3) Make Stephen Cronin whole for any loss of earnings or benefits suffered as a result of the City's decrease in his pay grade and job classification, plus interest at the rate specified in MGL c. 231, §6I, compounded quarterly.

[signed]
City of Newton

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, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).

* * * * * *

In the Matter of AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 93, AFL-CIO, LOCAL 193

and

BRUCE GAUVAIN

Case No. MUPL-03-4449

72.2 obligation to arbitrate grievance

June 10, 2009
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member

James J. Dever, Esq.	*Representing the American Federation of State, County and Municipal Employees, Council 93, AFL-CIO Local 193*
Bruce Gauvain	*Pro Se*

DECISION[1]

On February 19, 2003, Bruce Gauvain filed a charge with the former Labor Relations Commission (Commission), alleging that the American Federation of State, County, and Municipal Employees, Council 93, AFL-CIO, Local 193 (Union) had violated Section 10(b)(1) of the Law by engaging in conduct that was arbitrary, perfunctory, improperly motivated and constituted inexcusable neglect when it failed to investigate, evaluate or process a grievance concerning Gauvain's layoff. The Union filed its answer to the complaint on December 12, 2003. On January 23, 2004, the Union elected to present evidence at the hearing showing that even if Gauvain's grievance is found to be arguably meritorious, the grievance would have been lost at arbitration for reasons not attributable to the Union's misconduct.

On March 15, 2004 and March 16, 2004, Margaret M. Sullivan, Esq., a duly-designated Commission hearing officer (Hearing Officer) conducted a hearing. Both parties had the opportunity to be heard, to examine witnesses, and to introduce evidence. Gauvain and the Union chose to make oral statements at the close of the hearing rather than to submit post-hearing briefs. On May 10, 2006, the Hearing Officer issued her Recommended Findings of Fact. Neither party challenged the Hearing Officer's Recommended Findings of Fact. Therefore, we adopt them in their entirety and summarize the relevant portions below.

After considering the facts and the parties' arguments, we conclude that the Union did not violate its duty of fair representation to Gauvain, because there is no evidence that its decision not to submit his grievance to arbitration was improperly motivated, arbitrary, perfunctory or demonstrative of inexcusable neglect.

Findings of Fact[2]

The Union is the exclusive bargaining representative for certain employees of the City of Lynn (City). The Union and the City were parties to a collective bargaining agreement in effect from July 1, 2001 through June 30, 2004[3] containing the following provisions:

> Article 4-Grievance Procedure
>
> Definition: A grievance shall be defined as a dispute arising between the employer and the Union and/or any employee concerning the application, meaning or interpretation of this Agreement.
>
> Step 1: Any employee having a grievance shall take it up with his immediate supervisor-in-charge within three (3) working days of the date of the grievance or his knowledge of its occurrence. He may, if he so desires, have his steward present. The immediate supervisor shall, upon receipt of a complaint from an employee under his jurisdiction, attempt to adjust the matter and respond to the grieving employee within twenty-four (24) hours.
>
> Step 2: If the grievance has not been settled at Step 1, it may be presented in writing by the grievance committee of the Union to the Department Head or his designated representative within two (2) calendar weeks after the answer by the Step 1 supervisor is due. Any grievance over which the Step 1 supervisor has no authority, may be presented by the Union at Step 2. The Department Head or his designated representative shall respond to the Union's Grievance Committee in writing within five (5) calendar days after discussions are completed, but in no event no more than two (2) weeks after the grievance was presented by the Union at Step 2.
>
> Step 3: If the grievance still remains unadjusted, it may be presented by the Union's Grievance Committee to the Mayor or his designated

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1. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." The Commonwealth Employment Relations Board (Board) is the body within the Division charged with deciding adjudicatory matters. References in this decision to the Board include the former Labor Relations Commission (Commission). Pursuant to Section 13.02(1) of the Commission's Rules in effect prior to November 15, 2007, the Commission designated this case as one in which it would issue a decision in the first instance.

