

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

In the Matter of:

BOSTON SCHOOL COMMITTEE

and

BOSTON TEACHERS UNION, LOCAL 66

Case No.: MUP-20-7886

Issued: March 13, 2024

CERB Members Participating:

Marjorie F. Wittner, Chair  
Kelly B. Strong, CERB Member  
Victoria B. Caldwell, CERB Member

Appearances:

Jeff R. Smith, Esq. - Representing the Boston School Committee  
Harold Jones, Esq. - Representing the Boston Teachers Union

CERB DECISION ON APPEAL OF HEARING OFFICER'S DECISION

SUMMARY

1 The Boston Teachers Union, Local 66 (Union or BTU) has appealed from a  
2 Department of Labor Relations (DLR) hearing officer decision which dismissed a  
3 complaint that alleged that the Boston School Committee (School Committee) violated  
4 Section 10(a)(5), and derivatively, Section 10(a)(1) of Massachusetts General Law  
5 Chapter 150E (the Law) by eliminating bargaining unit positions and transferring their job  
6 duties to non-unit positions without providing the Union with prior notice and an  
7 opportunity to bargain to resolution or impasse over the decision and its impacts on  
8 bargaining unit members' terms and conditions of employment. The Hearing Officer

1 found that the allegation that the School Committee had unlawfully transferred bargaining  
2 unit work to the non-unit position of Climate and Culture Manager was untimely because  
3 the Union filed the charge more than six months after it had notice of the prohibited  
4 practices alleged in the charge. She further found that the Union failed to meet its  
5 evidentiary burden with respect to the allegation that the School Committee violated the  
6 Law by transferring bargaining unit work to the non-unit position of Transportation  
7 Operational Leader. After reviewing the hearing record and the parties' arguments on  
8 appeal, the CERB finds that the allegation with respect to the Climate and Culture  
9 Manager is timely, and therefore remands it to the Hearing Officer to make subsidiary  
10 findings regarding the issue of whether the School Committee transferred bargaining unit  
11 work to Climate and Control Managers at Charlestown High School and, if so, to render  
12 a decision on the issue of whether the Town violated Section 10(a)(5) and, derivatively,  
13 Section 10(a)(1) of the Law as alleged in the Complaint. We affirm the Hearing Officer's  
14 dismissal of the allegation that the School Committee unlawfully transferred bargaining  
15 unit work to the non-unit position of Transportation Operational Leader.

#### Background

16 The parties entered into a number of stipulations and the Hearing Officer made  
17 additional findings of fact, which are not in material dispute, except as noted below. We  
18 summarize the pertinent facts below, supplemented as necessary by additional,  
19 undisputed facts in the record. Further reference may be made to the facts set out in the  
20 Hearing Officer's decision, reported at 49 MLC 191 (November 28, 2022).

#### Bargaining Unit/CFCs

1           The Union is the exclusive representative for a unit of paraprofessionals employed  
2 in the Boston Public Schools (BPS). Charlestown High School (High School) is part of  
3 the BPS. At all relevant times, William Thomas (Thomas) served as Head of School of  
4 the High School.

5           The position of Community Field Coordinator (CFC) is part of the  
6 paraprofessionals bargaining unit. CFCs have various functions, including implementing  
7 student discipline and providing school-wide support and community outreach.<sup>1</sup>

8           Some CFCs are also Assistant Unit Leaders (AULs). The High School is  
9 composed of smaller learning communities, with each having a unit leader and an AUL.  
10 Some of the learning communities are separated by grade and some are separated by  
11 focus, i.e., special education (SPED) or students with disabilities, English language  
12 learners, etc. The AULs in each learning community deal mainly with student discipline  
13 issues, including implementing discipline. The job description for the High School CFC  
14 who was the AUL for the students with disabilities learning community included  
15 responsibilities pertaining to discipline, transportation, and community and family  
16 outreach such as:

- 17           • Facilitate mediations between students and adults/guardians.
- 18           • Co-construct interventions for students, using best practice in
- 19           positive behavior interventions and wellness instruction.
- 20           • Implement disciplinary policies and procedures in accordance with
- 21           Boston Public Schools discipline policies.

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<sup>1</sup> The Hearing Officer noted that the District maintains a number of non-unit positions that also perform community outreach, including the Dean of Students, Lead Dean, Head of School, Family Engagement Liaison, Partnership Coordinator, Early College Coordinator, and various other principals, assistant principals and operations managers. She further found that many non-unit positions perform school-wide support, including the Student Support Coordinator, Dean of Discipline, Assistant Principal, Special Education Director, and teachers who are Instructional Coaches.

