

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

BOARD OF HIGHER EDUCATION

and

MASSACHUSETTS COMMUNITY
COLLEGE COUNCIL

*
*
*
*
*
*
*
*
*

Case No.: SUP-16-5203

Date issued: June 29, 2018

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Carol Wolff Fallon, Esq. - Representing the Board of Higher Education

Matthew Jones, Esq. - Representing the Massachusetts Community
College Council

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the Board of Higher Education (Employer)
2 violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of G.L. c.150E (the Law) by
3 failing to bargain in good faith with the Massachusetts Community College Council
4 (Union) over the decision to transfer duties from the Coordinator of Tutoring position to
5 non-unit personnel at Bristol Community College (College) without first providing the
6 Union with prior notice and an opportunity to bargain to resolution or impasse over the

1 decision and its impacts. For the reasons explained below, I find that the Employer
2 violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it
3 transferred the following ten duties from the Coordinator of Tutoring position to non-unit
4 personnel at the College in December of 2015 without first providing the Union with prior
5 notice and an opportunity to bargain to resolution or impasse over the decision and its
6 impacts: (1) supervising the site coordinator; (2) making hiring recommendations; (3)
7 coordinating with College deans to determine supplemental instruction; (4) submitting
8 tutor payroll to the appropriate Dean; (5) producing quantitative data analyses on
9 student success, retention and persistence rates; (6) training and supervising peer
10 tutors; (7) writing grants; (8) preparing and submitting monthly reports for content-
11 tutoring activities; (9) working with faculty to develop content-based tutoring; and, (10)
12 participating in College committees related to content-based tutoring.

13 However, I find that the Employer did not violate the Law when it transferred
14 qualitative analysis and budgetary duties from the Coordinator of Tutoring position to
15 non-unit personnel in 2014 and March of 2015, respectively.

16 STATEMENT OF THE CASE

17
18 On April 22, 2016, the Union filed a Charge of Prohibited Practice (Charge) with
19 the Department of Labor Relations (DLR), alleging that the Employer had engaged in
20 prohibited practices within the meaning of Section 10(a)(5) and, derivatively, Section
21 10(a)(1) of the Law. On July 12, 2016, a DLR Investigator conducted an investigation
22 into the Charge. On July 21, 2016, the Investigator issued a Complaint of Prohibited
23 Practice, alleging that the Employer had violated Section 10(a)(5) and, derivatively,

1 Section 10(a)(1) of the Law by failing to bargain in good faith with the Union over the
2 decision to transfer unit work to non-unit personnel and the impacts of that decision on
3 unit members' terms and conditions of employment. On August 1, 2016, the Employer
4 filed its Answer to the Complaint. On May 24 and 25, 2017, I conducted a hearing at
5 which both parties had a full opportunity to be heard, to examine and cross-examine
6 witnesses, and to introduce evidence. Both the Employer and the Union filed their post-
7 hearing briefs on June 29, 2017.

8 ADMISSIONS OF FACT

9 The Employer admitted to the following facts:¹

- 10 1. The Employer is a public employer within the meaning of Section 1 of the Law.
- 11 2. The Union is an employee organization within the meaning of Section 1 of the
- 12 Law.
- 13 3. The Union is the exclusive bargaining representative for certain full-time and
- 14 part-time, day unit and professional staff employed at the College.
- 15 4. The College posted a non-unit position for a Director of Tutoring and Academic
- 16 Support on or about October 26, 2015.
- 17 5. The College sent the notice of posting described in paragraph 4, above, to the
- 18 Union pursuant to Article 16.01 and Article 2.06 of the parties' collective
- 19 bargaining agreement (CBA) on October 26, 2015.
- 20 6. On December 21, 2015, the Employer hired Chad Argotsinger [Argotsinger] to fill
- 21 the non-unit position described in paragraph 4, above.
- 22
- 23
- 24
- 25
- 26
- 27

28 STIPULATION OF FACT

29 The parties stipulated to the following fact:
30
31

¹ In its Answer, the Employer made full and partial admissions of fact. This section of my decision reflects only the Employer's full admissions of fact.

- 1 1. The Academic Coordinator position that Ronald Weisberger [(Weisberger)]
2 retired from on or about September 1, 2015 is a position included in the
3 bargaining unit, referred to in paragraph three, above.
4

5 FINDINGS OF FACT

6 **Background**

7 The Employer and the Union are parties to a collective bargaining agreement
8 (Agreement) that is effective from July 1, 2015 until June 30, 2018. Attached to the
9 Agreement is a memorandum of agreement (MOA) that the parties effectuated in June
10 of 2009. Section 2 of the MOA pertains to "CAS Resolution & Member Integration for
11 the Day Unit," and outlines the process that the parties agree to follow on determining
12 whether a position should be accreted into the bargaining unit:

13 2. Process for positions in dispute after the date of this agreement:
14

- 15 A. The Union shall present the Employer with a written request to
16 accrete a position or group of positions into the bargaining unit.
17
- 18 B. The representative of the Employer shall discuss the status of the
19 position with the Union's representative within thirty (30) calendar
20 days of receiving the request. The parties can agree to extend the
21 timeline for this initial meeting/discussion.
22
- 23 C. Should the informal discussion described in step 2(B) not resolve
24 the matter, the parties shall agree to meet in a designated joint
25 CAS committee made up of equal representation from the
26 Employer and the Union. Unless there are no outstanding unit
27 inclusion issues, the CAS committee shall meet twice per year –
28 once in November and once in March – for the purpose of
29 attempting to resolve all outstanding unit inclusion issues.
30
- 31 D. Any positions not resolved under steps 2(A) through (C) shall be
32 submitted to a mediation process in which a neutral mediator shall
33 attempt to resolve all outstanding CAS issues and then render a
34 binding decision for any cases in which mediation is unsuccessful.
35 The mediator shall be agreed upon by the Employer and the Union.

1 Unless there are no outstanding unit inclusion issues, mediation
2 shall be scheduled twice per year – once in December and once in
3 May – for the purpose of resolving all outstanding unit inclusion
4 issues. During the mediation process, the parties may present all
5 evidence and witnesses necessary to resolve the case.
6

7 **Ron Weisberger**

8 Beginning in 1979, the Employer hired Weisberger into a full-time position at the
9 College.² In 1985, the Employer promoted Weisberger to the full-time position of
10 Coordinator of Tutoring at the College. At some point within the first six months of
11 2015, Weisberger notified the Employer of his retirement, and he retired on September
12 1, 2015. At all relevant times, Weisberger was a member of the bargaining unit, and the
13 position of Coordinator of Tutoring was a bargaining unit position. At all relevant times,
14 Weisberger was also a member of the Union's Strategic Action Committee, and roughly
15 15 years prior to that, he served as Union co-president.

16 As Coordinator of Tutoring, Weisberger's duties included interviewing and
17 recommending for hire peer tutors.³ His hiring recommendations were accompanied by
18 a "Request to Employ" form, which he submitted to the appropriate College Dean for
19 approval for allocation of funds for tutor compensation. Weisberger also supervised
20 peer tutors, along with determining their assignments, developing their schedules, and
21 approving their timesheets. Part of his duties also entailed managing operations at the

² Neither party provided the job title for this position.

³ Peer tutors are students who are not members of the bargaining unit.

1 Tutoring and Academic Support Center (TASC) which is located at the College's main
2 campus. The TASC provides only content-based tutoring.⁴

3 At the TASC, Weisberger monitored budget expenditures, submitted yearly
4 budget requests to the College budget committee, provided input related to budget
5 allocations, applied for grants to augment the budget, and submitted tutor payroll to the
6 appropriate Dean. He also trained tutors and conducted workshops for them.
7 Occasionally, Weisberger would provide direct, content-based tutoring to individual
8 students. He also conducted bi-monthly coordinator meetings with the TASC site
9 coordinator⁵ to assess the College's tutoring needs at its satellite locations.⁶ In addition,
10 Weisberger produced monthly and end-of-the-year reports (quantitative and qualitative
11 analyses), which he submitted to the appropriate Dean; however, he had not submitted
12 a qualitative report since 2014.

