

In the Matter of ANDOVER EDUCATION ASSOCIATION  
and  
ANDOVER SCHOOL COMMITTEE

Case No. MUP-12-2294

16.2 “work to rule”  
63.7 discrimination–union activity  
65.2 concerted activities

July 2, 2013

Marjorie F. Wittner, Chair  
Harris Freeman, Board Member

Laurie Houle, Esq.                      Representing the Andover  
Ira Fader, Esq.                        Education Association  
John Foskett, Esq.                    Representing the Andover  
Robert Hillman, Esq.                School Committee

**DECISION**

SUMMARY

The issue before the Commonwealth Employment Relations Board (Board) is whether the Andover School Committee (Respondent, Employer or School Committee) violated Sections 10(a)(3) and, derivatively, Section 10(a)(1) of MGL c. 150E (the Law) when the Superintendent of the Andover Public Schools, Marinel McGrath (McGrath), terminated Jennifer Meagher (Meagher), an English teacher at Andover High School and a leader of the Andover Education Association (AEA or Union), for sending an email to other AEA members urging them, inter alia, to enter an abstain vote on the paper ballots for each of the New England Association of Schools and Colleges (NEASC) self-study reports to be voted on at the June 21, 2012 faculty meeting. The Employer contends that it did not violate the Law because urging an abstention vote on the NEASC reports for stated purpose of gaining leverage in collective bargaining was not protected concerted activity as defined by Section 2 of the Law. Rather, the Employer argues, Meagher was advocating an unlawful withholding of essential work duties in violation of Section 9A of the Law, which, according to the Employer, plainly prohibits such conduct. The Union, on the other hand, argues that terminating Meagher for urging her colleagues to vote to abstain on the NEASC reports was unlawful retaliation and that Meagher was engaged in concerted activity protected by Section 2 of the Law. After completing a two-day hearing on this matter, reviewing the exhibits and briefs submitted by the parties, and, for the reasons set forth below, the Board finds that Meagher was not engaged in conduct prohibited by Section 9A and that her termination for engaging in concerted

protected activity therefore violated Sections 10(a)(3) and, derivatively, 10(a)(1) of the Law.

STATEMENT OF THE CASE

On October 10, 2012, the AEA filed a prohibited practice charge with the Department of Labor Relations (DLR), alleging that the School Committee violated Sections 10(a)(3) and, independently, Section 10(a)(1) of the Law by terminating Meagher. The DLR investigated the charges and a Department investigator issued an amended on May 15, 2013.<sup>1</sup> The amended complaint alleged that the Respondent violated Section 10(a)(3) and, derivatively Section 10(a)(1) of the Law when it terminated Meagher.<sup>2</sup> On May 10, 2013, pursuant to Section 11 (f) of the Law, the parties requested that the Board hear this matter in the first instance. The Board granted the request. On June 4 and 5, 2013, a two-member panel of the Board<sup>3</sup> heard this matter. The parties submitted a Joint Statement of Stipulated Facts set out below before the hearing, along with twenty joint exhibits. The parties filed post-hearing briefs on June 19, 2013.

*Joint Stipulations of Fact*

1. The Town of Andover (“Town”) is a public employer within the meaning of Section 1 of G.L. c. 150E (“the Law”).
2. The Association is an employee organization within the meaning of Section 1 of the Law.
3. The Association is the exclusive bargaining representative for certain professional employees of the Town, including teachers.
4. The Committee is the collective bargaining representative of the Town for the purpose of dealing with school employees.
5. At all relevant times, Dr. Marinel McGrath was the superintendent of Andover Public Schools and an agent of the Committee.
6. At all relevant times, Kerry Costello was the President of the Association.
7. In December 2001, the Committee hired Jennifer Meagher as an English teacher in the English department at Andover High School (“AHS”), when she also became a member of the bargaining unit referred to in paragraph 3.
8. During the 2011-2012 school year, the Association and the Committee were engaged in successor contract negotiations that had started prior to that school year.
9. During the 2011-2012 school year, Ms. Meagher was a member of the Association’s bargaining team, served as the vice president of the Association, and chaired the Association’s action team.
10. The New England Association of Schools and Colleges (“NEASC”) is an accrediting body for public schools in Massa-

1. The complaint was amended to correct mis-numbered paragraphs.

2. The Investigator dismissed the independent Section 10(a)(1) allegation on grounds that it was more appropriately alleged as a violation of Section 10(a)(3). The Union did not file a request for review of the dismissal.

3. Chair Marjorie F. Wittner and Board Member Harris Freeman.

chusetts. Under NEASC, public schools are accredited every ten years.

11. During the 2011-2012 school year, AHS was engaged in the self-study phase of the reaccreditation process, during which AHS was evaluating its educational programs.

12. The self-study process included the formation of committees comprised of both teachers and administrators. There were committees to study each of the seven standards evaluated for accreditation. Ms. Meagher served on the “curriculum and instruction” committee.

13. The committees conducted evaluations of AHS programs, drafted reports according to NEASC rating guidelines, and presented the reports to the faculty for a vote. A two-thirds vote of approval was required for each report to pass. If any report was not approved by the faculty, it returned to the appropriate committee for revisions and subsequent vote.

14. In March 2012, the faculty unanimously voted to approve the report from the “core values” committee.

15. After the March vote, the faculty used a secret paper voting ballot for voting on all remaining reports. The ballot itself included three options for the voter to choose: yes, no, or abstain.

16. On or about April 9, 2012, the faculty did not approve the report from the “school resource” committee. The final vote tally was:

“yes” - 25 votes

“no” - 30 votes

“abstain” - 50 votes

ballots left blank - 14

17. On or about April 23, 2012, the faculty did not approve the report from the “school culture and leadership” committee. The final vote tally was:

“yes” - 63 votes

“no” - 9 votes

“abstain” - 40 votes

18. On or about June 6, 2012, the faculty voted to approve the report from the “community resources” committee. The final tally was:

1. “yes” - 82 votes

2. “no” - 0 votes

3. “abstain” - 41 votes

19. On or about June 10, 2012, Ms. Meagher sent an email from her personal email account to approximately sixty bargaining unit members at AHS via their personal email addresses. A copy of this email is found at Joint Exhibit 1.

20. On or about June 21, 2012, the faculty voted on the remaining five reports, including the reports covering curriculum and instruction issued by the committee on which Ms. Meagher served. All

five reports were approved by the faculty at the July 21 vote. The final tallies were:

School Culture:

“yes” - 94 votes; “no” - 9 votes; “abstain” - 28 votes

School Resources:

“yes” - 97 votes; “no” - 8 votes; “abstain” - 25 votes

Curriculum:

“yes” - 94 votes; “no” - 8 votes; “abstain” - 28 votes

Assessment:

“yes” - 95 votes; “no” - 10 votes; “abstain” - 27 votes

Instruction:

“yes” - 94 votes; “no” - 10 votes; “abstain” - 27 votes

21. On or about June 26, 2012, the Committee issued to Ms. Meagher a “Notice of Paid Administrative Leave and Notice of Intent to Dismiss.” A copy of this Notice is found at Joint Exhibit 2.

22. On or about September 14, 2012, the Committee issued to Ms. Meagher a “Notice of Dismissal” and terminated her effective September 17, 2012. A copy of this Notice is found at Joint Exhibit 3.

23. For School Year 2011-2012, the NEASC activities of teachers at Andover High School (information gathering, preparation and drafting of self-study reports, and participating in the voting on the reports) were required work duties of teachers.

#### FINDINGS OF FACT

##### *Andover High School, Background*

Andover High School had a student population of almost 1800 students during the 2011-2012 academic year. Over 93% of its graduates enrolled in college in 2011, (89.3% of these students went to four-year colleges) and another 1.2% enrolled in post-graduate year programs. Less than 1% enlisted in the military or enrolled in technical schools. The average annual drop-out rate was less than 1%.

Beginning in 1996, the AHS schedule was premised on a 4x4 two-semester block format with classes lasting eighty-two minutes. During each of the High School’s two semesters (September through December and January through June), students would take four courses. Teachers were assigned to teach three classes one semester and two classes the other semester, for a total of five classes across the school year; this is referred to as a 3 x 2 teaching load. Each semester, AHS teachers were afforded a planning period of eighty-two minutes and, during the semester when they taught two courses, were also assigned another duty, e.g., study hall, cafeteria duty, etc. The 4x4 schedule with a 3 x 2 teaching load was bargained for by the AEA. The 4x4 semester model and the 3 x 2 teaching load was intended to improve teaching students and it replaced a more traditional seven-period school day after substantial discussions by the School Committee, the AEA and the community.

*Jennifer Meagher, Background*

Meagher was a tenured English teacher who had been employed by AHA since September 2001. Meagher served as vice-president of the AEA from June 2011 until June 2012 and was also the chair of the AEA's action committee from its inception during the 2010-2011 school year.

There is no dispute that Meagher received positive work performance evaluations. For example, her most recent evaluation, received in May 2011, stated that she more than fulfilled her job responsibilities as required by contract and it commended her for her commitment to the Andover schools. The evaluation also identified her as an "activist" that worked constructively with others to solve problems and someone who was unafraid to voice her opinion, even if that opinion put her at odds with certain colleagues. The evaluation concluded by stating her impact on students was "powerful, her contributions to the school are many, and her presence in the Andover school community is powerful."

*The NEASC Accreditation Procedure*

NEASC serves as an accrediting body for Massachusetts public schools. Over 600 schools throughout New England, including AHS, belong to NEASC. Accreditation by NEASC requires a school to undertake a multi-year self-study that proceeds in accordance with written standards, guidelines and timetables established by the NEASC governing body, the Commission on Public Secondary Schools (the Commission). The accreditation process centers on a school's faculty and professional staff engaging in a self-study that culminates in a series of faculty-written reports, described below. The purpose of the reports is to provide NEASC and the team of NEASC visitors who would conduct the actual evaluation of the school at the end of the self-study process, with material on which to base their evaluation. According to NEASC guidelines, the self-study process takes a minimum of two school semesters; however, according to the guidelines, most schools elect to complete the process in three semesters. The Guidelines present no hard and fast dates as to how far in advance the reports needed to be submitted before the NEASC site visit. However, the understanding of the Steering Committee was that the reports needed to be provided to the evaluating team at least six weeks ahead of time.

