QUINCY CITY EMPLOYEES UNION, H.L.P.E. AND NINA PATTISON, MUPL-2883 AND CITY OF QUINCY AND NINA PATTISON, MUP-6037 (1/24/89).

35.7 supervisory and managerial employees
52.122 grievance procedures
54.511 discharge
54.53 grievance administration
62. Discharge and Discipline -- Just Cause
62.8 unsatisfactory work performance
67. Refusal to Bargain
67.8 unilateral change by employer
72. Duty of Fair Representation
72.1 discrimination
72.22 duty to investigate and process grievance
82.1 affirmative action
82.11 back pay
82.3 status quo ante
85.2 expenses, counsel fees
91.31 standing to file charge
92.45 motion to reopen

Commissioners Participating:

Maria C. Walsh, Commissioner
Elizabeth K. Boyer, Commissioner

Appearances:

Alan J. McDonald, Esq.
James F. Lamond, Esq. - Representing Nina Pattison

Nathan S. Paven Esq.
Sanford A. Kowal, Esq.
John J. Keefe - Representing Quincy Employees Union, HLPE[1]

David F. Grunebaum, Esq. - Representing the City of Quincy

DECISION

STATEMENT OF THE CASE

On August 29, 1985, Nina Pattison filed the above-captioned charges of prohibited practice at the Labor Relations Commission (Commission), alleging that the Quincy City Employees Union, HLPE (HLPE or Union) violated Section 10 (b)(1) and (3) of G.L. c.150E (Law), and that the City of Quincy, Quincy City

[1]Attorney Kowal represented the Union until January 21, 1987, when Attorney Paven substituted his appearance for the Union. By letter of September 30, 1987, the Union notified the Commission that John Keefe was substituting his appearance for that of Attorney Paven.

Hospital (Hospital, City or Employer) violated Sections 10(a)(5) and (6) of the Law. Following an investigation, the Commission issued a Complaint of Prohibited Practice on January 22, 1986, alleging that by certain conduct HLPE had breached its duty to represent Pattison fairly in violation of Section 10(b)(1) of the Law, and alleging that the Hospital had failed to comply with the collective bargaining agreement, in violation of Section 10(a)(5) and (1) of the Law. The remaining allegations of the charges were dismissed by the Commission.

Formal hearings were conducted on August 7 and October 16, 1986, and on January 21, 23, February 2, 4, 6, March 26, April 2, and 9, 1987. On August 28, 1986, the Commission issued its Rulings on Preliminary Motions which, inter alia, allowed amendment of the Complaint to allege that by changing the existing disciplinary policy and not complying with the just cause provisions of the collective bargaining agreement the Employer violated Section 10(a)(5) of the Law, denied the Employer's Motion to dismiss, and granted the Employer's Motion to bifurcate the proceedings so that the allegations against it would be heard and decided only after resolution of the allegations against the Union. See City of Quincy and Quincy City Employees Union, HLPE, 13 MLC 1129. On October 28, 1986, the Commission issued a Ruling denying Motions to dismiss filed by HLPE and the Employer arguing that Pattison was a managerial employee and not a member of the bargaining unit represented by the Union. In the Ruling the Commission also reconsidered, on a Motion by the Union, its decisions to bifurcate the proceedings against the two respondents and ordered the cases reconsolidated for hearing in order to ensure orderly litigation of the unit placement issue.

After the conclusion of the hearing, during which all parties were afforded full opportunity to be heard, to present evidence and to examine and cross examine witnesses,[2] all parties filed timely post-hearing briefs which we have carefully considered. For the reasons set forth below, we find that the Union breached its duty to represent Pattison fairly as a member of the bargaining unit,[3] but we decide that Pattison, as an individual employee, may not proceed in an action to enforce the Employer's duty to bargain with the Union even when her Union has failed to represent her. Thus we dismiss the allegations against the Employer.

---

[2]On or about September 10, 1987, the Union filed a Motion to reopen the hearing in this matter for the introduction of new evidence which it asserts was not available to it at the time of the hearing. For reasons fully discussed below at n.8, 13 and 44, we decline to reopen the record in the proceeding because the proffered evidence would not affect the outcome of the case.

[3]By submission dated September 29, 1987, the Union filed a "Motion for Summary Judgement Motion to Dismiss" [sic] based on a "lack of jurisdiction." A review of the Motion reveals that the Union contests not the Commission's jurisdiction over the parties or the subject matter of the case, but rather the Union contends that Pattison was never a bargaining unit employee to whom the Union owed a duty of fair representation. For reasons fully discussed below, we reject the Union's contentions and deny the Motions.

FINDINGS OF FACT

At all times relevant to this case the City[4] and the Union were parties to collective bargaining agreements, including one covering the period from July 1, 1984 through June 30, 1987,[5] and another effective from July 1, 1982 through June 30, 1984. Both agreements recognize the Union as the exclusive representative of "all employees as described in APPENDIX A" of the agreement. Appendix A reads as follows:

> APPENDIX A
>
> All job titles and salaries shall be listed on Appendix A and made part of the Agreement.
>
> CITY OF QUINCY
>
> Appendix A MCR 1311 as amended, by CAS 2126 and MCR 2407, MCR 2147, CAS 2520.
>
> All full-time and permanent part-time (including provisional) clerical, technical and administrative employees of the City of Quincy, including but not limited to: [thereafter follows a listing of specific job titles, with the applicable wage rates]

The listing of job titles in both collective bargaining agreements includes the title of Supervisor of Volunteer Services but does not specifically list the title of Director of Volunteer Services.

In the spring of 1984 bargaining unit employee Emma Hassen, who held the title of Supervisor of Volunteer Services, retired. During the summer of 1984 the vacancy created by Hassen's retirement was posted in the Hospital, for internal bid pursuant to the collective bargaining agreement, as an opening for Director of Volunteer Services. Margaret Corbett, Associate Administrator for Nusing and the supervisor of the position, explained that the title was changed to "Director" from "Supervisor" because it was more "universally acceptable" given the duties of the position, although the duties were to be essentially those that Hassen had performed. Sometime after the initial posting, which did not specify a salary rate, Corbett was instructed by her superior, Doris Sincevich, Director of Nursing, that the starting salary of the position would be

---

[4]The City is a "public employer," the Union is an "employee organization," and the Charging Party is a "public employee" within the meaning of G.L. c.150E.

[5]The 1984-87 agreement was reached in February 1986, ratified in or about April, and executed on July 9, 1986. The contractual provisions material to this case remained the same under both agreements.

raised to $23,000.[6] According to Corbett, the starting salary was raised from the level applicable under the collective bargaining agreement because the existing salary was not competitive with comparable positions at other hospitals. Corbett did not know how or by whom the decision to raise the salary or to change the position title was made, and the record does not further illuminate the issue. It was uncontroverted that no Employer representative discussed these issues with the Union before Pattison was hired as Director of Volunteer Services at the new starting salary.[7]

Pattison was hired by the Employer on or about August 14, 1984, to be the Director of Volunteer Services at the Quincy City Hospital. When Pattison was interviewed for the position by Corbett, Corbett told her that her position was in the bargaining unit represented by the Union. Corbett testified that she believed that Pattison's job was in the Union's bargaining unit because Hassen's position had been.[8]

The duties of the position of Director of Volunteer Services were essentially the same as those of the former position of Supervisor of Volunteer Services, with a slightly more administrative focus. Pattison's essential duties were to direct and administer the Hospital's program of volunteer services, including the recruitment, orientation, assignment, supervision and evaluation of volunteer workers.

---

[6]According to the applicable collective bargaining agreements, the starting salary for the position of Supervisor of Volunteer Services was $15,777 effective as of April 1, 1984. On July 9, 1986, the Union and City executed the 1984-87 agreement, which retroactively provided that the starting salary for the position was approximately $16,014 effective as of July 1, 1984, and $16,254 as of January 1, 1985.

[7]Corbett also obtained Sincevich's authorization for three weeks' vacation allowance for Pattison, and she told Pattison this when she was hired. The collective bargaining agreement only allowed two weeks' vacation for a new employee. No evidence was presented to indicate that the increase in vacation time was ever discussed with the Union.

[8]Although the Hospital customarily sends a monthly roster to each union at the Hospital listing employees newly hired, reclassified and terminated, Pattison's hire was not listed on the roster sent to HLPE. An internal hospital personnel notice form (P-20), Charging Party Exhibit 1, was created in connection with Pattison's hire into the position of Director of Volunteer Services and it lists "HLPE" on the line designated "Union Code" on the form. Although Employer personnel technician Marie Harris testified that it is not customary to write the union's name on the form, neither the evidence submitted at hearing nor the Union's post-hearing "proffer" offers support to the Union's apparent suggestion that the document was "altered." The form was signed by Corbett, as well as by Mark Mundy, Administrator of the Hospital, and Mayor Francis McCauley. The Hospital does not normally send copies of this form to the unions, and there was no evidence that HLPE received a copy of this particular form.

Corbett became dissatisfied with what she considered Pattison's unsatisfactory progress in her assigned objectives of recruiting new volunteers through outreach efforts, organizing an orientation program for volunteers, and decentralizing the volunteer program at the Hospital. In addition to discussing these problems at weekly meetings with Pattison, Corbett met with Pattison and Sincevich in January 1985 about Pattison's progress with the volunteer program. After Corbett failed to see sufficient improvement in Pattison's subsequent performance, she recommended to Sincevich in March 1985 that Pattison's employment be terminated. She also indicated that they should act promptly because Pattison's six-month probationary period[9] was about to end.

Corbett then met with Pattison in early March and informed her that she was considering Pattison's termination, and wanted Pattison to think about resigning. When they met again the following day Corbett told Pattison that she was going to recommend to Sincevich's superior, Director of Human Resources James Tzamos, that Pattison be terminated unless she opted to resign.[10] Corbett subsequently met with Hospital Administrator Mundy, Tzamos and Sincevich, all of whom accepted her recommendation that Pattison be terminated for poor performance. During the meeting, Tzamos noted that Pattison's "contractual" probationary period had already expired and stated that they would have to discuss the termination with the Union.[11]

The Hospital supplies to its managerial personnel uniform disciplinary guidelines which specify the appropriate progressive disciplinary steps for

---

[9]The Hospital recognizes a six-month probationary period for new employees. After successful completion of the six-month probationary period employees are given the protection of a progressive discipline system. See n.11, infra.

[10]Although Pattison recalls that this meeting ended with Corbett extending her hand and saying, "What do you say, business as usual?" we credit Corbett's recollection of this meeting as more consistent with events before and after. Pattison corroborated Corbett's recollection that Corbett asked her the previous day to think about resigning, that this meeting began with her declination to resign, and that Tzamos told her the following day that she was terminated.

[11]Article XXII, Management Rights, of the collective bargaining agreement refers to the Hospital's "right to discipline, suspend or discharge employees for just cause" but the agreement does not refer to a six-month probationary period for new employees. The Hospital's Employee Handbook contains a section entitled "Probationary Period" that reads:

> An employee may be terminated without notice during their probationary period if his/her performance is unsatisfactory. The probationary period is 720 hours for all non-civil service or provisional employees and six months for permanent civil service employees. See your Union Contract for more information.

(continued)

specific employee misconduct. The guidelines specify that an employee's "poor performance" will be punishable first by a verbal warning, then by a written warning, next by a suspension for one to five days, and finally by termination. It was undisputed that Pattison had not received either a formal written warning or a suspension before she was terminated.[12]

Since it was the Hospital's practice to inform the Union of any planned termination of a bargaining unit employee, Corbett and Tzamos met with Katherine Riley, a Hospital employee who agreed to participate in place of absent Union officer Dorothy Wassmouth.[13] They told Riley that they were going to terminate Pattison but that she had now been employed for several days beyond the six-month probationary period. According to Riley, she told them that could be a problem. Riley informed Wassmouth of the discussion as soon as Wassmouth returned to work.

