In the Matter of HIGHER EDUCATION COORDINATING COUNCIL

and

MASSACHUSETTS COMMUNITY COLLEGE COUNCIL

Case No. SUP-4142

54.58 *work assignments and conditions*
67.3 *furnishing information*
82.12 *other affirmative action*
92.47 *motion to dismiss*

June 6, 1997
Robert C. Dumont, Chairman
William J. Dalton, Commissioner

Cynthia Denehy, Esq.	*Representing the Higher Education Coordinating Council*
Brian Riley, Esq.	*Representing Massachusetts Teachers Association*

DECISION[1]

Statement of Case

On January 13, 1995, the Massachusetts Community College Council (Union) filed a charge with the Labor Relations Commission (Commission) alleging that the Higher Education Coordinating Council (HECC or Employer) engaged in a prohibited practice within the meaning of Sections 10(a)(5) and (1) of Massachusetts General Laws, Chapter 150E (the Law). Following an investigation, the Commission issued a two-count Complaint of Prohibited Practice on August 30, 1995. The Commission alleged that the HECC had violated Sections 10(a)(5) and (1) of the Law by failing to provide information reasonably necessary for the Union to execute its duties as collective bargaining representative and by unreasonably delaying its response to the Union's request for information. Pursuant to notice, an administrative law judge (ALJ) held a formal hearing on July 2, 1996 and September 24, 1996.[2] All parties had a full opportunity to be heard, to examine witnesses, and to introduce evidence. The parties submitted post-hearing briefs on or about November 27, 1996.

Findings of Fact

The Employer and the Union are parties to a collective bargaining agreement for a unit of employees in the Division of Continuing Education (DCE unit) effective September 11, 1990 through August 20, 1993 (agreement). Joseph Rizzo is the Union's grievance coordinator for the DCE unit.

When the DCE unit was created in September 1990, the Employer established specific DCE work areas. Some community colleges designated certain day departments, such as the Business department, as DCE work areas. Other community colleges including Middlesex Community College (College), established more narrow DCE work areas. Under the provisions of the agreement, DCE faculty could earn the right to an appointment in certain work areas.[3]

Since 1986, Ann Aman (Aman), a bargaining unit member, has regularly taught two business courses at Middlesex Community College (College)—Personal Money Management and Sales Principles. Those courses are classified in the Management work area.[4] However, the College only assigned her one course (Personal Money Management) for the spring semester of 1993. Under the terms of the agreement, Aman believed that she had the right to teach two courses; moreover, she believed that Sales Principles and Personal Money Management were improperly placed in the Management work area, thereby diminishing her right to teach in two separate work areas. When Aman shared her concerns with Rizzo, Rizzo informed her that it would be necessary to determine which courses were assigned to specific work areas.

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

2. At the hearing, the Respondent moved to dismiss the case on the grounds that an arbitration award issued on May 19, 1995 related to this grievance. The Respondent asserts that by the time the complaint issued in this case, the grievance process had been completed and the award issued rendering the information unnecessary. The Union, in its opposition to the motion, contends that the Union has a right to request in good faith that information it perceives to be relevant and reasonably necessary to process grievances despite the fact that the information may not ultimately be necessary at the arbitration or the fact that the case may be decided on other issues. The ALJ denied the Employer's Motion and we concur with that decision.

3. Article 10.02 of the agreement provides, in part:

> A unit member who has taught at least five (5) courses over three (3) consecutive fiscal years in the Division of Continuing Education at the College who has received a satisfactory evaluation in a work area(s) shall be eligible for a reappointment in that work area(s)...

Article 10.03 of the agreement provides,in part:

> A tentative appointment for one course will be offered first to those eligible unit members as defined above with the longest service in the division (sic) of Continuing Education at the college in that work area except under the following conditions:
>
> a. the unit member receives an unsatisfactory evaluation;
>
> b. if there are insufficient courses available within the work area
>
> c. if,... reasons exist which preclude such reappointment.

4. The College lists the following courses in Business Administration:

#1 Accounting/Finance
Intro to Acct I & II
Intermed. Acct I &II
Intro to Finance Taxation
#3 Management
Intro. to Business
Small Business Management
Personal Money Management
Investments
Sales Principles
#4 Marketing
International Marketing
Principles of Marketing
Advertising

Rizzo believed that before Aman could make a claim of right to appointment in specific work areas, the Union had to first determine if the courses were appropriately placed in their respective work areas.

