COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	
EVERETT TEACHERS ASSOCIATION/ MTA/NEA	*	Case No.: MUPL-08-4617
and	*	Date Issued: August 24, 2011
EUGENE W. DUMAS, JR.	*	

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Americo A. Salini, Esq. – Representing Everett Teachers Association

Ellen C. Shimer-Brenes, Esq. – Representing Eugene W. Dumas, Jr.

HEARING OFFICER'S DECISION AND ORDER

Summary

The issues are whether: (1) the Everett Teachers Association/MTA/NEA (Association) violated Section 10(b)(1) of Massachusetts General Laws Chapter 150E (the Law) by failing to arbitrate the grievance of Eugene W. Dumas, Jr. (Dumas) because of his non-membership in the Association; and, (2) the Association's failure to communicate with Dumas after failing to arbitrate his grievance was arbitrary, perfunctory and constitutes inexcusable neglect. Based on the record and for the reasons explained below, I conclude that: (1) the Association failed to arbitrate Dumas' grievance because of his non-membership in the Association; but, (2) the Association's failure to communi-

cate with Dumas after failing to arbitrate his grievance was not arbitrary or perfunctory and does not constitute inexcusable neglect.

Statement of the Case

On March 31, 2008, Dumas filed a Charge of Prohibited Practice (Charge) with the Department of Labor Relations (Department)[1] alleging that the Association violated Sections 8 and 10 of Chapter 150E and Section 4 of Chapter 150A. On July 21, 2008, a duly-designated Department Investigator conducted an in-person investigation, and, on November 10, 2008, issued a Notice of Hearing (Notice) and a Complaint of Prohibited Practice and Order of Dismissal (Complaint). In the Complaint, the Investigator alleged that the Association interfered with, restrained and coerced Dumas in the exercise of his rights under Section 2 of the Law in violation of Section 10(b)(1).[2] On January 8, 2009, the Association filed a Motion for Leave to file Answer Late (Motion) and also filed its Answer.

Pursuant to Notice, I conducted a hearing on October 20, 28 and December 2, 2009. The parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. On the first day of hearing, the Association elected to bifurcate the hearing and present evidence regarding the merits of the

[1] Pursuant to Chapter 3 of the Acts of 2011, the Division of Labor Relations is now the Department of Labor Relations.

[2] The Investigator dismissed Dumas' allegations regarding G.L. c.150E, Sec. 8 and G.L. c.150A, Sec. 4.

grievance at a subsequent proceeding if necessary.[3] On January 29, 2010, the parties filed post-hearing briefs. On the entire record, including my observation of the demeanor of witnesses, I make the following findings:

Admissions of Fact

In its Answer, the Association admitted to the following facts:

1. The City of Everett (City) is a public employer within the meaning of Section 1 of the Law.

2. The Everett School Committee (School Committee) is the representative of the City for the purpose of dealing with school employees.

3. The Association is an employee organization within the meaning of Section 1 of the Law.

4. The Association is the exclusive bargaining representative for teachers employed by the School Committee.

5. Prior to June 29, 2007, Dumas was an employee of the School Committee and a member of the bargaining unit referred to in paragraph 4, above.

6. On or about November 15, 2007, the School Committee denied Dumas' grievance at the last step in the grievance procedure. Dumas subsequently advised the Association that he wished to pursue his grievance to arbitration.

---

[3] See Quincy City Employees Union, H.L.P.E, 15 MLC 1340, 1355 (1989), aff'd sub nom., Pattison v. Labor Relations Commission, 30 Mass. App. Ct. 9 (1991), further rev. den'd, 409 Mass. 1104 (1991); see also United Rubber, Cork, Linoleum And Plastic Workers Of America, Local 250, AFL-CIO, 290 NLRB 817, 820-21 (1988) (where there exists a realistic possibility that the employer will consider the grievance on the merits if the union is later ordered to process it, the Board gives the union the option of litigating the merits of the employee's grievance at either the unfair labor practice hearing or at the subsequent compliance stage).

Findings of Fact

Dumas' City Employment History

The School Committee and the Association were parties to a collective bargaining agreement (Agreement) effective from September 1, 2002 to August 31, 2005. By separate settlement agreements, the parties extended the Agreement from August 31, 2005 to August 31, 2006; September 1, 2006 to August 31, 2007; and, September 1, 2007 to August 31, 2010. Article 4-02 of the Agreement pertains to layoff procedures and states, in part:

> For the purposes of this article, the words, "Professional Teachers Status" [PTS] shall mean bargaining unit members who have served more than three consecutive school years in the Everett Public Schools.
>
> a. In the event that two teachers have the same first day employment, then the teacher with the superior evaluation shall be retained.
>
> b. No PTS teacher shall be laid off if there is a non-[PTS] teacher holding a position which the PTS teacher is qualified to fill.
>
> c. No [PTS] teacher shall be laid off if there is another PTS teacher with less seniority holding a position which he is qualified to fill.
>
> In the placement of staff into position(s) held by junior teacher(s), bumping shall be accomplished to retain the most senior teacher(s) when more than one teacher is qualified for a position. When multiple layoffs do not create the problem of numerous placements of teachers, the most senior teacher shall be placed in the position for which he is qualified that is held by the most junior teacher.