On Friday, March 8, 1985, after the meeting with Riley, Corbett and Tzamos met with Pattison and notified her that she was being terminated. Cheryl Coate, an assistant to Tzamos who also had attended the meeting, then escorted Pattison out of the Hospital. After going to her car, Pattison returned to the Hospital in order to speak with Mundy. Mundy advised her to consider resigning rather than be fired, and told her to let him know if she changed her mind about resigning. Pattison never did so, and she subsequently received a letter of termination from Corbett dated March 18, 1985.[14] The letter read:

---

11 (continued)
Although the record does not establish that Pattison was a permanent civil service employee, the Union and the Hospital both acted on the assumption that a six-month probationary period applied to her position.

[12]Corbett and Tzamos testified, however, that the guidelines were not intended to apply during an employee's probationary period, and thus that Pattison's termination was not inconsistent with the provisions of the guidelines. Corbett also asserted that the guidelines did not apply to Pattison because she was a "management" employee, although this assertion is in conflict with her testimony that she considered Pattison a bargaining unit employee. In addition, Corbett testified that she considered that Pattison had received the equivalent of progressive discipline in several verbal discussions she and Sincevich had with Pattison about her performance deficiencies.

[13]Dorothy Wassmouth, a Union steward at the Hospital, was not at work on the day Tzamos called to arrange to meet concerning Pattison. Tzamos instead spoke to Riley and he and Corbett then met with her. Riley testifiyd that she told them that she was not the steward but would listen to them since she didn't know what input she would have anyway. Although Riley testified that she held the office of HLPE Treasurer, HLPE has moved to reopen the record to prove that Riley was not Union Treasurer at the time of this meeting. We deny the Motion to reopen both because the evidence was clearly within HLPE's knowledge at the time of the hearing and because the issue of Riley's actual status is immaterial to our decision.

(14, see page 1346)

> This letter is to inform you of your involuntary termination from Quincy City Hospital. Per our numerous conversations in regard to your job performance, this action was necessary. We wish you well in your future endeavors.

Corbett did not send a copy of the letter of termination to the Union.

According to Pattison, on Monday, March 11, she telephoned the Union's office and asked to speak to John Keefe, the Executive Director of HLPE.[15] Keefe returned her call that day, and Pattison told him of the Employer's intention to terminate her if she didn't resign. She indicated that she didn't know why it was happening, and asked Keefe what she should do. Keefe asked whether she had ever received any written warnings and, after she replied that she had not, told her that he thought he could get her reinstated if she wanted her job back. Pattison said she was uncertain about wanting her job back. Keefe told her to call Corbett to try to learn the reasons for the termination, and said that he would check into it from the Union side and get back to her.

According to Pattison, Keefe next called her on the telephone, probably the following day,[16] and told her that he could find no record of her being a dues-paying union member. She told him that this surprised her, since she believed that one of her payroll deductions had been for union dues. Keefe said that he could find no indication that she had paid any union dues, and asked her to call the Hospital payroll department and see what she could find out. Pattison immediately telephoned the payroll department and was informed that no union dues had ever been deducted from her paychecks.[17] She testified that on March 13, 14 and 15 she called the Union office to speak with Keefe but was told that

---

[14] (from page 1345)
The Hospital personnel notice form (P-20) that was generated in connection with her termination is dated March 28, and lists March 15 as the "[e]ffective [d]ate." The Union does not customarily receive a copy of this form. Nor did the Hospital's monthly roster of employees hired, reclassified or terminated, that was prepared for HLPE, show Pattison's termination from employment.

[15] The record does not disclose that Pattison had any previous contact with HLPE before this call. HLPE had never demanded that she pay union dues or an agency service fee, and, as noted infra, Pattison never paid dues to HLPE.

[16] The record contains a handwritten memo Pattison made for herself about calling Keefe on Tuesday, March 12. It reads: "HLPE John Keefe Not there Nothing in writing No specifics Spoke to Sheila Probation." There was no further testimony concerning this notation.

[17] The Hospital deducted union dues from employees who authorized the payroll deductions. The Hospital had no involvement in collecting agency service fees from non-union members of the bargaining unit. There is no evidence that HLPE ever had demanded or collected union dues from Pattison.

he was unavailable and would get back to her. He never did so, and she never spoke with Keefe again about her termination.

Keefe gave a different account of the events involving Pattison. According to Keefe, he learned about Pattison's termination on either Friday, March 8 or Monday, March 11, and had two or three telephone conversations before meeting with her later in the week of March 11.[18] In the first conversation, Keefe testified, Pattison told him that she "didn't have her six months in" but that she wanted to know the reason she was discharged. Keefe asked for her dates of employment and, after checking a calendar, told her that she did have more than six months' service. He claims to have arranged for Pattison to come to the Union office and meet with him that week. Before they met, however, Keefe called to tell her that he had checked the Union records and found that she had never paid any union dues.[19] Keefe claimed that Pattison responded that she didn't belong to the Union, and that she had been told that she was a department head and not covered by the Union.[20] Keefe allegedly told her that this was no problem, and that they would have her sign a card authorizing them to represent her when she came into the office.[21] Keefe testified that he met with Pattison in the Union office as arranged.[22]

---

[18]The log maintained of incoming calls to the Union office shows calls received from Pattison on March 13, 14, 20 and 21. The log submitted into evidence appears to encompass the remainder of March after the 8th, but the record does not disclose why there are no log entries at all for the dates of March 12, 18 and 25.

[19]However, in 1986, in a Superior Court case instituted against HLPE and the Hospital by Pattison, Keefe filed an Answer on behalf of the Union containing the following statement: "[Pattison] informed [Keefe] that she had not paid her dues since her employment but that she wanted assistance from the Union. Keefe informed her that he and the union steward Mary Ellen Wade would represent her."

[20]We find Keefe's recollection of this conversation unreliable for several reasons. First, the alleged statement by Pattison is inconsistent with the undisputed fact that she had contacted the Union about her termination, and with Corbett's and Pattison's testimony concerning what Pattison was told when she was hired. Second, although the Union now would have us believe that it did not represent Pattison because she was outside of the bargaining unit, the Union does not claim to have taken any steps to verify Pattison's bargaining unit status. This leads us to conclude that Pattison never indicated that she might not be in the bargaining unit, for had she so indicated surely the Union would have investigated.

[21]Keefe did not recall giving her or asking her to sign an authorization card when she later allegedly came to his office, and conceded that the Union records contain no card signed by Pattison. The absence of any evidence to support Keefe's testimony that Pattison come to his office (see n.22 below) also serves to undermine this part of Keefe's recollection.

(22, see page 1348)

According to Keefe, he called Wade after the alleged meeting,[23] and they agreed Wassmouth would continue to handle the matter. He also claims to have then called Wassmouth and asked her to arrange a meeting with Pattison and Corbett. Keefe testified that other than subsequent telephone calls with Wade and Wassmouth, he had no further involvement in the matter for several months.

After Pattison received the termination letter dated March 18, she tried to contact the Union steward at the Hospital.[24] She spoke with Wassmouth and told her that she wanted to file a grievance about her termination. Wassmouth allegedly replied, "You can file a grievance if we say you can file a grievance, and we'll get back to you." Pattison told Wassmouth that she didn't know why the termination had occurred, and Wassmouth said she would check into it. Pattison subsequently telephoned Wassmouth several times after having received no word from her, but was unable to reach her. Sometime prior to March 25, Pattison found a recorded message from Wassmouth on her telephone answering machine, with Wassmouth stating: "You have no grievance. As far as we are concerned, you have no grievance. Everything is taken care of, and please don't call this office again." According to Pattison, this was her last contact with any representative of the Union.

We credit Pattison's version of these events rather than the versions advanced by Keefe and Union witnesses Riley, Wade and Wassmouth. Keefe's assertion that he arranged for the stewards to meet with Corbett and Pattison was not corroborated by the testimony of either Wade of Wassmouth. Neither steward testified that Keefe had ever spoken to her about Pattison. In addition, Wassmouth testified that Pattison called shortly after her termination and wanted to know

---

22 (from page 1347)
Pattison denies that she ever met with Keefe and there is no corroboration of Keefe's claim to have met with Pattison. A former secretary employed by the Union, Karen Gibbons, who was allegedly present during the meeting with Pattison, was not called as a witness to corroborate the meeting, nor did the Union explain its failure to call her as a witness. In addition, Keefe's personal business appointment diary did not mention any meeting with Pattison.

[23]According to Keefe, Pattison had told him she didn't understand why she was terminated. He explained the process of filing a grievance, told her that the Union would help her initiate a grievance if she wanted to file one, and asked her whether she really wanted her job back. She allegedly responded that she wanted to know the reason she was terminated. Keefe explained that they could seek the reasons by filing a grievance or requesting a written statement of the reasons, but that this would necessarily create a negative written record that could harm her in future employment. He suggested that a steward arrange a meeting with her supervisor to discuss the reasons for her termination. According to Keefe, Pattison stated that she didn't want to file a grievance or return to work there, but liked the option of meeting with the steward and Corbett. Keefe said he would ask the steward to arrange the meeting. Pattison told him she had already talked with Wassmouth; Keefe said Mary Ellen Wade was her Union

(continued; 24, see page 1349)

why she had been terminated. According to Wassmouth, she told Pattison that she would have Corbett and Tzamos send a letter explaining the action, and later obtained their commitments to do so.[25] Wassmouth stated that Pattison later said that she had gotten a letter but that it did not tell her why she was terminated. Wassmouth claimed that as a result, she again spoke to Corbett and Tzamos, who allegedly told her that they had written a letter that told Pattison "everything about it." According to Wassmouth Pattison continued to call her repeatedly thereafter and, as a result Wassmouth left the following message on Pattison's answering machine: that she had taken care of her to the best of her ability, that she'd gone to Corbett and Tzamos, and that she worked for the Hospital and felt she owed them her time now.

Corbett, whom we consider to have been a generally credible witness on the basis of her thorough and fairly consistent recollection of critical events as well as her frank demeanor,[26] contradicted Wassmouth on several key points. First, Corbett testified that Wassmouth had told her at one point that she was trying to reach Pattison to say that the Union was not representing her and that she should not bother to call again. Corbett also recalled that Wassmouth laughed about a message she had left on Pattison's answering machine, to the effect that the Union was not representing her and not to bother calling her any more. Finally, Corbett testified that she did not recall that Wassmouth ever asked her about the reasons that Pattison was terminated. In addition, Corbett testified that she previously had sent letters notifying employees of their termination, just as she notified Pattison.

---

23 (continued)
steward, and that he'd contact both Wade and Wassmouth.

24 (from page 1348)
Pattison said she knew there was a Union steward at the time she got the letter, although she didn't know who it was. When she got the letter, she asked someone at the Hospital, whose name she could not recall, who the steward was.

25 Neither Corbett nor Tzamos corroborated Wassmouth's testimony that she asked them to send Pattison a letter stating the reasons for her termination. In addition, this action is inconsistent with Keefe's testimony that he told the stewards to arrange for an oral discussion about the termination so that no negative written record would be created. Also, in contrast with Wassmouth's testimony, Riley testified that she allegedly overheard several conversations Wassmouth had with Pattison, during which Wassmouth allegedly told Pattison that she could come in and file a grievance if she wanted to, and that Wassmouth advised her to do so. Riley testified that it sounded as if Pattison wasn't sure she wanted her job back, while Wassmouth testified that she thought Pattison said she wanted her job back.