- 1           • Work with Students with Disabilities Leaders to develop a system for  
2 measuring culture and climate improvements through:  
3           ○ attendance data, discipline data, social/emotional skills  
4 building data and student achievement data.
- 5           • Maintain accurate school discipline records for students.
- 6           • Collect culture/discipline referrals from staff and deliver prompt  
7 follow-through and planning for best practice and engagement.
- 8           • Establish and maintain contact with parents/guardians to better  
9 ensure success.
- 10          • Ensure compliance with all required federal and state laws, rules,  
11 and regulations regarding student transportation services for  
12 students with disabilities/students utilizing D:D transportation.
- 13          • Manage and maintain contact with the transportation department to  
14 ensure that all students with disabilities arrive and depart in a safe  
15 and timely manner.
- 16          • Communicate with bus drivers, monitors, and Transportation safety  
17 team if an issue may arise on a school bus.
- 18          • Supervises student arrival and dismissal, maintain transportation  
19 records, coordinate with Transition for travel training logs.
- 20          • Supervises breakfast and lunch programs (2 lunch blocks daily)
- 21          • Support families in crisis and connect community resources and or  
22 Clinical Coordinator
- 23          • Engage families as partners in planning, problem solving, and  
24 provide assistance with school assignments.
- 25          • Partner with the Community Based Juvenile Justice program.

26           The job description contained no experience or education requirements.<sup>2</sup>

27           Collective Bargaining Agreement and School Site Councils

28           Each school within BPS, including Charlestown High School, has its own School  
29 Site Council (SSC). Among other things, SSCs approve the school budget, examine  
30 school-wide policies, and are part of the hiring committee. Article III of the 2018-2021

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<sup>2</sup> Thomas testified that prior to 2015, the High School SPED Director, who is a member of the administrators' bargaining unit, handled the morning and afternoon transportation duties of the position. Around 2015-2016 the SPED Director assigned them to the SPED CFC/AUL.

1 collective bargaining agreement (CBA) between the Union and the School Committee  
2 describes SSCs' composition, purpose and procedures.<sup>3</sup> It states in pertinent part:

3 B. School Site Councils

4 1) Composition

5 (a) Represented Groups

6 Each Boston public school shall elect a School Site Council for the purposes  
7 enumerated in this Article . . .

8  
9 The School Site Council shall be composed of the Principal/Headmaster,  
10 members of the bargaining unit who work more than 50% of their work week  
11 at that school elected using a secret ballot from the pool of bargaining unit  
12 members similarly qualified, parents elected by the parents of children at  
13 that school, and in high schools, two voting high school student members  
14 elected by the student body.

15  
16 2) Role

17  
18 The parties agree that 1) the School Site Council shall remain the  
19 central governing body of the school under the school-based  
20 management/shared decision making model...

21  
22 C. Shared Decision-Making ....

23  
24 2. Operation of the School Site Council

25  
26 a) General Policy

27  
28 The parties expect the members of a School Site Council to  
29 operate as a single decision making team, not as a group of  
30 spokespersons representing constituent groups. Their role  
31 is to work together to find good solutions to educational  
32 problems confronting the schools. Members are chosen from

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<sup>3</sup> These provisions are in Article III of the teachers' contract. The Union represents the teachers and paraprofessionals in separate units that share a leadership structure, i.e., the same president, vice president, and executive board.

1 various groups to ensure that decisions reflect the expertise  
 2 and input of important affected groups....<sup>4</sup>

3  
 4 \* \* \*

5 Article II, Section B(2) of the CBA provides for a Steering Committee comprised of  
 6 the School Superintendent and BTU President, who are co-chairs, and other members,  
 7 including parents and students. The Steering Committee's role with respect to SSC's is  
 8 set forth in Article III(C)(2)(c), which states:

9 c) Monitoring of School Site Council Operation

10 The Steering Committee may request that School Site Councils provide  
 11 information on the dates of School Site Council meetings and who attended.

12  
 13 The Steering Committee will monitor the operation of School Site Councils  
 14 and may recommend action to deal with Councils that do not operate in  
 15 compliance with the terms of this collective bargaining agreement or where  
 16 Councils are frequently unable to reach decisions by consensus, or where  
 17 the principal/headmaster repeatedly exercises a veto over the votes of a  
 18 majority of council members.

19  
 20 To accomplish this monitoring role, the Steering Committee will establish a  
 21 subcommittee for the purpose of reviewing and responding to complaints  
 22 arising from schools that [School Based Management/Shared Decision  
 23 Making] is not implemented in accordance with the terms of the collective  
 24 bargaining agreement. The subcommittee will consist of two members of  
 25 the Steering Committee appointed by the BTU President, two members of  
 26 the Steering Committee appointed [by the] Superintendent...