Among the materials that NEASC provides to schools seeking accreditation is a detailed, fifty-eight page self-study guide. According to this guide, the self-study affords a school the opportunity to evaluate its own education program in terms of the Commission's standards. The "focus question" to be answered by the self-study is "How well do we meet the seven Standards for Accreditation?" The seven standards are: 1) Core Values, Beliefs, and Learning Expectations; 2) Curriculum; 3) Instruction; 4) Assessment of and for Student Learning; 5) School Culture and Leadership; 6) School Resources for Learning, and; 7) Community Resources for Learning. In order to complete the self-study, a school must engage the professional staff, faculty, students, the local school committee, parents and the community. To this end, the school's principal must convene a steering committee (usually between five and nine members) with a chair or co-chairs. In addition, all faculty not serving on the steering committee are required to participate in

one of seven self-study committees, each assigned to engage in fact-finding, and to prepare a report addressing one of the seven accreditation standards. Each of the seven committees has a chair and each steering committee member is assigned to serve as a liaison to one of the self-study committees. The principal or her designee is supposed to attend all steering committee meetings.

Once evidence is collected by the seven self-study committees and assessed using the NEASC standard under consideration, each committee prepares a report to be approved by a two-third's majority vote of the faculty, who meets as a plenary to consider the reports. NEASC does not require any particular method of faculty approval; the Guidelines permit both voting and decision by a consensus-type process. The Guidelines do, however, expressly indicate that all reports should be circulated to the faculty well in advance of any meeting where approval of the reports are sought and that an executive summary of the report be read aloud to the faculty in attendance prior to voting. While administrators may attend the meetings where each self-study is discussed, only faculty may vote. Each report prepared by the self-study committee for faculty approval contains a rating that designates the school's degree of compliance with NEASC standard. These ratings are: Deficient, Limited, Acceptable or Exemplary.

As noted above, NEASC requires that each report be approved by a minimum of a two-thirds majority faculty vote. If a report is not approved, it is returned to the committee for revision to address the concerns and points of view presented by the faculty and then it is presented again to the faculty for consideration. Once all seven reports have been approved by the faculty, they are compiled and edited by the steering committee and then provided to the visiting NEASC committee in advance of their visit. AHS was last accredited in 2002. Since the NEASC accreditation process for a school occurs at ten-year intervals, AHS was scheduled for another accreditation review on October 30, 2012.

*Successor Bargaining and the High School Schedule*

In August 2010, the collective bargaining agreement (CBA) between the Andover School Committee and the Union expired. The CBA covered teachers and professional staff at the Andover elementary, middle and public high schools. In the fall of 2009, the Union presented a demand to the School Committee to begin bargaining for a successor agreement. The School, however, did not respond or agree to set dates until May 2010, after Andover's April Town Meeting. In May, the Union also filed a prohibited practice charge against the School Committee alleging that the School had failed to bargain in good faith and that it had unilaterally implemented a change in health insurance. Bargaining sessions first began in July or August of 2010.

All witnesses testified, and the parties do not dispute, that bargaining over the successor agreement was, from the beginning, highly contentious because of the parties' disagreement over the School Committee's proposal to change the teacher's teaching schedule. This proposal had the biggest impact on high school teachers. Specifically, the School Committee proposed that AHS teachers change from the 3 x 2 schedule to a 3 x 3 schedule, resulting in teachers being assigned to teach one additional academic class

each year and an increase in teaching hours from 613-614 to 735 per year, or a 20% increase in teaching time. This change would be achieved by eliminating teachers' assigned duty period (hallway monitoring, bathroom duty, detention duty, etc.) in either of the two semesters. The School also intended to implement a reduction-in-force, laying off between nine and eleven High School teachers, and hiring lower-paid, non-professional staff to take on the duties previously performed by AEA teachers during their duty periods. According to McGrath, the proposed change to a 3 x 3 teaching load would create greater equity in teaching hours across the three teaching levels in the Andover school system.

The Union bargaining team, comprised of AEA President Kerry Costello (Costello) and nine or ten other bargaining unit members, including Meagher, considered the School's proposal to be, in Costello's words, "regressive and draconian" and reacted to the proposal with "extreme anger" because it would reduce teacher planning time while increasing teaching load and class size. There is really no dispute that the School Committee's proposed increase in teaching load was negatively received by AHS teachers. Indeed, AHS teachers told McGrath that the proposed change to a 3 x 3 teaching load would be detrimental to the education of students at the High School.

In December 2010, the School Committee unilaterally filed a petition seeking mediation with the DLR pursuant to Section 9 of Chapter 150E, alleging that contract negotiations were at impasse. It is undisputed that disagreements over the proposed change in teaching load were the driving force behind filing the petition. Mediation proved unsuccessful and, sometime in January or February 2011, the matter went to a fact finding hearing. The fact-finder's report was scheduled for issuance in June 2012.

In the meantime, during 2010-2011 academic year, the AEA undertook a public awareness campaign in the Town of Andover to advance its position in the bargaining process. In November 2010, around the time this campaign got underway, Meagher was elected as an AEA building representative. She also became chair of a newly formed AEA action committee (Action Committee) that was tasked with organizing the awareness campaign. Meagher spearheaded the first Union awareness campaign activities in the spring of the 2010/2011 school year. Branded as the "The Love Your Teachers Campaign," it involved creating postcards with a logo shaped like a heart that read, "Love your children, Love your community, Love your teachers." The campaign organized various constituencies (parents, teachers) to send the postcards to the School Committee as a show of support for the AEA. The other side of the postcard was addressed to the School Committee and the one from teachers stated,

As a teacher in Andover I work hard every day to ensure that every child in my classroom has access to the essential tools needed to succeed in today's challenging world. I hope that you will demonstrate your appreciation for this important work by taking your seat at the negotiation table and resuming negotiations in earnest. We need a contract now. Sincerely, [name, school to be filled in by the sender].

During the spring of 2011, the Action Committee organized teachers to attend school committee meetings and held a rally in

Andover during which AEA members carried signs and marched to Superintendent McGrath's office. Meagher was out in front of the march. She was also a leading spokesperson and a visibly key organizer for the Union at the School Committee meetings. The Union's "Love Your Teachers Campaign," however, did not shift the position of the School Committee over the course of the 2010-2011 school year.

In June 2011, Meagher was elected as vice-president of the AEA and in that capacity took a position on the Union's bargaining committee. She also remained chair of the action committee for the 2011-2012 academic year.

When school began in September 2011, the Action Committee continued its awareness campaign, but with modified tone and tactics. The Union branded this campaign as the "Teaching Conditions Equal Learning Conditions—Contract Now" campaign. The AEA newsletter dated September 1, 2011 contained two messages on the front page, one from Costello and a second from the Union's Action Team. Costello expressed alarm that this was the first time that the AEA had entered a second year of teaching without a contract. She stated that the School Committee was "racing to mediocrity with a vengeance" and that "[c]hildren's learning conditions are inextricably linked to our working conditions." The Action Committee indicated that the task at hand was to "bring wide-spread awareness to the town of Andover about this school committee's agenda to dismantle the excellent school system that we've built and they've inherited." The message urged building support from parents and concerned citizens who believe in quality education. The Action Committee's message urged AEA members to email Meagher if they were interested in helping to organize an event or join the Action Team.

The Superintendent and School Committee were present at the first AHS general faculty meeting in early September of 2011. McGrath entered with the School Committee and, as she was about to speak, faculty were organized to rise from their seats and hold up signs brandishing the new campaign slogan. Meagher coordinated this effort and stood up first, in the front of the room so others would, in Meagher's words, "feel okay to stand up." Meagher testified that McGrath did not look happy when this occurred.

The Union next organized its members for action in September 2011, on the day of the Andover schools open houses. The Union had designed bumper stickers and posters with the slogan, "Teaching Conditions Equal Learning Conditions—CONTRACT NOW—Andover Public Schools." The plan was to have teachers line up outside their schools before the start of the open house as a show of support for the Union's position in contract bargaining. Some of the high school teachers had these stickers or posters on the inside of their classroom doors and when the doors were open, the slogan was visible from the school hallway. During the school day of the open house, Meagher observed that the Union's colorful stickers were eye-catching and asked other teachers if it would be okay to put these slogans on their doors for the open house that evening. She proceeded to place stickers or posters on teachers' doors throughout AHS. An assistant principal informed Interim Principal Thomas Sharkey (Sharkey) that Meagher was placing the posters throughout the school; Sharkey asked that administrator to in-

form Meagher to “stop doing that.” Sharkey also consulted with McGrath about the posting of the Union posters.

Meagher left the building and when she returned prior to the start of the open house, she observed that the Union posters had been removed and was informed that this was pursuant to Sharkey’s order. Meagher then went to Sharkey’s office where the two exchanged angry words. Sharkey asked Meagher to leave his office and escorted her out. This incident resulted in Meagher filing a harassment complaint with the Town’s Human Resources Department. Candace Hall (Hall), the Town’s Director of Human Resources, investigated Meagher’s complaint and concluded that Sharkey had not violated the harassment policy and that his behavior was not “threatening and intimidating in such a way that he should not carry on the duties of the principal’s position.” Although Hall interviewed some witnesses who believed Meagher was the “egregious party,” there is no evidence, that Meagher was disciplined for her conduct.

AEA’s campaign continued in October 2011, when the Action Committee organized Union members to distribute 30,000 brochures presenting the Union’s view of the contract negotiations to Andover residents. Meagher designed the brochure with help from the Massachusetts Teachers Association and was in the leadership of the organizing effort that coordinated volunteers and logistics. This campaign, however, did not result in any change at the bargaining table and Meagher believed that members were demanding further action.

In December 2011, the AEA decided to undertake a work-to-rule campaign. It began in January 2012 following the winter break. Meagher drafted a memo dated January 23, 2011 to AEA members outlining the campaign. The memo outlined certain concerted activities and work requirements to be followed. This included picketing before the school day began, taking a thirty-minute lunch break, not working past the end of the contractual work day and a concerted action to leave the building en masse when the school day ended. The memo also informed members of certain required duties and obligations that teachers were to follow. The campaign continued until about March 9, when, as discussed below, a tentative agreement was reached between the School Committee and the Union.

