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

In the Matter of	*	
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OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 6, AFL-CIO	*	Case No.: SUPL-14-3628
	*	Date Issued: March 21, 2018
and	*	
	*	
JOHN F. MURPHY	*	

CERB Members Participating:

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

Appearances:

Michael A. Feinberg, Esq.	–	Representing OPEIU, Local 6
Luke Rosseel, Esq.	–	Representing John F. Murphy

CERB DECISION ON APPEAL OF HEARING OFFICER DECISION

SUMMARY

On May 14, 2013, John Murphy (Murphy) was terminated from his position as a Family Law Facilitator at the Worcester Probate and Family Court. His union, the Office and Professional Employees International Union Local 6 (Union), filed a grievance on his behalf challenging the termination but subsequently failed to submit a timely request for arbitration. After an arbitrator denied the grievance as not procedurally arbitrable, Murphy filed this charge of prohibited practice alleging that the Union had breached its duty of fair

representation to him in violation of Section 10(b)(1) of M.G.L. c. 150E (the Law). After six days of hearing, a Department of Labor Relations (DLR) Hearing Officer issued a decision concluding that the Union had violated the Law as alleged. Applying the shifting burdens of proof set forth in Quincy City Employees Union, H.L.P.E., 15 MLC 1340, 1355, MUPL-2883, MUP-6037 (January 24, 1982) (Quincy City), aff'd sub. nom., Pattison v. Labor Relations Commission, 30 Mass. App. Ct. 9 (1991), further rev. den'd, 409 Mass. 1104 (1991) (Pattison), and cases following Pattison, the Hearing Officer furthermore concluded that Murphy had met his burden of proving that his grievance was not clearly frivolous. Finally, because the Union had elected to present evidence on the merits of the underlying grievance at the hearing, rather than bifurcate that issue, the Hearing Officer analyzed whether the Union had met its burden of demonstrating that the grievance clearly lacked merit, i.e., that it would have "been lost for reasons not attributable to the union's misconduct." Berkley Employees Association, 19 MLC 1647, 1650 MUPL-3724 (January 28, 1993). She concluded that the Union had not met this burden and thus ordered the Union to, among other things; make Murphy whole for the loss of compensation he suffered as a direct result of his termination from the Trial Court (Trial Court or Employer).

The Union filed a timely appeal of the decision with the Commonwealth Employment Relations Board (CERB) and both parties filed supplementary statements. After reviewing the hearing record, the Hearing Officer's decision and both parties' arguments on appeal, the CERB affirms the decision for the reasons stated below.

Background

Neither supplementary statement specifically challenges any of the Hearing Officer's findings of fact; accordingly, we adopt the findings set forth in her decision and do not

reiterate them except as necessary to an understanding of our decision. Whitman-Hanson Regional School Committee, 9 MLC 1615, 1616, MUP-4815 (January 18, 1983).[1]

At all relevant times, the Union and the Trial Court were parties to a collective bargaining agreement (CBA) that contained a four-step grievance procedure culminating in binding arbitration.

Section 5 of the CBA states in pertinent part:

> Section 5.04: Grievances under this Article shall be handled as follows:
>
> Step 4 – If the grievance has not been settled at Step 3 it may be submitted to arbitration in the following manner: Within 20 workdays after receiving the Step 3 response at the Union office, the Union, and not the aggrieved employee(s), shall provide written notice to the other party requesting arbitration . . . The arbitrator shall have no power to add to, subtract from or modify any provision of this agreement. . .

On April 25, 2013, Murphy's supervisor, then-Register of the Worcester Probate Court, Steven G. Abraham (Abraham), notified Murphy that he was going to hold a hearing to determine whether there was just cause to discharge or otherwise discipline Murphy based on five separate charges and potential violations of Section 16.100B of the Trial Court's Personnel Policies and Procedures Manual.[2] Briefly described, the charges were as follows:

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[1] The Union's challenges to the conclusions that the Hearing Officer drew from those findings are discussed below.

