BOSTON CITY HOSPITAL AND AFSCME, COUNCIL 93, MUP-4893 (7/25/84).

63.21 discrimination -- filing a grievance
65.2 concerted activity
69.4 standards for discharge and discipline
92.45 motions to re-open
92.51 appeals to full commission

Commissioners participating:

Paul T. Edgar, Chairman
Gary D. Altman, Commissioner

Appearances:

David J. Hickey, Esq. - Representing Boston City Hospital

Joseph R. Lettiere, Esq. - Representing the American Federation of State, County and Municipal Employees, Council 93

DECISION ON APPEAL
OF HEARING OFFICER'S DECISION

Statement of the Case

The issue in this case is whether the City violated G.L. c.150E when it transferred Lawrence Brenner from his position as Senior Medical Librarian at Boston City Hospital to a job updating tumor records at the Hospital Tumor Registry, allegedly because of his making heat complaints and filing a grievance pursuant to a collective bargaining agreement. The hearing officer held that the City did not violate the Law in effectuating this transfer. We affirm the hearing officer's decision to dismiss the complaint in this case, but we modify and enlarge his findings of fact. Moreover, we modify his analysis of the parties' burdens of persuasion in a Section 10(a)(3) discrimination case, as elaborated in our Opinion below.

The case began on June 18, 1982, when the American Federation of State, County and Municipal Employees, Council 93 (Union) filed a charge with the Labor Relations Commission (Commission) alleging that the City of Boston, through the Boston City Hospital (Hospital or Employer), had violated certain sections of General Laws, Chapter 150E (the Law). After an investigation, the Commission issued its own Complaint of Prohibited Practice, alleging that the Employer had violated Sections 10(a)(1) and (3) of the Law. After an expedited hearing on October 29 and December 2, 1982, at which both parties appeared, were represented by counsel, and had full opportunity to present evidence, examine and cross-examine witnesses, Hearing Officer Alan Shapiro issued his decision on April 7, 1983, dismissing the allegations of the Complaint.

On April 21, 1983, the Union filed a timely appeal of the hearing officer's decision and thereafter submitted a supplementary statement, pursuant to CMR 13.12, that was received by the Commission on May 6, 1983. The Employer filed no

supplementary statement. On October 14, 1983, the Union filed a Motion to Reopen the Hearing in this case in order to present certain additional documentary and testimonial evidence. For the reasons stated in the opinion, below, the Union's Motion to Reopen is denied.

Facts

Lawrence Brenner began his employment with the Hospital in 1962, as an Assistant Medical Librarian. In 1965, he was appointed Senior Medical Librarian, in which capacity he remained until May 19, 1982, when he received the transfer which gave rise to this case. At the time of his transfer, Brenner was classified at Grade R-12. As Senior Medical Librarian, Brenner was in charge of the Hospital Medical Library, and since mid-1981 he was the sole employee in the Library. In approximately February 1982,[1] Robert Ulchak was promoted from Assistant Director to Director of the Medical Records Department. The Medical Library is within the supervisory jurisdiction of the Medical Records Department.

From late January through March, Brenner repeatedly complained to Ulchak about the lack of heat in the Library. According to Ulchak's testimony, Brenner had also complained about the heat to Ulchak's predecessor, prior to January of 1982. In response to Brenner's complaints, Ulchak called the plant manager, who explained that the heat for the Library was provided by the central system for the building and could not be separately controlled. The heat was gauged to the Medical Building where the patients were located. Heat reached the Administration Building, where the Library was housed, only after traveling through the Medical Building. Thus, if the patients were sufficiently warm, the heat would not be turned on, and no heat supply would reach Brenner's area. Ulchak testified that he instructed Brenner to report to the Tumor Registry, located in another building, if he found the Library too cold. Brenner testified that that suggestion was only made once, in April. Brenner did not accede to Ulchak's suggestion.

On April 12, Brenner and the Union steward filed a grievance, seeking as a remedy that the hospital "supply heat to the Medical Library in the morning when the temperature inside is 60°F or below." Ulchak responded to the grievance at Step 1 on April 14, explaining in writing the workings of the heat system. He also wrote:

> "2. In addition, I have on all occasions when notifyed [sic] by Larry Brenner of perceived heating problems suggested and encouraged that he report to his Cost Center-Tumor Registry, located in the ACC Building if he felt his health endangered. He has never chosen to do so.
>
> 3. I have not received any notification, written or verbal from any of the 2,679 library users/physicians during the period in question regarding heating problems or other environmental concerns.

