

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

In the Matter of

JOHN F. MURPHY

and

OFFICE AND PROFESSIONAL EMPLOYEES  
INTERNATIONAL UNION, LOCAL 6

Case No. SUPL-14-3628

Date Issued: August 29, 2024

Board Members Participating:

Marjorie F. Wittner, Chair  
Kelly B. Strong, CERB Member  
Victoria B. Caldwell, CERB Member

Appearances:

Luke Rosseel, Esq. - Representing John F. Murphy<sup>1</sup>

Michael A. Feinberg, Esq. - Representing OPEIU, Local 6

**CERB DECISION ON APPEAL OF HEARING OFFICER'S COMPLIANCE DECISION**

SUMMARY

Office and Professional Employees International Union, Local 6 (Union or OPEIU, Local 6) appeals from a Department of Labor Relations (DLR) Hearing Officer Amended Compliance Decision issued on June 30, 2023, for enforcement of an order that the Commonwealth Employment Relations Board (CERB) issued on March 21, 2018, in

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<sup>1</sup> On September 1, 2021, John F. Murphy (the Charging Party) died. On November 24, 2021, the Worcester Probate and Family Court issued an order appointing Colin B. Murphy as the personal representative for Murphy's estate.

1 connection with the above-captioned unfair labor practice proceeding (Order).<sup>2</sup> The issue  
2 before the Hearing Officer was whether the Union had complied with the make-whole  
3 remedy that the CERB ordered. The focus of the hearing was the amount of back pay  
4 that the Union owed to its former bargaining unit member and former employee of the  
5 Massachusetts Trial Court (Trial Court or Employer) John F. Murphy (Murphy) to  
6 compensate him for the losses he suffered as a direct result of the Union's breach of duty  
7 of fair representation to him. After eight days of hearing, the Hearing Officer issued a  
8 decision determining that the Union had failed to comply with the make-whole portion of  
9 the Order and ordering the Union to pay:

- 10 a) \$703,805.62 in net back pay for the period beginning on May 14, 2013, and  
11 ending on October 6, 2019, including all interest on that net back pay owed to  
12 Murphy at the rate specified in G.L. c. 231, s.6I compounded quarterly in the  
13 manner specified in Office and Professional Employees International Union,  
14 Local 6 (OPEIU), 44 MLC 196, 201 (2018).

15  
16 For the reasons set forth below, the CERB affirms that decision.

17 Relevant Factual and Procedural Background<sup>3</sup>

18 We adopt the facts set forth in the Hearing Officer's decision pursuant to 456 CMR  
19 13.19(3)(b), and summarize only those facts necessary to our decision, reserving some  
20 details for further discussion in the Opinion section.

21 Until the Trial Court terminated him on May 14, 2013, Murphy was a Family Law  
22 Facilitator for the Trial Court and a member of OPEIU, Local 6. In general, Family Law

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<sup>2</sup> The CERB's March 21, 2018, Order was affirmed by the Massachusetts Court of Appeals on December 27, 2019.

<sup>3</sup> These facts are based on the parties' stipulations and the Hearing Officer's findings of fact, which were in part based on the findings she had made in the underlying decision. Although, as discussed below, both parties dispute the conclusions that the Hearing Officer drew from these stipulations and findings, the underlying facts are not in material dispute.

1 Facilitators provide assistance to pro se indigent and financially disadvantaged  
2 individuals to access the Probate and Family Court and to inform them of court  
3 procedures and the rules and statutes concerning child support, spousal support,  
4 maintenance of health insurance, domestic violence, child custody and visitation and  
5 guardianship and child welfare matters. The Family Law Facilitator also determines which  
6 forms to fill out and which types of hearings to request.

7 On May 14, 2013, Murphy was terminated from his position as a Family Law  
8 Facilitator for the reasons set out in the DLR's and CERB's earlier decisions concerning  
9 these parties.<sup>4</sup>

10 At some point in June 2014, the Trial Court hired Paul Mullan (Mullan) to replace  
11 Murphy as Family Law Facilitator. Mullan continued in that position until May 2016, when  
12 the Register of Probate, Stephanie Fattman (Fattman) removed the Family Law Facilitator  
13 job title and Mullan's name from the Probate and Family Court's organization chart.<sup>5</sup>  
14 Mullan then applied for a vacant Staff Attorney position at the Court Service Center in  
15 Worcester, and the Trial Court selected him for that position. Since that time, the Family  
16 Law Facilitator position at the Worcester Probate and Family Court has remained vacant

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<sup>4</sup> The Hearing Officer's original decision is reported at 44 MLC 39 (August 25, 2017). The CERB's decision on appeal is reported at 44 MLC 196 (March 21, 2018). The Appeals Court decision affirming the CERB is reported at 96 Mass. App. Ct. 764 (2019). The compliance decision is reported at 49 MLC 326 (June 28, 2023). On June 30, 2023, the Hearing Officer issued an amended decision along with an errata sheet that corrected four non-material typographical errors.