27  
 28 A notice of all actions taken by School Site Councils will be distributed to all  
 29 BTU Building Representatives, the President of the Faculty Senate, and to  
 30 the Chairs of the Parent and Student Councils, within five school days  
 31 following a council meeting.

32 \* \* \*

33 g) Bylaws

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<sup>4</sup> Based upon this provision, and for other reasons explained in more detail below, we do not adopt the Hearing Officer's finding that "Article III of the CBA establishes a ...[SSC]... to allow the *Union* to engage in school-based management and shared decision making" and that SSCs are generally composed of the "Principal, Headmaster or Head of School and a number of *union*...representatives." (emphasis added). We find instead that the bargaining unit members who sit on the SSC are not Union representatives.

1 Each Council shall be required to pass bylaws to govern its School Site  
 2 Council. ...The bylaws must at least include provisions which address the  
 3 following matters:

- 4 • How will elections be held?
- 5 • When will meetings be held?
- 6 • What are the notice procedures for announcing meetings?

7 \* \* \*

8 j) Minutes

9  
 10 A notice of all actions taken by School Site Councils will be distributed to all BTU Building  
 11 Representatives and the President of the Faculty Senate within five school days following  
 12 a council meeting.<sup>5</sup>

13 The High School SSC meets once a month. The school's budget is typically  
 14 discussed in January. Thomas is co-chair of the SSC. There is no dispute that the  
 15 Steering Committee has not met since 2017-2018.<sup>6</sup> The record does not include a copy  
 16 of the High School SSC bylaws or reflect whether such documents exist. The record also  
 17 contains no information regarding the SSC's notice procedures for announcing meetings,  
 18 if any.

19 Paraprofessional Excess and Vacancy Lists

20 At least once a year, the BPS staffing office prepares a list of paraprofessionals  
 21 who will be excessed from their buildings. An excess list is a list of bargaining unit  
 22 members' positions that the School Committee does not intend to fill for the following  
 23 year. Although excessed paraprofessionals no longer have a right to the position from  
 24 which they were excessed, excess lists do not indicate whether a position has been

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<sup>5</sup> We have added this finding for the sake of completeness. The CBA was entered into the record as Joint Exhibit 1.

<sup>6</sup> BTU Executive Vice President Erik Berg (Berg) testified without rebuttal that the Steering Committee had "not met for years, despite the president-of-the union's efforts to get it to meet."

1 permanently eliminated. Excessed employees may have a right to another job,  
2 depending on seniority. Paraprofessionals seeking to transfer to another location can  
3 also place themselves on the excess list. Each year, BPS creates lists showing  
4 paraprofessional vacancies into which excessed paraprofessionals may transfer.

5 Climate and Culture Managers

6 At some point prior to January 8, 2019, the High School decided that it needed a  
7 position other than an AUL to meet its needs.<sup>7</sup> Thomas discussed this decision at a High  
8 School SSC meeting held on January 8, 2019. Thomas and five bargaining unit members  
9 (four teachers and one paraprofessional CFC) attended that meeting. The agenda for this  
10 meeting included the following budget item:

11 Restructure AULs position; convert into managerial so they can support  
12 summer work (current individual[s] in position must reapply).

13  
14 After Thomas informed those present about his plans to eliminate the AUL positions and  
15 create new managerial positions,<sup>8</sup> the SSC voted and approved the budgetary changes  
16 necessary to implement this change. The record contains no evidence that any member

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<sup>7</sup> Thomas testified as to a number of reasons for this decision, including trying more proactive measures to reduce student discipline issues through supporting academic success.

<sup>8</sup> The record does not reflect whether Thomas told bargaining unit members that the new positions would be titled "Climate and Culture Managers." There is no dispute, however, that this was the title of the managerial position created as a result of the January 8, 2019 vote to approve the budgetary changes necessary to eliminate CFC/AULs at the high school and create managerial positions.



1 of the SSC informed the High School's BTU building representatives or any Union officer  
2 or representative about this meeting.<sup>9</sup>

3 2019 Paralegal Excess Lists

4 On or about March 19, 2019, Director of Staff for the District, Hannah Hall, provided  
5 the Union with a list of excessed paraprofessionals for the 2019 - 2020 school year. This  
6 list indicated that bargaining unit members Amarildo Goncalves (Goncalves) and Ezzard  
7 Turner (Turner), both employed at the High School as CFC/AUL's in Regular Ed/Other,  
8 were to be excessed and would not be kept on payroll for the 2019 - 2020 school year. In  
9 addition, bargaining unit member Michael Rizzo (Rizzo) who was employed at the High  
10 School as a CFC/AUL in School Admin – Principal's Office, resigned before the end of  
11 the 2018-2019 school year, leaving his position vacant for the upcoming school year.<sup>10</sup>  
12 The School Committee does not dispute that this list included the three paraprofessional  
13 CFCs whose positions were eliminated as a result of the January 8, 2019 SSC meeting.

