

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of

INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE  
WORKERS, LOCAL LODGE 100

and

JOSEPH E. FITZGERALD

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Case No.: MUPL-17-6337

Date Issued: December 12, 2018

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Hearing Officer:

Kendrah Davis, Esq.

Appearances:

William F. Grant, Esq. – Representing I.A.M.A.W. Local Lodge 100

Richard J. Hayes, Esq. – Representing Joseph E. Fitzgerald

**HEARING OFFICER'S DECISION**

1 **SUMMARY**

2 The issue is whether the International Association of Machinists and Aerospace  
3 Workers, Local Lodge 100 (Union) breached its duty of fair representation to Joseph E.  
4 Fitzgerald (Fitzgerald) in violation Section 10(b)(1) of Massachusetts General Laws  
5 Chapter 150E (the Law) by acting in a manner that was arbitrary, perfunctory, and inex-  
6 cusably negligent when it investigated whether to file a grievance on behalf of Fitzgerald  
7 challenging his termination, but subsequently decided not to file a grievance. Based on  
8 the record, and for the reasons explained below, I conclude that the Union did not  
9 breach its duty of fair representation to Fitzgerald because its actions were not arbitrary,

1 perfunctory, or inexcusably negligent when it investigated whether to file a grievance on  
2 behalf of Fitzgerald challenging his termination, but subsequently decided not to file a  
3 grievance.

4 STATEMENT OF THE CASE  
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6 On November 10, 2017, Fitzgerald filed a Charge of Prohibited Practice (Charge)  
7 with the Department of Labor Relations (DLR) alleging that the Union had violated Sec-  
8 tion 10(b)(1) of the Law. On April 24, 2018, a DLR investigator issued a Complaint of  
9 Prohibited Practice (Complaint), alleging that the Union had violated Section 10(b)(1) of  
10 the Law by acting in a manner that was arbitrary, perfunctory, and inexcusably negligent  
11 when it failed to confirm Fitzgerald's ability to return to work and file a grievance chal-  
12 lenging Fitzgerald's termination. On May 7, 2018, the Union filed its Answer to the  
13 Complaint. On June 4, 2018, the DLR issued a Notice of Hearing.

14 I conducted one day of hearing on October 23, 2018, during which I afforded the  
15 parties a full opportunity to be heard, to examine and cross-examine witnesses and to  
16 introduce evidence. At the hearing, the Union elected not to bifurcate the proceeding.<sup>1</sup>  
17 Accordingly, I permitted both parties to present evidence on the merits of a grievance  
18 that the Union could have field, and whether the Union violated its duty of fair represen-

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<sup>1</sup> 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 an employer may consider a grievance on the merits if the Commonwealth Employment Relations Board (CERB) later orders a union to process it, the CERB gives that 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).

1 tation to Fitzgerald by refusing to file a grievance. At the conclusion of the hearing,<sup>2</sup> the  
2 parties gave closing statements in lieu of filing post-hearing briefs. On the entire record,  
3 I make the following findings of fact and render the following decision.

4 ADMISSIONS OF FACT<sup>3</sup>

5 The Union admitted to the following facts:

- 6 1. The Boston Water and Sewer Commission (BWSC) is a public employer with-  
7 in the meaning of Section 1 of the Law.  
8
- 9 2. The Union is an employee organization within the meaning of Section 1 of the  
10 Law.  
11
- 12 3. The Union is the exclusive bargaining representative for certain employees of  
13 the BWSC, including inspectors, yard clerks, dig crew members and meter  
14 staff.  
15
- 16 4. Fitzgerald was an inspector for the BWSC and a member of the Union's bar-  
17 gaining unit.  
18
- 19 5. On or about August 17, 2015, Fitzgerald fractured his ankle, went out of work  
20 on [a] leave of absence for the next 14 months, and underwent seven or eight  
21 surgical procedures.  
22
- 23 6. On October 26, 2016, the BWSC held a hearing (October 26, 2016 hearing)  
24 regarding [Fitzgerald's] employment status, including whether to extend his  
25 leave of absence or whether to terminate his employment.  
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<sup>2</sup> Prior to the hearing, the parties confirmed that Union President Chris O'Brien (O'Brien) had passed away in or about August of 2018. At the hearing, the Charging Party made an oral motion to strike any testimony that referenced alleged statements made by O'Brien. The Charging Party based its motion on the Respondent's Answer at paragraph 18 which stated in part, "O'Brien has no recollection of [his] purported contact with [Union Business Agent Michael] Vartabedian." I instructed the Charging Party to file its motion in writing; but, it did not do so. Both the Charging Party and Respondent presented witnesses who testified about alleged statements made by O'Brien. Neither party objected to those testimonies and, after the hearing, the Charging Party did not file a written motion to strike that testimony.

