COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	
	*	
OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 6, AFL-CIO	*	Case No.: SUPL-14-3628
	*	Date Issued: August 25, 2017
and	*	
	*	
JOHN F. MURPHY	*	
	*	

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Michael A. Feinberg, Esq. – Representing OPEIU, Local 6

Luke Rosseel, Esq. – Representing John F. Murphy
John T. Martin, Esq.

HEARING OFFICER'S DECISION

SUMMARY

The issue is whether the Office and Professional Employees International Union, Local 6, AFL-CIO (Union) breached its duty of fair representation to John F. Murphy (Murphy) in violation Section 10(b)(1) of Massachusetts General Laws Chapter 150E (the Law) by filing an untimely demand for arbitration after the Chief Justice for Administration and Management of the Trial Court (Trial Court or Employer) denied his grievance at "Step 3" on August 20, 2013. Based on the record, and for the reasons explained below, I conclude that the Union breached its duty of fair representation to Mur-

phy in violation of Section 10(b)(1) of the Law by filing an untimely demand for arbitration after the Trial Court denied his grievance at "Step 3" on August 20, 2013.

STATEMENT OF THE CASE

On April 9, 2014, Murphy filed a Charge of Prohibited Practice (Charge) with the Department of Labor Relations (DLR) alleging that the Union had violated Section 10(b)(1) of the Law. On August 25, 2014, Murphy filed a Second Amended Charge, alleging an additional violation of Section 10(b)(3) of the Law. On November 7, 2014, the DLR deferred the Charge, as amended, to arbitration. On December 3, 2014, the parties agreed to postpone the arbitration in lieu of settlement discussions. On July 16, 2015, an arbitrator denied Murphy's grievance, ruling that it was not procedurally arbitrable. Four days later on July 20, 2015, Murphy filed with the DLR a request to schedule an in-person investigation, which the Union opposed by filing an Opposition and Motion to Dismiss on July 22, 2015. The DLR granted Murphy's request and deferred to the investigator for a ruling on the Motion to Dismiss.

On September 25, 2015, a DLR investigator issued a Complaint of Prohibited Practice (Complaint), alleging that the Union had violated Section 10(b)(1) of the Law by filing an untimely demand for arbitration.[1] On October 22, 2015, the Union filed its Answer to the Complaint. On October 23, 2015, the DLR issued a Notice of Hearing (Notice), scheduling three days of hearing on April 26, May 23 and June 22, 2016. On March 9, 2016, the Union requested a postponement of the first day of hearing, which I granted. On March 16, 2016, the DLR issued an amended Notice, rescheduling the hearing for May 23, July 11 and 18, 2016. On April 29 and July 14, 2016, the DLR is-

[1] Murphy withdrew his Section 10(b)(3) allegation at the DLR investigation.

sued two more amended Notices, scheduling additional hearing days for July 25, 2016 and August 17-19, 2016.

On July 21, 2016, the Union filed a motion to suspend the hearing. The next day, Murphy filed an opposition to the motion. By letter dated July 22, 2016, I informed the parties that I would not suspend the hearing already scheduled for July 25, 2016, but would hear the parties' positions concerning the motion on the record and then issue a written ruling. On August 2, 2016, I denied the motion.

I conducted six days of hearing on May 23, July 8, 11, 25, and August 17 and 18, 2016. The parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. On the first day of hearing, the Union elected not to bifurcate the hearing.[2] Accordingly, I permitted both parties to present evidence on: (1) whether the Union violated its duty of fair representation to Murphy; (2) whether Murphy's grievance was not clearly frivolous; and, (3) whether Murphy's grievance was clearly without merit. On October 3 and 7, 2016, Murphy and the Union, respectively, filed their post-hearing briefs. On the entire record, I make the following findings of fact and render the following opinion.

STIPULATION OF FACTS

[2] As part of its defense, a union has the right bifurcate a hearing involving a duty of fair representation allegation, and may present evidence regarding the merits of the underlying grievance at a subsequent proceeding, if necessary. See 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) (where there exists a realistic possibility that the employer will consider the grievance on the merits if the union is later ordered to process it, the Commonwealth Employment Relations Board (Board) gives the union the option of litigating the merits of the employee's grievance at either the unfair labor practice hearing or at the subsequent compliance stage); see also United Rubber, Cork, Linoleum And Plastic Workers Of America, Local 250, AFL-CIO, 290 NLRB 817, 820-21 (1988).

The parties stipulated to the following facts:

1. Murphy was, at all relevant times, an employee of the Trial Court and a member of the bargaining unit.

2. Murphy was terminated by the Trial Court on May 14, 2013.

3. Murphy requested that the Union file a grievance on his behalf.

4. Pursuant to Murphy's request, the Union filed a grievance on his behalf.

5. In accordance with the applicable collective bargaining agreement, a Step 3 grievance hearing was held on July 31, 2013. The Employer denied the grievance.

6. On July 16, 2015, the arbitrator issued a decision denying the grievance as procedurally inarbitrable.

7. Murphy filed a charge of prohibited practice with the DLR.

8. On April 9, 2014, Murphy filed a second charge with the DLR (case no. SUPL-14-3628).

9. On June 17, 2014, a replacement arbitrator was appointed.

10. On September 3, 2014, Murphy filed a request with the DLR to reopen the second charge.

11. On September 15, 2014, the Union filed its response to Murphy's request to reopen the second charge, which included a Notice of Hearing from the AAA scheduling the arbitration hearing form December 12, 2014.

12. On September 18, 2014, the DLR granted Murphy's request to reopen the second charge.

13. On October 1, 2014, Murphy filed an Amended Charge with the DLR.

14. On September 25, 2013, the Union provided written notice to the Employer that it intended to arbitrate.

15. The Union received a copy of the Employer's denial of Murphy's grievance at "Step 3."

16. The courthouse catwalk[3] on which Murphy stood in 2012 was surrounded by netting.

ADMISSIONS OF FACT

The Union admitted to the following facts:

1. The Union is an employee organization within the meaning of Section 1 of the Law.

2. The Union is the exclusive bargaining representative for certain professional employees in the Trial Court including Probate and Family Court Family Law Facilitator positions employed by the Commonwealth of Massachusetts (Commonwealth).

3. The Union and the Commonwealth are parties to a collective bargaining agreement (Agreement) effective July 1, 2011 – June 30, 2014.

4. Article 5 of the Agreement referenced in paragraph 3 contains a grievance and arbitration procedure.

[3] While the parties agreed to this stipulation, it did not agree to the word "catwalk." The Union consistently referred to the disputed area as "the ledge" while Murphy consistently referred to it as "the balcony." Merriam-Webster's Dictionary defines catwalk as "a narrow walkway." It defines ledge as either "a raised or projecting edge or molding intended to protect or check" or "a narrow flat surface or shelf especially one that projects from a wall of rock." Balcony is defined as a "platform that projects from the wall of a building and is enclosed by a parapet or railing." Murphy testified that the "balcony" was "about five feet, maybe six feet across...[and] about 50 feet long, at least 40 feet long." He also testified that it was enclosed with protective, "heavy-duty netting" and lined with "big stone pillars." He testified further that the area could be accessed by a door/window and that someone was already using it to grow potted tomato plants. The Union did not rebut Murphy's testimony on these points, except Trial Court Manager of Labor Relations and Investigations Christine Hegarty (Hegarty) initially testified that the area was a "parapet," while Register of the Worcester Probate and Family Court Stephen G. Abraham (Abraham) testified that it was a "ledge."

For the following reasons, I decline to refer to the disputed area as a ledge or balcony. The area is about five or six feet wide, has a functioning door/window egressing to the area, and at least one other person besides Murphy had utilized the area to cultivate potted plants. While the area is surrounded by heavy-duty netting and large stone pillars, it is not enclosed by a railing or parapet. Neither Hegarty nor Abraham testified to having first-hand knowledge of the areas' measurements, neither rebutted Murphy's description of the area, and neither personally witnessed his appearance in the area. Based on this evidence, I refer to the area as a catwalk.

5. On or around May 14, 2013, the Union filed a grievance on Murphy's behalf.

6. The Union and the Commonwealth held a "Step 3" grievance hearing on July 31, 2013, and the Commonwealth denied the grievance by notice dated August 20, 2013.

7. On July 16, 2015, arbitrator Richard G. Boulanger issued an award denying the grievance because it was untimely filed at arbitration.

FINDINGS OF FACT

Article 5 of the parties' Agreement pertains to the grievance-arbitration procedure, and states, in pertinent part:

> Section 5.04 Grievances under this Article shall be handled as follows:
>
> > Step 4 – If the grievance has not been settled at Step 3, it may be submitted to arbitration in the following manner: Within 20 workdays after receiving the Step 3 response at the Union office, the Union, and not the aggrieved employee(s), shall provide written notice to the other party requesting arbitration to the American Arbitration Association [(AAA)] or an alternative forum as agreed to by the parties. The arbitrator shall have no power to add to, subtract from, or modify any provision of this Agreement, or to issue any decision or ward inconsistent with applicable law. The decision or award of the arbitrator shall be final and binding in accordance with Mass. Gen. Laws. chs. 150C and 150E.

The Trial Court Policy

Section 16.100(B)[4] of the Trial Court's Policies and Procedures Manual (Policy) enumerates certain employee conduct that is subject to discipline, including:

> 1. Failure or refusal to comply with a reasonable order or to accept or complete a reasonable assignment;
>
> 2. Inefficiency, incompetence, or negligence in the performance of duties, failure to be knowledgeable and current in one's area of responsibility;

[4] Neither party submitted a complete version of the Policy or of Section 16.100(B), but both parties relied jointly on Abraham's April 25, 2013 letter which enumerated ten parts from that Section.

4. Insubordination, or a demonstrated lack of respect for persons in authority;

7. Violation or failure to comply with the Federal or State Constitution, statutes or court rules and regulations;

10. Use of undue influence to gain, or attempt to gain, promotion, leave, favorable assignment, or other individual benefit or advantage;

11. Unauthorized use or release of confidential information;

13. Threats or abuse of others, fighting, or other disorderly conduct;

22. Conduct that undermines the administration of the court;

23. Conduct, whether in the course of one's employment or otherwise, that tends to bring the court into disrepute or lessens public confidence in the administration of justice;

24. Conduct unbecoming a Trial Court employee.

Murphy's Employment (2005 – 2013)

On or about April 1, 2005, the Trial Court hired Murphy as Family Law Facilitator of the Worcester Probate and Family Court with a starting annual salary of $46,000.[5] Pursuant to that position description, Murphy's major job duties included:

- meeting with indigent and financially disadvantaged parents to inform them of Probate and Family Court procedures and the rules and statues concerning child support, spousal support, maintenance of health insurance, domestic violence, child custody and visitation and guardianship and child welfare matters;

[5] In November of 2006, Abraham promoted Murphy to the position of Deputy Assistant Register, which increased Murphy's salary by approximately $16,600 annually. Except for salary, neither party presented evidence to distinguish the duties of Deputy Assistant Register from the Family Law Facilitator. I find that at all relevant times, Murphy's functioning job title was Family Law Facilitator because: (1) he was performing the duties of Family Law Facilitator when he was terminated on May 14, 2013; (2) that job title was listed on his May 14, 2013 grievance form; (3) Abraham alleged in his discharge letter that Murphy failed to perform these duties; and, (4) the arbitrator referenced that job title in his July 16, 2015 award.

