

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of *
*
BOSTON SCHOOL COMMITTEE * Case No. MUP-19-7322
*
and *
* Date Issued: March 24, 2021
*
BOSTON TEACHERS UNION *
*

Hearing Officer:
Gail Sorokoff, Esq.

Appearances:
Matthew Dwyer, Esq. Representing the Boston Teachers Union
Robert Hillman, Esq. Representing the Boston School Committee
Jennifer King, Esq

HEARING OFFICER'S DECISION
SUMMARY

1 The issue in this case is whether the Boston School Committee (School Committee)
2 violated Sections 10(a)(1) and (5) of Massachusetts General Laws Chapter 150E (the Law)
3 by failing to comply with two arbitration awards. I find that the School Committee violated the
4 Law as alleged.

STATEMENT OF THE CASE

6 On May 8, 2019, the Boston Teachers Union (Union or BTU) filed a charge of
7 prohibited practice with the Department of Labor Relations (DLR) alleging that the School

1 Committee had violated Section 10(a)(1) and (5) of Massachusetts General Laws, Chapter
2 150E (the Law). The Union amended the charge twice, on May 17, 2019 and June 19, 2019.
3 On October 2, 2019, a DLR investigator issued a Complaint of Prohibited Practice and Partial
4 Dismissal (Complaint). On March 16, 2020, the Union filed a motion that the complaint's
5 allegations be deemed admitted. On March 17, 2020, the School Committee filed an Answer
6 to the Complaint and responded to the Union's motion. On March 18, 2020, the DLR denied
7 the Union's motion. On October 7 and 8, 2020, I conducted a hearing by video conference
8 during which the parties received a full opportunity to be heard, to examine and cross-
9 examine witnesses, and to introduce evidence. On December 14, 2020, the parties filed
10 timely post-hearing briefs. Based on my review of the record, including my observation of the
11 demeanor of the witnesses, I make the following findings of fact and render the following
12 opinion.

STIPULATIONS OF FACT

- 13 1. The City of Boston ("City") is a public employer within the meaning of Section 1 of the Law.
- 14
- 15 2. The School Committee ("School Committee") is the collective bargaining representative of
16 the City for the purpose of dealing with school employees.
- 17
- 18 3. The Boston Teachers Union ("BTU" or "the Union") is an employee organization within the
19 meaning of Section 1 of the Law.
- 20
- 21 4. The Union is the exclusive bargaining representative for employees in four bargaining
22 units: 1) teachers, 2) paraprofessionals, 3) substitute teachers and nurses, and 4) ABA
23 specialists.
- 24
- 25 5. The Union and the School Committee have been parties to successive collective
26 bargaining agreements for the periods 2010 to 2013, 2013 to 2016, 2016 to 2018 and 2018
27 to 2021, all of which contained provisions describing the parties' grievance and arbitration
28 procedure.

1 6. On or about July 8, 2015, the Union filed a grievance (Koesling/O'Neill grievance)
2 contending, in part, that the School Committee had violated past practice, as referenced in
3 the parties' contract, by denying teachers Dagmar Koesling and Shawn O'Neill long-term
4 leaves of absence that exceeded twelve weeks and requiring them to submit federal forms
5 known as Family Medical Leave Act (FMLA) Certification of Health Care provider (medical
6 certification forms) rather than notes from their doctors when they applied for leave. A true
7 copy of the Union grievance dated July 8, 2015 is Joint Exhibit 4.
8

9 7. The Union pursued the Koesling/O'Neill grievance through the contractual grievance
10 procedure and submitted the grievance to arbitration on November 3, 2015. True copies of
11 the Union's appeal dated August 25, 2015 and its Demand for Arbitration dated November
12 3, 2015 are Joint Exhibits 5 and 6 respectively.
13

14 8. On January 12, 2017 and May 11, 2017 Arbitrator James Collins (Arbitrator Collins)
15 conducted a hearing on the Koesling/O'Neill grievance.
16

17 9. On August 16, 2017, Arbitrator Collins issued an award (Collins Award) granting the
18 Union's grievance and finding, in part, that the School Committee had unilaterally refused to
19 honor past practices in existence prior to April 2015 that related to medical leave, and had
20 failed to approve requests for year-long medical leaves of absence when proper application
21 and medical certification had been received.
22

23 10. The Collins Award ordered, in part, that the School Committee provide the Union with
24 prior notice of any proposed change in past practice relating to employee leave, and upon
25 request, bargain in good faith to resolution of impasse prior to implementing any change. A
26 true copy of the Collins Award is Joint Exhibit 7.
27

28 11. On or about October 18, 2017, the Union filed a grievance on behalf of teacher Lynn
29 Rabea Bean (Bean Grievance) protesting the School Committee's alleged unilateral change
30 to its policy regarding the use of short-term sick leave and leaves of absence when it denied
31 Bean's request to take a sixth consecutive day of sick leave and required her to apply for
32 FMLA leave and submit a medical certification form. A true copy of the Union's October 18,
33 2017 Bean Grievance letter is Joint Exhibit 8.
34

35 12. The Union pursued the Bean Grievance through the contractual grievance procedure and
36 submitted the grievance to arbitration on January 17, 2018. A true copy of the Union's
37 January 17, 2018 grievance is Joint Exhibit 10.
38

39 13. On May 7, 2018 and June 8, 2018, Arbitrator Michael Stutz (Arbitrator Stutz) conducted
40 a hearing on the Bean Grievance.
41

1 14. On October 15, 2018, Arbitrator Stutz issued an award (Stutz Award) finding, in part, that
2 the School Committee violated the collective bargaining agreement with respect to
3 implementation of the leave of absence policy as it applied to Bean and other similarly
4 situated unit members.

5
6 15. The remedy in the Stutz Award ordered, in part, that the School Committee: a) cease and
7 desist from unilaterally refusing to honor past practices related to medical leave in existence
8 prior to April 2015, b) cease and desist from implementing those parts of the Superintendent's
9 Circular No. S-PP132, which conflict with leave practices in existence prior to April 2015, and
10 rescind those parts of the circular, c) provide the Union with prior notice of any proposed
11 change in past practice relating to employee leave, and d) upon request, bargain in good
12 faith to resolution or impasse, prior to implementing any change. A true copy of the Stutz
13 Award is Joint Exhibit 11.

14
15 16. In January 2019, when unit member Joan Gregory ("Gregory") applied for a medical leave
16 of absence of more than five consecutive days and submitted a doctor's note in support of
17 her request, the School Committee notified her in writing it had received her doctor's note but
18 that she needed to apply for a leave of absence through the Office of Human Capital and
19 that if she were absent for six (6) or more consecutive days she would be deemed AWOL.

20
21 17. There were links to two forms contained in the School Committee's notification to Ms.
22 Gregory: Superintendent's Circular, HRS-PP-13 dated September 1, 2017 and a form
23 prescribed by the Wage and Hour Division of the United States Department of Labor, WH380-
24 E. HRS-PP-13A dated September 1, 2017, is attached to Joint Exhibit 12. WH-380-E, the
25 link in Joint Exhibit 12, is Joint Exhibit 14.

26
27 18. In January 2019, when unit member CasSandra Samuel ("Samuel") sought to use more
28 than five consecutive days of sick leave, the School Committee notified her that she needed
29 to apply for FMLA leave and that she needed to submit a medical certification form.

30
31 19. In late January, early February 2019, when unit member Ellen McCrave (McCrave)
32 needed to use more than five consecutive days of sick leave, the School Committee notified
33 her that she needed to apply for FMLA leave and that she needed to submit a medical
34 certification form.

35
36 20. In or about April 2019, when unit member Arlene Saia (Saia) needed to use more than
37 five consecutive days of sick leave, the School Committee notified her that she needed to
38 apply for FMLA leave and that she needed to submit a medical certification form.¹

¹ The stipulation regarding Saia appears to have an incorrect date. The documentary evidence demonstrates that Saia's request and the related communications between her and

1
 2 21. The School Committee did not bargain to impasse or resolution with BTU before requiring
 3 Gregory, Samuels, McCrave and Saia to apply for FMLA leave and submit WH-380E in
 4 support of their requests for medical leave.

