

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

In the Matter of *
* Case No. MUPL-16-5167
BOSTON TEACHERS UNION, *
LOCAL 66, AFT/AFL-CIO * Date Issued: December 28, 2018
*
and *
*
ANN MARIE O'KEEFFE *
*

Board Members Participating:

Marjorie F. Wittner, CERB Chair
Katherine G. Lev, CERB Member
Joan Ackerstein, CERB Member

Appearances:

Joseph G. Donellan, Esq. - Representing the Boston Teachers Union
Geoffrey A. Domenico, Esq. - Representing Ann Marie O'Keeffe¹
Ann Marie O'Keeffe - Pro Se

1 CERB Decision on Review of Hearing Officer's Decision

2 Summary

3 The issue on appeal is the timeframe of the make-whole remedy that a
4 Department of Labor Relations (DLR) Hearing Officer awarded to Ann Marie O'Keeffe
5 (O'Keeffe) to compensate her for the damages she suffered as a result of the failure of
6 her union to make a timely demand for arbitration. Based on the hearing record,

¹ On June 5, 2018, Attorney Domenico withdrew as counsel for the Charging Party Ann Marie O'Keeffe, who has appeared pro se since then.

1 including five days of witness testimony, stipulations of fact, documentary exhibits,
2 credibility determinations, and the parties' post-hearing briefs, the Hearing Officer found
3 that O'Keeffe could not have returned to her workplace at the conclusion of the leave of
4 absence that she was seeking at the time of her termination. The Hearing Officer thus
5 ordered the Boston Teachers Union, Local 66, AFT/AFL-CIO (BTU or Union) to make
6 O'Keeffe whole for any wages and contractual benefits that she lost from September 25,
7 2014, the date she was terminated as a Boston Public School (BPS) teacher, to March
8 16, 2015, the date that the leave she was seeking would have ended. O'Keeffe filed an
9 appeal with the Commonwealth Employment Relations Board (CERB),² alleging that the
10 finding that she could not have returned to work in March 2016 is erroneous and
11 unsupported by the record evidence. The BTU opposes the appeal. We affirm.

² On March 9, 2018, O'Keeffe filed a timely notice of appeal pursuant to Section 11 of the Law, requesting that the "review be on the record regarding the time frame of the damages to which Ms. O'Keeffe is entitled." The notice of appeal did not include a supplementary statement. On March 14, 2018, the BTU filed a motion to dismiss the appeal on grounds that it did not include a supplementary statement and thus, did not conform to DLR Rule 13.19(2), 456 CMR 13.19.(2). In addition to this procedural argument, the BTU's motion addressed the timeframe of O'Keeffe's backpay award, and included citations to the hearing record in support of the Hearing Officer's findings. On March 15, 2018, O'Keeffe filed a motion to file a late supplementary statement. The motion attached a "Preliminary Supplementary Statement" that described, without specific transcript references, those portions of the Hearing Officer's decision with which O'Keeffe disagreed and why. On April 13, 2018, the CERB issued a ruling on both motions. The CERB denied the BTU's motion to dismiss on grounds that filing a notice of appeal without a supplementary statement is not fatal to the appeal. The CERB denied O'Keeffe's motion to file late on grounds that it was filed after the timeline for filing a supplementary statement had expired, and O'Keeffe had not shown good cause for the late filing. The CERB indicated, however, that it considered O'Keeffe "Preliminary Supplementary Statement" to be part of the record on review.

1 Background

2 The facts pertinent to this appeal are as follows.³ In September 2013, an
3 arbitrator reinstated O’Keeffe to her position as a teacher in the Mildred School, which is
4 a part of the Boston Public Schools (BPS). In February 2014, O’Keeffe received an
5 unsatisfactory mid-year evaluation from the principal at the Mildred School. O’Keeffe
6 filed a grievance to contest the evaluation, which she believed was unwarranted and
7 made in retaliation for being reinstated.⁴