[1] Unless otherwise specified, all dates herein refer to 1982.

January	1057 users
February	822 users
March	800 users
	2679

4. I'm sure Spring will resolve any perceived heating problems in the Library."

Brenner's grievance was resolved at Step 3 of the grievance procedure, on May 6, by referral to the "safety committee."

From April 16 to April 26, the Library was scheduled to be closed for renovations. Brenner's vacation, from April 19 to April 27, coincided with the work. The work, however, took longer than anticipated, and when Brenner returned, the Library was still unusable. Brenner called Ulchak to report that the Library was a "mess"; Ulchak told Brenner he could help out in the Tumor Registry or work in the office pending completion of the Library. Brenner reported to the Tumor Registry. The Library renovation was completed in mid-May.

While working at the Tumor Registry, Brenner's duties included going through a backlog of cards on various cancer patients and attempting to locate them on the telephone. Under a state law effective January 1, 1982, the hospital was required to maintain and report records of the tumors in its patient population. The regulations allowed the hospital six months from the date of diagnosis to file the necessary reports. According to Ulchak, Brenner's certification as a Registered Records Administrator (RRA) qualified him to cull the mandated information from patient records. Curtis Henderson, who was in charge of the Tumor Registry and responsible for compiling these records before Brenner's arrival at the Tumor Registry, held no RRA certification.

From April 26 to at least April 30, the hospital posted a job opening for a Medical Records Librarian, classified at Grade R-13. The posting indicated that the opening was for the Medical Records Department.

On May 3, Ulchak received a letter addressed to Jim Mahoney, Ulchak's predecessor, from Charles W. Sargent, president of the Medical Library Association (MLA). The letter is here reproduced in full:

April 30, 1982

Jim Mahoney, Esq.
Acting Director
Medical Records Department
Boston City Hospital
818 Harrison Avenue
Boston, MA 02118

Dear Mr. Mahoney:

I would like to bring to your attention the experience that I as

President of the Medical Library Association have had with one of your employees, Mr. Lawrence Brenner.

Mr. Brenner found what he felt was a discrepancy in our auditor's report. After a number of letters to Mr. Brenner and several telephone calls, Mr. Brenner was not satisfied. He began a letter campaign to a number of the members of the Association stating that there was a "Watergate" cover-up. We asked our auditors, a reputable firm in Chicago, to write to him, and our President-elect also had an independent audit conducted. In spite of all our efforts (and most of the Board was not elected to office until after the years in question), he still continued the attack. A collegue [sic] sent a copy of a letter from him accusing me of ordering the auditing firm to change the books. I resent this very much as such action would not only by a breach of trust with our membership, but also would constitute an illegal act.

My concern currently is that Mr. Brenner is your institutional representative to the Medical Library Association. His actions may not be the type you desire for your institution. At our suggestion he resigned his personal membership, but chose to retain the institutional membership.

If Mr. Brenner continues his attack on my personal integrity, I may have to seek legal advice. Our Association is contemplating its future actions as well.

I would be happy to give you the full particulars and discuss this with you if you wish to pursue the matter. Please telephone me at your convenience at the number above.

Sincerely,
Charles W. Sargent, Ph.D.

sc: Bd. of Directors + Orfanos, Palmer

The following day, May 4, Ulchak telephoned Sargent to discuss the content of Sargent's letter. Ulchak asked Sargent to send copies of Brenner's correspondence with the MLA and to hold off on the lawsuit pending Ulchak's review of the material.

When the Library reopened in mid-May, Ulchak assigned an administrative assistant to take charge, and Brenner remained at the Tumor Registry. On May 12 or 13, Brenner telephoned Ulchak to verify a report that Brenner's position was posted at Simmons College, at an advertised salary approximately $1,000 more than the Senior Medical Librarian position, Grade R-12. The record is ambiguous as to Ulchak's response. Nonetheless, Ulchak apparently did not tell Brenner at this time that his library job was in jeopardy or that a transfer was imminent, nor did Ulchak disclose his contacts with Sargent concerning the MLA correspondence.

