

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

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In the Matter of	*	
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MASSACHUSETTS CORRECTION	*	Case No. SUPL-03-3008
OFFICERS FEDERATED UNION	*	
	*	
and	*	Date Issued:
	*	January 30, 2009
COMMONWEALTH OF MASSACHUSETTS/ COMMISSIONER OF ADMINISTRATION & FINANCE	*	
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Board Members Participating:

Marjorie F. Wittner, Chair  
Elizabeth Neumeier, Board Member

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Appearances:

Stephen Pfaff, Esq.	-	Representing the Massachusetts Correction Officers Federated Union
Marcelino La Bella, Esq.	-	Representing the Commonwealth of Massachusetts/Commissioner of Administration and Finance

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1 bargaining agreement (Agreement). The Union filed its answer to the amended  
2 complaint on December 20, 2005.

3 On February 28, 2006, a duly-designated agent of the Commission, Victor  
4 Forberger, Esq. (Hearing Officer), conducted a hearing at which all parties had  
5 the opportunity to be heard, to examine witnesses, and to introduce evidence. At  
6 the request of the parties, all witnesses except for the parties' designated  
7 representatives were sequestered. On May 1, 2006, the Union filed its post-  
8 hearing brief, and the Commonwealth filed its post-hearing brief on May 28,  
9 2006. On September 21, 2006, the Hearing Officer issued recommended  
10 findings of fact. Neither party filed challenges to those findings.

11 Findings of Fact<sup>3</sup>

12 Because neither party challenged the Hearing Officer's Recommended  
13 Findings of Fact, we adopt them in their entirety and summarize the relevant  
14 portions below.

15 The Union represents correction officers with the rank of lieutenant or  
16 below in the Commonwealth's correctional facilities operated by the Department  
17 of Correction (Department). On behalf of its members, the Union negotiated the  
18 Agreement with the Commonwealth, effective by its terms from January 1, 2001  
19 to December 31, 2003. Article 6, Anti-Discrimination and Affirmative Action, of  
20 the Agreement contains the following provisions:

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<sup>3</sup> The Board's jurisdiction is uncontested.



1 Harassment Policy may not file a grievance regarding those same  
2 allegations under this Section.

3  
4 Article 23A of the Agreement outlines the parties' grievance and arbitration  
5 process. It consists of four steps that culminate in binding arbitration. Individual  
6 employees as well as the Union have the authority under this provision of the  
7 Agreement to process grievances through the first three steps of the grievance  
8 process. Only the Union has the authority under Article 23A to request  
9 arbitration.

10 The Commonwealth's Statewide Sexual Harassment Policy (Policy)  
11 applies to Department employees. The Policy, in part, identifies sexual  
12 harassment as behavior that "has the purpose or effect of unreasonably  
13 interfering with work performance . . . [or] of creating an intimidating, hostile,  
14 humiliating or sexually offensive work environment."<sup>4</sup> The Policy provides  
15 examples of sexually harassing behavior, including direct sexual advances or  
16 sexual assault, and indicates that sexual harassment can come from a co-  
17 worker. The procedures outlined in the Policy for filing complaints of sexual  
18 harassment designate the Agreement's grievance procedure as one option. The  
19 Policy notes that "[e]mployees covered by a collective bargaining agreement who

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<sup>4</sup> The Policy became effective at the Department on January 22, 1998. In its brief, the Commonwealth submitted an updated version of the Policy effective on May 4, 2006 that differs substantially from the Policy entered into the record here. As the record in this matter was closed on February 28, 2006 and the updated Policy was not in effect at the time the events described in the amended complaint occurred, the Hearing Officer declined to consider the updated Policy. We similarly decline to consider the updated Policy. Town of Brookfield, 28 MLC 320, 321 (2002).

1 are charged with sexual harassment and who are subject to disciplinary action  
2 are entitled to representation by their respective union."

