

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

In the Matter of

AMHERST POLICE LEAGUE

and

WILLIAM J. KOSKI

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Case No. MUPL-05-4521

Date issued:

April 23, 2009

Board Members Participating:

Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member

Appearances:

Harold L. Lichten, Esq. - Representing William J. Koski
Dan V. Blair II, Esq. - Representing the Amherst Police League

DECISION

1 The issue in this case is whether the Amherst Police League (Union) breached
2 its duty to represent bargaining unit member William Koski (Koski or Charging Party)
3 fairly by the manner in which it handled the grievance that Koski had filed to challenge
4 his termination from employment with the Amherst Police Department. We find that the
5 Union violated Section 10(b)(1) of M.G.L. c.150E (the Law) by failing to properly
6 process and arbitrate Koski's grievance.

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8

1 consideration of the parties' challenges and briefs, the Board makes the following
2 findings of fact and renders the following opinion.

3
4 Stipulations of Fact²

- 5
6 1. The Union is an employee organization within the meaning of Section 1 of the
7 Law.
8
9 2. The Union is the exclusive collective bargaining representative for certain patrol
10 officers and sergeants in the Police Department for the Town of Amherst (Town).
11
12 3. At all relevant times, Mr. Koski was a member of the bargaining unit described in
13 Stipulation No. 2.
14
15 4. Article VIII of the collective bargaining agreement between the Union and the
16 Town contains a grievance-arbitration procedure. Under this procedure, unit
17 members can initiate a grievance only at the first step of the grievance process.
18
19 5. On or about September 9, 2004, the Town terminated Mr. Koski's employment.
20
21 6. On or about September 16, 2004, Mr. Koski filed a grievance challenging his
22 termination under the provisions of the collective bargaining agreement
23 described in Stipulation No. 4, above.
24
25 7. On or about September 27, 2004, Harold Lichten, Esq. (Lichten), acting on Mr.
26 Koski's behalf, wrote to the Union to encourage it to take Mr. Koski's grievance to
27 arbitration.
28
29 8. The Charging Party's termination grievance is not clearly frivolous as that
30 standard is set out in Berkley Employees Association, 19 MLC 1647 (1993).
31
32 9. Mr. Koski admitted to sufficient facts and his criminal case was continued without
33 a finding.
34
35 10. Mr. Koski was placed on probation for a period of one year beginning on
36 November 19, 2004 and ending November 18, 2005. His criminal case was
37 dismissed at the conclusion of his probation.
38
39 11. The telephone voice mail message listed first in Joint Exhibit No. 23 took place
40 on or about May 13, 2005. The second voice mail message took place on

² The Board's jurisdiction is not contested.

1 December 14, 2004, and the third voice mail message took place on May 19,
2 2005. Joint Exhibit No. 23 accurately reflects the voice mail messages.

3
4 12. Joint Exhibit No. 41 is Section 2 of the Amherst Police Department Rules and
5 Regulations, which were in effect at all times relevant to this case.

6
7 Findings of Fact

8
9 After reviewing the parties' challenges to the Hearing Officer's Recommended
10 Findings of Fact, we adopt the Hearing Officer's Recommended Findings, as modified
11 where noted, and summarize the relevant portions below.

12 The Union

13 The Union's bylaws state that its officers shall consist of a president, a vice-
14 president, and a secretary-treasurer, and that these officers, along with one additional
15 member³ of the corporation,⁴ constitute the Board of Directors. The bylaws charge the
16 Board of Directors with the general management of the Union's affairs. At all times
17 relevant to this case, Stephen Walsh (Walsh) was the Union President,⁵ Brian Johnson
18 (Johnson) was the Vice-President, and James Damouras (Damouras) was the
19 Secretary-Treasurer. These individuals, and Bargaining Member Michael Sullivan
20 (Sullivan), comprised the Union's Board of Directors.

21 The Union's bylaws state that the Union's bargaining agents shall be its sole
22 agents and shall represent and act for the Union in all matters affecting or arising out of
23 the employment of the Union's members. The bargaining agents consist of three Union

³ The Union appointed an individual to serve on the Board of Directors in the role of "bargaining member" during successor contract negotiations.

⁴ The Union's bylaws refer to the Union as a corporation.

⁵ Walsh's tenure as the Union president ended in May of 2005. Richard MacLean (MacLean) succeeded Walsh as the Union President.

1 members and any other agent so designated by the Board of Directors. At all times
2 relevant to this case, the bargaining agents were the same individuals who comprised
3 the Board of Directors.

4 The Union's bylaws contain no reference to a grievance committee or an
5 executive board. However, a Union Grievance Committee and an Executive Board
6 existed during the pendency of the events at issue in this case. The Executive Board
7 consisted of the Union President, Vice President, and Secretary-Treasurer. Between
8 September of 2004 and May of 2005, the Grievance Committee was comprised of the
9 following individuals: David Knightly (Knightly), Glenn Jackson (Jackson), Todd Lang
10 (Lang), Damouras, and Jeanine Bonnayer (Bonnayer).⁶ The bylaws contain no
11 reference to any appeals process from the Grievance Committee.

12 Soon after Walsh became the Union's president, the Union retained John
13 Claffey, Esq. (Claffey) as the Union's attorney to represent the Union, to provide
14 professional services, and to help the Union negotiate a successor collective bargaining
15 agreement. Claffey attended the successor contract negotiations between the Town and
16 the Union but did not have the authority to make binding agreements in the
17 negotiations. Claffey served as the Union's attorney until May of 2005.

18 **The Collective Bargaining Agreement and Disciplinary Procedures**

⁶ The Union selected the members of the Grievance Committee at random rather than by an election. Union members placed their individual identification numbers into a hat, and the five individuals whose numbers were pulled out of the hat constituted the Grievance Committee.

1 The Town and the Union were parties to a collective bargaining agreement
2 (Agreement) with a stated effective date of July 1, 2001 to June 30, 2004. Article VIII of
3 the Agreement, entitled Grievance and Arbitration Procedure, provides in relevant part:

4 Section 8.01 Definition

5 A grievance shall be defined as any difference between the parties to
6 this contract relating to its interpretation, application or administration
7 including a question as to whether a matter is arbitrable and any
8 question as to whether the suspension or discharge of an employee is
9 for just cause. Should any employee or group of employees feel
10 aggrieved, adjustment shall be sought as follows:

11
12 Step 1: Any employee may, with or without the assistance of the Union
13 Grievance Committee, orally present any grievance to the officer in
14 charge of his/her shift and such grievance shall be presented within
15 seven (7) calendar days of the occurrence giving rise to the grievance.
16 The officer in charge shall make a written record of the complaint, which
17 shall be signed by the aggrieved individual. The Supervisor shall then
18 attempt to adjust the matter and shall respond to the employee or the
19 Union Grievance Committee within seven (7) calendar days.

20
21 Step 2: If the grievance has not been settled, the Union Grievance
22 Committee shall, at its discretion, forward the grievance in writing to the
23 Chief of the Department. Within seven (7) calendar days of the receipt
24 of the grievance, the Chief shall meet with the Grievance Committee
25 and attempt to resolve the same. Within seven (7) calendar days of the
26 conclusion of this meeting, the Chief will reply in writing to the
27 Grievance Committee of his meeting with same.

28
29 Step 3: If the grievance is not resolved at Step 2 as set out aforesaid,
30 the Union Grievance Committee shall forward the grievance to the Town
31 Manager within seven (7) calendar days after the Chief's response is
32 due. Upon receipt of the grievance, the Town Manager shall schedule a
33 meeting to be held within fourteen (14) calendar days after the Union's
34 response is due at which time there will be an attempt to resolve the
35 grievance. The Town Manager will answer the grievance within seven
36 (7) calendar days of the conclusion of this meeting.

37
38 Step 4: If the grievance is still unsettled at Step 3 as set out aforesaid,
39 either party may, within 28 calendar days after the Town Manager's
40 reply is due, by written notice to the other, request arbitration. The
41 arbitration proceeding shall be conducted by an arbitrator to be selected
42 by the Town and the Union within nine (9) calendar days after notice
43 has been given and, in the event no such agreement shall be

1 forthcoming within ten (10) calendar days of the notice of submission of
2 the grievance, the moving party shall file a request with the American
3 Arbitration Association to provide a panel of arbitrators from which a
4 selection of an arbitrator agreeable to the parties shall be made.

5 ***
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8 The expense of the arbitrator's services and proceedings shall be borne
9 equally by the Employer and the Union....

10
11 Section 8.02 Time Limits

12 If a grievance is not presented within the time limits set forth above, it
13 shall be considered waived. If a grievance is not appealed to the next
14 Step within the specified time limit or a mutually agreed extension
15 between the parties has been reached, it shall be considered settled on
16 the basis of the Town's last answer. If the Town does not answer a
17 grievance or an appeal thereof within the specified time limits, the Union
18 may elect to treat the grievance as denied at the Step and may
19 immediately appeal the grievance to the next Step. The time limit in
20 each Step may be extended by mutual written agreement of the Town
21 and the Union representatives involved in each Step.

22
23 Step 8.03 Filing By Union

24 The Union in accordance with Section 8.01 shall be entitled to submit
25 grievances in the same manner as provided herein for employees, said
26 submissions to begin at Step 2 in the grievance procedure.

27
28 The Town's disciplinary procedures for non-union employees differ from the
29 disciplinary procedures for bargaining unit employees. Non-union employees have a
30 right to appeal a disciplinary action, such as a discharge, to the Town's Personnel
31 Board and receive a hearing. Bargaining unit employees have no right to a hearing
32 before the Personnel Board. As a matter of practice, however, the Town will meet with
33 bargaining unit members regarding disciplinary issues outside of the grievance
34 procedure or the Town bylaws. Since the early 1980s, the Union has brought few, if
35 any, discipline cases to the Town Manager's step of the grievance procedure and has
36 not brought any grievances involving employee discipline to arbitration.

37 Koski's Termination

1 The Town hired Koski as a police officer in 1989 and promoted him to sergeant in
2 2000. Police Chief Charles Scherpa (Chief Scherpa) considered Koski to be a good
3 sergeant and had not disciplined Koski prior to July 8, 2004.

4 On July 8, 2004, while off-duty, Koski began arguing with his wife, Tatiana Koski
5 (Mrs. Koski) at home after he had been drinking. Among other actions, Koski hit his
6 wife's face hard with his hand multiple times, injuring her. Immediately afterwards, Koski
7 left his home and drove to his mother's home in Vermont. The next morning, Koski
8 surrendered at the Deerfield police station.⁷ The Deerfield police arrested Koski and
9 charged him with domestic assault and battery, a misdemeanor.

