

INDEPENDENT PUBLIC EMPLOYEES ASSOCIATION, LOCAL 195 AND ELIZABETH P. CLARKE,
 MUPL-2633 (1/22/86).

- 54.5116 demotion
- 72. Duty of Fair Representation
- 72.22 duty to investigate and process grievance
- 82.2 cease and desist orders

Commissioners participating:¹

Paul T. Edgar, Chairman
 Gary D. Altman, Commissioner

Appearances:

- Michael Feinberg, Esq. - Representing Independent Public Employees Association, Local 195
- Cheryl Pilgrim Clarke, Esq. - Representing Elizabeth P. Clarke

DECISION

Statement of the Case

This case involves allegations by Elizabeth P. Clarke (Clarke) that the Independent Public Employees Association, Local 195 (Association) violated Section 10(b)(1) of Massachusetts General Laws, Chapter 150E (the Law) by breaching its duty of fair representation.

Clarke filed her charge with the Labor Relations Commission (Commission) on August 1, 1983.² The Commission investigated the charge and issued its Complaint and Notice of Hearing on September 23, 1983. Specifically, the Commission's Complaint alleged that the Association 1) had made no reasonable and diligent effort to investigate and process Clarke's grievance; 2) had failed to inform Clarke of any efforts it may have taken, if any, upon her behalf; 3) had declined to pursue Clarke's grievance to arbitration; 4) had failed to meet with Clarke and to afford her an opportunity to explain her grievance; and 5) had failed to demand negotiations with the City of Cambridge over the elimination of Clarke's position, and the impact that such elimination would have upon her.

On December 6, 1983 and January 25, 1984, a formal hearing was held before Diane M. Drapeau, a duly designated hearing officer of the Commission. All parties were afforded an opportunity to present testimonial and documentary evidence. In addition, the Association filed a post-hearing brief which has been carefully considered.

¹ Commissioner Maria C. Walsh excused herself from any consideration of this case.

² None of the parties dispute the Commission's jurisdiction over this matter.



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in Pasquarello, administrative assistant in the Buildings Department, and Joseph Cellucci, Commissioner of the Buildings Department, told her that they wanted her in the Buildings Department, but that the 1982-83 budget had already been completed and they could not, at that time, include her in it. They assured her that she would be included in the 1983-84 budget.

Clarke transferred to the Buildings Department with the status of temporary employee with a rate of pay equal to the senior clerk/stenographer position. Thus, she continued to receive the same amount of pay that she had been receiving as the Mayor's secretary. The position Clarke held was not a permanently budgeted slot but was specially funded. It is not clear from the record which special funds were used.

Clarke stayed in the Buildings Department position until March 1983. In early March 1983, Pasquarello asked Clarke to type the 1983-84 budget for the Buildings Department. While typing that budget, Clarke noted that her name appeared under the heading of "Senior Clerk/Typist," along with the name of Jane Maguire. Under the heading "Clerk/Typist" appeared the name of Elizabeth Fitzmaurice.

On March 22, 1983, Cellucci told Clarke that he could not include her name in the budget. Clarke asked him why and Cellucci told her that there were two clerk-typists who had more seniority than she did and therefore he could not reinsert her as senior clerk. In addition, he stated, "The only thing I can do for you is to give you a clerk/typist rating, monetary and all. You'll have to go down to a clerk/typist to equal the two girls." Cellucci also told her that City Manager Robert Healy had told him that Clarke would have to transfer from the Police Department and become a clerk/typist in the Buildings Department. Clarke told him that she did not want to transfer because it was a lower paying job. Therefore, Clarke did not bid for the job. According to Clarke, Cellucci replied: "Well, Mr. Bob Healy said if you don't transfer today, immediately on the spot, now, we're taking you off the payroll." Clarke continued to refuse and was immediately moved from the payroll.