2. The Board's jurisdiction in this matter is uncontested.

3. The City and the Union executed this agreement on December 27, 2001.

representative in writing within ten (10) calendar days after the response of the Department Head is due or received, whichever is later. The Mayor or his representative will meet with the Union's Grievance Committee within ten (10) calendar days after receiving the grievance.

The Mayor or his representative shall give an answer in writing within twenty-one (21) calendar days after the presentation of the grievance at the Step 3 level.

Time Limits: If, at the end of the thirty (30) days next following either the occurrence of any grievance or the date of first knowledge of its occurrence by any employee affected by it, whichever is later, the grievance shall not have been presented at Step 1 and/or Step 2 of the procedure set forth herein, the grievance shall be deemed to have been waived. Furthermore, any grievance in process under such procedure, shall also be deemed to have been waived if the action required to process the said grievance to the next step in the procedure by the Union shall not have been taken within the time specified thereof above.

Article 7-Seniority

Section 1: Definition: Length of continuous service with the City shall determine an employee's seniority except where there is a conflict with Civil Service Law rules which in such cases these rules shall apply. If any employee leaves the employment of the City and returns in less than two (2) years, he may, upon payment to the Retirement Board of a sufficient amount to be credited with his former service for retirement purposes, receive credit for former service with the City. However, if he returns to the employment of the City in more than two (2) years from his previous employment, he will be considered to be a new employee.

Section 2: The principle of seniority and necessary qualifications shall be a factor considered by the City in case of promotion within the Bargaining Unit. All other considerations being equal, the most senior qualified employee will be selected. Seniority will govern in transfers, decrease or increase in working force, as well as preference in the assignment to shift work when openings occur. …

Article 28-Management Rights

Except to the extent that is contained in this Agreement, a provision to the contrary, all of the authority, power, rights, jurisdiction and responsibility of the City are retained by and reserved exclusively to the City and to its respective Department Heads, including, but not limited to: The rights to manage the affairs of the City and each of its departments and to maintain and improve the efficiency of its operation; to determine the methods, means, processes and personnel by which operations are to be conducted; to determine that size and direct the activities of the working forces; to determine the schedule and hours of duty consistent with the statute and assignment of employees to work; to establish new job classifications for all jobs; to require from each employee the efficient utilization of their services; to hire, promote, assign, and retain employees; for just cause and reason to transfer, discipline, suspend, demote and discharge employees; to promulgate and enforce reasonable rules and regulations pertaining to the operation of the City, of its departments and to the employee which rules are not in conflict with the provisions of this Contract.

Article 41-Section 5.7 of Chapter 8 of the Acts of 1985 Allotments

On or before August first of each year, or within ten days after the approval of the City Council and the Mayor of the annual appropriation order for such fiscal year, whichever shall occur later, the city officials in charge of departments or agencies, including the Superintendent of Schools for the School Department, shall submit to the Chief Financial Officer, with a copy to the City Clerk, in such form as the Chief Financial Officer may prescribe. Whenever said Chief Financial Officer determines that any department or agency, including the school department, will exhaust or has exhausted its quarterly or shorter time period allotment and any amounts unexpended in previous periods, he shall give notice in writing to such effort to the Department Head, the Mayor, the City Solicitor, and to the City Clerk who shall forthwith transmit the same to the City Council. Upon such determination and notice thereof, said Chief Financial Officer shall provide such officers additional reports on at least a monthly basis indicating the status of such accounts.

The Mayor, within seven (7) days after receiving such notice, shall determine whether to waive or enforce such allotment. If the allotment for such period is waived or is not enforced, as provided above, the Department or Agency Head shall reduce the subsequent period allotments appropriately. If the allotment for such period is enforced or not waived, thereafter the Department shall terminate all personnel expenses for the remainder of such period. All actions, notices and decisions provided for in this section shall be transmitted to the City Council and the City Clerk within seven (7) days.