On May 19, 1983, Ulchak sent Brenner a memo premanently assigning him to the

Tumor Registry. The memo stated, "You have been working at the Tumor Registry since April 26, 1982 and feel this arrangement will best serve the interests of this department as well as the department of Health & Hospitals." This action was not preceded by any notice or discussion with Brenner. Both the Union's representative and Ulchak agreed in their testimony that the hospital customarily precedes disciplinary action against employees with a notice or warning.

Ulchak received the requested MLA documentation on approximately June 2, together with a cover letter from Dr. Sargent, which stated:

> "...Please accept my appreciation for your prompt response to this problem. I regret that Mr. Brenner has reached the state where you have to take some action, but I felt that his employers should be aware of his activities... ."

The documents comprised a series of letters between Brenner, officers and members of the Medical Library Association and the accountants for the Association. Brenner's letters extended from July 1981 to January 1982. He alleged a "Watergate" type cover-up involving funds of the Association. Three of the letters from July and August of 1982 were written on Hospital letterhead stationery. The Association, through its directors and accountants, repeatedly denied Brenner's charges. Brenner eventually withdrew his personal membership in the Association but continued to act as the hospital's representative under its institutional membership.

Toward the latter part of May, the Hospital hired Margie Dempsey pursuant to the previous posting for the position of Medical Records Librarian, Grade R-13, but assigned her to the Medical Library. She began work on June 15.

On June 18, Ulchak sent Brenner a memo labelled "Assignment to New Work Area," directing him "to report to the Library in the Department of Radiology," effective Friday, July 2. Ulchak testified that this transfer to Radiology was to fill in for a vacationing employee. Brenner remained there until August 6, when Ulchak reassigned Brenner to the Tumor Registry "due to the backlog of work" there, "due to the unforeseen illness of Curtis Henderson." (U.Ex.7).

On August 12, Union representative Francis represented Brenner at Step 3 of the grievance that protested his transfer. The Hospital was represented by spokesperson James Beverly. Beverly justified Brenner's transfer on the grounds that the heat would be too costly to repair and that the transfer of Brenner would solve the problem. Beverly attributed both these reasons to Ulchak.

Ulchak, however, testified that he transferred Brenner to the Tumor Registry initially because of the backlog of work there, owing to the state-mandated reporting requirements. Ulchak testified that he permanently transferred Brenner to the Tumor Registry after hearing from Sargent in regard to the Medical Library Association (MLA).

The Union's Supplementary Statement

The Union claimed that the hearing officer made erroneous findings of fact and

omitted critical facts. Specifically, the Union claimed that the record shows that Brenner's complaints about the heat began in 1980-81, whereas the hearing officer found that these complaints occurred from "late January through March 1982." The Union cited no portions of the record to substantiate its position on this disputed fact. See CMR 13.13(5). The Union further challenged the hearing officer's failure to include in his findings the admission made by the management representative at the third step grievance hearing regarding the reasons for Brenner's transfer. Cynthia Francis, Council 93 staff representative, testified that management representative James Beverly attributed Robert Ulchak's motives for making the transfer to two heat-related factors: (1) the heat would be too costly to repair, and (2) it would solve the problem to transfer Brenner.

The Union also challenged the hearing officer's alleged failure to attribute proper legal significance to certain facts. Specifically, the Union urges:

> (1) that more significance should attach to Ulchak's suggestion, prior to the transfer and in response to Brenner's heat complaints, that brenner report to the Tumor Registry, where it was warmer;
>
> (2) that it it unsupported and unreasonable to assume that any lawsuit which might stem from Brenner's letters to the Medical Library Association (MLA) would only be averted by transferring Brenner, rather than some other action, such as withdrawing Brenner's membership in the MLA as the representative of the Hospital; and
>
> (3) that any dire need for Brenner's services in the Tumor Registry is belied by his transfer several weeks later to the Radiology Department for several weeks.

