

Association prior notice and an opportunity to bargain in good faith to resolution or impasse over a proposed change;

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

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

a. Refrain from requiring or using the City physician’s examination of a police officer as a criterion for police officers’ eligibility to return to work light duty after an off-duty injury or illness unless the City physician is also the police officer’s treating or personal physician and the police officer provides this information as part of their request to work light duty after an off-duty injury or illness;

b. Make whole Officer Nancy Rooney for any loss of pay or benefits she may have suffered from February 16, 1994 until December 4, 1994 as a result of the City’s unlawful refusal to bargain, plus interest on all sums owed at the rate specified in M.G.L. c. 231, Section 6B, compounded quarterly, up to the date the City complies with this part of the order.

c. Upon request by the Newton Police Association, bargain collectively in good faith prior to changing any mandatory subject of bargaining, including criteria for eligibility to return to work light duty after an off-duty injury or illness;

d. Post in conspicuous places where employees represented by the Newton Police Association 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.

e. Notify the Commission within ten (10) days of receipt of this decision and order of the steps taken to comply with this order.

SO ORDERED.

**NOTICE TO EMPLOYEES**

The Labor Relations Commission has issued a decision finding that the City of Newton (City) committed a prohibited practice in violation of Sections 10(a)(5) and (1) of the Massachusetts General Laws, Chapter 150E (Chapter 150E), the Public Employee Collective Bargaining Law, by implementing a new criterion for police officers’ eligibility to return to work light duty following an off-duty injury or illness, without first giving the Union notice and an opportunity to bargain to resolution or impasse. In compliance with the Labor Relations Commission’s order,

WE WILL NOT fail or refuse to bargain with the Newton Police Association over the criteria for eligibility to return to work light duty after an off-duty injury or illness.

WE WILL NOT change a mandatory subject of bargaining by implementing new criteria for eligibility to return to work light duty after an off-duty injury or illness without giving the Newton Police Association prior notice and an opportunity to bargain in good faith to resolution or impasse over any proposed change.

WE WILL make whole Officer Nancy Rooney for any loss of pay or benefits she may have suffered from February 16, 1994 until December 4, 1994 as a result of the City’s unlawful refusal to bargain, plus interest on all sums owed at the rate specified in M.G.L. c. 231, Section 6B, compounded quarterly, up to the date the City complies with this part of the order.

WE WILL upon request by the Newton Police Association, bargain collectively in good faith to resolution or impasse prior to changing the criteria for eligibility to return to work light duty after an off-duty injury or illness.

[signed]  
For the City of Newton

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In the Matter of QUINCY SCHOOL COMMITTEE  
and  
KAREN SCHOLZ  
Case No. MUP-1986

62.8 *unsatisfactory work performance*  
63.21 *filing a grievance*  
65.22 *filing a grievance*  
65.6 *employer speech*  
82.13 *reinstatement*  
92.33 *rules of evidence*  
92.335 *credibility determination by hearing officer*

December 29, 2000

Helen A. Moreschi, Chairwoman  
Mark A. Preble, Commissioner

Michelle A. McNulty, Esq. *Representing the Quincy School Committee*

Vida K. Berkowitz, Esq. *Representing Karen Scholz*

**DECISION<sup>1</sup>**

STATEMENT OF THE CASE

On November 5, 1997, Karen Scholz (Scholz) filed a charge with the Labor Relations Commission (Commission) alleging that the Quincy School Committee (School Committee) had violated Sections 10(a)(1), (3), and (4) of M.G.L. c. 150E (the Law). Following an investigation, the Commission issued a Complaint of Prohibited Practice on August 19, 1998, alleging that the School Committee had: 1) violated Section 10(a)(3), and, derivatively, Section 10(a)(1) of the Law by failing to renew Scholz’s contract for the 1997-98 school year and to grant her professional teacher status in retaliation for Scholz’s statement that she was considering

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1. Pursuant to 456 CMR 13.02(2), this hearing has been designated for a Commission decision in the first instance.

filing a grievance; and 2) independently violated Section 10(a)(1) by making statements regarding Scholz's right to file a grievance pursuant to Section 2 of the Law.

On May 6, 7, and 10, 1999, Diane M. Drapeau, a duly designated hearing officer of the Commission, conducted a hearing at which all parties had an opportunity to be heard, to examine witnesses, and to introduce evidence.<sup>2</sup> The School Committee and Scholz submitted post-hearing briefs on August 31, 1999. On March 6, 2000, the hearing officer issued her Recommended Findings of Fact. The School Committee filed timely challenges to these findings pursuant to 456 CMR 13.02(2), and Scholz filed a response to the School Committee's challenges. We have considered the City's challenges to the findings, the arguments of the parties and the record in this matter. Based on that review, we make the following findings of fact and conclusions of Law.

#### FINDINGS OF FACT

In the Fall of 1994, the Quincy School Committee hired Scholz for a one-year position as a Spanish teacher at North Quincy High School to replace a teacher who was on sabbatical. During the 1994-1995 school year, Pamela Mateu (Mateu), the acting department head of North Quincy High School, evaluated Scholz. On the evaluation, dated March 14, 1995, Mateu listed the following strengths: 1) plans instruction to include the following skills: oral proficiency, listening comprehension, vocabulary acquisition and writing; 2) balances instruction to meet the needs of different learning styles by using oral as well as written evaluations and reinforces material previously taught; 3) maintains progress records for each student and discusses student progress with individual students; 4) works with guidance, school psychologist and special needs teachers and communicates with parents; 5) uses drills, questions and answer, skits, audio-visual materials, language lab to assist in learning process; 6) friendly, responsive, encourages students to ask questions and uses positive reinforcement; 7) uses different methods to present subject matter; 8) daily participation of all students in classroom activities; 9) ability to teach Spanish effectively to lower and mid-level classes; 10) improved organization and preparation; and 11) maintains a positive atmosphere where students can learn and has continued to produce more variety in lesson plans and has set rules for classroom conduct.

In the non-instructional area, Mateu listed the following strengths: 1) fire drill procedures explained and informs students of upcoming events; 2) organized Rank Book and seating charts are up-to-date; 3) maintains communication with deans, guidance, and department head on all discipline/academic problems; and 4) professional in appearance and classroom performance; contributes beyond the classroom; and is presently co-chair of the Spanish Club.

In the same evaluation, Mateu listed the following areas of improvement: 1) increase use of oral tests and quizzes as proficiency is one of the principal goals of curriculum; 2) increase variety of classroom activities; 3) continue to evaluate, on an ongoing basis, progress of students with regards to proficiency; 4) develop additional creative learning activities to reinforce vocabulary and maintain enthusiasm; 5) deal with any disruptive behavior in a swift and decisive manner; 6) more variety to teaching methods needed; greater use of overhead projector, transparencies and visuals is recommended and continue to seek suggestions and ideas from co-workers; 7) increase cooperative learning activities, skits, role playing, to maximize student involvement; 8) need to become more fluent in the language, preferably by taking advantage of summer programs abroad and plan lessons in greater detail to anticipate questions by students on additional vocabulary and verbs related to the lesson; 9) incorporate in each lesson use of audio-visual materials, charts, maps, particularly overhead and corresponding transparencies; and 10) continue to use department head, guidance, and parents to help deal with undisciplined and unmotivated students. There were no areas needing improvement in the non-instructional area.

Mateu recommended Scholz for reappointment and commented that:

Karen is a responsible, conscientious teacher. She has worked very hard this year to add variety and creativity to her lessons, as well as deal with a few unruly students. She is well-liked by her students and staff. I recommend she spend more time in a Spanish-speaking country to increase fluency, and add a greater cultural dimension to her classes.

