COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the Matter of:	
ANDOVER SCHOOL COMMITTEE	Case No. MUP-21-8668
and	Date issued: February 24, 2023
ANDOVER EDUCATION ASSOCIATION	

CERB Members Participating:

Marjorie F. Wittner, Chair
Kelly Strong, CERB Member[1]

Appearances:

Robert Hillman, Esq. - Representing Andover School Committee
Laurie Houle, Esq. - Representing Andover Education Association

Ruling on Motion to Amend Complaint

This is an interlocutory appeal of a Hearing Officer's denial of the Andover Education Association's (Union's) motion to amend a complaint (Complaint) in the above-captioned matter. We affirm.

The Complaint, which issued on September 21, 2021, alleged that the Andover School Committee violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of M.G. L. c. 150E (the Law) when it stopped granting paid leave for bargaining unit members to attend arbitrations and Department of Labor Relations (DLR) proceedings without first giving the Union notice and an opportunity to bargain to resolution or impasse over the

[1] Member Victoria Caldwell did not participate in this ruling.

change. Over a year later, on November 15, 2022, the Union sought to amend the Complaint to broaden the description of the change at issue, i.e., to allege that the Employer unilaterally changed its practice of granting leave for bargaining unit members to attend "union matters." The Union claimed that the amendment was consistent with its charge of prohibited practice, including the attachments to the charge, and with the information and exhibits that it provided to the DLR investigator (Investigator) during the investigation.[2] The School Committee opposed the motion to amend for two main reasons - that the Union did not file the motion with the Investigator within ten days of the Complaint being issued in November 2021, as required by the DLR's regulations, 456 CMR 15.06(2),[3] and because the motion did not include evidence that Union members

[2] The Union states in the summary of the charge that in December 2020 and January 2021, the School Committee denied paid leave to three bargaining unit members to attend a three-day grievance arbitration proceeding. The Union alleged that, by this conduct, the School Committee violated its statutory bargaining obligation, "[b]y unilaterally terminating the established past practice of granting paid leave for Association members to attend important Association matters." During the investigation, the Union provided several exhibits in support of its contention that the School Committee had previously provided paid leave to bargaining unit members to attend union-related meetings such as "Association dispute hearings," Massachusetts Teachers Association (MTA) annual meetings, and DLR and CERB proceedings. The exhibits also included a letter dated January 5, 2021 from the Assistant Superintendent to Union President Matt Bach (Bach) that stated in pertinent part:

> To the extent that the [Union] is advising teachers that they are entitled to use professional leave to attend hearings as parties or witnesses, the plain language of the CBA requires the AEA to cease this practice. Moreover, all requests for professional leave to attend activities without a demonstrable relationship to the improvement of professional skills will be denied.

[3] 456 CMR 15.06(2) states:

> Within ten days after the Department issues a complaint, if the charging party believes that the complaint should be amended to correct an error or omission, the charging party shall file a motion to amend the complaint with the investigator who issued the complaint. After the hearing opens, the

had actually been denied paid leave to attend any "union matters" other than the grievance and DLR matters alleged in the charge.

On December 5, 2022, the Hearing Officer denied the motion to amend. The Hearing Officer reasoned that the Investigator must have considered the broader allegations that the Union made in its charge but, when drafting the Complaint, deliberately chose to define the change more narrowly. The Hearing Officer stated that if the Union believed that the scope of the Complaint was too narrow, it should have filed a motion to broaden it within ten days of it being issued, as 456 CMR 15.06 requires. Based on the timing of the motion to amend and her consideration of the investigative record and pre-hearing memorandum submitted by the parties, the Hearing Officer construed the Complaint as only covering paid leave requests for attendance at arbitrations and DLR proceedings and not all "important Union matters." She therefore concluded that the requested amendment was not within the scope of the Complaint and denied the motion.

The Union reiterated its motion to amend on the first day of hearing, December 6, 2022. The Hearing Officer orally denied the motion for the reasons stated in her written ruling but stated that the Union could appeal the ruling to the CERB and that she would keep the record open until the CERB ruled.

This interlocutory appeal followed in which the Union argues that granting this motion would comport with the evidence presented at the investigation. It also contends that granting the amendment would be an efficient use of the DLR's and the parties'

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hearing officer may allow amendment of any complaint provided that such amendment is within the scope of the original complaint.

resources, because it would prevent new charges from being filed each time the School Committee denied a request for Union leave. The Union claims that the School Committee would not be prejudiced by the amendment because the parties already had two days of hearing scheduled and was on notice from the charge and the motion to amend that it might have to prepare for the larger issue.

