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18-P-1382 Appeals Court

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 6, AFL-CIO vs. COMMONWEALTH EMPLOYMENT RELATIONS BOARD & another.[1]

No. 18-P-1382.

Suffolk. October 11, 2019. - December 27, 2019.

Present: Neyman, Shin, & McDonough, JJ.

Commonwealth Employment Relations Board. Labor, Fair representation by union, Action against labor union, Damages. Damages, Fair representation by union, Interest.

Appeal from a decision of the Commonwealth Employment Relations Board.

Luke Rosseel for John F. Murphy.
Michael Feinberg for the plaintiff.
T. Jane Gabriel for Commonwealth Employment Relations Board.

SHIN, J. After John Murphy was discharged from his position at the Worcester Division of the Probate and Family Court Department (Worcester Probate and Family Court), his union, the Office and Professional Employees International

[1] John F. Murphy.

Union, Local 6 (union), filed a grievance on his behalf in accordance with the collective bargaining agreement (CBA) between the union and the employer (trial court). The trial court denied the grievance; under the CBA, this triggered a deadline of twenty working days by which the union had to file a demand for arbitration. The union missed that deadline, leading the arbitrator to rule that the grievance was not procedurally arbitrable.

Left with no means under the CBA to challenge his termination, Murphy filed a charge with the Department of Labor Relations (department), claiming that the union committed a breach of its duty of fair representation under G. L. c. 150E, § 10 (b) (1). A department hearing officer agreed and ordered the union to make Murphy whole for the loss of compensation he suffered as a result of his termination. On the union's administrative appeal, the Commonwealth Employment Relations Board (board)[2] upheld the hearing officer's decision and also ordered the union to pay interest at the rate specified in G. L. c. 231, § 6I, compounded quarterly.

The union appeals under G. L. c. 150E, § 11 (i), arguing that the board erred in concluding that the union committed a breach of its duty of fair representation and that Murphy was

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[2] Formerly the Labor Relations Commission.

entitled to a remedy. Murphy cross-appeals, arguing that the board erred in selecting the rate of interest to be paid on the award. We affirm.

Background. We summarize the hearing officer's findings of fact, which were adopted by the board and are unchallenged on appeal. We reserve some details for later discussion.

Murphy began working at the Worcester Probate and Family Court in 2005. In April 2013 Murphy's supervisor, Stephen Abraham, notified him that there would be a hearing to determine whether just cause existed to discharge or otherwise discipline Murphy based on charges that he had committed five acts of misconduct.[3] At the hearing, attended by Murphy and union business agent Richard Russell, among others, Murphy denied four of the charges and partially denied the fifth.[4] Abraham found

[3] In brief, the charges were as follows: (1) Murphy asked Abraham's administrative deputy assistant for the make and model of Abraham's car with the intent to have him followed; (2) Murphy maligned Abraham's reputation and disparaged his name to other court employees and to people in the community; (3) a lawyer filed a complaint alleging that Murphy had offered free legal advice to the lawyer's ex-wife; (4) Murphy arrived at work one day with an odor of alcohol on his breath; and (5) Murphy circumvented court policy by instructing staff to expedite the processing of pleadings filed in his own divorce case.

[4] Murphy admitted that he had asked for the make and model of Abraham's car, but he claimed that "it was just a joke" and denied that he intended to have Abraham followed.

Murphy's explanations not credible, however, and on May 14, 2013, terminated his employment.

The union challenged the termination by filing a timely grievance with the trial court pursuant to the first three steps of the four-step grievance and arbitration procedure provided in the CBA. By agreement with the union, attorney Michael Angelini represented Murphy at the "Step 3" grievance hearing, presided over by Christine Hegarty, the trial court's manager of human resources, labor relations, and investigations. Both Angelini and Russell attended the hearing, but neither offered evidence; instead, they summarily denied the charges in anticipation of presenting a more comprehensive case at arbitration.

On August 20, 2013, Hegarty notified the union that she had denied the grievance. This triggered "Step 4" of the grievance and arbitration procedure, which provided for submission of matters 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 to the American Arbitration Association or an alternative forum as agreed to by the parties. The arbitrator shall have no power to add to, subtract from, or modify any provision of this Agreement, or to issue any decision or award inconsistent with applicable law. The decision or award of the arbitrator shall be final and binding in accordance with Mass. Gen. Laws chs. 150C and 150E."

As Russell was aware, this provision required the union to file a demand for arbitration by September 20, 2013.

