

SO ORDERED.

**NOTICE TO EMPLOYEES**

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

The Labor Relations Commission has issued a decision finding that the Town of Winthrop (the Town) 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 decision to prevent officers from performing paid private details outside the Town without first giving the International Brotherhood of Police Officers (I.B.P.O.), Local 397 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 I.B.P.O., Local 397 over the decision to prevent officers from performing paid private details outside the Town.

WE WILL NOT change a mandatory subject of bargaining by implementing a decision to prevent officers from working paid private details without giving the I.B.P.O., Local 397 prior notice and an opportunity to bargain in good faith to resolution or impasse over any proposed change.

WE WILL make whole any employees represented by the I.B.P.O., Local 397 for any loss of earnings suffered as a result of the Town’s unlawful unilateral change in preventing officers from working paid private details outside the Town as a result of the Town’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 Town complies with this part of the order.

WE WILL upon request by the I.B.P.O., Local 397 bargain collectively in good faith to resolution or impasse prior to implementing a decision to prevent officers from working paid private details outside the Town of Winthrop.

[signed]  
For the Town of Winthrop

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In the Matter of ATHOL-ROYALSTON REGIONAL  
SCHOOL COMMITTEE

and

ATHOL TEACHERS ASSOCIATION, MTA/NEA

Case No. MUP-2279

- 54.62 *other fringe benefits*
- 62.3 *discrimination*
- 63.21 *filing a grievance*
- 63.43 *selective discipline of union leaders*
- 63.7 *discrimination - union activity*
- 65.2 *concerted activities*
- 65.22 *filing a grievance*
- 65.6 *employer speech*
- 67.16 *other defenses*
- 67.8 *unilateral change by employer*
- 82.12 *other affirmative action*

January 14, 2002

*Helen A. Moreschi, Chairwoman*

*Mark A. Preble, Commissioner*

*Peter Berry, Esq.*

*Representing Athol-Royalston  
Regional School Committee*

*Amy Laura Davidson, Esq.*

*Representing Athol Teachers  
Association, MTA/NEA*

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

Statement of the Case

The Athol Teachers Association MTA/NEA (Union) filed a charge of prohibited practice with the Labor Relations Commission (Commission) on December 18, 1998, alleging that the Athol-Royalston Regional School Committee (School Committee) had engaged in a prohibited practice within the meaning of Sections 10 (a) (1), (2), (3) and (5) of M.G.L. c. 150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on January 27, 2000. The complaint alleged that the School Committee had: 1) discriminated against Union President Robert Harris (Harris) in violation of Section 10 (a) (3) and, derivatively, Section 10 (a) (1) of the Law; and 2) unilaterally changed a term and condition of unit members’ employment without bargaining with the Union to resolution or impasse in violation of Section 10 (a) (5) and, derivatively, Section 10 (a) (1) of the Law.<sup>2</sup> The School Committee filed an answer on February 12, 2000.

The Union filed a Motion to Amend the Complaint on June 29, 2000. The School Committee filed an opposition on July 17, 2000. The Commission denied the Union’s Motion to Amend the Complaint on July 31, 2000.

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

2. The Commission dismissed the portions of the Union’s charge alleging that the School Committee violated Section 10 (a) (2) and Section 10 (a) (1) of the Law. The Union did not request reconsideration of the Commission’s decision to dismiss these portions of the charge.

On August 2, 2000, August 3, 2000, October 12, 2000, October 20, 2000, and February 2, 2001, Cynthia A. Spahl, a duly-designated Commission hearing officer (Hearing Officer), conducted a hearing at which both parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. The Union and the School Committee filed post-hearing briefs on July 10 and July 12, 2001 respectively. The Hearing Officer issued Recommended Findings of Fact on August 9, 2001. The parties filed challenges to the Recommended Findings of Fact on September 10, 2001. The parties filed responses to each other's challenges on October 5, 2001. The Union filed a Motion to Strike the argument portion of the School Committee's challenges to the Recommended Findings of Fact on October 5, 2001. The School Committee did not file an opposition to the motion. On October 17, 2001, the Hearing Officer allowed the Union's motion to strike in part and denied it in part.

#### Stipulations<sup>3</sup>

1. There was no meeting on November 10, 1998.
2. The telephone was never removed from Harris's office.
3. Carol Curtis (Curtis) is the principal of the Athol Middle School and an agent of the School Committee.
4. On November 12, 1998 in a local newspaper, Harris criticized the School Committee's decision to mediate a June 3, 1998 complaint against Superintendent Penelope Kleinhans (Kleinhans).

#### Findings of Fact<sup>4</sup>

The Union is the exclusive collective bargaining representative for two bargaining units of employees in the Athol-Royalston Schools. Unit A includes teachers, guidance counselors, a psychologist, a speech therapist/pathologist, librarians, and school nurses. Unit B includes assistant principals, team leaders, and coordinators. The Union and the School Committee were parties to a collective bargaining agreement in effect from approximately September 1, 1996 through August 31, 1999 (Agreement).

The School Committee has employed Harris since 1985. He presently works as a music teacher at the Athol High School, Secondary School Music Director,<sup>5</sup> and Chairman of the Fine Arts Department.<sup>6</sup> Harris has served as Union president since approximately 1993. As Union president, Harris also acts as chief advisor and presiding officer of the Union's Executive Board.

#### Job Descriptions

Prior to November 1998, Harris performed the following job duties listed in the department chairperson's job description:<sup>7</sup>

1. Established a file of materials and a professional library that acquainted department members with important current information primarily concerning curriculum, but also including other matters of importance to the department.
2. Supervised and organized the collections of materials for use in teaching the various courses within the department.
3. Became acquainted with the objectives of each course within the department to offer professional appraisals of the materials, methods, and means of evaluation.
4. Held regular meetings of the department specifically for the purposes of addressing curricular needs, sharing information, and participating as a group in matters of concern to the entire school program.
5. Visited classes and conferred with individual teachers to assess the outcomes of instruction and to offer professional advice where improvements could be made.
6. Conferred with individual teachers and submitted to the principal formal evaluations based on visitations and observations of teachers.
7. Encouraged and developed appropriate procedures for the self-evaluation of teachers.
8. Developed a process of curriculum evaluation.
9. Maintained a current knowledge of curriculum trends, research, and learning styles to better serve the role as instructional leader and advisor to the principal.
10. Provided special assistance to new teachers and student teachers – explaining, directing, and leading them in a way that will help them to develop competence in applying their individual talents and overcoming weaknesses.
11. Assisted and participated in new teacher orientation programs.
12. Became involved in the interviewing of teacher candidates and prospective student teachers whenever practicable.
13. Was responsible for checking on teacher attendance each morning before classes began.
14. Was responsible for ensuring that teacher lesson plans and teachers' daily schedules were available for substitutes if teachers were absent and assisted and supervised substitute teachers.
15. Assisted in resolving disciplinary matters as a liaison among the various levels of the school community: student, teacher, guidance, personnel, and administrators.
16. Was responsible, along with department members, for developing safety procedures and precautions for specialized areas.

3. These stipulations modify paragraphs 8, 12, 5, and 9 of the complaint respectively.

4. The Commission's jurisdiction is uncontested.

5. Harris has held this position since 1985.

6. Before the School Committee reorganized the department chair positions in or about 1997, the fine arts department chair position was known as the music department chair position. Harris served as Music Department Chairman from 1985 until the reorganization in 1997.

7. This job description was reviewed and revised in the spring of 1992.

17. Accumulated the necessary facts and figures and prepared annual department budget requests.

18. Was knowledgeable about the costs of various programs, textbooks, supplies and other supplementary materials.

19. Prepared purchase orders and monitored the expenditures of approved budgetary funds.

20. Participated and offered professional judgment in group meetings of department chairs with respect to the entire school program, the managerial aspects of the entire school, and any other matters brought before the department chairs by the administration.