On March 1, 1993, Aman filed a grievance asserting that the Employer organized work areas at the College in an arbitrary and capricious manner which diminished her rights to course assignments. The Union believed that Article 10 of the collective bargaining agreement provided for multiple course assignments for those bargaining unit members on the seniority list in more than one work area.[5] Therefore, Aman believed that she may have been entitled to more than one course assignment by virtue of being on more than one seniority list. To process this grievance, the Union believed it first needed to establish Aman's assigned work areas, and then pursue her entitlement to other course assignments. The Employer denied the grievance at step 1 and step 2 and the grievance was subsequently scheduled for arbitration.[6]

On November 4, 1993, Rizzo sent the following memorandum to the College:

> For the purpose of preparation of an upcoming arbitration, the following material is requested:
>
> 1. Copies of the course syllabi used in work areas #1, 3, 4 from the Fall 1990 semester to the present.
>
> 2. A copy of the college catalog.
>
> 3. A copy of the DCE master schedule of classes which reflect faculty assignments for work areas #1, 3, 4. Please contact me if you have any questions or need further clarification.[7]

Rizzo requested the course syllabi because they provided a more complete description of courses, including teaching procedures and course objectives, than the descriptions contained in the catalog. By reviewing the course syllabi, he could better ascertain the propriety of the College's placement of the Sales Principles course in the management work area rather than the marketing area and other similar decisions. All faculty complete course syllabi using the format outlined in the appendix of the agreement.[8] The syllabus is then filed with the chairperson of the division where the course is offered. Other than those requirements listed in the appendix and the requirement that the content of the syllabus be consistent with the course description in the course catalog, faculty have discretion in developing their syllabi.

When the College failed to respond to this request, Rizzo sent a second request on February 24, 1994. On March 7, 1994, the Union sent another request for the information and received a response from the Employer on March 14, 1994.[9] That response read, in part:

> ...[Y]ou will find a copy of Middlesex Community College's catalog for the Spring, 1994 semester, and a listing of faculty assignments for the Spring, 1993, semester.
>
> The Union's third request is more problematic. Course syllabi are not kept in any centralized file. In order to comply we would need to review each individual's personnel file and pull the relevant material. Please note that your request covers three (3) work areas and ten (10) semesters, and the listing of faculty contains more than fifty names. Consequently, anything you can do to narrow your request will increase the feasibility of our compliance...

On April 1, 1994, the Union narrowed its request to course syllabi in work areas 1, 3 and 4 for the Fall 1990 and Fall 1992 semesters and requested that the Employer provide the materials by May 1, 1994 because the arbitration was scheduled to proceed in June 1994. On September 29, 1994, the Employer provided those syllabi from faculty who had authorized their release. On October 13, 1994, the Union sent a request for those syllabi that it had not received. That letter read, in part:

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5. The Employer's position was that it was contractually obligated to provide only one course assignment, regardless of the number of work areas in which a unit member might be eligible.

6. The Union requests an additional finding that the agreement provides for mediation. Section 7.07 of the agreement provides, in part:

> Where a grievance involves the failure or refusal of a College to offer a contract of employment... mediation of a grievance may be initiated in accordance with the following provisions:...
>
> 1. The Association shall have the exclusive right to initiate mediation of a grievance.
>
> 2. The Association may initiate mediation...if the resolution of the grievance has been duly authorized by the Association...
>
> 3. The Association shall initiate mediation by filing a request...with the American Arbitration Association and with the Chancellor...
>
> 4. [M]ediation shall be conducted in accordance with the rules... of the American Arbitration Association...
>
> 5. Any grievance citing Article 10.03 will go to mediation only.

7. The Employer and the Union stipulated that the Union sought course syllabi for DCE faculty only. The parties also stipulated that the request for information contained other items that the Employer provided and those items are not at issue here.

8. Page xiii of the agreement describes those items that should be included in each course syllabus including:

> Instructor's Name
>
> Course Title/Number
>
> General course description
>
> All required texts and paperbacks, including information on publisher and edition used
>
> Course topics and/or assignments and/or required and/or supplemental reading
>
> Teaching procedures
>
> Instructional objectives
>
> Basis for student grading
>
> Procedure (criteria) for evaluating student performance
>
> Tentative Test Schedule/Assignments(s) Schedule
>
> Attendance Policy

9. From March 1994 through November 1994, all correspondence between the Union and the Employer were exchanged between their respective Counsel, Ira Fader and Cynthia Denehy.

