

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of \*  
\*  
CANTON SCHOOL COMMITTEE \* Case No.: MUP-13-2797  
\*  
and \*  
\*  
CANTON TEACHERS' ASSOCIATION \* Date Issued: May 6, 2015  
\*

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Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Rebecca L. Bryant, Esq.: Representing Canton School Committee  
Richard A. Mullane, Esq.: Representing Canton Teachers' Association

HEARING OFFICER'S DECISION

Summary

1 The issue is whether the Canton School Committee (Committee) violated Section  
2 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws Chapter  
3 150E (the Law) by: 1) transferring bargaining unit work to non-unit personnel; and, 2)  
4 repudiating a Memorandum of Understanding (MOU). Based on the record and for the  
5 reasons explained below, I find that the Committee did not violate the Law and dismiss  
6 the allegations.

Statement of the Case

7 On May 1, 2013, the Canton Teachers' Association (Association) filed a charge  
8 of prohibited practice with the Department of Labor Relations (DLR), alleging that the

1 School Committee had engaged in prohibited practices within the meaning of Sections  
2 10(a)(5) and 10(a)(1) of the Law. After an in-person investigation, a DLR Investigator  
3 issued a Complaint of Prohibited Practice and Partial Dismissal on December 17, 2013.  
4 The Association did not appeal the partial dismissal. The Committee filed an answer to  
5 the complaint on December 27, 2013, and I held a hearing on October 1, 2014. On  
6 November 21, 2014, the parties filed their post-hearing briefs. Based on the record,  
7 which includes stipulated facts and documentary exhibits, and in consideration of the  
8 parties' arguments, I render the following opinion.

9 Stipulated Facts

- 10 1. The [Town] is a public employer within the meaning of Section 1 of the Law.
- 11
- 12 2. The [Committee] is the Town's collective bargaining representative for the  
13 purpose of dealing with employees of the Canton Public Schools.
- 14
- 15 3. The [Association] is an employee organization within the meaning of Section 1 of  
16 the Law.
- 17
- 18 4. The [Association] is the exclusive bargaining representative for the bargaining  
19 unit of the [Committee's] instructional staff and certain other professional  
20 employees within the Canton Public Schools.
- 21
- 22 5. John D'Auria [(D'Auria)] was the superintendent of the Canton Public Schools  
23 from July 1, 2007 until June 30, 2010.
- 24
- 25 6. Jeffrey W. Granatino [(Granatino)] has been the superintendent of the Canton  
26 Public Schools since on or about July 1, 2010.
- 27
- 28 7. The Education Cooperative (TEC) is an educational collaborative under M.G.L. c.  
29 40, Section 4E, formed by approximately 17 school districts, including Canton  
30 Public Schools, that provides educational programs and services to member  
31 districts.

- 1 8. The [Committee] and Association were parties to a collective bargaining
- 2 agreement [(CBA)] covering the bargaining unit from September 1, 2008 through
- 3 August 31, 2011 [(2008-2011 CBA)].
- 4
- 5 9. In November 2011, the parties signed a Memorandum of Agreement [(MOA)]
- 6 providing for a successor contract covering the period from September 1, 2011
- 7 through August 31, 2012 (2011-2012 Successor MOA).
- 8
- 9 10. In June – July of 2012, the parties signed an MOA providing for a successor
- 10 contract covering the period from September 1, 2012 – August 31, 2015 (2012-
- 11 2015 Successor MOA).
- 12
- 13 11. In November 2012, the parties signed a CBA for the period from September 1,
- 14 2012 – August 31, 2015 [(2012-2015 CBA)].
- 15
- 16 12. For the 2013-2014 school year, beginning in September 2013, and the 2014-
- 17 2015 school year, beginning in September 2014, the Canton Public Schools
- 18 allowed students to receive credit for certain courses available through the TEC
- 19 Collaborative taken at the students' own initiative and expense.
- 20

Relevant Contract Language

The parties' 2012-2015 CBA includes the following clauses:

**ARTICLE I**  
**RECOGNITION**

- 24 A. The Committee recognizes the Association for the purpose of collective
- 25 bargaining as the exclusive bargaining agent for professional employees during
- 26 the regular school year in the following categories: classroom teachers,
- 27 guidance counselors, speech pathologists, elementary school assistant
- 28 principals, department chairpersons and advisors, librarians, coaches, teachers
- 29 of extra-curricular activities, and school nurses.
- 30
- 31
- 32
- 33

Excluded from the bargaining unit are the Superintendent of Schools, the Assistant Superintendent of Schools, the School Business Administrator, TEAM Chairpersons, the Early Childhood Coordinator, Principals, the Nurse Leader, and all other employees of the Canton School Committee and the Town of Canton, including persons employed by Federal, Summer or Evening School Programs.

