

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

AFSCME, COUNCIL 93
AFL-CIO

and

PAUL A. TOPOLSKI

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Case No. SUPL-18-6446

Date Issued: April 24, 2019

Hearing Officer:

Susan L. Atwater, Esq.

Appearances:

Joseph L. DeLorey, Esq. - Representing AFSCME, Council 93

Scott W. Dunlap, Esq. - Representing Paul Topolski

HEARING OFFICER'S DECISION

SUMMARY

The issue in this case is whether AFSCME, Council 93, AFL-CIO (AFSCME or Union) violated Section 10(b)(1) of Massachusetts General Laws, Chapter 150E (the Law) by filing an untimely demand for arbitration of Charging Party Paul Topolski's (Topolski or Charging Party) termination grievance. I find that AFSCME violated the Law as alleged, and that Topolski's grievance was not clearly frivolous. Because the Union elected not to present evidence on the merits of Topolski's grievance at the November 28, 2018 hearing in this case, I order a provisional make whole remedy. The Union will have an opportunity at a subsequent hearing to present evidence to establish

1 that Topolski's grievance was not meritorious. If it is unable to do so, the Union must
2 make Topolski whole for any wages and contractual benefits that he lost as the result of
3 his termination from employment at Mount Wachusett Community College (MWCC or
4 College).

5 STATEMENT OF THE CASE

6 Topolski filed a charge with the Department of Labor Relations (DLR) on
7 January 12, 2018, alleging that AFSCME had engaged in prohibited practices within the
8 meaning of Section 10(b)(1) the Law. A DLR investigator conducted an in-person
9 investigation on March 20, 2018, and issued a complaint of prohibited practice on April
10 24, 2018, alleging that AFSCME violated Section 10(b)(1) of the Law by filing an
11 untimely demand for arbitration of Topolski's grievance. AFSCME filed an answer to
12 the complaint on May 2, 2018.

13 I conducted a hearing on November 28, 2018, at which both parties had the
14 opportunity to be heard, to examine witnesses and to introduce evidence.¹ AFSCME
15 elected to bifurcate the case and, consequently, did not present evidence on the merits
16 of the grievance at issue during the hearing. Both parties filed post-hearing briefs on or
17 about January 25, 2019. Based on the record, which includes witness testimony, my
18 observation of the witnesses' demeanor, stipulations of fact, and documentary exhibits,

¹ AFSCME filed a Motion in Limine on November 19, 2018, seeking to present evidence on the negotiations between AFSCME and MWCC regarding the arming of campus police officers at MWCC and other colleges. Topolski filed an opposition to the Motion on November 28, 2018, and AFSCME filed a Response to the Opposition that day. I issued a ruling on November 28, 2018, allowing AFSCME to offer witness testimony regarding the MWCC negotiations, but prohibiting AFSCME from introducing evidence relating to the negotiations at other colleges. AFSCME objected to the Ruling on the record, but it did not file an interlocutory appeal.

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

3 STIPULATIONS OF FACT

4 1. The Board of Higher Education (Board) is a public employer within the meaning of
5 Section 1 of the Law.

6
7 2. The Union is an employee organization within the meaning of Section 1 of the Law.
8

9 3. The Union, acting through Local 1067, is the exclusive bargaining representative for
10 certain full-time and regular part-time employees at the fifteen state community
11 colleges, including a unit (Unit 1) of nonprofessional clerical and technical employees
12 and a unit of maintenance and security personnel (Unit 2) at Mount Wachusett
13 Community College (College)[or Employer].
14

15 4. The Union and the Board are parties to a collective bargaining agreement, which
16 in Article 29 describes a grievance and arbitration procedure whereby the Union
17 may submit a grievance to arbitration within twenty calendar days of receiving the
18 Step IV (Mediation) denial.
19

20 5. Topolski was a campus police officer I at the College for 2.5 years and was a
21 member of Unit 2.
22

23 6. Prior to June 2015, the College's campus police officers were unarmed.
24

25 7. On June 17, 2015, the College and the Union executed the June 17, 2015 MOA
26 requiring campus police officers to successfully complete specialized testing and
27 firearms training to become armed.
28

29 8. On July 7, 2015, the College gave Topolski a letter (termination letter) stating that
30 he had not successfully completed the specialized testing and that his appointment
31 as a campus police officer would end when its campus police officers became armed
32 in the Fall of 2015.
33

34 9. On July 20, 2015, Topolski filed a grievance, which he amended the next day,
35 challenging his termination letter.
36

37 10. The Union processed Topolski's grievance through the steps of the grievance and
38 arbitration procedure culminating with a Step IV review on February 29, 2016 at
39 which the College verbally denied the grievance.
40

41 11. In March 2016, the Union local executive board voted to pursue and fund
42 Topolski's grievance to arbitration.

12. On July 21, 2017, almost fifteen months later, the Union submitted Topolski's grievance to arbitration.

13. On August 8, 2017, the Union's Grievance Review Committee evaluated Topolski's grievance, heard from Topolski, and voted to withdraw the grievance from arbitration.

14. On December 1, 2017, the Union withdrew Topolski's grievance from arbitration.

FINDINGS OF FACT

Relevant Provisions of the CBA

Article 28 of the parties' collective bargaining agreement (CBA), entitled Disciplinary Action, states in pertinent part as follows:

A. The parties agree that corrective and disciplinary action, when imposed, shall be implemented in progressive stages from minor to severe. Such action is intended to be from a less severe to more severe corrective action in order to bring about the necessary change in work habits. An employee having successfully completed the required probationary period shall not be discharged; suspended or demoted for disciplinary reasons without just cause (sic).