Well before that date, on August 22, 2013, Angelini wrote to the union, urging that it promptly file a demand:

> "I know that you have the [d]ecision from Ms. Hegarty.
>
> "I would like to move on to arbitration ASAP. I assume that the Union will allow me to act as attorney for the Union in this arbitration. There will be no cost to the Union for this of course.
>
> "Please make the demand for arbitration and get back to me ASAP regarding this. Time is an enemy not an ally."

Nonetheless, the union waited until September 24, 2013 -- after the deadline had already passed -- to vote to move the case forward to arbitration. That same day, Russell left Hegarty a voicemail message asking for an extension of time to file the demand. Two days later, Hegarty informed Russell that the trial court had denied the union's request.

The union filed the arbitration demand on September 26, 2013, but did not immediately notify Murphy or Angelini that the filing was late. In fact, as evidenced by a letter Murphy wrote to Russell on January 17, 2014, the union had not, even as of that date, explained to Murphy the circumstances that led to the missed deadline, nor had it told him what steps it had taken to resolve the issue. The union also failed to respond for many months to Murphy's and Angelini's requests for a copy of the demand.

After several postponements the arbitration hearing was held in May 2015. The arbitrator concluded, however, that he

had no authority to rule on the merits of the grievance because of a provision in the CBA stating that "time limits prescribed at each Step of the grievance procedure . . . may be waived by mutual agreement of the parties" and "[i]f the Union fails 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 denial of the union's request for an extension resulted in abandonment of the grievance, rendering it not procedurally arbitrable.

The department hearing officer thereafter conducted six days of hearings on Murphy's charge that the union had committed a breach of its duty of fair representation under G. L. c. 150E, § 10 (b) (1). Based on detailed findings of fact, the hearing officer concluded that the union had committed a breach of its duty. The board affirmed, and these cross appeals followed.[5]

Discussion. 1. Standard of review. We review the board's decisions under the standards of G. L. c. 30A, § 14 (7), "which provides that a final administrative agency decision will be set aside if, among other grounds, it is '[u]nsupported by substantial evidence,' G. L. c. 30A, § 14 (7) (e), or '[a]rbitrary or capricious, an abuse of discretion, or otherwise

[5] Murphy also moved the board to reconsider the interest rate applied to the award. Upon the board's denial of the motion, Murphy filed a second notice of appeal.

not in accordance with law,' G. L. c. 30A, § 14 (7) (g)." Commissioner of Admin. & Fin. v. Commonwealth Employment Relations Bd., 477 Mass. 92, 95 (2017). See G. L. c. 150E, § 11 (i). In this case, to the extent a challenge to the sufficiency of the evidence has been made, it is not properly before us because the union failed to provide a complete hearing transcript. See United Steelworkers of Am. v. Commonwealth Employment Relations Bd., 74 Mass. App. Ct. 656, 661 (2009). We are thus "limited to determining whether the board's decision is marred by legal error or is otherwise arbitrary, capricious, or an abuse of discretion." Id. In conducting our review, we give "deference to the [board's] specialized knowledge and expertise, and to its interpretation of the applicable statutory provisions." Anderson v. Commonwealth Employment Relations Bd., 73 Mass. App. Ct. 908, 910 (2009), quoting Worcester v. Labor Relations Comm'n, 438 Mass. 177, 180 (2002).

2. Breach of duty of fair representation. "A union has a duty to represent its members fairly in connection with issues that arise under a collective bargaining [agreement]." National Ass'n of Gov't Employees v. Labor Relations Comm'n, 38 Mass. App. Ct. 611, 613 (1995). In discharging that duty, "[u]nions are permitted 'a wide range of reasonableness' in representing the often-conflicting interests of employees" and are thus "vested with considerable discretion not to pursue a grievance."

Graham v. Quincy Food Serv. Employees Ass'n & Hosp., Library & Pub. Employees Union, 407 Mass. 601, 606 (1990), quoting Baker v. Local 2977, State Council 93, Am. Fed'n of State, County & Mun. Employees, 25 Mass. App. Ct. 439, 441 (1988). A union may not, however, "arbitrarily ignore a meritorious grievance or process it in perfunctory fashion." Vaca v. Sipes, 386 U.S. 171, 191 (1967). See Graham, 407 Mass. at 606, quoting Baker, 25 Mass. App. Ct. at 441 (union's processing of grievance may not be "improperly motivated, arbitrary, perfunctory or demonstrative of inexcusable neglect"). Thus, "[a]lthough ordinary negligence may not amount to a denial of fair representation, lack of a rational basis for a union decision and egregious unfairness or reckless omissions or disregard for an individual employee's rights may have that effect.'" Graham, supra, quoting Trinque v. Mount Wachusett Community College Faculty Ass'n, 14 Mass. App. Ct. 191, 199 (1982).

