In the Matter of BOARD OF HIGHER EDUCATION

and

MASSACHUSETTS COMMUNITY COLLEGE COUNCIL/MTA/NEA

Case No. SUP-4509

67.3 furnishing information
82.12 other affirmative action

January 11, 2000
Robert C. Dumont, Chairman
Helen A. Moreschi, Commissioner
Mark A. Preble, Commissioner

James R. Brown, Esq. — *Board of Higher Education*
Ira Fader, Esq. — *Massachusetts Community College Council/MTA/NEA*

DECISION[1]

Statement of the Case

The Massachusetts Community College Council/MTA/NEA (the Union) filed a charge of prohibited practice with the Labor Relations Commission (the Commission) on September 14, 1998, alleging that the Board of Higher Education (the Board) had engaged in a prohibited practice within the meaning of M.G.L. c. 150E (the Law). Following an investigation, the Commission issued a Complaint of Prohibited Practice on April 9, 1999. The Complaint alleged that the Board had violated Section 10 (a) (5) and, derivatively, Section 10 (a) (1) of the Law by failing to provide the Union with relevant and reasonably necessary information.[2]

On June 29, 1999, Cynthia A. Spahl (Spahl), a duly-designated Hearing Officer of the Commission, conducted a hearing at which both parties were given an opportunity to be heard, to examine witnesses, and to introduce evidence. The Board orally filed an answer to the Commission's Complaint on the day of the hearing. Following the hearing, both parties submitted post-hearing briefs. Spahl issued Recommended Findings of Fact on August 10, 1999. The Board filed a challenge to the Recommended Findings of Fact on August 23, 1999.

Findings of Fact[3]

The Board is a public employer within the meaning of Section 1 of the Law. The Union is an employee organization within the meaning of Section 1 of the Law and is the exclusive bargaining representative for certain faculty and professional staff employed by the Board.

The Union and the Board, formerly known as the Higher Education Coordinating Council, were parties to a collective bargaining agreement (the Agreement) effective from July 1, 1995 through June 30, 1998. Article XIV of the Agreement governed the criteria and process for a change of rank of faculty and professional staff unit members. Section 14.01(A) of Article XIV lists four ranks for faculty members: 1) instructor; 2) assistant professor; 3) associate professor; and 4) professor. Section 14.02 of Article XIV pertains to eligibility for a change of rank. Factors considered to determine eligibility for a change of rank under this provision include: 1) years of service; 2) date of the unit member's last change of rank; and 3) degrees held. Section 14.04 of Article XIV sets forth the following additional qualifications: 1) evidence of significant relevant professional development; 2) significant contribution to the college or community service; 3) falling in the top twenty percent of the college faculty for the unit member's most recent two successive student evaluations; and 4) highly effective instructional performance of a faculty member or highly effective performance of a professional staff member in the professional judgment of the college president.

On or about April 24, 1997, Deborah R. McCormack (McCormack), an associate professor employed by the Board at Massachusetts Bay Community College (MBCC), filed a Step One Complaint pursuant to the grievance procedure in the parties' Agreement.[4] In the Step One Complaint, McCormack alleged that she had not been awarded a change of rank to full professor in violation of Article XIV of the Agreement.[5]

Roger A. Van Winkle (Van Winkle), President of MBCC at the time of the events in question, held a meeting with McCormack on May 28, 1997 regarding her Step One Complaint.[6] Van Winkle issued a Step One Decision on or about June 4, 1997, denying McCormack's grievance. Dennis Fitzgerald (Fitzgerald), Union

1. Pursuant to 456 CMR 13.02 (2), the Commission designated the hearing in this case as one in which the Commission shall issue a decision in the first instance.

2. The Board argued in its post-hearing brief that the Commission had dismissed the Union's Section 10 (a) (5) information claim and had proceeded to complaint under Section 10 (a) (1) only. However, paragraphs nine and ten of the Commission's complaint clearly allege that the Board failed to provide information in violation of Section 10 (a) (5) and, derivatively, Section 10 (a) (1) of the Law. The Commission dismissed the Union's repudiation claim under Section 10 (a) (5) and the Union's alleged violation of Section 10 (a) (6).

3. The Commission's jurisdiction is uncontested.

4. McCormack filed the Step One Complaint without Union assistance.

5. Although a change in rank does not alter working conditions or change wages or benefits, it recognizes an employee's service.

6. No Union representative was present at this meeting.

grievance coordinator, received a copy of the Step One Decision from Van Winkle on June 6, 1997.

On or about June 11, 1997, McCormack appealed the Step One Decision by filing a Step One Appeal to Mediation.[7] Fitzgerald received a copy of the Step One Appeal to Mediation on June 13, 1997. At this point, Fitzgerald became actively involved in the grievance process. He attempted to coordinate the mediation schedule with the Office of Community College Council (OCCC). After several postponements, the parties scheduled the mediation on November 3, 1997.