B. The provisions of this Article shall not be applied in an arbitrary or capricious manner. However, in some circumstances, actions or omissions which have resulted or will result in harm to the institution, academic community or members thereof, may require imposition of severe sanctions in the first instance.

Article 29, entitled Grievance and Arbitration Procedure, states in pertinent part as follows:

F. Step V. Arbitration

In the event the Union does not seek to mediate a grievance at Step IV, the Union, within twenty (20) calendar days of the Step III decision of a grievance, shall have the exclusive right to initiate arbitration of the grievance in accordance with Step V herein.

In the event the Union seeks mediation under Step IV and the Commissioner or CEO gives written notice to the Union's Field Services Director of their refusal to mediate a grievance, the Union, within twenty (20) days of its Field Services Director's receipt of the written notice of the Commissioner, shall have the exclusive right to initiate arbitration of the grievance in accordance with Step V herein. ...

1 In the event the parties utilize Step IV mediation and are unable to resolve
2 a grievance at the Step IV mediation, the Union, within twenty (20) days
3 after the conclusion of the mediation, shall have the exclusive right to
4 initiate arbitration of the grievance in accordance with Step V herein.
5

6 **AFSCME's Grievance Processing and Training**

7 As noted in Stipulation No. 4, the Union and the Board are parties to a CBA,
8 which in Article 29 describes a grievance and arbitration procedure whereby the
9 Union may submit a grievance to arbitration within twenty calendar days of receiving
10 the Step IV (Mediation) denial. There are five steps in the grievance process, and
11 Step V is arbitration.

12 Jerold LeBlanc (LeBlanc) is a member of AFSCME's bargaining unit, and he
13 began serving as the Union's Chief Steward for Unit 2, which includes the campus
14 police officers, in 2007. LeBlanc did not receive any grievance handling training in
15 2007, but at some point before 2015,² was taught how to schedule grievances at
16 various steps in the grievance procedure. He was not trained in processing grievances
17 past Step IV until January of 2017.

18 AFSCME maintains a procedure whereby grievances that are not resolved at
19 Step IV must first be brought to the Union's local executive board for funding approval
20 before they are filed for arbitration. Once the executive board votes to approve funding,
21 it is the Chief Steward's responsibility to forward information about the grievance to
22 Union officials in Boston and ask them to file the grievance for arbitration. The grievance
23 may be filed for arbitration at that point, but the Union's Grievance Review Committee

² LeBlanc could not remember specifically when he received training in filing grievances, but recalled that he had received it before Topolski asked him to file a grievance in 2015.

(GRC) must review and approve the grievance before it can be heard at arbitration. AFSCME may file a grievance for arbitration to preserve timeliness after the local executive board approves funding, but it retains the right to withdraw the grievance from arbitration if the GRC does not subsequently vote to approve it.

The Decision to Arm Campus Police Officers and the MOA

At some point prior to April of 2015, the College's President and Board of Directors decided that its campus police officers should carry firearms. The College and AFSCME subsequently bargained over the impact of that decision. They reached an agreement on or about April 9, 2015,³ and signed a Memorandum of Agreement (MOA) on June 17, 2015. The MOA states in pertinent part as follows:

This Memorandum of Agreement sets forth the understanding with respect to the upcoming arming of campus police at Mount Wachusett Community College.

Mount Wachusett Community College is planning for its Campus police officers to carry weapons following the completion of psychological testing and firearms training. ...

Campus Police Officers will be required to satisfactorily complete psychological testing and firearms training in order to be able to carry firearms. If a currently serving campus police officer is unable to satisfactorily complete such testing or training, he or she will not be permitted to carry a weapon, and will not be able to continue as a campus police officer when the campus police officers are armed except as follows:

If an officer is unable to fulfill the requirements to carry a firearm per the guidelines established by the Municipal Police Training Counsel (sic) (MPTC) and a psychological screening, the College intends to continue his/her employment with restricted duty for a specific period while the

³ LeBlanc did not participate in the negotiations for the MOA. He did not know that the College had decided to arm its police officers until he learned that the College planned to terminate Topolski because Topolski had failed the psychological test.

1 officer attempts to fulfill the requirements to the extent that the College is
2 able to maintain all functions of the campus police department. Any officer
3 who fails the Municipal Police Training Counsel (sic) (MPTC) firearms
4 qualifications after the number of opportunities prescribed by the MPTC
5 firearms training curriculum or fails to pass the psychological screening or
6 fails to complete any other required training as part of the arming process
7 will NOT be able to continue as a campus police officer after the date by
8 which all officers are armed (current projection of January 1, 2016)
9 (emphasis in original)....

10
11 *NOTE: Disqualification is determined by the failure to pass a
12 psychological examination, the failure to pass the MPTC firearms training
13 curriculum and/or firearms qualification course after being provided any
14 opportunity for remediation and re-testing as prescribed by the MPTC
15 firearms curriculum.

16
17 If an officer [who] is unable to fulfill the requirements to carry a firearm is
18 qualified for another vacant AFSCME position on campus that is available
19 prior to his or her termination date, the college would offer that position to
20 the officer....

21
22 This agreement shall not establish any precedent for any other college.

23
24 The parties did not agree during the negotiations that campus police officers covered by
25 the MOA were entitled to more than one psychological evaluation.