Because the teacher she replaced returned from sabbatical, Scholz received a notice of nonrenewal on May 30, 1995. After receiving the nonrenewal notice, Scholz spoke with Janet DiTullio (DiTullio), director of curriculum for the Quincy school system, and Mateu. As a result of her discussions with them, Scholz applied for a world language teacher position at Central Middle School. She interviewed with DiTullio, Mateu, and Central Middle School Principal Louis DiMartinis (DiMartinis).<sup>3</sup> DiMartinis observed one of Scholz's classes at North Quincy High School to determine whether to hire her at Central Middle School for the following year. He thought that she had an average performance and had some disciplinary problems. However, Scholz remembered that he complimented her on how well she handled a student who was misbehaving. After DiTullio and Mateu recommended hiring Scholz, DiMartinis offered Scholz a position at the Central Middle School for the 1995-96 school year. On June 26, 1995, the Superintendent of Schools notified Scholz of her appointment to the position of world language teacher at the Central Middle School<sup>4</sup> for the 1995-96 school year.

2. In accordance with 456 CMR 13.11(4)(a), (b), and (c), the parties prepared a written transcript of the hearing tapes, and we adopt this transcript as the official record of the hearing.

3. DiMartinis supervises approximately 48 teachers at the Central Middle School. He is responsible for the hiring and the firing of personnel in his school. He is also in charge of curriculum, and the safety and maintenance of the school building. He reports to the superintendent of schools.

4. Under Proposition 21/2, the world language program at the middle schools had been eliminated. Eight years ago, the world language program was reestablished as a program in the middle schools (grades 6, 7, and 8). All middle school students are required to take a core language.

*The 1995-1996 School Year*

During the 1995-96 school year at the Central Middle School, Scholz taught two advanced placement 8<sup>th</sup> grades, one honors 8<sup>th</sup> grade, and five 6<sup>th</sup> grade exploratory world language classes. She had at least one preparation period per day and sometimes two. Scholz did not have her own classroom and was considered a traveling teacher.<sup>5</sup> She had discussions with DiMartinis throughout the year about having to travel to different classrooms. At faculty meetings, she would mention the problem, and DiMartinis responded that he was working on it.<sup>6</sup>

During the 1995-96 school year, DiMartinis and DiTullio<sup>7</sup> evaluated Scholz.<sup>8</sup> DiTullio observed her class three or four times. Before observing, DiTullio spoke with Scholz about the new curriculum, and Scholz's plans for implementing it. She also discussed with Scholz activities that Scholz should do with the students and reviewed the activities Scholz was doing with students. DiTullio also scheduled a time when she would attend Scholz's class, and, when attending, DiTullio stayed for the entire class period. After observing Scholz, DiTullio provided feedback to Scholz about her observations.

In March 1996, Scholz received a written evaluation from DiTullio. She met with DiTullio to discuss the evaluation because she disagreed with some of the comments on the evaluation. She brought some of her classroom materials to the meeting. Because Scholz did not have her own classroom, DiTullio had not seen the student projects that Scholz kept in her office. In April 1996 DiTullio modified Scholz's evaluation based on her discussion with Scholz.

On the evaluation, DiTullio listed one strength: the pacing of goals and objectives of the 8<sup>th</sup> grade program, and listed the following areas of improvement: 1) given the population of advanced students, there is need to continue to provide supplementary activities and projects to challenge the gifted learner; 2) continue to organize and pace lessons to provide students with a variety of activities and project-based learning; students need to be provided with a variety of techniques to meet their individual differences; 3) continue to connect with other members of 8<sup>th</sup> grade advanced team to include connections with other subject areas; 4) continue to employ a variety of techniques that allow learners to be challenged and carry out independent study; 5) continue to improve rapport with students through respecting their learning styles; need to discuss successful techniques for the gifted learner with team members and Dr. Osborne; review self-study initiated by staff in 1994; 6) continue to include more project-based techniques, small and large group work using cooperative learning techniques; 7) continue to seek opportunities to increase active engagement of students in learning process; 8) need to continue study in

methodology for middle school learner; and 9) continue to use variety of materials: charts, overhead, film etc. that will challenge learners; need to use consistent lesson planning to self evaluate units of study. In the non-instructional area, DiTullio commented that Scholz needed to work on discipline techniques to have students attend to tasks at hand. DiTullio recommended Scholz for reappointment and commented that "given the population Karen has been working with this year, she needs to continue to investigate techniques that will challenge and support the gifted learner."

DiMartinis also observed Scholz's classroom during the 1995-96 school year. His practice was to have a quick talk with Scholz about how the year was going and then say he would be in to see her. He would then appear unannounced and stay for about fifteen minutes. He did this four or five times during the year and did not give her immediate feedback. Although DiTullio's and DiMartinis' observation methods differed, there is no established method for observing a teacher without professional teacher status. However, there is a standard evaluation instrument that is applied to all teachers without professional teacher status.

DiMartinis evaluated Scholz on March 25, 1996. On this evaluation, he listed the following strengths: 1) Scholz is working with a new curriculum; our goal will be to prepare students adequately so that they will want to pursue world languages; 2) realizes the importance of individualizing her program given the confines of class size and developing a new program; 3) works with the team and resource personnel to better understand the needs of her students; 4) since Scholz works primarily with advanced placement students, the number of learning problems she encounters is limited; 5) understands the importance of utilizing a multi-media approach within her teaching methodologies; 6) exhibits a genuine concern for her students and has established a sensitive rapport with them; 7) Scholz's schedule is quite rigorous in that she travels to a number of rooms during the 6-day cycle; this obviously does not lend itself to utilizing a variety of teaching modes; 8) during my observations, it was evident that Scholz encourages students' participation; 9) appears to be well-founded in her primary language (Spanish); will reserve judgment relative to the same competency in French upon additional observations; 10) this year has presented Scholz many challenges due to her traveling; however, she has done well in meeting this challenge by presenting materials that have kept student interest; and 11) maintains an appropriate climate for learning. In the non-instructional area, DiMartinis commented that Scholz "meets role expectancies" and that discipline and attendant problems had "improved since the beginning of the year".

In the same evaluation, DiMartinis listed the following areas of improvement: 1) need to refine the current curriculum, utilize those areas that are fundamental to a target language, and build upon your

5. A traveling teacher does not have a permanently-assigned classroom and travels from one classroom to another. Generally, there are three or four traveling teachers per year.

6. According to DiMartinis, Scholz's working conditions did not differ from other traveling teachers, and other traveling teachers rarely complained.

7. As director of curriculum, DiTullio is responsible for observing and evaluating nonprofessional teachers. Because she is specifically responsible for reestablishing the world language program in the middle schools, she observes and evaluates the world language teachers in the middle schools.

8. During the 1995-96 and 1996-97 school years, there were three foreign language teachers at the Central Middle School, including Scholz. None of the three had professional teacher status.

success; 2) will be encouraged to develop materials and strategies that assist the instructional process as it relates to individual learning styles; 3) develop and refine diagnostic materials that serve the teacher in providing a more individualized program; 4) continue to keep lines of communication open to parents and resource personnel within the building; 5) continue to explore a variety of instructional techniques to better serve students; 6) be cautious in building rapport with students without losing classroom control; 7) I will work with Scholz in order to make her traveling situation less disruptive to her teaching day; 8) continue to develop materials that both encourage and reinforce a constructivist approach to learning; 9) our challenge is to attempt to limit the number of rooms Scholz uses during the course of the week; and 10) work on developing a smoother tempo in transitioning from one activity to another; establish a firm but fair discipline procedure at the beginning of the year.

In the non-instructional area, DiMartinis commented that in the area of discipline, she should set rules and expectations early in the year and she should continue to develop materials that hold student interest. In addition, he noted that although many of the activities are not required by contract, he believed that teacher visibility at student functions is very important.

DiMartinis concluded his evaluation by recommending Scholz for reappointment. By letter dated June 10, 1996, Superintendent of Schools Eugene Creedon notified Scholz of her reappointment for the 1996-97 school year.