Shortly after her termination, Clarke visited the unemployment office. While at the unemployment office, she attempted to reach James Cassidy, the Union President, but was unsuccessful. Sometime after her visit to the unemployment office, Clarke spoke with Betty Burke, the Union steward for the clericals at City Hall, about her termination. Clarke requested a meeting with Cassidy.

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- B. Hospital and Infirmary Unit;
- C. Clerical and Technical Unit;
- D. Traffic and Parking Unit;
- E. Electrical Department;
- F. Parking Control Officers;

more specifically outlined in the Wage Appendices attached hereto but excluding other City employees (emphasis added).

Clarke had Union dues deducted from her paycheck during this period.



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Pasquarello and former Mayor Francis Duehay asked Clarke to return to work. She met with them on April 14, 1983 to solidify plans for her employment. Celluci gave City Manager Robert Healy a memo outlining the situation concerning Clarke's job title. Clarke requested and received a copy of the April 14, 1983 memorandum from Celluci to Healy which stated:

A new position for Clerk-Typist for FY84 will be recommended for the Inspectional Services Department. Funding is presently available for the remainder of FY83 and the position will be filled by Elizabeth Clarke. Upon approval of this position for FY84, Elizabeth Clarke will be offered the opportunity to transfer⁴ from the School Department to the newly-created position in the Building Department. (Footnote added).

On April 14, after Clarke received this information, she visited Cassidy at his office. After outlining her situation to him, he suggested that she return to the school department.⁵ Clarke explained to Cassidy that she did not want to return to the school department. Cassidy then made a copy of the letter Clarke had received from the personnel department and promised her that she would hear from him. Clarke then asked Cassidy for grievance forms which he gave her.

Clarke was reinstated to her position in the Building Department effective April 18, 1983. Sometime after April 18, when she returned to work, Clarke was asked to type the FY84 budget. Clarke's name was removed as "Senior Clerk Typist" and a vacancy existed for "Clerk Typist."⁶

On April 26, 1983, Clarke filed a grievance which contained the following statement.

Appointed to work in the Mayor of Cambridge office as Sec'y June 15, 1981. taking a leave of absence from the School Department -- then asked to work in the Bldg. Dept. on February 22, 1982 as Sr. Clk at the same salary. told at the new budget period I would be brought in as permanent employee.

⁴ If Clarke were to transfer, she would be transferring all of her Civil Service seniority from the School Department to the City of Cambridge. If Clarke had done so, she would have become a permanent employee with the City. Clarke would have had to bid on the job to get it.

⁵ Cassidy did not appear as a witness.

⁶ The position of Senior Clerk/Typist was not included in the FY84 budget. The budget provided for two Clerk-Typists (1.74, CP ex.8). The FY84 budget was consistent with the budget typed by Clarke in April of 1983 (1.77). The FY83 budget provided for one Senior Clerk-Typist and one Clerk-Typist (Ex.9).



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On March 22, 1982 was told I would have to sign transfer papers to accept a Clerk typist position immediately if not I could not be paid and would be dropped from the payroll. With this in/mid [sic] I seeked [sic] unemployment and after much discussion with the employment office and the Building Comm. also discussion with others this situation was resolved and I returned to work on April 19, 1983. at which time I was given a memo stating XXXX [sic] a position was being created as Clerk typist and I could take it or leave it come July 1st. (copy attached)

I question this action as a union employee. What protection does an employee get under these discriminatory actions. Should an employee take a demotion in salary at the whim of the City Manager. There are no lay-offs etc. to require this? Must I accept the demotion? There must be further action taken. There seems to be not one discriminatory action but a few.

A copy of the grievance went to Burke, Cassidy and Raymond Clark.

On May 6, 1983, Cellucci denied Clarke's grievance at Step 2. Raymond Clark, the City's employee relations manager, denied Clarke's grievance at Step 3. Clarke was unaware of these denials until she appeared at the Commission's investigation of her charge on September 12, 1983.