21. Facilitated in disseminating and exchanging information among the various levels of the school community: administrators, department chairs, teachers, and students. Also was responsible for keeping administrators informed on all matters of concern to them.

22. Taught/supervised classes as needed.

23. Ensured that books, equipment, and supplies were readily accessible to teachers as needed. Maintained storage areas assigned to the department.

24. Ensured that equipment assigned to the department was in good working order.

25. Was responsible for maintaining an up-to-date inventory of books, non-print materials, and equipment housed within the department.

26. Was responsible for the security of assigned areas of the building.

27. Assumed a leadership role in assisting students who were seeking independent study programs or who were experiencing problems in particular courses or with particular teachers. Consulted with guidance personnel and administrators in finding solutions.

28. Was responsible for reporting building maintenance problems to the principal.

29. Worked with and through the principal to meet the public relations goals of the school.

30. Was responsible for carrying out other tasks that might have been assigned by the principal from time to time to meet a particular school need.

Harris's job duties as Fine Arts Department Chairman prior to November 1998 were also outlined in a memorandum of under-

standing executed by the Union and the School Committee on June 30, 1997. That memorandum provided in part:

1. Department chairs performed all duties in the current job descriptions for grades 9 through 12 including supervision.

2. Department chairs assumed responsibility for curriculum coordination in grades 7-12 and for grade 6 when that grade was added in the middle school model.<sup>8</sup>

3. All existing department chairs retained their positions, with the music department chair assuming the position of fine arts chair.

4. Departments were reorganized as follows: Math, Science, English, Social Studies, SPED, Physical Education, and Fine Arts (Music and Arts).

Harris's job duties as Secondary School Music Director prior to November 1998 were listed in a memorandum to Interim Superintendent Willard Chiasson (Chiasson) from Athol High School Principal Charles Russell, Jr. (Russell) dated March 13, 1995. The memorandum provided as follows:

1. Directed and supervised the following performing groups – high school band, chorus, stage-band, color-guard and middle school band and chorus.<sup>9</sup>

2. Produced and directed three high school concerts (Winter, Spring and Pops), and two middle school concerts (Winter and Spring) annually.<sup>10</sup>

3. Supervised: a) the high school band's performance in the River Rat and Memorial Day parades, all home football games, the Thanksgiving Day game, and graduation and class day ceremonies; b) the middle school band's performance in the River Rat, Little League, and Memorial Day parades;<sup>11</sup> and c) the high school or stage band's performance at the United Way Kick-Off Drive.

4. Performed at the following assemblies: high school and middle school Veteran's Day and Memorial Day, high school spirit week, and two Golden Agers brunches.<sup>12</sup>

5. Encouraged student participation in and supervised students at District, All-Stage, and Quabbin Valley Music Festivals.

6. Produced the annual music awards banquet.

7. Attended other events as mutually agreed upon between the secondary school music director and the high school principal.

8. Performing the job duties in the job descriptions for secondary school teacher and high school department chairperson.

8. At all relevant times, the Athol Middle School was comprised of grades 7 and 8.

9. When the position of instructor at the Athol Middle School was upgraded to a teacher position (the upgrade) in approximately the 1995-1996 school year, the middle school teacher became responsible for directing and supervising the middle school band and chorus.

10. After the upgrade, the middle school teacher produced and directed the annual winter and spring concerts.

11. Since the upgrade, the middle school teacher has been responsible for the middle school band's performance in these parades. However, Harris has been involved in dealing with the community organizations and scheduling transportation to and from the events.

12. Since the upgrade, Harris has not been responsible as a teacher for the assemblies at the middle school.

9. Supervised the middle school's elementary music instructor<sup>13</sup> and supervised the music program from kindergarten through grade 6 in the Town of Royalston.

*Job Duties in the Athol Middle School*<sup>14</sup> Prior to 1998-1999

Harris taught band and chorus at 7:30 a.m. during the 1995-1996 school year. Harris evaluated the middle school music teacher,<sup>15</sup> Steve Damon (Damon), submitted budget requests to Curtis,<sup>16</sup> and reviewed Damon's purchase orders to ensure that the items requested were not duplicative of materials in the school's inventory before they were submitted to Curtis.<sup>17</sup>

Prior to the end of the 1995-1996 school year, the scheduling committee decided that band and chorus would be moved to the last class period of the school day starting with the 1996-1997 school year.<sup>18</sup> Because the Athol High School marching band practiced at that time and could not be rescheduled, Harris was notified that he could no longer teach band and chorus at the middle school during the 1996-1997 school year. Harris filed a grievance about the change in his middle school job responsibilities. After a hearing, Curtis responded to the grievance by memorandum dated June 19, 1996. In that memorandum, Curtis stated that, although Harris would no longer have teaching responsibilities at the Athol Middle School, he would continue to have responsibilities as department chair and any related Royalston elementary duties, including observing and evaluating the middle school music teacher and collaborating and facilitating the curriculum. Curtis further noted that, as department chair, Harris would also be involved in decisions impacting the music program.

During the 1996-1997 school year, Harris continued to evaluate and to supervise Damon,<sup>19</sup> to prepare the budget requests, and to review

Damon's purchase orders.<sup>20</sup> There were some changes in the music program. On or about January 14, 1997, Harris wrote a memorandum to Curtis to protest: 1) eliminating a required general music course for all grade 7 students; 2) scheduling band and chorus during the last period of the school day; 3) changing the grading system for music courses; 4) scheduling physical education activities in the gym/auditorium during the same time band and chorus rehearsals took place; 5) allowing students to enroll in band and chorus classes on a semester basis; and 6) withdrawing students from chorus because of non-attendance at the winter concert.<sup>21</sup>

Curtis chose not to rehire Damon for the 1997-1998 school year and, instead, hired Richard Graiko (Graiko) to fill the band and chorus teacher position. She also hired Ann White (White) as the performing arts teacher.<sup>22</sup> Harris participated in the hiring process. Harris reviewed Graiko and White's purchase orders before they were submitted to Curtis.<sup>23</sup> Harris evaluated Graiko that year but did not evaluate White because her position did not fall under Harris's supervision.

Graiko chose not to return to his position for the 1998-1999 school year. Curtis hired Diane Stone (Stone) to replace Graiko. Harris participated in the hiring process.

*Overall Job Duties from September to December 1998*

Harris taught music at the Athol High School in grades 9 through 12. As Chairman of the Fine Arts Department, he supervised two employees at the Athol High School and was responsible for curriculum coordination and program supervision in grades 7 through 12.<sup>24</sup> In his capacity as the secondary school music director, Harris supervised White and Stone at the Athol Middle School and two teachers at the Royalston Community School.<sup>25</sup>

13. After the upgrade, this position became a teacher position.

14. The Athol Middle School operates with a team leader structure and does not have department chairs. There are several teams representing different subject areas. Each team is comprised of teachers from a certain subject area led by a team leader. The teams coordinate the integrated and cooperative learning activities of themselves and other teachers and students.

15. Harris shared this responsibility with Curtis.

16. The school council sets the budget priorities in mid-October. These priorities are distributed in a written packet to the teachers. Every teacher is asked to submit requests for funding. Those requests are incorporated into department budgets. After department budgets are compiled, they are returned to the teachers for further review. Next, the school council reviews the first draft of the budget. The proposed budget then is sent to the central office and usually undergoes a series of cuts before becoming finalized.

