

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION &  
LAMONT DAVIS

Complainant

v.

DOCKET NO. 07-BEM-02201

INTERNATIONAL ASSOCIATION OF  
FIREFIGHTERS and LOCAL 863 IAFF,

Respondents

Appearances: Joseph G. Donnellan, Esq. for Complainant  
Neil Osborne, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On August 20, 2007, Complainant, Lamont Davis, an African American male, filed a complaint of discrimination against Respondents, International Association of Firefighters and Local 863, of the IAFF, and Francis Capello, the President of the Union Local at the time. The Complaint against Capello was dismissed by the Investigating Commissioner for Lack of Probable Cause.

The Complainant alleged that he was denied a personal loan by Local 863 of IAFF on account of his race and color. The Investigating Commissioner found Probable Cause to credit the allegations of the complaint and efforts at conciliation were unsuccessful. A public hearing was held before the undersigned Hearing Officer on October 16 and 18, 2012.

The parties submitted post-hearing briefs in January of 2013. Having reviewed the record of the proceedings and the post-hearing submission of the parties, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Complainant began employment with the City of Newton Massachusetts as a firefighter in January of 1995. Complainant is African American.

2. Respondent, Local 863 of the International Association of Firefighters, otherwise referred to as the “Union,” is the collective bargaining agent responsible for representing firefighters in connection with their employment as firefighters with the City of Newton. Local 863 is a “labor organization” within the meaning of G.L. c. 151B, § 1(3). During 2006 and 2007, Francis Capello, Jr. was the President of Local 863. Local 863 administers a fund, not financed by union dues, through which members may seek loans. This fund also provides gifts upon retirement to those firefighters who have achieved 20 years of service or who retire with a job related disability. (Testimony of Capello and Lopez) Members who have loans outstanding at the time of retirement have the amount of the outstanding loan deducted from any retirement gift to which they are entitled.

3. The Union had a practice of granting loans to its members who encounter financial hardship. The Local’s Constitution and By-Laws set forth the process for requesting and granting loans to its members. (Ex. C-3) Section 5 of the Union By-Laws states that active members of the Newton Fire Department are entitled to all benefits of the Association if they are members in good standing. According to the By-Laws, requests for assistance are subject to investigation by a committee appointed for such purpose, and also require a vote by the Executive Board in writing at a meeting called for the purpose of approving the request. (By-

Laws s. 3) During 2006 and 2007, Local 863 President, Francis Capello and Treasurer, Joseph Quinan, were generally the two Union officers who received requests for financial assistance from member firefighters in the form of a loan or gift. They made the decision to grant assistance. (Testimony of Quinan and Capello) This informal process was in contravention of the procedures set forth in the By-Laws that required a loan committee to investigate the request and for the Executive Board to formally approve the loan at a special Union meeting. Capello testified that as the President of the Union he had the authority to approve loans to members and that a request had to go before the Executive Board only if the person requesting the loan was not a member in good-standing. This view does not comport with the Union By-Laws. Complainant confirmed that the past practice for Union members seeking a loan was to just speak to the President of the Union.

4. In September of 2006, Complainant was arrested for driving under the influence and was discharged from his position as a Newton firefighter. Complainant did not inform Local 863 of his arrest. The Union learned of his termination several weeks later when the City inquired if a scheduled arbitration regarding certain benefits claimed by Complainant would be going forward. In September of 2006 Complainant ceased paying dues to the Union because the dues had been automatically deducted from his pay check.<sup>1</sup> Complainant testified that the Union never notified him that he was no longer a member and did not ask him to pay dues once his automatic payroll deduction ceased. He also testified that there is no provision in Local 863's By-Laws for termination of membership in the Union.<sup>2</sup>

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<sup>1</sup> Union By-Laws provide that dues will be paid by payroll deduction and that any member not paying in that manner, shall pay a lump sum in cash at the beginning of the year. Section 15

<sup>2</sup> Section 15 of the By-Laws provides that a member who declines payroll deduction of dues and chooses to pay the annual dues in a lump sum in January of that year shall be suspended from the association if the annual dues are not paid within 30 days of the designated time in January.