On June 7, 1983, Burke told Clarke that there would be a Union meeting regarding her grievance on June 17. She suggested that Clarke write a note to Cassidy requesting to be present at the meeting. Subsequently, Clarke sent a note to Cassidy requesting to be present at the June 17 meeting. Sometime prior to July 17, Burke told Clarke that, because June 17 was a holiday,⁷ the meeting would have to be rescheduled to 5 p.m. on June 21.

On June 21, Clarke went to the Union's office.⁸ When she arrived around 5 p.m., she noticed that there were no lights on in the office. She knocked on the door, and there was no answer. She waited until 6 p.m., but no one appeared. Burke arrived late at the Union's office for the scheduled 5 p.m. meeting and there was no one there when she arrived. Burke then called Sheila Tobin, vice-president of the clerical unit, who informed her that she had attempted to telephone the Union office, but no one answered. Burke then telephoned Cassidy who said he had been sick and unable to attend the meeting. The following day Clarke told Burke that she had gone to the Union office but nobody was there. Burke told Clarke she would try to reschedule the meeting.

⁷Bunker Hill Day.

⁸Clarke got permission from her employer to leave work early to attend the 5:00 Union meeting (1.80).



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According to Clarke, on June 29, 1983, Burke told her she was trying to re-schedule the meeting and wanted to know what time was best for Clarke. Clarke told Burke that she was leaving for a two-week vacation and that anytime after that would be fine. Burke said she would get back to her. Clarke heard nothing further from Burke.

According to Burke, the conversation with Clarke occurred sometime prior to June 27. She said she spoke with Clarke about rescheduling the meeting for June 27. Clarke told her she could not attend because she would be going on vacation. According to Burke, Clarke did not request that the meeting not proceed without her. The Union intended to discuss several grievances, other than Clarke's, at the June 27 meeting.

Present at the meeting of June 27 were: Michael Feinberg, the Union's attorney, Cassidy, Burke, Tobin, and two other Union representatives from the Department of Public Works and from the school department. They discussed several grievances, including Clarke's. The only reference made to Clarke's grievance was the fact that it had been denied at Steps 2 and 3. No Union representative contacted Clarke after this meeting.⁹ No further action was taken with respect to Clarke's grievance. Burke did not notify employees regarding the status of their grievances; that responsibility belonged to Union president Cassidy. In her tenure as steward, Burke had only been involved with one other grievance. In that case, there was a meeting with the grievant, the Union president and vice-president, herself, and a representative of the City. The grievance was resolved at that meeting. Burke testified that the Union never met to decide whether to pursue Clarke's grievance to arbitration.¹⁰

⁹Burke also testified that she herself has never notified employees regarding the status of their grievances; that is usually the responsibility of Cassidy, the Union president.

¹⁰The collective bargaining agreement contains the following grievance/arbitration provision.

ARTICLE III -- GRIEVANCE PROCEDURE

Section 1. Any grievance or dispute arising between the parties which involves the application, meaning or interpretation of this Agreement shall be settled pursuant to the provisions of this Article and Article IV. This procedure shall be the exclusive procedure to be followed involving suspensions, dismissals, removals or terminations, including involuntary retirements.

Section 2. The employee, with or without his union steward, shall take up the grievance with the employee's [sic] supervisor within five (5) working days of its occurrence or when he knew or should have known of its occurrence. The supervisor shall attempt to adjust the grievance. A settlement of the dispute at this level shall not establish precedent for the resolution of other or similar problems between the employee and his immediate supervisor or elsewhere throughout the city.

Section 3. If the grievance has not been resolved in Section 2, within five
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Pasquarello testified that neither the Union nor Clarke contacted him regarding the grievance. He does not usually get involved with the grievance procedure. Pasquarello also testified that sometime in June 1983, he saw Cassidy in City Hall and had the following conversation with him. Cassidy said: "Is Joe Cellucci upstairs? I've come over to talk to him about Betty Clarke's situation. I've talked to Bob [Healy]. Do you know if Bob has talked to Joe Cellucci?" Pasquarello replied: "No, I don't. I haven't been involved in it."

