

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

BOSTON TEACHERS UNION,
LOCAL 66, AFT/AFL-CIO

and

ANN MARIE O'KEEFFE

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Case No. MUPL-16-5167

Date Issued: March 1, 2018

Hearing Officer:

Susan L. Atwater, Esq.

Appearances:

Joseph G. Donnellan, Esq. - Representing the Boston Teachers Union

Geoffrey A. Domenico, Esq. - Representing Ann Marie O'Keeffe

HEARING OFFICER'S DECISION

SUMMARY

The issue in this case is whether the Boston Teachers Union, Local 66 AFT/AFL-CIO (BTU or Union) violated Section 10(b)(1) of Massachusetts General Laws, Chapter 150E (the Law) by filing an untimely demand for arbitration for Charging Party Ann Marie O'Keeffe (O'Keeffe or Charging Party). I find that the BTU violated the Law as alleged, and order the BTU to make O'Keeffe whole for any wages and contractual benefits that she lost between her September 25, 2014 termination from employment with the Boston School Committee (School Committee or BPS) and March 16, 2015, the date that her extended leave of absence would have ended.

STATEMENT OF THE CASE

O’Keeffe filed a charge with the Department of Labor Relations (DLR) on March 29, 2016 alleging that the BTU had engaged in prohibited practices within the meaning of Section 10(b)(1) of the Law. A DLR investigator investigated the charge and issued a Complaint of Prohibited Practice (Complaint) on June 16, 2016. The Complaint alleged that the BTU violated Section 10(b)(1) of the Law by knowingly filing an untimely demand for arbitration after agreeing and undertaking to arbitrate O’Keeffe’s discharge from the School Committee.¹ The BTU filed an Answer to the Complaint on or about June 24, 2016.

I conducted a hearing on November 1, 2016, November 22, 2016, December 19, 2016, January 4, 2017,² and April 6, 2017, at which both parties had the opportunity to be heard, to examine witnesses and to introduce evidence.³ Both parties filed post-hearing briefs on or about July 7, 2017.⁴ Based on the record, which includes witness testimony, my observation of the witnesses' demeanor, stipulations of fact, and

¹ The Complaint also alleged that the BTU violated the Law by not allowing O’Keeffe to testify at her arbitration and failing to submit a brief on her behalf. On the first day of hearing, the BTU orally motioned to dismiss those allegations. O’Keeffe did not oppose the motion, and I allowed it.

² On January 4, 2017, I also conducted an investigation into a subpoena duces tecum that I had issued to compel the testimony of Mark Esposito, Esq. and the production of certain documents. I dismissed the Union's Motion to Quash the subpoena duces tecum on March 6, 2017.

³ The BTU declined to bifurcate the case, and it presented evidence on the merits of O’Keeffe’s discharge in the same proceeding in which it introduced evidence on the allegation that it had breached its duty of fair representation.

⁴ The Union submitted a reply brief on July 25, 2017, along with a Motion for Leave to file the brief. The Charging Party opposed the Motion and I denied it on July 26, 2017. Consequently, I have not read or considered the reply brief before issuing this decision.

1 documentary exhibits, and in consideration of the parties' arguments, I make the
2 following findings of fact and render the following opinion.

3 STIPULATIONS OF FACT

4 1. The Charging Party, Ann Marie O'Keeffe, is a professional teacher holding six
5 licenses issued by the Department of Elementary and Secondary Education [DESE] in
6 the Commonwealth of Massachusetts, Certificate No. 312781.

7
8 2. No request for arbitration was filed with DESE on Ann Marie O'Keeffe's behalf in
9 November of 2014.

10
11 3. The City of Boston is a public employer within the meaning of the Law.

12
13 4. The Boston School Committee is the representative for the City for purposes of
14 dealing with school employees.

15
16 5. The Boston Teachers Union, Local 66 AFT/AFL-CIO is the exclusive bargaining
17 representative for teachers, paraprofessionals, and other school employees.

18
19 6. The Union is an employee organization within the meaning of the Law.

20
21 7. The School Committee and the Union are parties to a collective bargaining
22 agreement from September 1, 2010 through August 31, 2016. The CBA contains a
23 three-step grievance and arbitration procedure in Article 10.

24
25 8. Ann M. O'Keeffe was and is for all times relevant to this dispute a member of the
26 bargaining unit represented by the Union.

27
28 9. On August 29, 2014, Ms. O'Keeffe filed a request to extend her medical leave of
29 absence through and including March 16, 2015.

30
31 10. Arbitrator Dunn issued his award on February 7, 2016.

32
33 11. Patrick Connolly was not present at a meeting with Ann O'Keeffe on October 3,
34 2014.

35
36 12. Mr. Domenico had an appearance filed in court for Ms. O'Keeffe in connection with
37 her divorce between October 16, 2014 and November 2, 2015, and again between July
38 28, 2016 and October 31, 2016.

39
40 13. Ms. O'Keeffe's divorce trial did not end on May 2, 2015. It began in December of
41 2015.

1 FINDINGS OF FACT

2 The Law Firm of Dwyer & Duddy

3 Attorney Matthew Dwyer (Dwyer) is the owner of the law firm of Dwyer & Duddy,⁵
4 and the BTU is a client of the firm. Attorney Christina Duddy (Duddy) has worked at the
5 firm as an employee since approximately 1987, and Attorney Mark Esposito (Esposito)
6 worked there between 2008 and 2016.

7 The firm and the BTU have a protocol in place for dealing with grievances from
8 the BTU. If the BTU wants the law firm to handle a grievance, the BTU sends the firm a
9 letter referring the matter to the firm, and the firm handles it at the initial steps short of
10 arbitration. If the grievant wants to pursue arbitration, the firm tells the grievant to get
11 permission or authorization from the BTU. If the BTU decides to pursue arbitration, the
12 BTU will send a letter to the firm asking the firm to file a demand for arbitration. When
13 the BTU authorizes the firm to file a demand for arbitration, Dwyer signs and files the
14 demand. Once engaged, the attorneys at the law firm represent the BTU, and no
15 attorney-client relationship exists between the lawyer handling an arbitration and the
16 grievant.

17 The Contractual Grievance and Arbitration Procedure

18 Article X, entitled Dispute Resolution of the 2010 – 2016 collective bargaining
19 agreement between the BTU and the School Committee (CBA) provides in pertinent
20 part as follows:

21 **D. Dispute Resolution Process for Grievances**

22 Grievances of employees within the bargaining unit shall be presented
23 and adjusted in the following manner:

⁵ The name of the law firm has changed over time, and has formerly been known as Dwyer, Duddy and Esposito.

1. General Procedures**(a) Step 1: School Level**

(c) Step 3: Superintendent

A decision at Step 2 may be appealed in writing by the employee or the Union to the Superintendent of Schools within ten (10) school days after the decision by the appropriate administrator at Step 2 has been received. The Superintendent or his or her designated representatives shall meet with the aggrieved employee and the Union representative with a view to arriving at a mutually satisfactory resolution of the complaint. The aggrieved employee and the Union representative will receive at least two (2) school days' notice of the meeting and shall be given an opportunity to be heard. The Headmaster/Principal or Director and the Cluster Leader or Manager of Employee Relations may also be present at the meeting and state their views.

The Superintendent or her or his designated representatives shall communicate her or his written decision together with supporting reasons to the aggrieved employee and to the Union as soon as possible, but not later than ten (10) school days after receipt of the appeal or five (5) school days after the conference, whichever is earlier.

3. Time Limits and Application

(a) The time limits specified in any step of this procedure may be extended in any specific instance, by mutual agreement.

(d) A failure by a teacher or the Union to process the grievance from one step to the next step, within the time limits provided for will result in an automatic appeal of the grievance to the next step.

A failure of a Committee representative to answer a grievance at any step of the grievance procedure within the time limits provided shall be considered a denial of the grievance at that step.

E. Arbitration**1. Arbitration Defined**

A grievance which was not resolved at Step 3 under the grievance procedure may be submitted by the Union to arbitration. The arbitration may be initiated by filing with the Committee and the American Arbitration Association a request for arbitration. The notice shall be filed within thirty (30) school days after denial of the grievance at Step 3 under the grievance procedure, provided, however, if the Union did not receive a written reply from the Superintendent at Step 3, then said time limit shall

1 be extended to sixty (60) school days after the Step 3 hearing. The
2 voluntary labor arbitration rules of the American Arbitration Association
3 shall apply to the proceeding.

4
5 ***

6 **5. Alternate Arbitration Procedure**

7 Notwithstanding any contrary provision of this Article, unresolved
8 grievances at Step 3 may be submitted by the Union to a closed panel of
9 arbitrators and not the American Arbitration Association, under an
10 alternate arbitration procedure mutually agreed between the parties.

11
12 The CBA is silent on DESE arbitration.

13 **The Statutory Teacher Dismissal Process**

14 M.G.L. c.71, Section 42 is entitled "Teachers and Other Employees – Discharge,"
15 and it addresses, among other things, the process by which school districts dismiss
16 teachers who have attained professional teacher status (PTS). Generally, a school
17 district that seeks to terminate a teacher with PTS must first give them a written notice
18 of intent to dismiss, an explanation of the grounds for the dismissal in sufficient detail to
19 permit the teacher to respond, and documents relating to the grounds for dismissal.
20 When the teacher receives the intent to dismiss, they may be placed on an
21 administrative leave. The teacher can seek representation from their union, or they may
22 seek representation from some other individual or entity. Within ten days of receiving
23 the Notice of Intent to Dismiss, the teacher can demand a meeting with the
24 superintendent or principal to review the decision and to present information pertaining
25 to the basis for the decision. After the meeting is concluded, if the school district
26 decides to proceed with the dismissal, it will issue a letter dismissing the teacher as of a
27 specific date. Within 30 days of receipt of the dismissal notice, the teacher can demand
28 arbitration at DESE. DESE then refers the matter to the American Arbitration

1 Association (AAA), which compiles and forwards to the parties a list of arbitrators. The
2 parties then jointly select the arbitrator.

3 Teachers who are represented by the BTU are assigned an attorney when they
4 receive a notice of intent to dismiss. The attorney files a request for the meeting with
5 the superintendent or principal and attends the meeting with the teacher. If the BPS
6 decides to proceed with the dismissal after the meeting, the BTU explains to the teacher
7 that they have a right to file for arbitration through DESE.

8 The BTU has represented teachers at DESE arbitrations. It does not do so in
9 every case, but reviews the reasons for and the circumstances surrounding the
10 dismissal and makes a decision about whether the teacher has a reasonable
11 expectation of prevailing at arbitration. If the BTU decides to represent the teacher at
12 arbitration, the attorney previously assigned to the teacher's case generally handles the
13 arbitration, without charge, for the teacher.

14 **O'Keeffe's Divorce Proceedings**

15 In September of 2014, O'Keeffe was in the midst of divorce proceedings that had
16 been ongoing since 2012. Attorney Geoffrey Domenico (Domenico) filed an
17 appearance on O'Keeffe's behalf in connection with her divorce proceedings on or
18 about October 16, 2014, and represented her between that date and November 2,
19 2015. O'Keeffe's divorce trial began in December of 2015. O'Keeffe received a judicial
20 decision on July 15, 2016, after which her former husband filed an appeal and a request
21 for a new trial. Domenico then filed another appearance on O'Keeffe's behalf and
22 represented her between July 28, 2016 and October 31, 2016. Preparing for the trial
23 was a time-consuming process for O'Keeffe as she needed to compile documentation

1 and financial information, and arrange for testing of her child. O'Keeffe characterized it
2 as "disabling."

3 **BPS Procedures for Sick Leave, Medical Leaves of Absence, and Termination**
4 **from Employment**

5
6 A September 1, 2013, "Superintendent's Circular" contains the "Employee Sick
7 Leave Policy" (Policy) and "Employee Sick Leave Policy Guidelines" (Guidelines). The
8 Circular states that: "[t]he Boston School Committee will not permit any abuse of sick
9 leave privileges" and that "[s]ick leave is a benefit only to be used for absences caused
10 by illness, injury, or exposure to contagious diseases." BPS teachers can use sick leave
11 if they or a member of their family is ill, but sick leave cannot be used to prepare for a
12 divorce trial. If an employee is on a leave of absence and exhausts their accrued paid
13 leave, the BPS typically does not keep an employee in an unpaid status. Instead, they
14 would be deemed to have given up their position.⁶

15 The Policy provides in pertinent part that:

16 [I]f an employee is absent for six (6) or more consecutive working days, a
17 physician's certificate will be required upon return to work, or prior to
18 return if requested.