<sup>5</sup> Mullan's duties in both positions included assisting pro se litigants. As Family Law Facilitator however, his assistance was limited to litigants at the Worcester Probate and Family Court – his duties as a Staff Attorney were broader.

1 and, as of June 2017, unfunded, but not, as discussed in the Opinion section below,  
2 officially eliminated.

3 After his termination, Murphy filed a grievance over that termination. The Trial  
4 Court denied the grievance, and, as discussed in the original decisions, the Union missed  
5 a deadline for filing for arbitration thus causing Murphy to miss the opportunity to have  
6 his grievance heard on the merits.

7 On April 9, 2014, Murphy filed a Charge of Prohibited Practice with the DLR  
8 alleging the Union breached its duty of fair representation towards him by not processing  
9 his grievance to arbitration. The charge proceeded to complaint and then hearing. On  
10 June 16, 2023 after five days of hearing, a DLR Hearing Officer issued a decision  
11 concluding that the Union had violated Section 10(b)(1) of Chapter 150E (the Law) as  
12 alleged. The Hearing Officer issued an order that, in part, ordered the Union to make  
13 Murphy whole for the loss of compensation he suffered as a direct result of his termination  
14 from the Trial Court effective on May 13, 2013. The Union requested review of the Hearing  
15 Officer's decision by the CERB, which affirmed the Hearing Officer's decision. The Union  
16 then appealed the CERB's decision to the Massachusetts Appeals Court and the Appeals  
17 Court affirmed the CERB's decision and order on December 27, 2019.

18 In the meantime, on October 4, 2019, Murphy and the Trial Court entered into a  
19 settlement agreement, in which the Trial Court agreed to reemploy him as a Staff Attorney  
20 at the Worcester Service Center, the same position that Mullan held.<sup>6</sup> Among other

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<sup>6</sup> The settlement agreement with the Trial Court did not include back pay. Mullan remained in the Staff Attorney position until December 2019, when he was promoted to Manager of the Worcester Superior Court.

1 things, the settlement agreement indicated that the Family Law Facilitator position was  
2 no longer located within the Worcester County Probate and Family Court.

3 During Murphy's termination period, from May 14, 2013 to October 6, 2019, he  
4 reported earning \$112,008.00 in employment income (\$62,608 in wages, salaries, tips,  
5 and \$49,400 in business income). During that time, Murphy searched for work on Lawyers  
6 Weekly and Indeed.com on a monthly basis. Most of his job inquiries were made directly  
7 to friends and colleagues, some of whom were lawyers. In all, the record contains  
8 evidence that Murphy contacted about 19 people via email, or in person, related to his  
9 job search.

10 The record also shows that during the termination period, Murphy engaged in  
11 some limited self-employment and assisted the attorneys who were handling his litigation  
12 against the Union and the Trial Court. He conceded that he did not look for a job early in  
13 his termination because he was confident that he was going to win at arbitration and be  
14 returned to work. After he learned that the Union had not filed for arbitration in a timely  
15 manner, he began to search for work in the manner set forth above.

16 On March 6, 2020, the parties submitted a joint request to the DLR to conduct a  
17 back pay compliance hearing concerning the amount of money the Union owed to  
18 Murphy. There were eight days of hearing and testimony on a variety of matters from a  
19 number of experts.

20 After eight days of hearing, the Hearing Officer found, as a threshold matter, that  
21 Murphy's claims had survived his death.<sup>7</sup> Because there was no dispute that the Union

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<sup>7</sup> The Union had made an argument that Murphy's claims did not survive his death pursuant to the Massachusetts survival statute, M.G.L. c. 228, § 1. After reviewing

1 had failed to comply with the CERB's make whole order by not paying Murphy any back  
2 pay or interest, the Hearing Officer proceeded to calculate the amount of back pay owed,  
3 addressing issues such as the back pay period and the components of the award. This  
4 calculation included an in-depth analysis and evaluation of the potential components of  
5 the award, including, among other things, lost regular compensation, lost Deputy  
6 Assistant Register (DAR) stipends,<sup>8</sup> lost health insurance contributions, lost vacation  
7 time, lost sick time, lost retirement benefits, and statutory interest. The Hearing Officer  
8 further found that the back pay award should not include any monetary compensation  
9 related to lost vacation benefits but should include the restoration of 150 hours (20 days)  
10 of vacation credits that he would have accrued between May 15, 2013, and October 6,  
11 2019.<sup>9</sup>

12 Throughout the proceedings and in its post-hearing brief, the Union attempted to  
13 minimize its liability by arguing that the back pay period should have ended in 2016, not

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applicable case law, the Hearing Officer concluded that Murphy's claim survived his death, and that the Union remains obligated to his personal representative in compliance with the CERB's order *nunc pro tunc* for breaching its duty of fair representation. Noyes v. Bankers Indem. Ins. Co., 307 Mass 567, 569 (1941). The Union did not appeal from this portion of the decision.