8 In March 2014, O’Keeffe submitted her first request for a medical leave of
9 absence from BPS. On the leave request form, she listed as a reason that she was
10 experiencing work-related anxiety due to the punitive use of the evaluation. O’Keeffe
11 provided a doctor’s note to support her request. On March 31, 2014, the School
12 Committee approved the request for a leave beginning on March 10, 2014, with “an
13 expected return date” of September 1, 2014. The School Committee’s approval notice
14 stated in part:

15 If you are on a medical leave of absence, you must submit a doctor’s letter
16 indicating the date you are medically cleared to return to work. If, for any

³ The BTU does not seek review of the Hearing Officer’s determination that it violated its duty of fair representation to O’Keeffe. Thus, except for indicating that the Union filed a demand for arbitration on O’Keeffe’s behalf on May 4, 2015, and that an arbitrator found the demand to be untimely, we do not reiterate the Hearing Officer’s detailed findings regarding O’Keeffe’s and the Union’s dealings after the BTU terminated O’Keeffe in September 2014.

⁴ On September 29, 2014, O’Keeffe also filed an unfair labor practice with the DLR over the evaluation (Case No. MUP-14-4041), which the DLR dismissed as untimely on February 27, 2015. The CERB affirmed the dismissal on April 29, 2015. O’Keeffe did not seek judicial review.

1 reason, you want to change the starting or ending dates of your leave, you
2 must again seek approval of this office.

3 On June 6, 2014, O'Keeffe advised BPS employee Dianne Cassiani-Knox
4 (Cassiani-Knox) that she intended to return to work. On July 8, 2014, Cassiani-Knox
5 left a voice mail message for O'Keeffe stating that O'Keeffe needed to forward a memo
6 to that effect, as well as a clearance letter to return to work.⁵ On August 25, 2014,
7 O'Keeffe spoke to Cassiani-Knox and stated she would get a letter, but did not indicate
8 whether it would be a clearance letter. The Hearing Officer found that, as of that date,
9 O'Keeffe had not decided if she would return to work.

10 Sometime between August 25 and August 29, 2014, O'Keeffe decided not to
11 return to work. The Hearing Officer found, and O'Keeffe does not dispute, that O'Keeffe
12 requested the extension for leave in order to prepare for and represent herself at her
13 divorce trial. At hearing, O'Keeffe acknowledged that preparing for a divorce trial would
14 not be a proper use of sick time and testified at various times during the hearing that
15 preparing for the divorce was "taxing," "a very, very difficult process," "upsetting," and
16 "disabling."

17 On August 29, 2014, O'Keeffe submitted an on-line application to extend her
18 leave from August 26, 2014 until March 16, 2015. O'Keeffe's on-line application did not
19 include a doctor's note to support the request, as required by BPS policy. During the

⁵ The Hearing Officer found, and the parties do not dispute, that O'Keeffe would have been required to obtain a medical clearance prior to returning from her leave of absence.

1 month of September, there were a number of voicemails and correspondence from BPS
2 to O'Keeffe indicating that O'Keeffe's request to extend her medical leave was pending,
3 but that she needed to submit medical documentation. On September 30, 2015,
4 O'Keeffe saw her doctor, who faxed the following note to the BPS Office of Human
5 Resources the same day:

6 This is to state that Ms. O'Keeffe is unable to work as she is under a lot of
7 stress. She is a single Mom going through a divorce. Her husband has [a
8 medical condition] and [is] unable to provide or help financially to help
9 take care of her son, who is 14 years old. She is very anxious, has
10 insomnia [sic] will be following up with therapist and psychiatrist. She is
11 unable to work because of the stress and needs extension on her medical
12 leave til 03/31/2015 [sic].

13 O'Keeffe testified that the anxiety, insomnia and stress that Dr. Gowda referenced in her
14 letter were caused by her work.

15 On October 2, 2014, O'Keeffe learned that, effective September 25, 2014, the
16 School Committee had "terminated/resignation" [sic] her due to her failure to submit
17 medical documentation to support her request for the extended leave of absence.

18 Upon learning this, O'Keeffe contacted the BTU. On May 4, 2015, Union counsel
19 filed a Demand for Arbitration pursuant to M.G.L. c. 71, §42 on O'Keeffe's behalf. The
20 termination arbitration proceeded to hearing, and on February 7, 2016, an arbitrator
21 found that the petition for arbitration was untimely filed, and thus dismissed the matter
22 as procedurally inarbitrable without reaching the merits.