17. The School District has school-based budgeting. Each school has a certain amount of funds allocated to it for the principal and the staff to use. Consequently, the purchase order process is self-contained at each school in the school district. At the Athol Middle School, for example, Curtis reviews purchase orders. If the purchase order is not duplicative and complies with the school's overall goals, Curtis gives the purchase order to the building secretary to check if the account in question contains sufficient funds. If there are sufficient funds, Curtis signs the purchase order and sends it to the central office for processing. Kleinhaus or her designee also signs purchase order. The purchase order forms did not contain a line for Harris to indicate his approval of the expenditure.

18. In February, the Athol Middle School team leaders and team members were asked to list what they liked and disliked about the current school schedule. After the lists were compiled, a scheduling committee was formed and interested faculty

members were asked to join. Teachers who were not on the scheduling committee could submit written comments to the committee or speak to its members.

19. Although Curtis wrote a memorandum to Kleinhaus dated September 23, 1996 requesting that Harris be relieved of supervising Damon, Harris's job duties were not changed.

20. The procedure for processing purchase orders did not change during the 1996-1997 school year.

21. Curtis did not recall if she responded to Harris's memorandum. However, Curtis: 1) eliminated the general music course for grade 7 due to budgetary constraints; 2) wanted to continue scheduling band and chorus at a different time based on the faculty's input through the scheduling committee; 3) did not believe that changing the grading system interfered with Harris's responsibility for curriculum coordination; 4) did not schedule physical education classes in the gym/auditorium at the same time as band and chorus, although the gym teacher may have brought students inside if it rained; 5) wanted to increase enrollment in band and chorus by giving students the opportunity to start in January; and 6) did not want to reward students for inappropriate behavior.

22. Harris did not supervise White during the 1997-1998 school year. However, Harris did supervise her the following school year.

23. The procedure for processing purchase orders did not change during the 1997-1998 school year.

24. Article XXXI, Part A of the Agreement stated that department chairs would be compensated "a base amount of 6.5% of their amount on the current salary schedule" effective September 1, 1996. Part B of that Article provided that, in addition to the base amount, department chairs would receive an additional \$200 per teacher under his or her supervision effective September 1, 1996.

25. [See next page.]

Harris had curriculum coordination responsibilities for grades K-12 as part of his Fine Arts Curriculum Coordinator job duties.<sup>26</sup> In his capacity as Fine Arts Department Chairman and Secondary School Music Director, Harris had budgetary responsibility at the Athol High School, Athol Middle School, and the Royalston Community School. The teachers that Harris supervised sent proposed budgets for him to review and met with him to discuss their budget requests. He also typed and reviewed purchase orders. However, Harris neither supervised the art teacher at the Athol Middle School nor approved art supply purchase orders at that school.

After Stone was hired, Harris instructed her to submit purchase orders to him for his review. Harris evaluated Stone. Although Harris supervised White during the 1998-1999 school year, he did not formally evaluate her.

In or about the fall of 1998, Stone asked Curtis if it was permissible for her and a parent to drive several band students to watch a band extravaganza at UMass on a Saturday. Curtis agreed to Stone's request because the field trip rewarded the students for their good behavior, motivated them to stay in band, and did not cost any money. Although Harris had planned and approved field trips involving his department in the past, Stone did not consult with Harris before arranging the trip to UMass.

Stone wrote Curtis a memorandum dated October 23, 1998 asking to start an after-school instrument lesson program. Stone suggested that some UMass students might be willing to tutor the middle school students if they were compensated for their time and gasoline expenses. After receiving Stone's memorandum, Curtis instructed Stone to explore the subject with Harris. On or about October 28, 1998, Stone wrote to Harris and indicated, among other things, that Curtis had approved an after-school instrument lesson program. In a memorandum dated October 30, 1998, Harris replied that he approved Stone's initiative but reminded her that she needed to discuss any new programs with Harris before proposing them.

In early November 1998, Curtis wrote to Harris to notify him that she planned to ask Kleinhans to eliminate the requirement that he review purchase orders for music program expenditures at the Athol Middle School.<sup>27</sup> Curtis next wrote to Kleinhans and Assistant Superintendent Robert Saminski (Saminski) on or about November 5, 1998 asking "to change the practice of having the high

school department chair sign all forms for middle school music activities and needs." On that same date, Stone submitted a purchase order to Curtis for student audition registration for the Western District Festival without giving it to Harris for his review. Because Harris was unaware of Stone's actions, he wrote a note to her on November 5, 1998 asking her to submit the registration materials to him so he could write a purchase order.

On or about November 6, 1998, Harris met with Curtis and expressed a concern that his job duties as Secondary School Music Director and Fine Arts Department Chairman were eroding.<sup>28</sup> Specifically, Harris believed that he should have been involved in planning the field trip to UMass, implementing the after-school instrument lesson program, and reviewing purchase orders at the Athol Middle School. Harris indicated to Curtis that he would file a grievance if these issues could not be resolved. Curtis replied that she would speak to Kleinhans. Curtis sent an undated letter to Kleinhans that stated in part:

I would really like to sit down with you, Harris, Stone and myself to discuss how the music department should work at the Athol Middle School. There are some real concerns about how the department chair works with the middle school. I have discussed my concerns with Harris for the past few years and am only told that "it's his job." I don't read the job description the same way he does.

Curtis later sent a letter to Harris and Stone asking them to meet with her and Kleinhans on November 19, 1998 to discuss the middle school music program.

On or about November 6, 1998, Harris filed a grievance regarding the Athol Middle School music program.<sup>29</sup> In particular, this grievance addressed the supervisory status of Harris over Stone, the field trip, and purchase orders. On or about November 10, 1998, the Union filed a class action grievance indicating that the Agreement had been violated when Curtis approved non-unit members to teach instrumental music lessons.<sup>30</sup> On or about November 12, 1998, Harris filed a grievance alleging that Curtis refused to provide him with a copy of a memorandum she had written to Kleinhans regarding his supervision of the Athol Middle School music program.<sup>31</sup> Harris wrote a memorandum to Curtis dated November 16, 1998 stating in relevant part:

the record supports the Union's challenge, we have modified the finding accordingly.

28. Harris believed that the secondary school music director position and the fine arts department chairman position overlapped. Harris based his belief on the language in the March 13, 1995 memorandum from Russell to Chiasson indicating that the secondary school music director would perform the duties of secondary school teacher and high school department chairperson.

29. As of the second day of the hearing, the grievance was at either mediation or arbitration.

30. As of the second day of hearing, this grievance was at either mediation or arbitration.

31. After Curtis provided Harris with a copy of the memorandum, Harris withdrew the grievance.

25. Article XXXIII, Part C, Section 2 of the Agreement provided that the secondary school music director would receive a stipend of: a) \$1,350 for extra duties performed during the 1996-1997 school year; b) \$1,418 for extra duties performed during the 1997-1998 school year; and c) \$1,496 for extra duties performed during the 1998-1999 school year. In addition, the secondary school music director would receive \$200 per teacher for teachers supervised in grades K-8.

26. Harris was responsible for coordinating five curriculum meetings for the 1998-1999 school year.

27. The Hearing Officer found that Curtis wrote to Harris in early November 1998 to notify him that she planned to ask Kleinhans to eliminate the requirement that his signature appear on purchase orders for music program expenditures at the Athol Middle School. The Union challenged the Hearing Officer's finding on the basis that, although Curtis's letter made that statement, Harris did not sign the purchase orders. Rather, he reviewed them prior to their submission to Curtis. Moreover, the finding here conflicted with the finding in footnote 17 that purchase order forms did not contain a line for Harris to indicate his approval of the expenditure. Because

I am writing in response to your undated letter (received on Tuesday afternoon, November 10<sup>th</sup>) in which you propose that you and I meet with Kleinhans and Stone to discuss the middle school music program.