*The Beginning of the NEASC Self-Study Process at Andover High School- Fall 2011*

While the AEA’s work to rule campaign was being conducted, the NEASC self-study process began. The NEASC accreditation team scheduled their AHS committee visit for October 30, 2012. Sharkey was already a veteran of two prior NEASC accreditation reviews, one while he served as principal at Billerica High School and a second during his tenure as a principal in the City of Law-

rence public school system.<sup>4</sup> Sharkey selected an AHS NEASC steering committee from teachers who applied for a posted position as required by the parties’ collective bargaining agreement.<sup>5</sup> Sharkey selected Chris Phillips (Phillips), an assistant principal, and Greg Waters (Waters), an English teacher with fifteen years of teaching at AHS and prior NEASC experience, as co-chairs of the NEASC steering committee.<sup>6</sup> Waters was a member of the AEA bargaining unit, but was not otherwise involved in the ongoing contract negotiations.

Once the steering committee and self-study committee chairs were selected, all faculty members not serving on the steering committee were assigned to one of the seven self-study committees. Each committee was given a detailed self-study guide prepared by NEASC that provided a set of factors or indicators to consider when determining if AHS practices comported with the specific NEASC standard being addressed.

As the parties have stipulated, NEASC activities of AHS teachers—“information gathering, preparation and drafting of self-study reports, and participating in the voting on reports”—were required work duties. Committee chairs were given considerable discretion in how to divide up the work of the committee, whose information-gathering was supposed to be exhaustive, involving, for example, interviewing and comparative assessment of educational and curricular materials. While workloads may have varied, attendance at the self-study committee meetings was mandatory. Some of the committee chairs took attendance, which they reported to Assistant Principal Phillips. The committees routinely met during AHS faculty meetings and on professional days throughout the 2011-2012 academic year. Attendance at any given meeting varied.

As noted above, the NEASC visiting committee was scheduled to arrive at AHS to conduct their review on October 30, 2012. Given this timetable, there was a generalized awareness that the NEASC self-study had to be completed with enough time for the visiting committee to review the report in advance of their arriving in Andover.

*The Relationship of the Contract Dispute and the NEASC Self-Study Process at Andover High School*

The subject of the ongoing contract negotiations over teachers’ 3 x 3 versus 3 x 2 schedule became a frequent topic of discussion at NEASC study groups, particularly as the school year went on. As discussed below, the scheduling issue was also referenced in the self-study reports final versions.

The faculty discussions that occurred in their self-study committees routinely this issue. For example, Costello explained that there was debate on what should be presented in her committee’s report

4. Between 2008 and 2012, AHS employed three principals. Sharkey was the third, serving as principal until the end of the 2011-2012 school year.

5. Those selected received an hourly stipend for performing steering committee duties. The job-posting process was also used to select chairs for each of the seven self-study committees. Teachers who chaired the self-study committees also received an hourly stipend. Sharkey served as an *ex officio* steering committee member.

6. Waters had participated in the 2002 AHS steering committee that oversaw the schools last accreditation review and had also been part of five NEASC visiting committees to other schools.

because the proposal to add a sixth class had not been finalized. She explained that this uncertainty had contributed to the self-study committee having some very spirited debates because, “You’re supposed to do the self-study on what you currently do and have in place, not project into the future what your vision would be.” Brian Shea (Shea), who was the Chair of the Core Values Committee and an AEA building representative, testified that, beginning in November of 2011, the fact that the contract issue remained unresolved permeated all discussions at AHS. He stated that “[e]verybody was sort of reeling from what was going on with the contract and it was difficult anywhere to have a discussion that didn’t involve the contract.” Shea further explained that by January 2012, when the AEA work-to-rule campaign began, the contract dispute had altered the his self-study committee’s discussions and caused teachers to feel disingenuous about the report being prepared. The teachers’ concern was that if the proposed 3 x 3 schedule were to be put in place, it would be uncertain whether “programs that we offered, opportunities that we were giving to kids, time we were able to spend with kids, time we were able to volunteer to run certain programs . . . were still going to be available if the schedule were to change.” Shea met with other committee chairs who also conveyed that the contract issue was being discussed in their self-study groups.

Sharkey was aware that contract scheduling issues were being discussed in the self-study committees. He testified that the committees were discussing two issues: 1) what the content of the self-study was to be, along with; 2) “a fair number of contractual disagreements between the teachers and the school committee, administration.” Indeed, Waters, co-chair of the NEASC steering committee at AHS, described this confluence of events—the unresolved contract dispute and the ongoing NEASC self-study process—as being “almost like a perfect storm.”

*NEASC Votes and Self-Study Reports March 2012- June 2012*

The Core Values committee self-study report was the first report voted on by the AHS faculty. In order to reflect the discussion among committee members and faculty generally regarding the uncertainty of the teachers’ schedule, this committee prepared a preamble to reflect that the report was contingent upon teachers teaching five classes and the teachers’ uncertainty about what would happen if they taught six. Specifically, the opening paragraph of the Executive Summary of the Core Values Committee report began as follows:

At the time of the writing of this summary, the future of the Andover High School schedule is unknown. We believe that the school’s culture and identity is greatly influenced by the current 4 x 4 block schedule and the teachers’ current case load of five classes per year, and thus any alteration to the schedule and/or teaching conditions may impact our ability to achieve our stated learning expectations. [italicized in original].

Similar but not identical language was used at the beginning of the executive summaries of other self-study reports prepared in Spring 2012 to reflect concerns that what faculty was writing now would not be accurate if the School Committee’s proposal became part of the contract. For example, the first few sentence of executive summary of the Assessment Committee report states :

The teaching staff at Andover High School is passionate, dedicated, and professional. Currently, the high school is in transition from an administrative and pedagogical perspective. The high school has recently hired a new principal, and its faculty has been in contract negotiations for the past two years. Despite the high school’s town-wide and district-wide petition, the School Committee with support from the elementary and middle schools has voted to add a sixth class to the current 4 x 4 schedule for the 2012-2013 school year which threatens to alter the complexion of the high school significantly.

On March 5, 2012, the Core Values committee submitted its report to a faculty vote. After Shea read the executive summary of the report to the attendees, the report was adopted by at least a two-thirds majority of the faculty using a hand vote. Subsequently and significantly, however, voting on the six remaining self-study reports followed a different procedure.

On March 9, one month before the next scheduled vote on a NEASC self-study report, the School Committee and the Union reached a tentative agreement on a CBA. The agreement hinged on the parties creating a joint union/administration committee to explore the possible schedule configurations to resolve the differences over teacher workload. At this time, the Union ended work-to-rule. However, a final contract was not reached for reasons that are not clear on the record.

Towards the end of March, Water, the Steering Committee co-chair, attended an AEA meeting that discussed pushing forth a motion to not vote on the [NEASC] reports. Waters became concerned about the impact of teachers not voting on the School Resources self-study report at the April 9 faculty meeting. Waters testified that he assumed that “because contract discussions weren’t going the way we hoped, that this [proposal] was a method to maybe sway the administration or School Committee to take us a little bit more seriously.” On April 6, 2012, Waters wrote an email responding to a message he had received from Fred Hopkins, a member of the Union’s bargaining team. Water’s email, addressed to the members of the Union Bargaining Committee with the subject line of “Monday’s Meeting,” read in part:

I just received a message from Fred Hopkins that the Bargaining Team voted unanimously to “not vote/not discuss” any NEASC reports starting Monday. [ . . . ] One question I have for the Bargaining Team is “So what?” If the Bargaining Team does not want to vote but the rest of us do, then why can’t the voting continue? Does the faculty have a say in what they want to do as a collective group? Is this action even legal? Would our refusal to complete this work benefit AHS in the eyes of our parents/students or would it give the school committee more evidence that we are incapable of governing ourselves and need to take directives from outside the walls of AHS?

I did not email the committee chairs because I want to find out more info before contacting them. I am standing firm on the belief that the NEASC report is essential for the advancement of our school community. A neutral third party should shed light on this quagmire we are now in. The sooner we get the visiting [NEASC] team to sit and discuss these issues with teachers, students, administration and school committee, the better off we’ll be. If these reports are not complete, the October visit will not happen. I hope you continue to support our important work. Thanks for your time and enjoy the weekend.

PS: I will be attending the NEASC conference on Tuesday. I am confident the conference will shed light on some of our questions. Please email me with additional thoughts/concerns which I can have addressed on Tuesday by NEASC representatives.

Within hours of writing this email, Waters forwarded it to Sharkey. Sharkey was uncertain whether the bargaining team intended to show up and not participate at the meetings or just not show up at all. In any case, two days later, on Sunday, April 8, Sharkey forwarded the email chain to Costello with the following note:

Hi Kerry . . .

Greg apparently received this message from the bargaining team on Friday.

I think that you know that refusal to participate in the business of the school during legitimate school hours constitutes an illegal work stoppage.

Let's talk about this on Monday before things get tacky.

Thanks.

Tom

At some point after Sharkey emailed Costello on April 8 (Easter Sunday), and prior to the April 9 faculty vote on the next NEASC self-study report, a series of conversations and meetings occurred about voting on NEASC self-study reports. These exchanges involved Sharkey, Costello, Waters, and the AHS NEASC steering committee.

Costello spoke to Sharkey personally because, as Union president, she viewed his email as administration interference in the NEASC voting process. During their conversation, Sharkey reiterated that the School Committee considered non-participation in the NEASC self-study process to be withholding of services and that they would take disciplinary action against teachers who did not participate in the voting on the NEASC self-study reports. Costello proposed to Sharkey that a secret ballot should be used for voting and Sharkey agreed that it was a good idea.<sup>7</sup> The paper ballot would contain three options, yes, no and abstain. The NEASC steering committee also met with Principal Sharkey prior to the April 9 faculty meeting to discuss the idea of paper ballots containing an abstain option. Sharkey approved this option.<sup>8</sup>

Sharkey explained his understanding of why there was such an option. He testified that the steering committee was observing that the content of the self-study reports were reflecting the contractual disagreements between the teachers, the School Committee and the administration. Sharkey further explained his understanding that the abstain option was added to the ballot "to sort out folks who in voting no were voting no for reasons other than an objection to the content of the report." As Sharkey states, this was a "more pure way of discerning the objections that people had to what had been written apart from what the contractual disputes

were taking place at that time." According to the principal, the steering committee had a desire to "make certain that those who abstained were able to not—to not be placed in a position of challenging their—the positions that were contractual in nature." Also, according to Sharkey, the steering committee wanted to be able to clearly discern whether there was a two-thirds majority for any report so that they could be sure the school was in compliance with the NEASC two-thirds voting majority needed to pass each self-study report.

