
In the Matter of HIGHER EDUCATION COORDINATING
COUNCIL

and

MASSACHUSETTS COMMUNITY COLLEGE COUNCIL

Case No. CAS-3058

17.5	<i>public employee</i>
34.2	<i>community of interest</i>
34.4	<i>efficiency of operation (fragmentation)</i>
34.7	<i>geographical location - place of employment</i>
34.91	<i>accretion</i>
35.673	<i>university faculty</i>
35.676	<i>federally-funded program personnel</i>
35.7	<i>supervisory and managerial employees</i>

March 7, 1997

Robert C. Dumont, Chairman
William J. Dalton, Commissioner
Claudia T. Centomini, Commissioner

Cynthia Denehy, Esq. *Representing the Higher Education
Coordinating Council*

Brian A. Riley, Esq. *Representing the Massachusetts
Community College
Council/MTA/NEA*

DECISION

Statement of the Case

On January 29, 1993, the Massachusetts Community College Council/MTA/NEA (Union) filed a clarification petition with the Labor Relations Commission (Commission) seeking to accrete the position of Coordinator/Instructor ABE at Bristol Community College (CAS-3029) into a bargaining unit comprised of full-time and part-time faculty and professional staff in the day division of the community colleges (bargaining unit). On October 27, 1993, the Union filed a petition seeking to accrete the following positions at the regional community colleges into the bargaining unit currently represented by the Union:

Computer Lab Tech Assistant II at Bristol Community College (CAS-3058)

Tech Prep Coordinator at Cape Cod Community College (CAS-3058)

Part-time ESL Counselor Tutor of Nursing at Holyoke Community College

Part-time Recruiter at Massasoit Community College

Employment Specialist at Mt. Wachusett Community College (CAS-3058)

Interpreter at Northern Essex Community College

Tech Prep Project Director at North Shore Community College (CAS-3058 and CAS-3094)¹

On January 4, 1994, the Union filed a petition to accrete the position of Staff Assistant/Financial Aid Office at Massasoit Community College into the bargaining unit (CAS-3063).² On June 14, 1994, the Union filed a petition to accrete the position of Tech Prep Project Director at North Shore Community College into the bargaining unit (CAS-3094). On September 22, 1994, the Union filed a motion to consolidate CAS-3094 and CAS-3058. On October 12, 1994, the Commission consolidated CAS-3058, CAS-3029 and CAS-3063 for hearing. On March 1, 1995, the Union filed a petition to accrete the position of Technical Assistant II at Northern Essex Community College into the bargaining unit (CAS-3119).³ The Higher Education Coordinating Council (the Employer) opposed the accretion of the above-referenced positions.

Pursuant to notice, a hearing was held on January 23, 1995, before John Cochran, the Chief Counsel, and Stephanie Carey, a duly designated administrative law judge (ALJ). All parties were afforded the opportunity to present testimonial and documentary evidence related to the positions of Tech Prep Coordinator at Cape Cod Community College, Tech Prep Project Director at North Shore Community College, and Employment Specialist at Mt. Wachusett Community College. Both parties filed post-hearing briefs on March 1, 1995. Pursuant to 456 CMR 13.02(2), the administrative law judge issued recommended findings of fact on July 23, 1996. On September 12, 1996, the Employer submitted objections to the Recommended Findings of Fact.⁴ The Union did not file objections or a response to the Employer's objections.

Findings of Fact⁵

We have considered the Employer's objections and upon review of the record, we adopt the ALJ's findings and, therefore, adopt those findings except for certain modifications as noted below. In January 1976, March 1983, January 1987 and August 1988, the Union was certified (Case Nos. SCR-2083, SCR-2167, SCR-2179, and SCR-2190) as the exclusive collective bargaining representative for a bargaining unit composed of full-time and part-time faculty and professional staff in the community college system, excluding managerial and confidential staff members. The Employer is the governing body for institutions of public higher education and the statutory employer for employees of those institutions including the fifteen community colleges in the Commonwealth of

1. Prior to hearing the petition to accrete the positions of part-time ESL counselor, part-time recruiter and interpreter was withdrawn. On April 11, 1995, the Union withdrew its petition to accrete the computer lab tech position.