Article 9 of the Agreement pertains to teacher evaluations and states, in part:

> 9-01 Procedure
>
> All monitoring or observation of the work performance of a teacher will be conducted openly and with full knowledge of the teacher.
>
> Teachers will be given a copy of any evaluation report prepared by their superiors and will have the right to discuss such report with their superiors.

Members of the bargaining unit shall be evaluated in a three year cycle....

In 1975, the Everett School District (School District) employed Dumas as a Physical Education Teacher. In 1981, the School District laid off Dumas from employment as a Physical Education Teacher. In August of 2005, the School District offered Dumas an eighth grade teaching position at the Lafayette School. By letter dated August 22, 2005, the School District formally appointed Dumas to the Lafayette School, Science Department "with the understanding that [he] will begin the recertification process with the Massachusetts Department of Education."[4] When Dumas resumed his employment on August 29, 2005, he possessed an invalid teacher's license from the Massachusetts Department of Elementary and Secondary Education (MDESE). By letter dated January 19, 2006, the MDESE informed Dumas that he had "been approved to work under an Employment Waiver for the 2005-2006 academic year...in the role of General Science 7-12." By this same letter, the MDESE also informed Dumas that:

> While we hope you are able to satisfy the renewal requirements prior to the start of the next school year, a second year waiver may be granted. In order to obtain a second year waiver, you must make substantial progress toward meeting the licensure requirements prior to the beginning of the next school year. Substantial progress...is defined as at least 105 Professional Development Points (PDPs) of the required minimum of 150 PDPs.

At the end of the 2005-2006 academic year Dumas did not earn any PDPs toward satisfying his certification requirements. By letter dated August 8, 2006, Superin-

---

[4] The Massachusetts Department of Education is now the Massachusetts Department of Elementary and Secondary Education (MDESE). MDESE regulations require a school system to hire teachers who are certified; however, where a teacher is not certified, the school system must request and obtain a waiver. To obtain a waiver: (1) the superintendent—must make a (on-line) formal request to the MDESE; and, (2) the uncertified candidate must submit an (on-line) application indicating the teaching area sought for the waiver.

tendent of Schools, Frederick F. Foresteire (Foresteire) assigned Dumas to the Madeline English School as a Physical Education Teacher, effective August 28, 2006. By this letter, Foresteire stated his expectation that Dumas would "continue to work with the [MDESE] to clarify the status of [his] certification" and "obtain a waiver for this school year from the [MDESE.]" In March of 2007, Assistant Superintendent of Business Affairs Charles Obremski (Obremski) met with all non-certified teachers, including Dumas, and instructed those teachers to provide Obremski with a letter showing their progress toward certification. By letter dated April 13, 2007, Dumas informed Obremski of his plan for certification, which included completing 116.5 PDPs by the end of the 2006-2007 academic year. By this same letter, Dumas also informed Obremski that his "remaining PDPs will be acquired either during the summer or during the 2007-2008 school year." On or after April 13, 2007, Assistant Superintendent Thomas J. Stella (Stella) approved Dumas' Professional Improvement Request to take Contemporary Legal Issues in School Sports at French River Education Center. On or about July 12, 2007, Dumas received a certificate of completion showing that he had been awarded 67.50 PDPs. Although the School District made a formal request to the MDESE, it was unable to obtain a wavier for Dumas for the 2006-2007 school year because Dumas did not have a current application on file with the MDESE.

By letter dated May 2, 2007, Foresteire notified Dumas that "no new funds can be made available until the fiscal year 2008 state budget is passed" and that, "As a result, your employment in the [School District] will be terminated at the end of the day on Friday, June 29, 2007." By this same letter, Foresteire indicated that "Personnel may be rehired when Chapter 70 funds are restored for fiscal year 2008. This rehiring has

occurred in past years." After July 12, 2007, the School District received its Chapter 70 funding, recalled several teachers who were rehired based on their certification and recommendations by their principals, assistant principals and various department heads and coordinators. The School District did not recall or rehire Dumas; no principal, assistant principal, department head or coordinator recommended Dumas for recall or rehire. In the Physical Education Department, the Athletic Director and the Physical Education Director interviewed and hired candidates for various positions, including Dumas' former position. Sometime between July 12 and August 19, 2007, Dumas contacted Obremski and inquired about why the School District did not recall him. Obremski responded that Dumas had failed to make substantial progress toward certification.