19
20 The physician's certificate should be on the physician's letterhead and
21 should include:

22
23 1. A statement that the physician understands the nature of the
24 employee's duties and that the employee is incapable of performing the
25 duties and responsibilities of his/her position.

26
27 2. A statement of anticipated duration of the absence or the expected date
28 of the return to work (if the duration is unknown, the letter should indicate
29 when the employee will be seeing a physician again and an update letter
30 would be required after that visit).
31

⁶ The record does not detail the procedures governing FLMA leave or any requirements that employees seeking an FMLA leave are required to complete.

1 FAILURE TO PROVIDE THE PROPER PHYSICIAN'S CERTIFICATE
2 WHEN REQUIRED MAY LEAD TO LOSS OF PAY. (emphasis in original.)
3

4 Neither the Policy nor the Guidelines explicitly address long term medical leaves of
5 absence, or an employee's obligation to provide medical documentation when they seek
6 to extend a medical leave of absence.

7 The BPS leave of absence application process requires employees to apply on-
8 line on an internal BPS website known as the "HUB," and then submit all necessary
9 documentation to support the request. If the employee properly submits the application
10 and required documentation and the leave is approved, BPS employee Dianne
11 Cassiani-Knox (Cassiani-Knox) enters the leave into the Office of Human Capital⁷
12 System, and the system generates two documents to the employee: 1) an approval
13 letter; and 2) a form for the employee to complete and return indicating whether they
14 intend to return to work after their leave expires (Leave Expiration form). The leave
15 expiration form contains the leave expiration date and a section where the employee
16 can check off one of the following options:

- 17 • Yes, I plan to return upon the termination of my leave of absence.
18
19 • No, I do not plan to return upon completion of my leave of absence. My
20 resignation is attached:
21
22 • No, I do not plan to return upon completion of my leave of absence. My letter
23 requesting an extension, along with supporting documentation, is enclosed.
24 (emphasis in original.)
25

⁷ At some unspecified point in time, the Office of Human Resources (OHR) became known as the Office of Human Capital (OHC). Because documentary exhibits submitted in this hearing contain both names, both names are used in this decision to refer to the same office.

1 If an employee submits insufficient medical documentation to support a medical leave of
2 absence request, Cassiani-Knox notifies the employee of the deficiency and tells them
3 what is missing.

4 If an employee seeks to extend a leave of absence, they are required to request
5 the extension prior to the expected return date. They must also submit documentation
6 of the need for the extension. There are no document attachment capabilities on the on-
7 line system, so an employee requesting an extension must submit the documentation
8 by email, first class mail, fax, or hand delivery. Other than the reference to document
9 submission in the leave extension form, there is no rule or time deadline specifying
10 when the documentation must be submitted.⁸ Once an employee submits a request on-
11 line to extend their leave, the system forwards an email to the employee. The email
12 may state that the request is approved. If the request is not approved, the email will
13 state that the extension request is pending and that "in order for your leave to be
14 approved, the appropriate documentation must be delivered to the Office of Human
15 Resources immediately." If an employee asks for an extension of their leave and does
16 not submit appropriate documentation at the time of the extension request, the BPS
17 sends the employee a standard letter ("10-day letter") that states in pertinent part as
18 follows:

19 Please be advised that the Policies and Procedures of the Boston Public
20 School provides (sic) as follows:

⁸ Esposito testified that the requirement for a teacher to submit documentation substantiating the need to extend a leave of absence "immediately" had not been clearly communicated prior to O'Keeffe's situation. Duddy and Connolly also testified that there was no rule or timeframe dictating when that documentation had to be submitted. I credit the testimony of these witnesses since their testimony was not disputed by any other witness.

1
2 **Failure of any teacher or member of the supervising staff to report**
3 **for work for a period of thirty (30) consecutive days shall operate as**
4 **a resignation from service. Such absence is justified only if the**
5 **teacher or member of the supervising staff has been granted a leave**
6 **of absence for the period in question or if the absence is beyond the**
7 **control of the teacher or member of the supervising staff.**
8

9 To date you have been absent since _____. Your separation will be
10 reported to the Superintendent of Schools and you will be stricken from
11 the rolls of active employees in the Boston Public Schools.
12

13 If there is any reason you believe your prolonged absence without pay is
14 justified in accordance with the above, you should contact Diane Cassiani-
15 Knox by _____. (emphasis in original.)
16

17 The BPS completes the first blank in the form with the date that the employee was
18 scheduled to return to work, and fills in the second blank with a date that is 10 school
19 days later, by which the employee should return the necessary medical documentation.⁹
20 If the employee does not submit the necessary documentation by the second date
21 noted in the letter, the BPS terminates the employee. Cassiani-Knox forwards the
22 termination to a clerk to enter into the system, and then notifies the principal of the
23 school where the employee worked of the termination. If an employee who has been on
24 a medical leave wants to return to work, rather than extend their leave, they are
25 required to submit a doctor's letter stating that they are medically cleared to return to
26 work.

27 The BPS recognizes different types of terminations, including: resignations,
28 dismissals, non-renewal of one-year provisional contracts, expiration of appointments,

⁹ Although the letter does not explicitly state that employees must return the documentation 10 school days after the initial return to work date, Director of Employee Information Systems Deborah Pullen (Pullen) testified that the letter "request[s] them to return within ten business days the correct documentation." The record does not

1 and "AWOL." If a teacher failed to provide the necessary documentation to extend a
2 leave of absence and did not return to work, the BPS would consider that teacher to be
3 absent without leave (AWOL) and to have voluntarily resigned. The teacher would then
4 be terminated because they resigned. The BPS office that handles paperwork for
5 teachers who have resigned or abandoned their jobs is separate from the office that
6 handles disciplinary dismissals.

7 **O'Keeffe's 2010 Dismissal and 2013 Reinstatement**

8 O'Keeffe began her employment with the Boston Public Schools in 1994 and
9 worked at the West Roxbury High School, the Curley Middle School, the Edison Middle
10 School, and the Mildred Avenue K-8 school. In 2010, the School Committee gave
11 O'Keeffe a notice of intent to dismiss her from her position as a teacher of English as a
12 Second Language (ESL) at the Mildred Avenue school, and following a hearing,
13 dismissed her. O'Keeffe sought to challenge her dismissal.

14 On November 2, 2010, Dwyer contacted BTU Vice President Patrick Connolly
15 (Connolly), notified him that the deadline for demanding arbitration for O'Keeffe was
16 "rapidly approaching" and asked him to confirm in writing his prior verbal assent to
17 arbitrate O'Keeffe's dismissal. Connolly responded and told Dwyer to file the arbitration
18 demand. Dwyer then notified O'Keeffe on November 5, 2010 that a demand for
19 arbitration had been filed to preserve her right to arbitrate a grievance challenging her
20 dismissal. Dwyer's letter also advised O'Keeffe that the filing "...should not be
21 construed as a commitment by the Boston Teachers Union as the Union has not yet

disclose the origin of the letter or explain why it does not clearly specify a document submission date.

1 made its decision as to whether it will provide you with counsel at the arbitration
2 hearing.”

3 The BTU subsequently provided Duddy as counsel during the arbitration hearing,
4 and Esposito drafted the brief that the BTU submitted on O’Keeffe’s behalf. The
5 arbitrator overturned the dismissal and, in accordance with the arbitrator’s award, the
6 School Committee reinstated O’Keeffe in September of 2013 to the Mildred Avenue
7 School.

8 **O’Keeffe Obtains a Leave of Absence**

9 Following her reinstatement, O’Keeffe received an Unsatisfactory Formative
10 Assessment from the principal of the Mildred Avenue school on January 13, 2014.
11 O’Keeffe disagreed with this assessment of her teaching performance and the
12 evaluation procedures, and subsequently filed a grievance to contest the evaluation
13 (evaluation grievance).

14 In March of 2014, following her mid-year evaluation, O’Keeffe submitted a
15 request for a Personal Illness Leave and a doctor’s note on March 3, 2014, to support
16 the request. She listed as a reason that she was experiencing work-related anxiety due
17 to the punitive use of the evaluation instrument, because she believed that she had
18 received a negative evaluation in retaliation for being reinstated to the Mildred Avenue
19 School. On March 31, 2014, the School Committee notified O’Keeffe that her “request
20 for Personal Illness Leave was approved beginning on March 10, 2014 and your
21 expected return date will be 09-01-2014.” The March 31 notice also stated in pertinent
22 part that: “[i]f you are on a medical leave of absence, you must submit a doctor’s letter
23 indicating the date you are medically cleared to return to work. If, for any reason, you

1 want to change the starting or ending dates of your leave, you must again seek the
2 approval of this office. You should also be aware that any return rights, to the position
3 from which you are taking a leave, are determined by the provisions of your collective
4 bargaining agreement." A separate memo, also dated March 31, 2014, asked O'Keeffe
5 to tell the OHR whether she would be returning to the BPS at the conclusion of her
6 leave. The memo contained options for her to check off, stating specifically:

7 1) Yes, I plan to return upon the termination of my leave of absence;
8

9 2) No, I do not plan to return upon completion of my leave of absence. My
10 resignation is attached; and
11

12 3) No, I do not plan to return upon completion of my leave of absence. My letter
13 requesting an extension, along with supporting documentation, is enclosed.
14 (emphasis in original.)
15

16 O'Keeffe completed and signed the form stating that she intended to return, and she
17 forwarded the form to the OHR.

18 On June 6, 2014, O'Keeffe advised Cassini-Knox that she wanted to return to
19 work. Cassini-Knox told O'Keeffe that she needed to forward a memo to that effect and
20 submit a doctor's medical clearance letter. On July 8, 2014, Cassiani-Knox left a voice
21 mail message on O'Keeffe's telephone answering machine stating that O'Keeffe needed
22 a clearance letter to return to work in September. On August 25, 2014, O'Keeffe spoke
23 to Cassiani-Knox and stated that she would get a letter, but didn't state whether it would
24 be a clearance letter. As of that date, O'Keeffe had not decided whether or not she
25 would return to work.

26 **O'Keeffe's Evaluation Grievance**

27 As noted, in or around March of 2014, O'Keeffe filed a grievance over her 2014
28 evaluation. On July 7, 2014, the Union and the School Committee held a Step 3

1 hearing on her grievance, and the School Committee denied it on or about August 27,
2 2014.¹⁰ On September 17, 2014, O'Keeffe submitted a letter to the American Arbitration
3 Association (AAA) in an effort to file for arbitration on her evaluation grievance.¹¹ AAA
4 case administrator Molly Brown (Brown) subsequently contacted Duddy to clarify
5 O'Keeffe's letter, and Duddy contacted O'Keeffe. O'Keeffe emailed Brown on
6 September 22, 2014, stating that she intended to request arbitration on a pro se basis.

7 At some point between September 22 and October 2, 2014, O'Keeffe visited the
8 AAA offices and spoke to Brown. Brown advised O'Keeffe that she needed the Union's
9 permission to file for arbitration. Brown reiterated that message in an email to O'Keeffe
10 on October 2, 2014 at 10:20 a.m., and she copied Connolly on her email. O'Keeffe
11 forwarded Brown's email to Duddy on 1:15 p.m. that day, and asked Duddy for
12 clarification. In her message, O'Keeffe noted that: "Denise gave me an appt (sic) to see
13 Pat next week. Does the contract allow me to carry the level III grievance to arbitration
14 alone? The BTU does not seem to have the funds to cover the costs of pursuing the
15 process for a second time." Duddy responded at 1:57 p.m. stating that she could not
16 respond to O'Keeffe's request for advice unless the BTU gave her express
17 authorization. The record does not indicate whether or not O'Keeffe subsequently
18 asked the BTU to arbitrate her evaluation grievance. On September 29, 2014, O'Keeffe
19 filed a charge of prohibited practice with the Department of Labor Relations, alleging

¹⁰ The record does not disclose the dates or substance of any earlier steps in the grievance process.