<sup>3</sup> In its Answer, the Union made full and partial admissions of fact. This portion of my decision reflects only the Union's full admissions of fact.

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1 In 2004, Fitzgerald injured his back and took a leave of absence from work for a  
2 couple of months. In 2006, Fitzgerald sustained another back injury and took a four-  
3 month leave of absence, during which time he was treated by Doctor Eugenio Martinez  
4 (Martinez). In 2010, when Fitzgerald sustained his third back injury, a BWSC doctor  
5 recommended that he have surgery; but, for personal reasons, Fitzgerald rejected the  
6 recommendation. On or about July 21, 2014, Fitzgerald injured his back a fourth time  
7 when he stepped into a pothole and suffered sciatica, numbness in his right leg, sudden  
8 pain in his right ankle, and "pins and needles" in both feet. Based on Fitzgerald's 2014  
9 injury, he took a four-month leave of absence and was treated by BWSC Doctor Burress  
10 who referred Fitzgerald back to Dr. Martinez. In October of 2014, Dr. Martinez deter-  
11 mined that Fitzgerald was able to return to work without restrictions, which he did on or  
12 about November 26, 2014.

13 On January 5, 2015, Fitzgerald met with Dr. Burress. On or about April 22, 2015,  
14 Fitzgerald met with another BWSC doctor, neurologist Michael V. Ditullio, Jr. (Ditullio),  
15 who conducted an independent medical evaluation of Fitzgerald. Dr. Ditullio issued a  
16 written report clearing Fitzgerald's return to work on or about April 22, 2015 with certain  
17 restrictions, including avoidance of "lifting over 25 pounds, prolonged postural fixation,  
18 repetitive bending, [and] excessive spinal loading."

19 **Fitzgerald's August 17, 2015 Injury**

20 On or about August 17, 2015, Fitzgerald injured his right leg and fractured his  
21 ankle after falling down stairs at his home. He had surgery during which he was hospi-  
22 talized for approximately 10 days, and then went home for further recovery. On or  
23 about October 30, 2015, Fitzgerald returned to the hospital and later required several

1 additional operations that rendered him unable to return to work. Based on his August  
2 17, 2015 injury and subsequent surgeries, Fitzgerald requested vacation leave, sick  
3 leave, sick bank time, and additional leave pursuant to the Family and Medical Leave  
4 Act (FMLA), which the BWSC approved. By February of 2016, Fitzgerald had exhaust-  
5 ed all of his leave and his health insurance, which caused him to stay in contact with his  
6 supervisor for biweekly status updates.

7 On or about June 9, 2016, BWSC Manager of Human Resources Michael Kerr  
8 (Kerr) instructed Fitzgerald to complete a Personal Leave Request Form by June 17,  
9 2016 and to provide "appropriate medical documentation specifying the nature of [his]  
10 disability and the expected duration of [his] absence." By that letter, Kerr also informed  
11 Fitzgerald that failure "to provide the required medical documentation in the designated  
12 timeframe...will be considered Absent Without Leave...from work" and would subject  
13 him "to disciplinary action." Neither Fitzgerald nor the BWSC notified the Union about  
14 the BWSC's June 9, 2016 letter. On or about June 14, 2016, Fitzgerald provided the  
15 BWSC with a completed Personal Leave Request Form, indicating an "unknown" ex-  
16 pected return date. Neither Fitzgerald nor the BWSC notified the Union about Fitzger-  
17 ald's June 14, 2016 submissions. By reply letter dated June 22, 2016, Kerr notified  
18 Fitzgerald that the BWSC had approved his request for Personal Leave of Absence due  
19 to medical reasons, effective from August 17, 2015 through July 12, 2016. Again, nei-  
20 ther Fitzgerald nor the BWSC notified the Union about the BWSC's June 22, 2016 deci-  
21 sion to extend Fitzgerald's leave of absence through July 12, 2016.

