

COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF LABOR RELATIONS

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In the Matter of

AFSCME COUNCIL 93, AFL-CIO

and

DALE M. WEBBER

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Case No. MUPL-06-4542

Date issued:

June 24, 2009

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Hearing Officer:

Susan L. Atwater, Esq.

Appearances:

Jaime DiPaola-Kenney, Esq.- Representing AFSCME, Council 93, AFL-CIO

Dale M. Webber - Pro Se

DECISION

1 The issue in this case is whether AFSCME, Council 93, AFL-CIO (Union)  
2 breached its duty to fairly represent bargaining unit member Dale M. Webber (Webber)  
3 by the manner in which it settled prohibited practice Case No. MUP-03-3951 and by  
4 failing to explain to Webber its decision to withdraw certain grievances from arbitration.  
5 I find that the Union did not violate Section 10(b)(1) of M.G.L. c.150E (the Law) as  
6 alleged, and I dismiss this Complaint of Prohibited Practice.

7 Statement of the Case

8 On January 6, 2006, Webber filed a charge with the former Labor Relations  
9 Commission, now re-organized as the Division of Labor Relations (Division), alleging  
10 that the Union had engaged in prohibited practices within the meaning of Section

1 10(b)(1) of the Law.<sup>1</sup> The Board investigated Webber's charge and issued a complaint  
2 of prohibited practice on June 12, 2008. The Union filed an answer to the Board's  
3 complaint on June 25, 2008.

4 I conducted a hearing on December 1, 2008 at which both parties had the  
5 opportunity to be heard, to examine witnesses and to introduce evidence. Webber and  
6 the Union filed post-hearing briefs on or about January 30, 2009. Based on the record  
7 evidence and in consideration of the parties' briefs, I make the following findings of fact  
8 and render the following opinion.<sup>2</sup>

9 Stipulations of Fact

10 1. The arbitration cases referred to in Paragraph 9 of the Complaint of Prohibited  
11 Practice will be identified using the following numbers and terms:

- 12  
13 a. AAA 11 390 00477 05: Using union personnel in a managerial position  
14 b. AAA 11 390 00686 05: Overtime  
15 c. AAA 11 390 00687 05: Overtime  
16 d. AAA 11 390 00476 05/ AFSCME Case No. 05-051-SS NP: Use of cell phones  
17 and pagers.

18  
19 2. The overtime arbitration cases identified as case numbers AAA 11 390 00686 05 and  
20 AAA 11 390 00687 05 were withdrawn by AFSCME pursuant to a settlement agreement  
21 which is marked as Joint Exhibit No. 6.

22  
23 3. Arbitration case numbers AAA 11 390 00477 05 and AAA 11 390 00476 05 were  
24 withdrawn by action of AFSCME's Grievance Review Committee.  
25  
26  
27

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<sup>1</sup> 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 commission." The Commonwealth Employment Relations Board (Board) is the Division agency charged with deciding adjudicatory matters. References to the Board include the Commission.

<sup>2</sup> Pursuant to Standing Order 2009-1, the Board designated hearing officers to preside over hearings and decide the allegations set forth in complaints for prohibited practice charges filed on or before November 14, 2007.

Findings of Fact**The Union's Organization and Procedures**

Webber is an employee of the Town of Plymouth (Town) and is in a bargaining unit represented by Union Local 2824. Webber has held a variety of Union offices, including trustee, steward, and vice president. Webber was also the president of Local 2824 from 1993 until 2004. When Webber was the president of Local 2824, he involved bargaining unit members in decisions to settle or litigate prohibited practice charges brought before the former Labor Relations Commission, and he did not implement settlement agreements until affected unit members had received an opportunity to vote on a proposed settlement.