*The 1996-97 School Year*

During the 1996-1997 school year, Scholz taught a 6<sup>th</sup> grade exploratory class, an 8<sup>th</sup> grade standard class, an 8<sup>th</sup> grade honors class, and two 8<sup>th</sup> grade advanced placement classes. She was again a traveling teacher.

At the beginning of the 1996-97 school year, DiTullio and DiMartinis informed Scholz<sup>9</sup> that the 9<sup>th</sup> grade teachers had reported that Scholz's former 8<sup>th</sup> grade students were not at the level that the 9<sup>th</sup> grade teachers expected them to be. The 9<sup>th</sup> grade teachers thought that Scholz should have given the students more written and verbal work. Scholz promised DiTullio and DiMartinis to do more writing and speaking with her students. She also asked DiTullio for a meeting with the 9<sup>th</sup> grade teachers because she wanted to understand their expectations. During the course of this conversation, Scholz either requested peer mentoring<sup>10</sup> or DiMartinis suggested it.

On November 5, 1996, DiTullio observed one of Scholz's 8<sup>th</sup> grade classes.<sup>11</sup> Prior to her observation, DiTullio spoke to Scholz,

discussed the curriculum and her lesson plans, and made an appointment to attend the class. After the observation, DiTullio gave Scholz her written assessment that included commendations in the following areas: 1) rapport with students; 2) focus and response to students' oral fluency; 3) restaurant script development and dialogue with props; 4) fluency review with class on expressions dealing with food; 5) project of food pyramid, relay game objective and rules; 6) discipline; 7) relaxed manner with students; 8) enjoyment of students' responses; 9) portability of relay game materials; and 10) pacing of lesson. In addition, DiTullio commented that Scholz seemed much more relaxed with students this year, that her students attended to the lesson, to her, and their peers. She requested a copy of the November 5 lesson plan and requested that Scholz call her to set up an observation of a 6<sup>th</sup> grade class. She ended her comments by stating "Keep up the good work!"

Although Scholz remembered that DiMartinis came to her classes two or three times during the Fall of 1996, DiMartinis recalled that he conducted about six observations of Scholz from September to January. On three occasions, he put notes containing negative and positive comments in her mailbox. Although DiMartinis claims he mentioned to Scholz that he was concerned with the lack of attention of the students in her classes, Scholz did not remember that he made this comment. DiMartinis had a general conversation with Scholz concerning the lack of flow or organization in Scholz's Spanish class. However, he did not recall any specific examples that he brought to Scholz's attention. DiMartinis does not speak or understand Spanish.

On January 15, 1997, Thomas Walsh (Walsh), the School Committee's personnel director, sent all directors, coordinators, and principals a letter requesting that they forward all completed evaluations of nonprofessional status teachers by March 31, 1997. In addition, he specifically noted which teachers were currently subject to a nonprofessional teachers' evaluation, and he attached a copy of an evaluation form.

In early February 1997, Scholz applied for approval to register for summer courses to develop proficiency in French. She wanted credit towards a master's degree and to qualify for a salary increase for the following school year. The process for receiving approval required a teacher to submit a course description along with "course approval" forms to DiMartinis who, after signing his approval, would forward the forms to Walsh. After approving or denying the request, Walsh returned the forms to the teacher. When Walsh received Scholz's form, he did not recognize the name of the institution on the form, so he asked his secretary to call Scholz and request further information. After he received the information from

9. The hearing officer credited Scholz's recollection of this conversation because Scholz's testimony was not contradicted by either DiMartinis or DiTullio. Although DiMartinis did not recall this conversation with DiTullio and Scholz, he was, however, aware that world languages were a high priority with DiTullio and she had the responsibility of ensuring that there was continuity between the middle schools and the high schools. DiTullio did not testify.

10. Peer mentoring is a method by which a veteran teacher helps a less experienced teacher to improve his/her performance. It is not for the purpose of conducting an evaluation.

11. DiMartinis remembered that DiTullio observed one of Scholz's 8<sup>th</sup> grade classes during the 1996-97 school year, but did not recall whether that occurred in November 1996. However, he did recall that DiTullio spoke to him afterwards and that she had given Scholz a complimentary note after her observation. He did not recall whether DiTullio observed any other of Scholz' classes during the 1996-1997 school year.

Scholz, he signed his approval and returned the forms to Scholz at the beginning of or in the middle of March 1997.

In February 1997<sup>12</sup> DiMartinis initiated a meeting with Scholz. He told her he had some concerns about her classroom performance. He reminded her that this was her third year and that he would have to make a decision whether to grant her professional teacher status. He indicated to her that he was having difficulty recommending her for renewal. He told her that her lessons do not seem to flow right. When she asked what he meant, he said: “I don’t know; they just do not seem to flow properly.”

He also told her that parents were calling about her and that students were upset. When she asked him who the parents were, he told her he could not tell her. He told her that the parents were concerned about the lack of preparedness of her students. When she again asked who the parents were, he told her he could not tell her because he did not know who the parents were. Although DiMartinis received his information about parents’ complaints from Stacey Bucci (Bucci), a guidance counselor at Central Middle School, he did not tell Scholz who the parents were because he assumed that Bucci had told her.

DiMartinis also told Scholz that he had heard that she discussed her weekend plans with her students, was seen with her head on her desk, and dressed inappropriately for class. However, he did not tell her what specific weekend plans she was alleged to have discussed and with whom because he did not know. He did not know whether it was a conversation she had with the whole class in Spanish or whether it was a private conversation with some individual students at a school dance.<sup>13</sup> Nor did he tell her that he had received this information from Bucci.<sup>14</sup> In addition, DiMartinis told her that he had concerns about her appearance, that she looked tired and haggard and looked like she did not want to be there any more. Scholz started to cry and said she was in a very difficult situation. At the end of the meeting, DiMartinis told Scholz that he would be in to observe her classes and asked her for some lesson plans which she produced the following day.

Shortly after this meeting, DiMartinis consulted with Assistant Principal Kevin Marks (Marks) and requested him to conduct an

observation of Scholz’s class. Marks came to her classroom once. He did not stay for the entire class and did not give her any feedback.

In February and March 1997, DiMartinis conducted several observations of Scholz’s classes. He stayed approximately fifteen minutes each time and did not give her any feedback.<sup>15</sup> Some of the observations were on consecutive days. At the end of the first week of observation, he requested additional lesson plans which she gave him.

In late February or early March 1997, Scholz spoke with Paul Phillips (Phillips), the president of the Quincy Education Association (Association),<sup>16</sup> because she felt that DiMartinis was harassing her. Scholz told him that DiMartinis was showing up unannounced several times during the week to observe her classes. He sometimes stood in the back of the classroom for a couple of minutes or longer.

Scholz also told him about the February meeting with DiMartinis where he told her that there were rumors at the school about her. She was upset because she was unable to find out what the rumors were and where the rumors were originating. She and Phillips discussed whether this issue was grievable. Phillips told her that there was a provision in the Association’s collective bargaining agreement providing that a teacher must be informed of the specifics of an accusation in a timely manner. This provision covers all bargaining unit members whether or not they have professional teacher status.

Phillips and Scholz also discussed whether filing a grievance could result in a nonrenewal. He explained that there may be ramifications if she filed a grievance against a principal during her professional teacher status year. Phillips told her that he was going to speak with Ronald Suga (Suga), an MTA representative, about her concerns.<sup>17</sup> At the end of their meeting, Scholz told Phillips that she would think about their discussion and that she was not yet ready to file a grievance.

At the end of March 1997, DiMartinis asked Bucci, the guidance counselor, to refresh his memory about any reports she had about Scholz’s students and their parents. Bucci referred to her notes and reminded DiMartinis of the following information: 1) In October

12. Neither DiMartinis nor Scholz remembered the exact date of the meeting. However, their versions of this meeting are similar.

13. Scholz testified that she only discussed weekend activities in the context of teaching conversational Spanish when the students asked and responded to questions about day-to-day activities. She did not discuss her social or personal life with the students.