14 For the start of the 2019-2020 school year, the School Committee, through  
15 Thomas, created the non-unit position of Climate and Culture Manager. Generally,  
16 Climate and Culture Manager's job duties include some duties that CFC/AULs perform,  
17 such as imposing discipline, community outreach, and school wide support. The job

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<sup>9</sup> The only SSC member who testified was Thomas. Thomas did not testify that he notified any BTU officers or building representative of the events that transpired at the January 8, 2019 SSC meeting. The Union presented two witnesses: BTU Executive Vice President Erik Berg (Berg), and BTU representative Colleen Hart (Hart). Neither Hart nor Berg are the High School's building representatives. Both Hart and Berg testified without rebuttal that they did not find out that any High School CFC/AUL positions had been eliminated until the January 2020 arbitration proceeding described below.

<sup>10</sup> The 2019/2020 paraprofessional excess list does not indicate whether a bargaining unit member employed as a CFC/AUL for Students with Disabilities was excessed.

1 description for the High School Climate and Culture position contained the following  
2 summary of duties:

3 Develop a system for school staff to implement restorative practices,  
4 regularly monitor school culture and climate and work to ensure that the  
5 school is safe. This is a full-time position responsible for creating behavior  
6 systems, protocols and consequences in conjunction with the principal. He  
7 or she will develop a strong rapport with students and maintain behavior  
8 systems created to support students struggling with behavior. In addition,  
9 the behavior specialist will provide critical support to teachers and  
10 administrators during break, lunch and dismissal.

11  
12 The job description also included the following duties:

- 13 • Provide administrative support at critical times of the day, such as  
14 morning arrival, breakfast, lunch and dismissal;
- 15 • Manage and align school community on school culture expectations  
16 including interventions, discipline and incentives;
- 17 • Review data and assist in developing strategies for decreasing  
18 number of behavioral incidents;
- 19 • Develop and maintain a behavior system that supports students who  
20 have been temporarily removed from their classes due to poor  
21 behavior, following protocols established by the school's leadership  
22 team...
- 23 • Invest parents and families in their children's academic success  
24 through regular communication of success and challenges;
- 25 • Work in house and with BPS transportation department to handle  
26 any discipline on bus/MBTA or walking home.
- 27 • Create and maintain an after school academic assistance program  
28 to improve student academic outcomes.

29 The position required no specific educational requirements but did require  
30 at least two to three years experience managing adolescent programs and data  
31 collection, and at least three years experience in urban school systems working  
32 with a diverse ethnic student body.

33 Transportation Operational Leader

1           At some unspecified point in time,<sup>11</sup> the School Committee created a second new  
2 position titled “Transportation Operational Leader.” This position was not discussed at the  
3 January 8, 2019 SSC meeting. The job description for this position is identical to the  
4 CFC/AUL position except for one duty pertaining to professional development for staff  
5 using a software program. The record is unclear whether the position opened up in the  
6 2019-2020 school year and whether it was ever filled.<sup>12</sup>

7           In or around January of 2020, the Union attended an arbitration proceeding  
8 contesting disciplinary action for a bargaining unit member who had been a CFC/AUL at  
9 the High School but who had been demoted and transferred to another position elsewhere  
10 in the district. During this proceeding, the Union sought to have the member restored to  
11 his former position. Subsequently, the Union learned that the position previously held by  
12 the bargaining unit member no longer existed but had been converted to a managerial

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<sup>11</sup> The job description is undated.

<sup>12</sup> When seeking to introduce the job description for the Transportation/Operation Leader, the School Committee’s counsel asked Thomas whether it was the job description for a “transportation/operational-leader position that opened up at Charlestown High for the 2019-2020 school year?” Thomas replied:

I don’t know if it opened up. I mean, it’s -- like I said, each small-learning-community leaders were given a little bit of opportunity to kind of craft what’s happening with the individuals, with the understanding that this is the -- the main crux of it is we give them the parameters that were the main crux of what it’s supposed to do and then they kind of work it to make it fit within their--small learning communities.

Hearing Transcript, Vol. I, p. 64-65 (Punctuation in original).