5. Shortly after his termination, Complainant sought a loan from the Union in the amount of \$3000 to help him pay his mortgage and other outstanding bills. He made a verbal request for the loan to Union President Francis Capello, as was the accepted practice. (Testimony of Complainant and others) Complainant testified that Capello was evasive and that he did not receive a firm response to his request. (Testimony of Complainant) I credit this testimony. In January of 2007, Complainant made a request in writing to the Union for a loan, asking why his earlier request had not been acted upon. He received no written response to his request but Capello gave him evasive verbal responses such as “I’ll get back to you, or “Call me later, I’m busy now.” (Testimony of Complainant) Complainant felt that Capello was avoiding him and “putting him off.” Complainant made two follow-up requests in writing to the Local 863 in May of 2007 and July of 2007, asking why his request had gone unanswered. (Ex. C-4; C-5) He did not receive any written response to those letters. Ultimately the Executive Board met sometime after July of 2007, and decided to deny Complainant’s request for a loan. (Testimony of Lopez) No member of the Union’s Executive Board could recall ever having discussion or meeting for the purpose of granting financial assistance except in Complainant’s case. (Testimony of Merrill and Melendez) Respondent provided no documentation reflecting this vote.

6. Respondent asserts that because Complainant was not an active member of the Fire Department, he was no longer a member of the Union and therefore not eligible for a loan.<sup>3</sup> Capello testified that member in good-standing means “on the job, paying dues.” However, there is no definition in the Union By-Laws of what constitutes a member in good-standing, and the By-Laws provide that even certain retired firefighters are members of the Union and are eligible for financial assistance. (Ex. C-3 By-Laws s.5) Respondent admitted in its position

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<sup>3</sup> One firefighter testified that Francis Capello denied his verbal request for a loan in March of 2007 some 6 months after Complainant first sought a loan, because he had been terminated by the City at the time.

statement to the Commission that Complainant is and always was a member of Local 863.

According to Complainant, despite his repeated requests, Capello never told him he was ineligible for a loan because he was no longer a Union member.

7. Complainant challenged his termination through the Civil Service Commission and the City of Newton was ordered to reinstate him to his position as a firefighter by a decision of the Commission dated June 28, 2007. Complainant continued his efforts to seek a loan from the Union during the period that he was challenging his dismissal from the Newton Fire Department and the appeal of his termination was pending.<sup>4</sup> The City subsequently sought to enjoin Complainant's reinstatement and he requested legal representation from Local 863. The Union provided the assistance to Complainant to facilitate his return to work. I find that Complainant was, at all times relevant to this complaint, a member of Local 863. (C-8, Respondent's Position Statement in Response to the complaint)

8. A number of firefighters who were Union members testified that they merely made informal requests for loans to the Union President, Capello, and were granted the loans. They did not have to sign any documents or a repayment schedule. Several members who received loans had a slack history of repayment, made sporadic payments or were not required to repay at all. A number of them still had significant balances on their loans after more than 5 years and the Union took no measures to compel re-payment. (Testimony of various firefighters) Both before and after 2005, when Joe Quinan became the treasurer of Local 863, loans were granted with no documentation of the terms and conditions, schedule of re-payment or the obligation to re-pay. (Testimony of Quinan)

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<sup>4</sup> At least 3 other firefighters testified that their employment had been terminated by the City and that they were reinstated and returned to work after a Civil Service appeal or arbitration.

9. Francis Capello's cousin testified that he received "assistance" from the Union in 2004 when he was on leave from the department due to medical issues and had exhausted all his leave time. He testified that the financial assistance was not a loan and that he has never repaid the Union, despite the Francis Capello's subsequent re-characterization of the help as a loan in 2006 and request that he commence repayment. In 2008, when Francis Capello was no longer President of the Union, a Union committee voted to reclassify the help as assistance, and he was advised that he was no longer obligated to repay the Union. Capello's cousin stated that such matters as requests for financial help from the Union were handled privately through requests to the President. As of 2009, the Union had granted Capello's cousin roughly \$5300 that was not repaid.

10. In January of 2008, Complainant filed a charge of prohibited practice against Local 863 with the Division of Labor Relations alleging that, among other acts, the Union discriminated against him based on his race when it denied him a loan. A decision of the Labor Relations Division investigator found that the Complainant's allegations were untimely and were dismissed as procedurally defective. Notwithstanding this determination, the decision addresses the merits of Complainant's charge that the Union's denial of a loan to him was discrimination and a violation of the Union's statutory duty to serve the interest of all its members without hostility or discrimination. The decision of the DLR investigator issued on July 14, 2008, found no probable cause that Local 863 discriminated against Complainant based on his race, when it denied him a loan. (R-4)