26 We also note that Corbett, as a management representative of the Hospital, had no direct interest in the resolution of the Union--Pattison factual controversy. The Employer's interest, if any, might be seen to favor the Union, for all parties agreed during the litigation that a finding of Union unlawful action
(continued)

In crediting Pattison's testimony, we note that Wassmouth's, Wade's and Riley's versions taken together were inconsistent in several respects, as well as inconsistent with Keefe's testimony.[27] Riley claimed that Pattison had called her, asking to be told the reason she was terminated. Riley testified that she put Pattison's call on hold and called Corbett, who told her that Pattison was fired because her work was "not up to par" and that she had told Pattison this many times. Riley claimed that she asked Corbett whether the reason was ever put in writing, and that Corbett allegedly replied that she was not certain that it had been written. Riley allegedly urged Corbett to "make sure [Pattison] gets something in writing," and then told Pattison to reach Wassmouth if she wanted further contact with the Union. We note that the variant versions offered by Keefe, Wade and Wassmouth about their dealings with Pattison all share the self-serving themes that Pattison only wanted to know the reason for her termination and did not want her job back, and that the Union arranged for Corbett to send a termination letter to Pattison, thus arguably satisfying her demand to the Union. However, their versions of how they interacted with each other and with Pattison in the events are often inherently contradictory and internally illogical, as we have discussed. Therefore, we have found Pattison's general version of events more reliable and credible.

Pattison then contacted an attorney, Alan McDonald, and, on his advice, she delivered a letter to Corbett on March 25, stating that she was "grieving the decision...to terminate her employment...and [was] seeking review of that decision under the grievance and arbitration procedures of the collective bargaining agreement covering [her] position." Through the letter Pattison asked Corbett to contact her to arrange a meeting "under these grievance procedures."[28]

---

26 (continued)
was a precondition to Employer liability. The one unreliable aspect of Corbett's testimony is discussed at n.12, above.

[27]See also n.25, supra.

[28]The grievance procedure described in the collective bargaining agreement in effect at all times relevant to this case provides the following at Article 4.1:

> Complaints, disputes or controversies which arise between one or more employees and the EMPLOYER and/or his agent, concerning the working condition and the application, meaning or interpretation of the terms of this AGREEMENT are defined as grievances and may be processed as a grievance under this ARTICLE.
>
> A grievance shall be processed as follows:
>
> Step 1. The employee, with or without the Steward, shall present the grievance in writing to the employee's immediate supervisor, within ten (10) working days of the date of the grievance or the employee's first knowledge of its occurrence. The supervisor shall attempt to adjust the matter and shall respond to the employee within three (3) working days.

(continued)

Pattison sent a copy of the letter to Keefe, with a cover letter requesting not only the assistance of the Union in processing the grievance but also a copy of the current collective bargaining agreement. When Corbett received Pattison's letter she contacted Tzamos who told her to send the letter to him, and he would handle it. As already noted, Pattison had no further contact with the Union after she received Wassmouth's telephone message.

On April 2, having received no response from the Employer to her grievance Pattison wrote to Sincevich that she was "grieving [the termination decision] at step two" and "seeking review of that decision under the grievance and arbitration procedures." The letter requested that Sincevich contact her to arrange a meeting under the grievance procedure. She also sent a copy of this letter to Keefe.

After not having received a step two answer, Pattison sent a similar letter to the Mayor on April 9, seeking a step three review, and again forwarded a copy to Keefe.[29] Her attorney also sent a letter to the Mayor requesting a

---

28 (continued)

Step 2. If the grievance has not been settled in Step 1, it shall be presented to the Department Head in writing three (3) days after the supervisor's response is due. The Department Head shall respond to the employee or to the Steward in writing within five (5) working days of his receipt of the grievance from the employee or the Steward.

Step 3. If the grievance still remains unadjusted at the Step 2 level, it shall be presented to the Mayor of the City in writing within five (5) working days after the response of the Department Head is due. The Mayor shall conduct a hearing on the grievance and shall respond in writing within ten (10) working days after the receipt by him of the grievance from the employee or Steward.

Time periods may be extended by mutual agreement.

Failure of the employer to reply within the specified period shall result in a favorable decision for the employee.

Step 4. If the grievance still is unsettled, either party may, within fifteen (15) calendar days after the reply of the Mayor is due, by written notice to the other, request arbitration. The arbitrator shall be selected by mutual agreement of the parties hereto. If the parties fail to agree on a selection in the first instance, the American Arbitration Association will be requested to provide a list of arbitrators from which a selection shall be made in accordance with the applicable rules of the American Arbitration Association. Expenses for the arbitrator's services shall be shared equally by the parties. The arbitrator shall have the authority to settle only grievances defined herein. Any grievance appealed to an arbitrator over which he shall have no power to rule shall be referred back to the parties without a decision. The arbitrator shall have no

(continued; 29, see page 1352)

step three meeting, with copies to Keefe and Tzamos. The Mayor responded to Attorney McDonald by letter of April 9, suggesting that he direct future letters to Tzamos. After having received no further communication from Tzamos, McDonald wrote to him on April 22. In that letter, McDonald took the position that the Employer's failure to arrange for a step three hearing within 10 days had resulted in "a favorable decision for the employee" pursuant to the provisions of Article 4.1, Step 3 of the collective bargaining agreement, and requested that arrangements be made for Pattison's return to work and the payment of back pay and benefits to her.[30] He sent Keefe a copy of the letter. Without waiving her position concerning Article 4.1, Pattison and her attorney met with Tzamos and Hospital Attorney David Grunebaum on May 7 about her greivance but did not resolve it. At this meeting the Hospital made no claim that Pattison's grievance had been untimely filed initially.

On June 19, McDonald wrote to Keefe as follows:[31]

---

28 (continued)

power to add to, subtract from, or modify the terms of this AGREEMENT. The decision of the arbitrator shall be binding upon the parties.

29 (from page 1351)

Pattison, who was out of town around the time that Sincevich's step two answer was due, telephoned the Hospital to learn whether or not it planned to issue a step two response to her grievance. Tzamos's assistant, Coate, told her that the Hospital would not file a step two response but would send the grievance directly to step three. In response to Pattison's concern about being able to timely file her grievance at step three, Coate assured her, after speaking with Tzamos, that the Hospital was extending the time limits and she could contact them when she returned. Neither Pattison nor the Hospital informed the Union about this extension of the step three time limits.

[30]Both Keefe and Tzamos testified that the Union and the Hospital had a practice of waiving the application of this "default" provision in Article 4.1, Step 3 of the agreement, in favor of mutually extending the time limits for both parties under the grievance procedure. Tzamos testified that the Hospital's failure to respond within the specified time period under step three had never previously resulted in a favorable decision on a grievance filed by the Union.

[31]The record also establishes that McDonald wrote to Grunebaum on May 30, 1985, requesting that he advise him concerning the Hospital's position regarding Pattison's grievance. In a subsequent letter to McDonald dated September 23, 1985, Tzamos stated that "[i]n response to Step 3 of the grievance procedure," the Hospital had denied Pattison's grievance and request for reinstatement after determining that she was discharged for just cause. The record does not explain why Tzamos's letter issued more than four months after the step three meeting on May 7. The parties stipulated that copies of these two letters were not sent to the Union.

> As you know, Nina S. Pattison has filed a grievance with the City of Quincy contesting her discharge as Director of Volunteers for Quincy City Hospital. That grievance has not been resolved in the grievance procedure. I was advised yesterday by David Grunebaum that a satisfactory resolution was unlikely and that we should consider the grievance denied. Accordingly, pursuant to Step 4 of the grievance procedure a demand for arbitration must be filed within fifteen (15) calendar days from yesterday (June 18, 1985), or by July 2, 1985. Please accept this letter as an official request by Ms. Pattison that you file a demand for arbitration of her grievance, a copy of which is enclosed, seeking her reinstatement with full back pay and benefits. In my opinion, Ms. Pattison has an excellent chance to prevail. Thus, the Union's duty to process the case to arbitration is clear.
>
> Ms. Pattison would like to have me represent her in the arbitration, and is prepared to pay my fee for presenting the case on her behalf. I request your permission to do so.
>
> Would you kindly arrange to file a demand for arbitration at the earliest possible date, and send a copy of the demand to me. If you have any questions, please give me a call.
>
> Thank you for your anticipated cooperation.

On June 27, McDonald wrote to Keefe again, noting that the Union had neither responded to his June 19 letter nor filed a demand for arbitration of Pattison's grievance. The letter further informed Keefe that unless the Union filed a timely demand for arbitration Pattison would institute legal action against the Union "in State Court and/or the Labor Relations Commission" and would hold the Union responsible for her loss of earnings resulting from the termination. The Union made no reply.

At the hearing in this case, Keefe acknowledged that he had received Pattison's March 25 letter to him requesting the Union's assistance in processing her grievance, as well as the copies of other correspondence that she or her attorney had sent to him. He specifically admitted having received the June 19 and 27 letters from McDonald that requested the Union to file a demand with the Employer for arbitration of Pattison's grievance.

It was undisputed that the Union did not assist Pattison in processing her grievance, and did not file a demand for arbitration of the grievance. It was also undisputed that neither Keefe nor any representative of the Union ever attempted to contact Pattison's attorney after learning that he represented her.

Keefe claimed that he attempted to reach Pattison but was unsuccessful in doing so.[32] Keefe testified that

[32]Keefe was uncertain when these alleged attemptes to reach Pattison (continued)

> when [he] heard that Nina Pattison had hired an attorney and that she had changed her mind and wanted her job back ... [he] attempted to call her ... to find out firsthand from the employee had she, in fact, changed her mind, or did she, in fact, want her job back and did she hire a lawyer or did she no longer want us to represent her.

According to Keefe, one of the Union stewards informed him that Pattison was "somewhere down South in Virginia or North Carolina or something."[33] Keefe claimed that Wassmouth had given him Pattison's home phone number, and he testified that Pattison's home answering machine had a taped message of Pattison saying, "Nina's not here, but if you want to leave a message, maybe I'll give it to her and maybe I won't." There is no evidence that Keefe ever left a message for Pattison.[34]

Keefe acknowledge that he intentionally had declined to respond to McDonald's June 19 letter requesting that the Union file a demand for arbitration of Pattison's grievance, and that he made the decision not to request arbitration of her grievance.[35] He testified, at first, that the "basic reason" the Union did not take Pattison's case to arbitration, although there were other reasons, was that she had never asked for her job back, but had only wanted a reason for her termination.[36] When later recalled as a witness, Keefe expanded upon his reasons in the following testimony:

---

32 (continued)
occurred. He twice testified that he tried to reach her after he received a copy of McDonald's April 8 letter to the Mayor, and thus learned that she was represented by counsel, but he later indicated that it may have occurred after he received Pattison's March 25 letter.

[33]We note that Keefe did not mention this when he first testified about trying to reach Pattison. Only after Pattison had testified that she was out of state in Virginia Beach for several days around the end of March or beginning of April did Keefe, when recalled as a witness, elaborate this testimony with this detail.

[34]Keefe at first testified that he had made "numerous attempts" to contact Pattison without success, and that "other people" had also tried. However, in his subsequent testimony he did not allege that he had called Pattison more than once, when he heard the taped message on her answering machine. We find it unlikely that he telephoned her repeatedly because Pattison used a telephone answering machine on her phone and there was no evidence that Keefe ever had left any message for her. Moreover, Keefe never explained why he had made no attempt to contact Pattison through her attorney. No testimony corroborated his claim that "other people" had tried to reach Pattison. Moreover, Wassmouth never corroborated Keefe's claims that she knew that Pattison was "down South" at this time or that Keefe had ever consutled her about reaching Pattison.