10 On July 10, 2004, Koski was admitted to Providence Hospital where he received
11 treatment for depression and anxiety for four days. Dr. Joseph Gaubinger (Gaubinger),
12 a psychologist, and Dr. John Zebrun (Zebrun), a psychiatrist, treated Koski for anxiety,
13 depression and alcoholism following his release from Providence Hospital.

14 Koski met with Chief Scherpa soon after his release from Providence Hospital
15 and told the Chief that he had been drinking during the previous six months. Chief
16 Scherpa stated that he was investigating the July 8, 2004 incident and advised Koski
17 not to talk to him about the incident at that time. The Chief did not grant Koski any form
18 of immunity at that meeting.

19 On July 21, 2004, Town Counsel Alan Seewald (Seewald) extended an offer to
20 Koski to meet with Town Manager Barry Del Castilho (Del Castilho or Town Manager) to
21 explain and to provide information regarding the July 8th incident. Seewald indicated
22 that Del Castilho would decide whether to take any disciplinary action against Koski.

⁷ Koski's home is in Deerfield, Massachusetts.

1 Walsh authorized Koski to speak to Claffey regarding the meeting, and Koski
2 contacted Claffey. Because Claffey was unable to attend the meeting, Claffey retained
3 Attorney Marshall Moriarty (Moriarty) to act as the Union's attorney in his absence.
4 Koski spoke to Moriarty prior to the meeting, and Moriarty told him not to make a
5 statement regarding the July 8th incident at the meeting, because any statement Koski
6 made could be used against him in his criminal case. Moriarty also told Koski that, if the
7 Town terminated him, the Union would resolve the situation through the grievance
8 procedure in arbitration.

9 On July 30, 2004, Koski and Moriarty met with Del Castilho and Human
10 Resources Director Kay Zlogar (Zlogar). Koski did not request to speak with immunity at
11 that meeting, and Del Castilho and Zlogar did not grant Koski any form of immunity.
12 Moriarty told Del Castilho and Zlogar that he and Koski were not prepared to discuss
13 the July 8th incident, and when Koski started to speak at one point during the meeting,
14 Moriarty stopped him. Moriarty asked the Town to approve family and medical leave
15 (FMLA leave) for Koski to facilitate medical treatment for an alcohol-related illness. To
16 support his FMLA leave claim, Koski provided Zlogar with a note from Dr. Charles
17 Weeber, III (Dr. Weeber).

18 Zlogar subsequently notified Koski by letter dated July 30, 2004 that, as of July
19 26, 2004, he would be out of work on an unpaid status.⁸ Zlogar acknowledged receipt of
20 a note from Dr. Charles Weeber, III (Dr. Weeber) and informed Koski that she would
21 make a determination on his medical leave request following his completion of a specific
22 FMLA form.

⁸ The Town had suspended Koski with pay on July 9, 2004.

1 On August 6, 2004, Koski submitted a grievance to Sergeant William Menard
2 (Menard). Koski's grievance stated in pertinent part:

3 Please accept this letter as an Employee Grievance submitted in
4 accordance with Article VIII, Section 8.01 of the Collective Bargaining
5 Agreement between the Town of Amherst and the Amherst Police League,
6 dated December 13, 2001.

7
8 On July 30, 2004, I received a letter from Kay Zlogar, Human Resources
9 Director for the Town of Amherst, stating in part: "As of Monday, July 26,
10 2004, you are out of work on an unpaid status." The letter states that, on
11 that date, I made a verbal request to be carried on medical leave and had
12 provided the Town of Amherst with a note from Dr. Charles H. Weeber, III,
13 indicating that I have a "medical illness" and would be unable to work for
14 approximately six weeks.

15
16 Article III, Section 3.05 of the collective bargaining agreement states: "In
17 the event that an employee is unable to work by reason of illness or injury
18 and has exhausted other accumulated leave (i.e., sick leave,
19 compensatory leave, vacation leave) the Town may grant a leave of
20 absence without pay..." I have not yet exhausted this accumulated leave
21 (sick leave, compensatory leave, vacation leave) therefore, I am entitled to
22 sick pay dating from July 26, 2004.

23
24 The requested remedy is that the Town of Amherst adjust their records to
25 reflect that I am being carried on paid sick leave beginning July 30, 2004
26 and to make said payment to me.

27
28 Menard advised Koski that he (Menard) could not settle the matter, and he forwarded
29 Koski's August 6th grievance to the Union's Grievance Committee.

30 The Grievance Committee met in August to discuss Koski's August 6th
31 grievance. By letter dated August 29, 2004, the Grievance Committee advised Chief
32 Scherpa that Koski should have been permitted to use his accumulated sick,
33 compensatory or vacation leave during the four to six week period that Koski had been
34 on administrative leave. The Grievance Committee requested a meeting with the Chief
35 to address their questions regarding Koski's August 6th grievance.

1 Prior to September 9, 2004, Chief Scherpa recommended to Del Castilho that the
2 Town terminate Koski's employment. Del Castilho, the Town's appointing authority, did
3 so by letter dated September 9, 2004. Del Castilho's termination letter states in
4 pertinent part:

5 Upon the conclusion of my investigation of the incident resulting in your
6 arrest on July 9, 2004, I find that your actions constitute conduct
7 unbecoming a Police Officer.

8
9 Your actions of July 9th violate the Amherst Police Department Rules and
10 Regulations (Section 2), Amherst Police Department Policy #75, and the
11 Town of Amherst Personnel Procedures Manual.

12
13 I am therefore terminating your employment with the Town of Amherst
14 effective immediately.

15
16 **Koski's Termination Grievance**

17 Subsequently, Koski called Walsh and asked the Union to file a grievance on his
18 behalf over his termination. The Union had never previously filed a termination
19 grievance, and consequently, Walsh called a special Union meeting to ask the
20 membership what they wished to do. The Union's members voted not to file a grievance
21 on Koski's behalf but to let him file the grievance himself.

22 On September 16, 2004, Koski filed a grievance with shift supervisor Sergeant
23 Nelson (Nelson) regarding his termination. Koski's grievance stated:

24 On September 10, 2004, I was terminated as an employee of the Town of
25 Amherst. This termination is unjust and in violation of the contract between
26 the Amherst Police League and the Town of Amherst.

27
28 On September 17, 2004, Koski gave Del Castilho a letter that provided as
29 follows:

30 I request to appeal your decision to terminate my employment. None of
31 my actions on July 9, 2004 violate any of the Rules and Regulations in

1 Section 2, nor APD #75. Furthermore, no adjudication has been reached
2 with regards to my criminal matter.

3
4 I will have my attorney arrange with your office for the hearing.

5
6 Koski did not subsequently contact Del Castilho's office regarding a hearing.⁹

7 On September 22, 2004, the Grievance Committee met to discuss Koski's
8 grievances. Walsh subsequently told Koski that the Grievance Committee wished to
9 receive additional information from him regarding the grievances, and Koski contacted
10 Attorney Harold Lichten regarding this request.¹⁰

11 By letter dated September 23, 2004, the Grievance Committee forwarded its
12 September 22nd findings to Koski, stating in pertinent part:

13 Re: Grievances dated September 16, 2004 and September 8, 2004.¹¹

14 ***

15 1. The grievance dated September 8, 2004 has been tabled and no
16 further action will be taken at this time by this Committee until a
17 decision is rendered regarding your first grievance dated in August.
18 It is the belief of this Committee that your grievance dated
19 September 8, 2004 is directly related to the issue of being placed on
20 unpaid status.
21

⁹ Koski forwarded this letter to Del Castilho to inform Del Castilho of his intent to file a grievance and to challenge Del Castilho's termination decision.

¹⁰ Koski had contacted Lichten in July of 2004 because he believed, at that time, that the Union would not support him. The record does not indicate why Koski was skeptical of the Union's support in July of 2004. There is no evidence of any interaction between Koski and the Union prior to August other than the conversation between Walsh and Koski regarding Claffey's assistance at the July 30, 2004 meeting with Del Castilho and Zlogar.

¹¹ In various documents, the Union refers to grievances dated September 8, 2004, September 30, 2004 and October 6, 2004. The record indicates that Koski filed a separate grievance regarding sick leave and unpaid leave on some unspecified date around September 16, 2004.

1 2. The grievance dated September 16, 2004 is vague and lacking
2 sufficient information for this Committee to determine specifically the
3 reasons you feel the Town was unjust in its actions.

4
5 The Grievance Committee will gladly re-convene in the future in an
6 attempt to settle this matter. Provided that you supply this Committee with
7 the specific information as to why you feel the actions of the Town were
8 unjust.

9
10 The contract states in part under Article VIII-Grievance and Arbitration
11 Procedure, Section 8.01, Definition that: "A grievance shall be defined as
12 any difference between the parties to this contract relating to its
13 interpretation, application, or administration including a question as to
14 whether a matter is arbitrable and any question as to whether the
15 suspension or discharge of an employee is for just cause."

16
17 The contract further states in part under Article XXIII – Employee
18 Discipline, Section 23.01 that "The Town agrees that an allegation of
19 arbitrary or capricious application of its rules and regulations shall be
20 subject to the grievance procedure."

21
22 On September 27, 2004, Lichten forwarded a letter dated that day to Walsh

23 regarding Koski's termination grievance. Lichten's letter stated in relevant part:

24 I have been asked by Bill Koski to look into his current employment
25 situation. By way of introduction, I happen to be the attorney for the
26 Amherst Fire Fighters Union, and I represent police and fire fighter unions
27 around the Commonwealth. Thus, I am quite familiar with the difficulties
28 union's [sic] face in getting consensus on grievances.

29
30 As you know, Bill Koski has been employed by the Amherst Police
31 Department for 15 years. Other than for the recent events which I will
32 describe below, he has a good employment record and no discipline.
33 Recently, as a result of a drinking problem for which he is now being
34 treated, he had an unfortunate incident involving his wife (with whom he
35 has now reconciled.) Because of this one incident, he has been
36 terminated from his job.

37
38 As you are aware, because Amherst is not part of civil service, the only
39 avenue for Mr. Koski to win back his position as an Amherst police officer
40 is through arbitration. I would note that the collective bargaining
41 agreement, Article 23, provides that "the Town shall not discipline or
42 discharge any post-probationary employee without just cause."
43

1 Arbitrators generally hold that off-duty conduct, no matter how unfortunate,
2 is not grounds for discharge. In Mr. Koski's case, I realize that there is a
3 criminal charge pending against him. The charge arises out of his
4 allegedly assaulting his wife during a period of psychological stress.
5 Without in any way excusing assaultive behavior, the fact is that Mr. Koski
6 and his wife are reunited, he is now getting treatment, his psychiatrist
7 believes that he can return to his position of police officer without posing a
8 risk of danger to himself or others, and it is likely that the criminal charges
9 will be resolved in a way that does not include any finding of guilt.