Waters testified regarding the abstain option's origin. He explained that the NEASC steering committee, which included Sharkey, came up with the paper ballot so voting could become "more of a private matter where people might be more apt to vote their conscience rather than showing hands." Waters also explained that paper ballots with a yes, no and abstain option differentiated the no voters from the abstention voters and "gave us a better idea of where the faculty stood."

In sum, both Sharkey and the Steering Committee recognized three factors that contributed to the decision to move to a paper ballot with an abstain option: 1) privacy—providing a means for teachers to vote their conscience; 2) a desire to find a way to distinguish faculty who would vote no because they who had substantive objections to the reports versus those voting no due to the outstanding contract dispute; and; 3) to make sure that AHS was in compliance with the NEASC requirement that each report pass with a two-thirds faculty majority. Paper ballots with a yes, no and abstain option were used in the voting on the six remaining self-study reports.

Costello announced this change at the start of the April 9 faculty-only meeting. At this meeting, Costello also informed the faculty she had spoken with the School Committee's attorney who told her that "any action to stop the NEASC process would be seen either as a work stoppage or insubordination."<sup>9</sup> After Costello concluded her remarks to the faculty, Sharkey came into the cafeteria with Waters and some other members of the NEASC steering committee carrying the new paper ballots and a ballot box. The vote on the School Resources self-study report presented at the April 9 meeting was twenty-five yes votes, thirty no votes and fifty abstain votes. The report therefore failed to garner the required two-thirds majority.

For the remainder of the spring 2012 semester, there continued to be discussion about the meaning and impact of the abstain vote among faculty, as well as among the steering committee members and officials working for NEASC. There is no evidence, however, that any member of the administration ever addressed the meaning of the abstain vote directly with faculty members.

There were wide-ranging views about the abstain option and its relationship to the contract dispute discussed by the faculty follow-

7. We credit Costello's clear, unrefuted testimony on this point.

8. Sharkey testified that he could not recall if he attended this particular steering committee meeting. Nevertheless, McGrath testified that Sharkey approved the use of the paper ballot with the abstention option.

9. There is no evidence that Costello or anyone else went into further detail as to what it meant not to participate in the NEASC process.

ing the April 9 meeting. Rebecca D’Alise (D’Alise), chair of the Assessments self-study committee and member of the Union bargaining committee, testified that when she presented her committee’s report on May 1, 2012, she encouraged faculty to vote their conscience. She testified that she “stated to my faculty that if they wanted to approve the report, that was fine. However, if they wanted to vote no or abstain, I was in full support of that as well. I was not going to try to convince them to pass the report.” The vote on the Assessments self-study report was sixty-eight yes votes, twenty-nine no votes and thirty-two abstain votes; the report was not approved by the required two-thirds majority.

Meagher, who served on the Curriculum self-study committee, also testified to the meaning of the abstention vote given the ongoing contract dispute. For her, “[v]oting no meant there was something in specific [...] in that report that was objectionable. [...] The vote to abstain in my mind meant that I could not, me personally, in good conscience, read this report and say yes, this is Andover High School to the NEASC Committee to the community. [...] It didn’t feel like a real representation because everything could change.”

At one faculty meeting, Shea made a motion that voting on the self-study reports be suspended until the contract was resolved. Sharkey indicated his disagreement with this option and nothing further occurred.

Although there is extensive testimony on how the AEA members viewed the abstention vote, nothing in the record indicates that, in the course of the NEASC process, the School Committee or the Andover school administration informed the AEA teachers what their view of the abstention vote was or how the abstention was to be used. Sharkey, who was present at the faculty votes on the NEASC reports, testified that he did not respond to anyone who told him they were abstaining for purposes of contract obligation or dispute. It is not entirely clear whether Sharkey never responded to faculty who asked about abstention or that this question was never posed to him. In any case, it is undisputed that Sharkey never articulated a position on the issue of whether the abstention vote could be used for purposes of contract obligation or dispute.

Waters did, however, discuss the abstain option with the NEASC itself. On April 10, Waters attended a NEASC-sponsored conference where he raised the use of the abstain option on the AHS ballot with NEASC representatives.<sup>10</sup> Initially, NEASC officials informed Waters that NEASC did not require an abstain option during voting or a paper ballot. Usually, according to NEASC, there was a yes or no hand vote. However, NEASC took no formal position on the propriety of including the abstain option on the paper ballot.

Between April 9, 2012 and June 6, 2012, the faculty held five meetings during which they voted on reports from six of the self-study committees; two votes were taken on the School Resources, Curriculum and Instructions committee self-studies. Only

the June 6 vote on the Community Resources self-study received the required two-thirds majority. Otherwise, the reports failed to garner the required two-thirds majority. The abstention vote varied on the self-study reports that did not receive a two-thirds majority, garnering as few as twenty-five and as high as fifty votes per report.<sup>11</sup> Waters became concerned that the reports would not pass in time to get them to the visiting NEASC team before their scheduled visit. It was Waters’ understanding that reports should be provided to the NEASC team six weeks in advance of their visit, and that, without the timely receipt of the reports, the NEASC team would not conduct their reaccreditation review.

After the April 9 meeting, it was not clear whether the NEASC visiting team would come in October 2012 if the reports continued to garner less than the necessary two-thirds majority vote. Waters became concerned that the tensions between the successor bargaining negotiations and the NEASC process made it difficult to gain the necessary two-thirds vote on even reports such as the Instruction committee self-study, which he viewed as rather straightforward. He told faculty in groups that even if the NEASC process were not helping with the current round of contract negotiations, it would help in the future. Discussions also became very intense during the question and answer periods preceding each vote on the self-study reports. Waters became frustrated because teachers did not have specific objections to the report and, thus were not voting no; they abstained. Despite their having no substantive objections that would cause them to vote no, their vote would still result in the self-study not receiving the required two-thirds yes vote required for passage. Following the June 6, 2012 faculty meeting, Waters, Sharkey and Superintendent McGrath visited the NEASC offices in Bedford to ask what would happen if the reports were not passed and by what date must the reports be approved. NEASC officials told them the reports “can be passed in September, but you’re pushing it.” Their concern was that there would be no time for further revisions if the September voting did not result in approval for all six remaining reports. Ultimately, Waters adopted the view that the reports could be passed at the beginning of September, when school started, without jeopardizing the accreditation visit in October.

After Waters returned to AHS, he rearranged the schedule to provide for one more faculty meeting to vote on the reports to be held on June 21, the last day of school. With the Steering Committee’s assistance, he drafted a document entitled “NEASC FAQs” to respond to the faculty’s questions about deadlines for approving the reports. A copy of the FAQs was placed in every AHS faculty mailbox. The FAQs began as follows:

A number of people have asked for further clarification about the approval of the self-study documents. We feel it is important to address these questions so that every faculty member is informed about the implications of our vote on June 21st. We have consulted with Janet Allison (NEASC director), George Edwards (NEASC liaison), and the NEASC website in order to answer your questions as accurately and clearly as possible.

10. Waters also testified that he had raised the abstain vote with NEASC officials at other unspecified times.

11. A complete tally of vote totals are provided in the Joint Stipulation of Facts set forth above.



The first question on the FAQs was “When is the ‘last day’ to vote on the self-study reports?” The Steering Committee’s answer was that they recommended that the final votes on the reports be held on June 21. This recommendation was followed by an explanation that indicated a final vote could be taken when school reopened in September, 2012: “[t]hrough the first teacher days in September are options, we would like to keep the opening of school available to move forward with the NEASC process as we prepare for our October visit.” The FAQs also explained that AHS could not get an extension to put off the visit for a few months and that if the reports were not approved by a two-thirds majority, the NEASC visiting team would not come and the school would lose its accreditation. All of the teachers who testified indicated that as early as the June 6 faculty meeting and certainly by the time the June 21 meeting was scheduled and the FAQs distributed, the steering committee had informed AHS faculty that the self-study reports could be approved in September when school reopened without jeopardizing the reaccreditation process.

*June 2012*

On some unspecified date in June 2012 before June 10, the arbitrator who conducted the fact-finding hearing sent the parties a two-page summary of her recommended report—the full report would not reach the Union and School Committee until June 17. The arbitrator recommended that AHS alter the teacher’s workload and move to a 3 x 3 schedule for the 2012-2013 school year. She also recommended that the parties form a high school scheduling committee and select a mutually agreeable facilitator. Finally, the arbitrator suggested the scheduling committee come up with a timeline by which it would have a recommendation on the divisive scheduling and workload issues. Also in early June, the AEA held elections for officers. Meagher ran for president but lost the election to Costello. The new officers took their posts on June 7.

*Meagher’s June 10, 2012 email and termination*

On June 10, 2012, on the heels of receiving the fact finder’s recommendation, Meagher sent an email to sixty members of the AEA, which stated in its entirety:

There are 60 people receiving this email. All of you:

- - are members of the AHS faculty
- - have a vote on Wed. June 21
- - have demonstrated a willingness to support the union and your bargaining team this year in words and actions

I am no longer an officer of the AEA. That frees me up a bit to be perfectly candid.

Here’s what I’m going to do and what I ask you to do:

- - PICKETING next week, every day, 60 people is an impressive picket line. Admit it, you miss us.
- - ABSTAIN on June 21.
- - Attend School Committee meeting on June 21 (7PM, Central Office)

NEASC is the only leverage we have left at the bargaining table. We can assure the SC and the supt. that reports will be passed and NEASC will continue if there is a contract signed this summer that maintains a 5-class load at AHS. We need not argue with our col-

leagues over it. We have enough votes right here on this list to get it done. If, in the end, the SC decides that saving \$500,000 is more important than preserving accreditation, then so be it. At least we will know we’ve done all that we can.

If you decide not to participate in this action, please do not undermine it by complaining or criticizing it with people critical of the union. Please do not forward this email to people who will undermine this action. This is how we have shot ourselves in the foot for 2 years. Just let it be and allow it to have whatever impact it is going to have. And if you hear people complaining, remind them that the activists are the only ones standing in the way of 6 classes next year for high school teachers.