No personnel expenses earned or accrued, within any department, shall be charged to or paid from such department's or agency's allotment of a subsequent period without approval by the Mayor, except for subsequently determined retroactive compensation adjustments. Approval of a payroll for payment of wages, or salaries or other personnel expenses which would result in an expenditure in excess of the allotment shall be a violation of this section by the department or agency head, including the Superintendent of Schools and the School Committee. If the continued payment of wages, salaries or other personnel expenses is not approved in a period where a Department has exhausted the period allotment or allotments as specified above, or, in any event, if a department has exceeded its appropriation for a fiscal year, the City shall have no obligation to pay such personnel cost or expense arising after such allotment or appropriation has been exhausted.

Notwithstanding the provisions of Chapter One Hundred Fifty E of the General Laws, every Collective Bargaining Agreement entered into by the City or the School Department after March 26, 1985 shall be subject to and shall expressly incorporate the provisions of Section 5.7 of Chapter 8 of the Acts of 1985.

In May 2002, Gauvain worked as a code inspector[4] for the City in its health department and was a member of the Union's bargaining unit. Gauvain was classified as a provisional code inspector under MGL c. 31 (Civil Service Law)[5] and had the least seniority[6] of the six or seven inspectors who worked in the health department.[7] On Friday, May 8, 2002, Gauvain received the following letter via in-

4. As a code inspector, Gauvain would inspect vacant housing units in the City to ensure that the units were clean, habitable and safe for future occupants. He could also require property owners to fix substandard units. The City charged a $30 fee for each inspection that Gauvain conducted. Gauvain conducted approximately ten inspections per day.

5. The City had adopted Civil Service Law for many of its employees.

6. Gauvain had accumulated approximately seventeen years of service with the City in various capacities, which included working as a fire fighter, teacher, teacher's aide, housing rehabilitation inspector and maintenance worker. He had worked for the health department for approximately one and one-half years.

7. The health department, which was located in City Hall, employed three code inspectors, two sanitation inspectors, a health inspector, and a food inspector. Besides Gauvain, the code inspectors were Bob Barrett (Barrett), who had worked for the

teroffice mail from the City's personnel director Frances Castle (Castle):[8]

> It is with sincere regret that the Appointing Authority, Edward J. Clancy, Jr., Mayor of the City of Lynn, [Mayor Clancy] does hereby notify you that your provisional position as a Code Enforcement Inspector for the City of Lynn Health Department will be abolished.
>
> You will be separated from employment with the City as of June 30, 2002. This action is being taken due to reduced funding in state aid, increased health costs and other reductions in available revenue. This layoff is for lack of funds and efficiency and economy.
>
> If you still have vacation time due to you, you must take that prior to your final separation from your position.

On or about the same time, Gauvain approached the head of the health department Gerald Carpinella (Carpinella) and inquired whether Carpinella could do anything to prevent Gauvain's layoff. Carpinella indicated that the health department's budget was at the bare minimum and that he did not have the funds to keep Gauvain's position.[9]

On May 8, 2002, the City issued a total of thirty layoff notices to employees,[10] which included eleven employees who were members of the Union's bargaining unit. The City did not notify the Union before it issued the layoff notices, but certain unit members who had received layoff notices contacted Union president Joseph Downey (Downey)[11] over the following weekend. On Monday, May 11, 2002, Downey went to the personnel office, protested the City's failure to notify the Union before the City issued the layoff notices, requested a list of unit members who had received layoff notices and copies of those notices, and demanded to bargain over the proposed layoffs.