[35]The collective bargaining agreement permits either the Union or the Employer to demand arbitration of a grievance, and Keefe confirmed that an

(continued; 36, see page 1355)

> [I did not request arbitration of Pattison's grievance] for a number of reasons. One was the time period to file a grievance of ten days from the date she was discharged had long passed. Ms. Pattison had never requested the Union to file a grievance on her behalf, and we had no basis on which to make a determination whether an arbitration, or even a grievance, because we hadn't heard from the woman and didn't know what her intentions were, and the ten-day time period for filing a grievance had long passed. There was just simply no basis on which we could make a judgment as to whether an arbitration should or shouldn't be filed. One of the major reasons we were trying to get in touch with her was to get that basic information.[37]

The Union and the Employer had agreed to be bound by the terms of the 1982-84 agreement while they negotiated the successor agreement. In addition, Keefe conceded that at the time he "decided" not to process Pattison's grievance to arbitration, he had assumed that Pattison held the position of Supervisor of Volunteer Services and thus was in the bargaining unit represented by the Union.

DISCUSSION

I. THE UNION'S DUTY TO REPRESENT FAIRLY

A union certified or recognized as the exclusive collective bargaining representative of a unit of employees has a duty to fairly represent the employees in the bargaining unit in matters concerning collective bargaining. Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967); AFSCME, 7 MLC 2145 (1981); Framingham School Committee, 2 MLC 1292 (1976). See generally Leahy v. Local 1526, AFSCME, 399 Mass. 341 (1987). The duty of fair representation pursuant to G.L. c.150E encompasses a duty to represent employees and to process their grievances in a manner which is not arbitrary, perfunctory, unlawfully motivated, or the result of inexcusable negligence. Teamsters, Local 437, 10 MLC 1467 (1984). Incorporated in the duty of fair representation is not only the obligation to fairly represent an employee once a grievance has been filed, but also

---

35 (continued)
individual employee cannot submit a grievance to arbitration without the Union's consent. As the Union's Executive Director, Keefe determines whether a grievance will be submitted to arbitration.

36 (from page 1354)
As already noted, Wassmouth testified that in one of her conversations with Pattison, the employee had expressed her desire to get her job back.

37 Keefe's expressed concern about the strict application of the grievance process time limits is undercut by, inter alia, his earlier testimony that he tried to reach Pattison to find out whether she wanted her job back after he had received McDonald's April 8 letter. In addition, if Pattison was terminated on March 18, the date of Corbett's letter, Pattison's March 25 letter would have given the Union timely notice of her intent to grieve her termination.

the obligation to investigate an employee's claims to determine whether to pursue a grievance. Local 509, SEIU, 8 MLC 1173 (1981). Unions often must decide whether to file a particular grievance. While the Law does not require expert legal acumen or prophetic wisdom in the exercise of the union's judgment, it does require good faith, fair dealing and reasonableness. See Trinque v. Mount Wachusett Community College Faculty Association, 14 Mass. App. 191 (1982). Cf. Berman v. Drake Motor Lines, Inc., 6 Mass. App. 438, 445-56 (1978) (plaintiff's allegation that union had breached its duty of fair representation was dismissed for failure to state a claim when plaintiff alleged only an error in the union's judgment without an allegation of arbitrary, bad faith, or discriminatory conduct). A union acts in derogation of the duty of fair representation if its decision not to proceed with a grievance is motivated by unlawful considerations, such as the employee's lack of membership in the union. G.L. c.150E, Section 5; See generally Boston Teachers Union, 12 MLC 1577, 1584 (1986).

In the instant case, HLPE contends that it has not failed to fairly represent Pattison. In its defense, it offers two justifications for its failure to process a grievance concerning her discharge: first, HLPE contends that Pattison was not a member of the bargaining unit which it represents; second, HLPE contends that Pattison never asked the Union to do more than seek from the Hospital a written explanation of the reasons for her discharge. We consider each defense seriatim.

A. Pattison's Status in the Bargaining Unit

When Pattison was hired as the Director of Volunteer Services at the Hospital she replaced Emma Hassen, who had held the title of Supervisor of Volunteer Services. It is undisputed that the Supervisor of Volunteer Services was a bargaining unit position and that the salary of the Supervisor of Volunteer Services, specified in the collective bargaining agreement, was lower than the salary at which the Hospital hired Pattison.

Associate Administrator for Nursing Margaret Corbett, who interviewed and hired Pattison, told her at the time of her hire that her position was in the bargaining unit represented by HLPE. Although the Hospital customarily sends to each union a monthly roster of the names of all new bargaining unit employees, no notification of Pattison's hire was sent to HLPE. HLPE never demanded the payment of union dues or an agency service fee from Pattison; nor did Pattison ever pay HLPE dues or otherwise come into contact with HLPE prior to the events which spawned this charge.

Because Pattison's title was not listed in the collective bargaining agreement along with other unit position titles, because HLPE never received notification from the Hospital of the fact that Pattison was hired into a bargaining unit position, and because Pattison was hired at a salary that exceeded the bargaining unit salary of her predecessor, HLPE contends that she did not occupy a unit position and therefore it had no duty to represent her.

Quincy City Employees Union, H.L.P.E. and Nina Pattison, and City of Quincy and Nina Pattison, 15 MLC 1340

The placement of a position in a bargaining unit can be accomplished through many means. Generally, the Commission favors certification of units of all employees employed in a group of generic classifications (e.g., all clerical employees, all uniformed police employees, all maintenance employees, etc.). Unit placement is dictated by the functions performed by each employee rather than by the actual job title. E.g., Masconomet Regional School District, 3 MLC 1034, 1040 (1976). Similarly, when a job title is changed, the Commission determines whether the new job should be included in the unit by examining the job's functions and community of interest with the bargaining unit. If the newly-titled job includes the same responsibilities as a prior position or although a different job has sufficient community of interest to warrant inclusion in the unit, the Commission considers the title to be in the unit. See, e.g., Boston School Committee, 11 MLC 1219, 1230-32 (1984) (Area Managers, Assistant Manager for Day Field Operations).

In the instant case the Hospital and HLPE incorporated in their collective bargaining agreement a recognition clause that specified that HLPE was the bargaining agent for "all employees as described in Appendix A" of the agreement. Appendix A of the agreement refers to the generic classifications of: "All full-time and permanent part-time (including provisional) clerical, technical and administrative employees of the City of Quincy including but not limited to: ..." and also lists over 200 specific job titles including the "Supervisor of Volunteer Services."

HLPE argues that the omission of the title "Director of Volunteer Services" from the list of specific job titles accompanying Appendix A conclusively establishes that Pattison's position was not in the bargaining unit.[38] We disagree. Although the language of the collective bargaining agreement may be susceptible of a contrary interpretation, we conclude that a fair reading of the recognition clause, including the referenced inclusion of the generic job classifications of "clerical, technical and administrative employees" supports the conclusion that the Hospital and HLPE had agreed that HLPE was the exclusive collective bargaining representative of all "clerical, technical and administrative employees," and not merely the representative of the specific job titles listed in Appendix A. Therefore, if the Director of Volunteer Services was a "clerical, technical or administrative position" it was in the bargaining unit pursuant to the recognition clause.

An examination of the duties and responsibilities of the Director of Volunteer Services confirms that Pattison's position was in the bargaining unit. The job was, for purposes of unit placement, a close approximation of the Supervisor of Volunteer Services. Like the former acknowledged unit position, Pattison's job consisted of the administrative duties of recruiting, training, assigning, scheduling and supervising volunteer workers. In her performance of these tasks, Pattison reported to Corbett, and the evidence was insufficient to

[38] HLPE also argues that the title Director of Volunteer Services is absent from the MUNICLASS classification listing of positions regulated by the Civil (continued)

establish that Pattison was either a managerial employee[39] or otherwise excluded from collective bargaining. The evidence does demonstrate, however, that Pattison was paid a salary higher than that applicable to the Supervisor of Volunteer Services. The establishment of a salary without consultation with a union does not, without more, demonstrate the exclusion of a position from the bargaining unit.[40]

HLPE also argues, however, that it had no notice that Pattison was in its bargaining unit, and therefore it could not have had a duty to represent her. The principal flaw in the Union's argument is that it is raised too late. Had HLPE predicated its decision not to represent Pattison at the time of her discharge on a good faith doubt that she was a member of the bargaining unit this might be a different case.[41] A good faith decision not to represent an employee, which is reasonably based upon a good faith belief that the employee was not entitled to representation, might insulate the union from a charge of having breached the duty of fair representation.[42] See generally Teamsters Local 436, supra. But HLPE expressed no doubts about Pattison's unit status at the time of

---

38 (continued)
Service system. The fact that a working job title may not be listed in the MUNICLASS classification is irrelevant to our determination of unit placement.

39 At various points in this proceeding, both the City and HLPE took the position that Pattison's job was "managerial" within the meaning of the Law and therefore excluded from the bargaining unit. G.L. c.150E, Section 1 specifies that

> employees shall be designated as managerial employees only if they (a) participate to a substantial degree in formulating or determining policy, or (b) assist to a substantial degree in the preparation for or the conduct of collective bargaining on behalf of a public employer, or (c) have a substantial responsibility involving the exercise of independent judgment of an appellate responsibility not initially in effect in the administration of a collective bargaining agreement or in personnel administration.

The evidence submitted in this case does not establish that Pattison meets any of the definitions. Clearly she had no role in the conduct of collective bargaining, nor did she have any responsibility for administering a collective bargaining agreement on behalf of the City. Her participation in "personnel" functions was limited to recommending to Corbett ways to better organize the volunteer service at the Hospital. In none of her duties did she exercise the kind of authority that would indicate a managerial status. See Wellesley School Committee, 1 MLC 1389 (1975), aff'd sub nom. Wellesley School Committee v. Labor Relations Commission, 376 Mass. 112 (1978).

40 We note that generally an employer's unilateral action concerning the wages, hours, and working conditions of unit employees may form the basis of an unfair labor practice charge by the union when the union receives notice of the unilateral change. Whether HLPE could have protested the alleged unilateral

(continued; 41 and 42, see page 1359)

her termination. Instead, the Union noted her failure to have paid union dues. During the course of the Union's communications with Pattison and with Hospital administrators concerning her termination prior to the filing of the unfair labor practice charge in this case, the Union never questioned Pattison's status as a member of the bargaining unit. The Union never investigated either Pattison's job duties or other indicia of bargaining unit status. In fact, the Union did not raise this defense until long after it had filed its Answer to the Complaint in this case.[43] Accordingly, we conclude that the Union did not predicate its decision concerning whether to file or arbitrate a grievance on behalf of Pattison on any reasonable good faith belief that she was excluded from the bargaining unit. Further, we find that Pattison's position was included in the bargaining unit represented by HLPE and therefore Pattison was entitled to fair representation by HLPE.[44]

---

40 (continued)
establishment of the salary for Pattison's unit position is a questin outside the scope of this case.

41 (from page 1358)
In fact, HLPE's attorney acknowledged this point during the hearing in this case when he argued that "the only time material or relevant for the Commission's consideration of the Union's position is within that period of time when the employee was discharged and whatever reasonable time might have been required to process a grievance. Any other time thereafter is not material to the consideration of the charge which has been made by the Commission in this matter."

42 (from page 1358)
Notwithstanding a union's belief concerning an employee's unit status, a union has no duty to represent an employee who is not in its bargaining unit.