26 **Paul Topolski's Employment at the College**

27 Topolski began working for the College in August of 2012 as a campus security
28 officer. After he completed the requirements for a special state police officer position,
29 he was upgraded to a campus police officer I position. Topolski's position was
30 represented by AFSCME, Local 1071 in Unit 2.

31 At some point in early 2015, the College Police Chief told Topolski that the
32 College had decided to require its police officers to carry firearms. In a meeting held in
33 April of 2015, Topolski learned that the Union and the College had negotiated an
34 agreement regarding the requirements associated with arming the campus police

1 officers. Topolski also learned that the officers would have to pass a psychological
2 examination to qualify to carry firearms.

3 Topolski met with Dr. John Madonna, Jr. (Dr. Madonna) of Chandler
4 Psychological Services during the first week of May of 2015 for his psychological
5 examination. Topolski, who has type 2 diabetes, had difficulty completing the test
6 because his blood sugar was running low, and he was not permitted to take a food
7 break. Dr. Madonna issued a report on May 13, 2015, in which he concluded, among
8 other things, that "Mr. Topolski does not...at this time possess the psychological
9 capacity to facilely and effectively manage the use of a firearm in a rapidly unfolding
10 high risk, high threat situation..."

11 On July 7, 2015, Topolski attended a meeting with LeBlanc, Human Resources &
12 Payroll/Affirmative Action Officer Diane Ruksnaitis (Ruksnaitis) and Human Resources
13 & Affirmative Action Director, Heather Mulry (Mulry). Mulry and Ruksnaitis told Topolski
14 at the meeting that he had not passed the psychological examination, and that he could
15 not continue working as a campus police officer after the date when the officers would
16 carry firearms. Topolski was not given a copy of the results of his examination before or
17 at the July 7 meeting. Topolski was also given a letter dated July 7, 2015, from
18 Ruksnaitis which stated in pertinent part as follows:

19 Pursuant to the psychological screening, you will not be able to continue
20 as a Campus Police Officer after the date when the campus police officers
21 are armed. As the projected date for the College to have the Campus
22 Police Officers armed will be in October 2015, your appointment with the
23 College will end at that time....

The Grievance and Arbitration Process

Immediately after learning that he would be terminated, Topolski asked LeBlanc to file a grievance for him. LeBlanc declined to do so because he found no contractual violation to cite in the grievance. Consequently, Topolski filed the grievance himself at Step II on July 21, 2015.⁴ In the section of the grievance form titled "Specific Provision(s) Breached" that states: "Give contract Article Section and explanation if necessary," Topolski wrote: "Article 28 of the Collective Bargaining Agreement, Disciplinary Action, and all other relevant articles." In the section of the form titled "Relief or Remedy Sought," Topolski wrote:

- 1) Immediately rescind the termination notice.
- 2) Release the testing results.
- 3) Provide remediation training, counseling, or both if needed.
- 4) Re-test if appropriate and acceptable to this Officer.

Topolski filed the grievance at Step II because Step I addresses issues with the employee's immediate supervisor, and this grievance did not involve his supervisor. He based the grievance on generalities and the fairness of the test because he had not received a copy of the psychological examination and, thus, had no firm basis on which to argue the grievance. Later, on July 21, 2015, Topolski wrote to Ruksnaitis and advised her that "[p]er advice of counsel, I am modifying my original Grievance Form submitted on Monday, July 20, 2015. Please accept this form in lieu of yesterday's submittal..." Topolski attached to his letter a document that states:

I, Special State Police Officer, Paul A. Topolski currently employed in the capacity of Campus Police Officer I, received notification on July 7, 2015

⁴ The record contains an exhibit marked as CP-5, which is a completed but unsigned grievance form. It differs from the grievance form that Topolski signed and submitted to Mulry, which is marked as CP-6. I have relied on the exhibit marked as CP-6 as the initial grievance that Topolski filed.

1 of impending termination due to a failure of a psychological examination.
2 The following facts appear to be evident:
3

4 1. The MOU signed on June 17, 2015 was not in place before the test
5 psychological on May 5, 2015 (sic).
6

7 2. No officers were given an opportunity to provide input comments
8 regarding the wording of the MOU.
9

10 3. The MOU does not indicate that remediation, re-training, or opportunity
11 to re-test is expressly denied.
12

13 4. The H.R. department has been uncooperative when I asked for the
14 opportunity to review the test results. I was told to refer to the testing
15 company. The testing company in turn told me the testing was paid for by
16 the MWCC and they will not release the results to me. Subsequent
17 attempts to have the results released by MWCC have met with an
18 unsuccessful result nor will MWCC allow me to sign a medical release to
19 have the results released.
20

21 The College and the Union held a Step 2 hearing on July 30, 2015. LeBlanc,
22 Topolski, Mulry, and Ruksnaitis attended the hearing, and the College gave Topolski a
23 copy of his examination results at that time. LeBlanc represented Topolski at that
24 hearing. Topolski also spoke on his own behalf and argued that: the examination was
25 unfair due to his medical conditions, there was no written agreement in place between
26 the College and the Union when he took the examination, and the MOA had been
27 signed after the College informed him that he had failed the examination. Topolski also
28 explained that he had had difficulty concentrating during the psychological examination
29 because his blood sugar was low and he could not take a food break.