<sup>8</sup> The Deputy Assistant Register (DAR) "position" is a designation that provides the employee with an additional stipend in an amount equal to 15 per cent of the annual salary of the Worcester County register of probate. M.G.L., c. 217, §29F.

<sup>9</sup> The Hearing Officer cited Plymouth County House of Correction, 6 MLC 1523,1529-1530, MUP-2234, 2429 (October 24, 1979), as well as the testimony of Linda Rowe (Rowe), an employee in the Trial Court's Human Resources Department, when making this determination. Rowe testified that when calculating back pay, she does not include the employees' accrued vacation time as a monetary value in her calculation but simply "give[s] them the hours back."

2019; that Murphy had failed to mitigate his damages by searching for work;<sup>10</sup> and that the Hearing Officer should apportion back pay between the Trial Court and itself. The Hearing Officer rejected those arguments, finding that the back pay period should end with Murphy's reinstatement as a Staff Attorney in 2019; that the Union failed to meet its burden of demonstrating that Murphy had not mitigated his damages; and that the back pay award was properly directed to the Union only.

The Union filed a timely appeal of the decision to the CERB that challenge these three issues.<sup>11</sup> We affirm.

### Opinion<sup>12</sup>

#### Back Pay Period

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<sup>10</sup> The Union relied on the testimony of its expert witness, Nancy Segreve (Segreve), a vocational consultant, who has also testified as an expert witness in cases involving Social Security and the State Department of Industrial Accidents, but until the hearing, never in a DLR proceeding. Segreve testified mainly about an Employability Assessment report that she created in 2020, in which she evaluated Murphy's employability and the availability of positions in the Worcester area during the relevant time period for positions in family service and legal services. Segreve concluded that Murphy had failed to apply for several similar positions for which he was qualified and that, had he done so, it would have taken him three to six months to find employment given his education, legal experience and prior employment as a Family Law Facilitator. Murphy countered this testimony with several witnesses who were hiring attorneys at Worcester area law firms. As a whole, these attorneys testified that based on Murphy's termination from the Trial Court, his lack of a book of clients, his having almost no experience representing clients in court, or private law firm experience, it was unlikely that he would have been hired as a family law attorney or for a legal aid type of agency.

<sup>11</sup> Other than seeking clarification of whether vacation credits should be included in the final award, an issue that we address in the final section of this decision, the Union does not challenge the back pay calculations, including the calculations on sick leave or retirement contributions.

<sup>12</sup> The CERB's jurisdiction is not contested.

1           Where, as here, the CERB finds that a union has violated its duty of fair  
2 representation by failing to process a grievance to arbitration, it orders the union to make  
3 the affected employee whole for the economic losses suffered as a result of the union's  
4 unlawful behavior, including awarding back pay. Quincy City Employees Union, H.L.P.E.,  
5 15 MLC 1340, 1375, MUPL-2883, MUP-6037 (January 24, 1989), aff'd sub nom. Nina  
6 Pattison v. Labor Relations Commission (Pattison), 30 Mass. App. Ct. 9 (1991), further  
7 rev. den'd. 409 Mass. 1104 (1991). In cases where an employee has been separated  
8 from their job, the back pay period runs from the date of the separation to either the date  
9 that the employee is unconditionally offered reinstatement to the former position or the  
10 date that the employee is offered reemployment to a substantially equivalent position.  
11 Boston School Committee, 29 MLC 143, 150, MUP-967 (February 27, 2003) (additional  
12 citations omitted).

13           Here, the Hearing Officer found that the back pay period began on May 14, 2013,  
14 when the Trial Court terminated Murphy's employment as Family Law Facilitator, and  
15 ended on October 7, 2019, when the Trial Court reemployed Murphy as a staff attorney  
16 in the Court Service Center in Worcester.

17           During the hearing, the Union argued that back pay should end in May 2016, when,  
18 according to the Union, the Trial Court eliminated the Family Law Facilitator positions.  
19 Referencing the fact that the Trial Court hired Mullan to fill another position within the Trial  
20 Court in 2016, the Union compared what it characterized as Mullan's "exemplary  
21 employment record" to Murphy's "contentious relationship" with the Trial Court.<sup>13</sup> Based

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<sup>13</sup> The Union also stated that Murphy had been a "patronage" hire.