¹¹ In her application, O'Keeffe stated that she was on a leave of absence: "for the horrid stress I feel with regard to having Ms. Kris Taylor's office mate evaluate my instruction with such a retaliatory intent and hearing the overt threat of termination voiced by the principal."

1 that the BPS used the evaluation process to retaliate against her for prevailing in her
2 reinstatement arbitration.¹²

3 **O’Keeffe’s Efforts to Extend her Leave of Absence**

4
5 Between August 25 and August 29, 2014, O’Keeffe decided not to return to work
6 and to request an extension of her leave of absence. O’Keeffe requested the extension
7 in order to prepare for and represent herself at her divorce trial.¹³ On August 29, 2014,
8 O’Keeffe submitted an application online to extend her leave of absence from August
9 26, 2014 to March 16, 2015. She did not submit any medical documentation to support
10 her request along with her application. On that same date, she received an emailed
11 response from OHR that stated in pertinent part as follows:

12 Your request on 2014-08-29 for a leave of absence from 2014-08-26 to
13 2015-03-16 is pending.

14
15 Paid type: Personal Illness...

16
17 In order for your leave to be approved, the appropriate documentation
18 must be delivered to the Office of Human Resources immediately.

19
20 Documentation Required:

21
22 ***

23
24 Personal Illness – Physician’s certification on letterhead, signed by doctor
25 only, including a statement indicating an understanding of the
26 requirements of the position and confirmation the employee is unable to
27 perform those duties. This statement must clearly indicate the anticipated
28 dates the employee will be out of work.
29

¹² The DLR docketed the charge as Case No. MUP-14-4041.

¹³ O’Keeffe acknowledged in her testimony that she would not have grounds for using paid sick time to prepare for her divorce trial if she had had no physical or mental repercussions that resulted from her preparation. She also testified that preparing for the divorce was “upsetting” and “disabling.”

1 O'Keeffe forwarded this notice to Connolly.¹⁴ She knew when she received the OHR
2 notice that her request was pending and not approved, and that medical documentation
3 to support the request had to be submitted immediately.¹⁵ O'Keeffe did not return to
4 work at this time.

5 On September 2, 2014, Cassiani-Knox emailed O'Keeffe and advised her that
6 she needed to submit medical documentation regarding her leave extension request.
7 On September 10, 2014, then Human Resources Assistant Superintendent Ross Wilson
8 (Wilson) sent O'Keeffe the standard 10-day letter by certified mail which stated in
9 pertinent part as follows:

10 Please be advised that the Policies and Procedures of the Boston Public
11 School provides (sic) as follows:

12
13 **Failure of any teacher or member of the supervising staff to report**
14 **for work for a period of thirty (30) consecutive days shall operate as**
15 **a resignation from service. Such absence is justified only if the**
16 **teacher or member of the supervising staff has been granted a leave**
17 **of absence for the period in question or if the absence is beyond the**
18 **control of the teacher or member of the supervising staff.**

19
20 To date you have been absent since September 2, 2014. Your separation
21 will be reported to the Superintendent of Schools and you will be stricken
22 from the rolls of active employees in the Boston Public Schools.
23

¹⁴ The record does not detail the communications between O'Keeffe and Connolly during the time period before O'Keeffe learned of her termination on October 2, 2014. However, the fact that O'Keeffe sent Connolly the response to her extension request indicates that they had been in touch. Otherwise, there is no explanation in the record for why she told Duddy by email on October 2 at that "the BTU [did] not seem to have the funds to cover the costs of pursuing the [arbitration] process for a second time."

¹⁵ O'Keeffe acknowledged that a 31-day delay separated the directive to submit documentation "immediately" and her submission of her doctor's note, however, she understood the term "immediately" to mean "as soon as she could have the doctor fax it into the Office of Human Capital."

1 If there is any reason you believe your prolonged absence without pay is
2 justified in accordance with the above, you should contact Diane Cassini-
3 Knox by September 24, 2014. (emphasis in original.)
4

5 Although Wilson sent this letter to the address that O'Keeffe had on file with the school
6 system, she did not receive it, and the post office subsequently returned the letter to the
7 OHR.

8 At some point in or around mid-September, 2014, Cassiani-Knox left O'Keeffe a
9 telephone voice mail message stating that the leave of absence extension request was
10 pending, but couldn't be approved without medical documentation from O'Keeffe's
11 doctor. In her voicemail message, Cassiani-Knox did not specify a date by which
12 O'Keeffe had to submit the medical documentation.

13 O'Keeffe saw her physician, Dr. Savitha Gowda, on September 30, 2014.
14 O'Keeffe forwarded a letter from Dr. Gowda that day to OHR by facsimile transmission,
15 and OHR received it that day. Dr. Gowda's letter stated:

16 This is to state that Ms. O'Keeffe is unable to work as she is under a lot of
17 stress. She is a single Mom going through a divorce. Her husband has
18 schizophrenia and unable to provide or help financially to help take care of
19 her son, who is 14 years old. She is very anxious, has insomnia will be
20 following up with therapist and psychiatrist. She is unable to work
21 because of the stress and needs extension on her medical leave til
22 03/31/2015 (sic).¹⁶
23

24 On October 2, 2014, after O'Keeffe had been unable to use her gmail password,
25 she emailed Human Resources Information Management Director Deborah Pullen
26 (Pullen) at 2:44 p.m. and asked: "Please clarify for me. Was my request for medical
27 LOA denied? Was I involuntarily terminated from my post at the Mildred Ave k-8

¹⁶ O'Keeffe testified that the anxiety, insomnia and stress that Dr. Gowda referenced in her letter were caused by her work.

1 yesterday?" Pullen responded at 5:01 p.m. on October 2, stating: "[y]ou did not provide
2 medical documentation to support the request for LOA. You were sent a certified letter
3 on September 10, 2014 and you had until September 24, 2014 to submit that
4 documentation, therefore, you were terminated/resignation (sic) from Boston Public
5 Schools effective 9/25/14." The subject line of the email stated: "Re: FW: Involuntary
6 Termination." The School Committee did not give O'Keeffe written notice of intent to
7 dismiss, an explanation of the grounds for the dismissal, documents related to the
8 dismissal, or a dismissal hearing at any point before or after Pullen's October 2 email.¹⁷

9 **O'Keeffe Contacts the BTU**

10 After she received Pullen's October 2, email, O'Keeffe contacted Connolly.
11 O'Keeffe and Connolly then met on October 9, 2014,¹⁸ and they discussed Pullen's
12 October 2 email, the denial of her leave of absence request, and O'Keeffe's belief that
13 she had been wrongfully terminated. O'Keeffe asked Connolly to assist her in an
14 arbitration to investigate her termination, and Connolly stated that the BTU was willing

¹⁷ O'Keeffe's October 10, 2014 payroll advice, which covered the period from September 20, 2014 to October 3, 2014, stated that she was on a long term leave. It included pay for three days.

¹⁸ O'Keeffe initially testified that this meeting took place on October 3, 2014, the day after she received Pullen's October 2 email. Connolly testified that he met her on October 9, 2014, and the parties subsequently stipulated that Connolly was not present at a meeting with Ann O'Keeffe on October 3. I credit Connolly's testimony that this meeting occurred on October 9 because it is corroborated by an email message that Wilson sent to Pullen on October 9 which states that O'Keeffe was at the BTU offices on October 9. Additionally, for the reasons explained in footnote 22, O'Keeffe's testimony regarding the dates that certain events occurred is unreliable.

1 to take it to arbitration.¹⁹ Connolly then told O'Keeffe that she would arrange for her to
2 speak with Duddy. Connolly did not tell O'Keeffe at that meeting (or any subsequent
3 meeting) that she should do something under the teacher dismissal statute to protect
4 her rights.

5 At 9:52 p.m. that evening, O'Keeffe sent Connolly an email stating: "Thank you
6 for preparing the grievance regarding the denial of my LOA request. It did not seem like
7 Ross Wilson would reconsider the decision of OHC. I went to the Labor Board today,
8 and I requested an investigation. Would the BTU be willing to support me during the
9 investigatin (sic) process? I left a full package of information in your mailbox this
10 afternoon."

11 **The BTU Files A Grievance**

12 On October 16, 2014, Connolly forwarded a grievance to BPS Interim
13 Superintendent John McDonough (McDonough) which stated in pertinent part:

14 The Boston Teachers Union is filing a Step III grievance with you on
15 behalf of Ms. Ann Marie O'Keeffe, a teacher in the Boston Public Schools.
16 Ms. O'Keeffe was terminated from the Boston Public Schools Effective
17 September 25, 2014. Ms. O'Keeffe was in the process of applying for a
18 medical leave of absence when this occurred. There were ambiguous and
19 conflicting communications between her and the Office of Human Capital
20 during the course of this process.

21
22 Additionally Ms. O'Keeffe never received a registered or certified letter
23 supposedly sent to her detailing the exact steps necessary to complete
24 the medical leave process. These actions are a violation of the 2010-2016
25 Collective Bargaining Agreement including but not limited to Article VIII Q
26 3, Article X A, and the Superintendent's Circular on Employee Sick Leave.
27

¹⁹ Connolly testified that O'Keeffe did not ask him at their October 9 meeting if the Union would take her case to arbitration. I credit O'Keeffe's testimony on this point for the reasons explained on pages 35 to 38.

1 The remedy sought is that Ms. O'Keeffe be returned to active service and
2 that she be made whole in all respects. I am available for a meeting with
3 you or your designee at your earliest convenience.
4

5 On or about October 20, 2014, Connolly sent Duddy a referral letter²⁰ and they
6 also spoke by phone. Connolly asked Duddy to investigate the matter of the "dismissal
7 termination/resignation," and he authorized her to seek a settlement with the BPS using
8 her best efforts. Although Connolly did not send the law firm a letter asking them to file a
9 demand for arbitration in the fall of 2014, prior to November 12, 2014, he authorized
10 Duddy to submit the matter to arbitration and left the matter to Duddy's judgment.²¹

11 Duddy met with O'Keeffe on October 20, 2014. O'Keeffe told Duddy that she
12 had been on a leave of absence and had asked to extend that leave because she
13 needed time to work on her divorce. O'Keeffe explained that the BPS claimed to have
14 sent her a registered letter that she never received, that she had had submitted medical
15 documentation on September 30 to support her extended leave request, but had
16 received documentation stating that she had been "terminated/resignation." O'Keeffe

²⁰ The referral letter is not in evidence.

²¹ Connolly testified that Duddy was authorized to submit the matter to arbitration when she forwarded a letter to School Committee Attorney Joseph Bevington (Bevington) on November 12, 2014, advising Bevington that the Union had authorized her to file the matter for arbitration. Duddy denied that Connolly had given her such authorization as of November 12. I credit Connolly's testimony since he is more likely to have accurately recalled what he authorized her to do. Also, the fact that Connolly's testimony is against the Union's interest enhances Connolly's credibility. However, I also note that Duddy's ability to clarify or further explain any communication between herself and Connolly may have been restricted by the attorney-client privilege, and thus my credibility determination on this point does not negatively affect my view of Duddy's overall credibility as a witness in this case.

1 and Duddy did not discuss arbitration at that meeting,²² and Duddy never advised
2 O'Keeffe that she could file her own demand for arbitration under the statute.

3 Duddy understood at that meeting that the BPS had "fired" O'Keeffe at this point,
4 but she also knew that a termination could be voluntary and was not the same thing as
5 a dismissal. To clarify whether the BPS had dismissed O'Keeffe pursuant to M.G.L.
6 c.71, s. 42, Duddy forwarded a letter to BPS attorney Karen Glasgow (Glasgow) dated
7 October 21, 2014, that stated in pertinent part as follows:²³

8 As you know, the BTU has grieved Ms. O'Keeffe's termination for being
9 AWOL in spite of her request for a medical leave of absence. The Union
10 has authorized me to request the following information in conjunction with
11 the grievance:...