In June of 2005, Lee Regan (Regan) succeeded Webber as Local 2824's president. Regan implemented procedures for grievance and prohibited practice settlements that differed from Webber's prior practices. Regan understood that she and then Union General Counsel Wayne Soini (Soini) had the authority to make settlement decisions, and she did not require affected bargaining unit members to be involved in settlement decisions. If the Union decided to settle a case involving Local 2824, or if the Union's Grievance Review Committee (GRC) decided to withdraw a grievance from arbitration, Regan communicated these decisions to the stewards of Local 2824 at meetings that she held on a monthly basis, and the stewards were responsible for forwarding this information to the affected bargaining unit members.

In his capacity as the Union's General Counsel, Soini was authorized to make decisions regarding whether to settle or litigate cases that the Union had filed with the former Commission. In practice, Soini made those determinations in conjunction with

1 the presidents of various local unions. Prior to the events at issue in this case, Webber  
2 had communicated to the Union that he wished to have Soini assigned to cases that  
3 Webber was involved in, and there was no hostility or animus between Soini and  
4 Webber at the time that Soini settled Case No. MUP-03-3951.

5 The Union maintains the GRC to review cases that the Union has filed for  
6 arbitration. If the GRC decides to withdraw a grievance from arbitration, it notifies the  
7 local union of its decision and the local union's right to appeal the GRC's decision to the  
8 Union's Executive Board. There is no individual right of appeal from a GRC decision.

9 On or about March 28, 2004, Webber forwarded a letter to the GRC that  
10 criticized the GRC and its role in screening grievances prior to arbitration. Union Acting  
11 General Counsel Joseph DeLorey (DeLorey) responded to Webber's letter in a letter  
12 dated June 3, 2004, challenging some of Webber's assertions and explaining the  
13 purpose of the GRC. DeLorey's letter included the following statement:

14 The Committee is well aware of its obligation to the grievant, the Local,  
15 and the Council. If it happens that you find that to be "beyond  
16 comprehension" that speaks to your capacity to comprehend. It does not  
17 speak to any legal, practical or moral shortcoming on the part of the  
18 Committee.

19  
20 **The Grievances**

21 At some point prior to 2005, the Union processed to arbitration four grievances  
22 involving Webber:

- 23 1) AAA 11 390 00477 05/No. 05-051-SS-NP, Dale Webber, et. al. (use of  
24 union personnel in a managerial position);  
25  
26 2) AAA 11 390 00476 05/05-054-SS-NP, Dale Webber, et. al (use of cell  
27 phones and pagers);  
28  
29 3) AAA 11 390 00686 05 (class action overtime);  
30

1 4) AAA 11 390 00687 05 (class action overtime)

2  
3 By letters dated April 12, 2005 and September 29, 2005, the GRC notified Local 2824  
4 that it had voted to withdraw grievance numbers AAA 11 390 00477 05 and AAA 11 390  
5 00476 05 from arbitration, and that Local 2824 should contact Soini if it wished to  
6 appeal the GRC's decision to the Executive Board. Regan chose not to appeal the  
7 GRC's decisions in these cases.

8 On September 19, 2006, Local 2824 and the Town settled six grievances that  
9 had been scheduled for arbitration, including the two class action overtime grievances  
10 involving Webber. The settlement agreement stated that the Union accepted the lump  
11 sum payment of \$4,000 in full settlement for the withdrawal of the six arbitrations. No  
12 one from the Union told Webber of the Union's decisions not to arbitrate these four  
13 grievances or explained the decisions to him.

14 **Prohibited Practice Case No. MUP-03-3951**

15 On October 31, 2003, the Union filed a prohibited practice charge at the former  
16 Commission alleging that the Town had engaged in unlawful conduct. The former  
17 Commission docketed the case as MUP-03-3951 and issued a two-count complaint on  
18 or about June 10, 2005. Count I of the Complaint provided in pertinent part as follows:

- 19 1. Prior to 4 September 2003, the Town allowed any Division  
20 employee who wanted to work overtime on Saturday mornings to  
21 do so.
- 22 2. On or about 4 September 2003, the Town restricted the Saturday  
23 morning overtime referred to in paragraph 4, above, to four Division  
24 employees on the basis of seniority.
- 25 3. The Town took the action referred to in paragraph 5, above, without  
26 giving the Union prior notice and an opportunity to bargain to  
27 resolution or impasse.

