

MASSACHUSETTS LABOR CASES

CITE AS 14 MLC 1469

MASSACHUSETTS BOARD OF REGENTS OF HIGHER EDUCATION AND ASSOCIATION OF PROFESSIONAL ADMINISTRATORS/MTA/NEA AND MASSACHUSETTS STATE COLLEGE ASSOCIATION/NEA, SUP-2894, CAS-2613 (1/29/88).

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Commissioners participating:

Maria C. Walsh, Commissioner
Elizabeth K. Boyer, Commissioner

Appearances:

Ann Clarke, Esq.	- Representing the Association of Professional Administrators/MTA/NEA
Mark Peters, Esq.	- Representing the Board of Regents of Higher Education
William H. Shaevel, Esq.	- Representing the Massachusetts State College Association/NEA

DECISION

Statement of the Case

On October 25, 1984, the Association of Professional Administrators (APA) filed a charge with the Labor Relations Commission (Commission) alleging that the Board of Regents of Higher Education (Board) had engaged in a prohibited practice within the meaning of Sections 10(a)(1), (2) and (5) of General Laws, Chapter 150E (the Law). The APA also filed on October 25, 1984, a petition for unit clarification (CAS petition) with the Commission seeking to accrete to the unit the position of Library Program Chairperson, as it was then called, at Bridgewater and Fitchburg State Colleges. The Massachusetts State College Association (MSCA) moved to intervene in both matters.

On February 6, 1985, the Commission gave notice that the cases would be



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consolidated for investigation. Following an investigation, the Commission issued a Complaint and Notice of Hearing alleging that the Board had violated Sections 10(a)(5) and (1) of the Law by failing to bargain either to resolution or to impasse before unilaterally transferring work previously performed by the Library Directors at Bridgewater and Fitchburg State Colleges within the APA's bargaining unit to the position of Library Program Area Chairperson in the MSCA unit. The allegation of a 10(a)(2) violation was dismissed. The Commission allowed MSCA's motion to intervene with respect to issues raised in the CAS petition, but denied its motion to intervene in the prohibited practice charge.

A formal hearing, before Diane Drapeau, Esq., was held on October 7, 9, 11, 16, 17, 18 and November 21, 1985.¹ All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and otherwise present evidence. The parties also submitted timely post-hearing briefs which have been considered.

Statement of the Facts

The Association of Professional Employees (APA) is the certified representative of a unit of professional employees occupying administrative positions at the nine institutions within the State College System. In APA's collective bargaining agreement for 1980-83, the Board of Regents, as the employer, recognized the APA as the exclusive collective bargaining representative of employees holding positions set forth in APA's certification. One of the specific position titles included in the APA's certification since 1980 is that of "Director, Library."

The Massachusetts State College Association (MSCA) is recognized in its 1980-83 and 1984-86 contracts as the representative of persons employed in the state colleges as faculty and librarians. The title of Department Chairperson has been included in the unit since 1977.

Both the APA and MSCA contracts with the Board for 1980-83 expired on June 30, 1983. Negotiations for successor agreements began around January 1983. Ellen Suarez, a consultant for the Massachusetts Teachers Association (MTA), was the chief negotiator for the APA. Fred Doherty, also an MTA consultant, negotiated for the MSCA. Charles F. Mahoney, Esq., was the chief negotiator for the Board of Regents for both the APA and MSCA contract negotiations. The MSCA executed its 1984-86 contract on February 21, 1984. The APA executed its 1984-86 agreement on April 4, 1984.

Although the Board and the APA negotiated some changes in unit scope, the position of "Director, Library" continued to be included in the unit in the 1984-86 contract.

Prior to the commencement of the actual negotiations between the MSCA and the Board, but at the time when each party submitted written proposals to the other,

¹ None of the parties contests the Commission's jurisdiction over this matter.



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the MSCA proposed a library department chair position. The MSCA wanted to have the librarians included in the MSCA unit evaluated by a person holding a position within the MSCA unit, thereby giving the librarians parity of unit representation and fairness of treatment with the faculty members in the MSCA who were evaluated by department chairs who were also members of the MSCA. Librarians had been evaluated under the 1980-83 agreement by the "Director, Library," an APA unit member.²

According to the testimony of Mahoney, the Board of Regents, sometime prior to February 1984, made a decision to alter the administrative and personnel structures within certain of the larger State College Libraries. The Board wished to dismantle a hierarchical administrative structure within each library and supplant it with an essentially collegial one, similar to the model found in the traditional academic departments of the Colleges. The general direction of the Library would be overseen by one of the librarians who would be appointed by the President of the College to serve as Chair. Under this reorganization, the Director of the Library, who had served as its administrative head, would be displaced and the position abolished.

As a result of negotiations between the MSCA and the Board of Regents the parties included the following new provisions in the 1984-86 contract:

VI.J. 2. Libraries

With effect on July 1, 1984, at any College which, on the first day of any academic year falling within the term of this Agreement, shall have in its employ six (6) or more Librarians who are members of the bargaining unit, the Library shall be constituted and shall be deemed to be a program area. At any such College, the President shall designate one among the librarians who are members of the bargaining unit to discharge, during such academic year, those responsibilities, including, without limitation, the conduct of evaluations, which are required by the provisions of Section A of the Article VI to be performed by a Department Chairperson and which are relevant and appropriate to the conduct of affairs within the library. The librarian so designated by the President shall be known as the Program Chairperson.