Downey then told the Union's stewards to file separate grievances[12] on behalf of each unit member who had received a layoff notice.[13] Ennis, who was Gauvain's friend and a member of the Union's executive board, gave Gauvain one of the partially completed grievances. Gauvain finished filling out the grievance with his personal information, signed the form, and gave it to Union steward Laura Coppola (Coppola).[14]

The Union submitted all of the grievances to the City at the same time, and the City waived Steps 1 and 2 of the grievance process. After the Union filed the grievances at Step 3 of the grievance process, the Union and the City consolidated the Step 3 hearings on those grievances with impact bargaining sessions over the proposed layoffs. Between May 8, 2002 and June 28, 2002,[15] the Union met with the City approximately three times to bargain over the impacts of the layoffs.[16] The Union's eleven executive board members,[17] which included Downey[18], George Zorzy (Zorzy),[19] Coppola, Susan Hefler (Hefler),[20] Elaine Sharp and Ennis, participated in those bargaining sessions.[21] The Union did not notify its unit members about the impact bargaining sessions, except that it referenced those bargaining sessions at its regularly scheduled Union meetings.[22] Gauvain did not attend those meetings.[23]

During those bargaining sessions, the Union proposed that the City solicit volunteers to be laid off,[24] raised the issue of whether

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City for approximately forty years, and David Goodyear (Goodyear), who had worked for the City for approximately eight to ten years.

8. Castle in her May 8, 2002 letter indicated that she was acting as the Appointing Authority's designee.

9. Mayor Clancy had ordered his department heads to reduce their budgets by a certain percentage, and many department heads could only reduce their budgets by eliminating positions.

10. In addition to Gauvain, the City issued layoff notices to the following bargaining unit members: (1) Debra Ginivan, who was a permanent clerk typist in the building department; (2) Roger Ennis (Ennis), who was a provisional inspector in the building department; (3) Loreen Casey, who was a provisional accountant in the comptroller's office; (4) Harry McCabe (McCabe), who was a cashier/typist in the collector's office and whose position was not covered by civil service; (5) Shannon O'Shea, who was a permanent cashier/typist in the collector's office and whom the City ultimately did not lay off; (6) Jean Marie Maitland, who was a permanent part-time assistant laundry worker in the City's medical facility; (7) Nathaniel Hubburt, who was a permanent part-time kitchen worker at the medical facility; (8) Juan Torres, who was a temporary kitchen worker at the City's convalescent home; and (9) Stephen Savisky, who was a permanent part-time kitchen worker at the convalescent home.

11. Downey had been Union president for approximately ten years, and prior to that, had been vice-president for six years.

12. The Union filed separate grievances on behalf of the unit members in order to preserve all rights that the individual employees might have, including veterans' preference rights under civil service Law, etc. The Union contended that under civil service law, the City was obligated to lay off all emergency, all temporary and all provisional employees before it laid off any employees who held permanent civil service status.

13. Downey instructed the stewards to include the following language in the grievances:

> Articles and Sections of State Law which have been violated: INCLUDING BUT NOT LIMITED TO State Law 150E, Articles 1, 6, 8, 20, 28, 31, 36
>
> Grievance: My position was abolished effective June 30, 2002 without just cause. And without mandatory negotiations with our Collective Bargaining Representatives as required by law.
>
> Remedy: That I remain in my employment with available funds and be made whole in every way.

14. Coppola was the Union's secretary as well as the steward for unit members who worked at City Hall.

15. The record does not contain the exact dates of those bargaining sessions.

16. The City never issued an answer at Step 3 on any of the grievances.

17. The executive board negotiates successor collective bargaining agreements with the City, engages in all impact bargaining negotiations during the mid-term of the contract, and votes to accept or reject the grievance committee's recommendation about whether the Union should submit a grievance for arbitration.

18. Downey acted as chairman.

19. Zorzy was the Union's vice-president.

20. Hefler was the Union's secretary-treasurer.

21. Downey, Zorzy, Joseph Cashman (Cashman), the steward for the City's convalescent home, and an unidentified steward for the City's medical facility (the medical facility's steward) comprised the Union's grievance committee. Cashman and the medical facility's steward were also present during the three bargaining sessions.

22. Union meetings took place on the first Wednesday of each month, but the Union did not compile an agenda in advance of each meeting.

23. Gauvain credibly testified that for personal reasons he disagreed with the Union's choice of a venue for its meetings.

