

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

In the Matter of

BROOKLINE EDUCATORS UNION

and

JESSICA WENDER-SHUBOW; individually
and in her capacity as President of the BEU,
and ROBERT MILLER, individually and in his
Capacity as Vice President of the BEU

and

BROOKLINE SCHOOL COMMITTEE

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Case No. S.I.-20-8287

Date issued: November 3, 2020

CERB Members Participating

Marjorie F. Wittner, Esq., Chair
Joan Ackerstein, Esq., CERB Member
Kelly Strong, Esq., CERB Member

Appearances:

John Foskett, Esq.	-	Representing the Brookline School Committee
Jennifer F. King, Esq.		
Jennifer L. McDougall, Esq.	-	Representing the Brookline Educators Union and the individually named respondents

RULING ON STRIKE PETITION AND INTERIM ORDER

Summary and Statement of Case

1 On November 2, 2020, the Brookline School Committee (School Committee or
2 Employer) filed a petition with the Department of Labor Relations (DLR) for a strike
3 investigation (Petition) pursuant to Section 9A(b) of M.G.L. c. 150E (the Law). The
4 Petition alleged that a strike within the meaning of M.G.L. c. 150E, §9A(a) was about to
5 occur and that this strike has been induced, encouraged and condoned by the Brookline
6 Educators Union (BEU or Union), and Jessica Wender-Shubow (Wender-Shubow),
7 individually and in her capacity as President of the BEU, and Robert Miller (Miller),
8 individually and in his capacity as Vice President of the BEU.

9 On November 2, 2020, the DLR issued a Notice of Strike Investigation, which the
10 School Committee caused to be served by hand on each of the named respondents. On
11 November 3, 2020, Marjorie F. Wittner, Chair of the Commonwealth Employment
12 Relations Board (CERB), conducted a strike investigation pursuant to Section 11 of the
13 Law and Rule 16.03 of the DLR's Rules, 456 CMR 16.03.¹ The School Committee and
14 the Union had an opportunity to be heard, to examine witnesses and to introduce
15 evidence.² The record was closed on November 3, 2020.

16 As explained below, the CERB concludes that the BEU has engaged in an unlawful
17 strike, work stoppage, slowdown or other withholding of services. We further conclude
18 that the BEU, through its officers, including but not limited to Wender-Shubow, induced,
19 encouraged and condoned the strike. We dismiss the allegations against Wender-
20 Shubow in her individual capacity and also dismiss all allegations against Miller.

¹ The investigation was conducted remotely pursuant to Governor Baker's teleworking directive to Executive Branch employees.

² The Union did not call any witnesses.

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Stipulations of Fact

1. The Town of Brookline (Town) is a public employer within the meaning of Section 1 of the Law.
2. The Brookline School Committee (School Committee) is the collective bargaining representative of the Town for the purpose of dealing with school employees.
3. Dr. James Marini (Marini) is the Superintendent of the Brookline Public Schools (PSB) and an agent of the School Committee.
4. Suzanne Federspiel (Federspiel) is the Chair of the School Committee.
5. The Union is an employee organization within the meaning of Section 1 of the Law.
6. The Union, in Unit A, represents a bargaining unit comprised of professional school personnel including teachers, nurses, occupational therapists and physical therapists as described in Article 1 of the parties' 2016-2019 collective bargaining agreement (CBA). Unit B consists of department heads and supervisors as described in Article 1 of the CBA. The Paraprofessional unit consists of aides and coordinators. See JX 1(a); JX 1(b); JX 1(c).
7. Respondent Jessica Wender-Shubow (Wender-Shubow) is employed by the School Committee as an educator and is the President of the Union.
8. Respondent Robert Miller (Miller) is employed by the School Committee as an educator and is Vice-President of the Union.
9. On August 12, 2020, pursuant to reopening guidance from the Department of Elementary and Secondary Education (DESE), the School Committee adopted a hybrid plan (Plan) for the instruction of students in the 2020-2021 school year in the context of the COVID-19 pandemic. See JX 2. DESE subsequently approved the Plan.
10. On August 26, 2020, the School Committee and the Union began negotiating a Memorandum of Agreement regarding certain aspects of the reopening plan (Draft MOA). The parties have since engaged in approximately eighteen bargaining sessions and the parties have exchanged several proposals and counterproposals.
11. The parties were scheduled to meet for a negotiation session on November 2, 2020, but the meeting was cancelled. Two additional negotiating dates have been set for Wednesday, November 4, 2020 and Friday, November 6, 2020.
12. November 3, 2020, Election Day, is a scheduled professional development day for teachers. Students have the day off. See JX 5.