Upon the recommendation of the Vice President and where the circumstances so require, the President shall grant a reduction in the workload of such Program Chairperson commensurate with the duties performed as Program Chairperson.

²The 1980-83 and 1984-86 MSCA contracts define the term "Director, Library" as "the person, not being a member of the bargaining unit, who from time to time holds the position of Director, Library or who from time to time is authorized to act in that capacity, whether solely for the purposes of the Agreement or otherwise."



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At such Colleges, the Librarians shall review and make recommendations concerning policies applicable to the operation of the library after consultation with the Director of the Library, if any. Such recommendation shall be submitted in writing to the Director of the Library, if any, and the Vice President.

The members of such Library Program Area shall consider such recommendations and suggestions as the Vice President, the Director of the Library or the Chairperson of the Program Area may from time to time submit for consideration.

Not less than once at each semester the Vice President, the Director of the Library, if any, and the Program Chairperson shall meet and confer to facilitate the operation of the Library which the parties recognize to be an essential professional service and resource of the College.

At those Colleges at which there are fewer than six (6) professional librarians so employed on the first day of any academic year during the term of the Agreement, there shall be created a Library Policies Committee which shall consist at such College of all such librarians except the Director of the Library. The Committee shall elect a chairperson who shall convene their meetings and shall convey to the Vice President and the Director of the Library the recommendations and suggestions of the committee concerning policies applicable to the operation of the Library which the parties recognize to be an essential professional service and resource of the college.

In February 1984, the MSCA contract was executed and the APA negotiations were continuing. Suarez, having only heard about the above MSCA provision from a member of her negotiating team, but not having seen it, asked the Board representatives about it during a negotiating session on or about February 16, 1984. Four specific concerns were raised by the APA: (1) that the Director's loss of responsibility for evaluating the libraries would result in a loss of authority, (2) that APA would lose a unit position, (3) that APA's right to bargain over the issue was jeopardized, and (4) that the Directors would lose salary increases negotiated by the APA and other employment benefits.

In response, Mahoney stated that APA's concerns were speculative at that point since it was not known at which colleges or in what manner the provision would be implemented. The implementation date was not until July 1, 1984, and, therefore, Mahoney offered to put the issue over and to discuss it at such time in the future when it was known how, if at all, the provision would affect the Director's position.

On or about March 1, the parties met and compiled a final list of unresolved problems which included the issue of the MSCA provision. In a letter of March 8, 1984, Suarez sent Mahoney a list of unsettled issues which included unit



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scope and the title of Director, Library as a unit position and the following item:

Librarian (Director) - letter of intent to APA re: negotiations of the impact of Library Chairperson on the Director of the Library position.

On March 12 another negotiation session was held and Mahoney promised to send Suarez a letter recording the agreement to bargain over the issue of the Library Chairperson at a future date. By letter dated March 13, 1984, Mahoney wrote:

Dear Ellen:

This letter will confirm my verbal assurance given to your bargaining team that the Board of Regents, acting through the Council of Presidents, will in response to a request duly made by the Association, engage in impact bargaining, if any, that may be required incident to changes that may occur on and after July 1, 1984 at one or more of the State Colleges concerning the position Director, Library.

I want to underscore that at this time the subject matter raised by the Association is necessarily somewhat speculative since the relevant provisions of the MSCA Agreement are not effective until the next fiscal year and the colleges to which the provision may be of application have not as yet ascertained what changes, if any, may be required with respect to the Director, Library.

Finally, I also wish to confirm my request that following ratification and execution of the negotiated agreement between the Board of Regents and the Association of Professional Administrators that the subject matter be discussed by the joint Management-Association Committee on Employee Relations in accordance with the intent of Article II of the new agreement.

I trust that this letter will answer the questions raised by your team. Please contact me if you have any further questions.

The parties agreed that this letter resolved the outstanding issue concerning the Librarian (Director) which appeared on the March 8 list. There was no further discussion in the APA negotiations concerning the library provision of the MSCA contract prior to execution of the APA agreement on April 4, 1984.

The position of "Director, Library" remained listed as a position within the bargaining unit as it had in the 1980-83 contract. The 1984-86 APA contract also provides that the duties, responsibilities and qualifications for unit positions will be contained in job descriptions and that job descriptions in effect prior to execution of the agreement remain in effect until abrogated by the adoption of alternative job descriptions. The contract gives management the right to alter the table of organization and to amend any job description pursuant to that



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alteration, but the affected administrator has the right to object to the proposed changes and to have those objections considered before the changes are finalized.

It was not until mid-June of 1984 that the presidents of the State Colleges had a clear understanding of the reorganization of the Libraries. On June 18, 1984, the parties met for a Management-Association Committee on Employee Relations (MACER) meeting as provided for in the APA contract. The agenda included implementation of the library provision of the MSCA contract. The reorganization of the Libraries was sought at only four of the State Colleges -- Bridgewater, Fitchburg, Framingham and Salem. The Board's representatives described the proposed plan of action: (1) that as of July first, the Regents intended to "discontinue or terminate" the position of Director of Library at Bridgewater, Fitchburg and Salem, to appoint the persons currently in those positions as librarians, and thereafter to designate them as Library Program Area Chairpersons; (2) that the Board did not know yet what would happen to the Director of Library at Framingham, although it was likely he would retain the position with an alteration in his duties; and (3) that the seniority, tenure and salary of the affected individuals would be governed by the MSCA contract.³

In response to questioning by Suarez, Mahoney stated that the job description for Director of Library would be redefined and the duties of Library Program Chairperson would be added to it. Management representatives did not know, however, what would happen to the administrative duties, such as budget duties, currently performed by the Directors.