Thomas also testified that transportation was just a small part of the job and “I think it’s named improperly, based on the [sic] overall what they do all the time.” Hearing Transcript, Vol. I, p. 65.

1 position outside of the bargaining unit.<sup>13</sup> In response, on February 28, 2020, the Union  
2 filed the present charge of prohibited practice.<sup>14</sup>

3 Other non-unit employees throughout BPS perform duties relating to discipline,  
4 school-wide support, and community and family engagement.<sup>15</sup>

5 Opinion<sup>16</sup>

6 Timeliness

7  
8 Section 15.04 of the DLR's regulations, 456 CMR 15.04, states that "Except for  
9 good cause shown, no charge shall be entertained by the [DLR] based upon any  
10 prohibited practice occurring more than six months prior to the filing of a charge with the  
11 DLR." Absent good cause, the six-month period of limitations starts running when the  
12 charging party knew or should have known of the alleged violation. Miller v. Labor  
13 Relations Commission, 33 Mass. App. Ct. 404, 408 (1991). Here, the Hearing Officer

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<sup>13</sup> The Union did not present any evidence elaborating on what they had learned at the arbitration proceeding in January of 2020, including the CFC/AUL position held by the bargaining unit member whose position had been eliminated, the job duties for that position, or to which managerial position the employee's job duties were allegedly assigned.

<sup>14</sup> We infer that the Union found out about the Transportation/Operation Leader job description as a result of this arbitration. It is unclear from the record whether this is the managerial position that the Union alleges was created from the CFC/AUL position held by the bargaining unit member that was the subject of the arbitration.

<sup>15</sup> The School Committee submitted evidence through testimony that these work duties performed by the CFC/AULs were shared work duties with non-unit employees. The Union did not cross-examine the School Committee's witnesses or rebut this testimony but argues that "community outreach" and "school wide support" are sweeping objectives, not specific job duties. In its post-hearing brief, the Union states that every BPS employee shares these objectives, but this does not mean that every employee, whether a principal, a teacher, a paraprofessional, or a custodian share the same work.

<sup>16</sup> The CERB's jurisdiction is not contested.

1 found that the five BTU bargaining unit members present at the January 8, 2019 SSC  
2 meeting were Union representatives. She thus determined that because they were  
3 present on January 8, 2019, when Thomas explained his plan to transfer bargaining unit  
4 work from CFC/AUL positions to the Climate and Culture Manager, and because the SSC  
5 voted to approve the budget that implemented the change, the six-month period of  
6 limitations in this case began running on January 8, 2019. The Hearing Officer reasoned  
7 that this was the date when the Union knew or should have known that the School  
8 Committee had no intention of satisfying its bargaining obligation before implementing the  
9 transfer of bargaining unit work.

10 We disagree for several reasons. We first disagree with the finding that the  
11 bargaining unit members who served on the SSC were Union representatives, such that  
12 notice to them of a potential prohibited practice also constituted notice to the Union. The  
13 Hearing Officer reached this conclusion based on her findings that the representatives  
14 were elected by Union membership to represent Union interests, their participation was  
15 such that they would acquire information about school-based decisions that they were  
16 required to report back to Union officials, and the parties' recognition that a Steering  
17 Committee that included the Union president was necessary to monitor SSC operations.

18 These findings are not supported by the evidence. First, the CERB has held that  
19 an employer's notice to one or more bargaining unit members of a proposed change does  
20 not constitute actual notice to the union of the proposed change. Rather, the CERB only  
21 imputes notice to a union when a union officer with authority to bargain is made aware of  
22 the employer's proposed plan. Town of Hudson, 25 MLC 143, 148, MUP-1714 (April  
23 1999). See also Town of Watertown, 32 MLC 54, 56, MUP-01-3275 (June 29, 2005)

1 (citing Town of Ludlow, 17 MLC 1191, 1200-1201, MUP-7040 (August 3, 1990)) (declining  
2 to impute notice of change in insurance benefits to bargaining unit members on Insurance  
3 Advisory Council (IAC) to union, where the employees did not serve on the IAC as union  
4 representatives); Town of Dennis, 28 MLC 297, MUP-2634 (April 3, 2002) (where Town  
5 did not give union notice of co-payment increase, limitations period started to run when  
6 union president first learned from bargaining unit members that those changes had taken  
7 effect); City of Boston School Committee, 4 MLC 1912, 1915, MUP-2611 (April 27, 1978)  
8 (and decisions cited therein) (where superintendent consulted individual unit employees  
9 but not union officials regarding views on a possible reorganization, union was not on  
10 notice that a change had been proposed and union therefore did not waive its right to  
11 bargain by inaction). Here, there is no evidence and no party contends that the SSC's  
12 bargaining unit members were Union officers who had the authority to bargain.