1 4. The method and criteria for assigning overtime are mandatory  
2 subjects of bargaining.

3 5. By the conduct described in paragraphs 5 and 6, above, the Town  
4 has failed to bargain in good faith with the Union by unilaterally  
5 changing the method and criteria by which it assigns overtime to  
6 Division employees without giving the Union prior notice and an  
7 opportunity to bargain to resolution or impasse in violation of  
8 Section 10(a)(5) of the Law.

9 6. By the conduct described in paragraphs 5 and 6, above, the Town  
10 has derivatively interfered with, restrained, and coerced its  
11 employees in the exercise of their rights guaranteed under Section  
12 2 of the Law in violation of Section 10(a)(1) of the Law.  
13

14 Count II provided:

15 7. The allegations in paragraphs 1 to 5, above, are re-alleged.

16 8. At all relevant times, Dale Webber (Webber) was president of the  
17 Union and a member of the bargaining unit referred to in paragraph  
18 3, above.

19 9. Serving as president of the Union is concerted activity, protected  
20 under Section 2 of the Law.

21 10. The Town had knowledge of the concerted activity, protected under  
22 Section 2 of the Law referred to in paragraph 11, above.

23 11. The Town took the action referred to in paragraph 5, above, in  
24 retaliation for Webber engaging in the concerted activity, protected  
25 by Section 2 of the Law referred to in paragraph 11, above.

26 12. By the conduct referred to in paragraphs 5 and 14, above, the  
27 Town discriminated against Webber for engaging in concerted  
28 activity, protected by Section 2 of the Law in violation of Section  
29 10(a)(3) of the Law.

30 13. By the conduct described in paragraphs 5 and 14, above, the Town  
31 has derivatively interfered with, restrained, and coerced its  
32 employees in the exercise of their rights guaranteed under Section  
33 2 of the Law in violation of Section 10(a)(1) of the Law.  
34

1           Soini represented the Union in MUP-03-3951, and the former Commission  
2 notified him that it had scheduled a settlement conference on or about August 3, 2005.  
3 In preparation for the conference, Soini contacted Regan to discuss the merits of the  
4 case. Regan advised Soini to contact Webber, because Webber was more familiar with  
5 the underlying facts.

6           Soini contacted Webber on or about August 1, 2005 to discuss the changed  
7 overtime practice alleged in the complaint. Webber told Soini that the changed practice  
8 was no longer in effect, and they discussed how bargaining unit members had chosen  
9 not to sign up for any overtime for three to four Saturdays after the Town implemented  
10 the new practice at issue, prompting the Town to restore the prior practice. Soini  
11 interpreted the complaint to allege a change in practice for only one Saturday in early  
12 September of 2003, and understood from his conversation with Webber that only three  
13 or four employees would be affected because only three or four employees had worked  
14 the Saturday overtime at issue. Soini told Webber that Town Attorney Andrew Waugh  
15 (Waugh) would attend the settlement conference and consequently, Soini did not  
16 anticipate a financial settlement offer. At the conclusion of the conversation, Webber  
17 understood that Soini would advise the former Commission that the Union intended to  
18 litigate rather than settle the case, yet Webber and Soini made no specific agreement to  
19 that effect. Webber and Soini also did not make any agreement requiring Soini to

1 contact Webber to get Webber's approval for any proposed settlement.<sup>3</sup>