Due to prior commitments on November 19<sup>th</sup>, I am unable to meet[.] However, please be advised that it is not appropriate for any of the above parties to meet to discuss the middle school music program while grievances are currently pending regarding this same subject. As Stone is not a party to the grievance herself, it would be inappropriate to discuss these matters with her present. Moreover, the contract restricts the Superintendent from meeting with the grievant to discuss the subject of a grievance until the grievance has advanced to her level of the grievance procedure. Furthermore, from a management perspective, I believe that it would be equally inappropriate for you and I to air our concerns about one another and these issues in the presence of a subordinate.

Curtis forwarded Harris's memorandum to Kleinhans with a handwritten note stating: "Now what? Seems like I should have some rights here. Because I first recommended a meeting, he files three grievances to stop any and all conversations?! What do I do now?" The meeting on November 19, 1998 never occurred.

On or about November 23, 1998, Curtis sent a memorandum to Linda Harris (L. Harris), Union Building Representative at the Athol Middle School, regarding the November 6, 1998 grievance. The memorandum stated in part:

The confusion that I have is why this grievance is only referencing the music program. Why not the performing arts program? I asked if [Harris] wanted the same level of control over that program as he is requesting for the music program. He indicated that White's performance of duties differed and he did not need to have the same level of control over her program.

In spite of the number of hours spent discussing this and related issues of the past four years, I am still left in confusion. What exactly is the department chair supposed to have input into? What is a "critical program decision?" Whose responsibility is it to initiate the discussion?

Is going on a Saturday field trip a "critical program decision?" I don't think so. It seems like something that a teacher can arrange once s/he gets the proper permission(s). The field trip permission forms do not indicate that a department chair needs to approve.

A meeting between Stone and Harris was scheduled to discuss his concerns about lessons and purchase orders. That meeting never happened. A meeting to discuss Harris's concerns was scheduled for Friday, November 6, at 3:30 p.m. Harris came to the meeting but indicated that he did not want to discuss the issues at that time. He stated that he planned on taking more formal action.

Because we have not talked about problems, we are now in this situation. Memos between Harris and Stone have only aggravated the situation. A word choice innocently used by one party is viewed as a contractual issue by another. We cannot continue to be productive under these circumstances.

In order to make this situation easier on all parties, I recommend the following:

1. Written communication between all parties – White, Stone, Harris and Curtis be copied to all parties. That means that if Harris sends Stone a memo, Curtis will get a copy. If Stone sends Curtis a memo, then Harris gets a copy.

2. Biweekly meetings be set up with these parties with the intent to discuss program issues and ideas. These meetings will have to be scheduled for a common day and time so calendars can be prearranged. I request that Harris coordinate the scheduling of these meetings. I also request that each meeting last no longer than 30 minutes and have an open agenda.

Curtis sent L. Harris another memorandum dated November 23, 1998 regarding the November 10, 1998 grievance that read in pertinent part:

Please note that the volunteer music assistants have been told to stop coming. The volunteer after-school help has been stopped.

I understand Harris's overall concern — if we have volunteers teaching lessons after school, then someday we'll move all lessons to after school with volunteers and a teacher will lose his/her job. . . . This seems to me to be far fetched. The Athol Middle School has expanded the number of music contacts students have. We have added performing arts. The district has added additional music teachers. There is no evidence that we are trying to eliminate music staff and use volunteers.

If volunteers cannot "teach" students then a large part of our remedial efforts will be lost. The ability to match a student with a volunteer for the "teaching of skills" is an important one. Just what constitutes teaching? Who gets to decide if it is an appropriate use of volunteers?

As stated at the beginning, I have stopped all volunteer efforts at the Athol Middle School at this time. I am seeking the clarification of the Superintendent and/or School Committee in regard to the use of volunteers.

On or about December 2, 1998, Kleinhans had a meeting with the department chairpersons at the high school and various school administrators, including Harris and Curtis. Kleinhans handed out copies of the department chairperson job description that had been reviewed and revised in the spring of 1992. On the job description that Harris received at the meeting, the following language had been crossed out: "prepare purchase orders and monitor the expenditures of approved budgetary funds." At the meeting, Kleinhans asked the department chairs to identify the duties they performed on the job description and to indicate if there were any problems.

On or about December 3, 1998, Curtis sent a memorandum to all the department chairs to follow up on some ideas generated at the meeting including having department chairs visit middle school classes, conducting 7-12 grade meetings at the middle school, and obtaining input on the budget. Harris sent a memorandum to Kleinhans dated December 6, 1998 regarding the December 2, 1998 meeting. In that memorandum, Harris stated in part:

Your decision to call an "emergency meeting" of all ten department chairpersons, under the pretext of discussing their job description, in order to conduct an investigation into a pending grievance by one of them, is one which is completely transparent to the [Union]. Had your intent, in fact, been to gather information from the department chairpersons about their job description, then why didn't you provide them with advance notice of this meeting and copies of their job description beforehand?

Instead, after distributing copies of the department chairperson's job description to the individuals in attendance at the meeting, both you and Curtis questioned [them] about the duties and responsibilities contained therein line by line in the presence of their other immediate

supervisors for approximately one hour and thirty minutes. [B]oth you and Curtis had first-hand knowledge of the fact that the department chairperson's duties and responsibilities were, in part, the subject of a pending grievance at the time you conducted this interrogation.

After the December 2, 1998 meeting, Harris's responsibilities for preparing purchase orders and monitoring expenditures of approved budgetary funds in grades 7 and 8 at the Athol Middle School were eliminated.<sup>32</sup>

#### *Complaint Against Kleinhans*

Susan Tandy (Tandy) and Debra Eastman (Eastman) were members of Unit A represented by the Union and served on the school council at the Ellen Bigelow School during the 1997-1998 school year.<sup>33</sup> In late May or early June of 1998, Tandy complained to Harris about Kleinhans's allegedly unprofessional behavior at a school council meeting. Although Tandy indicated to Harris that she wanted to resign her membership on the school council because of Kleinhans's conduct, Harris advised Tandy that she had other options available to her, including filing a complaint against Kleinhans. Harris also reminded Tandy that she would no longer be eligible to receive a continuing education waiver for the salary increment if she quit the school council.

Tandy, Eastman, and two parents wrote a letter to School Committee Chairman Peter Gagliardi (Gagliardi) dated June 3, 1998. In that letter, Tandy and the other individuals requested to be heard during the School Committee's executive session on June 17, 1998 to complain about Kleinhans's conduct at the school council meeting.<sup>34</sup> However, the School Committee did not hear the complaint on June 17, 1998 because Kleinhans had to be notified that there was a complaint against her. Tandy and the other individuals then sent an open letter to the School Committee dated June 17, 1998 requesting the School Committee to take action against Kleinhans.

In July 1998, the Union Executive Board and Representative Council met and voted to support Tandy and Eastman's efforts to resolve the complaint against Kleinhans. At a School Committee meeting on or about July 15, 1998, Harris handed Gagliardi an open letter from the Union and the Union Executive Board and Representative Council to the School Committee requesting a hearing concerning Kleinhans's conduct at the school council meeting. On July 18, 1998, the Athol Daily News printed an article in which Harris criticized the School Committee for not hearing the complaint of Tandy, Eastman, and the two parents.

On or about September 30, 1998, the School Committee held a hearing on the complaint against Kleinhans. Tandy and Eastman asked Harris to attend the hearing because they wanted him to

represent them in his capacity as Union president. However, Harris was not permitted to participate.

