OX SCHOOL COMMITTEE AND LENOX EDUCATION ASSOCIATION, MUP-3229 (12/10/80).
ision on Appeal of Hearing Officer's Decision.

(10 Definition)
16.2 strike - "work to rule"
(60 Prohibited Practices by Employer)
65.2 concerted activities
(100 Impasse)
108.2 withdrawal of services

nissioners Participating:

Phillips Axten, Chairman
Joan G. Dolan, Commissioner
Gary D. Altman, Commissioner

earances:

J. Norman O'Connor - Counsel to the Lenox School Committee

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DECISION ON APPEAL OF HEARING OFFICER'S DECISION

Statement of the Case

The Lenox Education Association (LEA) charges that efforts by the Lenox School ittee (School Committee) to stop a work-to-rule job action constitute interence with employees' protected rights. Hearing Officer Stuart A. Kaufman ed a decision upholding the LEA claim on January 10, 1980, from which the School ittee timely appealed. 6 MLC 1708. The School Committee filed a supplementary ement on February 13, 1980, to which the LEA responded on March 4, 1980. Based the entire record and the parties' submissions, we hold that certain aspects of work-to-rule constituted protected activity and that the School Committee's onse to those actions violated Section 10(a)(1) of G.L. c.150E (the Law).

Findings of Fact

No material facts are seriously disputed.[1] We therefore adopt the findings of

[1] The School Committee's supplementary statement included 15 pages of requested ings of fact, but ignored the directive of 402 CMR 13.13(5) that, "A party claiming the hearing officer has made erroneous findings of fact shall identify the findings lenged and direct the attention of the Commission to the evidence supporting the y's proposed findings of fact." (emphasis added) Under these circumstances, we accept the hearing officer's statement of facts. In any event, the only substandeparture from the hearing officer's fact findings urged by the School Committee erns the alleged "passive resistance" campaign of the Association. See Hearing cer's Decision, fn.3. Resolution of the dispute noted in fn.3 is unnecessary to determination of this appeal and is therefore not a "material fact" which we must lve. See 402 CMR 13.13(7).

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ing officer, which, for the purposes of this opinion, we summarize as

School Committee and the LEA commenced bargaining in November, 1977 for a ective bargaining agreement to succeed the one expiring on August 31, 1978. agreement had been reached prior to the beginning of school in September, e LEA initiated a series of actions designed to apply pressure on the School e.

September 5, about two-thirds of the faculty attended an LEA meeting at x Holiday Inn. There, John Barrett, chairperson of the LEA Crisis Committ- sented the Committee's recommendation that the faculty engage in a "work-to- b action in order to support the LEA's negotiating committee. Such an he explained, would consist of the following: from predesignated places, would enter and leave their school buildings en masse at the beginning and he "work day," as that term is defined by the collective bargaining agreement; would no longer engage in light conversation with principals or assistant ls; and teachers would not initiate questions at faculty meetings. The LEA the recommendation of the Crisis Committee. Following the LEA meeting, hers belatedly attended the staff orientation meeting scheduled by the super- t, Roland Miller. The work-to-rule action of the LEA was reported in the r 11 edition of the Berkshire Eagle, a newspaper of general circulation in area.

September 25, 1978, the LEA again met. This time, the Association voted to the work-to-rule. Prior to this meeting, teachers had been leaving the uildings at the end of the "work day," but had been correcting papers, g lessons, and performing other school-related work at home. Escalation at teachers would complete all of their obligations within the confines of k day."

LEA initiated other actions as well. For instance, 59 of the 80 teachers submitted requests for personal leave for October 3 (all of which were y Miller), and substantially increased numbers of teachers made requests heir personnel files. Two teachers indicated to their principal that they pending their duties with respect to certain extra-curricular activities; chers, after discussion with the principal, assured him they would resume tivities.

September 29, Miller issued a memorandum to all faculty addressing the LEA rule action.[2] He stated, "[I]t has been reported in the media and I have

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e full text is as follows:

All Faculty
M: Roland M. Miller
E: September 29, 1978

has been reported to me that there have been instances where faculty members have used the classroom as a forum to advocate, either directly or indi- tly, positions taken by the Lenox Education Association with respect to

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ived some student complaints regarding the failure to promptly grade papers the withholding of other services which have been customarily performed in the ." Miller concluded, "To avoid any misunderstanding, each of you should under- d that we shall view the failure to perform duties which have been traditionally ormed as a slowdown or withholding of services and, hence, a violation of the and, as Superintendent, I would have to take appropriate action, however distaste- that may be.

On September 27,[3] LEA Secretary Bonnie Carnevale drafted a letter which she nded to sent to parents of her students.[4] In the letter, Carnevale explained to

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current negotiations. This use of the classroom in an attempt to influence the children is very clearly a violation of the law as well as a serious breach of professional ethics. Hopefully, the reports are not accurate and no teacher has engaged in this kind of activity. But, if this were to happen, we would view it as a violation of the law and respond accordingly.

Further, it has been reported in the media and I have received some student complaints regarding the failure to promptly grade papers and the withholding of other services which have been customarily performed in the past. As a strategy, "work to rule" attempts to equate a contract with the rules of employment. Yet, there is little or no relationship between the two because contracts do not attempt to describe teacher work rules in a definitive way. Indeed, teachers are professionals and, by definition, their "work rules" cannot be published in labor contract language. For example, typical contracts do not include any language concerning correcting of tests or evaluating student work, etc. as these are veiwed as part of the teacher's professional obligation. In our situation where the contract has expired and the Committee has extended the terms and conditions of employment that existed last year, the teacher organization has the same obligation under the so-called status quo doctrine. In other words, if the Lenox Education Association is entitled to last year's terms and conditions, is not the school system as well?