13 During his tenure, Weisberger initially reported to Susan Bossingham
14 (Bossingham), Dean of the Center for Developmental Education. In or around 2008,
15 Weisberger began reporting to Suzanne Buglione (Buglione), Dean of the Lash Division

⁴ The TASC is separate from the Writing Center which provided only writing tutoring. At some point after Weisberger's retirement, the Employer merged the TASC with the Writing Center. During his tenure, Weisberger had no duties or responsibilities related to the Writing Center.

⁵ The TASC site coordinator was a member of the bargaining unit and oversaw the day-to-day tutoring operations at the College's main campus and satellite locations. While Weisberger worked closely with the site coordinator, he never hired, supervised, or evaluated the site coordinator.

⁶ The College's main campus is located in Fall River, with satellite locations in New Bedford, Attleboro and Taunton. The Taunton location was not fully operational until some point after late 2015.

1 for Teaching and Learning (Lash Division).⁷ At all relevant times, Buglione was
2 responsible for the following job functions related to tutoring at the TASC: hiring and
3 evaluating all unit professionals—including Weisberger and the TASC site coordinator;⁸
4 supervising the Writing Center; determining the DWFI rate (i.e., the percentage of
5 students in a given course who receive academic grades of “D”, “F”, “W” or “I”); setting
6 the budget; and establishing policy.

7 **Tutoring and Supplemental Instruction**

8 The College offers tutoring to current students at all of its locations on a one-on-
9 one basis, but sometimes offers it for two students together. The College also offers
10 online-e-tutoring via Smart Thinking,⁹ which is administered by the Dean of E-Learning,

⁷ Buglione’s position as Dean of the Lash Division is not in the bargaining unit. The Lash Division oversees faculty development and provides student support services such as tutoring, cooperative education and library services.

⁸ At some point between July and December of 2015, Buglione temporarily assumed the duties of the site coordinator. The Union did not file a separate charge with the DLR alleging that the Employer had unlawfully transferred the site coordinator duties to Buglione in 2015.

⁹ Weisberger testified on cross-examination that Bellafiore was initially responsible for Smart Thinking, which is the College’s online e-tutoring. Weisberger also testified that at some point during the last year of his employment, the Employer assigned him to work with Bellafiore to perform Smart Thinking duties. While Weisberger’s E7 (stated below) did not include Smart Thinking as part of his responsibilities, his 2002-2006 and 2006-2016 job descriptions (stated below) included the duties of computer operation and computer-aided instruction. On direct examination, Buglione testified that at all relevant times Bellafiore oversaw Smart-Thinking. Argotsinger also testified that he only started performing Smart Thinking duties on December 21, 2015, when the Employer promoted him to Director of Tutoring and Academic Support. Argotsinger testified further that at all relevant times Smart Thinking responsibilities were “beyond the scope” of Weisberger’s duties as “TASC Coordinator.” Based on this evidence, I credit the testimony of Buglione and Argotsinger that Weisberger did not perform Smart Thinking

1 April Bellafiore (Bellafiore).¹⁰ Tutors can be current students (peer tutors), alumni,
2 volunteers, or bargaining unit members. The College also provides tutoring on a
3 supplemental instruction (SI) basis, where faculty members recommend specific SI
4 tutors to observe classes, conduct two or three weekly discussion sessions about class
5 work, and answer questions.

6 While Weisberger interviewed prospective peer tutors at the beginning of each
7 semester and recommended final candidates for hire, he was typically not involved in
8 the selection process for SIs because the College usually hired them based on faculty
9 recommendations. On occasion Weisberger would successfully recommend a specific
10 SI to a faculty member. Once the tutors were hired, Weisberger trained them pursuant
11 to College Reading and Learning Association (CRLA) requirements, which includes a
12 two-day training at the beginning of each semester. During the semester, Weisberger
13 would also work with tutors on a one-on-one basis and would sometimes conduct
14 workshops for them. The College provided additional, specialized training for SIs.

15 During Weisberger's tenure, the College employed around 80 tutors and 20 SIs.
16 In the spring of 2015, a combined total of 67 tutors and SIs assisted about 790 students.
17 These numbers increased in the spring of 2017 to 106 combined tutors and SIs who
18 assisted about 1,000 students.

19 **The Coordinator of Tutoring Position**

duties. However, I credit Weisberger's testimony that he assisted Bellafiore with Smart Thinking at some point during his last year of employment.

¹⁰ Bellafiore's position as Dean of E-Learning is not in the bargaining unit.

1 On or about May 19, 2002, the Employer posted a job availability notice for the
2 Coordinator of Tutoring position (effective from May 19, 2002 through July 8, 2006),¹¹
3 which listed a general statement of duties, supervision received, and examples of
4 duties:

5 GENERAL STATEMENT OF DUTIES:

6 The Coordinator of Tutoring will supervise the tutoring program at [the
7 College]. While doing some tutoring himself/herself when there is need,
8 the Director¹² seeks out and receives recommendations for tutors from the
9 faculty; trains student tutors; arranges for the meeting of tutors and
10 students; and supervises the tutoring as it is carried out.

11
12 SUPERVISION RECEIVED:

13 The Coordinator of Tutoring works under the direct supervision of the
14 Learning Specialist.

15
16 EXAMPLE[S] OF DUTIES:

- 17 1. Select, with the help of faculty, peer tutors for tutoring.
18 2. Train tutors to work effectively with students.
19 3. Work with faculty members, counselors, and with the Learning
20 Specialists to identify student p[ro]blems and provide the help needed.
21 4. Supervise the tutoring of students.
22 5. Other duties, as assigned.

23
24 On May 19, 2002, and effective through July 8, 2006, the Employer also created
25 a classification specification for Weisberger for the position of "Coordinator Learning

¹¹ Neither party explained why the Employer posted the notice even though Weisberger was already employed in the position.

¹² Neither party clarified the term "Director," and neither explained whether that job title was distinct from Weisberger's position as Coordinator of Tutoring.

Resources,"¹³ which included a general description of duties and a list of specific duties and responsibilities:

GENERAL DESCRIPTION OF DUTIES:

Under general supervision, the purpose of the classification is to coordinate activities of the Learning Center and its programs, including the Math Center, Communication Skills Center, Writing Laboratory, Writing Assistance Program, or other specialties. Employees in this classification perform teaching and program management. Classification is responsible for assisting with program development/implementation, providing instruction in assigned area, developing instructional materials/resources, and coordinating peer tutoring activities. Performs related work as directed.

SPECIFIC DUTIES AND RESPONSIBILITIES:

....

Coordinates activities of The Learning Center (TLC), including the Math Center, Communication Skills Center, Writing Laboratory, Writing Assistance Program, or other program/specialty, in offering personal, career, academic and disability counseling and peer tutoring to students (i.e. – assists with development, implementation, supervision and reporting of TLC programs/services; assists in development of policies/procedures and budget preparation; ensures accurate fiscal reporting and recordkeeping of TLC patterns/trends; participates in grant writing initiatives and grant reporting; ensures a balance of services between campuses; conducts annual program reviews; coordinates activities to ensure student retention; coordinates staff/faculty to support individualized programs; coordinates assessment test development, maintenance, and evaluation; supports lab activities with other Academic Support Center units).

Provides instruction in assigned area and academic advisement to students (i.e. – teaches courses and provides individual/group tutoring in assigned specialty; recruits/hires¹⁴ tutors to assist students in [C]ollege

¹³ Weisberger testified that prior to 2002 his position of Coordinator of Tutoring did not fall within a specific classification. While the Employer classified Weisberger's official job title as Coordinator Learning Resources in 2002, it is undisputed that at all relevant times his functional job title was Coordinator of Tutoring.