The Grievance against the School District

By e-mail on August 19, 2007, Dumas contacted Association Vice President Elaine Zaino (Zaino) and inquired about filing a grievance against the School District. On or about August 22, 2007, Zaino and Association President Kimberly A. Auger (Auger) filed a grievance on behalf of Dumas based on the School District's "nonrenewal" of his employment for the 2007-2008 school year. By this same letter, Auger cited to the following provisions of the Agreement: Preamble, Scope "Article 4-02 Procedure of Layoffs (Never recalled from the 1981 RIF) [and] Article 9 – Evaluations (never done during the 2006-2007 school year)." Sometime between August 19, 2007 and October 4, 2007, Auger and Zaino informed Dumas that because the Superintendent denies most Level II grievances and the School Committee denies most Level III grievances, his case could likely go to arbitration.

By letter dated October 4, 2007, Obremski informed the Association that he had

denied Dumas' Level II grievance.[5] By e-mail dated October 12, 2007, Zaino informed Dumas that, henceforth, he was to deal directly with the Massachusetts Teachers Association (MTA) Consultant Charles Stevens (Stevens) and that Zaino and Auger were "asked not to respond to you [sic] inquiries...so that you are not given three different responses to your questions."[6] By letter dated October 16, 2007, Dumas wrote to the MTA Northeast Regional Office, Regional Manager Arthur J. Pippo (Pippo), listing several concerns:

> I was denied a[n] evaluation as a teacher for 2006-2007.
> My subject that I taught was changed. If I had taken courses in Science, I would have wasted my time and money.
> The letter from DOE states that I have 2 years to complete my recertification. They never applied for a wavier for Physical Education.
> They hired 4 new P.E. teachers under 30 years old; I would like to see if we can push the age factor.
> My letter to Mr. Obremski states I have 116 PDP's well above the 105 that is listed in the letter from the DOE and it also states I have 2 years.
> Why was there no waiver filed on my behalf for year 2006-2007?
> Why can't I be talking to my ETA reps any more per Elaine Zaino[?]
> I want my job back.

On November 5, 2007, the School Committee heard the Association's presentation of Dumas' Level III grievance and by letter dated November 15, 2007, denied the grievance.

---

[5] Obremski testified that it is the standard practice of the Superintendent not to state the reasons for denying or granting a grievance. Obremski also testified that he understood the issues concerning Dumas' grievance to include the School District's failure to: (1) recall Dumas from the 1981 RIF; and, (2) evaluate Dumas during the 2006-2007 school year. Obremski testified further that the reason for denying Dumas' grievance was because he lacked the requisite certification.

[6] Stevens was copied on this e-mail correspondence.

The Association Decides against Arbitration

By telephone on November 19, 2007, Auger informed Dumas that the School Committee had denied his Level III grievance. During this conversation, Dumas asked Auger if the Association would take his grievance to arbitration and Auger responded with uncertainty.[7] By letter dated November 20, 2007, Stevens stated that he received Dumas' November 20, 2007 voicemail requesting that the Association take his grievance to arbitration. By this letter, Stevens also stated, in part:

> Based on the Contract, the Laws of the Commonwealth and the Department of Education's Regulations, I would not counsel the Everett Teaches Association to take this case to arbitration for two reasons. As a non-renewed teacher, you are no longer a member of the E.T.A., MTA or NEA. The Association, therefore, has no right to represent you before an arbitrator. For that very reason, the American Arbitration Association will not process an application to represent you.
>
> It was clear at the meeting that the superintendent did not want you to return to the classroom. Based on their explanation as to why you were not renewed, raises the question of why you would want to force them to re-

[7] Dumas testified that Auger stated to him that she was unsure about whether the Association would process his case to arbitration; however, Auger testified that she told Dumas that she was sure that the Association would not further process his grievance. In support of Auger's testimony, the Association submitted a cellular phone bill showing an eight minute conversation that took place between Auger and Dumas on November 19, 2007, at or around 6:00 p.m.; however, this document indicates only the time and duration of their conversation but not what was actually said. Instead, the evidence presented shows that: (1) after Dumas spoke with Auger on November 19, 2007, and received Stevens' letter on November 20, 2007, he contacted Zaino by e-mail on December 1, 2007, informing her that he wanted to proceed with arbitration; (2) Zaino replied to Dumas' e-mail on December 1, 2007, stating that she would forward his concerns to Auger and Stevens; (3) Dumas then requested an update about the status of his grievance from Zaino by e-mail on December 11, 2007; (4) Dumas also requested an update from Auger by e-mail on December 17, 2007, stating, "I have not heard anything from you. What is happening with my case;" and, (7) Auger responded to Dumas by telephone on December 17, 2007, stating definitively that the Association would not process his case to arbitration. Based on the totality of the evidence presented, particularly, the events following the November 19, 2007 telephone call, I credit Dumas' testimony that Auger responded with uncertainty to his inquiry about whether the Association would take his grievance to arbitration.