Your high school colleagues on the bargaining team will do all that we can to protect conditions at AHS, but don’t send us in empty-handed, PLEASE.

Thanks!

Jen

Jen Meagher

“Love your children. Love your community. Love your teachers.”

On June 13, 2013, Tom Meyers, former AEA president, responded to Meagher’s email; the subject line was “A ray of hope.” He wrote: “Hi Jen, A POWERFUL NOTE TO ALL OF US, ACTION DOES MAKE A DIFFERENCE /s/ Tom” (All caps in original). Meyers copied his response to twenty AEA members, a number of whom who had not been among the sixty that Meagher had emailed.

McGrath received Meagher’s email on June 14, 2012. It was delivered to her anonymously in a plain white envelope through the Andover School’s interoffice mail system. On that same day, Sharkey provided McGrath with a copy that he received from one of the AHS assistant principals. Sharkey did not inquire how or from whom the assistant principal acquired the email. McGrath and Sharkey did not converse with each other about the email. At least before Meagher’s termination hearing, no one in the school administration, including McGrath and Sharkey, communicated to Meagher that they had received the email.

On or about June 17, Meagher received a call from the Andover Townsman, the local newspaper, asking for her comment on the June 10 email she had circulated. Meagher declined. On June 19, Meagher, who remained a member of the bargaining committee, attended a scheduled bargaining session. Late in the session, three members of the Union’s bargaining committee, Costello, Lisa Nazzaro, the field representative for the Massachusetts Teachers Association, and bargaining co-chair Fred Hopkins met with the School Committee bargaining team. Either during that meeting, or sometime shortly before, McGrath provided Costello with a copy of Meagher’s email. Costello testified that McGrath conveyed to her that that Meagher’s email “could be construed as attempting to withhold services or derail the process and somehow perhaps impact bargaining in some way.” When the Union members returned to meet with the rest of the AEA bargaining team, Nazzaro angrily presented Meagher with a copy of the June 10 email and Meyer’s response. Meagher testified that everyone on the Union’s bargaining team reacted, particularly the elementary and middle school representatives. Meagher was asked to resign, but after further dis-

cussion, they all agreed that it would not help the Union if a person who had been key in the bargaining process would suddenly not be signing off on a contract settlement. Subsequent to this exchange, but in the course of the June 19 bargaining session a tentative contract was reached. It included the 3 x 3 workload put forward by the School Committee. The Union scheduled a vote on the tentative agreement for June 26.

The AHS NEASC steering committee scheduled another meeting to vote on the self-study reports for June 21, 2012, the last day of school for the AHS faculty. That day, the local newspaper carried an article describing Meagher's June 10 email. That same morning, before the workday began, Meagher sent an email to AHS faculty asking them to attend a ten-minute informational union meeting, which was held prior to the faculty meeting scheduled to conduct another vote on the self-study reports. Meagher, who had by then resigned from the bargaining committee, addressed the group, informed the faculty of the tentative settlement and discussed what she wrote in her June 10 and the attendant news coverage. She apologized to the faculty. The AHS faculty then convened early that afternoon to vote on the five self-study reports that had not yet been approved. All reports were approved, each receiving the required two-thirds majority. Meagher voted no on all the reports; D'Alise abstained on all the reports. Shea voted yes because the contract was now settled. Between eight and ten faculty voted no on the five self-study reports and between twenty-five and twenty-eight faculty voted to abstain. Aside from McGrath's statement to Costello, neither Meagher or any other member of the AHS faculty received any communication from the administration regarding their view of Meagher's June 10 email.

On June 26, after the school year had ended, the AEA held a ballot vote on the contract. It was ratified by the membership. On the same day, McGrath wrote a letter to Meagher conveying the superintendent's intent to terminate her employment for sending the June 10 email. After quoting large portions of the email, McGrath wrote:

As you know, the NEASC activities which are the subject of your email, including the referenced "June 21" vote and the referenced action on "reports," and which your email urged teachers to "abstain" from and to "put a hold on", are required in-service duties of those teachers.

McGrath next stated that these activities violated the prohibition set forth in Section 9A of Chapter 150E of the Massachusetts General Laws, which prohibits public employee conduct that induces, encourages or condones a strike, work stoppage, slowdown or a withholding of services. McGrath characterized Meagher's email as an "effort to bring the NEASC accreditation work to a halt and jeopardize the accreditation of Andover High School." She further stated that Meagher's email was "'conduct unbecoming a teacher',

'Insubordination', and 'other just cause'" for termination pursuant to Section 42 of Chapter 71 of the Massachusetts General Laws.

The letter further stated that only those portions of the June 10 email cited by McGrath formed the basis of her decision and that the Andover Public Schools recognized Meagher's right and the right of recipients to:

engage in lawful picketing, attend public School Committee meetings; and to communicate her views to others, including the public and the parents of students regarding the bargaining positions of APS and the union. Moreover, APS recognizes the right of teachers to engage in advocacy of the doctrine that they should have a right to strike (as opposed to advocacy which promotes an illegal strike). Finally the decision is in no way and to no extent premised on any activities you have taken to assert your rights under a collective bargaining agreement or to engage in activities which are protected by G.L. c. 150E, §10.

The final two paragraphs of the letter further informed Meagher that she was immediately placed on paid administrative leave and entitled to a hearing to present her information calling into question the superintendent's conclusions. That meeting was scheduled for September 6, 2012. McGrath testified that she conferred with legal counsel prior to sending the June 26 letter, but that she did not consult with the School Committee or Principal Sharkey before reaching her decision that Meagher should be terminated. Meagher received the letter by certified mail on June 29, three days after the Union had ratified the successor bargaining agreement.

Pursuant to section 42 of Chapter 71 of the Massachusetts General Laws Meagher presented testimony and offered argument by the Union's legal counsel to challenge her dismissal at a termination hearing held by McGrath on September 7, 2012. Based on the June 10 email and the testimony presented at the hearing, McGrath decided that Meagher should be terminated, because in her judgment, Meagher's email urged teachers to vote in a way that was not intended by the NEASC process. McGrath testified that she was not directly involved in the AHS NEASC process or involved in any of the discussions that led to the decision to create a paper ballot with a yes, no and abstain options. Prior to reaching her decision to terminate Meagher, McGrath did not confer with Sharkey or anyone else about what voting "abstain" on the NEASC reports actually meant.

McGrath's decision was conveyed in a September 14, 2012 letter to Meagher. The reasoning McGrath presented for her decision to terminate Meagher reiterated those stated in her June 26 letter. It quoted a portion of Meagher's testimony and stated that her statements and those of Meagher's union representatives and her attorney were considered.<sup>12</sup> McGrath wrote that "the NEASC activities which are the subject of your email, including the referenced 'June 21' vote and the referenced actions on 'reports' and which your

12. The September 14, 2012 letter contained the following excerpts from Meagher's testimony:

We were facing the last bargaining session and the end of the process. I was exhausted and totally defeated. I had run for a union position and was soundly defeated. I knew I had no political capital. There was one last action, the vote on the NEASC. [As] a last ditch, I will send [my email] to people who care about this teaching load issue. And I told them what I was go-

ing to do and they could choose to join me or not. Part of [the] language in the email—here's what I'm gonna do, and it is what it is. I never intended it go beyond the individuals. I thought I [was] having conversations with friends and colleagues.

(Bracketed words in original).

email urged teachers to ‘abstain’ from and to ‘put a hold on’, are required in-service duties of those teachers. McGrath added the following: “Although those activities include a requirement that teachers exercise their judgment as to the merits of the NEASC reports and vote accordingly, your email urged them to refrain from doing so.” Accordingly, McGrath concluded, Meagher had engaged in conduct prohibited by Chapter 9A of Chapter 150E and engaged in insubordination and conduct unbecoming a teacher in violation of section 42 of Chapter 71. The letter reiterated those portions of the June 26, 2012 letter emphasizing that the sole basis of the decision to terminate her was the referenced portions of her June 10<sup>th</sup> email. The termination letter concluded that Meagher’s final day of employment was to be September 17, 2012.

#### OPINION

The charge and defenses raised, respectively, by the AEA and the School Committee require the Board to address the interplay and inherent tensions that connect Section 2 and Section 9A of the Law, two of the Law’s core statutory mandates. Section 2 protects a public employee’s right to engage in concerted activity for the purpose of influencing collective bargaining and for other mutual aid or protection. *Lenox Educ. Assoc. v. Labor Relations Comm.*, 393 Mass. 276, 281 (1984). An employee engages in protected concerted activity within the meaning of Section 2 when he or she engages in activity protesting working conditions, or speaks publicly about issues affecting employees’ wages, hours or terms and conditions of employment. *Town of Winchester*, 19 MLC 1591, 1597 (1992). However, conduct that may be deemed generally within the scope of Section 2 loses the protection of the statute if it is found to be unlawful, violent, a breach of contract, indefensibly disloyal to the employer, or disruptive of the employer’s business. *Town of Bolton*, 32 MLC, 13, 18 (2005). Here, the Employer argues that Meagher’s email was unlawful under the plain language of Section 9A(a) of the Law, and therefore not “protected” under the statute. Section 9(A)(a) states that “[no] public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees.” The term strike is defined expansively in Section 1 of the Law to include:

a public employee’s refusal, in concerted action with others, to report for duty, or his willful absence from his position, or his stoppage of work, or his abstinence in whole or in part from the performance of the duties of employment as established by an existing collective bargaining agreement or in a collective bargaining agreement expiring immediately preceding the alleged strike, or in the absence of any such agreement, by written personnel policies in effect at least one year prior to the alleged strike; provided that nothing herein shall limit or impair the right of any public employee to express or communicate a complaint or opinion on any matter related to conditions of employment.

