

In the Matter of KING PHILIP REGIONAL SCHOOL
COMMITTEE

and

KING PHILIP TEACHERS ASSOCIATION

and

ILIDIO CARNEIRO, JOHN ADAMS, MARGARET
MAHER, NANCY FISCHER, CHRIS HENRICH, KELLY
FECTEAU, ANDREW GROVER, ANN LAMBERT, IN
THEIR CAPACITY AS OFFICERS AND/OR MEMBERS
OF THE BARGAINING TEAM OF THE KING
PHILIPTEACHERS ASSOCIATION

Case No. S.I.-10-279

16. *Strike*
16.2 *"work to rule"*
108. *Strikes*
108.2 *withdrawal of services*

October 25, 2010

Marjorie F. Wittner, Chair

Elizabeth Neumeier, Board Member

Harris Freeman, Board Member

*Kevin Bresnahan, Esq. Representing the King Philip
Regional School Committee*

*Will Evans, Esq. Representing the Massachusetts
Teachers Association*

*Americo A. Salini, Jr., Esq. Representing the King Philip
Teachers Association*

RULING ON STRIKE PETITION

Summary of the Case

The Commonwealth Employment Relations Board (Board) held a three-day strike investigation that concluded on October 14, 2010. The investigation occurred after a two-year effort by the Petitioner, the King Philip Regional School Committee (Employer or School Committee and Respondent, the King Philip Teachers Association (Union or KPTA) to reach a successor collective bargaining to their previous agreement that expired in August 2009. The School Committee's strike petition (Petition) alleges that the Respondents, the KPTA, the Massachusetts Teachers Association (MTA), certain named members of the bargaining unit,¹ in their individual and official capacities and all other members of the KPTA² were engaged in, or induced, encouraged and condoned, an illegal strike, i.e., a work to rule action that withheld services in violation of Section 9A of Massachusetts General Laws Chapter 150E (the Law).

The petition specifically alleges Section 9A of the Law was violated by: 1) a concerted refusal by teachers and guidance counsel-

ors to prepare individualized letters of recommendation for students; 2) a concerted refusal by teachers to utilize all features of the high school's computerized system used for entering attendance, grades, homework and to communicate with parents, and; 3) a refusal by seven teachers to follow through with their individual agreements to teach independent study courses for fourteen high school seniors. The respondents contend that the votes taken at a Union meeting and the actions of the members did not violate Section 9A because the services withheld were not job duties subject to sanction under the Law's prohibition against strikes and other forms of work stoppage. The MTA further contends that it did not induce, encourage and condone such activities.

For the reasons set forth below, we dismiss the petition in its entirety because the evidence fails to show that the three tasks at issue were required duties of employment such that the refusal to perform those duties constituted a violation of Section 9A of the Law.

Statement of Case

The School Committee filed the petition on October 4, 2010 with the Division of Labor Relations (Division) requesting a strike investigation pursuant to Section 9A(b) of Massachusetts General Law, Chapter 150E. The petition alleged that all respondents violated Section 9A(a) of the Law by engaging in or by inducing, condoning, and encouraging an illegal strike, work stoppage, and withholding of services as described above and more fully below. On October 6, the MTA filed a Motion to Dismiss and on October 7, the KPTA filed a Response to the Strike Petition and a Motion to Dismiss.

The Division scheduled the matter for investigation before the Board on October 7, 2010 and issued a notice of investigation to the parties. The Board conducted a three-day investigation of the Employer's petition on October 7, 13 and 14, 2010. On the first day of investigation, after hearing argument on a series of motions filed by the KPTA and the MTA, the Board denied both parties' Motions to Dismiss, declared the MTA's motion for a continuance moot, and held in abeyance the Motion for a More Definite Statement until the conclusion of the School Committee's case. At the close of the investigation, the Board dismissed the petition with respect to the individually named respondents, in their individual capacities only.

All parties had an opportunity to be heard, to examine witnesses, and to introduce evidence.

Stipulation of Fact

None of the duties alleged to have been withheld in the strike petition are specifically set forth in the collective bargaining agreement.

1. Ilidio Carneiro, John Adams, Margaret Maher, Nancy Fischer, Chris Henrich, Kelly Fecteau, Andrew Grover and Ann Lambert.

2. The School Committee withdrew its petition as to "All members of the King Philip Teachers Association" on the first day of the investigation.

Findings of Fact

The School District and the KPTA

The King Philip Regional School District (District), comprised of a middle school and high school, serves the communities of Norfolk, Plainville and Wrentham. Dr. Elizabeth Zielinski (Zielinski or Superintendent) has been the District's Superintendent since July 1, 2010.³ Charles Flahive (Flahive) has been the Interim High School Principal since July 29. Both Zielinski and Flahive were new to the District, having been previously employed as education administrators in other parts of the Commonwealth. Flahive was preceded by Jill Proulx (Proulx), who was principal for two years, until June 30. The high school has approximately 1300 students.