Here, the board's conclusion that the union's conduct was "perfunctory" and "demonstrative of gross or inexcusable negligence" was not erroneous as a matter of law or otherwise arbitrary, capricious, or an abuse of discretion. Unlike Baker, 25 Mass. App. Ct. at 441-443, on which the union relies, this case is not one where the union made a discretionary decision not to pursue the grievance based on a belief that it lacked merit. When the grievance was first filed, Russell thought it

had merit, and he knew that Angelini expected to win the case at arbitration. The union's abandonment of the grievance therefore resulted not from any exercise of discretion, but from its failure to follow the basic step of filing the arbitration demand by the deadline specified in the CBA. This was a ministerial act requiring no "complex legal interpretations." Goncalves v. Labor Relations Comm'n, 43 Mass. App. Ct. 289, 298 (1997). Indeed, Russell testified that he knew about the deadline and could have asked the trial court for an extension before it expired. Yet despite Angelini's reminder that "[t]ime [was] an enemy not an ally," the union waited until the deadline passed before even taking a vote on whether to pursue the grievance. Then, as the hearing officer found, the union "inexplicably" waited two more days to file the demand and failed to timely respond to Murphy's and Angelini's requests for updates on the case status.

Based on these facts, the board permissibly found that the union had committed a breach of its duty of fair representation. We see no factor that materially distinguishes this case from United Steelworkers and Goncalves. In United Steelworkers, 74 Mass. App. Ct. 659-660, we affirmed a board decision finding a breach of the duty of fair representation where the union failed to pursue a grievance because of a union official's mistaken belief that the employee still had time to take a civil service

appeal. As we concluded, the official "had an obligation to take reasonable steps to assure himself that [the employee] had a viable civil service appeal before he abandoned the grievance process," id. at 664, and "[t]hat [the official] misunderstood or disregarded the easily-knowable civil service limitation period [did] not shield the union from its duty to its members," id. at 665.

On analogous facts, in Goncalves, we reversed a decision of the Labor Relations Commission (commission) finding no breach of the duty of fair representation. There, the union abandoned the grievance process because it believed, contrary to its own policies, that the employee's retention of an attorney absolved the union of responsibility for processing the grievance. See Goncalves, 43 Mass. App. Ct. at 292-293. We held that "the union's failure to follow its own policies governing its processing of [the employee's] grievance, its failure to inform him of the status of his grievance, and its failure to respond to his attorney's requests for information constitute[d] nothing less than 'grossly inattentive or grossly negligent' conduct, thereby mandating a finding that the union violated its duty of fair representation." Id. at 297, quoting National Ass'n of Gov't Employees, 38 Mass. App. Ct. at 613.

As in United Steelworkers and Goncalves, the union here has failed to offer any viable explanation for its abandonment of

the grievance, which, as discussed infra, the board found to be meritorious. Although the union argues that it reasonably relied on the trial court's past practice of freely granting extension requests, the board properly found that the union's claim was "neither supported by fact nor explicit contract language." The union did not dispute that in no prior case had it let the deadline expire before asking for an extension. As a result, while the trial court did have a practice of granting predeadline requests, it had never applied the practice to postdeadline requests. Russell could have asked for an extension prior to the deadline, and the board was within its discretion to find that there was no "rational basis" for him not to have done so. That Russell may have believed that the trial court would grant a postdeadline request is not material. "[A] union is not shielded from liability solely because its officials are mistaken about readily recognizable issues that arise during representation." United Steelworkers, 74 Mass. App. Ct. at 664.[6]

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[6] Without distinguishing United Steelworkers or Goncalves, the union cites cases from other jurisdictions for the proposition that an untimely filing does not amount to a breach of fair representation. We are of course not bound to follow those cases, which do not in any event aid the union's position. In Goulet v. New Penn Motor Express, Inc., 512 F.3d 34, 44-46 (1st Cir. 2008), the court decided the limited question whether there was evidence to support a jury verdict for the union. In concluding that there was, the court pointed to evidence that would allow a rational jury to find that the employee's