2 Soini attended the settlement conference on August 3, 2005. At some point in the  
3 conference, Waugh offered a settlement proposal that included a cash payment of  
4 \$500, representing three hours of overtime for five employees. Soini responded by  
5 stating that the \$500 should be multiplied three or four times to avoid a credibility  
6 dispute at the hearing over a statement allegedly made by Town representative Ted  
7 Bubbins (Bubbins) that would have supported the allegation in Count II of the complaint.  
8 Waugh caucused with Town representatives to consider the Union's counter proposal  
9 and returned with an increased offer of \$1,000. Soini then contacted Regan and advised  
10 her of the Town's proposal. Regan agreed to the proposed settlement, and she and  
11 Soini discussed how to disburse the money. Regan and Soini decided that Local 2824  
12 should make the disbursement decision, and Soini communicated the Union's  
13 acceptance of the Town's offer to Waugh. Soini and Waugh signed a hand-written  
14 settlement agreement on August 3, 2005 that contained the following terms:

15 1. The Union shall withdraw Case No. MUP-03-3951 forthwith, with  
16 prejudice, in consideration of the Town's obligation here noted below.

17  
18 2. The Town shall pay a "lump sum" of \$1,000.00 divided equally among  
19 the following employees. (Lee Regan > Pat Flynn, in writing).

20  
21 3. The Town does not admit in this Agreement or by these payments to  
22 any wrongdoing but expressly reserves its defenses.

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<sup>3</sup> Webber testified that he told Soini that the case should be settled for \$10,000 to \$12,000 because the unlawful practice affected ten to twelve bargaining unit members and spanned a 16-week period of time. Soini denied that Webber described these details. Webber disputed Soini's testimony that Soini told Webber that the complaint alleged a change in practice for only one Saturday. It is unnecessary to resolve these disputes because Webber admitted that he and Soini did not specifically agree that Soini would litigate the case rather than settle it. Consequently, the statements describing the number of affected employees and amount of money at issue are immaterial.



1  
2 4. There are no other commitments, obligations, or understandings except  
3 as noted in this Agreement expressly or by natural implication thereof.

4  
5 5. This Agreement shall not be introduced in any forum except as may be  
6 necessary to enforce a term or terms thereof.

7  
8 In agreement with the above and warranting by their signatures to have  
9 authority to bind their respective principals, the parties hereby witness  
10 their said agreement by signing their names below....

11  
12 Soini did not contact Webber during the settlement conference. After he signed  
13 the agreement, Soini called Webber and told him that the Union had settled MUP-03-  
14 3951 for \$1,000.00. Webber stated: "that is fine for Count I, but what about Count II?"  
15 Webber was displeased with the settlement and communicated his sentiments to Soini.

16 Regan subsequently discussed the disbursement issue with Local 2824 Vice  
17 President Mark Donohue (Donohue) and Local 2824's Secretary Beverly Ness (Ness.)  
18 Regan, Ness and Donohue decided to disburse the \$1,000 by dividing it equally among  
19 eleven bargaining unit employees. Webber was one of the eleven.

### 20 Opinion

21 Unions are permitted a wide range of reasonableness in representing the often-  
22 conflicting interests of the employees they represent. Graham v. Quincy Food Service  
23 Employees Association, 407 Mass. 601, 606. (1990). Consequently, an aggrieved  
24 employee, notwithstanding the possible merits of his or her claim, is subject to a union's  
25 discretionary power to pursue, settle, or abandon a grievance, so long as the union's  
26 conduct is not improperly motivated, arbitrary, perfunctory or demonstrative of  
27 inexcusable neglect. National Association of Government Employees and Jessie  
28 Murray, 34 MLC 30, 38 (2007)( citing Baker v. Local 2977, State Council 93, Am. Fed'n  
29 of State, County, & Mun. Employees, 25 Mass. App. Ct. 439, 441 (1988)).