22 Fitzgerald continued to remain out of work between July and October of 2016.  
23 By letter dated October 5, 2016, BWSC Director of Human Resources James Faretra

1 (Faretra) notified Fitzgerald that his Personal Leave of Absence had expired on October  
2 4, 2016, and that failure to submit required medical documentation to Kerr by October  
3 14, 2016, could result in an employment status hearing. By this letter, Faretra also in-  
4 formed Fitzgerald that he had "failed to remit payment to the [BWSC] for the employee  
5 contribution [of his] health insurance coverage," and "failed to communicate with the  
6 [BWSC] concerning [his] ability to return to work and to provide any medical documenta-  
7 tion which states if and when [he] may be capable of resuming his full-time job respon-  
8 sibilities." Although Fitzgerald had informed his personal physician about the BWSC's  
9 October 5, 2016 directive, neither Fitzgerald nor the BWSC notified the Union about that  
10 letter.

11 By letter dated October 20, 2016, Faretra notified Fitzgerald that the BWSC had  
12 received medical documentation stating that Fitzgerald "remain[ed] unable to return to  
13 work," and that he would "be undergoing testing for future surgery." By this letter,  
14 Faretra reminded Fitzgerald that he had "been absent from work continuously since Au-  
15 gust 17, 2015" and that his Personal Leave of Absence had now exceeded 14 months.  
16 Faretra also informed Fitzgerald that "[c]oming to work is an essential function of [his]  
17 job and a leave of indefinite duration is not a reasonable accommodation." Faretra con-  
18 cluded his letter by informing Fitzgerald that the BWSC was holding a hearing on Octo-  
19 ber 26, 2016 regarding his "medical incapacity and employment status." Both Fitzgerald  
20 and the BWSC contacted the Union, notifying it of the October 20, 2016 letter and the  
21 upcoming October 26, 2016 hearing.

## 22 **Fitzgerald's October 26, 2016 Termination Hearing**

1           For about 30 minutes prior to the hearing on October 26, 2016, Fitzgerald met  
2 with Union Business Representative Vartabedian to discuss his case. During their  
3 meeting, Fitzgerald told Vartabedian that he believed the proceeding was not a termina-  
4 tion hearing but an inquiry into his disability. He also told Vartabedian about his medical  
5 history, provided him with certain medical documentation, and informed him of upcom-  
6 ing surgery scheduled for November 18, 2016. Fitzgerald mentioned to Vartabedian  
7 that he was considering whether to file a workers' compensation claim. When Varta-  
8 bedian asked whether the surgery would enable him to return to work, Fitzgerald re-  
9 sponded that it was unlikely that he would ever return to work.<sup>4</sup> After reviewing the Oc-  
10 tober 20, 2016 letter and after learning the specifics of Fitzgerald's case, Vartabedian  
11 explained to Fitzgerald that this was a termination hearing<sup>5</sup> and that the Union would

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<sup>4</sup> Fitzgerald testified that he did not remember saying to Vartabedian that he did not think he would ever return to work, or that he was "just biding time" to secure disability/workers' compensation. Fitzgerald later testified that during their post-hearing meeting on October 26, 2016, he "guess[ed]" that he told Vartabedian that he probably would not be able to return to work. Vartabedian testified that during both pre-hearing and post-hearing meetings on October 26, 2016, Fitzgerald said that he was "just biding time" to secure workers' compensation, and that he did not think he would ever return to work. Based on Vartabedian's clear recollection of the conversations between him and Fitzgerald on October 26, 2016, I credit Vartabedian's testimony that Fitzgerald stated that he did not think he would ever return to work, and that he was just "biding time" until he could secure workers' compensation.

<sup>5</sup> Fitzgerald testified that he did not believe that the October 26, 2016 hearing was a termination hearing because the BWSC's October 20, 2016 letter did not use the word "termination" to describe the proceeding. Vartabedian testified that he had been involved in many termination hearings since 2009, where the BWSC typically contacted him several days in advance to schedule the hearing. Vartabedian usually remains unaware of the charges until he meets with the affected employee on the day of the hearing. Vartabedian concluded that Fitzgerald's hearing on October 26, 2016 was a termination hearing based on: Vartabedian's nine-year experience as a Union business representative; his review of the October 20, 2016 letter; his understanding of Fitzgerald's medical condition; and Fitzgerald's 14-month leave of absence. Based on the totality of

1 represent Fitzgerald and try to secure an extension of time for him to provide the BWSC  
2 with medical documentation to return to work. At that point, Vartabedian ended the  
3 meeting and accompanied Fitzgerald to the hearing.