- providing educational material to parents and guardians concerning the procedures for establishing parentage, establishing, modifying and enforcing child support, divorce, paternity, guardianship and adoption including custody, visitation, health insurance orders and petitions for guardianship and adoption;

- assessing [the] service needs of litigants and refer[ing] individuals, as appropriate, to the Department of Revenue, the Probation Office, the Registry of Probate, Domestic Violence Advocates, Legal Services, Bar Association Reduced Fee and Referral Programs, Local Dispute Resolution Coordinator, Lawyer for the Day, District Attorney, Department of Social Services and community agencies and resources which provide services to parents and children;

- reviewing files, examining documents, assisting with the preparation of financial statements and child support guidelines worksheets, providing assistance in completing forms, reviewing stipulations and other proposed agreements, determining status of cases and otherwise assisting with the preparation and expediting of matters for hearing;

- assisting with the coordination of the Lawyer for the Day Program;

- collaborating with [the local] Bar Association in the development of educational programs that will assist indigent and financially disadvantaged litigants to gain meaningful access to the Probate and Family Court.

- advising parties, in appropriate cases, of the availability of genetic marker testing and, when appropriate, assist[ing] with the execution of a Voluntary Acknowledgement of Parentage after determination of genetic marker testing results;

- advising parties concerning the service of summons and other notices;

- advising parties concerning attendance at parent education classes;

- facilitating requests for expedited hearing of Complaint for Modification in cases where the litigant provides written documentation that he or she is unemployed or is temporarily or permanently disabled;

- providing an explanation of Child Support Guidelines and their use in child support matters;

- assisting the court to verify income and health insurance costs;

- performing related duties as required.

At all relevant times Abraham was the Register of the Worcester Probate and Family Court, and was Murphy's direct supervisor.

Murphy's 2009 Alteration of the Judge's Portrait

On or about September 30, 2009, Deputy Assistant Register John Dolan (Dolan) informed Abraham that a portrait of a certain retired judge had been "vandalized." On or about October 1, 2009, First Justice Denise Meagher (Meagher)[6] notified Abraham that Murphy was the person who altered the portrait. At some point on or prior to October 13, 2009, Abraham met with Murphy to discuss the portrait. During that meeting, Murphy denied vandalizing the portrait but admitted to altering it by drawing a "fake mustache" on a "piece of tape" that he had "touched…a bunch of times so it was hardly sticky," and then affixed that piece of tape onto the portrait.

On October 13, 2009, Abraham issued a written warning against Murphy for "vandaliz[ing]" the judge's portrait, stating in pertinent part:

> On or about October 1, 2009, you were identified as the person who broke through the sealed portrait…to make it look like the picture was vandalized…. Late in the afternoon on September 30, I was informed that the portrait was located, but that someone had torn through the plastic wrapping and had vandalized the portrait…. I was upset because I had to tell [the j]udge...that his portrait was vandalized. Eventually I was told that it was you who had broken the seal of the portrait as a joke and attempted to make it appear that the portrait was vandalized. I was shocked and extremely disappointed….In fact, your conduct as a lawyer and as my Deputy Assistant Register was immature, inappropriate and unprofessional.
>
> As you know, we have had several conversations in the past about your behavior and the manner in which you conduct business both in and outside the office. I have given you the benefit of the doubt because you

[6] Meagher was first appointed as Associate Justice of the Worcester Probate Family Court in 2005. In 2008, she became First Justice of that court and held that position for seven years before returning to Associate Justice. At all relevant times, Meagher served as First Justice.

> work hard and you have acknowledged your mistakes. However, you continue to use bad judgement that reflects on you, me and the Court."
>
> In addition, I am disappointed that once you discovered there was a problem, you did not immediately inform me of what happened. It was not until you found out that I knew that you decided to tell me. In that regard, I do not believe that you were being honest with me in our meeting and this again is very disappointing.
>
> This letter is a written warning that a continuation of bad judgement and unprofessional conduct will result in further disciplinary action, including possible suspension or discharge. A copy of this letter will be placed in your personnel file.

Murphy's 2010 and 2011 Accolades

In November of 2010, the Worcester Telegram & Gazette published an "On the Job" article that spotlighted Murphy in his position as the Family Law Facilitator of the Worcester Probate and Family Court.

On December 9, 2011, Chief Justice Carey addressed a letter to Murphy, on which he copied Abraham, First Justice Meagher and Director of Judicial Education Ellen M. O'Connor. That letter stated, in full, "I recently had the opportunity to review the evaluations for the Judicial Institute Trainings for Trial Court Staff. The comments clearly reflect that you were a shining star at these programs! You are a terrific ambassador for the Probate and Family Court."

Murphy's Reprimands in January of 2011 and February of 2012

Abraham reprimanded Murphy in January of 2011 and February of 2012 for "discussing cases with judges, not getting personally involved in cases and not circumventing the case flow policy of the office."

Murphy's 2012 Presence on the Courthouse Catwalk

On or about July 26, 2012 around 4:30 p.m. at the courthouse, Murphy spoke with a judge in a courtroom located on the third floor. At some point during their conversation, the judge focused Murphy's attention on two buckets placed outside the window on the catwalk. At the end of their conversation, Murphy opened an unlocked door/window that was adjacent to the catwalk and stepped onto the landing where he found tomato plants growing inside the buckets. While still on the catwalk, Murphy called down to the street at someone he knew. Another street-level person saw Murphy, took a picture of him standing on the catwalk and posted it onto Facebook. The next day, Abraham met with Murphy to discuss the incident.

At some point between July 26 and 31, 2012, Abraham spoke with Hegarty, Director of Human Resources Mark Conlon (Conlon) and Chief Justice Paula Carey (Carey)[7] and decided to place Murphy on administrative leave, conditioning his return to work on first having a psychiatric evaluation. By letter dated July 31, 2012, Abraham notified Murphy that the Trial Court had placed him on administrative leave with pay, effective July 27, 2012, and ordered him to undergo a psychiatric evaluation.[8] That letter stated, in pertinent part:

> On Thursday afternoon, at approximately 4:30 p.m., you were observed on the outside ledge of the third floor of the Worcester County Court Complex which is a restricted and dangerous area. You gained access to this location through a door/window that is normally locked. While standing on the outside ledge, you brought attention to yourself by waving your arms, gesturing and calling people by name. Your picture was taken and evidently placed on [F]acebook."

[7] Neither Chief Justice Carey nor Conlon testified at the hearing.

[8] Abraham consulted with the psychiatrist after, rather than before, issuing his July 31, 2012 directive.

> Your actions were unprofessional, irresponsible, dangerous and otherwise inappropriate. Your conduct was unbecoming a Trial Court Employee and certainly lessens the public's confidence in the [a]dministration of [j]ustice."
>
> On Friday morning at approximately 8:40 a.m., I had you come to my office to discuss the incident. When I told you that I was concerned about your behavior, you seemed perplexed when I told you that I did not think it was appropriate or funny. I do not believe that you understood the severity of what you did and in fact thought it was funny because you stated that you saw people laughing. In any event, in order to return to your position, the Trial Court has directed that you be evaluated at their expense. The Trial Court will be arranging for the evaluation and will be notifying you of the date and location by letter. You are directed not to return to the [c]ourthouse until the results of the evaluation are reviewed. In addition, the Trial Court has asked that you temporarily submit to me you Trial Court [i]dentification [t]ag and keys to the Court that you may have in your possession pending the results of the evaluation.

At some point after July 31, 2012, Abraham spoke with Dr. Vasile, a psychiatrist used by the Trial Court and inquired about how to evaluate Murphy.[9] After their conversation, Abraham believed that Dr. Vasile shared his concerns and would recommend to the Trial Court that Murphy undergo a psychiatric evaluation and resume taking Ritalin[10]

[9] On direct examination, Abraham admitted that while he did not know Dr. Vasile and had never met him, he spoke with him by telephone at some point between August 3 and 7, 2012, to discuss Murphy's mandatory evaluation. During that conversation, Abraham communicated his concerns to Dr. Vasile about Murphy's behavior, including his recent appearance on the courthouse catwalk. On direct examination Hegarty also testified that she had never met Dr. Vasile but only talked with him on the telephone. Hegarty also testified that she believed Dr. Vasile was a psychiatrist. Dr. Vasile did not testify at the hearing.

[10] Murphy testified on cross examination that he "first took Ritalin, maybe about 15 to 20 years ago, when he was diagnosed with having Attention Deficit Disorder (ADD)." He testified further that he was not taking Ritalin between 2011 and May of 2013, and that ADD "didn't manifest itself much in [his] work with the Trial Court." The Union did not rebut Murphy's testimony on this issue.

before returning to work. Later, Dr. Vasile issued a report,[11] notifying the Trial Court that Murphy was fit to return to work without having a psychiatric evaluation or prescription medication for Ritalin. Abraham read the report and disagreed with some of the findings, including Dr. Vasile's description of events and his conclusions that Murphy was fit to return to work and did not require a psychiatric evaluation or prescription medication. Abraham then contacted Human Resources[12] and complained that Dr. Vasile's report did not reflect Abraham's understanding of what happened with Murphy on the catwalk.[13] Abraham also explained that the report did not reflect the mutual concerns that he believed Dr. Vasile shared with him during their telephone conversation in early August of 2012.

[11] Neither party offered the complete report into evidence. The Union offered an October 30, 2012 cover letter from Dr. Vasile to Heather Shan (Shan) in Human Resources that referenced an addendum to the report. On direct examination, Abraham testified that while he received a copy of that letter/addendum, he could not recall when he read it, how it was delivered to him or how it came into his possession. Murphy testified on cross examination that he also saw the letter, but his counsel objected to the document for lack of completeness, which I sustained. Based on these facts, I declined to accept that document into evidence.

[12] On direct examination, Abraham testified that he could not recall whether he spoke to Hegarty or Shan.

[13] On cross examination, Abraham testified that he could have spoken with either Hegarty or Shan in Human Resources concerning Murphy's administrative leave, but could not recall. Shan did not testify at the hearing, but Hegarty gave unrebutted testimony that Shan works in the Human Resources office, coordinating leaves of absences, fitness-for-duty requests, workers comp, etc., and also serves as the contact with doctors used by the Trial Court to schedule fitness-for-duty evaluations. On direct examination, Abraham testified that when he asked either Hegarty or Shan whether Dr. Vasile had seen the photograph of Murphy standing on the catwalk prior to issuing his report, "she said 'no.'" Abraham did not identify whether "she" referred to Hegarty or Shan. On direct examination, Hegarty testified that she "honestly [did not] remember…seeing the photograph" of Murphy.

At some point after Abraham's discussion with Human Resources, Dr. Vasile contacted him by telephone. Abraham inquired about why the doctor had "changed" his recommendation. He also informed the doctor about the photograph of Murphy standing on the catwalk one month earlier. At some point after their conversation, Dr. Vasile modified his report, instructing Murphy to resume taking Ritalin and complete a psychiatric evaluation—subject to the Trial Court's review—before returning to work. The Trial Court adopted Dr. Vasile's modified report[14] and, by e-mail on August 22, 2012, Abraham notified Murphy that the Trial Court had scheduled an appointment for him to meet with psychiatrist Dr. Gobeil[15] on September 19, 2012. By that same e-mail, Abraham reminded Murphy that he was authorized to return to work on or about August 23, 2012, subject to certain conditions, including adherence to a new policy[16] related to Murphy's duties as Family Law Facilitator:

> In serving the public you must follow the policy that will be in effect Monday August 27. You will not give out your cell phone number to litigants or provide legal or other services other than during working hours. You cannot loan money to litigants and cannot advocate for them directly or indirectly. You cannot discuss cases with judges and certainly cannot tell litigants that you will speak to the judge on their behalf. You cannot bring paperwork to the sheriff or constable for a litigant and certainly cannot give a litigant the impression that you represent them. No case files should be kept on your desk and no pleadings should be held overnight. You should not encourage litigants to write to you or send documents to your attention. Although we will be discussing your duties and responsibilities on a

[14] Hegarty gave unrebutted testimony on direct that while it was Human Resources that "coordinated [Murphy's] fitness-for-duty request," it was Abraham who made the request to have Murphy evaluated.

