

MASSACHUSETTS SOCIETY OF PROFESSORS/MTA/NEA AND ROBERT B. DAVIS, SUPL-2348
(5/9/89). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

72.3 agency service fee
92.311 service
92.51 appeals to full commission

Commissioners participating:

Paul T. Edgar, Chairman
Maria C. Walsh, Commissioner
Elizabeth K. Boyer, Commissioner

Appearances:

Robert B. Davis - Pro Se
Brian A. Riley, Esq. - Representing the Massachusetts
Society of Professors/MTA/NEA

DECISION ON APPEAL OF
HEARING OFFICER'S DECISION

Statement of the Case

Hearing Officer Amy L. Davidson issued a decision on December 17, 1987,¹ holding that the Massachusetts Society of Professors/MTA/NEA (Union) had violated Section 10(b)(1) of G.L. c.150E (the Law) by seeking the suspension of Robert B. Davis (Davis) for failing to pay an agency service fee, because the Union had not "served" the demand for the fee upon Davis as required by Section 17.05(1) of the Commission's Rules, 456 CMR 17.05(1).² The Union filed a notice of appeal with the Labor Relations Commission (Commission) on December 28, 1987, and a Supplementary Statement on March 4, 1988, arguing that the hearing officer had factually and legally erred in holding that service of a postal notice of certified mail upon Davis' residence did not constitute "service" of the demand for purposes of Rule 17.05(1). For the reasons set forth below, we affirm the hearing officer's findings of fact, as summarized below, and her ruling that the Union violated Section 10(b)(1) of the Law.

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The hearing officer's decision is reported at 14 MLC 1389.

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456 CMR 17.05(1) provides as follows:

A bargaining agent seeking payment of a service fee shall serve a written demand for the fee upon the employee from whom the fee is sought. The written demand shall include the amount of the service fee, the period for which the fee is assessed, the method by which payment is to be made, the person to whom payment should be made, and the consequences of a failure to pay the fee.



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Facts

As a member of the faculty bargaining unit at the University of Massachusetts, Amherst (University) but a nonmember of the Union, Davis was subject to the agency fee provisions in the collective bargaining agreement between the University and the Union in effect at all times relevant to this case.³ Davis had been on a sabbatical leave in Australia during the 1983-84 academic year but had returned to his University position and his residence at 153 Main Street, Sunderland, Massachusetts, in the fall of the 1984-85 academic year. In December, 1984, Davis received mail at a post office box and at his sister-in-law's residence⁴ as well as at his own residence.

On or about December 7, 1984, the Union sent to Davis by certified mail/return receipt requested a written demand for payment of the 1984-85 service fee of \$276.00. The U.S. Postal Service left notice at Davis' residence on December 8 and December 14, 1984, that it had certified mail for him to claim.⁵ On December 26, 1984, the Post Office returned to the Union the unopened envelope marked "unclaimed." Davis testified that he did not receive the postal notice. The record discloses no other efforts by the Union to demand payment of the 1984-85 service fee from Davis.

By letter dated November 1, 1985, mailed to Davis' residence and received by him on or about November 2, 1985, the President of the University informed Davis that the Union was seeking his suspension, pursuant to the agency fee provisions of the collective bargaining agreement, for failure to pay the 1984-85 service fee. In January, 1986, Davis filed the prohibited practice charge with the Commission which has given rise to the present case.⁶

Opinion

A union violates Section 12 and therefore Section 10(b)(1) of the Law if it seeks to have a nonmember suspended (or otherwise sanctioned) in accordance with a

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The full text of the contractual provisions are set forth in the hearing officer's findings of fact, 14 MLC at 1389-90.

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The hearing officer referred to Davis' "sister's" rather than "sister-in-law's" residence, as the transcript actually reflects.

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The parties stipulated that the Union had received a notice from the U.S. Postal Service indicating that delivery had been attempted on December 8 and on December 14, 1984.

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The Commission's Rules prohibit termination of any employee for failure to pay the fee during the pendency of an agency service fee charge at the Commission. 456 CMR 17.16(2).



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contractual agency service fee clause without first demanding payment of the fee from the nonmember in the manner described in the Commission's Rules, 456 CMR 17.05. See Leominster Education Association, 9MLC 1114 (1982). The Union contends in this case that it served Davis with a fee demand by mailing its demand letter to him by certified mail, even though that document was returned to the Union in an unopened envelope marked "unclaimed." In view of the potentially severe consequences of a nonmember's failure to pay a fee, we conclude that "service" of a fee demand requires evidence that a nonmember received a demand⁷ or that he or she deliberately evaded receipt, and we affirm the hearing officer's decision that the Union violated Section 10(b)(1) of the Law. Since we have not previously addressed this issue, however, we deem it appropriate to clarify the service requirements under Rule 17.05(1).