4 At the hearing, Fitzgerald was also accompanied by Union President O'Brien,  
5 and Union Vice President Hargrove. Executive Director and Treasurer Henry F. Vitale  
6 (Vitale) and Director of Labor Relations Maureen Hanson (Hanson) represented the  
7 BWSC. During the hearing, Hanson recommended Fitzgerald's termination based on  
8 his absence from work for 14 consecutive months and his inability to perform his duties.  
9 In response, Vartabedian emphasized Fitzgerald's 27-year career with BWSC and his  
10 positive employment record. Vartabedian also argued for an extension of leave for  
11 Fitzgerald based on scheduled surgery for November 18, 2016, which might render  
12 Fitzgerald able to return to work soon thereafter. Fitzgerald's supervisor<sup>6</sup> also spoke  
13 "very highly" of Fitzgerald's work record at the hearing. After further questions and  
14 comments, Vitale ended the hearing stating that he would take the decision under ad-  
15 visement.

16 Immediately following the hearing, Fitzgerald met with Vartabedian to discuss  
17 next steps. During that meeting, Vartabedian stated that he believed that Vitale would  
18 give Fitzgerald an extension and not terminate him based on Vitale's personal nature  
19 which was affable and flexible, and also based on Fitzgerald's substantial medical doc-  
20 umentation and his supervisor's positive comments. At this point, Fitzgerald reiterated  
21 to Vartabedian that it was "more than likely" that he would "never return to work" be-

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the evidence presented, I credit Vartabedian's testimony that Fitzgerald's October 26, 2016 hearing was a termination hearing.

<sup>6</sup> Neither party identified the name of Fitzgerald's supervisor.

1 cause of his inability to walk on uneven surfaces. Vartabedian and Fitzgerald never  
2 spoke again after this meeting.

### 3 **Fitzgerald's Post-October 2016 Extended Leaves of Absence**

4 By letter dated October 26, 2016, Vitale granted Fitzgerald a third extended leave  
5 of absence, stating in pertinent part:

6 After considering the evidence presented at the hearing held before me  
7 today, the [BWSC] will extend your fourteen (14) month personal leave of  
8 absence pending receipt of medical documentation from your treating  
9 physician which defines the anticipated duration of your recuperative peri-  
10 od and your expected return to work date following your surgery on No-  
11 vember 18, 2016. You are therefore instructed to provide this documenta-  
12 tion to the Human Resources Department no later than November 30,  
13 2016. The [BWSC] will review this documentation from your treating phy-  
14 sician and will advise you in writing whether or not the [BWSC] will ap-  
15 prove this final extension of your long-term personal leave of absence.  
16 While a short-term extension of your leave of absence may be a reasona-  
17 ble accommodation, a leave of an indefinite duration is not a reasonable  
18 accommodation.

19  
20 After receiving medical documentation from Fitzgerald's doctor on or about No-  
21 vember 14 and 30, 2016, and December 21, 2016, Kerr notified Fitzgerald by letter  
22 dated January 9, 2017, that the BWSC had granted him "a final extension of...Personal  
23 Leave through February 28, 2017." By this letter, Kerr also informed Fitzgerald that the  
24 BWSC expected him to "return to work shortly after [his] medical re-examination on  
25 February 22, 2017," and that "[a]ny extended delay beyond February 27, 2017, may re-  
26 sult in a hearing with the Executive Director regarding [his] employment status." Fitz-  
27 gerald did not notify the Union about the January 9, 2017 letter.

28 In response to the BWSC's January 9, 2017 letter, Fitzgerald filed a workers'  
29 compensation claim in February of 2017. By February 22, 2017, Fitzgerald's physician  
30 had not released him to return to work, and thus, he did not return to work.

**1 Fitzgerald's April 28, 2017 Termination**

2 By letter dated April 28, 2017, Vitale notified Fitzgerald that the BWSC had ter-  
3 minated his employment, "effective immediately."<sup>7</sup> Specifically, Vitale informed Fitzger-  
4 ald that:

5 ....  
6

7 This action is being taken due to your stated and medically documented  
8 incapacity to perform the essential functions of your position as an Inspec-  
9 tor now and into the foreseeable future.

10  
11 As you know, a hearing was held before me on October 26, 2016 regard-  
12 ing your employment status due to your continuous absence from work  
13 which began on August 17, 2015. During the hearing you stated that you  
14 were incapable of returning to work due to your medical condition and that  
15 you were scheduled to undergo surgery on November 18, 2016.