10
11 All of this being the case, and based on my 20 years of experience as a
12 police and fire labor union attorney, I believe it almost a certainty that Mr.
13 Koski's discharge will be found to be without just cause, and he will be
14 returned to his job.

15
16 Of course, none of this can happen unless the union takes the case
17 forward to arbitration. Mr. Koski is willing to pay for his own lawyer if that
18 is necessary, but the union must provide him with the arbitral forum to do
19 so. Alternatively, the union can decide to provide its own legal
20 representative for Mr. Koski at its expense. Mr. Koski and I do not care
21 what the union's ultimate decision on this is, the critical thing is that the
22 union take the case forward to arbitration. If the union does not do this,
23 then Mr. Koski's career will be lost.

24
25 The law is clear that a union has a duty of fair representation to treat all of
26 its members fairly and to represent each appropriately if they have a
27 meritorious case. Certainly Mr. Koski satisfies this criteria. The last thing
28 in the world that Mr. Koski wants to do is be in conflict with the Amherst
29 Police League. Mr. Koski feels great loyalty to the union and to his
30 colleagues at work. He fervently requests that you consider this matter
31 promptly and agree to pursue this matter through the grievance/arbitration
32 machinery.

33
34 Literally, the union holds Mr. Koski's fate in its hands. We beg that the
35 union make the right decision.

36
37 Following receipt of the Grievance Committee's September 23rd letter, Koski
38 forwarded a letter dated September 30, 2004 to the Grievance Committee through
39 Bargaining Member Sullivan. Sullivan made copies of Koski's letter and the
40 accompanying attachments and forwarded the materials to each member of the
41 Grievance Committee. Koski's September 30th letter stated in pertinent part:

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Re: Additional information in support of grievance.

For the record, I did not receive a copy of the Grievance Committee's letter requesting further information until Friday, October 1, 2004, when it was picked up by myself at the Amherst Police Department.

1. On September 10, 2004, I was terminated as an employee of the Town of Amherst. This termination is unjust and in violation of the contract between the Amherst Police League and the Town of Amherst.
2. I have been a loyal employee for 15 years with no serious disciplinary issues.
3. I was given no opportunity to defend my position with this issue to the Town Manager.
4. The discipline is inconsistent with whatever breach of the policies and procedures the Town alleges.
5. There has been no progressive discipline with this issue.
6. There has been no adjudication of the criminal case; there has been no conviction.
7. The criminal charge is a misdemeanor.
8. The incident occurred off duty and in no way was connected to my employment.
9. The Town's position contradicts a position it held with another employee in a similar position within another department.
10. At this time, I have not been notified by the Town what policies I have allegedly violated. I also have had no access to the investigation conducted by the Town Manager, nor the opportunity to verify any information the Town Manager has used to reach his decision.
11. The Town Manager uses a reference to an incident on July 9, 2004.
12. The Town Manager never mentioned in his letter my right to appeal.
13. The Town Manager's letter was not sent via certified mail.
14. Therefore, I conclude the termination to be unjust.

1
2 Please refer to the letter from Attorney Harold Lichten to Detective Steve
3 Walsh.¹²

4
5 Finally, enclosed is a letter from Doctor John Zebrun.

6
7 The letter that Koski enclosed from Dr. Zebrun states as follows:

8 This letter is to confirm that William J. Koski (DOB 03-22-63) has been in
9 outpatient treatment with me since 08-26-04, and has been in ongoing
10 treatment at this clinic since 07-15-04. I have diagnosed him with
11 Generalized Anxiety Disorder, Adjustment Disorder with mixed anxiety
12 and depressed mood, and a past history of Alcohol Dependence. He has
13 completed the START intensive outpatient program, attended aftercare
14 recovery group, has been in ongoing individual psychotherapy, and now
15 also is seeing me for psychotropic medication treatment. His prognosis is
16 excellent as long as he continues in treatment. He is currently stable with
17 no major symptoms. By my last evaluation of him on 09-24-04, he can
18 return to work without restrictions. Mr. Koski does not currently present
19 with any clinical indication that he is a risk to himself or others.

20
21 After the Grievance Committee received Koski's September 30th letter,
22 Grievance Committee member Knightly researched Town and Police Department
23 policies, procedures, rules and regulations that pertained to the issues that Koski raised
24 in his letter. As a result of his research, Knightly believed that Koski's termination was
25 within the rights of the Town Manager and the Chief, and that the Town was not
26 required to discipline Koski progressively in the circumstances of his termination.
27 Knightly found nothing requiring the Town to treat off-duty conduct differently from on-
28 duty conduct and no regulation, policy or procedure requiring an adjudication or
29 conviction. However, Knightly wanted to resolve a few issues with the Chief and the
30 Town, and thus, he did not decide at that point to discontinue processing the grievance.

¹² Koski enclosed Lichten's September 27, 2004 letter.

1 Prior to October 4, 2004, Lichten and Claffey had never met or spoken to each
2 other. On October 4, 2004, Lichten telephoned Claffey's office to discuss Koski's
3 termination grievance, but he did not reach Claffey. Claffey returned Lichten's call that
4 day and left a voice mail message on Lichten's telephone answering machine. Claffey
5 stated in his voice mail message that the Union would take Koski's case forward to
6 arbitration¹³, and he questioned what role Lichten would have at the arbitration.¹⁴

7 The following day, October 5, 2004, Lichten forwarded a letter to Claffey that
8 stated in pertinent part, as follows:

9 Thank you for your voicemail message responding to my letter to you
10 regarding Bill Koski. I tried to call you yesterday, but was unable to reach
11 you. I am writing to bring you up-to-date regarding this matter.

12
13 Mr. Koski did, as you indicated in your voicemail, receive a letter from the
14 union asking for additional information. Although some of the requests
15 were confusing, Mr. Koski has sent a letter to the union responding to
16 every point raised. In addition, he has referred the union to my letter for
17 further clarification. In addition, he has sent a recent letter from his
18 psychiatrist, Dr. Zebrun, to the union for their information. I am sending a
19 copy of that to you.

20
21 From your voice mail, I understand that the union is going to take his case
22 forward to arbitration. Further, I understand from your message that, to the
23 extent Mr. Koski and I are concerned that the union might not take his
24 case forward to arbitration, those concerns are unnecessary.

25
26 Now that Mr. Koski and I have tried to provide all of the information
27 requested by the Union, and given that Mr. Koski has been cleared to
28 return to full duty by his psychiatrist, and given the passage of time, I

¹³ The Union challenges this finding of fact, alleging that it is unsupported by the record evidence. We disagree, and find that Lichten's statements in his October 5, 2004 letter sustain this factual assertion. Moreover, the Union did not challenge the hearing officer's determination that Claffey told Lichten on October 8, 2004, that the Union would take Koski's grievance to arbitration.

¹⁴ Walsh had never specifically authorized Claffey to enter into an agreement to process Koski's grievance to arbitration. Additionally, there had been no contact from the Union informing Lichten of the extent of Claffey's authority. We have supplemented this finding of fact to more thoroughly reflect the record evidence.

1 would greatly appreciate your assistance in getting the union to proceed
2 forward on this matter to grievance and arbitration. We stand ready to help
3 you in any way and provide you with any additional documentation.
4

5 Finally, as I indicated in my voicemail back to you, Mr. Koski's main
6 concern is to have his case proceed forward to arbitration. With respect to
7 who represents him at arbitration (yourself as the union lawyer, or an
8 outside lawyer at Mr. Koski's expense or with some form of limited help
9 from the union), Mr. Koski will do whatever the union thinks best.
10

11 Lichten faxed Claffey another letter two days later, on October 7, 2004 that states as

12 follows:

13 I received your voicemail message and agree that we should talk as soon
14 as possible. Article VIII of the collective bargaining agreement provides
15 that once a grievance has been filed with the immediate supervisor (as Mr.
16 Koski's termination grievance was on 9/16/04), it is "the union grievance
17 committee" which "shall forward the grievance in writing to the chief of the
18 department." Further, if the grievance is not resolved at that step, it is "the
19 union grievance committee" which "shall forward the grievance to the town
20 manager." Step four then provides that if the grievance is unsettled at step
21 three, "either party", meaning the union or the grievance committee, may
22 file for arbitration utilizing the procedures set forth in step four.
23

24 What Mr. Koski and I have been saying all along, but which apparently is
25 being confused by the union, is that only the union can process the
26 grievance to steps two, three, and four (four being arbitration). Once the
27 case is filed for arbitration, Mr. Koski is more than willing to provide his
28 own representation, or have union counsel provide representation. All we
29 mean by this is that some unions will not let outside counsel do an
30 arbitration in the union's name, while some will. We simply are willing to
31 do whatever the union will permit. The critical point is not who represents
32 Mr. Koski, it is ensuring that the union goes forward to steps two, three
33 and then to arbitration. Since only the union can file the matter though
34 these steps of the grievance procedure, and not Mr. Koski individually, the
35 union simply needs to process the grievance appropriately.
36

37 Once the grievance goes to step four, and if the union is agreeable, I will
38 file the case for arbitration and select the arbitrator. I would expect that the
39 union would pay for the arbitrator. As for legal representation, the union
40 can decide whether to have you do the case as the union attorney, or
41 allow me to do it for Mr. Koski at his expense.
42

43 I trust this clarifies the matter.
44

1 Lichten and Claffey spoke by telephone regarding Koski's grievance on the next
2 day, October 8, 2004. During their conversation, Claffey told Lichten that he was the
3 Union's lawyer.¹⁵ He also stated that the Union would take Koski's grievance to
4 arbitration, and that the Union wanted Koski to pay for his legal expenses at arbitration.

5 Koski received no information from the Grievance Committee between the
6 transmission of his September 30th letter and the end of October of 2004. On October
7 26, 2004, Lichten faxed a letter to Claffey, stating in pertinent part:

8 Although some time has passed since we last communicated, and since
9 Mr. Koski provided the information requested by the union in order to
10 prosecute his grievance, still, neither Mr. Koski nor I have received any
11 word as to what the union is doing with respect to his termination case. I
12 would greatly appreciate you or the union letting us know what is going on
13 with his grievance.

14
15 As you will recall, you first left a voicemail for me indicating that there was
16 no problem with the union sending the grievance forward, however, you
17 were confused as to whether Mr. Koski was going to use outside legal
18 counsel or the union. In addition, you informed me that the union would be
19 sending Mr. Koski a letter requesting some information. I replied to you
20 that since, under the union contract, only the union can take the case
21 through the second and third steps of the grievance procedure, Mr. Koski
22 was willing to use outside legal counsel for the arbitration case, but that
23 only the union could take the case through the latter steps of the
24 grievance procedure. It was my understanding that that clarified the
25 matter. In addition, Mr. Koski replied fully to the letter from the union
26 requesting certain information. That response was provided over three
27 weeks ago.