12
13 In addition, as G. L. c. 71, s. 42 expressly prohibits the dismissal of any
14 teacher with professional teacher status, unless h/she "has been furnished
15 with written notice of intent to dismiss with an explanation of the grounds
16 for dismissal in sufficient detail to permit the teacher to respond and
17 documents relating to the grounds for dismissal, and, if he so requests,
18 has been given a reasonable opportunity within ten school days after
19 receiving such written notice to review the decision with the principal or
20 superintendent..." As Ms. O'Keeffe has not received the requisite Notice
21 of Intent to Dismiss, she must be restored to her employment immediately
22 until the requirements of G.L. c.71, s.42 have been met and she must be
23 made whole for any losses incurred as a result of her unlawful dismissal...

²² O'Keeffe testified that she discussed arbitration with Duddy at this initial meeting, and Duddy testified that she did not. I credit Duddy's testimony. When questioned concerning her conversations about filing for arbitration, O'Keeffe stated that she "can't recall a specific conversation that the words were used in any specific conversation," and later admitted that her memory of dates is sometimes inaccurate. O'Keeffe demonstrated her inability to accurately recall dates when she could not conform her testimony regarding the timing of her divorce hearing to agreed-upon stipulations. However, my credibility determination on this point does not undercut my finding that she and Connolly discussed arbitration at their October 9, 2014 meeting, for the reasons noted on pages 35-38.

²³ Duddy testified that she never thought about whether O'Keeffe had been dismissed under G.L. c.71, s. 42. However, her October 21 letter, which refers to O'Keeffe's "unlawful dismissal" belies this testimony, and consequently, I do not credit it.

1 On October 21, 2014, O'Keeffe filed a second charge of prohibited practice at the
2 Department of Labor Relations. This charge, which the DLR docketed as MUP-14-
3 4096, alleged that the BPS had terminated her in retaliation for filing case no. MUP-14-
4 4041 at the DLR.

5 In early November, 2014, Duddy received the information that she had requested
6 in her October 21, 2014 letter. On November 12, 2014, Duddy forwarded a letter to
7 Bevington which stated in pertinent part as follows:

8 The Boston Teachers Union has asked me to write to you relative to Ms.
9 O'Keeffe. Ann O'Keeffe's current status is clearly a result of unfortunate
10 circumstances beyond her control, including but not limited to the mis-
11 delivery of the certified letter.

12
13 The facts are not in dispute and militate in favor of reinstating her and
14 approving her medical leave of absence. In late August, O'Keeffe
15 attempted to submit her request for a medical leave of absence online.
16 When she was unable to do so and received the error message "*the*
17 *server provided an invalid response null*", she contacted Diane Cassiani-
18 Knox to ask what to do and Cassiani-Knox gave her directions to re-file
19 and she did so. On September 8, 2014, Cassiani-Knox sent an e-mail to
20 O'Keeffe indicating that she had received her request for a medical leave
21 of absence and reminded her to submit medical documentation.
22 Accordingly, O'Keeffe immediately commenced her efforts to obtain and
23 provide medical documentation.

24
25 The actions of BPS from that point on are baffling and troubling. From the
26 date of her September 8 e-mail, Cassiani-Knox, who had been
27 communicating with O'Keeffe entirely by e-mail since spring 2014,
28 inexplicably stopped sending O'Keeffe e-mails.

29
30 On or about September 10th - just two days after Cassiani-Knox sent her
31 last e-mail to O'Keeffe, a certified letter reportedly went out over Ross
32 Wilson's signature advising O'Keeffe that employees who have not been
33 granted a leave of absence and are absent for 30 consecutive days shall
34 be deemed to have resigned. The letter advised her to contact Cassiani-
35 Knox by September 24th if she believed her absence was justified.

36
37 Ms. O'Keeffe never received this letter. As indicated by the USPS tracking
38 information you provided to me, the postman indicates he made only one
39 attempt to deliver the letter and, because no one was home, left a notice.

1 However, nothing in the tracking information indicates where the
2 attempted delivery occurred and where the notice was left. The letter was
3 not picked up (as Ms. O'Keeffe received no notice of such a letter) and
4 was subsequently returned to the sender (BPS).

5
6 In view of Cassiani-Knox's history of communicating with Ms. O'Keeffe by
7 e-mail, it is incomprehensible that she did not, before September 24th,
8 send an e-mail to O'Keeffe (attaching the letter) asking why she had not
9 responded to the letter - if she had, she would have learned that O'Keeffe
10 had not received the letter.

11
12 On September 30th, O'Keeffe obtained the requisite doctor's note and, on
13 that same day, provided same to BPS by fax. At this point, O'Keeffe had
14 been absent less than 30 consecutive days referenced in the certified
15 letter, so her request for a medical leave of absence could have been
16 approved, and the current dispute would have been averted.

17
18 Unfortunately, it was only after Ms. O'Keeffe submitted her doctor's note
19 that she learned, on October 2, 2014 via an e-mail from Deb Pullen, that
20 she had been terminated effective September 25, 2014. Prior to that date,
21 O'Keeffe's direct deposit stubs each indicated that she was on a long-term
22 leave. As a result, her termination was completely unexpected.

23
24 In view of the facts detailed above, Ms. O'Keeffe should be reinstated,
25 effective retroactive to the date of her termination.

26
27 The School Department's refusal to schedule a Step III grievance meeting
28 to hear all the facts, and your refusal to respond to my earlier requests
29 that O'Keeffe be reinstated and her medical leave of absence approved,
30 lead to the conclusion that she may be the target of retaliation as a result
31 of winning her arbitration case last year and insisting, as was her right, on
32 reinstatement to the school from which she had been wrongly dismissed.

33
34 Accordingly, please be advised that if she is not reinstated so that her
35 medical leave of absence can be approved, the Union has authorized me
36 to submit this matter to arbitration.²⁴(emphasis in original.)

37
38 On or about November 14, 2014, O'Keeffe received an application from the BPS
39 for severance pay.²⁵ O'Keeffe discussed the severance letter on November 18, 2014

²⁴ Duddy copied Connolly on the letter, and the record contains no evidence that Connolly advised Duddy after receiving it that she was not authorized to submit the matter to arbitration.

1 with Duddy. O'Keeffe advised Connolly of their conversation that day, and stated:
2 "[Duddy] and I spoke about the severance letter this morning. BPS wants me to resign
3 and accept a severance package. I have no plans to resign from my teaching post. She
4 is going to talk to Karen Glasgow to get clarification about reinstating my LOA or
5 formally terminating me, so there would be grounds to seek arbitration. She and I will let
6 you know what she learns...."²⁶

7 **The Step III Hearing and Settlement Proposal**

8 The Step III hearing on O'Keeffe's grievance was held on November 19, 2014.
9 Connolly, O'Keeffe, and BPS hearing officer Michael Rubin (Rubin) attended the
10 hearing.²⁷ Rubin never filed a response to the grievance, but on December 4, 2014,
11 Bevington emailed Duddy and O'Keeffe a written offer to settle the grievance and the
12 unfair labor practice charge that she had filed with the DLR. The settlement offer would
13 have reinstated O'Keeffe to a teaching position effective September 25, 2014, placed
14 her on a medical leave of absence effective September 30, 2014 until March 31, 2015,
15 and given her back pay. However, the offer also would have required her to accept a 5-
16 day unpaid suspension, deduct time paid to her from September 2 – 29 from the

²⁵ The severance application indicated that O'Keeffe had over 116 days of unused sick time.

²⁶ There is no evidence that Connolly responded to this email by telling O'Keeffe that the Union had not authorized arbitration.

²⁷ Connolly testified that Esposito also attended the Step 3 hearing. Esposito testified that he did not attend it. I credit Esposito's testimony because it is more likely that he would accurately recall his own attendance, and because Esposito was not involved in the case until he took it over from Duddy in the fall of 2015.

1 backpay award,²⁸ and withdraw the unfair labor practice charge (MUP-14-4096) that she
2 had filed at the DLR.²⁹

3 O'Keeffe and Duddy discussed the offer by phone, and O'Keeffe told Duddy that
4 she was unwilling to give up the pay that she received in September and would not
5 agree to a five-day unpaid suspension. Thereafter, Duddy and O'Keeffe discussed what
6 O'Keeffe would want for a settlement, and also began to discuss the possibility of a
7 termination pension.³⁰ Duddy told O'Keeffe that she would be "well-advised" to accept
8 the suspension since she had no medical support for the first 30 days of her leave, but
9 Duddy also offered to try to negotiate the suspension out of the proposed settlement.³¹

10 Duddy discussed the settlement offer with Bevington at some unspecified point in
11 time after receiving it.³² Bevington explained that the School Committee wanted money
12 deducted from O'Keeffe's back pay because her September 30 letter was untimely and
13 would not be applied retroactively to the month of September. Bevington and Duddy did

²⁸ The record indicates that BPS paid O'Keeffe through September 24, 2014.

²⁹ O'Keeffe testified that the settlement agreement required her to accept a written reprimand that would be placed in her personnel file, but no such requirement is contained in the written settlement agreement that was submitted into evidence. Thus, I do not credit her testimony that she was told that the agreement included a reprimand.

³⁰ M.G.L. c.32, Section 10(2) provides retirement benefits to certain teachers who have been involuntarily terminated.

³¹ O'Keeffe testified that Duddy did not offer to negotiate the suspension out of the agreement. I credit Duddy's contrary testimony on this point. O'Keeffe testified that the settlement offer included a requirement to accept a written reprimand, which is not included in the written settlement offer, and thus, her recollection of the settlement discussions is likely to be similarly faulty.

³² At some point after receiving the settlement offer, O'Keeffe emailed Bevington about it directly, and also spoke to him. Neither her email nor the substance of their conversation is in the record.

1 not address the substance or contents of Dr. Gowda's September 30 letter, or whether it
2 would have been sufficient to support O'Keeffe's request for an extended medical leave.

3 On some unspecified date after the Step 3 hearing, O'Keeffe asked Duddy if the
4 BTU was going to take her claim to arbitration. Duddy told O'Keeffe that she did not
5 have the authority to make a decision on filing for arbitration, that O'Keeffe would have
6 to ask the Union, and the Union would have to authorize arbitration.

7 **Events that Occurred Between January and April of 2015**

8 On January 7, 2015, O'Keeffe emailed Duddy to ask if there had been any
9 progress towards settlement, and she suggested some terms. One of O'Keeffe's
10 suggestions was for BPS to submit a letter of request to ascertain O'Keeffe's eligibility
11 for a termination pension. O'Keeffe stated that "[i]f I were confirmed as a retiree, then
12 we would no longer have to discuss the ... 2014 performance evaluation process as
13 described in MUP-14-4041 or the wrongful termination described in MUP-14-4096."
14 Duddy responded by email dated January 12 and explained that she could make a
15 counterproposal to the settlement offer that the BPS still had "on the table", but that if
16 O'Keeffe settled her case with the BPS, she would be unable to receive a termination
17 pension. Duddy also explained that the BPS could not submit an eligibility request letter
18 to the Retirement Board, and if it did, the Retirement Board would likely reject the
19 involuntary termination pension that O'Keeffe was seeking.

20 O'Keeffe had told Duddy that she did not want to return to her job,³³ but at this
21 point, O'Keeffe was considering both retirement and returning to work. Duddy was

³³ O'Keeffe disputed Duddy's testimony that she had told Duddy that she did not want to return to work. I credit Duddy's testimony because, in a January 14, 2015 email discussing her interest in a termination pension, O'Keeffe stated "[i]f I were to return to

1 unclear about whether O'Keeffe wanted to return to her leave of absence status or retire
2 and asked O'Keeffe to make a firm decision about which option she wished to pursue.
3 In her January 12 email, Duddy sought to clarify O'Keeffe's position by telling O'Keeffe:
4 "Please send me an email stating nothing more than "I want to pursue the involuntary
5 termination retirement' or "I want to return to my LOA status." O'Keeffe responded by
6 email on January 14, 2015, and suggested various options for resolving her grievance.
7 She also continued to suggest that BPS request a termination pension, stating toward
8 the end of her email that: **"If BPS does accept the request for an Involuntary**
9 **Termination pension at 45% based on my 25 years of service, then I would not**
10 **have to pursue the grievance process any further..."**(emphasis in original.) Duddy
11 responded to O'Keeffe's January 14 email on January 16, 2015, stating in pertinent
12 part: **"THE SCHOOL DEPT. CANNOT REQUEST A TERMINATION PENSION BE**
13 **APPROVED FOR YOU!"** (emphasis in original.) By email dated January 19, 2015,
14 O'Keeffe responded by stating: "I think I hear you telling me that because I have been
15 terminated I am eligible to apply for the Involuntary Termination pension, and that my
16 eligibility would be determined by the PERAC board. Thus I should inform them of the
17 details of my termination, apply in writing and then wait for a written response to see the
18 outcome...." Thereafter, Duddy continued to work with O'Keeffe on the possibility of
19 receiving a termination pension.³⁴

BPS to be evaluated unfairly or to have my eval (sic) documents altered on the edfs interface, I would only be put right back in the same distressful, unjust situation without any recourse." O'Keeffe's extensive inquiries into a securing a termination pension also show that she was considering not returning to work and had discussed that position with Duddy.