16  
17 In correspondence dated October 26, 2016...the [BWSC] agreed to ex-  
18 tend your Personal Leave of Absence through February 27, 2017. How-  
19 ever, you failed to return to work following your extended leave of ab-  
20 sence.

21  
22 Based on documentation received by the [BWSC], you continue to remain  
23 disabled from returning to work.<sup>8</sup>

24  
25 ....  
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27 Fitzgerald received his termination letter on or about May 5, 2017, called O'Brien  
28 that same day leaving voice messages about his termination. On or about May 11,  
29 2017, O'Brien spoke with Fitzgerald. During their conversation, Fitzgerald informed  
30 O'Brien about the January 9, 2017 letter which referenced a possible "hearing with the  
31 [BWSC] Executive Director." Fitzgerald also asked O'Brien if the Union could file a

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<sup>7</sup> The BWSC did not copy the Union on this letter.

<sup>8</sup> By of April 28, 2017, Fitzgerald's physician had not released him to return to work.

1 grievance on his behalf. O'Brien responded by telling Fitzgerald that he would contact  
2 Vartabedian and get back to Fitzgerald.<sup>9</sup>

3 At some point on or after May 11, 2017, O'Brien spoke with Vartabedian and  
4 asked whether the Union could help Fitzgerald. Vartabedian informed O'Brien that if  
5 Fitzgerald was able return to work and could produce relevant medical documentation,  
6 the Union might be able to take further action. O'Brien asked Vartabedian if Fitzgerald  
7 was entitled to another hearing prior to his termination. Vartabedian responded that the  
8 BWSC did not violate the contract<sup>10</sup> by not conducting a second hearing because Fitz-  
9 gerald already had a termination hearing on October 26, 2016. Vartabedian also ex-  
10 plained that in some instances the BWSC will not conduct a hearing prior to terminating  
11 an employee when there is enough evidence to support the termination. Two days after  
12 speaking with O'Brien, Vartabedian asked Hanson if anything could be done about Fitz-  
13 gerald's termination, and she responded that the BWSC's decision was final.

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<sup>9</sup> Fitzgerald gave un rebutted testimony that he had asked O'Brien if the Union could file a grievance for him. Fitzgerald also testified that O'Brien said he would get back to Fitzgerald but never did. Both Ford and Vartabedian testified that Fitzgerald never asked them to file a grievance. Ford and Vartabedian also testified that they were not aware of O'Brien or anyone else from the Union filing a grievance on behalf of Fitzgerald. Ford testified specifically that O'Brien could have filed a grievance if Fitzgerald asked him. Ford also testified that around the time of Fitzgerald's termination, O'Brien was confined to a wheelchair, had recently underwent surgery, was hospitalized, and had later recovered at home. Due to O'Brien's medical condition, Ford stated that she was not surprised that Fitzgerald had contacted her in lieu of not hearing from O'Brien because "[O'Brien] was not good about getting back to people," and that she "had already talked to [O'Brien] about it once." Based on the totality of evidence presented, I credit Fitzgerald's testimony that he had asked O'Brien if the Union could file a grievance, and that O'Brien had failed to reply to this inquiry. However, I also credit the testimony of Ford and Vartabedian that Fitzgerald never asked them to file a grievance and that no one from the Union filed a grievance on his behalf.

<sup>10</sup> Neither party submitted copy of the collective bargaining agreement or the relevant contractual language pertaining to the parties' grievance-arbitration procedures.

1 By voice message about two weeks later, Fitzgerald contacted Ford, complaining  
2 that he had not heard from O'Brien and asking about whether he was entitled to a sec-  
3 ond hearing based on the BWSC's January 9, 2017 letter. Ford informed Fitzgerald that  
4 she was not involved with grievances, but instructed him to send her copies of the Jan-  
5 uary 9 and April 28, 2017 letters. She also informed Fitzgerald that she would get in  
6 contact with the Union to find out about his case. By follow-up e-mail on June 5, 2017,  
7 Fitzgerald provided Ford with a copy of the January 9, 2017 letter and thanked Ford for  
8 her help. At no point did Fitzgerald ever ask Ford to file a grievance on his behalf.<sup>11</sup>