Mahoney asked Suarez whether and about what specific issues the APA wished to impact bargain as a result of these proposed changes. Suarez stated the APA did not have enough information to respond and requested job descriptions -- the current Director job description and the proposed job description for the Library Program Area Chairperson.

On June 28, 1984, Suarez wrote a letter to Mahoney detailing the APA position on the June 18 announcements:

It is our position further, that the administrative duties of the Director of Libraries position are recognized as within the APA/MTA bargaining unit. Therefore, any change in these duties by the Board is subject to negotiations with the APA/MTA.

We disagree strongly with your stated position of June 18, whereby the Board plans to "re-define" these functions. The administrative work must still be performed and the APA/MTA contends that it cannot be transferred to another bargaining unit without agreement between the parties as to the status of this work.

We await your response as to the exact disposition of this administrative work.

3 (see page 1475)



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During the next several weeks, Mahoney and Suarez talked on the telephone and exchanged letters. Mahoney, having reviewed the MSCA contract, stated that the Library Chair provision would not be implemented until the beginning of the academic year in September, instead of on July 1. In response to repeated requests for the job descriptions, Mahoney told Suarez that they were being compiled and that the Presidents at the four affected schools were writing the job descriptions for the Chair and Director positions to respond to the needs of the particular school. Finally, Mahoney stated that the Colleges were seeking to learn what each Director's status and entitlements were, and that the Colleges were willing to attempt to fashion some satisfactory resolution of those questions with the MSCA. Mahoney suggested that the employer, MSCA and APA meet together to resolve these issues and Suarez agreed. Suarez stated that if, in fact, the Board was going to move the three directors into the MSCA unit, she didn't know what the APA was going to be able to bargain over.

In response to a letter from Suarez dated July 13, Mahoney wrote her on July 17 and again stated that the job descriptions were being compiled. He also added:

We are awaiting receipt of the specific demand(s) for impact bargaining with respect to these issues. I trust that we can arrange such bargaining at our earliest mutual convenience in timely fashion such that the parties will have an opportunity to engage in such impact bargaining as may be required prior to any action being undertaken by the employer.

In a letter dated July 20, Suarez stated that the APA would be unable to respond with any specific demands until the Board provided concrete information as to the status of the job description of the Directors and the Chairs.

On August 1, Mahoney sent Suarez a letter describing the reorganization plans of the four schools and enclosing seven job descriptions, for the Director of Library at the four schools and the Library Chair position at Bridgewater, Fitchburg and Salem. Although the four job descriptions contain some variations the core duties of the Directors include the following:

1. Responsible for the development of library goals to meet the academic and related needs of the departments and develops policies and programs for the realization of these goals. The Director develops goals and programs for the total library community.

3 (from page 1474)

The Board initially believed the Directors to be on a leave of absence from the MSCA unit. However, although there had been a memo of understanding attached to the 1980-83 MSCA contract which listed individuals from the MSCA who were on a leave of absence, no such list appeared in the 1984-86 contract and therefore, it was the Board's later position that seniority, tenure and salary for these "returning" librarians would need to be negotiated with the MSCA.



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2. Works closely with administrators, faculty and students in establishing priorities for development within a department or departments of the library.
3. Responsible for long-range plans for the development of library collections and for the building of facilities to house library materials and services within his/her department.
4. Responsible for the operation of the departments, including its internal operations, its educational programs, and its services to faculty, staff and students.
5. Advises other administrative personnel on the fiscal and personnel needs of his/her department.
6. Prepares budget materials, administers library funds, and reports on expenditures made by the department.
7. Responsible for maintaining standards of performance for personnel assigned to his/her department including the provision for annual evaluations of department staff members for merit and/or promotion recommendations.
8. Performs duties of a related nature within area of professional competence.⁴

The duties for the Library Program Area Chairperson for Fitchburg and Salem State Colleges were substantially similar to each other in basic components and are illustrated by the following:⁵

1. Provide the functions and services, described in the MTA Agreement for Program Chairperson in the Library.
2. In accordance with the provisions of the MSCA Agreement and AFSCME Agreement establish the work schedules of librarians and library staff. Such schedules are subject to the approval of the Academic Vice President or his designee.
3. Make recommendations to the Academic Vice President or his designee regarding the extension or modification of the library programs and services and to endeavor and [sic] provide library users with maximum accessibility to the library's offerings and holdings.

⁴ In addition Directors might be responsible for participating as a member of various networks, consortia and other cooperative library organizations.

⁵ Salem State specifically required the Chairperson to participate in the evaluation and scheduling of the members of the library staff, whereas Fitchburg State required its Chair to do the functions and services described in the MTA Agreement for Library Program Chairperson (e.g., evaluations).