The School Committee and the KPTA are parties to a collective bargaining agreement that was effective by its terms from September 1, 2006 until August 31, 2009. The bargaining unit includes all full-time and regular part-time teachers and guidance counselors, as well as a number of other professional titles. There are approximately 141 members in the bargaining unit, approximately 80 of whom work at the high school. The most recent job description for District high school teachers was prepared in 1996. Among the essential job duties listed is to "keep appropriate records and prepar[ing] progress reports" and to "keep current in discipline and other teaching techniques." (SC6).

As of the date of the petition, the parties had been bargaining for a successor contract for almost two years. These efforts, despite a number of mediation sessions with both an outside and a Division-appointed mediator,⁴ have been unsuccessful. Last spring, the Union picketed outside the high school and School Committee members' homes on at least two occasions. The parties continued to bargain over the spring and summer without reaching agreement. They last met on August 31, the day before the teachers' first day of school and were scheduled to meet on October 4, 2010, the day the School Committee filed the instant petition.

The September 1 KPTA Meeting and the School Committee's Response

The teachers' first day of school was September 1. Zielinski prepared a schedule of events for the day including her opening address and an address by Union leadership to its bargaining unit members. After consulting with Union President Ildio Carneiro (Carneiro), Zielinski scheduled the Union portion of the meeting to last fifteen minutes. It actually lasted about ninety minutes

About 150 bargaining unit members attended the meeting, which was moderated by Carneiro and other unidentified members of the KPTA leadership.⁵ Members raised their overall frustration with the lack of a contract for the last two years. This discussion eventually resulted in a motion from the floor. The testimony of three teachers indicated that the vote was for members individually to

"reconsider" the amount of time they were each spending on the three tasks at issue in this investigation, and to evaluate or, as one teacher put it, "examine their conscience," to determine whether each teacher should continue their level of involvement with these issues given that each involved extra time. More specifically they voted that each teacher would reconsider whether they were going to continue spending as much time on individually written student letters; whether they were going to continue using the enhanced features of the high school's iPass system beyond what was required; and whether teachers were to continue their involvement carrying out independent studies for individual students.⁶ The motion was voted on by a showing of hands and passed.

The Employer first learned about the Union meeting discussion that same day, when a bargaining unit member who attended the meeting reported to the Superintendent and the Director of Special Education. According to Zielinski, this bargaining unit member told her that people were very upset over the contract and were planning not to write college recommendation letters for students or do independent studies.

Over the next few weeks, the administration received information that it believed showed that teachers had stopped doing the three tasks that form the basis of this petition. The evidence included direct conversations with teachers and students, and emails from parents, as well as discussions at the September 20 School Committee meeting and High School Open House on September 23, described in more detail below. Regarding parent information, on several occasions, the complaining parent refused to provide the teacher's name. At least one parent told Zielinski this was out of fear that it would make matters worse for their child.

There was also some public airing of the teacher's dissatisfaction, when on September 7, a Middle School teacher wrote a letter to the Sun Chronicle, a local newspaper. In the letter, the teacher indicated her unhappiness that, after two years with no contract and no pay raises, the parties had failed to reach agreement on a new contract the day before school started. The teacher's letter asked whether it was known that "teachers are not required to write letters of recommendation for private schools and colleges, not required to do independent studies [and] . . . not required to inform parents of grades except on progress reports and reports cards...."

Independent Studies, iPass and Teacher Recommendations

The testimony and exhibits submitted by the parties establish the following facts about independent studies, the iPass system, and teacher recommendations at King Philip High School.

Independent Studies

Each semester, high school teachers are assigned to teach five classroom-based classes along with an additional non-classroom based duty such as study hall, bathroom duty or lunch duty.

3. All dates are 2010, except as indicated.

4. The parties jointly filed a petition with the Division for mediation in September 2009. After several mediation sessions, the Division ordered the parties to engage in factfinding. The first factfinding session was scheduled for September 20, 2010 but cancelled by the Union. Another session is scheduled to take place on October 29.

5. There is no evidence that any MTA employees were present at this meeting.

6. This finding is based on the combined testimony of three teachers who were present at this meeting. None of the witnesses could recall who actually put the motion to a vote, nor were they able to articulate with any specificity how the motion was phrased.

Teachers may also, at their discretion, agree to supervise a student in what is known as an Independent Study (IS). The District has offered IS courses since approximately 1999-2000.

The High School's 2008-2009 Program of Studies describes Independent Studies as follows:

This part of the program is designed to provide opportunities in many areas as specific extensions of the program. Seniors may be admitted to independent studies for the purpose of either doing in-depth study of a specific discipline or doing in-depth study of an area not specifically taught in our curriculum. The student and teacher jointly prepare a study plan contract, ISPC, which must be executed within two weeks of the beginning of a semester. The ISPC available in the principal's office must be approved by the student, parent, teacher, counselor and principal.⁷

Students wishing to participate in Independent Studies must fill out a form called "Independent Study Plan/Contract" (ISPC). The ISPC states that it must be executed within two weeks of the beginning of a semester and jointly prepared by the student and teacher. The ISPC requests the title, goal of the study, credits to be awarded and beginning and completion dates. On a separate page, students/teachers are asked to provide a more detailed description of the project including learning outcomes, activities, and monitoring assessment criteria. It is not clear from the record whether teachers get additional compensation for doing an IS.⁸

The ISPC has spaces for student, parent, teacher, counselor and principal signatures. Once the student obtains the first three signatures a member of the administration, generally the principal or vice principal, must also approve the request. Their approval is noted on the form by the assignment of a course number and, at times, by the administrator's signature.⁹ Some students obtain the requisite approvals the semester before they take the IS.