30 Mulry issued a Step 2 decision on August 7, 2015, which stated in pertinent part
31 as follows:

32 On or about April 9, 2015, Mount Wachusett Community College and the
33 Union agreed to the procedures regarding the arming of the College's
34 campus police officers. Impact bargaining occurs between the Union
35 representatives and the college, it does not occur with individual

1 employees. The date the MOA was signed did not change nor influence
2 the outcome of Mr. Topolski's psychological test results. On July 7, 2015,
3 Mr. Topolski received a notice of pending separation based upon his
4 psychological test results, not disciplinary action. The letter was not of a
5 disciplinary nature.

6
7 The psychological test results did not recommend counseling or remedies
8 to improve Mr. Topolski's psychological test results to allow him to be
9 cleared to carry a gun as a Campus Police Officer with Mount Wachusett
10 Community College.

11
12 LeBlanc and Topolski discussed the grievance denial, and LeBlanc advanced it to Step
13 III on August 13, 2015.

14 At some point prior to the Step III hearing, Topolski asked AFSCME attorney
15 Diane Byrnes (Byrnes) whether there was any case law regarding whether he could
16 receive a second psychological test. Byrnes researched the issue, found Police
17 Department of Boston v. Jill Kavaleski, 463 Mass. 680 (2012) (the Kavaleski case), and
18 gave it to Topolski.⁵ AFSCME subsequently received a copy of a letter from
19 Massachusetts State Police Telecommunications Director C. Blair Sutherland,

⁵ Jill Kavaleski was bypassed for employment as a Boston police officer after Boston Police Department (BPD) psychiatrists tested her and found her psychologically unqualified for the position. Kavaleski appealed the bypass to the Civil Service Commission (CSC). The CSC held that the BPD had failed to meet its burden of establishing a reasonable justification for bypassing her because its decision rested on a report from a BPD psychiatrist that was based on "mere conjecture" and a negative predisposition against Kavaleski, and there was no evidence of a disqualifying psychiatric condition. The Supreme Judicial Court (SJC) eventually affirmed the CSC's decision. The SJC indicated that although the CSC had erred by considering testimony from a witness in a separate case, the error was not prejudicial, because the CSC had relied on other substantial and reliable evidence in reaching its conclusion. The SJC upheld the CSC's conclusion that the BPD had not established a reasonable justification for bypassing Kavaleski because the psychiatrist's report was based on unsubstantiated subjective criteria that lacked adequate factual support and resulted from arbitrary predispositions against Kavaleski.

1 commending Topolski's performance in the aftermath of the bombing at the Boston
2 Marathon on April 15, 2013.

3 Byrnes, LeBlanc, and Topolski attended a Step III hearing on August 26, 2015.
4 Topolski spoke on his own behalf, repeating the arguments that he had made at the
5 Step II hearing and incorporating the Kavaleski case into his argument. Hearing Officer
6 Jacqueline Belrose (Belrose) issued a Step III decision on August 31, 2015. The
7 decision stated in pertinent part that:

8 The grievant has been provided the results of the psychological testing.
9 The Grievant and the Union presented no evidence at the Step Three
10 Grievance hearing to support any contractual violation occurred (sic). The
11 Union does not dispute that the terms of the Memorandum were agreed
12 upon at the April 9, 2015 meeting and presented no evidence to support
13 any violation of the Contract and/or any evidence to support any assertion
14 that the Grievant is qualified to continue as a campus police officer once
15 the Mount Wachusett Community College Police Officers are armed. The
16 union questioned the fairness of the evaluation but provided no facts or
17 evidence in support of that statement. This is not a disciplinary matter,
18 rather a matter where the Grievant will not be able to meet the
19 requirements to serve as a campus police officer once the College's
20 officers are armed.

21
22 Upon receipt of the Step III decision, Topolski asked LeBlanc to forward it to Step IV. By
23 letter dated September 9, 2015, AFSCME Field Services Director for State & Higher
24 Education Gordon Blaquiere (Blaquiere) submitted the grievance to the Employer for a
25 Step IV review.

26 By letter dated November 13, 2015, the College notified Topolski that it "is willing
27 to offer you the opportunity of the AFSCME Cook 1 position that has recently become
28 available." The letter further stated that he "can apply for the Cook 1 position on the
29 College's employment website until November 25, 2015...." Topolski did not apply for

1 the position. Topolski's termination subsequently took effect on or around November
2 14, 2015.

3 On December 22, 2015, Topolski received an email from Annie Reiser (Reiser),
4 Constituent Services and Communications Director for the office of Senator Jennifer
5 Flanagan. Reiser was following up on earlier communications that she had received
6 from another senator on Topolski's behalf, and asked if there was something else that
7 her office could do for Topolski. Topolski responded to Reiser by email that same day
8 with a lengthy explanation of his situation, including: the College's decision to arm its
9 police officers, the MOA, the psychological testing requirement, the medical issues
10 impacting his test performance, the test results, his termination, his efforts to overturn
11 the termination, the financial impact of his termination, and the resulting stress that he
12 and his wife subsequently experienced (December 22 email).

13 By memo dated February 22, 2016, Director of Employee and Labor Relations
14 Michael Murray (Murray) advised the Union that the Step IV hearing would be held on
15 February 26, 2016. The hearing proceeded that day at Fitchburg State College.⁶ At the
16 hearing, Topolski read the December 22 email that he had sent to Reiser. Topolski was
17 excused from the room after his presentation, and a short discussion took place.
18 Following the discussion, College representatives stated orally that Topolski's grievance
19 was denied.