14. DiMartinis testified that, at some point, Marks, his assistant principal, also reported that he had seen Scholz’s head on her desk.

15. Although DiMartinis testified that he occasionally stayed for the entire class and that he gave Scholz feedback, the hearing officer credited Scholz’s testimony because DiMartinis could not recall the dates or how many times that he stayed for the entire class, or on what dates he gave Scholz face-to-face feedback or left her notes. Given the fact that DiMartinis was evaluating Scholz to determine whether to grant Scholz professional teacher status, the hearing officer thought that it seemed logical that he would have documented or recalled the number of observations, the length of time of the observations, and when and how he had given Scholz feedback.

16. The Association represents the teachers in the Quincy school system for the purpose of collective bargaining.

17. The Association is affiliated with the Massachusetts Teachers Association (MTA).

18. A progress report is a one-page document that identifies a student’s conduct, effort, behavior, homework, and grades. If the parent of a student requests a progress report, the guidance office generates the report and gives it to the teacher to fill out. After the teacher fills it out, it is either mailed to the student’s home or it is given to the student to be brought home.

1996, Bucci requested a progress report<sup>18</sup> for one of Scholz's students because a parent had called and was concerned how the Spanish class was being taught.<sup>19</sup> 2) In October 1996 and January 1997, Bucci received requests for progress reports from two parents of special education students who were in Scholz's classes. The parents were concerned about Scholz's ability to modify her lesson plans and the students' assignments. Bucci requested progress reports from Scholz on these students and suggested she speak to the special needs teacher.<sup>20</sup> 3) In January 1997, a parent called Bucci seeking information about getting a Spanish tutor because she thought her son was not learning in Scholz's class. Bucci provided the parent with telephone numbers of several tutors.<sup>21</sup> 4) In February 1997, a parent called Bucci and said that her son and Scholz must have personality differences because her son always got along with other teachers.<sup>22</sup> The parent thought that her son did not want to do his Spanish homework because of a personality conflict with Scholz.<sup>23</sup>

In early April 1997, Scholz met again with DiMartinis. At this meeting DiMartinis told her that he had decided to recommend her for professional teacher status. He said that he still had his doubts, but he had seen growth and thought there would be continued growth. She nodded and he continued to speak. He said that he may have said some inappropriate things at their last meeting and he apologized. He then said that it was important to be open and honest, and he noticed that she was not looking him in the eye. She said that she had considered filing a grievance. DiMartinis looked at her and said: "Against whom?" And she said "Against you". He said "Why?" and became a little bit agitated. She told him that when he observed her, he did not stay for the entire lesson. He responded: "I can do anything I want. I'm the principal. This is your professional status year. I've been principal in this building for twenty years." At this point he pounded his fist on the table and said "I know what I'm doing." She then said that it was harassment

to observe her that way. He responded: "Who said it was harassment?" She told him she had spoken with Phillips, the Association's president. He said that Phillips did not know what he was talking about and shook his head. She then said: "But you told me that parents were calling anonymously. How can you tell me that an anonymous parent is calling with an anonymous complaint. I need to know who that is. I need to defend myself and explain my motives and discuss my curriculum." He said, "I don't know who they were". She said "You told me rumors were going around about me." He did not respond to this. He then said that no one had ever accused him of being unprofessional and no one ever will. At this point Scholz started to cry.<sup>24</sup>

She then told him that she had decided not to file a grievance and that she had discussed the matter with Phillips because she was concerned about the manner he conducted the classroom observations. She told him that having 198 students in twenty-one classrooms was very difficult and that she had stayed the second year at the middle school because she believed in finishing what she had started. She wanted to follow through the program she had begun, but that it was time for her to move on to a better situation. She told him that it would suit her to have a classroom, and he said okay. She asked him if he would write her a letter of recommendation and he said he would be happy to. And then his tone changed and he said: "But what if you are here next year, then what are you going to do?" She responded that if she were here next year, "she would keep getting better and go and fight for more space in the school." He asked about the grievance and she told him she was not filing a grievance. She told him that she only wanted to communicate with him and let him know what was upsetting her, and he said okay. At the end of the meeting he shook her hand and said, "let's live together," and then she left to go to her class. The meeting had lasted approximately ten minutes.<sup>25</sup>

19. Bucci also testified that on another occasion, there was an inquiry from a parent about her daughter's grades. The daughter had received a "C" on her report card, and her mother wanted progress reports to ensure that her daughter did not receive another "C" for the next term. Scholz prepared the progress reports and forwarded them to Bucci. When the student received another "C", her mother called Scholz and was very angry because she had not received the progress reports. After investigating, it was discovered that Bucci had given the daughter the progress reports and they had not been given to her mother. Both Bucci and DiMartinis testified that Bucci only referenced her notes when refreshing DiMartinis' memory in March and there is no reference to this incident in Bucci's notes.

20. At the beginning of each school year, the special needs teacher meets with all of the teachers to discuss program modifications for special needs students in their classes. DiMartinis noted that, even if a teacher is modifying lessons or making accommodations for a special needs student, some parents are not satisfied and believe that the teacher is not doing enough.

21. Bucci never told Scholz about this phone call.

22. Bucci did not remember whether she mentioned this call to Scholz.

23. Although Bucci testified to other interactions with Scholz, her students, and the parents of her students, the only information she provided DiMartinis in March was reflected in her notes. It is not clear from the record if or when Bucci told DiMartinis about these other interactions. They included the following: 1) In February 1997, a student came to Bucci because she had received an "F" in Spanish on her report card and she thought that she deserved a higher grade. Bucci spoke with Scholz about the student and Scholz told her that, although the student had made efforts to go meet with Scholz before and after school and had been working one-on-one with Scholz, the student did not pass the tests and that is why she received an "F".

2) In February 1997, Bucci informed Scholz that a parent had called because of Scholz's comments on her child's report card noting that the child had excessive absences when in fact the student had left the class to attend the special needs resource room. 3) In March 1997 a parent called to say that she was concerned about how her child was progressing in Spanish and had some concerns with the teacher. However, Bucci did not communicate this to Scholz. 4) Also in March 1997, Bucci notified Scholz that a parent had called because there was an error in the comment on her son's report card. Bucci could not remember what the error was, but gave Scholz the form to correct the comment on the report card. 5) There were also occasions when students came to Bucci directly with their concerns about Scholz's Spanish class. Some advance placement students had come to her because they were concerned that they were not learning anything. The students also had some concerns about how Scholz treated them for gum chewing, talking out in class, and not raising their hand before speaking.

24. At some point during their meeting, Marks opened the door of DiMartinis' office and asked: "Do you need me in here?" DiMartinis and Scholz looked at him and DiMartinis responded: "No, I don't need you." Marks then exited the room.

25. Although DiMartinis contradicts many aspects of Scholz's testimony about this meeting, the hearing officer credited Scholz's version of this meeting for the following reasons. Considering the importance of this meeting, the hearing officer found that DiMartinis had a vague memory regarding his conversation with Scholz. DiMartinis did not dispute that Scholz mentioned that she was thinking about filing a grievance and that she had felt that she was harassing her, but he "thinks" he told her that it was her prerogative and "that's what unions are for." The hearing officer concluded that, if DiMartinis had told Scholz that he was not recommending her for professional teacher status, Scholz would have asked why she was not being recommended for renewal. Scholz asked DiMartinis several

Immediately after the end of the meeting with DiMartinis, Scholz called her mother to tell her that DiMartinis had decided to give her professional teacher status. She also told Phillips that DiMartinis had awarded her professional teacher status, but that it had been rough meeting. She also told him that she did not think that pursuing a grievance at this time would be productive.

About two days after her meeting with DiMartinis, Scholz made a final nonrefundable payment for the courses she planned to take in the summertime.