43 The Union first raised this issue in its Motion to Dismiss filed with the Commission on October 7, 1986. The Commission denied the Motion by the Ruling of October 28, 1986, in order to resolve through a full hearing conflicts in the facts proffered in support of and in opposition to the Motion. HLPE Executive Director Keefe testified that when he first heard from Pattison and, apparently through at least the date that he filed the Union's first Answer to the Complaint in this case, he assumed that Pattison was in the bargaining unit which HLPE represented.

44 As mentioned above at n.2, the Union sought to reopen the record to introduce certain evidence. The Union alleges that since the hearing it has obtained certain civil service records and hospital records "that the [Hospital] failed to produce [or] that came to light via the freedom of information act." It asserts that the new evidence would establish that throughout her employment, Pattison's position was regarded by the Hospital as a managerial rather than a civil service position and introduction of the evidence would enable the Union to argue that the Hospital conspired "to shift the responsibility for [terminating Pattison] to the Union." Even assuming that the Union's showing satisfies the requirement set forth in Boston City Hospital, 11 MLC 1065 (1984), (i.e., that the Union was excusably ignorant of this evidence at the time of the
(continued)

B. The Assistance that Pattison Requested from the Union

Pattison first requested the Union's assistance on Monday, March 11, 1985, when she telephoned HLPE Executive Director Keefe to discuss her situation. She told him that the Hospital had told her that she would be terminated if she did not resign. Keefe asked whether she had received a prior written warning. Pattison informed him that she had not and Keefe replied that she could be reinstated if she so desired. Pattison said that she was uncertain whether she wanted to return to the job. Keefe then directed Pattison to call Corbett to get the reason for the Hospital's decision, and he promised to look into the matter to see what the Union could do.

The next day Pattison and Keefe again spoke by telephone. Keefe told Pattison that HLPE had no record that she was a member of the Union and asked her to contact the payroll department to find out what had happened to the payroll deductions which she believed to have been union dues. Keefe also promised to call her back when he had more information about the matter.

As detailed in the Findings of Fact, supra, each witness had a vastly different recollection of the events that followed this second Keefe-Pattison conversation. Based upon the credited facts, we conclude that Pattison requested the Union's assistance several additional times. Thus, in addition to the telephone conversations with Keefe on March 11 and 12, Pattison asked Wassmouth how to file a grievance shortly after having received the termination letter of March 18. She left phone messages for Wassmouth for several days until she received Wassmouth's telephone message telling her that she "had no grievance" and shouldn't call the Union anymore.

The Union's duty to represent employees in the bargaining unit extends to all bargaining unit employees regardless of their union membership. A union cannot discriminate against employees on the basis of their membership or non-membership in the union. G.L. c.150E, Section 5. Thus, when Keefe raised the

---

44 (continued)
hearing despite the exercise of reasonable diligence) we decline to reopen the record because the proffered evidence would not materially affect the outcome of the litigation in this matter. As discussed above, we rest our determination concerning the unit status of Pattison's position primarily upon the language contained in the recognition clause of the parties' collective bargaining agreement and an examination of Pattison's duties. The Employer's alleged beliefs concerning Pattison's unit status are not determinative of whether she was covered by the language of the parties' recognition clause, in view of the language of the contract. Moreover, the alleged belief of the Employer concerning Pattison's unit inclusion is irrelevant to our consideration of the Union's motives and conduct in this case. When the Union failed to process a grievance on behalf of Pattison it did not predicate its conduct on the belief that she was outside of the bargaining unit.

subject of union membership with Pattison, he evidenced a concern for an issue that had no relevance to the Union's legal obligations in this case.

The Union claims that its early preoccupation with Pattison's membership status was immaterial to its later failure to process a grievance on her behalf. To the contrary, the Union contends, despite Pattison's non-membership the Union offered to assist Pattison in her efforts to learn the reason for her discharge. Specifically, the Union claims that Wassmouth was responsible for the fact that Corbett sent Pattison a letter concerning her termination. Not only does Corbett not corroborate this claim but other facts also demonstrate that HLPE provided no material assistance to Pattison. Rather, Pattison had received a letter of termination before she first called Steward Wassmouth. Pattison asked Wassmouth for the Union's assistance in securing more information concerning the reasons for her termination. No subsequent information concerning the reasons for the discharge was secured by the Union for her. Instead, Wassmouth responded by leaving a message on Pattison's telephone answering machine informing her that, as far as the Union was concerned, she had no grievance and should not call the Union again.

Pattison then consulted private counsel and, on his advice, wrote to the Hospital on March 25, stating that she was "grieving" the termination decision and "seeking review" of the decision under the "grievance and arbitration procedures of the collective bargaining agreement." A copy of this letter was sent to Keefe. On April 2, after having received no response from the Hospital and no communication from Keefe, Pattison sent a letter to Sincevich stating that she was "grieving at step two" the termination decision and seeking review of the decision under the terms of the collective bargaining agreement. A copy of this letter also was sent to Keefe. When Pattison wrote to the Mayor on April 9, seeking a step three review of the termination decision, she again copied Keefe with the letter. The subsequent correspondence from Pattison's attorney to Tzamos on April 22, requesting compliance with step three of the collective bargaining agreement was also copied to Keefe. On June 19, Pattison's attorney wrote to Keefe requesting, inter alia, that the Union file a demand for arbitration concerning Pattison's grievance. By letter dated June 27 Pattison's attorney wrote again to the Union reiterating the earlier request and informing the Union that Pattison might institute legal action against the Union in State Court and/or the Labor Relations Commission. The Union never responded to any of Pattison's correspondence, nor did it respond to the letters sent directly by her attorney.

If the Union had no obligation to represent Pattison, its failure to respond to her repeated requests for assistance might be considered merely unprofessional; but where, as here, the Union had a legal duty to fairly represent Pattison, its failure to respond constitutes part of a pattern of gross neglect and unlawful discrimination. The Union argues that its failure to represent Pattison should be excused for several reasons. We discuss each below.

i) The Grievance was Untimely

The Union argues that Pattison never asked the Union to file a grievance on her behalf until well past the time deadlines for filing grievances specified in the collective bargaining agreement. Since the Union could not process a timely grievance on her behalf, the Union had no duty to process a grievance that was barred by the time limits of the collective bargaining agreement.

We have found, contrary to the Union's contentions, that Pattison requested the Union's assistance in fighting her termination in a telephone conversation with Wassmouth within a few days after having received her termination letter from Corbett.[45] During this conversation Pattison told Wassmouth that she wanted to file a grievance[46] concerning her termination.[47] Wassmouth replied that the Union would tell her whether she could file a grievance and would "get back" to her.

---

[45] In finding that Pattison sought the Union's assistance to challenge her termination we rely in part on Wassmouth's acknowledgement that Pattison had expressed an interest in reinstatement. We find it understandable that on or about March 11 in her first conversation with a representative of HLPE immediately following the March 8 interview with Hospital officials, Pattison might have been unsure of whether she wanted to return to work at the Hospital. Her subsequent conduct, however, made clear her interest both in clearing her employment record and in regaining her job.

[46] Whether Pattison actually used the word "grievance" or fully understood the technicalities of what it meant to file a "grievance" is immaterial to our decision in this case. From the facts found above, it is clear that Pattison requested the Union's assistance in contesting the Hospital's decision to terminate her. Whether that was undertaken through the vehicle of a contractual grievance, or through some more informal intercession by the Union, was undoubtedly of no consequence to Pattison. She merely sought whatever help the Union could provide and relied upon the Union to identify the procedural vehicle by which she might gain relief. We note that we do not fully endorse Pattison's argument that the Union had a duty to inform and educate her concerning her rights under the collective bargaining agreement. A union has an obligation to apply its expertise and knowledge of the collective bargaining agreement for the benefit of the employees whom it represents. Nonetheless, we perceive no legitimate basis for a requirement that unions undertake the legal education of members of the bargaining unit. While some unions do this as a matter of policy, it is not required by the Law. If Pattison had not communicated to HLPE her desire for Union representation and relief from the termination, the Union would not have been obligated either to imagine what remedy she might desire, or to engage in all possible conduct to achieve any conceivable remedies. The union's duty of fair representation must be undertaken with good faith cooperation on the part both of the union and the grievant. While the grievant is not required to incant the technical term for the relief she or he seeks, neither is the union required to guess at what the grievant wants. In this case, however, it

(continued; 47, see page 1363)

It appears that a grievance filed by HLPE immediately following Pattison's request to Wassmouth would have been timely under even a strict reading of the contract. Pattison's letter of March 25 to Corbett, copied to Keefe, gave Keefe timely notice of the fact that Pattison sought to challenge her termination through the grievance process. In addition, since Pattison conversed with Wassmouth between March 18, the date of the termination letter and March 25, HLPE knew within seven days of the date of Pattison's termination letter that she wanted to file a grievance to challenge the Hospital's decision.

The fundamental flaw in the Union's argument is that there is no proof that HLPE ever considered the timeliness or untimeliness of Pattison's grievance as a reason not to assist her in March, April, May, June, July, August, or September, 1985. Not only did the Union never respond to her requests for assistance during those months, but, at the hearing in this matter the Union never documented that it gave any consideration to Pattison's requests at the time they were made. Instead, the Union offered an elaborate ex post facto rationale of why Pattison's self-initiated grievance might have been considered untimely. In view of the notice taken of Pattison's lack of union membership, however, the Union needed to offer some explanation of its contemporaneous decision-making process and rationale when it decided neither to assist nor to respond to Pattison. In examining whether a union has breached a duty owed to a bargaining unit employee the Commission evaluates the conduct of the union in light of the reasons which motivated the conduct. The relevant inquiry is why did the Union engage in the conduct when it did. See, e.g., Fitchburg School Committee, 9 MLC 1399, 1415 (1982).

The record is devoid of any evidence that the Union considered the

---

46 (continued)
is clear that HLPE was adequately notified by Pattison that she desired assistance in challenging her termination.

47 (from page 1352)
At the hearing in this case, HLPE sought to question Pattison about the date when she first consulted with her attorney and learned what a "grievance" was. The Union sought to impeach Pattison's recollection that she had asked Wassmouth to file a grievance sometime prior to March 25. We sustained Pattison's objection to the question and reaffirm that ruling now because the date when Pattison consulted her attorney is immaterial to the resolution of this case. Wassmouth admits that Pattison said that she wanted to challenge her termination. Even if Pattison does not remember precisely the exact words that she used in her conversation with Wassmouth, the important point -- that she said that she wanted her job back -- is admitted by the Union's witness. In view of this, and in view of the various inconsistencies in the testimony of Keefe, Wassmouth and Riley described above we conclude that Pattison's testimony would not be impeached by any possible evidence concerning the date when she first consulted with her attorney.

timeliness of Pattison's grievance at the time that she sought the Union's assistance. To the contrary, the evidence suggests that neither Keefe nor any other HLPE official gave any thought to Pattison's request for assistance between the time that Wassmouth told Pattison not to call the Union again and the time that Pattison, through her attorney, threatened legal action against the Union. Keefe's shifting assertions of different reasons for the Union's failure to assist Pattison are not persuasive. First Keefe claimed that the basic reason that the Union had not helped Pattison was because she had never asked for her job back. This assertion was contradicted by Wassmouth's recollection that Pattison wanted her job back. It is further contradicted by the fact that HLPE had received a copy of Pattison's March 25 letter which announced Pattison's desire to grieve her termination. Next Keefe claimed that the ten-day period within which to file a grievance at the first step had passed before the Union knew that Pattison wanted to file a grievance. But Pattison's letter of March 25 to Corbett, copied to Keefe, in which she requests a review of the decision to terminate her and seeks a meeting under the grievance procedures, clearly gave Keefe timely notice of the fact that Pattison sought to challenge her termination and sought to do so through the grievance procedure. Yet Keefe made no response to Pattison. Even assuming, arguendo, that Pattison's letter of March 25 does not constitute a grievance within the meaning of the collective bargaining agreement,[48] the Union still had time to file a timely grievance after having received Pattison's March 25 letter.[49]

We note also that the issue of untimeliness is an unsatisfactory defense by the Union for another reason. The timeliness of a grievance is typically a defense raised by an employer in denial of a grievance. Although a union should be attentive to time periods and may choose not to process a grievance because it is untimely, it is unusual for a union to insist that a grievance is untimely, when the employer has not so contended. In this case the Hospital did not contend initially that Pattison's grievance was untimely filed or processed. Instead, the Hospital heard and responded to the merits of the grievance in a manner that was consistent with the past practice between the Hospital and the

---

[48] In fact, Pattison's March 25 letter appears to be a grievance filed by the employee at the first step of the grievance process.