28
29 As I'm sure you can understand, Mr. Koski's career is at stake. All we are
30 asking the union to do is take the grievance through the grievance
31 procedure as provided for in the contract so that the matter can be filed for
32 arbitration. If, at that point, the union is agreeable to Mr. Koski having his
33 own legal counsel, we will do the arbitration without the union having to
34 pay the legal costs. Further, if the union wants its legal counsel to do the
35 case, that is also acceptable.

¹⁵ There is no evidence that Lichten and Claffey discussed any limits to Claffey's authority as the Union's lawyer.

1
2 It is critical that the union take Mr. Koski's grievance through the grievance
3 procedure. Neither Mr. Koski nor I can do that ourselves (as I read the
4 contract), unless the union wants to authorize me to prosecute the matter
5 through the grievance procedure, in which case, I will. Absent that
6 authority, the grievance appeals must be by the union. I remain confident
7 that the union will follow up on this as soon as possible.

8
9 On November 8, 2004, Claffey forwarded a letter to Walsh regarding Koski's
10 grievance and sent a copy of the letter to Lichten. Claffey's letter stated:

11 The purpose of this letter is to follow up on our telephone conversation of
12 October 26, 2004, in which I had inquired as to the status of Sgt. William
13 Koski's grievances. It was my understanding that Sgt. Koski had provided the
14 Amherst Police League Grievance Committee with a clarification of why he
15 believed that he had been aggrieved by his dismissal. The Committee was
16 then going to forward the grievances to the Chief of Police for his
17 consideration. The second step of the Grievance and Arbitration Procedure
18 provides that the Chief will reply within seven days. If the grievance cannot
19 be resolved at that level, it is then brought to the Town Manager for his
20 review. He too has seven calendar days to consider the employee's
21 grievance.

22
23 Please advise me as soon as possible as to the dates that these
24 grievances have been sent through the various steps in the procedure and
25 the present status of these grievances. As soon as the second and third
26 steps have been complied with, you should notify Sgt. Koski immediately,
27 so that the necessary arbitration request can be made.

28
29 Thank you for your attention to this matter. A prompt response would be
30 greatly appreciated.

31
32 After October 6, 2004, Knightly did not request any additional information from
33 Koski. However, Koski forwarded certain information to the Grievance Committee
34 through Union President Walsh. Specifically, Koski supplied the Committee with the
35 disposition of his criminal case and a letter co-written by Drs. Gaubinger and Zebrun
36 describing his ongoing treatment, attendance at Alcoholics Anonymous meetings, and
37 positive prognosis.

1 On November 27, 2004, the Grievance Committee met to discuss issues relating
2 to Koski's termination that Chief Scherpa had noted in a letter to the Committee.¹⁶
3 Specifically, the Grievance Committee considered the Town's failure to pay Koski for
4 unused vacation time, sick time, personal days, holiday pay, longevity pay and "Quinn
5 Bill" benefits. By letter dated November 30, 2004, the Grievance Committee advised
6 the Chief that it believed that the authority to address those issues required the Chief's
7 presence. The Grievance Committee forwarded a copy of its letter to Koski.

8 When Koski received the Grievance Committee's November 30th letter, he called
9 Grievance Committee member Bonnayer and asked her why the letter did not address
10 his termination. Bonnayer indicated that she did not know but would contact the Chief
11 and others to get an answer. Bonnayer never responded to Koski's inquiry.

12 Between October 6, 2004, when Koski supplied his September 30th letter to the
13 Union, and December of 2004, the only communication from the Grievance Committee
14 that Koski received was the November 30, 2004 letter. Because Koski did not know the
15 location of his termination grievance in the contractual grievance process, he
16 telephoned Walsh and Knightly several times in late 2004. They did not return his calls.

17 At this point in time, Koski was frustrated with what he perceived to be a lack of
18 communication over the status of his grievance and the time frame for processing it. At
19 times, Koski spoke individually to Grievance Committee members Knightly, Lang, and
20 Jackson regarding his grievance. He told them that the Union had a duty to represent
21 him, and that the Union might be liable if they did not take his case forward to
22 arbitration.

¹⁶ The Chief's letter is not in the record.

1 On December 14, 2004, Claffey contacted Lichten and left a telephone message
2 telling Lichten that the Union was going to pursue Koski's Quinn Bill benefits, unpaid
3 vacation time, lost sick time and termination "to the next step." Claffey noted that the
4 Town appeared to be open to settlement discussions with Koski, and related a
5 conversation that Claffey had had with "somebody from the Town" regarding settlement.
6 Claffey advised Lichten that he had told this individual that: "your initial settlement
7 discussions weren't anywhere near serious enough to make anybody think about doing
8 anything but grieving this and going to arbitration." In his message, Claffey also relayed
9 a conversation that he had had with the Chief regarding Koski. Specifically, Claffey
10 remarked that Chief Scherpa had stated that Koski would not return to work while he
11 was the Police Chief. In response, Claffey had asked the Chief for a ticket to the Chief's
12 retirement party, and stated that it sounded like the Chief was announcing his
13 retirement. Claffey told the Chief: "you know that you are not going to win this
14 arbitration." Claffey's message to Lichten concluded by stating "I will keep an eye on
15 this from this end, just to make sure that the Grievance Committee continues to pursue
16 this."

17 **Grievance Processing in 2005**

18 In January of 2005, the Chief asked Knightly and Walsh what was going on with
19 Koski's case. Walsh responded that he did not know, and that the Union was dealing
20 with its attorney. Knightly told the Chief that there had been postponements for various
21 reasons.

22 On January 7, 2005, Lichten forwarded a letter to Claffey stating in pertinent part
23 as follows:

1 Let me again thank you for leaving a long voicemail several weeks ago
2 informing me that the union was proceeding through the
3 grievance/arbitration process on Mr. Koski's case. I also appreciate the
4 information you gave me about the Chief's position in the matter. Since
5 that time, I instructed Mr. Koski to stay in touch with Union President
6 Walsh about the status of his case. Mr. Koski has attempted to call
7 President Walsh several times but, unfortunately, has received no return
8 call.

9
10 Since Mr. Koski is unable to talk to President Walsh, it becomes
11 necessary for me to contact you.

12
13 Mr. Koski and I are both anxious for word on the status of Mr. Koski's
14 arbitration case. Presumably, the grievance procedure has now been
15 exhausted and the matter should be being filed for arbitration. However,
16 neither Mr. Koski nor I have received any further communications since
17 your voicemail several weeks ago. We obviously want to work
18 cooperatively with the Union and you for the common purpose of getting
19 Mr. Koski restored to his position. However, as you can imagine, the lack
20 of communication is somewhat frustrating.

21
22 I would greatly appreciate Steve Walsh contacting Mr. Koski directly, or
23 you contacting me by letter or phone to discuss the status of the case.
24 Specifically, we would very much like to know whether the case is in order
25 for filing for arbitration and whether I could be involved in the process of
26 selecting the appropriate arbitrator.

27
28 On February 2, 2005, in an effort to facilitate a conversation between Koski and
29 Walsh, Mrs. Koski telephoned the Police Station and asked to speak with Walsh. When
30 Walsh answered the phone, Mrs. Koski gave the telephone to Koski so that he could
31 ask Walsh about his grievance. Walsh explained that the Grievance Committee needed
32 to meet with the Chief one more time, and told Koski that he would not be surprised to
33 see him at roll call. Koski told Walsh that he believed that the Union was resolving his
34 grievance slowly, and that Koski was uncomfortable with the lack of support.

1 On February 6, 2005, Knightly contacted Chief Scherpa and asked to re-
 2 schedule a grievance meeting regarding Koski. Knightly did not inform Koski that the
 3 Grievance Committee intended to meet with the Chief on March 10, 2005.¹⁷

4 On February 22, 2005, Claffey forwarded the following letter to Walsh and sent a
 5 copy of it to Lichten.

6 The purpose of this letter is to follow up on our recent telephone
 7 conversations of February 2, 2005 and February 21, 2005 in which I had
 8 inquired as to the status of Sgt. William Koski's grievance.

9
 10 It is my understanding that the Grievance Committee is awaiting Chief
 11 Scherpa's return from vacation to discuss this matter with him. If the
 12 grievance cannot be resolved at that level it is then brought to the Town
 13 Manager for his review.

14
 15 Let me emphasize a point that I had made to you during our telephone
 16 conversations. Considering the enormous impact that a dismissal has on
 17 an employee and his family, it would be prudent for the Grievance
 18 Committee to give full consideration to exercising the option to arbitrate
 19 this matter. To take any other course of action would compromise both the
 20 rights of Sgt. Koski and the role of the Amherst Police League in
 21 disciplinary matters.

22
 23 Sgt. Koski has chosen to retain a private attorney to handle this matter for
 24 him in arbitration. I will remain in contact with Atty. Lichten to update him
 25 on this matter. I would advise you to urge the Grievance Committee to
 26 expedite this matter...

27
 28 **The Step 2 Grievance Meeting**

29 The Grievance Committee¹⁸ met with the Chief on March 10, 2005¹⁹ to discuss
 30 Koski's grievances. Because Human Resources Director Zlogar attended the meeting

¹⁷ Between January and March of 2005, Koski left numerous messages for Knightly by e-mail and by telephone. Knightly did not contact Koski until the middle of March of 2005.

¹⁸ Three out of the Grievance Committee's five members -- Knightly, Lang and Jackson - attended the meeting.

1 with Chief Scherpa, the Grievance Committee believed that the March 10th meeting
2 combined Steps 2 and 3 of the Grievance Procedure. However, the Town and the Union
3 had not agreed to combine Steps 2 and 3, no one had made that assertion, and Del
4 Castilho had not authorized Zlogar to act as his representative at the meeting.

5 At the outset of the meeting, Knightly made a short presentation stating that the
6 purpose of the meeting was to inform the Town that Koski had asked the Union to
7 support him in his grievance claiming an unjust termination. The Grievance Committee
8 gave the Chief and Zlogar Koski's September 30th letter and used it as an outline to
9 describe Koski's arguments opposing his termination. The Grievance Committee stated
10 that they agreed that Koski should receive holiday pay, Quinn Bill benefits, sick leave
11 and longevity benefits up until the day of his termination. Knightly stated that the
12 Committee did not know how to react on Koski's termination and that they felt that they
13 were in an awkward situation.