[15] On direct examination, Abraham gave unrebutted testimony that he believed Dr. Gobeil was a psychiatrist. Dr. Gobeil did not testify at the hearing.

[16] The record is unclear about whether the new policy applied only to Murphy or all employees.

> regular basis[,] it is imperative that you follow the new policy which will allow you to help litigants as needed but not 'represent' them on an ongoing basis.[17]

Murphy's 2012 Divorce Modifications

At some point on or prior to November 27, 2012, Murphy informed his former wife[18] that he had been diagnosed with prostate cancer and needed to have surgery that his current insurance plan would not cover. Murphy asked if she would be willing to modify the status of their divorce by filing a court complaint to switch their health insurers, whereby she would "switch" coverage to cover his surgery.[19] Murphy's former wife agreed to the switch and Murphy prepared both the complaint and accompanying stipulation for modification, which he filed with the court on November 27, 2012.

The Worcester Probate and Family Court has a practice called "routine allowables" where cases are not argued before a judge, but the parties sign a notarized agreement and later present it to a judge for signature. Such cases can involve child

[17] On cross examination, Murphy admitted to engaging in the following conduct: giving his cell phone number to litigants; loaning money to litigants (one time only); advocating for litigants directly or indirectly: discussing cases with judges; bringing paperwork to the sheriff or constable for a litigant; keeping case files on his desk; holding pleadings overnight; and encouraging litigants to write to him and send documents to his attention. The record is unclear about whether Murphy engaged in this conduct after the implementation of the new policy in July of 2012. Murphy denied ever telling litigants that he would speak to the judge on their behalf, or that he ever gave litigants the impression that he represented them.

[18] In or about 2010, Murphy effectuated a divorce from his wife in the Worcester Probate and Family Court. The record is unclear whether Murphy was first required to seek, and then successfully sought, approval from Abraham before filing for divorce in that court.

[19] On cross examination, Murphy testified that he had scheduled an appointment to see his physician in "mid-to-late November of 2012" and underwent surgery "right after the first of the year" in 2013. The record is unclear about whether Murphy was on leave during this time.

support matters and issues related to health insurance. When Murphy filed his Complaint for Modification and Stipulation for Modification (collectively, the Modifications), he filed pursuant to the Trial Court's practice of permitting "routine allowables." On or about the same day, he met with First Justice Meagher[20] and explained his urgent medical circumstances. First Justice Meagher instructed Murphy to have the Registry docket the Modifications and return them for her signature. Murphy followed her instructions, successfully asked the clerk to expedite the docketing of his Modifications and issue a summons to him. Upon issue, Murphy immediately accepted the summons and attempted to deliver the Modifications to First Justice Meagher to sign that afternoon; but, because she had already left the courthouse for a doctor's appointment, another judge signed them.[21]

At no point did Murphy notify Abraham that he was seeking to file (or had filed) the Modifications in the Worcester Probate and Family Court. Almost six months later in May of 2013, Abraham accused Murphy of circumventing the "case flow policy"[22] of the office by failing to notify him about the Modifications, and failing to file the Modifications in another court.[23]

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[20] First Justice Meagher gave unrebutted testimony that she was the judge assigned to Murphy's 2010 divorce case and "entered…the judgment of divorce and agreement between he and his ex-wife."

[21] Murphy testified on cross that the second judge signed the modification on either November 27 or 28, 2012.

[22] There is no evidence of this policy in the record.

[23] On direct examination, Murphy testified that his filing of the expedited Modifications was a "routine allowable" that the Trial Court would have granted "if somebody came to the front counter and said 'I've got an emergency' or 'I'm going out of town, I need you to process this case or open up this quickly.'" Murphy's job description also covers "fa-

Lunny's 2013 Complaint Against Murphy

On February 14, 2013, Abraham received a complaint from lawyer David M. Lunny (Lunny) who alleged that Murphy "had supplied free legal advice, on countless occasions to [Lunny's] ex-wife…involving [Lunny's] child custody case…."[24] In that letter, Lunny also alleged that Murphy had "supplied [Lunny's ex-wife] with blank motions, provided legal advice, [and] reviewed her filings in an effort to assist her in the various legal proceedings against [Lunny]." Lunny also accused Murphy of contacting Lunny on behalf of his ex-wife to delay advancing certain motions that Lunny intended to file against her. Further, Lunny accused Murphy of falsely telling his ex-wife that Murphy

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cilitating requests for expedited hearings of Complaint for Modification" in cases where litigants are unemployed or disabled. Similarly, First Justice Meagher testified on direct examination that fast-tracking Murphy's Modifications was "routine activity" that the Trial Court would have done for "anyone walking in off the street, particularly with their circumstances relating to an up-and-coming surgery and there was a need for a court order to get the insurance in place."

On direct examination, Abraham testified that Section 16.100B of the Trial Court's Policy prohibited Murphy from filing the Modifications with the Worcester Probate and Family Court without first seeking approval from the Registrar. While neither party submitted a complete record of Section 16.100B, none of the portions listed by Abraham in his April 25, 2013 letter expressly address "routine allowables" or how/whether a Trial Court employee should/could file a personal matter in the Worcester Probate and Family Court. Instead, the record shows that Abraham failed to identify the specific policy language that Murphy allegedly violated when he filed his Modifications. It also shows that Murphy had effectuated his 2010 divorce in the same court as the Modifications and that the Trial Court expressly permitted Murphy to facilitate expedited modifications for indigent parties. For all these reasons, coupled with the fact that the Union failed to rebut the testimony of First Justice Meagher that the Trial Court permits "routine allowables," I credit Murphy's testimony that the Trial Court had an established practice of permitting "routine allowables" in November of 2012. I also find that Section 16.100B of the Trial Court Policy neither prohibited Murphy from filing his Modifications with the Worcester Probate and Family Court during that time, nor required him to notify Abraham before doing so.

[24] Neither Lunny nor his former wife testified at the hearing.

was a "clerk of the court." Last, Lunny accused Murphy of giving legal advice to another unidentified person at the courthouse on February 13, 2013. Murphy knew that the former Ms. Lunny was not indigent but he assisted her with forms and form-related questions as a standard part of his duties.[25]

Abraham met with Murphy on February 20, 2013 and reprimanded him after determining that Murphy had violated Trial Court Policy by assisting the former Ms. Lunny.

Murphy's Disparaging Statements Against Abraham

At some point in February of 2013, Abraham learned from certain individuals that Murphy had made unfavorable statements about his character and name.[26] Abraham

[25] On cross examination, Murphy testified that while it was "standard" for people to come to him at the counter, ask for forms, and ask form-related questions, he did not have a specific memory of supplying Ms. Lunny with blank motions or advising her how to complete the motions. On redirect, Murphy testified that he did recall handing Ms. Lunny some forms, at one point, but doing so was not out of the ordinary. On redirect, he also testified that while part of his job description included representing indigent litigants, he was aware that Ms. Lunny did not qualify as "indigent" at the time of Mr. Lunny's complaint. On cross examination, Murphy admitted to calling Mr. Lunny once, on behalf of Ms. Lunny, asking if Mr. Lunny would delay advancing a particular motion because Ms. Lunny was running late. On redirect, Murphy testified further that he was "well aware that this was a very contentious case" and that he remembered, specifically, "being very careful about the extent to what [he] would even get involved in it." Based on the totality of evidence related to this allegation, I find that Murphy: (1) supplied the former Ms. Lunny with blank motions and advised her how to complete them; (2) called Mr. Lunny, on behalf of his former wife, asking him to delay advancement a particular motion; and (3) assisted her, knowing that she did not qualify as "indigent" at the time of Mr. Lunny's complaint in February of 2013.

[26] Abraham testified that "over the course of past several months" prior to May of 2013, certain "court staff" and "prominent people in the community" (e.g., Dolan, First Justice Meagher, Leslie Girardi (Girardi), Jeanne Angers (Angers), Theresa Buckowitz (Buckowitz), Bob Hankinson (Hankinson) and Kelly Corelli (Corelli)), informed him that Murphy had called him "a fucking asshole," "evil" and "the devil." Those individuals also told Abraham that Murphy threatened that he "was going to do whatever he can do to remove [Abraham] from the office, and he maybe was going to run for Register of Probate." With the exception of First Justice Meagher, Abraham failed to give testimony about when the other five individuals informed him about Murphy, how they informed

1 did not hear Murphy make these statements directly. On February 20, 2013, Abraham

2 met with Murphy and reprimanded him for making statements that disparaged his name

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him (i.e., in person, in writing, etc.), and what specific words they used during the encounter(s). Girardi, Angers, Buckowitz, Hankinson and Corelli did not testify at the hearing.

On cross examination, Murphy testified that he could not recall ever calling Abraham "a fucking asshole," "evil" or "the devil." However, Abraham testified on direct that he knew Murphy called him "a fucking asshole," "evil" and "the devil" for three reasons: "[n]umber one, because people told me; [n]umber two, it made complete sense given the way [Murphy] responded or didn't respond within the office; and, number three, I'm not a dummy." Abraham also testified that he had experienced "repeated encounters" where Murphy had openly criticized him and questioned his judgment in front of other employees.

Abraham also testified that First Justice Meagher came to his office on or about October 25, 2012, inquiring first about Halloween, but then raising the issue of Murphy. Abraham then testified that First Justice Meagher told him that Murphy was "not going after you but…going after the Trial Court," and that "you need to do something about him; he's about to explode." Abraham also testified on direct that he told First Justice Meagher that Murphy would not "talk to [me]," that Murphy "disparages [me]," "talks about [me]," and that Murphy "hate[d] [me]." Abraham then testified that he told First Justice Meagher, "of course [Murphy's] mad; of course he's mad, and very, very defensive," testifying later that he felt that his relationship with Murphy had changed after the Trial Court had ordered him to have a psychiatric evaluation. Conversely, First Justice Meagher testified that "there was no such discussion" on October 25, 2012 between her and Abraham relative to Murphy's alleged statements. She also testified that she had "no idea" about "the relevance of the [October 25, 2012] date and the statements." On direct examination, First Justice Meagher denied ever telling Abraham that Murphy was angry or was exhibiting escalating anger. She testified specifically that she "never had any concerns for Murphy's anger and behavior." Conversely, Abraham testified on direct examination that he "absolutely, positively" recalled having a conversation with First Justice Meagher about Murphy's alleged anger.

The Union cannot identify who specifically told Abraham that Murphy had called him "a fucking asshole," "evil" and "the devil," and it cannot identify when or where these statements were made. Abraham admitted that Murphy never directly made these statements to him, and Murphy denied saying those words. Based on these facts, I do not credit Abraham's testimony that Murphy called him "a fucking asshole," "evil" or "the devil." However, because Murphy admitted to complaining about Abraham to Dolan and Judge Horan, I credit Abraham's testimony that "over the course of the past several months," prior to May 14, 2013, Murphy made general statements against Abraham that were disparaging.

and maligned his character. He also warned Murphy against further misconduct. Murphy acknowledged Abraham's reprimand and agreed to comply with his demands. Around this time, Murphy had complained to Assistant Registrar John Dolan (Dolan) and Housing Court Judge Diana Horan (Horan)[27] about Abraham's lack of leadership and lack of presence at the courthouse.[28]

On or about April 14, 2013, Abraham learned that that Murphy was again making negative and disparaging comments about him.[29] Although Abraham did not hear Murphy make these comments, he nonetheless relied on them in a letter dated April 25, 2013, as one of several bases for scheduling a just cause hearing on May 2, 2013 "to discharge or otherwise discipline" Murphy.

Murphy's Alleged Intoxication

Section 27.000, *et seq*., pertains to the Trial Court Policy on Substance Abuse and the Workplace, with Section 27.100 stating, in full:

> It is the policy of the Trial Court that the workplace shall be free from the illegal use of drugs, the abuse of alcohol and other forms of substance

[27] Neither Judge Horan nor Dolan testified at the hearing.