On June 30, Clarke's job terminated. She was on vacation after June 30. When she returned, Clarke contacted Cellucci regarding the status of her position. Cellucci reminded Clarke that since she did not bid on the Clerk/Typist position, the job had been filled. Clarke did not return to full employment until September 12, when she resumed her former position at the School Department.¹¹ On September 20, 1983, Clarke was promoted to Senior Clerk and Stenographer at the Cambridge School Department retroactive to July 1983.

Opinion

The Commission must determine whether the Union breached its duty of fair representation by processing Clarke's grievance in a perfunctory manner.

In Vaca v. Sipes, 386 U.S. 171, 190 (1967), the United States Supreme Court stated that:

[A] union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion...In administering the grievance and arbitration machinery as a statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances.

The Commission adopted the Vaca v. Sipes standard in Framingham School Committee, 2 MLC 1292, 1300 (1976).

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(5) days of its submission, it shall be presented in writing by the Union and or the aggrieved employee to the Department Head within five (5) working days thereafter. The Department Head shall respond in writing within five (5) days of the receipt of said grievance.

Section 4. If the grievance has not been resolved in Section 3, it shall be presented in writing to the City Manager or his designee within five (5) working days after the reply of the Department Head has been received or is due. The City Manager or his designee shall respond in writing within ten (10) days of the receipt of said grievance.

Section 5. Failure by the Union to comply with the above time limits shall be reasonably extended.

Section 6. Upon written request of either party the above time limits shall be reasonably extended.

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The Commission has previously held that a union has a duty to process the grievances of bargaining unit members in a manner which is not arbitrary, perfunctory, improperly motivated, or demonstrative of inexcusable neglect. Robert W. Kreps, 7 MLC 2145 (1981). This standard requires that, in certain circumstances, a union must investigate a grievance before deciding not to proceed. Local 509, SEIU, 8 MLC 1173 (1981). The exact nature of the required investigation will vary according to the circumstances of each case. Local 285, SEIU, 9 MLC 1760 (1980). The investigation must be sufficient to permit the union to make a reasoned judgment about the merits of the grievance rather than an arbitrary choice. Teamsters, Local 437, 10 MLC 1467 (1984).

Clarke filed a grievance of arguable merit on April 26, 1983. She grieved the fact that she was faced with the situation of either losing her job or accepting a position at a lower salary. The Commission does not require a union to formally process every grievance filed by a bargaining unit member. The Commission has stated, "If [a union] determines in good faith that a grievance is without merit, the union may refuse to entertain the grievance without running afoul of its duty of fair representation." Local 195, Independent Public Employees Association, 7 MLC 1483, 1488 (1980) and cases cited therein.

Before the Commission can determine whether the Union breached its duty of fair representation by processing Clarke's grievance in a perfunctory manner, it must first define what constitutes perfunctory conduct. There are very few cases which have defined a union's perfunctory conduct. In Harris v. Schwerman Trucking Co., the Eleventh Circuit stated, "[W]e believe that a claim that a union acted 'perfunctorily' requires a demonstration that the union ignored the grievance, inexplicably failed to take some required step, or gave the grievance merely cursory attention." The Court also noted that it found helpful the definition of perfunctory offered in Mitchell v. Hercules Inc., 410 F.Supp. 560, 568 (S.D. Ga. 1976): "to do it merely to get through or rid of the matter; as a matter of routine and for form's sake only, without interest or zeal." 668 F.2d 1204 (11th Cir. 1982), 109 LRRM 3135, 3137 and at n.3.

In the instant case, Clarke filed her grievance in April 1983 with the knowledge of Burke and Cassidy. Celluci denied the grievance on May 6 and Raymond Clark denied it shortly thereafter. Yet it was not until Clarke appeared at the Commission's investigation on September 12, 1983 that she learned that the City had

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ARTICLE IV -- ARBITRATION

Section 1. Any grievance which has not been settled under Article III, may be submitted by the City of the Union to arbitration in the manner set forth below within fifteen (15) working days after the response of the City Manager or his Designee is due.