1 Return to Work

2 O'Keeffe had enough accrued paid sick leave to carry her through the end of her
3 requested leave.⁶ BPS policy provides that if an employee is on a leave of absence and
4 exhausts their accrued paid leave, the BPS typically does not keep the employee in an
5 unpaid status. Instead, the employee would be deemed to have given up their
6 position.⁷

7 At various times during the hearing, the attorneys for both parties questioned
8 O'Keeffe regarding when she would have been able to return to work, had it been
9 granted, and had she not been terminated prior to the stated end date of March 16,
10 2015. O'Keeffe's answers were less than clear in this regard. On her first day of
11 testimony, December 19, 2016, O'Keeffe testified that that she would have been
12 physically able to resume her teaching duties right after May 2, 2015, which was the
13 date she believed her divorce trial was over. The parties stipulated however, that
14 O'Keeffe's divorce trial did not end on May 2, 2015, but rather began in December
15 2015.

16 O'Keeffe was recalled to the stand by her attorney as a rebuttal witness on April
17 6, 2017, the fifth and final day of hearing. On that day, in response to questions from

⁶ O'Keeffe testified that she had approximately one hundred sick leave days to use as of August 29, 2014. Although she testified that she did not know precisely when they would expire, she also testified that she would not have had enough time to carry her into May 2015.

⁷ The Hearing Officer noted that the record contained no information regarding BPS FMLA policies.

1 Union counsel, O’Keeffe initially testified that she was prepared to go to work at the
2 expiration of her hundred sick days. However, when more specifically asked whether
3 there was a time before May 2, 2015 when she was not sick anymore and when she
4 could have gone back to work, O’Keeffe replied, “I don’t know. I don’t know.” As
5 counsel for both sides continued to press her as to when she could go back to work,
6 O’Keeffe repeatedly indicated that her divorce was a very difficult process, that she took
7 the leave in order to prepare for it, and that she did not know at the time she filed for her
8 leave how long that would take. She confirmed, however, that her earlier testimony that
9 she could have returned to work after May 2, 2015, was true.⁸

⁸ Such testimony includes but is not limited to the following excerpts from the transcript.

Q. (Attorney Donellan (on cross): So my question is when were you well enough to go back to work, regardless of the – how far the case, the divorce case had gone, when was the day that you felt well enough to go back into the classroom:

A. (O’Keeffe) – It’s a question of just taking care of myself, so that I can - - I had to put together what I had to put together in order to explain my - - my divorce was a very, very, difficult process, and I simply needed the time to prepare the documentation for the trial . . .

Hearing transcript, Day 5, p. 144, lines 9-19.

Q. (Attorney Donellan): And so back to my question. Was there a time before May 2, 2015, where you were physically - - you weren’t sick any more. You could have gone back into the classroom?

A. I don’t know. I don’t know.

Q. But regardless of where your divorce case was on May 2, 2015, you felt that was the day that you could return to the classroom - - excuse me – the day thereafter; is that right?

A. If need be, yes.

Hearing Transcript, Day 5, p. 145, lines 4-13.

1 In August 2015, O’Keeffe began working at the Barnstable Public Schools. This
2 was her first job after her termination from the BPS.⁹

3 Opinion¹⁰

4 Section 11 of M.G. L. c. 150E (the Law) grants the CERB considerable discretion
5 in fashioning appropriate remedies. Town of Brookfield v Labor Relations Commission,
6 443 Mass. 315, 326 (2005); School Committee of Newton v. Labor Relations
7 Commission, 388 Mass. 557, 580 (1983). The goal of CERB remedies is to place
8 employees in the same position that they would have been in but for the respondent’s
9 unlawful conduct. City of Gardner, 26 MLC 72, 78, MUP-1949, MUP-1967, MUP-1995
10 (January 5, 2000). The CERB traditionally orders unions that breach the duty of fair
11 representation to take all steps necessary to make the charging party whole for all
12 economic losses caused by the union’s conduct. United Steelworkers of America, 31

Similarly, on re-direct, O’Keeffe and her attorney had the following colloquy:

Q. Attorney Domenico: So looking back over history, is there any clear - - do you have any clear idea in your mind when you would have or could have returned to work?