[2] No party submitted a complete copy of Section 16.100B into evidence. However, in the May 14, 2013 termination letter, Abraham found Murphy to be in violation of the following provisions of Section 16.100B:

1- Failure or refusal to comply with a reasonable order to accept or complete a reasonable assignment.
2- Inefficiency, incompetence, or negligence in the performance of duties, failure to be knowledgeable and current in one's area of responsibility.
4- Insubordination, or a demonstrated lack of respect for persons in authority.

1. On March 14, 2013, Murphy asked Abraham's Administrative Deputy Assistant John Dolan (Dolan) for the make and model of Abraham's car so that Murphy could have Abraham followed. The charge indicated that Dolan believed that Murphy intended to follow Abraham and that Dolan informed Abraham of the conversation on March 15, 2013

2. Over the course of the past several months, it was reported to Abraham that Murphy had "continually maligned" Abraham's reputation and disparaged his name to Probate Court staff, other Trial Court employees and people in the community. It was also reported to Abraham that Murphy had described him as a "f***king asshole," "evil" and "the devil."

3. On or about February 14, 2013, Abraham received a complaint from a lawyer, David M. Lunny (Lunny), alleging that Murphy had offered free legal advice to Lunny's ex-wife.[3] This charge also alleged that Murphy "continued to provide legal advice and representation to pro se litigants" and to get "personally involved in cases, which creates potential conflicts."

4. On March 14, 2013, Murphy arrived at work "with a strong odor of alcohol on his breath which was witnessed and/or observed by Probate Court employees and the public and subsequently reported to [Abraham]."

5. On November 27, 2012, Murphy prepared and processed a complaint for modification of his divorce agreement that was filed by Murphy's former wife to switch their health insurance The charge alleged that Murphy circumvented

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7- Violation or failure to comply with the Federal or State Constitution, statutes or court rules and regulations.
10-Use of undue influence to gain, or attempt to gain, promotion, leave, favorable assignment, or other individual benefit or advantage.
11-Unauthorized use or release of confidential information.
13-Threats or abuse of others, fighting, or other disorderly conduct.
22-Conduct that undermines the administration of the court.
23-Conduct, whether in the course of one's employment or otherwise, that tends to bring the court into disrepute or lessens public confidence in the administration of justice.
24-Conduct unbecoming a Trial Court employee.

[3] The April 25, 2013 notice had several attachments, including a copy of Lunny's February 14, 2013 letter to Abraham. This letter asserted, among other things, that Murphy had supplied Lunny's ex-wife with blank motions and had, on two occasions, asked Lunny if he could delay advancing a motion because his ex-wife was "running late to Court." At the hearing of this matter, Murphy admitted to providing forms to Lunny's wife, assisting her knowing she was not indigent, and to calling Lunny on one occasion to ask him to delay filing a motion because Lunny's ex-wife was running late.

Trial Court and office policy and procedure for his own personal gain, resulting in Murphy "somehow" obtaining a judgment of modification the same day.[4]

The April 25, 2013 notice also relied upon and described discipline that Abraham previously had imposed on Murphy, including a 2009 written warning for "defacing" a portrait of a retired judge; being placed on paid administrative leave from July 27 – August 23, 2012 for "inappropriate and unprofessional behavior which involved calling attention to yourself while standing on the outside ledge of the Courthouse" (Catwalk incident); an August 22, 2012 email that Abraham sent to Murphy advising him that he could return to work on August 23, 2012, but which contained certain "additional concerns and directives regarding his work performance;"[5] and a verbal warning on February 20, 2013 with respect to the disparaging remarks referenced in Charge 2.

Abraham conducted a hearing on the charges on May 7, 2013.[6] On May 14, 2013, he issued a letter to Murphy that summarized his findings as to each of the charges. Concluding that Murphy's conduct with respect to each of the five charges had violated

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[4] Murphy had recently informed his ex-wife that he had a serious medical condition that required surgery that his current insurance plan would not cover. Murphy asked his wife if she would switch health insurance coverage so that his surgery would be covered, and she agreed to file a Complaint for Modification to accomplish this.