After the April meeting, DiMartinis did not observe any of Scholz's classes.<sup>26</sup> Nor did anyone else observe her classes.<sup>27</sup>

On April 10, 1997, Walsh sent DiMartinis the following memorandum, in relevant part:

This is a follow-up to my memo of January 15, 1997, concerning the evaluation of educators who have not as yet attained Professional Teacher Status. In that memo I requested that such evaluations be completed and submitted to the Personnel Office by March 31, 1997. However, our records seem to indicate that we have not as yet received an evaluation for the following teachers who work full-time in your building: Lawrence Taglieri, Karen Scholz.

Please complete an evaluation form and forward it to the Personnel Office as soon as possible, but in no event later than April 28, 1997.

Sometime after April 10, DiMartinis called Walsh. DiMartinis told him that one of the two people he was evaluating was Scholz and he was not certain he could meet the April 28<sup>th</sup> deadline. He added

that he was having difficulty deciding what he wanted to do in Scholz's case. He was not happy with her performance and he was not certain he was going to renew her.<sup>28</sup> Walsh responded that DiMartinis should do his best and try to get the evaluation to Walsh within the next week or two.

Several days later, DiMartinis called Walsh again to advise him that he still had not completed Scholz's evaluation.<sup>29</sup> Walsh responded that he knew that it was a difficult decision, and that if would help him out, he should consider whether he would want his child or grandchild in Scholz' class.<sup>30</sup> At some point, Walsh received the May 5, 1997 evaluation of Scholz and DiMartinis's recommendation for nonrenewal.

On the May 5<sup>th</sup> evaluation, DiMartinis did not list any strengths. However, he listed the following areas of improvement: 1) concern continues regarding the depth of content understanding of Ms. Scholz's students; the high school world language department has also echoed this concern as have parents and students; 2) classes are taught largely on a "whole class" methodology; little evidence of individualizing instruction; 3) lesson plans and class preparation show little evidence of focusing on the needs of individual students; most of the diagnosis of student needs is text directed; 4) the majority of Ms. Scholz's students are absent of specific learning problems; three of the four 8<sup>th</sup> grades she teaches are above average scholastically, two advanced placement and one honors eight grade; 5) during my many observations, I have found that there was a definite lack of motivational instructional techniques introduced in

25. *continued...*

questions at their February meeting when he expressed concerns about her performance, and DiMartinis' version of the April meeting does not reflect any questions on Scholz's part. Furthermore, Scholz's version of the April meeting is consistent with her concerns at the February 1997 meeting about anonymous rumors, the subsequent meeting with Phillips about a potential grievance based on her belief that DiMartinis was harassing her, and her continued interest in having her own classroom and not being a traveling teacher.

The hearing officer also found that Scholz's version of the April meeting with DiMartinis was further buttressed by Scholz's post-meeting conduct. Scholz's conduct after the meeting with DiMartinis is consistent with her testimony that DiMartinis told her that he would grant her professional teacher status. Shortly after her meeting with DiMartinis in April 1997, she informed her mother and Phillips that she would be receiving professional teacher status. Even discounting the inherent bias in her mother's testimony, Phillips's testimony, corroborating Scholz, was uncontradicted and unimpeached. Considering the February discussion that Scholz had with Phillips about possibly filing a grievance against DiMartinis, she told Phillips soon after her April meeting with DiMartinis that DiMartinis was recommending her for professional teacher status and that there was no need to file a grievance. She also told Phillips that it had been a rough meeting but that matters had been resolved favorably. The hearing officer concluded that it would be illogical for Scholz to tell Phillips, the Association's president, that she would be receiving professional teacher status if DiMartinis had not in fact told her. It is also illogical for Scholz to have sent in a nonrefundable payment for summer courses following this meeting, if she did not believe that she would be returning the following year and would receive the salary increase.

Moreover, the hearing officer drew an adverse inference because Marks did not testify at the hearing. Because DiMartinis claimed that: 1) he consulted with Marks about Scholz before and after the April meeting, 2) Marks had observed Scholz in her classroom prior to the April meeting, and 3) he had asked Marks to observe her after the April meeting, Marks could have corroborated DiMartinis' testimony. In addition, DiMartinis did not deny Scholz's testimony that Marks interrupted the April meeting between DiMartinis and Scholz. Since DiMartinis denied raising his voice and banging his hand on the table, Marks could have corroborated DiMartinis' version of the tone of the meeting.

In summary, the hearing officer concluded that Scholz's testimony was consistent and supported by the unbiased and reliable corroborative testimony of Phillips and that the inconsistency of DiMartinis' testimony coupled with the absence of Marks' potentially corroborative testimony made DiMartinis' version of this meeting not credible.

26. The hearing officer credited Scholz's testimony that DiMartinis did not observe her classes after the April meeting. She found that DiMartinis was not sure whether he observed her classroom again after this meeting and that his memory of his observations prior to the April meeting were more precise.

27. The hearing officer credited Scholz's testimony that no one else observed her classes. She found that DiMartinis testified that he asked Marks to observe Scholz's classroom after the April meeting and that Marks reported back to him reinforcing DiMartinis' poor opinion of Scholz. Because Marks did not testify, the hearing officer drew an adverse reference that his testimony would not have supported DiMartinis' testimony.

28. The School Committee challenged the hearing officer's finding that DiMartinis did not provide any specifics regarding these conversations and that her facts reflected only Walsh's recollection of these conversations. Our review of the record supports the hearing officer's finding.

29. There is no evidence whether or not DiMartinis had already completed the Taglieri evaluation.

30. The hearing officer found that Walsh testified that he thought there was a third conversation, but he was not sure if or when it occurred. DiMartinis testified there were three conversations, but he did not provide any details of these conversations. Therefore, the hearing officer did not include in the facts what Walsh "thought" the third conversation was about.

Ms. Scholz's lessons; 6) there appears to be a limited amount of class attentiveness and participation in both the 6<sup>th</sup> and 8<sup>th</sup> grades I have observed; 7) very limited use of varied teaching methodologies and techniques; 8) Ms. Scholz's lack of enthusiasm fails to motivate and energize her students; 9) for the past two years I would have hoped to have seen more visible signs of subject matter competency as it applies to reasoning and creativity; 10) I have observed that little growth has occurred in this area; organizational skills need to be addressed to facilitate the learning process and pace of daily lessons; and 11) A major concern of mine which I have addressed with Ms. Scholz was the disjointed tempo of her lessons; it appeared that the transition from one concept to another was often uncertain thus often causing confusion to students.

In the noninstructional area, DiMartinis generally noted that Scholz "meets role expectancies," but noted two areas of improvement: 1) need to be constantly aware of maintaining a professional posture among students; the line between teachers and student role needs to be clearly defined; being thoroughly prepared each day will assist in this effort, and 2) teaching, in my opinion, is more than an 8:30-2:30 commitment; students and parents appreciate the visibility of staff at events that are beyond contractual hours.

DiMartinis did not recollect that Scholz had been a faculty adviser to the Spanish Club at the high school. He also did not recollect that she chaperoned school dances from time to time at Central Middle School. He was aware that she went on field trips with students; but he did not recollect that she assisted at a school play. However, he was aware that Scholz's students had taken the National Spanish Exam, but did not remember that they received awards and achieved merit level on the exam.<sup>31</sup> He was aware that Scholz taught remedial Spanish in the 1995-96 summer session.

During the 1996-1997 school year, Scholz also participated in a workshop at the annual conference of the Massachusetts Foreign Language Association on October 24-25, 1996. DiMartinis was aware of her participation, because she requested a substitute teacher to attend. In the Spring of 1997, she had received a certificate from the Norfolk County Teachers Association certifying that she had completed a graduate level course in channeling community resources to classroom activities. DiMartinis was aware of her participation because Scholz had submitted course cards that he approved and she received credits for a salary increase. She also took a course in conversational French and DiMartinis signed the course approval form for her to qualify for a salary increment. She also received a certification for completing an in-service program in Mexico City sponsored by the company that published the textbook that she was using in class. DiMartinis was aware of this program because the trip to Mexico

was sponsored by a grant through the Quincy public schools and she also received a salary increase.