³⁴ The record does not indicate whether O'Keeffe applied for a termination pension.

1 On February 27, 2015, a DLR hearing officer dismissed the two charges of
2 prohibited practice that O'Keeffe had filed with the DLR. O'Keeffe subsequently filed a
3 request for review of both dismissals.³⁵ O'Keeffe notified Duddy of her appeals, and on
4 March 10, 2015, Duddy advised O'Keeffe that she was not authorized to represent or
5 advise her regarding the DLR charges, and that the only matter that had been referred
6 to her was the pending grievance.

7 On March 24, 2015, O'Keeffe received a copy of her personnel card from OHC
8 Director Emily Qazilbash. On April 7, 2015, O'Keeffe forwarded an email to Connolly
9 that stated in pertinent part as follows:

10
11 Have you by any chance received a response from Mr. Rubin regarding
12 the hearing held last November?

13
14 I am quite concerned about the lack of resolution to the question of my
15 wrongful termination for being awol.

16
17 Having reviewed my personnel card, I discovered that it incorrectly states
18 that I resigned from my teaching post. Thus, I urgently want to see the
19 question of my termination resolved.

20
21 After speaking with Tina Duddy today, I understand that at this time BPS
22 does not wish to offer a settlement proposal without the requirement that I
23 take a written censure for filing for a medical leave in September of 2014. I
24 do no (sic) wish to agree to a written censure or a suspemsion (sic),
25 because I complied with the district's protocol for filing a request for
26 medical leave in both March of 2014 and in September of 2014.
27

³⁵ The Commonwealth Employment Relations Board (CERB) affirmed the dismissal of both charges on April 29, 2015. O'Keeffe appealed the CERB decision in MUP-14-4096 to the Massachusetts Appeals Court, and on December 5, 2017, the Appeals Court affirmed the CERB's decision. O'Keeffe subsequently petitioned for rehearing and further appellate review. The Appeals Court subsequently denied her petition for rehearing, and her petition for further appellate review was pending as of the date of this decision.

1 **Because there is no current plan for settlement, I wish to request that**
2 **the BTU file with DESE for the situation to be resolved through the**
3 **arbitration process.** Please let me know whether or not the BTU would
4 be willing to file this arbitration request on my behalf. I am quite willing
5 and able to follow the proceeding through to its completion.³⁶ (emphasis in
6 original.)
7

8 The record contains no evidence of a response from Connolly. On April 13,

9 2015, O'Keeffe forwarded a letter to Connolly that stated in pertinent part as follows:

10 Please let me know whether or not the BTU will file the application for
11 arbitration with DESE. I have been unemployed for over six months, and
12 the last term of the school year has begun. I know that the case for
13 wrongful termination could be demonstrated with the evidence that Tina
14 has collected. Obviously for myriad reasons I urgently need to see the
15 question of my termination resolved.
16

17 After speaking with Tina Duddy last Monday, I understand that the
18 settlement proposal from BPS requires that I accept written censure for
19 filing for medical leave in August of 2014. I do no (sic) wish to agree to a
20 written censure or a suspension, because I complied with the district's
21 protocol for filing a request for medical leave in both March of 2014 and
22 September of 2014. My personnel card incorrectly states that I resigned
23 from my teaching post. BPS sent me a severance proposal in October.
24 How can they continue to claim that I was AWOL or that I resigned from
25 my post after 25 years of service to the city schools?
26

27 Please let me know this week whether or not the BTU will file this
28 arbitration request on my behalf. I assure you that I am quite willing and
29 able to participate in the process until its closure.
30

.....

31 The record contains no evidence of a response. Subsequently, on April 21, 2015,

32 O'Keeffe emailed Connolly, stating in pertinent part as follows:

33 Have you begun the process of filing for arbitration on the level 3
34 grievance about my terminatin (sic) last September?

³⁶ O'Keeffe testified that she sent a written request for arbitration to Connolly on a monthly basis from December of 2014 through March of 2015, but she did not offer those documents into evidence. She also testified that she regularly emailed Duddy asking why she had not taken her case to arbitration. I do not credit O'Keeffe's testimony that she ever sent these requests to Duddy or Connolly because she never produced the emails or explained why she did not produce them.

1
2 Is there a deadline or a time window for filing this grievance/erb request
3 with DESE?

4
5 Will we meet this week to discuss a grievance for mischaracterization of
6 my separation from BPS?

7
8 Please let me know this week.

9
10 At some point in April of 2015, O'Keeffe traveled to Ireland to manage matters
11 pertaining to the use of family land there.

12 **O'Keeffe's Arbitration**

13 By letter dated April 23, 2015, Connolly notified Dwyer that Dwyer, Duddy &
14 Esposito was authorized to represent O'Keeffe. Connolly's letter stated in pertinent part
15 that:

16 This letter provides authorization for Dwyer, Duddy & Esposito P.C. to
17 represent Ms. Ann O'Keeffe, a permanent teacher assigned to the Mildred
18 Avenue School. Ms. O'Keeffe received notice from Boston Public Schools
19 of their intention to dismiss due to performance issues. We will forward
20 her termination package and any supporting documents to your office
21 when we receive them.³⁷

22
23 On April 28, 2015, O'Keeffe emailed Connolly, stating in pertinent part that:

24 Please let me know when we can meet this week to discuss the
25 termination grievance and the other regarding mis-characterization of my
26 separation from BPS.

27
28 Tina and I have discussed the possibility of my filing for Termination
29 Retirement and the mess created by the OHC when they recorded
30 inaccurate information on my Personnel File.

31
32 Seven months have passed since my termination. It is nearly May now,
33 and I MUST make a decision regarding how to proceed.

34
35 Please advise me about when we could have a brief meeting.
36

³⁷ Connolly testified that the statements in his letter regarding performance issues and O'Keeffe's receipt of an intent to dismiss notice were erroneous.

1 By letter dated May 4, 2015, Dwyer filed a Demand for Arbitration (Demand) on
2 O'Keeffe's behalf with DESE. The Demand was dated April 29, 2015, and indicated that
3 O'Keeffe was demanding arbitration pursuant to M.G.L. c.71, Section 41. Dwyer listed
4 his and Duddy's names on the form under the heading "Representative or Union."
5 Under the heading "Nature of the Dispute," Dwyer listed: "Termination of Ann O'Keeffe,
6 a teacher with professional status, without just cause," and under the heading "Claim or
7 Relief Sought," listed "Reinstatement with full back pay and all other rights restored."³⁸

8 O'Keeffe emailed Duddy on May 4, 2015, stating in pertinent part: "Thank you for
9 the call last week about my visit to the retirement board offices....I will not go back there
10 without speaking to you first. Like you, I still hope that filing of the arbitration request
11 will prompt the Legal Department at BPS to respond with another settlement proposal.
12 Please let me know when the request is filed with DESE."

13 Duddy did not discuss settlement with the BPS after the arbitration demand was
14 filed, however, in the fall of 2015, Duddy and O'Keeffe continued to discuss O'Keeffe's
15 possible receipt of a termination pension. On October 22, 2015, Duddy sent O'Keeffe
16 an email stating in pertinent part: "I am double booked on the first day of your arbitration
17 so Attorney Mark Esposito will be handling your entire arbitration – in the interests of
18 consistency, it makes sense for him to handle the entire case rather than just day 1."

19 **Esposito's Involvement in the Arbitration**

³⁸ The record does not disclose who decided to file for DESE arbitration. Duddy, Connolly and Esposito all testified that they did not know who made the decision. Duddy testified that someone at the BTU made the decision, yet Connolly stated that he could not explain why the "law firm" proceeded under the statute. No one called Dwyer, who filed the demand, to testify at the hearing. Thus, there is no testimonial explanation of the timing of the demand or the forum in which it was filed.

1 Esposito learned from discussions with Duddy in September of 2014 that
2 O'Keeffe had been separated from employment with the BPS, but he did not become
3 fully involved in handling O'Keeffe's arbitration until after Duddy notified him that she
4 had a scheduling conflict with the date of the hearing. Once he became fully involved,
5 he reviewed the materials in the case file, discussed the case with Duddy, set up a
6 meeting with Connolly and O'Keeffe, and participated in the decision to select Arbitrator
7 Philip Dunn.

8 In November and December of 2015, Esposito and Bevington exchanged emails
9 about a potential settlement, and at the December 3, 2015 arbitration, the School
10 Committee presented a second settlement offer to O'Keeffe. The December 2015
11 settlement proposal differed from the December 2014 offer as it proposed a severance
12 package instead of reinstatement, and required O'Keeffe to resign. O'Keeffe rejected
13 the December 2015 settlement offer, and the parties proceeded to the arbitration
14 hearing.

15 At the beginning of the arbitration, Bevington raised the issue of procedural
16 arbitrability. Bevington and Esposito agreed to present opening statements and
17 evidence first regarding procedural arbitrability, and then present opening statements
18 and evidence regarding the merits of the case. After the hearing concluded, Esposito
19 prepared a post-hearing brief to submit to the arbitrator, and forwarded it to O'Keeffe on
20 January 12, 2016 for her review. O'Keeffe objected to various sections of the brief, and
21 she and Esposito exchanged numerous emails about their respective views. O'Keeffe
22 advocated for what she thought was important to include, and Esposito offered advice
23 on what he believed would help or harm her case. They were unable to agree on the

1 language of the brief, so on January 26, 2016, Esposito gave O'Keeffe two choices:
2 allow him to submit the brief that he had drafted or submit a brief on her own.
3 Ultimately, O'Keeffe submitted her own brief, and Esposito notified the AAA that his
4 signature block should be removed from her brief.

5 **The Arbitration Decision**

6 Arbitrator Dunn issued his decision on February 7, 2016, finding that "[t]his
7 matter regarding the termination of Ms. O'Keeffe is not procedurally arbitrable." In
8 pertinent part, his award stated that:

9 Finally, Ms. O'Keeffe argues that the BPS failed to follow certain of the
10 procedures that are mandated by M.G.L. c.71, s.42 if a public school
11 system wishes to terminate a teacher's employment. Specifically Ms.
12 O'Keeffe alleges that BPS failed to give her the requisite "written notice of
13 intent to dismiss and with (sic) an explanation of the grounds for
14 dismissal...;" and furthermore, BPS failed to give her "a reasonable
15 opportunity... after receiving such notice to review the decision with the
16 principal or superintendent..." Given those procedural omissions by BPS,
17 petitioner asserts, it would be inequitable to allow BPS to turn around and
18 rely on an arguable procedural error on Ms. O'Keeffe's part - delay in filing
19 her petition with the commissioner - as a basis to have her case deemed
20 to be procedurally not arbitrable.

21
22 However, one of the possible grounds for overturning the petitioner's
23 termination under M.G.L. c. 71, s. 42 could be procedural error on the part
24 of BPS. Either substantive or procedural defenses, if proven by the
25 petitioner, might provide reason for an arbitrator to rule that a teacher's
26 dismissal was improper under M.G.L. c.71, s.42. Indeed such a petition
27 timely filed with the commissioner was the only avenue available to Ms.
28 O'Keeffe for challenging those allegedly procedural and/or substantive
29 errors... Thus, alleged procedural errors by BPS did not give Ms. O'Keeffe
30 justification to delay in filing a petition for arbitration; rather, those alleged
31 errors should have given her added cause to file a timely petition, so that
32 she could utilize that exclusive avenue of appeal to seek redress for the
33 alleged procedural errors of BPS.