[49] We reach this conclusion by considering the March 18 termination letter as the date of the Employer's action. A first step grievance could have been filed within ten working days of the date of the grievance or the employee's first knowledge of its occurrence. We reject the Hospital's suggestion that Pattison's time for filing a grievance began to run on March 8 when Pattison met with Corbett and Tzamos and was told that she would be terminated unless she resigned. There is no evidence that the Hospital told Pattison what date she would be terminated; and it is reasonable to conclude that she learned by the letter of March 18 that she was terminated that date.

Union. Both Keefe and Tzamos acknowledged that grievance time limits frequently had been waived by mutual agreement of the parties. Had HLPE conducted any investigation of the facts of Pattison's "grievance" it would have learned that the Hospital took the view that the time limits for processing the grievance at the second step, at least, had been extended.[50] In fact, as the Union concedes in its post-hearing brief, "[n]owhere is there any evidence that the City raised the issue of time limits..." HLPE Brief at 44. In light of this, we are constrained to reject the Union's contention that it could not have processed Pattison's grievance because of its initial untimeliness.

ii. Pattison's Request to HLPE to File a Request for Arbitration was Untimely

The Union also argues that Pattison's June 19 request that the Union request arbitration of her grievance was untimely because the time period for filing for arbitration had expired before Pattison wrote to the Union.

The collective bargaining agreement grievance procedure specifies that either party may file a request for arbitration "within (15) calendar days after the reply of the Mayor [at the third step] is due..." The Union notes that Pattison had filed her third step request on April 8, 1985 [which the Union concedes to have been within the time limits set forth in the collective bargaining agreement]. The Union calculates that the Mayor's response would have been due on or before April 22, 1985. After having received no response from the Mayor by that date Pattison, through her attorney, wrote to the Employer on April 22, 1985, asserting that the Employer's failure to respond within the contractually specified time period had resulted in "a favorable decision for the employee" pursuant to the provisions of Article 4.1, Step 3 of the contract. Without waiving her claim that she was entitled to have her grievance sustained by operation of the time provisions of the contract, Pattison subsequently agreed to meet with Tzamos and Attorney Grunebaum to discuss the grievance on May 7. The Union argues that even if the May 7 meeting is taken as a "third step" meeting, within the meaning of the collective bargaining agreement, the Employer's third step response would have been due on May 21, 1985. HLPE

[50] We note that the Hospital now contends that the grievance was untimely filed at the first step, while simultaneously arguing that the grievance was timely processed at the second step. Although we can appreciate the reluctance of any party to waive a possible defense, we are compelled by the evidence in this case to conclude that strict compliance with the contractual time limits was not the sine qua non of this particular grievance procedure. In fact, as the Hospital points out in its brief in this case, "the Hospital did not rely on this untimeliness of the filing of [the] grievance..." Hospital Brief at 10. Moreover, as noted above, if Pattison's March 25 letter constitutes a grievance at step one, it was filed within ten days of the March 18 termination letter.

contends that Pattison waited until July 19 to demand that the Union request arbitration, by which date any request for arbitration would have been untimely.

But the union also concedes that the Employer's "response" to the May 7 meeting, i.e. the letter of September 23, may have renewed the time period for filing for arbitration. "A right to request arbitration may be considered to have occurred after the City answered the 3rd Step meeting on September 23." Brief of HLPE, p. 34. Therefore, argues the Union, Pattison should have asked HLPE to file for arbitration once more after she had received the September 23 letter. The Union contends that Pattison's failure to inform the Union of the contents of the Hospital's September 23 letter denied the Union the opportunity to file for arbitration at that point. The Union characterizes Pattison's conduct as a decision to "ignore" the Union at that point, and HLPE argues that Pattison may not now complain of the Union's refusal to arbitrate.

In effect the Union contends that it was exonerated from responsibility for representing Pattison when she "ignored" the Union following her receipt of the Hospital's September 23 answer to her grievance. We have found, however, that Pattison gave the Union ample opportunity to assist her prior to September 23, 1985, and her selection of more formal means to compel the Union's attention (i.e. through the filing of a prohibited practice charge withthe Commission) rather than her continued reliance upon unanswered correspondence, does not justify the Union's complaint that it was not given the "opportunity" to assist her. To the contrary, HLPE was afforded ample opportunity either to assist Pattison or to make a contemporaneous, lawful decision not to assist her. In the absence of evidence that the Union did either, HLPE cannot now contend that Pattison excluded the Union from a process in which the Union would have participated.

C. Conclusion Concerning the Union's Duty of Fair Representation

Pattison first approached HLPE immediately after having been told that she must resign or be terminated. She expressed to the Union her confusion concerning possible reasons for her discharge and requested the Union's assistance with fighting the discharge. She may have been unsure about whether she wanted reinstatement, but she clearly informed the Union that she wanted to "fight" the termination. During the middle and end of March her telephone calls to the Union were more often unreturned than answered, and when she finally received a response from the Union it was to tell her that she had no grievance and that she should not call the Union again. At no point did the Union investigate whether Pattison was in the bargaining unit, at no point did the Union ask any representative of the Hospital to describe to the Union the reason for Pattison's termination, and at no point did the Union explain to Pattison why the Union would take no further action on her behalf. Instead the evidence demonstrates that the only information which the Union possessed when it made the decision not to assist Pattison further was the following: (1) she had replaced Emma Hassen, a bargaining unit member; (2) Tzamos and Corbett had met with Katherine Riley, whom they believed was acting as a representative of the

Union, to inform the Union that they were planning to terminate Pattison and that Pattison had worked a few days beyond the six-month probationary period;[51] (3) Pattison had telephoned HLPE's office on March 11 following her March 8 meeting with Corbett and had told the Union that she would be terminated if she didn't first resign, that she didn't understand the reasons, and had asked Keefe what she should do; (4) Pattison never had received a written warning; (5) Pattison had told Wassmouth that she wanted her job back; and, finally, (6) Pattison was not a dues-paying Union member. In sum, the information concerning Pattison's case available to HLPE as of the date that it stopped processing Pattison's grievance was that the Hospital apparently considered Pattison to be represented by the Union, that Pattison had served her six-month "probationary period," that she had received no written warning prior to discharge, that she was uncertain about the reasons for her termination, and she wanted her job back. HLPE offered no reason why this information would not have been sufficient to warrant pursuit of a grievance. Instead, shortly after HLPE confirmed that Pattison had never joined the Union and paid union dues it decided to drop the whole matter. In the absence of any expressed rationale for its failure to pursue this matter, or any apparent justification based upon the facts known to the Union at the time that Pattison sought assitance, we are constrained to conclude that the critical factor which caused the Union to refuse further assistance to Pattison was her non-membership in the Union.[52] By its refusal to assist Pattison to enforce her collective bargaining rights because of her lack of union membership HLPE breached its duty of fair representation in violation of G.L. c.150E, Section 10(b)(1). See Bellingham Teachers Association, 9 MLC 1536 (1982).

II. THE CASE AGAINST THE HOSPITAL

Count II of the Complaint alleges that the Hospital violated Section 10(a)(1) and (5) of the Law by failing to comply with the contractual grievance procedure which specifies that the Employer's failure to timely respond to a grievance will result in a favorable decision for the employee; and by

---

[51] The parties recognize a six-month probationary period for new employees during which time they are not protected by the "just cause" provisions of the contract. Pattison had been hired on or about August 14, 1985. Therefore, her six-month probationary period would have been passed on or about February 14, 1985.

[52] We also note that even in the absence of evidence of this unlawful motive, the Union's conduct amounted to gross negligence in this case. By its failure to investigate the merits of Pattison's complaint, the Union acted without regard for the facts or the contractual rights of Pattison. See Local 509, SEIU, 8 MLC 1173 (1983); Hines v. Anchor Motor Freight, Inc., 424 U.S. 454, 91 LRRM 2481 (1976).

unilaterally changing the practice of the following mandatory subjects: application of a progressive disciplinary system, and application of a just cause standard for discharge of non-probationary employees.

As noted by all parties, and acknowledged by the Commission,[53] the Commission has no precedent in this area.[54] The issue presented by Count II of the Complaint is whether an individual employee may proceed against her or his employer in an action to enforce the employer's duty to bargain in good faith with the union when the union has breached its duty to fairly represent the employee.[55] After considerable deliberation, and aided by the thoughtful briefs filed by the parties to this case, the Commission has concluded that the facts of this case do not warrant adoption of such a right of action under G.L. c.150E.

Pattison urges that she should be permitted to "stand in the shoes" of the Union in order to enforce the Hospital's good faith bargaining obligation. Because of the Union's breach of its duty of fair representation, the Union failed to compel the Hospital to comply with the contract and the parties' past practice to her detriment. Therefore, argues Pattison, she should be permitted to compel her employer's compliance with the contract and practice.

Pattison notes that under federal law, an individual employee covered by a collective bargaining agreement may bring a civil suit against the employer for breach of the agreement when the employee's union has violated its duty to fairly represent the employee. Such actions may be brought pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185(a). Smith v. Evening News Ass'n, 371 U.S. 195, 51 LRRM 2646 (1962); Republic Steel Corp.

---

[53] See Quincy City Hospital (Ruling on Employer's Motion to Dismiss Complaint), 13 MLC at 1130

[54] The Labor Relations Commission has previously authorized complaints for which no precedent exists. E.g., National Association of Government Employees, 13 MLC 1525 (1987). Through adjudication of such claims the Commission can determine on the basis of a full record whether the claim has merit. Issuance of a complaint does not reflect the Commission's belief that the alleged conduct violates the Law, but instead reflects the Commission's determination that there is probable cause to believe that the conduct could violate the Law. In addition, the Commission may authorize complaint in a case in which no precedent exists as a means by which to articulate the legal standards applicable to such a case.

[55] It is the Commission's policy to decline to authorize complaint upon any charge filed by an individual employee alleging that the employer has violated its statutory duty to bargain in good faith with a union, in violation of Section 10(a)(5), in the absence of an allegation that the union has not fairly represented the employee.

v. Maddox, 379 U.S. 650, 58 LRRM 2193 (1965). "[I]f an employee is discharged without cause, either the union or the employee may sue the employer under [the Labor Management Relations Act Section 301. 29 U.S.C. Section 185(a)]...to enforce [a] collective bargaining agreement [that contains a just cause clause]." Vaca v. Sipes, 386 U.S. 171, 183, 64 LRRM 2369, 2374 (1967). When an individual employee brings a Section 301 suit against an employer, applicable contractual grievance and arbitration procedures also must first be exhausted unless the employee has been unlawfully precluded from exhausting the procedures. Federal courts have recognized that an employee need not first exhaust the contractual grievance procedures when the union which has exclusive control over the procedures wrongfully refuses to process the employee's grievance to arbitration. As a prerequisite to bringing the Section 301 suit against the employer the employee must prove that the union breached its duty of fair representation in handling the employee's grievance. Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967).