14 Chief Scherpa asked if the Grievance Committee believed that he terminated
15 Koski unjustly. Lang responded that the Grievance Committee did not have to agree or
16 disagree with the decision; that they were present at the meeting to represent a Union
17 member. Chief Scherpa stated that the Grievance Committee needed to have an
18 opinion, and he asked a second time whether the Grievance Committee believed that
19 the Town terminated Koski wrongfully. Lang answered that the Union had been advised
20 to support Koski.

¹⁹ A variety of factors affected the timing of the meeting including a homicide investigation; family issues affecting two members of the Grievance Committee; and the Grievance Committee members' varying shift schedules.

1 Knightly asked if Koski had received the right to defend his position with the
2 Town Manager. Zlogar stated that Koski and his attorney had met with her and Del
3 Castilho. She further stated that Koski had received the opportunity to meet again with
4 Del Castilho but did not do so.²⁰ In response to Koski's assertion in his September 30th
5 letter that he had received no opportunity to defend himself before the Town Manager,
6 Zlogar extended an offer for Koski and his attorney to meet with Town officials once
7 more.²¹ This offer was never received by Koski or his attorney.

8 Chief Scherpa asked the Committee a third time whether the Union thought that
9 he had wrongly terminated Koski's employment. Knightly responded that Koski wanted
10 to have access to the information that Del Castilho used when deciding to terminate
11 Koski, and that the Union believed that Koski should have the information. The Chief
12 agreed that the Town should compensate Koski up to his termination date, but stated
13 that he did not support reinstatement. Knightly asked if Koski could review the
14 information that the Town Manager was given. Zlogar agreed, and stated that the
15 information was a public record. The Chief told the Grievance Committee that they
16 should get a different attorney if their attorney was advising them that they could be
17 sued, and he expressed concern that the situation could bring negative publicity on the
18 Police Department.

19 The Grievance Committee did not seek Claffey's guidance in preparation for the
20 March 10, 2005 meeting. The Grievance Committee attended the meeting on Koski's

²⁰ There is no evidence in the record that the Town offered to meet with Koski again between July 30, 2004 and March 10, 2005.

²¹ Zlogar anticipated that the meeting would include herself, Koski, the Town Manager, Town Counsel, and Chief Scherpa.

1 behalf to present information from Koski to the Chief and the Town, but the Grievance
2 Committee was not aware of any Union duty to advocate for his reinstatement. At the
3 meeting, the Grievance Committee did not provide any additional information regarding
4 Koski to the Chief or Zlogar. The Committee did not inform them of Koski's recent
5 sobriety, treatment or progress in rehabilitation; provide any medical reports from his
6 doctors; or advise them of the disposition of Koski's criminal case. Other than stating
7 that they believed that Koski was due compensation for vacation and sick time, the
8 Committee did not say anything in Koski's favor, present any supporting information or
9 arguments, and did not ask the Chief to reinstate Koski.²²

10 Following the meeting, Knightly drafted a letter to Koski that stated in pertinent
11 part:

12 The Grievance Committee met with Chief Scherpa and Kay Zlogar on
13 March 10, 2005 in regards to your grievance dated September 30, 2004.
14 The facts and information you have outlined were presented to Chief
15 Scherpa and Kay Zlogar. At this time, Chief Scherpa has taken the matter
16 under advisement and will present this Committee with his decision in
17 accordance with the timeframe allowed by contract.

18
19 Kay Zlogar has indicated that she and the Town are willing to meet with
20 you and your attorney to discuss any issues you feel have been left
21 unresolved.

22
23 Respectfully,
24 Amherst Police League, Grievance Committee
25

²² Knightly knew that Koski had agreed to pay the legal expenses of any arbitration, and Walsh had informed Knightly of Claffey's letters.

1 Koski never received the letter, and there is no evidence that the Union ever mailed it to
2 him.²³ Knightly contacted Koski in mid-March, and told him that the Grievance
3 Committee had met with the Chief and was awaiting his decision. Knightly did not tell
4 Koski that Zlogar had offered to meet with Koski and his attorney.

5 On or about March 17, 2005, Chief Scherpa provided a written response to the
6 Grievance Committee that stated as follows:

7 Pursuant to our discussions at the meeting held on Thursday, March 10,
8 2005 regarding William Koski, I am providing the following as my response
9 and resolution to this matter.

10
11 Payment
12 Although the Collective Bargaining Agreement between the Amherst
13 Police League and Town of Amherst establishes certain conditions the
14 employee is required to meet in order to receive payment upon
15 termination of employment and, notwithstanding the fact that William Koski
16 did not satisfy these conditions, I support the Union's position that the
17 Town provide compensation to Mr. Koski. I have therefore requested and
18 the Town Manager has approved payment to Mr. Koski in the same
19 manner as would have been paid had he voluntarily resigned.

20
21 Termination
22 After review of the facts involved and consideration of the arguments
23 advanced, I find that the Collective Bargaining Agreement was not violated
24 in the termination of William Koski and his termination was for just cause.

25
26 The Grievance Committee did not send the Chief's response to Koski, Lichten or
27 Claffey.

²³ Knightly gave the letter to Walsh to mail to Koski but did not subsequently ask Walsh if he mailed the letter. Walsh did not recall whether he mailed the letter or gave it to Bonnayer to mail. Bonnayer did not testify at the hearing.

1 The Grievance Committee received a letter from Zlogar dated March 17, 2005 at
2 about the same time that it received the Chief's response.²⁴ Zlogar's letter stated as
3 follows:

4 Pursuant to our discussions at the meeting held on Thursday, March 10,
5 2005 regarding William Koski, I am providing the following information as
6 requested.

7
8 In addition to discussion and the thought process of the individuals
9 involved, this information was utilized in the Town's investigation:

- 10 • Arrest report of Deerfield, MA Police Department
- 11 • Amherst Police Department Regulations
- 12 • Collective Bargaining Agreement between Amherst Police League and
- 13 Town of Amherst
- 14 • Town of Amherst Personnel Procedures Manual
- 15 • July 30, 2004 meeting with Mr. Koski and his attorney
- 16 • 18 U.S.C. §922 The Gun Control Act of 1968, as amended
- 17 • CRS Report for Congress, "Firearms Prohibitions and Domestic
- 18 Violence Convictions: The Lautenberg Amendment"
- 19 • Massachusetts General Laws Chapter 209A, §3B
- 20 • Massachusetts General Laws Chapter 140, §131
- 21 • 29 CFR 825.114 of The Family and Medical Leave Act of 1993
- 22 • 29 CFR 825.303 of The Family and Medical Leave Act of 1993
- 23 • 29 CFR 825.312 of The Family and Medical Leave Act of 1993
- 24 • F.3d – 7th Circ. 1999, 98-2691, Jerald Gillespie v. City of Indianapolis,
- 25 Indianapolis, Police Department, and Michael Zunk, Chief of Police.
- 26
- 27

28 Mr. Koski did have the opportunity to defend his position on this issue
29 when he and his attorney met with the Town Manager and Human
30 Resources Director on July 30, 2004. Although the purpose of the
31 meeting, stated to Mr. Koski's attorney via Town Counsel, was to discuss
32 his employment status as a result of his arrest and temporary
33 incarceration in relation to a domestic violence incident on July 9, 2004,
34 Mr. Koski refused to discuss the incident.

35
36 The September 9, 2004 official termination letter from the Town Manager
37 to Mr. Koski stated: "Your actions of July 9th violate the Amherst Police
38 Department Rules and Regulations (Section 2), Amherst Police
39 Department Policy #75, and the Town of Amherst Personnel Procedures

²⁴ Zlogar also sent a copy of her letter to the Chief, the Town Manager and Town Counsel.

1 Manual." Mr. Koski was notified by the Town of what policies he had
2 violated.
3

4 An individual reaching a plea agreement with the Court does not negate
5 the Town's right to determine whether the nature of the offense is so
6 heinous as to warrant termination of employment. The Collective
7 Bargaining Agreement does not restrict the Town's right to discipline for
8 just cause. I also refer to the Town's Personnel Procedures Manual which
9 states:

10
11 "In situations where an employee has committed a violation
12 of Town policies as defined under **EMPLOYEE CONDUCT**
13 or a violation of Federal, State or local laws, dismissal of the
14 employee may be warranted. The Town reserves the right
15 to conduct an internal investigation with regard to the offense
16 to determine whether the nature of the offense makes it
17 inappropriate for the individual to continue in the employ of
18 the Town.
19

20 While the intent of disciplinary procedure is to be progressive, it must
21 evaluate the severity of misconduct in determining the appropriate
22 discipline. The Town did conduct that internal investigation and did
23 determine that it was inappropriate for Mr. Koski to continue employment
24 with the Town.
25

26 Mr. Koski was aware of his right to appeal the Town Manager's decision to
27 terminate as evidenced in his September 17, 2004 letter to the Town
28 Manager which stated:
29

30 "I request to appeal your decision to terminate my
31 employment. None of my actions on July 9, 2004 violate any
32 of the Rules and Regulations in Section 2, nor APD #75.
33 Furthermore, no adjudication has been reached with regards
34 to my criminal matter.
35

36 I will have my attorney arrange with your office for the hearing."
37

38 The Town received no further correspondence from Mr. Koski or his
39 attorney.
40

41 I believe this response addresses all of the issues we discussed, but
42 should you need additional information, please feel free to contact me.
43 [emphasis in original.]
44

45 The Grievance Committee did not send Zlogar's letter to Koski or Claffey.

1 After receiving Zlogar's letter, Knightly did not contact Claffey to determine
2 whether the points that Zlogar referenced were relevant to Koski's case. However,
3 Knightly reviewed the citations to the Lautenberg Amendment and the Gun Control Act
4 of 1968 and thought that they applied to Koski's case. Knightly also reviewed Section 2
5 of the Amherst Police Department Rules and Regulations and Amherst Police
6 Department Policy #75 to determine the applicability of those provisions.²⁵ Knightly
7 believed the assertions that Zlogar made in her letter regarding Koski's opportunity to
8 defend his position in the July 30, 2004 meeting, and Knightly was not aware that
9 Moriarty had instructed Koski to remain silent during the meeting.²⁶ Knightly was not
10 aware of whether or not Koski, as a bargaining unit employee, had a right to appeal the
11 Town Manager's decision to terminate him. Knightly did not disbelieve Zlogar's
12 assertion that he possessed, but failed to exercise, that right.

13 **The Grievance Committee's Decision**

14 The Grievance Committee met on April 1, 2005 to decide whether to pursue
15 Koski's grievance to the next step. At that time, the Committee considered whether or
16 not to take the case to arbitration, because it believed that it had received a Step 3,
17 rather than a Step 2, answer. Prior to the meeting, the Grievance Committee did not
18 seek advice from anyone regarding the merits or strength of Koski's case. No one
19 notified Koski of this Grievance Committee meeting.