Once approved, the IS is included in the schedule the student receives at the beginning of the year and in the administration's "Master Schedule." Students typically do not find out that their IS's have been denied until the beginning of the term, at which point they have to select an alternative class.

The IS does not appear on the teacher's schedule the administration prepares before August 1 and does not appear as a separate assignment on the final schedule the teacher receives at the beginning of the year. Rather, teachers who undertake IS's are typically assigned to a study hall for one period rather than another

non-teaching duty (i.e., bathroom or lunch duty) so that they can meet individually with the Independent Studies student. At the beginning of the school year, the name of the student who signed up for the IS appears on the teachers' study hall roster, along with other students who signed up for that study hall. These non-classroom assignments may change at the beginning or during the school year, depending on the needs of the school.

There is a ten day period at the beginning of each term when students can drop or add classes from their schedule. Teachers are not free to cancel classes that were assigned before August 1 during the drop/add period nor may the administration change a teacher's schedule after August 1 without the teacher's consent. Article VI (A) of the Agreement, *Assignments*, states:

All employees shall be notified in writing of their assignments for the ensuing school year prior to August 1. Such assignments shall not be changed subsequent to August 1, except with the consent of the employee involved, or because of extraordinary circumstances making such change necessary.

Independent Studies 2010-2011

In the spring before the first 2010-11 school year term,¹⁰ seven teachers¹¹ agreed to oversee Independent Studies with fourteen students. The administration denied two of those requests at some point between April and September 2010. At the beginning of the 2010 school year, all students whose IS's had previously been approved learned that they were no longer being offered.¹² There were also a number of students who first requested an IS during the first two weeks of school. Their requests were turned down as well. As a result, there are no students taking Independent Studies this semester.

During the ten day drop/add period the administration learned that teachers refused to undertake IS's. Zielinski found out around the first week in September. Flahive and Wargo first found out when students came to them asking to adjust their schedules. They also found out through conversations with the teachers themselves. Flahive spoke to Wolloff and asked him why he would not do IS's. According to Flahive, Wolloff replied, "My hands are tied." Flahive asked another teacher, Joe Ferreira, why he was not conducting them. Flahive testified that Ferreira said he believed that there could be "severe consequences" if they were taught.¹³

The School Committee was also made aware of the situation as a result of oral and written parent complaints made at the September

7. The Program of Studies was not offered into evidence but this portion of it was read into the record by Guidance Counselor and Union Vice President John Adams after he testified that IS's were not outlined in the high school's program of studies.

8. In response to a question from KPTA counsel on cross-examination, Zielinski testified that teachers received no additional compensation. However, the Union's witness, a high school teacher and coach, testified that he had received extra compensation in the past.

9. A number of the approved IS plans in evidence did not contain the principal's signature.

10. The high school year is broken up into four terms.

11. Peter Tileston, a music teacher signed seven of the Independent Study forms submitted in Spring 2010. Tileston retired over the summer and Josh Wolloff (Wolloff) was hired to replace him. At the beginning of the school year, Wolloff

was assigned to take over all of Tileston's classes and independent studies. As described below, Wolloff did not supervise any of the IS's he was assigned.

12. The record is not clear which teachers notified the students directly and which students had just heard that teachers were no longer overseeing Independent Studies. In some cases, however, students told Assistant Vice Principal Robert Wargo that their IS teacher told them they would not participate in the IS.

13. Flahive testified that Ferreira explained to him that he believed he could be thrown out of the Union for doing an IS and that this belief was based on what others had told him. Given the multiple levels of hearsay and speculative nature of the teacher's statement to Flahive, we do not allow it in for the truth, but for the fact that Ferreira had a conversation with Flahive in which Ferreira acknowledged canceling his IS's as a result of what he perceived as Union pressure.

20 School Committee meeting and the September 23 Open House - both of which occurred after the drop/add period had closed.

At no time after the administration learned that teachers would not be conducting IS's did anyone in the administration direct the teachers to conduct the independent study plans at issue or discipline them for failing to do so. There is no evidence that before the current school year, teachers had ever withdrawn from teaching IS's after the IS was approved and scheduled. As a result of the teachers' withdrawal from IS participation, the students whose IS's had previously been approved and scheduled had to find alternative classes at the high school or independent studies with outside teachers or professors. Several began to take courses at Bristol Community College. One student, with a teacher's help, arranged an IS with a local college professor, while other students were re-scheduled to take classes at the high school. This created some scheduling challenges, because in some cases, the class that the student wished to take as an alternative met at time when the student had a conflict, or the class was already full.

iPass. Generally

King Philip, like most districts in Massachusetts uses some form of electronic recordkeeping for teachers. Since 2007, the District has used the program "iPass," a computerized data entry system that enables teachers, parents and the administration to enter and process student grades, including homework, test, quiz, midterm exams, final exams, final grades, attendance and other student and teacher data.¹⁴ District teachers first received training in iPass in school year 07-08 and the system has been in use since then. The iPass system includes an iTeacher component for use by teachers only and an iParent component so parents can, with password access, view their child's grades. Notably, iPass allows teachers to check a box if they do not want to allow parents to view information they may post on iPass.