- 1 B. The Committee agrees not to bargain with any teachers' organization other than
- 2 that designated as the exclusive bargaining agent pursuant to Chapter 150E (the
- 3 Canton Teachers' Association). The Committee further agrees not to negotiate
- 4 with any other teachers' organization in regard to changes in wages, hours, and
- 5 other conditions of employment to become effective during the term of this
- 6 Agreement.
- 7
- 8 C. Should a new position be created during the term of this Agreement, the parties
- 9 agree to meet to negotiate as to whether said position is to be included in the
- 10 bargaining unit. If no agreement is reached, the parties agree to jointly submit
- 11 the matter to arbitration as providing in this Agreement.
- 12
- 13 D. Unless otherwise indicated, the employees in this bargaining unit will be
- 14 hereinafter referred to as teachers.
- 15

**ARTICLE II**  
**MANAGEMENT RIGHTS**

- 16
- 17
- 18
- 19 A. Nothing in this Agreement shall be construed in any way to alter, modify, change
- 20 or limit the authority and jurisdiction of the School Committee, as provided by the
- 21 Massachusetts Constitution, the General Laws of Massachusetts, or the
- 22 decisions of the Supreme Judicial Court of the Commonwealth of Massachusetts,
- 23 or the laws of the United States.
- 24
- 25 B. During the term of this Agreement, except as provided otherwise herein, the
- 26 determination and administration of education policy, the operations of the
- 27 schools and direction of the staff are vested exclusively in the School Committee.
- 28 However, should the School Committee contemplate a substantial change of
- 29 policy not covered by this Agreement, which affects the wages, hours, and other
- 30 conditions of employment of the employees covered by this Agreement, then the
- 31 School Committee shall notify the Association regarding said change and shall
- 32 meet to negotiate concerning said change. Nothing herein shall be construed to
- 33 require the School Committee to submit to arbitration, as provided by this
- 34 Agreement, any matter so discussed.
- 35

**ARTICLE XXXV**  
**DURATION**

- 36
- 37
- 38
- 39
- 40
- 41
- 42 A. This Agreement shall become effective on September 1, 2012 and continue in
- effect to and including August 31, 2015.

1  
 2 B. The within Agreement represents the entire agreement of the parties. Any  
 3 agreement reached during the term of this Agreement by and between the  
 4 parties will be reduced to writing, signed by the Committee and the Association,  
 5 and become an addendum to this Agreement.<sup>1</sup>  
 6

Opinion

7 **Factual Background**

8 2010 Memorandum of Agreement

9 In a March 2010 meeting with the Association, Superintendent D'Auria raised the  
 10 idea of allowing high school students to take TEC online courses for credit. Patricia  
 11 Phalan (Phalan), Association President, advised D'Auria that the Association  
 12 considered that idea to be against the 2008-2011 CBA. D'Auria agreed with Phalan and  
 13 offered to have Committee counsel draft a memorandum of agreement to reflect that  
 14 understanding. Affirming their conversation, by email dated March 19, 2010, Phalan  
 15 advised D'Auria, in relevant part:

16 In regard to our conversation yesterday about our understanding [of] the  
 17 TEC situation, please have Mike<sup>2</sup> draw up a letter of understanding and I  
 18 will pass it along to Dorine.<sup>3</sup> Just so we are clear, any Canton teacher  
 19 who wishes, on their own time and not during the Canton school day, can  
 20 work for TEC and teach a TEC course. Any Canton child who wishes can  
 21 pay to take a TEC course [and] take a TEC course. In neither scenario,

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<sup>1</sup> The parties' 2008-2011 CBA includes the same language as Article XXXV(B) in the 2012-2015 CBA.

<sup>2</sup> Michael Loughran was Committee counsel at the time.

<sup>3</sup> Dorine Levasseur is the Massachusetts Teachers Association consultant to the Association.