3 One of the Department's facilities is the Shattuck Hospital Correctional  
4 Unit (Shattuck), which provides medical care to inmates. Correction officers staff  
5 the facility twenty-four hours a day, seven days a week, in three shifts: 7 AM to 3  
6 PM (1st shift), 3 PM to 11 PM (2nd shift), and 11 PM to 7 AM (3rd shift).<sup>5</sup>  
7 Correction officer Morris Charley (Charley) worked the 1st shift in the unit known  
8 as 8 North in Shattuck. Correction officer Brenda Brittle (Brittle) worked the 2nd  
9 shift at 8 North. Because of overtime, shift swaps, and re-assignments, Charley  
10 and Brittle sometimes worked together at 8 North.

11 On May 29, 2003, when both Charley and Brittle were at work, Charley  
12 grabbed Brittle in a sexually offensive manner,<sup>6</sup> and she pushed him off while  
13 demanding that he not touch her again. Brittle worked the rest of her shift  
14 without further incident. When she arrived home that evening, she called a co-  
15 worker and confided in him about the incident with Charley. The co-worker  
16 advised Brittle to do what Brittle believed was best. Prior to this incident, Charley  
17 had made repeated remarks and inquiries of a sexual nature to Brittle and acted  
18 in ways that were sexually offensive, all of which she had rebuffed.

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<sup>5</sup> The start and end times for these shifts are approximations.

<sup>6</sup> While the Union has disputed what happened between Charley and Brittle in other forums, it did not present any evidence or arguments here to indicate that Brittle's allegations of what happened do not constitute serious allegations of sexual harassment. Because the issue in this case is not whether sexual harassment occurred but how the Union responded to Brittle's allegations of sexual harassment, it would serve no legitimate purpose to detail those allegations concerning Charley's conduct towards Brittle.

1           On May 31, 2003, Brittle reported to work, met with the Union's chief  
2 steward at Shattuck, John "Leo" McKinnon (McKinnon), and informed him of the  
3 May 29th incident with Charley.<sup>7</sup> Two other correction officers were present at  
4 the meeting, including one who had witnessed the May 29th incident with  
5 Charley and confirmed to McKinnon what had happened to Brittle. McKinnon  
6 asked Brittle if she was willing to meet with Charley to resolve the issue, and  
7 Brittle said that she was. McKinnon then explained that the meeting would occur  
8 the next time Charley, McKinnon, and Brittle worked the same shift together.  
9 McKinnon did not inform Brittle of what action she could take under the  
10 Agreement or the Policy regarding Charley's conduct towards her.

11           The following week there were several occasions where Brittle and  
12 Charley worked together. During those times, Charley continued to act in a  
13 sexually suggestive manner and to make sexually inappropriate remarks and  
14 entreaties to Brittle. Brittle contacted McKinnon twice that week to ask when he  
15 would schedule the meeting that they had discussed on May 31st.

16           On June 12, 2003, Charley walked into the room where Brittle was  
17 working and informed Brittle's co-worker that Brittle had "sic'ed the chief steward  
18 on me." Charley then left, and Brittle called McKinnon about the meeting. A few  
19 minutes later, Brittle received a call from McKinnon asking her to meet with him  
20 and Charley in the roll call room. Brittle went, and Charley began the meeting by  
21 remarking that Brittle's complaint was "fuckin' bullshit" as he repeatedly rapped

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<sup>7</sup> McKinnon testified that he was not aware of the true nature of Brittle's allegations until June 13, 2003, when she filed a formal complaint of sexual harassment with the Department. For reasons discussed below, the Hearing Officer did not find that his testimony was credible.

1 the table at which he sat. "I've been through this bullshit before, and I'm not  
2 going through it again," Charley told her. Brittle replied incredulously, "You  
3 violate my body, and you're going to tell me it's bullshit," and began crying.  
4 McKinnon asked Charley to leave the room. After Charley had left, Brittle told  
5 McKinnon that she did not need to have this meeting because she could have  
6 already gone to the Department with a complaint. McKinnon suggested that if  
7 Charlie did not bother her for two weeks, she let the matter go. Brittle asked,  
8 "Two weeks?"