34
35 In sum, Ms. O'Keeffe had one avenue available to her, if she wished to
36 challenge the propriety of BPS's termination of her employment. That
37 avenue was to file a timely petition for arbitration with the commissioner.
38 She failed to follow that avenue, since her petition was filed many months

1 too late. Because her petition was untimely filed, it must be concluded that
2 this matter is not procedurally arbitrable.
3

4 Esposito forwarded the award to O'Keeffe by email on February 9, 2016, and
5 advised her that he saw no valid grounds for appeal. He stated in his email that she
6 could challenge the decision by filing an appeal in Superior Court within 30 days, but
7 that neither he nor the BTU would take any further action on her behalf.

8 **The Timing of O'Keeffe's Request for Arbitration**

9 O'Keeffe testified that she asked Connolly, at her first meeting with him in
10 October of 2014, if the Union would take her case to arbitration, and that Connolly told
11 her that it would.³⁹ Connolly denied that O'Keeffe asked him at that meeting to take her
12 case to arbitration. I credit O'Keeffe's testimony on this point for the following reasons.

13 First, O'Keeffe's familiarity with and interest in arbitration makes it likely that she
14 raised it with Connolly when she first met with him in October of 2014. O'Keeffe had
15 successfully used arbitration to overturn her 2010 termination, and she was reinstated in
16 September of 2013. After filing a grievance over her March 2014 evaluation, she
17 appeared at the AAA offices in September of 2014, to file for arbitration of her
18 evaluation grievance. When the AAA advised her that she needed the Union's
19 permission to do so, O'Keeffe contacted Duddy and asked about arbitration. Since
20 O'Keeffe tried to arbitrate her evaluation grievance in September of 2014, and was told
21 that she needed the Union's permission to do so, it is more than likely that she asked
22 Connolly to arbitrate her termination grievance when she met with him a few weeks
23 later. O'Keeffe's prior success at arbitration, her efforts in September of 2014 to
24 arbitrate her evaluation grievance, and her attempts to involve the Union convince me

1 that she raised the issue of arbitrating her 2014 termination when she met with Connolly
2 in October.

3 Second, the evidence of O'Keeffe's untiring attempts to secure a termination
4 pension simultaneously with reinstatement, despite being repeatedly told of the
5 impossibility of such a goal, her continuing refusal to accept the BPS's successive
6 settlement offers, and her adamant refusal to accept Esposito's recommendations
7 regarding the wording of her arbitration brief, reveal a tenacity that persuades me that
8 she would have requested arbitration at the first opportunity.

9 Additionally, O'Keeffe's October 9 email, which she forwarded to Connolly after
10 she met with him, asks if the Union would be willing to support her at a DLR
11 investigation. She subsequently filed a prohibited practice charge with the DLR on
12 October 21 to challenge her termination. Given her interest and prior success with
13 arbitration, it is extremely unlikely that on the same day, O'Keeffe would have asked the
14 BTU to support her in a DLR investigation regarding her termination, but would not have
15 asked it to arbitrate her termination.

16 Further, Duddy forwarded a letter to Bevington on November 12, 2014, prior to
17 the Step 3 hearing, in which she stated that the Union had authorized her to submit the
18 matter to arbitration. Connolly testified that Duddy was authorized to submit the matter
19 to arbitration at that time, and I have credited his testimony. Duddy copied Connolly on
20 this letter, and there is no evidence that Connolly subsequently advised Duddy that her
21 assertion was wrong. It is unlikely that Connolly would have given Duddy
22 authorization to submit the matter to arbitration if O'Keeffe had not requested it, and it is

³⁹ The balance of their conversation need not be repeated.

1 similarly doubtful that Duddy would have advised the School Committee about
2 arbitration prior to the Step 3 hearing if O'Keeffe had not raised it with Connolly.

3 Finally, if O'Keeffe did not request arbitration in October of 2014, and the Union
4 was waiting for her request (and its approval) before filing the arbitration demand, there
5 is no explanation for the delay between her April 7, 2015 request and the May 4, 2015
6 arbitration filing date. The Union's ability to expedite her arbitration filing in 2010 shows
7 that it could act quickly when necessary to preserve a teacher's rights, and there is
8 simply no explanation for the delay between April and May in 2015.

9 In so finding, I recognize that O'Keeffe's April 7, 2015 email asking the BTU to
10 file with DESE for arbitration could be interpreted as her first request for arbitration.
11 ("Because there is no current plan for settlement, I wish to request that the BTU file with
12 DESE for the situation to be resolved through the arbitration process.") However,
13 O'Keeffe drafted this letter after she had rejected the BPS's December 2014 settlement
14 offer and had limited options, and she does not state in the letter that it is her initial
15 request. Consequently, the April 7, 2015 letter does not contravene my finding that
16 O'Keeffe first requested arbitration in October of 2014.

17 The Union argues, for various reasons, that O'Keeffe's testimony was neither
18 credible nor plausible. I agree that some of O'Keeffe's testimony is not credible, as
19 described supra. However, I have no reason to discredit everything she said, and a
20 hearing officer may believe parts of a witness's testimony and disbelieve other
21 parts. Town of Weymouth, 19 MLC 1126, 1132, MUP-6839 (August 4, 1992).
22 Connolly's testimony that O'Keeffe did not raise the issue of arbitration with him in
23 October of 2014 is as self-serving as the Union claims O'Keeffe's testimony to be.

1 Finally, O'Keeffe's demeanor at the hearing, which suggested an effort to accurately
2 recall the events in question, supports my finding. Thus, for the reasons cited above, I
3 credit O'Keeffe's testimony that she asked Connolly, at her first meeting with him in
4 October of 2014, if the Union would take her case to arbitration, and Connolly agreed to
5 do so.

6 OPINION

7 The Duty of Fair Representation

8 A union has a duty to represent its members fairly in connection with issues that
9 arise under a collective bargaining unit. National Association of Government
10 Employees v. Labor Relations Commission, 38 Mass. App. Ct. 611, 613 (1995). The
11 duty of fair representation applies to all union activity, including contract negotiation,
12 United Steelworkers of America, 31 MLC 122,129, MUPL-4282 (March 3, 2005), aff'd
13 sub nom. United Steelworkers of America vs. Commonwealth Employment Relations
14 Board, 74 Mass. App. Ct. 656 (2009) (citing Air Line Pilots Ass. v. O'Neill, 499 U.S. 65
15 (1991)), and contract administration, including grievance processing. Massachusetts
16 State College Association, 24 MLC 1, SUPL-2588 (July 24, 1997). A union breaches its
17 statutory responsibility to bargaining unit members if its actions toward an employee
18 during the performance of its duties as the exclusive collective bargaining
19 representative are unlawfully motivated, arbitrary, perfunctory, or reflective of
20 inexcusable neglect. Quincy City Employees Union, H.L.P.E., 15 MLC 1340, 1355
21 (1989), aff'd sub nom. Pattison v. Labor Relations Commission, 30 Mass. App. Ct. 9
22 (1991), further rev. den'd, 409 Mass. 1104 (1991).

1 O'Keeffe contends that the Union breached its duty to represent her fairly
2 because she requested the Union's assistance at her first meeting with Connolly,
3 Connolly knew of the facts surrounding her dismissal, Connolly promised to arbitrate her
4 grievance, and he did not tell her to request arbitration from the BTU or file for
5 arbitration herself. Further, the Union was aware of the statutory filing limitations, and it
6 failed to file a timely demand for arbitration under the statute or demand arbitration
7 under the contract.⁴⁰ O'Keeffe also maintains that it was inexcusable neglect not to have
8 advised her of her choice of remedies and explained each one.⁴¹

9 The Union argues as a threshold matter that the duty of fair representation does
10 not require unions to pursue arbitrations for teachers under M.G.L. c.71, s. 42, because
11 a teacher's statutory right to arbitration is not guaranteed by M.G.L. c.150E, and is
12 independent of the collective bargaining process.⁴² It states that the CBA gives the BTU
13 no role in the statutory arbitrations and is silent concerning the DESE arbitration
14 process. Consequently, the BTU claims that it had no duty to represent O'Keeffe in her
15 DESE arbitration.

⁴⁰ Because the Complaint does not allege that the Union breached its duty to O'Keeffe by failing to file for arbitration under the CBA, I do not address O'Keeffe's argument on that point.

⁴¹ O'Keeffe also argues that the "effective assistance of counsel" required the Union to protect her rights while the settlement negotiations between the BTU and the BPS were ongoing. However, the Complaint does not contain such an allegation, and I have found that no attorney-client relationship existed between Duddy, who represented the BTU, and O'Keeffe.

⁴² The Union acknowledged in its opening statement and brief that if it had agreed to arbitrate O'Keeffe's grievance, it would have undertaken the duty to represent her fairly.

1 Alternatively, the BTU argues that it satisfied any duty that it may have owed to
2 O'Keeffe. O'Keeffe asked the BTU to file a grievance regarding her leave of absence
3 and it did so, acting at all times in complete good faith and honesty. It tried to secure an
4 extension of her medical leave of absence, and its decision to handle the denial of her
5 leave as a contract matter, rather than a statutory termination, was within the discretion
6 that the Law permits unions to exercise. It contends that O'Keeffe did not ask the Union
7 to arbitrate her grievance until long after the 30-day filing period had passed, and the
8 Law does not compel unions to anticipate unit members' demands or act proactively.
9 Requiring the BTU to have filed for statutory arbitration in advance of O'Keeffe's request
10 would impose a higher duty on unions than the Law currently requires. I am not
11 persuaded by the Union's arguments and address each one in turn.

12 First, I reject the Union's claim that it has no duty to represent the teachers in its
13 bargaining unit at DESE arbitration. A union's duty of fair representation stems from its
14 role as the exclusive representative of employees whose individual workplace interests
15 and rights have been relinquished or subordinated to their collective interests. See Vaca
16 v. Sipes, 366 U.S. 171, 182 (1967) (the duty of fair representation stands as a bulwark
17 to prevent arbitrary union conduct against individuals stripped of traditional forms of
18 redress by federal labor law); Fitchburg School Committee, 9 MLC 1399, 1414, MUPL-
19 2447 (September 1, 1982) (union's duty to fairly represent its members is a corollary to
20 its right to act as the exclusive representative; exclusive representative status silences
21 the voices of individual employees and gives the representative significant power over
22 employees' terms and conditions of employment.) Thus, a union's duty of fair
23 representation is generally co-extensive with its authority to act as the exclusive

1 representative, and a union can only be held to represent employees unfairly in regard
2 to those matters where it is required to represent them at all. See generally, William
3 Freeman v. Local Union No. 135 Chauffeurs, Teamsters, Warehousemen and Helpers,
4 746 F. 2nd 1316 (7th Cir. 1984). The Union correctly notes that the statute governing
5 dismissal arbitrations permits teachers to demand arbitration on their own, see
6 generally, Groton-Dunstable Regional School Committee v. Groton-Dunstable
7 Educators Association, 87 Mass. App. Ct. 621 (2015), and the CBA is silent concerning
8 DESE arbitration. However, once a union assumes the responsibility to represent a
9 member, it must act in accordance with its duty of fair representation. Local 195,
10 Independent Public Employees Association and Robert McLaughlin, 8 MLC 1222,
11 MUPL-2327 (July 14, 1981); Amherst Police League and William Koski, 35 MLC 239,
12 253, MUPL-05-4521 (April 23, 2009).

