

In the Matter of BOARD OF HIGHER EDUCATION  
AND  
MASSACHUSETTS COMMUNITY COLLEGE COUNCIL,  
MTA/NEA

Case No. SUP-02-4892

63.21 filing a grievance  
65.22 filing a grievance

June 21, 2006  
John F. Jesensky, Chairman  
Hugh L. Reilly, Commissioner

James R. Brown, Esq. Representing the Board of Higher  
Education

Richard A. Mullane, Esq. Representing the Massachusetts  
Community College Counsel,  
MTA/NEA

DECISION<sup>1</sup>

Statement of the Case

On March 15, 2002, the Massachusetts Community College Council, MTA/NEA (Union) filed a charge with the Labor Relations Commission (Commission) alleging that the Board of Higher Education (Employer or Board) had violated Sections 10(a)(1) and 10(a)(3) of the Massachusetts General Laws, Chapter 150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on October 3, 2002 alleging that the Board had violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by assigning Timothy Cichocki (Professor Cichocki) to teach courses outside of his academic discipline in retaliation for filing a grievance.<sup>2</sup>

The Board filed its answer on or about October 8, 2002.

On June 5, 2003 and October 24, 2003, Margaret M. Sullivan, Esq., a duly designated Commission hearing officer (Hearing Officer), conducted a hearing at which all parties had an opportunity to be heard, to examine witnesses and to introduce evidence. At the close of the hearing on October 24, 2003, the Union made an oral motion to amend the Commission's complaint of prohibited practice to include an allegation that the Board had independently vio-

lated Section 10(a)(1) of the Law by statements that Associate Dean Thomas Sabbagh (Associate Dean Sabbagh) had written in a December 11, 2001 memorandum.<sup>3</sup> The parties submitted their post-hearing briefs on or about July 26, 2004. The Hearing Officer issued Recommended Findings of Fact on May 5, 2005, and the parties filed challenges to her Recommended Findings on or about June 20, 2005.

Findings of Fact<sup>4</sup>

The Union and the Employer challenged portions of the Hearing Officer's Recommended Findings of Fact. After reviewing those challenges and the record, we adopt the Hearing Officer's Recommended Findings of Fact, as modified where noted, and summarize the relevant portions below.

The Union is the exclusive collective bargaining representative for all full-time and regular part-time faculty and professional staff who work in the Day Division of the Commonwealth's fifteen community colleges. The Union and the Board are parties to a collective bargaining agreement in effect from July 1, 1999 through June 30, 2002 (the 1999-2002 Agreement).<sup>5</sup>

Article 12, Section 12.03, and Article 12, Appendix A, of the 1999-2002 Agreement provide the agreed-upon criteria that the Board and the Union use to measure the workload of full-time faculty members. The criteria include a full-time faculty member's total units of instruction, which include the faculty member's total instructional hours and the number of preparations<sup>6</sup> that are allotted to the faculty member. Article 12.03 states in pertinent part:

Article 12, Section 12.03 Faculty Workload

A. Faculty workload shall consist of:

1. Instructional workload, which includes:
  - a) teaching in both traditional and non-traditional learning modes;
  - b) instructional preparation;
  - c) assessment of student performance.
2. Non-instructional workload shall consist of:
  - a) student assistance/advisement
  - b) office hours
  - c) college service ....
  - d) college recognized community service, provided that such service is not compensated by an outside funding source;
  - e) professional development activities ....

1. Pursuant to 456 CMR 13.02(1), the Commission has designated this case as one in which the Commission shall issue a decision in the first instance.

2. The Commission dismissed the portions of the Union's charge alleging that the Board had independently violated Section 10(a)(1) of the Law on the grounds that the Union's allegations were more appropriately alleged as a violation of Section 10(a)(3) of the Law. The Union did not seek reconsideration pursuant to 456 CMR 15.04 of the portion of its charge that the Commission had dismissed.