> hire you. No one wants to work where they are not appreciated. As I've stated above, there is no option left to us that would accomplish that goal.[8]

By e-mail dated December 1, 2007, Dumas informed Zaino that he wanted to proceed with arbitration. By e-mail dated December 1, 2007, Zaino replied to Dumas' e-mail and indicated that she would forward his concerns to Auger and Stevens. By e-mail dated December 11, 2007, Dumas stated to Zaino, "I have not heard one word from anyone. Please have Kim call me ASAP." By e-mail on December 17, 2007, Dumas stated to Auger, "I have not heard anything from you. What is happening with my case?" By telephone on or about December 17 2007, Auger informed Dumas that the Association would not take his grievance to arbitration because it had reason to believe that the School District would not reinstate Dumas based on his failure to complete his recertification requirements. By letter dated January 5, 2008, Dumas wrote to Pippo in response to Stevens' November 20, 2007 letter and indicated that he was "very dissatisfied" with the Association's decision not to take his case to arbitration even though Auger and Zaino told him that his "case would go to arbitration."

By letter dated on or about January 7, 2008, Dumas contacted Brian Devine (Devine) at the MDESE and asked whether the School District "violate[d] any [MDESE] laws for not requesting a waiver." By letter dated January 17, 2008, Obremski contacted Office Educator Licensure Nancy Perkins (Perkins) and informed her that Devine

---

[8] Stevens testified that before sending Dumas this letter, he spoke to Dumas and told him that his case was weak due to his lack of certification. Stevens also testified that: (1) he explained to Dumas that the School District's failure to evaluate was irrelevant to its decision not to rehire him; (2) in his first eight years of teaching he was also "RIF'd" and knows what it is like to experience layoff; (3) he tried to help Dumas even though the ETA did not want to pursue the grievance past Level II; and, (4) he successfully convinced Auger and Zaino to take Dumas' case to Level III despite the ETA's reluctance and advocated for giving Dumas an opportunity to speak for himself before the School Committee.

had contacted the School District inquiring about Dumas's certification. In his letter to Perkins, Obremski stated, in part:

> During the 2006-2007 school year, Mr. Dumas was employed at the Madeline English School as an Unassigned Teacher. He would report each day to Mr. Laurence Arinello, Principal, for his assignment. If all teachers were present and coverage was not necessary, Mr. Dumas was assigned to help Ms. Susan Williamson, Physical Education Teacher. At no time during the school year was Mr. Dumas the teacher of record in the Physical Education Department at the Madeline English School nor was he ever responsible for grading the students.
>
> During the 2005-2006 [sic] the Everett Public Schools did apply for and receive a waiver in General Science Grades 7-12 for Mr. Dumas. Mr. Dumas had two years to complete the required PDPs necessary to renew his certification as directed in his waiver letter dated January 19, 2006. Since Mr. Dumas did not complete these PDPs, he was not recalled for the 2007-2008 school year.

By letter dated January 28, 2008, Pippo responded to Dumas' January 5, 2008 letter and wrote, in part:

> I have reviewed the letter you received from Mr. Stevens and I wish to correct the misstatements in it. Mr. Stevens suggests that he "would not counsel" the ETA to take your case to arbitration for two reasons. Both reasons were incorrect. Your membership in ETA/MTA/NEA is irrelevant to the Association's right to represent you...
>
> More importantly, Ms. Auger and Ms. Zaino have told me that the ETA never relied on the erroneous statements in Mr. Steven's letter in making the decision not to take your grievance to arbitration. Just as it made no difference to the ETA that you were not a member in October and November 2007 when the ETA represented you at Levels 2 and 3 of the grievance process, the fact that you were not a member played no role in the decision of the ETA not to take your case to arbitration.
>
> The basis for the ETA's decision was that you were not legally employable for 2007-08 because you had not met the requirements for recertification. Because of that legal impediment, there was nothing to be gained by taking your grievance to arbitration. Under the Everett contract, a demand for arbitration would have to have been filed by November 25, 10 days after the School Committee denied the grievance.