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Supplemental Findings of Fact

The PSB employs approximately 976 teachers and 310 paraprofessionals.

On Sunday, November 1, 2020, at 10:14 p.m., Wender-Shubow sent an email to Federspiel regarding “Negotiations and BEU plans” (November 1 email). The November 1 email stated in its entirety:

Hi Suzanne,

I am acknowledging your email canceling our Monday negotiation session. We will likely be able to make it both Wednesday and Friday so please post these sessions. I'll be back in touch as soon as possible with firm confirmations.

Attached you will find our next set of proposals. We have:

- 1. Accepted Word tracked changes
- 2. Made changes to our proposals, all tracked in Word.
- 3. Made comments on our proposals as a quick summary and/or explanation.

We hope you can use Monday's time to review these proposals and get back to us before our next negotiating session.

By a vote of 90%, the BEU membership voted tonight to strike on Tuesday, Nov. 3. The membership cannot abide by the School Committee's position on 6 foot distancing. They believe that our position is in the best interest of all students and families.

Sincerely,
Jess

The referenced proposals were titled “Package Proposal for a Memorandum of Agreement between the Brookline School Committee and the Brookline Educators Association Regarding the Reopening of Schools for the 2020-2021 School Year.”³ This

³ Although the email indicates that this document was attached, Federspiel testified that she did not see a copy of this document until the day of the hearing, when someone forwarded it to her.

1 twelve-page document, which was labeled “Working Draft,” contained blue tracked
2 changes throughout. Its preamble, which was not marked-up, stated:

3 WHEREAS the [School Committee] and the [BEU], collectively referred to
4 as the “Parties,” have engaged in good faith negotiations regarding the
5 reopening of schools for the 2020-2021 school year;

6
7 WHEREAS the Parties wish to memorialize their understanding about
8 certain aspects of the reopening of school for the 2020-2021 school year;

9
10 NOW THEREFORE, notwithstanding any contrary provision in the Parties’
11 collective bargaining agreements or practices, the parties hereby agree as
12 follows for the duration of the 2020-2021 school year:

13
14 Paragraph 13 of the Draft MOA is titled “Social Distancing and Cohorting.” It
15 contained lettered subparagraphs (a) – (g). The final, unlettered, paragraph contained
16 two side by side text boxes. The one on the left contained the Union’s version of the
17 School Committee’s latest proposal, which stated:

18 As conditions change and before the conclusion of this agreement,
19 the parties may negotiate changes to these parameters 13a-13g.

20
21 The Union’s proposal stated:

22
23 If the US CDC, MA Board of Public Health and the Brookline Board
24 of Public Health agree that 6 foot distancing is no longer required,
25 the parties shall negotiate changes to these parameters at the
26 request of either party.

27
28 According to Felderspiel, the parties discussed the Union’s proposal but have yet to come
29 to any agreement.

30 Around November 3, Felderspiel received a copy of a four-page document,
31 which she believed was printed from the BEU’s Facebook page.⁴ That document,
32 which was unsigned, stated in its entirety:

⁴ The Union did not object to the authenticity or admission of this document or question Felderspiel about it.

1 Dear Parents/Community members,
2
3 Teachers across Brookline would like the Brookline School Committee to
4 codify established social distancing guidelines into the memorandum of
5 agreement being negotiated with the Brookline Educators' Union.
6
7 We wish to maintain the promised 6 feet student separation within
8 classrooms. We proposed that this be subject to renegotiation as public
9 health guidelines change.
10
11 Agreements in many surrounding districts maintain the 6 feet. We are
12 grateful for your support in urging the school administration and school
13 committee to honor this practice.
14
15 We want to emphasize a few points:
16
17 It is essential to ensure the promised 6 feet of distance from student chair
18 to chair because all the health and safety measures (ventilation, mask
19 wearing, lunch protocols etc.) are interrelated and ride on it.
20
21 The School Committee has stated they want the flexibility to be able to
22 change the distancing between students when they see fit.
23
24 As the people on the ground, we want to be equal partners in the decisions
25 affecting all children and educators.
26
27 As a result, we want you to know that educators in Brookline have chosen
28 to call in sick or take a personal day tomorrow during our Professional
29 Development Day.
30
31 We are doing this to express our deep concern over the School Committee's
32 refusal to include the safety measure in our negotiated agreement as many
33 other towns and cities have done.
34
35 Please know that we have chosen to take this action tomorrow because it
36 will not affect your children's learning or your work schedule.
37
38 We are deeply committed to providing your children with the highest quality
39 and safest learning environment possible.
40
41 We understand that this action will impact important training and planning,
42 but we feel standing up for safety and health must come first and we will, as
43 always, support each other in doing our best work with students.
44

1 We stand ready and willing to collaborate with the district in transparent
2 negotiations. We thank you for your continued support as we all work
3 together to navigate through this difficult time.