5
 6 FINDINGS OF FACT

7 **Background**

8 The School Committee and the Union have been parties to a series of collective
 9 bargaining agreements (CBA). Article 1 E of the September 1, 2013 through August 31,
 10 2016 CBA, provided as follows:

11 Except as any change may be commanded by law, the committee will continue
 12 its policies as outlined herein. With respect to matters not covered by this
 13 Agreement which are mandatory subjects for collective bargaining, the
 14 committee agrees it will make no changes without prior consultation and
 15 negotiation with the union.

16
 17 Article VIII Q(3) covered sick leave and provided, in part, as follows:

18 All members of the bargaining unit shall be granted an annual leave for fifteen
 19 (15) days without loss of pay, for absence caused by illness or by injury, or by
 20 exposure to contagious disease.

21
 22 Sick leave may accumulate from year to year without limitation....

23
 24 When the record of repeated absence reflects a clear pattern of abuse, the
 25 building administrator shall warn the employee and subsequently may request
 26 a doctor's certificate.

27
 28 The CBA was silent regarding the method for applying for sick leave.
 29

the school took place in late January or early February 2019, but the stipulation places the events in or about April 2019. The inaccurate date, alone, does not compel me to discount this stipulation.

1 Article X set forth the grievance procedure. Article X E(3) specified that "[t]he decision
2 of the arbitrator will be accepted as final by the parties and both will abide by it." Article X
3 E(4) provided that the School Committee "will apply to all substantially similar situations the
4 decision of an arbitration sustaining a grievance and the union agrees that it will not represent
5 any employee in any grievance which is substantially similar to grievance denied by decision
6 of the arbitrator ... "

7 There were no substantive changes to any of the above provisions in either the 2016-
8 2018 or the 2018-2021 CBAs.

9 **First Arbitration Award**

10 On July 8, 2015, the Union filed a grievance alleging that the School Committee
11 violated the CBA when it failed to grant Dagmar Koesling, Shawn O'Neill and similarly
12 situated employees leaves of absence. On November 3, 2015, the Union filed for arbitration.

13 On August 16, 2017, Arbitrator James Collins (Collins) issued his decision. Collins
14 determined that the past practice in place for decades was that the School Committee
15 approved medical leave of up to one year as long as the bargaining unit member submitted
16 a request for medical leave to the Office of Human Capital (OHC) with a doctor's note
17 certifying that the leave was medically necessary. Collins further determined that the School
18 Committee could not require that employees submit a FMLA form in order to obtain more
19 than five days of sick leave as this was a change to the past practice. Collins wrote as follows:

20 If the Committee wanted to change the long-standing practices under Article
21 VIII. Q, Article I.E. provided the way for the Committee to pursue this objective.
22 Leaves of absence is a mandatory subject for collective bargaining, and the
23 Committee agreed in Article I.E. that it would make no changes without prior

1 consultation and negotiation with the Union. As the Committee's action in
2 implementing the new medical leave policy would change established past
3 practice, the Committee was required by Article I.E. to notify the Union and
4 bargain to impasse or resolution, prior to implementing any such change in
5 practice.

6
7 Collins found the School Committee violated the CBA by denying Koesling's request
8 for a year-long medical leave and by threatening O'Neill with dismissal in response to his
9 request for an extension of his medical leave although both had submitted an application for
10 medical leave and medical documentation from their doctor certifying that the leave was
11 medically required. As a remedy, Collins ordered that the School Committee take the
12 following actions:

13 cease and desist from unilaterally refusing to honor the past practices relating
14 to medical leave in existence between the Committee and the Union prior to
15 April 2015; and, from failing to approve requests for year-long medical leaves
16 of absence when the proper application and medical certification has been
17 received.

18
19 The School Committee shall provide the Union with prior notice of any
20 proposed change in past practice relating to employee leave and, upon
21 request, bargain in good faith to resolution or impasse, prior to implementing
22 any change.

23
24 The School Committee shall make whole Dagmar Koesling and Shawn O'Neill,
25 and any other affected bargaining unit member, for their out-of-pocket
26 expenses associated with securing the necessary medical documentation, as
27 a result of the School Committee's violations of the CBA.

28
29 The School Committee did not appeal Collins' arbitration award to the Superior Court.²

² M.G.L. c. 150C, § 11 provides various reasons that the Superior Court can vacate an arbitration award, upon application of a party within thirty days of delivery of the award, or within 30 days of when certain specified grounds are known or should have been known. Section 11 (a)(5)(b).

1 Second Arbitration Award

2 On October 18, 2017, the Union filed a grievance on behalf of Ms. LynRabea Bean
3 and other similarly situated members. The Union grieved the School Committee's decision
4 to require Bean to apply for a leave of absence rather than allow her to take a sixth
5 consecutive day of sick leave and the School Committee's unilateral decision to change the
6 policy regarding use of sick leave and leaves of absence. On January 17, 2018, the Union
7 filed for arbitration.

8 On October 15, 2018, Arbitrator Michael Stutz (Stutz) issued his decision in AAA Case
9 No. 01-18-0000-3140. Stutz framed the issue as whether the School Committee's
10 requirement that an employee apply for Family Medical Leave Act (FMLA) leave by filing out
11 a federal application form whenever requesting six or more consecutive days of sick leave
12 violated the past practice. Stutz explained that the School Committee administers sick leave
13 pursuant to "Superintendent Circulars" that are issued annually. Stutz found that previously,
14 the requirement in the yearly "Superintendent Circulars" was that absences for six or more
15 consecutive workdays must be supported by a physician's letter, on the physician's
16 letterhead, that includes a statement that the physician understands the nature of the
17 employee's duties and that the employee is incapable of performing those duties, along with
18 a statement of anticipated duration of the absence or the expected date of the return to work.
19 In making his findings, Stutz also considered Collins' award in which Collins found that "a
20 decades-long past practice of management granting long-term medical leave applications for

1 up to a year based on a simple request supported by a physician's certification that the
2 employee was disabled from performing work duties."

3 Stutz found that the School Committee made a change, noting,

4

5 [o]n December 23, 2015, the School Committee issued a Superintendent's
6 Circular with new provisions which identified all long-term leaves as "FMLA
7 leaves." The subsequent circular issued on September 1, 2017 added the
8 following paragraph applicable to Union members:

9

10 **BTU MEMBERS**

11 If a BTU member is eligible for leave under the Family and Medical Leave Act
12 (FMLA), the first 12 weeks of leave will be designated as "FMLA Leave,"
13 consistent with the notice requirements of that statute. Approved leave beyond
14 12 weeks will be designated as "BPS Approved Leave." These designations
15 are consistent with both federal law and contractual requirement but do not
16 impact whether a BTU member is eligible for a leave of absence longer than
17 12 weeks.

18

19 Stutz determined that the School Committee unilaterally changed the past practice
20 when it required the grievant to apply for FMLA leave, by filling out a three-page federal
21 application form entitled "Certification of health Care Provider for Employee's Serious Health
22 Condition (Family and Medical Leave Act)" when seeking more than five days consecutive
23 absence. Stutz explained as follows:

24 It is beyond dispute that requiring an employee to apply for a FMLA medical
25 leave for six days of consecutive absence is different from the past practice of
26 requiring a simple request and doctor's certification to justify absences
27 exceeding five consecutive days. Although the information sought by the FMLA
28 form is similar to that required of physician's certifications in prior circulars,
29 applying for an FMLA leave is a new, more burdensome requirement that is
30 contrary to the established past practice, and brings with it a thicket of
31 regulations.

32

33 As a remedy, Stutz, finding that the grievant did not suffer any loss of pay or leave,
34 ordered the School Committee to

1 cease and desist from unilaterally refusing to honor the past practices relating
2 to medical leave in existence between the Committee and the Union prior to
3 April 2015, and shall cease and desist from implementing, and shall rescind,
4 those parts of Circular HRS-PP 13 that conflict with leave practices prior to April
5 2015.

6
7 He further ordered that the School Committee “shall provide the Union with prior notice of
8 any proposed change in past practice relating to employee leave and, upon request, bargain
9 in good faith to resolution or impasse, prior to implementing any change.”

