representatives and not individuals.¹⁴

Section 10(a)(5) Allegations

For the same reasons, we reject Dorsey's claim that the Investigator erred when she dismissed his Section 10(a)(5) and derivative, Section 10(a)(1) allegation for lack of standing. As discussed above, Pattison conclusively resolved this issue in 1990 and Dorsey's efforts to distinguish that decision are not persuasive.

Section 10(a)(1) (Derivative and Independent)

The Investigator also considered whether the Employer's conduct constituted an independent violation of Section 10(a)(1) of the Law.¹⁵ On the face of the charge, Dorsey alleged, among other things, that the Employer had interfered, restrained and coerced "the MCCC and Day unit into reaching a [collective bargaining agreement] that violates the DCE unit's collective bargaining agreement and the rights of the DCE members." The Investigator dismissed this allegation on the merits. As a practical matter, she found that Dorsey could not allege restraint and coercion of a bargaining unit of which he was not a member. She further found that that the Day Unit and the Employer had negotiated in good faith and reached a CBA that was ratified by members. On those facts, the Investigator found no basis to conclude that such negotiations could restrain and coerce individuals in the exercise of their rights under Section 2 of the Law.

Marks would still not have standing to file a charge under Chapter 150E asserting the Union's rights.

¹⁴ Although Pattison arose under Section 10(a)(5) of the Law, its reasoning applies equally in circumstances where, as here, an individual brings a charge alleging that both his union's and his employer's conduct during collective bargaining violated the Law.

¹⁵In light of her dismissal of the Section 10(a)(2) and Section 10(a)(5) allegations, the Investigator dismissed the derivative Section 10(a)(1) allegation.

On review, Dorsey claims that the Investigator incorrectly limited the restraint and coercion prohibited under Section 10(a)(1) to rights guaranteed under Section 2 of the Law. Dorsey argues that nothing in the text of Section 10(a)(1) limits its scope in this manner and, paraphrasing his charge, argues that the Employer “interfered, restrained and coerced the MCCC’s Day Unit into agreeing to a Day Unit CBA provision that would inhibit the wages, hours, and workload rights of the DCE unit that had been bargained for and guaranteed to the DCE unit under M.G.L. c. 150E.” There are several flaws in this argument.

First, Dorsey’s theory of the Section 10(a)(1) violation is, for all intents and purposes, the same as his theory underlying the Sections 10(a)(2) and (5) violations – that the Employer committed an unfair labor practice by negotiating a CBA provision with the Union that extended Day Unit members’ teaching hours to the alleged detriment of DCE unit members. As repeatedly stated above, however, Chapter 150E does not confer upon individual employees the right to attempt to enforce an employer’s duty to bargain in good faith. Pattison, 30 Mass. App. Ct. at 23-24.

Second, the Investigator correctly cited decades of black letter law for the proposition that a public employer violates Section 10(a)(1) of the Law when it engages in conduct that may reasonably be said to interfere with, restrain or coerce employees in the exercise of their rights *under Section 2 of the Law*. See, e.g., Quincy School Committee, 27 MLC 83, 91, MUP-1986 (December 29, 2000)(emphasis added); Town of Athol, 25 MLC 208, 212, MUP-1448 (June 11, 1999); Town of Winchester, 19 MLC 1591, 1595, MUP-7514 (December 22, 1992); Groton-Dunstable Regional School Committee, 15 MLC 1551, 1555, MUP-6748 (March 20, 1989) and cases cited therein.¹⁶ Despite Dorsey’s insistence that this is an incorrect reading of the Law, he points to no provision of Chapter 150E that guarantees to employees the “right” to any wages, hours or terms and conditions of employment outside of that which their union has negotiated on their behalf. This principal is embodied in the text of Section 2 itself, which grants employees the right to bargain collectively “*through representatives of their own choosing on questions of wages, hours, and other*

¹⁶ Section 2 of the Law states:

Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except to the extent of making such payment of service fees to an exclusive representative as provided in section twelve.

terms and conditions of employment.” (Emphasis added). Section 6 of the Law also makes this explicit insofar as it requires the “employer and the exclusive representative” to “negotiate in good faith over terms and conditions of employment.”¹⁷

For all of these reasons, we affirm the dismissal of the Section 10(a)(1) allegation and dismiss the Case No. SUP-16-5218 in its entirety.¹⁸

SUPL-16-5149

Dorsey filed this charge on March 22, 2016 alleging that the MCCC had engaged in prohibited practices within the meaning of Section 6, 10(b)(1 and 10(b)(2) of the Law. The Investigator conducted an in-person investigation on June 22, 2016 and dismissed the charge for lack of standing on September 22, 2016. For the reasons set forth below, we affirm the dismissal of the 10(b)(2) allegation for lack of standing but dismiss the Section 10(b)(1) allegation on its merits.

