In the Matter of HIGHER EDUCATION COORDINATING COUNCIL

and

MASSACHUSETTS COMMUNITY COLLEGE COUNCIL/MTA/NEA

Case No. SUP-4090

54.586	*school curriculum decisions*
54.589	*bargaining unit work*
65.2	*concerted activity*
65.6	*employer speech*
67.15	*union waiver of bargaining rights*
67.164	*pre-existing practice*
67.6	*other refusal to bargain*
82.13	*reinstatement*
82.3	*status quo ante*

September 17, 1996
Robert C. Dumont, Chairman
William J. Dalton, Commissioner
Claudia T. Centomini, Commissioner

Cynthia S. 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

The Massachusetts Community College Council/MTA/NEA (the Union) filed a charge with the Labor Relations Commission (the Commission) on July 26, 1994, alleging that the Higher Education Coordinating Council (the Employer) had engaged in prohibited practices within the meaning of Sections 10(a)(1), (3) and (5) of Massachusetts General Laws, Chapter 150E (the Law).

Pursuant to Section 11 of the Law and 456 CMR 15.04, the Commission investigated the Union's charge and issued a Complaint of Prohibited Practice, alleging that the Employer refused to bargain in good faith by transferring work previously performed by bargaining unit members to non-unit personnel without providing the Union prior notice or an opportunity to bargain, in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law, and discriminated against bargaining unit member Molly Flannery (Flannery) because she had engaged in concerted, protected activities, in violation of Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law.

Administrative Law Judge Susan L. Atwater conducted a hearing on December 12, 1995 at which time both parties had a full opportunity to examine and cross-examine witnesses and to introduce documentary evidence. Both parties filed post-hearing briefs on or about February 9, 1996.

Pursuant to 456 CMR 13.02(1), the Commission designated the case as one in which the Commission would issue a decision in the first instance, and the ALJ issued Recommended Findings of Fact on February 29, 1996.[1] The Employer filed challenges to the Recommended Findings of Fact, which we address below. Based on our review of the record and the legal arguments of the parties, we make the following findings of fact and conclusions of law.

Findings of Fact

There are two separate divisions within the fifteen colleges that comprise the statewide community college system: the Day division and the Division of Continuing Education (DCE). Each division has a separate bargaining unit, and the bargaining units are governed by separate collective bargaining agreements.[2] The bargaining unit for the Day division is composed of full-time faculty and professional staff in the Day division, and part-time faculty and staff members who have worked for a specified number of years.[3] The bargaining unit for the DCE is composed of all full-time and part-time, non-supervisory, professional employees teaching credit courses in the DCE. Approximately thirty percent of the full-time faculty in the Day division also teach in the DCE.

Originally, the Day division offered courses on weekdays during the school year and the DCE offered courses in the evenings (after 4:00 p.m.) during the school year and during the summer. Subsequently, however, certain Day division courses were converted to the DCE, and the DCE began to offer courses before 4:00 p.m.[4]

Prior to September 1993, the College offered courses in English as a Second Language (ESL) in both the Day and DCE divisions, and the DCE division offered ESL classes in the daytime and in the evening. In mid-September, the College transferred the daytime DCE ESL courses to the Day division and thereafter, beginning with the spring semester in 1994, all DCE ESL courses were only offered in the evening or on weekends.[5] This transfer had an impact on the DCE faculty who taught daytime ESL courses because they were transferred to the Day division along with their daytime ESL courses.

The Union became aware of the transfer of daytime DCE ESL courses in the fall of 1993 when affected faculty members notified DCE Grievance Coordinator Joseph Rizzo (Rizzo) of the transfer. The transfer of work concerned these faculty members because, as part-time instructors, they were not eligible for membership in the Day division bargaining unit until their third consecutive year of teaching in the Day division, and thus were not covered under either the Day collective bargaining agreement or the DCE collective bargaining agreement. Also, some of the affected DCE faculty members lost reappointment rights that they had accrued under the DCE contract.[6] Early in the spring semester of 1994, Rizzo contacted DCE Dean Paul Willenbrock (Willenbrock) to confirm the information he had received and, in the course of their conversation, Willenbrock acknowledged that the College had transferred daytime ESL courses from DCE to the Day division. Rizzo did not ask Willenbrock to bargain over the transfer, and they never discussed bargaining. The Union filed a prohibited practice charge over the work transfer with the Commission on July 26, 1994.