¹⁴ Weisberger admitted that during his tenure he never hired tutors, but only submitted "Request to Employ" forms to the Dean.

1 courses; coordinates peer tutoring activities; provides diagnosis,
2 prescription, and personal advising for students, recommends and
3 facilitates academic accommodations, academic intervention strategies,
4 and individual academic support needs; designs/delivers workshops,
5 orientations, and presentations for classes and independent study;
6 conducts workshops on computer-oriented instruction and computer
7 literacy; assists staff, volunteers, work study students, and tutors in using
8 TLC computer lab hardware/software to provide patron assistance and
9 disabilities access use; directs students to specific instructional materials;
10 maintains an active student advisee caseload; participates in student
11 advisement and registration activities; may coordinate services for
12 students with disabilities).

13
14 Develops instructional materials and resources (i.e. – facilitates students'
15 education in math, reading, writing, and study skills using various
16 approaches; develops credit and non-credit courses;
17 previews/recommends academic support materials for purchase; selects
18 appropriate lab material; develops supplemental material to ensure
19 continuity and quality of self-paced instruction; locates, reviews, and
20 provides information on commercial instructional materials for staff;
21 maintains specialized resources for individualized instruction; ensures
22 availability of instructional worksheets; designs/revises tutoring materials).

23
24 Performs administrative tasks associated with department activities (i.e. –
25 maintains student files; collects, organizes, and disseminates information
26 as required; writes content for TLC program brochures/flyers; prepares
27 logs, annual reports, semester summaries, student records,
28 goals/outcomes, instructional materials, agendas, budget documents,
29 grant proposals, purchase requisitions, policies, procedures, reports,
30 forms, and general correspondence; receives or refers to schedules,
31 attendance records, curriculum materials, textbooks, catalogs,
32 newsletters, manuals, and reference materials; operates a computer and
33 utilizes word processing, spreadsheet, database, instructional, e-mail, or
34 other software programs).

35
36 Interacts with various agencies/individuals (i.e. – develops professional
37 awareness; attends meetings and participates in committees; consults
38 with other faculty/staff on program/planning issues; communicates with
39 supervisor, employees, other departments, students, faculty members, the
40 public, outside agencies, and other individuals to coordinate activities,
41 review status of work, exchange information, or resolve problems).

Coordinates work of assigned staff, work study students, and/or student peer tutors (i.e. – instructs assigned staff in performance of duties according to established standards; prioritizes, assigns, reviews, and coordinates work; coordinates work schedules; conducts staff meetings; assists with complex/problem situations and provides direction; responds to employee issues and concerns; interviews and recommends selection of new employees).

Maintains professional knowledge in applicable areas (i.e. – maintains a working knowledge of assigned area; researches new technologies, products, methods, trends, and advances in the profession; reads professional literature; attends conferences, workshops, and training sessions).

....

Performs miscellaneous tasks (i.e. – creates brochures/flyers; contributes information/articles to newsletters/publications; creates student “help” cards; orders supplies; enters data into computer; type documents; makes copies; schedules appointments; provides information on college services; resolves problems involving classrooms, classes, computers, facilities or environment).

Performs related duties as directed.

On July 9, 2006, and effective through December 24, 2016, the Employer updated Weisberger’s classification specification, renaming his job title as Academic Coordinator and including general duties, specific duties and responsibilities:

GENERAL DESCRIPTION OF DUTIES:

Under the general direction, the purpose of the classification is to coordinate activities pertaining to academic advisement, placement testing/assessment, academic support for at-risk students, the Peer Tutoring Program, and/or the ESL and Electronics Technology Certificate Program. Employees in this classification perform advisory work, academic placement, and educational work. Classification is responsible for coordinating advisement services, coordinating placement testing/assessment, coordinating tutorial staff, and/or teaching ESL and Electronics Technology courses. Also responsible for coordination of assigned staff. Performs related work as directed.

SPECIFIC DUTIES AND RESPONSIBILITIES:

....

Coordinates provision of academic advising services to assist students in developing academic plans of study (i.e. – assists in developing, coordinating, and managing daily operations of Advising Center; implements year-round academic advising program; recommends reinstatement or suspension of students).

Provides comprehensive academic support services to students eligible for Student Support Services grant services (i.e. – assesses, advises, and registers incoming general studies students who are not yet in Student Support Services; screens students to determine eligibility for grant services).

Coordinates remedial support for at-risk students (i.e. – identifies students at-risk; monitors academic progress of at-risk students; coordinates intervention program for students at-risk).

Provides support for faculty advising system (i.e. – trains faculty and professional staff advisors; instructs/aids faculty with student advisees; develops training materials for faculty advisors; coordinates production and distribution of advisement information sheets; coordinates advising component of orientation and registration).

Coordinates academic services relating to placement testing/assessment (i.e. – administers and coordinates placement testing; scores/assesses writing placement exams).

Coordinates the Peer Tutoring Program (i.e. – coordinates tutorial assistance for participants; trains, instructs, hires,¹⁵ and coordinates activities of tutors; designs, creates, and teaches peer tutoring training curriculum; compiles/publishes Peer Tutoring Program publicity; maintains tutorial records).

Coordinates ESL and Electronics Technology Certificate Program (i.e. – establishes training goals; recruits, assesses, counsels, and advocates [for] students in program; teaches courses in program; works with Office of Grants & Contracts to obtain/administer grants for program; writes grant

¹⁵ Although the Employer updated Weisberger's job description, it continued to list "hir[ing]" tutors as one of his duties. As stated in footnote 14, above, Weisberger never hired tutors during his tenure as Coordinator of Tutoring.

1 proposals and administers grants; coordinates job development for
2 program graduates; arranges company visits).

3
4 Performs academic advisement to caseload of students (i.e. – conducts
5 career advising, career assessments, and transfer advising; screens,
6 interviews, evaluates, and processes incoming students for general
7 studies competency and registers into appropriate academic curricula;
8 evaluates admission applications, registration documents, transfer
9 transcripts, placement test scores, and transfer credits; provides college
10 transcripts and schedules for students; re-evaluates transcripts for change
11 of major or further credit; assists students in selecting appropriate or major
12 or field of study; links students career interests to choice of major; advises
13 students regarding their academic plan, course selection/sequencing,
14 curriculum/concentration selection and changes, and transition issues;
15 provides information regarding course degree requirements and transfer
16 requirements; monitors academic progress of students; assists students in
17 registering, adding, dropping, or withdrawing from courses; assists
18 students in obtaining developmental and tutorial assistance; refers
19 students to additional instructional material, agencies, or other resources;
20 advises students of financial aid procedures; assigns academic advisors
21 and notifies students/faculty of advisor assignments; alerts faculty peer
22 advisors of students experiencing academic difficulties; prepares/analyzes
23 graduation reviews; prepares end-of-semester reports).

24
25 Plans, conducts, or participates in related academic programs (i.e. –
26 presents workshops on academic skills necessary for college success;
27 cooperates with project staff in delivering a unified educational support
28 program; develops/coordinates mentoring program for baccalaureate-level
29 students at local institution to serve as mentors to college students;
30 coordinates special summer credit courses for project participants).

31
32 Performs administrative tasks associated with department activities (i.e. –
33 maintains student files, counseling notes, and contact logs which
34 document student advisement sessions; conducts research; provides data
35 on students and program components to assist director with proposals

1 and reports;¹⁶ prepares semester summaries, advisement summaries,
2 incident reports, student records, degree audits, individual education
3 plans, instructional materials, workshop handouts, registration forms,
4 drop/add forms, recommendation letters, training manuals, statistical
5 analyses, purchase orders, grant proposals/applications, charts, flyers,
6 logs, reports, forms, and general correspondence; receives or refers to
7 staff reports, enrollment reports, students at risk reports, attendance
8 reports, transcripts, test/exam materials, applications, general studies
9 assessments, career assessments, study skills inventories, student
10 profiles, registration forms, disability documents, psychology evaluations,
11 insurance forms, advisement updates, job placement reports, time sheets,
12 schedules, course descriptions, logs, policies, publications, handbooks,
13 catalogs, manuals, and reference materials; operates a computer and
14 utilizes word processing, spreadsheet, database, computer-aided
15 instruction, desktop publishing, e-mail, or other software programs).