Furthermore, Chapter 150E, Section 9A, of the Massachusetts General Laws states that "...no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees." To avoid any misunderstanding, each of you should understand that we shall view the failure to perform duties which have been traditionally performed as a slowdown or withholding of services and, hence, a violation of the law, and, as Superintendent, I would have to take appropriate action, however distasteful that may be.

We are in the midst of mediation and following the procedures outlined in the Law to resolve our differences. Hopefully, all will conform to the requirements of the law and will allow the bargaining process to continue without disrupting the educational program.

[3]All dates hereafter refer to 1978 unless otherwise indicated.

[4]The full text is as follows:

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nts how the work-to-rule would affect her teaching activities. Specifically, e said, (1) she would not work past 3:15 p.m. on school-related activities; would cease sending home weekly evaluations; (3) she would cease publication thly newletter to parents; and (4) she would be avilable to meet with parents ing her planning period. As fully explained in the hearing officer's decision, e used two teaching teachniques, weekly evaluations of the students and a newletter to parents, which were individual to her and not in general use teachers. We find from the record and the hearing officer's factfindings, that teachers, including Carnevale, made themselves avilable to meet with during times other than the planning period, and that "school-related es" such as correcting papers and lesson preparation often required teachers, g Carnevale, to work past the end of the school day, either at school or at

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r Parents,

you are probably aware, the Lenox Education Association has been negotiating the past 10 months with the School Committee to settle on a contract. pite our sincere efforts to come to an agreement with the School Committee, have been unable to resolve our differences. It is because of this that members of the L.E.A. have decided to "work to rule" and will continue ng so until a contract settlement is reached.

particular, what this means for you and me at this time is that I will not working beyond 3:15 p.m. on school related activities. What I will be ng besides my usual planning and teaching in school is trying to keep up on r children's work and get it out to you. For the time being I will have give up my weekly evaluations and the upcoming September Highlights news- ter. These are things that I personally do and are not systemwide. They also something that I could not possibly get done in school and it is h regret that I set them aside for now.

ase be assured that should you need to meet with me or I with you, we ld make arrangements to meet during my planning period in school during day.

ersonally feel very strongly about the position the L.E.A. has taken and ld welcome any of you to call me to discuss our situation regardless of fact that you may be for or against this action. I would also urge those you who are so inclined to call any or all School Comittee members with any stions you feel should be directed toward them.

m looking forward to the time when our contract is settled and we can urn to normal working conditions.

Sincerely,
Bonnie Carnevale

e LEA as charging party has the burden on all elements of its affirmative case.
(Footnote continued on following page)

For various reasons not germane to our decision, Carnevale never sent the :er to the parents. She did, however, distribute it to various teachers, and it posted on a bulletin board withthe erroneous inscription, "Bonnie C. sent the owing letter to her students' parents." The letter found its way to Miller who, l Principal Marguerite Cameron, entered Carnvale's classroom the morning of Octo- 6. Miller displayed a copy of Carnevale's letter to parents, and asked whether had sent it out. She said that she had not. He referred to a statement in the :er regarding keeping up with children's work, and asked whether she anticipated ıg that. She said that she was keeping up with work. He asked her whether the 'd paragraph, which said that meetings with parents would take place during the ıol day, meant that she would not meet with parents after school. That was what ıeant, she said. He then asked whether seh ever had, in fact, met with parents ır school. She gave some examples of having done so. Finally, Miller asked :her Carnevale intended to stop sending home her weekly evaluations and her :hly newsletter. She said that she did. He asked why. "Because I am in a work- 'ule situation," she responded. He said that those activities were customary and :, therefore, be continued. She argued that the activities were voluntary and been done on her own time. Miller then asserted that she had to do them. When 'd why, he said that work-to-rule was not a legitimate excuse for stopping her vities, adding that had her excuse been a professional one or one related to her :-school communications, it would have been legitimate. They argued further ıt the effect of work to rule, until finally Miller declared, "Cut the crap." :ameron followed Miller out of the classroom, she turned to Carnevale, apologized, said that she had advised Miller not to come.

Later that day, Miller sent a letter to Carnevale, which stated in pertinent :

> As I explained to you, if you were to take the steps outlined in your letter, you would, indeed, be withholding services that you have customarily provided. Further, your reason for such action, as you have explained, would be to support the "work to rule" action of the Lenox Education Association and that such action would continue "until a contract settlement is reached."
>
> So that there is no misunderstanding, I want you to understand that Marguerite and I expect you to provide those services which you have customarily provided over the years. This is a directive and, specifically applied to the areas mentioned in your letter of September 27, means the following:
>
> 1. You are to "keep up" with the work of the children as you have done in the past. When we met, you assured us this was being done and, thus, I see no problem here at the present time.

5/(footnote continued from previous page)
the reasons elaborated below, we conclude that one such element would be that :her availability after school was not a duty of employment. The LEA failed to ıblish this element.

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2. You are to continue with the "weekly evaluations" mentioned in paragraph two.
3. You are to issue your newsletter as you normally have done.
4. You are to accomodate parental requests for conferences and not restrict them to the school day.