After two hearings, the School Committee determined that it did not have the authority to resolve the complaint against Kleinhans and suggested that the parties mediate their differences.<sup>35</sup> The Union objected to the School Committee's position that it did not have the legal authority to resolve the complaint. The Union and its Executive Board and Representative Council sent an open letter to the School Committee dated November 11, 1998 voicing this objection. The open letter stated in pertinent part:

In our opinion, the School Committee's response is totally unacceptable. Under the Education Reform Law, school committees still have the responsibility for supervising the superintendent of schools. This Committee's failure to hold Superintendent Kleinhans accountable for her actions makes it clear that they have chosen to relinquish this authority. When a superintendent of schools is no longer accountable to an elected school committee, the school department itself is no longer accountable to the public.

Furthermore, the School Committee's decision to hire a mediator to resolve this matter is yet another example of its members' inability to carry out their role as elected town officials. The School Committee should not be spending tax dollars on a mediator simply because the majority of its members do not have the backbone to require accountability from the Superintendent. Spend these tax dollars where they should be spent – on the children. Moreover, mediation is not appropriate because it implies that the teachers and parents in some way share responsibility for the Superintendent's conduct. Ironically, it will be the School Committee itself that will share in the responsibility should the Superintendent engage in similar conduct in the future.

The Athol Daily News printed the open letter in an article dated November 12, 1998. The newspaper article quoted Harris as follows: "The [Union] applauds these parents and teachers for their efforts to hold the Superintendent and the School Committee accountable for their actions. For those Committee members who refuse to hold the Superintendent accountable, they will stand accountable at the polls next April if they choose to seek re-election."

#### *N.A.S.B. Conference*

In the summer or early fall of 1998, Harris was invited to attend the National Association of School Boards (NASB) national conference in San Francisco in April 1999 in his capacity as Union president.<sup>36</sup> Harris received the invitation because he had negotiated a clause in the parties' collective bargaining agreement concerning teacher mentoring and teacher induction programs. No other member of the Union was invited to attend.

32. The record does not reflect who eliminated these job duties.

33. The school council devises ways to improve the school, examines special programs, and reviews the budget. The school council is comprised of teachers, administrators, parents, and a community representative and is co-chaired by the school principal and a member of the community. According to Article XXVII of the Agreement, teachers who participate on the school council do not need to take a continuing education course to receive a salary increment.

34. The allegations in the letter are not covered by the grievance procedure of the Agreement. Rather, Tandy, Eastman, and the two parents brought the complaint under Section 16 of the School Committee's bylaws.

35. The record does not reflect the date on which the second hearing was held.

36. Since Harris became Union president in July 1993, no other Union representative had been invited to a N.A.S.B. conference. Usually, School Committee members, school administrators, or a representative of the School District attended the conference.

In a memorandum to the Union Executive Committee dated November 17, 1998, Kleinhans stated: “This communication is to inform you that there has been a change of plans concerning the N.A.S.B. convention. . . . The [Union] will no longer be accompanying school committee and district administration representatives to that event[.]” No one from the school administration explained the reason for rescinding the invitation and Harris did not ask Kleinhans about it.

#### *Hiring Jenkins*

On or about June 2, 1998, the School Committee posted a vacancy for an elementary school principal position.<sup>37</sup> The posting indicated that applicants should be certified or certifiable as an elementary school principal, possess a master’s degree, and have a minimum of three years experience in an appropriate administrative position. The deadline to apply was June 30, 1998. Bargaining unit members represented by the Union were eligible to apply for the position.

Because the vacancy was at the Pleasant Street School, Harris designated two representatives from that school to serve on the interview committee: Roberta Concetta (Concetta) and Kathleen Mativer (Mativer).<sup>38</sup> At some point during the hiring process, Concetta and Mativer expressed their concern to Harris about the hiring process. Specifically, they told Harris that the School Committee’s likely choice, Paula Jenkins (Jenkins), was not certified as an elementary school principal, whereas other candidates were certified and had more experience than Jenkins. After speaking with Concetta and Mativer, Harris decided to investigate the credentials of Jenkins and the other applicants. He obtained a list of the applicants from Mativer.

Harris called the Massachusetts Department of Education (DOE) to determine if Jenkins was certified as an elementary school principal.<sup>39</sup> Harris learned that Jenkins was not certified and the School Committee had submitted a waiver application to the DOE on or about October 21, 1998 so it could hire her despite her lack of certification.<sup>40</sup> On or about October 26, 1998, the DOE sent a letter to Kleinhans stating that the waiver request for Jenkins could not be approved because the School Committee had not justified the need for a waiver. Specifically, the School Committee had not explained why the certified applicants were not qualified. On that same date, Kleinhans resubmitted the waiver request to the DOE.

On or about October 27, 1998, Harris faxed a letter to DOE Commissioner David Driscoll (Driscoll) asking that the DOE reject the School Committee’s application for a waiver for Jenkins.<sup>41</sup> In the letter, Harris indicated that the School Committee did not meet the “great hardship” standard required for a waiver because seventeen out of the nineteen applicants for the position were certified as school principals.<sup>42</sup> Because Harris at some point had learned from someone at the DOE that the waiver application was incomplete, he decided to request a copy of the application from DOE and to check the names on the application with the names on the list he had received from Mativer. Harris faxed a letter dated November 3, 1998 to DOE General Counsel Rhoda Schneider (Schneider) requesting a copy of the waiver application.<sup>43</sup>

On or about November 10, 1998, Kleinhans sent a memorandum to all of the applicants for the principal vacancy at the Pleasant Street School informing them that the DOE had asked the School Committee to supply their names and a brief statement about their candidacy. The memorandum also stated: “I am making you aware of the attached request from the [Union] because we feel it is an invasion of your privacy and to make clear that the [School Committee] will not participate in any way.”<sup>44</sup>

Harris sent a letter to Dennis DiCarlo (DiCarlo) in the Teacher Certification Division of the DOE dated November 16, 1998.<sup>45</sup> The letter stated in part:

As you are aware, the District’s initial waiver application for [Jenkins’s] employment only listed the names of six (6) applicants. Upon learning that the District grossly misrepresented the actual number of certified applicants for this position, the [Union] forwarded the complete list of all nineteen (19) applicants to the Department (of the nineteen (19) applicants, we believe seventeen (17) were appropriately certified as school principals). It is our understanding that, based on the misrepresentation of the total number of certified applicants and, because the District failed to provide the reason why each certified applicant who applied was not qualified to perform the duties; the Department denied the District’s initial waiver application.

Please understand that our purpose is to ensure that qualified certified personnel are hired for positions in our school district and that unqualified, uncertified persons are not given special favors under the guise of a “great hardship.”

37. Article XIII (G) of the Agreement read in part: “Notice of all vacancies . . . for a new school year shall be posted by the end of the preceding school year in each school clearly setting forth the qualifications, duties, and salary ranges.”

38. Article XL of the Agreement stated in relevant part: “Two (2) [Union] members designated by the [Union] president shall have the right to serve as non-voting members during the interview process on any committee whose role it is to interview candidates for . . . Unit B positions[.] The views of the [Union] members will be considered in the final recommendations made to the full school committee.” Although principals were taken out of Unit B after the Education Reform Act was passed in 1993, the language in Article XL of the Agreement was never updated to reflect that fact. Further, although the superintendent has legal responsibility for hiring principals under that Act, bargaining unit members represented by the Union continue to participate in the interview process. The Union is always concerned about hiring principals because they hire, fire, and evaluate bargaining unit members.

39. The record does not reflect when Harris called the DOE.

40. A waiver application lists the names of the individuals who applied for the position in question and the reasons why they were not qualified to fill the position. The waiver application also lists the name of the individual on whose behalf the application was filed.

41. Harris was not certain if he had used a school fax machine or the fax machine in his home to fax the letter. Harris used Union letterhead and included his telephone number at work and his telephone and fax number at home.

42. Before the DOE will grant a waiver application, a school committee must show that there is great hardship in filling a position with a certified candidate.