On May 9, 1997, DiMartinis met with Scholz. Also present for this meeting was Marks who did not speak during the meeting. DiMartinis told Scholz that he had been thinking and that he just could not recommend her for professional teacher status. He then gave her the May 5 evaluation, but did not discuss it. She reminded him that he had told her that he had decided to recommend her for professional teacher status. He crossed his arms and looked at her and said that they had a misunderstanding of what happened at that meeting. Scholz took the evaluation and left.<sup>32</sup>

Immediately after receiving this news, Scholz called her mother to tell her that she was not going to get professional teacher status. The message was left on her mother's answering machine, but when her mother heard it, it was unintelligible.<sup>33</sup>

After being notified of her nonrenewal, Scholz met with Phillips and Suga, an MTA representative, to discuss whether she should file a grievance. After speaking to them and her family, she decided it would be best to move on with her life and teach elsewhere.

However, at the suggestion of Phillips and Suga, she met with Walsh, the personnel director, so that he would know what happened from her viewpoint. Scholz told Walsh that she had received good evaluations from Mateu and DiTullio and she thought that DiMartinis had made an error in not renewing her contract. Walsh responded that it was the principal who made the decision and that the teacher had to live up to the expectations of the principal, and the fact that DiTullio or Mateu may have a more positive opinion of a particular teacher does not matter. Scholz told Walsh that DiMartinis had granted her professional teacher status, but Walsh denied this.<sup>34</sup>

## OPINION

### *Credibility Determination*

Even when challenged, we will not disturb a hearing officer's credibility determinations absent a clear preponderance of all relevant evidence that the resolutions are incorrect. *Boston Water and Sewer Commission*, 26 MLC 61, 63, n.8 (1999); *New England Water Resources Professionals*, 25 MLC 135, 136, n.6 (1999); *City of Somerville*, 23 MLC 11, 12, n.8 (1996); *Town of Northborough*, 22 MLC 1527, 1538-39, n.10 (1996). In crediting Scholz's version of the April meeting, the School Committee claims that: 1) the hearing officer's conclusion that DiMartinis's testimony was vague is not supported by the record; 2) Scholz's mother's testimony should not be referenced because of its inherent bias, and 3) the hearing officer erred in drawing an adverse inference because of

31. Scholz testified that DiMartinis was aware that she had administered this exam because he had requested a photocopy of the test results, and two of her students received plaques and their pictures were put in the yearbook; also both students' names were in the local newspaper.

32. Scholz's and DiMartinis's recollection of this meeting are similar.

33. The School Committee challenged the hearing officer's reference to Scholz's state of mind in the facts because the hearing officer had ruled that she was not going to allow testimony regarding the tone of Scholz's voice or Scholz's mental state. We agree with the School Committee's challenge and have modified the findings of fact.

34. The School Committee claimed that the hearing officer omitted certain details of the conversation between Walsh and Scholz. We have reviewed the record and modify the facts accordingly.

the School Committee's failure to call Assistant Principal Marks as a witness. Our review of the record and the hearing officer's reasons does not support the School Committee's contention. In resolving each factual dispute presented, the hearing officer referred to the relevant evidence and explained her reasons for resolving the testimonial conflict as she did. Her factual determinations were based on factors like the consistency of the witnesses' testimony in conjunction with their post-meeting conduct and the corroboration of other witnesses. Furthermore, the hearing officer specifically discounted Scholz's mother's testimony as being inherently biased.

Moreover, the hearing officer properly applied the adverse inference rule when making her credibility determination. It is well settled that the Commission applies the adverse inference rule "if a party has relevant evidence within his control that it fails to produce, and that failure gives rise to an inference that the evidence is unfavorable to that party." *Bellingham Teachers Association*, 9 MLC 1536, 1548 (1982), citing *Auto Workers v. NLRB*, 79 LRRM 2332, 459 F.2d 1329 (D.C.Cir. 1972). See also, *Commonwealth v. Figueroa*, 413 Mass. 193, 199 (1992), *Corsetti v. Stone Co.*, 396 Mass. 1, 15 (1985); *Commonwealth v. Franklin*, 366 Mass. 284, 292-294 (1974). The application of the rule is a matter of discretion for the fact finder. *Massachusetts Board of Regents*, 14 MLC 1397, 1399 (1987), citing *Auto Workers*, 79 LRRM at 2338.

The School Committee asserts that the rule may only be applied to a party who has the burden of proof and may not be applied if the parties had equal access to a witness. The courts have recognized, however, that adverse inferences may be drawn against any party to a proceeding. *Commonwealth v. Figueroa*, 413 Mass. at 199. The rule does not apply if it appears that: 1) a witness was equally accessible to either party; and 2) the witness would be as likely to testify favorably for either party. *Commonwealth v. Byer*, 398 Mass. 9, 12 (1986); *Commonwealth v. Franklin*, 366 Mass. at 293; *Commonwealth v. O'Rourke*, 311 Mass. 213, 222 (1942). Here, Scholz had no reason to believe that Assistant Principal Marks would testify favorably on her behalf. However, the School Committee could have expected that Assistant Principal Marks would favorably testify on behalf of Principal DiMartinis. Therefore, we find that the hearing officer properly drew an adverse inference from Marks' failure to testify in making her credibility determination here.

#### *Section 10(a)(1) Allegation*

We next examine whether the School Committee independently violated Section 10(a)(1) of the Law. Section 2 of the Law guarantees employees, among other things, "the right to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion." A public employer violates Section 10(a)(1) of the Law when it engages in conduct that may reasonably be said to interfere with its employees in their free exercise of rights guaranteed under Section 2 of the Law. *Town of Athol*, 25 MLC 208, 212 (1999), citing *Groton-Dunstable Regional School Committee*, 15 MLC 1551, 1555 (1989); *City of Boston*, 8 MLC 1281, 1284 (1981).

In determining whether an employer has violated Section 10(a)(1) of the Law, the Commission applies an objective test that focuses on the impact that the employer's conduct would have on a reasonable employee rather than the subjective impact of the employer's conduct on the actual employee involved. *City of Peabody*, 25 MLC 191, 193 (1999). Under this test, expressions of employer anger, criticism, and ridicule directed at an employee's protected activities have been found sufficient to constitute interference, restraint, and coercion of the employee. It is not necessary that the employer's conduct actually restrain or coerce an employee in the exercise of the employee's rights. *Athol-Royalston Regional School District*, 26 MLC 55, 56 (1999); *City of Peabody*, 25 MLC at 193. For this reason, proof of illegal employer motivation is not necessary to find a violation of Section 10(a)(1) of the Law. *City of Boston*, 8 MLC 1281, 1284 (1981).

It is well-established that the filing and processing of grievances constitutes protected activity under Section 2 of the Law. *City of Somerville*, 23 MLC 11,14 (1996); *Massasoit Greyhound Association*, 23 MLC 142, 146 (1996); *Town of Clinton*, 12 MLC 1361 (1985); *Boston City Hospital*, 11 MLC 1065 (1984); *Town of Halifax*, 1 MLC 1486 (1975). Moreover, even a statement to an employer that an employee intended to protest the employer's actions either by seeking the union's assistance or by filing a charge with the Commission is sufficient to bring that employee within the parameters of Section 2 of the Law. *Town of Wareham*, 3 MLC 1334, 1336 (1976).

Here, the record reflects that Scholz sought Association President Phillips' advice about a potential grievance and Phillips advised Scholz that there was a provision in the Association's collective bargaining agreement providing that a teacher must be informed of the specifics of an accusation in a timely manner and that this provision covered all bargaining unit members whether or not they had professional teacher status. Scholz's consultation with Phillips about a potential grievance constitutes protected activity. The *Town of West Springfield*, 8 MLC 1041, 1047 (1981) case cited by the School Committee in support of its position that Scholz was not engaged in protected activity is not analogous to the facts in this case. The employee in the *West Springfield* case engaged in insubordinate conduct and there is no evidence that Scholz was insubordinate in her interactions with DiMartinis. Nor does the School Committee's argument that Scholz's potential grievance was arguably nonmeritorious render Scholz's consultation with Association President Phillips outside the parameters of protected activity.