I certainly recognize the difficulties that some teachers are having in deciding what is proper and improper in the present situation and, under the assumption that you did not realize that you might be acting improperly, I am not going to put this letter in your personnel file. My reason for visiting with you today and writing this letter is so that you will have clear guidelines as to what is expected of you.

netime subsequent to their October 6 meeting with Carnevale, Miller and decided that Carnevale did not have to prepare her newsletter. Their was based, according to Cameron, on the fact that the newsletter was ng Carnevale did on her own and had not been requested to do. Cameron phoned le to tell her this, and CArnevale asked Cameron to put it in writing. On 20, Cameron sent notice to Carnevale that she was not obligated to issue sletter as she normally had done.

October 4, LEA President Donna Donovan sent a letter to her students' describing the impact of work-to-rule on her teaching activities.[6] cally, Donovan said, (1) she would correct papers, meet with parents and deal

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he full text is as follows:

ar Parent(s):

you are probably well aware, the Lenox teachers are at a "work to rule" tuation. This is a result of the inability of the bargaining committees the Lenox Education Association and the School Committee to reach accord er several contract issues.

an effort to produce the most harmonious understanding between you and I this difficult time, I will attempt to explain how the above situation ll or will not, impact my classroom.

expect to be as prepared as I have always been, adhering to the highest hical qualities of my profession. My dedication, like any teacher's, nnot be determined by a timetable. Therefore my performance in the class- om will be, as it has always been, of the highest quality.

expect to be able to correct assignments during my free period and lunch- me. If you wish to see me for a conference, it will be held at those mes. Call the school, leave a message, and I will return the call. sisting children with individual academic and/or personal problems will be ne at recess time(s) also.

ere are several areas that go beyond the "normal obligations" of teachers

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:h students' special problems only during free periods such as lunch and recess; the coffee hour she planned for parents would be postponed; and (3) she might be able to make complete comments on students in the take-home folders she pre-:d twice a month. As the hearing officer found, the coffee hour and the take-home lers were educational practices individual to Donovan and not in general use by)x teachers. As we found above with respect to Carnevale, however, teachers :rally performed school-related activities such as grading papers and meeting with :nts and students beyond the confines of the school day.

At 9 a.m. on October 6, Donovan entered the Center School teachers' room. :ing there were Miller and Cameron. The principal told Donovan that they wanted speak to her about the letter that she sent. Miller then took out a copy of the :er,[7] and began to question Donovan about it. He asked her if her statement that planned to correct assignments during her free periods meant that she was not ig to keep up with her work. Her reply indicated that she would keep up. He :d her if her statement that she would hold parent conferences during her free

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[6](footnote continued from previous page)
that I performed in the past. I refer specifically to the attached sheet. This sheet briefly describes my personal program for enhancing home/school communications. It is not a reflection of school policy.

I would normally be planning and communicating to you about the coffee hour. I have decided to postpone this until agreement in bargaining has been reached, and will contact you at that time. (I bring it to your attention now for advanced notice as I do each year.)

Your child will be bringing home a T.H.F. (take-home-folder) twice a month on Mondays. There is a place for both parents and teacher comment. This is something I usually do at home. Therefore if no teacher comment is written it should be understood that I did not have time to do it during the day.

There are other areas in regards to the communications sheet that may need clarification as time goes on. I will work under the assumption that negotiations will be resolved soon, and therefore see no need to mention those areas at this time.

I sincerely hope I can plan, and look forward to, the coffee hour in the very near future. It is one of the most pleasureable ways I have found of getting parents interested in their child's classroom, as well as helping to clear up any present or future misunderstandings about what goes on in the room.

I look forward to meeting each of you and working with you to make your child's year in fourth grade both educationally sound and interesting.

Sincerely,
Donna M. Donovan

[7]Miller received the letter as a parent, having previously requested that his ghter be placed in Donovan's classroom.

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meant that she would refuse to meet with parents at other times. She that if the conference could not be held during her free period and was enough, she would not refuse to accommodate a parent who requested an after- onference, and that she had in fact handled three conferences at her own ve over the phone in the evenings. Miller then asked whether her statement would assist children with personal problems at recess times meant that neglecting the needs of the children. She assured him that she would deal blems as they came up and in the most direct way possible. Upon Miller's Donovan confirmed that her coffee hour had been postponed. He asked whether anything to do with collective bargaining, and she said that it did. g to Donovan, there was some discussion about her assertion that these acti- ere voluntary and therefore could be curtailed during work-to-rule. Miller that they were customary and must, therefore, be provided. Miller also d his belief that what Donovan had told him contradicted the implications etter to parents. Miller testified that he left indicating that he would think more about Donovan's letter. Donovan testified that Miller left asser- t Donovan's failure to perform customary activities was a withholding of and that he took the letter as a serious offense about which he would have mething.

October 12, an advertisement appeared in a local newspaper. At the top was , "Notice!! Lenox Taxpayers." Below that was a body of text, and at the as the note, "Paid for by Lenox Education Association," followed by the Donovan, Carnevale, and two other LEA officers. The text read, in part, as

> The Lenox Education Association would like to clarify what "working to rule" indicates. It means that the traditional work of the teacher, that is, correcting papers, planning lessons, confer- ring with parents, recording grades, etc. will be done during the confines of the school day. Unfortunately, this does not leave time for the many personal contributions and involvements that teachers voluntarily bring to their classrooms. However, we want to assure you that Lenox teachers will continue to adhere to the highest ethical qualities of our profession. Our dedication cannot be determined by a timetable. Therefore, our performance in the classroom will be, as always, of the highest quality.

next day, an article in the Berkshire Eagle reported that the School Com- ad issued a strong statement of support for the superintendent. The article that the statement came in response to an LEA vote to condemn Miller for ed disagreement with Donovan and Carnevale.

the same day, Miller issued a memorandum to all faculty. It stated:

> It has come to the attention of the School Committee that one or more members of the faculty intend to write and deliver letters to parents which directly or indirectly refer to the collective bar- gaining process or to what the Lenox Education Association refers to as "work to rule."

