COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

MUP-10-6005

In the Matter of

WORCESTER SCHOOL COMMITTEE,

And

EDUCATIONAL ASSOCIATION OF WORCESTER, INC.

REQUEST FOR REVIEW OF HEARING OFFICER'S DECISION BY WORCESTER SCHOOL COMMITTEE AND SUPPLEMENTARY STATEMENT

Now comes the Worcester School Committee, through its counsel and in accordance with 456 CMR 13.15 and Mass. G.L. c. 150E, § 11 and respectfully requests that the decision of the Hearing Officer in this case be reviewed by the Commonwealth Employment Relations Board. In correspondence from the Department of Labor Relations, dated June 16, 2016, Gwenn Kelley advised the undersigned counsel that "[Y]our client's appeal rights are preserved by the emails you have sent to the DLR (and CERB). The CERB is treating your most recent correspondence as your notice of appeal." In response to a motion seeking additional time to file a Supplementary Statement filed by the undersigned, the CERB granted the motion allowing for the filing of the Supplementary Statement on or before Thursday, August 4, 2016. This filing shall constitute the Supplementary Statement required pursuant to 456 CMR 13.15.

I. BACKGROUND

On or about June 8, 2016, Hearing Officer Margaret Sullivan (hereinafter, the "Hearing Officer") issued her decision in this case. In her decision, the Hearing Officer determined that the Worcester School Committee violated Section 10(a)(5), and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by failing to give the Educational Association of Worcester, Inc.'s environmental expert access to certain schools in the Worcester Public School System. The decision of the Hearing Officer followed five days of public hearing and the filing of post-hearing briefs by the Parties. During the hearing, the Worcester School Committee called James Okun as an expert witness. The Hearing Officer allowed him to testify after denying a motion filed by the EAW seeking to exclude his testimony. The Hearing Officer designated Mr. Okun as an expert witness.

II. FRAMEWORK OF HEARING OFFICER'S DECISION

At the outset of her opinion, the Hearing Officer laid out a general framework for her decision, acknowledging that the Department of Labor Relations generally regards requests for access such as the one in the instant case as an information request. She stated, "If a public employer possesses information that is **relevant** and **reasonably necessary to an employee organization in the performance of its duties** as the exclusive collective bargaining representative, the employer is generally obligated to provide the information upon the employee organization's request. Higher Education Coordinating Council, 23 MLC 266, 268, SUP-4142 (June 6, 1977)" (emphasis added). Notably, the cited case law establishes that the right to receive relevant and reasonably necessary information is derived from the statutory obligation to engage in good faith collective bargaining, including both grievance processing and contract administration. The decision indicates that the CERB standard for determining relevancy is a

liberal one similar to the standard for determining relevancy in civil litigation proceedings. The decision cites City of Lynn, 27 MLC 60, 61, MUP-2236, 2237 (December 1, 2000) for the proposition that terms and conditions of employment of bargaining unit members are presumptively relevant and necessary to an employee organization to perform its statutory duties. Apparently, the Hearing Officer has made the nexus between that general presumption and her later statement that "[I]t is undisputed that matters affecting the safety and health of bargaining unit members are mandatory subjects of bargaining and are included within a union's representation duties. See, e.g. Town of Bridgewater, 12 MLC 1612, 1615, 1617, MUP-5356 (February 7, 1986)." The decision then recites the second half of the traditional information request standard generally followed by the Department. "Once a union has established that the requested information is relevant and reasonably necessary to its duties as the exclusive representative, the burden shifts to the employer to establish that it has legitimate and substantial concerns about disclosure, and that it has made reasonable efforts to provide the union with as much of the requested information as possible. Board of Higher Education, 26 MLC at 93 (citing Boston School Committee, 13 MLC 1290, 1294-1295, MUP-5905 (November 2, 1986)); Adrian Advertising a/k/a Advanced Advertising, 13 MLC 1233, 1263, MUP-2497 (November 6, 1986), aff'd sub nom., Despres v. Labor Relations Commission, 25 Mass. App. Ct. 430 (1988)." The employer's legitimate and substantial concerns are then balanced against the employee organization's need for the information. Commonwealth of Massachusetts, Chief Administrative Justice of the Trial Court, 11 MLC 1440, 1443-1444, SUP-2746 (February 21, 1985) (adopting the balancing approach used by the United States Supreme Court in Detroit Edison C. v. NLRB, 440 U.S. 301, 100 LRRM 2728 (1979).