For a long period of time, a Day division regulation restricted the number of credits which part-time ESL faculty could teach to either seven or five credits. This allowed the Reading and Writing course of 7 credits to be taught by one teacher and the Conversation or Applied Grammar course of five credits to be taught by another teacher. In the fall of 1993, Day division ESL Chairman Jose Gonzales (Gonzales) informed the DCE faculty of this regulation, and, in December 1993, eight members of the DCE ESL faculty wrote to Gonzales to protest the limitation. Gonzales subsequently met with many of the part-time faculty to discuss this issue.[7]

Flannery was a part-time DCE ESL instructor who began teaching at the College in the fall of 1990. From September 1990, until the fall of 1993, she taught DCE ESL courses only during the morning. As a result of the transfer of daytime DCE ESL courses to the Day

---

1. Neither party contests the Commission's jurisdiction in this matter.

2. The parties stipulated that the collective bargaining agreements for the academic years 1990-1991, 1991-1992 and 1992-1993 were in effect at all times relevant to this case.

3. The Recognition clause of the Day contract provides in pertinent part as follows:

> The Board hereby recognizes the Association as the exclusive bargaining representative with respect to conditions of employment for all regular full-time employees occupying the positions delineated in Appendix A and, **those part-time employees recognized as unit members by the Labor Relations Commission in Case SCR-2190, i.e. part-time faculty teaching credit courses who have taught during any part of the academic year for each of the last three consecutive years, or who are now teaching in his/her third consecutive academic year, and those part-time daytime academic support personnel employed for any part of the fiscal year for each of the last three fiscal years or who are now employed in their third consecutive fiscal year....** (emphasis in original).

4. The Employer objects to this finding, as well as the finding *infra*, line 6 and 7 that the College transferred the daytime DCE ESL courses to the Day division. Citing evidence in the record demonstrating that prior to September 1993, ESL courses were offered by both the Day division and the Division of Continuing Education, the Employer argues that consequently, ESL courses were not "transferred" to any one division. The Employer acknowledges, however, that while ESL courses continued to be offered by both divisions, the number of those courses offered in the Day division increased. Although the Employer is correct in noting that the record demonstrates that both the Day and DCE divisions offered daytime ESL courses prior to September 1993, we decline to amend the ALJ's finding because the record also reveals that the College moved all of the daytime DCE ESL courses to the Day division.

5. There is no evidence in the record that the Employer gave the Union prior notice of the transfer or an opportunity to bargain over it.

6. The Employer challenges this finding, arguing that the collective bargaining agreement governing DCE bargaining unit members does not guarantee specific courses or time slots. It also asserts that Dean Willenbrock's testimony demonstrates that Flannery did not lose her reappointment rights under the contract and continued to receive opportunities to teach in the DCE program. We agree that the record demonstrates that the College offered Flannery courses in the DCE division after her daytime ESL course was transferred to the Day division. However, the record also contains evidence, uncontradicted by Willenbrock, which established that bargaining unit members other than Flannery lost reappointment rights as a result of the transfer of the daytime ESL courses. Accordingly, we do not disturb the ALJ's finding.

7. Of the eight signatories to the December 9 letter, six were offered ESL courses in the Day division during the spring semester of 1994.

division, Flannery, along with other instructors, was transferred from the DCE division to the Day division at some point during the fall of 1993.[8] Following the transfer, Flannery received a Day division contract and was supervised and evaluated by Gonzales.