3. The Union submitted a written motion to the Commission on November 14, 2003, and the Board filed an opposition to the Union's motion on December 13, 2003. The Commission has allowed the Union's motion. See discussion, *infra*, at page 17.

4. The Commission's jurisdiction in this matter is uncontested.

5. Article XXVI of the 1999-2002 Agreement states that in the event that the Board and the Union fail to secure a successor agreement prior to the termination of the 1999-2002 Agreement, then the 1999-2002 Agreement shall remain in full force and effect until a successor agreement is executed or an impasse in negotiations is reached.

6. Preparations (preps) refer to the preparation periods allotted to faculty members who are teaching a particular course. Although faculty members sometimes teach multiple sections of the same course, i.e. five classes of algebra I, they are allotted a single prep for each course taught.

## B. Instructional Workload

1. The standard faculty instructional workload shall be thirty (30) units of instruction per year with no more than three (3) preparations per semester and no more than five (5) preparations per year. This standard is not intended to be a fixed, absolute maximum of 30 units of instruction per year, but is intended to achieve greater uniformity in the system with 30 units being the target norm.<sup>7</sup> Any significant variation above the norm could subvert the purpose of the standard; provided further that faculty teaching only didactic courses with more than 31 instructional hours per semester and faculty teaching other than only didactic courses with 34 or more instructional hours per semester will receive an adjustment in non-instructional workload. All such adjustments shall be made in accordance with Article XII, Appendix A of the Agreement.<sup>8</sup>

A unit of instruction shall mean per week:

- a) one (1) fifty (50) minute lecture or seminar;
- b) one and one-quarter (1¼) hours of laboratory instruction;
- c) one and one-quarter (1¼) hours of clinical instruction; provided that the effect of the implementation of this ratio shall not be considered as a violation of the standard of 30 units;
- d) one and six tenths (1.6) hours of individualized instruction or other non-traditional modes of instruction ....

### Article XII, Appendix A

The workload for faculty members shall include office hours for students, instructional workload and non-instructional workload as defined below. The faculty customary workweek shall be Monday through Friday, but in no case shall a faculty member be required to work more than five days in any seven consecutive day period....

## A. Instructional Workload

The instructional workload shall contain all faculty activity directly related to the preparation and/or conduction of instruction.

1. Preparation includes content and pedagogical research, the creation of instruction materials, development of student evalua-

tion instruments and procedures, the evaluation of student performance and any activity related to the instructional process. It is understood that faculty members at their option need to utilize off-campus resources in fulfilling their preparation time.

2. Contact time is the actual time the instructor spends with students in an instructional method.

3. The instructional workload shall be a minimum of twenty-nine (29) hours per week and a maximum of thirty-five (35) hours per week.

4. In determining the instructional workload the actual contact hours shall be added to preparation time allotted on the following basis ....

Professor Cichocki is a full-time faculty member at the College and a member of the Union's bargaining unit that is referenced above.<sup>9</sup> He holds a doctorate in electrical engineering and is a professor of electrical and computer engineering in the Division of Science and Engineering (Division)<sup>10</sup> at the College. Professor Cichocki has primarily focused on teaching electrical engineering courses at the College, including courses in digital electronics, electrical circuit analysis, hardware design and organization, and microprocessors.<sup>11</sup> The College occasionally assigned Cichocki to teach math courses, and at times Cichocki also agreed to teach math courses to earn additional compensation.<sup>12</sup> In the fall 2001 semester, he taught courses in electrical circuit analysis I, digital electronics, and microprocessors. His workload consisted of 13.8 units of instruction, 32.97 instructional hours, and three preps.

In or about October 2001, pursuant to Article 12.02 of the 1999-2002 Agreement,<sup>13</sup> Professor Cichocki submitted written notice for the spring 2002 semester of the courses that he preferred to teach and the schedule that he preferred to work.<sup>14</sup> He chose to teach courses in electrical circuit analysis II, digital circuitry systems II, and hardware design and organization.<sup>15</sup> In a November 29, 2001 memorandum, Dean Darkazalli notified Professor

7. The parties agreed to increase the targeted norm to 30 units of instruction per year in the 1999-2002 Agreement, from the targeted norm in the 1995-1998 collective bargaining agreement which was 24 units of instruction per year. The new targeted norm was not reflected in faculty course assignments at certain community colleges, including MassBay Community College (the College), until the 2001-2002 academic year.