> Per our conversation following last week's arbitration hearing in the Aman matter, I write to request copies of all course syllabi in work areas #1, #3, and #4 for the Fall 1990 and Fall 1992 semesters.
>
> As we discussed, it is the Union's position that course syllabi, unlike other documents retained in a personnel file, should be made available with or without an individual's release. The requested information is reasonable and necessary to the Union in the prosecution of this arbitration case, and the documents do not contain information of a confidential nature. The mere fact that they are kept in faculty personnel files for convenience is not a basis for withholding them in response to a request for information pursuant to G.L. c. 150E.
>
> I need to have the course syllabi in advance of the deposition testimony...

When the Employer declined to release the remaining syllabi, the Union then requested, on October 26, 1994, the names, addresses, and telephone numbers of those faculty members who did not authorize release of their course syllabi. On or about October 26, 1994, the Employer sent the Union a letter expressing its position that it would not voluntarily release course syllabi without the faculty member's authorization and suggesting that it would make available the names and means for the Union to contact those faculty who had not consented to the release. By letter dated November 22, 1994, the Union again requested the names, addresses, and telephone numbers of faculty who had not authorized the release of their course syllabi. In this letter, the Union requested receipt of this information prior to the December 12, 1994 deposition of its final witness. On November 30, 1994, the Employer complied with that request in a letter that read, in part:

> I had thought that it [the list] was sent to you prior to my vacation, but upon returning yesterday I found your letter dated November 22, 1994 making a second request. I apologize if this is the first list you have received.[10]

On May 19, 1995, Arbitrator Ryan issued a decision on the Aman grievance finding that it was not timely-filed.[11] Prior to the Ryan Award, Arbitrator Katz issued an arbitration award in 1993 and Arbitrator Cooper issued an award in 1994. Both awards found that where a grievance involves the issue of the failure or refusal of the College to offer a contract of employment .... [that grievance] will go to mediation only. Both arbitrators concluded that the grievances were not arbitrable.

OPINION

If a public employer possesses information that is relevant and reasonably necessary to a union in the performance of its duties as the exclusive collective bargaining representative, the employer is generally obligated to provide the information upon the union's request. *Whittier Regional School Committee*, 19 MLC 1183, 1185 (1992). That obligation is derived from the statutory obligation to engage in good faith collective bargaining, including both grievance processing and contract administration. *Adrian Advertising*, 13 MLC 1233, 1263 (1986). Moreover, the obligation to provide information extends to information that is relevant to a party's evaluation of whether to pursue a grievance. *Boston School Committee*, 8 MLC 1380, 1382 (1981).

The standard for determining relevancy is similar to the standard for determining relevancy in discovery proceedings in civil litigation. *Id.* We find that, absent some prevailing consideration, the Union is entitled to documentary information which may shed light on the reasons for the Employer's course of action. *See Board of Trustees*, 8 MLC 1139, 1143 (1981). Here, we find that the Union reasonably believed that the course syllabi would shed light on the Employer's decisions related to course assignments. Consequently, the course syllabi were relevant to the Union's evaluation of the merits of the Aman grievance and, as such, were reasonably necessary to the Union's ability to adequately process that grievance and fulfill its obligations as the exclusive collective bargaining representative.

Once a union has established that the information is relevant and reasonably necessary to its duties as bargaining agent, the burden shifts to the employer to demonstrate that its concerns about disclosure are legitimate and substantial and that it has made reasonable efforts to provide the union with as much of the requested information as possible, consistent with its expressed concerns. *Boston School Committee*, 13 MLC 1290, 1294 (1986). The employer's concerns are then balanced against those of the union and the employer's refusal will be excused where its concerns outweigh those of the union. *Commonwealth of Massachusetts*, 11 MLC 1440, 1443 (1985). Here, the Employer justifies its refusal to produce the requested information by claiming that course syllabi are confidential. The Employer further argues that course syllabi are confidential because 1) they represent the work product of faculty members and 2) they are maintained in the personnel files of faculty members. The Employer further contends that its interest in protecting the faculty course materials supersedes the Union's right to that information.

In *Board of Trustees*, we stated that,

> the requirement that the bargaining representative be furnished with relevant information necessary to carry out its duties overcomes any claim of confidentiality in the absence of a showing of great likelihood of harm flowing from the disclosure.