1           nor when a Canton student takes a TEC course taught by anyone, will  
2           said course be accepted by the Canton Public Schools for Canton credit.  
3  
4           Is this your understanding from yesterday's meeting?  
5  
6           By reply e-mail on or about March 19, 2010,<sup>4</sup> D'Auria stated that he shared the  
7           same understanding as Phalan. On March 31, 2010, D'Auria e-mailed Phalan,  
8           attaching a draft memorandum of understanding (MOU) and stating that, "[t]he only  
9           change from what you and I had already discussed is an added caveat that this  
10          should/could be reviewed when the contract is open again next year."<sup>5</sup>  
11          In response, Phalan replied by e-mail on March 31, 2010, advising D'Auria to,  
12          "Take out the caveat." By that same e-mail, Phalan also stated,  
13          The [Association] is now and fully expects to remain the "exclusive  
14          bargaining agent for professional employees during the regular school  
15          year" (Article I, paragraph A). I cannot foresee the [Association] ever  
16          agreeing to allowing teachers outside the membership of the [Association]  
17          being allowed to teach courses that will be accepted for Canton credit.  
18          Your argument regarding SPED students at out of district placements  
19          does not apply because their placement is mandated by law.

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<sup>4</sup> Although D'Auria's response is not dated, Phalan testified that he responded on the same day.

<sup>5</sup> The "added caveat" language to which D'Auria referred in the draft MOU provides, "It is understood that during negotiations for the successor agreement, the parties will examine this MOU to determine whether this provision needs to be modified in any way. Each party reserves all of its rights to negotiate in good faith over this memorandum of understanding."

1 In or about April of 2010, the Committee and Association subsequently entered  
2 into a MOU regarding TEC online courses (TEC MOU), which provided:<sup>6</sup>

3 The Canton School Committee and the Canton Teachers Association  
4 hereby agree to the following regarding the TEC Online Academy  
5 sponsored by The Education Cooperative of Dedham, MA:  
6

- 7 • Any Canton Public School Teacher who would like to teach an  
8 online course sponsored by The Educational Collaborative (TEC)  
9 may do so as long as such teaching takes place on his or her own  
10 time and not during the Canton school day.
- 11
- 12 • If a student successfully completes a TEC online course, Canton  
13 Public Schools will not accept credit for such course nor will  
14 participation in the course be accepted as fulfilling any of the  
15 graduation requirements of Canton Schools.
- 16
- 17 • While students may enroll in TEC online courses, as they can in  
18 any other enrichment opportunity, any cost associated with such  
19 course work will be the responsibility of the individual student.
- 20

21 The 2013 Events

22 In early 2013, teachers from Canton High School advised Phalan that Derek  
23 Folan (Folan), the high school principal, was considering offering online courses to  
24 students through TEC. By email to Granatino and Folan, dated January 7, 2013,  
25 Phalan advised:

26 I have been told that CHS and CPS are in consultation with TEC to  
27 provide online instruction to students of Canton High School. Please  
28 know that only [Association] members are contractually approved to  
29 provide instruction to CPS students for CPS credit. Attempts to allow

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<sup>6</sup> Reuki Schutt (Schutt), at all relevant times a member of the Committee, signed the MOU on behalf of the Committee on April 8, 2010. On April 13, 2010, Phalan signed the MOU on behalf of the Association.

1 others to provide such instruction are in direct violation of our CBA.  
2 Please advise as soon as possible.

3  
4 By reply email that same day, Granatino stated, in pertinent part:

5  
6 ...As you know, the Canton schools are a member of the TEC  
7 collaborative. We are also members of CHARMS.<sup>7</sup> TEC has run an  
8 online academy for a few years that member schools' students can access  
9 if there is a desire and it is open to non-member schools as well. To date,  
10 I believe we are the only member school who has not had a student take  
11 part in TEC online courses, but there have been CTA members who have  
12 created courses at TEC and taught them.

13  
14 I know we had a brief discussion in the past on contract language, but  
15 never delved too deep into it [because] there were no students involved.  
16 Just so I can be looking at the same language can you tell me the  
17 article/section that notes "only CTA member[s] are contractually approved  
18 to provide instruction to CPS students for CPS credit."

19  
20 Phalan responded to Granatino by e-mail on January 8, 2013, stating, in full:

21  
22 As has been stated in the past, CTA members have the exclusive right to  
23 teach the schoolchildren for credit in the Canton Public Schools as  
24 employees of the Canton Public Schools. This is stipulated in the  
25 recognition clause of the CBA Article 1.

26  
27 While a Canton teacher may elect to teach a course elsewhere, including  
28 through an agency like TEC, it would be on their own time as an employee  
29 of TEC and not the CPS. Therefore, any credits derived from that course  
30 would not be acceptable for credit through the CPS.