8. Article 12, Appendix A also incorporates the two-page workload computation form, XII - 1, that is used to calculate a faculty member's units of instruction and instructional hours that accompanies all course assignments.

The workload computation form notes at the bottom of the second page that:

The total units of instruction is subject to a standard of 30 units of instruction per two academic semesters. If an assignment of over 15 units of instruction is made in a semester, the projected instructional workload for the next semester may be requested.

An assignment of more than 31 total instructional hours for faculty teaching only didactic courses, or for 34 or more total instructional hours for faculty teaching other than only didactic courses, will require an adjustment in the 11 hours of non-instructional workload.

9. Professor Cichocki began teaching at the College in the fall of 1992 and was granted tenure in January of 1999.

10. The Division is also sometimes referred to as the Science and Advanced Technology Institute at the College. The Division contains the following disciplines: electrical engineering, computer engineering, mechanical engineering, chemistry, mathematics, computer sciences, electronics and technology, which includes the areas of telecommunications and computer-aided designs.

11. The credits that students earn from taking those courses are typically transferable to a four-year college.

12. We have supplemented the findings of fact regarding Cichocki's math class assignments to more accurately reflect the record evidence.

13. Article 12.02 of the 1999-2002 Agreement states:

The President of the College or the President's designee shall consider as advisory written notice from each faculty member and/or department chairperson/curriculum coordinator as to the preferred schedule and courses to be taught. Such written notice must be received by the President of the College or the College's designee by March 30 for the fall semester and by October 30 for the spring semester. The President of the College or the President's designee shall notify in writing each faculty member of that faculty member's tentative schedule and courses by April 30 for the fall semester and by November 30 for the spring semester.

14. Pursuant to Article 12.02 of the 1999-2002 Agreement, the Division's Dean Ghazi Darkazalli (Darkazalli) was to consider Cichocki's written notice of his preference for course assignments as advisory. Arbitrator Milton Nadworny (Arbitrator Nadworny) in his decision in Case No. 11 390 0160 90 considered the meaning of similar language in the parties' 1986-1989 collective bargaining agreement. Case No. 11 390 0160 90 concerned an alleged change in a practice at Holyoke Community College, whereby faculty members previously decided schedules and course assignments at faculty meetings. Arbitrator Nadworny reasoned that:

'Advisory' can very simply mean that the preferences and recommendations submitted by a department faculty [member] should be implemented unless a Division Chair or other academic administrator has substantive

Cichocki<sup>16</sup> about his tentative course assignments for the spring 2002 semester, which included the three courses that Cichocki had requested as well as a fourth course, business mathematics.<sup>17</sup>

On December 4, 2001, Cichocki responded:

I recently received your spring semester workload. This memo is to inform you that this schedule violates the union contract on multiple counts

- more than 30 instructional units for the year<sup>18</sup>
- more than 33 instructional hours/semester
- more than 3 preps/semester and 5 preps/year

Please make appropriate changes in this schedule, consulting me if my agreement is necessary (as indicated in the union contract). If I do not receive such notice from you by Friday, 12/07/01, I will begin appropriate union action.

Professor Cichocki and Associate Dean Sabbagh subsequently met on December 5, 2001 and December 6, 2001<sup>19</sup> in an attempt to resolve the issue.<sup>20</sup>

Professor Cichocki presented additional reasons why the College should assign him to teach only the three electrical engineering courses that he had requested in October 2001. Associate Dean Sabbagh informed Professor Cichocki that he needed him to step up to the plate<sup>21</sup> and teach the business math course. Associate Dean Sabbagh also informed Professor Cichocki that if he did not agree to teach the business math course as well as the three engineering courses, the College could simply assign him to teach five math classes without his consent.