43. Harris faxed this letter from the fax machine in the high school library. He used Union letterhead and listed his office phone number and his telephone and fax number at home.

44. The record does not reflect what the attachment was.

45. Harris was uncertain if he had faxed this letter using a school fax machine or the fax machine in his home. Harris used Union letterhead.



Harris concluded the November 16, 1998 letter by requesting the DOE to thoroughly investigate the waiver application.

The Union grieved the posting for the principal position at the Pleasant Street School on January 4, 1999 alleging that the School Committee violated the Agreement by hiring “a non-certified, non-certifiable individual with less than the minimum requirement of three years of appropriate administrative experience.” The Union withdrew the grievance after Jenkins became certified as an elementary school principal.<sup>46</sup> The School Committee continued to employ Jenkins throughout the 1998-1999 school year.

*Letter of Reprimand*

Kleinhans sent Harris a letter dated November 24, 1998. The letter read as follows:

It has come to my attention that on November 3, 1998, during working hours, you used the fax equipment in the Athol High School library to fax several pages to the State Department of Education. Your fax pertained to your duties as president of the [Union].

As you are well aware, your use of school equipment and/or supplies for union business at any time, but particularly during school hours when you are required to be working on school business is prohibited[.]

You also listed your office phone on the letter to DOE which was written on [Union] stationery and signed in your capacity as [Union] president. As you know, you are not authorized to use your office phone for [Union] business. Consequently, I have decided to remove the phone from your office.

A copy of this letter will be placed in your personnel file and should you engage in any such inappropriate use of school equipment [in] the future you will be disciplined more severely.<sup>47</sup>

Harris sent a letter to Kleinhans dated November 30, 1998. The letter provided in pertinent part:

First, be assured that I do not engage in Union business when I have assigned duties. However, like every other district employee, I do have break times and lunch time during the work day. There is no district policy which prohibits me, or for that matter, any employee from, on occasion, communicating about Union matters during these times. A policy such as this would be unlawful.

For the record, I am *not* “well aware” that “(my) use of school equipment and/or supplies for union business at any time . . . is prohibited.” (Emphasis in original.) *Nor* did I “know” that I was “not authorized to use (my) office phone for [Union] business” during break time. (Emphasis in original.) To the contrary, it is a well established practice that, on occasion, district employees during break time or lunch time use school equipment (telephones, fax machines, the pouch, employee mailboxes) to communicate on union matters. The [Union] also uses school equipment when sponsoring various activities within the district.

You are well aware of these practices in our district. In fact, on occasion, you and your office, as well as other district administrators, engage me in union business during the school day; most often

during my preparation time, break time and/or lunch time. At times, this is the most expedient way for the Union and the district to dispose of their business. This practice can be well-documented over the last three and one-half years.

It appears that, as long as my communication on Union matters is initiated by the district, then it is permitted. However, when my communication about Union matters is not initiated by the district, such as was the case with my communication to the DOE, then you choose to prohibit it (even though it took place during my break time).

If you prohibit me from communicating about Union matters during my unassigned times during the school day, then you will have to place a similar restriction on all employees. Also, if I cannot, on occasion, communicate about Union matters during my break or lunch time, then it follows that I cannot, on occasion, communicate about any non-school related matters during these times, unless that is you are only discriminating against me for my Union activities. Furthermore, it would also follow that other district employees cannot, on occasion, communicate about any matters other than those related to their work assignments during their break and/or lunch time as well.

Moreover, if you’re going to prohibit me from giving out the high school’s number as the place where I can be reached during the business day; then similarly, you will have to prohibit all district employees from giving out their work numbers in the event a particular institution needs to contact them during the work day (i.e., on applications, to a doctor’s office, to the local bank, the MTA, the DOE, etc.).

[Placing] your November 24<sup>th</sup> letter in my personnel file and your proposed removal of the telephone from my office (which was placed there to facilitate my role as a department chairman) are actions taken in retaliation for my communication to the DOE on November 3<sup>rd</sup>.

Harris gave a copy of the letter of reprimand to First Vice President and Grievance Chairperson Keith Williams (Williams). After receiving that letter, neither Williams nor Harris used the telephone to conduct Union business during school hours during the 1998-1999 school year.

*Practices Prior to November 1998*

Harris conducted Union business in his capacity as Union president during school hours, including presenting grievances,<sup>48</sup> negotiating, and representing employees at disciplinary hearings. School administrators and members of management were frequently present when Harris conducted these activities. Although Harris usually conducted Union business during non-teaching times, he occasionally conducted Union business during his teaching periods at the administration’s request. In addition to Harris, other Union representatives conducted Union business like grievance meetings and mediations in the presence of school administrators during non-teaching periods during the school day. No Union representative was ever disciplined for conducting Union business during non-teaching periods during school hours. No one from the school administration ever informed Harris that Union repre-

46. The DOE certified Jenkins as a principal/assistant principal on February 24, 1999.

47. The letter of reprimand remains in Harris’s personnel file.

48. Harris processed several grievances in his capacity as Union president and as a bargaining unit member of the Union in the fall of 1998. He discussed these grievances with Kleinhans and/or the building principals.

sentatives were not allowed to conduct Union business during non-teaching periods during the school day. The Union did not receive notice that the School Committee intended to prohibit conducting Union business during school hours and did not agree to a change in the practice in effect at that time.

There was no policy that prohibited using the school fax machines to conduct Union or personal business during the school day. Any employee could use the school fax machines during school hours provided that they paid a certain amount of money per page. Harris and other Union representatives used the school fax machines to fax written communications about Union business to school administrators during school hours. No one from the school administration ever told Harris that using the school fax machine during school hours to conduct Union business was prohibited. The Union did not receive notice that the School Committee intended to prohibit using school fax machines to conduct Union business during school hours and did not agree to any changes in the practice in effect at that time.

There was no policy that prohibited using school telephones to conduct Union or personal business during non-teaching periods during the school day. Harris and other Union representatives used school phones to conduct Union business during non-teaching periods during the school day, including making and receiving calls from school administrators. No one from the school administration ever told Harris that he was not permitted to use his office phone to conduct Union business during the school day.<sup>49</sup> Harris was unaware of: 1) any teacher receiving discipline for making or receiving personal telephone calls during school hours; or 2) any Union representative receiving discipline for using school telephones during the school day to conduct Union business. The Union did not receive notice that the School Committee intended to prohibit using school phones to conduct Union business during school hours and did not agree to any changes in the practice in effect at that time.

There was no policy that prohibited using school equipment for Union or personal business during the school day. Teachers used school equipment for personal business. No one had been disciplined for using school equipment for non-school purposes during the school day.

#### Opinion

##### *Retaliation*

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).<sup>50</sup> 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).

Here, the School Committee does not dispute that Harris engaged in concerted, protected activity by processing grievances in his capacity as Union president and as a bargaining unit member and by making comments to the press criticizing how the School Committee handled the complaint of Tandy, Eastman, and two parents. Although the School Committee does not challenge Harris's right as Union president to question the waiver request filed with the DOE, it argues that Harris's actions lost their protected status when he used school equipment to conduct Union business during the school day after agreeing not to do so. However, the Hearing Officer discredited Shenkman's testimony that Harris had entered into an agreement with those terms. Thus, the School Committee's argument is unpersuasive on this point.

The School Committee also asserts that Harris's efforts to disqualify Jenkins did not constitute concerted protected activity and cites to *New Perspectives School, Inc.*, 6 MLC 1504, 1511 (1979), for the proposition that attempts to influence and to produce changes in the School Committee's management hierarchy are unprotected. That case dealt with employees who tried to oust a manager because they disliked her. Here, however, Harris was concerned with whom the School Committee chose to fill the vacant principal position because principals have the authority to hire, to fire, and to evaluate employees and, thus, to affect employees' working conditions. Consequently, Harris's activity was protected under Section 2 of the Law.