²⁵ It is not clear from the record whether Knightly read all of the materials that Zlogar cited in her March 17th letter.

²⁶ Knightly did not attempt to ascertain whether the Union's attorney instructed Koski not to speak at the July 30, 2004 meeting.

1 The members of the Grievance Committee believed that the Grievance
2 Committee was not obligated to take Koski's termination grievance through every step
3 of the grievance procedure. The Grievance Committee had seen Lichten's September
4 27, 2004 letter advocating Koski's case, and believed that it had adequate information
5 at that time to decide how to proceed on Koski's termination grievance. The Committee
6 reviewed the documents provided by the Chief and Zlogar and unanimously decided
7 that the Town acted within its rights.²⁷ The Grievance Committee thought that the Town
8 had just cause to terminate Koski because of his actions, and decided that it would take
9 no further action on his grievance. The Grievance Committee knew that Claffey wanted
10 them to take Koski's termination grievance to arbitration. However, the Grievance
11 Committee disregarded Claffey's advice, because they viewed Claffey as a real estate
12 lawyer whom the Union had hired to help the Union negotiate its contract.

13 Early in April, Knightly advised Walsh that the Grievance Committee was
14 satisfied with the documentation that it had received from the Town and had decided not
15 to process the grievance further. Knightly and Walsh discussed how to inform Koski of
16 the decision and decided to ask Claffey to draft a letter.

²⁷ Knightly was aware of Lichten's letters from Walsh. Knightly believed that he had adequate information to make an informed decision regarding Koski's termination grievance. Among other considerations, Knightly included in this determination his belief that: 1) Koski had done nothing to appeal his termination after the Town had offered him the opportunity to do so; 2) Koski had not availed himself of the opportunity that he had received to defend himself on July 30, 2004; and 3) Koski had failed to supply information that the Grievance Committee could use to advocate on his behalf. The record does not indicate whether the other members of the Grievance Committee shared these beliefs. We have modified this finding of fact to more accurately conform to the record evidence.

1 On April 14, 2005, Lichten faxed a letter to Claffey regarding arbitration.²⁸

2 Lichten's letter stated in pertinent part that:

3 I am sorry to seem like a broken record, but it is now April 13 and still
4 neither I nor Mr. Koski has received notice of the filing of the demand for
5 arbitration with respect to his termination. We understand that the union
6 has been going through the grievance process in a slow, deliberative
7 fashion, and that the union finally met with the Chief more than a month
8 ago to hear the grievance. At that time, Mr. Koski was informed that when
9 the Chief's response was provided, the union would appeal to the next
10 step, the Town Manager level, and that that should be completed by early
11 April. You have informed me on several occasions that the union has
12 agreed to take the case forward to arbitration, with the understanding that
13 Mr. Koski will pay for his own legal counsel. Mr. Koski has now been
14 waiting patiently for more than eight months and, still, it appears that his
15 arbitration case has not even been filed, let alone scheduled for hearing.

16
17 As you know, Mr. Koski and I have repeatedly held off taking any other
18 type of action based upon the union's assurance that it will proceed with
19 his case to arbitration.

20
21 Walsh told Claffey later in April of 2005 that the Grievance Committee had
22 decided not to process the grievance further and asked him to draft a letter conveying
23 the decision to Koski. Claffey recommended that the Union draft the letter for his review.
24 Walsh conveyed Claffey's opinion to the Grievance Committee, who decided that
25 Claffey should write the letter. The discussions between Walsh, Claffey and the
26 Grievance Committee regarding who should compose the letter advising Koski of the
27 Grievance Committee's decision continued for approximately three weeks, and no one
28 contacted Koski during that timeframe.²⁹

²⁸ Claffey gave this letter to Walsh on April 29, 2005. Walsh never told Lichten to stop communicating with Claffey, and there is no evidence that Walsh contacted Lichten to address any of the assertions in the April 14, 2005 letter.

²⁹ At that time, Walsh believed that Koski's case was held in abeyance at Step 2, and that the grievance time lines were not being enforced.

1 On May 13, 2005, Lichten faxed Claffey a letter advising him that if Lichten and
2 Koski did not receive written confirmation by May 20, 2005 that the Union had or would
3 file Koski's case for arbitration, Koski would file a charge against the Union on May 23,
4 2005 alleging that the Union had violated its duty of fair representation. When Claffey
5 received the letter, he left the following telephone voice mail message for Lichten on
6 Lichten's answering machine:

7 I'm in receipt of your letter a couple of hours ago, I got it on my fax...I just
8 wanted to let you know that I did receive it and I have been in touch
9 with...the former president, Stephen Walsh to let him know of the
10 existence of this letter. I am going to be giving him a copy this evening,
11 along with a letter from myself emphasizing the severity and the
12 seriousness of this matter, and.... I know you understand, but I just
13 wanted to reemphasize that I have explained the severity of this matter,
14 and I'm not getting much recognition whatsoever from some members of
15 the Union that this is something that they need to address immediately. I
16 do see your ultimatum as far as a week from today. I'm just asking if
17 toward the end of the week, if I'm starting to make some progress, if you
18 would consider an extension and I will not let the Union know if there's an
19 extension that's offered or if you and I make some kind of an agreement to
20 extend your ultimatum but, I just want you to know that I am working on
21 this and... I think the letter I'm writing them today may get their attention,
22 but I can't guarantee anything....

23
24 Claffey then forwarded a letter dated May 13, 2005, to Walsh, advising him as follows:

25 The purpose of this letter is to confirm our telephone conversation from
26 earlier this afternoon regarding the status of Sgt. William Koski's
27 grievance.

28
29 About two weeks ago, you had indicated to me that the Grievance
30 Committee had come to a decision regarding this matter. I asked that they
31 put this decision in writing to Sgt. Koski and to forward a copy to me. I
32 have not yet received written confirmation of this decision nor has Sgt.
33 Koski.

34
35 Enclosed, please find copies of two recent letters from Attorney Harold
36 Lichten (the one dated April 14, 2005 was delivered to you in hand on
37 April 29, 2005). I am not sure how much more plain I can state this
38 message to the members of the Grievance Committee – if the Amherst
39 Police League decides through its Grievance Committee not to file for

1 arbitration in Sgt. Koski's case, it is exposing itself as an organization, and
2 its officers and members, individually to a great deal of liability.

3
4 The organization has a duty of fair representation with regard to all
5 members. As I have stated in numerous conversations and in writing,
6 considering the enormous impact that a dismissal has on an employee
7 and his family, it would be irresponsible for the Amherst Police League to
8 choose any other path than to file for arbitration. To take any other course
9 of action would compromise the rights of Sgt. Koski and could severely
10 impact the Amherst Police League, its officers and its members.

11
12 As you well know, Sgt. Koski has retained a private attorney to represent
13 him in this matter in an arbitration proceeding. I would advise you and the
14 Grievance Committee to expedite this matter. [emphasis in original.]

15
16 **Notification of the Grievance Committee's Decision**

17 By letter dated May 18, 2005, the Grievance Committee advised Koski of the
18 status of his grievances. The Grievance Committee's letter stated as follows:

19 After review of the grievance filed by you on September 16, 2004
20 regarding your termination as an employee with the Town of Amherst, the
21 Amherst Police League Grievance Committee has unanimously decided to
22 not pursue the matter through arbitration. This is a decision that was
23 reached after a great amount of review and consideration of the facts
24 involved.

25
26 You also filed a grievance on October 6, 2004 stating you had not
27 received your Quinn Bill payment or payment for unused vacation time,
28 sick time, personal days, holiday pay, or longevity pay. After reviewing
29 matter (sic) with Chief Charles Scherpa, he is in agreement and has
30 requested the Town Manager approve payment in the same manner as
31 would have been paid had you voluntarily resigned.

32
33 Koski received the Grievance Committee's May 18th letter on May 20, 2005.

34 On May 19, 2005, Claffey left the following telephone voice mail message for
35 Lichten:

36I'm going to call you on your cell phone, so if we've talked on the cell
37 phone, you can just delete this message. As you were leaving your
38 message, I was on the phone with Steven Walsh, the former president.
39 There's a new president of the Amherst Police League. I have a letter here
40 that ...finally presses this Grievance Committee into making a decision or

1 to confirming their decision. And their decision is to not go forward with
2 this. If we haven't talked, I don't have a copy of that Muniak decision. If
3 you have one available, if you could fax it to me at (413) 526-8939. I want
4 to take one more shot at these guys. I'm baffled. I am absolutely stunned
5 by their decision, but if you could just give me one more shot at them, I
6 would appreciate it....

7
8 On May 19, 2005, Lichten telephoned Koski to inform him of the Grievance
9 Committee's decision and asked Claffey to provide a copy of the Union's constitution
10 and bylaws. Claffey provided the materials on May 20, 2005. On May 20, 2005, Alfred
11 Gordon (Gordon), an attorney in Lichten's law firm, faxed a letter to Del Castilho that
12 stated in pertinent part:³⁰

13 During the grievance process, Mr. Koski, though his counsel, was
14 assured that the Union was taking this matter to arbitration. Though we
15 believe that arbitration had indeed been authorized, there may be some
16 internal Union impediments that have prevented the Union from
17 demanding arbitration as of this date. We are attempting to resolve
18 those impediments, but, at this juncture, believing that arbitration had
19 indeed been authorized, Mr. Koski is hereby invoking arbitration, as a
20 relator to and on behalf of the Union, in order to preserve the timeliness
21 of the Union's arbitration demand.

22
23 Zlogar responded to Gordon's May 20 letter on May 25, 2005, stating as follows:

24 Your letter of May 20, 2005 to Amherst Town Manager Barry L. Del
25 Castilho has been referred to me for response.

26
27 The Town rejects your inference that arbitration has been authorized. It is
28 the Town's position that the grievance filed by the Amherst Police League
29 was settled as per Chief's Scherpa's letter of March 17, 2005.

30
31 There was no mutual written agreement between the Town and the
32 Amherst Police League to extend the time limits beyond March 17, 2005.

33

34 Lichten subsequently asked Zlogar for a copy of Chief Scherpa's March 17, 2005 letter,
35 which Koski had never received.

³⁰ At this time, Lichten believed that the Union was at Step 3 of the grievance procedure and had twenty-eight days to file for arbitration.