31  
32 On March 14, 2013, Phalan emailed the following to Granatino:

33 Please inform me where we stand currently with TEC regarding their  
34 providing courses for Canton credit. In particular, I would be interested to  
35 know if you have had, or are scheduled to have, conversations with TEC  
36 about providing such courses.

37  
38 Later that day, Granatino replied to Phalan's e-mail stating, in relevant part:

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<sup>7</sup> CHARMS is a multi-district collaborative that serves the special education needs of students in Canton, Sharon and Stoughton, Mass.

1  
2 ...As you are aware, TEC has offered online courses for TEC-member  
3 schools as well as for students who come from non-TEC schools for some  
4 time. As we discussed a few weeks back, we are looking at giving CHS  
5 students the ability to consider enrolling in some of the courses. This  
6 would afford our students the same opportunity that other TEC schools  
7 are able to provide for their students.

8  
9 I have not scheduled a conversation with TEC about providing such  
10 courses, because they are providing them regardless of our involvement.  
11 All TEC members are aware of the offerings each year that are part of  
12 their online program and each district varies in how their students enroll in  
13 the program.

14  
15 That is where we are at this point.

16  
17 Also on March 14, 2013, Folan presented the Canton High School Program of  
18 Studies for the 2013-2014 school year at a Committee meeting.<sup>8</sup> The Program of  
19 Studies includes the following language in reference to the TEC Online Academy:

20 TEC Online Academy offers a selection of “virtual courses” taught by area  
21 instructors and available to students attending TEC member school  
22 districts including Canton. These TEC courses are rigorous learning  
23 experiences equivalent to a “major” course at Canton High School....  
24 Students must complete their commitment to the course and their grade  
25 will be included on the CHS transcript. TEC courses will not be granted  
26 credit if they are being taught at CHS and/or recently have been taught at  
27 CHS.<sup>9</sup>  
28

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<sup>8</sup> Granatino testified that Folan “probably” provided the Program of Studies to the Committee members approximately one week prior to the March 14, 2013 meeting. However, because Granatino had no specific knowledge of this event, I do not credit his testimony.

<sup>9</sup> Granatino explained that they included the last sentence of the provision because they did not want to subvert any classes that were already in place or create a situation that would upset the staff-to-student ratio, or reduce current course offerings or full time employees.

1 Folan highlighted this reference to the TEC Online Academy at the meeting as it  
2 was a significant change from the previous year's Program of Studies, which did not  
3 allow students to take TEC online courses for credit. The Committee had the  
4 opportunity to discuss the Program of Studies, but no Committee members referenced  
5 the TEC MOU.<sup>10</sup>

6 By email to Granatino dated March 20, 2013, Phalan stated:

7 In the 2013-2014 CHS Program of Studies, TEC Online Academy is listed  
8 as offering courses that can be included on CHS transcript.

9  
10 Will you and the Canton SC be accepting TEC online courses – taught  
11 outside of the CTA – for Canton HS credit next year?

12  
13 By letter to Granatino dated March 21, 2013, Phalan stated in relevant part:

14 I am formally asking you now if the representation as written on the  
15 Program of Studies referring to the TEC Online Academy means that TEC  
16 courses will be accepted for Canton High School Credit OR will simply be  
17 added to the transcript as an enrichment course without credit.

18  
19 As I have made clear to you, the CTA represents ALL teachers who  
20 instruct students attending the Canton Public Schools. Should you, with  
21 the approval of the School Committee, allow our students to take courses  
22 to fulfill Canton Public Schools academic requirements that are taught by  
23 individuals who are NOT represented by the CTA, we would consider this  
24 a clear, deliberate, and blatant violation of the collective bargaining  
25 agreement between the School Committee and the CTA as well as a  
26 violation of the CTA's rights as the exclusive bargaining agent for Canton

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<sup>10</sup> In addition to Schutt, John Bonnanzio was a Committee member at the time the TEC MOU was executed in 2010 and, also, at the time of the March 2013 Committee meeting.