13 Second, Article III does not state or imply that the bargaining unit members who  
14 are elected to serve on the SSC are serving as Union representatives. According to Article  
15 III (B)(1)(a) of the CBA, which sets forth the "Represented Groups" that comprise the  
16 SSC, the SSC is composed of the:

17 ... Principal/Headmaster, *members of the bargaining unit who work more*  
18 *than 50% of their work week at that school elected using a secret ballot from*  
19 *the pool of bargaining unit members similarly qualified, parents elected by*  
20 *the parents of children at that school, and, in high schools, two voting high*  
21 *school student members elected by the student body (emphasis added).*  
22

23 Even though the BTU's officers and representatives are mentioned throughout the CBA,  
24 including in Article II, Article III(B)(1) does not list the BTU as one of the "Represented  
25 Groups" that comprise the SSC.

1           Furthermore, Article III(C)(2)(a) sets forth the parties' (i.e., the Union's and the  
2 School Committee's) expectation that the "Represented Groups" on the SSC are not  
3 serving in a representative capacity. That provision states that the "parties [i.e., the Union  
4 and the School Committee] expect the members of a School Site Council to operate as a  
5 single decision making team, *not as a group of spokespersons representing constituent*  
6 *groups.*" (emphasis added). When read alone, or in conjunction with Article III(B)(1)(a),  
7 Article III(C)(2)(a) makes plain that the bargaining unit members who serve on the SSC  
8 and who are referenced in Article III (B)(1)(a) are not serving on the Union's behalf.

9           Article III(C)'s notice provisions further reinforce this conclusion by requiring that  
10 notice of all actions taken by SSC be sent to BTU building representatives. These  
11 provisions demonstrate that the parties distinguished between the bargaining unit  
12 members on the SSC and formally designated Union representatives, and understood  
13 that notice to the former of the SSC's meetings did not automatically constitute notice to  
14 the Union.

15           The Hearing Officer, however, viewed these notice requirements differently,  
16 finding that they demonstrated that the Union understood that the SSC's actions could  
17 affect the bargaining unit's interests and thus, that it was important for the Union to  
18 communicate with its representatives to receive information about the SSC's business.  
19 We do not disagree that the Union has an interest in what goes on at SSC meetings.  
20 However, the prudence of including a provision requiring the SSC as an entity to inform  
21 building representatives about its meetings that, notably, does not specify which SCC  
22 individual(s) is required to inform the Union, does not transform the bargaining unit

1 members who sit on the SSC into Union representatives, and we find no basis in the  
2 record to conclude that they were.<sup>17</sup>

3 As the Hearing Officer stated, timeliness is an affirmative defense, which the  
4 School Committee bore the burden of proving. City of Boston, 29 MLC 122, 124, MUP-  
5 2419 (January 15, 2003). As such, the School Committee has the burden of proving that  
6 Union representatives with the authority to bargain either knew or should have known  
7 what transpired at the January 8, 2019 meeting. The School Committee did not meet this  
8 burden. In both its brief and opening statement at hearing, the School Committee argued  
9 that the proposed change was “no secret” and that it “strained credulity” to think that Union  
10 did not know about the proposed transfer given its involvement in the SSC process.  
11 However, the hearing record contains no evidence that, as of January 9, 2019, or even  
12 March 2019, any BTU building representative or officer had actual knowledge that  
13 Thomas planned to eliminate the CFC/AUL positions and create non-union positions to  
14 replace them.<sup>18</sup> Therefore, to the extent that the Hearing Officer found that the Union had  
15 actual knowledge of the events that formed the basis of its charge, we reverse that finding.

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<sup>17</sup> We further note that M.G.L. c. 71, § 59C, which governs the operation of school site councils, provides that “school councils shall have no authority over matters which are subject to chapter one hundred fifty E.”

<sup>18</sup> The Hearing Officer rejected the School Committee’s argument that the Union also should have learned about the change in March 2019, when it received the paraprofessional excess lists showing that certain CFC/AULs would be excessed the following school year. While she noted that the lists demonstrated “further implementation of Thomas’ plan,” she nonetheless found that they did not constitute notice of the alleged prohibited practice because they did not indicate that bargaining unit work had been transferred from the eliminated positions to new managerial positions. We summarily affirm this aspect of the decision.