[5] With respect to the 2012 administrative leave, the supporting documents attached to the April 25, 2013 letter indicated that among the conditions imposed on Murphy's return were that he see Dr. Gobeil, a psychiatrist, and that Murphy "resume taking Ritalin." According to the Hearing Officer, these conditions were imposed based on recommendations made by a different psychiatrist, Dr. Vasile. Upon learning of the Catwalk incident from Abraham, Dr. Vasile issued a report indicating that Murphy was fit to return to work without having a psychiatric evaluation or resuming taking any prescription medication. Based on witness testimony, the Hearing Officer found that, after speaking to Abraham a second time, Dr. Vasile modified this report to require that Murphy undergo a psychiatric evaluation and resume taking prescription medication, as a condition of returning to work. (The Hearing Officer declined to admit the proffered portions of Dr. Vasile's reports into evidence.)

[6] The Union represented Murphy at this hearing.

certain Trial Court personnel policies and procedures, and in conjunction with the earlier incidents detailed in the April 25th letter, Abraham found just cause to discipline Murphy and terminated his employment effective that date.

The Union filed a grievance over the termination on May 14, 2013, and processed it through Step 3 of the grievance procedure. By letter dated August 20, 2013, the Trial Court notified the parties that the grievance had been denied.[7] However, the Union failed to file a demand for arbitration within the CBA's requirement of 20 working days, and failed to request an extension of time in which to do so before the deadline expired, despite Murphy's private attorney's timely reminders that it do so. Rather, on September 24, 2013, four days *after* the filing deadline passed, the Union asked the Trial Court for an extension of time to file the demand. The Trial Court denied that request.

The matter was nevertheless scheduled for arbitration in May 2015. On April 10, 2015, five judges (three active, two retired) and one judicial case manager at the Worcester Probate Family Court signed a joint letter to the Trial Court's Director of Human Resources Mark Conlon (Conlon) expressing their support for Murphy's reinstatement and stating, in pertinent part:

> We respectfully request that the Massachusetts Trial Court allow Attorney Murphy a fair and impartial hearing on the justification for his termination rather than summarily rely upon the unverified accusations, innuendos and perceptions of his former manager. From our personal experience, having shared a workplace with the parties involved, you will find little demonstrative evidence, witness testimony or staff concerns to justify the termination.
>
> During the course of the last [nine] years, Attorney Murphy has been among the most talented valued and hard-working trial court employees we have had the pleasure to work with. In his work with our indigent self-represented population [,] he is kind, compassionate and dedicated. Among his most

[7] The Trial Court's Step 3 decision was addressed to Murphy's private attorney, with copies to Union and Trial Court representatives.

> impressive qualities is his patience, and empathy when working with our county's diverse population....We concur with Chief Justice Carey in her letter of December 9, 2011, attached hereto, in stating that Attorney Murphy has been a terrific ambassador for the Probate and Family Court.[8]

The Trial Court did not respond to this letter. At the May 6, 2015 arbitration hearing, the Trial Court challenged the procedural arbitrability of Murphy's grievance.[9] On July 16, 2015, the Arbitrator dismissed the grievance as procedurally inarbitrable. His decision was grounded in his interpretation of Section 5.07 of the CBA, which stated that any "time limits prescribed at each Step of the grievance procedure, may be waived by mutual agreement of the parties." Section 6.07 further stated that if the Union failed to "abide by the time limits with respect to each Step, the grievance shall be deemed abandoned." The Arbitrator interpreted this provision to mean that the Trial Court's refusal to grant the Union an extension to file for arbitration meant that the grievance had not been timely filed and thus, that the grievance had been abandoned. The Arbitrator therefore determined that he had no authority to rule on the grievance's merits and denied it on grounds that it was not procedurally arbitrable.

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[8] Chief Justice Carey's letter, which was admitted into evidence stated, in full:

> I recently had the opportunity to review the evaluations for the Judicial Institute Trainings for Trial Court Staff. The comments clearly reflect that you were a shining star at these programs! You are a terrific ambassador for the Probate and Family Court.

[9] The Trial Court and the Union agreed to bifurcate the arbitration proceeding, beginning with the Trial Court's arbitrability challenge.

