

In the Matter of SALEM TEACHERS UNION, LOCAL 1258,
MFT, AFT, AFL-CIO

and

ELIZABETH ANNE BABCOCK

Case No. MUPL-04-4479

72.22 *duty to investigate and process grievance*

April 14, 2009

Marjorie F. Wittner, Chair

Elizabeth Neumeier, Board Member

Jeffrey W. Jacobsen, Esq. *Representing the Salem Teachers
Union, Local 1258, MFT, AFT,
AFL-CIO*

Elizabeth Anne Babcock *Pro Se*

DECISION

Summary

The Commonwealth Employment Relations Board (Board) has determined that the Respondent did not violate Section 10(b)(1) of MGL c. 150E (the Law) when it refused to process two grievances over the Salem School Committee's refusal to allow teachers to place materials in teachers' mailboxes without prior approval. The findings reflect that the Respondent's decision was based on its interpretation of the collective bargaining agreement as granting Respondent, not other entities or individuals, general, unrestricted access to teacher's mailboxes. Therefore, the Respondent did not violate its duty of fair representation where there is no evidence that its decision not to process the grievances was improperly motivated, arbitrary, perfunctory or demonstrative of inexcusable neglect.

1. Pursuant to 456 CMR 13.02(1) of the former Labor Relations Commission's regulations, this case was designated as one in which the former Labor Relations Commission would issue a decision in the first instance. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." The Commonwealth Employment Relations Board (Board) is the body within the Division charged with deciding adjudicatory matters.

2. In addition to the charge against the Union, Babcock filed a charge on January 8, 2004 against the Salem School Committee (School Committee), and the former Commission docketed that charge as Case No. MUP-04-4008. On March 2, 2005, the former Commission issued a complaint and partial dismissal in Case No. MUP-04-4008 and consolidated that case for hearing along with Case No. MUPL-04-4479. On March 24, 2005, Babcock filed a timely reconsideration request in Case No. MUP-04-4008 but did not request reconsideration of the dismissed allegations in Case No. MUPL-04-4479. The former Commission issued an amended complaint of prohibited practice and dismissal in Case No. MUP-04-4008 on May 19, 2005. For the sake of consistency, the former Commission issued an amended complaint of prohibited practice and partial dismissal (Amended Complaint) in Case No. MUPL-04-4479 on May 19, 2005 as well. Because the allegations in the Amended Complaint were unchanged from the prior complaint, the Un-

Statement of the Case¹

On January 8, 2004, Elizabeth Anne Babcock (Babcock) filed a charge with the former Labor Relations Commission (Commission), alleging that the Salem Teachers Union, Local 1258, MFT, AFT, AFL-CIO (Union) had violated Sections 10(b)(2) and 10(b)(1) of MGL c.150E (the Law). Following an investigation, the former Commission issued a complaint and partial dismissal on March 2, 2005, dismissing some allegations and alleging that the Union had violated Section 10(b)(1) of the Law when the Union interfered with, restrained, and coerced bargaining unit employees in the exercise of their rights guaranteed under Sections 2 and 5 of the Law by refusing to file grievances regarding: (1) a prohibition against the distribution of materials relating to the Union and collective bargaining; and (2) the employer's requirement that distribution of those materials had to be pre-approved. The Union filed its answer to the complaint on March 14, 2005.²

On July 14 and 15, 2005, Victor Forberger, Esq., a duly-designated Division Hearing Officer (Hearing Officer) conducted a hearing at which all parties had the opportunity to be heard, to examine witnesses, and to introduce evidence. On December 16, 2005, the Union and Babcock filed their post-hearing briefs. Babcock filed challenges to the findings on May 21, 2008.³ The Union did not file any challenges. After reviewing challenges and the record, we adopt the Hearing Officer's recommended findings of fact, as modified where noted, and summarize the relevant portions below.⁴

Findings of Fact⁵

The Union represents teachers employed by the School Committee in Salem High School, a middle school, and seven grade schools.⁶ The School Committee provides mailboxes through which various memoranda and documents are circulated to its teachers. Teachers have used these mailboxes to distribute educational materials to each other as well as non-work related information, including announcements for social gatherings and birthday cards.⁷

ion did not file a second answer in this matter. On May 16, 2005, Babcock filed a motion to amend the complaints in both Case Nos. MUP-04-4008 and MUPL-04-4479 with additional allegations. The Union filed its response on May 24, 2005. On August 12, 2005, the former Commission denied Babcock's motion to amend the Amended Complaint against the Union.