4
5 Thank you!

6 November 3, 2020

7 The PSB 2020-2021 school calendar indicates that Tuesday, November 3,
8 2020, was a Professional Development Day. According to the key at the bottom of
9 the calendar, Professional Development Days mean “No School for Students;
10 Teachers and Paras Report.” The Union did not dispute that teachers were
11 required to report to work on November 3.

12 Based on numbers obtained from AESOP, PSB’s online attendance
13 system, on November 3, 2020, a total of 897 teachers and paraprofessionals either
14 called in sick or took a personal day. Roughly 77% of the PSB teachers and 46%
15 of the paraprofessionals took a sick or personal day.⁵

16 Ruling⁶

17 Section 1 of the Law defines a strike as:

18
19 A public employee’s refusal, in concerted action with others, to report for
20 duty, or his [or her] willful absence from his [or her] position, or his [or her]
21 stoppage of work, or his [or her] abstinence in whole or in part from the
22 performance of the duties of employment as established by an existing
23 collective bargaining agreement or in a collective bargaining agreement
24 immediately preceding the alleged strike . . .; provided that nothing herein
25 shall limit or impair the right of any public employee to express or
26 communicate a complaint or opinion on any matter relating to conditions of
27 employment.

⁵ Based on his review of AESOP, Interim Human Resources Director Joseph Russo testified that on November 3, 2020, 525 teachers reported sick and 227 teachers reported a personal day; 118 paraprofessionals reported sick and 27 used a personal day.

⁶ The CERB’s jurisdiction is not contested.

1 Section 9A(a) of the Law states:

2 No public employee or employee organization shall engage in a strike, and no
3 public employee or employee organization shall induce, encourage or condone
4 any strike, work stoppage, slowdown or withholding of services by such public
5 employees.
6

7 Based on the stipulations and facts set forth above, we conclude that the members
8 of Units A and B have been engaged in a strike beginning on November 3, 2020. We
9 further conclude that the Union, its officers, including but not limited to Wender-Shubow
10 in her capacity as Union President, engaged in, encouraged and condoned the strike.

11 The CERB can infer the existence of a strike from, among other things,
12 absenteeism of an abnormally high rate, similarity of employee excuses for absence or
13 timing of absenteeism coincident to expressed frustration with labor relations. Northeast
14 Metropolitan Regional Vocational School Committee, 13 MLC 1213, 1215, SI-190
15 (October 17, 1986). These elements are all present here. The evidence in this case shows
16 that nearly 77% of the teachers and 46% of the paraprofessionals required to show up
17 for professional development duties on November 3 took either a sick or personal day.
18 The timing of the concerted refusal to work coincides with Wender-Shubow's November
19 1 email indicating that 90% of the Union's membership had voted to strike as a result of
20 their dissatisfaction with the School Committee proposal regarding future changes to the
21 proposed parameters contained in Paragraph 13 of the MOA. Further evidence of a
22 concerted refusal to work may be gleaned from the ostensible BEU Facebook posting.
23 Although we do not give this document as much weight as the November 1, 2020 email
24 signed by Wender-Shubow, its message corroborates the other record evidence that
25 Brookline educators "have chosen to call in sick or take a personal day tomorrow, during
26 [their] Professional Development Day to express deep concern" over the School

1 Committee's social distancing proposal. Because the absences occurred in the context
2 of negotiating the MOA and followed the Union's strike vote, and absent evidence
3 showing that bargaining unit members had permission not to report to work on November
4 3, we can infer that the bargaining unit members represented by the Union have engaged
5 in a concerted withholding of services in violation of Section 9A(a) of the Law. See id.
6 See also Quincy School Committee, 12 MLC 1675, SI-184 (March 31, 1986) (concerted
7 withholding of services inferred from reported sick leave absences of 78% of bargaining
8 unit members increasing to 87% the next day that occurred in the context of ongoing
9 collective bargaining negotiations).

10 The evidence also shows that the Union held a strike vote, that Wender-Shubow
11 was aware of the strike vote and reported the results to Felderspiel without repudiating it
12 or taking any affirmative steps to discourage the withholding of services. Taken together,
13 we find these facts are sufficient to conclude that the Union encouraged and condoned
14 the strike in violation of the Law. See e.g., Dedham School Committee, 16 MLC 1624,
15 SI-232 (March 8, 1990); Nashoba Valley Technical High School Committee, 13 MLC
16 1307, SI-191 (November 21, 1986); City of Boston, 16 MLC 1137,1141, SI-223 (August
17 8, 1989) (citing Northeast Metropolitan Regional Vocational School Committee 13 MLC
18 at 1216).