After Scholz informed DiMartinis that she had consulted with Phillips about a potential grievance, DiMartinis reacted angrily by pounding his fist on the table while telling Scholz that he could do anything he wanted because he was the principal, and reminded her that it was her professional teacher status year. When Scholz mentioned that she thought his classroom observations constituted harassment, he angrily asked her "who said it was harassment?". When she told him that it was Association President Phillips, he then criticized Phillips claiming that he did not know what he was talking about. In addition, DiMartinis told Scholz that no one had ever accused him of being unprofessional and "no one ever will." DiMartinis's expressions of anger in response to Scholz's

comments about her potential grievance and his disparaging comments about Association President Phillips would intimidate and discourage a reasonable person from filing a grievance. Therefore, we find that DiMartinis's statements and actions constitute interference, restraint, and coercion of an employee in the exercise of her Section 2 rights and that, by these statements, the School Committee has independently violated Section 10(a)(1) of the Law.

*Section 10(a)(3) Allegation*

In allocating the burden of proof in a Section 10(a)(3) allegation, the Commission has traditionally applied the three-step analysis articulated in *Trustees of Forbes Library v. Labor Relations Commission*, 384 Mass. 559 (1981). First, the Commission determines whether the charging party has established a *prima facie* case of discrimination, by producing evidence to support each of the four following elements: 1) the employee engaged in protected activity; 2) the employer knew of the protected activity; 3) the employer took adverse action against the employee; and 4) the employer's conduct was motivated by a desire to penalize or discourage the protected activity. If the charging party establishes a *prima facie* case, the employer may offer evidence of one or more lawful reasons for taking the adverse action. Once the employer produces lawful reasons for its actions, the employee must prove that, "but for" the protected activity, the employer would not have taken the adverse action. *Trustees of Forbes Library*, 384 Mass. at 565-566; *Bristol County*, 26 MLC 105, 108-109 (2000); *South Middlesex Regional School District*, 26 MLC 51,53 (1999); *Town of Athol*, 25 MLC 208, 211 (1999); *Town of Dracut*, 25 MLC 131, 133 (1999); *Town of Belmont*, 25 MLC 95, 96 (1998); *Commonwealth of Massachusetts*, 24 MLC 116, 118 (1998).

Recently, the Supreme Judicial Court articulated the analytical framework to be applied in discrimination cases arising under M.G.L. c. 151B when an employment decision results from a mixture of legitimate and illegitimate motives. *Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination*, 431 Mass. 655 (2000). Under the Court's two-step analysis, the employee must first prove by a preponderance of the evidence that a proscribed factor played a motivating part in the challenged employment decision. The burden of persuasion then shifts to the employer who may prevail by proving that it would have made the same decision even without the illegitimate motive. *Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination*, 431 Mass. at 669-670. In contrast, under *Forbes*, the burden of persuasion remains with the charging party at every stage. *Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination*, 431 Mass. at 669. Because we find that Scholz meets the higher burden of proof set forth in *Forbes*, it is not necessary for us to decide in this case whether to adopt the mixed-motive analysis the *Wynn & Wynn* court announced for cases arising under M.G.L.c. 151B.

Here, we have found that Scholz's consultation with Association President Phillips about a potential grievance constituted concerted, protected activity. In addition, the School Committee does not dispute that Principal DiMartinis knew of Scholz's protected activity or that he decided not to grant Scholz professional teacher

status and renew her contract. However, the School Committee denies that DiMartinis took these actions in retaliation for Scholz's protected activity. Therefore, we must consider whether Scholz presented sufficient evidence to prove unlawful motivation.

Absent direct evidence of improper motivation, unlawful motivation may be established through circumstantial evidence and reasonable inferences drawn from that evidence. *Bristol County*, 26 MLC 105, 109 (2000), citing *Commonwealth of Massachusetts*, 6 MLC 2041, 2045-6 (1980). Circumstantial factors may include: the timing of the adverse action in relation to the protected activity, *Bristol County* at 110, citing *Town of Athol*, 25 MLC 208 (1999) and *Commonwealth of Massachusetts*, 14 MLC 1743 (1988); *Labor Relations Commission v. Blue Hills Spring Water Co.*, 11 Mass App Ct 50 (1981) and expressions of animus or hostility towards union or other protected activity, *Commonwealth of Massachusetts*, 24 MLC 116, 118 (1998).

Here, DiMartinis submitted a negative evaluation of Scholz recommending that Scholz's contract not be renewed one month after Scholz told DiMartinis that she had considered filing a grievance against him. Prior to the April 7th meeting with Scholz, DiMartinis had conducted all of his classroom observations and received reports from Marks and Bucci about Scholz. There were no further observations or reports after the April 7th meeting. The only information about Scholz that DiMartinis did not know prior to April 7 was the information she conveyed to him at the meeting that she had considered filing a grievance against him. DiMartinis reacted angrily to this information and criticized Association President Phillips for telling Scholz that there may be contractual grounds for a grievance against him. The timing of the negative evaluation coupled with DiMartinis's angry reaction to Scholz's potential grievance is sufficient evidence to establish a *prima facie* case that DiMartinis was unlawfully motivated when he decided to deny Scholz professional teacher status and not renew her contract.

Under the *Forbes Library* test, a charging party establishes a *prima facie* case of retaliation, it is the employer's burden to produce legitimate, non-discriminatory reasons for taking the adverse action. The employer must state a lawful reason for its decision and "produce supporting facts indicating this reason was actually a motive in the decision." *Boston School Committee*, MUP-9067 (March 2, 1994), *aff'd. sub. nom. School Committee of Boston v. Labor Relations Commission*, 40 Mass. App. Ct. 327 (1996), *further app. rev. denied*, 422 Mass. 1111 (1996).

The School Committee argues that DiMartinis's decision to deny Scholz professional teacher status and not to renew her contract was because of Scholz's performance deficiencies listed on the May 5<sup>th</sup> evaluation. On the May 5<sup>th</sup> evaluation, DiMartinis articulated the following concerns about Scholz's job performance: 1) the depth of content understanding of Scholz's students echoed by the high school world language department and parents and students; 2) classes are taught largely by a "whole class" methodology with little evidence of individualizing instruction; 3) lesson plans and class preparation show little evidence of focusing on the needs of individual students; 4) the majority of Ms. Scholz's students do not have a specific learning problem; three of the four 8<sup>th</sup> grades she teaches are above average scholastically, two advance and one

honors eight grade; 5) lack of motivational instructional techniques; 6) limited amount of class attentiveness and participation in both the 6<sup>th</sup> and 8<sup>th</sup> grades; 7) very limited use of varied teaching methodologies and techniques; 8) lack of enthusiasm; 9) few visible signs of subject matter competency as it applies to reasoning and creativity; 10) organizational skills need to be addressed to facilitate the learning process and pace of daily lessons; and 11) the disjointed tempo of the lessons often causing confusion to students.

In the noninstructional area, DiMartinis noted that Scholz generally met role expectancies, except in two areas: 1) maintaining a professional posture among students; the line between teachers and student role needs to be clearly defined; being thoroughly prepared each day will assist in this effort, and 2) students and parents appreciate the visibility of staff at events that are beyond contractual hours.