11. At least eight white firefighters with less than twenty years of service to the Newton Fire Department testified at the Hearing. At the time of their requests in 2006 or 2007, they received financial assistance in the form of a loan or gift from Local 863 by simply making a

request to Francis Capello or Joe Quinan. (Testimony of firefighters) None of their requests were brought before the Executive Board for consideration of approval or denial. Between 2004 and 2007 only African American firefighters with more than 20 years of service received financial assistance from Local 863. At least ten white firefighters with less than 20 years of service received loans. (Testimony of Capello; Ex. C-7)

12. In 2004, Complainant had been suspended as a firefighter for six months as a result of criminal charges involving a controlled substance. Complainant served the suspension and was returned to work subject to a “last chance agreement” with which he complied. In July of 2005 Complainant was found to be innocent after a jury trial.<sup>5</sup> The Union asserted that it fairly represented Complainant in grievances challenging discipline taken against him by the City of Newton, which resulted in Complainant receiving compensation and benefits from the City. (R-1; R-2) Complainant also sought the assistance of Local 863 regarding his reinstatement after his termination was overturned by the Civil Service Commission in June of 2007. (R-4)

13. Complainant felt frustrated and hurt by the fact that he his loan request was not responded to for over eight months and he questioned why his request was treated differently. The denial of the loan was hurtful and he testified that it changed his view of the “brotherhood” of firefighters and their willingness to support him in times of hardship. He was made to feel awkward and uncomfortable as a Union member and his filing of a discrimination claim over the denial has only exacerbated these feelings of alienation from his fellow Union members. I credit his testimony about the emotional impact of the loan denial.

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<sup>5</sup> Complainant’s record of prior discipline is irrelevant to the issues in this case but was raised by the Union to demonstrate its role in assisting Complainant in his grievances related to prior discipline.

### III. CONCLUSIONS OF LAW

General Laws c. 151B § 4(2) makes it unlawful for a labor organization to deny full membership rights or to otherwise discriminate against any member based on race. Respondent is a labor organization within the meaning of the statute. In the first instance, Complainant must establish a prima facie case of discrimination. *Blare v. Huskey*, 419 Mass. 437 (1995); *Abramian v. Pres. & Fellows of Harvard College*, 432 Mass. 107 (2000) Complainant is African American and was a member of Respondent Union, Local 863. Complainant sought and was denied a loan from the Union in 2007 subsequent to his termination from the City, an employment action which he challenged.

There is a dispute about whether Complainant remained a member of the Union after his termination. Respondent asserts that when Complainant's employment with the City was terminated, payment of his Union dues ceased because they were automatically deducted from his paycheck. As a result, the Union claims he was no longer a member in good standing of the Union and therefore was not eligible to receive a loan. I do not accept Respondent's position with respect to Complainant's Union membership.

At the time Complainant sought a loan, he was appealing his termination from the City and a hearing was pending before the Civil Service Commission. Complainant ultimately prevailed in his appeal and was re-instated to his position as a firefighter. Respondent was aware of this fact. Moreover, Respondent admitted in its position statement to the MCAD that Complainant was a member of the Union at all times relevant to this matter. Complainant was never informed that the Union no longer considered him to be a member in good standing and he was not asked to pay his Union dues directly once he stopped receiving a pay check from the City. Respondent's President, Francis Capello, did not inform Complainant that the Union

declined to consider his request for a loan because he was no longer a member of the Union. Instead he avoided Complainant, brushed him off and refused to respond to his requests for assistance. The Union By-Laws and Constitution are silent on the criteria that govern membership in good standing or when and how membership in the Union is terminated. Retired firefighters who are no longer employed by the City continue to be members under certain circumstances. Firefighters who exhaust all their leave time from the City for medical or other reasons continue to be members of the Union. For all of these reasons, I do not accept Respondent's assertion that Complainant was not a member of the Union when he sought a loan, and therefore conclude that Complainant has established a prima facie case of discrimination.

Once Complainant has established a prima facie case of discrimination, the Union must articulate a legitimate non-discriminatory reason for its adverse action, supported by some credible evidence that the reason advanced was the real reason. *Blare, supra.* at 442 quoting *Wheelock College v. MCAD*, 371 Mass. 130, 138 (1976). I do not find Respondent's position on the issue of Complainant's discontinued membership in the Union to be credible. Since I have rejected Respondent's stated reason, normally the inquiry would end here. See *Id.* at 138 (if the employee has proved a prima facie case... and the employer gives an explanation which has no reasonable support in the evidence or is wholly disbelieved, the employee should prevail)

However, even if one were to accept Respondent's stated reason as legitimate, Complainant may prove that the reason is a pretext for discrimination and demonstrate that the decision was motivated by discriminatory intent, motive or state of mind. *Lipchitz v. Raytheon*, 434 Mass. 493, 504 (2001). I conclude that the articulated reason for the Union's denial of a loan to Complainant is a pretext for the following reasons. In Complainant's case, Respondent departed from its prior practice of granting loans upon an informal request to the President or

Treasurer of the Union. There was ample evidence that the President of the Union would make the decision to grant a loan absent a formal meeting or vote of the Executive Board.