9 McKinnon next met with Charley outside the room. When they returned,  
10 Charley apologized for anything that he had done, or if he had "violated her."  
11 Brittle responded that Charley must be kidding, and Charley said "nothing but  
12 horseplay" was intended. In response, Brittle pointed her finger at Charley and  
13 said, "I got your horseplay." The meeting ended and Brittle returned to work  
14 crying. The rest of her shift was uneventful. At the meeting, McKinnon had  
15 made no mention of protections available to Brittle against sexual harassment

1 either under the Agreement or the Policy.<sup>8</sup>

2 On the morning of June 13, 2003, Brittle contacted Pina from her home to  
3 inform him that she wished to file a sexual harassment complaint regarding  
4 Charley's actions and comments towards her. Pina asked that she arrive an hour  
5 before her scheduled shift to file that complaint, and Pina arranged for Union  
6 steward Dana Lymon (Lymon) to attend that meeting when Brittle requested

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<sup>8</sup> McKinnon disagrees with Brittle's testimony about what happened at this meeting. McKinnon testified that Brittle had not indicated prior to June 13, 2003 that her problem with Charley involved sexual harassment. McKinnon further testified that he scheduled the meeting in the roll call room because he had heard rumors of a personal dispute between Charley and Brittle that he hoped to resolve. At the meeting, according to McKinnon, Brittle only indicated that she wanted an apology. McKinnon asserts that Charley apologized and told Brittle that he did not know why he needed to apologize. After Charley had left, McKinnon testified, he told Brittle that if her dispute with Charley involved sexual harassment she should see Captain Jeffrey Pina (Pina). The Hearing Officer did not credit this testimony because it contradicts: (a) statements McKinnon made to a Department investigator; and (b) an affidavit entered into evidence that McKinnon had provided during the former Commission's written investigation of the charge. First, McKinnon reported to the Department's investigator that he learned of the May 29th incident involving Charley when he met with Brittle and two other correction officers prior to June 12th, that he had explained the Policy to Brittle at the June 12th meeting, and that he had asked Brittle to give Charley a week to change his conduct. During his testimony, McKinnon offered no explanation for these contradictions. Second, in his affidavit, McKinnon avers that he scheduled the June 12<sup>th</sup> meeting because he had overheard Brittle's discussion with a correction officer that Charley had sexually harassed her, that he scheduled the meeting to determine what had occurred between them, and when Charley left at the end of the meeting, McKinnon explained to Brittle the proper procedure for filing a sexual harassment complaint. McKinnon asserted on cross-examination at the hearing that there was no disagreement between his testimony and these portions of his affidavit.

1 Union representation.<sup>9</sup> When Brittle arrived, she met with Lymon privately and  
2 described to him the incident with Charley and her meetings with McKinnon.  
3 Lymon then requested that McKinnon join the meeting. When McKinnon arrived,  
4 the two Union stewards met privately before they accompanied Brittle to her  
5 meeting with Pina. When all four were gathered in Pina's office, McKinnon stated  
6 that Brittle had agreed to give Charley two more weeks. Brittle denied making  
7 this agreement. The two Union stewards next stated that they could no longer  
8 attend the meeting, because a conflict of interest existed. They explained that  
9 they might have to represent Charley in any disciplinary proceedings the  
10 Department brought against him, and they left Brittle to file a complaint on her  
11 own.<sup>10</sup> She did so, and Pina informed her that she could take the rest of the day  
12 off.

13 When Brittle returned to work after June 13th, her co-workers refused to  
14 talk to her except when necessary to do their jobs. Because of that treatment,  
15 the Department re-assigned Brittle on June 27, 2003 away from 8 North to

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<sup>9</sup> The Hearing Officer did not credit any of Lymon's testimony due to its unreliability. At the outset of his direct examination, Lymon reviewed an affidavit he had previously submitted during the former Commission's investigation of the charge. There was no indication at the time that Lymon's recollection of events had been exhausted. Furthermore, during cross-examination, a small section of the affidavit was read into the record that contradicted testimony Lymon had offered on direct examination. Lymon hastily changed his testimony to conform to what he stated in his affidavit.

<sup>10</sup> McKinnon subsequently informed the Department's superintendent that Brittle was filing a sexual harassment complaint against Charley. McKinnon believes that he and Lymon had no obligation to represent Brittle, because she did not face any possible disciplinary action from the Department, and because she was pursuing her complaint in the forum of her choice.