Because the Union challenged certain of the hearing officer's findings of fact, the entire record in this case has been reviewed. Such review confirms the accuracy of most of the hearing officer's findings. However, the foregoing factual findings modify and expand upon those of the hearing officer is some respects. The most notable addition to the hearing officer's findings stem from the Francis testimony about management's statements at the third step of Brenner's transfer grievance on August 12, 1982. According to Francis, James Beverly, the management representative at that meeting, ascribed two motives to Robert Ulchak, Director of the Medical Records Department, for transferring Brenner: first, that the heat would be too costly to repair; second, that transferring Brenner would solve the heat problem. As the Union pointed out, Ulchak, who was present and testified at the hearing, neither denied that these were the reasons he stated to Beverly nor otherwise responded to Francis' testimony. We accept the Francis testimony as evidence of Ulchak's motivation for Brenner's transfer since the witness was credible, the testimony was given in Ulchak's presence, and the information was unrebutted. Accordingly, this evidence is incorporated into the foregoing statement of facts and considered in the opinion below.

Opinion

The elements of a Section 10(a)(3) violation are: (1) that the employee was engaged in protected activity; (2) that the employer knew of this activity; (3) that the employer took adverse action against the employee; and (4) that the employer's motive in taking this action was to penalize or discourage the protected activity. City of Boston (Police Department), 8 MLC 1872, 1874 (1982); City of Boston, 7 MLC 1216, 1223 (1981); Clinton Services Corporation d/b/a Great Expectations, 9 MLC 1494, 1497 (1983). Cf. So. Worcester County Reg. Voc. School District v. LRC, 386 Mass. 414, 418-19 (1982). A charging party establishes a prima facie violation once it produces evidence to support the findings of fact on each element.

With respect to the motivational element, the charging party bears the burden of demonstrating in its prima facie case that the protected activity played some role in causing the adverse action. An employer may then rebut the prima facie case by producing evidence that one or more lawful reasons actually motivated the adverse action. If lawful motives are found to coexist with the impermissible motive, thereby rendering the case one of "mixed motives," the Commission must judge the employer's motivation by a "but for" standard. That is, if the employer would not have taken the adverse action against the employee but for the employee's protected activities, the adverse action is unlawful and the employee will prevail. If, on the other hand, a lawful cause would have led the employer to the same conclusion even in the absence of protected activity, the adverse action must not be disturbed. Trustees of Forbes Library v. LRC, Mass. Adv. Sh. (1981) 2183; Minuteman Reg. Voc. School Dist., 10 MLC 1177 (1983).

In Forbes Library, supra, the Supreme Judicial Court elaborated on the allocation of the burdens of proof and persuasion in applying the "but for" test for mixed-motive cases under G.L. Chapter 150E. Specifically, after the prima facie case has been established, the employer's burden is only a responsibility to produce evidence. The employer must state a lawful reason for its decision and produce supporting facts indicating that the stated reason was actually a motive in the decision. Once the employer has proposed a lawful reason and presented supporting facts, the presumption of discrimination is dispelled. The burden of persuasion is on the charging party, who must prove by a preponderance of the evidence that the asserted lawful reason was not the real reason for the discharge. Thus, if either the Commission finds that the adverse action would have occurred even in the absence of the protected activity, or if the evidence is in balance, the employer will prevail.[2]

[2]The burdens of production and persuasion applied by the Supreme Judicial Court in Forbes differ from those applied by the National Labor Relations Board, as enunciated in the Board's decision in Wright Line, Div. of Wright Line, Inc., 251 NLRB 1083, 105 MLRR 1169 (1980). Wright Line, like Forbes, proceeds upon a "but for" test for establishing the impermissible motive element. However, under the Wright Line formula, the employer not only must establish that it had another, legitimate motive, but also must persuade the decisionmaker that the legitimate motive was controlling -- i.e., that the employer would have taken the same action absent the protected activity. Thus, if the decisionmaker determines that the employer's legitimate motives were controlling, the charging party would lose under either the

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In connection with the above discussion, we wish to clarify certain aspects of the motive analysis in the hearing officer's decision. First, the "but for" test does not require the charging party to establish that the employer's proffered legitimate motives were "pretextual." On the contrary, unless the employer has substantiated that it was actually motivated in some part by legitimate factors, the case is not one of "mixed motives" and the "but for" test does not come into play. The second point is related to the first. The decision-maker must find it more than "plausible" that legitimate reasons motivated the employer's decision. Those reasons must actually have been a motive in the decision in order to be a case of dual motive.