In November or December of 1993, Flannery complained to various college officials, including Dean Willenbrock, College President Dr. Grace Brown (Brown) and Boston Business School Building Coordinator Tom McGuire (McGuire), that there was inadequate heat in her classrooms. In December 1993, she initiated and signed the letter to Gonzales protesting the credit limit affecting Day division ESL instructors.[9]

In December 1993, Flannery completed and submitted a form to Gonzales indicating that she wished to continue teaching ESL in the morning in the Day division. On or about January 18, 1994, Flannery telephoned Gonzales to discuss her teaching schedule for the spring semester because she had not received any classes at that time.[10] Gonzales told Flannery that he had not given her any classes and explained that he had thought she did not want any classes because she "complained so much." Following their conversation, Flannery wrote to College President Brown and College Vice President Dr. Bruce Rose (Rose) and protested Gonzales's decision and procedure. Neither Brown nor Rose responded to Flannery's letters. Willenbrock subsequently offered Flannery an evening ESL DCE course in the spring semester of 1994. Flannery did not accept the assignment because she teaches the piano and performs during evening hours.[11]

Opinion

There are two issues before us in this case: first, whether the Employer unlawfully transferred daytime ESL courses from the DCE and its bargaining unit to non-unit employees in the Day division; and second, whether the Employer unlawfully discriminated against Flannery for participating in concerted, protected activities when it failed to offer her a daytime ESL course in the Day division.

Count I: Transfer of Bargaining Unit Work

The Commission has consistently held that an employer must bargain with the exclusive representative of its employees before transferring work that traditionally has been performed by bargaining unit employees to non-unit personnel. *City of New Bedford*, 15 MLC 1732,1736 (1989). To determine whether an employer has unlawfully transferred bargaining unit work, the Commission considers the following factors: 1) whether the employer transferred bargaining unit work to non-unit personnel; 2) whether the transfer of unit work to non-unit employees has an adverse impact on individual employees or the unit itself; and 3) whether the employer gave the bargaining representative prior notice and an opportunity to bargain over the decision to transfer the work. *See, City of Gardner*, 10 MLC 1218, 1219 (1983).

In certain circumstances where job duties have traditionally been shared by bargaining unit members and non-unit employees, the Commission has held that the work in question will not be recognized as exclusively bargaining unit work. *City of Quincy/Quincy City Hospital*, 15 MLC 1239 (1988). In these shared work situations, there is no obligation to bargain over every incidental variation in job assignments between unit and non-unit personnel - rather, bargaining must occur only in situations where there is a calculated displacement of bargaining unit work. *City of Boston*, 10 MLC 1539,1541 (1984). To determine whether a calculated displacement of unit work has occurred, the Commission examines how the work has been shared in the past. If unit employees traditionally have performed an ascertainable percentage of the work, a significant reduction in the portion of work performed by unit employees with a corresponding increase in the work performed by non-unit employees may demonstrate a calculated displacement of unit work. *City of New Bedford* at 1737.

The Union argues that the Employer failed to notify it before making the decision to transfer the daytime DCE ESL courses to the Day division and did not provide an opportunity to bargain over the decision or its impacts. It contends that the removal of work from the DCE unit had a negative impact on those employees who possessed reappointment rights under the DCE contract but would have no bargaining unit status or reappointment rights in the Day division until they had reached their third consecutive year of Day division teaching.

Conversely, the Employer maintains that it had no duty to bargain with the Union over its action because its decision to increase its Day division ESL courses and limit the DCE daytime ESL courses was a school curriculum decision that did not require bargaining. The Employer further contends that it had no obligation to bargain with the Union because the Union failed to demand bargaining after confirming the Employer's conduct. Finally, it asserts that, because the work was shared between the Day division bargaining unit and the DCE bargaining unit, the work was not the sole province of the DCE unit. We consider each of these arguments *in seriatim*.

First, we find that the Employer was obligated to bargain with the Union over the transfer of ESL courses. There is no evidence that the ESL curriculum was at issue in the decision, nor did the transfer change the level of services that the College provided;

---

8. The record does not reveal a talismatic point at which the transfer took place. Flannery became aware that the transfer had occurred when Gonzales became her supervisor and conducted her evaluation.

9. Although other faculty members were similarly concerned about the lack of heat in the classrooms, it is not clear from the record whether they voiced their concern to school administrators. There is no evidence demonstrating that Flannery spoke on behalf of other faculty members when she complained about the lack of heat.

10. Flannery received her assignments for Day division ESL classes from Gonzales after she was transferred to the Day division. Willenbrock was unable to offer Day division assignments to Flannery because his authority was limited to making course assignments in the DCE.

Prior to their January 18 conversation, Flannery left several messages for Gonzales inquiring about her teaching schedule for the spring semester.