Opinion[10]

Duty of Fair Representation

As the Hearing Officer correctly stated, once a union acquires the right to act for and negotiates agreements on behalf of employees in a bargaining unit, Section 5 of the Law imposes on that union an obligation to represent all bargaining unit members without discrimination and without regard to employee organization membership. Quincy City Employees Union, H.L.P.E., 15 MLC at 1355. The duty of fair representation encompasses a duty to represent employees and to process their grievances in a manner that is not arbitrary, perfunctory, unlawfully motivated, or the result of inexcusable negligence. Quincy at 1355 (citing Teamsters, Local 437, 10 MLC 1467, MUPL-2566 (March 21, 1984)). While ordinary negligence may not amount to a denial of fair representation, reckless omissions or disregard for an individual employee's rights may have that effect. Trinque v. Mount Wachusett Community College Faculty Ass'n, 14 Mass. App. Ct. 191, 199 (1982). Further, the CERB has held that a union violates the Law when it acts with gross negligence and a reckless disregard for a unit member's grievance. Amherst Police League and William J. Koski, 35 MLC 239, 253, MUPL-05-4521 (April 23, 2009).

Applying these standards, we agree with the Hearing Officer that the Union breached its duty of fair representation by filing an untimely demand for arbitration. The undisputed facts showed that the CBA required the Union to file its demand for arbitration within twenty working days from the date of the Step 3 decision, but despite a timely and prescient reminder from Murphy's personal attorney that "time was an enemy, not an ally"

[10] The CERB's jurisdiction is not contested.

when it came to filing for arbitration, the Union waited until after the deadline for filing had expired to ask the Trial Court for an extension of time in which to do so.

The CERB, with judicial approval, has held that, in the absence of complex legal or procedural issues, analogous conduct that resulted in individuals losing their rights to have their grievances heard on the merits at arbitration demonstrates inexcusable neglect. AFSCME, Council 93 and Richard Allen Bettuchy, 32 MLC 85, 88, MUPL-02-4331 (October 14, 2005) (citing AFSCME, Council 93 and Herbert Avant, 27 MLC 129, SUPL-2695 (April 9 2001)). See also Massachusetts Teachers Association and Anthony Swiercz, 39 MLC 233, 238, MUPL-08-4631 (February 28, 2013)(Union's actions "constitute gross negligence, *not unlike a failure to timely file for arbitration")* (Emphasis added).

The Union's claims to the contrary are not persuasive. The Union contends its conduct here did not demonstrate the type of irrational, bad faith or discriminatory conduct that has been found under current case law to violate a union's duty of fair representation. To this end, it contends that its dilatory conduct was not irrational because Murphy's attorney had previously notified the Employer that Murphy intended to proceed to arbitration, and because the Employer had a practice of excusing contractual filing deadlines. However, as Murphy argued in his post-hearing brief, and as the Arbitrator and Hearing Officer found, the Union's claims of past practice were neither supported by fact nor explicit contract language. Further, the Appeals Court has previously rejected similar efforts by a union to excuse its inaction based on the grievant's having retained private counsel. See Goncalves v. Labor Relations Commission, 43 Mass. App. Ct. 289, 297 (1997) (Union violated its duty of fair representation when it failed to pursue a grievance in accordance with the contract in the mistaken belief that the employee's own attorney would

handle it). Cf. NAGE v. Labor Relations Commission, 38 Mass. App. Ct. 611, 614 (1995) ("In light of [the union's] undertaking to represent its members and avowed skill in so doing, the defense of improper processing by its member is redolent of afterthought, rather than a rational policy related to legitimate union purpose.").

Nor did this case implicate any complex legal or procedural issues. The CBA clearly stated the deadline for filing for arbitration and the consequences of failing to do so. It further made clear that only the Union and not the aggrieved employee could pursue arbitration. At hearing, the Union's business agent confirmed that he knew about the deadline and that he could have, had he chosen, asked for an extension beforehand. The Union's failure to do so, without any rational basis, has consistently been found to be a breach of the duty of fair representation under our Law. Compare Local 137, AFSCME Council 93 and Charles W. Bigelow, 20 MLC 1271, SUPL-2553 (H.O. November 24,1993), *aff'd,* 22 MLC 1329 (December 29,1995) (unexplained failure to timely file for arbitration is a breach of the duty of fair representation) with Baker v. Local 2977, AFSCME, Council 93, 25 Mass. App. Ct. 439, 442 (1988) (declining to process an arguably meritorious grievance in furtherance of a union policy that favors seniority over merit in promotions is not a breach of the DFR, where no substantial evidence indicated that the Union's conduct was arbitrary, irrational, discriminatory or made in bad faith).