24. The City agreed to this proposal and, as a result, the City did not lay off McCabe in June 2002 because a colleague in the collector's office agreed to accept a voluntary layoff.

the City should lay off unit members who helped bring in revenue for the City,[25] and questioned the various department heads about whether additional monies could be found that would prevent the need for layoffs.[26] The Union and the City also negotiated an oral agreement that all laid off unit members, regardless of their civil service status, would be entitled to recall rights for five years.[27] The Union did not notify its bargaining unit members about the agreement, and the City and Union never reduced the agreement to writing.[28]

The Union never submitted any of the grievances to arbitration.[29] During the bargaining sessions, the grievance committee and the executive board conferred and agreed that the grievances should not proceed to arbitration because the City had demonstrated that it had a budgetary shortfall.

Between May 8, 2002 and June 28, 2002,[30] Gauvain contacted Coppola one or two times to inquire about the status of his grievance[31] and to request a copy of the collective bargaining agreement, which Coppola subsequently provided to him. Coppola informed Gauvain that she was not sure what was happening with his grievance, but that she believed that he would be laid off as scheduled. On June 28, 2002, the City laid off Gauvain from his position as a code inspector.

Between June 28, 2002, and August 12, 2002,[32] Gauvain called Coppola three more times to inquire about the status of his grievance. Coppola informed him that she had not heard from the Union about his grievance.[33] On August 12, 2002, Gauvain called Downey and asked him if anything was being done with the grievance. Downey informed him that there was nothing pending on the grievance.[34] On September 9, 2002 and September 29, 2002, Gauvain again called Coppola, and she informed him that she had not heard anything about his grievance. After September 29, 2002, Gauvain and the Union had no further communication until Gauvain filed his prohibited practice charge on February 19, 2003.

Opinion

Once a union acquires the right to act for and to negotiate agreements on behalf of employees in a bargaining unit, Section 5 of the Law imposes on that union an obligation to represent all bargaining unit members without discrimination and without regard to employee organization membership. A union breaches its statutory responsibility to bargaining unit members if its actions towards an employee, during the performance of its duties as the exclusive collective bargaining representative, are unlawfully motivated, arbitrary, perfunctory, or reflective of inexcusable neglect. *Quincy City Employees Union, H.L.P.E*, 15 MLC 1340, 1355 (1989), *aff'd sub nom.*, *Pattison* v. *Labor Relations Commission*, 30 Mass. App. Ct. 9 (1991), *further rev. den'd*, 409 Mass. 1104 (1991). If the facts support a finding that an exclusive bargaining representative has breached its duty of fair representation, the Board concludes that the union has violated Section 10(b)(1) of the Law.

Unions are permitted a wide range of reasonableness in fulfilling their statutory obligations, subject to good faith and honesty in the exercise of their discretion. *Trinque* v. *Mount Wachusett Community College Faculty Association*, 14 Mass. App. Ct. 191, 199 (1992) (citations omitted). "Consequently, an aggrieved employee, notwithstanding the possible merits of his claim is subject to a union's discretionary power to pursue, settle, or abandon a grievance, so long as its conduct is not improperly motivated, arbitrary, perfunctory or demonstrative of inexcusable neglect." *Baker* v. *Local 2977, State Council 93, American Federation of State, County & Municipal Employees*, 25 Mass. App. Ct. 439, 441 (1988) (citations omitted). *See also National Association of Government Employees* v. *Labor Relations Commission*, 38 Mass. App. Ct. 611, 613 (1995) (a union has considerable discretion in determining whether to file a grievance and whether to purse it through all levels of contractual grievance-arbitration procedure).