It is undisputed that teachers are required to enter attendance information on iPass. It is also undisputed that when Proulx was principal she told teachers at a faculty meeting during the 2009-2010 school year that they were not required to post or make test and homework grades viewable to parents on the iPass system, but that they were required to enter quarter term grades, mid-term exam grades, final exam grades and the final year's grade (collectively "term grades"). The Union does not dispute the teachers' obligation to enter term grades.

According to a memo that former Principal Proulx sent teachers in June, at the end of the 2009-10 school year, teachers could turn in their homework grades as they appeared in written hard copy in a teachers' rank book or as a printout from a digital rank book located in iTeacher, the teachers' part of iPass.

Two KPTA exhibits suggest that this continued to be the case until September 22. On that date, the District updated its response to a question appearing in the "Parent FAQ's" section of its website, www.Kingphilip.org/Parent-FAQ.htm. The question was, "What if I don't see a grade from a teacher?" The response on September 21 was "iParent view is real time so it is possible that the teacher has not entered the grade *or that teacher is currently maintaining an offline rank book*. If you have questions about your child's progress, please contact that teacher by phone or email." (Emphasis supplied). The September 22 Parent FAQ's omitted the italicized reference to teachers' maintaining offline rank books in lieu of posting grades on iPass.

As of approximately October 1, 38 teachers had accessed iPass at least once to enter a homework assignment.¹⁵ Records submitted indicate that in academic year 2009-2010, 117 teachers entered at least one homework assignment into the iPass system at some point during that school year. Similarly, the number of teachers entering at least one assignment in the 2008-2009 and 2007-2008 school years was 121 and 123 respectively.

The September 20 School Committee Meeting and September 23 Open House

At the September 20 School Committee meeting, a number of parents sought clarification of the administration's expectations regarding iPass. On September 21, the Superintendent prepared a memo to all middle and high school faculty stating that it was the District's "expectation" that the following occur:

- Test and quiz grade be entered no later than 5 days after the date given
- Grades for essays and papers entered no later than 10 days from due date
- Bi-weekly posting of homework grades
- All test, quiz and homework grade be made viewable to parent
- "As a reminder" progress reports and terms grade entered within grade window
- All faculty continue to use iPass for attendance

A hard copy of the September 21 memo was also placed in teachers' mailboxes. With the exception of the "reminder" that progress reports and terms grades be entered within the grade window, this was the first time the expectations set forth therein were put in writing or verbally by the current administration. Zielinski was not aware whether these expectations were conveyed to teachers, verbally or in writing by previous administrations. As noted above, the prior directive teachers received from then Principal Proulx indicated otherwise.

On September 23, 2010, Zielinski sent a letter to Carneiro confirming that the September 21 memo represented the District's

14. The Massachusetts Department of Elementary and Secondary Education (DESE) regulations do not specifically require teachers to post grades on internet-based systems like iPass. The regulations do, however, require some form of electronic record keeping for teachers and students.

15. Zielinski testified that the iPass printouts (School Committee Exhibits 3(a) - (d)) reflected which teachers had set up a rank book by entering an assignment into iPass to which a grade could be assigned. However, math teacher Edward Kummer,

whose name appears on the 2010-2011 printout (School Committee 3(d)) testified that he had not yet entered any homework assignments in iPass this school year. Thus, the only conclusion that can be drawn from School Committee 3(d) is that the 38 teachers listed therein had accessed iPass at least once for reasons unclear from the record. Because the Union does not dispute that teachers are required to use iPass for certain purposes, School Committee 3(d) has limited probative value.

“expectations” regarding iPass. She forwarded that memo to all staff on September 24. However, on September 23, 2010, a substitute teacher wrote an email to the middle school’s principal and vice principal expressing her “confusion regarding the iPass system” and stating that she had felt “some pressure to not use the system except for required submissions of progress reports and term grades.” The teacher asked them to let her know exactly what the administration wanted her to do. The record does not reflect what response if any she was given.

In response to the September 21 memo, on September 28, Donna Buckley (Buckley), the MTA consultant to the KPTA, wrote to Zielinski stating that “with the exception of end of term grades, the final grade and the grades for mid-term and final exams, the extent of the use of the other features of iPass has always been voluntary and up to the discretion of the KPTA staff.” Buckley requested that Zielinski answer whether the additional “expectations” in the September 21 letter were a directive that could subject teachers who did not use these iPass features to discipline. Zielinski did not respond to this letter either.

Parents emailed the administration regarding their concerns about iPass. A parent sent an email to Flahive on September 23 reporting that five teachers had told her during Open House that they were not going to be using iPass. According to the parent, two teachers said they would not be using it because the “system did not work;” a third stated that she was told that teachers were not to be using iPass until the contract was settled and they were not supposed to be discussing it that evening; and one stated that they were not going to use it to enter grades. On October 1, 2010, a high school parent wrote the administration complaining that her daughter’s grades had not been posted on iPass. This parent also reported that a teacher she had spoken to at the Open House told her that grades would not be posted until the contract was settled. On September 29, a middle school parent wrote to the principal indicating that none of the eighth grade teachers had posted grades on iPass.