> To leave the employee remediless in such circumstances would, in our opinion, be a great injustice. We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract. Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements. [citation omitted]
>
> For these reasons, we think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance. [citations omitted] Id. at 185-86, 64 LRRM at 2375.

State courts have concurrent jurisdiction to hear claims brought pursuant to Section 301(a) of the Labor Management Relations Act. Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 49 LRRM 2619 (1962); See Humphrey v. Moore, 375 U.S. 335, 55 LRRM 2031 (1964). The Massachusetts Supreme Judicial Court (SJC) has stressed that a prerequisite to an employee's Section 301 suit to compel employer compliance with a collective bargaining agreement is an allegation that the union has failed to fairly represent the employee in processing the contractual grievance. Balsavich v. Local 170, Int'l Bhd. of Teamsters, 381 Mass. 283, 286 (1976).[56]

[56] It is well established that in Section 301 actions for breach of a collective bargaining agreement the substantive law to be applied by the courts is "a federal common law grounded in national labor policy" rather than merely the common law of contract or tort. Bowen v. United States Postal Service, 459 U.S. (continued)

Quincy City Employees Union, H.L.P.E. and Nina Pattison, and City of Quincy and Nina Pattison, 15 MLC 1340

In dismissing an action brought by an employee of the Massachusetts Bay Transportation Authority (MBTA) to compel the MBTA to arbitrate a grievance brought without the union's endorsement the SJC relied upon principles articulated in Vaca v. Sipes. Norton v. Massachusetts Bay Transp. Auth., 369 Mass. 1 (1975). See also Leahy v. Local 1526, AFSCME, 399 Mass. 341 (1987). Recently, in Driscoll v. Boston Edison Co., 25 Mass. App. Ct. 954 (1988) (rescript), the Appeals Court noted that a plaintiff's claims for wrongful termination and breach of the duty of fair representation constitute a hybrid wrongful termination/fair representation action pursuant to Section 301.[57] See also Carbone v. School Comm. of Medford, 12 Mass. App. Ct. 948 (1981) (rescript); Frost v. Town of Framingham, 9 Mass. App. Ct. 843 (1980) (rescript).

None of the referenced state cases, however, suggests that an employee may pursue a hybrid refusal to bargain and duty of fair representation claim under G.L. c.150E. Rather, an employee who has been wrongfully terminated or otherwise harmed by the employer's breach of a collective bargaining agreement, and whose interests have not been fairly represented by the union, has recourse to the state courts for redress.[58] In view of the apparent protection already afforded to Massachusetts workers by the causes of action recognized in the Norton and Driscoll decisions, there appears no need to interpret G.L. c.150E to permit an employee to sue the employer for a breach of its bargaining obligation to the union.

In reaching this conclusion, we note that the Commission historically has distinguished beteen enforcement of the duty to bargain pursuant to G.L. c.150E, Section 6, and enforcement of the terms of a collective bargaining

---

[56] (continued)
212, 225, 112 LRRM 2281, 2286 (1983) (and cases cited therein). The Court has noted that "a collective-bargaining agreement 'is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.' United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578, 46 LRRM 2416 (1960)." Id. at 224, 112 LRRM at 2286. Although Massachusetts courts must apply this federal common law when they exercise their concurrent jurisdiction to hear Section 301 cases, Massachusetts courts have not discussed the distinction between traditional contract law and the labor law policies applicable to cases alleging breaches of a collective bargaining agreement.

[57] When an employee covered by G.L. c.150E pursues a hybrid breach of contract and duty of fair representation court action, the court may stay the action in order to defer to the Commission's primary jurisdiction to hear the duty of fair representation portion of the case. Leahy, 399 Mass. at 351 n.5.

[58] Employee civil suits against an employer also may include allegations grounded in tort or in individual employment contract theories.

agreement. See, e.g., Town of Watertown, 5 MLC 1922 (1979). Thus, the Commission has long maintained that actions merely to correct a breach of a collective bargaining agreement do not, without more, constitute violations of Section 10(a)(5) of G.L. c.150E.[59] Although the conduct complained of may both breach the collective bargaining agreement and violate the duty to bargain in good faith (as where a long-standing term of employment, incorporated into the collective bargaining agreement, is unilaterally changed), the Commission processes the charge alleging a unilateral change in the mandatory subject of bargaining, while the parties may separately enforce the breach of the contract. See generally Mendes v. City of Taunton, 366 Mass. 109 (1974).[60]

Pattison next argues that the National Labor Relations Board (NLRB) occasionally has permitted individual employees to allege that an employer has violated its duty to bargain with a union pursuant to the National Labor Relations Act (NLRA), 29 U.S.C. Sections 141 et seq. -- a statute analogous to c.150E. While the NLRB has decided a small number of cases filed by individual employees alleging an employer's refusal to bargain, it has not explained why individual employees may assert the union's bargaining rights. See, e.g., Alfred M. Lewis, Inc., 229 NLRB 757 (1977) (Administrative Law Judge (ALJ) noted that the union had filed but withdrawn a grievance concerning the employer's conduct. ALJ concluded that Board's policy of deferring to grievance arbitration process dictated that withdrawn grievance be considered resolution to which NLRB should defer. On appeal, NLRB reverses ALJ's deferral conclusion but does not discuss the issue of the individual employee's standing to bring charge). The General Counsel of the NLRB has counseled against permitting employees to bring refusal to bargain charges. See NLRB General Counsel Advisory Memorandum in ITT Continental Baking Company, Case No. 25-CB-11118, 103 LRRM 1499 (1980) (advising that charge brought by individual employee alleging employer refusal to furnish information to union should be dismissed to avoid interference with union's right to decide how best to conduct its relations with the employer. The case is distinguished from situations in which the union's conduct breaches the duty of fair representation).[61] Because the decisions of the NLRB offer no

---

[59] A party's repudiation of a collective bargaining agreement, however, does constitute an unlawful refusal to bargain. E.g., Adrian Advertising, 13 MLC 1233 (1986), aff'd sub nom. Despres v. Labor Relations Commission, 25 Mass. App. Ct. 430 (1988).

[60] For a discussion of the analogous federal statutory scheme see C&C Plywood Corp., 385 U.S. 421, 64 LRRM 2065 (1967) (relying on legislative history of NLRA to conclude that Congress had not intended NLRB to have jurisdiction over actions to interpret collective bargaining agreements). See also Arnold Co. v. Carpenters District Council, 417 U.S. 12, 86 LRRM 2212 (1974).

[61] See n. 55, supra.

articulated rationale for granting standing to an individual employee to pursue enforcement of the employer's bargaining obligation with the union they do not persuade us to adopt the NLRB's infrequent practice, especially in view of the absence from G.L. c.150E of any indication that individuals should be granted standing to enforce the employer's obligation to bargain with a union.[62]

The language of G.L. c.150E does not require that employees be permitted to pursue a pure refusal to bargain charge even when the union itself has failed to bring the charge in breach of its duty to represent the employee fairly. The express policy of G.L. c.150E favors collective action while mandating the protection of individual rights. Section 5 of G.L. c.150E permits individual employees to present grievances to the employer for resolution consistent with the terms of the collective bargaining agreement. That section has not been interpreted to compel an employer to bargain with an individual employee.[63]

Thus, an employee has a right to present a grievance to the employer but no corresponding right to compel the employer to bargain with anyone other than the exclusive collective bargaining representative. The object of a prohibited practice charge alleging an employer's refusal to bargain (through unilateral changes or other conduct) is the vindication of the union's bargaining rights and preservation of its exclusive representative status. Although in theory the Commission could permit an individual employee to bring a unilateral change (or other refusal to bargain) charge against the employer when the union has refused to do so, we believe that such a right of action would interfere with stable labor relations more than it would enhance the conduct of collective bargaining.

---

[62]Of course a charge filed by an individual on behalf of a union does not raise the same issues posed by a charge filed in contravention of a position taken by the union.

[63]An analogous provision of Section 9(a) of the NLRA, 29 U.S.C. Section 159(a) contains a proviso that states:

> That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect...

This proviso has been interpreted by the United States Supreme Court as follows:

> The intendment of the proviso is to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative, a violation of Section 8(a)(5). H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 7 (1947); H.R. Rep. No. 510, 80th Cong., 1st Sess., p. 46 (1947) (Conference Comm.). The Act nowhere protects this "right" by making it

(continued)

Permitting an individual employee to pursue a unilateral change prohibited practice charge in place of the union would create several problems. First, it would unfairly penalize an employer who has relied to its detriment upon either the union's acquiescence or agreement to an announced or implemented change in working conditions. An employer would be unable to ascertain whether a union's agreement to, or acquiescence in, a unilateral change is a legitimate exercise of the union's discretion or instead is the result of its breach of the duty of fair representation. Second, there may be cases in which a union, in breach of its duty to fair representation, fails to protest a unilateral change that initially affects one employee. Later the employer's unilateral action may affect more unit employees and the union may decide, now for legitimate reasons, to acquiesce in the employer's conduct.[64] The individual employee's pursuit of a unilateral change charge could interfere with the union's legitimate decision to either agree to, or acquiesce in, the change when it affects more employees. If the majority of employees in the bargaining unit disagree with the Union's conduct, they may take steps to remove the union as the exclusive representative. If an individual employee is harmed by the union's breach of the duty of fair representation, the union will be ordered to provide an appropriate remedy. On balance, we conclude that the rights of individual employees appropriately are protected by remedies available through prohibited practice charges brought against the union that has breached the duty of fair representation rather than by procedures which necessarily substitute the employee for the union in charges brought against the employer.

Moreover, there are procedural impracticalities to an individual employee's litigation of a unilateral change charge. In preparation for the charge, the individual employee will lack the union's full access to information concerning the union's complete bargaining position, or the history of the practice that is alleged to have been changed. Because the Commission's investigatory procedures presently do not accommodate full pre-investigation or pretrial discovery by the parties, an individual employee should have significant difficulty attempting to prove both the past practice and the union's past bargaining position. For all of the above reasons, we decline to extend to individual employees standing to allege that their employer has violated its duty to bargain with their union. Instead, individual employees may seek a remedy

---

63 (continued)
an unfair labor practice for an employer to refuse to entertain such a presentation, nor can it be read to authorize resort to economic coercion. This matter is fully explicated in Black-Clawson Co. v. Machinists, 313 F.2d 179, 52 LRRM 2038 (CA 2 1962). See also Republic Steel v. Maddox, 379 U.S. 650, 58 LRRM 2193 (1965).

Emporium Capwell Co. v. WACO, 420 U.S. 50, 61, n.12, 88 LRRM 2660, 2665 n. 12 (1975).

64 The Commission frequently has dismissed cases in which a union alleges a unilateral change but the evidence demonstrates acquiescence. See generally Scituate School Committee, 9 MLC 1010 (1982).

for the employer's action through a prohibited practice charge filed against their union for its failure to fairly represent them. Accordingly, the charge against the Employer, case no. MUP-6037, is dismissed.

REMEDY

We have concluded that the Union breached its duty to fairly represent Pattison when it failed and refused to assist her to pursue a grievance concerning her termination. In view of our conclusion that the Employer has not committed an unfair labor practice, we find no basis for assessing liability against the Employer. Thus, the remedy which we order will be applicable only to the Union.

