MLC Commentary *July-September 2023*

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Unlawful Strike or Permissible Work Action?

In Massachusetts, public employees are prohibited from engaging in, inducing, encouraging or condoning a strike, work stoppage, slowdown, or withholding of services. Despite this prohibition, the CERB has long held that public employees may engage in a work-to-rule action to further their collective bargaining goals provided that they do not withhold duties that they are otherwise obligated to perform as a matter of law or practice. For example, while employees refusing to report to work en masse will be found to have engaged in an unlawful strike, employees do not run afoul of the Law by confining their labor to their required work hours and forgoing voluntary tasks outside of those hours.

The CERB recently provided further guidance distinguishing an unlawful strike from a permissible work-to-rule action in *Newton Teachers Association*, 50 MLC 39 (September 26, 2023). Specifically, the CERB held that the Newton Teachers Association and its membership engaged in an unlawful strike when they boycotted a district-wide meeting on the first workday of the 2023-2024 school year. Although teachers were permitted to skip this meeting in the past in order to work in their classrooms, the CERB concluded that the employees did not have the unfettered right to refuse to attend the meeting following the Superintendent's directive that the meeting was mandatory and would be aimed at preparing teachers to teach and support students in the upcoming year. In contrast, the CERB rejected the School Committee's contention that the employees engaged in unlawful strike activity when they remained silent during building-based, principal-led staff meetings. The CERB found that the School Committee failed to communicate their expectations regarding the employees' expected level of participation in these meetings, there was no previously established practice with respect to employees' required participation, and there was no evidence that the principals were prevented from presenting the material they needed to cover during the meetings. The CERB therefore concluded that these so-called "silent meetings" were permissible work-to-rule actions protected by the Law.

Both Employers and Unions Have Obligation to Provide Relevant Information

The DLR/CERB issued three recent decisions that involve parties' entitlement to certain information. Two cases highlight employers' obligations to provide requested information that is relevant and reasonably necessary to the union's collective bargaining obligations or that is related with reasonable directness to a matter before the DLR. A third case serves as an important reminder that unions have a corresponding duty to provide information requested by an employer that is relevant and reasonably necessary to the employer's bargaining obligations.

It is well established that an employer's duty to bargain in good faith requires the employer to disclose information requested by a union that is relevant and reasonably necessary to the union's execution of its duties as exclusive bargaining representative. An employer cannot justify withholding relevant information based on vague or general concerns about privacy, but must cite specific confidentiality requirements. *City of Newton*, 36 MLC 71 (October 28, 2009). Even where the employer's concerns are legitimate and substantial, the employer has an obligation to make reasonable efforts to provide the union with as much information as possible, consistent with its expressed concerns. *Boston School Committee*, 37 MLC 140 (January 4, 2011).

In *Boston School Committee*, 50 MLC 24 (August 31, 2023), the DLR found that the School Committee failed to demonstrate legitimate and substantial concerns in response to a union's request for information related to bargaining members' reasonable accommodation requests. The School Committee initially expressed concern that providing such information would violate its Accommodations Policy, which required that such information "be kept confidential to the extent practicable." The Hearing Officer determined that this reference was too unspecific to justify its failure to provide the information to the Union and rejected the School Committee's attempted reliance on state and federal privacy laws that it did not raise with the Union prior to the filing of the DLR charge. The Hearing Officer further concluded that even if the School Committee's reference to the Accommodation Policy was sufficient to demonstrate a legitimate and substantial concern over disclosure, the School Committee still violated the Law by requiring the Union to provide individual waivers from the employees before providing the requested information. *See also*, *Bristol County Sheriff's Dept.*, 32 MLC 76 (2005) (employer's insistence that union provide authorization from bargaining unit member before releasing personnel file was not reasonable effort to work with union to provide as much information as possible consistent with employer's confidentiality concerns).

In addition to its obligation to provide a union with requested information that is relevant and reasonably necessary to the union's execution of its collective bargaining obligations, the DLR will require an employer in an adjudicatory proceeding to provide information pursuant to a subpoena if the subpoenaed information relates with reasonable directness to any matter in question, *including* the respondent's defenses.