At the September 20 and September 23 meetings, parents also expressed concerns about recommendation letters and IS’s. Both Zielinski and Carneiro were present and answered parents’ questions.¹⁶ When the School Committee was asked whether it had made a determination that teachers would no longer teach IS’s, members of the School Committee replied they had not. The administration also invited parents who had concerns to put them in writing.

Parents asked Carneiro whether the Union had sanctioned the teachers’ refusal to do letters of recommendation and IS’s. Carneiro did not directly answer the question.¹⁷ The parents also asked Carneiro if he would ask the teachers to reconsider the actions they were taking. Carneiro stated that he did not make decisions for individual members, but that he would think about it and

bring this before the next Executive Board meeting, which would be an open meeting.

Parents also asked whether the administration was willing to sit down with the KPTA and discuss these two issues. Both the Superintendent and Carneiro indicated they would be happy to. Zielinski contacted Carneiro the next day suggesting some dates, but Carneiro sent back an email stating that he could not discuss these issues because his MTA representative was unavailable.

The Administration sent an email to parents on September 22 inviting them to relay their concerns in writing and describing what it was doing to address the concerns they had raised at the School Committee meeting:

We wish to assure the KP community that several steps are being taken to address the situation and provide immediate remedy for affected students. Students and parents are rightly concerned about the chaos that the cancellation of Independent Studies has caused for students whose schedules depend on them; about the urgency of getting thoughtfully prepared letters of recommendation, which are being to be needed for early decision applications, since “form” letters are generally frowned upon by the colleges and may not be considered for acceptance; and about the lack of access to their student’s grades through iPass...

The letter then reiterated the District’s iPass “expectations” set forth in the September 21 memo, described above, but stated no expectations or action plan for teacher recommendations or IS’s.

The next day, September 23, was the High School Open House. Zielinski testified that, that evening, several parents told her that teachers had told them that they would not post grades on iPass or prepare letters of recommendations. Flahive testified that he heard similar complaints from parents. In particular, one parent told Flahive that a teacher told her child that if she wanted a letter of recommendation he would put her on a waiting list for a form letter. The same parent had also sent an email to Flahive on September 22 reiterating this conversation.

Teacher Recommendations, Generally

Most college applications require one or more teacher recommendation(s) for students. As part of the college application process, the high school’s guidance office prepares handouts, one of which includes deadlines for submitting senior questionnaire packets¹⁸ and a bulleted description of the “College Application Process.” The second to last bullet states, “Students should talk to their selected teachers about writing letters of recommendation for them in the fall and make sure they provide each teacher with an addressed envelope & postage, per school, in a timely fashion.” The earliest deadline listed is October 18, when the Guidance office would prefer students applying “early action” to colleges with a November 1 deadline to submit their forms to the Guidance office.

16. There is no evidence that any MTA officials were present at this meeting.

17. Carneiro did not testify. These findings are based on Zielinski’s un rebutted testimony regarding Carneiro’s remarks at this meeting.

18. The packet consists of two separate questionnaires, otherwise known as “brag sheets,” for students and parents. The questionnaires ask about the student’s interests, strengths and extracurricular activities, the colleges the student is applying to and for a copy of the student’s application. Teacher recommendations are not typically included in the questionnaire packet provided to Guidance.

Consistent with the described “College Application Process” handout, students wishing recommendations approach teachers directly. The teacher has the discretion to decline the request. If the teacher agrees, the teacher usually sends the completed recommendation directly to the college itself. Although the teacher may also give it back to the student or to the Guidance Office to mail, the recommendation is not screened or reviewed by the administration or the Guidance Office. The administration keeps no records regarding teacher recommendations and has no way of knowing how many teachers complete them.¹⁹

The District does not prescribe a particular format for teacher recommendations. However, the Common Application, used by over 400 institutions of higher learning, requests teachers preparing letters of recommendation to “please write whatever you think is important about this student, including a description of academic and personal characteristics as demonstrated in your classroom. We welcome information that will help us to differentiate this student from others.” Two of the Union’s three witnesses, both teachers who had previously written student recommendations, testified that they had never seen this portion of the Common Application.²⁰ However, one teacher testified that the requested information was commensurate with the information he has included in his recommendations in the past. High School Assistant Vice Principal and former Guidance Counselor Robert Wargo (Wargo) similarly testified. We find that the information requested in the Common Application is typical of what colleges require for student evaluations.

Guidance counselors also prepare their own recommendations for college seniors applying to college. Guidance counselors consider this to be a duty of employment and there is no evidence that any guidance counselor has refused to prepare student evaluation or did so in a manner different from prior school years.