Pattison argues that if the Commission finds that the Union alone has violated the Law, the Commission should order the Union to compensate her fully for all economic losses caused by the Union's conduct. Pattison acknowledges that the Commission has previously expressed approval for remedial orders that direct a union which has breached its duty of fair representation to take any steps necessary to resolve the charging party's grievance.

The Union's post-hearing brief argues that the only remedy that can be ordered in this case is an order directing the Union and the Employer to arbitrate Pattison's grievance. It does not further discuss the appropriate remedy in the event that it alone is found to have violated the Law.

The Commission previously has imposed liability upon unions which have breached the duty of fair representation by ordering the union to take any and all steps necessary to have the grievance resolved, or, failing that, to make the charging party whole for the damage sustained as a result of the union's unlawful conduct. See, e.g., Bellingham Teachers Association, 9 MLE 1536, 1550-51 (1982); Local 195, Independent Public Employees Association, 8 MLC 1222 (1981). Such a remedy is appropriate in the instant case as well.

Since the Union has caused the harm to the Charging Party by its failure to process a grievance in her behalf, we shall direct the Union to first attempt to remedy the harm to the Charging Party by taking all steps necessary to have Pattison's grievance resolved. This will include, at minimum, a written request from the Union to the City either to arbitrate the mertis of Charging Party's grievance, including an offer by the Union to pay the full costs of arbitration, or to provide to the Charging Party the grievance remedy that would have been sought by the Charging Party from an arbitrator (i.e. reinstatement to her former (or substantially equivalent) position with full back pay). If the grievance is processed to arbitration, it seems clear from the conduct of this case that the Union cannot be expected to represent the Charging Party in the arbitration. Therefore, the Union will be liable for the full reasonable and necessary costs incurred by the Charging Party to secure legal representation in connection with arbitration of the grievance.

If the City does not agree to arbitrate or otherwise fully resolve the Charging Party's grievance, the Union shall be liable for the Charging Party's losses resulting from its failure to process her grievance.[65] In the instant case, the remedy will include making Pattison whole for any monetary loss suffered as a direct result of her discharge by the Employer, including lost earnings and benefits from the March 18, 1985 date of her discharge until Pattison is reinstated by the City or obtains other substantially equivalent employment, plus interest.

Although the Commission does not adjudicate the merits of a charging party's grievance in the context of a duty of fair representation charge, the evidence presented at the Commission's hearing in this matter is sufficient to demonstrate that Pattison's grievance is not "clearly frivolous." Therefore, the provisional make whole remedy against the Union is justified. See Bellingham Teachers Association, 9 MLC at 1541 n. 13 (1982). In fact, the evidence presented by Pattison at the hearing was sufficient to establish that a reasonable arbitrator could find that the grievance had merit; and the Union's evidence failed to demonstrate that the grievance was clearly nonmeritorious. We note that the standard by which a grievance should be evaluated recently has been the subject of much discussion by the NLRB and the federal courts. See United Rubber, Cork, Linoleum and Plastic Workers of America Local 250, AFL-CIO (Mack-Wayne Closures), 290 NLRB No. 90 (1988) and cases cited therein. We have concluded that the "not clearly frivolous" standard applied by the Commission in Bellingham, supra, is appropriate.

In a recent Supreme Judicial Court opinion, the Court imposed back pay liability on a union that had admitted mishandling a grievance and had stipulated that the grievant would have won the grievance on the merits. The Court analogized to legal malpractice cases when it concluded that the union was liable for the same remedy that the grievant would have received had the union properly fulfilled its duty to represent the grievant. Leahy v. Local 1526, AFSCME, supra.[66] In the absence of a stipulation of union liability, we

---

[65] If the City agrees to reinstate the Charging Party without an arbitration hearing, or voluntarily agrees to provide some other partial remedy, the Union of course will be obligated to make Pattison whole for the remainder of the remedy.

[66] We note that the Court's opinion does not suggest that a plaintiff employee must prove the equivalent of "legal malpractice" in order to win a fair representation claim. Because the Union in Leahy had stipulated to liability, the plaintiff had no burden to litigate the issue of liability. In DelCostello v. Teamsters, 462 U.S. 151, 167, 113 LRRM 2737, 2743 (1983), the Supreme Court observed that the analogy between union fair representation and attorney malpractice claims (for purposes of applying a statute of limitations) suffers from objections "peculiar to the realities of labor relations and litigation." See also Boston Teachers Union, 12 MLC 1577, 1588 (1986) and cases cited therein.

conclude that the Charging Party has fulfilled her prima facie burden by adducing evidence sufficient to establish that her grievance would not have been "clearly frivolous." The Union failed to rebut the Charging Party's prima facie showing by adducing persuasive evidence that the grievance would not have succeeded at arbitration.[67] Although we make no findings about these issues, we note that Pattison adduced evidence that could lead an arbitrator to conclude that she was eligible for the protection of the just cause provision of the collective bargaining agreement, and that she did not receive a written warning pursuant to the Employer's progressive disciplinary policy prior to her discharge. In addition, Pattison adduced evidence which could lead an arbitrator to conclude that the City lacked "just cause" for discharging her. Accordingly, Pattison has met her burden to establish that the grievance was "not clearly frivolous," while the Union failed to adduce evidence sufficient to establish that the grievance lacked merit.[68] Accordingly, it is appropriate that the Union be ordered to make Pattison whole for her monetary loss directly resulting from the Union's failure to properly process her grievance if it cannot persuade the Employer to arbitrate the grievance on the merits.

In addition, the Union shall post the notice to employees attached as the Appendix to this Decision in conspicuous places at its business office and meeting hall and in all places where Union notices are customarily posted to employees of the Hospital to assure employees that the Union will not violate the Law.

---

[67]We note that a union might wish to postpone its rebuttal of this aspect of a charging party's prima facie case until after the unfair labor practice proceeding. If the union's conduct is found to have violated the Law and the Union is ordered to process the grievance through the arbitration process, the union and the grievant would be at a distinct disadvantage if the union has been forced to disclose all of the weaknesses in the grievance during the unfair labor practice case. Therefore, in the future, a union may make an unequivocal election on the record of the prohibited practice hearing to postpone until the compliance stage its rebuttal concerning the merits of the charging party's grievance. In such a case if the merits of the grievance cannot be resolved in the grievance arbitration process following the unfair labor practice proceeding, the union will be given the opportunity in a subsequent compliance proceeding to reduce its liability for the breach of the duty of fair representation by demonstrating that the grievance would have been lost for reasons not attributable to the union's misconduct. See generally United Rubber, Cork, Linoleum and Plastic Workers of America Local 250, AFL-CIO, supra. Because HLPE did not raise any concern about this issue in the instant proceeding, we have no reason to delay until the compliance stage our determination of the extent of HLPE's liability in this case.

[68]The Union's principal evidence rebutting Pattison's prima facie showing concerning the grievance was that the grievance would have been untimely. For the reasons discussed above, we have concluded that the evidence is insufficient

(continued)

ORDER

WHEREFORE, pursuant to the authority vested in the Commission by Section 11 of the Law, it is HEREBY ORDERED in case no. MUP-6037 that the Complaint against the City of Quincy be dismissed in its entirety, and it is FURTHER ORDERED in case no. MUPL-2883 that the Quincy City Employees Union, HLPE shall:

1. Cease and desist from:

   a) refusing to process grievances because of an employee's non-membership in HLPE, or

   b) otherwise interfering with, restraining, or coercing any employee in the exercise of any right guaranteed under the Law.

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

   a) Request the Quincy City Hospital to offer Nina Pattison reinstatement to her former position, or if that position no longer exists, to a substantially equivalent position, with full back pay to March 18, 1985. If the Quincy City Hospital declines to offer Nina Pattison reinstatement with full back pay, HLPE shall request in writing that the Quincy City Hospital waive any time limits that may bar further processing and arbitration of Nina Pattison's grievance and HLPE shall offer to pay the cost of arbitration. If the Quincy City Hospital agrees to waive any applicable time limits and to arbitrate the merits of Pattison's grievance, HLPE shall process the grievance to conclusion in good faith and with all due diligence and shall pay the cost of arbitration if so agreed by the Hospital. Because HLPE's conduct indicates an inability on the part of HLPE to adequately represent Pattison's interests, HLPE shall pay the reasonable and necessary costs of a private attorney selected by Pattison to represent her in connection with arbitration of the grievance. In addition, HLPE shall pay all of the costs which would otherwise have been incurred by HLPE in processing the case to arbitration.

   b) Make Pattison whole for the loss of earnings[69] she may have suffered as a result of her discharge from Quincy City Hospital

---

68 (continued)
to establish that Pattison's grievance would have been untimely had the Union properly responded to Pattison when she first requested its assistance.

69 The amount of compensation for which HLPE is liable will be reduced by any compensation paid by Quincy City Hospital to Pattison for the period during which back pay liability accrues.

from the date of her discharge, March 18, 1985, until the earlier of the following: (a) the date when she is offered reinstatement by Quincy City Hospital to her former or a substantially equivalent job; or (b) the date when Pattison obtained, or obtains, other substantially equivalent employment. HLPE's obligation to make Pattison whole includes the obligation to pay Pattison interest on all money due at the rate and pursuant to the formula described in Everett School Committee, 10 MLC 1609 (1984).

c) Immediately post in conspicuous places at its business office and meeting hall and at all places where notices to bargaining unit employees and HLPE members are customarily posted, including all such places at Quincy City Hospital, copies of the attached notice marked "Appendix." Postings of the notice, after being signed by the Executive Director of HLPE, shall be maintained for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by HLPE to insure that said notices are not altered, defaced, or covered by any other material. If HLPE is unable to post copies of the notice at all places where notices to bargaining unit employees are customarily posted at Quincy City Hospital, HLPE shall immediately notify the Executive Secretary of the Commission in writing, so that the Commission can request the Quincy City Hospital to permit the posting.

d) Notify the Commission, in writing, within thirty (30) days from the date of this Order, of the steps taken by HLPE to comply with this Order.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

MARIA C. WALSH, COMMISSIONER

ELIZABETH K. BOYER, COMMISSIONER

Quincy City Employees Union, H.L.P.E. and Nina Pa tison, and City of Quincy and Nina Pattison, 15 MLC 1340

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

After a hearing at which all sides had the opportunity to present evidence and to make arguments, the Massachusetts Labor Relations Commission has found that we violated M.G.L. c.150E, the Public Employee Collective Bargaining Law, and has ordered us to post this notice and to comply with what it says:

The Massachusetts Public Employee Collective Bargaining Law gives all employees the following rights:

> the right to engage in concerted, protected activity, including the right to form, join and assist unions, to improve employee 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 a concerted protected activity, or forming, or joining or assisting unions.

WE WILL NOT fail or refuse to fairly represent any employee in a bargaining unit represented by us because of his or her membership in Quincy City Employees Union; HLPE.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of rights guaranteed by the Law.

WE WILL request the Quincy City Hospital to offer reinstatement to Nina Pattison to her former position, or, if it no longer exists, to a substantially equivalent position with full back pay. If the Hospital declines to offer reinstatement to Nina Pattison to her former, or a substantially equivalent position, we will ask the Quincy City Hospital to process a grievance concerning Pattison's termination, and we will pursue the grievance in good faith and with due diligence.

Because the Commission has decided that we violated the Law by failing and refusing to process a grievance on behalf of Nina Pattison, WE WILL make her whole for any monetary losses she has suffered by reason of our failure to process her grievance.

Quincy City Employees Union/HLPE

by:_____
Executive Director