10 The School Committee did not appeal Stutz’s decision.

11 **The School Committee’s Actions After the Arbitration Decisions**

12 The Office of Human Capital (OHC) manages employee-related services, including
13 processing leaves of absences. On December 19, 2018, Emily Qazilbash (Qazilbash), Chief
14 Human Capital Officer, wrote to Eric Berg (Berg), Executive Vice President of the Union, as
15 follows:

16 To comply with AAA Case No. 01-18-0000-3140, we will be removing the
17 current HRS-PP13 circular and reposting the two circulars that were in place
18 prior to April 2015. I have linked to those circulars here. We anticipate these
19 **will** be updated on the website next week. These circulars are the same to
20 what was previously posted except for some minor changes to dates. Please
21 let me know if you have any questions.

22
23 On December 21, 2018, OHC issued the two Superintendent Circulars, HRS-PP13A
24 covering the Family and Medical Leave Act (FMLA) and Small Necessities Leave Act³ and
25 HRS-PP13, covering the Employee Sick Leave Policy.

³ The FMLA policy allows for up to 12 weeks of leave to be taken in a fiscal year. The policy also addressed how employees apply for FMLA leave, as follows:

1 The Employee Sick Leave policy in HRS-PP13 provided as follows:

2 The School Committee's Employee Sick Leave Policy and Guidelines cover all
3 employees of the Boston Public Schools. In accordance with the guidelines, if
4 an employee is absent for six (6) or more consecutive working days, a
5 physician's certificate will be required upon return to work, or prior to return if
6 requested.

7
8 The physician's certificate should be on the physician's letterhead and should
9 include:

10
11 1. A statement that the physician understands the nature of the employee's
12 duties and that the employee is incapable of performing the duties and
13 responsibilities of his/her position.

14
15 2. A statement of anticipated duration of the absence or the expected date of
16 the return to work (if the duration is unknown, the letter should indicate when
17 the employee will be seeing a physician again and an updated letter would be
18 required after that visit).

19
20 **FAILURE TO PROVIDE THE PROPER PHYSICIAN'S CERTIFICATE WHEN**
21 **REQUIRED MAY LEAD TO LOSS OF PAY.**

22
23 Absences interrupted by weekends and/or holidays are considered
24 consecutive. All absences for six (6) or more consecutive work days must be
25 completely documented by a physician's letter. A letter documents an absence
26 only for the dates specified in the letter. If the absence is longer than the dates
27 given, another letter is necessary. The employee is responsible for obtaining
28 the certificate and making sure the letter is submitted to the Office of Human
29 Capital either by mailing directly to 2300 Washington Street Roxbury, MA
30 02119; emailing OHCLeaves@BostonPublicSchools.org or faxing to 617-635-
31 7957. Employees should also submit an application on the Hub.
32

School-based employees (except custodians, itinerants, cafeteria workers, and principals/headmasters) must submit a request for leave electronically via the Hub. Once the leave request is submitted electronically, it is automatically sent to the Principal/Headmaster of the employee's school for notification and to the Office of Human Capital for review. Employees and supervisors will automatically be notified whether the leave was approved, denied or is pending due to documentation, through their BPS email.

1 All managers are directed to discuss the guidelines with all staff members at
2 the beginning of the school year to ensure mutual understanding. Please note
3 the guidelines are consistent with the BTU and the BASAS contracts.
4

5 Although the OHC revised the Superintendent Circulars regarding FMLA and the sick
6 leave policy, the OHC did not send any specific guidance regarding the Collins and Stultz
7 decisions to the principals or other staff at the various schools.⁴

8 **The School Committee's subsequent actions regarding medical leave requests**

9
10 The OHC handles approximately 1200 leave requests per year, from both bargaining
11 unit employees and non-bargaining unit employees. Generally, if an employee contacts the
12 OHC about needing leave, the OHC instructs the employee to complete a leave of absence
13 application. The application link is published on their website on the Hub. OHC also advises
14 the employee on what type of documentation is required to support the leave of absence.
15 For instance, employees seeking FMLA leave are informed they must provide an FMLA form,
16 specifically a WH-380-E. The OHC also accepts FMLA forms provided to support regular
17 medical leave requests.⁵

⁴ Erik Berg (Berg), who has been the Union's Executive Vice President since July 2017, testified that he was unaware of any communication from the OHC to principals at the schools about the implication of either the Collins or Stutz awards. Francis Lugo (Lugo), Employee Services Department, OHC, also testified that she was unaware of any directive issued to principals or headmasters regarding the arbitration awards. Lugo began her employment with the OHC in October 2017.

⁵ Lugo testified that although the OHC accepts a WH-380-E to support a request for non-FMLA sick leave, a WH-380-E is not required. Lugo further testified that the School Committee's current official policy is that any bargaining unit employee seeking six or more consecutive sick days must submit a doctor's note and apply for leave; there is no requirement that they apply for FMLA. In his Union role, Berg has consulted with various employees seeking leave of absences. Based on this experience, he testified that although

1 Form WH-380-E is a United States Department of Labor form, entitled "Certification
2 of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave
3 Act." Section I is to be completed by the employer. Section II, which merely asks for the
4 applicant's name, is to be completed by the employee prior to the employee giving the form
5 to his or her medical provider. In part, the instructions for the employee provides:

6 The FMLA permits an employer to require that you submit a timely, complete,
7 and sufficient medical certification to support a request for FMLA leave due to
8 your own serious health condition. If requested by your employer, your
9 response is required to obtain or retain the benefit of FMLA protections. 29
10 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient
11 medical certification may result in a denial of your FMLA request.
12

13 The employee's health care provider must complete section III of the WH-380-E. This
14 section notes "[y]our patient has requested leave under the FMLA." Among other questions,
15 the form requests the health care provider to provide the approximate date the patient's
16 condition commenced, the probable duration of the condition, the dates the provider treated
17 the patient, whether the patient was hospitalized, whether medication was prescribed,
18 whether the patient was referred to other health care providers, whether the medical
19 condition was pregnancy, whether the employee is unable to perform any of his/her job

the official policy may only require employees to request time and submit a doctor's note, that is not what actually happens. Instead, employees are required to file a WH-380-E form even when seeking to use non-FMLA sick leave. Berg testified that there may be a few instances where an employee "pushed back pretty aggressively against their principal and/or the office of human capital" and were allowed to take medical leave without filling out a FMLA form. However, based on his interactions with employees who were seeking medical leave, he credibly testified "[b]ut in the vast majority of cases, in the run of the mill cases, yes, they were required to complete – they were required to take the FMLA leave even though they didn't necessarily want to."

1 functions due to the condition, and the estimated dates of incapacity. The health care provider
2 is also asked to describe other relevant medical facts related to the patient's condition.

3 The OHC directs employees requesting FMLA leave and non-FMLA leave, even those
4 who have already submitted a doctor's note to support their requested leave, to the on-line
5 application on their website. Once at that site, users can choose between two boxes. One
6 box, labeled employee illness, provides a link to the "Certificate of Health Care Provider
7 (Form WH 380-E)." The second box is labeled BPS Medical (non FMLA). This is the link that
8 anyone who is not seeking FMLA leave should utilize. The link in the second box is called a
9 "Certification of Health Care Provider." Although there no specific mention to Form WH 380-
10 E, when a user hits the link, it takes the user to the same WH-380-E form.⁶

11 **Joan Gregory's Leave Request**

12 Joan Gregory (Gregory) worked as a teacher at West Roxbury Academy. Sometime
13 in January 2019, Gregory requested more than five days of sick leave and submitted a
14 doctor's note to support her request.⁷

⁶ A number of the Union witnesses testified to this fact. Lugo, the sole School Committee witness, also affirmed that regardless of which of those two blocks the employee chooses, FMLA or non-FMLA leave, once the employee clicks on the provided link, the employee is sent to the WH 380-E form. Lugo testified that she had only discovered that both of those links take the applicant to the same WH 380-E form during the week of the hearing.

⁷ Gregory, who has since retired, did not testify at the hearing. The documentary evidence suggests that she submitted two doctor's notes, one sometime on or prior to January 29, 2019, and another one on January 30, 2019. The only doctor's note submitted into evidence on her behalf was dated January 30, 2019. All the doctors' notes submitted into evidence were heavily redacted to ensure the employees' privacy.

1 On January 29, 2019, Jarleen John (John), Headmaster at the West Roxbury
2 Academy, wrote to Christine Lee, Human Capital Manager, High Schools, OHC, to inform
3 her that Gregory had emailed John that “the BTU Rep said she did not need to apply for a
4 medical leave, her doctor's note is sufficient. She insisted that we reach out to Eric Berg if
5 we have questions. I think she needs to hear directly from someone in HR.”