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4. Assist with the recruitment of librarians and other staff.
5. Periodically submit requests for supplies, equipment, library holdings and other needs of the department.
6. Maintain communications with students, faculty and administrative offices with regard to library matters.
7. Meet regularly with the Academic Vice President or his designee and from time to time with members of the library and with the appropriate committees in order to coordinate the interaction of library programs and activities and to facilitate the discharge of the responsibilities described in the Agreement.
8. Responsible for maintaining standards of performance for personnel assigned to the library and responsible for carrying out the provisions of appropriate contracts, evaluations of librarians and library staff for reappointment, promotion, tenure, merit, D.S.A. and other personnel actions.
9. Advise librarians and library staff of the receipt of any substantial complaint from library users that the Chairperson believes may affect the employment status of the librarian or library staff member.
10. Carry out such other assignments as may be made from time to time by the Academic Vice President. Such assignments will include but are not limited to the following: cooperative efforts with other libraries, long range planning, budget requesting and monitoring, and keeping the College Archives.

The job description for the Bridgewater Library Program Area Chairperson listed the following duties:

1. Develop schedule for Librarians and other staff assigned to Library and make location assignments consistent with the provisions of this Collective Bargaining Agreement.
2. Work closely with administrators, faculty and students in making recommendations for development within a department or departments of the Library to provide students with maximum accessibility to the Library.
3. Assist in the recruitment of Librarians.
4. Periodically submit requests for supplies, equipment, library holdings and other needs of the Library.
5. Advises the Vice President, Academic Affairs on needs of the Library.
6. Maintain communication with students, prospective students and other



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faculty at the College relative to Library matters.

7. Conduct the evaluation of the members of the Library as required.
8. Represent the Library at meeting for Southeastern Massachusetts Cooperative Libraries and other appropriate type [sic] of meeting when assigned by the Vice President, Academic Affairs.

In his August 1 letter to Suarez, Mahoney confirmed that "impact negotiations" concerning the Director of Library issues were scheduled for August 21 and asked Suarez to inform him by August 20th of any demands which the APA wished to be the subject of the "impact bargaining." He also restated the Board's position:

I wish to confirm to you that it is the intention of Framingham State College to retain the position of Director of the Library as is currently established and to appoint a Library Program Chairperson. It is the intention of the Presidents at Bridgewater, Fitchburg and Salem to abolish the position of Director of the Library at each such college effective September 1, 1984 and to appoint a Library Program Chairperson. As stated, these actions will be taken on September 1, 1984 except as is required to be in effect on July 1, 1984.

I also wish to confirm by this letter that which I believe we advised the Association at our last meeting concerning questions which were asked by the Association about the impact of this decision upon the individuals who presently hold the position Director of Library at Bridgewater, Fitchburg and Salem. It is our position that at each of these three institutions the individuals presently holding the position of Director of the Library Services shall be appointed Librarians and thereafter designated Program Chairpersons. Further, it is our position that questions raised with respect to seniority and tenure that may be presently held by any one of the three individuals are not properly the subject of impact bargaining by the Association. Those subject matters, to the extent required, are being separately addressed with the MSCA unit. A negotiating session has been scheduled with the MSCA for that purpose on August 7, 1984.

I hope that this letter will serve to clarify questions which have been raised in connection with this matter and that the parties will be able to deal with any issues that may properly be the subject of impact bargaining on August 21st. I want to be clear, however, that if additional time is required it is important that we endeavor to arrange the schedules of the bargaining teams so that additional sessions can be scheduled as needed in order to permit the parties to endeavor to reach agreement in advance of the commencement of the academic year on September 1, 1984. At that date it is necessary for the operation of the institutions that the new arrangements be established and in place.

At the August 21st meeting, Stan McDonald, Director of the Framingham



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library, stated the position of the President of his College that the Director role should be retained and that the collegial role of the Chair should be confined to the performance of evaluations and the development of work schedules. This was contrary to the position of the Board of Regents which was opposed, according to Mahoney, to such "bifurcated" responsibilities. Mahoney reiterated the Board's plan calling for the abolition of the Director of Library position and designating a librarian from time to time to serve as Chair of a "more collegiate body."

Suarez demanded that Mahoney rescind his August 1 letter, threatened to file a CAS petition⁶ and called for application of the APA contract retrenchment article.⁷ Mahoney objected to the APA filing a grievance because it would be inconsistent with the parties' agreement to impact bargain. No grievance was ever filed.

Suarez then proposed that the position of Director of Library at Bridgewater, Fitchburg and Salem remain in the APA unit and that the responsibility for evaluating and scheduling librarians be transferred to the Library Program Area Chairperson, subject only to the Director's concurring or not concurring in the evaluation and having final approval of the schedule.

Mahoney agreed to take the proposal to the Board of Regents and to try to arrange a joint meeting with the MSCA, APA and the Board of Regents.

Suarez confirmed the APA proposal in writing to Mahoney in a letter of August 29, 1984.

The parties next met on September 12, 1984. Mahoney met first with the MSCA which refused to engage in joint negotiations, but was willing to "discuss" the issue.⁸ The MSCA was unwilling either to acknowledge or to accord any rights of seniority or tenure to persons who might transfer from the APA's bargaining unit to its own. MSCA did agree to delay the Appointment of the Library Chairs, but insisted that the new structure be implemented in substantial conformity with the time limits that had originally been agreed upon in the contract.

⁶The parties disagree as to the Board's response to this proposal. Suarez believes Mahoney suggested that the parties consider filing a joint CAS petition with a stipulation of facts. Mahoney recalls objecting to the proposal as it was inimical to the parties' March agreement to bargain over the issue.

⁷Article IX (Reduction in Force) set forth specific procedures which the Board was to follow after a determination was made to reduce the number of administrative positions and which gave persons in the abolished positions certain rights, such as twelve months of severance pay.