If a union ignores a grievance, inexplicably fails to take some required step, or gives the grievance merely cursory attention, it has breached the duty of fair representation by its perfunctory handling of an employee's grievance. *Independent Public Employees Association, Local 195*, 12 MLC 1558, 1565 (1986) (quoting *Harris* v. *Schwerman Trucking Co.*, 668 F.2d 1204 (11th Cir. 1982)). Similarly, if a union fails to investigate, evaluate, or pursue an arguably meritorious grievance without explanation, it has breached its duty of fair representation by its gross or inexcusable negligence. *NAGE*, 20 MLC 1105, 1113 (1993), *aff'd sub nom.*, *National Association of Government Employees* v. *Labor Relations Commission*, 38 Mass. App. Ct. at 811. A finding of honest mistake or ordinary or simple negligence, standing alone, does not constitute a breach of the duty of fair representation. *Pattison* v.

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25. The City responded by maintaining that it could earn a similar amount of revenue with fewer employees.

26. Ultimately, the Union agreed that no additional funds could be found in the budget.

27. Only permanent employees are entitled to recall rights under civil service law.

28. The City subsequently complied with this oral agreement.

29. The record does not reveal whether the Union subsequently withdrew any of the grievances.

30. The record does not contain the exact date(s) when Gauvain contacted Coppola.

31. Gauvain was aware that he was the most junior employee in the health department and described that City's layoff policy as "the last one in the door is the first one to go out the door." However, he wanted to pursue his grievance because he believed that the monies that he earned for the City as a code inspector were sufficient to pay his salary.

32. The record does not contain the exact dates when Gauvain called Coppola.

33. Downey testified that when Coppola subsequently informed him about Gauvain's three telephone calls, she indicated that she had told Gauvain that she did not have anything to say to him. However, Coppola did not testify at the hearing, and Downey had no first hand knowledge of the nature of the telephone conversations between Gauvain and Coppola. Thus, the hearing officer credited Gauvain's testimony on this point.

34. Gauvain testified that Downey commented that he was unaware that Gauvain had a grievance. However, Gauvain's subsequent conduct in contacting Coppola two more times to inquire about the status of his grievance is more consistent with Downey's recollection of the conversation. Therefore, the hearing officer credited Downey's testimony on this point.

Labor Relations Commission, 30 Mass. App. Ct. at 16 (citations omitted); *Teamsters Local 692 (Great Western)*, 209 NLRB 446, 448, 85 LRRM 1385, 1387 (1973). However, the absence of a rational basis for a union's decision and egregious unfairness or reckless omissions or disregard for an individual employee's rights may amount to a denial of fair representation. *Graham* v. *Quincy Food Serv. Employees Ass'n & Hosp., Library & Pub. Employees Union*, 407 Mass. 601, 606 (1990) (quoting *Trinque* v. *Mount Wachusett Community College Faculty Association*, 14 Mass. App. Ct. at 199). The Board reviews the circumstances of each case to determine whether a union's investigation or inquiry was sufficient for it to make a reasoned judgment in deciding whether to pursue or abandon a grievance. *Local 285, SEIU*, 9 MLC 1760, 1765 (1983) (citing *Local 509, SEIU*, 8 MLC 1173 (1981)).

The issue here is whether the Union violated its duty of fair representation by failing to investigate, evaluate or process Gauvain's grievance. In support of his claim, Gauvain argues that the Union violated its duty to fairly represent him because it failed to submit his grievance to arbitration even though the fees that he collected as a code inspector were sufficient to pay for his salary and because the Union failed to keep him informed about the status of his grievance. Upon review of the record, we do not find a breach of the duty of fair representation.

Here, the facts show that in May of 2002, the City issued layoff notices to thirty employees, including eleven unit members. After certain unit members notified the Union about the layoff notices, the Union requested a list of unit members who had received layoff notices, asked for copies of the layoff notices, and demanded to bargain over the proposed layoffs. The Union then filed separate grievances on behalf of each of the eleven unit members, including Gauvain, in order to preserve any individual rights that those employees might have. Therefore, we conclude that the Union did not fail to investigate or evaluate the merits of Gauvain's claim.