6 Charmie Curry, Professional Growth Specialist, OHC, replied to John that Gregory
7 had 15 days to submit the application for leave, noting that “[i]f it is not submitted, she will be
8 considered AWOL.” Based on this input from OHC, John emailed Gregory and Berg on
9 January 29, 2019, to inform them that,

10 [w]e are in receipt of your doctors (sic) note. Given the length of time you will
11 be absent from work, you MUST apply for a leave of absence through Human
12 Capital. See attached forms.

13
14 If you are absent for 6 or more consecutive days without an approved leave of
15 absence you will be considered AWOL.

16
17 If you have any questions about this, please do not hesitate to contact Human
18 Capital atohcleaves@bostonpublicschools.org.

19
20 Instead of attaching the most recent Superintendent Circular, John attached the
21 Superintendent Circular dated September 1, 2017, for the school year 2017-2018, HRS-
22 PP13⁸ along with a WH-380-E FMLA form.

⁸ The attached Superintendent Circular, which was issued shortly after the Collins decision but before the Stutz decision, distinguishes between short-term absences, those involving absences of one to five consecutive days, and long-term absences, which are addressed as FMLA leave. The Circular further provides that if the employee is requesting medical leave, they are to complete a WH-380-E or WH-380-F. Both are FMLA forms. WH-380-E

1 On the same day, a few minutes later, Lugo also emailed Gregory, writing:

2 We are in receipt of your medical note indicating that you must remain out of
3 work due to a medical condition. Pursuant to Superintendent's circular HRS-
4 PP13A employees must request a leave of absence by submitting an
5 application. Attached the circular for your review.⁹
6 Here is the link to access the application.

7
8 Please note that failure to comply with this requisite may result in being on
9 AWOL status.

10
11 Gregory forwarded Berg the email. He clicked on the provided link, which brought him
12 to an on-line application form which, in turn, led to the WH-380-E form. Although Gregory
13 never indicated that she wished to take FMLA leave,¹⁰ she took steps to complete the WH-
14 380-E as directed.

15 On January 30, 2019, Gregory submitted a doctor's note requesting extended sick
16 leave. John forwarded the doctor's note to OHC. On January 31, 2019, Gregory's leave for
17 the time period from January 24, 2019 through the end of the school year was approved.
18 Later that day, Gregory also submitted the WH-380-E that her doctor had completed.

19 **Arlene Saia's Leave Request**

20 Like Gregory, Arlene Saia (Saia) also worked as a teacher at the West Roxbury
21 Academy. In January 2019, Saia originally planned to only take two sick days, but after

is a form for an employee's serious health condition while WH-380-F is a form for a family member's serious health condition.

⁹ The attached HRS-PP13A covers FMLA leave rather than the sick leave that Gregory was requesting.

¹⁰ Berg assisted Gregory in her attempt to obtain sick leave. Berg, in uncontradicted testimony, confirmed that Gregory explicitly did not want to use FMLA leave.

1 medical complications arose, she realized that she needed to take additional time off. She
2 had sufficient accrued sick leave to cover all of the time that she needed off from work. Saia
3 emailed the school secretary and John about her need for additional sick leave. She provided
4 the Administrative Assistant, Theresa Mclrney (Mclrney), with a January 31, 2019 doctor's
5 note, on physician letterhead, which said that Saia needed to be excused from work from
6 January 29 to February 18, 2019.

7 On February 1, 2019, Mclrney emailed Saia as follows:

8 Ms. John told me to send you the attached Leave of Absence forms. She would
9 like you to fill them out and/or have your doctor fill them out. You can have
10 them sent to me and I will take care of it.

11
12 Mclrney attached a few documents including a WH-380-E form and the Superintendent's
13 Circular for the 2017-2018 school year, HRS-PP1, absence and leave policy, dated January
14 11, 2018, which stated that short term absences due to illness were for one to five
15 consecutive days; longer-term absences were designated as FMLA.

16 Saia questioned why she had to fill out the FMLA form, but Mclrney told her it was
17 required. Saia, who did not confer with OHC about her leave, had never intended to take
18 FMLA; she planned to use her accumulated sick leave. Nevertheless, based on this direction
19 by school staff, Saia requested that her doctor complete the necessary information on the
20 WH-380-E. Saia's husband then submitted a hard copy to the school and also sent it via
21 email.¹¹

¹¹ Saia's personnel file only contains a one-page medical clearance note and an indication that her leave was granted. There was no testimony explaining why Saia's completed WH-

1 Ellen McCrave's Leave Request

2 During the 2018-2019 school year, Ellen McCrave (McCrave) worked as a Physical
3 Therapist, traveling between various schools. McCrave took a sick day on Friday, March 22,
4 2019. On March 25, 2019, she realized she would need to be out longer to address a medical
5 condition. McCrave had sufficient accrued sick leave that she intended to use to cover her
6 11-day absence. On March 27, 2019, she obtained a doctor's note, indicating that McCrave
7 would be out of work through April 8, 2019. After McCrave submitted the note to her
8 department supervisor, the department secretary informed McCrave that she had to apply
9 for FMLA leave. Thereafter, the OHC emailed McCrave to inform her that, due to the length
10 of time she planned to be out, she needed to complete certain forms. OHC either attached
11 the WH-380-E form to this email or provided a link to the form within the email. Based on this
12 communication, McCrave understood that she was required to fill out a WH-380-E, so she
13 faxed it to her physician to complete. McCrave had never informed OHC or her school that
14 she wished to use FMLA leave prior to being required to apply for FMLA and submit a WH-
15 380-E.

16 Melanie Allen's Leave Request

17 Melanie Allen was a teacher at Rafael Hernandez K-8 school during the 2018-2019
18 school year. On June 3, 2019, she called in sick to her principal. The next day she had

380-E was not in her personnel file. Even though the form is not currently in her personnel file, Saia testified that she believes that her leave was categorized as FMLA leave. Additionally, the parties stipulated that School Committee notified Saia that she needed to apply for FMLA leave.

1 emergency surgery and remained out of work. On June 16, 2019, Allen emailed OHC,
2 recounting her absences from school since June 3, writing, in part,

3 All my absences have been requested via ess.boston.gov. I have read
4 conflicting information about how to apply for this leave, but HRS-PP-13
5 seemed to have the most recent date (2018-19), and it said, "In accordance
6 with the guidelines, if an employee is absent for six (6) or more consecutive
7 working days, a physician's certificate will be required upon return to work, or
8 prior to return if requested." As such, both physician's notes are attached
9 below.¹² I have been in contact with my principal regarding this leave, and I
10 have arranged to complete any necessary tasks to close out the end of the
11 school year.

12
13 On June 17, 2019, OHC sent Allen an email which stated, in part,

14
15 Employees are required to file an application for Leave of Absence as well as
16 submitting the supporting documentation. Included below for your
17 convenience, is the link to the application form. Once we receive it we may
18 process your request.

19
20 Click Here To Apply for a Leave of Absence...

21 If you are requesting a medical leave, you may need to separately submit the
22 completed WH-380-E or WH-380-F (links below), within 15 days of the request
23 for leave, to ohcleaves@bostonpublicschools.org...

24
25 Later that day, Allen replied with another email, noting her confusion by the
26 documentation requirements of the on-line leave request. She wrote "[t]here are two
27 requirements that appear to be different, but when you click the links, they take you to the

¹² One note was to cover Allen's leave up until June 13, 2019. The second note specified that it was medically necessary for Allen to stay out of work for the remainder of the school year.

1 same FMLA form, even though one of them is for "non-FMLA" leave. Screenshot below.
2 Please advise."¹³

3 Allen wanted to use her accumulated leave, but was directed to use the on-line
4 leave request form which then directed her to complete a WH-380-E.¹⁴ The record is silent
5 on whether Allen submitted a WH-380-E and whether her medical leave was granted.