Teacher Recommendations in the 2010-2011 School Year

At the September 1 Union meeting described above, teachers discussed creating a template for student recommendations, so that teachers could spend less time preparing them, but none was ever developed. There is no evidence that teachers have submitted a form letter in lieu of a personalized letter of recommendation or what would have been included in the form letter. However, one of the teachers who testified asserted that he came away from the September 1 meeting with the understanding that he was not going to spend as much time as he used to crafting recommendations. As of the date of the investigation, that teacher had not prepared a letter of recommendation or determined how he was going to prepare the letter using less time. He did testify, however, that he would

write deserving students good evaluations and questioned why he would write an evaluation that would be of no value to a college.

Sometime during the first week of school, Wargo testified that one teacher had asked him for advice about the fact that teachers were not doing letters of recommendation.²¹ Wargo advised her to prepare them anyway regardless of what she stated publicly because they were critical for students applying to college.

On September 22, a parent sent an email to Zielinski and Flahive complaining that when her daughter asked two teachers for a college recommendation they both indicated that would only give her a “form letter, nothing personal.” The record does not reflect whether this actually occurred. Another parent wrote Zielinski and Flahive on October 8, reporting that a teacher had told her son that she was not sure if she would write a letter of recommendation for him as it was dependent on the outcome and decision by the teachers’ union during negotiations. Flahive spoke to the teacher about the email. She told Flahive that she did not want to comment on the issue but had taken the student’s packet. She then said, “Wink.”

A math teacher testified that in his twenty-six years of teaching he had only declined recommendation requests four or five times. The Special Education teacher testified that in his nine years of teaching, he had declined recommendation requests approximately eight or nine times. As of the date of the investigation these teachers had not written any letters of recommendation for students, despite requests to do so, claiming that they had received insufficient information from the student or that they had not yet decided whether to write on the student’s behalf.

The MTA

Three emails sent by the KPTA from September 14 to September 28 reference the MTA in connection with upcoming meetings of the KPTA’s “Crisis Response Team” (CRT).²² On September 14, 2010, John Adams (Adams), a high school guidance counselor since 2009 and KPTA Vice President, sent a memo announcing a CRT meeting on September 21 that would be “open to all members interested in taking on a more active role.” The memo further stated that “updated information from the Negotiating Team and the MTA would be provided.” The memo finally stated:

Please ensure that all members in all units pay attention to detail on a daily basis. It is critical that you meet the obligations of your contract. This will allow us to maintain our high professional standards, while minimizing potential risk.

Another bargaining unit member, Mark Breen, sent an email on September 22 to all high school and middle school faculty announcing a CRT meeting that afternoon at which an MTA repre-

19. The School Committee submitted a printout of a page from the KPTA’s website titled “facts about the King Philip Teachers” that claims that 77% of professional staff write letters of recommendation on behalf of students. Because it is not clear whether the 77% refers to a single year or to the percentage of teachers who have written at least one recommendation over the course of their career, we draw no conclusions from this document regarding the percentage of high school teachers who write recommendations in a given school year. Both teachers who testified indicated that they had been asked to write at least one recommendation this school year, but they also testified that there had been school years in which they were not asked to write any.

20. The Union’s third witness, guidance counselor and Union vice president John Adams, testified that he had seen the Common Application when preparing the guidance counselor portion of this application. Adams testified that instead of using the Common Application form, he prepared his own recommendation letter, which he then attached to the form.

21. Wargo testified that the teacher stated that “We’re not doing letters of recommendation.” In light of the record as a whole, as summarized herein, we infer the word “we” to refer to bargaining unit teachers.

22. The record contains no further information about the CRT.

sentative would speak. Finally, on September 28, the CRT sent KPTA membership a memo indicating that the KPTA's president had made statements to the Boston Globe and stating, "We currently are working with three of MTA's most elite consultants in an effort to maximize our momentum, and formulate our next plan of action."

On October 13, 2010, Buckley filed with the Division three separate charges of prohibited practice on behalf of KPTA alleging that the School Committee had violated Sections 10(a)(1), 10(a)(3), 10(a)(5) and, derivatively, Section 10(a)(1) of the Law, when, as a result of filing this petition, it unilaterally made the three tasks at issue here duties of employment, without giving the Union proper notice and an obligation to bargain.

Discussion

The threshold issue in this case is whether KPTA members have engaged in a work action that is prohibited within the meaning of Section 9(A) and Section 1 of the Law. Section 9A(a) of the Law prohibits public employees and employee organizations from engaging in, inducing, encouraging, or condoning any strike, or stoppage, slowdown, or withholding of services. Section 1 of the Law, in pertinent part, defines a strike "as a public employee's refusal, in concerted action with others, to report for duty, or his/her willful absence from his position or stoppage of work, or abstinence in whole from the performance of the duties of employment." In *Lenox Education Association*, 7 MLC 1761, 1775 (1980), *aff'd sub nom. Lenox Education Association v. Labor Relations Commission*, 393 Mass. 284 (1984), the Board concluded that "'duties of employment,' the abstinence in whole or in part from which constitutes a strike, includes duties specifically mentioned in an existing or recent expired collective bargaining agreement. . . [and] also those practices not unique to individual employees which are intrinsic to the position or which have been performed by employees as a group on a consistent basis over a sustained period of time."