1

2 **Koski's Efforts to Appeal the Decision**

3 On May 23, 2005, Koski wrote to MacLean, the Union's recently-elected new
4 president, asking to appeal the Grievance Committee's decision to the Union's
5 Executive Board. MacLean responded to Koski by letter dated May 27, 2005.
6 MacLean's letter stated as follows:

7 I have received your letter requesting the Executive Board grant you an
8 appeal of the decision of the Grievance Committee. I have met with the
9 members of the Executive Board to discuss this request. After a thorough
10 review of Article VIII of the contract, we have concluded that I, nor [sic]
11 any member of the Executive Board, have the authority to appeal any
12 decision made by the Grievance Committee concerning any aggrieved
13 issue. The purpose of the Grievance Committee is to be a counsel of your
14 peers free from any outside influence or persuasion and to render a
15 decision.

16
17 According to documentation that was sent to you on May 18, 2005, the
18 Committee rendered a decision on grievances that you filed on September
19 16, 2004 and October 6, 2004, respectfully. The Grievance Committee
20 has reviewed all of the facts, and upon doing so, has come to a resolution.
21 These grievances are now to be considered settled. I nor [sic] any
22 member of my Executive Board, have the authority to challenge their
23 decision.

24
25 On May 23, 2005, Koski also filed a charge with the Board, alleging that the
26 Union had breached its duty to represent him fairly.

27 **Opinion**

28 A union has a duty to represent its members fairly in connection with issues that
29 arise under a collective bargaining unit. National Association of Government
30 Employees v. Labor Relations Commission, 38 Mass. App. Ct. 611, 613 (1995). Unions
31 are permitted a wide range of reasonableness in representing the often-conflicting
32 interests of employees; hence, unions are vested with considerable discretion not to

1 pursue a grievance, as long as their actions are not improperly motivated, arbitrary,
2 perfunctory or demonstrative of inexcusable neglect. Graham v. Quincy Food Service
3 Employees Association, 407 Mass. 601, 606 (1990) (citing Baker v. Local 2977, State
4 Council 93, Am. Fed'n of State, County, & Mun. Employees, 25 Mass. App. Ct. 439, 441
5 (1988)). Ordinary negligence may not amount to a denial of fair representation,
6 however, the lack of a rational basis for a union decision and egregious unfairness or
7 reckless omissions or disregard for an individual employee's rights may have that effect.
8 Trinque v. Mount Wachusett Community College Faculty Ass'n, 14 Mass. App. Ct. 191,
9 199 (1982).

10 Generally, an employee has no right to require that his grievance be submitted to
11 arbitration. Vaca v. Sipes, 386 U.S. 171, 191 (1967). A union has considerable
12 discretion in determining whether to file a grievance and whether to pursue it through all
13 levels of the contractual grievance procedure. National Association of Government
14 Employees, 38 Mass. App. Ct. at 613. Although the grievance process need not be
15 error-free, Hines v. Anchor Freight, Inc., 424 U.S. 554, 571 (1976), in the absence of
16 complex legal or procedural issues, a union's failure to follow the grievance procedure
17 outlined in a collective bargaining agreement demonstrates inexcusable neglect.
18 AFSCME, Council 93 and Herbert Avant, 27 MLC 129 (2001).

19 Koski was terminated on September 9, 2004, and timely filed a grievance
20 challenging his termination. Despite Koski's continual requests to expedite the process,
21 the Union did not conduct a Step 2 hearing until March of 2005, did not decide whether
22 to arbitrate Koski's grievance until April of 2005, and did not inform Koski of its adverse
23 decision until May of 2005. Between those dates, the Union failed to inform Koski of the

1 Town's willingness to meet with him outside the grievance procedure, mishandled two
2 critical steps in its grievance procedure, penalized Koski for following advice that a
3 Union lawyer had recommended, and failed to honor its attorney's agreement to
4 arbitrate the grievance. The Union defends its conduct by arguing that: 1) it assembled
5 sufficient information to make a reasoned decision foregoing arbitration; 2) it acted
6 without bias or improper motive; 3) time limits were inconsequential; and, 4) its attorney
7 had no authority to agree to arbitrate Koski's grievance. We are not persuaded by the
8 Union's arguments, and we find that its actions demonstrate a pattern of grossly
9 negligent conduct that severely prejudiced Koski's ability to challenge his termination.

10 **Procedural Missteps**

11 We first address the Union's failure to advise Koski of Zlogar's offer to meet with
12 Koski and his attorney. At the Step 2 meeting, in the midst of a discussion over Koski's
13 written assertion that he had received no opportunity to defend himself before the Town
14 Manager, Zlogar extended an offer for Koski and his attorney to meet with Town
15 officials. However, the Grievance Committee did not communicate this offer to Koski.
16 Although the Union may have intended to convey this information to Koski by letter, it
17 did not. Moreover, because the Union had not informed Koski about the Step 2 meeting
18 in advance, Koski had no opportunity to attend the meeting and hear Zlogar's offer first-
19 hand. We do not speculate concerning the potential outcome of such a meeting,
20 however, it would have been with the Town Manager, who possessed the authority to
21 overturn the Chief's Step 2 decision. The Union's failure to alert Koski to this pivotal
22 opportunity to challenge his termination shows a reckless disregard for Koski's
23 grievance and his contractual rights.

1 We next consider the Union's improperly blended steps in the grievance
2 procedure. The Grievance Committee met with Chief Scherpa and Zlogar on March 10,
3 2005 for a Step 2 meeting. Zlogar's attendance led the Union to assume that this
4 meeting combined Steps 2 and 3 of the Grievance Procedure. The Union made this
5 assumption without taking steps to ascertain whether Del Castilho had authorized
6 Zlogar to act as his Step 3 representative at the meeting, or whether the Town had
7 intended and agreed to merge the grievance steps.

8 It is well-settled that unions must know their own policies and contractual
9 procedures. Goncalves v. Labor Relations Commission, 43 Mass. App. Ct. 289 (1997);
10 United Steelworkers of America, 31 MLC 122 (2005) (appeal pending). In Goncalves,
11 the union failed to pursue an employee's grievance because it believed that the
12 employee's personal attorney would manage it. However, the union failed to follow its
13 own policy of securing a written waiver from grievants who retained separate
14 representation. The Goncalves court held that, inter alia, the union's failure to follow its
15 own policies governing its grievance processing violated the union's duty of fair
16 representation. Goncalves, 43 Mass. App. Ct. at 297.

17 Here, as in Goncalves, the Grievance Committee significantly and detrimentally
18 misapplied its own procedures by combining Steps 2 and 3 when it failed to ask the
19 Town whether it intended to combine the steps. After the Chief's Step 2 response, the
20 Union had seven days to forward the matter to the Town Manager for Step 3. By
21 operation of Section 8.02, Time Limits, the Union's failure to forward the grievance to
22 Step 3 within the allotted time frame caused to grievance to be considered settled and
23 waived on the basis of the Step 2 decision. The Town's enforcement of this time limit is

1 evident from Zlogar's May 25, 2005 letter.³¹ As a result, the Union's failure to follow its
2 own grievance procedure caused the Union to skip the third and final pre-arbitration
3 step in the grievance process, and again, thwarted Koski's ability to present his
4 grievance to the Town Manager. This prejudicial error constituted unlawful negligence.
5 Goncalves, 43 Mass. App. Ct. 289.³²

6 **The Arbitration Agreement**

7 We next consider the Union's agreement, made through its lawyer, Claffey, to
8 arbitrate Koski's grievance. The Union contends that Claffey lacked both the actual and
9 apparent authority to bind the Union to arbitrate Koski's grievance. It argues that there
10 was no actual authority because Walsh never authorized Claffey to agree to arbitrate
11 Koski's grievance, Claffey never told Lichten that he had such authorization, and only
12 the Union's Board of Directors could authorize the use of Union funds. The Union
13 further contends that Claffey did not possess apparent authority because Lichten had
14 no contact with the Union which would lead him to believe Claffey possessed authority

³¹ The Union argues that there is no evidence that the grievance time limits played a role in this case. We reject this contention as factually inaccurate. Zlogar's May 25, 2005 letter demonstrates that the Union's failure to properly and timely process the grievance irreparably harmed Koski's grievance.

³² The Union's consideration of Zlogar's assertion regarding Koski's silence at the July 21, 2004 meeting is further evidence of the carelessness with which the Union treated Koski's grievance. In the March 17, 2005 letter that Zlogar forwarded to the Grievance Committee, Zlogar stated that Koski had the opportunity to defend his position when he and his attorney met with the Zlogar and the Town Manager, but that Koski refused to discuss the incident. The Grievance Committee reviewed Zlogar's letter when it decided to deny arbitration, yet failed to recognize that Koski's silence resulted from the Union attorney's advice. Although the weight that the Grievance Committee placed on this factor is not detailed in the record, it is clear that it was a consideration for Knightly. However, Knightly's reliance on this information from Zlogar is patently unfair, because, with routine inquiry, Knightly could have determined that Koski acted pursuant to the Union attorney's instruction.

1 to bind the Union. Additionally, the Union argues that Lichten, an experienced labor
2 lawyer, would have known that Claffey, a general practitioner who was new to the
3 Union, would not have the authority to reach an agreement to arbitrate a grievance. If
4 Lichten possessed this knowledge, the Union maintains, Lichten unreasonably failed to
5 reduce the agreement to writing. Finally, the Union argues that, as a former Grievance
6 Committee member, Koski should have known how the Union made decisions and
7 should have communicated that information to Lichten.

8 Apparent authority is created when a principal engages in conduct that causes
9 another person to reasonably believe that the alleged agent has the authority to act on
10 behalf of the principal. Higher Education Coordinating Council, 25 MLC 69, 71 (1998).
11 Thus, if the Union's conduct caused Lichten and/or Koski to reasonably believe that the
12 Union authorized Claffey act on its behalf, we will find that Claffey had apparent
13 authority to act for the Union. Further, unless communication of a limitation in one's
14 authority is presented to the other party, an individual in charge of a transaction has
15 been held to have broad apparent authority. Town of Ipswich, 11 MLC 1403, 1410 n.7
16 (1985) (citing Costonis v. Medford Housing Authority, 343 Mass. 108, 115 (1961)). We
17 need not consider whether Claffey possessed the actual authority to consummate an
18 arbitration agreement, because the evidence demonstrates that Claffey possessed
19 apparent authority to bind the Union to arbitrate Koski's grievance.

20 We first note that in July of 2004, Walsh authorized Koski to speak with Claffey
21 regarding the July 21, 2004 meeting with Del Castilho, and Claffey retained Moriarty to
22 act as the Union's attorney at the meeting. Moriarty told Koski that, if the Town
23 terminated him, the Union would resolve the situation through the grievance procedure

1 in arbitration. This scenario communicated to Koski that Claffey was the Union's lawyer
2 whom the Union had retained to assist him in processing his grievance.