The face of the charge stated:

This action is for interference, restraint and coercion on the part of the [MCCC] for entering into an agreement on behalf of its Full-Time and Part-Time Day and Professional unit members that violates and fails to protect the rights of the [DCE] unit members, fails to meet the standard of bargaining collectively in good faith

¹⁷ Because Dorsey does not argue that the Employer’s conduct restrained, interfered with or coerced employees in the exercise of the rights under Section 2 of the Law, we need not reach this issue. In general, however, we agree with the Investigator that an employer’s good faith negotiations with the exclusive representative would not chill a reasonable employee from engaging in activity protected under Section 2 of the Law. See Brockton School Committee, 10 MLC 1169, 1175-1176, MUP-5050 (H.O. September 1, 1983) *aff’d* 11 MLC 135 (January 29, 1985).

¹⁸ Dorsey complains that the Investigator “stripped him of his right to an investigation by granting the motion to dismiss without first holding an in-person investigation.” However, neither the Law nor the DLR’s regulations guarantee charging parties the right to an in-person investigation. Rather, Section 11(b) of the Law and DLR Rule 456 CMR 15.05, subsections (1) and (3) expressly authorize an investigator to dismiss the charge prior to conducting an in-person investigation. Because we conclude that none of the arguments that Dorsey claims he would have made had there been an investigation either establish his standing to bring this charge or probable cause to believe that the Law has been violated in the manner alleged, the Investigator committed no error by granting the motion to dismiss without first conducting an in-person investigation.

and fails to meet the standards and obligations of an exclusive bargaining representative.

Attached to the charge was a lengthy bulleted list of the ways in which the MCCC allegedly violated Sections 6, 10(b)(1) and 10(b)(2) of the Law.¹⁹ The crux of these allegations is that the MCCC “bargained away the rights of DCE unit members,” transferred their bargaining unit work and failed to represent them by not notifying them about, or including them in, the negotiation or ratification of the Day Unit agreement pertaining to teaching hours. We turn first to the Section 10(b)(2) allegation.

Section 10(b)(2)

Section 10(b)(2) of the Law prohibits an exclusive collective bargaining representative from refusing to bargain in good faith with a public employer. Massachusetts State Lottery Commission, 22 MLC 1519, 1522, SUPL-2579 (February 16, 1996). A union’s obligation to bargain in good faith under Section 10(b)(2) mirrors an employer’s good faith bargaining obligation under Section 10(a)(5) of the Law. Boston School Committee, 37 MLC 214, 221, MUPL-06-4570 (May 23, 2011). Accordingly, the policies articulated in the Pattison decision for denying standing to individual employees to enforce an employer’s duty to bargain by bringing Section 10(a)(5) charges apply equally to individuals attempting to enforce a union’s duty to bargain under Section 10(b)(2) of the Law. We therefore summarily affirm the Investigator’s dismissal of the Section 10(b)(2) allegation for lack of standing. None of the cases that Dorsey and Marks cite persuade us otherwise.

Section 10(b)(1)

Throughout this charge, Dorsey also alleges that the Union violated its duty as his exclusive representative by the manner in which it negotiated and ultimately agreed to the extension of the Day Unit teaching hours provision. The Investigator dismissed this aspect of the charge for lack of standing. Relying on both the text of Section 5 of the Law²⁰ and various judicial decisions, the Investigator reasoned that when the MCCC was negotiating the Day Unit

¹⁹ The list was not separated into separate counts or otherwise categorized by the section of the Law allegedly violated.

²⁰ The Investigator relied on the first paragraph of Section 5, which states:

The exclusive representative shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership.

agreement, it only owed a duty of fair representation to Day Unit members. She therefore concluded that Dorsey and Marks, as DCE Unit members, lacked standing to allege a DFR violation with respect to the Union's conduct during Day Unit negotiations and dismissed the charge on those grounds.