3. Murphy's right to a remedy. Once the board finds that a union has violated its duty of fair representation, the question becomes whether the employee is entitled to a remedy. See Pattison v. Labor Relations Comm'n, 30 Mass. App. Ct. 9, 17 (1991). In making that determination, the board has long applied a burden-shifting framework, under which the "employee . . . must establish that his or her grievance was not clearly frivolous; the burden then shifts to the union to demonstrate that the grievance was clearly without merit." Id. The board concluded that Murphy was entitled to a remedy under this framework, and the union does not challenge the merits of that

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grievance was not meritorious; contrary to the union's characterization here, the Goulet court did not conclude that the evidence was sufficient for the jury to find a lack of reckless conduct by the union. See id. at 45. The remaining cases cited are factually distinguishable. See Ruzicka v. General Motors Corp., 649 F.2d 1207, 1210 (6th Cir. 1981) (untimeliness resulted from union's reliance on parties' "prevailing practice" of extensions being granted "even after the [deadline] had passed"); Ethier v. United States Postal Serv., 590 F.2d 733, 736 (8th Cir.), cert. denied, 444 U.S. 826 (1979) (union's noncompliance with time limits "understandable" because CBA provisions were ambiguous); Sanchez v. New England Confectionery Co., 120 F. Supp. 3d 33, 38, 39 (D. Mass. 2015) (untimeliness resulted from "miscommunication" between union's business agent and attorney, both "worked immediately to fix it," and no prejudice resulted because arbitrator addressed merits of grievance despite untimeliness); Amalgamated Transit Union Local No. 1498, 360 N.L.R.B. 777, 778 (2014) (union president "zealously pursued the grievance" and "twice conferred [with union attorney] to verify the timely status of [employee's] arbitration," and attorney "believed that he had" acted consistently with grievance procedures).

determination. Instead, it argues that the board should have abandoned the burden-shifting framework in favor of the rule adopted by the National Labor Relations Board in Iron Workers Local 377, 326 N.L.R.B. 375, 377 (1998), which puts the burden on the charging party to prove that the grievance would have succeeded had the union properly processed it.

We reject the union's argument for several reasons. First, the union did not challenge application of the burden-shifting framework until it submitted its posthearing brief. The board thus determined that in fairness to Murphy, "even if [it] were inclined to adopt a different standard, which [it was] not, it would do so only prospectively." The union has not explained why this was an abuse of discretion.

Second, it was the board's prerogative to conclude that the burden-shifting rule was preferable to the Federal rule "[a]s a policy matter." The board was entitled to reject the union's claim that burden shifting runs the risk of imposing punitive liability on the union and granting a windfall to the employee. As the board observed, we addressed that very issue in Pattison, 30 Mass. App. Ct. at 19, and concluded that burden shifting "does not unduly disfavor the union, which ordinarily has full access to the facts about the merits of the grievance, and is aided by its developed understanding of the 'common law of the shop.'" While the union may prefer the Federal rule, it has

offered no reason why the board was required as a matter of law to adopt it. See id. at 18 (burden-shifting rule was "tenable as a determination by the responsible agency with specialized knowledge and experience in the field").

Finally, the board found that, whichever standard applied, Murphy was still entitled to a remedy because he offered sufficient evidence to show that his grievance would have succeeded at arbitration. The union's sole response is that, had it known that the board would go on to analyze the evidence under the Federal rule, it would have presented its case before the hearing officer differently. But it was the union that (belatedly) raised the argument that the board should apply the Federal rule. The union could have offered evidence in anticipation of that argument, as the hearing officer conducted six days of hearings, and the union does not claim that she in any way limited its presentation of evidence.

4. Interest rate. We turn to the issue raised in Murphy's cross appeal. The board ordered the union to pay interest at the rate specified by G. L. c. 231, § 6I, which applies a floating rate on judgments against the Commonwealth.[7] Murphy

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[7] General Laws c. 231, § 6I, provides, in pertinent part:

> "Interest required to be paid by the commonwealth pursuant to this section shall be calculated at a Weekly average one-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for

contends that the board should have instead ordered interest at the rate of twelve percent per annum pursuant to G. L. c. 231, § 6H, which states in full:

> "In any action in which damages are awarded, but in which interest on said damages is not otherwise provided by law, there shall be added by the clerk of court to the amount of damages interest thereon at the rate provided by section six B[8] to be determined from the date of commencement of the action even though such interest brings the amount of the verdict or finding beyond the maximum liability imposed by law."