2. At a pre-hearing conference, the parties indicated they had reached an agreement in principle on the staff assistant/financial aid office position.

3. On September 29, 1995, the parties agreed to hold this matter in abeyance pending the resolution of SUP-4162 and SUP-4163.

4. On September 12, 1996, the Employer filed a Motion to Dismiss that portion of the petition that seeks to include the Employment Specialist at Mount Wachusett Community College. Because the Union had no objection to the motion, we have dismissed that portion of the petition that sought to accrete the position of employment specialist into the bargaining unit.

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

Massachusetts. The community colleges provide low-cost post-secondary education to high school graduates leading to an associate's degree. Although each college operates as a separate entity, the community colleges share common employment procedures, program structure, and the general terms and working conditions of their staff and faculty.

Tech Prep Project Director at North Shore Community College

The Tech Prep Program (TP program) at North Shore Community College (NSCC) is designed to prepare students for success in the job market. The program has the dual objective of increasing the student population at NSCC while enhancing the skills of high school students to ensure their competitiveness in the high tech job market. Selected junior and senior high school students may receive college credit for those courses taken at their respective high schools in which they have achieved certain stated criteria. The program is federally and state-funded through grants and is administered through the Commonwealth's Department of Education. In order to secure funding, NSCC was required to apply as part of a consortium comprised of twenty to twenty-five (20-25) individual representatives of the business community, principals and superintendents of area high schools and representatives of other community colleges with TP programs. There are fourteen (14) Tech Prep consortia that meet approximately five times per year as convened by the Department of Education.

A Leadership Committee, comprised of representatives of the consortium members, oversees the TP program and the consortium. The Leadership Committee develops grant guidelines, determines salaries, distributes funds to the participating schools, coordinates rule accountability and has certain hiring authority, including the hiring of the TP Project Director (director).⁶ The second tier of governing authority rests with the Implementation Team Committee (ITC), comprised of high school principals and school site coordinators. The ITC is responsible for the day to day operations of the grant and various logistical matters. Other teams include a marketing team, a student evaluation guidance team and an evaluation team. These teams have marketing, career guidance and evaluation responsibilities, respectively. The Leadership Committee has general oversight responsibility for the Tech Prep program and sets the goals and objectives of the program. The Leadership Committee also formulates policy and issues directives to the director. The director then has significant autonomy and independence in the specifics of implementing those directives.

The director has the overall responsibility for developing, directing and coordinating the Tech Prep program among area secondary schools, members of the business/industry community and the North Shore Community College (NSCC). NSCC maintains three campuses: Lynn, Danvers and Beverly (Sohier Road campus). The director and the Leadership Committee select individual program participants. All tech prep students are high school students and approximately ten percent (10%) of the participants

take high school courses for which they receive credit at NSCC.⁷ Although the director maintains an office on the Beverly campus of NSCC, the director uses that office only about two days a week. The director meets with business and industry leaders to develop sites for internships; visits most of the fifteen (15) schools participating in the program; and selects and meets with NSCC faculty who are responsible for curriculum development at the high schools. The director, however, spends little time with students. The director spends the bulk of his/her time at participating high schools and spends approximately ten per cent (10%) of the time with the faculty and staff of NSCC.⁸ The director oversees the expenditures of a \$190,000 grant, develops the budget, decides allocations for each school, awards stipends to faculty, site facilitators and guidance counselors. The director has significant autonomy in directing the program and in setting goals; however, the Leadership Committee develops general program policies and grant guidelines.