1 on this comparison, the Union contended that “it is not an understatement to suggest that  
2 it is uncertain that the Charging Party would have been successful through the intense  
3 application process [for another Trial Court position] after the elimination of the Family  
4 Law Facilitator position in May 2016 had he still been employed.”

5 After carefully assessing the relevant evidence and testimony, the Hearing Officer  
6 disagreed, finding that there was no evidence that anyone at the Trial Court ever had  
7 officially eliminated the Family Law Facilitator position but rather, that the Family Law  
8 Facilitator position had been kept in a vacant and unfunded status at the Worcester  
9 Probate and Family Court since July of 2016. She further found nothing in the record to  
10 support the Union’s contention that had the Trial Court not terminated Murphy in 2013, it  
11 would have left his position unfilled in 2016 and unfunded in 2017.<sup>14</sup>

12 On appeal, the Union, reiterates most of the arguments that it made to the Hearing  
13 Officer regarding the appropriate back pay end date and claims that the Hearing Officer  
14 erred when she found that Murphy’s position had not been eliminated as of May 2016.  
15 We disagree.

16 In a lengthy and detailed footnote in her decision, the Hearing Officer carefully  
17 considered the Union’s arguments, and after making several well-explained credibility  
18 resolutions, concluded, based on the totality of that evidence, that the Trial Court did not  
19 completely eliminate the Family Law Facilitator position in 2016, but kept it unfilled. As  
20 such, she determined that the applicable back pay period ended on 2019, when Murphy  
21 was offered reemployment as a Staff Attorney.

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<sup>14</sup> The Hearing Officer did not address the Union’s argument that, the Trial Court would not have reemployed Murphy as a Staff Attorney in 2016 had he still been employed.

1           It is well-established that the CERB will not disturb a Hearing Officer's credibility  
2 determinations absent a clear preponderance of all relevant evidence that the resolutions  
3 are incorrect. City of Somerville, 23 MLC 11, 12 n.8, MUP-8450 (June 6, 1996). Because  
4 the Union does not challenge the specific credibility findings that the Hearing Officer  
5 made, but merely reiterates the arguments it made to the Hearing Officer, which she  
6 rejected, we find no basis to overturn her finding that the Trial Court eliminated the Family  
7 Law Facilitator position and her resulting determination that back pay liability ends in  
8 2019, not 2016.

9           Further, when assessing damages, it is well-established that uncertainty  
10 concerning the amount of make-whole relief is appropriately resolved in favor of the  
11 injured party. Boston Teachers Union, Local 66, AFT/AFL-CIO, 45 MLC 92, 95, MUPL-  
12 16-5167 (December 28, 2018) (citing Webco Industries, Inc., 340 NLRB 10, 11 (2003)).  
13 Thus, even assuming that Fattman would have removed the Family Law Facilitator  
14 position from the Worcester Probate and Family Court's organization chart in 2016 if  
15 Murphy had still been employed in the position, and further assuming that this would have  
16 caused Murphy to lose his job, the Union's argument that the Trial Court would not have  
17 then hired Murphy in a different position is, as the Union concedes, "very uncertain." We  
18 resolve that uncertainty in Murphy's favor and affirm that the back pay period ended with  
19 Murphy's reinstatement in 2019. See Id.

#### 20 Mitigation of Damages

21           The CERB has long held that a public employee who is wrongfully discharged has  
22 a duty to mitigate damages by "dispos[ing] of his time in a reasonable way, so as to obtain  
23 as large compensation as possible, and to use honest, earnest and intelligent efforts to

1 this end.” Boston Police Department v. Jones, 98 Mass. App. Ct. 762 , 771 (2020)  
2 (quoting Sheriff of Suffolk County. v. Jail Officers & Employees. of Suffolk County, 465  
3 Mass. 584, 589 (2013); Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 6 (1908)).

4 In back pay matters, the party responsible for paying back pay, here the union,  
5 bears the burden of proving that the employee failed to mitigate his damages. Sheriff of  
6 Suffolk County, 465 Mass. at 592; Dickson v. Riverside Iron Works, Inc., 6 Mass. App.  
7 Ct. 53, 57 (1978). In order to meet this burden, the responsible party must show: (a) one  
8 or more discoverable opportunities for comparable employment were available in a  
9 location as convenient as, or more convenient than, the place of former employment; (b)  
10 the improperly discharged employee unreasonably made no attempt to apply for any such  
11 job; and (c) it was reasonably likely that the former employee would obtain one of those  
12 comparable jobs. Sheriff of Suffolk County at 592 (citing Black v. School Committee of  
13 Malden, 369 Mass. 657, 661-662 (1976)).