⁸The MSCA agreement contained a "zipper" clause which supplied the basis for its refusal to reopen the contract or make seniority and tenure provisions the subject of actual negotiations. A grievance was filed by the MSCA charging the Board with violating their agreement but this was later dropped.



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Immediately following this meeting, Mahoney met with the APA and reiterated the Board's proposal: on or about October 5, 1984, the position of Director would be abolished at Bridgewater, Fitchburg and Salem and the individuals then serving as Director would become librarians and then be designated as Chairpersons. The Board had committed itself to ensuring that every former Director would not suffer any diminution in his or her compensation, but made no promises regarding preservation of seniority or tenure rights. Mahoney told Suarez that the MSCA refused to alter or diminish the rights of Library Program Chairpersons arising under its labor agreement with the Board, and, thus, the APA proposal was rejected. A discussion ensued concerning the job descriptions of the Library Program Chair. No new proposals from either party emerged from the discussion.

Suarez restated APA's position in a letter of September 19 to Mahoney:

The APA/MTA further asserts, that this transfer of the Director of Library's responsibilities to the MSCA librarian unit would cause a negative impact on the status of the Association of Professional Administrators. Based upon the information and documents provided to us in the August 1st letter, specifically Exhibits E, F, and G,⁹ it is clear that the Board is merely removing the three employees from the present bargaining unit and placing these same employees into another position, outside the bargaining unit, without any substantial change in their duties and responsibilities.

Furthermore, the APA/MTA feels strongly that the employer can address the requirements of the MSCA/MTA Agreement through the implementation of our proposal, previously stated. Our organization cannot agree to this unilateral change in the status of these employees and the loss of bargaining unit positions. If the Board is seeking to maintain proper functioning of the libraries at each of these colleges, it is clear that the only solution can be the continuance of the Director of Library position with the described changes in the present job descriptions. This solution was agreed to at Framingham State College and should, therefore, also be possible at the three other colleges.

Mahoney had a series of discussions with the Council of Presidents during the subsequent three weeks. Two changes in the Board's position resulted. First, none of the Director's positions would be abolished but rather would remain vacant indefinitely. Second, Salem State would adopt the "Framingham" model: the incumbent Director would retain his position with two of his duties -- evaluation and scheduling of librarians -- given to the Chairperson.

On October 3, 1984, APA met with Board representatives and Mahoney announced the changes in the Board's position. He also announced that while the Director at Bridgewater would be appointed librarian and designated Library Program Chairperson,

⁹ Library Program Chairperson job descriptions for Bridgewater, Fitchburg and Salem State Colleges.



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the Director at Fitchburg would be appointed librarian but the position of Library Program Chairperson would be filled under the MSCA contract provisions with no guarantee given to the former Director. The date of the implementation of the changes was given by Mahoney as October 5, 1984, per the Board's agreement with the MSCA. The meeting ended with the APA asking for the Library Program Chairperson job descriptions from Bridgewater and Fitchburg after they had been revised.

On October 4, 1985, the changes were implemented at the four colleges. At Bridgewater, Owen T.P. McGowan who had served as Director of Library since 1977 or 1978 became Library Program Chairperson. At Fitchburg State, William T. Casey who had served as Director of the Library since 1967 resigned as Director on October 5, 1984 and was appointed librarian. Bruce McSheehy, a librarian, was appointed Library Program Chairperson on October 14, 1984. All of those holding Chairperson positions received a \$1400 stipend.

On November 26, 1984, approximately one month after the APA filed its charge with the Commission, Mahoney wrote Suarez to request that the APA return to the bargaining table in order to pursue the impact negotiations. The APA made no reply, and the negotiations never resumed.

Opinion.

The complaint alleges that the Board of Regents violated Sections 10(a)(5) and (1) of the Law by refusing to bargain to resolution or impasse over the transfer of bargaining unit work performed by the Directors of Library at Fitchburg and Bridgewater to nonbargaining unit personnel, the Library Program Chairpersons. The Board, however, argues that because the transfer of the work to the Chairperson positions occurred in the context of a management reorganization, the decision to transfer the unit work out of the unit is not a mandatory subject of bargaining. It also argues that the parties reached an impasse in bargaining about the impacts of that decision prior to the actual implementation of the decision, or, alternatively, that the APA waived its right to bargain about the impacts of the transfer of unit work. For the reasons discussed below, we conclude that the Board unlawfully transferred APA bargaining unit work without having bargained either to impasse or to resolution with the APA.

Under certain circumstances public employers may reorganize their operations without prior bargaining about the reorganization decision. Boston School Committee, 10 MLC 1420 (1984). Resultant decision to abolish or create positions have been found to be exempt from bargaining. See School Committee of Braintree v. Raymond, 369 Mass. 686 (1976); School Committee of Hanover v. Curry, 369 Mass. 683 (1976). The impact of such decisions on wages, hours, or working conditions, however, are mandatory subjects of bargaining. Cambridge School Committee, 7 MLC 1026, 1028 (1980); Newton School Committee, 388 Mass. 557 (1983). Similarly, a decision to subcontract or remove unit work must generally be negotiated when the decision has an adverse impact on either bargaining unit employees or the unit as a whole. See City of Gardner, 10 MLC 1218, 1219 (1983); City of Quincy, 13 MLC 1436 (1987); cf. Town of Burlington v. Labor Relations Commission, 390 Mass. 157 (1983). [Employer's unilateral assignment of police prosecutor duties from police



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officers to town counsel was a "public policy" decision exempt from collective bargaining.]