In the remainder of this opinion, we apply the preceding analysis to the facts of the Brenner transfer.

1. The Prima Facie Case.

Relying upon the so-called "Interboro" doctrine, the hearing officer found both Brenner's complaints about the heat and his filing a grievance on April 12, protesting the lack of heat, to be protected activity within the purview of Section 2 of the Law. According to the "Interboro" doctrine, an individual employee's grievance under a collective bargaining agreement is concerted activity, although he may be the only one affected by his grievance. Interboro Contractors, Inc., 157 NLRB 1295, 61 LRRM 1573 (1966), enf'd, 399 F.2d 495, 67 LRRM 2083 (2d Cir. 1967). The Commission has adopted the Interboro principle, Town of Halifax 1 MLC 1486 (1975); Town of West Springfield, 8 MLC 1041, 1047 (1981). Because Brenner pursued his complaints about the lack of heat through the contractual grievance procedure, we have no difficulty in determining that his actions are concerted and protected.

With respect to the elements of employer knowledge of Brenner's protected activity and adverse action (an involuntary transfer to a less desirable position), we agree with the hearing officer that these elements are not in controversy. Turning to the motivational element, the record yeilds sufficient evidence upon which to conclude that Brenner's heat complaints played a role in Ulchak's decision to transfer him. Various factors contribute to this conclusion. Circumstantial factors which may affect a finding of improper motive include the timing of the adverse action in relation to the protected activity and the insubstantiality of the reasons advanced by the employer for the termination, Town of West Springfield, 8 MLC 1041, 1047-48 (1981). In addition, marked departure from normal procedures for effectuating employee discipline, such as failing to provide prior warning to the employee, failure to tell the employee the reason for the action contemporaneously

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Forbes or the Wright Line burden allocations. If, however, the decisionmaker cannot determine whether the impermissible motive was a "but for" factor and the evidence is in balance, the charging party would prevail under the Wright Line and lose under the Forbes allocation of the burden of proof. The United States Supreme Court recently upheld the NLRB's Wright Line formula in its decision in NLRB v. Transportation Management Corp., 462 U.S. ____, 113 MLRR 2857 (1983).

with the action, and different explanations for the action, may cast doubt upon the legitimacy of the employer's motives. See generally, Morris, Developing Labor Law (1983) at 193.

As the hearing officer noted, hostility toward Brenner's heat complaints could be inferred from the sarcastic tone of Ulchak's response to Brenner's April 12 grievance (Union Ex.1). More significant direct evidence linking the transfer to the heat complaints is supplied by management's comments on August 12 at Step 3 of Brenner's transfer grievance. There, management attributed the transfer to two heat-related factors: 1) that fixing the heat would be too costly; and 2) that Ulchak thought it would remedy the heat problem to reassign Brenner. When these comments are compared with Ulchak's previous directions to Brenner to report to the Tumor Registry if he was cold in the Library, they are sufficient to establish a prima facie finding that the heat complaints contributed in some part to the transfer.

Certain circumstantial factors also cause us to suspect impermissible motivation. One is the timing of the transfer, which is not only proximate to Brenner's grievance, but tenuously connected to one of the Hospital's asserted lawful reasons for the transfer, namely, the need for Brenner's services as a Registered Records Administrator (RRA) in the Tumor Registry.

A second circumstantial factor is the irregular way in which the transfer decision was made and communicated to Brenner. Ulchak testified that, absent an emergency, the normal procedure for disciplining employees because of job performance would be to warn them first. Although Ulchak spoke with Brenner on approximately May 12 or 13, 1983, Ulchak made no mention to Brenner of the communications from Dr. Sargent, any other concerns about Brenner's job performance, or the tumor backlog situation. Indeed, Ulchak at no time discussed these concerns with Brenner before or after the May 19 memo effectuating the transfer. Certainly the failure to provide contemporaneous reasons or warning casts suspicion on the Hospital's motives. This suspicion is enhanced by the Hospital's asserting heat-related reasons for the transfer at one proceeding (the August 12 meeting) and other reasons before this agency. Accordingly, we find that Ulchak was responding at least in part to Brenner's heat complaints when he decided to transfer Brenner to the Tumor Registry.