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On instructions of the School Committee, I am hereby advising you of the following:

1. School children are not to be used for the delivery of such correspondence;

2. Such correspondence is not to be prepared on school time or with the use of school facilities or materials.

You are further advised that such correspondence if otherwise delivered to parents is not to substantially indicate that you are or that you anticipate the withholding of any services contrary to the law.

The School Committee feels that the law provides appropriate means for the resolution of collective bargaining issues and has asked me to convey to each of you that it hopes that you will permit that process to function.

on October 13, Miller sent a letter to Donovan. It read:

Following my inquiry of you on October 6, 1978, concerning your October 4 letter to the parents of your fourth grade class, I have discussed the contents with Principal Marguerite Cameron and have decided to issue this as a letter of reprimand to be placed in your personnel file. This reprimand is written for what, in my opinion, is conduct unbecoming a teacher for the writing and distribution of your October 4 letter and for possible insubordination with respect to my memo to the faculty of September 29.

As an alternative to having this reprimand placed in your file, I will extend to you the following option. You may, if you choose, write a second letter to your parents to clear up several points. First, the fourth paragraph is, in my judgment, very misleading with respect to parent conferences. You state, "I expect to be able to correct assignments during my free period and lunchtime. If you wish to see me for a conference, it will be held at those times" (underlining mine). Both Miss Cameron and I, prior to our conference with you, interpreted those statements to mean that you would refuse to meet with a parent for whom an after-school conference was the only reasonable possibility. However, during our meeting, you stated to us that you would indeed make arrangements that would accomodate such a request from a parent. Therefore, if you choose to write another letter to parents, you must make it clear that you will accomodate parents who request an after-school meeting.

Second, you state at the end of paragraph four: "Assisting the children with individual and/or personal problems will be done at recess times also." While one could read this statement to mean that you would restrict such assistance to recess times, you stated at our

October 6 meeting that you would continue to assist children at any time which, in your professional judgment, would be most effective in dealing with the issue. Again, if you choose to write a second letter, it must make clear that assistance to children will be provided as you have customarily odne. Finally, such a letter must also assure parents that you plan to provide written comments on the "Take-Home Folders" to the same extent as in the past.

With reference to the School Committee's directive of October 13 concerning letters to parents, you may send the letter home with the children and you may prepare it on school time and with the use of school facilities and materials. However, you may not indicate that you are or that you anticipate the withholding of any services contrary to the law.

If you choose to write the letter, it is to be distributed no later than the end of the school day on Friday, October 20, with a copy sent to Miss Cameron and to me. Otherwise, you are to sign the enclosed copy of this letter and return it to be placed in your personnel file. If I receive neither a copy of a second letter to parents nor a signed copy of this letter by Monday, October 23, this letter shall be placed in your file and shall be considered by the administration and School Committee as a letter of reprimand. (emphasis in original).

:ause Donovan became ill, Miller extended until October 27 the time in ıe was to write the clarifying letter.

ıovan did not, however, write the letter. Instead, on October 27, she wrote ır that she felt it was her obligation as a teacher to keep her students' informed of all that went on in her classroom, and that she had always done

To have parents draw conclusions based on heresay (sic) and inadequately documented newspaper articles, without a more articulated explanation from myself, can only foster unfounded assumptions that could be injurious to the learning environment. I therefore think it would be conduct unbecoming a teacher not to communicate to them that their child's education was indeed not being neglected.

ıovan went on to accuse Miller of insulting her both professionally and lly. She said that she considered the reprimand to be without basis in d an attempt at harassment and intimidation in violation of her rights.

ller mailed a response to Donovan on November 2. He wrote:

[T]o suggest that the doctrine of academic freedom gives you the right to advocate the position of the LEA and to support the withholding of services is to use the guise of academic freedom

> as a conduit for what is essentially a political statement to parents. (Emphasis in original).

hen reiterated his belief that her letter to parents was misleading based on what said during their October 6 meeting. He confirmed that the reprimand would be ed in her personal file, and invited her to submit for the file a written answer. ovember 8, Donovan placed in her file a notice that Miller had granted her request ttach to the reprimand Miller's September 29 memorandum to all faculty, her ber 4 letter to parents, Miller's letter granting her an extention of time to are a clarifying letter, her October 27 response to the reprimand, and Miller's mber 2 reply to her response.

Opinion

The hearing officer found that Carnevale and Donovan were engaged in lawful, erted activity protected by Section 2 of the Law in drafting and/or sending the ers and in restricting their activities as they did. He therefore found that er's actions, specifically his September 29 memorandum to all faculty, his ber 6 meetings with Donovan and Carnevale, his October 6 letter to Carnevale, his October 13 and November 2 letters to Donovan, constituted interference, raint, and coercion in violation of Section 10(a)(1) of the Law because he atened disciplinary action if the teachers persisted in engaging in their protec- ctivity.

The School Committee argued to the hearing officer and reiterates on appeal that an's and Carnevale's actions, as part of the LEA work-to-rule, constituted a e within the meaning of Section 9A(a) of the Law. Their actions were therefore rotected under Section 2, and the employer was entitled to discipline them. chool Committee further argues that there is no proof of unlawful motivation ller's part.