Finally, where the CERB's case law on this very issue has been consistent and has met with judicial approval, there was no need for the Hearing Officer, or for the CERB on review, to rely on contrary NLRB precedent. See Board of Trustees, UMass, 8 MLC 1139, SUP-2306 (June 24, 1981) (although NLRB legal precedent can provide useful guidance at times, particularly in cases of first impression, the CERB is not bound by it). We write only

to emphasize that, in addition to being perfunctory, as the Hearing Officer found, the Union's conduct here was demonstrative of gross or inexcusable negligence. See AFSCME Council 93 and Bettuchy, 32 MLC at 88; AFSCME, Council 93 and Herbert Avant, 27 MLC at 131 (Preble, Commissioner, concurring).[11] With that clarification, we affirm that the Union's failure to advance Murphy's grievance to arbitration in accordance with the CBA's time limits violated its duty of fair representation in violation of Section 10(b)(1) of the Law.

Murphy's Right to a Material Remedy - The Pattison Analysis

As it did to the Hearing Officer, the Union also urges the CERB to abandon its reliance on the shifting burden procedures set forth in Pattison and its progeny, and instead to adopt the standard that the NLRB has used since 1998 in Iron Workers Local 377, 326 NLRB 375 (1998). According to the Union, under that standard, the burden of proving entitlement to damages remains with the charging party at all times and, thus, instead of merely having to prove that the union had violated its duty of fair representation with respect to a grievance that was not clearly frivolous, a charging party is also required to prove by a preponderance of evidence that the grievance would have succeeded at arbitration. We disagree that the Hearing Officer erred in any way when she applied the Pattison analysis to the facts of this case, and we decline to abandon this analysis for several reasons.

As a preliminary matter, we note that the CERB has consistently applied the burden-shifting analysis approved in Pattison for over a quarter of a century. Prior to the hearing, there was no evidence from either the Hearing Officer or the CERB that this approach

[11] We have modified Section 1(a) of the Order accordingly.

would change. Nor was this longstanding rule challenged by the Union until it submitted its post-hearing brief, after the hearing record was closed. Murphy therefore litigated this matter in the reasonable belief that the Pattison burdens of proof would apply. Under these circumstances, even if we were inclined to adopt a different standard, which we are not, we would do so only prospectively. See City of New Bedford, 38 MLC 239, 248, MUP-09-5581, MUP-09-5599 (April 3, 2012) (declining to apply new judicial rule retroactively where employer reasonably relied on CERB's longstanding interpretation of Section 7(a) of the Law); see also Tamerlane Company v. Warwick Insurance Company, 412 Mass. 486, 490-91 (1981) (declining to apply decision overturning fifty-year SJC precedent where new rule was not foreshadowed and substantial hardship resulted from its application).

As a policy matter, we note that the Pattison standard was not adopted arbitrarily. Rather, it is rooted in "'traditional equitable principles that the wrongdoer shall bear the risk of any uncertainty arising from its actions.'" 30 Mass. App. Ct. at 18-19 (quoting United Rubber, Cork, Linoleum & Plastic Wkrs. of Am., Local 1250 (Mack-Wayne Closures), 290 NLRB 817(1988) (Mack-Wayne II)). Where, as here, the opportunity for an employee to bring a grievance before an arbitrator has been lost due to the union's conduct, the CERB has made a judicially-approved policy determination that it is the union and not the employee who must bear the ultimate risk of any uncertainty regarding the merits of the grievance. Pattison, 30 Mass App. Ct. at 18-19.