On December 11, 2001, Professor Cichocki filed a grievance at Step One of the contractual grievance procedure alleging that his spring 2002 work assignment violated multiple sections of the

contract. Also on that date, Associate Dean Sabbagh sent the following memorandum to Professor Cichocki:

In reference to your memo dated 12/04/01 and subsequent meetings and discussions in my office, I have outlined three possible workload assignments for your consideration (#1,<sup>22</sup> #2,<sup>23</sup> and #3<sup>24</sup>).

Please review them and let me know your preferred option by Friday, December 14, 2001. As I have explained in our conversations, faculty teaching in career programs often do not have more than one section of required courses to choose from. Therefore, faculty do teach more than 5 preps per year in order to accommodate their students, contractual obligations, as well as their own course preferences.

It is obvious (based on your grievance) that you have ended our informal conversations about these issues. Since you prefer to teach courses which only fulfill your contractual obligations, the best option for you is workload assignment #3.<sup>25</sup>

On December 14, 2001, Professor Cichocki sent the following memo to Dean Darkazalli:

In this memo I propose a solution to the workload discussion in which we are involved. Please note that a workload of the 3 EE [electrical engineering] courses would result in the following:

35 Total Instructional Hours for the spring 2002 semester and 70 total instructional hours for the [2001-2002 academic] year.

3 Class Preps for the spring 2002 semester and 6 class preps for the [2001-2002 academic] year.

By both measures of workload, this suggestion is indicated to be not merely an appropriate assignment, but one that in fact equals or exceeds the maximum values specified in the union contract. This plus the fact that the assignment remains within my work area indicates that it is reasonable and a good solution for both myself and the division. More importantly, it is a proposal which certainly is in the best interests of our students. This is the criterion which any institution advocating a philosophy of "CASE"<sup>26</sup> must choose to endorse.<sup>27</sup> I hope you will agree with me and accept this as a solution.

knowledge that the assignments of courses and schedules have been tainted by prejudice, politics, or other violations of academic freedom, or, of course, if student enrollments do not conform to expectations or if staff changes take place.

15. We supplement the findings of fact to reflect the parties' agreement that Cichocki's preferred assignment would consist of 13.8 units of instruction for the spring semester and 27.6 units of instruction for the year. This assignment included three preps for the semester and six for the year.

16. Associate Dean Sabbagh selected Professor Cichocki's course assignments initially, but his selections were subject to the review and approval of Dean Darkazalli.

17. The course assignments that Dean Darkazalli outlined in his November 29, 2001 memorandum would give Professor Cichocki a workload of 16.8 units of instruction, 39.96 instructional hours and 4 preps.

18. 13.80 units of instruction from the fall 2001 semester added to 16.8 units of instruction for the spring 2002 semester equals 30.60 total units of instruction for the 2001-2002 academic year. We have corrected calculation errors in the findings of fact, but have not modified the facts to correct errors that may exist in the documentary evidence.

19. Professor Cichocki characterized those meetings as informal meetings that were not scheduled ahead of time.

20. Associate Dean Sabbagh indicated that time was of the essence and that Professor Cichocki's course assignments for the spring 2002 semester needed to be finalized as soon as possible.

21. Associate Dean Sabbagh was seeking to increase the total number of courses that Professor Cichocki taught in a semester and to have the professor agree to voluntarily increase his instructional hours and/or his preps.

22. The first proposal reiterated the course assignments that were previously outlined in Dean Darkazalli's November 29, 2001 memorandum.

23. The second proposal required Professor Cichocki to teach an engineering class in hardware organization and design and four algebra classes, including two sections of introductory algebra and two sections of intermediate algebra. His workload would consist of 16.6 units of instruction, 34.93 total instructional hours and 3 preps.

24. The third proposal required Professor Cichocki to teach five math classes, including three sections of introductory algebra and two sections of calculus I. His workload would consist of 17 units of instruction, 32.91 instructional hours and two preps.