14 Under Massachusetts law, “for the work to be comparable or substantially similar,  
15 the new position must afford a plaintiff virtually identical promotional opportunities,  
16 compensation, job responsibilities, working conditions, and status as the former position.”  
17 Furthermore, discharged employees are not required to accept employment “. . . in  
18 another line of work . . . a demotion, or take a demeaning position.” Sheriff of Suffolk  
19 County, 465 Mass. at 593.

20 During the hearing and in its post-hearing brief, the Union argued, based on  
21 Segreve’s testimony, that Murphy’s job search was inadequate under these standards,  
22 and thus, he had not mitigated his damages. The Union also contended that the burden  
23 of proving mitigation is appropriately placed on Murphy, not itself.

1       The Hearing Officer rejected those arguments for a variety of reasons, including  
2 her disagreement with Segreve's assessment of what constituted "comparable  
3 employment" and whether Murphy would have been hired for the positions that Segreve  
4 testified about, even if he had applied. As to the latter point, the Hearing Officer held that  
5 it was not reasonably likely Murphy would have obtained most of the positions for three  
6 main reasons: 1) the Trial Court had fired him for cause; 2) he was actively pursuing  
7 reinstatement with the Trial Court; and as to positions requiring litigation, 3) he had no  
8 experience practicing as a Family Law attorney or a book of business.

9       The Union challenges these conclusions on appeal, arguing that the Hearing  
10 Officer did not give sufficient weight to Segreve's testimony or expertise. The Union again  
11 asks the CERB to adopt a standard that shifts the burden of proof back to the employee  
12 in situations "where an employee has remained completely idle following [their]  
13 discharge." Quint v. A.E. Staley Mfg. Co., 172 F.3d 1, 16 (1st Cir. 1999). However, as  
14 stated in Boston Police Department, "the Supreme Judicial Court [has] expressly declined  
15 to adopt [the standard set forth in Quint]" but has instead agreed with "the Sixth Circuit  
16 that 'basic principles of equity and fairness mandate that the burden of proof must remain  
17 with the employer because the employer's illegal discharge of the employee precipitated  
18 the search for another job.'" Boston Police Department, 98 Mass. App. Ct. at 773 (citing  
19 Sheriff of Suffolk County, *supra*, and quoting NLRB v. Westin Hotel, 758 F. 2d 1126,  
20 1130 (6th Cir. 1985)). Based on the Boston Police Department decision and the cases  
21 cited therein, we conclude that the Hearing Officer correctly placed the burden of proving  
22 a failure of mitigation on the Union. We decline to apply a different standard to the Union  
23 where, having found that the Union breached its duty of fair representation by not making

1 a timely demand for arbitration over a grievance that the Union had failed to prove clearly  
2 lacked merit<sup>15</sup> the CERB ordered the Union to make Murphy whole for the losses he  
3 suffered as a direct result of his termination, i.e., the damages Murphy would have  
4 received had the Union not breached its duty to him. Under these circumstances, where  
5 the Union thwarted the arbitral process, it is appropriately held to the same burden of  
6 proof as employers subject to similar make-whole awards. cf. Nina Pattison v. Labor  
7 Relations Commission, 30 MLC at 12 (adjusting burdens of proof as to right to a material  
8 remedy in “light of the union’s delinquency, which aborted the arbitral process”).

9 In any event, Murphy’s behavior stands in sharp contrast to the employees in the  
10 decisions cited by the Union. In Black v. School Committee of Malden, 369 Mass. 657  
11 (1976), the employee rejected a compromise that the MCAD had proposed, and the  
12 employer accepted, to settle her claims against the school committee. It was only then  
13 that the court stated that it became reasonable to expect that the employee would seek  
14 alternate employment and to sustain any consequences of not doing so. Id. at 662. Here,  
15 by contrast, Murphy accepted the 2019 offer of reemployment and presented evidence  
16 that prior to that, he was diligent about seeking reinstatement, had used his contacts to  
17 search for other jobs, and had periods of self-employment. Black therefore is easily  
18 distinguishable. Quint is inapposite not only because it has been expressly rejected by  
19 the SJC but because it concerned an employee who had remained “completely idle” in  
20 seeking alternative employment. Murphy’s six-year search for alternative employment or  
21 reinstatement cannot be characterized the same way.

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<sup>15</sup> See CERB discussion at 44 MLC at 200-201.

1           Accordingly, for the reasons set forth above, and those stated in the Hearing  
2 Officer's decision, we agree that the burden of proving that Murphy did not mitigate his  
3 damages rests with the Union.