The Union nevertheless argues that this standard runs the risk of imposing "essentially punitive liability on the union and granting a windfall to the grievant/discriminatee." However, the Appeals Court addressed this issue in Pattison, finding no basis to overturn the CERB's policy determination on grounds that it either

unduly favored employees or disfavored unions. 30 Mass. App. Ct. at 18-19. The Court pointed out that an employee who lost the opportunity to have his grievance heard by an arbitrator due to the union's delinquency was not unduly favored by the rule because the employee had already lost several advantages, including the ability at arbitration to "sit back and force the employer to make its case" and to plead for a reduced sanction, even if the employer were found to have had just cause for the discharge. Id. at 19 (quoting Mack-Wayne II, 290 NLRB at 819). The Court further pointed out that the rule did not unduly disfavor unions, which "ordinarily ha[ve] full access to the facts about the merits of the grievance, and [are] aided by [their] developed understanding of the 'common law of the shop.'" Id. We remain persuaded by this reasoning. Nothing about the facts of this case or the Union's arguments on appeal persuades us otherwise.

In any event, as Murphy points out, the application of the NLRB's standard would make no difference in this case because, as part of her grievance merits analysis, the Hearing Officer concluded that Murphy had "presented sufficient evidence to show that his grievance would have succeeded at arbitration." Indeed, the Union's remaining arguments challenge this conclusion. It is to those arguments that we now turn.

The Merits of the Grievance

As described above, because the Union elected not to bifurcate the unfair labor practice hearing, the Hearing Officer heard evidence from both parties as to the merits of each of the five charges, as well as the facts surrounding Murphy's prior discipline. We do

not repeat all of her detailed findings here, many of which were based on credibility resolutions that were carefully explained and which neither party challenges on appeal.[12]

Based on her findings, she first concluded that Murphy's grievance was not clearly frivolous, a conclusion that the Union also does not challenge on appeal. She then found that Murphy had presented sufficient evidence to support the grievance,[13] and that there was insufficient evidence to support the discharge. Having reviewed these findings, we agree with the Hearing Officer's ultimate conclusion that an arbitrator would likely have upheld the grievance and, thus, that the Union had failed to meet its burden of showing that the grievance was clearly without merit.

To succeed in meeting its burden here, the Union had to prove two things: 1) that Murphy actually engaged in the conduct that formed the basis of the five charges; and 2) assuming that it met this burden, that this conduct, coupled with Murphy's work history, including prior discipline and work performance, constituted just cause to terminate him. We briefly summarize the Hearing Officer's findings in this regard.

[12] We therefore do not disturb them. Vinal v. Contributory Retirement Appeal Board, 13 Mass. App. Ct. 85 (1982).

[13] This conclusion was based on several factors, including the quality of the evidence presented by the Union in support of the termination, what she deemed were Abraham's efforts to "interfere" with Murphy's employment by placing conditions on his return from paid administrative leave after the Catwalk incident, despite Dr. Vasile's initial recommendations to the contrary, and the April 2015 judges' letter that praised Murphy's work and expressed support for his reinstatement.

Failure to Support Charges 1, 2 and 4

At hearing, Murphy denied that he engaged in practically all of the allegations contained in Charges 1, 2 and 4.[14] However, the only witness that the Union called to counter Murphy's testimony was Abraham, who admitted at hearing that he did not have personal knowledge about any of the five primary allegations that formed the basis of his decision to terminate Murphy. Thus, his testimony, much like the written charges themselves, consisted mainly of Abraham reporting what others had reported to him about Murphy's behavior. Where the Hearing Officer found that no other witnesses had corroborated Abraham's allegations, we agree with the Hearing Officer that this hearsay evidence, in the face of Murphy's denials, was insufficient to support the disputed factual allegations contained in these three charges.[15]

[14] With respect to Charge 1, Murphy admitted that he asked for the make and model of Abraham's car, but denied that it was for the purpose of following him. With respect to Charge 2, Murphy denied ever calling Abraham "evil," "the devil," or a "f***ing asshole," but admitted to complaining about Abraham to Housing Court Judge Diana Horan (Judge Horan) and Dolan in the months preceding his termination. Based on this admission, the Hearing Officer credited Abraham's testimony that, prior to May 14, 2013, Murphy had made general statements against Abraham that were disparaging. However because the Union could not identify who told Abraham that Murphy had called him by the specific epithets and because Abraham admitted that Murphy never directly made those statements to him, she did not credit Abraham's testimony that Murphy actually used those words. Murphy denied all aspects of Charge 4.