The Commission now has before it several cases involving "work-to-rule" activity. ch of these cases, including this one, public employees, in an attempt to bring ure on their employer, have threatened to cease or actually ceased certain acti- s while continuing to perform the bulk of their usual work. In each case the ssion must determine whether such actions are proscribed under Section 9A(a) e Law, which reads:

> No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees.

on 1, the definitional section of the Law, defines "strike"; however, "work age," "slowdown," and "withholding of services," as used in Section 9A, are ined.

In most work-to-rule cases, as in this one, the employer does not contend that mployees are engaged in a full-fledged strike. Rather, the claim is made that mployees are engaged in a "wtihholding of services" or "slowdown" proscribed ction 9A(a). Our task is to coordinate the Section 1 definition of strike with ection 9A prohibitions, and to interpret the different sections in a harmonious

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radictory, manner, Commissioner of Banks v. McKnight, 281 Mass. 467, 183 20 (1933), while preserving the vitality of the words of the statute, Common- . Wade, 372 Mass. 91, 360 N.E.2d 867 (1977).

nition of Strike

begin our inquiry by analyzing the definition of strike contained in Section 1:

> a public employee's refusal, in concerted action with others, (1) to report for duty, or his (2) willful absence from his position, or his (3) abstinence in whole or in part from the performance of the duties of employment as established by an existing collective bargaining agreement or in a collective bargaining agreement expiring immediately preceding the alleged strike, or in the absence of any such agreement, by written personnel policies in effect at least one year prior to the alleged strike;.... (numbers supplied for later reference).

by number above, the definition has three distinct elements. The first, to report for duty, covers the traditional concept of the full-fledged With respect to this element, we need only note that the refusal to report would constitute a strike only when there is a correlative right of the to require attendance. Similarly, employees' absence from their positions, nd aspect of the definition, would be a strike only when their presence equired. The third element of the definition proscribes both total and refusals to perform duties of employment and meticulously delineates the ances under which an employer may require employees to report or to be present positions. It reads: "absence in whole or in part from the performance of f employment as established by an existing collective bargaining agreement collective bargaining agreement expiring immediately preceding the alleged or in the absence of any such agreement, by written personnel policies in t least one year prior to the alleged strike." See Town of Milford, 6 MLC 79); City of Beverly, 3 MLC 1229 (1976). We have departed from this construc- y when a public emergency has been involved. Town of Arlington, 3 MLC 1276

have had little occasion to consider the breadth of the three criteria by ties of employment are to be measured. Two extremes may be rejected.

extreme is that the Legislature intended to preclude by the strike definition s of withholding of services. Two factors lead us to the conclusion that the ure had no such intent. First, the definition is carefully drawn by reference has been done in the past, either by agreement of the parties or by long- employer practice. Second, in developing the current strike definition, the

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Town of Arlington, employees protested working conditions by refusing to sand ets. In finding the protest to constitute a strike, we held, "We believe that employer has certain residual authority, in an emergency situation, to the public interest by requiring the performance of services which would e be voluntary." 3 MLC at 1277.

lature rejected an apparently more comprehensive definition.[9]

The other extreme, advocatdd by the LEA here, is that the definition must be literally, and the definition of duties includes only those expressly stated in ng in a collective bargaining agreement or in personnel policies. Such a ruction would frustrate both the common sense and the obvious intent of the Legis- e to ensure the delivery of basic public services. Collective bargaining agree- often fail to define duties of employment expressly. The contract may nowhere hat a teacher shall teach, that a fire fighter shall fight fires. Nevertheless, duties are so essential to the very nature of the job as to require no explica- Others are necessarily implied in the collective bargaining agreement under the employees work.

We concur with the policies of both courts and arbitrators that implied in ctive bargaining agreements is an obligation to continue certain customs and practices of the parties. The following extracts are typical of the views of rators:

> "It is generally accepted that certain, but not all, clear and long standing practices can establish conditions of employment as binding as any written provision of the agreement."

a General Hospital, 50 LA 48, 51 (1976) (D. Jones, Arbitrator).

> "It is well recognized that the contractual relationship between the parties normally consists of more than the written word. Day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are not at variance with any written provision negotiated into the contract by the parties and where they are of long standing and were not changed during contract negotiations."

Specialty Co., 39 LA 197, 198 (1947) (M. Volz, Arbitrator).

> "Custom can, under some circumstances, form an implied term of a contract. Where the Company has always done a certain thing, and the matter is so well understood and taken for granted that it may be said that the contract was entered into upon the assumption that the customary action would continue to be taken, such customary action may be an implied term."

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[9]Specifically, the strike definition in Senate Doc. 1771(1973) was rejected. liscarded language read:

(8) "Strike" shall mean a public employee's refusal, in concerted action with 's, to report for duty, or his willful absence from his position, or his stoppage ›rk, or his abstinence in whole or in part from the full, faithful, and proper ›rmance of the duties of employment, for the purpose of inducing, influencing or :ing a change in the conditions, compensation, rights, privileges or obligations ıblic employment; provided that nothing herein shall limit or impair the right ıy public employee to express or communicate a complaint or opinion on any matter :ed to the conditions of employment.