A. I never anticipated that divorce going on like that.

Hearing Transcript, Day 5, p. 161, lines 12-16.

⁹ O’Keeffe erroneously states in her “Preliminary Supplementary Statement” that she returned to work as a teacher in March 2015. The record does not support this statement. Rather, on the final day of hearing, O’Keeffe’s testimony was clear that she started the Barnstable position on August 27, 2015 and that this was the first position she had held since being terminated by the BPS.

¹⁰ The CERB’s jurisdiction is not contested.

1 MLC 122, 130, MUPL-4282 (March 3, 2005), *aff'd sub nom. United Steelworkers of*
2 *America v. Commonwealth Employment Relations Board*, 74 Mass. App. Ct. 656
3 (2009).

4 Based on the arbitration decision, and the Union's conduct leading up to the
5 demand for arbitration, as described in the Hearing Officer's facts, the Hearing Officer
6 concluded that the Union violated Section 10(b)(1) of the Law. Because the Union also
7 elected to litigate the merits of the termination grievance, the Hearing Officer further
8 determined that O'Keeffe would have prevailed at arbitration, i.e., that an arbitrator
9 would have determined that the BPS did not have just cause to dismiss her from
10 employment on September 24, 2014. The Hearing Officer thus ruled that the BTU was
11 liable for what O'Keeffe would have received had it fulfilled its duty to represent her.

12 In assessing this liability, the Hearing Officer necessarily took into account the
13 fact that O'Keeffe's employment status was in an uncertain state when the BPS
14 terminated her, i.e., that she had been on a leave of absence since March 2014 and her
15 request to extend that leave until March 2015 had yet to be approved. Opining
16 however, that uncertainty concerning the amount of make-whole relief is appropriately
17 resolved in favor of the injured party,¹¹ the Hearing Officer found that O'Keeffe was
18 entitled to a remedy that presumed that the BPS would have granted her request for a
19 medical leave until March 16, 2015.

¹¹ The Hearing Officer cited *Webco Industries Inc.*, 340 NLRB 10, 11 (2003) and *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 256 (1946) for this proposition.

1 She reached a different conclusion regarding whether O’Keeffe could have
2 returned to work as of March 16, 2015. Noting that O’Keeffe would have been required
3 to obtain medical clearance before she could return to work, the Hearing Officer stated
4 that the evidence in the record “clearly” showed that O’Keeffe could not have returned
5 to work at the expiration of her leave and, thus, was only entitled to a limited make-
6 whole remedy.

7 The Hearing Officer based this finding on the following record evidence:
8 O’Keeffe’s testimony that she could not return to work until May 2, 2015, when O’Keeffe
9 erroneously believed her divorce trial had concluded; O’Keeffe’s testimony that her
10 divorce proceedings were “difficult” and “disabling”; the fact that O’Keeffe’s divorce trial
11 did not actually begin until December 2015, past the end date of her leave; and
12 O’Keeffe’s testimony that the workplace itself was the source of her stress, thereby
13 preventing her working and obtaining the requisite clearance.

14 On appeal, O’Keeffe contests these findings on grounds that they are speculative
15 because they presume that her condition would have remained the same for the
16 duration of her leave. O’Keeffe also contends that the fact that she returned to work as
17 of March 2015 belies the Hearing Officer’s finding that she would have been unable to
18 obtain medical clearance to return to work as of that date. The latter argument is not
19 persuasive, however, because the record reflects that O’Keeffe returned to work in
20 another school district in August 2015, not March 15, 2015, as she contends on appeal.

1 Furthermore, in determining whether O’Keeffe could have returned to work as of
2 March 2015, the Hearing Officer properly relied on O’Keeffe’s testimony regarding that
3 issue. Both parties’ counsel repeatedly tried to elicit from O’Keeffe when she believed
4 she would have been able to return to work. The clearest and most consistent answer
5 that O’Keeffe gave in this regard was that she could return any time after May 2, 2015,
6 when she erroneously believed her divorce trial had finished. All other efforts by
7 counsel to pin down a date resulted in responses from O’Keeffe that repeatedly tied her
8 ability to go back to work to when she no longer needed to prepare for her divorce.