1           Absent evidence showing that the Union had actual knowledge of the change,  
2 the issue becomes whether the School Committee has met its burden of showing that the  
3 Union should have known about Thomas' plans. We find that it did not. In Felton v. Labor  
4 Relations Commission, the SJC stated that, "A wrong....is not inherently unknowable if  
5 the injured party, in the exercise of reasonable diligence, should have known of the factual  
6 basis for the wrong." 33 Mass. App. Ct. 926, 927-928 (1992) (additional citations omitted).  
7 Here, there is no evidence that any Union representatives were informed about the  
8 January 9, 2019 SSC meeting before it took place. Moreover, although the CBA requires  
9 each SSC to create bylaws that include provisions on when meetings will be held and the  
10 notice procedures for announcing meetings, these bylaws were not entered into the  
11 record and we therefore do not know who, if anyone, on the SSC was responsible for  
12 notifying the Union about its meetings and other matters. Where the CBA does not  
13 require BTU officials to inquire about SSC meetings, but rather requires the SSC to give  
14 notice to the Union of the meeting and there is no evidence in the record that the SSC  
15 ever did so, the record does not support a finding that the Union, in the exercise of  
16 reasonable diligence, "should have known" that the meeting announcing the transfer of  
17 bargaining unit work took place such that it could file a prohibited practice charge.

18           The fact that Article III (C)((2)(c) permits the Steering Committee to request  
19 School Site Councils to provide information on the dates of SSC, and states that it "will  
20 monitor" SSC operations, does not change this conclusion. First, there is no dispute that  
21 Steering Committee has not met since 2017-2018. Second, read in its entirety, Article III  
22 (C)((2)(c) makes clear that the Steering Committee's monitoring role is accomplished by  
23 the establishment of a subcommittee whose purpose is limited to reviewing and

1 responding to complaints that school-based management is not being implemented in  
2 accordance with the CBA's terms. Even ignoring that there is no evidence here that such  
3 a subcommittee exists, or that any such complaint was made, it is clear that the Steering  
4 Committee's monitoring obligation is triggered by complaints it receives and is not just a  
5 general obligation to monitor all SSC meetings. Finally, to the extent these provisions  
6 impose any obligation on the BTU President to monitor SSC meetings, they do so only in  
7 the President's capacity as the co-chair of the Steering Committee, and not independent  
8 of that role. Again, it is notable that the Steering Committee has not met since 2017.  
9 Compare City of Boston, 32 MLC 173, 176, MUP-02-3623 (June 2, 2006) (finding that  
10 union president should have known about changes to health insurance plans, where he  
11 was notified by email but chose not to read it) with Commonwealth of Massachusetts, 39  
12 MLC 169, SUP-08-5447 (December 27, 2012) (rejecting argument that union should have  
13 known about change to mileage reimbursement where employer drafted a memo  
14 regarding the change but there was no evidence that union knew about the memo or any  
15 other factors that could have put the union on notice of the change).

16 For these reasons, we find that the Union was not placed on actual or  
17 constructive notice of facts concerning the transfer of bargaining unit work to the Climate  
18 and Culture Managers until January 2020. Because the Union filed this charge one month  
19 later, it is timely. We therefore turn to the merits of the complaint.

#### 20 Transfer of CFC/AUL Work to Climate and Culture Managers

21 Because the Hearing Officer found that the allegation was untimely, she did not  
22 analyze whether the Union had met its burden of proving that the School Committee  
23 transferred bargaining unit work outside of the unit without first giving the Union notice

1 and an opportunity to bargain. To prevail on this allegation, the Union had to show: 1)  
2 that the employer transferred bargaining unit work to non-unit personnel; 2) the transfer  
3 of unit work had an adverse impact on individuals, employees, or the bargaining unit itself;  
4 and 3) the employer failed to give the employee organization prior notice and an  
5 opportunity to bargain to resolution or impasse over its decision. Commonwealth v. Labor  
6 Relations Commission, 60 Mass. App. Ct. 831, 833 (2004) (citing Town of Bridgewater,  
7 25 MLC 103, 104, MUP-8650 (December 30, 1998)).