> You refer to a decision involving a Hull teacher in your letter, [sic] In that case an arbitrator ordered the reinstatement of a non-PTS teacher who had not been evaluated in violation of the Hull contract. However, there was no issue in that case of whether the teacher was properly certified.
>
> Finally, Mr. Stevens' closing comments in the letter to you were ill-advised. While it is important for all of us working with MTA members to provide each member with frank assessments, any such observations would have been more appropriately raised in a face-to-face discussion with you.

By letter dated February 8, 2008, Devine responded to Dumas's January 7, 2008 letter, which inquired about whether the School District had violated MDESE policy when it failed to obtain a wavier on behalf of Dumas. Devine's response stated, in part:

> The educator licensure statute, G.L. c. 71, § 38G and the Regulations for Educator Licensure and Preparation Program Approval, 603 CMR 7.00, require school districts to employ teachers who are appropriately licensed unless the district requests and receives a waiver. Waivers are governed by section 7.14 (13)(a), which provides as follows:
>
> > The Commissioner may exempt a district for any one school year from the requirement to employ personnel licensed or certified under M.G.L. c. 71, § 38G upon request of a superintendent and demonstration to the Commissioner that the district has made a good faith effort to hire licensed or certified personnel, and has been unable to find them. Persons employed under waivers must demonstrate that they are making continuous progress toward meeting the requirements for licensure or certification in the field in which they are employed. During the time that a waiver is in effect, services of an employee of a school district to whom the waiver applies shall not be counted as service in acquiring professional teacher status or other rights under M.G.L. c. 71, §41.
>
> In order to confirm your employment situation the [MDESE] contacted Charles Obremski, Everett's Associate Superintendent of Business Affairs....Based on the information that Everett has provided, the [MDESE] has determined that Everett did not need a waiver to employ you during the 2006-2007 school year.

Opinion

Apparent Authority

Apparent authority is created when a principal engages in conduct that causes another person to reasonably believe that the alleged agent has the authority to act on behalf of the principal. Amherst Police League, 35 MLC 239, 252 (2009) (citing Higher Education Coordinating Council, 25 MLC 69, 71 (1998)). At the hearing, counsel for the Respondent posited that the Everett Teachers Association (ETA) is the exclusive bargaining agent for unit members, including Dumas, but the Massachusetts Teachers Association (MTA) as an "affiliate" of the ETA should not be named as a Respondent in this case. In support of its position, the Association submitted a copy of MCR-363, which names the ETA as an "affiliate" of the MTA. However, the evidence shows that Stevens: (1) agreed to be the exclusive contact person for Dumas on or about October 12, 2007; (2) represented Dumas at his Level III grievance meeting; and, (3) counseled the ETA not to take Dumas' case to arbitration by letter dated November 20, 2007. See Amherst Police League, 35 MLC at 252 (citing Town of Ipswich, 11 MLC 1403, 1410 n. 7 (1985) (unless communication of a limitation in one's authority is presented to the other party, an individual in charge of a transaction is held to have broad apparent authority). Accordingly, I find that the MTA is a proper Respondent in this case and that it had the apparent authority to act on behalf of the ETA when it represented Dumas throughout the grievance procedure.

Duty of Fair Representation

Once a union acquires the right to act for and negotiate agreements on behalf of employees in a bargaining unit, Section 5 of the Law imposes on that union an obliga-

tion to represent all bargaining unit members without discrimination and without regard to employee organization membership. Quincy City Employees Union, H.L.P.E, 15 MLC at 1355. A union breaches its statutory responsibility to bargaining unit members if its actions toward an employee, during the performance of its duties as the exclusive collective bargaining representative, are unlawfully motivated, arbitrary, perfunctory, or reflective of inexcusable neglect. Shaugnessy v. AFSCME, 35 MLC 12, 16 (2008). The duty of fair representation applies to all union activity. Id. at 16. A union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion. Mulvaney v. NAGE, 28 MLC 218, 224 (2002). Rather, a union is required to gather sufficient information concerning the merits of a grievant's claim to make a reasoned judgment in deciding whether to pursue or to abandon a particular grievance. Id. at 224 (citing Local 285, SEIU, 9 MLC 1760, 1764 (1983)).

A union breaches the duty of fair representation in violation of Section 10(b)(1) of the Law when it ignores a grievance, inexplicably fails to take some required step, or treats a grievance in a cursory fashion. Mulvaney, 28 MLC at 224-25 (citing Independent Public Employees Association, Local 195, 12 MLC 1558, 1565 (1986)). Similarly, if a union fails to investigate, evaluate, or pursue an arguably meritorious grievance without explanation, it breaches its duty of fair representation. Id. (citing American Federation of State County Municipal Employees, 23 MLC 279, 281 (1997)). The Commonweatlh Employment Relations Board (Board) gives a union considerable discretion in determining whether to file a grievance and whether to pursue it through all levels of the contractual grievance-arbitration procedure. Mulvaney, 28 MLC at 225 (citing NAGE, 20 MLC 1105, 1113 (1993)).

