

In the Matter of AMHERST POLICE LEAGUE

and

WILLIAM J. KOSKI

Case No. MUPL-05-4521

**72.2** *obligation to arbitrate grievance*  
**72.23** *union's share of arbitration remedy*

*April 23, 2009*

*Marjorie F. Wittner, Chair*

*Elizabeth Neumeier, Board Member*

*Harold L. Lichten, Esq.*      *Representing William J. Koski*  
*Dan V. Blair II, Esq.*      *Representing the Amherst Police League*

### DECISION

The issue in this case is whether the Amherst Police League (Union) breached its duty to represent bargaining unit member William Koski (Koski or Charging Party) fairly by the manner in which it handled the grievance that Koski had filed to challenge his termination from employment with the Amherst Police Department. We find that the Union violated Section 10(b)(1) of MGL c.150E (the Law) by failing to properly process and arbitrate Koski's grievance.

#### Statement of the Case

Koski filed a charge with the Division of Labor Relations (Division) on May 23, 2005, alleging that the Union had engaged in a prohibited practice within the meaning of Section 10(b)(1) of the Law.<sup>1</sup> The Commonwealth Employment Relations Board (Board) investigated Koski's charge and issued a complaint of prohibited practice on December 14, 2005. On February 27, 2006, Koski filed a motion to clarify or amend the complaint. The Union filed an opposition to Koski's motion on March 22, 2006. On May 24, 2006, the Board issued an amended complaint of prohibited practice, alleging that the Union had engaged in conduct that was arbitrary, perfunctory and constituted inexcusable neglect. The Union filed an answer to the Board's complaint on December 27, 2005, and an answer to the amended complaint on June 2, 2006.

On June 20, 2006, June 22, 2006 and August 10, 2006, Susan L. Atwater, Esq., a duly-designated Board hearing officer, conducted a hearing at which both parties had the opportunity to be heard, to examine witnesses and to introduce evidence. On the first day of hearing, the Union elected to bifurcate the hearing and to present evidence regarding the merits of the grievance at issue at a subsequent proceeding, if necessary. Koski and the Union filed

post-hearing briefs on or about October 6, 2006. The Hearing Officer issued Recommended Findings of Fact on June 29, 2007 and both parties subsequently filed challenges to those findings. Based on the record evidence and in consideration of the parties' challenges and briefs, the Board makes the following findings of fact and renders the following opinion.

#### Stipulations of Fact<sup>2</sup>

1. The Union is an employee organization within the meaning of Section 1 of the Law.
2. The Union is the exclusive collective bargaining representative for certain patrol officers and sergeants in the Police Department for the Town of Amherst (Town).
3. At all relevant times, Mr. Koski was a member of the bargaining unit described in Stipulation No. 2.
4. Article VIII of the collective bargaining agreement between the Union and the Town contains a grievance-arbitration procedure. Under this procedure, unit members can initiate a grievance only at the first step of the grievance process.
5. On or about September 9, 2004, the Town terminated Mr. Koski's employment.
6. On or about September 16, 2004, Mr. Koski filed a grievance challenging his termination under the provisions of the collective bargaining agreement described in Stipulation No. 4, above.
7. On or about September 27, 2004, Harold Lichten, Esq. (Lichten), acting on Mr. Koski's behalf, wrote to the Union to encourage it to take Mr. Koski's grievance to arbitration.
8. The Charging Party's termination grievance is not clearly frivolous as that standard is set out in *Berkley Employees Association*, 19 MLC 1647 (1993).
9. Mr. Koski admitted to sufficient facts and his criminal case was continued without a finding.
10. Mr. Koski was placed on probation for a period of one year beginning on November 19, 2004 and ending November 18, 2005. His criminal case was dismissed at the conclusion of his probation.
11. The telephone voice mail message listed first in Joint Exhibit No. 23 took place on or about May 13, 2005. The second voice mail message took place on December 14, 2004, and the third voice mail message took place on May 19, 2005. Joint Exhibit No. 23 accurately reflects the voice mail messages.
12. Joint Exhibit No. 41 is Section 2 of the Amherst Police Department Rules and Regulations, which were in effect at all times relevant to this case.

1. Pursuant to 456 CMR 13.02(1) of the former Labor Relations Commission's (Commission) regulations, this case was designated as one in which the Commission would issue a decision in the first instance. Pursuant to Chapter 145 of the Acts of 2007, the Division "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations com-

mission." The Commonwealth Employment Relations Board (Board) is the Division agency charged with deciding adjudicatory matters. References to the Board include the Commission.

2. The Board's jurisdiction is not contested.

## Findings of Fact

After reviewing the parties' challenges to the Hearing Officer's Recommended Findings of Fact, we adopt the Hearing Officer's Recommended Findings, as modified where noted, and summarize the relevant portions below.

*The Union*

The Union's bylaws state that its officers shall consist of a president, a vice-president, and a secretary-treasurer, and that these officers, along with one additional member<sup>3</sup> of the corporation,<sup>4</sup> constitute the Board of Directors. The bylaws charge the Board of Directors with the general management of the Union's affairs. At all times relevant to this case, Stephen Walsh (Walsh) was the Union President,<sup>5</sup> Brian Johnson (Johnson) was the Vice-President, and James Damouras (Damouras) was the Secretary-Treasurer. These individuals, and Bargaining Member Michael Sullivan (Sullivan), comprised the Union's Board of Directors.

The Union's bylaws state that the Union's bargaining agents shall be its sole agents and shall represent and act for the Union in all matters affecting or arising out of the employment of the Union's members. The bargaining agents consist of three Union members and any other agent so designated by the Board of Directors. At all times relevant to this case, the bargaining agents were the same individuals who comprised the Board of Directors.

The Union's bylaws contain no reference to a grievance committee or an executive board. However, a Union Grievance Committee and an Executive Board existed during the pendency of the events at issue in this case. The Executive Board consisted of the Union President, Vice President, and Secretary-Treasurer. Between September of 2004 and May of 2005, the Grievance Committee was comprised of the following individuals: David Knightly (Knightly), Glenn Jackson (Jackson), Todd Lang (Lang), Damouras, and Jeanine Bonnayer (Bonnayer).<sup>6</sup> The bylaws contain no reference to any appeals process from the Grievance Committee.

Soon after Walsh became the Union's president, the Union retained John Claffey, Esq. (Claffey) as the Union's attorney to represent the Union, to provide professional services, and to help the Union negotiate a successor collective bargaining agreement. Claffey attended the successor contract negotiations between the Town and the Union but did not have the authority to make binding agreements in the negotiations. Claffey served as the Union's attorney until May of 2005.

*The Collective Bargaining Agreement and Disciplinary Procedures*

The Town and the Union were parties to a collective bargaining agreement (Agreement) with a stated effective date of July 1, 2001

to June 30, 2004. Article VIII of the Agreement, entitled Grievance and Arbitration Procedure, provides in relevant part:

Section 8.01 Definition

A grievance shall be defined as any difference between the parties to this contract relating to its interpretation, application or administration including a question as to whether a matter is arbitrable and any question as to whether the suspension or discharge of an employee is for just cause. Should any employee or group of employees feel aggrieved, adjustment shall be sought as follows:

Step 1: Any employee may, with or without the assistance of the Union Grievance Committee, orally present any grievance to the officer in charge of his/her shift and such grievance shall be presented within seven (7) calendar days of the occurrence giving rise to the grievance. The officer in charge shall make a written record of the complaint, which shall be signed by the aggrieved individual. The Supervisor shall then attempt to adjust the matter and shall respond to the employee or the Union Grievance Committee within seven (7) calendar days.

Step 2: If the grievance has not been settled, the Union Grievance Committee shall, at its discretion, forward the grievance in writing to the Chief of the Department. Within seven (7) calendar days of the receipt of the grievance, the Chief shall meet with the Grievance Committee and attempt to resolve the same. Within seven (7) calendar days of the conclusion of this meeting, the Chief will reply in writing to the Grievance Committee of his meeting with same.

Step 3: If the grievance is not resolved at Step 2 as set out aforesaid, the Union Grievance Committee shall forward the grievance to the Town Manager within seven (7) calendar days after the Chief's response is due. Upon receipt of the grievance, the Town Manager shall schedule a meeting to be held within fourteen (14) calendar days after the Union's response is due at which time there will be an attempt to resolve the grievance. The Town Manager will answer the grievance within seven (7) calendar days of the conclusion of this meeting.

Step 4: If the grievance is still unsettled at Step 3 as set out aforesaid, either party may, within 28 calendar days after the Town Manager's reply is due, by written notice to the other, request arbitration. The arbitration proceeding shall be conducted by an arbitrator to be selected by the Town and the Union within nine (9) calendar days after notice has been given and, in the event no such agreement shall be forthcoming within ten (10) calendar days of the notice of submission of the grievance, the moving party shall file a request with the American Arbitration Association to provide a panel of arbitrators from which a selection of an arbitrator agreeable to the parties shall be made.

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The expense of the arbitrator's services and proceedings shall be borne equally by the Employer and the Union....

Section 8.02 Time Limits

If a grievance is not presented within the time limits set forth above, it shall be considered waived. If a grievance is not appealed to the next Step within the specified time limit or a mutually agreed exten-

3. The Union appointed an individual to serve on the Board of Directors in the role of "bargaining member" during successor contract negotiations.

4. The Union's bylaws refer to the Union as a corporation.

5. Walsh's tenure as the Union president ended in May of 2005. Richard MacLean (MacLean) succeeded Walsh as the Union President.

6. The Union selected the members of the Grievance Committee at random rather than by an election. Union members placed their individual identification numbers into a hat, and the five individuals whose numbers were pulled out of the hat constituted the Grievance Committee.

sion between the parties has been reached, it shall be considered settled on the basis of the Town's last answer. If the Town does not answer a grievance or an appeal thereof within the specified time limits, the Union may elect to treat the grievance as denied at the Step and may immediately appeal the grievance to the next Step. The time limit in each Step may be extended by mutual written agreement of the Town and the Union representatives involved in each Step.

#### Step 8.03 Filing By Union

The Union in accordance with Section 8.01 shall be entitled to submit grievances in the same manner as provided herein for employees, said submissions to begin at Step 2 in the grievance procedure.