Thus, in *Berkshire Roots, Inc.*, 50 MLC 36 (September 20, 2023), the DLR denied the Employer's motion to quash a subpoena issued at the Union's request seeking documents containing financial information related to the Employer's profitability. The underlying complaint alleged, among other things, that the Employer

unlawfully increased bargaining unit members' wages and starting pay without giving the Union prior notice and an opportunity to bargain to impasse or resolution in violation of M.G.L. c. 150A. The Employer argued that the financial information sought was not relevant because the Employer had not asserted that it was unable to meet the union's economic demands. However, because the Employer defended against the prohibited practice allegations by claiming that it was permitted to give wage increases consistent with past practice, and the Employer's handbook provided for wage increases based in part on the Employer's profitability, the Hearing Officer concluded that the information sought by the Union related with reasonable directness to the Employer's asserted past practice defense and ordered the Employer to produce the subpoenaed documents.

As evidenced by the above cases, information relevant to the parties' respective collective bargaining obligations is often within the custody and control of the employer. However, a union's obligation to bargain in good faith mirrors that of the employer and, therefore, the same legal principles that require an employer to provide relevant information to the union apply equally to the union when an employer requests relevant information. *Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, et al.*, 12 MLC 1531 (January 21, 1986) (duty to bargain requires both public employer and unions to provide requested information that is relevant and reasonably necessary to other party's collective bargaining obligations).

The CERB reaffirmed this corresponding obligation in *Malden Police Patrolmen's Assoc. and Malden Superior Officers Assoc.*, 50 MLC 5 (August 15, 2023). There, the collective bargaining agreements between the City and its two police unions established a Detail Board comprised of members of each union that "has control over all matters having to do with details." In response to a federal lawsuit filed by several City police officers and a grievance filed by one of the unions, the City requested that the Detail Board provide the City with all records relating to the Detail Board's establishment or modification of detail rates. The unions claimed that detail rates were set by the applicable CBAs and not by the Detail Board, and therefore claimed that any responsive records were within the City's custody and control. The CERB found that while the CBAs set the base rate for details, the Detail Board was responsible for calculating the detail rate pursuant to contractual increases, and notifying bargaining unit members and contractors about rate increases and when such increases would go into effect. The CERB agreed with the hearing officer that the unions were not required to provide documents that the City already maintained or information that did not exist, but where the record demonstrated that Detail Board members discussed calculating and implementing rate increases via text and personal email, the CERB held that the unions had an obligation to search these records for information responsive to the City's request and their failure to do so violated the Law.

The CERB's decision reinforces that the duty to provide information is a two-way street. Like an employer, a union is not permitted to withhold information by merely stating its objection to the request. The union is best served by raising its objections with the employer, working with the employer to clarify the scope and relevancy of the employer's request, and making reasonable efforts to obtain and provide as much responsive information as possible consistent with its expressed objections. ■

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ARBITRATION DECISIONS

Arbitrator Hatfield Upheld City's Termination Of Employee For Failing To Follow COVID-19 Protocol, Lying About His Vaccination Status And Providing A Fake Vaccination Card To Obtain Benefits He Was Not Entitled

Public employees have an obligation to always tell the truth and be forthcoming with their employer. Being dishonest to an employer can result in catastrophic consequences for the employees, including termination from their position, especially if the dishonest conduct involves intentional fraud and consistent failure to tell the truth in an investigation. As demonstrated by the recent arbitration award below, a public employee has a duty to always be honest especially when the employee holds a position that requires trust and daily interactions with the public.

At the time he engaged in the misconduct, the grievant in *City of Revere*, 50 MLC 53 (September 28, 2023) was employed in the City of Revere's ("City") Inspectional Services Division as a Sanitation Inspector, which is a position of autonomy and trust. The City had a non-mandatory vaccination program for all City employees, offering them a $250 bonus payment for proof of vaccination and requiring those who do not submit a vaccination card to be tested weekly.