The hiring process for the director's position was initiated by a job posting directing applicants to send their applications to the Director of Human Services at NSCC. The applications were then sent to Dr. Anita Kaplan, Assistant Dean of Academic Affairs (Kaplan). Kaplan convened a sub-committee of five members of the Leadership Committee (two of whom were NSCC representatives) to screen resumes and select interviewees. The director was hired by a consensus of that sub-committee. The current director was, therefore, hired by a committee of five, two of whom were affiliated with NSCC; moreover, the hiring process was initiated and administered by NSCC officials. The director is paid by the college, in its capacity as a sub-state grantee. Specifically, NSCC, as the grant recipient, issues checks drawn on the grant funds. The director is jointly supervised by Kaplan, a NSCC academic dean, and the Leadership Committee. Kaplan also supervises three other off-campus programs: Upward Bound, the Outcome Assessment Program (Title III program) and the Center for Alternative Studies. Although the director of the Upward Bound program is a bargaining unit position, neither the Outcome Assessment nor the Center for Alternative Studies program directors are bargaining unit positions. The Upward Bound program and the TP program share some basic similarities. Upward Bound is a federally-funded grant program with a \$300,000 budget. The Upward Bound director maintains an office on the Lynn campus of NSCC. The program is limited to Lynn public schools and designed to encourage participation in after-school and summer programs. Although a small percentage of Upward Bound participants eventually matriculate at NSCC, the program is not considered a recruitment program for NSCC. The two programs are similar in that both maintain off-campus offices, work with area high school students as opposed to NSCC students and although not recruitment programs, *per se*, do ultimately enroll a small percentage of program participants as NSCC students.

6. The Employer initially posted this position on September 15, 1993.

7. The ALJ found that the majority of students in the Tech Prep program were high schools students; however, we modify that finding to reflect the record evidence.

8. The record evidence supports this finding and we, therefore, modify the ALJ's findings to reflect the record.

Tech Prep Coordinator at Cape Cod Community College

Vahan J. Khachadorian (Khachadorian) held the position of Tech Prep Coordinator (coordinator) at Cape Cod Community College (CCCC) on a part-time basis for two years and has held his current position on a full-time basis for two years.⁹ As coordinator, Khachadorian coordinates the efforts of eleven (11) high schools and several business groups. He maintains an office at CCCC from which he manages a \$121,000 grant and allocates funds to the various high schools. He also purchases textbooks for the schools and distributes money to facilitators and staff. In 1991-92, he was responsible for two (2) high schools and forty (40) students. In 1993, his participants included two-hundred sixty-five (265) students, and eleven (11) high schools. Although general program policies are developed by the Leadership Committee, the coordinator makes recommendations regarding program development which are subject to final approval of the Academic Dean. The coordinator, therefore, has limited policy-making authority with respect to the Tech Prep program. Certain faculty affiliated with the tech prep program report to the coordinator and each faculty member has a contract regarding hours and payment. In a typical week, the coordinator interacts with the business community, college faculty and principals, but has no interactions with students. Khachadorian also works with high school teachers in motivating students to pursue the community college program. The coordinator makes several presentations to the community about the program. Although Khachadorian has had no evaluation in three years, the Dean of Academic Affairs has the responsibility of supervising and evaluating the coordinator. The coordinator receives no guidance or direction from the college as to his duties.¹⁰

Several unit positions possess similar titles and characteristics as that of the coordinator including the following:

- Bristol Tech Prep Student Counselor (part-time)
- Bunker Hill Tech Prep Project Coordinator (full time)
- Bunker Tech Prep Curriculum Specialist (part-time)
- Holyoke Tech Prep Community Outreach Coordinator (part-time)
- Holyoke Tech Prep Counselor (part-time)
- Holyoke Tech Prep Program Assistant (part-time)¹¹

The Bunker Hill full-time coordinator's (BHC) position is comparable to the coordinator's position. The BHC has program management, curriculum development, meeting coordination, business/industry recruitment, project evaluation, budget and grant-writing responsibilities similar to that of the TPC position that is the subject of this petition.