13 Here, the evidence shows that the Union has represented teachers at statutory
14 dismissal arbitrations in the past and has a protocol in place for filing the demand for
15 DESE arbitration and supplying an attorney to assist the member. By voluntarily and
16 regularly representing unit members at DESE dismissal arbitrations, the BTU has
17 assumed the duty to represent its members in those proceedings, and represent them
18 fairly within the meaning of the Law. Although the cases in which a union has
19 undertaken to represent a member and thereby assumed a duty of fair representation
20 have arisen in cases involving a single bargaining unit member, the principle
21 nonetheless applies to the BTU's obligation to represent its teachers at DESE
22 arbitration. A contrary conclusion would lead to the absurd result that the BTU must
23 represent teachers in the preliminary steps of a disciplinary process, but not after a

1 dismissal, when the union's help is most essential. It would also ignore the myriad of
2 cases adjudicating a union's duty of fair representation in the context of an employee's
3 termination. See generally, Quincy City Employees Union, H.L.P.E. supra; United
4 Steelworkers of America, supra; Amherst Police League, supra; Boston Teachers
5 Union and Georgia Clark, 12 MLC 1577, MUPL-2699 (January 31, 1986); Local 137,
6 AFSCME Council 93 and Charles W. Bigelow, 22 MLC 1329, SUPL-2553 (December
7 29, 1995); Framingham School Committee and Michael D'Amato and Framingham Bus
8 Drivers Association, 2 MLC 1292, MUP-704 and MUPL-66 (January 9, 1976). Thus, the
9 BTU had a duty to represent O'Keeffe in connection with her DESE dismissal
10 arbitration.⁴³

11 However, even if the BTU has no duty to represent unit members at DESE
12 arbitrations generally, I find that it owed O'Keeffe a duty of fair representation in that
13 forum because Connolly agreed to arbitrate O'Keeffe's termination and Duddy helped
14 O'Keeffe challenge her dismissal. As previously noted, I have found that O'Keeffe
15 asked the Union to take her case to arbitration, and Connolly agreed that the Union
16 would do so. Additionally, O'Keeffe met with Duddy on October 20, 2014 to explain her
17 termination, and Duddy forwarded a letter to Glasgow the next day which challenged
18 O'Keeffe's "unlawful dismissal," noted the School Committee's failure to provide a
19 Notice of Intent to Dismiss, and demanded her reinstatement. By these actions, the
20 BTU assumed the responsibility to handle O'Keeffe dismissal in the statutory arena.

⁴³ However, a union that represents teachers in DESE proceedings continues to possess the discretionary authority to decline to pursue an individual case to arbitration for lawful reasons.

1 Once it specifically agreed to take her case to arbitration, the BTU was obligated
2 to act in conformity with the Law's requirements, and a union that files an untimely
3 demand for arbitration, as the BTU did here, breaches its duty to represent a unit
4 member by its gross negligence.⁴⁴ See Local 137, AFSCME Council 93 and Charles W.
5 Bigelow, 20 MLC 1271, SUPL-2553 (H.O. 1993), aff'd, 22 MLC 1329 (December
6 29, 1995); AFSCME Council 93 and Richard Allen Bettuchy, 32 MLC 85, 88, MUPL-02-
7 4331 (October 14, 2005) (union's unexplained failure to timely file for arbitration violates
8 the union's duty of fair representation). For despite their familiarity with the short
9 statutory arbitration filing window, neither Connolly nor Duddy told O'Keeffe that she
10 needed to file for arbitration within 30 days of her termination date, and neither filed a
11 demand for her during that critical time. Aside from its argument that O'Keeffe did not
12 request arbitration until April of 2015, there was no witness testimony explaining the
13 delayed filing, and it is undisputed that the belated demand prevented the arbitrator
14 from assessing the merits of O'Keeffe's grievance.

15 Moreover, the late filing is not excused by the School Committee's failure to
16 follow the statutory protocol for teacher dismissals, and the Union cannot be heard to
17 argue that it did not know that she had been dismissed. Duddy's October 21 letter to
18 Glasgow contained the subject heading "Ann O'Keeffe's Dismissal," and, as noted,
19 challenged the School Committee's failure to follow the dismissal statutory procedures
20 and demanded that the BPS make O'Keeffe whole for her unlawful dismissal. Although
21 Duddy testified that she did not believe that O'Keeffe had been "dismissed" rather than

⁴⁴ My finding that O'Keeffe asked the Union to file for arbitration obviates the need to discuss the Union's argument that it cannot be required to act before a member asks for help.

1 terminated, both she and Connolly knew, prior to November 2, 2014, that O'Keeffe had
2 lost her job. Connolly asked Duddy to investigate the matter of O'Keeffe's "dismissal
3 termination/resignation," and at some point prior to November 12, authorized Duddy to
4 submit the matter to arbitration. Thus, the Union was clearly aware within the DESE
5 filing window of O'Keeffe's termination and the statutory deficiencies in how the School
6 Committee had separated her from employment. The fact that the Union eventually
7 filed for statutory, rather than contractual, arbitration also show its recognition of her
8 dismissal. A union is not shielded from liability solely because its officials are mistaken
9 about readily recognizable issues that arise during representation. United Steelworkers
10 of America, 74 Mass. App. Ct. at 664. The Union's untimely filing of the arbitration
11 demand in these circumstances constitutes gross negligence.

12 For similar reasons, I reject the Union's claim that it acted within its lawful
13 discretion to handle O'Keeffe's leave denial as a contractual rather than a statutory
14 matter. The Union argues that Connolly and Duddy believed that O'Keeffe's leave
15 extension denial was a contractual benefit denial rather than a statutory dismissal, thus,
16 it was reasonable for them handle the matter as a contract violation rather than a
17 discharge. The Union correctly notes that Duddy and Connolly considered BPS to have
18 violated O'Keeffe's contractual rights when they first met with her. As noted however,
19 Duddy's October 21 letter challenged the School Committee's failure to follow the
20 dismissal statutory procedures and demanded that the BPS make O'Keeffe whole for
21 her unlawful dismissal. That Duddy wrote the letter to illuminate the School
22 Committee's position is inconsequential since the Union knew, at that point, that the
23 School Committee had terminated O'Keeffe without giving her the statutory dismissal

1 procedures.⁴⁵ And although the Union initiated the process by filing a grievance under
2 the contract rather than arbitration under the statute, the Union ultimately filed for
3 arbitration under the statute, not the contract. No Union representative testified that
4 they considered both options, and specifically decided to choose the contractual
5 grievance process rather than statutory arbitration. Indeed, none of the Union
6 witnesses knew who made the decision to file for DESE arbitration, and no one
7 explained why the Union eventually demanded statutory rather than contractual
8 arbitration. Consequently, the evidence does not support the Union's argument that it
9 made a discretionary decision to choose the contractual grievance process over the
10 statutory arbitration process.⁴⁶

11 Finally, the Union's good faith and extensive, honest dealings with O'Keeffe do
12 not negate the untimely filing. The record shows that the BTU made significant efforts

⁴⁵ Moreover, Duddy's October 21 letter criticizing the School Committee's failure to comply with the statutory requirements undercuts the Union's argument that it was reasonable to handle the situation as a contractual matter. Duddy's letter showed that the School Committee's procedural omissions were a basis for overturning the dismissal. Stated another way, the procedural deficiencies in O'Keeffe's termination did not excuse the Union's decision to ignore the statute. Rather, as the arbitration decision explains, the School Committee's failure to give O'Keeffe the statutory notices and hearing gave O'Keeffe the best possible avenue for overturning the dismissal.

⁴⁶ The BTU also distinguishes this case from United Steelworkers of America and Mark Muniak, *supra*, arguing that it is factually and legally dissimilar because the BTU did not negotiate DESE dismissal proceedings into its CBA, and consequently had no duty to educate O'Keeffe about the interplay between contractual and statutory arbitration. However, there are notable parallels between this case and Muniak. O'Keeffe, like Mark Muniak, asked the union to challenge her termination and had multiple potential venues in which to do so. In both cases, the union allowed the filing deadline to lapse in a non-contractual forum and failed to file for contract arbitration. The grievants in both cases lost the opportunity to substantively challenge their terminations as a result. However, I do not address the legal consequences of these similarities, because the issue of the BTU's obligation to have filed a grievance under the CBA was not pleaded in the Complaint.

1 on O'Keeffe's behalf over a long period of time, and Duddy and Esposito were
2 extraordinarily patient with her. However, once the Union agreed to take O'Keeffe's
3 case to arbitration, the Law compelled the Union to file for arbitration in a timely manner.
4 Its failure to do so breached its duty of fair representation.

5 **The Merits of O'Keeffe's Grievance**

6 If an employee's grievance is so weak that her chances before a reasonable
7 arbitrator are minimal or hopeless, the employee is not entitled to material relief.
8 Pattison v. Labor Relations Commission, 30 Mass. App. Ct. at 17; AFSCME, Council
9 93, 22 MLC at 1332. Thus, the employee has the initial burden to show that her
10 grievance is not clearly frivolous. Id. If the employee sustains that burden, and the
11 CERB finds that a union has breached its duty of fair representation by failing to pursue
12 a termination grievance to arbitration, or filing the arbitration demand late, the CERB will
13 generally order the union to make the charging party whole for the compensation that
14 the charging party lost from the date of a termination until he or she is reinstated by the
15 employer or obtains substantially equivalent employment. United Steelworkers of
16 America, 31 MLC at 130.

17 However, a union may limit its liability by proving that the termination grievance
18 would have been lost for reasons not attributable to the union's misconduct. Id. at 130-
19 131. Unions may elect to present evidence on the merits of the grievance at the initial
20 unfair labor practice hearing or in a subsequent compliance hearing. In this case, the
21 BTU opted to present evidence on the merits of the grievance at the unfair labor
22 practice hearing. Thus, I must assess the merits of O'Keeffe's grievance to determine

1 whether the arbitrator would have found that the BPS terminated O'Keeffe in violation of
2 M.G.L. c.71, s. 42⁴⁷ if he had reached the merits of the grievance.⁴⁸

3 O'Keeffe argues that she would have prevailed if the Union had provided fair
4 representation because the School Committee's communications gave her an
5 "indeterminable" time frame for submitting medical documentation, and more
6 importantly, it failed to give her a notice of intent to dismiss. Conversely, the Union
7 contends that O'Keeffe's grievance lacked merit and would not have succeeded at
8 arbitration. It argues that she failed to meet the BPS's medical leave extension
9 requirements because she requested the extension for an unacceptable reason, and
10 failed to provide the necessary paperwork in a timely manner. I am not persuaded by
11 the Union's arguments, and find that O'Keeffe's grievance would have succeeded at
12 arbitration.

13 First, it is undisputed that the BPS did not follow the statutory dismissal
14 requirements of c.71, s. 42. It did not give her written notice of its intent to dismiss her,
15 an explanation of the grounds for the dismissal, documents relating to the grounds for
16 dismissal, and an opportunity to review the dismissal with the school principal or
17 superintendent and present information. Because the arbitrator based his award on
18 O'Keeffe's failure to comply with the statutory 30-day arbitration filing deadline, he
19 would not have ignored the School Committee's failure to comply with the statute's

⁴⁷ The BPS and the Union stipulated to the following issues at the start of the arbitration:
1) Is this matter procedurally arbitrable? and 2) If so, was Ann O'Keeffe's termination in
violation of Massachusetts General Laws Chapter 71, Section 42? If so, what shall be
the remedy?

1 procedural requirements. In short, the School Committee's failure to comply with the
2 statutory requirements would have been as fatal to the substantive merits of its case, as
3 O'Keeffe's failure to comply with the procedural requirements was to hers.

4 Second, the BPS did not communicate a clear and consistent deadline by which
5 O'Keeffe had to submit medical documentation to support her leave of absence.
6 Although O'Keeffe signed a notice on April 3, 2014, that included language indicating
7 that an employee needed to submit medical documentation to support a leave extension
8 simultaneously with the extension request, the School Committee's subsequent
9 communications gave O'Keeffe conflicting and confusing messages regarding that
10 requirement. On August 29, 2014, she received an emailed response to her leave
11 request stating that she needed to provide documentation "immediately," but the email
12 did not specify a date. Cassiani-Knox later advised O'Keeffe that the leave of absence
13 extension request couldn't be approved without medical documentation, but did not
14 specify a date by which O'Keeffe had to submit it. On September 10, 2014, the BPS
15 mailed O'Keeffe a letter stating that she needed to "contact" Cassiani-Knox by
16 September 24, 2014, but the letter said nothing about submitting medical
17 documentation. Indeed, the fact that the BPS uses this so-called "10 day letter" to give
18 employees an extra 10 days to submit documentation shows that employees need not
19 submit documentation on the day that they request an extension, and the absence of
20 any reference to a documentation deadline implies that no real deadline actually

⁴⁸ Because I find that O'Keeffe's grievance was meritorious, she has met her burden to show that it was not clearly frivolous.