[28] Murphy testified on direct about "how Mr. Abraham wasn't there [at the Trial Court] or certain things that [Abraham] had promised to do and didn't get to." While Murphy admitted to maligning Abraham's character and disparaging his name, he denied sharing that information with anyone "on Probate Court staff" other than Dolan and Housing Court Judge Diana Horan (Horan). First Justice Meagher corroborated Murphy's testimony that Abraham was an "absent Register" who "was not in the office much, was not an active participant in management" and was "a bit of a tyrant." She testified further that it was a running joke that certain unidentified members of management and at the Worcester Bar needed to call the 'I-team' after learning that the I-Team had actually investigated the Register in Barnstable. In contrast, she testified on cross examination that Murphy was "very, very loyal to the Trial Court and very, very loyal to the Bar."

[29] On redirect, Abraham did not identify those individuals and testified that he could not recall the exact statements allegedly made by Murphy.

> abuse, and from employees whose performance may be impaired by such use or abuse.
>
> Employees shall not unlawfully manufacture, distribute, dispense, possess or use a controlled substance while on the job or in the workplace, or be under the influence of a controlled substance or alcohol while on the job or in the workplace.
>
> The term "substance", when used in the term "substance abuse", includes both controlled substances under state and federal law and alcohol. The term "workplace" includes all Trial Court premises including court rooms, offices, work areas, parking lots, lounges, lavatories, smoking areas, and all premises and employee may visit while acting in the scope of employment.

Section 27.300 of that Policy pertains to "Supervisor Action" and states, in pertinent part:

> A supervisor faced with an employee who displays declining or erratic performance, attendance problems or inappropriate behavior due to suspected substance abuse, should take the following steps:
>
> 1. Documentation: As soon as the supervisor recognizes that an employee's attendance, job performance or conduct is becoming unsatisfactory, he/she should begin to document observable, verifiable facts….
>
> 2. Discussion: Once the problems have been observed and documented, there should be a discussion of the matter between the supervisor and the employee….The points to be covered in the meeting will include the aspects of work performance, attendance, and conduct that are not meeting expectations….It should be made clear that if performance does not improve within a stated period of time, disciplinary action will be taken.
>
> If there is a reason to believe that the deficiencies are caused in whole or in part by a personal or substance abuse problem, the supervisor should remind the employee of the Employee Assistance Program (EAP)….
>
> By the end of the discussion, the employee must understand that if the performance or behavioral problem is not corrected within a set period of time, further action will be taken….The points made in the meeting should be confirmed in writing to the employee. A copy should be retained by the supervisor for future reference.

Last, Section 27.500 addresses "Deferral of Disciplinary Action" and states, in pertinent part:

> The supervisor may consider deferral of disciplinary action in exchange for an agreement by the employee to get professional assistance or to participate in a rehabilitation program….
>
> In considering whether or not deferral is appropriate, the supervisor should consider such factors as the nature of the employee's job, the relationship between the offense and the job, and the employee's record….
>
> If deferral is not appropriate, or the employee does not agree to get professional assistance or to participate in a rehabilitation program, or the rehabilitation effort is unsuccessful for any reason, the performance or behavior problems should be treated as a disciplinary matter.

On March 15, 2013, Dolan informed Abraham that Murphy had allegedly come to work the day prior with a strong odor of alcohol on his breath. Later, on the same day of Murphy's suspected intoxication, Murphy left work early for a dentist appointment. A couple of weeks later, Abraham met with Murphy and confronted him about whether he had come to work under the influence of the alcohol on March 14, 2013. At that meeting, Abraham also asked Murphy why he left work early that day and whether the real reason was to go home and sleep off a hangover. Murphy answered that he wasn't drinking on the morning in question, and stated that Dolan's suspicions were misplaced on account of Murphy probably having had bad breath on that day.[30] Murphy insisted that he went to the dentist on March 14, 2013, and that he had scheduled the appoint-

[30] On cross examination, Murphy admitted that, from time-to-time, around this period, he consumed alcohol to excess; however, he maintained that he never showed up to work under the influence of alcohol and never "drink[s] in the morning." Murphy also maintained that on the day in question, a co-worker had offered him a breath mint after complaining that Murphy's breath smelled badly. On redirect, Murphy testified that during his tenure at the Trial Court, he "was never spoken to about alcohol by anyone other than Steve Abraham." During his examination, Abraham conceded that he did not personally witness Murphy's alleged intoxication.

ment in advance; however, Murphy conceded that he only gave notice to the Trial Court of the appointment that morning.[31]

Murphy's Inquiry into the Make and Model of Abraham's Car

On or about March 14, 2013, Dolan warned Abraham that Murphy had allegedly asked for the make and model of Abraham's car for the purpose of having Abraham followed.[32] During this conversation, Dolan expressed his concerns to Abraham about Abraham's personal safety. Abraham was also concerned not only for himself, but for his daughter, who "at the time was driving [Abraham's] car quite a bit." As a result,

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[31] Murphy testified on cross examination that he had previously scheduled the dentist appointment despite Abraham's contention that Murphy had put in the request at the "last minute" so he "could go home and sleep." Although Murphy admitted to not putting "in the request for time until that morning," he maintained that it was not a "last minute" appointment. On direct examination, Abraham testified that Murphy "just left the office" and "put in the slip at the last-second" rather than "several days before." Abraham also testified that Murphy's appointment was "last minute" based on "conversations [Abraham] had with other people in the office." Because Murphy admitted to requesting his leave on the same day that he took the leave, I find that Murphy took leave on March 14, 2013 without Abraham's prior knowledge or authorization. However, the Respondent failed to offer evidence showing that Murphy did not have a previously scheduled dentist's appointment on that day, or that he did not actually go to the dentist. For these reasons, I do not find that Murphy's leave was a pretext for wanting to go home and sleep-off the effects of being intoxicated.

[32] On cross examination, Murphy admitted to asking Dolan for the make and model information of Abraham's car, but denied that the reason was to have Abraham followed. Murphy also admitted that "having someone followed" was a "pretty serious" allegation. Murphy testified on cross that he wanted the vehicle information to avoid seeing Abraham outside of the courthouse, especially at several of Worcester's restaurants and lounges where many courthouse employees would sometimes visit after work. Murphy also testified that he was not comfortable being around Abraham and, therefore, wanted to identify Abraham's car for the purpose of avoiding him outside of work. On direct examination, Abraham admitted that he learned about Murphy's inquiry from Dolan. Because Murphy had a specific recollection about what he said to Dolan, because Dolan did not testify, and because Abraham did not hear Murphy make those statements to Dolan, I do not credit Abraham's testimony that Murphy intended to have him followed. Instead, I credit Murphy's reason for inquiring into the make and model of Abraham's car, which was to avoid unnecessary contact with Abraham outside of the courthouse.

Abraham instructed Dolan to inquire further into Murphy's intentions. The next day, Dolan met with Murphy, cautioning him that he did not think it was a good idea to have Abraham followed. Murphy responded to Dolan that he "was not having [Abraham] followed," that it was a "crazy idea," and that he "couldn't afford" to "pay somebody" to have Abraham followed.

On March 20, 2013, Abraham and Assistant Judicial Case Manager Jeanne Angers (Angers) met with Murphy to discuss these allegations. During their meeting, Murphy admitted to asking for the make and model of Abraham's car but denied wanting to use that information to hire someone to follow Abraham. Murphy explained that because he and Abraham frequented the same restaurants and lounges, he wanted to obtain Abraham's vehicle information for the sole purpose of avoiding Abraham at those places. On March 26, 2013, Abraham met with Murphy again and issued a verbal warning against him for inquiring into Abraham's vehicle information.

The Just Cause Hearing and the Termination Letter

Abraham issued a letter dated April 25, 2013, informing Murphy that there would be a hearing on May 2, 2013 to determine whether there was just cause to discharge or otherwise discipline him due to potential violations of Section 16.100B of the Trial Court's Policy.[33] By reply letter on April 26, 2013, Murphy asked Abraham to reschedule the hearing for a later date due to a previously scheduled trip. At some point Abraham granted Murphy's request and rescheduled the hearing for May 7, 2013.

On May 7, 2013, Abraham conducted a just cause hearing, with the following individuals attending: Murphy, Union Business Agent Richard Russell (Russell), Abraham,

[33] As stated earlier, neither party submitted Section 16.100B into evidence.

Dolan and Angers.[34] Murphy spoke at the hearing, denying all of the charges except seeking the make and model information of Abraham's car to have him followed. At the hearing's conclusion, Abraham found just cause to terminate Murphy, and issued a termination letter on May 14, 2013, relying on Murphy's entire work history, including his recent 2013 reprimands. That letter stated, in full:

> Dear Mr. Murphy,
>
> On Tuesday, May 7, 2013, I held a hearing to determine whether there is just cause to discharge or otherwise discipline you for your conduct and charges detailed in my letter of April 25, 2013. You were present at the hearing with your representative, Union Business Agent Richard Russell. Also present was Administrative Deputy Assistant John Dolan and Assistant Judicial Case Manager Jeanne Angers. Based upon my investigation, my meeting with you[35] and the evidence presented at the hearing, I make the following findings concerning each of the charges against you.
>
> Charge 1
>
> - On Thursday, March 14, 2013, you asked my Administrative Deputy Assistant for the make and model of my car so that you could have me followed.
> - My Administrative Deputy Assistant believed that you intended to have me followed which caused him great concern for me and my family.
> - My Administrative Deputy Assistant informed me of this conversation on March 15, 2013.
> - On Tuesday, March 19, 2013, my Administrative Deputy Assistant asked you about your statement that you wanted to have me followed. Your response was that you did not think that you were going to do it because it would cost money to have me followed and you did not have the money. Despite being warned by my Administrative Deputy Assistant that taking such action could result in termination[,] you stated that you could not be terminated for such behavior and offered no apology for your threats.
> - Your further discussions with my Administrative Deputy Assistant continued to cause him grave concern and he communicated these concerns to me.

[34] The record is unclear about whether Russell, Dolan and Angers spoke at the just cause hearing. Lunny was not present at that hearing.

[35] The record is unclear as to which "prior meeting" Abraham was referring.

- After further conversations and further investigation, I met with you on March 20, 2013 in the presence of Jeanne Angers.
- In that meeting, when I asked you why you were going to have me followed you laughed and said that it was just a joke. You then said it would cost money to have me followed and that you did not have the money. You also said that your statements were taken out of context. You admitted in that meeting how angry you are at me, and you blamed me for the conditions imposed upon you by the Trial Court due to your actions last July.
- You questioned why my Administrative Deputy Assistant would tell me about the conversations, but did admit that if these charges were true, they were very serious.
- Since March 26, 2013, you have been unapologetic and have shown no regret about your comments.
- Subsequent to our meeting on March 26, 2013, you questioned my Administrative Deputy Assistant as to why he would tell me what you said, but and at no time did you indicate to him that your threat to have me followed was a joke or taken out of context.
- You stated at the hearing that you thought that your comments to John Dolan about having me followed were confidential and that they were in the context of your frustrations with the administration.
- You stated in the meeting with me and at the hearing that you wanted the make and model of my car because you did not want to be at the same event in the same place as me.

I find that your explanation lacks credibility and that your comments about having me followed are very real and are threatening to me and my family. I also find that if you cannot be in a public place or event with me, you cannot and should not be in the same work place as me.

Charge 2

- Over the course of the past several months you have continually maligned my reputation and disparaged my name to Probate Court staff, other Trial Court employees and to people in the community.
- For the past several months you have described me to various lawyers, business people and other prominent people in the community as "a fucking asshole," "evil" and "the devil."
- You have told court staff and people in the community that you want me out of the office.
- You have told Probate Court employees, Trial Court employees and other people in the community how much you hate me and you blame me for the conditions imposed upon you by the Trial Court.
- At no time have you denied making these comments.
- You have openly criticized and questioned my judgment and authority with respect to prior discipline that you have received from me.