The Town's disciplinary procedures for non-union employees differ from the disciplinary procedures for bargaining unit employees. Non-union employees have a right to appeal a disciplinary action, such as a discharge, to the Town's Personnel Board and receive a hearing. Bargaining unit employees have no right to a hearing before the Personnel Board. As a matter of practice, however, the Town will meet with bargaining unit members regarding disciplinary issues outside of the grievance procedure or the Town bylaws. Since the early 1980s, the Union has brought few, if any, discipline cases to the Town Manager's step of the grievance procedure and has not brought any grievances involving employee discipline to arbitration.

#### *Koski's Termination*

The Town hired Koski as a police officer in 1989 and promoted him to sergeant in 2000. Police Chief Charles Scherpa (Chief Scherpa) considered Koski to be a good sergeant and had not disciplined Koski prior to July 8, 2004.

On July 8, 2004, while off-duty, Koski began arguing with his wife, Tatiana Koski (Mrs. Koski) at home after he had been drinking. Among other actions, Koski hit his wife's face hard with his hand multiple times, injuring her. Immediately afterwards, Koski left his home and drove to his mother's home in Vermont. The next morning, Koski surrendered at the Deerfield police station.<sup>7</sup> The Deerfield police arrested Koski and charged him with domestic assault and battery, a misdemeanor.

On July 10, 2004, Koski was admitted to Providence Hospital where he received treatment for depression and anxiety for four days. Dr. Joseph Gaubinger (Gaubinger), a psychologist, and Dr. John Zebrun (Zebrun), a psychiatrist, treated Koski for anxiety, depression and alcoholism following his release from Providence Hospital.

Koski met with Chief Scherpa soon after his release from Providence Hospital and told the Chief that he had been drinking during the previous six months. Chief Scherpa stated that he was investigating the July 8, 2004 incident and advised Koski not to talk to him about the incident at that time. The Chief did not grant Koski any form of immunity at that meeting.

On July 21, 2004, Town Counsel Alan Seewald (Seewald) extended an offer to Koski to meet with Town Manager Barry Del

Castilho (Del Castilho or Town Manager) to explain and to provide information regarding the July 8th incident. Seewald indicated that Del Castilho would decide whether to take any disciplinary action against Koski.

Walsh authorized Koski to speak to Claffey regarding the meeting, and Koski contacted Claffey. Because Claffey was unable to attend the meeting, Claffey retained Attorney Marshall Moriarty (Moriarty) to act as the Union's attorney in his absence. Koski spoke to Moriarty prior to the meeting, and Moriarty told him not to make a statement regarding the July 8th incident at the meeting, because any statement Koski made could be used against him in his criminal case. Moriarty also told Koski that, if the Town terminated him, the Union would resolve the situation through the grievance procedure in arbitration.

On July 30, 2004, Koski and Moriarty met with Del Castilho and Human Resources Director Kay Zlogar (Zlogar). Koski did not request to speak with immunity at that meeting, and Del Castilho and Zlogar did not grant Koski any form of immunity. Moriarty told Del Castilho and Zlogar that he and Koski were not prepared to discuss the July 8th incident, and when Koski started to speak at one point during the meeting, Moriarty stopped him. Moriarty asked the Town to approve family and medical leave (FMLA leave) for Koski to facilitate medical treatment for an alcohol-related illness. To support his FMLA leave claim, Koski provided Zlogar with a note from Dr. Charles Weeber, III (Dr. Weeber).

Zlogar subsequently notified Koski by letter dated July 30, 2004 that, as of July 26, 2004, he would be out of work on an unpaid status.<sup>8</sup> Zlogar acknowledged receipt of a note from Dr. Charles Weeber, III (Dr. Weeber) and informed Koski that she would make a determination on his medical leave request following his completion of a specific FMLA form.

On August 6, 2004, Koski submitted a grievance to Sergeant William Menard (Menard). Koski's grievance stated in pertinent part:

Please accept this letter as an Employee Grievance submitted in accordance with Article VIII, Section 8.01 of the Collective Bargaining Agreement between the Town of Amherst and the Amherst Police League, dated December 13, 2001.

On July 30, 2004, I received a letter from Kay Zlogar, Human Resources Director for the Town of Amherst, stating in part: "As of Monday, July 26, 2004, you are out of work on an unpaid status." The letter states that, on that date, I made a verbal request to be carried on medical leave and had provided the Town of Amherst with a note from Dr. Charles H. Weeber, III, indicating that I have a "medical illness" and would be unable to work for approximately six weeks.

Article III, Section 3.05 of the collective bargaining agreement states: "In the event that an employee is unable to work by reason of illness or injury and has exhausted other accumulated leave (i.e., sick leave, compensatory leave, vacation leave) the Town may grant a leave of absence without pay..." I have not yet exhausted this accumulated leave (sick leave, compensatory leave, vacation leave) therefore, I am entitled to sick pay dating from July 26, 2004.

7. Koski's home is in Deerfield, Massachusetts.

8. The Town had suspended Koski with pay on July 9, 2004.



The requested remedy is that the Town of Amherst adjust their records to reflect that I am being carried on paid sick leave beginning July 30, 2004 and to make said payment to me.

Menard advised Koski that he (Menard) could not settle the matter, and he forwarded Koski's August 6<sup>th</sup> grievance to the Union's Grievance Committee.

The Grievance Committee met in August to discuss Koski's August 6th grievance. By letter dated August 29, 2004, the Grievance Committee advised Chief Scherpa that Koski should have been permitted to use his accumulated sick, compensatory or vacation leave during the four to six week period that Koski had been on administrative leave. The Grievance Committee requested a meeting with the Chief to address their questions regarding Koski's August 6th grievance.

Prior to September 9, 2004, Chief Scherpa recommended to Del Castilho that the Town terminate Koski's employment. Del Castilho, the Town's appointing authority, did so by letter dated September 9, 2004. Del Castilho's termination letter states in pertinent part:

Upon the conclusion of my investigation of the incident resulting in your arrest on July 9, 2004, I find that your actions constitute conduct unbecoming a Police Officer.

Your actions of July 9th violate the Amherst Police Department Rules and Regulations (Section 2), Amherst Police Department Policy #75, and the Town of Amherst Personnel Procedures Manual.

I am therefore terminating your employment with the Town of Amherst effective immediately.

*Koski's Termination Grievance*

Subsequently, Koski called Walsh and asked the Union to file a grievance on his behalf over his termination. The Union had never previously filed a termination grievance, and consequently, Walsh called a special Union meeting to ask the membership what they wished to do. The Union's members voted not to file a grievance on Koski's behalf but to let him file the grievance himself.

On September 16, 2004, Koski filed a grievance with shift supervisor Sergeant Nelson (Nelson) regarding his termination. Koski's grievance stated:

On September 10, 2004, I was terminated as an employee of the Town of Amherst. This termination is unjust and in violation of the contract between the Amherst Police League and the Town of Amherst.

On September 17, 2004, Koski gave Del Castilho a letter that provided as follows:

I request to appeal your decision to terminate my employment. None of my actions on July 9, 2004 violate any of the Rules and Regulations in Section 2, nor APD #75. Furthermore, no adjudication has been reached with regards to my criminal matter.

I will have my attorney arrange with your office for the hearing.

Koski did not subsequently contact Del Castilho's office regarding a hearing.<sup>9</sup>

On September 22, 2004, the Grievance Committee met to discuss Koski's grievances. Walsh subsequently told Koski that the Grievance Committee wished to receive additional information from him regarding the grievances, and Koski contacted Attorney Harold Lichten regarding this request.<sup>10</sup>

By letter dated September 23, 2004, the Grievance Committee forwarded its September 22nd findings to Koski, stating in pertinent part:

Re: Grievances dated September 16, 2004 and September 8, 2004.<sup>11</sup>

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1. The grievance dated September 8, 2004 has been tabled and no further action will be taken at this time by this Committee until a decision is rendered regarding your first grievance dated in August. It is the belief of this Committee that your grievance dated September 8, 2004 is directly related to the issue of being placed on unpaid status.

2. The grievance dated September 16, 2004 is vague and lacking sufficient information for this Committee to determine specifically the reasons you feel the Town was unjust in its actions.

The Grievance Committee will gladly re-convene in the future in an attempt to settle this matter. Provided that you supply this Committee with the specific information as to why you feel the actions of the Town were unjust.

The contract states in part under Article VIII-Grievance and Arbitration Procedure, Section 8.01, Definition that: "A grievance shall be defined as any difference between the parties to this contract relating to its interpretation, application, or administration including a question as to whether a matter is arbitrable and any question as to whether the suspension or discharge of an employee is for just cause."

The contract further states in part under Article XXIII - Employee Discipline, Section 23.01 that "The Town agrees that an allegation of arbitrary or capricious application of its rules and regulations shall be subject to the grievance procedure."

On September 27, 2004, Lichten forwarded a letter dated that day to Walsh regarding Koski's termination grievance. Lichten's letter stated in relevant part:

I have been asked by Bill Koski to look into his current employment situation. By way of introduction, I happen to be the attorney for the

9. Koski forwarded this letter to Del Castilho to inform Del Castilho of his intent to file a grievance and to challenge Del Castilho's termination decision.

10. Koski had contacted Lichten in July of 2004 because he believed, at that time, that the Union would not support him. The record does not indicate why Koski was skeptical of the Union's support in July of 2004. There is no evidence of any interaction between Koski and the Union prior to August other than the conversation be-

tween Walsh and Koski regarding Claffey's assistance at the July 30, 2004 meeting with Del Castilho and Zlogar.

11. In various documents, the Union refers to grievances dated September 8, 2004, September 30, 2004 and October 6, 2004. The record indicates that Koski filed a separate grievance regarding sick leave and unpaid leave on some unspecified date around September 16, 2004.

Amherst Fire Fighters Union, and I represent police and fire fighter unions around the Commonwealth. Thus, I am quite familiar with the difficulties union's [sic] face in getting consensus on grievances.

As you know, Bill Koski has been employed by the Amherst Police Department for 15 years. Other than for the recent events which I will describe below, he has a good employment record and no discipline. Recently, as a result of a drinking problem for which he is now being treated, he had an unfortunate incident involving his wife (with whom he has now reconciled.) Because of this one incident, he has been terminated from his job.