On November 2, 2021, the City reached out to the grievant to inform him that it was unable to verify the vaccination information he submitted to the City and that he needed to speak with the pharmacy that administered his COVID-19 vaccine to have it upload the vaccine information in its system. The grievant agreed to go to the pharmacy. He insisted that he had received the vaccinations and that his vaccination card was legitimate even though the Walgreens pharmacy had no information or record of him receiving his vaccinations from them. A month later, the grievant gave the City another vaccination card after receiving a single dose of the Johnson and Johnson vaccine. When asked by his supervisor why he would receive another vaccination if he was already vaccinated, he responded "so I could upload a verifiable card." The City terminated his employment for lying about his prior vaccination status.

In his decision, Arbitrator Hatfield found that there was overwhelming evidence in the record proving that the grievant committed the misconducted he is accused of, i.e., lying to his supervisor about his vaccination status, submitting a fake vaccination card in an attempt to defraud the City and receive a bonus payment to which he was not entitled, and continuing to lie when confronted with the allegations against him.

Arbitrator Hatfield was not persuaded by the grievant and the Union's key argument that the grievant was vaccinated twice at Walgreens without filling out any paperwork and that Walgreens must have made an error in its system that prevented the grievant from obtaining proof of his vaccination. He further found that the grievant's belated attempt to rectify the situation by obtaining a one-shot dose of the Johnson and Johnson vaccine and submitting a valid vaccination card only reinforced his continued dishonesty. Arbitrator Hatfield agreed with the City that the grievant's dishonesty amounted to serious misconduct, particularly since he held a position that required trust, and, therefore, warranted his discharge from employment.

INFORMATION REQUEST

CERB Reversed Hearing Officer Decision In Part Finding That The Union Violated The Law By Failing To Make A Reasonable Effort To Search For Responsive Records Within Their Exclusive Possession And Control

Whenever there is a request for information by either the Union or the employer that pertains to their collective bargaining obligations, that information must be produced. A union's statutory obligation under MGL c. 150E ("the Law") to provide relevant and necessary information in a timely manner parallels that of an employer. A union's failure to provide the requested information could invite an unfair labor practice by the employer.

In a recent decision, the Commonwealth Employment Relations Board ("CERB") affirmed the Hearing Officer's finding that the Malden Police Patrolmen's Association and the Malden Police Superior Officers Association ("the Unions") were not obliged to provide the City of Malden ("City") with records that were already within the City's possession or control. But it found that the Unions violated the Law when they failed to make a reasonable effort to search for email and text records within their exclusive possession and control to try and identify Detail Board records that had been requested by the City. *City of Malden*, 50 MLC 5 (August 15, 2023).

In this case, the City requested records relating to the establishment or modification to detail rates by the Detail Board to ensure that it is correctly paying wages to unit members in accordance with the parties' collective bargaining agreement ("CBA"). In determining whether the requested information is relevant, the CERB applies a liberal standard. Here, there was no dispute by the parties that the information requested by the City was relevant and necessary to meet its collective bargaining obligations.

Once the requestor has established that the requested information is relevant, the burden shifts to the custodian of records to demonstrate that the information does not exist or that there is a legitimate reason to not produce the records to the requestor. In the instant case, the parties' CBA explicitly states that the Detail Board has control over all matters having to do with details. The City has no direct or indirect representation on the Detail Board,

and all the members of the Detail Board are Union presidents or their designees, or union members elected by other union members. There was ample evidence found by the Hearing Officer indicating that the Detail Board conducted business by texts and personal emails. The City had no access to those texts and emails, but the Unions did.

The Unions argued that they have no control over the Detail Board or its records. But the CERB rightly rejected the Union's argument, noting that there was no way to distinguish between Detail Board records from union records since union officials and their designees had exclusive control and access to all Detail Board communications. Further, the CERB chided the Unions for making no attempt to search for any responsive records that were in their possession or that they could obtain from the Detail Board members. The CERB stressed that the Unions had a duty to make a reasonable effort to search for records in their own possession and/or control and failed to carry out that duty.