In her decision, the Hearing Officer also outlined an alternative to the DLR's traditional standard in information cases, which was the NLRB's balancing test first enunciated in Holyoke Water and Power, 273 NLRB 1369, 1370 (1985), *enforced* 778 F.2d 49 (1st. Cir. 1985), *cert. denied* 477 U.S. 905 (1986). That approach weighs a union's interest in obtaining access against the employer's interest in controlling its property and operations. Although the Holyoke Power Order of the NLRB was enforced by the First Circuit, the decision of the Appeals Court did not explicitly endorse the NLRB's balancing approach. The Hearing Officer in this case apparently echoed the First Circuit's thinking that it was not imperative to distinguish between the traditional information request standard and the Holyoke Power balancing approach. The Hearing Officer wrote: "As is the case here, the First Circuit noted that the choice between balancing a union's interest in obtaining access against either an employer's interest in protecting its property under the Holyoke Power test, or an employer's legitimate and substantial concerns under the traditional information case standard, was not particularly crucial to the outcome of the case. Id.; see also, City of Boston, 21 MLC 1113, 1120, MUP-9048 (H.O. July 29, 1994)." A careful reading of the decision of the Hearing Officer in the instant case reveals that she analyzed the case under both the traditional approach and the Holyoke Power approach.

III. Arguments

A. The Hearing Officer Made Various Errors of Law In Connection With Her Decision.

1. **No determination of relevance and reasonable necessity in the instant case is possible if the Hearing Officer does not first make a determination whether PCBs pose a health and safety risk to EAW members.**

In her Decision, the Hearing Officer stated, "… I need not determine whether PCBs pose a health hazard to humans, nor do I need to reconcile differences between Sireci's and Okun's testimony on this issue in order to determine whether the EAW's request for access to obtain test samples is relevant and reasonably necessary to its role as bargaining representative." The failure to make this preliminary determination amounted to a substantial error of law on the part of the Hearing Officer and undermines the validity of the decision as a whole.

The decision, on its face, seems to conclude that that the EAW's request was relevant and reasonably necessary because it involved a "matter affecting the safety and health of bargaining unit members" and involved "information about terms and conditions of employment" The Employer does not dispute that matters involving employee safety are mandatory subjects of bargaining and certainly fall within the ambit of the a union's representation of its members. The dispute here is over whether PCBs actually constitute a matter of employee safety and implicate terms and conditions of employment. If not, then the Employer argues that the preliminary showing of "relevance" and "reasonable necessity" is absent and the EAW is not entitled to the requested information (i.e., access to test).

The employer introduced the expert testimony of James Okun, who holds a bachelor's degree in chemistry and a master's degree in toxicology from the Massachusetts Institute of Technology. He is a licensed site professional under Mass. G.L. c 21E and is qualified to oversee the cleanup of sites contaminated with chemicals. He is the founding partner of an environmental consulting firm in Massachusetts, which has overseen the cleanup of sites

including the former Monsanto Plant in Everett, a building at Salem State University and land at the University of Massachusetts – Boston. Notably, he is a former employee of the Environmental Protection Agency, having worked in the Office of Pesticides and Toxic Substances, and having been involved in matters relating to PCBs. *See Employer Exhibit Nos. 13A and 13B.* He is also a published author on the subject of PCBs. *See Employer Exhibit Nos. 16, 17 and 18.* As noted in her decision, the Hearing Officer designated him an expert witness. *See Employer Exhibit Nos. 14, 15* (admitted for limited purpose of qualifications as expert). The decision acknowledged that the Hearing Officer "found his testimony useful concerning the history of the regulation of PCBs."