Here, both parties have stipulated that the duties alleged to have been withheld are not contained in the collective bargaining agreement. As *Lenox* acknowledges, however, implied in any collective bargaining relationship is the obligation to continue certain customs and past practices of the parties. *Id.* at 1774. Thus, to decide the threshold question, we must consider whether the duties at issue, which are not enumerated in the parties' collective bargaining agreement, are intrinsic to the position, or constitute enforceable past practices. *Id.* at 1775. To constitute a past practice enforceable as a "duty" of employment, the practice must be long-continued, well understood, and mutually concurred in by the parties. *Id.*

According to the School Committee, the three job duties at issue here, use of the iPass system, writing letters of recommendation and teaching independent study courses, meet the *Lenox* criteria. The KPTA disagrees, contending that the School Committee has failed to establish that the concerted activities undertaken by teachers for the purpose of influencing collective bargaining were a prohibited action under G. L. c. 150E §9A(a). The MTA adopts the KPTA's arguments and further argues that the evidence is insufficient to establish that MTA induced, encouraged or condoned

the three activities. We address the parties' arguments with respect to each of the three activities.

iPass

The School Committee contends that teachers have, as a group and on a consistent basis, used iPass to enter more than term grades and that their use of iPass demonstrably declined this year as result of pressure. We agree that there is evidence, albeit rather weak, demonstrating that teachers' use of iPass has declined this school year. We disagree, however, that there was a well understood and mutual practice of using the iPass system as the School Committee asserts. In fact, undisputed evidence shows that the former principal specifically told teachers at a faculty meeting that they were *not* required to enter grades, other than term grades, into iPass or to make those grades viewable to parents. Rather, as Proulx's June 30 end-of-year memo and the District's website, at least as of September 21 indicate, teachers could, at their discretion, enter those grades into iPass *or* enter them in an offline rank book, which had to be turned in at the end of the year.

The September 21 District memo outlining different iPass "expectations" does not alter our conclusion that there was no established practice of using iPass in the manner set forth therein for several reasons. First, the memo is not a directive, but merely sets forth "expectations." Second, as Zielinski and two teachers testified, this was the first time that such expectations had been set forth verbally or in writing. Third, the expectations set forth therein were inconsistent with what teachers had previously been told by the principal. Accordingly, there is insufficient evidence to conclude that employees have used iPass to enter grades other than term grades on a consistent basis over a sustained period. We therefore dismiss this aspect of the petition.

Recommendation Letters

As a preliminary matter, we dismiss this aspect of the petition with respect to guidance counselors, because there is no evidence that the guidance counselors have ceased providing them, as is expressly required by their job duties.

As to the teachers, the School Committee contends that, since the September 1 vote, teachers have informed students that they would not be providing them with a recommendation or would only be providing a form letter. The School Committee argues that these actions constitute an unlawful withholding of services because, as the KPTA's website acknowledges, 77% of all professional staff write letters of recommendation on behalf of students and because the purpose of a recommendation letter is to provide personalized information that distinguishes one particular student from another.

We disagree. The evidence falls short of establishing there is an established practice with respect to teachers' recommendations or that has been a clear-cut refusal to provide them.

With respect to the practice, nothing in this record establishes how, when, how much time or what standards are to be utilized in performing the task. The administration does not screen a teacher's recommendations, nor has it established guidelines or provided a questionnaire for students to provide to teachers as it does for stu-

dents and parents to provide to guidance counselors. Although the Common Application form may generally set forth required elements of an effective recommendation, the evidence does not establish that the administration ever conveyed this to teachers or enforced it in any way. Due to this lack of oversight and guidance, the record does not show that there is a mutually concurred and well understood practice with respect to the content and time spent preparing teacher recommendations as required under our *Lenox* standard.

Furthermore, even assuming teachers have some duty to provide schools with effective recommendations of deserving students, there is insufficient evidence that teachers have refused to do this. The September 1 vote simply required teachers individually to “reconsider” the amount of time they spent writing letters of recommendation. Although this is hardly the model of clarity, based on the record, we construe this vote to mean that teachers who agreed to write letters of recommendation might decide to spend less time doing so.

Further, although creating a form or template letter was discussed at the September 1 meeting, there is no evidence that one was ever created. The two teachers who testified indicated that they were still willing to write recommendations and one testified his letter would be of value to the student, even though he intended to spend less time drafting it. When Flahive questioned a teacher who purportedly told a student that she could not write a recommendation, the teacher told Flahive that she had taken the student’s packet and, through her use of the work “wink,” implied to Flahive that she would write one anyway. Beyond that, there is no clear evidence as to the impact the September 1 vote had on this activity and we decline to infer one in the absence of evidence as to what the administration’s expectation was in the first place. In short, in the absence of mutually understood and concurred practices regarding the structure, content and requisite time spent writing recommendations, and the lack of any clear evidence as to what teachers have actually done before or since the vote was taken, we conclude that there has been no unlawful withholding of services with respect to letters of recommendation. Accordingly, we dismiss this aspect of the petition with respect to all remaining respondents.

Independent Studies

Unlike the use of iPass for matters beyond entering term grades and the writing of recommendation letters, IS’s are defined in the high school program of studies, with a submission and approval process for students and teachers. Moreover, unlike iPass and teacher recommendations, the record evidence is clear that all the teachers who agreed to undertake IS’s last spring or summer withdrew at the beginning of the school year and no new teachers have agreed to take on this responsibility.