2. The Hospital's Asserted Lawful Reasons and the Union's Burden of Persuasion.

In order to rebut the Union's prima facie case, the Hospital must state a lawful reason for its decision and produce supporting facts indicating that this reason was actually a motive in the decision to transfer Brenner. Trustees of Forbes Library, supra. The Hospital claimed a need for Brenner's services as a certified Registered Records Administrator to relieve the backlog of work in the Tumor Registry, caused by the state-mandated tumor reporting requirements. The Hospital also relied upon certain communications from Dr. Sargent of the MLA concerning Brenner's charges of fund misuse and cover-ups on the part of officials of that organization. A review of the events leads us to conclude that, of these two asserted reasons, only the MLA communications played a role in the May 19 transfer decision.

The timing of the May 19 transfer and other relevant events demonstrate that the tumor-backlog-RRA rationale was not instrumental in that decision. Both Ulchak's and Brenner's testimony are consistent with the conclusion that Ulchak had no intention as of April 27 to permanently reassign Brenner. Yet the tumor reporting requirements went into effect the previous January. Curtis Henderson, who was in charge of the Tumor Registry, was handling the updating of records and compliance with the reporting requirement. Brenner was on an approved vacation from April 19 through April 26, which was scheduled to coincide with the Library renovations taking place that week. Rather than having been planned to relieve a backlog of work, the April 27 move to the Tumor Registry appears to have been an ad hoc response to the happenstance that the Library renovations remained unfinished when Brenner returned from his vacation. Indeed, on April 27, Brenner and Ulchak had a discussion about how Brenner should handle the Library mail while the Library was closed. Moreover, Ulchak gave Brenner the choice of working in the office until the Library was ready or reporting to the Tumor Registry.

The "backlog" rationale is also belied by the fact that Brenner was only working at the Tumor Registry for about one month before he was transferred to the Department of Radiology on June 18, where he remained until August 6. The tumor backlog rationale does not appear to have become operative until August 6, owing to the unexpected illness of the Tumor Registry supervisor, Curtis Henderson, who had been doing the tumor updating work. In sum, the tumor reporting requirements and Brenner's RRA certification may have cloaked the transfer with an added advantage, but only as an afterthought.

In contrast, the timing of the transfer is contemporaneous with the Hospital's other stated justification for the transfer: the communications from Dr. Sargent. On May 3, approximately one week after Brenner began working in the Tumor Registry because of the Library renovations, Ulchak received a letter from Dr. Sargent of the MLA, disclosing certain allegedly libelous charges Brenner had been making against Sargent and the MLA officials. On May 4, Ulchak telephoned Sargent to discuss Brenner's MLA activities and asked for copies of Brenner's letters.

In the meantime, the Hospital was interviewing applicants for the Medical Records Librarian position it had posted on April 26. Both Ulchak's testimony and the job posting exhibit indicated that this position was originally intended for the Medical Records Department rather than the Medical Library. The decision to hire Margie Dempsey for that position and assign her to the Medical Library was made toward the latter part of May, and she began working in the Medical Library on June 15.

The Union made a Motion to Reopen the Hearing in this case and offered to produce evidence alleged to support the contention that a job posting was conveyed by telephone on April 27, 1982 to Simmons College for a position entitled "Medical Librarian - Boston City Hospital," at a salary of $14,000, and that this job was posted at the College beginning on May 4, 1982. The Union contended that this evidence was both newly-discovered and significant. The posting predated Sargent's contacts with Ulchak. Thus, if the job that was posted on April 27 was, in fact, Brenner's job, it would mitigate against a finding that the MLA communications played a role in the decision to transfer Brenner. The Union claimed it was unaware

of the existence of this evidence because an unidentified employee of the College had told Brenner, somewhat contemporaneously with the posting, that access to the posting was available only to students, and both Brenner and his attorney believed that the posting would have been discarded by the time of the hearing in this case, some six months later.