9 Given this testimony, there is no basis in the record to overturn the Hearing
10 Officer’s conclusion that O’Keeffe could not have returned to work as of March 16,
11 2015, the date her requested leave would have expired. Although O’Keeffe argues that
12 this is speculative, any uncertainty is the result of O’Keeffe’s inability to state with any
13 certainty that she could have returned to work at any time prior May 2, 2015. The fact
14 that the charging party herself is the cause of the uncertainty distinguishes the general
15 rule that any uncertainty in calculating damages must be resolved in favor of the
16 wrongdoer. See Webco Industries, Inc., 340 NLRB at 11 (for purposes of calculating
17 backpay, declining to resolve uncertainty as to whether discriminatee would have
18 received an attendance bonus in favor of discriminatee, where eligibility for an
19 attendance bonus was a matter exclusively within the discriminatee’s control). See
20 generally Berkley Employees Association and Gary Joseph, 19 MLC 1647, 1650, n. 4,
21 MUPL-3724 (January 28, 1993) (fair representation remedies are crafted to ensure that

1 charging parties are not placed in a better position than they would have been absent
2 the union's breach of its duty).

3 Conclusion

4 For the reasons set forth above and in the Hearing Officer's decision, we affirm
5 the Hearing Officer's remedy decision and issue the following Order.

6 **SO ORDERED.**

7 Order

8 WHEREFORE, on the basis of the foregoing, it is hereby ordered that BTU shall:

9 1. Cease and desist from:

- 10 a) Failing to represent employees fairly by failing to file demands for
11 arbitration in a timely manner; and
12
13 b) Otherwise interfering with, restraining, or coercing employees in the
14 exercise of their rights guaranteed under the Law.
15

16 2. Take the following affirmative action that is necessary to effectuate the
17 purposes of the Law:

- 18
19 a) Make O'Keeffe whole for any wages and contractual benefits that she
20 lost between her September 25, 2014 termination from employment
21 with the Boston Public Schools and March 16, 2015, the date that her
22 extended leave of absence would have ended. The BTU's obligation to
23 pay O'Keeffe includes the obligation to pay interest on all back pay due
24 at the rate specified in M.G.L. c. 231, Section 6I, compounded
25 quarterly; and
26

- 27 b) Immediately post signed copies of the attached Notice to Employees in
28 conspicuous places where notices to bargaining unit employees are
29 customarily posted, including electronic postings, if the BTU
30 customarily communicates to members via intranet or email. The
31 Notice to Employees shall be signed by a responsible BTU officer and
32 shall be maintained for at least thirty consecutive days thereafter.
33 Reasonable steps shall be taken by the BTU to ensure that the Notices

1 are not altered, defaced, or covered by any other material. If the BTU
2 is unable to post copies of the Notice in all places where notices to
3 bargaining unit employees are customarily posted, the BTU shall
4 immediately notify the DLR in writing, so that the DLR can ask the BPS
5 to permit the posting.
6

7 COMMONWEALTH EMPLOYMENT RELATIONS BOARD

8 
9
10 MARJORIE F. WITTNER, CHAIR
11

12
13 KATHERINE G. LEV, MEMBER

14 
15
16 JOAN ACKERSTEIN, MEMBER
17

18 **APPEAL RIGHTS**

19 Pursuant to M.G.L. c. 150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.



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

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
COMMONWEALTH EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board has held that the Boston Teachers Union (BTU) has violated Section 10(b)(1) of Massachusetts General Laws, Chapter 150E by breaching its duty of fair representation to Ann Marie O’Keeffe. The BTU posts this Notice to Employees in compliance with the hearing officer’s order.

WE WILL NOT fail to represent employees fairly by failing to file timely demands for arbitration.

WE WILL make Ann Marie O’Keeffe whole for any wages and contractual benefits that she lost between her September 25, 2014 termination from employment with the Boston Public Schools and March 16, 2015, the date that her extended leave of absence would have ended.

Boston Teachers Union

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).