Unfortunately for the Employer, the substantial reliance on Mr. Okun's expert testimony, including his testimony throughout the fifth day of hearing, was not given adequate consideration by the Hearing Officer whose eighty-six page decision devoted only approximately two pages to Mr. Okun's testimony. The Employer argued that there had been no reproducible scientific studies demonstrating that PCBs pose a health risk to humans. This was contrasted with the EAW's reliance on certain materials from the EPA which referred to PCBs only as "probable carcinogen" to humans. Mr. Okun explained this terminology and the rationale for its use by the EPA, citing the lack of scientifically rigorous studies and the lack of consistent duplication of results. Moreover, Mr. Okun's testimony regarding the certain limited health effects to humans which were known to him involved direct exposures to PCBs such as through dermal contact or inhalation.

The decision nuances the safety issue in that the Hearing Officer refused to resolve the very real factual dispute presented through the testimony of EAW Executive Secretary Michael Sireci and Employer expert witness James Okun as to whether the presence of PCBs posed a

health risk to EAW members. The decision ducks the issue by suggesting that the EAW's awareness of EPA regulations which would require the removal of caulking that contained a concentration of PCBs greater than 50 ppm made the request for access relevant and reasonably necessary so that the EAW could ascertain "whether its unit members' workplaces actually contained caulking that would need to be removed and to request bargaining over the impacts of caulking removal on unit members' terms and conditions of employment, including their health and safety." However, the latter part of this statement itself highlights the need for the Hearing Officer to make a determination whether health and safety was actually a real issue. Moreover, the Hearing Officer referenced in her decision that "certain teachers at Burncoat H.S. came to the EAW on or about June 2009 with concerns about the number of unit members at that school who were diagnosed with cancer. As part of its duties as the exclusive representative, the EAW acted on those members' health and safety concerns when Delsignore made the access request about seven months later." It is impossible then to divorce the motivation for the access request from the basic issue of whether PCBs are a real health and safety issue. The Parties have a fundamental difference on that core issue and its resolution by the finder of fact is a necessary condition precedent to any conclusion about the relevance and reasonable necessity of the EAW's access request. If determined not to have been a relevant or reasonably necessary request, the Employer's denial of access was not unlawful.

The Hearing Officer's refusal to resolve this factual dispute was a fatal legal error and should serve as the basis for CERB overturning the decision, or at a minimum, remanding the case to her for resolution of this factual dispute on the basis of the evidence introduced by the Parties.

2. The Employer's stated concerns about the authenticity of samples taken do not render the request for access relevant and reasonably necessary.

In ruling as she did, the Hearing Officer rejected the Employer's argument that access was not necessary because EAW Executive Secretary Michael Sireci had already taken his own caulking samples from the three schools in question. Her decision stated, "Because of the Employer's stated concerns about the authenticity of the samples, the EAW's environmental experts needed access to the three schools in order to take new samples and then test them for the presence of PCBs. Thus, the access requested is relevant and reasonably necessary to the EAW in its role as exclusive bargaining representative." Essentially, this ruling suggests that the Employer must facilitate the EAW's testing of the Employer's property even in the face of the established fact that the EPA does not require property owner's to test for the presence of PCBs. The logic of this conclusion seems to be that if the Employer won't recognize the validity of tests already taken without permission by the EAW, it must grant access and by doing so agree to the authenticity of the new tests. This seems to be a fundamental misuse of the information request concept and instead involves the Board as a mechanism to be used to advance the EAW's interest in forcing the removal of caulking by mandate of the EPA. Essentially, the interest of the EAW is to force the Employer to acknowledge its test results to the EPA thereby compelling the removal of caulking, all while EPA regulations do not require the Employer to test. This is an especially troubling overreach when considered in the context that there has been no finding in the decision that PCBs pose a health and safety risk to EAW bargaining unit members. The preliminary requirement of a showing that the requested information is both relevant **AND** reasonably necessary cannot be satisfied in the instant case if the relevance issue (i.e., whether PCBs pose a health and safety risk) remains unresolved, leaving only a strained reasonable

necessity conclusion grounded not in any issue of labor relations but instead grounded in a desire to compel the Employer to essentially join with the EAW in presenting test results to the EPA where no such testing requirement even exists. Even in the face of the Order issued by the Hearing Officer, the Employer can't be compelled to acknowledge the findings of the EAW resulting from any testing and the Employer can't be compelled to do its own testing. The decision of the Hearing Officer, perhaps unwittingly, could result in a circumvention of EPA regulations by forcing testing where no such obligation currently exists, which would represent a significant misapplication of the information request mechanism whose basis lies in the good faith bargaining relationship of the Parties.