Discussion

The Employer opposes these petitions on three separate grounds: 1) neither the director nor the coordinator are public employees because the Leadership Committee, by exercising control over hiring, firing and salary determination, maintains the requisite control for effective collective bargaining purposes; 2) both the director and coordinator positions are supervisory and managerial in nature because they have significant and autonomous responsibility in formulating and determining policies as evidenced by the coordinator's role in recommending program expansion and design changes, the grant writing responsibilities of both positions and the control both have over substantial budgets or the disbursement of funds; and 3) both positions lack a community of interest with the day division bargaining unit, and also lack any correlation with other faculty and professional staff in that bargaining unit.

Public Employees

Whether an employee is a public employee within the meaning of M.G.L. c. 150E (the Law) is determined by whether the individual is actually employed by a public employer. *Worcester School Committee*, 13 MLC 1471, 1482 (1987). That determination is contingent upon whether the employing entity exercises substantial control over the employees so that the individuals are actually employees of the state or its political subdivision. To establish an entity's control over employees, the Commission considers several factors including, whether the employing entity: 1) hires, unilaterally disciplines, transfers and discharges the employees; 2) establishes wage rates, determines job assignments and pays the employees; and, 3) is liable for reporting and remitting deductions for social security, unemployment taxes, federal and state taxes. *See, Commonwealth of Massachusetts, Commissioner of Administration*, 23 MLC ____ (1996); *Worcester School Committee*, 13 MLC 1471, 1482 (1987).

Although the director is hired by a committee of five, only two of whom are affiliated with NSCC, officials at NSCC initiate and administer the hiring process. The Employer, in its capacity as sub-state grantee is also responsible for paying the director. Both the director and the coordinator are supervised by college officials; an NSCC official supervises the director in conjunction with the Leadership Committee and the Dean of Academic Affairs at CCCC, who also has the final authority to accept or reject the coordinator's program recommendations, supervises the Employer's coordinator.

A review of the record evidence reveals that HECC's role in hiring, supervising, and paying these disputed positions demonstrates a level of control sufficient to find that it is the public employer for these employees.

9. The Employer initially posted this position on August 6, 1993.

10. Although the Employer asserts that the College exercises no supervision of the coordinator in any meaningful way, we find that although the Dean of Academic Affairs has declined to evaluate the coordinator to date, the Dean and thus, the College, still retains that responsibility.

11. We note that the computer-generated list of positions utilized by the Union is not the product of negotiations with the Employer or certification by the Commission. Only two of the positions listed, Tech Prep Project Coordinator and Tech Prep Curriculum Specialist at Bunker Hill Community College are unit positions. We, therefore have limited our comparison to those bargaining unit positions.

Managerial and Supervisory Employees

To be considered a managerial employee, the scope of the employee's discretion in formulating policy must be significant in relation to the mission of the public entity or the employee's decisions must impact a significant aspect of the public entity. *Winchester School Committee*, 3 MLC 1653 (1977). The term participate to a substantial degree in formulating policy includes not only the authority to select and implement a policy alternative but also regular participation in the policy decision-making process. *Town of Agawam*, 13 MLC 1364, 1368 (1986). Thus, it does not include someone who merely provides some input necessary for the development of policy, but does not otherwise participate meaningfully in the decision-making process. *Town of Wellfleet*, 11 MLC 1238, 1241 (1984). Merely consulting in formulating policy or periodic discussions with higher administrators on policy matters is not enough to make one a managerial employee. *City of Quincy*, 13 MLC 1436, 1440 (1987). In contrast, supervisory employees transmit policy directives to lower levels and, within certain areas of discretion, implement the policies. *Wellesley School Committee*, 1 MLC 1389, 1403 (1975). The Commission has determined that managerial employees are distinguishable from supervisors because "managerial employees make the decisions and determine the objectives while supervisory employees transmit policy directives to lower levels, and within certain areas of discretion, implement the policies." *City of Boston*, 19 MLC 1050, 1063 (1992); *Town of Plainville*, 18 MLC 1001, 1009 (1991).