[15] Because the Union did not meet its burden of demonstrating that Murphy made the threats or the specific disparaging or profane remarks attributed to him in Charges 1 and 2, there is no need to address the Union's arguments on appeal that this conduct standing alone would have constituted just cause for Murphy's dismissal. Further, although the Union argues on review that Murphy admitted to most of the allegations against him, neither the record citations provided by the Union, nor the record itself, supports its claim that Murphy admitted threatening to have Abraham followed, calling him by the specific names referenced in Charge 2 or showing up to work intoxicated on March 14, 2013.

Charges 3 & 5, Just Cause

Murphy did not deny that he processed the Complaint for Modification filed by his former wife as described in Charge 3. Nor did he deny providing Lunny's ex-wife with certain legal forms or calling Lunny on one occasion to ask if Lunny would delay filing a motion because his ex-wife was running late as alleged in Charge 5. Murphy denied, however, that this conduct violated Trial Court rules or policies. The Hearing Officer thus analyzed this conduct under the arbitral standard of just cause, which requires an arbitrator to weigh multiple factors, like whether the employer had a consistently applied clear rule or policy, whether the affected employee knew of that rule or policy, whether the employee violated that rule or policy, whether there were extenuating factors that led to the employee's actions, whether the employer's decision to discharge the employee was based on a thorough investigation that recognized the employee's industrial due process rights, and whether the discipline imposed was punitive rather than corrective in nature. Bigelow, 22 MLC at 1333-1334.

Applying these criteria, the Hearing Officer found that the Trial Court's policy was neither clear nor consistent regarding providing legal forms to non-indigent parties. She further found no Trial Court policy that prohibited Murphy's actions with respect to his former wife's Complaint for Modification, but rather that the Trial Court had an established practice of permitting "routine allowables," without distinction as to whether the filer was a Trial Court employee.[16] Based on these findings, we agree that the Union has not

[16] Even assuming that the Trial Court did have a rule or policy against Murphy handling his own divorce modifications, we find it likely that an arbitrator would have considered the extenuating circumstances surrounding Murphy's conduct, i.e., that he had been diagnosed with a serious medical condition requiring surgery that was covered by his former wife's insurance plan but not his own, and that his wife had agreed to switch their coverage.

established that just cause existed to discipline Murphy with respect to the majority of the incidents in Charges 3 and with respect to all of Charge 5.

Without specifically contesting these findings, the Union argues that the Hearing Officer "arbitrarily disregarded" Murphy's prior disciplinary record when determining that the Union had not established its burden here. The Union argues that this was improper because an arbitrator would have considered this evidence in deciding whether the discharge would have been sustained. We agree that prior disciplinary history is a factor in determining the propriety of present discipline. However, the Hearing Officer did not disregard Murphy's past record; rather she concluded that it did not support the Union's claim that Murphy's behavior had escalated to the point where discipline was warranted.

We agree. According to Merriam-Webster's online dictionary, to "escalate" means to "to increase in extent, volume, number, amount, intensity, or scope." Merriam-Webster.com (2018).[17] Here, however, out of the five charges levelled against Murphy, there were only two events that Murphy did not deny engaging in that were not directly addressed in the Hearing Officer's just cause analysis: making general statements against Abraham that were disparaging[18] and calling Lunny on one occasion to ask if he would delay filing a motion. Further, although Murphy admitted to engaging in some of the conduct for which he was reprimanded for in January 2011, and February and August 2012, the Hearing Officer found that the Union failed to present any evidence that Murphy engaged in this conduct after August 2012. Thus, even assuming without deciding that any discipline was

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[17] Available at: *https://www.merriamwebster.com/dictionary/escalate?utm_campaign=sd&utm_medium=serp &utm_source=jsonld* (last visited March 16, 2018).

[18] See note 14, above.

warranted for Murphy's call to Lunny or his generally disparaging statements about Abraham, because there is no evidence that Murphy persisted in engaging in the behavior for which he had previously been counseled or disciplined, we agree that the Union has failed to demonstrate that, as of April 25, 2013, Murphy's behavior had increased in extent, volume, intensity or scope to the point where discharge was warranted. Indeed, when Murphy's conduct is viewed in light of other evidence that Murphy presented in support of his grievance, including the April 15, 2015 letter from five judges who expressed their support for his reinstatement, and praised him as one of the most "talented, valued and hardworking trial court employees [they] ha[d] had the pleasure to work with," we agree with the Hearing Officer's ultimate conclusion that the Union failed to satisfy its burden that Murphy's grievance clearly lacked merit. None of the Union's remaining arguments on appeal persuade us otherwise.[19]

Conclusion

Based on the foregoing, we affirm that the Union breached its duty of fair representation to Murphy. We further affirm that the Union failed to meet its burden of proving that Murphy's grievance clearly lacked merit and thus is liable to Murphy for the damages he suffered. We therefore issue the following Order.