The Board argues in this case that its decision to transfer work¹⁰ from the Library Directors to the Chairpersons was motivated by a policy decision to emphasize collegiality in the Library rather than to maintain an administrative hierarchy. Such a change does not significantly involve educational policy or the public services offered by the employer. The change does, however, involve a very significant aspect of employee working conditions. The most important difference between the former and present organizational structures is the bargaining unit placement of the position whose incumbent performs the administrative and supervisory functions of the library.¹¹ A change in the unit placement of a position is not an issue of educational or public policy. The Board's obligation to bargain prior to transferring unit work involves no substantial infringement upon the Board's prerogative to determine educational policy. The fact that the Board has abolished its "fundamentally hierarchical" organizational structure in favor of one that is more closely patterned on the collegial model of other academic departments, has not been shown to significantly affect the type of educational services which the Board delivers to the public. When balanced against the employees' interest in working conditions, it is apparent that the impact on public policy, assuming *arguendo* that there is some impact, is insignificant, while the impact upon employee working conditions is direct and significant.

True policy decisions

involve matters which determine the level of public services to be delivered by the public body rather than the means by which the services shall be delivered. Where the school committee's decision involves the means and method by which the service shall be delivered it usually does not implicate public policy decisions reserved to elected officials. Town of Dennis, 12 MLC 1027, 1030 n.4 (1985).

Here the decision to transfer APA unit work to a position within the MSCA unit involves no change in the level of public services delivered by the Board. Instead, the transfer of unit work amounts to a subcontracting decision about which a public employer must bargain. E.g., City of Haverhill, 11 MLC 1289 (1984); City of Boston, 6 MLC 1117, 1120-23 (1979). Cf. Town of Burlington v. Labor Relations Commission, 390 Mass. 157 (1983) [decision to assign prosecutorial duties

¹⁰ The Board does not dispute, and the record establishes, that the job duties of the newly created Library Chair positions at both Bridgewater and Fitchburg State Colleges include essentially the same type of administrative duties formerly performed by the Director of Library positions within the APA unit.

¹¹ It is undisputed that the former Directors of Library are themselves professional librarians.



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formerly performed by police to town counsel implicated a public policy issue that overrode collective bargaining obligations].

In cases alleging a removal of unit work the Commission examines the following: 1) did the employer transfer bargaining unit work to non-bargaining unit personnel; 2) did the transfer decision have an adverse effect on individual employees or on the bargaining unit as a whole; and 3) did the employer give the union notice and an opportunity to bargain about the decision to transfer the work? City of Quincy, 13 MLC 1436, 1442 (1987). In the instant case the record establishes that the Board has transferred work previously performed by the Library Directors at Bridgewater and Fitchburg State Colleges to the non-unit positions of Library Program Area Chairpersons. The evidence further compels the conclusion that the transfer of the Library Directors' work has had an adverse impact both on the individual employees and on the APA unit. The former Library Director of Bridgewater was transferred from that position to a position as librarian in the unit represented by the MSCA, and was subsequently designated as the Library Program Area Chairperson. Because of the transfer, the employee no longer enjoyed the seniority and tenure provisions of the APA contract. The former Fitchburg Library Director was also transferred to a position as a librarian in the unit represented by the MSCA, but was not subsequently designated Library Program Area Chairperson. The APA unit lost the opportunity to represent two Library Directors, and that loss of unit positions constitutes an adverse impact on the unit. Town of Marblehead, 12 MLC 1667, 1670 n.4 (1986); also see City of Quincy, supra at 1443. We must next consider whether the employer gave the union notice and an opportunity to bargain about the transfer.

The Board first gave the APA adequate notice of the proposed elimination of the Library Director positions at the four colleges in June 1984, after the APA had notified the Board that it wanted to negotiate about any change that might affect the positions. The Board invited the APA to identify specific issues about which it wanted to bargain; and in response the APA requested the job descriptions of the new positions from the Board. By letter of June 28 the APA also clearly notified the Board of its opposition to any unilateral change in duties or transfer of unit work.

When the Board submitted the revised job descriptions to the APA in early August, it also notified the APA that it did not consider either the seniority or the tenure of Library Directors who would be transferred to the MSCA unit to be proper subjects for bargaining with the APA. The APA protested the Board's proposed transfer of duties at the bargaining session of August 21, when the APA also demanded that the Board rescind its August 1 letter. Instead, the APA proposed that the Library Directors should be retained, but agreed to transfer their evaluation and scheduling duties to the MSCA unit.

When the parties next met on September 12, the APA learned that the Board had rejected the proposal to retain the Library Directors. By letter of September 19, the APA advised the Board that it could not agree to the abolition of the unit positions and transfer of work, although it reiterated its proposal to transfer some duties to the MSCA unit. At the October 3 meeting the APA was told that



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the Board had decided to adopt the APA proposal at Salem State [i.e., to retain the Library Director but transfer evaluation and scheduling duties to the MSCA unit] but not at Fitchburg or Bridgewater. Instead, at those two colleges the Library Directors would be transferred to the MSCA unit as librarians and the position of Library Director would be retained, but kept vacant.

Thus when the Board implemented the changes on October 5, it did so after having been notified that the APA opposed the proposed changes,¹² after having received from the APA bargaining proposals and requests for information,¹³ but without having reached agreement with the APA. Instead, we conclude that the Board transferred the work of the Library Directors without having reached either agreement or impasse with the APA. By so doing the Board violated its legal duty to bargain in good faith. See City of Haverhill, 11 MLC 1289 (1984).