Based on the evidence presented at hearing, neither the director nor the coordinator are significantly involved in the formulation of policy. Nor was there any evidence that either position had any collective bargaining responsibilities or participated in the grievance process. We conclude that, although the director has significant autonomy in directing the program, it is the Leadership Committee that develops general program policies and grant guidelines. Similarly, we find that despite the coordinator's role in making program recommendations, it is the Academic Dean who has the final approval of those recommendations, and it is the Leadership Committee that develops overall program policies. Therefore, we conclude that both the coordinator and the director lack the requisite policy-making authority to be deemed managerial employees within the meaning of the Law.

Community of Interest

In analyzing whether employees should be accreted into an existing bargaining unit, the Commission uses a three-step test: 1) whether the position was included in the original certification of the bargaining unit; 2) whether the positions were considered by the parties to be included in the bargaining unit; and 3) whether the position shares a community of interest with the other positions in the bargaining unit. *Holyoke School Committee*, 21 MLC 1765, 1769 (1995).

First, it is clear from the record evidence that the positions of coordinator and director were initially posted on August 6, 1993 and September 15, 1993, respectively and therefore, did not exist prior to the Union's certification. Second, the record is devoid of any bargaining history or other subsequent conduct by the parties that would conclusively determine the parties' intentions with

respect to these positions. Because application of the first two prongs of the Commission's analysis is inconclusive, it is necessary to next examine whether the disputed positions share a community of interest with the recognized bargaining unit. *Id.*

Section 3 of the Law requires the Commission to structure bargaining units that foster stable and continuing labor relations. The Law mandates that the Commission consider the following criteria when determining the appropriateness of a bargaining unit: community of interest, efficiency of operations and effective dealings, and safeguarding the rights of employees to effective representation. To that end, the Commission follows a policy of joining employees who share a community of interest in the largest practical unit, preferring broad, comprehensive units over units which are small and fragmented. *Boston School Committee*, 2 MLC 1557 (1976). That policy may result in including employees with similar positions at different work locations in an overall unit. *City of Boston*, 8 MLC 1835 (1982); *Massachusetts Board of Regional Community Colleges*, 1 MLC 1426 (1975). The Commission has consistently ruled that community of interest is not the equivalent of identity of interest. *City of Malden*, 9 MLC 1073, 1080 (1982). Minor differences do not necessitate separate bargaining units where employees perform similar functions under similar working conditions and share common interests which would be involved in collective bargaining. Separate bargaining units are required only when the differences are so significant as to produce conflicts in the collective bargaining process. *University of Massachusetts*, 4 MLC 1384 (1977).

The Commission has ruled that differences in funding sources do not undermine the existing community of interest between the petitioned-for positions and the current bargaining unit members. *Framingham School Committee*, 18 MLC 1212, 1214 (1991). Thus, even though the federal grants that underwrite the tech prep program are different from funds generated from the community college system, this distinction is not sufficient to exclude any of the petitioned-for positions in the current bargaining unit.

We find that the director shares similar functions, working conditions and common interests with other similarly-titled bargaining unit positions. Specifically, we can discern no appreciable difference in this petitioned-for position and that of the director of the Upward Bound program, a bargaining unit position. They both work with high school students to enhance these students' skills.

We also conclude that the bargaining unit is comprised of members with similar titles and job functions as that of the tech prep coordinator. Specifically, we find that the tech prep coordinator shares similar interests in program development, project evaluation and community recruitment responsibilities with other similarly-titled bargaining unit positions. The tech prep coordinator maintains an office on campus, interacts with college faculty, and is supervised by the Dean of Academic Affairs, thereby, sharing a similar work environment and working conditions with other bargaining unit members.

Because we have consistently recognized that community of interest exists where there is a similarity of interests and working

conditions predicated upon common supervision and similar work environment, we find that both the tech prep project director and tech prep coordinator positions share a sufficient community of interest with other bargaining unit positions to warrant accretion into the bargaining unit. See *City of Brockton*, 9 MLC 1040, 1043 (1982).

Conclusion

For the reasons stated above, we conclude that the positions of Tech Prep Coordinator at Cape Cod Community College and Tech Prep Project Director at North Shore Community College should be appropriately accreted into the bargaining unit of full-time and part-time faculty and professional staff in the community college system represented by the Union for purposes of collective bargaining.