Dumas' Non-Membership Status

It is well-settled that a union cannot discriminate against an employee for lack of membership in the Union. Service Employees International Union, Local 254, 16 MLC 1093, 1101 (1989) (citing Quincy City Employees Union, 15 MLC 1340, 1536 (1989)). The law charges unions with the responsibility to represent the interests of all employees fairly as a corollary to its right to act as the employees' exclusive representative. Service Employees International Union, Local 254, 16 MLC at 1101; (citing Fitchburg Teachers Association, 9 MLC 1399 (1982); see also The Wallace Corporation v. NLRB, 323 U.S. 248, 255-56 (1944)). Consequently, a union cannot refuse to arbitrate a grievance based on lack of union membership. Service Employees International Union, Local 254, 16 MLC at 1101; see also Carbone v. School Committee of Medford, 12 Mass. App. Ct. 948 (1981) (rescript opinion) (court found that the only reason union refused to process plaintiff's claim under the grievance provisions of the collective bargaining agreement was because he was not a member of the local; held that although union's refusal may have been in good faith, it was discriminatory as to the plaintiff within the meaning of G. L. c. 150E, Section 5) (citing Norton v. Massachusetts Bay Transportation Authority, 369 Mass. 1, 2 (1975)); Bellingham Teachers Association, 9 MLC 1536 (1982)).

The Association argues that it exhibited no animus toward Dumas because it supported his grievance through Level III. Specifically, the Association contends that it believed Dumas' grievance was "weak" after Obremski denied the grievance at Level II but decided to process the case based on Stevens' personal layoff experience and his desire to allow Dumas to speak for himself at the Level III hearing. The Association

claims that its decision against arbitration was not based on Dumas' non-membership status because it treated "all non-renewed probationary teachers as non-bargaining unit members." Instead, the Association argues that it decided against arbitration because: (1) Dumas failed to procure adequate certification; (2) the matter of certification was beyond the scope of the Agreement; (3) the School District failed to obtain a waiver because Dumas did not have a current application on file with the MDESE; and, (4) the overall weakness of Dumas' grievance. Further, the Association argues that the School District's decision not to renew Dumas' employment is distinguished from a decision not to "rehire" because the former status, if tainted by faulty evaluations, is redressable under the Agreement. Specifically, the Association asserts that the School District did not renew Dumas' employment because he lacked certification, not because of faulty performance evaluations. Last, the Association argues that after the School Committee denied Dumas' Level III grievance on November 15, 2007, but prior to Stevens' November 20, 2007 letter, Auger decided against taking Dumas' grievance to arbitration based on his lack of certification and wavier deficiencies. Specifically, the Association argues that Auger decided against arbitration independent of Stevens' letter.

The evidence shows that sometime between August and October of 2007, Auger expressly told Dumas that his case could likely go forward to arbitration because of the high denial rates of level II and level III grievances. The evidence presented shows also that on October 12, 2007, the Association instructed Dumas to correspond exclusively with Stevens about his case. The evidence shows further that Auger and Zaino deferred to Stevens' authority as Dumas' exclusive correspondent when they refrained from corresponding with Dumas until November 19, 2007, when Auger informed Dumas

that the School Committee had denied his level III grievance. Stevens proceeded to advocate for Dumas and persuaded Auger and Zaino to process his grievance through Level III. While Stevens testified that he believed Dumas' grievance was "weak," Stevens agreed represent Dumas despite his non-membership status. Although Stevens also testified that he was trying to help Dumas by sending the November 20, 2007 letter, the evidence presented shows that Stevens' letter was arbitrary when he stated that, "As a non-renewed teacher, you are no longer a member of the [Association and]...the Association, therefore, has no right to represent you before an arbitrator."

The Association argues that Pippo's January 28, 2008 letter satisfies the Association's duty of fair representation because it corrected Stevens' misstatements made in the November 20, 2007 letter. Specifically, Pippo stated that Dumas was "not legally employable for 2007-08 because [he] had not met the requirements for recertification." However, Pippo's letter also acknowledged that "[u]nder the Everett contract, a demand for arbitration would have to have been filed by November 25, 10 days after the School Committee denied the grievance." Consequently, Pippo's letter was issued almost 60 days after the contractual arbitration deadline; therefore, I find that Dumas suffered harm based on Stevens' November 20, 2007 disposition of his grievance, which caused the contractual period to file for arbitration to lapse.[9]