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[19] The Union argues that the Hearing Officer relied "heavily" on Dr. Vasile's findings or "Report" when concluding that there was evidence to support the grievance. The Union argues this was improper because this document was not admitted into evidence. However, both Abraham and Murphy consistently testified that Dr. Vasile's initial report did not require Murphy to undergo psychiatric evaluation as a condition of his returning to work, but that Dr. Vasile's amended report did. It was well within the Hearing Officer's discretion to make findings that comported with this consistent testimony. In any event, even absent what the Hearing Office deemed Abraham's "interference with Murphy's employment," the record in this case supports her ultimate conclusion that the Union failed to meet its burden of showing that Murphy could not have succeeded on the merits of the grievance had he proceeded to arbitration.

ORDER

WHEREFORE, based on the foregoing, it is hereby ordered that the Office and Professional Employees International Union, Local 6, AFL-CIO shall:

1. Cease and desist from:

   a) Failing to advance grievances to arbitration within contractual time limits;

   b) Otherwise interfering with, restraining, or coercing any employee in the exercise of their rights guaranteed under the Law.

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

   a) Make Murphy whole for the loss of compensation he suffered as a direct result of his termination from the Trial Court effective on May 14, 2013. The Union's obligation to make Murphy whole includes the obligation to pay interest on all compensation owed due at the rate specified in M.G.L. c. 231, Section 6I, compounded quarterly.[20]

   b) Immediately post signed copies of the attached Notice to Employees in conspicuous places where notices to bargaining unit employees are customarily posted, including all places in the Trial Court, and including electronic postings if the Union customarily communicates to members via intranet or e-mail. The Notice to Employees shall be signed by a responsible elected Union Officer and shall be maintained for a period of at least thirty (30) consecutive days thereafter. Reasonable steps shall be taken by the Union to assure that the Notice is not altered, defaced or covered by any other material. If the Union is unable to post copies of the Notice in all places where notices to bargaining unit employees are customarily posted in the Trial Court, the Union shall immediately notify the Executive Secretary of the DLR in writing, so that the DLR can request the Trial Court to permit the posting.

[20] Section 2(a) of the Hearing Officer's Order did not include an order to pay interest on all money due, which is a standard part of all CERB make-whole orders, including orders against unions. See, e.g., MTA and Swiercz, 39 MLC at 239; AFSCME and Bettuchy, 32 MLC at 89; Bigelow, 22 MLC at 1335. We have modified this section of the Order accordingly.

c) Notify the DLR in writing within thirty (30) days from the date of the Order of the steps taken by the Union to comply with this Order.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

MARJORIE F. WITTNER, CHAIR

KATHERINE G. DEV, CERB MEMBER

JOAN ACKERSTEIN, 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 claim such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

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

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board has held that the Office and Professional Employees International Union, Local 6, AFL-CIO (Union) violated Section 10(b)(1) of Massachusetts General Laws, Chapter 150E (the Law) by breaching its duty of fair representation to unit member John F. Murphy (Murphy). The Union posts this Notice in compliance with the CERB's Order.

Section 2 of the Law gives public employees the right to engage in self-organization; to form, join or assist any union; to bargain collectively through representatives of their own choosing; to act together for the purpose of collective bargaining or other mutual aid or protection; and to refrain from all of the above.

WE WILL NOT fail to process grievances within contractual time limits for employees who are covered by our collective bargaining agreement with the Chief Justice for Administration and Management of the Trial Court (Trial Court).

WE WILL NOT otherwise interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under the Law.

WE WILL make Murphy whole for the loss of compensation he suffered as a direct result of his termination from the Trial Court effective on May 14, 2013.

_____ _____

For the 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).