1       The Complaint in this case alleges that the Union acted in a manner that was  
2 arbitrary, perfunctory, or inexcusably negligent by: 1) settling Case No. MUP-03-3951  
3 without addressing the allegations in Count II of that case; 2) signing the settlement  
4 agreement in Case No. MUP-03-3951 without first notifying Webber of the settlement or  
5 its terms; and 3) failing to give Webber an explanation for withdrawing from arbitration  
6 four grievances that involved him. Webber argues that the Union resolved Case no.  
7 MUP-03-3951 in a manner that was irrational, egregiously unfair, and discriminated  
8 against him for previously criticizing the Union. Webber has failed to meet his burden of  
9 proof as the Charging Party, and consequently, I dismiss the Complaint.

10       First, the evidence demonstrates that the settlement that Soini negotiated with  
11 the Town in Case No. MUP-03-3951 encompassed Count II of the Complaint of  
12 Prohibited Practice. Waugh's initial financial proposal stemmed from the economics of  
13 the overtime practice at issue. Soini counterproposed a higher monetary figure to avoid  
14 a dispute over whether Bubbins had made a statement evincing the discriminatory  
15 intent that was at issue in Count II. The Town's subsequent agreement to increase the  
16 monetary payment demonstrates that the overall settlement took Count II into  
17 consideration, even if the written agreement does not specifically reference Count II or  
18 its allegations. Consequently, Webber's argument has no factual support, and I dismiss  
19 the allegation that the Union acted unlawfully by failing to include Count II in the

1 settlement agreement.<sup>4</sup>

2 Second, the Union did not violate the Law by entering into the settlement  
3 agreement without first notifying Webber of its terms or its decision to settle. Generally,  
4 an employee has no right to require that his grievance be submitted to arbitration, Vaca  
5 v. Sipes, 386 U.S. 171, 191 (1967), and a union has considerable discretion in  
6 determining whether to file a grievance and whether to pursue it through all levels of the  
7 contractual grievance procedure. AFSCME, Council 93, AFL-CIO and Herbert Avant, 27  
8 MLC 129, 130 (2001). A union's duty to represent bargaining unit employees in  
9 grievance processing parallels its duty to represent employees in prohibited practice  
10 proceedings at the Division. National Association of Government Employees, 34 MLC at  
11 37. Consequently, the Union had the statutory discretion to determine whether to settle  
12 or litigate MUP-03-3951. Although Webber may have believed that Soini would litigate  
13 the case rather than settle it, Soini and Webber made no such agreement. Webber was  
14 not the president of Local 2824 at the time that Soini negotiated the settlement  
15 agreement. Therefore, Soini had no obligation to contact Webber or secure his approval  
16 prior to concluding the settlement agreement, or to follow any practice that Webber may  
17 have previously employed in his capacity as Local 2824's president. Rather, Soini

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<sup>4</sup> Even if the parties had omitted any reference to Count II in their discussions or the agreement, I would find no violation of Law. In National Association of Government Employees, 34 MLC 30 (2007), the union negotiated an agreement settling an unfair labor practice case without addressing the reduction in hours, layoff, or recall rights of a particular employee. The Board stated that it would not substitute its judgment for that of the union, and held that the terms of the settlement agreement were a lawful exercise of the union's discretion notwithstanding those omissions. Id. at 38.

1 followed the Union's current practice by contacting Regan regarding the settlement that  
2 the Town had proposed and soliciting her input.

3 Further, Webber's role as the motivating force and the source of case information  
4 does not, as Webber contends, obligate the Union to seek his prior input or approval.  
5 Regan did not advise Soini to secure Webber's approval, only the facts that Webber  
6 uniquely possessed. Accordingly, Regan's suggestion that Soini contact Webber did not  
7 join Webber as a necessary party to the settlement process.