- After meeting with you on February 20, 2013 and despite being told to stop this behavior, you continue to malign and disparage my name and reputation and criticize me to employees and others in the community.
- After meeting with you on February 20, 2013, and despite being warned that you had to stop this behavior and stop talking negatively about me, you threatened me and specifically told my Administrative Deputy Assistant that you were going to have me followed.
- As recently as April 14, 2013, I was told by people in the community that you were out to get me.
- At the hearing, you did not deny that you made negative and disparaging comments about me except that you denied that you said these things to probate court employees other than John Dolan.
- You justified your actions and comments by saying that you had to defend your reputation because you were accused of having a nervous breakdown.
- You stated that you considered any comments that you made to John Dolan were confidential.

I find that you have and continue to malign my character and my reputation to probate court employees, lawyers and people in the community.

Charge 3

- On or about February 14, 2013, I received a complaint from a lawyer stating that you had offered free legal advice on countless occasions to his ex-wife and that you were personally involved in the case.
- On February 20, 2013, I discussed this issue with you and you denied having any recollection of any inappropriate behavior.
- After telling the attorney what you said, he said that you were lying and did in fact provide legal advice and legal representation to his ex-wife.
- You continue to provide legal advice and representation to pro se litigants.
- You continue to get personally involved in cases.
- You stated at the hearing that you had no recollection of this behavior and Attorney Lunny may have confused you with John Dolan.

I find that your explanation lacks credibility and that Attorney Lunny's complaint is well-founded and consistent with your past behavior.

Charge 4

- On or about March 14, 2013, you came to work with a strong odor of alcohol on your breath which was witnessed and/or observed by Probate Court employees and the public.
- On March 15, 2013, I was informed of your behavior.

- At the hearing, you stated that you may have had bad breath because George Panagiotou gave you a mint.
- You stated you had no recollection of what you did the night before but denied drinking that morning and denied drinking during the day.

I find your explanation to be untruthful given the fact that you admitted to John Dolan that you were "shit faced" that day and that George "saved" you. I also find that you falsely put in a slip for a last minute dentist appointment that day so that you could go home and sleep.

Charge 5

- On November 27, 2012, you personally filed in the Worcester Probate and Family Court, a Complaint for Modification against you by your former spouse. You also filed a Stipulation of Modification.
- You instructed a staff employee to expedite the initiating and docketing of these pleadings and issue a summons to you for your personal benefit.
- On November 27, 2012, you accepted service of this summons which was docketed on November 28, 2012.
- You personally paid for the Complaint which was receipted by the cashier at 3:50 p.m. on November 27, 2012.
- You stated that you then discussed your case with the First Justice and she had no problem with issuing a Judgement right away. The Judgement was entered on November 27, 2012 and docketed on November 28, 2012.
- You did not inform me of this at any time.
- At the hearing, you stated that you were at a loss as to why this would be an issue.

I find that you not understanding the fact that having unilateral discussions about a case, especially your own Worcester case[,] is quite disconcerting. I find that you are either lying or covering up the truth since Judge Meagher did enter the Judgement. I also find that you circumvented Trial Court and office policy for your own personal gain and benefit and that you placed a staff employee in a compromising situation to gain a personal advantage.

Based upon these findings, I conclude that there is just cause to discipline you. I have taken into account the seriousness of the charges, your disciplinary record and your work history. As you know, a position within the Trial Court is one of public confidence and trust. The present charges constitute serious misconduct warranting swift and harsh discipline.

A review of the record reveals that beginning in 2005, I communicated my concerns to you in the form of verbal warnings and meetings. This type of

> communication continued on a regular basis as we moved into the new courthouse at the end of 2007. In October 2009, you received a written warning from me for inappropriate and unprofessional behavior which involved defacing a Judge's portrait and then not being forthcoming about it. In January 2011, you were given specific verbal warnings and directives in a meeting in my office for many of the same things, including not discussing cases with Judges, not getting personally involved in cases and not circumventing the case flow policy of the office. In February 2012, I met with you again to discuss many of the same issues. On July 26, 2012, you arrived at approximately 10:00 a.m. and we had a serious discussion of you being late for work, not signing in the day before and not showing up for work the previous Friday. You acknowledged the problem and stated that you drank too much the night before. The next day at 8:00 a.m.[,] I was informed that at 4:30 p.m. on July 26, 2012 you were standing on the ledge on the Main Street side of the Courthouse calling attention to yourself. I called you into my office when you arrived at 8:30 a.m. and sent you home for your inappropriate and unprofessional behavior. On July 31, 2012, you were placed on Administrative Leave with Pay for the behavior relative to the ledge incident. When you came back to work on August 23, 2012, I reiterated through e-mail my specific expectations to you about your job performance and behavior. On October 2, 2012, I again verbally warned you about certain inappropriate behavior. On October 25, 2012, the First Justice informed me that your anger[36] was escalating and that I

[36] As discussed in footnote 26, above, Abraham testified that he met with First Justice Meagher in his office on or about October 25, 2012. Abraham also testified that during that meeting First Justice Meagher told him that Murphy was "not going after you but…going after the Trial Court," and that "you need to do something about him; he's about to explode." First Justice Meagher testified, conversely, that "there was no such discussion" on October 25, 2012 with Abraham relative to Murphy's alleged statements, and that she had "no idea" about "the relevance of the [October 25, 2012] date and the statements." On direct examination, she also denied ever telling Abraham that Murphy was angry or was exhibiting escalating anger, and that she "never had any concerns for Murphy's anger and behavior."

Russell testified on direct examination that he "[thought]" Murphy admitted at the May 7, 2013 hearing that he was "angry" with Abraham in response to Charge 5 of the termination letter. Russell later admitted that he did not know whether Murphy did, in fact, make that admission. Murphy's attorney Michael Angelini (Angelini) testified that he had never witnessed Murphy display any anger. Similarly, Murphy testified that he was never "angry" and never displayed any "anger" toward Abraham during his employment. Considering the totality of the evidence, including the fact that Abraham never personally witnessed Murphy's anger, I find that while Abraham and First Justice Meagher did meet on or about October 25, 2012, there was no discussion between them about Murphy's "anger" or him being "angry."

needed to something about it. I attempted to discuss these issues with you, but you refused. On February 20, 2012, I met with you because your behavior was getting progressively worse and I told you that it must stop. You agreed.

In conclusion, I find that your conduct has violated the Trial Court Personnel Policies and Procedures Manual, specifically Section 16.100 B[:]

1. Failure or refusal to comply with a reasonable order or to accept or complete a reasonable assignment.
2. Inefficiency, incompetence, or negligence in the performance of duties, failure to be knowledgeable and current in one's area of responsibility.
4. Insubordination, or a demonstrated lack of respect for persons in authority.
7. Violation or failure to comply with the Federal or State Constitution, statutes or court rules and regulations.
10. Use of undue influence to gain, or attempt to gain, promotion, leave, favorable assignment, or other individual benefit or advantage.
11. Unauthorized use or release of confidential information.
13. Threats or abuse of others, fighting, or other disorderly conduct.
22. Conduct that undermines the administration of the court.
23. Conduct, whether in the course of one's employment or otherwise, that tends to bring the court into disrepute or lessens public confidence in the administration of justice.
24. Conduct unbecoming a Trial Court employee.

Having considered the serious and egregious nature of these charges as well as your history of being unable to correct your behavior, I find that there is just cause to discharge you and I conclude that your employment is terminated effective immediately.[37]

The Step 3 Hearing

[37] Although not referenced in the termination letter, Murphy introduced into evidence Section 19.000 of the Trial Court Policy. Section 19.200(A) relates specifically to "Discharge" and states, in pertinent part, "An employee of the Trial Court discharged for cause, except those discharged due to the exhaustion of all sick time and leave benefits as result of a long-term illness, *shall not be eligible for hire within the Trial Court*." [Emphasis added.] Because the Trial Court terminated Murphy for cause in May of 2013, Section 19.200(A) expressly prohibits the Trial Court from rehiring him in any capacity at any Trial Court location in the Commonwealth.

On May 14, 2013, the Union filed a grievance challenging Murphy's termination; and, at that time, Russell believed that the grievance had merit. At some point between May 14, 2013 and June 26, 2013, Hegarty scheduled a Step 3 hearing for June 26, 2013. Additionally, at some point between May 14, 2013 and June 25, 2013, certain unidentified members of the Worcester County Bar Association (WCBA) contacted attorney Michael Angelini (Angelini), informing him about Murphy's termination.

After being contacted by the WCBA, Angelini and the Union's then-General Counsel and Business Manager Robert Manning (Manning) reached an agreement where Angelini would represent Murphy at the Step 3 hearing.[38] Pursuant to that agreement, Angelini contacted Hegarty by e-mail on June 25, 2013, asking to reschedule the June 26, 2013 hearing for a later date. At some point prior to July 31, 2013, Russell had also contacted Hegarty requesting the same. By reply e-mail on June 25, 2013, Hegarty agreed to reschedule the hearing.

On July 31, 2013, Hegarty presided over Murphy's Step 3 grievance hearing, at which she gave the parties an opportunity to speak on their respective positions. Neither Angelini nor Russell offered evidence at the hearing to refute Abraham's allegations. Rather, they simply denied all of the allegations in anticipation of presenting a more comprehensive case at arbitration. At some point during the hearing there was a fire alarm in the courthouse. Hegarty temporarily suspended the hearing, and the parties exited to a courtyard, where Hegarty and Angelini spoke briefly about the proceed-

[38] Russell testified on direct examination that this was an "oddball" case for the Union because Angelini was "outside counsel" who had conducted the Step 3 hearing and also wanted to conduct the arbitration for gratis. Russell also testified on direct that he normally "hear[s] grievances at the first and second steps" and that Manning "normally does all the arbitrations."

ing. During that conversation, Angelini told Hegarty that he expected the Union to move forward to arbitration.[39] After the fire alarm, the parties resumed the hearing, where Angelini reiterated his intention to proceed to arbitration.

By e-mail on August 9, 2013, Hegarty informed Angelini that she expected to "issue a decision…shortly" and apologized "for the delay." By follow-up e-mail on August 20, 2013, Angelini informed Hegarty that "[i]t is now three weeks since we met. Since I assume that you will reject the grievance, please do so promptly so we can proceed with the arbitration." Angelini copied Russell and Abraham on that e-mail. By reply e-mail that same day, Hegarty attached her decision and acknowledged that Angelini was "correct" in that she "was unsuccessful in resolving the grievance." By formal letter dated August 20, 2013, Hegarty notified Angelini—with copies to Abraham, Conlon and Russell—that she had denied the grievance after finding "just cause to discipline [Murphy]" and that the "termination was appropriate."

At all relevant times, both Angelini and Russell believed that the Trial Court was probably going to deny the grievance as "a rubber stamp" of Abraham's decision to terminate Murphy. On July 31, 2013 and, again, on August 20, 2013, Hegarty had notice that Angelini believed that the grievance would go to arbitration; however, Hegarty did not interpret this notice to mean that either Angelini or the Union would eventually seek an extension to file a demand for arbitration.

[39] Angelini testified that when he spoke with Hegarty during the fire drill, he explained that he expected to win Murphy's case at arbitration. Hegarty testified on direct examination that she had no recollection of this conversation with Angelini. However Russell testified that he was standing close enough to overhear what was said; thus, corroborating Angelini's recollection of events. Based on these facts, I credit Angelini's testimony that he informed Hegarty of his intent to pursue Murphy's grievance to arbitration.