---

[9] Article 2-03 of the Agreement states, in part: "If at the end of twenty-five (25) days following the presentation of the grievance in writing to the School Committee the grievance shall not have been disposed of...the Association may, be giving written notice to the School Committee within ten (10) days next following conclusion of such period of 25 days, present the grievance for arbitration; in which event the School Committee or the Association may forthwith submit the grievance to the Board of Conciliation and Arbitration established under Chapter 150 of the General Laws of Massachusetts for arbitration and decision in accordance with the applicable rules of the said Board." The

Dumas' grievance

Where the union has breached its duty of fair representation with regard to the processing of an employee's grievance, the charging party bears the initial burden of establishing that the grievance was not clearly frivolous. National Association of Government Employees, 20 MLC 1105, 1111 (1993), aff'd 38 Mass. App. Ct. 611 (1995) (citing Quincy City Employees Union, H.L.P.E., 15 MLC 1340, 1375 (1989)); Bellingham Teachers Association, 9 MLC 1536, 1540 (1982). See also Berkley Employees Association, 19 MLC 1647, 1650 (1993) (termination from employment, allegedly without just cause, coupled with the possibility that the grievance contesting that termination is substantively arbitrable under the contract, generally satisfies the "not clearly frivolous" test).

The Association argues that pursuing Dumas' grievance to arbitration "would not yield any meaningful remedy" because the School District decided against renewing his employment based solely on Dumas' lack of certification. Dumas argues that the Superintendent and the School Committee denied his grievance because the School District failed to recall him from his 1981 RIF and failed to evaluate him for the 2006-2007 year. Dumas also argues that at the time of his non-renewal he possessed a PTS teacher status and was entitled to a performance evaluation by the School District prior to his layoff. Obremski, Stevens and Auger testified that they understood the scope of Dumas' grievance to include the School District's failure to recall him from his 1981 RIF and its failure to evaluate him during the 2006-2007 school year. While the Association points to evidence showing that the Superintendent and the School Committee denied

---

Agreement does not provide for individual employees to independently submit their grievances to arbitration.

Dumas' Level II and Level III grievances based on his failure to make "substantial progress" toward certification, it failed to present evidence against Dumas' claim that he was a PTS teacher who qualified for layoff protection, including performance evaluation, pursuant to Articles 4-02 and 9-01 of the Agreement. Accordingly, I that find Dumas' grievance satisfies the "not clearly frivolous" test.

Dumas has no general right to require the Association to submit his grievance to arbitration (see Vaca v. Sipes, 386 U.S. at 191), and the Board gives the Association considerable discretion in determining whether to file a grievance and whether to pursue it through all levels of the contractual grievance procedure (see National Association of Government Employees, 38 Mass. App. Ct. at 613). However, on November 20, 2007, the Association decided arbitrarily against taking Dumas' grievance to arbitration because of his non-membership status even though it had agreed earlier to represent Dumas through Level III despite his non-membership. Service Employees International Union, Local 254, 16 MLC at 1101. While the Association corrected this mistake in its January 28, 2008 letter to Dumas, this correction was made almost 60-days after the contractual arbitration filing period had lapsed. Thus, based on the evidence presented, I find that the Association's refusal to arbitrate Dumas' grievance based on his non-membership status was arbitrary and violated Section 10(b)(1) of the Law.

2. Association's communication with Dumas post-Level III grievance

Dumas argues that the Association failed to communicate with him after it decided against pursuing his case to arbitration. However, the evidence shows that after receiving Stevens' November 20, 2007 letter, Dumas inquired by e-mail to Zaino on December 1, 2007, who responded to him by e-mail on the same day. The evidence also

shows that by e-mails dated December 11 and 17, 2007, Dumas contacted Zaino and Auger inquiring about the status of his grievance. Auger responded to Dumas by telephone on December 17, 2007, and informed him that the Association would not process his case to arbitration. The evidence shows further that Dumas wrote to Pippo on January 5, 2008, and Pippo responded in writing on January 28, 2008, which reiterated the Association's position against arbitration. Based on the evidence presented, I do not find that the Association failed to communicate with Dumas after deciding against pursuing his case to arbitration.

Conclusion

For the foregoing reasons, I conclude that the Association breached its duty of fair representation to Eugene W. Dumas, Jr., when it arbitrarily refused to arbitrate his grievance because of his non-membership in the Association in violation of Section 10(b)(1) of the Law.