As the School Committee notes, the job description for teachers states that a teacher “[m]eets and instructs assigned classes.” Since approximately 2000, teachers have agreed to teach independent

study courses by signing, with the student, parent and guidance counselor, an ISPC. The IS then is placed on the student’s schedule and the student receives course credit. The IS course also appears on the teacher’s schedule on the first day of school. In the School Committee’s view, once those steps are taken, the IS becomes an enforceable duty for that teacher.

This view however does not take into account the uncertainty inherent in the entire IS process and the differences between IS’s and other academic and non-academic assignments. First, teacher participation is strictly voluntary and done on an individual basis. Although the program of studies references IS’s, there is nothing in the record to suggest and we do not find that teachers are obligated to accept a student’s request to perform one.

Second, IS’s are scheduled very differently than regular classroom or non-classroom based duties. ISPC’s do not have to be executed until the beginning of the school year or even later depending on when the ISPC is requested and approved. They do not appear on the teacher’s regular teaching schedule before August 1, or even after. Rather, the only indication that the teacher has undertaken an IS is that the name of the student who signed up for it appears on the teacher’s Study Hall roster. The manner in which the administration schedules IS’s demonstrates two things: First, that IS’s are not one of the “assignments” listed in Article VI (A) of the Agreement that the administration must refrain from changing after August 1 without the teacher’s consent or in extraordinary circumstances. Second, that IS’s are not the equivalent of a non-classroom based assignment like study hall or bathroom duty. Rather, teachers who volunteer for IS’s meet with their IS students over and above their assigned study hall obligations. There is no evidence here that the teachers who had agreed to undertake IS’s did not otherwise perform their study hall obligations.

Third, there is no evidence that any teacher had previously declined to teach an IS after having initially agreed to do so. When that occurred this fall, no one in the administration questioned the right of teachers to withdraw from conducting the IS’s. Flahive, notably, did not direct either of the two teachers who told him they were opting out to perform these duties to continue. Moreover, when School Committee members were asked on September 20 whether the administration had made a determination that teachers would no longer teach IS’s, members of the School Committee replied they had not. Finally, the administration issued no subsequent orders or memos to teachers setting forth duties or expectations regarding IS’s as it did with iPass.²³ Thus, during the critical first two weeks of school, i.e., the drop/add period, the administration, in essence, acquiesced in the teachers’ action in dropping the IS’s rather than attempting to enforce what it claims was a required job duty.

In *Board of Higher Education*, 28 MLC 91 (2001), the Board concluded that where the employer had not previously enforced a requirement that graduate students turn in grades by a certain date

23. Although the issuing of the September 21 iPass memo did not alter our conclusion that teachers were not required, as a duty of employment, to post grades other than term grades, the fact that the administration issued a memo regarding iPass and

not IS’s further demonstrates that the administration did not consider the IS’s to be enforceable terms of employment.

and time, their five hour delay in doing so did not constitute an illegal strike. A similar scenario unfolded in this case. The administration was faced, for the first time, with a group of teachers who were refusing to perform voluntarily agreed-to duties. Yet the administration did nothing about their refusal until, almost a month later, when it filed this petition to enforce what it claims is a required service. By then the students, working with both the administration and teachers during the drop/add period, had been placed in other courses or independent studies. While the filing of the strike petition may have made the administration's position clear, its earlier inaction belies the contentions made herein. *See Labor Relations Commission v. Fall River Educators' Association*, 382 Mass. 465, 473 (1980) (Section 9A deals with situations often requiring prompt action in response to an unlawful strike by public employees).

In this case, for the reasons set forth above, IS's are distinguishable from regular classroom courses, the teaching of which are intrinsic job duties. Moreover, there is no clear past practice as to the teachers' individual obligations to proceed with IS's once they are placed on a student's schedule. Given these findings, we conclude that the administration's unexplained failure to direct the teachers to perform IS's at a time when the directive would have had meaningful consequences, if obeyed, evinces that the teachers were not obligated to undertake Independent Studies as a condition of employment and could withdraw from them at the beginning of the school year.²⁴ *Board of Higher Education*, 28 MLC at 94; Cf. *Lenox School Committee v. Labor Relations Commission*, 393 Mass. at 285 (construing Section 9A(b) as not precluding a public employer from acting to protect threatened essential public services given the inevitability of a certain amount of delay while the Board investigated the strike petition. Accordingly, we dismiss this aspect of the petition.

Conclusion

Having determined that the performance of the three duties at issue here were not a condition of teachers' employment, we conclude that the teachers' conduct did not constitute a strike, slowdown or withholding of services within the meaning of Section 9A. Because we conclude that the teachers' actions did not constitute a strike, neither the KPTA nor the MTA has accordingly induced, condoned or encouraged a strike. Therefore, we dismiss the petition in its entirety.

* * * * *

24. In so holding, we by no means suggest that an employer directive is a necessary element of a finding that a particular task is a required duty of employment. Rather, our determination is here fact specific and the relevance of employer directives must always be made on a case by case basis.