4           Mitigation

5           We also affirm that the Union did not meet its burden of proving that Murphy failed  
6 to mitigate his damages. As to the first element, that there were one or more discoverable  
7 opportunities for comparable employment in the Worcester area, we agree for the  
8 reasons stated in the Hearing Officer decision that the positions that Segreve thought  
9 would be suitable for Murphy were not comparable positions within the stringent definition  
10 set forth in Sheriff of Suffolk County, supra.

11           As to the second prong, Murphy's job search, even if we were to find that at least  
12 one of the positions discussed was comparable, Murphy did not remain idle during the  
13 termination period, nor did he unreasonably fail to apply for comparable positions. The  
14 Hearing Officer's decision details his job search, which included Murphy reaching out to  
15 his informal network of contacts and attorneys in the Worcester area (which is how he  
16 obtained the Family Law Facilitator role in the first place), periods of self-employment,  
17 and his attempts to be reinstated to the Trial Court in the Family Law Facilitator position  
18 or another similar position. These are all valid methods of job search,<sup>16</sup> and thus, it cannot  
19 be said that Murphy unreasonably made no attempt to apply for a comparable position.

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<sup>16</sup> See e.g., Boston Public Health Commission v. MCAD, 67 Mass. App. Ct. 404, 410 (2006) (MCAD did not err when concluding that charging party's self-employment satisfied her duty to mitigate damages where she was fired in a sudden and discriminatory manner and began business in good faith). As to reinstatement efforts, although Segreve admitted that she did not address self-employment when assessing Murphy's job search, she did agree in her testimony that pursuing reinstatement is one form of a job search.

1 For these reasons, we affirm the Hearing Officer that the Union has not met its burden on  
2 the second prong of the mitigation.

3 As to the third prong, whether it was likely that Murphy would have obtained a  
4 comparable job, we agree with the Hearing Officer that the Union failed to prove that any  
5 of the positions that Segreve identified would have been open to hiring Murphy given his  
6 lack of experience in direct client representation, lack of litigation experience, lack of a  
7 “book of business,” and his termination for cause from the Trial Court. While Murphy may  
8 have had additional specialized skills that were an asset in the Family Law Facilitator  
9 position, this does not necessarily translate to the skills needed to represent clients in  
10 court. Boston School Committee (Compliance) and Boston Public School Buildings  
11 Custodians’ Association, 29 MLC 143, 151, MUP-9067 (February 27, 2003) (and cases  
12 cited) (mere fact that employees have specialized skills at a time when a job market is  
13 open does not prove the third prong, as it was not reasonably likely that the employees  
14 would have obtained one of those jobs). Segreve herself admitted at the hearing that she  
15 did not know whether Murphy would have been hired for the jobs she listed as possibilities  
16 and that she had not asked the firms that she called what types of credentials or  
17 experience family law attorneys possess. Nor was she aware whether they would have  
18 been willing to hire someone like Murphy, who had been fired from the Trial Court and  
19 had no trial court experience.

20 Furthermore, during the hearing and on appeal, the Union failed to address the  
21 effect that Murphy’s termination would have on his job search. The Hearing Officer heard  
22 and credited testimony from several experienced attorneys and legal practitioners that  
23 such a termination would have prevented them from hiring Murphy in any form of new,

1 comparable employment. The Appeals Court similarly considered this factor in Boston  
2 Police Department, which like the instant case, involved public employees who had been  
3 terminated for just cause. There, the Court agreed with trial judge's observation that "even  
4 if comparable employment was available to the officers on the date of their respective  
5 terminations, the department failed to show that it was reasonably likely that the officers  
6 could obtain such employment *given the reason for their discharge.*" Boston Police  
7 Department, 98 Mass. App. Ct. at 772 (emphasis added). Based on the testimony in this  
8 case, the Hearing Officer was warranted in drawing the same conclusion.

9 Apportionment of Damages

10 The Hearing Officer considered and rejected the Union's arguments, made for the  
11 first time at the compliance proceeding, that it should not be held entirely liable for the  
12 losses that Murphy suffered due to the Trial Court's culpability in terminating him, and  
13 instead that she should apportion damages between the Union and the Employer. The  
14 Union argued that holding it wholly liable for Murphy's damages would contravene  
15 principles of equity and fairness because the settlement agreement between the Trial  
16 Court and Murphy was tantamount to an admission that the Trial Court violated Murphy's  
17 rights. The Union claims that under these circumstances, the Hearing Officer should  
18 adopt something akin to the federal scheme set forth in Section 301 of the Labor-  
19 Management Relations Act (LMRA), 29 USC §185 (Section 301),<sup>17</sup> which allows litigants  
20 to bring hybrid suits in federal court against an employee for breach of the collective

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<sup>17</sup> Although the Union cites to 29 USC 301, we assume, based on its arguments, that it meant Section 301 of the LMRA, codified as 29 USC §185.