Notwithstanding that this was in violation of the Union's Constitution and By-Laws, it was the practice. This practice was not adhered to with Complainant's request and I do not accept the Union's position that the departure from accepted practice was because he was no longer a Union member. Departure from a prior practice can be probative of discriminatory intent.

*Currier v. National Board of Medical Examiners*, 462 Mass. 1, 16-17 (2012) citing *Trustees of Health and Hosps. of Boston, Inc. v. Massachusetts Comm'n Against Discrimination*, 449 Mass. 675, 686 (2007) (Strong animus of discrimination existed where neutral procedure for lay-offs was fully implemented only against African American employees)

In this case, Respondent's President avoided Complainant for many months, refusing to respond to his request for a loan, and did not advise Complainant that he was no longer a member. Only after several written inquiries by Complainant asking why his request was being ignored, did Respondent advise Complainant that his request was denied because he was no longer considered a member of the Union. There is no documentary evidence of a vote of the Executive Board with respect to Complainant's request.

Furthermore, there appears to have been no transparency in the loan granting process. The process was completely arbitrary, based solely on verbal requests to Union officers and was typified by shoddy record keeping. By all accounts, the loan program was poorly managed, largely disorganized and minimally documented with no written terms or repayment schedules. There was scant documentary evidence of the loan program or process, and no apparent mechanism for tracking re-payment. Many members who were granted loans did not make

regular payments or never repaid their loans. One firefighter testified that he had still not repaid a loan from several years ago.

These facts alone call into question the credibility of Respondent's articulated reason and render the denial of Complainant's loan suspect. Having a practice which exempted other members' loan requests from a formal vote as required by Union By-Laws, while compelling an Executive Board vote on Complainant's request, permits an inference of intentional discrimination. *Currier v. National Board of Medical Examiners*, 462 Mass. at 16. Such an arbitrary application of the rules and lack of transparency in the process allows the fact-finder to draw an inference of discriminatory motive.

This is especially true given that the Union's concern about a member's ability or willingness to repay a loan was virtually non-existent. The Union raised by inference the need to have some guarantee that it would have the ability to collect on the debt. It stated that loan balances not repaid could be deducted from the 20 year service gift to firefighters. However, in practice, the Union had no established procedures or schedules for loan repayment and was extraordinarily lax in recouping the monies it loaned. The justification that it could deduct any outstanding loan balance from a gift paid to members who achieve twenty years of service is not persuasive, since there is no guarantee of long-term service and the Union made loans to a number of white firefighters with short term service as firefighters. Any concern that Complainant would fail to repay the loan because he was no longer a member, is belied by the fact that a number of white firefighters who received loans were extremely lax in re-paying or did not repay and the Union took no action. Capello's cousin received financial assistance that was classified as a "gift," then a loan, and ultimately forgiven.

All of this points to the fact that the Union's decision to grant a loan was arbitrary and likely tainted by favoritism or personal relationships with the Union officers. This type of action is suspect where the decisions adversely affect a member of a protected class. *See Chief Justice for Administration and Management of the Trial Court v. MCAD*, 439 Mass. 729 (2003) (finding that gender was the reason for denial of promotions upheld by SJC despite some support in the evidence that political support of successful candidates was reason they were selected to be clerks of court) Given all of the above, I find that Respondents reason is a pretext for discrimination and that the denial of a loan to Complainant was for discriminatory reasons related to his race.