Remedy

The Board traditionally orders unions that breach the duty of fair representation to take any and all steps necessary to have the grievance resolved or to make the charging party whole for the damage sustained as a result of the union's unlawful conduct. See, National Association of Government Employees, 20 MLC at 1114-1115. Here, the Association caused harm to Dumas by refusing to pursue his grievance to arbitration; therefore, I first direct the Association to attempt to remedy the harm to Dumas by taking all steps necessary to resolve Dumas' grievance. These steps include, at a minimum, the Association submitting a written request to the School District either to arbitrate Dumas' grievance, including an offer by the Association to pay the full

costs of the arbitration, or to provide Dumas the grievance remedy that would have been sought from an arbitrator (i.e., reinstatement to his former, or substantially equivalent, position with full back pay). If the School District does not agree to arbitrate or otherwise fully resolve Dumas' grievance, the Association shall be liable for the wages and contractual benefits Dumas lost because the Association failed to pursue his grievance to arbitration, plus interest, from the date of his termination until he is reinstated by the School District or obtains substantially equivalent employment.

According to the procedure described in Quincy City Employees Union, H.L.P.E., the Association explicitly elected at the hearing to postpone its introduction of evidence designed to rebut Dumas' case concerning the merits of his grievance. Id., 15 MLC at 1376 n. 67. Therefore, if the Association is unable to resolve the grievance with the School District, the Association may return to the Department of Labor Relations for a compliance hearing to limit its liability by proving that Dumas' grievance would have been lost for reasons not attributable to the Association's misconduct. In addition, the Association shall post the attached Notice to Employees in conspicuous places at its business office and meeting hall and in places where Association notices are customarily posted to employees of the School District to assure employees that the Association will not violate the Law.

Order

WHEREFORE, based on the foregoing, it is hereby ordered that the Association shall:

1. Cease and desist from:

   a) Failing to properly process grievances for employees who are covered by the terms of a collective bargaining agreement between the Everett School Committee and the Everett Teachers Association.

b) otherwise interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under the Law.

2. Take the following affirmative action necessary to effectuate the purposes of the Law:

a) Request in writing that the School Committee offer Dumas reinstatement to his former position, or if that position no longer exits, to a substantially equivalent position.

b.) If the School Committee declines to offer Dumas reinstatement with full back pay, the Association shall request in writing that the School Committee waive any time limits that may bar further processing and arbitration of Dumas' grievance; and the Association shall offer to pay the cost of arbitration. If the School Committee agrees to waive any applicable time limits and to arbitrate the merits of Dumas' grievance, the Association shall process the grievance to conclusion in good faith and with all due diligence if the School Committee accepts its offer to do so.

c) If the School Committee does not agree to arbitrate or otherwise fully resolve Dumas' grievance, the Association shall make Dumas whole for loss of compensation that he suffered as a direct result of his termination from the School Committee effective on June 29, 2007. The Association's obligation to make Dumas whole includes the obligation to pay Dumas interest on all money due at the rate specified in G.L. c. 231, Sec. 6B.

d) Immediately post signed copies of the attached Notice to Employees in conspicuous places where notices to bargaining unit employees are customarily posted, including all places at the School Committee and, including electronic postings if the Association customarily communicates to members via intranet or e-mail. The Notice to Employees shall be signed by a responsible elected Association Officer and shall be maintained for a period of at least thirty (30) consecutive days thereafter. Reasonable steps shall be taken by the Association to ensure that the Notices are not altered, defaced or covered by any other material. If the Association is unable to post copies of the Notice in all places where notices to bargaining unit employees are customarily posted at the School Committee, the Association shall immediately notify the Executive Secretary of the Department in writing, so the Department can request the School District to permit the posting.

e) Notify the Department in writing within 30 days from the date of this Order and Order of the steps taken by the Association to comply with the Order.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

Kendrah Davis, Esq., Hearing Officer

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 456 CMR 13.02(1)(j), and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

NOTICE TO EMPLOYEES

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

A Hearing Officer of the Massachusetts Department of Labor Relations has decided that the Everett Teachers Association/MTA/NEA (Association) acted in an unlawful manner by failing to properly process and arbitrate a grievance for Eugene W. Dumas, Jr. (Dumas), in violated Section 10(b)(1) of Massachusetts General Laws, Chapter 150E, the Public Employee Collective Bargaining Law (the Law). The Association posts this Notice in compliance with the Hearing Officer's Order.

Section 2 of the 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 Everett School Committee (School Committee).

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

WE WILL request the School Committee to offer Dumas reinstatement to his former position, or if that position no longer exists, to a substantially equivalent position with full back pay. If the School Committee declines to offer Dumas reinstatement to his former, or substantially equivalent position, WE WILL ask the School Committee to arbitrate the grievance concerning Dumas' termination. If the School Committee agrees to waive any applicable time limits and to arbitrate Dumas' grievance, WE WILL represent him in the arbitration. If the School Committee declines to arbitrate the grievance, WE WILL make Dumas whole for any loss of compensation that he may have suffered as a direct result of our unlawful conduct, plus interest.

_____ _____

For the Everett Teachers Association/MTA/NEA Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).