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ndard Oil Co., 16 LA 73, 74 (1951) (W. McCoy, Arbitrator).[10]

order to constitute a past practice enforceable as a "duty" of employment, tice must be long-continued, well understood, and mutually concurred in by ies.[11] Columbia Broadcasting Corp., 37 LA 330 (1961), cited with approval, lantic and Pacific Tea Co., 46 LA 372 (1966). The origin of the practice is sive. Whether it began on the instructions of the employer or was instituted rily" by the employees is not determinative if the practice is longstanding been regularly performed. In determining past practices, we are concerned h group, not individual, practices. It is the union which is party to the , not individual members of the bargaining unit. To find otherwise would dis- individual employees from doing additional or creative tasks, since they ereby become obligated to continue such extra work at the risk of discipline arge. Therefore, individual performances which are superior to, or individual es which are different from, the bargaining unit's generalized level or means rmance cannot be considered enforceable past practices[12] for purposes of ing required duties in a strike or work-to-rule context.

New York Public Employment Relations Board (PERB) and the New York courts en a similar approach in determining those duties which public employees form to avoid committing an illegal strike as defined by Section 210(a) lew York Civil Service Law (Taylor Law). Strike is defined by Section 210(a) "any strike or other concerted stoppage at work or slow down by public em- " Town of Hempstead v. Bellmore-Merrick United Secondary Teachers, Inc., 2d. 282 (Superior Court, Nassau County 1975) involved a refusal by teachers d a "Back to School Night"--an annual event where teachers meet parents. t found that despite the absence of any reference to the affair in the appli- llective bargaining agreement:

> ...the fair, reasonable and obvious inference to be drawn from the mutual conduct of the parties is that this once-a-year after hours program has, by custom and usage, been regarded by both the administration and by the union members as part of their teaching duties and professional responsibilities and it is too late in the day for the teachers to maintain that they have an absolute, unilateral right to refuse any further participation in the program. In short, the court holds that the long standing conduct of the parties establishes quite plainly that attendance at the 'Back-to-School-Night' is an activity which the parties have considered to be an integral part of professional

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Accord, Steelworkers v. Warrior and Gulf Navigation Co., 80 S.Ct. 1347, 1351-1352

As noted above, fn.8, we have enunciated an exception to this rule where an y substantially affecting public health or safety requires employee response he ordinary course.

This approach is similar to that taken by arbitrators in past practice decisions i-employer settings. See, e.g. National Brewing Company of Michigan, 31 LA 58) (M. Kahn, Arbitrator).

> duties of the teachers and the teachers do not have the option to refuse to participate therein. 85 Misc.2d. at 286 (emphasis supplied).

lso Suppa v. New Rochelle, 11 PERB 7538 (1978); Amalgamated Transit Union, Division, 580, 8 PERB 3056 (1975); Yonkers Firefighters, Local 62, I.A.F.F., RB 3067 (1979) ("the concerted failure by public employees to perform voluntary ces in the usual and customary manner constitutes a strike....") 12 PERB at

To conclude: "duties of employment," abstinence in whole or in part from which itutes a strike, include not only those duties specifically mentioned in ing or recently expired collective bargaining agreements (or personnel policies fect for more than one year), but also those practices not unique to individual yees which are intrinsic to the position or which have been performed by yees as a group on a consistent basis over a sustained period of time.

ection 9A(a) Prohibition

Section 9A(a) reads as follows:

> No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees.

on 9A(b) provides recourse to the Commission "(w)hen a strike occurs or is about cur."

It is clear from our interpretation of the definition of strike that a broad of partial withholdings of services constitutes a strike. The question is, does the Section 9A(a) reference to "work stoppage, slowdown or wtihholding rvices" regulate job actions not covered by the term "strike"? We think not.

Our construction of the term strike encompasses most notions of the meaning of stoppage, slowdown or withholding of services." Certainly "work stoppage" to refer to what has classically been understood to be a strike, and whether ork stoppage is continuous or intermittent would be of no importance given the ole or in part" language of the strike definition. "Slowdown" presumably the delayed or slower performance of work, and again, would seem covered by the art" language of the strike definition. "Withholding of services" is certainly ined in the strike definition to the extent that "services" relates to "duties loyment." Thus, we conclude that the Section 9A(a) prohibitions are coextensive the Section 1 definition of strike, which includes traditional ideas of both and partial refusals to perform required duties.

o-Rule as Protected Activity

iven this construction of Sections 1 and 9A(a) of the Law, we turn to the ionship of these sections to Section 2, which protects the right of employees "to in lawful, concerted activities for the purposes of collective bargaining or mutual aid or protection, free from interference, restraint or coercion."

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:ion 2 by its terms affords employees protection similar to that of Section 7 ıtional Labor Relations Act, as amended, 29 U.S.C. 151 et seq. (NLRA); cases ınder the NLRA are helpful in interpreting c.150E although we must be mindful ·ences between the statutes and the public and private sectors. See City ›f Medford v. Labor Relations Commission, 353 Mass. 519, 233 N.E.2d 310 We have generally looked to federal precedent in determining whether certain is protected, Commonwealth of Massachusetts, 4 MLC 1415 (1977), or unpro-:ity of Boston (Edward Hunt, Sr.), 6 MLC 1096 (1979) (although we do not)llow it, City of Boston (Howard Rotman), 3 MLC 1101 (1976). Activity which ·ted and intended to improve the lot of fellow employees as a group loses its ›n when it is unlawful, Southern Steamship Co. v. NLRB, 316 U.S.31, 10 LRRM :); violent, NLRB v. Fansteel Metalurgical Corp., 306 U.S.240, 4 LRRM 515 n breach of a collective bargaining agreement, NLRB v. Sands Mfg. Co.,)32, 4 LRRM 530 (1939); or indefensibly disloyal to the employer, NLRB v. Local .1229, IBEW (Jefferson Standard), 346 U.S. 464, 33 LRRM 2183 (1953).