9 At some point between late May and June 19, 2017, Ford contacted O'Brien who  
10 told her that Fitzgerald was not entitled to another hearing because he already had a  
11 termination hearing on October 26, 2016, and the BWSC had already granted him addi-  
12 tional extensions. At some point after speaking with O'Brien, Ford contacted Vartabedi-  
13 and inquired about Fitzgerald's case. Vartabedian told Ford that he had already spoken  
14 with O'Brien and Hanson, and that Fitzgerald was not entitled to a second hearing be-  
15 cause Fitzgerald already had a termination hearing on October 26, 2016, he was unable  
16 to return to work, and because the BWSC would not grant Fitzgerald additional extend-  
17 ed leave its decision was final. However, Vartabedian told Ford that if Fitzgerald could

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<sup>11</sup> At all relevant times, Ford was not involved in hearings or the grievance process while she was Union secretary/treasurer. However, on or about January 24, 2018, Ford became Union President and testified to her knowledge about the grievance process in her role as President. Specifically, she stated that while each grievance is different, the process is generally initiated when a member requests a grievance and the Union decides to file a grievance on behalf of that member who is either made whole at step 1 or proceeds to step 2. She also stated that a grievance is timely if it is filed 10 days "from when the infraction comes to light." Ford did not specify whether the 10-day contractual language was in effect during Fitzgerald's termination.

1 produce other relevant information showing that he could return to work, Fitzgerald  
2 should contact Vartabedian.

3 By e-mail on June 19, 2017, Ford notified Fitzgerald that based on review of his  
4 case, the Union determined that the BWSC did not have to provide him with “an addi-  
5 tional hearing prior to termination.” After receiving Ford’s e-mail, Fitzgerald did not con-  
6 tact Ford or anyone else from the Union.

7 **Fitzgerald’s Medical Condition from December 21, 2017 to Present**

8 On or about December 21, 2017, Fitzgerald’s personal doctor provided the  
9 BWSC with an independent medical evaluation of Fitzgerald’s medical condition, con-  
10 cluding, in part, that Fitzgerald should permanently avoid activities that “involve lifting  
11 over 25 pounds, prolonged postural fixation, repetitive bending or excessive spinal load-  
12 ing.” However, the doctor also concluded that Fitzgerald “should be able to participate  
13 in those occupational duties that would appropriately allow him to adhere to the above-  
14 recommended restriction and offer him the opportunity to alternate between sitting and  
15 standing at his own discretion.”

16 At the hearing, Fitzgerald admitted that he was physically unable to return to  
17 work. He also stated that while he was actively looking for other employment, he was  
18 collecting workers’ compensation.

19 **OPINION**

20 Once a union acquires the right to act for and negotiate agreements on behalf of  
21 employees in a bargaining unit, Section 5 of the Law imposes on that union an obliga-  
22 tion to represent all bargaining unit members without discrimination and without regard  
23 to employee organization membership. Quincy City Employees Union, H.L.P.E., 15

1 MLC 1340, 1355, MUPL-2883 and MUP-6037 (Jan. 24, 1989), aff'd sub. nom., Pattison  
2 v. Labor Relations Commission, 30 Mass. App. Ct. 9 (1991), further rev. den'd, 409  
3 Mass. 1104 (1991). Section 5 of the Law permits unions a wide range of reasonable-  
4 ness in representing the often-conflicting interests of employees; and, thus, vests un-  
5 ions with considerable discretion to pursue or not pursue a grievance in a manner that is  
6 not improperly motivated, arbitrary, perfunctory, or demonstrative of inexcusable ne-  
7 glect. Graham v. Quincy Food Service Employees Ass'n, 407 Mass. 601, 606 (1990)  
8 (citing Baker v. Local 2977, State Council 93, American Fed'n of State, County & Munic-  
9 ipal Employees, 25 Mass. App. Ct. 439, 441 (1988)); see also American Federation of  
10 State, County and Municipal Employees, Council 93, AFL-CIO and Daryl D. Dunlap  
11 (Dunlap), 27 MLC 113, 115, SUPL-2696 (Feb. 9, 2001) (citing National Association of  
12 Government Employees v. Labor Relations Commission (NAGE), 38 Mass. App. Ct.  
13 611 (1995) (union has considerable discretion in determining whether to file a grievance  
14 and whether to pursue it through all levels of the contractual grievance-arbitration proce-  
15 dure).