To prepare for McCormack's mediation, Fitzgerald wrote a letter to Attorney Cynthia Denehy (Denehy) from OCCC on October 27, 1997 to request the following information[8] pursuant to Appendix A of Article X of the Agreement:[9] 1) a list of all unit members who were determined to be eligible for a change in rank or classification; 2) a copy of each appropriate dean's recommendation to Van Winkle of unit members to receive a change in rank or classification; 3) a list of unit members who received a change in rank or classification and the date decided; 4) a copy of Van Winkle's decision[10]; 5) a copy of the statistics listing the unit members whose student evaluation scores were in the top twenty percent for two consecutive years; 6) a copy of all evaluative material considered since the last change in rank or classification for McCormack and all unit members who received a change in rank or classification; and 7) identification of the Article 14.04 additional qualification that was met for each recipient of a change in rank or classification. However, Fitzgerald did not expect the Board to provide him with all of the material that he requested prior to McCormack's mediation, because the Board had not had sixty days to respond to the information request pursuant to Appendix A of Article X of the Agreement.[11]

The mediation occurred as scheduled on November 3, 1997. Representatives from the Union and the Board did not discuss what, if any, information the Board had brought to the mediation. The parties did not resolve the issues related to McCormack's grievance at the mediation.

On December 8, 1997, the Union Executive Committee certified McCormack's case for arbitration. On or about May 7, 1998, Fitzgerald received notice through the Massachusetts Teachers Association (MTA) that the American Arbitration Association had scheduled an arbitration hearing on October 7, 1998.

After receiving a letter from Brown dated March 27, 1998 concerning outstanding information requests, Fitzgerald wrote to Brown on or about March 30, 1998 to confirm, among other things, that the Union's information request related to McCormack was still pending. Subsequently, Fitzgerald and Brown had several conversations during which Brown stated that the information regarding McCormack was forthcoming. On or about May 17, 1998, Brown sent Fitzgerald a fax with two documents attached: 1) a process for classroom/instructional observation form for McCormack dated March 28, 1996; and 2) a recommendation against a change in rank from McCormack's immediate supervisor dated April 8, 1997. On or about June 29, 1998, Brown faxed Fitzgerald a list of unit members who had received a change in rank effective as of fall 1997. On October 4, 1998, MTA consultant Dan Donohue (Donohue) reviewed McCormack's personnel file. However, the Union still did not have all of the information Fitzgerald had requested in his October 27, 1997 letter to Denehy. Consequently, Fitzgerald asked the MTA to file a charge of prohibited practice at the Commission and to obtain an arbitration subpoena.[12]

The arbitration did not occur on October 7, 1998 and was rescheduled to March 26, 1999. On the day of the arbitration, the Board provided the Union with: 1) copies of each dean's recommendation for all unit members who had received a change in rank; 2) Van Winkle's decision; and 3) a listing of unit members who fell in the top twenty percent of student evaluations. Nevertheless, the Union requested to postpone the arbitration because it still did not have the evaluation material for other unit members who had received a change in rank. The Board protested the Union's postponement request and sought to proceed with the arbitration. The arbitrator postponed the arbitration until August 1999.

On June 15, 1999, Fitzgerald received a telephone call from Director of Personnel Laurie Taylor (Taylor) advising him that the remaining documents were ready for him to come and review. Fitzgerald told Taylor that the Agreement required her to send the information to him. He received the documents on June 21, 1999. At this point, the Union had all of the information that Fitzgerald had requested in his October 27, 1997 letter to Denehy.

Opinion

The duty to bargain encompasses the duty of an employer to disclose to a union information that is relevant and reasonably necessary to the union's execution of its duties as exclusive bargaining representative. *Adrian Advertising*, 13 MLC 1233 (1986), *aff'd sub nom. Despres* v. *Labor Relations Commission*, 25 Mass. App. Ct. 430 (1988). The standard for determining relevancy is a liberal one, similar to the standard for determining relevancy in discovery proceedings in civil litigation. *Board of Trustees,*

7. McCormack filed the Step One Appeal to Mediation without Union assistance.

8. All of the information requested by the Union pertained to the spring 1997 change in rank and classification process at MBCC.

9. The first enumerated paragraph of Article X, Appendix A provides, in part, that the Union grievance coordinator shall make a written request to the applicable college president whenever he or she needs personnel file information in order to evaluate and prepare a grievance involving evaluations, promotions, or performance-based awards.

10. The reference to Van Winkle's decision pertains to the decision for other bargaining unit members and not for McCormack.

11. The second enumerated paragraph of Article X, Appendix A provides, in part, that the president of the college or the president's designee, after receiving a written request for information from the Union grievance coordinator, *shall mail the* requested information within sixty calendar days of receipt of the request.

12. Fitzgerald's October 27, 1998 letter to Denehy was attached to the arbitration subpoena. To the best of Fitzgerald's knowledge, the arbitration subpoena was served.

University of Massachusetts, 8 MLC 1139 (1981). Once the union establishes that the requested information is relevant and reasonably necessary to its duties as exclusive bargaining representative, the burden shifts to the employer to demonstrate that: 1) its concerns about disclosing the information are legitimate and substantial; and 2) 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). A refusal to provide information will be excused where the employer's concerns are found to outweigh the needs of the union. *Id.* at 1298.