6 **CasSandra Samuel's Leave Request**

7 CasSandra Samuel (Samuel) worked as a teacher at the Curley K-8 school during the
8 2019-2020 school year. In late December 2019, Samuel needed extended leave from work
9 due to a medical issue. Samuel first sought assistance from the school secretary and then
10 from the principal, Katie Grassa (Grassa). Samuel informed Grassa that she needed to take
11 4 to 6 weeks off due to a medical issue. Samuel had accrued over 180 sick days and wanted
12 to use those sick days to cover her absence. However, Grassa told Samuel that she needed
13 to apply for FMLA leave. Following this advice, Samuel contacted OHC¹⁵ and was told to
14 complete an on-line form. Samuel filled out the first part of the WH-380-E and had her doctor

¹³ The screen shot that she provided showed two boxes. As noted earlier, one box was labeled "Employee Illness" and provided a link to form WH 380-E. The second box was labeled "BPS Medical (non-FMLA)." This box had a link for a "Certification from Health Care Provider." The form had to be submitted as soon as possible but not later than 15 days. Although this link did not expressly state that the form was the WH-380-E, this link also sent the user directly to form WH-380-E.

¹⁴ Allen did not testify at the hearing. Berg testified that Allen only wanted to use her accumulated sick leave, not FMLA leave, and that she submitted a doctor's note to that end.

¹⁵ Samuel testified that she spoke with at least two employees in OHC, one of whom was Lugo.

1 complete the rest. Samuel later confirmed to OHC that she had completed the WH-380-E.
2 Her leave request was granted after she submitted the FMLA form.

3 **Helen Williams-Waldron's Leave Request**

4 Helen Williams-Waldron was a teacher at Higginson-Lewis School for the 2019-2020
5 school year.¹⁶

6 Williams-Waldron needed to be off from work from January 6, 2019 through June 19,
7 2019 due to a medical procedure. She obtained a doctor's note, dated December 18, 2019,
8 affirming her need for sick leave for this period of time. She planned to retire in June 2019.
9 Williams-Waldron informed the principal, Darlene Ratliffe (Ratliffe), of her need for sick leave
10 and provided her with the doctor's note. Thereafter, Ratliffe texted Williams-Waldron, writing

11 Thanks for letting me know. I have been informed by OHC that after 5 days,
12 you will be classified as "AWOL". Though you provided the doctor's note, you
13 will be out for an extended period of time, therefore, you should re-visit your
14 plan of action as it pertains to FMLA and/or Retirement....

15
16 On January 7, 2020, Williams-Waldron wrote to Berg for some clarification about the
17 information she had received from Ratliffe. Next, Williams-Waldron contacted Dianne, from
18 Employee Services Department, OHC.¹⁷ Dianne followed up with an email on Saturday
19 January 11, 2020, explaining that

20 all employees who are in need of a leave are required to file an application for
21 a Leave of Absence. For your convenience, included below is a link to the
22 application form. In addition, you must provide a medical note, on letterhead,
23 signed and dated by your physician. It must include: Your name, the
24 approximate date your condition commenced, probable duration, period of

¹⁶ Williams-Waldron did not testify at the hearing.

¹⁷ No last name was provided.

1 incapacity and return/re-evaluation date. Alternatively, your physician provider
2 may complete a WH-380-E form (blank copy attached). Once we receive your
3 application and supporting documents we may review and process your
4 application.
5

6 At the bottom of this email, a few items were listed for her to “keep in mind,” including “[i]f
7 you are requesting a medical leave, you must separately submit the completed WH-380-E
8 (personal illness) or WH-380-F (family illness), within 15 days of the request for leave, to
9 ohcleaves@bostonpublicschools.org ...”

10 Williams-Waldron alerted Berg about this communication. On January 12, 2020, Berg
11 emailed OHC Deputy Chief Albert Taylor Jr. (Taylor) about this situation. Berg reminded
12 Taylor about the Collins and Stutz decisions, writing

13 In the second one, it was made clear that members are entitled to sick leave
14 under our contract for personal illness with a Doctor's note. Helen Williams-
15 Waldron at the Higginson-Lewis submitted a Doctor's note that she would be
16 out using sick leave from January 6 through June 19, and was informed by her
17 principal that she would be AWOL if she did not either retire or take FMLA
18 leave. Can you please clarify what is going on in this case, and make sure that
19 our members continue to have the right to use their sick leave under our
20 contract without filling out the Dept. of Labor FMLA form?
21

22 After Berg's communication with Taylor, Williams-Waldron submitted another doctor's
23 note. This second note was dated January 28, 2020. On February 12, 2020, Lugo emailed
24 Williams-Waldron that her leave was approved from January 6 through April 1, 2020. Lugo
25 advised William-Waldron that “for future leave of absence requests, please complete an
26 application form by clicking here.” The link sent the user to the WH-380-E.¹⁸

¹⁸ The record is silent on whether Williams-Waldron completed the FMLA form after Berg became involved in the situation. Berg testified he was not sure if Williams-Waldron ultimately

1 Kevin Moy's Leave Request

2 Kevin Moy (Moy), a teacher at the Mather Elementary School for the 2019-2020
3 school year, had taken FMLA due to illness in his family during the 2018-2019 school year.

4 In October 2019, Moy sought to use sick leave due to his own medical condition. On
5 October 16, 2019, Moy submitted a doctor's note to support his leave request. The Head
6 Staff Assistant, Georgette Travis, acknowledged receipt of the doctor's letter and informed
7 Moy that he needed to apply to OHC leaves. Moy then went to the OHC portal and clicked
8 on the provided link. When he clicked on the link, he was brought to the WH-380-E form. He
9 had his physician fill it out and then submitted it on-line to OHC. He later received an email
10 from OHC confirming that he was on FMLA leave through November 18, 2019. Thereafter,
11 Moy needed to extend his leave until February 8, 2020. In order to secure this additional
12 leave, he and his doctor submitted another WH-380-E form.

13 Moy was unable to return to work on February 8, 2020. In order to be approved for
14 additional medical leave, Moy had his doctor complete another WH-380-E on February 5,
15 2020, seeking medical leave through May 23, 2020. On February 10, 2020, OHC responded
16 with the following:

17 Your request to extend your leave to 05/23/2020 has been denied. You are not
18 eligible for this leave type...I have denied your extension request as you have

did have to complete the WH-380-E. The record also doesn't reveal exactly what took place after Williams-Waldron's leave concluded on April 1, 2020. The evidence suggests that Williams-Waldron remained out of work because, on June 25, 2020, Ratliffe wrote to OHC that two teachers were out on leave, noting that Williams-Waldron "went out on FMLA."

1 exhausted all your leave eligibility.¹⁹ You may contact Grace Jung in the equity
2 for further assistance as she will have a conversation with you and determine
3 any further time off.
4

5 OHC informed Moy that he was due back to work on February 24, 2020.

6 On February 10, 2020, Moy responded to OHC, writing “[a]s per my union's advice, I
7 am updating my leave request with the attached documentation. Since I am exhausting my
8 FMLA limit, I am hereby requesting regular medical leave for the additional days.” Moy
9 submitted a note from his doctor, on letterhead, dated February 10, 2020. The doctor’s note
10 indicated that Moy was under his care and should remain out of work until May 23, 2020.

11 At that time Moy had 143 days of accumulated sick leave available.

12 Moy also communicated with Grace Jung (Jung), Director of Training and
13 Accommodations, and provided her with the same doctor’s note. On February 11, 2020,
14 Jung tried to explain to Moy why he could not use his accumulated sick leave; Moy
15 understood that it may have something to do with the length of his absence.²⁰ Jung also
16 referenced that Moy could request a reasonable accommodation of his condition.

17 After this discussion, Jung wrote to Moy on February 12, 2002 and copied OHC
18 leaves, to address his “request for an accommodation.” She indicated she had reviewed his

¹⁹ According to Lugo, employees have to work at least 1,260 hours within a 12-month period in order to be eligible for FMLA. Based on the amount of time Moy had already been absent, he did not meet that requirement.

²⁰ Moy testified that he communicated with OHC and Jung via emails and phone conversations. Both OHC and Jung informed Moy that he had exhausted his leave even though he knew that he had accumulated 143 days of sick leave which he believed should have been available for his use.

1 medical documentation and his leave history.²¹ She confirmed that his doctor had submitted
2 documentation recommending that Moy remain out of work until May 23, 2020.
3 Nevertheless, she wrote,

4 Given your leave history and the medical information you submitted, this office
5 has determined that extending your leave for another three months would have
6 an unreasonable adverse impact on the students and staff of the Mather
7 Elementary School. As such, this office is referring you back to the Office of
8 Human Capital for next steps.