25. Associate Dean Sabbagh developed the three proposals prior to December 7, 2001, because he anticipated that he would encounter Professor Cichocki at the College on that date. However, he never scheduled a formal meeting with the professor. Ultimately, Associate Dean Sabbagh and Professor Cichocki never encountered each other on that date, and Associate Dean Sabbagh did not notify the Professor about the three options until the afternoon of December 11, 2001. Professor Cichocki had already filed his grievance at that point, and Associate Dean Sabbagh was aware that the grievance had been filed.

26. The acronym CASE stands for the slogan, "caring for students everyday."

27. Professor Cichocki contended that the three proposed workload options would negatively impact his students, his professional status and the reputation of the Col-

If you do not, pursuant to Associate Dean Sabbagh's memo, I will choose option #1—the 3 EE courses plus the business math. However, I must make it absolutely clear that this action on my part is not to be construed as a voluntary acceptance of your proposed workload. It is instead a result of being forced to choose from 3 undesirable options, all of which appear to violate the union contract. I retain my right to continue the grievance I have filed over this matter, and will pursue it until a just outcome is reached.

In a December 18, 2001 memorandum, Associate Dean Sabbagh notified Professor Cichocki that his course assignments for the spring 2002 semester would consist of five math classes.<sup>28</sup> Associate Dean Sabbagh also noted that the courses met all contractual obligations.

On December 20, 2001, Professor Cichocki in a memorandum to Dean Darkazalli responded:

I received and read with great interest your 12/18/01 proposal for my spring 2002 workload.

The workload indicated in the memo appears to be incorrect.<sup>29</sup> I request that you please review and verify this particular assignment, and appropriately initial your response to me.

Once again, I must make it absolutely clear that this action on my part is not to be construed as a voluntary acceptance of your proposed workload. It is instead a result of being forced to choose from undesirable options, all of which appear to violate the union contract. I retain my right to continue the grievance I have filed over this matter, and will pursue it until a just outcome is reached....

In response to Professor Cichocki's memorandum, Associate Dean Sabbagh issued a corrected course assignment to the professor on December 20, 2001 that showed each of the calculus I sections as being scheduled for four times per week.

For the spring 2002 semester, Professor Cichocki taught five math classes, three sections of fundamental algebra and two sections of calculus I, which was consistent with the course assignment that Associate Dean Sabbagh issued to him on December 18, 2001. The spring 2002 semester was the first time during Professor Cichocki's ten years of employment at the College that he did not teach any engineering courses.

#### Opinion

##### Section 10(a)(3) of the Law

A public employer that retaliates or discriminates against an employee for engaging in activity protected by Section 2 of the Law

violates Section 10(a)(3) of the Law. *School Committee of Boston v. Labor Relations Commission*, 40 Mass. App. Ct. 327 (1996); *Southern Worcester Regional Vocational School District v. Labor Relations Commission*, 386 Mass. 414 (1982). The Commission traditionally applies a three-step analysis to Section 10(a)(3) discrimination cases.<sup>30</sup> *Town of Clinton*, 12 MLC 1361 (1985), citing *Trustees of Forbes Library v. Labor Relations Commission*, 384 Mass. 559 (1981). First, the Commission determines whether the charging party has established a *prima facie* case of discrimination by producing evidence to support each of the following four elements: 1) the employee engaged in protected activity; 2) the employer knew of the protected activity; 3) the employer took adverse action against the employee; and 4) the employer's conduct was motivated by a desire to penalize or discourage the protected activity. If the charging party establishes a *prima facie* case, the employer may offer evidence of one or more lawful reasons for taking the adverse action. Once the employer produces lawful reasons for its actions, the employee must prove that, "but for" the protected activity, the employer would not have taken the adverse action. *Trustees of Forbes Library*, 384 Mass. at 565-566; *Bristol County*, 26 MLC 105, 109 (2000).