16
17 Interacts with various agencies/individuals (i.e. – attends meetings; works
18 with deans and department heads to develop resources/procedures for
19 improving participants' achievement; communicates with supervisor,
20 employees, other departments, students, interns, tutors, faculty members,
21 other academic institutions, crisis centers, the public local businesses,
22 outside agencies, and other individuals to coordinate activities, review
23 status of work, exchange information, or resolve problems).

24
25 Coordinates activities of student tutors, student workers, interns, or other
26 assigned staff (i.e. – provides training and guidance to student tutors;
27 instructs assigned staff in performance of duties according to established

¹⁶ Weisberger testified that at all relevant times he produced end-of-the-year TASC reports that included quantitative data and qualitative analyses of that data. However, he later admitted that while he prepared those reports for "a number of years," at some point his duties changed and he only submitted quantitative data reports to the Dean. Specifically, Weisberger last recalled producing a qualitative analysis report in 2014. Buglione testified that Weisberger only provided her with quantitatively "clean data" reports which included things like "the number of hours and number of students," but he never provided her with qualitative analysis of that data. Buglione also testified that she was responsible for producing qualitative analyses until December of 2015. Based on the totality of the evidence, I partially credit Weisberger's testimony, finding that prior to 2014, he provided both Dean Buglione and Dean Bossingham with reports on quantitative data and qualitative analysis of that data. However, I find that at some point in 2014, he stopped producing qualitative analyses reports and only produced reports related to quantitative data. Last, I find that Buglione began producing qualitative data analyses in 2014, and stopped performing that duty in December of 2015.

standards; plans the work of others and allocates personnel; prioritizes, assigns, reviews and coordinates work; assists with complex or problem situations and provides direction; responds to employee issues and concerns; interviews and recommends selection of new employees).

Maintains professional knowledge in applicable areas (i.e. – maintains a working knowledge of assigned area; researches new trends and advances in the profession; reads professional literature; attends workshops and training sessions).

....

Performs miscellaneous tasks (i.e. – assists testing center with exam administration as needed; administers placement tests on an individual basis; provides translation for international students; supports recruitment activities through telemarketing; enters transfer credits on computer system; secures office at end of workday; answers telephones and provides information).

Performs related duties as directed.

Weisberger's E7 Job Description

At some point between July 1, 2014 and March 31, 2015, the Employer and the Union exchanged draft terms for Weisberger's "E7 Professional Staff Position Description" (E7)¹⁷ to update his responsibilities as Coordinator of Tutoring. One iteration of the draft E7 included the following duties for Weisberger: direct activities of the College's Holocaust Center;¹⁸ provide training at the New Bedford and Attleboro sites; participate in the monitoring of the TASC budget; and approve the weekly payroll for the TASC budget.

At some point during negotiations over the E7, Weisberger filed a grievance

¹⁷ Neither party identified whether E7 stands for something specific.

¹⁸ On retiring in September of 2015, the College employed Weisberger as the Director of the Holocaust Center and also as a part-time, adjunct professor.

1 challenging the Employer's description of his proposed job duties and responsibilities.¹⁹

2 Subsequently, the parties settled the grievance,²⁰ and on March 31, 2015, agreed to a
3 final version of Weisberger's E7 that removed all budgetary duties and excluded
4 Holocaust Center activities. Instead, the E7 listed the following responsibilities:

5 Responsibilities:

6 1. Recommend, train and supervise peer tutors as hired by the Dean

7 A. Recruit, train and supervise peer tutors including those who will
8 work in content areas, Quest tutors and Supplemental Instruction
9 Leaders as well as those who work to meet the needs of all BCC
10 locations[;]

11 B. Provide training and ongoing supervision of these tutors and
12 facilitate the process of College Reading and Learning Association
13 (CRLA) Tutor Certification[;]

14 C. Function as a liaison between tutors, learning specialist, faculty,
15 professional staff and administrators[;]

16 D. Work with selected tutors on either a contract-learning basis or
17 with Cooperative Education interns in the areas of pedagogy and
18 learning theory pertaining to tutoring, as needed[.]

19
20 2. Manage the operation of TASC

21 A. Oversee and work to develop the self-directed learning material
22 of TASC[;]

23 B. Facilitate bi-monthly coordinators meetings; ensure the
24 production and distribution of minutes[;]

25 C. Develop TASC resources including grant writing and other
26 strategies[;]

27 D. Prepare and submit monthly reports for TASC activities related
28 to this E7[.]

29
30 3. Provide direct student services

31 A. Work with individual tutees in the areas of History and Social
32 Sciences[;]

33 B. Provide academic advising to an assigned number of students[.]
34

¹⁹ Neither party submitted a copy of the grievance into evidence.

²⁰ Neither party offered a copy of the settlement agreement into evidence.

1 4. Provide faculty development through resources on teaching and
2 Learning

3 A. Work with [College] faculty and staff as a resource in the areas
4 of teaching and learning through consultation, workshops, seminars
5 and making resources available from the TASC collection of study
6 skill and academic support materials[.]

7
8 5. Provide Services to the [C]ollege

9 A. Participate in the work of [C]ollege committees as assigned by
10 the [C]ollege and/or as may be beneficial to the operation of
11 TASC[.]

12 6. Participate in the Lash Division and Learning Commons²¹ program
13 development

14 A. Regularly attend division and Learning Commons meetings[.]

15
16 7. Professional development through attendance at professional
17 conferences and participation in relevant professional organizations[.]

18
19 8. Carry out responsibilities as assigned by the Dean of the Lash Division
20 in accordance with the collective bargaining agreement[.]

21
22 **Weisberger's Retirement and Argotsinger's Promotion**

23 When Weisberger retired on September 1, 2015, the Employer promoted Chad
24 Argotsinger (Argotsinger) to Acting Coordinator of Tutoring.²² Argotsinger remained a
25 member of the bargaining unit in that position and performed all but six of Weisberger's

²¹ The Learning Commons is a teaching model used by the College to provide academic support to students in the areas of content tutoring (TASC), writing tutoring (Writing Center), supplemental instruction, and study skills. At some point after Weisberger's retirement in September of 2015, the Employer reorganized the Learning Commons by increasing the number of SIs and site coordinators, hiring professional tutors who belonged to the bargaining unit, and merging the TASC with the Writing Center. The positions of site coordinator and professional tutor are bargaining unit positions.

²² Neither party submitted into evidence the job description for the position of Acting Coordinator of Tutoring. At the hearing, Argotsinger testified that as Acting Coordinator, he followed the same job description as Weisberger.

1 former duties between September 1 and December 21, 2015.²³ The six duties that
2 Argotsinger did not perform as Weisberger's successor were performed by Buglione on
3 a temporary basis during that same time, which were: (1) supervising the site
4 coordinator; (2) making hiring recommendations; (3) coordinating with College deans to
5 determine supplemental instruction; (4) submitting tutor payroll to the appropriate Dean;
6 (5) and, producing quantitative data analyses on student success, retention and
7 persistence rates. When Weisberger retired, the Employer permanently reassigned two
8 of his former duties to the site coordinator and not Argotsinger. Those duties were
9 managing the day-to-day tutoring operations at the TASC, and providing content-based
10 tutoring to students.