3 Second, the Union's limited contact with Koski and its reliance on Claffey to
4 communicate with Koski and Lichten on the Union's behalf, caused Koski and Lichten to
5 reasonably believe that Claffey had the authority to act on behalf of the Union. After
6 Koski submitted information to the Grievance Committee on September 30, 2004, the
7 Union had little contact with Koski until four months later, when Koski's wife initiated a
8 conversation with Walsh as a ruse to facilitate a conversation between Koski and
9 Walsh. The next contact occurred in mid-March when Knightly told Koski that the
10 Committee had met with the Chief and was awaiting his decision. The final contact
11 occurred on May 18, 2005, after Lichten threatened the Union with legal action if it did
12 not act on the grievance.

13 Simultaneously, the Union effectively delegated to Claffey the responsibility to
14 deal with Koski and Lichten regarding the grievance and widely communicated this
15 transfer of responsibility. Walsh authorized Koski to speak with Claffey regarding the
16 July 21, 2004 meeting with the Town, and Moriarty spoke in Claffey's place. When the
17 Chief asked Walsh in January of 2005 about the status of the case, Walsh replied that
18 the Union was dealing with its attorney. In Claffey's February 22, 2005 letter written to
19 Walsh and copied to Lichten, Claffey told Walsh that he (Claffey) would retain contact
20 with Lichten to update Lichten regarding the grievance and arbitration. In April of 2005,
21 when the Committee decided to discontinue processing the grievance, Knightly and
22 Walsh asked Claffey to draft the letter to Koski.

1 Further, neither Walsh nor Claffey communicated to Koski or Lichten any
2 restriction on Claffey's authority. Town of Ipswich, 11 MLC 1403 (1985). Lichten
3 contacted Walsh regarding Koski's interest in arbitration well before Lichten had any
4 contact with Claffey. At that time, Walsh could have explained the Union's procedures to
5 Lichten, including Claffey's role in the process. There is no evidence that Claffey told
6 Lichten of any limit to his authority when he told Lichten on October 8, 2004 that he was
7 the Union's lawyer. After Walsh received Claffey's November 8, 2004 and February 22,
8 2005 letters discussing the grievance procedure, Walsh did not communicate with Koski
9 or Lichten regarding Claffey's function. Because Claffey copied Lichten on both letters,
10 Walsh could have advised Lichten if the letters inaccurately reflected Claffey's authority
11 or role in the grievance/arbitration process.

12 We have reviewed the Union's arguments to the contrary and find that they are
13 without merit. The lack of contact between Lichten and the Union does not preclude a
14 finding of apparent authority. As previously noted, Lichten initially contacted Walsh yet
15 received no response. Once Claffey identified himself as the Union's attorney, Lichten
16 appropriately restricted his communication to Claffey.³³ Additionally, there is no
17 evidence that Lichten knew that the Union had recently retained Claffey, or that Claffey
18 had focused his prior practice on real estate law, and thus the Union's arguments on
19 this point are not supported by the record. Although reducing the agreement to arbitrate
20 to writing may have averted this dispute, the lack of a written agreement is

³³ Once a party is represented by counsel, an attorney may not circumvent the lawyer and have direct communication with the client without consent. Mass. R. Prof. C. 4.2, 426 Mass. 1402 (1998). Thus, once Claffey's role as the Union's lawyer was clear, Lichten could not contact the Union directly and in fact had all his communication with Claffey.

1 inconsequential. Finally, we reject the Union's contention that Koski's prior service on
2 the Grievance Committee should have informed him and Lichten of the Union's
3 decision-making process. Koski was not a current member of the Union's Grievance
4 Committee and could not have known how the Union had chosen to work through this
5 new attorney in his case. Accordingly, we conclude that Claffey had apparent authority
6 to commit the Union to arbitrate Koski's grievance.

7 Once the Union had communicated through Claffey that the Union would
8 arbitrate Koski's grievance, the Union was obligated to follow through on its agreement.
9 In Local 195, IPEA and Robert P. McLaughlin, 8 MLC 1222 (1981), bargaining unit
10 member Robert McLaughlin (McLaughlin) told the union president that he wished to
11 resign his position and asked the union president if the union would process a grievance
12 for him. The union president assured McLaughlin numerous times that the union would
13 take care of his grievance, yet the union subsequently declined to arbitrate it. The Board
14 found that the union's failure to arbitrate the grievance violated the Law, because the
15 union had assumed the responsibility to pursue McLaughlin's grievances after the union
16 assured McLaughlin that it would take care of them. Local 195, 8 MLC at 1227 - 1229.
17 Similarly here, the Union undertook the responsibility to pursue Koski's grievance to
18 arbitration once Claffey agreed to arbitrate it.

19 Our determination that the Union's actions violated the Law is based on the
20 unique multiplicity of errors in this case. In reaching this conclusion, we nevertheless
21 affirm the general principle that a union that initially files a grievance for arbitration
22 retains the discretion to subsequently withdraw it, so long as it makes a reasoned, non-

1 negligent judgment, untainted by improper motives, about the merits of the grievance.
2 American Federation of State, County and Municipal Employees, 29 MLC 127 (2003).

3 Further, our review of the Union's actions in this case focuses on the totality of
4 the circumstances surrounding the Union's treatment of Koski's grievance and does not
5 hinge solely on the existence of a binding agreement to arbitrate between the lawyers.
6 As previously noted, the Union acted with a reckless disregard for Koski's grievance
7 and gross negligence by failing to advise him of the Town's offer to meet with Del
8 Castillo outside the grievance procedure; erroneously assuming that two separate steps
9 of the grievance procedure had been merged, thereby foreclosing timely access to the
10 Town Manager's step of the grievance procedure; and failing to recognize that Koski
11 had previously refused to discuss the matter under order of Union counsel. These
12 procedural missteps resulted in a breach of the duty of fair representation, even
13 assuming without deciding that the Union's ultimate decision not to arbitrate the
14 grievance was otherwise reasonable, as the Union argues.

15 Finally, we note that the parties stipulated that Koski's grievance was not clearly
16 frivolous. We adopt the parties' stipulation because the evidence demonstrates that
17 Koski was a long-term employee with no prior discipline, and the collective bargaining
18 agreement between the Town and the Union contained a "just cause" clause pertaining
19 to discharges. Berkley Employees Association, 19 MLC 1647, 1650 (1993) (termination
20 from employment, allegedly without just cause, coupled with the possibility that the
21 grievance contesting that termination is substantively arbitrable under the contract,
22 generally satisfies the "not clearly frivolous" test).

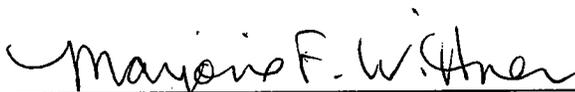
- 1 a) Request in writing that the Town offer Koski reinstatement to his
2 former position, or, if that position no longer exists, to a
3 substantially equivalent position.
4
- 5 b) If the Town declines to offer Koski reinstatement with full back pay,
6 the Union shall request in writing that the Town waive any time
7 limits that may bar further processing and arbitration of Koski's
8 termination grievance; and the Union shall offer to pay the cost of
9 arbitration. If the Town agrees to waive any applicable time limits
10 and to arbitrate the merits of Koski's grievance, the Union shall
11 process the grievance to conclusion in good faith and with all due
12 diligence and shall pay the cost of arbitration if the Town accepts its
13 offer to do so. Because the Union's conduct indicates an inability
14 on its part to adequately represent Koski's interests, the Union shall
15 pay the reasonable and necessary costs of a private attorney
16 selected by Koski to represent him in connection with the arbitration
17 of the grievance.
18
- 19 c) If the Town does not agree to arbitrate or otherwise fully resolve
20 Koski's termination grievance, the Union shall make Koski whole for
21 the loss of compensation that he suffered as a direct result of his
22 termination from the Town effective on September 9, 2004. The
23 Union's obligation to make Koski whole includes the obligation to
24 pay Koski interest on all money due at the rate specified in M.G.L.
25 c. 231, Section 6B.
26
- 27 d) Immediately post in conspicuous places where notices to
28 bargaining unit employees are customarily posted, including all
29 places at the Town, copies of the attached Notice to Employees.
30 The Notice to Employees shall be signed by a responsible elected
31 Union officer and shall be maintained for at least thirty consecutive
32 days thereafter. Reasonable steps shall be taken by the Union to
33 ensure that the Notices are not altered, defaced, or covered by any
34 other material. If the Union is unable to post copies of the Notice in
35 all places where notices to bargaining unit employees are
36 customarily posted at the Town, the Union shall immediately notify
37 the Executive Secretary of the Division in writing, so that the
38 Division can request the Town to permit the posting.

- e) Notify the Division in writing within thirty days from the date of this Order of the steps taken by the Union to comply with the Order.

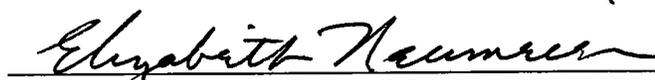
SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF LABOR RELATIONS

COMMONWEALTH EMPLOYMENT RELATIONS BOARD



MARJORIE F. WITTNER, CHAIR



ELIZABETH NEUMEIER, BOARD MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.



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

NOTICE TO EMPLOYEES

**POSTED BY ORDER OF
THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD OF THE
THE MASSACHUSETTS DIVISION OF LABOR RELATIONS
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

The Massachusetts Commonwealth Employment Relations Board (Board) has decided that the Amherst Police League (Union) acted in an unlawful manner by failing to properly process and arbitrate a grievance for William J. Koski, in violation of Section 10(b)(1) of M.G.L. c. 150E, the Public Employee Collective Bargaining Law (the Law). The Union posts this Notice to Employees in compliance with the Board's order.

Section 2 of the Public Employee Collective Bargaining Law gives all employees the following rights:

The right to engage in concerted, protected activity, including the right to form, join and assist unions, to improve wages, hours, working conditions, and other terms of employment, without fear of interference, restraint, coercion or discrimination and;

The right to refrain from either engaging in concerted protected activity, or forming, or joining or assisting unions.

WE WILL NOT fail to properly process grievances for employees who are covered by our collective bargaining agreement with the Town of Amherst.

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

WE WILL request the Town to offer Koski reinstatement to his former position, or, if it no longer exists, to a substantially equivalent position with full back pay. If the Town declines to offer Koski reinstatement to his former, or substantially equivalent position, we will ask the Town to arbitrate the grievance concerning Koski's termination. If the Town agrees to arbitrate Koski's grievance, we pay the reasonable and necessary costs of an attorney selected by Koski to represent him in the arbitration. If the Town declines to arbitrate the grievance, WE WILL make Koski whole for any loss of compensation that he may have suffered as a direct result of our unlawful conduct, plus interest.

Amherst Police League

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 Division of Labor Relations, 14 Staniford St., 1st Floor, Boston, MA 02114 (Telephone: (617) 626-7132).