-fledged strikes, generally protected in the private sector, are unlawful and : unprotected under c.150E. Furthermore, less comprehensive job actions which ıin the sweep of Section 1, as discussed above, are also illegal and hence :ed.[13] However, a withholding of services, engaged in by employees in fur- of their collective bargaining goals, which is not prohibited by Section 1 of would gain the protections of Section 2, subject to the normal constraints action not be violent, unlawful, in breach of contract, or indefensibly

·its of this Case

:urn now to the actions taken by Carnevale and Donovan and Miller's responses actions.

ıevale drafted a letter to the parents outlining how the work-to-rule would :r activities as a teacher. Four aspects of the letter warrant our attention. ·ale's refusal to work beyond 3:15 p.m. on school-related activities; 2) her ı of weekly evaluations; 3) her cessation of a monthly newsletter; and 4) her :o meet with parents owther than during her planning period.

:r the principles we have described above, we find that the weekly evaluations ıonthly newsletters are activities individual to Carnevale, and are not · duties which teachers in Lenox are at least implicitly required to perform. ıd, however, that teachers as a group have traditionally been expected to work :15 p.m. when required to keep current with their work. We also find that it ıst practice and expectation that teachers be available outside of school meet with parents to discuss students. Thus, were Carnevale as part of work-

: note that under the NLRA, case law has somewhat restricted the right of ;ector employees to engage in partial strikes. See UAW Local 232 v. Wis. Emp. 'n. (Briggs & Stratton), 336 U.S.245, 23 LRRM 2361 (1949); Lodge 76, Int'l. Assn. & Aero Wkrs. v. Wis. Emp. Rel. Com'n., 427 U.S.132, 92 LRRM 2881 (1976). The ;ilent on partial strikes, and the restrictions developed in response to that ;cause c.150E specifically prohibits partial strikes, federal case law on the largely irrelevant.

ule to cease production of the weekly evaluations and newsletter, that would be vity protected under Section 2 of the Law. However, refusing to do any work ide of the specified hours of the work day, be it classroom preparation or meeting parents, would constitute a strike if the refusal were concerted with other ners.

Carnevale never sent the letter. The only aspects of her letter which she carried were the cessations of the weekly evaluations and the newletter. Having learned , Miller responded with a discussion with Carnevale on October 6 and a follow-up er. In both instances Miller ordered Carnevale to perform all of her duties, uding the weekly evaluations and the monthly newsletter. Because we have found that vas protected in her right to refuse to perform those functions, Miller's order, ed by a threat of discipline, constitutes unlawful interference, restraint and tion violative of Section 10(a)(1) of the Law.[14] The order to perform the other es, however, was permissible inasmuch as these constituted duties of employment e cessation is proscribed by Section 9A(a). Because she did not cease to perform e duties, she wasnever reprimanded and there is no further violation.

Donovan's case is somewhat different. She drafted and sent a letter to the nts. Three aspects of the letter are material: 1) Donovan's willingness to correct s, meet with parents, and deal with students' special problems only during free ods and lunchtime; 2) Donovan's cancellation of her special coffee hour; and ne possibility that the twice-monthly take-home folders might be less complete before the work-to-rule. The clear import of her letter was that Donovan would work after school correcting papers or assisting parents and children. We have l that this had been a customary practice among teachers in Lenox. Thus, were Dono- in concert with others, to carry out her intentions in this regard as her part rking to rule, such would constitute a strike within the meaning of Section 1 of Law. However, the cancellation of the coffee hours and the possibly incomplete home folders merely reflect a cessation of practices individual to Donovan and under the principles outlined above, were not required as duties of employment.

Miller responded to Donovan's actions by meeting with her on October 6. Donovan Miller that she would continue to have conferences after school if required and ict had done so on her own initiative. She also assured him that she would with the problems of the children as they came up. Miller told her that she o perform all of those duties she had in the past performed, under threat of pline. We find that his statement to her is a violation of Section 10(a)(1) of

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[14] The School Committee contends on appeal that there was no proof that Miller was ally motivated in warning Carnevale to continue to perform all previous educational ities. The argument fails. Miller was clearly attempting to require Carnevale t rtain things which we hold she was protected in refusing to do. Furthermore, as ixth Circuit of Appeals held in National Cash Register Co. v. NLRB, 460 F.2d 81 LRRM 2001 (6th Cir. 1972), den. cert. 410 U.S.966 (1973), "If the employer acts od faith but mistakenly assumes that his conduct does not infringe on protected ity,...the employer will be held to have interfered with protected rights without ficient justification, and the absence of an improper motive will not exculpate rom a violation of Section 8(a)(1)." 81 LRRM at 2012.

vith respect to the coffee hour and the take-home folders, but does not con-
a violation as to the other duties which were traditionally required of Lenox

lowing the conversation, Miller wrote a letter to Donovan reprimanding her for
unbecoming of a teacher", namely writing and distributing the October 4
The letter gave Donovan the opportunity to avoid the reprimand by writing a
f clarification to the parents. Donovan refused to write such a clarifying
nd the repimand was entered in her file.