11 **The Director of Tutoring and Academic Support Position**

12 On or about October 26, 2015, the Employer posted a job description for a new
13 Director of Tutoring and Academic Support position that included the following duties,
14 responsibilities, and supervision:

15 STATEMENT OF DUTIES: Responsible for the [C]ollege's academic
16 support services including the assessment of needs and the design,
17 implementation, assessment of programs and services to improve the
18 retention and academic success of all students. In consultation with
19 faculty, professional staff, and administrators direct a comprehensive and
20 integrated tutoring and academic support program to increase academic
21 success across the curriculum through strategies that engage a diverse
22 range of students.
23

²³ The Employer first hired Argotsinger as the Special Programs Coordinator in or about January of 2015. He kept that position until his promotion to Acting Coordinator of Tutoring in September of 2015. Both positions of Special Programs Coordinator and Acting Coordinator of Tutoring were bargaining unit positions.

1 SUPERVISION RECEIVED: Report to the Dean, Lash Division for
2 Teaching and Learning.

3
4 SUPERVISION EXERCISED: Special Programs Coordinator, Staff
5 Associates and Tutors.

6
7 DUTIES AND RESPONSIBILITIES:

- 8 • Oversee the vision, operation and growth of the Learning
9 Commons models to provide efficient and effective academic
10 support services across all [C]ollege locations.
- 11 • Oversee payroll and manage budgeting processes.
- 12 • Develop various, evidence-based strategies including
13 Supplemental Instruction, Group Tutoring, Study Skills groups and
14 online tutoring.
- 15 • Oversee marketing and communications in conjunction with the
16 Director of the Writing Center and Learning Commons staff.
- 17 • Collaborate with staff, faculty and student leaders across all college
18 units.
- 19 • Oversee technology-related products that support tutoring.
- 20 • Design, implement and assess tutor training.
- 21 • Develop and ensure the implementation of policies and procedures
22 working cooperatively with all stakeholders.
- 23 • Oversee the College Reading and Learning Association (CRLA)
24 and/or other certifications and awards for the [C]ollege in
25 conjunction with the Director of the Writing Center and ensure
26 alignment with training.
- 27 • Oversee evidence-based assessment and research and other
28 scholarly ventures related to Tutoring and Academic Support.
- 29 • Identify and develop emerging trends, best practices, and research
30 results related to student success issues and share this knowledge
31 within and outside the [C]ollege community.
- 32 • Other duties as assigned by the Dean.

33
34 The Union did not become aware of the new Director of Tutoring and Academic
35 Support position until on or after the October 26, 2015 posting date.

36 By letter dated December 21, 2015, the Employer promoted Argotsinger to
37 Director of Tutoring and Academic Support, where he immediately assumed the five job
38 duties that Buglione had been performing temporarily in lieu of Weisberger's retirement.

1 While he did not assume any of the site coordinator's duties, he did assume new duties
2 from Buglione that Weisberger had never previously performed, such as: hiring and
3 evaluating all unit professionals, site coordinators and professional tutors; supervising
4 the Writing Center; determining the DWFI rate; and establishing policy for the Learning
5 Commons.

6 As Director, Argotsinger currently oversees the Learning Commons; establishes
7 policy for the Learning Commons; hires and evaluates tutors and SIs; determines the
8 DWFI rate; and approves attendance and payroll for all peer tutors, all site coordinators.
9 Neither he nor Weisberger performed these duties while they were in the bargaining
10 unit. However, once the Employer promoted Argotsinger outside of the unit on
11 December 21, 2015, it transferred to him the following E7 duties that were previously
12 performed by Weisberger: (1) train and supervise peer tutors; (2) grant writing; (3)
13 prepare and submit monthly reports for content-tutoring activities; (4) work with faculty
14 to develop content-based tutoring; and (5) participate in College committees related to
15 content-based tutoring. When the Employer promoted Argotsinger out of the bargaining
16 unit, it also transferred to him the following five unit duties that Buglione had performed
17 temporarily between September 1 and December 21, 2015: (1) supervise the site
18 coordinator; (2) make hiring recommendations; (3) coordinate with College deans to
19 determine supplemental instruction; and (4) submit tutor payroll to the appropriate
20 Dean; and, (5) produce quantitative data analyses on student success, retention and
21 persistence rates. In total, the Employer transferred ten bargaining unit duties to
22 Argotsinger on December 21, 2015.

DECISION**Timeliness**

The Commonwealth Employment Relations Board (CERB) holds that “except for good cause shown, a charge of prohibited practice must be filed with the [DLR] within six months of the alleged violation.” See 456 CMR 15.04. Absent a showing of good cause, a charge must either be filed within six months of the alleged violation, or within six months of the time at which the charging party knew or should have known about the incident in order to be timely. See 456 CMR 15.04; see also Felton v. Labor Relations Commission, 33 Mass. App. Ct. 926 (1992); Town of Lenox, 29 MLC 51, MUP-01-3214 and MUP-01-3215 (September 5, 2002); citing Town of Dennis, 26 MLC 203, 205, MUP-1868 (April 21, 2000)). An employer can claim untimeliness as an affirmative defense if it is able to show that the charging party had knowledge of the alleged violation prior to the expiration of the six month limitations period. Diane McCormick v. Labor Relations Commission, 412 Mass. 164, 171, n.13 (1992); Commonwealth of Massachusetts, 35 MLC 268, 269, SUP-07D-5371 (Dec. 31, 2008); Town of Dennis, 28 MLC 297, 301, MUP-2634 (April 3, 2002).

The Employer argues that the Union’s charge is untimely based on the Union’s participation in drafting Weisberger’s E7 which changed his duties as Coordinator of Tutoring. Specifically, the Employer contends that between July 1, 2014 and March 31, 2015, the Union became aware that the Employer was going to transfer Weisberger’s budgetary responsibilities to Buglione on March 31, 2015 because the final draft of the E7 permanently removed those duties from his job description. Further, when

1 Weisberger signed the E7 he had responsibilities as a Union official and Strategic
2 Action Coordinator for the Union's Executive Committee, the Employer asserts that the
3 Union had to have known that Buglione would be performing those duties effective
4 March 31, 2015 when it issued the E7.

5 Concerning the duties that the Employer had transferred to Buglione on a
6 temporary basis between September 1 and December 21, 2015 (i.e., making hiring
7 recommendations, coordinating with College deans to determine supplemental
8 instruction; supervising site coordinators, and producing quantitative analyses of student
9 success, retention and persistence rates), the Employer argues that Union should have
10 known about the temporary transfer of these duties on September 1, 2015, because
11 that is the day when Weisberger retired.

12 In the alternative, the Employer argues for dismissal of the Charge based on the
13 various changes to Weisberger's duties and responsibilities over his 30-year tenure.
14 For example, the College established a new SI program in or around 1990—five years
15 after Weisberger was hired as Coordinator of Tutoring. Although this new program
16 changed Weisberger's duties by requiring him to supervise the work of the SIs, the
17 Union never filed a Charge disputing the change. Thus, because the Union knew about
18 these changes decades ago but failed to take appropriate action, the Employer
19 maintains that the Charge is untimely.

20 **1. Change to Weisberger's Job Duties**

21 First, I reject the Employer's argument that the Union's alleged knowledge about
22 changes to Weisberger's job duties over his 30-year tenure as Coordinator of Tutoring

1 warrants dismissal. The Complaint does not allege that the Employer violated the Law
2 by unilaterally changing Weisberger's job duties. Rather, it only alleges that the
3 Employer unlawfully transferred those duties to non-unit personnel. Thus, I find no
4 merit to the Employer's argument on this issue.

5 **2. Weisberger's Budgetary Duties**

6 Next, the evidence shows that the Union was aware of the Employer's transfer of
7 Weisberger's budgetary duties to Buglione in March of 2015. Specifically, on March 31,
8 2015, the Employer removed all of Weisberger's budgetary duties from his E7 and
9 transferred them to Buglione on a permanent basis. The Union knew or should have
10 known that the Employer had transferred all of Weisberger's budgetary duties to
11 Buglione on March 31, 2015 based on the parties' negotiations over the E7, their
12 agreement on its final terms, and Weisberger signing the document. Even if the Union
13 was unaware that Buglione had assumed all of Weisberger's budgetary duties in March
14 of 2015, it should have known that she was performing those duties when Weisberger
15 retired in September of 2015 because Argotsinger was not performing those duties in
16 his capacity as Acting Coordinator of Tutoring. In fact, Argotsinger conceded that he
17 performed "the same [E7] job description" as Weisberger while he was Acting TASC
18 Coordinator.