The conclusion by the Hearing Officer that the Employer's stated concerns about the authenticity of the samples previously taken by Michael Sireci of the EAW renders the requested access reasonably necessary (and relevant despite no finding on the issue of health and safety risk) constitutes an error of law which should serve as a basis for CERB overturning the decision of the Hearing Officer.

3. The doctrine of unclean hands should have been considered as an affirmative defense in this case.

The record in this case is replete with evidence which demonstrated that the EAW acted in bad faith when it made its initial requests for access. The EAW refused or attempted to avoid providing the information requested by the Employer as to the status of a certain study being conducted by Robert Herrick and to which the Worcester Public Schools had been allegedly invited or included or to return the samples taken without permission. *See Joint Exhibit Nos. 5, 9, 10, 11, 12, 13, 15 and Employer Exhibit No. 3.* George Weymouth and Michael Sireci had both engaged in self-help by taking caulking samples in 2009 without authorization and refused to return such samples to the Employer. The EAW's Executive Secretary had represented to the

District that the Employer had been invited to be part of the Herrick Study. *See Employer Exhibit No. 3; Joint Exhibit No. 10*. Moreover, the evidence confirms that the study of PCBs was part of Sireci's own educational endeavors and interests and the alleged rationale for testing based on health and safety concerns was a pretext for his own personal interests. *See Employer Exhibit No. 1*. It is not a leap of logic to suggest that Herrick and one who tested on his behalf (Weymouth) were acting as agents of the EAW and that Sireci's efforts were driven by personal rather than union interests. The Hearing Officer rejected that argument, finding that she could not conclude that the sole reason that the Employer denied the access request was because the EAW previously acted in bad faith. This conclusion would suggest that it is permissible for one Party to the collective bargaining relationship to act in bad faith but nevertheless prevail in a case such as this if it later can establish that a request which had bad faith as its genesis was later justified by some relevance argument or that it was reasonably necessary for the union to carry out its role as exclusive bargaining representative. This would seem antithetical to the principles of good faith as those have been interpreted under Mass. G.L. c. 150E. This conclusion appears to be an overly aggressive application of DLR precedent and constitutes an error of law that should serve as a basis for CERB overturning the Hearing Officer's decision.

Additionally, the Hearing Officer rejected the Employer's "unclean hands" argument, ostensibly on the basis of her conclusion that it was an equitable doctrine and that generally CERB does not award parties relief in equity, *citing* Town of Hudson, 25 MLC 143, 146, n.21, MUP-1714 (April 1, 1999). What is not mentioned in the decision is that the cited note from the Town of Hudson case made it clear that a refusal to dismiss a case based upon the equitable doctrine of unclean hands is not the end of the analysis. The cited note 21 provides in pertinent part, "However, although we deny the Town's motion to dismiss, we will consider the Town's

argument regarding unclean hands as a potential affirmative defense to the Complaint before us." It does not appear from the Hearing Officer's Decision that the "unclean hands" argument was treated as an affirmative defense. At a minimum, the matter should be remanded to the Hearing Officer for consideration of this affirmative defense.

4. **The Hearing Officer should have found in favor of the Employer in this case because it is clear that the EAW has already achieved its objective of testing for the presence of PCBs at the schools in question and has by virtue of this engaged in extensive representation of its members alleged interests**.

This case presents a unique challenge to the DLR in that the facts do not fit neatly into the fact patterns that other access cases normally do, for example where there is an established and universally accepted health risk that is at issue, such as excessive noise levels, asbestos, lead paint, etc.. Here, the EAW's interest in testing is not based upon any definitive evidence of negative health effects associated with PCBs. Indeed, the chief union witness on this point was EAW Executive Secretary Michael Sireci, who relied upon literature from the EPA that referred to probable health effects. The Employer, on the other hand, relied on an expert witness far more capable than Mr. Sireci to opine on the question of whether PCBs present health risks to humans. The expert witness was educated at one of the finest institutions in the United States, had worked for the EPA, is a published author on the subject of PCBs, is a licensed site professional, and believes that there was a regulatory overreaction to PCBs and that the EPA's use of the term "probable" was because the studies claiming to show a link between PCB exposure and cancer in humans were not scientifically rigorous enough as the results were not able to be consistently duplicated. This dispute over what should have been a core issue in this case was never resolved by the Hearing Officer. There is no question that this case, based on that factual dispute alone, stands on completely different footing than the various other cases where access was aimed at