ovan's letter to the parents had the likely and foreseeable effect of convincing
t she would not be performing certain expected and required services. We
sider the legal and factual context of the letter. It came in the midst
gaining dispute and during a well-publicized and escalating work-to-rule
on. An employee communicated directly to the parents, indicating which services
provided and which would not.[15] By its nature, the letter constituted more
ere threat to wtihhold certain services, because these services are in part
d by requests from the services' recipients. This turns what might otherwise
d as a mere threat into an accomplished fact, because we may reasonably
at the recipients' expectation that the services will be withheld will reduce
or such services. See NLRB v. Local Union No.1229, IBEW (Jefferson Standard),
464, 33 LRRM 2183 (1953). An employee in these circumstances is effectively
the parents that the employer is no longer offering certain services. Where
oyer is entitled to offer (and require its employees to perform) these services,
ion is an arrogation of the employer's prerogative. Cf. Honolulu Rapid
Co., 110 NLRB 1806, 35 LRRM 1305 (1954). Because Donovan did not actually
her services, we cannot find her actions to constitute a strike. We cannot
however, the fact that Donovan's letter accomplished in part the same end--
ence with the employer's right to have those services provided. Thus, with
to her assertion that she would not perform those duties which we have found
obligated to perform, we find Donovan's letter to the parents to be conduct
ted by Section 2 of the Law. Miller's reprimand is thus permissible except
as he reprimands her for conveying her intention to refrain from performing
nctions which do not constitute "duties of employment."

ovan could have avoided the reprimand by clarifying her letter to the parents.
ude that when an employee has an obligation to perform a service and creates
le public impression that that service will not be performed, the employer is
to require the employee to retract that public statement and give assurances
work will be performed. Accordingly, we find that to the extent that Donovan
imanded for refusal to clarify her letter to the parents the reprimand was

aining for consideration is Miller's memorandum issued to all teachers on

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[15] The mere fact of communicating directly to the parents would not trouble us under
rcumstances were the withdrawal of services limited to those not required under
ysis. Donovan's letter was less a political statement than information to the
about what they could expect of the teacher in the coming year, the type of
:ation routinely occurring between parent and teacher.

ember 29, which stated in part:

> To avoid any misunderstanding, each of you should understand that we shall view the failure to perform duties which have been traditionally performed as a slowdown or withholding of services and, hence, a violation of the Law, and, as Superintendent, I would have to take appropriate action, however distasteful that may be. (emphasis supplied).

ist determine whether it may reasonably be said that, under the circumstances, emorandum tended to interfere with the employees' free exercise of their rights Section 2 of the Law. Bristol County House of Correction, 6 MLC 1582 (1979). unclear to what duties the emphasized portion of the memorandum refers. If emorandum is understood to command performance of only those duties explicitly plicitly required by the prior collective bargaining agreement, the memorandum impinge on no protected right. If, however, the memorandum is understood to re the performance of all duties, both those individual to a particular teacher hose in effect system-wide, the memorandum is an overbroad directive violative ction 10(a)(1). We think the latter interpretation more likely. The work-to- was escalating, and two teachers had already disclaimed any intention of performing in duties with respect to extracurricular activities. We need not determine aspects of the LEA work-to-rule constituted a strike and which aspects consti- protected activity. It is sufficient to find that the teachers may reasonably interpreted the memorandum to be an attempt to coerce performance of all duties, er individually undertaken or collectively required. Thus, we hold that the mber 29 memorandum constituted an additional violation of Section 10(a)(1) of aw.

We conclude with a general comment about the conduct of Superintendent Miller is case. Miller was faced with a difficult situation as the LEA embarked upon action largely untested in this state. As is apparent from our discussion , many aspects of the work-to-rule might be found to violate Section 9A(a) if atter were litigated; some aspects we have found to be protected. Miller oted to keep the situation from getting out of hand, and it is evident from his is that he wanted the matter settled as amicably as possible. His conduct was ed largely against unprotected activity, and we have held that conduct permis- ; we have found violations only where his actions were overbroad.

CONCLUSION

On the basis of the foregoing, we conclude that the School Committee violated on 10(a)(1) of the Law by interfering, restraining and coercing employees in the se of their rights guaranteed by Section 2 of the Law, to the extent that the Committee sought to require employees to perform duties not explicitly or itly required under the most recent collective bargaining agreement.

ORDER

ursuant to Section 11 of the Law, the School Committee IS HEREBY ORDERED to:

. Cease and desist from interfering with, restraining and coercing employees in the exercise of their guaranteed rights;

Take the following affirmative action which will effectuate the purposes of the Law:

a. Remove from Donna Donovan's personnel file all letters of reprimand which were issued as the result of the "work-to-rule."

b. Immediately post, in plain view, and leave posted for thirty (30) days from the date of posting, in a conspicuous place in each of its school buildings where teachers usually congregate and where notices are usually posted, a signed copy of the Notice attached hereto.

c. Notify the Commission in writing within ten (10) days of receipt of this Decision, of the steps taken to comply herewith.

ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PHILLIPS AXTEN, CHAIRMAN
JOAN G. DOLAN, COMMISSIONER
GARY D. ALTMAN, COMMISSIONER

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

The Massachusetts Labor Relations Commission has concluded that the Lenox ol Committee engaged in prohibited practices under the public employee collective aining law in the Fall of 1978.

Specifically, the Massachusetts Labor Relations Commission has concluded that actions of the Lenox School Committee constituted an interference with, restraint coercion of Donna Donovan and Bonnie Carnevale in the exercise of lawful concerted rity.

WE WILL NOT interfere with, restrain or coerce Donna Donovan or Bonnie Carnevale ne exercise of lawful, concerted activity.

Further, WE WILL permanently remove from the personnel files of Donna Donovan letters of reprimand which were issued as the result of the "work-to-rule."

LENOX SCHOOL COMMITTEE