SO ORDERED.

* * * * *



In the Matter of TOWN OF WEYMOUTH

and

INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS

Case. No. MUP-1430

- 54.589 *bargaining unit work*
- 65. *Interference, Restraint or Coercion*
- 67.14 *management rights*
- 67.164 *pre-existing practice*
- 67.8 *unilateral change by employer*
- 82.3 *status quo ante*

March 7, 1997

Susan L. Atwater, Administrative Law Judge

Joseph Emerson, Jr., Esq. Representing the Town of Weymouth

Mary Ellen Farrell, Esq. Representing the International Brotherhood of Police Officers

ADMINISTRATIVE LAW JUDGE DECISION

Statement of the Case

The International Brotherhood of Police Officers (Union) filed a charge with the Labor Relations Commission (Commission) on January 11, 1996, alleging that the Town of Weymouth (Town) had engaged in a prohibited practice within the meaning of Sections 10(a)(1) and (5) of Massachusetts General Laws, Chapter 150E (the Law). Pursuant to Section 11 of the Law and Section 15.04 of the Commission’s Rules (456 CMR 15.04), the Commission investigated the Union’s charge and issued a Complaint of Prohibited Practice, alleging that the Town refused to bargain in good faith by transferring work previously performed by bargaining unit members to non-unit personnel without giving the Union prior notice and an opportunity to bargain to impasse or resolution, in violation of Sections 10(a)(5) and (a)(1) of the Law.¹

Pursuant to notice, I conducted a hearing on November 22, 1996. Both parties had a full opportunity to be heard, to examine and cross-examine witnesses and to introduce documentary evidence. The parties introduced evidence through stipulated facts, witness testimony and documentary exhibits. After considering all of the record evidence and the legal arguments advanced by the parties, I make the following findings of fact and render the following opinion.²

Findings of Fact

The Police Department in the Town of Weymouth is organized into the follow divisions: the Detective Bureau, the Uniformed Division and the Division of Technical Services.³ The Personnel Office is in the Uniformed Division, and is presently managed by Captain James Thomas (Thomas) and staffed by Officer Costini (Costini) and Civilian Tracy Gear (Gear). Costini and Gear hold clerk positions⁴ and their duties include: maintaining records of personnel, sick and vacation time, health and dental insurance, distributing detail assignments, scheduling leave and addressing personal issues. At the time of the hearing in this case, the Police Department employed approximately 78 patrol officers.

The Police Department has employed civilians in various departments for the past thirty years. Civilians began performing crossing guard duties in 1967, clerical duties in the prosecutor’s office in 1970⁵, dispatching and switchboard duties in 1981, clerical

1. The Commission dismissed the portion of the Union’s charge which alleged that the Town violated Section 10(a)(5) by refusing to bargain and unilaterally changing terms and conditions of employment.

2. Following the hearing, the Union filed a Motion to Reopen the Record and for a Cease and Desist Order. Specifically, the Union sought to reopen the record to introduce evidence of a vacancy announcement which the Town placed in a local newspaper advertising a payroll clerk position in the Personnel Office. The Union asked me to issue a cease and desist order to prevent the Town from hiring a civilian to fill the position. I decline to grant both aspects of the requested relief. The fact that the Town has advertised a position in the newspaper with a specified salary is not probative of any material issue in this case and I decline to speculate concerning the potential legality of the Town’s plan to fill this position. If the Union believes that the Town’s actions are unlawful and the order in this case does not provide sufficient remedial relief, the Union can file a separate charge of prohibited practice.

3. The Police Department employs a Captain of Night Operations but the record did not indicate whether “Night Operations” is a separate division within the Department.

4. The Town argues that the performance of clerical duties in the Personnel Office is an assignment of duties rather than a specific bargaining unit position. However, in his December 4, 1995 memo, Captain Thomas solicited individuals interested in the “clerks position in the personnel office.” Consequently, I will use the same title in this decision.

5. The Prosecutor’s Office is in the Detective Bureau.