The Trial Court's Practice of Granting Extensions

The parties' Agreement is silent on the issue of granting requests for extensions when the Union needs more time to file a demand for arbitration. Nonetheless, the Trial Court's practice is usually to grant the Union's extension request when it is made before the filing deadline. At all relevant times, the decision of whether to grant an extension request has belonged exclusively to the Trial Court. At all relevant times, Hegarty has granted all pre-deadline requests for extensions when made by the Union, in the first instance. However, prior to September of 2013, the Union never presented Hegarty with an extension request that was made after a deadline had passed.[40]

When Hegarty issued her August 20, 2013 decision denying Murphy's grievance at Step 3, the Union had 20 work days from that date (i.e., September 20, 2013) to file a demand for arbitration pursuant to Article 5, Section 5.04 of the Agreement. At some point during that 20-day period, Abraham contacted Hegarty and informed her that he did not support granting a deadline extension, if one was requested.

On or about September 24, 2013, days after the filing deadline had passed, the Union's Executive Board voted to process Murphy's case to arbitration. On that same day, Manning instructed Russell to contact Hegarty and ask for an extension to file the demand. By telephone that day, Russell left Hegarty a voicemail, requesting "an extension on the Murphy case." By telephone later that day, Driscoll contacted Russell asking what he needed, and Russell responded that the Union needed an extension. Driscoll then told Russell that Hegarty would contact him the next day. Prior to returning

[40] On redirect, Russell testified that he was not aware of any Trial Court policy or practice that denied granting a Union request for an extension if it was made after the filing deadline.

Russell's call, Hegarty met with Conlon at some point between September 24 and 26, 2013, and asked if she was permitted to grant the Union's request for an extension. Conlon instructed her not to grant the request. On or about September 26, 2013, Hegarty contacted Russell by telephone, informing him that the Trial Court had denied the Union's request.

Russell knew that he could have asked for an extension prior to the September 20, 2013 deadline and that the Trial Court would have granted it; however, he never requested an extension in Murphy's case because "it was out of [his] pay grade." Russell also knew that, in terms of the contractual filing deadline, "the clock started ticking on the 20th" of August.

The Union's Untimely Demand for Arbitration

By letter dated August 22, 2013, Angelini wrote to the Union, stating in pertinent part:

> I know that you have the [d]ecision from Ms. Hegarty.
>
> I would like to move on to arbitration ASAP. I assume that the Union will allow me to act as attorney for the Union in this arbitration. There will be no cost to the Union for this of course.
>
> Please make the demand for arbitration and get back to me ASAP regarding this. Time is an enemy not an ally.

At all relevant times, Russell knew that both Murphy and Angelini wanted to take the case to arbitration. At some point after August 22, 2013, the Union contacted Angelini, informing him that it had filed the demand for arbitration. At the end of that conversation, Angelini believed that the Union had affirmatively filed a timely demand. Memo-

rializing his belief, Angelini contacted Union counsel Wendy M. Bittner (Bittner)[41] by letter dated October 3, 2013, stating, in full:

> I understand that you represent Local 6 of the OPEIU and appreciate your representation that a timely arbitration claim has been made on behalf of Mr. Murphy.
>
> You indicated during our call that your client is considering whether to proceed with arbitration and has not yet decided to do so. Our evaluation of Mr. Murphy's circumstances is that his case is compelling. The purported reasons for his termination are contrived and we believe that it is highly probable that an arbitrator will order Mr. Murphy's reinstatement.
>
> I recognize your client's belief that it is its right and not Mr. Murphy's as to whether to proceed to arbitration. However, Mr. Murphy has real and substantial rights which must be protected. If cost is a consideration, Mr. Murphy has asked me to assure you that he is prepared to proceed with the arbitration at his expense, and with my counsel.

During this time, Murphy had also left several messages for Russell inquiring about the status of his case. When Russell asked Manning how he should respond to Murphy's inquiries, Manning instructed Russell that Bittner would be in touch with Murphy and/or Angelini. Responding to Angelini's October 3, 2013 letter, Bittner corrected Angelini's belief on October 10, 2013, writing that, "[t]here appears to be a misunderstanding that, while I did say that the Demand for Arbitration was filed, I did not say that it was timely filed. It appears from your letter that you may have assumed that it was timely filed….In fact there is an issue of timeliness in this case." At some point after receiving Bittner's October 10, 2013 response, Angelini tried unsuccessfully to contact her. For the next several months, both Angelini and Murphy made repeated requests to the Union for a copy of the arbitration demand. The Union refused to respond to those

[41] Bittner did not testify at the hearing.

requests until at some point in April of 2014, when it finally provided Murphy with a copy of the arbitration demand.

Murphy's Personnel Record and the Arbitration Postponements

At some point on or after September 26, 2013, the Union terminated its relationship with Angelini and reassumed its representation of Murphy's case. Prior to October of 2013, the Union did not request from Murphy a release of his personnel record. By telephone in early October of 2013, Russell left a voicemail message for Murphy, asking him to sign a release so the Union could access his personnel file. By follow-up letter dated October 28, 2013, Russell again asked Murphy to sign the release. By reply letter dated November 4, 2013, Murphy notified Russell that he was in receipt of the Union's October 28, 2013 request but, before signing the release, wanted to know the Union's reason for requesting the file. By that reply, Murphy also asked the Union to confirm whether it had taken necessary steps to proceed with the arbitration, explaining that he was willing to hire his own attorney "if the Union will not finance the cost of an attorney to represent my interests at the arbitration." Murphy also stated to Russell that his "livelihood is at stake and this is extremely important."

By letter on November 3, 2013, Russell responded to Murphy, answering that "the purpose of the release is so that the Union can evaluate your grievance and so that the Union can represent you effectively if it decides to proceed to arbitration." By that letter, Russell did not notify Murphy that the Union had filed an untimely arbitration demand. On December 31, 2013, Russell sent Murphy another request to release his personnel file to the Union.

At some point prior to January 17, 2014, Murphy learned that the Union had made an untimely filing of the demand. By letter dated January 17, 2014, Murphy informed Russell that he was "puzzled" as to why the Union had not yet explained to him why it filed a late demand for arbitration. Specifically, Murphy stated that he "would very much like to know the circumstances by which the Arbitration Demand was not filed within the time period set forth in the Agreement.…What steps have been taken to resolve the issue of timeliness?" Murphy went on to state that he "would also like to know why [the Union is] interested in my personnel file….If it is ultimately determined that we cannot proceed to arbitration because the Arbitration Demand was not filed on a timely basis, I see no point in releasing my personnel file. If there is some other reason why it is necessary to have it, please let me know and I will certainly consider it." On the same day, Murphy filed an initial charge against the Union at the DLR, which he later withdrew.[42]

At some point between September of 2014 and February 17, 2015, the Union retained outside counsel Michael Feinberg (Feinberg) to represent Murphy at the arbitration. By e-mail on February 17, 2015, Murphy contacted Feinberg, complaining that the Union had failed to provide timely updates on the status of his grievance, and had failed to notify him about a "unilateral postponement" of the arbitration.[43] Murphy also complained that the Union's failure was a repudiation of a prior agreement reached between

[42] The DLR docketed Murphy's first charge as SUPL-14-3411.

[43] At some point in or around April of 2014, Murphy learned that the arbitrator had scheduled a hearing for June 11, 2014. By telephone on June 3, 2014, Bittner informed Murphy that the arbitration had been postponed. On or about September 15, 2014, Murphy learned that the arbitration had been rescheduled for December 12, 2014. Eventually, the Union and the Trial Court later agreed on a second postponement for May 6, 2015.

him and the Union in November of 2014. By reply e-mail that same day Feinberg "sympathize[d]" and "agree[d]" with Murphy that there had been an "institutional failure to obtain a date for a hearing." Feinberg also explained that the "cause of the delays is that the lawyer for the Trial Court who was assigned to your case…is leaving in 2 weeks" and that "[a]nother attorney in the Trial Court's Labor Relations Department…retired in January." Feinberg further explained that he had "expressed [his] anger and frustration to the AAA and Mark Conlon at the Trial Court" and that if the Trial Court would not consider waiving any claim of untimeliness on the part of the Union, Feinberg would discuss with the Union "the feasibility of filing a [c]harge against the Trial Court at the DLR for failing to engage in the arbitration process in good faith."[44]

By e-mail on February 25, 2015, Murphy sent another complaint to Feinberg after learning that the arbitration would not be scheduled until April 17 or 24, 2015. Specifically, Murphy complained that despite his agreement to "dismiss/postpone hearings four times(!!) in good faith so the Union could do what it had to do…" the Union had yet to explain why it delayed "filing the demand for Arbitration until after the CBA established deadline." [Emphasis in original.] By reply e-mail that same day, Feinberg responded that he had "only been involved in [Murphy's] case since September – about 6 months" and that he was "not to blame for the major part of the 'delay'." By that reply, Feinberg also reminded Murphy about the Trial Court staffing issues and explained that he postponed the December hearing based on belief that the new Register might support Mur-

[44] There is no evidence in the record that the Union filed a charge at the DLR against the Trial Court on this issue.

phy's reinstatement after she took office in January of 2015.[45] Feinberg then expressed his mutual frustration and assured Murphy that he had "made (and will continue to make) pleas with Mark Conlon to waive any claim of arbitrability and proceed directly to try your case on its merits (which I continue to feel are strong)." Feinberg concluded by stating that "Local 6 remains committed to representing you aggressively and diligently through the conclusion of your case."

By e-mail on May 28, 2015, Murphy contacted Feinberg, expressing his feelings about a prior meeting at which Murphy and Feinberg were present. That e-mail stated, in part:

> Thanks for taking the time to meet with me yesterday. I'm sorry if things got a little testy, but….I appreciate the fact that the Union is willing to deploy such an impressive array of manpower to discuss my case….I'm going to try to keep an open mind, and listen before I react….If there are any further discussions with the Trial Court…please feel free to communicate directly with Mike Angelini. Or me. Or both."

The Judges' Letter Supporting Murphy's Reinstatement

On or about April 10, 2015, five judges (three active, two retired) and one judicial case manager at the Worcester Probate and Family Court signed a joint letter (Judges' Letter) addressed to Conlon, expressing their support for Murphy's reinstatement as Family Law Facilitator. Copied on the letter was Union counsel Michael Feinberg. The Letter stated, in full:

> Dear Attorney Conlon:
>
> We write to express our support for the reinstatement of Attorney John F. Murphy to the position of Family Law Facilitator at the Worcester Probate & Family Court. We respectfully request that [t]he Massachusetts Trial Court allow Attorney Murphy a fair and impartial hearing on the justification for his termination rather than summarily rely upon the unverified ac-

[45] Abraham was defeated in his reelection as Register by Stephanie K. Fattman.

> cusations, innuendos and perceptions of his former manager. From our personal experience, having shared a workplace with the parties involved, you will find little demonstrative evidence, witness testimony or staff concerns to justify the termination.
>
> During the course of the last [nine] years[,] Attorney Murphy, a graduate of Yale University and [t]he University of Connecticut Law School, has been among the most talented, valued and hardworking trial court employees we have had the pleasure to work with. In his work with our indigent self-represented population[,] he is kind, compassionate and dedicated. Among his most impressive qualities is his patience and empathy when working with our county's diverse population, many with significant emotional, intellectual and financial limitations. He quickly and concisely can identify the legal issues before him and consistently presents common sense solutions to individuals and families in crisis in our court. We concur with Chief Justice Carey in her letter of December 9, 2011, attached hereto, in stating that Attorney Murphy has been a terrific ambassador for the Probate and Family Court.
>
> Based on the foregoing, we respectfully request that Attorney Murphy be allowed a fair and impartial hearing to defend the accusations made, as soon as possible. We strongly encourage that your hearing to be held on May 6th address the substantive grounds for termination rather than be used to ratify his termination based upon a procedure deficit. Attorney Murphy is a valued and loyal employee of our court and the interest of the public and [t]he Massachusetts Trial Court will be best served the sooner he is returned to his position.
>
> At no time did the Trial Court respond to the signatories of the Judges' Letter.