As you are aware, because Amherst is not part of civil service, the only avenue for Mr. Koski to win back his position as an Amherst police officer is through arbitration. I would note that the collective bargaining agreement, Article 23, provides that "the Town shall not discipline or discharge any post-probationary employee without just cause."

Arbitrators generally hold that off-duty conduct, no matter how unfortunate, is not grounds for discharge. In Mr. Koski's case, I realize that there is a criminal charge pending against him. The charge arises out of his allegedly assaulting his wife during a period of psychological stress. Without in any way excusing assaultive behavior, the fact is that Mr. Koski and his wife are reunited, he is now getting treatment, his psychiatrist believes that he can return to his position of police officer without posing a risk of danger to himself or others, and it is likely that the criminal charges will be resolved in a way that does not include any finding of guilt.

All of this being the case, and based on my 20 years of experience as a police and fire labor union attorney, I believe it almost a certainty that Mr. Koski's discharge will be found to be without just cause, and he will be returned to his job.

Of course, none of this can happen unless the union takes the case forward to arbitration. Mr. Koski is willing to pay for his own lawyer if that is necessary, but the union must provide him with the arbitral forum to do so. Alternatively, the union can decide to provide its own legal representative for Mr. Koski at its expense. Mr. Koski and I do not care what the union's ultimate decision on this is, the critical thing is that the union take the case forward to arbitration. If the union does not do this, then Mr. Koski's career will be lost.

The law is clear that a union has a duty of fair representation to treat all of its members fairly and to represent each appropriately if they have a meritorious case. Certainly Mr. Koski satisfies this criteria. The last thing in the world that Mr. Koski wants to do is be in conflict with the Amherst Police League. Mr. Koski feels great loyalty to the union and to his colleagues at work. He fervently requests that you consider this matter promptly and agree to pursue this matter through the grievance/arbitration machinery.

Literally, the union holds Mr. Koski's fate in its hands. We beg that the union make the right decision.

Following receipt of the Grievance Committee's September 23rd letter, Koski forwarded a letter dated September 30, 2004 to the Grievance Committee through Bargaining Member Sullivan. Sullivan made copies of Koski's letter and the accompanying attachments and forwarded the materials to each member of the Grievance Committee. Koski's September 30th letter stated in pertinent part:

Re: Additional information in support of grievance.

For the record, I did not receive a copy of the Grievance Committee's letter requesting further information until Friday, October 1, 2004, when it was picked up by myself at the Amherst Police Department.

1. On September 10, 2004, I was terminated as an employee of the Town of Amherst. This termination is unjust and in violation of the contract between the Amherst Police League and the Town of Amherst.
2. I have been a loyal employee for 15 years with no serious disciplinary issues.
3. I was given no opportunity to defend my position with this issue to the Town Manager.
4. The discipline is inconsistent with whatever breach of the policies and procedures the Town alleges.
5. There has been no progressive discipline with this issue.
6. There has been no adjudication of the criminal case; there has been no conviction.
7. The criminal charge is a misdemeanor.
8. The incident occurred off duty and in no way was connected to my employment.
9. The Town's position contradicts a position it held with another employee in a similar position within another department.
10. At this time, I have not been notified by the Town what policies I have allegedly violated. I also have had no access to the investigation conducted by the Town Manager, nor the opportunity to verify any information the Town Manager has used to reach his decision.
11. The Town Manager uses a reference to an incident on July 9, 2004.
12. The Town Manager never mentioned in his letter my right to appeal.
13. The Town Manager's letter was not sent via certified mail.
14. Therefore, I conclude the termination to be unjust.

Please refer to the letter from Attorney Harold Lichten to Detective Steve Walsh.<sup>12</sup>

Finally, enclosed is a letter from Doctor John Zebrun.

The letter that Koski enclosed from Dr. Zebrun states as follows:

This letter is to confirm that William J. Koski (DOB 03-22-63) has been in outpatient treatment with me since 08-26-04, and has been in ongoing treatment at this clinic since 07-15-04. I have diagnosed him with Generalized Anxiety Disorder, Adjustment Disorder with mixed anxiety and depressed mood, and a past history of Alcohol Dependence. He has completed the START intensive outpatient program, attended aftercare recovery group, has been in ongoing individual psychotherapy, and now also is seeing me for psychotropic medication treatment. His prognosis is excellent as long as he continues in treatment. He is currently stable with no major symptoms. By my last evaluation of him on 09-24-04, he can return to work without restrictions. Mr. Koski does not currently present with any clinical indication that he is a risk to himself or others.

After the Grievance Committee received Koski's September 30th letter, Grievance Committee member Knightly researched Town

12. Koski enclosed Lichten's September 27, 2004 letter.

and Police Department policies, procedures, rules and regulations that pertained to the issues that Koski raised in his letter. As a result of his research, Knightly believed that Koski's termination was within the rights of the Town Manager and the Chief, and that the Town was not required to discipline Koski progressively in the circumstances of his termination. Knightly found nothing requiring the Town to treat off-duty conduct differently from on-duty conduct and no regulation, policy or procedure requiring an adjudication or conviction. However, Knightly wanted to resolve a few issues with the Chief and the Town, and thus, he did not decide at that point to discontinue processing the grievance.

Prior to October 4, 2004, Lichten and Claffey had never met or spoken to each other. On October 4, 2004, Lichten telephoned Claffey's office to discuss Koski's termination grievance, but he did not reach Claffey. Claffey returned Lichten's call that day and left a voice mail message on Lichten's telephone answering machine. Claffey stated in his voice mail message that the Union would take Koski's case forward to arbitration<sup>13</sup>, and he questioned what role Lichten would have at the arbitration.<sup>14</sup>

The following day, October 5, 2004, Lichten forwarded a letter to Claffey that stated in pertinent part, as follows:

Thank you for your voicemail message responding to my letter to you regarding Bill Koski. I tried to call you yesterday, but was unable to reach you. I am writing to bring you up-to-date regarding this matter.

Mr. Koski did, as you indicated in your voicemail, receive a letter from the union asking for additional information. Although some of the requests were confusing, Mr. Koski has sent a letter to the union responding to every point raised. In addition, he has referred the union to my letter for further clarification. In addition, he has sent a recent letter from his psychiatrist, Dr. Zebrun, to the union for their information. I am sending a copy of that to you.

From your voice mail, I understand that the union is going to take his case forward to arbitration. Further, I understand from your message that, to the extent Mr. Koski and I are concerned that the union might not take his case forward to arbitration, those concerns are unnecessary.

Now that Mr. Koski and I have tried to provide all of the information requested by the Union, and given that Mr. Koski has been cleared to return to full duty by his psychiatrist, and given the passage of time, I would greatly appreciate your assistance in getting the union to proceed forward on this matter to grievance and arbitration. We stand ready to help you in any way and provide you with any additional documentation.

Finally, as I indicated in my voicemail back to you, Mr. Koski's main concern is to have his case proceed forward to arbitration. With respect to who represents him at arbitration (yourself as the union lawyer, or an outside lawyer at Mr. Koski's expense or with some form of limited help from the union), Mr. Koski will do whatever the union thinks best.

Lichten faxed Claffey another letter two days later, on October 7, 2004 that states as follows:

I received your voicemail message and agree that we should talk as soon as possible. Article VIII of the collective bargaining agreement provides that once a grievance has been filed with the immediate supervisor (as Mr. Koski's termination grievance was on 9/16/04), it is "the union grievance committee" which "shall forward the grievance in writing to the chief of the department." Further, if the grievance is not resolved at that step, it is "the union grievance committee" which "shall forward the grievance to the town manager." Step four then provides that if the grievance is unsettled at step three, "either party", meaning the union or the grievance committee, may file for arbitration utilizing the procedures set forth in step four.

What Mr. Koski and I have been saying all along, but which apparently is being confused by the union, is that only the union can process the grievance to steps two, three, and four (four being arbitration). Once the case is filed for arbitration, Mr. Koski is more than willing to provide his own representation, or have union counsel provide representation. All we mean by this is that some unions will not let outside counsel do an arbitration in the union's name, while some will. We simply are willing to do whatever the union will permit. The critical point is not who represents Mr. Koski, it is ensuring that the union goes forward to steps two, three and then to arbitration. Since only the union can file the matter though these steps of the grievance procedure, and not Mr. Koski individually, the union simply needs to process the grievance appropriately.

Once the grievance goes to step four, and if the union is agreeable, I will file the case for arbitration and select the arbitrator. I would expect that the union would pay for the arbitrator. As for legal representation, the union can decide whether to have you do the case as the union attorney, or allow me to do it for Mr. Koski at his expense.

I trust this clarifies the matter.

Lichten and Claffey spoke by telephone regarding Koski's grievance on the next day, October 8, 2004. During their conversation, Claffey told Lichten that he was the Union's lawyer.<sup>15</sup> He also stated that the Union would take Koski's grievance to arbitration, and that the Union wanted Koski to pay for his legal expenses at arbitration.

Koski received no information from the Grievance Committee between the transmission of his September 30th letter and the end of October of 2004. On October 26, 2004, Lichten faxed a letter to Claffey, stating in pertinent part:

Although some time has passed since we last communicated, and since Mr. Koski provided the information requested by the union in order to prosecute his grievance, still, neither Mr. Koski nor I have received any word as to what the union is doing with respect to his termination case. I would greatly appreciate you or the union letting us know what is going on with his grievance.

As you will recall, you first left a voicemail for me indicating that there was no problem with the union sending the grievance forward,

13. The Union challenges this finding of fact, alleging that it is unsupported by the record evidence. We disagree, and find that Lichten's statements in his October 5, 2004 letter sustain this factual assertion. Moreover, the Union did not challenge the hearing officer's determination that Claffey told Lichten on October 8, 2004, that the Union would take Koski's grievance to arbitration.

14. Walsh had never specifically authorized Claffey to enter into an agreement to process Koski's grievance to arbitration. Additionally, there had been no contact from the Union informing Lichten of the extent of Claffey's authority. We have supplemented this finding of fact to more thoroughly reflect the record evidence.