9
10 Prior to your return to work, if you would like to discuss reasonable
11 accommodations for your work, please feel free to contact the Office of Equity
12 to engage in an interactive dialogue.

13
14 Moy did not return to work as scheduled on February 24, 2020. At some point prior
15 to February 27, 2020, Moy emailed the school noting he was unable to come to work. After
16 consulting with OHC, Riddick wrote to Moy on February 28, 2020 to remind him that the
17 school had not received any documentation from OHC approving an extension of his leave.
18 Riddick wrote that “[w]e need the documentation to ensure that we are following protocol.
19 You may be in violation of the BPS employee attendance policy if this is not resolved. Please
20 contact OHC as soon as possible.”

21 On May 6, 2020, Taylor issued the following letter to Moy,

22 According to our records, you have been absent from your assignment since
23 October 18, 2019. Your approved leave of absence expired on February 24,
24 2020 and you were expected to return to work on that date. However, you have
25 not returned to work and have failed to provide us with appropriate notice

²¹ In her response, Jung noted that Moy had been granted medical leave from January 2, 2019 and ending April 3, 2019, which was later extended through September 1, 2019. He also requested and was granted medical leave starting October 18, 2019 and ending November 18, 2019, which was subsequently extended to February 24, 2020.

1 and/or documentation regarding your absence.²² You are therefore absent
 2 without leave and will be considered to have irrevocably resigned from the
 3 Boston Public Schools if you fail to return to work or present adequate
 4 documentation to support your absence by May 18, 2020. Should you return to
 5 work without presenting adequate documentation, you may be subject to
 6 discipline up to and including termination.

7
 8 On the same day, Moy submitted another doctor’s note stating that Moy needed to
 9 remain out of work due to medical issues from May 26 through June 26, 2020. Moy reported
 10 back to work in August 2020 to commence the 2020-2021 school year.²³

11 OPINION²⁴

²² Taylor did not testify at the hearing. Accordingly, it is unclear why there was no reference to the February 10, 2020 doctor’s note that Moy submitted that indicated that Moy needed to remain out of work through May 23, 2020.

²³ The Union acknowledges that Moy was kept on the payroll drawing sick leave until June 2020.

²⁴ In its opening argument and its brief, the Union challenged the School Committee’s classification of all sick leave beyond five consecutive days as FMLA leave, which is deducted from the employees’ annual statutory entitlement of 12 weeks of FMLA leave a year. The Union argues that this automatic classification of any such leave as FMLA is “embedded” in both underlying arbitration awards. I disagree. I find that the issue in the arbitration awards regards what an employee must submit in order to receive extended sick leave and whether the School Committee can require that employees apply for FMLA, or complete the FMLA form, in order to obtain leave. I agree with the School Committee’s stance that the underlying awards do not address the concept of “offsetting leave time against the employee’s annual FMLA allowance.” The arbitration awards do not permit the School Committee to require employees to apply for FMLA in order to have extended sick leave but are silent on the issue of whether any extended sick leave taken may be counted against the FMLA allowance. Additionally, although both parties addressed the issue in their opening statements as well as in their briefs, the specific issue about counting any long-term sick leave as FMLA was not fully litigated. Accordingly, I will not address that issue in this decision. See, Town of Norwell, 18 MLC 1263, MUP-6962 (January 22, 1992).

1 Section 6 of the Law obligates employers and employee organizations to negotiate in
2 good faith with respect to wages, hours, standards of productivity and performance, and any
3 other terms and conditions of employment. This obligation to bargain in good faith does not
4 end with the negotiation and execution of a collective bargaining agreement; it is a
5 continuing obligation requiring the parties to exercise good faith in processing and adjusting
6 grievances arising under the contract. City of Lynn, 9 MLC 1049, MUP-4502 (June 4,
7 1982). The statutory obligation to bargain in good faith includes the duty to comply with
8 arbitration awards resulting from the negotiated grievance procedures. City of Boston, 2 MLC
9 1331, MUP-2152 (January 20, 1976); Board of Higher Education, 28 MLC 315, 316, SUP-
10 4649, SUP-4686 (April 18, 2002).

11 The Collins and Stutz decisions are clear. They established that the past practice was
12 that bargaining unit employees need only submit a simple request for medical leave,
13 supported by a doctor's note, in order to be granted extended medical leave. The Stutz
14 decision specifically found that the School Committee's requirement that an employee apply
15 for FMLA leave by filling out the federal application form whenever requesting six or more
16 consecutive days of sick leave violated the past practice. Stutz unambiguously articulated
17 this in his decision, writing,

18 It is beyond dispute that requiring an employee to apply for a FMLA medical
19 leave for six days of consecutive absence is different from the past practice of
20 requiring a simple request and doctor's certification to justify absences
21 exceeding five consecutive days. Although the information sought by the FMLA
22 form is similar to that required of physician's certifications in prior circulars,
23 applying for an FMLA leave is a new, more burdensome requirement that is
24 contrary to the established past practice, and brings with it a thicket of
25 regulations.

1 Both arbitration awards provide that if the School Committee wished to change this
2 established past practice it could do so by providing the Union with notice and the opportunity
3 to bargain over the change. It is undisputed that the School Committee did not approach the
4 Union about bargaining over a change to the process of applying for sick leave.

5 The School Committee did not pursue a review of either the Collins decision or the
6 Stutz decision. Accordingly, it was required to abide by the two decisions and could not require
7 employees to apply for FMLA, or complete the WH-380-E form, in order to use their own sick
8 leave.

9 The School Committee maintains that it complied with the arbitration decisions. In this
10 regard, the School Committee notes that the OHC issued revised Superintendent Circulars
11 updating the leave policy in its effort to comply with the two decisions. Although the School
12 Committee did properly issue revised Superintendent Circulars with revised leave
13 requirements, that appears to be the only action the School Committee took to comply with
14 the awards. There is no evidence that the School Committee took any actions to alert the
15 school staff about the arbitration awards and the proper process for applying for leave. Both
16 Berg and Lugo, the only witness who testified on behalf of the School Committee, stated that
17 they were unaware of any guidance that the School Committee sent to the principals or school
18 staff about the arbitration awards.

19 The evidence demonstrates that even though the arbitration awards prohibited the
20 School Committee from requiring employees seeking more than five consecutive sick leave
21 days to apply for FMLA or use FMLA forms, the School Committee directed employees to

1 apply for FMLA leave or, at minimum, to complete the WH-380-E. The School Committee
2 argues that the OHC understood that the WH-380-E form could not be required for bargaining
3 unit employees seeking to use medical leave and avows that after the two arbitration awards
4 issued, the OHC did not require bargaining unit employees to complete the WH-380-E in order
5 to use their accrued sick leave. The School Committee concedes some “operational
6 confusion” by “intermediate administrators,” and admits that it is “unfortunate” that building
7 principals and secretaries sometimes provided faulty information to employees, including
8 distributing of earlier and out-of-date versions of the Superintendent Circulars. The School
9 Committee, though, argues that it cannot be held responsible for these actions, because the
10 OHC, not school personnel, has authority regarding leave requests. The School Committee
11 maintains that anyone who contacted OHC received the correct advice, in compliance with
12 the arbitration awards, regarding how to apply for leave. I disagree on both counts. Whether
13 it was the school staff or the OHC that required employees to complete a WH-380-E in order
14 to obtain sick leave is a meaningless distinction. Moreover, the evidence supports a finding
15 that both school staff members as well as OHC employees played in role in requiring
16 bargaining unit employees to apply for FMLA leave or complete a WH-380-E form when
17 seeking to use more than five days of sick leave.

18 For example, Samuel’s principal informed her that she needed to apply for FMLA even
19 though she had sufficient sick days to cover her requested medically required absence and
20 did not intend to apply for FMLA leave. The OHC also instructed her to go on-line and

1 complete the on-line application, which brought her to the WH-380-E.²⁵ Similarly, McCrave
2 did not intend to apply for FMLA and she had sufficient sick days to cover her intended
3 absence. Nevertheless, OHC directed McCrave to the website to apply for sick leave, which
4 automatically sent her to the WH-380-E. Saia was also told that she needed to submit a leave
5 of absence form, and she was provided with the WH-380-E to complete. Although Saia did
6 not have direct communication with OHC, and although the completed WH-380-E form is not
7 reflected in her personnel file, the evidence is clear that school staff informed Saia that she
8 had to submit a WH-380-E when she was merely seeking to use her sick leave. There can be
9 no dispute that the School Committee notified Saia, McCrave and Samuel that they needed
10 to apply for FMLA leave and that they needed to submit a medical certification form in order
11 to have their leave requests granted because the School Committee and the Union stipulated
12 to these facts.