11. Willenbrock offered Flannery DCE ESL courses in the three semesters which followed the spring semester of 1994. These classes were also scheduled for evenings or on weekends.

consequently, the transfer does not constitute a non-bargainable curriculum or level of services decision.[12] Further, "[t]he [Employer's] obligation to bargain prior to transferring unit work involves no substantial infringement upon the [its] prerogative to determine educational policy." *Massachusetts Board of Regents of Higher Education*, 14 MLC 1469,1482 (1988). In addition, we find that the transfer of work constituted a calculated displacement of shared unit work. The work transferred, all of the daytime DCE ESL classes, was a distinct, quantifiable amount of work having an impact on approximately eight teachers.

Contrary to the Employer's arguments, we find that the Employer was obligated to bargain with the Union notwithstanding the Union's failure to demand bargaining. "The doctrine of waiver is applied in cases where the Union has notice of a *proposed* change in terms of employment and through some action or inaction and is found to have forfeited its right to protest unilateral action with respect to the matter." *City of Boston*, 8 MLC 1800, 1804, (1982)(emphasis in original). Here, the Employer failed to give the Union advance notice of its proposed action and the Union first learned of the transfer after it had already taken place. This approach negates the purpose behind requiring prior consultation over changes affecting mandatory subjects of bargaining: to enable the union to present arguments to dissuade the employer from taking the proposed action, or to suggest modifications in the planned action. *City of Everett*, 2 MLC 1471, 1476 (1976). Moreover, "the employer cannot rely upon the union's failure to properly request bargaining unless the employer has satisfied its obligations to provide notice and a reasonable opportunity to bargain." *Commonwealth of Massachusetts*, 9 MLC 1362,1355 (1982). Consequently, we conclude that the Union was not obligated to demand bargaining after the fact to preserve its rights. *Cf. Town of Dennis*, 12 MLC 1027 (1985). (Union presented with a *fait accompli* was not required to demand bargaining to preserve its right to an adjudication of unlawful conduct or remedial relief.)

Next, we consider whether the transfer of work had an adverse impact on either the individual employees or the DCE bargaining unit. Although Flannery apparently retained reappointment rights under the DCE contract, other transferred teachers did not and those teachers were adversely affected by the loss of DCE bargaining unit status and contractual benefits.[13] In addition, the transfer caused the DCE bargaining unit to lose numerous bargaining unit positions. Accordingly, we find that the transfer of daytime ESL courses detrimentally affected the DCE bargaining unit as well as individual employees, *see*, *Massachusetts Board of Regents of Higher Education*, 14 MLC at 1483, and the fact that the work was shared between the two bargaining units is inconsequential. *City of New Bedford*, 15 MLC at 1739.

Count II: Unlawful Retaliation

The Commission applies a three-step analysis when reviewing an alleged violation of Section 10(a)(3). *Trustees of Forbes Library* v. *Labor Relations Commission*, 384 Mass. 559, 565-566 (1981); *Town of Clinton*, 12 MLC 1361, 1364 (1985); *Boston City Hospital*, 11 MLC 1065, 1071 (1984). First, the Commission determines whether a *prima facie* case had been established. To establish a *prima facie* case of discrimination based on concerted, protected activities, the charging party must produce evidence to support each of the following elements: that the employee engaged in concerted, protected activity under Section 2 of the Law, that the employer knew of this activity, that the employer took adverse action against the employee, and that the adverse action was motivated by the employer's desire to penalize or discourage the concerted, protected activity. *Town of Clinton*, 12 MLC at 1364, *Boston City Hospital*, 11 MLC at 1071; *City of Boston (Police Department)*, 8 MLC 1872, 1874 (1982).

Once the charging party has established a *prima facie* case, the employer may rebut it by producing evidence that one or more lawful reasons actually motivated the adverse action. *Town of Holbrook*, 15 MLC 1221,1225 (1988); *Athol-Royalston Regional School District Committee*, 12 MLC 1399,1408 (1985). If the employer produces that evidence, the Commission considers whether the employer would not have taken the adverse action "but for" the employee's concerted, protected activity. *Town of Clinton*, 12 MLC at 1364; *Boston City Hospital*, 11 MLC at 1071; *cf. Trustee of Forbes Library*, 384 Mass. at 566.