15. There is no evidence that Lichten and Claffey discussed any limits to Claffey's authority as the Union's lawyer.



however, you were confused as to whether Mr. Koski was going to use outside legal counsel or the union. In addition, you informed me that the union would be sending Mr. Koski a letter requesting some information. I replied to you that since, under the union contract, only the union can take the case through the second and third steps of the grievance procedure, Mr. Koski was willing to use outside legal counsel for the arbitration case, but that only the union could take the case through the latter steps of the grievance procedure. It was my understanding that that clarified the matter. In addition, Mr. Koski replied fully to the letter from the union requesting certain information. That response was provided over three weeks ago.

As I'm sure you can understand, Mr. Koski's career is at stake. All we are asking the union to do is take the grievance through the grievance procedure as provided for in the contract so that the matter can be filed for arbitration. If, at that point, the union is agreeable to Mr. Koski having his own legal counsel, we will do the arbitration without the union having to pay the legal costs. Further, if the union wants its legal counsel to do the case, that is also acceptable.

It is critical that the union take Mr. Koski's grievance through the grievance procedure. Neither Mr. Koski nor I can do that ourselves (as I read the contract), unless the union wants to authorize me to prosecute the matter through the grievance procedure, in which case, I will. Absent that authority, the grievance appeals must be by the union. I remain confident that the union will follow up on this as soon as possible.

On November 8, 2004, Claffey forwarded a letter to Walsh regarding Koski's grievance and sent a copy of the letter to Lichten. Claffey's letter stated:

The purpose of this letter is to follow up on our telephone conversation of October 26, 2004, in which I had inquired as to the status of Sgt. William Koski's grievances. It was my understanding that Sgt. Koski had provided the Amherst Police League Grievance Committee with a clarification of why he believed that he had been aggrieved by his dismissal. The Committee was then going to forward the grievances to the Chief of Police for his consideration. The second step of the Grievance and Arbitration Procedure provides that the Chief will reply within seven days. If the grievance cannot be resolved at that level, it is then brought to the Town Manager for his review. He too has seven calendar days to consider the employee's grievance.

Please advise me as soon as possible as to the dates that these grievances have been sent through the various steps in the procedure and the present status of these grievances. As soon as the second and third steps have been complied with, you should notify Sgt. Koski immediately, so that the necessary arbitration request can be made.

Thank you for your attention to this matter. A prompt response would be greatly appreciated.

After October 6, 2004, Knightly did not request any additional information from Koski. However, Koski forwarded certain information to the Grievance Committee through Union President Walsh. Specifically, Koski supplied the Committee with the disposition of his criminal case and a letter co-written by Drs. Gaubinger and Zebrun describing his ongoing treatment, attendance at Alcoholics Anonymous meetings, and positive prognosis.

On November 27, 2004, the Grievance Committee met to discuss issues relating to Koski's termination that Chief Scherpa had noted in a letter to the Committee.<sup>16</sup> Specifically, the Grievance Committee considered the Town's failure to pay Koski for unused vacation time, sick time, personal days, holiday pay, longevity pay and "Quinn Bill" benefits. By letter dated November 30, 2004, the Grievance Committee advised the Chief that it believed that the authority to address those issues required the Chief's presence. The Grievance Committee forwarded a copy of its letter to Koski.

When Koski received the Grievance Committee's November 30th letter, he called Grievance Committee member Bonnayer and asked her why the letter did not address his termination. Bonnayer indicated that she did not know but would contact the Chief and others to get an answer. Bonnayer never responded to Koski's inquiry.

Between October 6, 2004, when Koski supplied his September 30th letter to the Union, and December of 2004, the only communication from the Grievance Committee that Koski received was the November 30, 2004 letter. Because Koski did not know the location of his termination grievance in the contractual grievance process, he telephoned Walsh and Knightly several times in late 2004. They did not return his calls.

At this point in time, Koski was frustrated with what he perceived to be a lack of communication over the status of his grievance and the time frame for processing it. At times, Koski spoke individually to Grievance Committee members Knightly, Lang, and Jackson regarding his grievance. He told them that the Union had a duty to represent him, and that the Union might be liable if they did not take his case forward to arbitration.

On December 14, 2004, Claffey contacted Lichten and left a telephone message telling Lichten that the Union was going to pursue Koski's Quinn Bill benefits, unpaid vacation time, lost sick time and termination "to the next step." Claffey noted that the Town appeared to be open to settlement discussions with Koski, and related a conversation that Claffey had had with "somebody from the Town" regarding settlement. Claffey advised Lichten that he had told this individual that: "your initial settlement discussions weren't anywhere near serious enough to make anybody think about doing anything but grieving this and going to arbitration." In his message, Claffey also relayed a conversation that he had had with the Chief regarding Koski. Specifically, Claffey remarked that Chief Scherpa had stated that Koski would not return to work while he was the Police Chief. In response, Claffey had asked the Chief for a ticket to the Chief's retirement party, and stated that it sounded like the Chief was announcing his retirement. Claffey told the Chief: "you know that you are not going to win this arbitration." Claffey's message to Lichten concluded by stating "I will keep an eye on this from this end, just to make sure that the Grievance Committee continues to pursue this."

16. The Chief's letter is not in the record.

*Grievance Processing in 2005*

In January of 2005, the Chief asked Knightly and Walsh what was going on with Koski's case. Walsh responded that he did not know, and that the Union was dealing with its attorney. Knightly told the Chief that there had been postponements for various reasons.

On January 7, 2005, Lichten forwarded a letter to Claffey stating in pertinent part as follows:

Let me again thank you for leaving a long voicemail several weeks ago informing me that the union was proceeding through the grievance/arbitration process on Mr. Koski's case. I also appreciate the information you gave me about the Chief's position in the matter. Since that time, I instructed Mr. Koski to stay in touch with Union President Walsh about the status of his case. Mr. Koski has attempted to call President Walsh several times but, unfortunately, has received no return call.

Since Mr. Koski is unable to talk to President Walsh, it becomes necessary for me to contact you.

Mr. Koski and I are both anxious for word on the status of Mr. Koski's arbitration case. Presumably, the grievance procedure has now been exhausted and the matter should be being filed for arbitration. However, neither Mr. Koski nor I have received any further communications since your voicemail several weeks ago. We obviously want to work cooperatively with the Union and you for the common purpose of getting Mr. Koski restored to his position. However, as you can imagine, the lack of communication is somewhat frustrating.

I would greatly appreciate Steve Walsh contacting Mr. Koski directly, or you contacting me by letter or phone to discuss the status of the case. Specifically, we would very much like to know whether the case is in order for filing for arbitration and whether I could be involved in the process of selecting the appropriate arbitrator.

On February 2, 2005, in an effort to facilitate a conversation between Koski and Walsh, Mrs. Koski telephoned the Police Station and asked to speak with Walsh. When Walsh answered the phone, Mrs. Koski gave the telephone to Koski so that he could ask Walsh about his grievance. Walsh explained that the Grievance Committee needed to meet with the Chief one more time, and told Koski that he would not be surprised to see him at roll call. Koski told Walsh that he believed that the Union was resolving his grievance slowly, and that Koski was uncomfortable with the lack of support.

On February 6, 2005, Knightly contacted Chief Scherpa and asked to re-schedule a grievance meeting regarding Koski. Knightly did not inform Koski that the Grievance Committee intended to meet with the Chief on March 10, 2005.<sup>17</sup>

On February 22, 2005, Claffey forwarded the following letter to Walsh and sent a copy of it to Lichten.

The purpose of this letter is to follow up on our recent telephone conversations of February 2, 2005 and February 21, 2005 in which I had inquired as to the status of Sgt. William Koski's grievance.

It is my understanding that the Grievance Committee is awaiting Chief Scherpa's return from vacation to discuss this matter with him. If the grievance cannot be resolved at that level it is then brought to the Town Manager for his review.

Let me emphasize a point that I had made to you during our telephone conversations. Considering the enormous impact that a dismissal has on an employee and his family, it would be prudent for the Grievance Committee to give full consideration to exercising the option to arbitrate this matter. To take any other course of action would compromise both the rights of Sgt. Koski and the role of the Amherst Police League in disciplinary matters.

Sgt. Koski has chosen to retain a private attorney to handle this matter for him in arbitration. I will remain in contact with Atty. Lichten to update him on this matter. I would advise you to urge the Grievance Committee to expedite this matter...

*The Step 2 Grievance Meeting*

The Grievance Committee<sup>18</sup> met with the Chief on March 10, 2005<sup>19</sup> to discuss Koski's grievances. Because Human Resources Director Zlogar attended the meeting with Chief Scherpa, the Grievance Committee believed that the March 10th meeting combined Steps 2 and 3 of the Grievance Procedure. However, the Town and the Union had not agreed to combine Steps 2 and 3, no one had made that assertion, and Del Castilho had not authorized Zlogar to act as his representative at the meeting.

At the outset of the meeting, Knightly made a short presentation stating that the purpose of the meeting was to inform the Town that Koski had asked the Union to support him in his grievance claiming an unjust termination. The Grievance Committee gave the Chief and Zlogar Koski's September 30th letter and used it as an outline to describe Koski's arguments opposing his termination. The Grievance Committee stated that they agreed that Koski should receive holiday pay, Quinn Bill benefits, sick leave and longevity benefits up until the day of his termination. Knightly stated that the Committee did not know how to react on Koski's termination and that they felt that they were in an awkward situation.

Chief Scherpa asked if the Grievance Committee believed that he terminated Koski unjustly. Lang responded that the Grievance Committee did not have to agree or disagree with the decision; that they were present at the meeting to represent a Union member. Chief Scherpa stated that the Grievance Committee needed to have an opinion, and he asked a second time whether the Grievance Committee believed that the Town terminated Koski wrongfully. Lang answered that the Union had been advised to support Koski.

17. Between January and March of 2005, Koski left numerous messages for Knightly by e-mail and by telephone. Knightly did not contact Koski until the middle of March of 2005.

18. Three out of the Grievance Committee's five members - Knightly, Lang and Jackson - attended the meeting.

19. A variety of factors affected the timing of the meeting including a homicide investigation; family issues affecting two members of the Grievance Committee; and the Grievance Committee members' varying shift schedules.