1 bargaining agreement and against a union for breach of the duty of fair representation.

2 The Hearing Officer rejected these arguments. We affirm.

3 First, we agree that given that the Trial Court was never a party or intervenor in  
4 this case, and thus never had the opportunity to be heard, to examine and cross-examine  
5 witnesses or introduce evidence, imposing liability on it would violate due process. Given  
6 that the Union is attempting to have the Trial Court pay some or all of the damages it has  
7 been required to pay, this is not a situation where the Union and the Trial Court interests  
8 are closely aligned, such that binding the Trial Court to a judgment in a proceeding it was  
9 never a part of would be appropriate.

10 Second, as the Hearing Officer determined, where Murphy filed a charge with the  
11 DLR alleging that the Union had breached its duty of fair representation towards him, the  
12 DLR's authority in this case is limited to addressing that issue and to assess damages  
13 against the Union accordingly. Due process aside, neither the DLR or the CERB has any  
14 statutory or regulatory jurisdiction to apportion damages between the Union and the Trial  
15 Court, who was never a party to this proceeding. See Pattison v. Labor Relations  
16 Commission, 30 Mass App. Ct. at 21-23 (distinguishing the federal scheme from  
17 situations where the DLR has "primary jurisdiction" over the dispute and only the union is  
18 a respondent). Although the Union argues that the equities of this case favor application  
19 of the Section 301 scheme, the cases that the Union relies upon are in no way binding  
20 on the CERB and arise under a completely different statutory scheme.

1 Finally, we agree that the settlement agreement does not amount to an admission  
2 by the Trial Court that it violated Murphy's rights.<sup>18</sup> But even if it did, that would not relieve  
3 the Union of its obligation to make Murphy whole for its own wrongdoing under Chapter  
4 150E's statutory scheme. In Leahy v. Local 1526, AFSCME, 399 Mass. 341 (1986),  
5 where the union, who was found to have breached its duty of fair representation to the  
6 plaintiff by missing a deadline to submit a grievance involving pay to arbitration, made a  
7 similar argument that it should not be liable to the plaintiff because it was the city who  
8 underpaid the plaintiff, the SJC held:

9 [T]he union misapprehends the nature of its liability. Because of the union's  
10 breach of its duty of fair representation, the plaintiff lost his opportunity to  
11 collect from the [employer]. As in a legal malpractice action, the union is  
12 liable for what the plaintiff would have received had the union fulfilled its  
13 duty.

14  
15 Id. at 354. The same result should apply here.<sup>19</sup>

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<sup>18</sup> However, all other considerations aside, the settlement agreement, which settled all claims between Murphy and the Trial Court, could present yet another bar to this agency imposing further liability on the Trial Court for its conduct.

<sup>19</sup> In a footnote to its supplementary statement, Murphy questions the timeliness of the Union's raising the apportionment argument for the first time in the compliance proceeding. Although our rejection of this argument does not rest on this point, we agree with Murphy that the appropriate time to have raised this argument was in the proceeding below. During the first hearing, which addressed whether the Union had violated its duty of fair representation to Murphy and, if so, what the extent of its liability should be, the Union urged the Hearing Officer to adopt the federal rule that would place the burden of proving that his grievance would have been meritorious on Murphy, instead of applying the decades-old rule that required the Union to prove that Murphy's grievance would not have been meritorious. The Hearing Officer and the CERB declined to change this burden of proof, and the Appeals Court held that this was not an abuse of the CERB's discretion. 96 Mass. App. Ct. at 771. Aside from the inconsistency of the Union arguing in the first set of proceedings that Murphy had to prove the Trial Court's wrongdoing to *establish* the Union's liability, but now arguing that proof of the Trial Court's liability should *relieve* the Union of some liability, the time to have made this argument was before the Hearing Officer issued a remedy, not after two appeals of that decision that addressed liability issues.

1 Conclusion

2 For the reasons explained above, the CERB affirms the Hearing Officer Decision  
3 and Order of June 30, 2023 and issues the following Order:

4 ORDER<sup>20</sup>

5 WHEREFORE, based upon the foregoing, it is hereby ordered that OPEIU, Local 6  
6 shall:

- 7 1) Immediately pay to John F. Murphy's personal representative Colin B. Murphy the  
8 sum of seven hundred and three thousand, eight hundred and five dollars and  
9 sixty-two cents (\$703,805.62 ) plus interest at the rate specified in M.G.L. c. 231,  
10 s.6I, compounded quarterly, in the manner specified in OPEIU, Local 6, 44 MLC  
11 at 201; and  
12  
13 2) Immediately post signed copies of the attached Notice to Employees in  
14 conspicuous places where notices to bargaining unit employees are customarily  
15 posted, including all places in the Trial Court, and including electronic postings if  
16 the Union customarily communicates to members via intranet or email. The Notice  
17 to Employees shall be signed by a responsible elected Union Officer and shall be  
18 maintained for a period of at least thirty (30) consecutive days thereafter.  
19 Reasonable steps shall be taken by the Union to assure that the Notice is not  
20 altered, defaced, or covered by any other material. If the Union is unable to post  
21 copies of the Notice in all places where notices to bargaining unit employees are  
22 customarily posted in the Trial Court, the Union shall immediately notify the  
23 Director of the DLR in writing, so that the DLR can request the Trial Court to permit  
24 the posting; and;  
25

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<sup>20</sup> In the final footnote of its response to the Union's supplementary statement, Murphy asks the CERB, "[w]ithout posing any challenge to any aspect of the Hearing Officer's Decision on compliance" to "clarify how so much of the Hearing Officer's Decision on Compliance 'include[s] the restoration of 150 hours (20 days) of vacation credits' can be enforced in light of the due process implications of making an award against a non-party such as the Trial Court." The Union proposes converting the vacation credits into a monetary amount by multiplying 20 [days] by Murphy's 2019 daily rate. We decline to do so. Murphy never asked the Hearing Officer to address vacation credits in his post-hearing brief, and the Hearing Officer specifically rejected Murphy's request to include the value of accrued vacation time in the back pay award. Further, the Union never filed a cross-appeal of the Hearing Officer's decision and thus a footnote seeking clarification of the Hearing Officer's decision, but not challenging back pay award itself, provides an insufficient basis for the CERB to augment the carefully considered back pay award by over \$7,000.

- 1 3) Notify the CERB within ten days of this decision of the steps taken to comply with  
2 this decision and order by sending to the DLR a photocopy of the check (or  
3 disbursement) to Colin B. Murphy in the amount of \$703,805.62; signed receipt of  
4 the payment from Colin B. Murphy; and a signed affidavit from the Union stating  
5 the date when it posted the attached Notice, the location(s) posted, and the name  
6 of the person who signed the Notice.

7  
8 **SO ORDERED**

COMMONWEALTH EMPLOYMENT RELATIONS BOARD

*Marjorie F. Wittner*

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MARJORIE F. WITTNER, CHAIR

*Kelly B. Strong*

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KELLY B. STRONG, CERB MEMBER

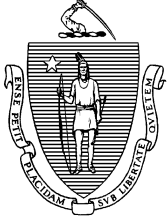
*Victoria B. Caldwell*

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VICTORIA B. CALDWELL, CERB MEMBER

### **APPEAL RIGHTS**

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



**THE COMMONWEALTH OF MASSACHUSETTS**  
**NOTICE TO EMPLOYEES**  
**POSTED BY ORDER OF THE**  
**DEPARTMENT OF LABOR RELATIONS**  
**COMMONWEALTH EMPLOYMENT RELATIONS BOARD**  
**AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

The Commonwealth Employment Relations Board has affirmed a Department of Labor Relations Hearing Officer's decision holding that the Office and Professional Employees International Union, Local 6 (Union) has failed to comply with an order of the Commonwealth Employment Relations Board (CERB) to make John F. Murphy whole for the loss of compensation that he suffered as a direct result of his termination from the Massachusetts Trial Court (Trial Court), and from the Union's subsequent unlawful conduct.

General Laws, Chapter 150E (the Law) gives public employees the right to form, join or assist a union; to participate in proceedings at the DLR; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities.

The Union assures its members that:

- WE WILL immediately pay to John F. Murphy's personal representative Collin B. Murphy the amount specified in the Hearing Officer's Compliance Order plus interest at the rate specified in M.G.L. c. 231, s.6I, compounded quarterly, in the manner specified in Office and Professional Employees International Union, Local 6 (OPEIU), 44 MLC 196, 201 (2018).
- WE WILL notify the CERB of steps taken to comply with this decision and order by sending to the DLR: a photocopy of the check (or disbursement) to Colin B. Murphy in the amount specified in the Hearing Officer's Compliance Order plus interest at the rate specified in M.G.L. c. 231, s.6I, compounded quarterly, in the manner specified in OPEIU, 44 MLC at 201; a signed receipt of the payment from Colin B. Murphy; and, a signed affidavit from the Union stating the date when it posted the attached Notice, the location(s) posted, and the name of the person who signed the Notice.

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Office and Professional Employees International Union, Local 6

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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 Labor Relations, 2 Avenue de Lafayette, Boston, MA 02111-1750 Telephone: (617) 626-7132.