20 Topolski then asked LeBlanc to advance his grievance to arbitration. LeBlanc
21 told Topolski that they had to meet with the Union's local executive board to request

⁶ The contract includes language regarding mediation at Step IV. The record does not indicate whether or not the parties participated in mediation at any point before or at the Step IV hearing.

1 funding to proceed to arbitration. Topolski, Byrnes, Union President Kevin Hanley
2 (Hanley) and LeBlanc met with the local executive board in March of 2016.⁷ Topolski
3 read the December 22 email to the executive board members, and they asked him a
4 few questions. The executive board voted unanimously to forward the grievance to
5 arbitration. Someone attending the meeting told Topolski that it would take 18 to 24
6 months to get an arbitration hearing.⁸ Topolski thanked the members of the executive
7 board for hearing his case and moving it forward.

8 Events in 2017

9 In early July of 2017, Topolski contacted LeBlanc to see if a date for arbitration
10 had been set. LeBlanc contacted Hanley, and Hanley asked LeBlanc what information
11 he had forwarded to the Union. LeBlanc told Hanley that he (LeBlanc) did not realize
12 that he was supposed to forward information to the Union, and that he hadn't done so.
13 Hanley told LeBlanc that the grievance had not been filed for arbitration because
14 LeBlanc had not forwarded information to the Union, and they had missed the
15 arbitration deadline.

16 LeBlanc responded by email to Topolski on July 14, 2017. LeBlanc's email
17 stated in full:

18 The request I failed to send resulted in our time frame running out. We
19 had 20 days fro[m] the step IV decision to request a hearing for arbitration.
20 The Union, from the time it was voted at E-board to fund your case and
21 the denial decision at step IV was pushing it. Paul I take full responsibility
22 for this as I didn't know the procedure as I never had a grievance go to
23 arbitration before. Ignorance is no excuse. I even told Kevin I felt I should
24 resign as steward. I am going to think had about doing just that. My term
25 ends in November so I may just go to then. We did get training on

⁷ The record does not indicate the date of the local executive board meeting.

⁸ The record does not identify the person who gave Topolski this time frame.

1 Grievance procedures and time frames, unfortunately, it was 9 months
2 after the decision to fund your grievance to step V, again no excuse. One
3 thing I want to point out is just because we voted to fund going to Step V
4 all that means is it will go to a hearing where it will be decided if it merits
5 going forward. This is where the MOA [will] bite us in the seat []. They will
6 see that both the Union and MWCC agree to the terms outlined in the
7 agreement, There was no Contractual violation, No disciplinary action, just
8 following the language of the MOA (sic). This is entirely my opinion. I feel
9 your best bet is in civil court there the validity of the MOA itself can be
10 question[ed]. Paul[,] best of luck with this and as always my best to you
11 and your wife.

12
13 Topolski responded to LeBlanc a few hours later, expressing his frustration with the
14 Union's inaction. Later that day, LeBlanc sent an email to Hanley and Byrnes stating
15 that: "I told Paul that the time frame expired, I took full responsibility for not sending in
16 the request in time...."

17 LeBlanc and Topolski both subsequently talked to Hanley. Hanley told LeBlanc to
18 get the packet of information to certain Union officials in Boston. Topolski and LeBlanc
19 then met,⁹ and LeBlanc asked Topolski for some documents to forward to AFSCME for
20 further review and consideration for arbitration. LeBlanc forwarded the necessary
21 information, knowing at the time that the grievance would be untimely.

22 On July 21, 2017, AFSCME Attorney Joseph DeLorey (DeLorey) filed a demand
23 for arbitration with the American Arbitration Association (AAA). DeLorey listed the
24 nature of the dispute as "Termination [i]n violation of but not limited to: Article 29 and
25 any and all articles that may cover." DeLorey described the claim or relief sought as "To
26 be made whole with all lost pay & benefits." In his cover letter to the AAA's Case
27 Manager, DeLorey stated in pertinent part: "AFSCME files this request in order to

⁹ The record is not completely clear on whether Topolski and LeBlanc met in person at the College before or after their email exchange on July 14, 2017. However, this detail is not material to my analysis or decision.

1 preserve arbitrability on the basis of timely filing. AFSCME reserves its right to review
2 [the] merits and, in the event the grievance is not justified for arbitration after all, to
3 withdraw it.” Also on July 21, 2017, AFSCME’s Special Assistant to the Executive
4 Director, Mark Bernard (Bernard), forwarded a letter to Hanley stating that the GRC
5 would meet on August 8, 2017 to discuss Topolski’s grievance.

6 The GRC met on August 8, 2017. Topolski attended the meeting and made a
7 presentation to its members. He spoke about the psychological examination, the
8 Kavaleski case, and the statements he made in his December 22 email. The GRC
9 discussed¹⁰ the case and voted unanimously to withdraw it from arbitration. By letter
10 dated August 15, 2017, Bernard notified Hanley that the GRC had voted to withdraw
11 Topolski’s grievance from arbitration. The letter indicates that AFSCME sent Topolski a
12 copy of the letter by certified mail. AFSCME withdrew the grievance from arbitration on
13 December 1, 2017, however, Topolski did not learn of the withdrawal until after he filed
14 the charge of prohibited practice in this case on January 12, 2018.