13 Other employees who wished to use sick leave, and had sufficient sick days to cover
14 their absence, were also directed to complete a WH-380-E. For instance, Moy submitted a
15 doctor's note to support his leave request. He never gave any indication that he wished to
16 take FMLA leave. However, instead of granting his requested leave, school personnel
17 informed Moy that he must submit the on-line application. Like everyone else using the on-

²⁵ The WH-380-E requires the health care provider to supply information that was not previously required in a doctor's note, including, but not limited to, whether the employee was prescribed medication, whether the patient was referred to other health care providers, whether the patient was hospitalized, and whether the medical condition is pregnancy. The form also requests the health care provider to describe other relevant medical facts related to the condition.

1 line application, he was directed, via a link, to complete a WH-380-E. He submitted the form
2 as requested. When Moy was no longer eligible for FMLA, he clearly requested regular
3 medical leave. Moy submitted a doctor's note to support his request. At this time, Moy had
4 143 days of sick leave available. If the School Committee was abiding by the arbitration
5 awards, Moy's leave would have been granted. Instead, OHC informed him, when he did not
6 return to work, that he was absent without leave and would be considered to have
7 "irrevocably resigned" from his position if he failed to return to work or support his absence
8 by May 18, 2020. Moy submitted yet another doctor's note. Moy was not terminated, and he
9 returned to work at the start of the next school year. Nevertheless, the School Committee
10 clearly denied his February 2020 leave request, even though it was supported by a doctor's
11 note, and threatened to terminate him, contrary to the Collins and Stutz decisions.

12 The evidence does indicate that the School Committee granted certain other
13 employee's sick time even in the absence of a completed WH-380-E. For instance, Gregory's
14 leave was granted hours before she submitted her WH-380-E. Williams-Waldron received
15 leave although there is no evidence that she ever submitted a WH-380-E. The School
16 Committee argues that the allegations regarding Gregory must be dismissed and the
17 evidence proffered regarding Williams-Waldron must be disregarded because neither
18 employee testified in this matter and because, the School Committee claims, the related
19 documentation entered into evidence by the Union is wholly insufficient to establish the
20 events related to their leaves of absence. I do not disregard any of the evidence presented.
21 Even where the evidence is insufficient to demonstrate that the School Committee required

1 Gregory or Williams-Waldron to submit a WH-380-E prior to receiving sick leave, it is
2 illuminating to see the OHC and the schools' communication with these employees about
3 their leave requests.

4 In January 2019, Gregory sought extended sick leave and submitted a doctor's note.
5 Rather than granting the leave based on her simple request and a doctor's note, the
6 headmaster at her school told Gregory that she had to apply for a leave of absence through
7 OHC or she would be considered AWOL. Thereafter, OHC provided Gregory with a link to
8 apply for her leave which, in turn, led to the WH-380-E. Although Gregory explicitly did not
9 wish to apply for FMLA, she completed and submitted the FMLA form as requested.
10 Gregory's leave request was granted hours before the FMLA form was submitted.²⁶

11 Williams-Waldron also submitted a doctor's note to certify her need to use extended
12 sick leave. Her principal informed her that she needed to complete a WH-380-E, or she would
13 be classified as AWOL. Her principal also advised Williams-Waldron that although she had
14 provided a doctor's note, because she was seeking an extended absence, she should
15 "revisit" her plans as it pertains to the FMLA or retirement. OHC then provided her with a link
16 to apply for a leave of absence via email. This January 11, 2020 email also noted that anyone
17 requesting medical leave must separately submit a completed WH-380-E form within 15

²⁶ Even though Gregory's leave was granted before OHC received the WH-380-E, the parties included her name in stipulation 21, which confirmed that the School Committee required certain named employees, including Gregory, to apply for FMLA and submit a WH-380-E in support of the request for medical leave.

1 days. Therefore, even though Williams-Waldron may not have submitted a WH-380-E,²⁷ she
2 was certainly directed to do so and it took the involvement of the Union Executive Vice
3 President to question the OHC's actions and remind the OHC about the two arbitration
4 awards.

5 Similarly, although there is no conclusive evidence that Allen was required to submit
6 a WH-380-E, it is clear that even though Allen submitted a doctor's note to support her sick
7 leave request, like Gregory and Williams-Waldron, the OHC informed her that she needed to
8 apply for a leave of absence. When she attempted to do so and chose the link to apply for
9 non-FMLA leave, Allen was directed to the WH-380-E FMLA form.

10 Given the above, I find the evidence supports the conclusion that the School
11 Committee failed to follow the past practice and grant extended sick leave requests based
12 on a request supported by a medical note, as required by the Collins and Stutz decisions.
13 The School Committee continued to require that some employees to apply for FMLA. This is
14 not in dispute; the School Committee stipulated to this fact. Even where the evidence does
15 not demonstrate that other employees, such as Gregory, Williams-Waldron or Allen, were
16 required to actually complete a WH-380-E, they were still directed to complete a WH-380-E,
17 even though they had already supplied the necessary doctor's note. The School Committee

²⁷ I conclude that the evidence is insufficient to demonstrate that Williams-Waldron was required to submit a WH-380-E. The Union was unable to provide evidence that Williams-Waldron submitted a WH-380-E after the Union intervened on her behalf. Although her principal later wrote that Williams-Waldron was out on FMLA leave, this may have been a misunderstanding on the part of the principal, rather than conclusive evidence that Williams-Waldron was required to take FMLA leave.

1 admits that some employees “encountered an FMLA leave form in some manner.” The
2 employees did not just “encounter” the WH-380-E. The evidence demonstrates that school
3 staff and the OHC either outrightly required employees, even those who had no intention of
4 taking FMLA, to complete the WH-380-E., or directed them to complete the on-line
5 application which automatically sent them to the WH-380-E form. A number of the employees
6 were threatened with being charged as AWOL if they did not do so. These threats came from
7 both school staff and from the OHC. Even the Chief Human Capital Officer informed Moy
8 that he was AWOL although Moy had requested regular medical leave and supported that
9 leave with a doctor’s note. The evidence is clear that the School Committee was not
10 complying with the arbitration awards.

11 The fact that the School Committee took some limited steps to ensure compliance
12 with the arbitration awards does not compel a different finding. In Board of Higher Education,
13 41 MLC 217, SUP-08-5396 (February 6, 2015), the Commonwealth Employment Relations
14 Board (CERB)²⁸ considered the Respondent’s arguments that it did not deliberately repudiate
15 an agreement where various officers tried, but ultimately failed, to comply with the
16 agreement. The CERB found that this argument missed the point because “the Law requires
17 actual compliance, not just good efforts and intentions.” Although Board of Higher Education
18 regards the failure to comply with a negotiated agreement rather than a failure to comply with
19 arbitration awards, it provides useful guidance. Here, the School Committee issued revised
20 Superintendent Circulars, but took no further action to inform school employees about the

²⁸ References in this decision to the CERB include the former Labor Relations Commission.

1 arbitration awards. School personnel at times provided employees with out-of-date
2 Superintendent Circulars. When certain employees submitted a doctor's note to support their
3 sick leave request, school personnel and the OHC specifically told them that they had to
4 complete a WH-380-E. Throughout 2019 and into 2020, school personnel or the OHC
5 informed still other employees seeking extended sick leave to complete an on-line application
6 which then sent them to complete a WH-380-E.

7 The School Committee attempts to defend itself in this regard by noting that Lugo, and
8 the OHC, did not realize that the on-line application directed all employees, those seeking
9 FMLA leave and those seeking non-FMLA leave, to complete the same WH-380-E FMLA
10 form. However, the evidence reveals that the OHC was not unaware of the issue. Even
11 though Lugo credibly testified that she was personally unaware that the on-line application
12 directed all employees to complete a WH-380-E until the week of the hearing, Allen had
13 notified OHC as far back as June 17, 2019 that when she used the on-line leave request
14 form, and selected the link provided for non-FMLA leave, she was taken to the WH-380-E
15 form, the exact same form that was required for employees who were seeking FMLA leave.
16 Accordingly, the facts show that the OHC was aware that all employees, even those who
17 were seeking to use their own sick leave and not FMLA leave, were directed to the WH-380-
18 E, but took no steps to correct it.