As a threshold issue, we find that Flannery engaged in concerted, protected activity when she, along with eight other employees, wrote to Gonzales to protest the credit limitation on part-time Day division teachers. Consequently, we focus our analysis on the Employer's arguments.

Although the Employer admits having knowledge of Flannery's participation in writing the December 9 letter, it argues that the Union has failed to prove that Gonzales's decision constituted adverse action or was unlawfully motivated. In the alternative, it offers a legitimate, non-discriminatory reason for Gonzales's decision.

The Employer asserts that it was not obligated to offer a Day division course to Flannery and that it satisfied any obligation to her by offering her an evening DCE ESL course. However, this argument overlooks the fact that the Employer transferred Flannery to the Day division, offered Day division courses to other, similarly transferred teachers, yet denied Flannery's request to continue teaching Day division ESL classes. Thus, although the Employer may have had no contractual obligation to offer a Day division course to Flannery, its refusal to do so is nonetheless adverse for purposes of the Section 10(a)(3) analysis.[14]

---

12. The Employer argues that requiring bargaining over the decision to move daytime ESL courses from the DCE to the Day program would subject each and every semester's course offering to collective bargaining. This argument is not compelling because there is no evidence that the ramifications of the transfer are as significant or far-reaching as the Employer suggests.

13. Part-time employees in the Day division do not acquire bargaining unit status until their third consecutive year of Day division teaching.

14. In *Town of Holbrook*, 15 MLC 1221 (1988), the Commission noted that an action that is punitive can also be adverse within the meaning of the Law. Because

The Employer next argues that Gonzales was not motivated by unlawful considerations when he failed to offer a Day division ESL course to Flannery, and that Flannery misunderstood his words in their January 18, 1994 conversation. It maintains that Gonzales's words did not manifest any retaliatory intent, but instead, reflected his justifiable belief that Flannery did not want a Day division assignment because of the credit limitations on part-time teachers. The record, however, belies this interpretation. Flannery expressed her interest in teaching a Day division ESL course by submitting a request form to Gonzales; thus, Gonzales had no basis for believing that Flannery did not want a Day division course and any contrary belief would be disingenuous.[15] Moreover, it is patently clear from Gonzales's words that Flannery's complaints were germane to his decision. This evidence, coupled with the timing of his decision which occurred within two months of receipt of the December 9 letter, is sufficient to sustain the *prima facie* case and create a presumption of unlawful discrimination.

We next consider the Employer's contention that Gonzales had a legitimate, non-discriminatory reason for his decision, specifically, Flannery refused to accept the Day division policy on total course credits and assignments.[16] This argument is simply not credible. Although Flannery protested the Day division credit limitation, there is no evidence that she had refused, or would refuse to accept a Day division course assignment. As previously noted, Flannery submitted a form to Gonzales in December indicating that she wished to continue teaching ESL in the Day division, in a course load that conformed to the factious credit limitations. Most significantly, however, Gonzales never testified that this was the basis for his decision. Consequently, we find that the Employer has failed to sustain its burden of producing evidence that this proffered reason actually motivated Gonzales's decision not to offer Flannery a Day division ESL class. Thus, the Employer has failed to rebut the presumption of discrimination created by the Union's *prima facie* case and the following order is warranted. *See, generally, Boston School Committee*, 22 MLC __ (MUP-9067, March 2, 1994, unpublished opinion) *aff'd.*, No. 94-P-1931 (Mass. App. Ct., April 24, 1996).

CONCLUSION

For the foregoing reasons, we conclude that the Employer violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unlawfully transferring bargaining unit work to employees outside the bargaining unit, and violated Section 10(a)(3) and, derivatively, Section 10(a)(1) by unlawfully discriminating against Molly Flannery for engaging in concerted, protected activities.

ORDER

WHEREFORE, WE HEREBY ORDER the Employer to:

1. Cease and desist from:

a. Interfering with, restraining and coercing its employees, including Molly Flannery, in any right guaranteed under the Law.

b. Unilaterally transferring any work traditionally performed by employees in the DCE bargaining unit to employees outside that unit, without first bargaining collectively to resolution or impasse with the DCE.

c. Discriminating against Molly Flannery or any other employee in regard to hiring, tenure or any other term or condition of employment, in retaliation for participating in concerted, protected activities.