The City agreed to waive Steps 1 and 2 of the contractual grievance procedure. After the Union filed the grievances at Step 3 of the grievance process, the Union and the City consolidated the Step 3 hearings on the grievances with three impact bargaining sessions over the proposed layoffs. The Union made the proposal that the City solicit volunteers to be laid off, challenged whether the City should lay off unit members, like Gauvain, who helped bring in revenue for the City, and questioned the various department heads about whether additional monies could be found that would prevent layoffs. Thus, the Union did not give the matter only cursory attention or fail to take a required step. *See Independent Public Employees, Local 195*, 12 MLC at 1565-1566 (union acted in a perfunctory manner when it did nothing to help process a grievance and had no explanation as to why it did not pursue the grievance).

After engaging in impact bargaining, the Union decided not to submit any of the grievances to arbitration because the City had demonstrated that it had a budgetary shortfall. Turning specifically to Gauvain's grievance, it is undisputed that Gauvain was a provisional employee under Civil Service Law and that he had the least seniority of all the inspectors in the health department. Further, Gauvain himself characterized the City's layoff policy as "the last one in the door is the first one to go out the door." Finally, the City rejected the Union's argument that the City should not lay off unit members who garnered revenue for the employer, which was the reason why Gauvain believed that the Union should submit his grievance to arbitration. Therefore, we conclude that the Union did not treat Gauvain's grievance in an arbitrary manner. *International Brotherhood of Police Officers, Local 338*, 28 MLC 285, 288 (2002) (union's action is arbitrary if it is without a rational basis and unrelated to legitimate union interests).

Finally, the record contains no evidence that personal hostility motivated the Union's handling of Gauvain's grievance. *Compare Graham*, 407 Mass. at 609 (unit member showed a history of hostility and animosity between herself and union officials concerning the running of the union that arguably tainted the handling of her grievance); *with American Federation of State, County, and Municipal Employees and Darryl Dunlap*, 27 MLC 113, 116 (2001) (record devoid of any evidence showing that a union's decision to proceed on the first grievance that an employee filed rather than a subsequent grievance was tainted by personal hostility). Thus, we find that the Union's determination was reasonable under the circumstances and did not amount to a breach of the duty of fair representation. *University of Massachusetts Faculty Federation*, 25 MLC 194, 200 (1999).

Furthermore, a union's failure to provide a grievant with information about a pending grievance does not, standing alone, constitute a breach of the Union's duty of fair representation. *American Federation of State, County, and Municipal Employees and Patrick Palmer (Palmer)*, 29 MLC 127, 131 (2003); *Robert W. Kreps*, 7 MLC 2145, 2148 (1981). Here, the facts show that the Union failed to inform Gauvain about the status of his grievance for the period from May until August 2002. When Gauvain contacted Downey on August 12, 2002 to inquire about the status of the grievance, Downey informed him that there was nothing pending on the grievance.[35] However, while the Board does not condone the Union's lack of communication, the Union already had made a good faith, reasoned judgment not to submit Gauvain's grievance to arbitration and, therefore, the belated notice to Gauvain did not impair or prejudice his contractual rights. *Palmer*, 29 MLC at 131 (even though a union failed to inform an employee that it had withdrawn his grievance, employee's rights were not impaired because the union previously determined that the grievance was not arbitrable); *Teamsters, Local 437*, 10 MLC 1467, 1477-1478 (1984) (union's delay in notifying employee about the status of his griev-

35. Because the Union expressly agreed to waive timeliness as an affirmative defense, we have decided this case on its merits and need not reach the issue of whether Downey's comments to Gauvain were sufficient to trigger the six-month period of limitations for the filing of his charge. *See generally*, *Commonwealth of Massachusetts/Commissioner of Administration and Finance*, SUP-07D-5371, slip op. at 5 (Dec. 31, 2008).

ance did not prejudice his rights, because of union's prior determination that the grievance lacked merit).

Conclusion

Based on the record and for the reasons stated above, we conclude that the Union did not violate Section 10(b)(1) of the Law. Accordingly, we dismiss the complaint of prohibited practice.