Knightly asked if Koski had received the right to defend his position with the Town Manager. Zlogar stated that Koski and his attorney had met with her and Del Castilho. She further stated that Koski had received the opportunity to meet again with Del Castilho but did not do so.<sup>20</sup> In response to Koski's assertion in his September 30<sup>th</sup> letter that he had received no opportunity to defend himself before the Town Manager, Zlogar extended an offer for Koski and his attorney to meet with Town officials once more.<sup>21</sup> This offer was never received by Koski or his attorney.

Chief Scherpa asked the Committee a third time whether the Union thought that he had wrongly terminated Koski's employment. Knightly responded that Koski wanted to have access to the information that Del Castilho used when deciding to terminate Koski, and that the Union believed that Koski should have the information. The Chief agreed that the Town should compensate Koski up to his termination date, but stated that he did not support reinstatement. Knightly asked if Koski could review the information that the Town Manager was given. Zlogar agreed, and stated that the information was a public record. The Chief told the Grievance Committee that they should get a different attorney if their attorney was advising them that they could be sued, and he expressed concern that the situation could bring negative publicity on the Police Department.

The Grievance Committee did not seek Claffey's guidance in preparation for the March 10, 2005 meeting. The Grievance Committee attended the meeting on Koski's behalf to present information from Koski to the Chief and the Town, but the Grievance Committee was not aware of any Union duty to advocate for his reinstatement. At the meeting, the Grievance Committee did not provide any additional information regarding Koski to the Chief or Zlogar. The Committee did not inform them of Koski's recent sobriety, treatment or progress in rehabilitation; provide any medical reports from his doctors; or advise them of the disposition of Koski's criminal case. Other than stating that they believed that Koski was due compensation for vacation and sick time, the Committee did not say anything in Koski's favor, present any supporting information or arguments, and did not ask the Chief to reinstate Koski.<sup>22</sup>

Following the meeting, Knightly drafted a letter to Koski that stated in pertinent part:

The Grievance Committee met with Chief Scherpa and Kay Zlogar on March 10, 2005 in regards to your grievance dated September 30, 2004. The facts and information you have outlined were presented to Chief Scherpa and Kay Zlogar. At this time, Chief Scherpa has taken the matter under advisement and will present this Committee with his decision in accordance with the timeframe allowed by contract.

20. There is no evidence in the record that the Town offered to meet with Koski again between July 30, 2004 and March 10, 2005.

21. Zlogar anticipated that the meeting would include herself, Koski, the Town Manager, Town Counsel, and Chief Scherpa.

22. Knightly knew that Koski had agreed to pay the legal expenses of any arbitration, and Walsh had informed Knightly of Claffey's letters.

Kay Zlogar has indicated that she and the Town are willing to meet with you and your attorney to discuss any issues you feel have been left unresolved.

Respectfully,

Amherst Police League, Grievance Committee

Koski never received the letter, and there is no evidence that the Union ever mailed it to him.<sup>23</sup> Knightly contacted Koski in mid-March, and told him that the Grievance Committee had met with the Chief and was awaiting his decision. Knightly did not tell Koski that Zlogar had offered to meet with Koski and his attorney.

On or about March 17, 2005, Chief Scherpa provided a written response to the Grievance Committee that stated as follows:

Pursuant to our discussions at the meeting held on Thursday, March 10, 2005 regarding William Koski, I am providing the following as my response and resolution to this matter.

#### Payment

Although the Collective Bargaining Agreement between the Amherst Police League and Town of Amherst establishes certain conditions the employee is required to meet in order to receive payment upon termination of employment and, notwithstanding the fact that William Koski did not satisfy these conditions, I support the Union's position that the Town provide compensation to Mr. Koski. I have therefore requested and the Town Manager has approved payment to Mr. Koski in the same manner as would have been paid had he voluntarily resigned.

#### Termination

After review of the facts involved and consideration of the arguments advanced, I find that the Collective Bargaining Agreement was not violated in the termination of William Koski and his termination was for just cause.

The Grievance Committee did not send the Chief's response to Koski, Lichten or Claffey.

The Grievance Committee received a letter from Zlogar dated March 17, 2005 at about the same time that it received the Chief's response.<sup>24</sup> Zlogar's letter stated as follows:

Pursuant to our discussions at the meeting held on Thursday, March 10, 2005 regarding William Koski, I am providing the following information as requested.

In addition to discussion and the thought process of the individuals involved, this information was utilized in the Town's investigation:

- Arrest report of Deerfield, MA Police Department
- Amherst Police Department Regulations
- Collective Bargaining Agreement between Amherst Police League and Town of Amherst
- Town of Amherst Personnel Procedures Manual

23. Knightly gave the letter to Walsh to mail to Koski but did not subsequently ask Walsh if he mailed the letter. Walsh did not recall whether he mailed the letter or gave it to Bonnayer to mail. Bonnayer did not testify at the hearing.

24. Zlogar also sent a copy of her letter to the Chief, the Town Manager and Town Counsel.

- July 30, 2004 meeting with Mr. Koski and his attorney
- 18 U.S.C. §922 The Gun Control Act of 1968, as amended
- CRS Report for Congress, “Firearms Prohibitions and Domestic Violence Convictions: The Lautenberg Amendment”
- Massachusetts General Laws Chapter 209A, §3B
- Massachusetts General Laws Chapter 140, §131
- 29 CFR 825.114 of The Family and Medical Leave Act of 1993
- 29 CFR 825.303 of The Family and Medical Leave Act of 1993
- 29 CFR 825.312 of The Family and Medical Leave Act of 1993
- F.3d - 7<sup>th</sup> Circ. 1999, 98-2691, Jerald Gillespie v. City of Indianapolis, Indianapolis, Police Department, and Michael Zunk, Chief of Police.

Mr. Koski did have the opportunity to defend his position on this issue when he and his attorney met with the Town Manager and Human Resources Director on July 30, 2004. Although the purpose of the meeting, stated to Mr. Koski’s attorney via Town Counsel, was to discuss his employment status as a result of his arrest and temporary incarceration in relation to a domestic violence incident on July 9, 2004, Mr. Koski refused to discuss the incident.

The September 9, 2004 official termination letter from the Town Manager to Mr. Koski stated: “Your actions of July 9<sup>th</sup> violate the Amherst Police Department Rules and Regulations (Section 2), Amherst Police Department Policy #75, and the Town of Amherst Personnel Procedures Manual.” Mr. Koski *was* notified by the Town of what policies he had violated.

An individual reaching a plea agreement with the Court does not negate the Town’s right to determine whether the nature of the offense is so heinous as to warrant termination of employment. The Collective Bargaining Agreement does not restrict the Town’s right to discipline for just cause. I also refer to the Town’s Personnel Procedures Manual which states:

“In situations where an employee has committed a violation of Town policies as defined under **EMPLOYEE CONDUCT** or a violation of Federal, State or local laws, dismissal of the employee may be warranted. The Town reserves the right to conduct an internal investigation with regard to the offense to determine whether the nature of the offense makes it inappropriate for the individual to continue in the employ of the Town.

While the intent of disciplinary procedure is to be progressive, it must evaluate the severity of misconduct in determining the appropriate discipline. The Town did conduct that internal investigation and did determine that it was inappropriate for Mr. Koski to continue employment with the Town.

Mr. Koski was aware of his right to appeal the Town Manager’s decision to terminate as evidenced in his September 17, 2004 letter to the Town Manager which stated:

“I request to appeal your decision to terminate my employment. None of my actions on July 9, 2004 violate any of the Rules and

Regulations in Section 2, nor APD #75. Furthermore, no adjudication has been reached with regards to my criminal matter.

I will have my attorney arrange with your office for the hearing.”

The Town received no further correspondence from Mr. Koski or his attorney.

I believe this response addresses all of the issues we discussed, but should you need additional information, please feel free to contact me. [Emphasis in original.]

The Grievance Committee did not send Zlogar’s letter to Koski or Claffey.

After receiving Zlogar’s letter, Knightly did not contact Claffey to determine whether the points that Zlogar referenced were relevant to Koski’s case. However, Knightly reviewed the citations to the Lautenberg Amendment and the Gun Control Act of 1968 and thought that they applied to Koski’s case. Knightly also reviewed Section 2 of the Amherst Police Department Rules and Regulations and Amherst Police Department Policy #75 to determine the applicability of those provisions.<sup>25</sup> Knightly believed the assertions that Zlogar made in her letter regarding Koski’s opportunity to defend his position in the July 30, 2004 meeting, and Knightly was not aware that Moriarty had instructed Koski to remain silent during the meeting.<sup>26</sup> Knightly was not aware of whether or not Koski, as a bargaining unit employee, had a right to appeal the Town Manager’s decision to terminate him. Knightly did not disbelieve Zlogar’s assertion that he possessed, but failed to exercise, that right.

#### *The Grievance Committee’s Decision*

The Grievance Committee met on April 1, 2005 to decide whether to pursue Koski’s grievance to the next step. At that time, the Committee considered whether or not to take the case to arbitration, because it believed that it had received a Step 3, rather than a Step 2, answer. Prior to the meeting, the Grievance Committee did not seek advice from anyone regarding the merits or strength of Koski’s case. No one notified Koski of this Grievance Committee meeting.

The members of the Grievance Committee believed that the Grievance Committee was not obligated to take Koski’s termination grievance through every step of the grievance procedure. The Grievance Committee had seen Lichten’s September 27, 2004 letter advocating Koski’s case, and believed that it had adequate information at that time to decide how to proceed on Koski’s termination grievance. The Committee reviewed the documents provided by the Chief and Zlogar and unanimously decided that the Town acted within its rights.<sup>27</sup> The Grievance Committee thought that the Town had just cause to terminate Koski because of

25. It is not clear from the record whether Knightly read all of the materials that Zlogar cited in her March 17<sup>th</sup> letter.

26. Knightly did not attempt to ascertain whether the Union’s attorney instructed Koski not to speak at the July 30, 2004 meeting.