The Arbitration

On May 6, 2015, an arbitration hearing was conducted where the Trial Court challenged the procedural arbitrability of Murphy's grievance. The parties agreed to bifurcate the proceeding, beginning with the threshold issue of whether the grievance was procedurally arbitrable. Angelini did not attend the hearing. Instead, attorneys Feinberg and Nicholas Chalupa represented the Union in attendance with Russell and Murphy. Representing the Trial Court was attorney Eamonn Gill, attending with Hegarty. On July

16, 2015, the arbitrator issued an award, denying the grievance because it was not procedurally arbitrable.

OPINION

Once a union acquires the right to act for and 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. Quincy City Employees Union, H.L.P.E, 15 MLC 1340, 1355, MUPL-2883 and MUP-6037 (Jan. 24, 1989), aff'd sub. nom., Pattison v. Labor Relations Commission, 30 Mass. App. Ct. 9 (1991), further rev. den'd, 409 Mass. 1104 (1991). The duty of fair representation pursuant to Section 5 of the Law encompasses a duty to represent employees and to process their grievances in a manner which is not arbitrary, perfunctory, unlawfully motivated, or the result of inexcusable negligence. Quincy City Employees Union, 15 MLC at 1355 (citing Teamsters Local 437, 10 MLC 1467, MUPL-2566 (March 21, 1984)).

1. Perfunctory Handling of the Grievance

A union's action is perfunctory if it ignores a grievance, inexplicably fails to take some required step, or gives the grievance merely cursory attention. AFSCME, Council 93 and Shand Palmer (Palmer), 31 MLC 180, 188, MUPL-4257 (June 3, 2005); American Federation of State, County and Municipal Employees and Charles W. Bigelow (Bigelow), 20 MLC 1271, 1275, SUPL-2553 (H.O. Nov. 24, 1993), aff'd, 22 MLC 1329, (Dec. 29, 1995). A union's action is also perfunctory if it is done as a matter of routine and for form's sake, without interest or zeal. Independent Public Employees Association, Local 195 and Elizabeth P. Clarke, 12 MLC 1558, 1565-66, MUPL-2633 (Jan. 22,

1986) (union acted in a perfunctory matter when it did nothing to help process a grievance and had no explanation as why it did not pursue the grievance). The CERB holds that filing an untimely demand for arbitration constitutes perfunctory action that violates Section 10(b)(1) of the Law. See AFSCME, Council 93 and Richard Allen Bettuchy (Bettuchy), 32 MLC 85, 88 MUPL-02-4331 (Oct. 14, 2005).

Here, the Union failed to make a timely demand for arbitration but argues that it relied on the Trial Court's practice of granting requests for arbitration deadline extensions. In the alternative, the Union argues that it should not be responsible for the untimely filing of the demand for arbitration because Hegarty sent her Step 3 denial directly to Angelini and not the Union. I am not persuaded by these arguments. Although the Union correctly asserts that the Trial Court had established a practice of granting requests for extensions whenever the Union needed more time to file a demand for arbitration, the Union failed to show that the practice applied to requests for extensions made *after* the filing deadline. Rather, the Trial Court's practice has been to always grant extension requests when they were made *before* the filing deadline. At no point has the Trial Court ever changed this practice to allow extensions beyond the post-filing deadline.

It is undisputed that prior to September 26, 2013, the Union had never asked for an extension after the filing deadline had passed. It is also undisputed that the Trial Court has no formal policy concerning deadline extension requests, and that the parties' Agreement is silent on this issue. Article 5, Section 5.04 of the Agreement merely states that, "[i]f the grievance has not been settled at Step 3, it may be submitted to arbitration…[w]ithin 20 workdays after receiving the Step 3 response at the Union office."

The Union contends that Abraham had interfered with the Trial Court's established practice by asking Hegarty not to grant the Union's request for an extension. While the Trial Court may have considered Abraham's request in deciding not to grant the extension, there is no dispute that the decision belonged exclusively to Trial Court, and not the Union.

Concerning the Union's alternative argument, the evidence shows that Hegarty provided the Union with a timely copy of her Step 3 decision. While Angelini was the primary addressee on the decision, Hegarty also copied Russell on that letter. Angelini also notified Russell two days later on August 22, 2013 that he wanted to pursue the matter to arbitration gratis. Thus, the Union's assertion that Angelini was somehow responsible for the untimely demand is not only disingenuous, but is not supported by the evidence. See, e.g., Goncalves v. Labor Relations Commission, 43 Mass. App. Ct. at 297 (union violated its duty of fair representation when it failed to pursue employee's grievance after believing that employee's personal attorney would manage it, and failed to follow its own policy of securing written waiver from grievants who retained separate representation). Based on correspondence from Hegarty and Angelini, the Union knew on August 20 and 22, 2013, that the filing deadline was set to expire on September 20, 2013. Russell knew, specifically, that the clock started ticking on August 20, 2013. He also knew that he could have asked for an extension prior to the September 20, 2013 deadline, and that the Trial Court would have granted it. Despite this knowledge, the Union waited until September 24, 2013 to vote affirmatively to move the grievance forward to arbitration; and, then, inexplicably, waited an additional two days to file the arbitration demand on September 26, 2013. Even though Russell had contacted both Dris-

coll and Hegarty on September 24, 2013, his request for an extension by that point was already four days beyond the deadline.

Both the Union and Angelini believed that Hegarty would treat Murphy's grievance as a "rubber stamped" denial at Step 3. This meant that the Union could only argue the merits of the grievance at arbitration. Russell knew that Angelini wanted to proceed to arbitration based on Angelini's conversation with Hegarty during the fire alarm at the courthouse on July 31, 2013, and based on Angelini's subsequent correspondence with her on that exact matter. For example, on August 20, 2013, over three weeks after the Step 3 hearing, Angelini copied the Union on an e-mail that he had sent to Hegarty, stressing his concern over her delay in issuing the decision and notifying her that he wanted to proceed to arbitration. The Union knew it had 20 days from the date of the Step 3 decision to file a timely demand for arbitration. In fact, the Union was aware that Angelini was seriously concerned about the issue of timeliness per his August 22, 2013 letter in which he stressed to the Union that "you have the [d]ecision from Ms. Hegarty. I would like to move on to arbitration ASAP….Please make the demand for arbitration and get back to me ASAP regarding this. Time is an enemy not an ally." Despite these concerns, the Union first failed to notify Angelini about whether it had filed the demand for arbitration, and then waited until October 10, 2013 to correct Angelini's wrongly-held assumption that the Union had filed the demand on time.

The record shows that the Union failed to take a timely vote on whether to pursue the grievance to arbitration. Bettuchy, 32 MLC at 88. It also shows that the Union failed to secure a pre-deadline extension from the Trial Court, and then inexplicably waited two additional days after the vote before filing the demand. Id. This conduct is demon-

strative of egregious disregard for Murphy's rights because the Union took these actions without any rational basis. See, e.g., 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 absence of a rational basis for a union's decision coupled with egregious unfairness or reckless omissions or disregard for an individual employee's rights amount to a denial of fair representation).

Based on this evidence, I find that the Union has breached its duty of fair representation by acting perfunctorily in handling the grievance and filing the untimely demand for arbitration on September 26, 2013. Bettuchy, 32 MLC at 88; Bigelow, 22 MLC at 1334; see also AFSCME, Council 93 and Herbert Avant (Avant), 27 MLC 129, SUPL-2695 (April 9, 2001) (CERB found breach of the duty of fair representation where union failed to follow the grievance procedure outlined in a collective bargaining agreement); see generally, Goncalves v. Labor Relations Commission, 43 Mass. App. Ct. 289, 297 (1997) (It is well-settled that unions must know their own policies and contractual procedures).

2. Grievance Was Not Clearly Frivolous

Once the Commonwealth Employment Relations Board (Board) determines that a union has breached its duty of fair representation, the burden is on the employee to demonstrate that the grievance is not clearly frivolous. Bigelow, 22 MLC at 1332 (citing Pattison, 30 Mass. at 17); National Association of Government Employees (NAGE), 20 MLC 1105, 1111, SUPL-2522 (Aug. 9, 1993), aff'd sub nom. NAGE v. Labor Relations

Commission, 38 Mass. App. Ct. 611, 811 (1995); Quincy City Employees Union, H.L.P.E., 15 MLC at 1375 (1989).

Here, the evidence shows that the grievance was not clearly frivolous for several reasons. First, the Union never communicated privately to Murphy any concerns about the merits of his grievance. Rather, the Union admitted on several occasions that it believed Murphy's grievance was "compelling", "strong," and "had merit." Specifically, Russell believed that the grievance had merit when he filed it on May 14, 2013. The Union Executive Board echoed his sentiment when it voted on September 24, 2013, to process the grievance to arbitration. Months later, by letter dated October 23, 2013, Bittner affirmed that Mr. Murphy's case was "compelling," that "[t]he purported reasons for his termination are contrived," and that "it is highly probable that an arbitrator will order Mr. Murphy's reinstatement." Years later, by e-mail on February 25, 2015, Union Counsel Feinberg asserted to Murphy that the merits of his grievance were "strong."

As to Murphy's job performance, Abraham admitted that he did not have personal knowledge about any of the five primary allegations which formed the basis of his decision to terminate Murphy. Abraham relied primarily on reports made to him by Dolan, and on the meetings he had with Murphy to justify his termination. Despite Dolan being a key witness to this case, Dolan did not testify. Conversely, Murphy consistently denied four of the allegations in full, and denied one, in part (i.e., asking for the make and model of Abraham's car but denying that the reason was to have Abraham followed). According to these facts, I conclude that Murphy has satisfied his burden of establishing that his grievance was "not clearly frivolous" based on the possibility that he was terminated without just cause and that his grievance was substantively arbitrable under the

contract. Bettuchy, 32 MLC at 88 (citing, Berkley Employees Association, 19 MLC 1647, 1650, MUPL-3724 (Jan. 28, 1993) (termination from employment, allegedly without just cause, coupled with the possibility that the grievance contesting that termination was substantively arbitrable under the contract, generally satisfies the "not clearly frivolous" test)).

3. The Grievance Had Merit

When an employee satisfies his burden of showing that the grievance was not clearly frivolous, the burden shifts to the union to demonstrate that the grievance was clearly without merit (i.e., that the employee could not have succeeded if arbitration had proceeded on the merits of the grievance). See Bigelow, 22 MLC at 1332 (citing Pattison, 30 Mass. App. Ct. at 17); see also Quincy City Employees Union, 15 MLC at 1374. The burden shifts to the union because in a typical disciplinary arbitration proceeding, the employer assumes the full burden of justifying the action it took against the employee; thus giving the employee the advantage of forcing the employer to make its case. Bigelow, 22 MLC at 1332 (citing Pattison, 30 Mass. App. Ct. at 17). However, when a union acts unlawfully, the employee not only loses that advantage, but also loses "the opportunity to plead for a reduced sanction, even if the [e]mployer is found to have had 'just cause' for the discharge." Id. Therefore, because the employee has lost his opportunity to present his matter before an arbitrator due to the union's unlawful conduct, the union must bear the ultimate risk of uncertainty as to how an arbitrator would have decided the grievance. Pattison, 30 Mass. App. Ct. at 18. In other words, when a union elects to present evidence concerning the merits of a grievance at the prohibited practice hearing, the union must step into the shoes of the employer, argue the merits of the

grievance, and show that it would have been lost for reasons not attributable to the union's misconduct. Berkley Employees Association, 19 MLC at 1650 (citing Oil Chemical and Atomic Workers International Union, Local 5-114, 139 LRRM 1036); see generally, Quincy City Employees Union, H.L.P.E., 15 MLC at 1376 n. 67.