* * * * * *

In the Matter of BOSTON SCHOOL COMMITTEE

and

BOSTON TEACHERS UNION, LOCAL 66, MFT/AFT/AFL-CIO

Case No. CAS-04-3600

23. Contract Bar
45.1 contract bar
93.61 dismissal of petition

June 18, 2009
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member

Virginia Casey Goscinak, Esq.	*Representing the Boston School Committee*
Matthew E. Dwyer, Esq. *Ryan P. Dunn, Esq.*	*Representing the Boston Teachers Union, Local 66, MFT/AFT/AFL-CIO*

RULING ON MOTION TO DISMISS[1]

Statement of the Case

On November 12, 2004, the Boston Teachers Union, Local 66, MFT/AFT/AFL-CIO (Union) filed a unit clarification petition with the Labor Relations Commission (Commission) seeking to accrete the position of instructional technician into its existing bargaining unit of paraprofessionals in the Boston schools. On April 19, 2005, the Boston School Committee (School Committee) filed a motion to dismiss on the grounds of contract bar. On May 9, 2005, the Union filed its opposition to the motion to dismiss, and on May 19, 2005, the School Committee filed a reply memorandum.

Statement of Facts

The Union is the exclusive bargaining representative for "all teacher paraprofessionals (paras) employed by the [School] Committee, including clerical paras, teacher paras, library paras, tool keepers, bilingual paras, security paras, community liaison paras, and community field coordinators." On November 21, 2002, the Union filed a grievance at Step 2 of the parties' contractual grievance procedure[2] protesting the School Committee's failure to recall unit member Matthew Ball (Ball) to the position of instructional technician at the South Boston Educational Complex.[3] The parties attended an arbitration hearing before Arbitrator Philip Dunn (Arbitrator Dunn) on January 2, 2004, January 9, 2004, February 4, 2004, and March 5, 2004.[4] On April 14, 2004, the parties executed a successor collective bargaining agreement for the period from September 1, 2003 through August 31, 2006 (2003-2006 Agreement). On August 6, 2004, Arbitrator Dunn issued an award dismissing the grievance on the grounds that "the essence and core job content of the instructional technician position created at the South Boston Educational Complex in the fall of 2002 was fundamentally different than that of the library media para position, which had been eliminated in the spring."

Opinion

Section 14.06(1)(b) of the former Commission's regulations, 456 CMR 14.06(1)(b), entitled "Bars to Petitions" states that:

> Except for good cause shown, no petition seeking clarification or amendment of an existing bargaining unit shall be entertained during the term of a valid existing collective bargaining agreement, unless such petition is filed no more than 180 days and no fewer than 150 days prior to the termination date of said agreement, provided that a petition to alter composition or scope of an existing unit by adding or deleting job classifications created or whose duties have been substantially changed since the effective date of the collective bargaining agreement may be entertained at other times.

The purpose of the contract bar rule is to establish and promote the stability of labor relations and to avoid instability of labor agreements, in part by ensuring that both labor and management know which positions are included in the bargaining unit covered by their collective bargaining agreement. *Springfield School Committee*, 29 MLC 106, 111 (2002) (citing, *Massachusetts Water Resources Authority*, 19 MLC 1778, 1779 (1993)). The Board's application of the contract bar rule is discretionary. *Chief Justice of the Administration and Management of the Trial Court*, 29 MLC

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1. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." The Commonwealth Employment Relations Board (Board) is the body within the Division charged with deciding adjudicatory matters. References in this decision to the Board include the former Labor Relations Commission (Commission). Pursuant to Section 13.02(1) of the Commission's Rules in effect prior to November 15, 2007, the Commission designated this case as one in which it would issue a decision in the first instance.

2. The Union and the School Committee were parties to a collective bargaining agreement that by its terms was in effect from September 1, 2000 through August 31, 2003 (2000-2003 Agreement).

3. Ball previously had worked as a library media para at South Boston High School.

4. The Union represents that during the arbitration hearing, it became aware of six to eight other instructional technicians employed by the School Committee.