1 another unit in Shattuck and to a shift that usually was assigned to more senior  
2 members of the bargaining unit. On her first day in the new position, June 27th,  
3 Lymon met with her, informed her that she should not be in this position,  
4 indicated that the Union would grieve her transfer to this position, remarked that  
5 she was acting like Correction Officer Maria Ruggerio (Ruggerio),<sup>11</sup> and called  
6 Brittle crazy and in need of help.

7 Lymon and Brittle had two additional encounters after June 27th. At the  
8 last encounter on August 5, 2003, Lymon and Brittle engaged in a heated  
9 exchange, and Lymon filed a complaint with the Department alleging that Brittle  
10 had been verbally abusive towards him that day. The Department investigated  
11 the allegation and concluded that, although the allegation had merit, no action  
12 was needed because Brittle had accepted a voluntary transfer to another  
13 Department facility. Before the Department could implement that transfer, Brittle  
14 resigned from her position with the Department.<sup>12</sup> She subsequently filed suit  
15 against the Department, Charley, and others, but not the Union, alleging, in part,  
16 that the Department: (a) sexually harassed her and discriminated against her  
17 because of her gender in violation of M.G.L. c.151B and other state statutes; and

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<sup>11</sup> Ruggerio previously had filed complaints of sexual harassment and eventually quit her job at the Department.

<sup>12</sup> The record is silent regarding when Brittle's resignation became effective.

1 (b) created a hostile work environment against Brittle that led to her constructive  
2 discharge from the Department.<sup>13</sup>

3 Opinion

4 A party that deliberately fails to implement an unambiguous provision of a  
5 collective bargaining agreement repudiates the agreement's terms in violation of  
6 the obligation to bargain in good faith. North Middlesex Regional Sch. Dist.  
7 Teachers Ass'n, 28 MLC 160, 163 (2001). In this case, the Commonwealth  
8 argues that the Union repudiated Article 6, Sections 1 and 4 of the Agreement by  
9 failing to immediately report Brittle's sexual harassment allegations to the  
10 Commonwealth; failing to advise Brittle of her options for pursuing a sexual  
11 harassment complaint under the Agreement; attempting to dissuade Brittle from  
12 pursuing her allegations; and, generally, by "attempt[ing] to protect a male  
13 member of the bargaining unit to the detriment of a female employee."

14 To prevail on its repudiation claim, the Commonwealth must show that the  
15 Union deliberately refused to abide by Sections 1 and 4 of Article 6 of the  
16 Agreement. North Middlesex Regional Sch. Dist. Teachers Ass'n, 28 MLC at  
17 163 (citing Massachusetts State Lottery Commission, 22 MLC 1519, 1522  
18 (1996)). If the contract language is ambiguous, the Board must examine  
19 applicable bargaining history to determine whether the parties reached an  
20 agreement. Commonwealth of Massachusetts, 28 MLC 8, 11 (2001). There is

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<sup>13</sup> The Department discharged Charley on October 21, 2003. On July 14, 2005, an arbitrator upheld the discharge. Criminal charges for sexual assault also were brought against Charley. He was acquitted of those charges.

1 no repudiation of an agreement if the language of the agreement is ambiguous  
2 and there is no evidence of bargaining history to resolve the ambiguity. Id.

3 Article 6, Section 1 of the Agreement requires that the parties not  
4 discriminate in any way against employees covered by the Agreement on the  
5 basis of certain protected classifications, including sex. In Article 6, Section 4 of  
6 the Agreement, the Union acknowledges that sexual harassment is a form of  
7 unlawful sex discrimination and agrees that no employee should be subjected to  
8 sexual harassment. Section 4 also provides a definition of sexual harassment.<sup>14</sup>  
9 Both sections are silent as to how the Union is to effectuate these provisions, and  
10 therefore, in the absence of any evidence of bargaining history, the  
11 Commonwealth's claims that the Union repudiated these sections by deliberately  
12 refusing to abide by them must fail.