3. On April 2, 2008, the Hearing Officer extended the parties' time for filing challenges to May 12, 2008.

4. The findings regarding the "Vote No" Letter, the First Ratification Vote, and the Second Ratification Vote are identical to the findings issued in Case No. MUP-04-4008 under the same subject headings.

5. The Board's jurisdiction is uncontested.

6. This finding has been modified to conform to the record evidence.

7. Several witnesses expressed their understanding of how teachers had used their mailboxes previously. That testimony did not indicate prior specific uses of teachers' mailboxes. Thus, the Hearing Officer declined to find that their testimony provides a credible and substantial basis for concluding that any particular materials, other than what is noted above, had previously been delivered in teachers' mailboxes.

On behalf of its members, the Union negotiated a collective bargaining agreement (Agreement) with the School Committee on September 18, 2000, effective by its terms from September 1, 2000 to August 31, 2003. Article IX, “Union Privileges and Responsibilities,” sets forth in Section C(2)(b) that the “Union shall have the right to place its material[s] in the mailboxes of all teachers.”⁸ Babcock served as President of the Union from 1997 to 2001.

“Vote No” Letter

At the start of the 2003 to 2004 school year, the Union and the School Committee reached a tentative agreement regarding a successor collective bargaining agreement (Successor Agreement) to the expiring Agreement.⁹ The Union scheduled a ratification vote on September 15, 2003 and a membership meeting on September 8, 2003 to describe the contents of the proposed Successor Agreement. At the September 8th meeting, Union President David McGrath (McGrath) and a field representative for the Union, Jay Porter (Porter), answered questions about the proposed Successor Agreement. Members of the Union’s negotiating team were present at the meeting, but McGrath and Porter indicated to those attending that negotiation team members were not allowed to answer members’ questions. Prior to the membership meeting, Porter instructed members of the negotiating team that they had to support and endorse the proposed Successor Agreement and cautioned them about preparing a minority report or voicing comments in opposition to the proposed Successor Agreement. Because of the large turnout and a requirement that the meeting last no longer than three hours, the Union tried to limit questioners to three minutes per question. Several of the questions concerned new salary schedules. When one questioner asked for a comment specifically from one member of the negotiating team, McGrath and Porter directed the member of the negotiating team not to respond. When another questioner asked for the pros and cons to the proposed Successor Agreement, the Union’s response was simply that the proposed Successor Agreement was the best that could be negotiated.

Several teachers at Salem High School were not satisfied with the Union’s responses at the September 8th meeting. They had examined current and proposed salary schedules and had wanted to present their findings at the informational meeting. Because they could not present that information, they drafted a letter (“Vote No” letter) voicing their concerns about the proposed Successor Agreement. They met with Babcock to have her review their draft letter and to advise them about how to distribute the letter. Babcock explained that they could distribute the letter through the teachers’

mailboxes, but the letter had to be prepared and produced without use of school resources and distributed after the regular work day had ended. Babcock urged the teachers to put their names on the flier so that people knew that the flier reflected their personal points of view.¹⁰ As a result, John Cammarata (Cammarata), James Flynn (Flynn), Addison Chrystie (Chrystie), George Clement (Clement), and Andrew Moore (Moore) (collectively, the five teachers) — signed the final draft of the “Vote No” letter.¹¹ None of the five teachers was an officer in the Union, a member of the Union’s negotiation team, or a Union building representative.