The Union alternatively contends that, even if the Hearing Officer appropriately declined to amend the Complaint, she abused her discretion by ruling, pre-hearing, that the Union could not present evidence at hearing on the full scope of the past practice. The Union argues that this information would be relevant and material to establishing the fact that the School Committee has long granted paid leave for Union matters, of which arbitrations and DLR proceedings are only a part.

The School Committee reiterated its opposition to the proposed amendment and stated that the Hearing Officer's ruling was consistent with CERB precedent, regulations and guidance.

Ruling

Inherent in a hearing officer's broad grant of authority under 456 CMR 13.07 to, among other things, "inquire fully into the facts relevant to the subject matter of hearing" is the duty to exercise that authority responsibly. City of Worcester, 6 MLC 1475, 1476-1477, MUP-3369 (September 21, 1979). Accordingly, when ruling on interlocutory appeals under 456 CMR 13.04, the CERB applies an abuse of discretion standard. City of Cambridge, 30 MLC 31, 32, MUP-01-3033 (September 3, 2003); Commonwealth of Massachusetts, 7 MLC 1477, 1480, SUP-2414 (October 29, 1980).

Here, given the wording of the Complaint and the Union's failure to file a motion with the Investigator to broaden its scope, the Hearing Officer's conclusion that the Union's motion to amend would fall outside of the scope of the Complaint was a reasonable interpretation of the Complaint, that, under the circumstances, does not amount to an abuse of discretion. See Worcester School Committee, 48 MLC 324, MUP-20-8368 (June 17, 2022) (deferring to hearing officer's construction of ambiguous complaint and denying motion to amend to broaden it).

In affirming the ruling, we acknowledge that the CERB has, on occasion, allowed amendments to complaints based on new conduct that occurred while the proceeding was pending before the DLR, where the CERB found that the new conduct was related to the original allegations and grew out of them. The CERB has concluded that such amendments fall within the scope of the original complaint. See Salem School Committee, 35 MLC 199, 213, MUP-04-4008 (April 14, 2009) (citing Labor Board v. Fant Milling Co., 360 U.S. 301 (1959).

Conversely, the CERB has also held that a hearing officer did not abuse her discretion when issuing a ruling that limited the scope of a hearing to the time period specified in the complaint. See City of Boston, 45 MLC 171, 172, MUP-15-4572 (CERB Ruling on Interlocutory Appeal of Exclusion of Post-Charge Evidence, April 26, 2019) (citing City of Cambridge, 30 MLC at 33)(hearing officer acted within her discretion when limiting the scope of the hearing to the time period and allegations specified in the complaint). In City of Boston, the CERB observed that the fact that hearing officers' rulings may vary on this issue "serves only to reinforce the discretion that hearing officers have,

and does not, without more, mean that a hearing officer who excludes such evidence abuses her discretion." 45 MLC at 172.

In this case, the Union's proposed amendments did not include specific or new information about the denial of paid leave for other Union business that occurred after the Complaint issued. Rather, the Union alleged that the School Committee had failed to bargain in good faith by unilaterally ceasing to grant Unit A members paid leave to attend "union matters." Under these circumstances, the Hearing Officer's determination that the proposed amendment did not fall within the scope of the original complaint was not an abuse of discretion.

That said, there is force to the Union's argument that it would not be an efficient use of the DLR's or the parties' time and resources to require it to file a new charge with the DLR on each subsequent occasion that the School Committee denied paid Union leave pursuant to the School Committee's January 5, 2021 letter that allegedly altered a binding past practice. Thus, although we are affirming the denial of the motion to amend, we do so without prejudice to the Union filing future timely charges concerning the denial of paid leave for other Union matters addressed in its charge.

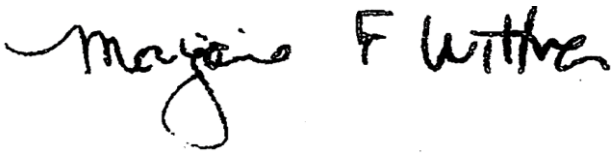
As to the Union's alternative contention that the Hearing Officer abused her discretion by preventing the Union from presenting evidence on the full scope of the past practice, the hearing record shows that the Hearing Officer did, in fact, admit Union exhibits showing that from 2017 to 2019, before Bach was Union president, school administrators approved his requests for paid leave to attend MTA meetings, including two Annual Meetings and a Personnel Selection Team meeting, and to provide testimony

at the State House at the MTA's request.[4] Accordingly, such evidence is already part of the record.

Conclusion

For the foregoing reasons, we affirm the denial of the motion to amend.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



MARJORIE F. WITTNER, CHAIR

KELLY STRONG, CERB MEMBER

[4] See Charging Party Hearing Exhibits 1 and 4.