Finally, with respect to the decision of the DLR, Respondent would have me adopt the ruling of the Investigator with respect to discrimination. Respondent relies on the decision to support its position that there was no bias in the decision to deny Complainant a loan. It is important to note that this Commission is not necessarily bound by the decisions of other administrative bodies or arbitration decisions, and need not give preclusive effect to their findings and conclusions, but should review those decisions and give them due consideration. *Porio v. Dept. of Revenue*, 80 Mass. App. Ct. 57 (2011) (decision rendered in Civil Service appeal did not have preclusive effect on subsequent discrimination claim); *City of Boston v. MCAD*, 39 Mass. App. Ct. 234 (arbitrator's decision need not be given deference or special weight by MCAD, but may be accorded weight the MCAD deems appropriate) The primary issue before the Division of Labor Relations was whether Respondent violated its statutory duty to represent Complainant fairly. The decision in question resulted from an investigation

conducted pursuant to 456 CMR 15.04<sup>6</sup> not an adjudicatory hearing held pursuant to G.L. c. 30A. I have considered the decision but decline to give its finding preclusive effect on the issue before me.

#### IV. REMEDY

Upon a finding of discrimination, the Commission is authorized to award remedies to make the Complainant whole and to ensure compliance with the anti-discrimination statute. G.L. c. 151B, s. 5; *Stonehill College v. MCAD*, 441 Mass. 549, 576 (2004) The Commission may award monetary damages for losses resulting from the discriminatory action and for emotional distress suffered as direct and probable consequence of the unlawful discrimination. In addition, the Commission may issue cease and desist orders, award other affirmative, non-monetary relief and assess civil penalties against a Respondent.

Complainant is entitled to damages to compensate him for the Union's unlawful denial of a loan. While he testified that he needed the loan to help pay for his mortgage and other bills while he was not receiving a salary, I am unable to conclude from the evidence presented what actual-out-of pocket losses resulted from the failure to grant him a \$3000 loan. He testified that he found funds elsewhere, that he worked a second job as an ironworker and he received a gift from his aunt that helped him stay afloat financially for a time, but that he ultimately filed for bankruptcy. However, this was more likely the result of his being out of work for almost a year, and not the Union's denial of a relatively small loan to him.

An award of damages for emotional distress must be supported by evidence in the record. Such awards must be fair and reasonable and proportionate to the harm suffered. Factors to

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<sup>6</sup> The investigator did not conduct an adjudicatory hearing but dismissed the charge after investigation finding no probable cause that a violation of 456 CMR 15.00 had occurred.

consider in determining the extent of Complainant's suffering are the nature, character and severity of the harm, the duration of the suffering and any steps taken to mitigate the harm. Complainant must also prove that the emotional harm was caused by the Respondent's unlawful action. *Stonehill College v. MCAD*, 441 Mass. 549, 576 (2004).

Complainant testified that when it became clear that Capello was avoiding him and refusing to address his request he felt it was because of his race. He testified that this made him uneasy and uncomfortable, because he felt that he was part of a "brotherhood" of firefighters who are meant to support each other and back each other up. He stated that denial of the loan was very hurtful and damaging to him emotionally, because it changed how he felt about his fellow firefighters and the "brotherhood." He also testified that his filing a claim of discrimination to vindicate his rights over denial of the loan has caused further tension with his fellow firefighters and made everyone ill at ease, particularly since a number of them were subpoenaed to be witnesses at this hearing. He continues to be employed as a firefighter and experiences the discomfort of feeling alienated from his fellow Union members. However, Complainant also likely suffered significant distress related to his termination, his prior disciplines, and his disputes with the City over its unwillingness to return him to work, despite a ruling ordering his reinstatement. Therefore, I conclude that Respondent's actions were not the sole source of his distress during this time period. Complainant is entitled to an award of damages for emotional distress in the amount of \$20,000.

#### V. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, and pursuant to the Commission's authority to grant remedies as articulated in G.L. c. 151B, section 5, it is hereby ordered that the Respondent shall:

- 1) Cease and desist from discriminatory action in its loan policy and procedures and in the granting of loans to members.
- 2) Establish a clear and transparent written policy for granting loans that includes the criteria for granting loans and procedures for re-payment and render decisions in conformance with such policy.
- 3) Pay to the Complainant, Lamont Davis, the amount of \$20,000 in damages for emotional distress with interest thereon at the rate of 12% per annum from the date the Complaint was filed until such time as payment is made or this Order is reduced to a Court judgment and post-judgment interest begins to accrue.

This constitutes the final Order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this Order may file a Notice of Appeal to the Full Commission within ten days of receipt of this Order and a Petition for Review to the Full Commission within thirty days of receipt of this Order. Counsel for Complainant may file a Petition for Attorney's fees within 10 days of receipt of this Order.

So Ordered this 2<sup>nd</sup> day of October, 2013.

Eugenia M. Guastaferr  
Hearing Officer