8 Although Webber alleges that Soini disposed of MUP-03-3951 hastily and  
9 arbitrarily, the terms of the settlement reflect Soini's understanding of the complaint and  
10 the merits of the case. Soini believed that the complaint alleged a violation involving  
11 three or four bargaining unit members on one day, and that the Union would not receive  
12 compensation for any period of time in which bargaining unit members had effectively  
13 boycotted any available overtime. The Town's initial offer comports with Soini's  
14 understanding of the case, and the terms of the settlement parallel Soini's belief. I am  
15 also not persuaded by Webber's contention that the Union handled the settlement in  
16 such a haphazard manner that it failed to include the critical issue of prospective  
17 Saturday overtime opportunities for bargaining unit members. The evidence  
18 demonstrates that the Town had reinstated the prior practice well before the settlement  
19 conference, and that the overtime opportunities were not an ongoing issue at that time.

20 Lastly, there is no evidence to support Webber's argument that the Union's  
21 actions in settling MUP-03-3951 reflected any personal hostility against Webber or bad  
22 faith stemming from his prior criticism of the GRC. Soini was Webber's preferred  
23 representative. There is no evidence of any hostility or unlawful animus existing

1 between Soini and Webber at the time that Soini approved the settlement, and no  
2 evidence of any connection between Soini's actions and Webber's prior criticism of the  
3 Union's GRC. The timing of the events surrounding the settlement of MUP-03-3951  
4 similarly fail to suggest any unlawful nexus. Webber forwarded his letter criticizing the  
5 GRC in March of 2004, over one year before Soini decided to settle MUP-03-3951. The  
6 GRC withdraw one case from arbitration two months before the MUP-03-3951  
7 settlement and withdrew another case one month after the settlement.

8 I next consider whether the Union violated the Law by failing to explain to  
9 Webber its decision to withdraw from arbitration four grievances that involved him. The  
10 Board has long held that a union's failure to communicate its decisions to bargaining  
11 unit employees, standing alone, does not constitute a breach of the duty of fair  
12 representation. National Association of Government Employees, 34 MLC at 38;  
13 Teamsters, Local 437 and James Serratore, 10 MLC 1467 (1984) (no violation where a  
14 union failed to tell a grievant that his grievance lacked merit until the investigation of the  
15 prohibited practice charge; delay did not prejudice charging party's contractual rights).

16 Here, the Union did not give Webber an explanation of the GRC's decision to  
17 withdraw two grievances from arbitration or Local 2824's decision to settle two other  
18 grievances. However, the Union's inaction regarding the GRC decisions did not impair  
19 any right that Webber possessed, because individual employees have no individual  
20 right to appeal GRC decisions to withdraw a grievance from arbitration. Therefore, the  
21 Union's inaction did not violate the Law. Taunton Police Supervisory Association and  
22 Michael Silvia, 31 MLC 153 (2005) (union's failure to inform charging party in advance  
23 that it was withdrawing his grievance from arbitration did not violate the duty of fair

1 representation because the delay did not prejudice any contractual right that the  
2 charging party held); AFSCME, Council 93 and Gary R. Zorzy, 28 MLC 246 (2002)  
3 (Commissioner Preble, concurring) (no violation where union failed to notify charging  
4 party of its decision not to file a prohibited practice charge: union had previously  
5 decided that the charge lacked merit, and thus, union did not hinder charging party's  
6 ability to pursue a meritorious charge.) There is no evidence that Local 2824's decision  
7 to settle the two overtime grievances without communicating with Webber contravened  
8 any Union policy or procedure and no evidence that the Union's failure to explain its  
9 decisions to Webber stemmed from deliberate bad faith or personal hostility. Although  
10 the Union could better serve its bargaining unit members by taking steps to ensure that  
11 grievants receive a timely explanation of the outcome of their grievances, the Union did  
12 not violate the Law in the circumstances here.

### 13 Conclusion

14 For the reasons stated above, I conclude that the Union did not violate Section  
15 10(b)(1) of the Law, and I dismiss the complaint of prohibited practice.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF LABOR RELATIONS

  
SUSAN L. ATWATER, ESQ., HEARING OFFICER

### APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.02(1)(j), to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Division of Labor Relations within ten days after receiving notice of this decision. If a Notice of Appeal is not filed within ten days, this decision shall become final and binding on the parties.