The School Committee further contends that, because Harris violated the state ethics law, his actions were unprotected. In particular, the School Committee alleges that, because the Union is a

49. Athol High School Principal Randi Shenkman (Shenkman) testified that she told Harris before the telephone was installed in his office in the fall of 1998 that he could not use it to conduct Union business and could only respond to calls from district administrators. She further testified that Harris agreed to this proposal. Harris, however, testified that Shenkman's only concern was that Harris might use the phone in his office to conduct Union business during his teaching time. Harris assured Shenkman that he would continue to use the phone to conduct Union business only during non-teaching periods during the school day. Harris denied that he had agreed not to use the phone in his office to conduct any Union business and testified that he would have filed a grievance immediately if Shenkman had restricted his use of the phone. While observing Harris's demeanor on the witness stand, the Hearing Officer saw that he became flushed and agitated when testifying

about this subject on rebuttal and appeared anxious to correct Shenkman's testimony. Moreover, Williams, Tandy, and Shenkman corroborated Harris's testimony that school employees used school telephones during the school day. Because Harris is an assertive Union president, it is unlikely that he would have agreed to change this practice. Accordingly, the Hearing Officer credited Harris's testimony on this point.

50. In *Lipchitz v. Raytheon Company*, 434 Mass. 493, 505 (2001), the Supreme Judicial Court cited *Trustees of Forbes Library* with approval in cases involving indirect evidence of discrimination. Because there is indirect evidence here of anti-union animus, we will apply the *Trustees of Forbes Library* analysis to the facts of this case.

private, for-profit entity, Harris could not use the school fax machine to contact the DOE. The School Committee cites to a conflict of interest opinion issued by the Massachusetts Ethics Commission in Case No. EC-COI-93-6 dated January 26, 1993 to support its contention. However, that case did not prohibit private, for-profit entities from using an employer's office equipment. Rather, the cited case narrowly holds that it was a conflict of interest for police officers to use the police department's office equipment to solicit charitable donations from the public because a reasonable person could believe that the police department had officially endorsed the solicitation. Because the cited case is inapplicable to the facts here, we find that Harris did not violate state ethics law and, instead, conclude that his communications with the DOE constitute concerted protected activity. Because the School Committee does not dispute that it knew about Harris's concerted protected activities, we will next examine whether the School Committee took adverse action against Harris.

The Union alleges that the School Committee took adverse action against Harris by issuing a letter of reprimand, eliminating his supervisory and budgetary authority, rescinding the invitation to the N.A.S.B. conference, and revoking his privilege to use school equipment to conduct Union business during the school day.<sup>51</sup> With regard to Harris's supervisory and budgetary authority, Harris specifically alleges that the School Committee: 1) excluded him from planning the field trip to UMass; 2) implemented the after-school instrument lesson program without involving him; and 3) eliminated his responsibilities for reviewing purchase orders and monitoring expenditures of approved budgetary funds in grades 7 and 8 at the Athol Middle School. Although the School Committee does not contest that the November 24, 1998 letter of reprimand constitutes adverse action, the School Committee denies the remainder of the Union's allegations. Thus, we will analyze each of the School Committee's arguments in turn.

Despite the School Committee's assertion that it did not change Harris's job duties, the evidence shows that Harris no longer exercised independent discretion over allocating budgetary funds in grades 7 and 8 at the Athol Middle School after approximately December 2, 1998. Moreover, this action was taken after Harris had expressed concern to Curtis about Stone submitting purchase orders directly to Curtis and had filed a grievance regarding this issue. Further, although Harris had planned and approved field trips involving his department in the past, he was not consulted before Stone arranged the field trip to UMass. We infer from these facts that eliminating Harris's discretion over allocating budgetary funds and failing to consult him about the field trip were punitive and constituted adverse action. *See, Suffolk County Sheriff's Department*, 27 MLC 155, 159 (2001), *citing Town of Holbrook*, 15 MLC 1221 (1988). However, the evidence does not support the Union's contention that the School Committee implemented an after-school instrument lesson program without consulting Harris. Rather, the record reflects that Curtis instructed Stone to discuss the subject with Harris after Stone had written to Curtis seeking permission to

start the program. When Stone contacted Harris about the program, he applauded her initiative but admonished her to discuss any new programs with him before proposing them. Therefore, the School Committee did not take adverse action against Harris regarding the after-school instrument lesson program.

The School Committee next asserts that it did not take adverse action against Harris by rescinding the invitation to attend the N.A.S.B. conference because it was not a term or condition of his employment. The record demonstrates that Kleinhans had invited Harris to attend the conference in his capacity as Union president in the summer or early fall of 1998 in recognition for negotiating a clause in the parties' collective bargaining agreement concerning teacher mentoring and induction programs. Kleinhans sent a memorandum to the Union Executive Committee dated November 17, 1998 stating that the Union could not attend the conference. However, Kleinhans's decision to rescind his invitation only impacted Harris, because no other Union member had been invited to attend the conference. Further, the School Committee never explained to Harris why Kleinhans had rescinded the invitation. Moreover, the invitation was a special privilege extended to Harris to recognize an achievement attained during negotiations. No other Union representative had been invited to attend a N.A.S.B. conference since 1993. From these facts, we infer that the School Committee intended to punish Harris for engaging in concerted, protected activity by rescinding the invitation. *Id.* Accordingly, we conclude that the School Committee acted adversely within the meaning of the Law.

Absent direct evidence of improper employer motivation, unlawful motivation may be established through circumstantial evidence and reasonable inferences drawn from that evidence. Several factors may suggest unlawful employer motivation including timing of the alleged discriminatory act, triviality of reasons given by employer, an employer's deviation from past practices, or expressions of animus or hostility towards a union or the protected activity. *Bristol County*, 26 MLC at 109.

Here, Harris: a) filed grievances in the fall of 1998 including grievances dated November 6, 10, and 12, 1998; b) faxed the DOE from the school library on November 3, 1998; and c) was quoted in the press on July 18 and November 12, 1998. Harris was not consulted about the field trip to UMass in the fall of 1998. Kleinhans rescinded the N.A.S.B. invitation on November 17, 1998 and issued the letter of reprimand revoking Harris's privileges on November 24, 1998. Harris no longer exercised discretion over budgetary funds in grades 7 and 8 in the Athol Middle School as of approximately December 2, 1998. These adverse actions occurred close in time to the concerted protected activities. Further, Kleinhans critically referred to Harris's efforts to investigate the credentials of Jenkins and the other candidates for the vacant principal position as "an invasion of . . . privacy" and vowed that the School Committee would "not participate in any way." Curtis also expressed anger directed at Harris's grievances dated November 6, 10, and 12, 1998 when she wrote to Kleinhans after receiving

51. Because we find that the School Committee unilaterally changed employees' working conditions by discontinuing the practice of permitting Union officials to

use school equipment during the school day, we do not decide whether this change also constituted adverse action under Section 10 (a) (3) of the Law.

Harris's November 16, 1998 memorandum. In particular, Curtis stated: "Now what? Seems like I should have some rights here. Because I first recommended a meeting, he files three grievances to stop any and all conversations?! What do I do now?" Consequently, the preponderance of the circumstantial evidence indicates that the School Committee was motivated by anti-union animus when it took adverse action against Harris.

Under the *Forbes Library* test, once 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." *Quincy School Committee*, 27 MLC 83, 92 (2000).