Where, as here, it is alleged that an employer has violated Section 10(a)(3) by taking an adverse action against an employee for engaging in protected concerted activity, the allegation may be proven by proffering direct evidence that the employee’s protected concerted activity was a motivating factor in the adverse action. *Town of Brookfield, Graupner, et. al and the Mass. Coalition of*

*Police*, 28 MLC 320, 327-328 (2002) (citing *Wynn & Wynn, P.C. v. MCAD*, 436 Mass. 655, 667 (2000), *aff’d sub nom., Town of Brookfield v. Labor Relations Commission*, 443 Mass. 315 (2005)). Under the *Wynn & Wynn* two-step analysis adopted by the Board, if the employee first proves by a preponderance of the evidence that a proscribed factor played a motivating part in the challenged employment decision, the burden of persuasion shifts to the employer “who may avoid a finding of liability only by proving that it would have made the same decision even without the illegitimate motive.” *Town of Brookfield*, 28 MLC at 327 (citing *Wynn & Wynn*, 436 Mass. at 669-670)).

Here, neither party disputes that the School Committee terminated Meagher because of her email. The legality of her termination therefore turns upon the nature of the email, i.e., whether it was lawful protected, concerted activity under Section 2, as the Union alleges, or whether, as the Employer argues, that it was urging collective ‘sabotage’ directed at the integrity of NEASC process and therefore, encouraged an unlawful withholding of services that placed her concerted activity outside the protections that Section 2 of the Law affords public employees. *See Stoneham School Committee*, 6 MLC 1829 (H.O. 1980), *aff’d* 7 MLC 1412 (1980) (lawfulness of employee’s termination for leading walkout turned on whether activity was protected under Section 2 of the Law or an unlawful withholding of services).

To decide this case, therefore, we must analyze whether Meagher’s email, specifically those portions urging an abstention vote on five NEASC self-study reports, was the type of concerted activity protected by Section 2 of the Law or the advocacy of a withholding of essential services, which the Employer defines as casting a vote without considering the merits of the self-study reports, prohibited by Section 9A(a).

#### *The Email as Concerted Activity under Section 2*

We begin by examining whether Meagher’s email constituted concerted activity. It is undisputed that Meagher wrote her email to address what she and others could do to win a contract that maintained the five-class load at AHS, an issue that was a mandatory subject of bargaining and at the core of the ongoing contract dispute in the Andover school system. To that end, she encouraged teachers to picket, attend a School Committee meeting scheduled for June 21, and to vote to abstain on the five self-study reports that were to be presented at June 21, 2012 faculty meeting. As such, Meagher’s email communication was an effort to induce collective action to influence collective bargaining over the high school teachers’ workload and schedule, a hotly contested term and condition of employment. Therefore, on its face, and in the context of other facts established at hearing, Meagher’s email was plainly an effort to induce fellow teachers to take action for their mutual aid and protection and to advance collective bargaining goals.

Before addressing the crux of the dispute over Meagher’s email—whether the email is *protected* under Section 2 or *prohibited* under Section 9A(a) of the Law, we first address the Employer’s argument that Meagher’s email is not even “activity” within the meaning of Section 2 of the Law because participating in NEASC voting was a work duty. The Employer, citing

*Westchester County, Correction Officers Benevolent Ass'n.*, contends that it is illogical to define the actual performance of a work duty as conduct that falls under the protection of Section 2. 2009 WL 8179711, \*7 (NY. PERB ALJ Decision July 23, 2009). *Westchester County* involved a charge alleging that Westchester County retaliated against a corrections officer for engaging in protected concerted activity by disciplining him after he brought an unauthorized food thermometer into the facility, to measure the temperature of the food being served to inmates and then filed a complaint with the New York Public Employee Safety and Health Bureau. *Id.* at \*4. The administrative law judge dismissed the charge, finding that the employee's actions were neither required nor protected. In dicta, the administrative law judge stated that even if she accepted the union's argument—that the correction officer was simply performing his regular job duties (looking after the care and custody of inmates) his "actions were not protected because a public employee does not engage in protected activity under the [New York statute] by performing his or her regular job duties." *Id.* at \*7 (noting that kitchen staff were responsible for determining if the food is too cold for inmates).

We find the Employer's reliance on this PERB decision unpersuasive. First, voting on the AHS NEASC reports and advocacy on whether to vote yes, no or abstain is factually dissimilar from the correction officer's food testing, which was held not to even be part of his job duties. Second, and more significantly, the School Committee's reliance on this PERB ruling assumes the legal conclusion that must be proven, i.e., whether the Law protected Meagher's urging other teachers to vote "abstain" on the self-study reports in order to put a hold on the NEASC process. Adopting the Employer's narrow interpretation of concerted activity—in essence, that performing any work-related type of activity is removed from the protection of the Law—would necessarily *per se* render any work to rule campaign by a public sector union to be a *per se* violation of Section 9A of the Law. Such a broad rule is contrary to our holdings, which have consistently engaged in a case-specific, fact-based analysis to determine whether the withheld services fell within Section 9(A)'s reach.

The Employer's analogy of the action urged in Meagher's email to that of a teacher who deliberately teaches students in a confusing manner so as to lower test scores to put pressure on a school committee for bargaining purposes is distinguishable. There can be no dispute that teaching is, at its most basic, explaining how to do something to someone else. A teacher that deliberately tries to confuse students is not engaged in the act of teaching. The dispute here, whether the teacher's duty to participate and vote on the NEASC reports included a duty to vote on the merits of the reports, when the teachers were given the option to vote "abstain," is not nearly as self-evident. We therefore reject the Employer's argument and turn to the crux of the matter, whether Meagher's email unlawfully advocated the withholding of employee services within the meaning of Section 9A(a).

#### *Section 9A(a) and the Withholding of Employee Services*

The test for determining whether an employee or a union's conduct violates Section 9A(a)'s prohibition of public employees advocating or engaging in strikes, work stoppages, slowdowns or the

withholding of services is well settled. In *Lenox Education Association*, 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 period of sustained time." 7 MLC 1761, 1775 (1980), *aff'd. sub nom. Lenox Education Association v. Labor Relations Commission*, 393 Mass 284 (1984). Thus, to determine whether public employees are engaging in a strike or withholding of services, the Board considers: 1) whether the service at issue is one that employees must perform as a condition of employment; 2) whether the service was withheld or is about to be withheld; and 3) the party responsible for the withholding of the service. *Danvers Police Benevolent Society*, 31 MLC 76, 81 (2004). *Town of Walpole*, 12 MLC 1039 (1985); *Newton School Committee*, 9 MLC 1611 (1983).

Neither party relies upon any terms of the recently expired collective bargaining agreement to support their view of the legality of Meagher's June 10 email. Nor is there evidence that suggest that the duties at issue here, participation in the NEASC process, had been performed by teachers as a group on a consistent basis over a sustained period of time. See *Lenox Education Association*, 7 MLC at 1775. The NEASC self-study process had only begun in the Fall of 2011 and there is no record of how the school handled the NEASC process a decade earlier. We therefore address whether the employee duties at issue are intrinsic to the position. See *id.*

The parties stipulated that "For School Year 2011-2012, the NEASC activities of teachers at Andover High School (information gathering, preparation and drafting of self-study reports, and participating in the voting on the reports) were required work duties of teachers." Given this stipulation, the parties' disagreement over the meaning of the duty at issue here is rather narrow.

The Union contends that Meagher's June 10 email advocating abstention did not advocate a withholding of services that employees must perform as a condition of employment. The Union points out that Meagher had participated in her assigned self-study committee, attended the faculty meetings where the reports were voted on and participated in voting on the reports. The Union argues that June 10 email was consistent with her prior participation in the NEASC process and consistent with the agreed upon duty, participating in the voting on the reports. In this regard, the Union emphasizes that the School Committee never communicated to the Union or the faculty that voting to abstain for purposes of influencing the outcome of contract negotiations was unlawful or otherwise problematic. To the contrary, argues the Union, Meagher cannot be found to have violated Section 9A(a) for urging an abstain vote to "hold up" NEASC because the abstain vote was added to the self-study ballots for the express purpose of allowing teachers to base their vote on their personal view of the unresolved labor contract issues. What's more, the Union points to undisputed testimony indicating that Sharkey approved the use of the abstain vote on the self-study ballots, participated in the NEASC Steering

Committee, and attended the meetings where the faculty discussed and voted to abstain on NEASC reports. Therefore, Meagher’s advocating abstention stands on the same legal footing as prior advocacy and action by other faculty who favored the Employer-approved abstain option.

The Employer, on the other hand, contends that implicit in the stipulated duty of AHS teachers participating in voting on the NEASC reports is an obligation to vote on the *merits* of the reports and not use the voting process for any goal unrelated to that end. Therefore, encouraging faculty to vote to abstain on grounds other than the content of the reports is not protected by Section 2. Further, the School Committee argues that the AHS administration did not condone an abstention vote “to advance collective bargaining objectives.” Finally, it contends that the facts show that a wide range of concerted protected activity occurred without administration interference during the course of the NEASC process, thereby undercutting any claim that the School was motivated by anti-union animus. The Employer claims that this proves that the sole reason for terminating Meagher, whom all agree was an outspoken union official and a leading activist in the AEA’s contract campaigns, was her June 10 email.

*The Meaning and Use of the Abstention Vote*

We agree with the Union, that based on all the evidence, Meagher’s email telling certain bargaining unit members to vote “abstain” did not advocate a withholding of services that employees must perform as a condition of employment. Key to this conclusion are our findings as to why the abstention option was originally placed on the ballot, Sharkey’s approval of that option and the failure of the administration to explain to faculty how that option was to be used or otherwise notify faculty, before or after Meagher’s email, that using this option to affect the NEASC process in any way would be considered an unlawful withholding of services.

The abstention option originated in early April 2012 amidst palpable tensions at AHS over the parties’ failure to reach a contract settlement and in the course of discussions that included the AHS Principal, the NEASC Steering Committee and Costello. Around that time, Waters notified Sharkey by email that the Union Bargaining Committee had voted to not participate/not vote on the NEASC reports. Within two days of receiving Water’s email, and on Easter Sunday, Sharkey emailed Costello to inform her, in no uncertain terms, that “refusal to participate in the business of the school during legitimate school hours constitutes an illegal work stoppage.”

Costello and Sharkey met to discuss his email. These discussions resulted in a proposal to put the abstain option on the ballot, as an alternative to voting yes or no on the self-study reports. Sharkey agreed to this option, which, in his view, served three purposes: 1) privacy so that faculty could vote their conscience; 2) a desire to find a better way to determine where faculty actually stood on the reports, i.e., developing a voting method to sort out folks who were voting no as a result of disagreements with the administration over pending contract talks from those who were voting no because they disagreed with the substance of the report, and; 3) to make

sure that the voting process complied with the NEASC requirement that a two-third majority of the faculty approve each report.