8 As a threshold matter, the first element of the test examines whether the work at  
9 issue has been performed traditionally by bargaining unit members. Commonwealth of  
10 Massachusetts, SUP-13-2604 (November 24, 2014) (citing City of Lawrence, 23 MLC  
11 213, 215 MUP-9876 (March 31, 1997)). Here, there is no dispute that CFCs/AULs  
12 performed the duties set forth on their job descriptions, but the School Committee argues  
13 that many of the duties they performed were also performed by non-bargaining unit  
14 members. In cases where job duties have traditionally been shared by bargaining unit  
15 members and persons who are not members of the bargaining unit, the CERB has held  
16 that the work at issue is not exclusively bargaining unit work. Higher Education  
17 Coordinating Council, 23 MLC 90, 93, SUP-4090 (September 17, 1996). In shared work  
18 situations, an employer does not have to bargain over every incidental variation in work.  
19 Id. Rather, the duty to bargain arises only if there has been a calculated displacement of  
20 unit work. Id. Whether there has been a calculated displacement of unit work is  
21 determined by examining whether bargaining unit members performed an ascertainable  
22 percentage of the work, and the employer has taken action that results in a significant  
23 reduction in that percentage, with a corresponding increase in the percentage of the work

1 performed by non-unit personnel. City of New Bedford, 15 MLC 1732, 1737, MUP-6488  
2 (May 31, 1989); City of Boston, 6 MLC 1117, 1126, MUP-2863 (June 4, 1979).

3 Here, although the Hearing Officer found that the SSC implemented Thomas's  
4 January 8, 2019 proposal when it voted on a budget that implemented the change, and  
5 that the CFC/AULs shared certain duties with non-bargaining unit members, she did not  
6 make any findings or reach any conclusions on whether there had been a calculated  
7 displacement of bargaining unit work, such that bargaining was required. Nor did she  
8 make any findings as to whether the alleged transfer had an adverse impact on the  
9 bargaining unit. As such, we are unable to assess the School Committee's defenses  
10 without further findings and a ruling on these critical issues. We therefore conclude that  
11 before we can proceed to consider the arguments on appeal regarding shared bargaining  
12 unit work, we must remand this issue to the Hearing Officer to make subsidiary findings  
13 of fact on the issues raised above and to render a decision on those facts regarding the  
14 transfer of bargaining unit work from CFC/AULs to non-unit Climate and Culture Manager  
15 positions. See Town of West Springfield, 39 MLC 190, 192, MUP-07-4951 (January 25,  
16 2012) (citing Boston School Committee, 23 MLC 170, CAS-2937 (January 27,1997)  
17 (remanding matter to the hearing officer to make independent findings of fact on issues  
18 necessary to consider parties' arguments on appeal).

19 Transfer of Work from CFC/AUL for Students with Disabilities to Transportation  
20 Operational Leader

21  
22 The Hearing Officer found this allegation timely and thus proceeded to analyze  
23 whether the Union had met its burden of proving an unlawful transfer of bargaining unit  
24 work under the three-part test set forth above. She held that the Union did not meet its  
25 burden due to an absence of evidence in the record showing that: 1) the School

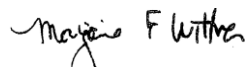
1 Committee had exceeded the CFC/AUL for Students with Disabilities position as alleged  
2 in the Complaint; 2) the School Committee instructed the incumbent to stop performing  
3 that work; 3) the job duties formerly performed by the bargaining unit members were  
4 subsequently performed by a non-unit employee; 4) the Transportation Operational  
5 Leader Position had opened up; and 5) a non-union person had ever filled that job. On  
6 review, the Union points to the almost identical job descriptions for the CFC/AUL for  
7 Students with Disabilities and the Transportation Operational Leader to argue that they  
8 demonstrate that a transfer has occurred. We agree with the Hearing Officer that due to  
9 the absence of evidence on the five issues she identified, and without knowing whether  
10 the changes contemplated by the new job description had ever been implemented, the  
11 Union has not demonstrated that a transfer of bargaining unit work occurred. We  
12 therefore affirm this aspect of the decision.

13 Conclusion

14 We reverse the Hearing Officer's determination that the Climate and Control  
15 Managers transfer allegation was untimely. We remand that allegation to the Hearing  
16 Officer to make subsidiary findings of fact and to render a decision on the merits. We  
17 affirm the dismissal of the Complaint pertaining to the Transportation Operational  
18 Manager.

**SO ORDERED.**

COMMONWEALTH EMPLOYMENT RELATIONS BOARD



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MARJORIE F. WITTNER, CHAIR



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KELLY B. STRONG , CERB MEMBER



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VICTORIA B. CALDWELL, CERB MEMBER

**APPEAL RIGHTS**<sup>19</sup>

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To obtain 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.

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<sup>19</sup> These Appeal Rights pertain only to the CERB's ruling on timeliness and dismissal of the Transportation Operational Leader transfer allegation. The decision to remand the Climate and Culture Managers allegation to the Hearing Officer for further findings and a ruling is not a final decision within the meaning of Section 11 of the Law. Any appeal of the CERB's ruling on timeliness and dismissal of the Transportation Operational Leader transfer allegation will be stayed until a final decision is issued on the allegation remanded to the Hearing Officer.