In order to establish that a union seeking the nonmember's suspension or termination has failed to properly serve the demand for fee payment, the charging party must establish that he or she has not received the fee demand.⁸ In order to rebut the charging party's assertion, the union must establish by a preponderance of the credible evidence that the charging party actually or constructively received the demand. The Union may meet this burden by establishing: that the nonmember or another competent adult residing with the nonmember signed a return receipt showing postal delivery of the document; that the nonmember was given the document in person; or that the document was left at the nonmember's last and usual residence.⁹ The union also may defend against the nonmember's assertion of non-receipt by evidence that the nonmember evaded receipt, e.g., evidence that the nonmember intentionally discarded the demand or avoided its delivery.¹⁰

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Evidence that a nonmember received a demand includes proof that the nonmember either actually or constructively received notice of the demand, as discussed below.

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For example, the charging party can meet this initial burden of proof through credible testimony establishing non-receipt of the union's demand.

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In articulating the foregoing service requirements, we are guided by the personal service requirements set forth in Rule 4(d) and (e), Mass. R. Civ. P. 4(d) and (e). We emphasize, however, that a union will be held to have served the demand if it can prove that a nonmember actually received a fee demand, even if the union employed a method of service different from those outlined above. For example, a union that mailed a demand by first class mail or left a demand letter in the nonmember's school mailbox may still validly pursue the fee, if clear and convincing evidence (such as an admission by the nonmember) demonstrates that the nonmember who claims not to have received the demand in fact received it.

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We may not necessarily require the union to show that a nonmember knew that the postal notice pertained to an agency fee demand letter when demonstrating that
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The definition of "service" which we adopt is consistent with Conte v. School Committee of Methuen, 4 Mass. App. Ct. 600 (1976). There the Appeals Court affirmed the general principle that "notice is 'given' only when received by the person to whom it is directed..." However, the court held that the plaintiff was effectively served because he had knowingly avoided delivery of the school committee's nonrenewal notice. 4 Mass. App. Ct. at 604. The foregoing service rules will also encourage unions to ensure actual receipt by nonmembers of fee demands, without requiring in-hand service and without unduly abridging nonmembers' rights to pursue meritorious fee charges.

In the present case, the nonmember established by a preponderance of the credible evidence that he was not served with a demand for the fee. Therefore, the Union violated Section 10(b)(1) of the Law when it pursued Davis' suspension without having served him with a demand for payment of the agency fee in accordance with Rule 17.05(1). To remedy this violation, we issue the following Order.

Order

Wherefore, based upon the foregoing, it is hereby ordered that the Massachusetts Society of Professors, MTA/NEA (Union) shall:

1. Cease and desist from seeking the suspension of, or any other sanction against, Robert B. Davis for the failure to pay an agency service fee for the 1984-85 academic year without first having served him with a demand for the fee.
2. Withdraw any request for the suspension of Davis based upon his failure to pay an agency service fee for the 1984-85 academic year pursuant to the Union's December 7, 1984 demand for the fee.
3. Sign and post in all places where employees represented by the Union usually congregate and where notices are normally posted,¹¹ and leave

¹⁰ (continued)

the nonmember deliberately evaded delivery of the letter. It may suffice for the union to show that the nonmember deliberately evaded delivery of the letter, without also having to show that the nonmember was aware of the contents. However, as we determine in this case, the fact that the union can establish that the postal service left notices of attempted delivery of the demand letter at the nonmember's residence does not, without more, establish that the nonmember intentionally evaded delivery of the demand.

¹¹

If the Union has no access to bulletin boards on the Employer's premises it shall request permission in writing of the Employer to post the notice on the Employer's bulletin boards. If the Union is unable to secure permission to post the notice on the Employer's premises the Union shall promptly notify the Commission. Upon receipt of such notice the Commission shall set alternative publication requirements.



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posted for a period of not less than thirty (30) consecutive days, copies of the attached Notice to Employees.¹²

- 4. Notify the Commission within thirty (30) days of receipt of this Decision and Order of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, CHAIRMAN
MARIA C. WALSH, COMMISSIONER
ELIZABETH K. BOYER, COMMISSIONER

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

After a hearing, the Labor Relations Commission has determined that the Massachusetts Society of Professors/MTA/NEA (Union) violated Section 10(b)(1) of the Law by seeking the suspension of Robert B. Davis for failure to pay an agency fee for the 1984-85 academic year without first having served him with a demand for the fee.

WE WILL NOT seek the suspension of, or any other sanction against Robert B. Davis for the failure to pay an agency service fee for the 1984-85 academic year without first serving him with a demand for the fee.

WE WILL withdraw any request for the suspension of Davis based upon his failure to pay an agency service fee for the 1984-85 academic year pursuant to our December 7, 1984 demand.

President
Massachusetts Society of
Professors/MTA/NEA

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The thirty (30) day posting period is to occur during the school year in order to promote the likelihood of ample notice to employees. If the school year ends before the completion of the thirty (30) day posting period the Union is required to repost the notice for the remainder of the thirty (30) day period at the start of the next school year.