15 OPINION

16 The Duty of Fair Representation

17 A union has a duty to represent its members fairly in connection with issues that
18 arise under a collective bargaining unit. National Association of Government
19 Employees v. Labor Relations Commission, 38 Mass. App. Ct. 611, 613 (1995). The
20 duty of fair representation applies to all union activity, including contract negotiation,
21 United Steelworkers of America, 31 MLC 122,129, MUPL-4282 (March 3, 2005), aff’d
22 sub nom. United Steelworkers of America vs. Commonwealth Employment Relations

¹⁰ The record does not contain evidence of the substance of the GRC’s discussion.

1 Board, 74 Mass. App. Ct. 656 (2009) (citations omitted)), and contract administration,
2 including grievance processing. Massachusetts State College Association, 24 MLC 1,
3 SUPL-2588 (July 24, 1997). A union breaches its statutory responsibility to bargaining
4 unit members if its actions toward an employee during the performance of its duties as
5 the exclusive collective bargaining representative are unlawfully motivated, arbitrary,
6 perfunctory, or reflective of inexcusable neglect. Quincy City Employees Union,
7 H.L.P.E., 15 MLC 1340, 1355, MUPL-2883, MUP-6037 (January 24, 1989), aff'd sub
8 nom. Pattison v. Labor Relations Commission, 30 Mass. App. Ct. 9 (1991), further rev.
9 den'd, 409 Mass. 1104 (1991).

10 Topolski contends that the Union breached its duty to represent him fairly by
11 filing the arbitration demand late, and he compares the facts in this case to other cases
12 in which the CERB has found that a union violated the Law by failing to timely file a
13 grievance at various steps in a contractual grievance/arbitration process. The Union
14 acknowledges that it filed the grievance for arbitration late. However, it argues that
15 LeBlanc's failure to process the grievance to arbitration was the result of simple
16 negligence rather than inexcusable neglect. It contends that, despite believing that
17 there was no contractual violation, LeBlanc conscientiously processed the grievance
18 through the Step IV decision and to the local executive board. Once he learned that he
19 should have forwarded paperwork to ensure a timely arbitration demand, LeBlanc,
20 Hanley, and the GRC processed the case "with deliberate dispatch." The Union notes
21 that the Law recognizes that the grievance process need not be error-free, and may
22 account for careless conduct.

1 I am not persuaded by the Union's arguments because the Law distinguishes
2 between ordinary negligence and gross negligence, and the Commonwealth
3 Employment Relations Board (CERB) has held that a union that files an untimely
4 demand for arbitration, as AFSCME did here, breaches its duty to represent a unit
5 member by its gross negligence. See OPEIU and John Murphy, 44 MLC 196, 198,
6 SUPL-14-3628 (March 21, 2018)(appeal pending); Local 137, AFSCME Council 93 and
7 Charles W. Bigelow, 20 MLC 1271, SUPL-2553 (H.O. November 24, 1993), aff'd, 22
8 MLC 1329 (December 29, 1995); AFSCME Council 93 and Richard Allen Bettuchy, 32
9 MLC 85, 88, MUPL-02-4331 (October 14, 2005). There is no dispute that LeBlanc
10 agreed to file the grievance for arbitration, and the local executive board gave arbitration
11 funding approval. The 20-day time frame for filing grievances to arbitration is clearly set
12 out in the CBA. There were no complex legal issues or procedures; all that LeBlanc
13 had to do was know the Union's internal grievance procedure and follow it. The Union
14 did not file the grievance on time because LeBlanc did not forward the necessary
15 information to the Union officials who needed it to file the case at arbitration. LeBlanc's
16 ignorance of the Union's own procedures and his lack of training is, as he
17 acknowledged in his July 14, 2017 email, "no excuse." Neither the diligence LeBlanc
18 displayed prior to Step IV, nor the speed with which he and other Union officials
19 processed the grievance after learning of his error, compensates for LeBlanc's mistake.
20 By the time he forwarded the paperwork for arbitration in July of 2017, as he knew, the
21 arbitration demand would be late. Here, as in AFSCME, Council 93 and Herbert Avant,
22 27 MLC 129, SUPL-2695 (April 9 2001), a mistake that stems from inexperience and/or
23 a lack of training and does not involve complex legal or procedural considerations will

1 be found to be gross, rather than ordinary negligence. See also, Raul Goncalves v.
2 Labor Relations Commission, 43 Mass. App. Ct. 289 (1997). Thus, the Union's failure
3 to timely file the grievance for arbitration breached its duty of fair representation.

4 The Merits of the Grievance

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

15 However, a union may limit its financial liability by proving that the grievance
16 would have been lost for reasons not attributable to the union's misconduct. Id. at 130-
17 131. Unions may elect to present evidence on the merits of the grievance at the initial
18 unfair labor practice hearing or in a subsequent hearing. In this case, AFSCME
19 declined to present detailed evidence on the merits of the grievance at the initial unfair
20 labor practice hearing. Thus, at this stage of the litigation, I must only assess whether
21 or not Topolski's grievance was clearly frivolous.

22 Topolski argues that his grievance was not clearly frivolous because: 1) the MOA
23 did not include a protocol for individuals who were initially unable to pass the

1 psychological screening; 2) he was entitled to present medical testimony to challenge
2 the results of the psychological examination; 3) he was deprived of his constitutional
3 right to a Loudermill hearing;¹¹ and 4) the Kavaleski case shows that the Employer's
4 reliance on one psychologist's subjective opinion of his fitness to carry firearms did not
5 constitute just cause for termination. Conversely, the Union contends that Topolski's
6 grievance was clearly frivolous because his termination did not constitute discipline, the
7 holding of the Kavaleski case does not apply to his situation, and his Loudermill claims
8 are irrelevant. For the following reasons, I find that Topolski's grievance was not clearly
9 frivolous.