19 Based on this evidence, I find that the Union's Charge is untimely as it relates to
20 the Employer's transfer of Weisberger's budgetary duties to Buglione on March 31,
21 2015 because the Union filed the Charge more than six months after that date. See

1 Diane McCormick v. Labor Relations Commission, 412 Mass. at 171, n.13;
2 Commonwealth of Massachusetts, 35 MLC at 269.

3 **3. Weisberger's Qualitative Analysis Duties**

4 Pursuant to Weisberger's 2006-2016 classification specification, the Employer
5 required him to perform certain administrative tasks, including production of quantitative
6 and qualitative reports. Specifically, that classification specification required Weisberger
7 to:

- 8 • Provide data on students and program components to assist
9 director with proposals and reports; [and]
- 10 • Prepare semester summaries, advisement summaries, incident
11 reports, student records, degree audits, individual education plans,
12 instructional materials, workshop handouts, registration forms,
13 drop/add forms, recommendation letters, training manuals,
14 statistical analyses, purchase orders, grant proposals/applications,
15 charts, flyers, logs, reports, forms, and general correspondence.
16

17 Pursuant to his E7, the Employer also required Weisberger to "prepare and
18 submit monthly reports for TASC activities." Between 1985 and 2014, Weisberger
19 exclusively produced qualitative data analyses pursuant to his job description. He also
20 produced quantitative data analyses from 1985 until his retirement in September of
21 2015. However, the record shows that Weisberger stopped producing qualitative data
22 analyses in 2014, when Buglione began performing that duty until December of 2015.
23 There is no evidence that the Union knew about this change in 2014. Even when the
24 parties were negotiating the E7 between July of 2014 and March of 2015, the Employer
25 failed to show any part of the parties' bargaining history that supports its contention that
26 the Union was aware of the change to Weisberger's qualitative data analysis duty in

1 2014. Further, nothing in Weisberger's final E7 specifies whether the Employer intended
2 to limit his duty of "prepar[ing] and submit[ting] monthly reports for TASC activities" to
3 quantitative analyses, qualitative analyses or both. Rather, the Union did not become
4 aware of the change until almost two months after Weisberger's retirement, when the
5 Employer issued its October 26, 2015 posting for the Director position, which included
6 "evidence-based assessment and research" as part of that position's duties and
7 responsibilities.

8 Based on this evidence, I find that the Union's Charge is timely as it relates to the
9 issue of qualitative data analyses because the Employer cannot show that the Union
10 had knowledge of this transfer prior to the expiration of the six month limitations
11 period. See Diane McCormick v. Labor Relations Commission, 412 Mass. at 171, n.13
12 (1992); Commonwealth of Massachusetts, 35 MLC at 269.

13 **4. Buglione's Temporary Duties**

14 Additionally, I find no evidence that the Union was aware of the Employer's
15 temporary transfer of Weisberger's duties to Buglione prior to October 26, 2015.
16 Besides Weisberger's budgetary duties, nothing in his E7 showed that the Employer
17 had transferred or intended to transfer his other duties to non-unit personnel (i.e.,
18 making hiring recommendations, coordinating supplemental instruction with deans,
19 supervising site coordinators, or producing data analysis). Nor is there any evidence
20 that Buglione or anyone else from the College met with the Union or otherwise notified it
21 that the Employer had actually transferred some of Weisberger's duties to Buglione on a
22 temporary basis on September 1, 2015. Instead, the Union only became aware of

1 these changes on October 26, 2015, when it first read the Employer's posting for the
2 non-unit position of Director of Academic Tutoring and Support, which listed many of
3 Weisberger's former duties. Based on this evidence, it was reasonable for the Union to
4 believe that when the Employer promoted Argotsinger to Acting Coordinator of Tutoring
5 in September of 2015, Argotsinger would continue to make hiring recommendations,
6 coordinate with deans on supplemental instruction, and produce data analyses as
7 Weisberger had done before him. Thus, I find that the Union's Charge is timely as it
8 relates the Employer's temporary transfer of bargaining unit duties to Buglione in
9 September of 2015 because the Union did not know about this transfer until it saw the
10 October 26, 2015 posting for the Director of Tutoring and Academic Support.

11 Because I have found the Union's Charge to be untimely only as it relates to
12 Weisberger's budgetary duties, I next consider whether the Employer's transfer of
13 Weisberger's remaining duties, including those transferred to Buglione on a temporary
14 basis, violated the Law.

15 **Transfer of Unit Work to Non-Unit Personnel**

16 Section 10(a)(5) of the Law requires a public employer to give the exclusive
17 collective bargaining representative of its employees prior notice and an opportunity to
18 bargain before transferring bargaining unit work to non-bargaining unit personnel.
19 Commonwealth of Massachusetts v. Labor Relations Commission, 60 Mass. App. Ct.
20 831 (2004); City of Boston, 26 MLC 144, MUP-1085 (March 10, 2000); Town of
21 Bridgewater, 25 MLC 103, 104, MUP-8650 (Dec. 30, 1998). The CERB holds that the
22 transfer of bargaining unit work to non-bargaining unit members is a violation of Section

1 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. City of New Bedford, 15 MLC
2 1732, 1736-37, MUP-6488 (May 31, 1989); City of Boston, 6 MLC 1117, 1121, MUP-
3 2863 (June 4, 1979); Town of Andover, 4 MLC 1086, 1087, MUP-2358 (June 24, 1977);
4 Town of Danvers, 3 MLC 1559, 1576, MUP-2292 and 2299 (April 6, 1977). To
5 determine whether a public employer has unilaterally transferred bargaining unit work to
6 non-unit personnel, the union must establish that: (1) the employer transferred
7 bargaining unit work to non-unit personnel; (2) the transfer of unit work to non-unit
8 personnel had an adverse impact on individual employees or the unit itself; and (3) the
9 employer failed to give the union prior notice and an opportunity to bargain over the
10 decision to transfer the work, and the impacts of that decision. Commonwealth of
11 Massachusetts, 60 Mass. App. Ct. at 833 Higher Education Coordinating Council
12 (HECC), 23 MLC 90, 92, SUP-4090 (Sept. 17, 1996); City of New Bedford, 15 MLC at
13 1736.

14 Here, the Employer argues that unlike Argotsinger, Weisberger never made
15 actual hiring decisions of any tutors, and did not select a majority of the SIs because
16 those selections were made by faculty members. Weisberger never oversaw the
17 operations at the College's satellite campuses; and, while he worked with the TASC site
18 coordinator, he never hired, supervised or evaluated them. Nor did he ever approve
19 any time sheets for unit members, establish College policy, or exercise authority over
20 the Writing Center. Additionally, the parties also declined to include Smart Thinking
21 duties in his final E7. Thus, the Employer maintains that because Weisberger never
22 performed these duties, there is no unlawful transfer of bargaining unit work.

1 The Union argues that the Employer transferred nearly all of Weisberger's duties
2 and responsibilities to Argotsinger as Director of Tutoring and Academic Support. It
3 also argues that despite Argotsinger's additional managerial duties to hire tutors and
4 SIs, that authority is immaterial to the fact that the Employer transferred bargaining unit
5 work that was previously performed by Weisberger to non-unit personnel.