Board of Trustees, 8 MLC at 1143-44.

First, we find that the Employer has not demonstrated any likelihood of harm flowing from the disclosure of course syllabi. We are not persuaded that information related to course description, course topics, course assignments, teaching procedures and the names of the course, required texts, publishers and course instructor are in any way confidential in nature or that any great likelihood of harm might result from its disclosure. The Employer has, therefore, failed to sustain its burden of demonstrating a substantial concern

10. Apparently, the December 12th deposition was postponed and did not occur until February 3, 1995. Therefore, the Employer released the requested list of names, addresses and telephone numbers three (3) months prior to that deposition.

11. Arbitrator Ryan concluded that Aman should have known of the work area allocation dispute before March 1, 1993 and the claim was, therefore, considered waived per Article 7.02B. Arbitrator Ryan did not reach the merits of any aspect of the grievance.

about the disclosure of course syllabi or that its concern about disclosure outweighs that of the Union in receiving the information.

Second, the fact that the Employer elects to utilize faculty personnel files as a repository for course syllabi does not then endow the syllabi with any privacy-based protections. Individual faculty members can have no expectation of privacy related to course syllabi and those syllabi enjoy no extraordinary protections based on privacy or confidentiality.[12] Therefore, we find the Employer had no legitimate, substantial concerns about non-disclosure that would justify its refusal to provide the Union with the requested course syllabi.

The Employer alternatively argues that it attempted to accommodate the Union by other means including giving the Union access to those faculty who did not authorize the release of their course syllabi. This argument has no merit because the fact that information is available from another source is not a sufficient defense to a failure to provide requested information, See *Commonwealth of Massachusetts*, 12 MLC 1590, 1598 (1986), and we see no extenuating circumstances in this case that would require a departure from that rule.

The Employer next argues that the missing syllabi could not have been necessary because the Union proceeded to arbitration without the requested materials and failed to subpoena the missing syllabi prior to the close of the arbitration hearing. That argument is specious. It would be farcical for us to excuse the Employer's unlawful conduct merely because the Union was forced to proceed without the information illegally withheld by the Employer. The Employer was obligated to provide the requested information as prescribed by Law and to do so in a timely manner.

Lastly, we address the Employer's delay in responding to the Union's request. The record reflects that despite the Union's requests on November 4, 1993, February 24, 1994 and March 7, 1994, the Employer failed to respond until March 14, 1994. Furthermore, even after the Union narrowed its request on April 1, 1994, the Employer failed to respond until September 29, 1994 and then only partially complied with the request. Therefore, we find that the Employer unreasonably delayed in responding to the Union's requests for course syllabi.[13]

CONCLUSION

Based on the foregoing, we conclude that the Higher Education Coordinating Council has failed to bargain in good faith by failing to provide the Union with information relevant and reasonably necessary for it to fulfill its obligations as the exclusive collective bargaining representative and by unreasonably delaying its response to the Union's request for information in violation of Section 10(a)(5) and derivatively, Section 10(a)(1) of the Law.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the Higher Education Coordinating Council shall:

1. Cease and desist from:

   a. Failing to bargain collectively in good faith with the Massachusetts Community College Council (Union) by refusing to provide information relevant and reasonably necessary to the Union's processing of a grievance on behalf of Ann Aman.

   b. In any like or similar manner, interfering with, restraining, or coercing its employees in the exercise of their rights protected under the Law.

2. Take the following affirmative action that will effectuate the policies of the Law:

   a. Immediately provide the Union with the DCE course syllabi used in work areas 1, 3, and 4 during the Fall 1990 and Fall 1992 semesters.

   b. Post immediately in all conspicuous places where employees usually congregate and where notices are usually posted, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the Notice to Employees; and

   c. Notify the Commission in writing within thirty (30) days of receiving this Decision and Order of the steps taken to comply therewith.

SO ORDERED.

APPEAL RIGHTS

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Labor Relations Commission are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such an appeal, the appealing party must file a notice of appeal with the Labor Relations Commission within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

* * * * * *

12. Although we recognize that proposed syllabi in draft form may be distinguished from final syllabi that are ultimately utilized by faculty members, we do not reach the issue of whether proposed syllabi in draft form are subject to any special protections.

13. Although the Employer similarly delayed in responding to the Union's subsequent requests for the names and addresses of faculty members who had failed to authorize release of their syllabi, that delay was apparently due to an oversight.