19 Based on the November 1 email, we further find that Wender-Shubow, in her
20 capacity as Union president, induced, encouraged and condoned the strike. However,
21 there is no evidence that Wender-Shubow communicated with Felderspiel in any capacity
22 other than her capacity as Union president or that she participated in the strike. We
23 therefore dismiss the allegations against her in her individual capacity. As to Miller, there

1 is no evidence that he either participated in the strike or induced, encouraged or condoned
2 it. We therefore dismiss the allegations against him in their entirety.

3 Conclusion

4 Based on the parties' stipulations and the facts set forth above, we conclude that
5 on November 3, 2020, the Union and its membership have engaged in a strike in violation
6 of Section 9A of the Law and that the Union, its officers, including Jessica Wender-
7 Shubow, in her capacity as president of the Union, induced, encouraged and condoned
8 such action in violation of Section 9A of the Law. Moreover, although the purported
9 Facebook page and the November 1 email suggest that the strike would just occur on
10 November 3, the BEU has not denounced this action in any way or provided any
11 assurance that the teachers and paraprofessionals will return to work on November 4 or
12 thereafter.⁷

13 Accordingly, pursuant to Sections 9A(a) and (b) of the Law, we issue the following
14 Interim Order:

- 15 1. The BEU, its officers, and the employees it represents shall immediately cease
16 and desist from engaging in any strike, work stoppage, slowdown or other
17 withholding of services.
18
- 19 2. The BEU, its officers including Jessica Wender-Shubow, and the employees it
20 represents shall immediately cease and desist from inducing, encouraging, or
21 condoning any strike, work stoppage, or other withholding of services, either
22 directly or through surrogates. The BEU shall not permit its officers to encourage,
23 condone or induce any strike, work stoppage, slowdown, or other withholding of
24 services.
25
- 26 3. Immediately upon receipt of a copy of this order, the BEU, its officers, and Wender-
27 Shubow shall take any necessary steps to notify BEU bargaining unit members of
28 their obligation to fully perform the duties of their employment, including the
29 obligation to not participate in any form of strike or work stoppage. Such notification

⁷ Indeed, during the investigation, the BEU offered no defense of its actions.

1 shall be completed immediately upon receipt of this order and shall entail all of its
2 usual means of communicating with its bargaining unit members.
3

4 4. Immediately upon receipt of a copy of this Order, the BEU, its officers and Wender-
5 Shubow shall take any and all necessary steps to inform BEU bargaining unit
6 members of the provisions of Sections 9A(a) and (b) of the Law and the contents
7 of this Order. Such notification shall be completed immediately upon receipt of this
8 order and shall entail all of its usual means of communicating with its bargaining
9 unit members.

10
11 5. The School Committee and the Union and Wender-Shubow shall continue to
12 bargain in good faith over the Draft MOA.⁸
13

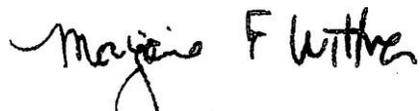
14 6. The Union and the School Committee shall notify the DLR at 10:00 a.m. on
15 November 4, 2020 of the steps taken to comply with this Order.
16

17 7. The DLR shall retain jurisdiction of this matter to set further requirements as may
18 be appropriate.
19

20 **SO ORDERED**

⁸ In its closing statement, the Union requested that if the CERB issue an Order, that it contain a bargaining order. The School Committee objected, stating that the School Committee had been bargaining in good faith and that this was not a part of the CERB's traditional order in strike cases. The CERB finds that a bargaining order of the type set forth above is appropriate in this matter insofar as the unlawful strike arose out of a bargaining dispute, the parties have future bargaining sessions scheduled and the Union expressed interest in mediating the dispute. Further, the CERB has issued similar bargaining orders in the context of strike petitions in the past, including most recently in Dedham School Committee, 46 MLC 76, 81, SI-19-7658 (October 24, 2019). See also Greater Lawrence Regional Vocational Technical High School District, 16 MLC 1339, SI-225 (October 23, 1989) (ordering the parties to continue to bargain in good faith and participate in mediation as may be directed by the Board of Conciliation and Arbitration); Hanover School Committee, 15 MLC 1182, SI-217 (September 27, 1988) (same).

COMMONWEALTH EMPLOYMENT RELATIONS BOARD



MARJORIE F. WITTNER, CHAIR



JOAN ACKERSTEIN, CERB MEMBER



KELLY STRONG, CERB MEMBER