6 **1. The Unlawful Transfer of Weisberger's Duties**

7 According to Weisberger's July 9, 2006 classification specification, which was
8 effective through December 24, 2016, he was responsible for at least 13 primary duties
9 and responsibilities that consisted primarily of assisting students, supervising peer
10 tutors, managing the TASC, and coordinating with faculty and deans:

- 11 1. Coordinates provision of academic advising services to assist students
- 12 in developing academic plans of study;
- 13 2. Provides comprehensive academic support services to students
- 14 eligible for Student Support Services grant services;
- 15 3. Coordinates remedial support for at-risk students;
- 16 4. Provides support for faculty advising system;
- 17 5. Coordinates academic services relating to placement
- 18 testing/assessment;
- 19 6. Coordinates the Peer Tutoring Program;
- 20 7. Coordinates ESL and Electronics Technology Certificate Program;
- 21 8. Performs academic advisement to caseload of students;
- 22 9. Plans, conducts, or participates in related academic programs;
- 23 10. Performs administrative tasks associates with department activities;
- 24 11. Interacts with various agencies/individuals;
- 25 12. Coordinates activities of student tutors, student workers, interns, or
- 26 other assigned staff;
- 27 13. Maintains professional knowledge in applicable areas.

28 When the Employer updated Weisberger's job description on March 31, 2015, it
29 eliminated all of his budgetary duties but kept him assigned to the following TASC
30 duties:
31

1. Recommend, train and supervise peer tutors as hired by the Dean;
2. Manage the operation of TASC, including grant writing, and preparation and submission of monthly reports for content-tutoring activities;
3. Provide direct student services;
4. Provide faculty development through resources on teaching and Learning;
5. Provide Services to the [C]ollege;
6. Participate in the Lash Division and Learning Commons program development by attending regular meetings;
7. Attend professional conferences for professional development;
8. Carry out responsibilities as assigned by the Dean of the Lash Division in accordance with the collective bargaining agreement.

When Weisberger retired, Argotsinger became Acting Coordinator of Tutoring and continued to perform the above-eight duties. However, when the Employer promoted Argotsinger to the new position of Director of Tutoring and Academic Support on December 21, 2015, it transferred to him five of the above-eight duties: (1) training and supervising peer tutors; (2) writing grants; (3) preparing and submitting monthly reports for content-tutoring activities; (4) working with faculty to develop content-based tutoring; and, (5) participate in College committees related to content-based tutoring). On December 21, 2015, the Employer also transferred to Argotsinger the duties that Buglione had been performing temporarily since Weisberger's retirement (i.e., supervising the site coordinator; making hiring recommendations; coordinating with College deans to determine supplemental instruction; submitting tutor payroll; and, producing quantitative data analyses on student success, retention and persistence rates). Based on this evidence, I find that the Union has satisfied the first prong of its prima facie case because it has shown that the Employer had transferred bargaining unit work to non-bargaining unit personnel in December of 2015.

2. Shared Work

Shared work is work that bargaining unit employees share with non-unit employees prior to the transfer. When work is shared by bargaining unit members and non-unit employees, the CERB has determined that it will not recognize the disputed work as exclusively bargaining unit work. HECC, 23 MLC at 92; City of Quincy, 15 MLC 1239, 1241, MUP-6490 (Nov. 9, 1988). Instead, the CERB looks to whether there has been a calculated displacement of bargaining unit work to determine if a transfer has occurred. City of Lawrence, 23 MLC 213, 215, MUP-9876 (March 31, 1997) (citing HECC, 23 MLC at 92).

The Employer contends that Weisberger's qualitative data analyses was shared work and did not amount to a calculated displacement of Weisberger's duties because the transfer to Buglione in 2014 was only an incidental variation based on the temporary duration of the transfer (i.e., from 2014 to 2015). Conversely, the Union asserts that the work was not shared because at all relevant times Weisberger performed this duty exclusively. While I agree that the disputed work was not shared, I disagree that it was performed exclusively by Weisberger at all relevant times.

The record shows that Weisberger exclusively performed the duty of qualitative data analyses prior to 2014. He stopped performing this duty completely in 2014, and neither he nor any other unit employee has performed it since that time. There is no evidence that Weisberger ever shared this duty with any employees inside or outside of the unit. Even when Buglione began performing this duty exclusively in 2014, nothing in the record supports the contention that Weisberger shared the duty with her at any time

1 between 2014 and his retirement on September 1, 2015. Rather, it was always
2 performed exclusively: first by Weisberger, then by Buglione, and finally by Argotsinger
3 on December 21, 2015. Consequently, I cannot find that the duty of producing
4 qualitative data analyses was shared, nor can I find that there was a calculated
5 displacement of that work because no one in the unit had performed the work since
6 2014. See City of Lawrence, 23 MLC at 215; see also HECC, 23 MLC at 92.

7 **3. Adverse Impact**

8 Next, the Union must show that the Employer's transfer of Weisberger's duties to
9 non-unit personnel had an adverse impact on individual employees or the unit itself.
10 See Higher Education Coordinating Council, 23 MLC at 92; City of Gardner, 10 MLC
11 1218, 1219-21, MUP-4917 (1983).

12 To support its contention that the transfer had no adverse effect on the
13 bargaining unit, the Employer points to its decisions to increase number of bargaining
14 unit positions and increase the number of unit members employed in those positions
15 since December of 2015. Specifically, the Employer argues that it once it expanded the
16 College's tutoring services by merging the TASC and Writing Center via the Learning
17 Commons, it needed to hire new professional tutors, writing tutors, and site
18 coordinators. The Employer maintains that there was no loss of unit work because
19 some work remained in the bargaining unit after Weisberger's retirement (i.e.,
20 overseeing the day-to-day tutoring operations at the College's campuses, and providing
21 direct content-based tutoring to students). The Union rejects these arguments, asserting

1 that the Employer's net increase in bargaining unit positions is immaterial to whether it
2 violated the Law by transferring Weisberger's duties outside of the bargaining unit.

3 I find that the Employer's reliance on the increase of bargaining unit members
4 and positions after December 21, 2015 is inapposite to whether the transfer of
5 Weisberger's duties had an adverse impact on the unit. This is because the Employer's
6 addition of new bargaining unit positions did not mitigate the permanent loss of unit
7 work experienced by the unit after the Employer promoted Argotsinger to Director in
8 December of 2015. Contrast Chief Justice for the Administration and Management of
9 the Trial Court v. Commonwealth Employment Relations Board, 79 Mass. App. Ct. 374
10 (2011) (bargaining unit of correction officers was not impacted by employer's decision to
11 hire per diem correction officers where evidence showed that work would have gone
12 undone if per diems were not hired). Thus, the Employer's December 21, 2015 transfer
13 of bargaining duties outside of the unit resulted in an adverse impact on the unit based
14 on the lost opportunity to perform the work. See Lowell School Committee, 28 MLC 29,
15 32, MUP-2074 (June 22, 2001) (citing City of New Bedford, 15 MLC at 1739)).

16 **4. Notice and Opportunity to Bargain**

17 It is undisputed that the Employer failed to provide the Union with prior notice and
18 an opportunity to bargain over the transfer. The Union did not become aware of the
19 change until October 26, 2015, at the earliest (when the Employer posted the job notice
20 for the position of Director of Tutoring and Academic Support), or December 21, 2015,
21 at the latest (when the Employer promoted Argotsinger). Because the Employer failed
22 to notify the Union and bargain over the transfer prior to implementation, I find that the

1 Union has satisfied its burden of proving that the Employer unilaterally transferred
2 bargaining unit work in December of 2015. See City of New Bedford, 15 MLC at
3 1740.

4 **5. Waiver**

5 The Employer argues that the Union waived its right to bargain over the transfer
6 based on the Union's failure to exercise its accretion rights pursuant to Section 2 of the
7 MOA. The Union argues that the Employer's position on accretion is irrelevant to
8 whether the transfer violated Section 10(a)(5) of the Law.