On review, the Charging Parties claim, for a variety of reasons, that they have standing to bring the Section 10(b)(1) allegation. We need not reach their arguments. Even assuming that Dorsey and Marks had standing to allege a 10(b)(1) violation under the particular circumstances of this case, the facts adduced during the investigation do not establish probable cause to believe that the Union violated its duty of fair representation to them in the manner alleged. On these grounds, we dismiss this aspect of the charge.

Under the Law, a bargaining representative has a statutory duty to serve the interests of all its members without hostility or discrimination toward any, and to exercise its discretion in complete good faith and honesty. Local 285, SEIU and Vicki Stultz, 9 MLC 1760, 1764, MUPL-2461 (April 5, 1983) (citing Vaca v. Sipes, 386 U.S. 171, 177 (1967)).²¹ Because bargaining agents' obligations often require representing conflicting interests, the Law grants them wide range of reasonableness in fulfilling their statutory duties, as long as their actions are "not improperly motivated, arbitrary, perfunctory or demonstrative of inexcusable neglect." Graham v. Quincy Food Service Employee Association, 407 Mass. 601, 607 (1988)(additional citations omitted). Ultimately, there must be "substantial evidence" of bad faith that is "intentional, severe, and unrelated to legitimate union objectives" in order to show a breach of the duty of fair representation. Id. at 609 (citing Amalgamated Association of St., Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 301 (1971)). In this case, as a single union representing two different bargaining units at the same employer, the MCCC was obliged to represent both units fairly without hostility or discrimination, but within the wide range of reasonableness afforded to it by the Law. For the following reasons, there is not probable cause to believe that the manner in which the Union conducted negotiations over a topic that

²¹ On review, the Charging Parties reiterate their argument that the Union "breached its fiduciary duties" owed to them and the DCE Unit. Although the Investigator did not directly address this argument, she noted that Dorsey had presented no cases holding that a union owes a duty to its members beyond the duty of fair representation required by Section 10(b)(1) of the Law. None of the cases that the Charging Parties cite on review arise under Chapter 150E or even remotely relate to the duty that public unions owe to their members. They therefore provide no basis to analyze the Charging Parties' Section 10(b)(1) claims under anything other than the well-established duty of fair representation standard articulated above. Accord Chase v. Commonwealth Employment Relations Board, 88 Mass. App. Ct. 1103, slip op. at 3 (Unpublished Disposition, August 28, 2015) ("The union is not a fiduciary; it is a representative.").

impacted both the Day and DCE bargaining units violated its duty to the DCE Unit in any way.

As a preliminary matter, we agree for the reasons stated in the dismissal letter that, because the DCE Unit and Day Unit are separate, not blended bargaining units, the Union's duty of fair representation to the DCE Unit did not include extending to it the same rights that members of the Day Unit have under the MCCC's bylaws have when it comes to participating in the Day Unit negotiations or ratifying the Day Unit agreement. We also agree that, under the logic of parity cases, the Union was not required to negotiate for and simultaneously represent and negotiate for the DCE unit or administer the DCE agreement during negotiations. See, e.g., Town of Andover, 18 MLC 1311, 1313, MUP-8228 (February 25, 1997). None of the Charging Parties' arguments on review or the cases they cite persuade us that the Day and DCE units, have, over time, become blended units, or that the reasons the CERB created separate Day and DCE Units back in 1979 require us to find that the MCCC violated its duty of fair representation towards the DCE Unit when it negotiated an extension of teaching hours for Day Unit employees.

For similar reasons, we do not find probable cause to believe that the Union violated its duty to DCE members by negotiating this provision on behalf of the Day Unit without first holding bargaining sessions with the DCE Unit and the Employer. Dorsey and Marks argue that the Union's and Employer's actions amounted to a transfer of DCE bargaining unit work and the Union's failure to take steps to prevent this amounts to a breach of the duty of fair representation. The Investigation record shows, however, that the teaching provision was the result of lengthy, give and take negotiations between the Employer and the Union, in its capacity as the Day Unit's representative. Absent "substantial evidence" of bad faith that is "intentional, severe, and unrelated to legitimate union objectives," the fact that the teaching time provision may have also impacted DCE Unit members' terms and conditions of employment does not automatically mean that the Union violated its duty of fair representation to DCE Unit employees when it decided to negotiate the teaching time provision with the Day Unit without first seeking to negotiate this issue on behalf of the DCE unit. Graham v. Quincy Food Service Employee Association, 407 Mass. at 609. There is no such evidence here.