13 We cannot infer from the plain language of either Section 1 or 4 that the  
14 Union was obligated to report Brittle's allegations to the Employer rather than  
15 meeting with Brittle and Charley, both separately and together, in an apparent,  
16 albeit unsuccessful, effort to settle matters.<sup>15</sup> Moreover, the fact that the Union

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<sup>14</sup> The definition provided in the Agreement is substantially the same as the definition of sexual harassment set forth in M.G. L. c.151B, § 1(13).

<sup>15</sup> The Employer reasons that because Article 25 of the Agreement requires the employer to determine disciplinary actions pursuant to a just cause standard, the Union should have reported any allegation of sexual harassment immediately in order to prohibit such conduct. However, Article 6, Section 5, which requires grievances over sexual harassment to be filed within twenty-one days of the alleged act or occurrence, could just as easily be read to allow the Union up to three weeks to report such allegations. In the absence of clear, unambiguous language requiring the Union to report sexual harassment complaints upon receiving them, the Employer's argument that the Union repudiated the Agreement by not reporting the claims immediately must fail.

1 did not set up a meeting between Charley and Brittle for almost two weeks and  
2 then attempted to persuade Brittle to wait another two weeks before taking action  
3 does not constitute a repudiation of Sections 1 and 4, where those provisions do  
4 not set forth specific deadlines for filing sexual harassment charges. Even  
5 assuming without deciding that the twenty-one day deadline for filing a sexual  
6 harassment grievance set forth in Article 6, Section 5 was somehow incorporated  
7 into Sections 1 and 4, the Union's unsuccessful efforts to forestall Brittle from  
8 filing a complaint against Charley within the twenty-one day period do not  
9 constitute a repudiation of Sections 1, 4 or 5, because the Union never refused to  
10 file a grievance within that period and Brittle ultimately chose to file a complaint  
11 under the Policy and did so within twenty-one days. Thus, there is no evidence

12 of a deliberate refusal to abide by these provisions. Similarly, in the absence of  
13 clear, unambiguous language imposing an affirmative duty on the Union to inform  
14 Brittle of her right, under Section 5, to file either a grievance or a complaint under  
15 the Policy, we conclude that the Union did not repudiate Sections 1 and 4 when it  
16 did not share this information with her, particularly where Brittle informed  
17 McKinnon within two weeks of the May 29<sup>th</sup> incident that she was aware that she  
18 could file a complaint with the Department and did so the very next day.

19 We also decline to find that the Union discriminated against Brittle by  
20 generally favoring Charley's interests over Brittle's, as the Commonwealth  
21 alleges. As noted above, the anti-discrimination provision is ambiguous and  
22 there is no bargaining history to clarify its meaning. Massachusetts State Lottery  
23 Commission, 22 MLC at 1524 (union that posted a memorandum openly

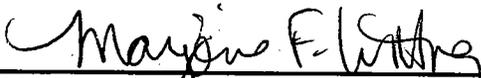
1 chastising union members for testifying on behalf of employer at arbitration  
2 hearing held not to have repudiated contract provision prohibiting discrimination  
3 on the basis of union activity, where the Board found the provision to be  
4 ambiguous and there was no evidence of bargaining history). Moreover, the  
5 Policy recognizes that employees who are charged with sexual harassment and  
6 who are subject to disciplinary action are entitled to representation by their  
7 respective union. Indeed, it was only after Brittle announced that she would be  
8 filing a complaint with the Commonwealth, and, by implication, not filing a  
9 grievance, that the Union determined that it would no longer represent Brittle.  
10 Ultimately, although the Union could have acted in a more expedient and  
11 sensitive manner when contacted by Brittle, its conduct does not amount to a  
12 deliberate repudiation of the parties' bargained-for Agreement.

13 Conclusion

14 For the foregoing reasons, we conclude that the Association did not  
15 violate Section 10(b)(2) and, derivatively, Section 10(b)(1) of the Law by  
16 repudiating Section 4 and 1 of Article 6 of the Agreement. Therefore, we dismiss  
17 the complaint.

**SO ORDERED.**

DIVISION OF LABOR RELATIONS  
COMMONWEALTH EMPLOYMENT  
RELATIONS BOARD

  
MARJORIE F. WITTNER, CHAIR

  
ELIZABETH NEUMEIER, BOARD  
MEMBER