1 exists.⁴⁹ Further, Connolly and Duddy confirmed that there is no rule or time frame
2 dictating when documentation must be provided, and Esposito noted that the
3 requirement to submit documentation “immediately” had not been clearly communicated
4 prior to O’Keeffe’s extension request. Although O’Keeffe may have avoided her
5 termination by submitting her medical documentation in closer proximity to her leave
6 extension request, she did not fail to submit her documentation by any clearly
7 established deadline.

8 The Union stresses that O’Keeffe was absent without an approved leave after
9 September 2, 2014. However, the BPS had advised her twice that her leave request
10 was pending, and her October 10, 2014 pay advice noted that she was on a long-term
11 leave. She never received the School Committee’s September 10 letter, which would
12 have prompted her to contact Cassiani-Knox by September 24, 2014, explain the
13 situation, and presumably, learn of any actual deadlines.⁵⁰

14 Finally, the School Committee made its decision to dismiss a long term teacher -
15 who was requesting to extend a previously approved medical leave of absence – as a
16 purely administrative matter without any kind of investigation. No one advised O’Keeffe
17 of her termination until O’Keeffe contacted Pullen on October 2, 2014. Wilson was
18 unaware of O’Keeffe’s termination until he asked Pullen, over two weeks later, why
19 O’Keeffe was denied leave and terminated. Further, no one from the BPS determined

⁴⁹ The fact that O’Keeffe did not receive the September 30 letter is inconsequential since the BPS sent the letter to give her additional time to submit her medical documentation.

⁵⁰ I am not persuaded by the BTU’s argument that O’Keeffe failed to supply the requisite FLMA paperwork, because the record does not clearly establish what FLMA paperwork she was required to produce.

1 that her September 30 documentation was deficient in any way. In these circumstances,
2 O'Keeffe's failure to report to work between her August 29, 2014 extension request, and
3 her September 30 documentation submission does not constitute just cause to dismiss
4 her from employment.⁵¹ Although a less severe sanction may have been warranted,
5 there is also no evidence that the School Committee attempted to apply progressive
6 discipline, and her inaction did not warrant a dismissal.⁵²

7 I am also not persuaded that the arbitrator would have denied O'Keeffe's
8 grievance if he had known that O'Keeffe was seeking a leave of absence to prepare for
9 her divorce. The BPS does not allow employees to use sick leave to prepare for divorce
10 proceedings, and O'Keeffe admittedly sought a leave for that purpose. However, the
11 record establishes that O'Keeffe and her doctor believed that she was sick at the time
12 that she requested her leave, and Dr. Gowda's letter documented that belief. Dr.
13 Gowda's letter stated that O'Keeffe was anxious, had insomnia, was unable to work
14 because she was under a lot of stress, and would be following up with a therapist and
15 psychiatrist.⁵³ O'Keeffe testified that she was under stress in the spring of 2014 due to
16 the "retaliatory" evaluation that she had received, and that preparing for her divorce was

⁵¹ Because there is no evidence that the School Committee considered whether the note that O'Keeffe submitted on September 30 was sufficient to extend her leave of absence, I need not address that question.

⁵² The Union does not argue that O'Keeffe's failure to report to work in September of 2014 constituted inefficiency, incompetency, incapacity, conduct unbecoming a teacher, insubordination or failure to satisfy the performance standards developed pursuant to G. L. c.71, s. 38. Although it argues that O'Keeffe's indifference to the BPS's directive to produce medical documentation "immediately" is borderline insubordinate behavior, it did not argue that it would have merited a dismissal under the statute.

1 disabling. Since the record contains credible evidence that O’Keeffe was ill at the time
2 that she requested her leave, and the BTU did not produce any contrary evidence, I find
3 that the arbitrator would not have denied her grievance because she intended to use the
4 leave to prepare for her divorce proceedings.

5 CONCLUSION

6 Based on the record and for the reasons explained above, I conclude that: 1) the
7 BTU breached its duty of fair representation in violation of Section 10(b)(1) of the Law;
8 and 2) the arbitrator would have overturned O’Keeffe’s discharge if her demand for
9 arbitration had been timely filed.

10 REMEDY

11 Section 11 of the Law authorizes the CERB to issue orders “requiring the
12 charged party to cease and desist from such prohibited practice and take such further
13 affirmative action as will comply with the provision of this section.” This language gives
14 the CERB broad discretion in fashioning remedies that are designed to effectuate the
15 purposes of the Law and vitiate the effects of a violation. Boston Police Patrolmen’s
16 Association, Inc., 8 MLC 1993, 2002, MUPL-2049, MUPL-2050 (February 2, 1982 and
17 March 23, 1982); Secretary of Administration and Finance v. Labor Relations
18 Commission, 434 Mass. 340 (2001). The CERB traditionally orders unions that breach
19 the duty of fair representation to take all steps necessary to make the charging party
20 whole for all economic losses caused by the union’s conduct. United Steelworkers of
21 America, 31 MLC at 130. Because O’Keeffe would have prevailed at arbitration, the

⁵³ Although Esposito was not called as an expert witness, he testified that the doctor’s statement that O’Keeffe was anxious, had insomnia, and unable to work because of stress was a valid reason to get an extension. No contrary evidence was introduced.

1 BTU is liable for what she would have received if the BTU had fulfilled its duty to
2 represent her. Leahy v. Local 1526, American Federation of State, County, and
3 Municipal Employees, 399 Mass. 341, 353-354 (1987). In this case, that liability
4 consists of the wages and contractual benefits that O'Keeffe lost from the date of her
5 termination until the expiration of the medical leave that she had been seeking.⁵⁴

6 In AFSCME, Council 93 and Justin B. Chase, 38 MLC 280, MUPL-07-4581 (May
7 18, 2012) aff'd sub nom. Justin B. Chase v. Commonwealth Employment Relations
8 Board & another, 88 Mass. App. Ct. 1103 (August 28, 2015)(Rule 1.28 decision), the
9 CERB held that the charging party's union had violated its duty of fair representation by
10 failing to grieve the timing of his layoff, and it ordered the union to make him whole by
11 paying him the wages and contractual benefits that he lost from date of his termination
12 (November 30, 2006) until the employer's compliance with contractual meeting and
13 notice requirements (January 3, 2007). The CERB subsequently issued a clarification of
14 its remedy, explaining that since the charging party's layoff would not have been
15 avoided, he was not entitled to a remedy premised on reinstatement and full back pay.
16 See Ruling on Motion for Clarification of CERB's Order, (unpublished), MUPL-07-4581
17 (March 31, 2016), aff'd sub nom. Justin B. Chase v. Commonwealth Employment
18 Relations Board & another, 92 Mass. App. Ct. 1105 (September 25, 2017) (Rule 1.28
19 decision).⁵⁵ Here as in Chase, O'Keeffe was not entitled to a remedy that presumed
20 continuing employment.

⁵⁴ The record indicates that O'Keeffe's accrued sick leave would have carried her through the expiration of her leave.

⁵⁵ In so finding, I reject the Union's argument that its liability should end at December of 2014, when the BPS offered to reinstate O'Keeffe. The Union cited no precedential

1 If O’Keeffe had prevailed at the arbitration, the arbitrator would have reinstated
2 her to employment as of September 25, 2014. It is not certain whether O’Keeffe would
3 have been placed on the extended medical leave that she had requested or whether the
4 School Committee could then have assessed her medical documentation from Dr.
5 Gowda to determine whether the letter properly supported her leave extension request.
6 Because uncertainty concerning the amount of make-whole relief is appropriately
7 resolved in favor of the injured party, see In Re Webco Industries Inc., 340 NLRB 10, 11
8 (2003) (citing Kansas Refined Helium Co., 252 NLRB 1156, 1157 (1980)), en’d sub
9 nom. Angle v. NLRB, 683 F. 2d 1296 (10th Cir. 1982); Bigelow v. RKO Radio Pictures,
10 327 U.S. 251, 256 (1946), I find that O’Keeffe is entitled to a remedy that presumes her
11 receipt of an extended leave until March 16, 2015. However, O’Keeffe was not entitled
12 to return to her position at the expiration of her leave unless she received the medical
13 clearance that BPS requires employees to secure prior to returning from a long-term
14 medical leave of absence. This medical clearance requirement bars a full make whole
15 remedy to O’Keeffe, just as the inevitability of his layoff limited the remedy to Justin
16 Chase.

17 The evidence in the record clearly shows that O’Keeffe would not have returned
18 to work at the expiration of her leave, and thus she is only entitled to a limited make
19 whole remedy.⁵⁶ O’Keeffe’s doctor documented that she was “unable to work because

authority holding that an offer of reinstatement, coupled with a limited back pay award, and an unpaid suspension, tolls its liability.

⁵⁶ The fact that the arbitrator did not hear evidence of the BPS medical clearance procedures does not limit my consideration of this evidence. Fair representation case remedies are crafted to ensure that charging parties are not placed in a better position than they would have been absent the union’s breach of its duty. Berkley Employees Association and Gary Joseph, 19 MLC 1647, 1650, n. 4, MUPL-3724 (January 28,

1 she is under a lot of stress,” and noted that that O’Keeffe was a single mother who was
2 going through a divorce. O’Keeffe needed the extended leave to prepare for the divorce
3 proceedings and characterized her divorce preparation as “disabling.” The stipulated
4 facts show that O’Keeffe’s divorce proceedings continued past the end date for her
5 leave of absence, thus, the debilitating stress that she was suffering because of the
6 divorce would have continued, leaving her unable to obtain the requisite clearance to
7 return to work before March 16, 2015.⁵⁷

8 Additionally, even if O’Keeffe retained someone else to help her prepare for
9 divorce, the stress that necessitated her leave would have continued to prevent her
10 from working because the workplace itself was a source of her stress. O’Keeffe stated
11 in her September 2014 AAA arbitration application that she was suffering from “horrid
12 stress” due to her belief that BPS evaluated her instruction with “retaliatory intent” and
13 from hearing her school principal express an “overt threat of termination.”⁵⁸ In sum,
14 because the record evidence shows that O’Keeffe could not have returned to the
15 workplace at the conclusion of her leave, I limit the Union’s liability to any wages and

1993). Thus, the CERB permits unions to limit their liability by introducing evidence on the weaknesses of a grievance that they would not have presented at an arbitration.

⁵⁷ O’Keeffe initially testified that she could return to work on May 2, 2015, when her divorce proceedings had concluded, however, the parties later stipulated that her divorce proceedings did not actually begin until December of 2015. Consequently, she could not have returned to work in March of 2015. Any argument or consideration of an additional extension would be pure conjecture.

⁵⁸ The fact that O’Keeffe traveled to Ireland in April of 2015 does not establish that she would have been medically cleared to return to work since the source of her stress remained in place after her return. Additionally, O’Keeffe did not argue at the arbitration that she was no longer ill and could return to work at that point, and there is no evidence that she made such an assertion in her post-arbitration brief.

benefits that O'Keeffe lost from the date of her termination until the expiration of the extended medical leave that she had been seeking.

Order

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

1. Cease and desist from:

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

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

- a) Make 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. The BTU's obligation to pay O'Keeffe includes the obligation to pay interest on all back pay due at the rate specified in M.G.L. c. 231, Section 6I, compounded quarterly; and
- b) Immediately post signed copies of the attached Notice to Employees in conspicuous places where notices to bargaining unit employees are customarily posted, including electronic postings, if the BTU customarily communicates to members via intranet or email. The Notice to Employees shall be signed by a responsible BTU officer and shall be maintained for at least thirty consecutive days thereafter. Reasonable steps shall be taken by the BTU to ensure that the Notices are not altered, defaced, or covered by any other material. If the BTU is unable to post copies of the Notice in all places where notices to bargaining unit employees are customarily posted, the BTU shall immediately notify the Executive Secretary of the DLR in writing, so that the DLR can ask the BPS to permit the posting.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



SUSAN L. ATWATER, 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 CERB by filing a Notice of Appeal with the Executive Secretary of 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 the 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 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.