19 The School Committee argues that this "technological error" and other minor mistakes
20 that were made when dealing with some employee leave requests, were only a slight
21 departure from past practice, and are de minimis. The School Committee compares the

1 “technical issue” of all employees being directed to the WH-380-E when attempting to apply
2 for medical leave as being tantamount to a server outage or broken link. In this regard, the
3 School Committee argues that such departures from the past practice are “temporary and
4 outside of the Committee’s control but within its ability to timely rectify.” The School
5 Committee asserts that the Union “cherry-picked” a few isolated cases where “employees
6 encountered tech errors despite the Committee’s best efforts to comply with the arbitration
7 awards.”

8 First, I disagree that the issue here involves something that is tantamount to an outage
9 or other temporary technical issue. For at least two years after Collins and Stutz issued their
10 decisions, OHC and school personnel directed employees to submit an on-line application
11 which then directed them to a WH-380-E. Most employees would reasonably assume, under
12 these circumstances, that they were required to complete the WH-380-E in order to be
13 granted sick leave. The School Committee says this is a matter that can be easily rectified,
14 but it did not rectify it when it was brought to their attention in June 2019.

15 In support of its argument that there was only a de minimis departure from the past
16 practice, the School Committee cites Town of Danvers, 3 MLC 1559, 1576-77, MUP-2292
17 and MUP-2299 (April 6, 1977). In Danvers, the CERB found that a change to the fire fighters’
18 time slips was too insignificant to require that it be negotiated. Danvers does not involve a
19 failure to comply with an arbitration award. The School Committee cited no cases, and I have
20 found none, in which the CERB found certain violations of arbitrator awards to be de minimis.
21 Instead, the School Committee seems to argue that it did not implement a change when it

1 required employees to complete an application and produce a medical note and “the addition
2 of the link to the WH-380E form does not alter this practice.” The issue in this case is not
3 whether the School Committee implemented a change without bargaining, the issue is
4 whether the School Committee complied with the arbitration decisions. The decisions defined
5 the past practice and clearly indicate that the School Committee may not require employees
6 to file for FMLA or submit a FMLA form, such as a WH-380-E, to be eligible for medical leave
7 in excess of 5 days. Because I find that the School Committee did require certain employees
8 to file for FMLA or submit a WH-380-E prior to being granted leave, and directed still other
9 employees to a WH-380-E through its on-line application for sick leave, the School
10 Committee failed to abide by the arbitration decisions.

CONCLUSION

11 Based on the record and for the reasons explained above, I find that the School
12 Committee violated Section 10(a)(5) and, derivatively 10(a)(1) of the Law when it failed to
13 grant sick leave based on a simple request and a doctor’s note and instead directed many
14 employees to apply for FMLA leave or complete a WH-380-E.

REMEDY

15
16 The DLR has broad authority to formulate remedies for violations of the Law. Labor
17 Relations Commission v. City of Everett, 7 Mass. App. Ct. 826 (June 28, 1979). The Union
18 requests that the School Committee be ordered to affirmatively inform employees that they
19 remain at liberty to use their sick leave without seeking FMLA leave. The Union also requests
20 that I order the School Committee to immediately cease its automatic designation of all long-

1 term leaves as FMLA leaves pending completion of its notice and bargaining obligations. In
2 order to ensure remediation of the School Committee's conduct in continuing to automatically
3 designate all long-term medical leaves as FMLA, the Union asks that I order the School
4 Committee to furnish the Union with a list of all bargaining unit members whose leave was
5 designated as FMLA leave, within the preceding twelve months, and identify which
6 employees drew upon their unused, accumulated sick leave. The Union asserts that the
7 School Committee should be directed to affirmatively inform employees who drew upon their
8 sick leave that, unless they signify a desire otherwise, the number of days deducted from
9 their annual FMLA entitlement will be restored. The Union also seeks reasonable attorneys'
10 fees.

11 Because I have determined that the underlying arbitration awards do not pertain to the
12 issue of designating all sick leave over 5 days as FMLA, I decline to make any such order.

13 The Union did not present any specific evidence that any employee suffered any loss
14 of pay or leave and I therefore do not order a status quo remedy.²⁹ In order to rectify the
15 violation here, the School Committee must abide by the Collins and Stutz decisions and must,
16 thereby, restore its pre-2015 leave practices by only requiring a simple request for leave
17 supported by an appropriate medical note. The School Committee must take steps to ensure

²⁹ Although the School Committee informed Moy that he was not eligible for FMLA leave and threatened him with termination for being absent without leave, the Union did not provide evidence that Moy actually lost any pay or leave. The School Committee did not terminate Moy and the Union admitted that the School Committee kept Moy on the payroll drawing sick leave until June 2020. The Union similarly did not provide any evidence demonstrating that any other employee suffered any loss of leave or any other economic harm.

1 that school personnel and the OHC are aware of the Collins and Stutz decisions and that
2 they should no longer advise employees that they must apply for an FMLA leave or submit a
3 completed WH-380-E in order to secure extended sick leave. In its brief, the School
4 Committee indicated it was taking action to ensure that employees who were using the on-
5 line application form to seek non-FMLA leave were no longer automatically sent to the WH-
6 380-E. If it has not already done so, my order requires the School Committee to take this
7 step.

8 ORDER

9 WHEREFORE, based upon the foregoing, it is hereby ordered that the School
10 Committee shall:

- 11 1. Cease and desist from:
- 12
- 13 a. Refusing to bargain in good faith by failing to comply with the Collins and Stutz
14 arbitration awards.
- 15
- 16 b. Requiring or directing bargaining unit employees seeking extended sick leave to apply
17 for FMLA leave and/or complete the WH-380-E form.
- 18
- 19 c. In any like or similar manner, interfering with, restraining, or coercing its employees in
20 the exercise of their rights under the Law.
- 21
- 22 2. Take the following affirmative action which will effectuate the policies of the Law:
- 23
- 24 a. Abide by the Collins and Stutz arbitration awards by restoring its pre-2015 leave
25 practices and granting extended sick leave requests supported by an appropriate
26 medical note;
- 27
- 28 b. Provide the Union with notice and the opportunity to bargain over any proposed
29 changes to the sick leave policy;
- 30
- 31 c. Ensure that employees using the on-line application form to seek non-FMLA leave
32 are no longer automatically sent to the WH-380-E form;

- 1
2 d. Post immediately in all conspicuous places where members of the Union's bargaining
3 unit usually congregate, or where notices are usually posted, including electronically,
4 if the School Committee customarily communicates with these unit members via
5 intranet or email and display for a period of thirty (30) days thereafter, signed copies
6 of the attached Notice to Employees;
7
8 e. Notify the DLR in writing of the steps taken to comply with this decision within ten (10)
9 days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



Gail Sorokoff, Esq.
Hearing Officer

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c.150E, Section 11 and 456 CMR 13.19, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within ten days, this decision shall become final and binding on the parties.



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

NOTICE TO EMPLOYEES

**POSTED BY ORDER OF A HEARING OFFICER OF THE
MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

A hearing officer of the Massachusetts Department of Labor Relations (DLR) has held that the Boston School Committee violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by failing to comply with two arbitration awards addressing the process for obtaining sick leave in excess of 5 consecutive days.

The Law gives public employees the right to form, join or assist a union; to participate in proceedings at the DLR; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities. Based on these rights, the Boston School Committee assures its employees that:

WE WILL NOT refuse to bargain in good faith by failing to comply with arbitration awards.

WE WILL NOT require or direct bargaining unit employees who are seeking extended sick leave but not Family Medical Leave Act (FMLA) leave to file for FMLA leave or to complete a WH-380-E form.

WE WILL abide by the Collins and Stutz arbitration awards by granting extended sick leave requests supported by an appropriate medical note;

WE WILL provide the Union with notice and the opportunity to bargain over any proposed changes to the sick leave policy.

WE WILL NOT otherwise interfere with, restrain or coerce employees in the exercise of their rights guaranteed under the Law.

Boston School Committee

Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).