establishing the presence of a known and accepted health hazard. This alone should have resulted in a finding in favor of the Employer as applying the traditional access case interpretations to the instant fact pattern constituted an error of law.

Perhaps in recognition of the fact that the instant case didn't fall within the normal parameters of access cases, the Hearing Officer fashioned an opinion that seemed to hold that because the EPA guidelines require removal of materials containing PCBs over an allowable limit, access should have been granted so that the union could ascertain whether the PCBs existed at levels above the allowable limit. The fault with that conclusion is that the issue of whether removal would be mandated by the EPA was not a matter tied to the employer and union relationship but rather was one properly between the property owner and the federal agency. Even in the face of test results showing elevated levels, the removal of the material, which the Hearing Officer's decision indicated could have been the subject of a demand to bargain by the EAW over the impacts of such removal on unit members' terms and conditions of employment, including their health and safety, would not have been a certainty that the union could have forced through collective bargaining channels or through litigation at the DLR. Moreover, in the absence of any finding that PCBs posed a health and safety risk, the EAW would be hard pressed to insist that health and safety would have been an appropriate subject of impact bargaining even had they been able to force removal.

It is, admittedly, difficult to isolate the true dispute here, but suffice it to say, it is not about identifying the presence of a known health hazard in the workplace. It is a dispute over whether the EAW can effectively use an information request purportedly grounded in health and safety in order force the Employer to essentially co-sponsor test results in an effort to force removal of the material by the Employer by mandate of the EPA. If the access were truly about

identifying PCB levels, the EAW has already presumably accomplished that on two occasions by taking its own unauthorized tests and engaging in self-help. It even went so far as providing test results itself to the EPA. What the EAW really wants is for the DLR to play a role in the process so that it can argue that any test results emanating from the access the EAW has been granted are such that they must be acted on by the EPA as though taken collectively by the EAW and the Employer. This is not what information requests are intended to be used for in the context of Mass. G.L. c. 150E and allowing their misuse in this case for these purposes constitutes an expansion of the substance and spirit of such requests beyond that contemplated by Mass. G.L. c. 150E, which in and of itself constitutes an error of law.

As noted in the Decision, and as argued at the Hearing, the EAW has already engaged in considerable union activity around the issue of PCBs, including through informational pickets, presentations at public meetings, submission of bargaining proposals, and general advocacy on behalf of its members. The denial of access has not done anything to prevent this activity and substantially undermines the notion that the access was reasonably necessary for the EAW to carry out its duties as the exclusive bargaining representative of its members.

IV. Conclusion

For all of these reasons, the Employer requests that the CERB reverse the decision of the Hearing Officer in this case and enter in order finding that the Employer did not violate Mass. G.L. c. 150E, Section 10(a)(5) and derivatively Section 10(a)(1) when it denied the EAW's request for access to test for the presence of PCBs. If the CERB is not inclined to find in favor of the Employer based upon these arguments, the Employer requests that the matter be remanded to the Hearing Officer for decision on the issue of whether PCBs pose a health and safety risk to bargaining unit members and to rule on the issue of unclean hands as an affirmative defense, and

having done so, amend her decision based upon those findings to reflect that the Employer did not violate Mass. G.L. c. 150E, Section 10(a)(5) and derivatively Section 10(a)(1) when it denied the EAW's request for access to test for the presence of PCBs.

Respectfully Submitted,
Worcester School Committee,
By Its Counsel,

/s/ Sean P. Sweeney

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Dated: August 4, 2016

Certificate of Service

I hereby certify that I have served a copy of the within Request for Review and Supplementary Statement, addressed as follows, via e-mail on the date set forth below:

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/s/ Sean P. Sweeney

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