According to Murphy, this matter is one in which interest "is not otherwise provided by law"; thus, he argues, the board was statutorily required to apply § 6H to the award.

Murphy's argument fails for the basic reason that G. L. c. 231 applies to court actions, not administrative agency proceedings. Chapter 231 appears in Part III of the General Laws, which is entitled "Courts, Judicial Officers and Proceedings in Civil Cases." The board's authority to award interest therefore derives not from any provisions of that

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> the calendar week preceding date of the judgment; provided, however, that such interest shall not exceed the rate of ten percent per annum."

[8] See G. L. c. 231, § 6B ("In any action in which a verdict is rendered or a finding made or an order for judgment made for pecuniary damages for personal injuries to the plaintiff or for consequential damages, or for damage to property, there shall be added by the clerk of court to the amount of damages interest thereon at the rate of twelve per cent per annum from the date of commencement of the action . . .").

chapter, but from G. L. c. 150E, § 11, which confers on the board "considerable discretion . . . in fashioning an appropriate remedy," including interest awards. School Comm. of Newton v. Labor Relations Comm'n, 388 Mass. 557, 580 (1983). Cf. Conway v. Electro Switch Corp., 402 Mass. 385, 391 (1988) (although Massachusetts Commission Against Discrimination [MCAD] may be "guided by G. L. c. 231, § 6B," in setting interest, actual interest award "not made pursuant to that legislation" but pursuant to "exercise of broad agency discretion to fashion appropriate remedies"); Blockel v. J.C. Penney Co., 337 F.3d 17, 30-31 (1st Cir. 2003) ("Although the MCAD may well look to [c. 231] for guidance in calculating the rate of prejudgment interest, it ultimately derives its authority from the statute governing its own processes").[9]

Murphy's reliance on Secretary of Admin. & Fin. v. Labor Relations Comm'n, 434 Mass. 340 (2001), for the proposition that the board is bound by the provisions of c. 231, § 6H, is misplaced. The court held in that case that the commission was required to apply c. 231 -- in particular, § 6I's floating rate

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[9] See Smith v. Bell Atl., 63 Mass. App. Ct. 702, 726 (2005) ("date of commencement of the action" in c. 231, §§ 6B and 6H, refers to date of commencement of court action, not date of filing of charge with agency). Accord Salvi v. Suffolk County Sheriff's Dep't, 67 Mass. App. Ct. 596, 610 (2006); Scott v. Boston Hous. Auth., 64 Mass. App. Ct. 693, 696 (2005).

-- when awarding interest against the Commonwealth.[10] But in so holding, the court cited two factors not applicable here. First, the court observed that the formula delineated in § 6I "mirror[ed] a nearly identical provision of the eminent domain statute," which was enacted the same year. Id. at 345-346. As the court reasoned, "[t]hat the Legislature imposed the floating interest rate against the Commonwealth in two unrelated statutes, at roughly the same time, reveal[ed] its intention to establish a uniform interest rate on all payments the Commonwealth must make, regardless of type." Id. at 346. Second, the court concluded that applying § 6B's twelve percent rate would be contrary to public policy, "at the expense of the taxpayers," because it would result in a windfall to the charging parties. Id. at 347.

In comparison, Murphy points to no legislative history supporting an inference that by enacting c. 231, § 6H -- a "catch-all interest provision," Herrick v. Essex Regional Retirement Bd., 465 Mass. 801, 807 (2013) -- the Legislature intended to bind the board and deprive it of discretion to fashion interest awards. Nor has Murphy shown that the board's longstanding practice of applying § 6I's floating rate (adopted after the decision in Secretary of Admin. & Fin.) contravenes

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[10] Consistent with its practice at the time, the commission had applied the twelve percent rate specified in c. 231, § 6B.

public policy. Although Murphy asserts that the commission erred in adopting a policy of applying § 6I to all monetary judgments, not just those against the Commonwealth, he does not specifically challenge the commission's determination -- made in 2003 and adhered to since -- that such a practice would further public policy by "more closely approximat[ing] charging parties' actual losses" and by "promot[ing] fairness and consistency." Ashburnham-Westminster Regional Sch. Dist., 29 M.L.C. 191, 196 (2003). The board was within its discretion and committed no error of law in choosing not to deviate from this consistently applied practice.

Conclusion. The decision and order of the Commonwealth Employment Relations Board is affirmed. The order denying the motion for reconsideration is affirmed.

So ordered.