Rather, the Investigation record demonstrates that it was the Employer, not the MCCC, who first made the teaching time proposal. Further, as soon as the Employer made this proposal, the Union, recognizing that extending the Day Unit's teaching hours affected both Day and DCE members' interests, rejected the proposal. The Employer, however, insisted that extending Day Unit teaching hours was one of its "must-haves." The dismissal letter amply details the Union's efforts over the next eight months to limit the scope and impact of the proposal,

while still attempting to reach a successor agreement on behalf of the Day Unit to whom, we emphasize, it also owed a duty of fair representation.²²

The final product of those negotiations demonstrates these efforts. The Employer's original proposal would have unconditionally allowed it to schedule Day Division classes up until 6:30 p.m. However, the Union was able to negotiate changes that only allowed the Employer to schedule Day Division classes only as late as 5:00 p.m., and only upon the faculty members' and the College' president's mutual consent, absent bona fide programmatic concerns. Further, the Union insisted the MCCC Chapter be informed whenever Day Unit members were assigned classes that started after 4:00 p.m. in order to address issues that arose for both Day *and* DCE unit members. Further, when Dorsey objected to being told that DCE Unit members could not participate in the Day Unit's ratification vote, the Union President asked Union counsel what the DCE Unit's rights were. Union counsel responded at length in a reasoned letter that acknowledged that the Day Unit's agreement affected DCE bargaining unit members and explained that although this did not entitle DCE Unit members to vote on the tentative agreement, they had other rights in this regard. This sequence of events demonstrates that the Union took the DCE Unit's interests into account when negotiating the teaching time provision and addressed their expressed concerns. Although Dorsey disagrees with the manner in which the negotiations were handled, such behavior falls within the broad discretion granted to unions and provides no grounds for finding a violation of the DFR. Cf Teamsters Local 437 and James Serratore, 10 MLC 1467, 1474, MUPL-2566 (March 21, 1984)(when investigating potential grievances, union need not make either the best judgment or the same judgment as would have been reached by the CERB as long as the conclusion is neither arbitrary nor tainted by some unlawful discriminatory motivation).

There is not probable cause to believe that the Union violated its DFR to the Charging Parties in any other way. Although they continue to argue that the MCCC did not put DCE Unit members on notice of the Day Unit negotiations, the investigation record contains numerous examples of the ways in which the

²² Indeed, had the teaching provision become a "deal breaker" based on the Union's concerns over the impact of the teaching times provision on DCE Unit members' interests, Day Unit members could have filed a charge making the very same allegations that Dorsey and Marks make here. This illustrates the quandary that unions can find themselves in when addressing the sometimes divergent interests of their members and, thus, the need for the Law to provide a union with latitude in negotiating solutions that are in the best interests of all members, subject only to complete good faith and honesty of purpose in the exercise of this discretion. Marion Town Employees Association and Polly Church, 35 MLC 173, 177, MUPL-04-4486 (January 30, 2009) (citing Trinque v. Mount Wachusett Community College Faculty Association, 14 Mass. App. Ct. 191, 199 (1982) (quoting Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953))).

Union provided such notice, including newsletters and bargaining updates. Further, one of the members of the Day Unit's negotiating team was also a DCE unit member and the Board of Directors, which included twelve members who were also members of the DCE bargaining unit, considered the provision as part of the entire tentative agreement and recommended that it be ratified. The Union also held Chapter meetings, which provided members of both units the opportunity to comment on the tentative agreement. The Investigation record demonstrates that Dorsey attended and spoke during at least one Chapter meeting and therefore cannot be heard to complain that he or other DCE unit members were not kept apprised or silenced when it came to Day Unit successor negotiations.

Conclusion

For all of the foregoing reasons, the CERB affirms the dismissal of both charges.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

MARJORIE F. WITTNER, CHAIR

KATHERINE G. LEV, CERB MEMBER

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.