Here, the School Committee asserts that Kleinhans issued the letter of reprimand because he had violated an agreement not to use school equipment during the school day and the state ethics law by corresponding with the DOE. The School Committee next contends that Curtis never changed Harris's job duties. However, Harris's discretion over allocating budgetary funds in grades 7 and 8 at the Athol Middle School was eliminated and Harris was not involved in planning the field trip to UMass, although he had planned field trips in the past. The School Committee alternatively argues that Curtis was confused by Harris's multiple titles and overlapping job duties and any action taken by her was a result of this confusion. The record shows that Harris told Curtis during a meeting with her on or about November 6, 1998 that he believed his job duties were eroding. After her meeting with Harris, Curtis asked Kleinhans to set up a meeting with Curtis, Kleinhans, Harris, and Stone to discuss how the music department should work at the Athol Middle School. Curtis requested this meeting because she did not read Harris's job description in the same way that he did. Curtis also expressed confusion over Harris's job duties in her memorandum to L. Harris dated November 23, 1998 regarding Harris's November 6, 1998 grievance. Therefore, the School Committee proffered legitimate, non-discriminatory reasons for issuing the letter of reprimand and eliminating Harris's discretion over allocating budgetary funds. However, the School Committee failed to introduce any evidence explaining why Kleinhans rescinded Harris's invitation to attend the N.A.S.B. conference. Accordingly, the School Committee failed to meet its burden of proffering a lawful reason for taking that adverse action. See, *Boston School Committee*, 20 MLC 1005 (1994).

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, the Commission considers whether the employer would have taken the adverse action but for the employee's protected activities. *Town of Athol*, 25 MLC at 211; *Town of Belmont*, 25 MLC at 97; *Commonwealth of Massachusetts*, 24 MLC at 118. 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.*

As discussed previously, Sherkman's testimony about Harris's purported agreement not to use the school phone to conduct Union business during the school day was not credible. Further, there is

no evidence that Harris violated state ethics law by faxing communications in his capacity as Union president to the DOE. Therefore, we find the School Committee's stated reasons for issuing the letter of reprimand are pretexts, and we conclude that the School Committee would not have taken this adverse action but for Harris's concerted protected activities. We next turn to examine whether the School Committee would have eliminated Harris's supervisory and budgetary responsibilities but for his concerted protected activities.

The record demonstrates that Curtis approved the field trip to UMass because it rewarded the students for their good behavior, motivated them to stay in band, and did not cost any money. Harris believed that approving the field trip was a critical program decision that should have involved him. In her memorandum to L. Harris dated November 23, 1998 regarding the November 6, 1998 grievance, Curtis pointed out that the field trip was on a Saturday when school was not in session. Curtis also expressed her belief that a teacher could arrange a field trip after obtaining permission and noted that the field trip permission forms did not indicate that a department chair needed to approve of the trip. Moreover, the record is unclear whether Harris engaged in any concerted protected activity before Curtis approved the field trip in the fall of 1998. Therefore, the preponderance of the evidence indicates that Curtis would have given Stone permission to chaperone the field trip regardless of Harris's concerted protected activities because she believed that it was within her authority as principal to approve the trip.

The record supports a similar conclusion regarding Harris's budgetary responsibilities. Harris believed that he had the authority to review purchase orders at the Athol Middle School based on paragraph 8 in Russell's memorandum to Chiasson dated March 13, 1995 and paragraph 19 of the high school chairperson's job description. Paragraph 8 of the memorandum stated that the Secondary School Music Director would perform the job duties in the job descriptions for secondary school teacher and high school department chairperson. Paragraph 19 of the job description provided that the high school chairperson prepared purchase orders and monitored the expenditures of approved budgetary funds. However, the evidence shows that Curtis interpreted the memorandum and job description differently. Further, because Curtis was responsible for reviewing all purchase orders at the Athol Middle School, she thought that it was unnecessary for Harris to do the same. Moreover, the record demonstrates that Harris and Curtis had been struggling for several years to define Harris's job duties at the Athol Middle School. Accordingly, the preponderance of the evidence shows that the School Committee would have eliminated Harris's budgetary responsibilities whether or not he had engaged in concerted protected activity.

#### *Unilateral Change*

A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first giving its employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or

impasse. *Commonwealth of Massachusetts v. Labor Relations Commission*, 404 Mass. 124 (1989); *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983); *City of Boston*, 16 MLC 1429 (1989). The obligation to bargain extends to working conditions established through past practice as well as to working conditions contained in a collective bargaining agreement. *City of Gloucester*, 26 MLC 128 (2000); *City of Everett*, 19 MLC 1304 (1992). Allowing union officials to conduct union business during work hours is a mandatory subject of bargaining. See, *City of Lawrence*, 12 MLC 1604 (1986); *Town of Marblehead*, 1 MLC 1140 (1974).

Here, the School Committee argues that there has been no change in practice. In particular, the School Committee asserts that Harris had agreed not to use school equipment to conduct Union business during the school day and relies on Shenkman's testimony to support its assertion. However, the Hearing Officer discredited Shenkman's testimony. Moreover, the evidence establishes that Union officials used school equipment, including fax machines and telephones, to conduct Union business during the school day prior to November 24, 1998. Therefore, when the School Committee issued a letter of reprimand on that date for using school equipment during school hours to conduct Union business, the School Committee changed the existing practice of permitting Union officials to use school equipment for Union business during the school day. The School Committee took this action without giving the Union prior notice and an opportunity to bargain. Thus, the Union established the requisite elements of its unilateral change allegation.

#### Conclusion

Based on the record before us, we conclude that the School Committee violated: 1) Section 10 (a) (3) and, derivatively, Section 10 (a) (1) of the Law by rescinding the N.A.S.B. invitation and issuing a letter of reprimand and 2) Section 10 (a) (5) and, derivatively, Section 10 (a) (1) by unilaterally changing the practice of allowing Union officials to conduct Union business during the school day. However, we dismiss those portions of the complaint alleging that the School Committee discriminated against Harris by eliminating his supervisory and budgetary responsibilities.

#### Order

WHEREFORE, based on the foregoing, it is hereby ordered that the School Committee shall:

##### 1. Cease and desist from:

- a. Retaliating against Harris for engaging in concerted protected activities.
- b. Failing and refusing to bargain collectively in good faith with the Union by unilaterally changing the past practice related to using school equipment during the school day to conduct union business.
- c. In any like manner, interfering, restraining and coercing its employees in any right guaranteed by Law.

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

- a. Rescind the letter of reprimand.

- b. Consider inviting Harris to attend the next N.A.S.B. conference.
- c. Immediately restore the parties' past practice regarding using school equipment to conduct union business during the school day.
- d. Upon request, bargain in good faith with the Union over using school equipment to conduct union business during the school day.
- e. 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.
- f. 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 Massachusetts Labor Relations Commission has held that the Athol Royalston Regional School Committee has violated 1) Section 10 (a) (3) and, derivatively, Section 10 (a) (1) of the Law by rescinding the N.A.S.B. invitation, issuing a letter of reprimand, and revoking Harris's privileges to use school equipment to conduct Union business during the school day; and 2) Section 10 (a) (5) and, derivatively, Section 10 (a) (1) by unilaterally changing the practice of allowing Union officials to conduct Union business during the school day.

WE WILL NOT retaliate against Harris for engaging in concerted protected activities.

WE WILL NOT fail and refuse to bargain collectively in good faith with the Union by unilaterally changing the past practice related to using school equipment during the school day to conduct union business.

WE WILL NOT in any similar manner, interfere with, restrain, or coerce employees in the exercise of their rights under the Law.

WE WILL rescind the letter of reprimand.

WE WILL consider inviting Harris to attend the next N.A.S.B. conference.

WE WILL immediately restore the parties' past practice regarding using school equipment to conduct union business during the school day.

WE WILL, upon request, bargain in good faith with the Union over using school equipment to conduct union business during the school day.

[signed]

For the Athol Royalston Regional School Committee

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