The decision that the parties did not negotiate to impasse in this case is compelled by a careful review of the evidence presented and Commission precedent. We continue to adhere to a high standard of impasse, before which unilateral changes cannot be lawfully made: an impasse can be found only after both parties have negotiated in good faith on bargainable issues to the point where it is clear that further negotiations would be fruitless. City of Worcester, 9 MLC 1622, 1628 (1983); New Bedford School Committee, 8 MLC 1472, 1477 (1981). Among the factors to be weighed in deciding whether parties have reached impasse in their negotiations are the bargaining history, the good faith of the parties in the negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of the negotiations. Commonwealth of Massachusetts (Unit 9), 8 MLC 1978, 1982 (1982).

At the first negotiating session on August 21 concerning the Board's proposal, the APA proposed that the Board implement at the other three colleges the plan proposed as to Framingham State College -- that is, to retain the Director position but transfer the work of evaluating the librarians and scheduling their assignments, subject to the Director's concurrence, to the Library Chair position. The Board's representative agreed to take the APA's proposal to the Board for consideration. At the subsequent meeting on September 12, the Board informed the APA that the MSCA had allowed the Board to delay until October 5 implementation of the MSCA contract provisions concerning the establishment of the Library Chair position, and that the MSCA refused to negotiate with the Board to allow former Library Directors, who would be transferred to librarian positions in the MSCA unit under the Board's plan, to retain pre-existing tenure and seniority rights

¹²By protesting proposed changes in working conditions a union preserves its rights to bargain with the employer before the changes are implemented. See Town of Andover, 4 MLC 1086, 1089 (1977).

¹³The Board contends that the APA never demanded bargaining about the decision to transfer the Library Director's work out of the APA unit. We find, however, that by her letter of June 28, Suarez made a sufficient demand to bargain about the transfer of unit work to fully preserve the APA's rights. In addition, (continued)



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not afforded by the MSCA contract. When the APA reiterated its proposal to implement the "Framingham model" at the other three colleges, Mahoney indicated that he would ask the college presidents to reconsider it. At the final meeting held on October 3, the Board announced that it would implement the "Framingham model" at Salem State College but not at Bridgewater or Fitchburg State Colleges. As to those two colleges, the Board announced that on October 5 it would implement the changes it had proposed and detailed in the August 1 letter to the APA. In view of the limited number of bargaining sessions which had taken place on an issue of relative importance to the APA and the affected unit members, and the evidence of significant changes in the parties' positions during the brief period of negotiations, we cannot conclude that the parties were hopelessly deadlocked on October 3 so as to justify the Board's unilateral implementation of the proposed changes on October 5.¹⁴

Since we find that no impasse was reached, we conclude that the Board of Regents violated Sections 10(a)(5) and (1) of the Law by failing to bargain over its decision to transfer duties to the Chair positions at Bridgewater and Fitchburg prior to the implementation of those changes.¹⁵

¹³ (continued)

the APA's proposal on August 21 to retain the Library Director positions but to transfer the evaluation and scheduling work to the SMCA unit demonstrates clearly the APA's desire to bargain concerning the proposed transfer of Library Directors' work.

¹⁴ Although the Board of Regents had a contractual commitment to the MSCA for a timely implementation of the provision concerning the Library Program Chairperson, it also had an obligation to bargain to impasse or resolution with the APA concerning the decision to transfer its work to MSCA positions and the impacts of that decision before it could lawfully implement such changes. The Board voluntarily created potentially conflicting legal obligations to the APA and the MSCA when it contractually agreed with the MSCA to implement the decision involved here without any certainty that it could fulfill its bargaining obligation with the APA about that issue. Such a predicament is not a legitimate defense to its failure to fulfill the statutory duty.

¹⁵ The Board also contends (1) that the complaint does not specifically allege that it unlawfully refused to bargain about the impacts of its decision to eliminate the Library Director position and transfer the work to the non-unit Library Chair position, and (2) that the APA waived its right to bargain about the impacts by failing to offer any proposals it wished to discuss. In view of our conclusion that the Board did not bargain to impasse before implementing the decision to remove the unit work, it is not necessary to resolve these contentions. During the bargaining in which the Board must engage under the terms of our remedial order, the APA remains free to advance bargaining proposals concerning both the decision and its impacts upon the wages, hours and working conditions of bargaining unit members. An employer may not take unilateral action until impasse has been reached on all mandatory aspects of the decision. Newton School Committee, 5 MLC 1016, 1024 (1978); Watertown Housing Authority, 10 MLC 1066, 1069 (1983). Moreover, the (continued)



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CAS Petition

Generally, the Commission does not make unit placement decisions about new positions until the positions are filled. See Boston School Committee, 10 MLC 1410, 1421 (1984); Upper Cape Cod Regional Vocational Technical School Committee, 9 MLC 1503 (1982); Town of Wellesley, 2 MLC 1443 (1976).

Compliance with our remedial order will require the return of the unlawfully transferred work of the Library Directors at Bridgewater and Fitchburg¹⁶ to the former Library Director positions, and the restoration to their former positions of the Library Directors who were unlawfully transferred to MSCA librarian positions. Presumably, this will significantly alter the duties of the Library Program Area Chairperson positions at Bridgewater and Fitchburg State Colleges. Because we cannot speculate on the duties of the Library Program Area Chairperson positions that will result from compliance with this decision the unit clarification petition is premature at this time. Accordingly, the petition is dismissed.