In this case, the parties do not dispute that Professor Cichocki engaged in protected activity by filing a grievance. Associate Dean Sabbagh's reference to Professor Cichocki's grievance in Sabbagh's December 11 memo demonstrates his knowledge of the grievance. The spring course assignment containing all math courses and no engineering courses constitutes adverse action, because the Employer knew that it was an undesirable assignment. See *Athol-Royalston Regional School Committee*, 28 MLC 204, 214 (2002) (loss of discretion over allocation of budgetary funds and loss of consultative role in departmental trips found to be punitive and constituted adverse action); *Suffolk County Sheriff's Department*, 27 MLC 155, 159 (2001) (employer's failure to consider employee for favorable and prestigious assignment constituted adverse action); *Town of Holbrook*, 15 MLC 1221, 1225 (1988) (sergeant's permanent assignment to desk duty was punitive and constituted adverse action); *Boston City Hospital*, 11 MLC 1065, 1072 (1984) (an involuntary transfer to a less desirable position constituted adverse action).

Absent direct evidence of improper motivation, unlawful motivation may be established through circumstantial evidence and reasonable inferences drawn from that evidence. *Suffolk County Sheriff's Department*, 27 MLC at 159. Professor Cichocki told As-

lege's engineering program. First, he asserted that his students would be negatively impacted, because they would be denied the educational benefit of having the same professor for companion engineering classes, including electrical circuit analysis I and II. Also, he argued that assigning him to teach lower level math classes instead of assigning him to teach engineering courses could tarnish his reputation as an engineering professor. Finally, he claimed that his advocacy on behalf of the College's engineering program would be discredited, when his industry contacts learned that he did not actually teach courses in the program.

28. Professor Cichocki was assigned to teach three sections of the fundamentals of algebra and two sections of calculus I. His workload would consist of 17 units of instruction, 32.91 instructional hours, and two preps.

29. Associate Dean Sabbagh's December 18, 2001 memorandum indicated that the two sections of calculus I would take place three times per week on Monday, Tues-

day and Thursday. However, the classes were actually scheduled for four times per week Monday, Tuesday, Thursday and Friday.

30. In discrimination cases where the charging party has proffered direct evidence of discrimination, the Commission applies the two-step analysis articulated in *Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination*, 431 Mass. 655 (2000). We have applied the three-step analysis of *Forbes Library* in this case, because we find no direct evidence of unlawful discrimination. We do not consider Associate Dean Sabbagh's statements in his December 11 memo to be direct evidence of discrimination, because the memo predated the disputed assignment, and because Sabbagh only references the grievance in the context of the ongoing informal conversations.

sociate Dean Sabbagh in their meetings on December 5 and December 6 of his desire to teach electrical engineering courses, and he reiterated his preference in his December 14 memo. Although the Employer previously had assigned Professor Cichocki to teach math classes, it had not, in Professor Cichocki's ten years of employment, assigned Cichocki to a course load that excluded engineering classes. We find that this departure from past practice, coupled with the Employer's knowledge of Professor Cichocki's preference for engineering courses, demonstrates circumstantial evidence of unlawful motivation. *See generally, Quincy School Committee, 27 MLC 83, 92 (2000).*

Under the tripartite *Forbes Library* analysis, once a charging party establishes a *prima facie* case of retaliation, it is the employer's burden to produce a legitimate, non-discriminatory reason for taking the adverse action. The employer must state a lawful reason for its decision and produce supporting facts indicating that the proffered reason was actually a motive in the decision. *Quincy School Committee, 27 MLC at 92.* Here, the Employer contends that the collective bargaining agreement limited the number of preps that it could assign to Professor Cichocki in the spring semester. This restriction compelled Associate Dean Sabbagh to give Professor Cichocki the disputed assignment, because it was the only assignment that satisfied the contractual requirements. The record supports the Employer's contention that the contract limited the number of preps to five per year, and that the spring assignment adhered to that limit because it contained only two preps. Consequently, the Employer has met its burden of production, and we must consider whether the Employer would have not assigned Professor Cichocki to Option III "but for" his protected activity. *Town of Athol, 25 MLC 208, 212 (1999).*