From these facts, we conclude first, that the abstain option was developed with Sharkey’s knowledge and approval and, just as critically, as a direct result of the administration’s informing the Union that it would view an outright refusal to vote or otherwise participate in the NEASC process as an unlawful work stoppage. We also find that both Sharkey and Waters understood that the inclusion of the abstention option was a direct result of the nexus between the NEASC process and the ongoing bargaining dispute over the School Committee’s proposed change in the high school teacher’s workload. They further understood that having this option of the ballot provided, in Sharkey’s words, a “more pure way of discerning the objections that people had to what had been written apart from what the contractual disputes were taking place at that time.” In other words, the very existence of the abstain option on the ballot enabled faculty to vote without having to take a stance on the substance of the reports but rather to enter a vote in line with their personal view of the contract dispute.

We also find that it was patently clear to teachers and to Principal Sharkey that abstention votes would be counted in the calculation of whether any given self-study report garnered the required two-thirds vote required for passage. In fact, Waters sent emails to the faculty reporting the yes, no and abstain vote totals and indicating that the reports did not pass. Thus, the abstain option on the paper ballots, as approved by Sharkey, *de facto* enabled faculty to “put a hold on” the NEASC process, while still fully participating in the NEASC process in a manner consistent with Joint Stipulation 23, i.e., information gathering, preparation and drafting of self-study reports, and participating in the voting on the report, and without taking a substantive position on the reports. Indeed, at least in the first rounds of voting, the remaining six reports failed to garner the required two-thirds majority as a result of the faculty voting in significant numbers to abstain. In other words, the very essence of the abstain option, to vote on other than the substance of the report, yet still vote, belies the School Committee’s claim that employees were required, as a condition of employment, to vote on the merits.

The administration’s actions reinforce this conclusion. That is, once the paper ballot with an “abstain” option was approved by Sharkey, the AHS administration did not provide the faculty any directive conveying management’s view as to the appropriate use of this option at any point in the sequence of events leading to Meagher’s termination—not after the first series of votes resulted in significant abstain votes and caused the June 21<sup>st</sup> vote to be taken—and, as significantly, not after Meagher’s email was sent. The administration’s silence on this issue stands in stark contrast to the stern warning Sharkey sent to Costello after he learned from Waters that the Bargaining Team was considering not participating in the votes at all stating that refusal to participate in school business constitutes an “illegal work stoppage.”

Given these facts, we are unable to find that Meagher’s email urging other bargaining unit members to vote abstain induced, coerced or condoned an unlawful withholding of employee services under the *Lenox* test. While we agree that a duty to participate in

the voting was intrinsic to the teachers duty to participate in the NEASC process, it does not follow, as the School Committee argues, that implicit in the stipulated duty of participation was an obligation to vote on the merits of the reports and not to use the voting process for any goal unrelated to that end. Our conclusion is premised on our findings set forth above and the reasoning that has grounded a host of Board decisions implicating Section 9(A) and the *Lenox* test.

The Board has consistently held that when an employer fails to establish, communicate and/or enforce rules governing the duties employees are obligated to perform, employees or union who withhold or urge or condone the withholding of those services have not engaged in an illegal work stoppage within the meaning of Section 9A(a). For example, in *King Philip Regional School and King Philip Teachers Association*, 37 MLC 81 (2010), the Board held that teachers did not unlawfully withhold employee services in violation of Section 9A(a) when they engaged in a concerted effort to refrain from: 1) using the school's web-based system to enter grades in an electronic format; 2) spending significant time crafting nuanced and individualized letters of recommendation for students, or; 3) teaching independent studies. *Id.* at 81. The Board's holding turned on the employer's failure to establish or convey to teachers what the standards were governing these activities and/or enforce rules that were in place. *See id.* at 87-89. In particular, the Board found that school administration had expressly permitted teachers to enter their grades electronically or on paper. We also found that the administration had not established what their expectations were with regard to recommendation letters to be authored by teachers. *Id.*

In *United Auto Workers Local 2322/GEO and James Shaw and University of Massachusetts (Amherst)*, 28 MLC 91, 94 (2001), the Board held that graduate student instructors at the University of Massachusetts did not engage in an unlawful work stoppage when they collectively decided to turn grades in five hours late, even though the administration had made clear to the instructors that grades were due at a certain date and time. The Board reached this conclusion based on the employer's failure to consistently apply the rule on grade deadlines and because, on the date in question twelve instructors turned their grades in late for reasons unrelated to GEO's concerted grade embargo and suffered no adverse consequences. *Id.*; *see also, Danvers Police Benevolent Association, et. al.*, 31 MLC at 81 (holding that officers did not violate Section 9A(a) by refusing to issue traffic citations (after Town insisted on 0% wage increase) when employer's policy and procedure indicated officers retained discretion as to whether a traffic citation would be issued); *American Federation of Teachers, Lawrence Teachers Union Local 1019, et. al and the Lawrence School Committee*, 26 MLC 3,4 (1999) (holding teachers did not engage in unlawful work stoppage by refusing to teach summer school classes when employer failed to establish summer teaching was an established past practice).

The converse is also true. That is, the Board has not hesitated to find a violation of Section 9A(a) when, in the course of a contract dispute, a clearly established work rule was violated as part of a campaign to advance a union's collective bargaining goals. For ex-

ample, in *Town of Nahant and Nahant Fire Fighters Association*, 21 MLC 1788, 1793 (1995), the Board found that firefighters had engaged in an unlawful work stoppage where, after being informed of the town's strict time constraints for funding of the E-911 system in January of 1995, they waited almost four months before responding to the town's repeated requests to bargain and refused to attend scheduled trainings that were necessary to implement the new dispatch system in June 1995. The Board found that the Union had waived its right to bargain and that the employer was therefore free to implement the proposal. The Board also found that the scheduled trainings were a required job duty and, therefore, that the union was engaged in an unlawful work stoppage by failing to attend the trainings. *Id.*

Here, there is no testimony that anyone involved in the NEASC process, either the administration or NEASC officials, ever communicated to teachers what McGrath stated in Meagher's termination letter as the grounds for her dismissal: that NEASC "activities include a requirement that teachers exercise their judgment as to the merits of the NEASC reports and vote accordingly." Indeed, when Waters communicated with the NEASC officials that AHS had adopted a paper ballot with an abstain option, they explained that approval was usually registered by a hand vote. However, the NEASC officials remained agnostic as to the efficacy of the AHS paper ballot. Waters testified that "they wouldn't tell how to pass these reports," offering no view on how AHS ought to treat the abstain option on the ballot.

Nor was it ever communicated to teachers or to the Union that a vote to abstain in order to "put a hold on" the NEASC was advocating that teachers vote in dereliction of this job duty. Indeed, the only information conveyed to the faculty regarding the abstention vote came from Costello, when on, April 9, 2012, she stood in front of a faculty only gathering and informed them that the School Committee would view any action to stop the NEASC process as a work stoppage. However, at that very moment, Sharkey, Waters and other members of the NEASC Steering Committee came into the room carrying the new paper ballots containing the abstain option. In the absence of evidence that either Sharkey or the NEASC Steering Committee members provided any more specific directive as to the meaning or the use of the abstain option on the secret paper ballot at this meeting or any other time, the only reasonable conclusion to be drawn from this sequence of events was that exercising the option to vote abstain on the reports was permitted and not an activity that would be viewed as either an unlawful work stoppage or an improper attempt to stop the NEASC process. Further, absent such directive, we find no basis to conclude that advocating an abstention vote to "hold up" the NEASC process was violative of Section 9A(a). *See King Phillip Regional School*, 37 MLC at 97-89.

Despite the administration's failure to convey any view or directive on the voting process in general and the abstain option in particular, the Andover School Committee nevertheless asks the Board to find that Meagher's actions violated Section 9A(a) based on its contention that there is a legally discernible distinction between individual teachers casting abstain votes—which the School Committee contends may have been cast "for valid reasons

having to do with the content of the reports,” including voting to abstain “to express a view on the unrelated collective bargaining issue”—on the one hand, and, on the other, what the Employer purports to be Meagher’s unlawful advocacy to abstain for reasons motivated by the unresolved collective bargaining agreement. In the context of the factual findings set forth above and longstanding Board precedent, the distinction the Employer asks us to recognize has no legal foundation.

Again, the notion that teachers knew they were required to cast their votes based on the merits of the each self-study report conflicts with the reason for having an abstain option on the ballot on the first place, as an alternative to a yes or no vote in light of the existing contractual dispute. It also conflicts with Sharkey’s and Waters’ undisputed testimony—that the abstain vote was available to teachers so that the NEASC self-study committees could separate out no votes—which required the committee to revise their reports to gain more yes votes—from abstain votes, which did not convey any particular substantive objection to the content of the report.

Moreover, the Employer does not contest that individual teachers voted to abstain to express their view on the collective bargaining dispute that permeated discussions on the NEASC reports. We therefore agree with the Union that the School Committee is treating Meagher’s urging a concerted vote to abstain for purposes of influencing collective bargaining differently from a vote to abstain based on a teacher’s individual view of the collective bargaining dispute at AHS. The Board has held that a Section 9A(a) violation cannot be based on conduct that the employer agrees is permissible if done alone, but is unprotected when carried out in a concerted fashion. See *Town of Plymouth and Local 1768, Int’l. Assoc. of Firefighters*, 18 MLC 1191, 1193 (1991); *City of Newton*, 13 MLC 1462, 1466 (1987). In these two cases, the Board rejected the argument that an illegal work stoppage occurred when employees engaged in a concerted refusal to work overtime, explaining that that an employer cannot “argue that what is permissible for individuals (to refuse the overtime opportunity) is unlawful when engaged in collectively.” *Town of Plymouth*, 18 MLC at 1193. This reasoning applies with full force to the Employer’s argument in this case.