On Thursday, September 11, 2003, three of the five teachers distributed the “Vote No” letter in mailboxes in seven of Salem’s public schools.¹² At some schools, the teachers had the opportunity to notify school principals of their distribution of the “Vote No” letter, and those principals did not object to the distribution or ask to see the “Vote No” letter.

On Friday, September 12, 2003, school administrators received a number of phone calls concerning the “Vote No” letter. Assistant Superintendent of Personnel Lawrence Callahan (Callahan) went to the high school to examine the “Vote No” letter. After reading the letter, he decided to meet with the five teachers to determine what was happening between the five teachers and the Union.

That afternoon, while classes were still in session, school administrators removed the five teachers from their classes and lunchroom duties to attend a meeting with Callahan and High School Principal Ann Papagiotas (Papagiotas) regarding the “Vote No” letter. Before this incident, school administrators had not removed multiple teachers from their regular job duties in the middle of the school day. School administrators invited McGrath to attend, because they believed the five teachers were entitled to Union representation at this meeting.¹³ The five teachers met McGrath just before the meeting started, but they and McGrath did not discuss why they had been summoned to the meeting. Instead, the five teachers met with each other.¹⁴

At the meeting, Callahan and Papagiotas asked the five teachers a number of questions regarding the mailbox distribution, including whether they had made copies using school resources or on school time, whether they had represented the Union, and whether they had sought Union review or approval of the “Vote No” letter. The five teachers answered all these questions. Towards the end of the questioning, Papagiotas announced that no mail or information could be circulated throughout the high school building without her express approval. Callahan added that employees would have to seek approval from School Superintendent Herbert Levine (Le-

8. Article I of the Agreement specifically defines the Union as “Salem Teachers Union, Local 1258, American Federation of Teachers, AFL-CIO” and “Union representative” as “the Union building representative or other qualified designee of the Union.”

9. Unless specifically indicated, all references to the Agreement are to provisions that remained unchanged after ratification of the Successor Agreement.

10. The Board has granted Babcock’s request to modify this finding to reflect that she told the five individuals who met with her to sign the Vote No letter.

11. A copy of the “Vote No” letter is provided in Appendix 1.

12. This finding has been modified to reflect the correct number of schools.

13. Article IX, Section L, “Right of Representation,” of the Agreement states:

In the event a teacher is called into a meeting with management representative and the teacher reasonably believes that any disciplinary action may result, it is the teacher’s right to have a Union representative present in the meeting. If this right is refused, the teacher is under no obligation to respond to management’s questions.

14. The record is silent regarding what the five teachers discussed.

vine) before using employee mailboxes in other school buildings.¹⁵ McGrath was present throughout the meeting but said nothing.

During the course of the meeting, Cammarata asked several times whether the information that the administration was seeking could be used for disciplinary purposes and indicated that he wanted Union representation. Callahan was puzzled at this request, because McGrath was present at the meeting. At the end of the meeting, Cammarata asked Callahan if discipline was forthcoming. Callahan replied that discipline might occur, and Cammarata asked for representation.¹⁶ Callahan replied that representation was unnecessary since the meeting was over. As the five teachers left the school office, Callahan directed Flynn to stay and asked Flynn if he had learned anything today.¹⁷

After the meeting, Callahan contacted a few principals at other schools to verify the five teachers' statements. When the principals verified what the five teachers had said, Callahan concluded that the five teachers had not violated any terms of the Agreement or working conditions, that they had answered all questions directly, and that there would be no discipline as a result. Callahan and Papagiotas did not inform the five teachers of this decision.

First Ratification Vote

The contract ratification vote for the Successor Agreement was held on Monday, September 15, 2003, in the lobby of Salem High School after the school day had ended. A number of bargaining unit members—but not the five teachers—handed out the “Vote No” letter to teachers as they arrived to vote. Because of the September 12th meeting, the five teachers did not want to risk further action by school administrators.