For the following reasons, we find that the Employer would not have given Professor Cichocki the disputed assignment, if he had not filed his grievance on December 11, 2001. Although the contract limits the number of preps that the Employer can assign to an employee each year, we do not agree with the Employer that Professor Cichocki refused to waive the annual prep cap. Professor Cichocki's December 14 correspondence shows his disdain for the options offered to him, but it also indicates his willingness to exceed the annual five prep limit and to teach courses that would total six preps for the year. In his memo, Professor Cichocki expressly characterizes his proposed three-prep course load as an "appropriate assignment." Thus, we are not persuaded that the contractual prep cap forced the Employer's hand and compelled Associate Dean Sabbagh to assign Professor Cichocki to Option III.

Second, we find no merit in the Employer's argument that it had made the decision to assign Professor Cichocki to a course load containing all math courses before Professor Cichocki filed his grievance. Associate Dean Sabbagh told Professor Cichocki that Sabbagh *could* assign him to five math classes, if he did not agree to teach the business math course along with the three engineering courses. However, the fact that Associate Dean Sabbagh considered various options and discussed potential work assignments with Professor Cichocki before Cichocki filed his grievance does not conclusively establish that the Employer had embarked on a

course of action in early December that was unaffected by Cichocki's subsequent grievance.

Finally, we note that in his December 11 memo, Associate Dean Sabbagh offered Professor Cichocki three workload options. Cichocki responded to the memo on December 14 stating that he would accept Option I, the course load containing three engineering classes and a business math class. Professor Cichocki also noted his preference for teaching courses in engineering, his work area. Associate Dean Sabbagh subsequently assigned Professor Cichocki to Option III, the only option that contained no engineering courses. Associate Dean Sabbagh's decision to consign Professor Cichocki to course subjects that Sabbagh knew were undesirable and to rescind the choice that he had previously offered to Professor Cichocki persuades us that he gave Professor Cichocki course subjects containing all math courses to punish Cichocki for filing a grievance. Accordingly, we find that the Employer has violated Sections 10(a)(3) and, derivatively, 10(a)(1) of the Law.

#### *Section 10(a)(1) of the Law*

On the last day of hearing, the Union asked the Commission to amend the complaint to allege that the Employer had independently violated Section 10(a)(1) of the Law when Associate Dean Sabbagh asserted in his December 11 memo: "It is obvious (based on your grievance) that you have ended our informal conversations about these issues. Since you prefer to teach courses which only fulfill your contractual obligations, the best option for you is workload assignment #3." The Commission has allowed the Union's motion to amend the complaint pursuant to 456 CMR 15.05(1), because this allegation is within the scope of the original complaint. Thus, we consider whether Associate Dean Sabbagh's statement tends to interfere with, restrain or coerce employees in the exercise of their rights under Section 2 of the Law. *Quincy School Committee, 27 MLC at 91, citing Town of Athol, 25 MLC at 212.*

To determine whether an employer's conduct violates Section 10(a)(1) of the Law, the Commission applies an objective test that focuses on the impact that the conduct would have on a reasonable employee. *Town of Winchester, 19 MLC 1591, 1596 (1992).* Expressions of anger, criticism or ridicule directed at employees' protected activities have been found to constitute interference, restraint and coercion of employees, although an employer's conduct need not actually restrain or coerce an employee in the exercise of the protected rights. *Groton-Dunstable Regional School Committee, 15 MLC 1551, 1556-1557 (1989).* In reviewing written statements, the Commission does not subject each phrase to a litmus test of permissibility, but considers the tone of the writing as a whole. *Town of Bolton, 32 MLC 20, 25 (2005).*

Associate Dean Sabbagh's December 11 memo discusses Professor Cichocki's workload and his grievance. The memo might suggest that Professor Cichocki wanted a light workload, but it does not express anger in tone or language and does not demean Cichocki for filing the grievance. Accordingly, we do not find that any statements in Associate Dean Sabbagh's December 11 memo would chill a reasonable employee from engaging in activity protected by Section 2 of the Law.