27. Knightly was aware of Lichten’s letters from Walsh. Knightly believed that he had adequate information to make an informed decision regarding Koski’s termination grievance. Among other considerations, Knightly included in this determi-

nation his belief that: 1) Koski had done nothing to appeal his termination after the Town had offered him the opportunity to do so; 2) Koski had not availed himself of the opportunity that he had received to defend himself on July 30, 2004; and 3) Koski had failed to supply information that the Grievance Committee could use to advocate on his behalf. The record does not indicate whether the other members of the Grievance Committee shared these beliefs. We have modified this finding of fact to more accurately conform to the record evidence.

his actions, and decided that it would take no further action on his grievance. The Grievance Committee knew that Claffey wanted them to take Koski's termination grievance to arbitration. However, the Grievance Committee disregarded Claffey's advice, because they viewed Claffey as a real estate lawyer whom the Union had hired to help the Union negotiate its contract.

Early in April, Knightly advised Walsh that the Grievance Committee was satisfied with the documentation that it had received from the Town and had decided not to process the grievance further. Knightly and Walsh discussed how to inform Koski of the decision and decided to ask Claffey to draft a letter.

On April 14, 2005, Lichten faxed a letter to Claffey regarding arbitration.<sup>28</sup> Lichten's letter stated in pertinent part that:

I am sorry to seem like a broken record, but it is now April 13 and still neither I nor Mr. Koski has received notice of the filing of the demand for arbitration with respect to his termination. We understand that the union has been going through the grievance process in a slow, deliberative fashion, and that the union finally met with the Chief more than a month ago to hear the grievance. At that time, Mr. Koski was informed that when the Chief's response was provided, the union would appeal to the next step, the Town Manager level, and that that should be completed by early April. You have informed me on several occasions that the union has agreed to take the case forward to arbitration, with the understanding that Mr. Koski will pay for his own legal counsel. Mr. Koski has now been waiting patiently for more than eight months and, still, it appears that his arbitration case has not even been filed, let alone scheduled for hearing.

As you know, Mr. Koski and I have repeatedly held off taking any other type of action based upon the union's assurance that it will proceed with his case to arbitration.

Walsh told Claffey later in April of 2005 that the Grievance Committee had decided not to process the grievance further and asked him to draft a letter conveying the decision to Koski. Claffey recommended that the Union draft the letter for his review. Walsh conveyed Claffey's opinion to the Grievance Committee, who decided that Claffey should write the letter. The discussions between Walsh, Claffey and the Grievance Committee regarding who should compose the letter advising Koski of the Grievance Committee's decision continued for approximately three weeks, and no one contacted Koski during that timeframe.<sup>29</sup>

On May 13, 2005, Lichten faxed Claffey a letter advising him that if Lichten and Koski did not receive written confirmation by May 20, 2005 that the Union had or would file Koski's case for arbitration, Koski would file a charge against the Union on May 23, 2005 alleging that the Union had violated its duty of fair representation. When Claffey received the letter, he left the following telephone voice mail message for Lichten on Lichten's answering machine:

I'm in receipt of your letter a couple of hours ago, I got it on my fax... I just wanted to let you know that I did receive it and I have been in touch with... the former president, Stephen Walsh to let him know of the existence of this letter. I am going to be giving him a

copy this evening, along with a letter from myself emphasizing the severity and the seriousness of this matter, and... I know you understand, but I just wanted to reemphasize that I have explained the severity of this matter, and I'm not getting much recognition whatsoever from some members of the Union that this is something that they need to address immediately. I do see your ultimatum as far as a week from today. I'm just asking if toward the end of the week, if I'm starting to make some progress, if you would consider an extension and I will not let the Union know if there's an extension that's offered or if you and I make some kind of an agreement to extend your ultimatum but, I just want you to know that I am working on this and... I think the letter I'm writing them today may get their attention, but I can't guarantee anything...

Claffey then forwarded a letter dated May 13, 2005, to Walsh, advising him as follows:

The purpose of this letter is to confirm our telephone conversation from earlier this afternoon regarding the status of Sgt. William Koski's grievance.

About two weeks ago, you had indicated to me that the Grievance Committee had come to a decision regarding this matter. I asked that they put this decision in writing to Sgt. Koski and to forward a copy to me. I have not yet received written confirmation of this decision nor has Sgt. Koski.

Enclosed, please find copies of two recent letters from Attorney Harold Lichten (the one dated April 14, 2005 was delivered to you in hand on April 29, 2005). I am not sure how much more plain I can state this message to the members of the Grievance Committee - if the Amherst Police League decides through its Grievance Committee not to file for arbitration in Sgt. Koski's case, it is exposing itself as an organization, and its officers and members, individually to a great deal of liability.

The organization has a duty of fair representation with regard to *all* members. As I have stated in numerous conversations and in writing, considering the enormous impact that a dismissal has on an employee and his family, it would be irresponsible for the Amherst Police League to choose any other path than to file for arbitration. To take any other course of action would compromise the rights of Sgt. Koski and could severely impact the Amherst Police League, its officers and its members.

As you well know, Sgt. Koski has retained a private attorney to represent him in this matter in an arbitration proceeding. I would advise you and the Grievance Committee to expedite this matter. [Emphasis in original.]

#### *Notification of the Grievance Committee's Decision*

By letter dated May 18, 2005, the Grievance Committee advised Koski of the status of his grievances. The Grievance Committee's letter stated as follows:

After review of the grievance filed by you on September 16, 2004 regarding your termination as an employee with the Town of Amherst, the Amherst Police League Grievance Committee has unanimously decided to not pursue the matter through arbitration. This is a decision that was reached after a great amount of review and consideration of the facts involved.

28. Claffey gave this letter to Walsh on April 29, 2005. Walsh never told Lichten to stop communicating with Claffey, and there is no evidence that Walsh contacted Lichten to address any of the assertions in the April 14, 2005 letter.

29. At that time, Walsh believed that Koski's case was held in abeyance at Step 2, and that the grievance time lines were not being enforced.



You also filed a grievance on October 6, 2004 stating you had not received your Quinn Bill payment or payment for unused vacation time, sick time, personal days, holiday pay, or longevity pay. After reviewing matter (sic) with Chief Charles Scherpa, he is in agreement and has requested the Town Manager approve payment in the same manner as would have been paid had you voluntarily resigned.

Koski received the Grievance Committee's May 18th letter on May 20, 2005.

On May 19, 2005, Claffey left the following telephone voice mail message for Lichten:

...I'm going to call you on your cell phone, so if we've talked on the cell phone, you can just delete this message. As you were leaving your message, I was on the phone with Steven Walsh, the former president. There's a new president of the Amherst Police League. I have a letter here that ...finally presses this Grievance Committee into making a decision or to confirming their decision. And their decision is to not go forward with this. If we haven't talked, I don't have a copy of that Muniak decision. If you have one available, if you could fax it to me at (413) 526-8939. I want to take one more shot at these guys. I'm baffled. I am absolutely stunned by their decision, but if you could just give me one more shot at them, I would appreciate it....

On May 19, 2005, Lichten telephoned Koski to inform him of the Grievance Committee's decision and asked Claffey to provide a copy of the Union's constitution and bylaws. Claffey provided the materials on May 20, 2005. On May 20, 2005, Alfred Gordon (Gordon), an attorney in Lichten's law firm, faxed a letter to Del Castilho that stated in pertinent part:<sup>30</sup>

During the grievance process, Mr. Koski, though his counsel, was assured that the Union was taking this matter to arbitration. Though we believe that arbitration had indeed been authorized, there may be some internal Union impediments that have prevented the Union from demanding arbitration as of this date. We are attempting to resolve those impediments, but, at this juncture, believing that arbitration had indeed been authorized, Mr. Koski is hereby invoking arbitration, as a relator to and on behalf of the Union, in order to preserve the timeliness of the Union's arbitration demand.

Zlogar responded to Gordon's May 20 letter on May 25, 2005, stating as follows:

Your letter of May 20, 2005 to Amherst Town Manager Barry L. Del Castilho has been referred to me for response.

The Town rejects your inference that arbitration has been authorized. It is the Town's position that the grievance filed by the Amherst Police League was settled as per Chief's Scherpa's letter of March 17, 2005.

There was no mutual written agreement between the Town and the Amherst Police League to extend the time limits beyond March 17, 2005.

Lichten subsequently asked Zlogar for a copy of Chief Scherpa's March 17, 2005 letter, which Koski had never received.

#### *Koski's Efforts to Appeal the Decision*

On May 23, 2005, Koski wrote to MacLean, the Union's recently-elected new president, asking to appeal the Grievance Committee's decision to the Union's Executive Board. MacLean responded to Koski by letter dated May 27, 2005. MacLean's letter stated as follows:

I have received your letter requesting the Executive Board grant you an appeal of the decision of the Grievance Committee. I have met with the members of the Executive Board to discuss this request. After a thorough review of Article VIII of the contract, we have concluded that I, nor [sic] any member of the Executive Board, have the authority to appeal any decision made by the Grievance Committee concerning any aggrieved issue. The purpose of the Grievance Committee is to be a counsel of your peers free from any outside influence or persuasion and to render a decision.

According to documentation that was sent to you on May 18, 2005, the Committee rendered a decision on grievances that you filed on September 16, 2004 and October 6, 2004, respectfully. The Grievance Committee has reviewed all of the facts, and upon doing so, has come to a resolution. These grievances are now to be considered settled. I nor [sic] any member of my Executive Board, have the authority to challenge their decision.

On May 23, 2005, Koski also filed a charge with the Board, alleging that the Union had breached its duty to represent him fairly.

#### Opinion

A union has a duty to represent its members fairly in connection with issues that arise under a collective bargaining unit. *National Association of Government Employees v. Labor Relations Commission*, 38 Mass. App. Ct. 611, 613 (1995). Unions are permitted a wide range of reasonableness in representing the often-conflicting interests of employees; hence, unions are vested with considerable discretion not to pursue a grievance, as long as their actions are not improperly motivated, arbitrary, perfunctory or demonstrative of inexcusable neglect. *Graham v. Quincy Food Service Employees Association*, 407 Mass. 601, 606 (1990) (citing *Baker v. Local 2977, State Council 93, Am. Fed'n. of State, County, & Mun. Employees*, 25 Mass. App. Ct. 439, 441 (1988)). Ordinary negligence may not amount to a denial of fair representation, however, the lack of a rational basis for a union decision and egregious unfairness or reckless omissions or disregard for an individual employee's rights may have that effect. *Trinque v. Mount Wachusett Community College Faculty Ass'n.*, 14 Mass. App. Ct. 191, 199 (1982).