During the ratification vote, Callahan visited the high school at the request of Levine to investigate complaints about a disruption there and to determine if the police needed to be called.¹⁸ Callahan circulated throughout the lobby where the voting took place, did not see any disturbance meriting the complaints, and called Levine to inform him that the police were not needed, as the voting was orderly. Callahan did not ask to see the flyer being distributed. Callahan met with McGrath and Porter to explain why he was there and told them that he believed there were no problems.¹⁹ After meeting with McGrath and Porter, Callahan left the high

school. Callahan's visit to the high school lasted from five to ten minutes. Papagiotas also was present in the lobby while the vote took place.²⁰

After Callahan left, Porter and McGrath met with the teachers handing out the “Vote No” letter. Porter told the teachers that he had intervened on their behalf, because Callahan wanted to have them arrested if they did not stop distributing the “Vote No” letter.²¹ Porter explained that he had convinced Callahan to leave the teachers alone, because only teachers and not the general public were present at the time. Cammarata asked Porter to grieve Callahan's threat to arrest them, but Porter declined to do so.²²

Additionally, Cammarata asked Porter and McGrath to file a grievance over the prohibition Papagiotas had announced against using mailboxes to distribute information without prior approval from school administrators. Porter and McGrath replied that the Union would not file that grievance, because the Agreement provided that only official Union representatives and not teachers in general had unrestricted access to teachers' mailboxes.

Second Ratification Vote

Because the Union's membership declined to ratify the proposed Successor Agreement on September 15, 2003, the Union and the School Committee returned to the negotiating table. After reaching agreement on a new proposed Successor Agreement with the School Committee, the Union scheduled a second ratification vote for Monday, November 24, 2003.

Prior to scheduling the second ratification vote, Papagiotas distributed a memo dated October 22, 2003 to all high school staff stating: “As a reminder requests to distribute information or materials through the mailboxes must be *pre-approved* by me” (emphasis in original). At a subsequent Union meeting, Cammarata asked McGrath about grieving Papagiotas pre-approval requirement for using teachers' mailboxes.²³ McGrath replied that Article IX, Section C(2)(b) of the Agreement only made teachers' mailboxes available to official Union representatives, so a grievance to extend access to all teachers lacked merit.

In September and October of 2003, the five teachers and their supporters learned that the School Committee had received a \$500,000 Smaller Learning Communities Grant for the high

15. Callahan testified that his and Papagiotas's statements mirrored existing school policy regarding the use of teachers' mailboxes. The Hearing Officer did not credit this testimony, because other school principals did not apply this prohibition to the five teachers who disbursed the “Vote No” letter, and the School Committee did not discipline the five teachers for violating this alleged policy.

16. Cammarata hoped to bring Babcock to the meeting as his representative.

17. Callahan and Flynn knew each other prior to Flynn becoming a teacher at Salem High School. The record is silent about Flynn's response to Callahan's question.

18. There is nothing in the record to indicate that McGrath and Porter voiced complaints to school administrators about the leafleting.

19. Porter testified that Callahan had asked if he and McGrath wanted the teachers distributing flyers to be removed by calling the police. Porter's testimony is that he told Callahan that he did not want anything of the sort done, and that Callahan should leave.

20. The record does not contain substantial and credible evidence regarding any specific action Papagiotas took while in the lobby or how long she was there.

21. While Porter testified about his conversation with Callahan, he did not testify about what he had said to the teachers and their supporters distributing the “Vote No” letter. McGrath simply testified that he confirmed Porter's testimony regarding what Porter had said to the teachers. Accordingly, the testimony of Cammarata and others regarding what Porter and McGrath told them about the conversation with Callahan is un rebutted.

22. Porter and McGrath did not testify about this request, and this request is not part of the complaint against the Union in Case No. MUPL-04-4479. Under direct examination, they were only asked about Cammarata's request to file a grievance over access to teacher's mailboxes (described below).