Conclusion

For all of the foregoing reasons, we conclude that the Employer violated Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law by assigning Professor Cichocki to teach all math classes and no engineering courses in the spring of 2002. Further, we find that the statements contained in Associate Dean Sabbagh's December 11, 2001 memo to Professor Cichocki did not independently violate Section 10(a)(1) of the Law.

Order

WHEREFORE, on the basis of the foregoing, it is hereby ordered that the Board of Higher Education shall:

1. Cease and desist from:
  - a. Retaliating against Professor Cichocki for engaging in concerted protected activity by assigning him to a course load that consists entirely of classes that are outside of his discipline.
  - b. In any like manner, interfering with, restraining and coercing its employees in the exercise of their rights guaranteed under the Law.
2. Take the following affirmative actions that will effectuate the purposes of the Law:
  - a. Consider Professor Cichocki's workload and course subject assignments without reference to his protected activity.
  - b. Sign and post immediately in conspicuous places where employees usually congregate or where notices to employees are usually posted and maintain for a period of thirty (30) days thereafter copies of the attached Notice to Employees.
  - c. Notify the Commission within ten (10) days of receiving this decision of the steps taken to comply herewith.

SO ORDERED.

**NOTICE TO EMPLOYEES**

The Massachusetts Labor Relations Commission has ruled that the Board of Higher Education (Employer) has violated Sections 10(a)(3) and 10(a)(1) of General Laws Chapter 150E (the Public Employee Collective Bargaining Law) by retaliating against Professor Timothy Cichocki for engaging in activity protected by Section 2 of the Law.

WE WILL NOT retaliate against Professor Cichocki for engaging in concerted protected activities.

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

WE WILL consider Professor Cichocki's workload and course subject assignments without reference to his protected activity.

[signed]  
Board of Higher Education

\* \* \* \* \*

In the Matter of UNIVERSITY OF MASSACHUSETTS

and

UMASS DARTMOUTH FACULTY FEDERATION, LOCAL  
1895, MFT, AFT, AFL-CIO

Case No. CAS-04-3590

- 34.2 *community of interest*
- 34.91 *accretion*
- 35.2 *confidential employees*
- 35.7 *supervisory and managerial employees*

October 5, 2005

Helen A. Moreschi, Commissioner

Hugh L. Reilly, Commissioner

James Cox, Esq.

*Representing University of  
Massachusetts*

Jeffrey Jacobsen, Esq.

*Representing University of  
Massachusetts at Dartmouth  
Faculty Federation, Local  
1895, MFT, AFT, AFL-CIO*

**DECISION<sup>1</sup>**

Statement of the Case

The University of Massachusetts Dartmouth Faculty Federation, Local 1895, MFT, AFT, AFL-CIO (Union) filed a petition with the Labor Relations Commission (Commission) on August 16, 2004 seeking to accrete the position of Director of Operations of the Advanced Technology and Manufacturing Center (ATMC) into its bargaining unit of administrative employees known as the Educational Services Unit (ESU). The Union and the University of Massachusetts Dartmouth (University) attended an informal conference at the Commission on April 12, 2005.

The Commission investigated the issues raised in the petition and, on August 12, 2005, provided the parties with a summary of the information adduced during the investigation. Further, because it did not appear that any material facts were in dispute, the Commission requested the parties to show cause why it should not resolve the unit placement issue based on the information summary.

The parties' responses to the Commission's show cause letter were due to be filed at the Commission on August 30, 2005. On August 29, 2005, the University filed an unopposed request for an extension of time until September 9, 2005 to file a response to the Commission's show cause letter. The University did not file its response by that date or request an additional extension of time to do so. Instead, the University filed its response on September 28, 2005. Under the attendant circumstances, we find that the University's response is untimely and do not consider it when rendering our decision here.

<sup>1</sup> Pursuant to 456 CMR 13.02(1), the Commission has designated this case as one in which the Commission shall issue a decision in the first instance.