Generally, an employee has no right to require that his grievance be submitted to arbitration. *Vaca v. Sipes*, 386 U.S. 171, 191 (1967). A union has considerable discretion in determining whether to file a grievance and whether to pursue it through all levels of the contractual grievance procedure. *National Association of Government Employees*, 38 Mass. App. Ct. at 613. Although the grievance process need not be error-free, *Hines v. Anchor Freight, Inc.*, 424 U.S. 554, 571 (1976), in the absence of complex legal or

30. At this time, Lichten believed that the Union was at Step 3 of the grievance procedure and had twenty-eight days to file for arbitration.

procedural issues, a union's failure to follow the grievance procedure outlined in a collective bargaining agreement demonstrates inexcusable neglect. *AFSCME, Council 93 and Herbert Avant*, 27 MLC 129 (2001).

Koski was terminated on September 9, 2004, and timely filed a grievance challenging his termination. Despite Koski's continual requests to expedite the process, the Union did not conduct a Step 2 hearing until March of 2005, did not decide whether to arbitrate Koski's grievance until April of 2005, and did not inform Koski of its adverse decision until May of 2005. Between those dates, the Union failed to inform Koski of the Town's willingness to meet with him outside the grievance procedure, mishandled two critical steps in its grievance procedure, penalized Koski for following advice that a Union lawyer had recommended, and failed to honor its attorney's agreement to arbitrate the grievance. The Union defends its conduct by arguing that: 1) it assembled sufficient information to make a reasoned decision foregoing arbitration; 2) it acted without bias or improper motive; 3) time limits were inconsequential; and, 4) its attorney had no authority to agree to arbitrate Koski's grievance. We are not persuaded by the Union's arguments, and we find that its actions demonstrate a pattern of grossly negligent conduct that severely prejudiced Koski's ability to challenge his termination.

#### *Procedural Missteps*

We first address the Union's failure to advise Koski of Zlogar's offer to meet with Koski and his attorney. At the Step 2 meeting, in the midst of a discussion over Koski's written assertion that he had received no opportunity to defend himself before the Town Manager, Zlogar extended an offer for Koski and his attorney to meet with Town officials. However, the Grievance Committee did not communicate this offer to Koski. Although the Union may have intended to convey this information to Koski by letter, it did not. Moreover, because the Union had not informed Koski about the Step 2 meeting in advance, Koski had no opportunity to attend the meeting and hear Zlogar's offer first-hand. We do not speculate concerning the potential outcome of such a meeting, however, it would have been with the Town Manager, who possessed the authority to overturn the Chief's Step 2 decision. The Union's failure to alert Koski to this pivotal opportunity to challenge his termination shows a reckless disregard for Koski's grievance and his contractual rights.

We next consider the Union's improperly blended steps in the grievance procedure. The Grievance Committee met with Chief Scherpa and Zlogar on March 10, 2005 for a Step 2 meeting. Zlogar's attendance led the Union to assume that this meeting combined Steps 2 and 3 of the Grievance Procedure. The Union

made this assumption without taking steps to ascertain whether Del Castillo had authorized Zlogar to act as his Step 3 representative at the meeting, or whether the Town had intended and agreed to merge the grievance steps.

It is well-settled that unions must know their own policies and contractual procedures. *Goncalves v. Labor Relations Commission*, 43 Mass. App. Ct. 289 (1997); *United Steelworkers of America*, 31 MLC 122 (2005) (appeal pending). In *Goncalves*, the union failed to pursue an employee's grievance because it believed that the employee's personal attorney would manage it. However, the union failed to follow its own policy of securing a written waiver from grievants who retained separate representation. The *Goncalves* court held that, *inter alia*, the union's failure to follow its own policies governing its grievance processing violated the union's duty of fair representation. *Goncalves*, 43 Mass. App. Ct. at 297.

Here, as in *Goncalves*, the Grievance Committee significantly and detrimentally misapplied its own procedures by combining Steps 2 and 3 when it failed to ask the Town whether it intended to combine the steps. After the Chief's Step 2 response, the Union had seven days to forward the matter to the Town Manager for Step 3. By operation of Section 8.02, *Time Limits*, the Union's failure to forward the grievance to Step 3 within the allotted time frame caused the grievance to be considered settled and waived on the basis of the Step 2 decision. The Town's enforcement of this time limit is evident from Zlogar's May 25, 2005 letter.<sup>31</sup> As a result, the Union's failure to follow its own grievance procedure caused the Union to skip the third and final pre-arbitration step in the grievance process, and again, thwarted Koski's ability to present his grievance to the Town Manager. This prejudicial error constituted unlawful negligence. *Goncalves*, 43 Mass. App. Ct. 289.<sup>32</sup>

#### *The Arbitration Agreement*

We next consider the Union's agreement, made through its lawyer, Claffey, to arbitrate Koski's grievance. The Union contends that Claffey lacked both the actual and apparent authority to bind the Union to arbitrate Koski's grievance. It argues that there was no actual authority because Walsh never authorized Claffey to agree to arbitrate Koski's grievance, Claffey never told Lichten that he had such authorization, and only the Union's Board of Directors could authorize the use of Union funds. The Union further contends that Claffey did not possess apparent authority because Lichten had no contact with the Union which would lead him to believe Claffey possessed authority to bind the Union. Additionally, the Union argues that Lichten, an experienced labor lawyer, would have known that Claffey, a general practitioner who was new to the Union, would not have the authority to reach an agreement to arbitrate a grievance. If Lichten possessed this

31. The Union argues that there is no evidence that the grievance time limits played a role in this case. We reject this contention as factually inaccurate. Zlogar's May 25, 2005 letter demonstrates that the Union's failure to properly and timely process the grievance irreparably harmed Koski's grievance.

32. The Union's consideration of Zlogar's assertion regarding Koski's silence at the July 21, 2004 meeting is further evidence of the carelessness with which the Union treated Koski's grievance. In the March 17, 2005 letter that Zlogar forwarded to the Grievance Committee, Zlogar stated that Koski had the opportunity to defend

his position when he and his attorney met with the Zlogar and the Town Manager, but that Koski refused to discuss the incident. The Grievance Committee reviewed Zlogar's letter when it decided to deny arbitration, yet failed to recognize that Koski's silence resulted from the Union attorney's advice. Although the weight that the Grievance Committee placed on this factor is not detailed in the record, it is clear that it was a consideration for Knightly. However, Knightly's reliance on this information from Zlogar is patently unfair, because, with routine inquiry, Knightly could have determined that Koski acted pursuant to the Union attorney's instruction.

knowledge, the Union maintains, Lichten unreasonably failed to reduce the agreement to writing. Finally, the Union argues that, as a former Grievance Committee member, Koski should have known how the Union made decisions and should have communicated that information to Lichten.

Apparent authority is created when a principal engages in conduct that causes another person to reasonably believe that the alleged agent has the authority to act on behalf of the principal. *Higher Education Coordinating Council*, 25 MLC 69, 71 (1998). Thus, if the Union's conduct caused Lichten and/or Koski to reasonably believe that the Union authorized Claffey act on its behalf, we will find that Claffey had apparent authority to act for the Union. Further, unless communication of a limitation in one's authority is presented to the other party, an individual in charge of a transaction has been held to have broad apparent authority. *Town of Ipswich*, 11 MLC 1403, 1410 n.7 (1985) (citing *Costonis v. Medford Housing Authority*, 343 Mass. 108, 115 (1961)). We need not consider whether Claffey possessed the actual authority to consummate an arbitration agreement, because the evidence demonstrates that Claffey possessed apparent authority to bind the Union to arbitrate Koski's grievance.

We first note that in July of 2004, Walsh authorized Koski to speak with Claffey regarding the July 21, 2004 meeting with Del Castilho, and Claffey retained Moriarty to act as the Union's attorney at the meeting. Moriarty told Koski that, if the Town terminated him, the Union would resolve the situation through the grievance procedure in arbitration. This scenario communicated to Koski that Claffey was the Union's lawyer whom the Union had retained to assist him in processing his grievance.

Second, the Union's limited contact with Koski and its reliance on Claffey to communicate with Koski and Lichten on the Union's behalf, caused Koski and Lichten to reasonably believe that Claffey had the authority to act on behalf of the Union. After Koski submitted information to the Grievance Committee on September 30, 2004, the Union had little contact with Koski until four months later, when Koski's wife initiated a conversation with Walsh as a ruse to facilitate a conversation between Koski and Walsh. The next contact occurred in mid-March when Knightly told Koski that the Committee had met with the Chief and was awaiting his decision. The final contact occurred on May 18, 2005, after Lichten threatened the Union with legal action if it did not act on the grievance.

Simultaneously, the Union effectively delegated to Claffey the responsibility to deal with Koski and Lichten regarding the grievance and widely communicated this transfer of responsibility. Walsh authorized Koski to speak with Claffey regarding the July 21, 2004 meeting with the Town, and Moriarty spoke in Claffey's place. When the Chief asked Walsh in January of 2005 about the status of the case, Walsh replied that the Union was dealing with its attorney. In Claffey's February 22, 2005 letter written to Walsh

and copied to Lichten, Claffey told Walsh that he (Claffey) would retain contact with Lichten to update Lichten regarding the grievance and arbitration. In April of 2005, when the Committee decided to discontinue processing the grievance, Knightly and Walsh asked Claffey to draft the letter to Koski.

Further, neither Walsh nor Claffey communicated to Koski or Lichten any restriction on Claffey's authority. *Town of Ipswich*, 11 MLC 1403 (1985). Lichten contacted Walsh regarding Koski's interest in arbitration well before Lichten had any contact with Claffey. At that time, Walsh could have explained the Union's procedures to Lichten, including Claffey's role in the process. There is no evidence that Claffey told Lichten of any limit to his authority when he told Lichten on October 8, 2004 that he was the Union's lawyer. After Walsh received Claffey's November 8, 2004 and February 22, 2005 letters discussing the grievance procedure, Walsh did not communicate with Koski or Lichten regarding Claffey's function. Because Claffey copied Lichten on both letters, Walsh could have advised Lichten if the letters inaccurately reflected Claffey's authority or role in the grievance/arbitration process.