23. The record does not indicate when the meeting occurred.

school (Federal Grant). On November 19, 2003, Babcock and Patrick Schultz (Schultz) obtained a copy of the Federal Grant and began to examine it. After that examination, the two believed that the Federal Grant funded the implementation of various changes at the high school, including block scheduling. Babcock and others drafted a flyer containing a four-page summary of the Federal Grant that they attempted to distribute to other high school teachers by sliding the summary under classroom doors.²⁴ They did not ask Papagiotas for permission to distribute the flyer through teachers' mailboxes, because the Union had not authorized the flyer. Despite Babcock's and her co-workers' efforts, the Union's membership ratified the new Successor Agreement on November 24, 2003.

Opinion

The duty of fair representation requires unions to process the grievances of bargaining unit members in a manner that is not arbitrary, perfunctory, unlawfully motivated, or demonstrative of inexcusable neglect. *Quincy City Employees Union, H.L.P.E.*, 15 MLC 1340, 1355 (1989), *aff'd sub nom., Pattison v. Labor Relations Commission*, 30 Mass. App Ct. 9 (1991), *further rev. den'd*, 409 Mass. 1104 (1991). A union is required to gather sufficient information concerning the merits of a grievant's claim and to make a reasoned judgment in deciding whether to pursue or to abandon a particular grievance. *Local 285, SEIU*, 9 MLC 1760, 1764 (1983). However, a union has considerable discretion in determining whether to file a grievance and whether to pursue it through all levels of the contractual grievance-arbitration process. *National Association of Government Employees v. Labor Relations Commission*, 38 Mass. App. Ct. 611, 613 (1995).

The complaint alleges two separate but related violations of Section 10(b)(1) of the Law concerning the Union's failure to file grievances over the School Committee's imposition of rules prohibiting bargaining unit members from distributing materials in teachers' mailboxes without prior approval. Babcock contends that the Union's refusal to file grievances over the new rules violated the Law because, by interpreting the contract to mean that only the Union could have unfettered access to teacher mailboxes, the Union eliminated the teachers' chance to have redress from these rules through the grievance process. Babcock questions the right of the Union to interpret contract language, particularly where its interpretation is different from that of other dues paying bargaining unit members and where the refusal to file the grievance has left the issue of the use of mailboxes unresolved.²⁵ However, "the function of interpreting the meaning of contracts lies with the contracting parties." *Teamsters, Local 437 and James Serratore*, 10 MLC 1467, 1477 (1984) (quoting *Local 285, SEIU*, 9 MLC 1760, 1766 (1983)).

24. The summary is not part of the record.

25. Babcock also argues that the Union violated the Law when McGrath did nothing to assist the five teachers during September 12, 2005 meeting, even though they had asserted their *Weingarten* rights. However, this matter is not part of the complaint before us, as Babcock did not file a motion to amend the complaint to include

Here, even if the Board disagrees with the Union's interpretation of Article IX of the Agreement, the Union need not make either the best judgment or the same judgment as would be reached by the Board, as long as the Union's conclusion is neither arbitrary nor tainted by some unlawful discriminatory motivation. *Teamsters, Local 437*, 10 MLC at 1474.

We find no evidence that the Union's decision not to process the two grievances over the mailbox rule meets these criteria. The Union's conclusion that the contract did not entitle teachers to unrestricted access to teacher mailboxes was not unreasonable, arbitrary or negligent, particularly since the School Committee and the Union agreed upon the meaning of Article IX. *Id.* Moreover, there is nothing in the record to suggest that the Union's motivation for refusing to process the grievance was to quiet the voices of members who opposed the terms of the proposed agreement, or that it otherwise acted in deliberate bad faith, or out of personal hostility or invidious intent. To the contrary, the record shows that the Union refused Callahan's offer to call the police to stop bargaining unit members from handing out the Vote No letter on the day of the ratification vote. We further note, taking administrative notice of the findings in the companion decision in Case No. MUP-04-4008, that, several months after the vote, the Union filed a grievance over the change in evaluators that affected three of the five teachers who signed the Vote No letter. This conduct persuades us that the Union's decision not to file a grievance over the mailbox policy was a good faith exercise of its broad discretion to decide whether to proceed with a grievance, and not a violation of its duty of fair representation. We therefore DISMISS both counts of the complaint.