A. Sufficient Evidence To Support The Grievance

Murphy presented sufficient evidence to show that his grievance would have succeeded at arbitration. First, several key witnesses (e.g., Dolan, Lunny, Conlon, Angers, Chief Justice Carey, Bittner and Manning) failed to testify even though they allegedly possessed direct knowledge of Murphy's conduct, his termination and the grievance. See, generally, Elkouri and Elkouri, How Arbitration Works, 8.3.B, 8-13 (8th Ed., 2016). Next, much of the evidence on which Abraham relied to justify his termination of Murphy was based primarily on hearsay from Dolan. Except for Murphy's partial admissions, no other witnesses corroborated the allegations raised by Abraham. Abraham also made concerted efforts to interfere with Murphy's employment by requiring him to undergo a psychiatric evaluation and take prescription medication in July of 2012, despite Dr. Vasile's initial recommendation that such action was unnecessary. Additionally, numerous judges and other Trial Court staff publicly declared their support for Murphy's reinstatement as Family Law Facilitator. Last, the 2010 Worcester Telegram & Gazette article and Chief Justice Carey's 2011 acknowledgement letter praised Murphy's work as a Family Law Facilitator.

Although the Union points to Murphy's admissions about disparaging Abraham, interfering with Lunny's divorce proceedings, standing on the Courthouse catwalk, altering the judge's portrait, and inquiring about the make and model information of Abra-

ham's car, this evidence does not overcome the fact that Murphy denied most of the allegations raised by Abraham; and, the Union failed to present evidence rebutting his denials. For example, Murphy denied coming to work intoxicated on March 14, 2013 and denied leaving work that day without prior authorization. He denied wanting the make and model information of Abraham's car to have Abraham followed. He also denied violating Trial Court policy by providing Lunny's wife with certain legal forms. Similarly, Murphy denied violating Trial Court Policy when he filed his 2012 expedited divorce Modifications in Worcester Probate and Family Court. Next, he denied that the 2012 courthouse catwalk incident warranted the Trial Court's orders for him to undergo a psychiatric evaluation and ingest prescription drugs. Last, he denied ever telling litigants that he would speak to judges on their behalf, or that he ever gave them the impression that he represented them.

Similarly, the Union points to Murphy's admission to: giving out his cell phone number to litigants; loaning money to a litigant; advocating for litigants directly or indirectly; discussing cases with judges; bringing paperwork to the sheriff or constable for a litigant; keeping case files on his desk; holding pleadings overnight; and encouraging litigants to write to him and send documents to his attention. However, the Union failed to present evidence that Murphy engaged in this conduct after August 22, 2012, when Abraham told him that such conduct was prohibited. Although Abraham's May 14, 2013 termination letter referenced Murphy's engagement in this activity in January of 2011 and February of 2012, it never alleged that Murphy violated these policies after August of 2012. See, generally, Elkouri, at 15.3.F.vii, 15-73.

B. Insufficient Evidence to Support Discharge

The arbitral standard of just cause requires an arbitrator to weigh many factors like whether the employer had a clear rule or policy that it had consistently applied, whether the affected employee knew of that rule or policy, whether the employee violated that rule or policy, whether there were extenuating factors that led to the employee's actions, whether the employer's decision to discharge the employee was based on a thorough investigation that recognized the employee's industrial due process rights, and whether the discipline imposed was punitive rather than corrective in nature. See Pattison, 30 Mass. App. Ct. at 19.

Here, the Trial Court's policy is neither clear nor consistent regarding divorce modifications or providing legal forms to non-indigent parties (e.g., Lunny's former wife). In fact, the evidence shows that there is no policy that covers how/whether a Trial Court employee should/could file a personal matter in the Worcester Probate and Family Court. Rather, the evidence shows that the Trial Court has an established practice of permitting "routine allowables," without distinction as to whether the filer is a Trial Court employee or employed elsewhere. Further, Murphy often interacted with the general public from behind the counter in the Clerk's office, and there is no evidence that the Trial Court ever proscribed him from providing certain legal forms to the public, regardless of someone's ability to hire an attorney. While the Union relies on Section 16.100B to justify Abraham's discipline of Murphy on these matters, it neither offered the complete policy into evidence, nor pointed to the specific part of the policy to show where Murphy had allegedly violated it.

The evidence also shows that Abraham did not conduct a thorough investigation of Murphy's alleged intoxication on March 14, 2013. He also failed to rebut Murphy's

explanation of leaving work early that day to attend a previously scheduled dentist appointment. Further, there is no evidence that Abraham ever applied the provisions of Section 27.000 of the Trial Court's policy as it pertained to Murphy's alleged substance abuse. Despite Dolan reporting to Abraham that he smelled "a strong odor of alcohol" on Murphy's breath, Dolan did not testify and the Union provided no other evidence—besides Abraham's testimony—to support this allegation.

C. Arbitrator Would Likely Uphold Grievance

Considering all of the evidence presented here, I find that an arbitrator would have upheld the grievance based on the fact that many of the disputed allegations raised by Abraham are not supported by the record, namely: Murphy's alleged intoxication and leaving work without permission, his alleged intention to have Abraham followed, his alleged violation of Trial Court policy by filing expedited divorce modifications, his alleged reasons for appearing on the courthouse catwalk, and his alleged advocacy for litigants.

Concerning the undisputed allegations, I find that an arbitrator would have considered Murphy's personal circumstances (e.g., his 2010 divorce, his 2012 cancer diagnosis, and his 2013 surgery) as mitigating factors to overturn his termination in favor of a less severe form of discipline, such as suspension. See, generally, Elkouri, at 15.3.F.ii, 15-46 through 15-47. Even if an arbitrator would not have considered Murphy's divorce and ill health as mitigating factors, Murphy never complained to the Trial Court that his personal transitions were affecting him professionally. See, generally, Elkouri, at 15.3.E.i, 15-35.

While the Union contends that that Murphy's behavior had escalated to the point where discharge was warranted in May of 2013, I find no evidence to support this contention. Murphy admitted to altering the portrait in 2009 and was disciplined for it, but he emphatically denied that his presence on the catwalk in July of 2012 was grounds for forced leave and a mandatory psychiatric evaluation. On this point, Dr. Vasile agreed with Murphy, reporting that he was fit to return to work without an evaluation or prescription medication, until Abraham insisted that Dr. Vasile's opinion was wrong. The only other instance of prior discipline was Murphy's warnings in January of 2011 and February of 2012 related to his interaction with litigants. However, the Trial Court clarified the scope of Murphy's interaction with litigants and implemented new policies in August of 2012 with which Murphy complied. There is no evidence that Murphy engaged in any further misconduct to warrant his termination, or that the Trial Court imposed any discipline between the warnings and the termination. See, generally, Elkouri, at 15.3.F.vii, 15-73. Therefore, I do not find that the Trial Court discharged Murphy for just cause, but find, instead, that but for the Union's perfunctory handling of his grievance, Murphy would have succeeded on the merits at arbitration. Consequently, the Union has failed to meet its burden of showing that Murphy's grievance was clearly without merit. Bigelow, 22 MLC at 1332 (citing Pattison, 30 Mass. App. Ct. at 17).

CONCLUSION

For the reasons discussed, I conclude that the Union breached its duty of fair representation to Murphy by filing an untimely demand for arbitration in violation of Section 10(b)(1).

REMEDY[46]

The Board traditionally orders unions that breach their duty of fair representation to take any and all steps necessary to have the grievance resolved or to make the charging party whole for the damage sustained as a result of the union's unlawful conduct. Bettuchy, 32 MLC at 88 (citing, NAGE, 28 MLC 218, 222 (2002); NAGE, 20 MLC at 114-15; Quincy City Employees Union, H.L.P.E., 15 MLC at 1374-78 (further citations omitted)). Here, the Union's unlawful conduct harmed Murphy by foreclosing his ability to challenge the merits of his termination. Bettuchy, 32 MLC at 88. Because the Union has failed to show that the Trial Court terminated Murphy for just cause, it is liable to Murphy for his loss of earnings from the date of his discharge until he has secured reinstatement as Family Law Facilitator, or a similar position at the Trial Court, or similar employment elsewhere.[47] Pattison, 30 Mass. at 21. In addition, I order the Union to

[46] In its post-hearing brief, Murphy stated that he "refrains from making any argument… with regard to what the proper remedy would be" and "[s]hould the Hearing Officer wish to entertain argument on issues relative to the proper remedy…requests that a Compliance Hearing be held." Murphy's request for compliance falls under DLR Rules and Regulations, 456 CMR 16.08, which permits a party to "seek enforcement of any order *issued* by the [DLR]" subject to certain requirements, including a "statement as to what facts cause the requesting party to believe that there has been non-compliance with the specific order…supported by affidavits." 456 CMR 16.08(1)(f). [Emphasis added.] Because Murphy made his request for a compliance hearing *before* the issuance of any DLR order, the request is premature and, thus, not ripe for consideration.

[47] Murphy has also filed a wrongful termination suit against the Trial Court in the United States District Court for Massachusetts. Consequently, whether the amount of compensation for which the Union is liable should be reduced by any compensation paid by the Trial Court to Murphy for the period during which back pay liability accrues can be addressed by the parties in a subsequent compliance proceeding. Pattison, 30 Mass. at 22. If Murphy's claim against the Trial Court fails, the Union shall be liable for all compensation Murphy lost because of the Union's failure to timely file his grievance at arbitration, plus interest, from the date of his termination until he is reinstated by the Trial Court or obtains substantially equivalent employment. Bettuchy, 32 MLC at 88.

cease and desist from its misconduct of mishandling grievances and post a notice to employees in the bargaining unit notifying them of their rights. Bettuchy, 32 MLC at 88-89.

ORDER

WHEREFORE, based on the foregoing, it is hereby ordered that the Office and Professional Employees International Union, Local 6, AFL-CIO shall:

1. Cease and desist from:

   a) Perfunctorily mishandling of unit members' grievances.

   b) Otherwise interfering with, restraining, or coercing any employee 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) Make Murphy whole for the loss of compensation he suffered as a direct result of his termination from the Trial Court effective on May 14, 2013.

   b) Immediately post signed copies of the attached Notice to Employees in conspicuous places where notices to bargaining unit employees are customarily posted, including all places in the Trial Court, and including electronic postings if the Union customarily communicates to members via intranet or e-mail. The Notice to Employees shall be signed by a responsible elected Union Officer and shall be maintained for a period of at least thirty (30) consecutive days thereafter. Reasonable steps shall be taken by the Union to assure that the Notice is 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 in the Trial Court, the Union shall immediately notify the Executive Secretary of the DLR in writing, so that the DLR can request the Trial Court to permit the posting.

   c) Notify the DLR in writing within thirty (30) days from the date of the Order of the steps taken by the Union to comply with this Order.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

KENDRAH DAVIS, ESQ., HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 456 CMR 13.19, 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 Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

NOTICE TO EMPLOYEES

POSTED BY ORDER OF A HEARING OFFICER OF THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS

AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

A Hearing Officer of the Massachusetts Department of Labor Relations has held that the Office and Professional Employees International Union, Local 6, AFL-CIO (Union) violated Section 10(b)(1) of Massachusetts General Laws, Chapter 150E (the Law) by breaching its duty of fair representation to unit member John F. Murphy (Murphy). The Union posts this Notice in compliance with the Hearing Officer's Order.

Section 2 of the Law gives public employees the right to engage in self-organization; to form, join or assist any union; to bargain collectively through representatives of their own choosing; to act together for the purpose of collective bargaining or other mutual aid or protection; and to refrain from all of the above.

WE WILL NOT fail to properly process grievances for employees who are covered by our collective bargaining agreement with the Chief Justice for Administration and Management of the Trial Court (Trial Court).

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

WE WILL make Murphy whole for the loss of compensation he suffered as a direct result of his termination from the Trial Court effective on May 14, 2013.

_____ _____

For the Union Date

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