We next address a variant that the Employer offers on its argument that there were legitimate reasons for casting an abstention vote that are distinguishable from the reasons Meagher urged in her email. The School Committee points to the substantive critiques of the potential impacts of the 3 x 3 schedule that were set forth in numerous self-study reports. The School Committee devoted a substantial portion of its brief to detailing the criticisms of the School Committee’s proposed 3 x 3 schedule that were included in various self-study committee reports<sup>13</sup> to support its argument that Meagher’s advocacy was divorced from any critique of the reports or even an awareness of what the reports stated. The Employer contends that Meagher’s email urged an abstention despite the fact that a majority of the reports opined that the 3 x 3 schedule proposed by the School Committee could have adverse impacts on the educational experience of the students. By ignoring these substan-

tive points, the Employer argues that Meagher’s testimony, that she viewed the reports as “flawed,” was contrary to the evidence and demonstrated that Meagher had not read the reports and/or based her advocacy on a faulty view of their contents. The Employer contends that, for these reasons, Meagher’s testimony proves her email transgressed the boundaries of lawful advocacy since she urged fellow teachers register an abstain vote to “put a hold on NEASC” in order to impact the collective bargaining process without considering the merits of the reports.

This argument fails as it offers no fact or legal principle to alter our finding that the record shows there were no directives presented to the faculty by the Employer as governing the NEASC voting process. In this regard, the School Committee is in a weaker position than the employer in *Danvers Police Benevolent Association*, 31 MLC 76. In that case, after the employer offered a zero percent wage increase at the bargaining table, the police officers decided not to issue traffic citations, thereby depriving the town of revenues. *Id.* at 81. The Board found no Section 9A(a) violation because the town’s policy and procedure manual for traffic enforcement stated that an “officer’s discretion plays a big part in the decision to take punitive action against a violator” and because the manual was silent regarding whether officers must issue a certain number of citation in a given time period. *Id.* at 81-82 (citing *Town of Plymouth*, 18 MLC 1191, 1193 (1991)) (“contractual provision stating unit members had to perform ‘a reasonable amount of overtime’ was too vague to establish parameters of employee’s commitment to perform that duty.”). The School Committee stands on even shakier footing here given that the Employer sanctioned having an abstain option on the ballot, and cannot point to a contract provision, long established past practice or a recent directive that offers the employer’s view as to the proper scope of what may inform a teacher’s vote in the NEASC process.

The Employer’s contention that Meagher’s email was an unlawful withholding of employee services is further compromised by two sets of facts: First, the seven-day hiatus separating McGrath’s receipt of Meagher’s June 10 email from her informing Meagher that she had violated the Law and was to be terminated, and; second, McGrath’s lack of involvement with and knowledge of the NEASC voting process that was put in place at AHS.

McGrath’s testimony and her June 26 letter to Meagher indicated that the Superintendent viewed Meagher’s alleged withholding of services to be problematic because it was a disloyal and insubordinate “effort to bring the NEASC accreditation work to a halt and jeopardize the accreditation of Andover High School.” In the Employer’s brief, Meagher’s conduct is branded as “sabotage” because the June 10 email had the potential to cause a large enough abstain vote on June 21 to purportedly delay the sending of the self-study to the NEASC visiting team in time for them to prepare for the scheduled October 30, 2012 accreditation visit. This argument ignores the fact that the NEASC steering committee informed the faculty at meetings and in writing that the NEASC accreditation review could proceed even if the faculty did not vote to

13. For example, those portions of the Executive Summaries, detailed above, that directly address the proposal to add another class to AHS teachers’ schedules.

pass the self-study reports until they returned to AHS in September, 2012. And, although the Sharkey's, McGrath's and Waters' testimony indicated that a September vote was not preferable, there was no directive telling the teachers that the June 21 was their last chance to vote to approve the NEASC reports. In this regard, the Employer's failure to establish as a factual matter that June 21 would be the last chance to vote on NEASC reports stands in sharp contrast to the firm deadline that the *Town of Nahant* faced and communicated to its fire fighter's union in order to resolve a bargaining issue before the implementation of a new dispatching system. *See* 21 MLC at 1793.

Furthermore, although McGrath was provided with Meagher's June 10 email on June 14, 2012, a full week before the scheduled June 21 meeting, neither McGrath or Sharkey took steps to inform the faculty of the Superintendent's view prior to the June 21 meeting so as to prevent the more than sixty faculty members who received Meagher's email from abstaining on grounds that McGrath considered to be an unlawful abuse of the NEASC voting process and an unlawful work stoppage. Rather, McGrath allowed Meagher to return to the classroom for remainder of the school year, and to attend and vote at the June 21 faculty meeting. It was not until after the AEA voted to approve the contract that Meagher received McGrath's letter informing Meagher of her suspension pending a termination hearing in September 2012. McGrath's long delay in addressing Meagher's email and her decision to terminate Meagher contrast sharply with the timing of the administration's prior responses to concerted efforts by the AEA during the NEASC process and the Employer's actions. McGrath and Sharkey conferred as soon as Sharkey learned that Meagher had posted union slogans throughout the high school during the September 2011 open house. Meagher was immediately told to cease and desist. In April 2012, when Sharkey was informed that the AEA bargaining team had voted to not participate in the NEASC process, he again responded promptly, providing the AEA with the administration's view that a failure to participate in NEASC activities would be viewed as a work stoppage.<sup>14</sup> The Employer's effort to persuade us that McGrath terminated Meagher because her actions might prevent passage of the reports at the June 21 meeting is therefore called into question by the timing of McGrath's disciplinary actions and how it sharply contrasted with the Employer's earlier rapid responses to what it stated was conduct in the nature of a work stoppage.

The Employer's arguments that employees knew and understood that they were required, as a condition of their employment, to cast a vote on the merits on the self-study reports is further undercut by McGrath's limited understanding of what the abstain option on the ballot signified. McGrath testified that she had only limited involvement with the high school's NEASC process. She further tes-

tified that she was not at all involved in the discussions that resulted in the creation of the abstention option and the secret ballot. And, while McGrath knew that Sharkey had approved the abstention option on the NEASC ballot, she had not talked to anybody about what the various options on the NEASC ballot actually meant. In fact, McGrath testified that she did not even confer with Sharkey after he provided her with Meagher's June 10 email and prior to her making the decision to terminate Meagher. In this regard, we note that the Employer offered no testimony from other school administrators, including Sharkey, who served ex-officio on the AHS NEASC steering committee and attended the faculty meeting where NEASC voting occurred, corroborating McGrath's judgment about the meaning of the June 10 email.

For all of the foregoing reasons, we conclude that Meagher's email was not prohibited under Section 9A(a) of the Law and therefore, constitutes protected concerted activity to advance a collective bargaining goal protected by Section 2 of the Law. The Employer freely admits that Meagher was terminated for those portions of her email advocating an abstention vote to advance collective bargaining goals. This therefore constitutes direct evidence that Meagher was terminated for engaging in protected concerted activity under the *Wynn & Wynn* two-part, direct evidence test set forth above. Because the Employer's defense was that this same June 10 email was not protected conduct under Section 2, it has failed to meet its burden that Meagher would have been terminated absent her protected conduct.

#### CONCLUSION

For all of the foregoing reasons, the Board holds that the Employer discriminated against Meagher based on her union activity in violation of Section 10(a)(3) and, derivatively, Section 10(a)(1) of the Law.<sup>15</sup>

#### ORDER

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

1. Cease and desist from:
  - a. Retaliating against Meagher for engaging in concerted protected activities.
  - b. 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. Immediately offer to reinstate Meagher to the teaching position she held at Andover High School.

14. Notwithstanding Sharkey's prompt email in response to what he considered to be a violation of 9A(a), we note that no AEA bargaining committee member was disciplined for voting not to participate in the NEASC process.

15. Given the nature of the evidence at issue here, we do not apply the three-part test used in cases where indirect or circumstantial evidence of discrimination is proffered as the central proof that the adverse action was caused by employer animus. *See Wynn & Wynn*, 436 Mass. at 669-670 (citing *Lipschitz v. Raytheon Co.*, 434

Mass. 493, 505, n. 18 (2001)) (holding that the burden of proof based on circumstantial evidence remains with the employee)). We also do not consider the Union's alternative argument that the Employer's actions independently violated Section 10(a)(1) of the Law because the Investigator specifically dismissed that allegation and the Union did not seek review. *See* n. 2, above.



b. Make whole Meagher whole for all losses she suffered, if any, as a result of the School Committee’s unlawful action, plus interest on all sums owed at the rate specified in MGL c. 231, Section 6I, compounded quarterly;

c. Post immediately in all conspicuous places where members of the Union’s bargaining unit usually congregate, or where notices are usually posted, *including electronically*, if the School Committee customarily communicates with these unit members via intranet or email and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

d. Notify the Commonwealth Employment Relations Board 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.

APPEAL RIGHTS

Pursuant to the Supreme Judicial Court’s decision in *Quincy City Hospital v. Labor Relations Commission*, 400 Mass. 745 (1987), this determination is a final order within the meaning of MGL c. 150E, § 11. Any party aggrieved by a final order of the Board may institute proceedings for judicial review in the Appeals Court pursuant to MGL c. 150E, §11. **To claim such an appeal, the appealing party must file a Notice of Appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision.** No Notice of Appeal need be filed with the Appeals Court.

THE COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

BEFORE THE COMMONWEALTH EMPLOYMENT  
RELATIONS BOARD

**NOTICE TO EMPLOYEES**

POSTED BY ORDER OF COMMONWEALTH EMPLOYMENT  
RELATIONS BOARD

AN AGENCY OF THE COMMONWEALTH OF  
MASSACHUSETTS

The Commonwealth Employment Relations Board has determined that the Andover School Committee has violated Section 10(a)(3) and, derivatively 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by retaliating against Jennifer Meagher (Meagher) for engaging in concerted, protected activities.

The School Committee posts this Notice to Employees in compliance with the Commonwealth Employment Relations Board’s Order.

Chapter 150E gives public employees the right to form, join or assist a union; to participate in proceedings at the Department of Labor Relations; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities.

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

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

WE WILL immediately offer to reinstate Jennifer Meagher to the teaching position she held at Andover High School.

WE WILL make Jennifer Meagher whole for all economic losses she suffered, if any, as a result of the School Committee’s unlawful action, plus interest on all sums owed at the rate specified in MGL c. 231, Section 6I, compounded quarterly.

[signed]  
For the School Committee

Date

This notice must remain posted for 30 consecutive days from the date of the posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, 19 Staniford Street, 1<sup>st</sup> Floor, Boston, MA 02114. Telephone: (617) 626-7132.

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