16 A union's action is perfunctory if it ignores a grievance, inexplicably fails to take  
17 some required step, or gives the grievance merely cursory attention. American Federa-  
18 tion of State, County and Municipal Employees and Charles W. Bigelow (Bigelow), 20  
19 MLC 1271, 1275, SUPL-2553 (H.O. Nov. 24, 1993), aff'd, 22 MLC 1329, (Dec. 29,  
20 1995). A union's action is also perfunctory if it is done as a matter of routine and for  
21 form's sake, without interest or zeal. Independent Public Employees Association, Local  
22 195 and Elizabeth P. Clarke (Clarke), 12 MLC 1558, 1565-66, MUPL-2633 (Jan. 22,  
23 1986). A union's conduct is demonstrative of inexcusable neglect when, in the absence

1 of complex legal or procedural issues, it fails to follow the grievance procedure outlined  
2 in a collective bargaining agreement. AFSCME, Council 93 and Herbert Avant (Avant),  
3 27 MLC 129, 130-31, SUPL-2695 (April 9, 2001). A union's conduct is arbitrary if it fails  
4 to gather sufficient information concerning the merits of a grievant's claim and fails to  
5 make a reasoned judgment in deciding whether to pursue or abandon a particular  
6 grievance. AFSCME, Council 93 and Shand Palmer (Palmer), 31 MLC 180, 188-89,  
7 MUPL-4257 (June 3, 2005) (citing Teamsters, Local 437 and James L. Serratore (Ser-  
8 ratore), 10 MLC 1467, 1474-75 and 1477-78, MUPL-2566 (March 21, 1984); Local 285,  
9 SEIU and Vicki Stultz (Stultz), 9 MLC 1760, 1764, MUPL-2461 (April 5, 1983)).

10 Fitzgerald argues that the Union's conduct was perfunctory based on O'Brien's  
11 failure to respond in May of 2017, showing that the Union ignored his request for a  
12 grievance, and/or treated his request in a cursory manner. Fitzgerald also argues that  
13 the Union's delay in responding to his requests for assistance in May of 2017 amounts  
14 to inexcusable neglect because that delay caused him to potentially miss the contractu-  
15 al deadline for filing a grievance. Last, Fitzgerald argues that the Union's conduct was  
16 arbitrary because it refused to process a grievance without first investigating the poten-  
17 tial merits of his case. I disagree.

#### 18 **The Union's Conduct Was Not Perfunctory**

19 When Fitzgerald inquired about whether the Union could file a grievance in May  
20 of 2017, O'Brien informed him that the Union would investigate the matter and respond  
21 with answers. Although O'Brien failed to respond to Fitzgerald, there is no evidence  
22 that the Union ignored Fitzgerald's request or treated it in a perfunctory or cursory man-  
23 ner. Instead, the record shows that between May 11 and June 19, 2017, O'Brien, Vart-

1 abedian, and Ford conducted a full investigation into Fitzgerald's claim by: conversing  
2 with each other, speaking with Fitzgerald, speaking with Hanson, reviewing relevant  
3 documentation, and referring to the BWSC's practice of terminating employees and  
4 conducting termination hearings. Ultimately, the Union concluded that Fitzgerald's  
5 claim lacked merit because he was not entitled to a second termination hearing and be-  
6 cause he was medically unable to return to work, and the BWSC would not grant addi-  
7 tional extended leave. Ford notified Fitzgerald of the Union's decision by e-mail on  
8 June 19, 2017. Based this investigation, I find that the Union's conduct was not per-  
9 functory. Contrast Clarke, 12 MLC at 1565-66 (union acted perfunctorily when it did  
10 nothing to help process a grievance and had no explanation as why it did not pursue the  
11 grievance).

12 **The Union's Conduct Was Not Demonstrative Of Inexcusable Neglect**

13 Similarly, there is no evidence that the Union acted with inexcusable negligence.  
14 Fitzgerald cannot show that the Union failed to follow the grievance procedures outlined  
15 in the parties' collective bargaining agreement because—aside from Ford's testimony  
16 based on her tenure as Union President beginning in 2018—there is no evidence of  
17 specific grievance procedures that the Union allegedly failed to follow between Fitzger-  
18 ald's termination on April 28, 2017 and the Union's final correspondence with him on  
19 June 19, 2017. Contrast Avant, 27 MLC at 131 (CERB found that union steward's fail-  
20 ure to read and follow contractual procedures and his failure to timely process grievance  
21 to step 3 demonstrated inexcusable negligence). Nor is there any evidence that  
22 O'Brien's failure to respond to Fitzgerald in May of 2017 violated the contract or any es-  
23 tablished practice because two weeks after speaking with O'Brien, Fitzgerald contacted