We have reviewed the Union's arguments to the contrary and find that they are without merit. The lack of contact between Lichten and the Union does not preclude a finding of apparent authority. As previously noted, Lichten initially contacted Walsh yet received no response. Once Claffey identified himself as the Union's attorney, Lichten appropriately restricted his communication to Claffey.<sup>33</sup> Additionally, there is no evidence that Lichten knew that the Union had recently retained Claffey, or that Claffey had focused his prior practice on real estate law, and thus the Union's arguments on this point are not supported by the record. Although reducing the agreement to arbitrate to writing may have averted this dispute, the lack of a written agreement is inconsequential. Finally, we reject the Union's contention that Koski's prior service on the Grievance Committee should have informed him and Lichten of the Union's decision-making process. Koski was not a current member of the Union's Grievance Committee and could not have known how the Union had chosen to work through this new attorney in his case. Accordingly, we conclude that Claffey had apparent authority to commit the Union to arbitrate Koski's grievance.

Once the Union had communicated through Claffey that the Union would arbitrate Koski's grievance, the Union was obligated to follow through on its agreement. In *Local 195, IPEA and Robert P. McLaughlin*, 8 MLC 1222 (1981), bargaining unit member Robert McLaughlin (McLaughlin) told the union president that he wished to resign his position and asked the union president if the union would process a grievance for him. The union president assured McLaughlin numerous times that the union would take care of his grievance, yet the union subsequently declined to arbitrate it. The Board found that the union's failure to arbitrate the grievance violated the Law, because the union had assumed the responsibility to

33. Once a party is represented by counsel, an attorney may not circumvent the lawyer and have direct communication with the client without consent. Mass. R. Prof. C. 4.2, 426 Mass. 1402 (1998). Thus, once Claffey's role as the Union's lawyer was

clear, Lichten could not contact the Union directly and in fact had all his communication with Claffey.



pursue McLaughlin's grievances after the union assured McLaughlin that it would take care of them. *Local 195*, 8 MLC at 1227 - 1229. Similarly here, the Union undertook the responsibility to pursue Koski's grievance to arbitration once Claffey agreed to arbitrate it.

Our determination that the Union's actions violated the Law is based on the unique multiplicity of errors in this case. In reaching this conclusion, we nevertheless affirm the general principle that a union that initially files a grievance for arbitration retains the discretion to subsequently withdraw it, so long as it makes a reasoned, non-negligent judgment, untainted by improper motives, about the merits of the grievance. *American Federation of State, County and Municipal Employees*, 29 MLC 127 (2003).

Further, our review of the Union's actions in this case focuses on the totality of the circumstances surrounding the Union's treatment of Koski's grievance and does not hinge solely on the existence of a binding agreement to arbitrate between the lawyers. As previously noted, the Union acted with a reckless disregard for Koski's grievance and gross negligence by failing to advise him of the Town's offer to meet with Del Castillo outside the grievance procedure; erroneously assuming that two separate steps of the grievance procedure had been merged, thereby foreclosing timely access to the Town Manager's step of the grievance procedure; and failing to recognize that Koski had previously refused to discuss the matter under order of Union counsel. These procedural missteps resulted in a breach of the duty of fair representation, even assuming without deciding that the Union's ultimate decision not to arbitrate the grievance was otherwise reasonable, as the Union argues.

Finally, we note that the parties stipulated that Koski's grievance was not clearly frivolous. We adopt the parties' stipulation because the evidence demonstrates that Koski was a long-term employee with no prior discipline, and the collective bargaining agreement between the Town and the Union contained a "just cause" clause pertaining to discharges. *Berkley Employees Association*, 19 MLC 1647, 1650 (1993) (termination from employment, allegedly without just cause, coupled with the possibility that the grievance contesting that termination is substantively arbitrable under the contract, generally satisfies the "not clearly frivolous" test).

#### Conclusion

For the reasons stated above, we conclude that the Union violated Section 10(b)(1) of the Law by failing to properly process and arbitrate Koski's grievance.

#### Remedy

The Board traditionally orders unions that breach the duty of fair representation to take any and all steps necessary to have the grievance resolved or to make the charging party whole for all economic losses caused by the union's conduct. *National Association of Government Employees*, 28 MLC 218, 222 (2002); *Quincy City Employees Union, HLPE*, 15 MLC 1340, 1374-1378 (1989), *aff'd. sub nom. Pattison v. Labor Relations Commission*, 309 Mass.

App. Ct. 9 (1991), *further rev. den'd.*, 409 Mass. 1104 (1991). Here, the Union's unlawful conduct harmed Koski by foreclosing his ability to challenge the merits of his termination.

Therefore, we first direct the Union to attempt to remedy the harm to Koski by taking all steps necessary to resolve Koski's termination grievance. These steps include submitting a written request to the Town to either arbitrate Koski's grievance, including an offer by the Union to pay the full costs of the arbitration, or to provide Koski with the grievance remedy that would have been sought from an arbitrator (*i.e.*, reinstatement to his former, or substantially equivalent, position with full back pay). Because the Union's conduct indicates an inability to adequately represent Koski's interests, the Union shall pay the reasonable and necessary costs of a private attorney selected by Koski to represent him in connection with the arbitration of the grievance.

If the Town does not agree to arbitrate or otherwise fully resolve Koski's grievance, the Union shall be liable for all compensation that Koski lost because of the Union's action, plus interest.

According to the procedure contained in *Quincy City Employees Union, HLPE*, the Union elected at the hearing on the prohibited practice complaint to postpone introducing evidence designed to rebut Koski's case concerning the merits of the termination grievance. *Quincy City Employees Union, HLPE*, 15 MLC at 1376, n.67. Therefore, if the Union is unable to resolve the grievance with the Town, the Union may return to the Division for a hearing to limit its liability by proving that Koski's termination grievance would have been lost for reasons not attributable to the Union's misconduct.

In addition, the Union shall post the attached Notice to Employees in conspicuous places where Union notices are customarily posted to employees of the Town to assure employees that the Union will not violate the Law.

#### Order

WHEREFORE, on the basis of the foregoing, it is hereby ordered that the Amherst Police League shall:

1. Cease and desist from:
  - a) Failing to properly process grievances for employees who are covered by the terms of a collective bargaining agreement between the Town of Amherst and the Amherst Police League.
  - b) Otherwise interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under the Law.
2. Take the following affirmative action necessary to effectuate the purposes of the Law:
  - a) Request in writing that the Town offer Koski reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position.
  - b) If the Town declines to offer Koski reinstatement with full back pay, the Union shall request in writing that the Town waive any time limits that may bar further processing and arbitration of Koski's termination grievance; and the Union shall offer to pay the cost of arbitration. If the Town agrees to waive any applicable time limits and to arbitrate the merits of Koski's grievance, the Union shall process the grievance to conclusion in good faith and

with all due diligence and shall pay the cost of arbitration if the Town accepts its offer to do so. Because the Union’s conduct indicates an inability on its part to adequately represent Koski’s interests, the Union shall pay the reasonable and necessary costs of a private attorney selected by Koski to represent him in connection with the arbitration of the grievance.

c) If the Town does not agree to arbitrate or otherwise fully resolve Koski’s termination grievance, the Union shall make Koski whole for the loss of compensation that he suffered as a direct result of his termination from the Town effective on September 9, 2004. The Union’s obligation to make Koski whole includes the obligation to pay Koski interest on all money due at the rate specified in MGL c. 231, Section 6B.

d) Immediately post in conspicuous places where notices to bargaining unit employees are customarily posted, including all places at the Town, copies of the attached Notice to Employees. The Notice to Employees shall be signed by a responsible elected Union officer and shall be maintained for at least thirty consecutive days thereafter. Reasonable steps shall be taken by the Union to ensure that the Notices are not altered, defaced, or covered by any other material. If the Union is unable to post copies of the Notice in all places where notices to bargaining unit employees are customarily posted at the Town, the Union shall immediately notify the Executive Secretary of the Division in writing, so that the Division can request the Town to permit the posting.

e) Notify the Division in writing within thirty days from the date of this Order of the steps taken by the Union to comply with the Order.

SO ORDERED.

**NOTICE TO EMPLOYEES**

POSTED BY ORDER OF THE COMMONWEALTH  
EMPLOYMENT RELATIONS BOARD OF THE THE  
MASSACHUSETTS DIVISION OF LABOR RELATIONS

AN AGENCY OF THE COMMONWEALTH OF  
MASSACHUSETTS

The Massachusetts Commonwealth Employment Relations Board (Board) has decided that the Amherst Police League (Union) acted in an unlawful manner by failing to properly process and arbitrate a grievance for William J. Koski, in violation of Section 10(b)(1) of MGL c. 150E, the Public Employee Collective Bargaining Law (the Law). The Union posts this Notice to Employees in compliance with the Board’s order.

Section 2 of the 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 wages, hours, working conditions, and other terms of employment, without fear of interference, restraint, coercion or discrimination and;

The right to refrain from either engaging in concerted protected activity, or forming, or joining or assisting unions.

WE WILL NOT fail to properly process grievances for employees who are covered by our collective bargaining agreement with the Town of Amherst.

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

WE WILL request the Town to offer Koski reinstatement to his former position, or, if it no longer exists, to a substantially equivalent position with full back pay. If the Town declines to offer Koski reinstatement to his former, or substantially equivalent position, we will ask the Town to arbitrate the grievance concerning Koski’s termination. If the Town agrees to arbitrate Koski’s grievance, we pay the reasonable and necessary costs of an attorney selected by Koski to represent him in the arbitration. If the Town declines to arbitrate the grievance, WE WILL make Koski whole for any loss of compensation that he may have suffered as a direct result of our unlawful conduct, plus interest.

[signed]  
Amherst Police League

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

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Division of Labor Relations, 14 Staniford St., 1<sup>st</sup> Floor, Boston, MA 02114 (Telephone: (617) 626-7132).

\* \* \* \* \*