10 In Berkley Employees Association and Gary R. Joseph, 19 MLC 1647, 1650, n.
11 5, MUPL-3724 (January 28, 1993), the CERB explained that an "employee's initial
12 burden is purposefully low because the union's breach prevents the employee from
13 seeking redress through the channels agreed to by the parties, including the possibility
14 of compromise or settlement of the grievance." In that case, the CERB held that
15 termination from employment, allegedly without just cause, coupled with the possibility
16 that a grievance contesting the termination is substantively arbitrable under the
17 collective bargaining agreement, generally satisfies the "not clearly frivolous" test. Id. at
18 1650.

19 In this case, the Union argues that Topolski's grievance is not substantively
20 arbitrable because Article 28 deals with corrective and disciplinary action, and
21 Topolski's termination did not constitute discipline. It contends that Topolski's

¹¹ In Cleveland Board of Education v. Loudermill et. al., 470 U.S. 532 (1985), the United States Supreme Court held that two public employees had a constitutional due process right to a pre-termination hearing before they were discharged.

1 employment terminated by operation of the testing requirement - an unambiguous
2 condition of employment contained in the MOA – rather than the application of
3 discipline.

4 The Union correctly notes that the Employer's Step II and Step III decisions
5 stated that the termination did not constitute disciplinary action. However, these
6 statements did not prohibit arbitration since they merely expressed the Employer's
7 position, and the Union could take a contrary view at arbitration. Moreover, if the parties
8 wanted to foreclose the possibility that an employee who failed the firearms training or
9 psychological testing requirement could grieve his or her subsequent discharge, they
10 could have included such a provision in the MOA. They did not. The MOA is silent
11 concerning an employee's ability to challenge a termination that stems from failing the
12 firearms qualification or psychological test, and it also does not address whether such a
13 termination would constitute disciplinary action within the meaning of Article 28. Thus,
14 because the MOA contains no express restrictions on a campus police officer's ability to
15 grieve and arbitrate a discharge stemming from a failure to satisfactorily complete
16 firearms training and/or the psychological screening, it is possible that such a grievance
17 is substantially arbitrable through the just cause provision of Article 28.¹²

18 Additionally, although LeBlanc believed that the Employer did not violate the CBA
19 when it discharged Topolski for failing the psychological test, the Union pressed the
20 grievance through each step of the grievance procedure despite LeBlanc's initial

¹² Given the time frame of the events in this case, Topolski's arbitration would likely be the first case to test whether a discharge stemming from a failure to meet the qualifications required in the MOA would be substantively arbitrable. Consequently, the Union's argument that Topolski's grievance would not be arbitrable under the just cause provision of the contract was untested at the time that Topolski sought arbitration.

1 reservations and the Step II denial, and it eventually filed the grievance for arbitration.¹³
2 The Union's belief in the potential viability of the grievance can also be seen in the
3 executive board's unanimous decision to fund the arbitration, since the Union presented
4 no evidence or argument to explain why it would have decided to financially support a
5 frivolous grievance.

6 Finally, Topolski took and failed the psychological test over a month before
7 AFSCME and the College had executed the MOA. Although the Police Chief told
8 Topolski before he took the test that he would have to pass it to carry a firearm,
9 Topolski could not have known when he took the test in May that the MOA would not
10 provide for re-testing if he failed it due to his medical and/or physical needs. At this
11 stage of the litigation, I need not definitively determine whether an arbitrator would have
12 found that the College's retroactive application of the testing requirements and resulting
13 termination failed to meet the just cause standard. It is enough that Topolski's
14 grievance alleged that his termination violated Article 28, the contractual just cause
15 provision, and, for the reasons stated above, may have been substantively arbitrable.
16 See United Steelworkers of America, 31 MLC at 130. For all of these reasons, I find
17 that Topolski's grievance was not clearly frivolous.¹⁴

¹³ The fact that the GRC withdrew the grievance from arbitration does not necessarily signal its view of the substantive merits of the grievance. There is no evidence in the record explaining why the GRC withdrew the grievance from arbitration. Consequently, the GRC may have withdrawn the grievance from arbitration merely because it was untimely filed.

¹⁴ Because my decision rests on other grounds, I express no opinion on the parties' arguments regarding the Kavaleski case, any re-testing rights that Topolski might possess, and/or his right to a Loudermill hearing.

1

2 Based on the record and for the reasons explained above, I conclude that
3 AFSCME breached its duty of fair representation in violation of Section 10(b)(1) of the
4 Law by filing an untimely demand for arbitration of Paul Topolski's grievance, and the
5 grievance was not clearly frivolous.

6

7 The CERB traditionally orders unions that breach the duty of fair representation
8 to take all steps necessary to make the charging party whole for all economic losses
9 caused by the union's misconduct. Id. Here, the Union's unlawful conduct harmed
10 Topolski by foreclosing his ability to challenge the merits of his termination.
11 Consequently, AFSCME must first attempt to remedy the harm to Topolski by taking all
12 steps necessary to resolve his grievance. These steps include submitting a written
13 request to the Employer to either arbitrate Topolski's grievance, including an offer by
14 AFSCME to pay the full costs of the arbitration, or to provide Topolski with the grievance
15 remedy that would have been sought from an arbitrator.¹⁵ If the Employer does not
16 agree to arbitrate or otherwise fully resolve Topolski's grievance, the Union shall be

¹⁵ In cases where a union's conduct indicates an inability to adequately represent a grievant's interests, the CERB has ordered the union to pay the reasonable and necessary costs of a private attorney to represent the grievant in connection with the arbitration of the grievance. Such an order is not appropriate here because the only defect in the Union's handling of Topolski's case was one Union official's failure to follow a step in the grievance/arbitration procedure. This error, though costly, does not demonstrate the Union's *inability* to represent Topolski's interests. The Union demonstrated its ability to represent Topolski at arbitration when Byrnes researched the possibility of re-testing at Topolski's request, and she gave him a copy of the Kavaleski decision that she found.