Hearing Officer Denied Employer's Motion To Quash Subpoena Compelling It To Provide The Union With Limited Financial Records Pertaining To Its Profitability

In *Berkshire Roots, Inc.*, 50 MLC 36 (September 20, 2023), the Employer unilaterally decided to increase wages for its employees without first providing notice and opportunity to bargain with the Union over the decision and the impacts of that decision. The Union subsequently requested financial information regarding the Employer's profitability but excluding information pertaining to its operating costs or budgets.

Hearing Officer Meghan Ventrella agreed with the Union's argument that the requested information is relevant as it would demonstrate whether the Employer departed from past practice regarding wage increases assuming the Union is able to establish that such practice exists. Further, she found that the employee handbook states that wage increases are dependent at least in part on the employer's profitability, which made the information more relevant. The Employer did not provide any specific explanation of why the limited financial information sought by the Union was confidential that would provide a basis for the Department of Labor Relations ("DLR") to quash the subpoena.

RETALIATION

In A Retaliation Case, Union Failed To Establish That The School District Relied On Prior Grievances Filed By Its Plumbing Instructor When It Declined To Offer Him The Position Of Golf Head Coach

In retaliation cases, the charging party must establish a prima facie case by demonstrating that (1) the employee had engaged in activity protected under the Law, (2) the employer was aware of the employee's protected activity, (3) the employer took adverse action against the employee, and (4) the employer's conduct was motivated by a desire to penalize the employee for engaging in protected activity.

The first three elements of a prima facie case of retaliation are easy to prove but the fourth element is often most litigated. When analyzing the fourth elements, the DLR looks at several factors that may suggest unlawful motivation, including, but not limited to, the timing of the employer's action in relation to the protected activity, disparate treatment, an employer's deviation from past practices, or expressions of animus toward a union.

For instance, in *Greater Lowell Regional Vocational Technical School District*, 50 MLC 31 (September 7, 2023), Hearing Officer Kendrah Davis found that the Greater Lowell Regional Vocational and Technical School District ("District") did not retaliate against Plumbing Inspector Robert Jones ("Jones") for filing grievances in 2018 and 2019 when it declined to offer him the position of golf head coach in September of 2020.

The parties did not dispute that Jones was engaged in concerted activity protected under the Law when he filed the 2018 and 2019 grievances. Nor was there any dispute that the District knew of Jones' concerted activities. Further, Hearing Officer Davis found that the District's failure to offer Jones the position of golf head coach in September of 2020 constituted adverse action against him because it materially disadvantaged his ability to receive increased compensation via a stipend in the amount of approximately $4,500.00. Further, given that he was not appointed to the position, he was also disadvantaged by the fact he could not be an incumbent coach which would have helped him secure the position in the future.

As to the fourth and final element, Hearing Officer Davis correctly found no evidence in the record indicating that the District relied on the 2018 and 2019 grievances during Jones' hiring process. Also, there was no evidence that Jones was treated differently during the interview process. All applicants were asked the same questions and given the same opportunity to provide additional information. The Union further could not prove that the District deviated from its established practice of preferring incumbent coaches/internal candidates over external candidates when it hired an external candidate to the position. Neither Jones nor the selected external candidate were incumbent coaches that would have entitled them to a hiring preference.

UNLAWFUL STRIKE

CERB Found That Newton Educators Engaged In Unlawful Strike When They Boycotted A District-Wide Meeting But Did Not Violate The Law When They Remained Silent During Staff Meetings Absent Evidence That They Were Expected To Participate

In *Newton School Committee*, 50 MLC 39 (September 26, 2023), Newton Educators were required by the Superintendent to attend work-related meetings on their first days back at school. The meetings served a variety of purposes such as welcoming teachers back, introducing or re-introducing them to each other and providing them with resources for support. The Educators boycotted the convocation event at the Union's request. Consequently, the CERB found that the Union and its officers induced, encouraged, and condoned the unlawful strike.

However, the CERB found that the Educators' refusal to speak during administrator led meetings did not rise to the level of an unlawful withholding of services because there was no evidence suggesting that they were required or expected to participate at those meetings. ■