1 Ford who immediately investigated his claim and kept in regular contact with him until  
2 June 19, 2017, when the Union decided against further action. Compare Dunlap, 27  
3 MLC at 115-16, (CERB found no inexcusable neglect where the union delayed respond-  
4 ing to a unit member's phone calls and letters); see also Serratore, 10 MLC at 1477-78  
5 (union's delay in notifying employee about the status of his grievance did not prejudice  
6 his rights because of union's determination that the grievance lacked merit); see gener-  
7 ally American Federation of State, County, and Municipal Employees, Council 93 and  
8 Robert W. Kreps (Kreps), 7 MLC 2145, 2147-48, MUPL-2043 (May 19, 1981) (even  
9 though union failed to inform employee that it had withdrawn his grievance, employee's  
10 rights were not impaired because the union had determined that the grievance was not  
11 arbitrable).

#### 12 **The Union's Conduct Was Not Arbitrary**

13 Last, the Union did not act arbitrarily because it gathered sufficient information  
14 concerning the merits of Fitzgerald's claim and made a reasoned judgment in deciding  
15 not to pursue a grievance. Beginning in or around May 11, 2017, O'Brien initiated an  
16 investigation into the merits of Fitzgerald's claim by speaking with Vartabedian and later  
17 with Ford. In addition to their conversations with each other, O'Brien and Vartabedian  
18 also considered the following factors while investigating Fitzgerald's case: (1) documen-  
19 tation showing Fitzgerald's medical inability to return to work; (2) Fitzgerald's work histo-  
20 ry showing a consecutive, 20-month leave of absence from work; (3) Fitzgerald's initial  
21 termination hearing on October 26, 2016; and, (4) the BWSC's subsequent approvals  
22 granting Fitzgerald additional extended leaves of absence.

1       The Union also considered the BWSC's January 9, 2017 letter which referenced  
2   a hearing with the BWSC's Executive Director. However, after reviewing the contents of  
3   that letter the Union concluded that the BWSC's refusal to conduct a second hearing for  
4   Fitzgerald did not violate the contract based on his full termination hearing on October  
5   26, 2016, and his subsequent medical inability to return to work. Vartabedian also con-  
6   tacted Hanson in May of 2017, who informed him that the BWSC's decision to terminate  
7   Fitzgerald was final. Considering all of this information, the Union decided not to take  
8   further action on behalf of Fitzgerald, and notified him of its decision on June 19, 2017.  
9   This evidence shows that the Union's actions were not arbitrary but were well-reasoned  
10   and fully-supported by the information gathered. See Serratore, 10 MLC at 1477-78  
11   (CERB found no breach of duty of fair representation because union reached a rea-  
12   soned conclusion that the grievance lacked merit); see also Stultz, 9 MLC at 1764 (alt-  
13   hough union exhibited "poor judgment" by failing to interview a recently-promoted em-  
14   ployee and failed to notify her that it had filed a grievance challenging her promotion,  
15   CERB found that the union's actions were not "unreasonable," and thus did not amount  
16   to breach of duty of fair representation).


17       Because the Union's actions were not perfunctory, arbitrary, or demonstrative of  
18   inexcusable neglect, but fell within the bounds of permissible discretion afforded to un-  
19   ions under the Law, I find that the Union did not breach its duty of fair representation to  
20   Fitzgerald. Graham, 407 Mass. at 606 (citing Baker, 25 Mass. App. Ct. at 441); NAGE,  
21   38 Mass. App. Ct. at 613 (union has considerable discretion in determining whether to  
22   file a grievance and whether to pursue it though all levels of the contractual grievance-

1 arbitration procedure). Therefore, I need not consider the merits of any grievance that  
2 the Union could have filed for Fitzgerald.<sup>12</sup>

3 CONCLUSION

4 For the reasons discussed, I conclude that the Union did not breach its duty of  
5 fair representation to Fitzgerald because its actions were not arbitrary, perfunctory, or  
6 inexcusably negligent when it investigated whether to file a grievance on behalf of Fitz-  
7 gerald challenging his termination, but subsequently decided not to file a grievance.

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.

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<sup>12</sup> See, Bigelow, 22 MLC at 1332 (citing Pattison, 30 Mass. at 17) (once the CERB 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); Id. (when an employee satisfies its 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).