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

a. Restore to the DCE bargaining unit all the daytime ESL courses performed by the DCE unit prior to the transfer which occurred in the fall of 1993.

b. Upon request, bargain collectively with the DCE to resolution or impasse over the decision to transfer the daytime, DCE ESL courses to the Day division.

c. Make whole any DCE employee who suffered a loss of pay or benefits as a direct result of the transfer of daytime DCE ESL courses to the Day division, plus interest on any sums owing at the rate specified in *Everett School Committee*, 10 MLC 1609 (1984).

d. Immediately offer Molly Flannery a daytime, Day division ESL course.[17]

e. Make Molly Flannery whole for any loss of wages and benefits suffered as a result of the Employer's unlawful decision not to offer her a daytime Day division ESL course in the spring semester of 1994, plus interest on any sums owed at the rate specified in *Everett School Committee*, 10 MLC 1609 (1984).

f. Post in conspicuous places where employees represented by the Union usually congregate, or where notices are usually posted, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

g. Notify the Commission in writing within thirty (30) days after receipt of this decision and order of the steps taken to comply herewith.

NOTICE TO EMPLOYEES

The Labor Relations Commission has concluded that the Higher Education Coordinating Council has violated Sections 10(a)(1),(3) and (5) of Massachusetts General Laws, Chapter 150E when it unilaterally transferred daytime ESL courses from the DCE to the

---

14. *continued...* Gonzales linked his decision to Flannery's complaints, we find that his action can be deemed to be punitive.

15. Gonzales testified that he did not recall whether Flannery had applied for an opportunity to teach in the Day division; however, he did not deny receiving the form indicating that Flannery wished to teach a seven-credit course load in the Day division. Also, the record indicates that prior to the January 18 telephone conversation, Flannery left several messages inquiring about her teaching schedule for the spring semester, and Gonzales did not deny receiving these messages. Consequently, we cannot conclude that Gonzales was unaware of Flannery's interest in a Day division ESL course.

16. Although Gonzales did not cite the December letter to Flannery as an example of the complaints for which she was not reappointed, the Employer's argument clearly links the letter to Gonzales's decision.

17. The Commission's traditional *status quo ante* remedy requires the Employer to offer Flannery a daytime, Day division ESL course and make her whole for its unlawful failure to offer her such a course in the spring semester of 1994. However, pursuant to the Day division collective bargaining agreement, part-time teacher such as Flannery do not become unit members until their third consecutive year of teaching, and thus the Employer would not have been contractually obligated to offer her any additional courses. We limit our remedy accordingly.

Day division and when it failed to offer Molly Flannery a daytime Day division ESL course in the 1994 spring semester, in retaliation for her participation in concerted, protected activity.

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of their rights under M.G.L.c.150E.

WE WILL NOT transfer bargaining unit work to non-bargaining unit personnel without first giving the Union prior notice and an opportunity to bargain to resolution or impasse about that decision.

WE WILL NOT refuse to bargain in good faith with the Union over the decision to transfer daytime DCE ESL courses to the Day division.

WE WILL restore to the DCE bargaining unit the daytime DCE ESL courses transferred to the Day division in the fall of 1993.

WE WILL make whole any DCE employee who suffered a loss of pay or benefits as a direct result of the College's decision to transfer daytime DCE ESL courses to the Day division, plus interest on any sums owing at the rate specified in *Everett School Committee*, 10 MLC 1609 (1984).

WE WILL NOT discriminate against Molly Flannery or any other employee in regard to hiring, tenure, or any other term and condition of employment, in order to discourage concerted, protected activity.

WE WILL immediately offer Molly Flannery a daytime Day division ESL course.

WE WILL make Molly Flannery whole for any loss of wages and benefits suffered as a result of the Employer's unlawful decision not to offer her a daytime Day division ESL course in the spring semester of 1994, plus interest on any sums owed at the rate specified in G.L. c.231, Section 6B.

[signed]
For the Higher Education Coordinating Council

* * * * * *