1 liable for the wages and contractual benefits that Topolski lost because of the Union's
2 conduct, plus interest.¹⁶

3 As previously noted, AFSCME elected at the prohibited practice hearing to
4 postpone introducing evidence designed to rebut Topolski's arguments concerning the
5 merits of the termination grievance. See Quincy City Employees Union, HLPE, 15 MLC
6 at 1376, n.67. Therefore, if AFSCME is unable to resolve the grievance with the
7 Employer, AFSCME may return to the DLR for a hearing to limit its liability by proving
8 that Topolski's termination grievance was clearly without merit and would not have
9 succeeded if arbitration had taken place.

10 Order

11 WHEREFORE, on the basis of the foregoing, it is hereby ordered that AFSCME
12 shall:

- 13 1. Cease and desist from:
 - 14 a) Failing to represent employees fairly by failing to file demands for
15 arbitration in a timely manner; and
16
 - 17 b) Otherwise interfering with, restraining, or coercing employees in the
18 exercise of their rights guaranteed under the Law.
19
- 20 2. Take the following affirmative action that is necessary to effectuate the
21 purposes of the Law:
 - 22
 - 23 a) Request in writing that the Employer offer Paul Topolski reinstatement
24 to his former position, or, if that position no longer exists, to a substantially
25 equivalent position, and make him whole for the loss of wages and
26 contractual benefits that he suffered as a direct result of his termination.
 - 27 b) If the Employer declines to offer Topolski reinstatement with full back
28 pay, the Union shall request in writing that the Employer waive any time

¹⁶ I order the Union to ask the Employer to arbitrate the grievance notwithstanding the GRC's decision to withdraw it from arbitration because Topolski could only be reinstated to his former position through arbitration.

limits that may bar arbitration of Topolski's termination grievance, and the Union shall offer to pay the cost of arbitration. If the Employer agrees to waive any applicable time limits and to arbitrate the merits of Topolski's grievance, the Union shall process the grievance to conclusion in good faith and with all due diligence and shall pay the cost of arbitration if the Employer accepts its offer to do so.

c) If the Employer does not agree to arbitrate or otherwise fully resolve Topolski's grievance, the Union shall make Topolski whole for the wages and contractual benefits that he lost as a direct result of his termination from employment. The Union's liability to make Topolski whole for the loss of wages and contractual benefits will cease upon the earlier of the following: (a) the date when he is offered reinstatement by the Employer to his former or a substantially equivalent job; or (b) the date when Topolski obtained, or obtains, other substantially equivalent employment. The Union's obligation to make Topolski whole includes the obligation to pay Topolski interest on all money due at the rate specified in M.G.L. c. 231, Section 6I, compounded quarterly.

d) Immediately post signed copies of the attached Notice to Employees in conspicuous places where notices to bargaining unit employees are customarily posted, including electronic postings, if AFSCME customarily communicates to members via intranet or email. The Notice to Employees shall be signed by a responsible AFSCME officer and shall be maintained for at least thirty consecutive days thereafter. Reasonable steps shall be taken by AFSCME to ensure that the Notices are not altered, defaced, or covered by any other material. If AFSCME is unable to post copies of the Notice in all places where notices to bargaining unit employees are customarily posted, AFSCME shall immediately notify the Director of the DLR in writing, so that the DLR can ask the Employer to permit the posting.

e) Notify the DLR in writing of the steps taken to comply with this decision within ten days of receipt of the decision.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



SUSAN L. ATWATER, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, and 456 CMR 13.19 to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

NOTICE TO EMPLOYEES

**POSTED BY ORDER OF A HEARING OFFICER OF
THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

A hearing officer of the Massachusetts Department of Labor Relations has held that AFSCME Council 93 (AFSCME) has violated Section 10(b)(1) of Massachusetts General Laws, Chapter 150E by breaching its duty of fair representation to Paul Topolski (Topolski). AFSCME posts this Notice to Employees in compliance with the hearing officer's order.

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

WE WILL request that the Employer offer Topolski reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position.

WE WILL, if the Employer declines to offer Topolski reinstatement with full back pay, request in writing that the Employer waive any time limits that may bar arbitration of Topolski's termination grievance and offer to pay the costs of arbitration. If the Employer agrees to waive any applicable time limits and to arbitrate the merits of Topolski's grievance, we shall process the grievance to conclusion in good faith and with all due diligence and shall pay the cost of arbitration if the Employer accepts our offer to do so.

WE WILL, if the Employer does not agree to arbitrate or otherwise fully resolve Topolski's grievance, make Topolski whole for the wages and contractual benefits that he lost as a direct result of his termination from employment, and we will pay Topolski interest on all money due at the rate specified in M.G.L. c. 231, Section 6I, compounded quarterly.

AFSCME, Council 93

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.)