Remedy

The remedy for an unlawful unilateral change is restoration of the status quo ante. Framingham School Committee, 4 MLC 1809 (1978). An exception has been made, however, when the employer's unilateral action increases employee wages. The Commission has recognized that requiring the employee to reimburse the employer for the improperly paid wages could penalize the employee for the unlawful conduct of the employer and could alienate the employee from the union that represents him or her. Commonwealth of Massachusetts, 14 MLC ____ (SUP-2864, Nov. 19, 1987) and cases cited therein. Accordingly, any increased wages received by the employees because of the Board's unlawful unilateral action need not be repaid.

Additionally, the Board of Regents is to offer Owen McGowan and William T. Casey restoration to their former positions as Library Directors, with retroactive restoration of all salary, seniority and tenure rights to which they would have been entitled had the Director of Library positions not been eliminated on October 5, 1984.

Further, the positions of the Library Director at Bridgewater and Fitchburg State Colleges, with the duties previously performed, shall be restored to the APA

15 (continued)

Board's waiver argument with respect to the impact issues necessarily rests upon the doubtful premise that the APA could not legitimately wait to formulate its bargaining agenda concerning the impact issues until the outcome of the parties' negotiations about the decision to transfer the unit work was known.

¹⁶ The assignment of duties at Framingham and Salem State Colleges are not at issue in the charge or complaint in this case.



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bargaining unit. The Board shall notify the APA of its willingness to meet and negotiate in good faith concerning the transfer of duties of the Library Directors at Bridgewater and Fitchburg State Colleges and, upon request of the APA shall meet and negotiate in good faith concerning this subject.

ORDER

WHEREFORE, based upon the foregoing IT IS HEREBY ORDERED that the Board of Regents shall immediately

1. Cease and desist from:
 - a) Unilaterally transferring any work traditionally performed by employees in the APA bargaining unit to employees outside that unit, without first bargaining collectively to resolution or impasse with the APA.
 - b) In particular, and without limitation to paragraph (a), above, transferring duties formerly performed by the Directors of Library at Bridgewater and Fitchburg State Colleges to the Library Program Area Chairperson at those two schools, or any other personnel outside the APA's bargaining unit, without first bargaining collectively to resolution or impasse with the APA.
 - c) In any like manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under the Law.
2. Take the following affirmative action that will effectuate the policies of the Law:
 - a) Restore the position of Director of Library and its duties, as performed prior to October 5, 1984 by William Casey at Bridgewater State College and by Own McGowan at Fitchburg State College, to the bargaining unit represented by the APA.
 - b) Upon request, bargain collectively in good faith with the APA to resolution or impasse over the decision to subcontract or transfer the duties of the Directors of Library at Bridgewater and Fitchburg State College to personnel outside the bargaining unit represented by the APA.
 - c) Offer William T. Casey and Own McGowan full reinstatement to their former positions as Director of Library at Bridgewater and Fitchburg State Colleges without prejudice to their seniority or other rights and privileges, and make them whole for any loss of wages or other benefits they suffered as a result of the elimination of their former positions. This remedy is to include interest on any sums owing at the rate specified in M.G.L. c.231, Section 6B with quarterly compounding.



MASSACHUSETTS LABOR CASES

CITE AS 14 MLC 1488

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- d) Post immediately in conspicuous places where APA unit employees usually congregate or where notices are usually posted, and maintain for a period of thirty (30) days thereafter, copies of the attached Notice to Employees.
 - e) Notify the Commission in writing within thirty (30) days of service of this decision of the steps taken to comply herewith.
- SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

MARIA C. WALSH, COMMISSIONER
ELIZABETH K. BOYER, COMMISSIONER



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**NOTICE TO EMPLOYEES
POSTED BY ORDER OF
THE MASSACHUSETTS LABOR RELATIONS COMMISSION
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

The Labor Relations Commission has determined that the Board of Regents of Higher Education has violated Sections 10(a)(5) and (1) of the Massachusetts General Laws, Chapter 150E (the Public Employee Collective Bargaining Law) by failing to bargain to resolution or to impasse with the APA over the decision to transfer duties performed by APA bargaining unit personnel to members outside that unit.

WE WILL NOT transfer bargaining unit work to non-unit personnel without first bargaining to resolution or impasse with the APA.

WE WILL NOT refuse to bargain in good faith with the APA over the decision to transfer the duties of Director of Library to personnel outside the unit.

WE WILL refrain from transferring the duties formerly performed by the Directors of Library at Fitchburg and Bridgewater State Colleges to the Library Program Area Chairperson or any other personnel outside the bargaining unit represented by the APA.

WE WILL restore the position Director of Library at Fitchburg and Bridgewater State Colleges and its duties to the bargaining unit represented by APA.

WE WILL offer to reinstate William T. Casey and Owen McGowan to their former positions as Director of Library at Fitchburg and Bridgewater State Colleges without prejudice to their seniority or other rights, and make them whole for lost wages or other benefits they may have suffered as a result of the elimination of their former positions.

WE WILL, upon request, bargain in good faith to resolution or impasse with APA over the decision to transfer job functions formerly performed by the Director of Library position at Fitchburg and Bridgewater State Colleges to employees outside the bargaining unit represented by APA.

Board of Regents of Higher Education