Here, the Board does not dispute that: 1) the information requested by the Union was relevant and reasonably necessary for it to execute its duties as collective bargaining representative; and 2) it responded inefficiently to the Union's information request. Nevertheless, the Board asserts that its actions do not rise to the level of an unfair labor practice and offers five reasons to support its assertion. We will examine each of these reasons in turn.

The Board first contends that the Union crafted a broad, poorly defined, and potentially duplicative information request. However, the Commission has found that a union's information request is not overly broad, provided the request is tailored to a reasonable period in time and to a reasonable number of employees. *Worcester School Committee*, 14 MLC 1682 (1988). Here, the Union's information request was confined to personnel who received a change in rank at MBCC during spring 1997. Thus, the Union's information request was permissible in scope.

The Board next argues that it made a good faith effort to ascertain what information was outstanding and to provide the information to the Union. It points to Brown's March 27, 1998 letter, Brown's May 17, 1998 and June 29, 1998 faxes, and the parties' discussion on March 26, 1999 in support of its argument. However, the Board's argument overlooks two facts. First, although the Board provided the Union with some of the requested information on the latter three dates, the Union had to file a charge of prohibited practice with the Commission on September 14, 1998 to secure the remainder of the requested information. Compelling an exclusive bargaining representative to file charges to obtain information to which it is legally entitled does not effectuate the purposes of the Law or enhance the spirit of labor relations. *Boston Public School Committee*, 24 MLC 8, 11 (1997). Second, the Board's delay in providing the requested information to the Union resulted in a postponement of the March 26, 1999 arbitration. Because this delay hampered the Union's ability to represent McCormack, it was unreasonable. *See, e.g., Boston School Committee*, 24 MLC at 11; *Massachusetts State Lottery Commission*, 22 MLC 1468, 1472 (1996); *City of Boston*, 8 MLC 1419, 1437-1438 (1981). Consequently, the Board's efforts to provide the Union with the requested information do not comport with the requirements of the Law.

The Board also asserts that the parties believed they could settle McCormack's grievance. It asks the Commission to infer that, as a result, the parties did not place a high priority on the information request. However, the record reflects that the Union continuously sought the requested information. For example, Fitzgerald wrote to Brown on or about March 30, 1998 to confirm that the information request related to McCormack was still outstanding. He also spoke to Brown on numerous occasions about the pending information request. The Union later filed a charge of prohibited practice and obtained an arbitration subpoena in an effort to secure the requested information. When the Board did not provide the remaining information by the March 26, 1999 arbitration date, the Union requested and received a postponement to force the Board to produce the evaluative materials for other unit members who had received a change in rank. Accordingly, the record does not support the Board's proposed inference.

The Board further argues that the Union was not negatively impacted at the March 26, 1999 arbitration, because the outstanding information was either irrelevant or had already been provided to the Union. However, as previously noted, the Union sought and received a postponement of the arbitration precisely because it lacked relevant information to present to the arbitrator. This postponement impeded the Union from effectively fulfilling its role as exclusive representative. Therefore, the Board's argument is without merit.

The Board additionally posits that McCormack was not harmed when the grievance mediations and the March 26, 1999 arbitration were postponed. It reasons that McCormack would only receive an honorary designation rather than an increase in pay or benefits from the change in rank. In addition, the Board states that: 1) the Union postponed the arbitration in October 1998 without detriment to McCormack; and 2) the mediation postponements were not related to the Union's information request. However, the legal standard is not whether the grievant is harmed by the employer's delay in providing the information. Rather, the Commission asks if the Union's role as exclusive bargaining agent has been diminished by the employer's delay in furnishing the requested information. *Boston School Committee*, 24 MLC at 11; *Massachusetts State Lottery Commission*, 22 MLC at 1472; *City of Boston*, 8 MLC at 1437-1438. Thus, the Board's argument is unpersuasive.

Conclusion

For the reasons set forth above, we conclude that the Board violated Section 10 (a) (5) and, derivatively, Section 10 (a) (1) of the Law by failing to provide the Union with relevant and reasonably necessary information in a timely manner.

Order

WHEREFORE, based on the foregoing, it is hereby ordered that the Board of Higher Education shall:

1. Cease and desist from:

   a. Failing and refusing to bargain collectively in good faith with the Union by refusing to provide in a timely manner information that is relevant and reasonably necessary to the Union's role as exclusive bargaining representative.

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

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

a. Provide requested information that is relevant and reasonably necessary to the Union's role as exclusive bargaining representative in a timely manner.

b. Make whole the Union for any costs incurred relating to the postponement of the arbitration on March 26, 1999 due to the Board's unlawful failure to provide the Union with relevant and reasonably necessary information in a timely manner.

c. Sign and post immediately in conspicuous places where employees usually congregate or where notices to employees are usually posted and maintain for a period of thirty (30) days thereafter copies of the Notice to Employees.

d. Notify the Commission within ten (10) days after the date of service of this decision and order of the steps taken to comply with its terms.

SO ORDERED.

* * * * * *