Based on this evaluation, the School Committee has met its burden of proffering a legitimate and non-discriminatory reason for denying Scholz professional teacher status and for not renewing her contract. The record reflects that Scholz was aware of several of DiMartinis's concerns prior to her April 7<sup>th</sup> meeting with DiMartinis because they had been raised in her 1995-96 evaluation and during the course of the 1996-97 school year. These concerns include: 1) the depth of content understanding of Scholz's students that DiMartinis had brought to Scholz's attention in the Fall of 1996 when the 9<sup>th</sup> grade teachers complained that Scholz's former 8<sup>th</sup> grade students had not been adequately prepared for the 9<sup>th</sup> grade level. DiMartinis also told Scholz in their February meeting that parents and students had complained about the lack of her students' preparedness. 2) the lack of attentiveness of her students that DiMartinis had mentioned to Scholz in the Fall of 1996 after he had observed her classes. 3) the lack of organization that DiMartinis raised with Scholz in the Fall of 1996. 4) the lack of flow of her lesson plans that DiMartinis mentioned to Scholz in the Fall of 1996, at the February 1997 meeting, and on her 1995-1996 evaluation, and 5) her lack of enthusiasm that DiMartinis had mentioned to her at the February 1997 meeting when he told her that he thought she looked tired and haggard.

Once an employer produces evidence of a legitimate, non-discriminatory reason for taking the adverse action, the case becomes one of "mixed motives" and, under the *Forbes Library* analysis, we consider whether the employer would have taken the adverse action but for the employee's protected activities. *Town of Athol*, 25 MLC 208, 211 (1999); *Town of Belmont*, 25 MLC 95, 97 (1998); *Commonwealth of Massachusetts*, 24 MLC 116, 118 (1998); *Town of Stow*, 11 MLC 1312, 1319 (1984), *aff'd. sub. nom. Town of Stow v. Labor Relations Commission*, 21 Mass. App. Ct. 935 (1985). Under this analysis, the charging party bears the burden of proving that but for the protected activity, the employer would not have taken the adverse action. *Id.* The School Committee has offered evidence that DiMartinis's negative evaluation of Scholz was based on legitimate concerns about her performance

deficiencies, and thus, Scholz, must prove that "but for" her protected activity, she would have been renewed and received professional teacher status.

For the following reasons, we find that "but for" Scholz's protected activity, DiMartinis would have granted her professional teacher status and renewed her contract. Although DiMartinis had raised some job performance concerns on Scholz's evaluation for the previous year, he had also listed many of her strengths. In those instances where DiMartinis had doubts about her abilities, he generally resolved them in her favor. In contrast to the 1995-1996 evaluation, the 1996-1997 evaluation he submitted in early May 1997 is a negative assessment of Scholz, listing no strengths, but only weaknesses. The 1996-1997 evaluation does not reflect the balanced and even-handed viewpoint of her work performance as noted in the previous evaluation. Rather, the 1996-1997 evaluation appears to be a deliberate attempt to show Scholz only in a negative light.

Moreover, during his angry confrontation with Scholz at the April 1997 meeting, DiMartinis made a point of reminding Scholz that this was her professional teacher year and that he was the principal and he could do anything he wanted.

Only Principal DiMartinis had the authority to grant or deny professional teacher status to Scholz. Because we have credited Scholz's testimony that, prior to learning that she had consulted with Phillips about a potential grievance, DiMartinis had told her she would be granted professional teacher status, we find that "but for" his knowledge of her protected activity, DiMartinis would have given Scholz a more positive evaluation and granted her professional teacher status. DiMartinis changed his mind about Scholz's professional teacher status and gave her a negative evaluation to retaliate against her for her protected activity. Accordingly, we find that the School Committee has violated Sections 10(a)(3), and derivatively, Section 10(a)(1) of the Law.

#### CONCLUSION

For all of the above reasons, we conclude that the School Committee independently violated Section 10(a)(1) when DiMartinis reacted negatively at the April 7, 1997 meeting to Scholtz's concerted, protected activity. Further, we conclude that the School Committee violated Section 10(a)(3) and, derivatively Section 10(a)(1), of the Law by declining to grant her professional teacher status because she engaged in concerted, protected activity.

#### ORDER<sup>35</sup>

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the Quincy School Committee shall:

1. Cease and desist from:

35. Although Scholz has requested that the Commission award her emotional distress damages and attorney fees, the Commission does not have statutory authority to award either emotional distress damages and/or attorney fees. See, e.g.,

*Southern Worcester County Regional Vocational School District v. Labor Relations Commission*, 386 Mass. 414 (1982).

- a. Making statements that would tend to interfere with, restrain or coerce employees from consulting with Association representatives about filing grievances;
- b. Retaliating against employees for consulting with Association representatives about filing grievances;
- c. In any like manner, interfering, restraining and coercing its employees in any right guaranteed by Law.

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

- a. Refrain from making statements that would tend to interfere with, restrain or coerce employees in the exercise of their rights guaranteed under the Law;
- b. Immediately offer Karen Scholz reinstatement with professional teacher status;<sup>36</sup>
- c. Make Karen Scholz whole for any losses that she has suffered as a result of the School Committee’s unlawful actions, plus all interest on all sums due calculated in the manner specified in *Everett School Committee*, 10 MLC 1609 (1984);
- d. 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 attached Notice to Employees.
- e. Notify the Commission within thirty (30) days after the date of service of this decision and order of the steps taken to comply with its terms.

SO ORDERED.

**NOTICE TO EMPLOYEES**

The Labor Relations Commission has determined that the Quincy School Committee violated Sections 10(a)(1) and (3) of M.G.L. c. 150E when Principal Lewis DiMartinis angrily reacted to Karen Scholz’s comment that she was considering filing a grievance and by disparaging Quincy Education Association President Paul Phillips’s opinion regarding the viability of Scholz’s potential grievance. In addition, the Commission has determined that the School Committee retaliated against Scholz for consulting with Association President Phillips by denying her professional teacher status and by not renewing her contract.

WE WILL NOT angrily react to the filing of grievances by a bargaining unit member or disparage the Association’s President’s opinion of the viability of a bargaining unit member’s grievance.

WE WILL NOT retaliate against employees for consulting with Association representatives about filing grievances.

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

WE WILL immediately offer Karen Scholz reinstatement with professional teacher status.

WE WILL make Karen Scholz whole for any losses that she has suffered as a result of the School Committee’s unlawful actions, plus all interest on all sums due calculated in the manner specified in *Everett School Committee*, 10 MLC 1609 (1984).

[signed]  
Quincy School Committee

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In the Matter of TOWN OF HOLLISTON  
and  
HOLLISTON POLICE ASSOCIATION  
Case No. MUP-9776

- 54.611 *health insurance*
- 67.4 *good faith test (totality of employer’s conduct)*
- 82.4 *bargaining orders*
- 91.1 *dismissal*
- 92.51 *appeals to full commission*
- 92.52 *credibility determination on appeal*

January 3, 2001  
Helen A. Moreschi, Chairwoman  
Mark A. Preble, Commissioner

<i>John M. Carey, Esq.</i>	<i>Representing the Town of Holliston</i>
<i>Amy Laura Davidson</i>	<i>Representing the Holliston Police Association</i>

**DECISION**

STATEMENT OF THE CASE

On March 10, 1994, the Holliston Police Association (Association) filed a charge with the Labor Relations Commission (Commission) alleging that the Town of Holliston (Town or Employer) had engaged in a prohibited practice within the meaning of Sections 10(a)(5) and (a)(1) of Massachusetts General Laws Chapter 150E (the Law.) Pursuant to Section 11 of the Law and Section 15.04 of the Commission’s Rules, the Commission investigated the Association’s charge and, on October 24, 1994, issued its own Complaint of Prohibited Practice, alleging that the Employer had engaged in regressive bargaining in violation of Sections 10(a)(5) and, derivatively, (a)(1) of the Law. The Employer subsequently filed an Answer to the Commission’s Complaint.

Pursuant to Notice, Hearing Officer Diane Drapeau, Esq. conducted a hearing on January 11, 1996 at which both parties had an

36. Scholz should be placed in the same position she would have been “but for” the School Committee’s unlawful action. M.G.L. c.71, Section 41 does not prohibit the Commission from granting this remedy.