Although the job posting evidence the Union sought to introduce arguably could be relevant to the issue of impermissible motivation in this case, we decline to reopen the record. In previous cases, the Commission has articulated the principle that evidence which a party seeks to include in the record after the close of the hearing generally must be newly-discovered evidence, which was in existence at the time of the hearing, but of which the moving party was excusably ignorant, despite the exercise of reasonable diligence. See City of Worcester, 5 MLC 1397, 1398 (1978); Town of Wayland, 5 MLC 1738, 1739-40 (1979); NLRB v. Decker and Sons, 569 F.2d 347, 97 LRRM 3179 (5th Cir. 1978.) The Union has not satisfied these criteria in the present case. While the Simmons job posting documents may not have been in the Union's possession at the time of the hearing, the Simmons posting was a subject of both Brenner's and Ulchak's testimony at the hearing. Thus, the record itself demonstrates that the Union was aware of the Simmons posting at the time of the hearing. Yet the Union failed to subpoena the posting from the College, the City, or the Hospital Personnel Director, the individual Ulchak testified would have been responsible for conveying the job posting information to Simmons. Instead, the Union admits that its failure to produce this evidence at the time of the hearing was based upon inaccurate assumptions about the availability of the posting. We are not persuaded that the Union exercised reasonable diligence or that its failure to exclude the posting evidence was excusable neglect. The other evidence that the Union sought to introduce pursuant to its Motion (Ulchak's proposal to budget for the installation of heating controls in the library) is of negligible probative value. City of Worcester, 5 MLC at 1398. Moreover, we are not satisfied that this evidence could not have been produced at the hearing in this matter, if reasonable diligence had been exercised.

Under these circumstances, to reopen the record in this matter more than a year after the hearing ended and more than six months after the hearing officer's decision in the case would seriously erode the finality of the Commission's administrative proceedings. Town of Wayland, 5 MLC at 1740. Accordingly, we decline to reopen the record for the introduction of any of the Union's proffered evidence. Our decision in this case therefore proceeds upon the facts disclosed by the record as it existed when the hearing officer made his decision. As noted in the findings above, the job posting exhibit (Er.Ex.1) indicates on its face that the position was not the same as Brenner's, but rather carried a different title, a different department (Medical Records), a different cost center number than the Medical Library, and a different pay grade (R-13).

Although the Sargent correspondence received by Ulchak on May 3 did not specifically request Brenner's removal from the Medical Library, Sargent expressed his "concern...that Mr. Brenner is [the Hospital's] institutional representative to the Medical Library Association...His actions may not be the type you desire for your institution. At our suggestion he resigned his personal membership but chose to retain the institutional membership. Our Association is contemplating its future

actions... ." In view of Sargent's statements, we find entirely plausible the Hospital's explanation that Brenner's transfer was in reaction to the implicit threat of the MLA to sever its ties with the Hospital should Brenner remain in the Library. When the Library reopened on May 10, Ulchak assigned an administrative assistant to take charge. He then informed Brenner by the May 19 memo of this "permanent reassignment to the Tumor Registry." On approximately June 2, Ulchak received correspondence from Sargent indicating Sargent's appreciation for Ulchak's "prompt response to the [Brenner] prorble." The conclusion is inescapable that the "response" referred to by Sargent was the transfer of Brenner from the Library. This sequence of events substantiates the Hospital's claim that the decision to transfer Brenner on May 19 was caused by a reaction to the Sargent disclosures about Brenner's attacks upon the MLA leadership. The Hospital thus has successfully met its burden of producing evidence to support its contention that its stated reason, the MLA controversy, was actually a motive in its decision to transfer Brenner. Accordingly, the Employer has successfully rebutted the Union's prima facie case.

In order to prevail, the Union must now prove by a preponderance of the evidence that the MLA controversy alone was not the real reason for the adverse action and would not have caused Brenner to be transferred. Forbes Library instructs us that if the evidence is in balance, the employer must prevail. We cannot conclude on this record that Ulchak would not have viewed Brenner's conduct in making provocative charges against Sargent and the MLA as sufficiently irrespondible to warrant a transfer in and of itself. We are not persuaded that the Employer's stated lawful reason for taking the adverse action against Brenner was not the real reason.

Accordingly, we affirm the hearing officer's decision to DISMISS the alleged violations of Sections 10(a)(1) and (3) of the Law.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, Chairman

GARY D. ALTMAN, Commissioner