¹¹ Clarke applied for the job at the School Department.



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denied her grievance at Step 2 and Step 3. Although the Union referred to Clarke's grievance at the June 27 meeting, there is no evidence that the Union discussed the merits of her grievance, or that they did anything to help the grievance along.¹² The Union offered no explanation of why it decided not to pursue the grievance to Step 4 of the procedure or to arbitration. No further action was taken on Clarke's grievance. Even assuming that there had been a misunderstanding between Clarke and Burke regarding the June 27 meeting, at no time after that meeting did any Union representative contact Clarke regarding the status of her grievance. At no time did the Union offer Clarke an explanation as to why they were not pursuing her grievance. Clarke seems to have made every attempt to keep the grievance "alive," but the Union's response can only be described as perfunctory.

The Union could have decided not to pursue Clarke's grievance based on the merits of the grievance. However, there is no evidence that the Union considered the merits or had any rational explanation for its failure to pursue the grievance. Burke testified that the Union never met to decide whether to pursue Clarke's grievance. Union President Cassidy did not testify. Perhaps he could have explained the Union's role in processing Clarke's grievance. However, he did not testify, and there is no evidence that the Union considered the merits of Clarke's grievance or had any rational explanation for its failure to pursue the grievance. Rather, the record supports the conclusion that the Union was indifferent to Clarke and ignored her grievance.¹³

Accordingly, based on the totality of all events, we find that the Union has breached its duty of fair representation and has therefore violated Section 10(b)(1) of the Law.¹⁴

¹²Pasquarello's testimony regarding his conversation with Cassidy is not proof that the Union was handling the grievance.

¹³In Lewis v. Postal Workers, 115 LRRM 3630, 3635 (U.S. District Court, Western Dist. of VA, 1983), the Court stated: "Arbitrary" or "perfunctory" treatment of grievances may also be condemned...when it rests on indifference or slovenliness -- in short, when the union has completely abdicated its responsibilities... Thus, when a shop steward misses a deadline because he just does not care, his union may be liable for breaching the duty of fair representation. Negligent handling of a grievance, however, when it results from an honest mistake or carelessness, is not actionable.

¹⁴After the charging party filed the grievance, she accepted a job in the School Department at the same rate of pay she was receiving while she was in the position of Senior Clerk Stenographer at the Building Department. Charging party has not told us of any monetary damages nor can we perceive any. Nor have we been told by charging party that she wishes now to resuscitate the grievance. Accordingly, based on all the circumstances, our remedy consists of a cease and desist order and an order to post an appropriate notice.



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ORDER

WHEREFORE, pursuant to the authority vested in the Commission by Section 11 of the Law, IT IS HEREBY ORDERED that the Union shall:

1. Cease and desist from processing grievances of bargaining unit members in a perfunctory manner.
2. Take the following affirmative action which will effectuate the policies of the Law:
 - a. Post the attached Notice to Employees in conspicuous places where employees generally congregate and leave the same posted for a period of thirty (30) consecutive days;
 - b. Notify the Commission within thirty (30) days of receipt of this Decision and Order of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, CHAIRMAN
GARY D. ALTMAN, COMMISSIONER

NOTICE TO EMPLOYEES
POSTED BY ORDER OF
THE MASSACHUSETTS LABOR RELATIONS COMMISSION
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Massachusetts Labor Relations Commission, after a hearing at which all sides had the opportunity to present evidence and to be heard, has determined that Local 195, Independent Public Employees Association violated Massachusetts General Laws, Chapter 150E (the Law), Section 10(b)(1), by processing the grievance of Elizabeth P. Clarke in a perfunctory manner.

Section 10(b) (1) of the Law provides that it shall be a prohibited practice for an employee organization to interfere with, restrain or coerce any employer or employee in the exercise of any right guaranteed under the Law.

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

WE WILL NOT process an employee's grievance in a perfunctory manner.

President, Local 195, INDEPENDENT
PUBLIC EMPLOYEES ASSOCIATION