SO ORDERED.

APPENDIX 1

An Open Letter to Fellow Salem Teachers Union Members

On Monday, September 15, you are going to be asked to ratify the contract as it was explained to the members this past Monday. Please consider the following points before casting your vote.

It was explained that the contract was financially beneficial for members who are currently on steps 5, 6, and 7 on the current pay scale. However, an analysis of the pay scales over a five-year period reveals a different result. Comparing total earnings by members currently on steps 5, 6, and 7 of the old pay scale assuming a 0% raise over a five-year period versus total earnings on the new pay scales reveals the following:

[continued on next page...]

this allegation. We therefore do not consider it now. We also do not consider Babcock's claim that Porter and McGrath's refusal to file a grievance over Callahan's statement on the day of the first ratification vote violated the Union's duty of fair representation, since that allegation is not part of the complaint before us and Porter and McGrath were not questioned about this on direct examination. See n. 22, above.

Starting step Year 2003-2004	Old Contract Bachelors Column	New Contract Bachelors Column	Total Earnings LOSS	Old Contract Bachelors +15 Column	New Contract Bachelors +15 Column	Total Earnings LOSS	Old Contract Masters Column	New Contract Masters Column	Total Earnings LOSS
Step 5	\$221,067	\$217,767	\$(3,300)	\$226,018	\$224,055	\$(1,963)	\$231,664	\$230,467	\$(1,197)
Step 6	\$232,891	\$227,277	\$(5,614)	\$238,056	\$233,566	\$(4,490)	\$243,950	\$239,986	\$(3,964)
Step 7	\$243,282	\$236,786	\$(6,496)	\$248,660	\$243,077	\$(5,583)	\$254,794	\$249,496	\$(5,298)

This is unfair and inequitable.

It was explained that the new pay scale was based on the Danvers School System salary schedule. However, the Danvers salary schedule includes 14 steps while the new Salem plan has only 11 steps. Furthermore, the money achieved at the Salem step 11 is still less than the Danvers step 14. We are still getting less money than our colleagues in neighboring systems. We have achieved a 99% MCAS pass rate! We are worth more!

It was explained that tuition reimbursement for teachers would resume the year after it is suspended. The specific language in the contract reads:

The Tuition Reimbursement Program shall be suspended during School Year 2003-2004 resulting in no reimbursements made during School Year 2004-2005, and thereafter, the program shall be reinstated.

The language omits a definitive restart date and could be construed to read anytime after the year 2004-2005. Furthermore, there is no language that specifies how much money will be available in the program once it is reinstated.

When asked about information regarding Longevity Plan B, the membership was told that more information would be forthcoming. The simple fact here is that we are being asked to vote on a longevity plan without all the information necessary to make an informed decision that will affect the retirement futures of all our members, both present and future.

During the informational meeting, we were told to look at the contract and see how it affects us as individuals. A union is only as strong as its collective membership. If we are to remain a union, we must look at this contract, and any contract, in terms of how it affects us as a whole, not as individuals.

We were told that a 3-year contract was better than a one or two-year contract. However, 3 years from now the Mayor of Salem will be in the very first year of a new 4-year term. If we allow this, we will be giving the other side the political advantage during the next contract negotiations.

We were told that the purpose of the Monday meeting was to provide the opportunity for members to obtain information and ask questions. The reality is that the free flow of information was discouraged and, in some cases, even silenced by the chair. We, as members of a union voting on our futures, deserve the opportunity to hear all sides and have all information available to us. We may differ in our opinions, but we should all be allowed to speak and be heard. To accept less is unacceptable.

A "NO" VOTE ALLOWS THE NEGOTIATING TEAM THE OPPORTUNITY TO GO BACK TO THE TABLE

AND ADDRESS THESE PROBLEMS THAT AFFECT US ALL. GIVE THEM THAT CHANCE. VOTE "NO"! [Emphasis in original.]