9 Where an employer raises the affirmative defense of waiver by contract, it bears
10 the burden of demonstrating that the parties consciously considered the situation that
11 has arisen, and that the union knowingly waived its bargaining rights. City of Newton, 29
12 MLC 186, 190, MUP-2709 (April 2, 2003) (citing Massachusetts Board of Regents, 15
13 MLC 1265, 1269, SUP-2959 (November 18, 1988)). The initial inquiry focuses upon the
14 language of the contract. Town of Mansfield, 25 MLC 14, 15, MUP-1567 (August 4,
15 1998)). If the language clearly, unequivocally and specifically permits the public
16 employer to make the change, no further inquiry is necessary. City of Worcester, 16
17 MLC 1327, 1333, MUP-6810 (October 19, 1989). If the language is ambiguous, the
18 CERB will review the parties' bargaining history to determine their intent. Town of
19 Marblehead, 12 MLC 1667, 1670, MUP-5370 (March 28, 1986).

20 The relevant language of the MOA does not expressly give the Employer the
21 right to unilaterally transfer bargaining unit work. Rather, it merely states that if the
22 Union presents the Employer with a written request to accrete a position or group of

1 positions into the bargaining unit, the parties will commence discussion and possible
2 mediation into whether accretion is appropriate. Nothing in the MOA or in any other part
3 of the parties' Agreement clearly, unequivocally or specifically permits the Employer to
4 transfer the disputed work outside of the unit without first bargaining with the Union.
5 City of Worcester, 16 MLC at 1333. Consequently, because there is no evidence that
6 the Union knowingly waived its bargaining rights, I find that the Employer is unable to
7 meet its burden of demonstrating contractual waiver. See City of Newton, 29 MLC at
8 190 (citing Massachusetts Board of Regents, 15 MLC at 1269).

9 CONCLUSION

10 The Employer violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the
11 Law when it transferred the following ten duties from the Coordinator of Tutoring
12 position to non-unit personnel at the College in December of 2015 without providing the
13 Union with prior notice and an opportunity to bargain to resolution or impasse over the
14 decision and its impacts: (1) supervising the site coordinator; (2) making hiring
15 recommendations; (3) coordinating with College deans to determine supplemental
16 instruction; (4) submitting tutor payroll to the appropriate Dean; (5) producing
17 quantitative data analyses on student success, retention and persistence rates; (6)
18 training and supervising peer tutors; (7) writing grants; (8) preparing and submitting
19 monthly reports for content-tutoring activities; (9) working with faculty to develop
20 content-based tutoring; and (10) participating in College committees related to content-
21 based tutoring. However, the Employer did not violate the Law when it transferred

1 qualitative analysis and budgetary duties from the Coordinator of Tutoring position to
2 non-unit personnel in 2014 and March of 2015, respectively.

3 REMEDY

4 The CERB fashions remedies for violations of the Law by attempting to place
5 charging parties in the position they would have been in but for the unfair labor practice.
6 Natick School Committee, 11 MLC 1387, 1400, MUP-5157 (February 1, 1985). The
7 traditional remedy where a public employer has unlawfully refused to bargain over a
8 decision to transfer unit work is an order to restore the status quo ante until the
9 employer has fulfilled its bargaining obligations, and to make all affected employees
10 whole for any economic losses they may have suffered. See Commonwealth of
11 Massachusetts, 35 MLC 105, 110, SUP-04-5054 (December 10, 2008). Here, I order
12 the Employer to restore the five duties that it transferred outside of the bargaining unit to
13 the position of Director of Tutoring and Academic Support on December 21, 2015, until
14 it has fulfilled its bargaining obligation with the Union. However, I decline to order a
15 make whole remedy because there is no evidence of an economic loss.

16 ORDER

17 WHEREFORE, based on the foregoing, it is hereby ordered that the Board of
18 Higher Education shall:

19 1. Cease and desist from:

- 20 a. Transferring bargaining unit work to non-bargaining unit employees without
21 first bargaining to resolution or impasse with Massachusetts Community
22 College Counsel (Union) over the decision to transfer the work and the
23 impacts of that decision on bargaining unit members' terms and conditions of
24 employment;

- 1
2 b. In any like or similar manner, interfering with, restraining, or coercing any
3 employees in the exercise of their rights guaranteed under the Law.
4

5 2. Take the following affirmative action that will effectuate the purposes of the Law:
6

- 7 a. Upon request, bargain in good faith with the Union to resolution or impasse
8 about the decision and impact of the decision to transfer the following duties
9 that bargaining unit member Ronald Weisberger performed prior to his
10 retirement on September 1, 2015 and the impacts of the decision on
11 bargaining unit members' terms and conditions of employment:

- 12 i. supervising the site coordinator;
13 ii. making hiring recommendations;
14 iii. coordinating with College deans to determine
15 supplemental instruction;
16 iv. submitting tutor payroll to the appropriate Dean;
17 v. producing quantitative data analyses on student success,
18 retention and persistence rates;
19 vi. training and supervising peer tutors;
20 vii. writing grants;
21 viii. preparing and submitting monthly reports for content-
22 tutoring activities;
23 ix. working with faculty to develop content-based tutoring;
24 and
25 x. participating in College committees related to content-
26 based tutoring.

- 27 b. Restore to the bargaining unit the duties referenced in paragraph 2(a) that
28 bargaining unit employee Ronald Weisberger performed prior to his
29 retirement on September 1, 2015. The obligation to restore the duties to the
30 bargaining unit shall continue until the earliest of the following conditions is
31 met:
32

- 33 i. The Union and the Board of Higher Education reach agreement
34 over the decision to transfer Weisberger's duties to non-unit
35 personnel and its impacts; or
36
37 ii. Good faith bargaining results in a bona fide impasse;
38

- 39 c. Post immediately in all conspicuous places where members of the Union's
40 bargaining unit usually congregate and where notices to these employees are

1 usually posted, including electronically, if the Board of Higher Education
2 customarily communicates with Union's employees via intranet or email, and
3 display for a period of thirty (30) consecutive days thereafter, signed copies of
4 the attached Notice to Employees; and
5

- 6 d. Notify the DLR in writing within 30 days of receipt of this Decision and Order
7 of the steps taken to comply with it.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



KENDRAH DAVIS, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.19, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for Review with the Executive Secretary of the Department of Labor Relations within ten days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties.



**THE COMMONWEALTH OF MASSACHUSETTS
NOTICE TO EMPLOYEES POSTED BY ORDER OF A HEARING
OFFICER OF THE MASSACHUSETTS DEPARTMENT OF LABOR
RELATIONS AN AGENCY OF THE COMMONWEALTH OF
MASSACHUSETTS**

A Hearing Officer of the Massachusetts Department of Labor Relations has held that the Board of Higher Education (Employer) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) when it unilaterally transferred bargaining unit work outside of the unit without first providing the Massachusetts Community College Council (Union) with notice and an opportunity to bargain about the decision and the impacts of the decision.

Chapter 150E gives public employees the right to form, join or assist a union; to participate in proceedings at the DLR; 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.

The Employer assures its employees that:

- WE WILL NOT unilaterally transfer bargaining unit work to non-unit employees;
- WE WILL NOT fail or refuse to bargain in good faith with the Union by failing to provide the Union with prior notice and the opportunity to bargain to over the decision to transfer bargaining unit work to non-unit members;
- WE WILL NOT in any like or similar manner interfere with, restrain or coerce employees in any right guaranteed under the Law.
- WE WILL take the following affirmative action that will effectuate the purpose of the Law:
 - Upon request, bargain in good faith with the Union to resolution or impasse over the decision to transfer the bargaining unit duties referenced in the Order in Case No. SUP-16-5203 to non-unit members and the impacts of that decision;
 - Restore to the bargaining unit the duties referenced in the Order in Case No. SUP-16-5203 until the earliest of the conditions reference in that Order are met;
 - Notify the DLR within thirty (30) days after the date of service of this Decision and Order of the steps taken to comply with its terms.

Board of Higher Education

Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of 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 Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).