1 teachers.<sup>11</sup> In the latter instance, your actions would be a massive  
2 violation of Chapter 150E of the General Laws, the Commonwealth's  
3 Collective Bargaining Law. In that case, the CTA would have no choice  
4 but to pursue any and all legal remedies as well as those remedies  
5 outlined in the collective bargaining agreement.<sup>12</sup>  
6

7 By letter to Phalan dated March 29, 2013, Granatino stated:

8 I do not agree with the legal analysis in your March 21 letter to me. To  
9 answer your question, students who choose to take and complete a  
10 course through the TEC Online Academy will receive academic credit  
11 applicable to a Canton High School diploma. As always, I would be happy  
12 to discuss this matter with you.  
13

14 The Canton High School 2014-2015 Program of Studies also includes the TEC  
15 Online Academy for course credit.<sup>13</sup> To date, no students who are enrolled at Canton  
16 High School have taken a TEC online course for credit.<sup>14</sup>

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<sup>11</sup> In this letter, Phalan did not advise Granatino that the Association believed that allowing students to take TEC online courses for credit violated the TEC MOU, nor did she advise him of the existence of the TEC MOU until the DLR's in-person investigation for this charge on December 17, 2013. Phalan testified that she did not advise Granatino of the TEC MOU until the in-person investigation because she could not find a signed copy of it until then. Granatino testified that he was not aware of the TEC MOU because he was not superintendent when it was executed.

<sup>12</sup> Following this letter, Phalan also requested that Granatino provide certain information relative to TEC, including prior correspondence and agreements. Because the Association has not alleged that the Committee failed to provide the requested information, I refrain from addressing further the information request.

<sup>13</sup> Unlike the 2013-2014 Program of Studies, on which the Committee had the opportunity to discuss at their meeting but did not vote, the Committee voted on the 2014-2015 Program of Studies because it included a potential financial impact to the School Committee unrelated to the TEC Online Academy.

<sup>14</sup> Although two students were interested in taking a TEC online course in the 2013-2014 school year, neither student completed such a course.

1           The Committee permits high school students to take TEC online courses for  
2 credit because online courses are a large part of the educational landscape, and online  
3 learning is important in developing necessary technology skills. In addition, online  
4 courses provide an opportunity for students to expand their horizons and take courses  
5 that would not normally be offered in a public school setting because there would not be  
6 enough students interested in the course to offer it at the school. To run a core or  
7 elective course, the school typically needs to have at least fifteen students in the class  
8 to maintain proper student to teacher ratios.

9 Courses for Credit Outside Canton High School

10           Bargaining unit members teach all courses at Canton High School. However,  
11 there are certain situations in which students may obtain course credit from courses  
12 taken outside the high school, specifically, students that are home schooled and then  
13 enroll in the district, a student transferring from another school, credit recovery  
14 courses,<sup>15</sup> and other special education programs across the Commonwealth.<sup>16</sup>

15 Other Memoranda of Agreement

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<sup>15</sup> Credit recovery courses are those courses taken by certain students who have failed a course or missed too many days of school. To make up their credits, the Committee permits the students to take credit-recovery courses that are usually offered at Massasoit Academy and Stoughton Academy. Prior to Granatino's time as superintendent, students could also obtain credit recovery through an online program called NovaNet.

<sup>16</sup> If a student's special education team determines that the best setting for the student is an out-of-district placement (e.g., at a collaborative or private school), the Committee will enroll the student in that placement program and incur associated costs.

1           In June 2009, the parties executed an MOA, which provides that the Middle  
2 School Interscholastic Athletics Coordinator position (Athletics Coordinator) would be  
3 added to Appendix C of the 2008- 2011 CBA. The Athletics Coordinator position is also  
4 included in Appendix C of the 2012- 2015 CBA.<sup>17</sup>

5           On April 6, 2012, the Committee and the Town's Public Employee Committee  
6 (PEC) entered into an agreement relative to group health insurance (PEC Agreement),  
7 which stated, in part, "...this Agreement is binding on all subscribers and their  
8 representatives from July 1, 2012 through June 30, 2014." Even though the parties only  
9 included certain provisions from the PEC agreement in the 2012-2015 CBA, the  
10 Committee treats the other terms of the PEC Agreement as still effective.

11 Successor Contracts

12           In November of 2011, the parties agreed to a 2011-2012 successor MOA, which  
13 provided that, "except as modified by this Memorandum, the terms and provisions of the  
14 [2008-2011 CBA] will be carried forward into the new contract." The 2011-2012  
15 Successor MOA did not reference the TEC MOU.

16           In June/July 2012, the parties executed the 2012-2015 Successor MOA. It  
17 provides, "except as modified by this Memorandum, the terms and provisions of the  
18 September 1, 2011 through August 31, 2012 contract will be carried forward into the

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<sup>17</sup> Although the Committee entered into two additional MOAs, evidencing that the parties had specifically incorporated them into the 2012-2015 CBA, this assertion is neither clear on the face of the documents nor from witness testimony. Thus, I decline to make this finding. Moreover, the issue is not relevant to my analysis of this case, as discussed below.

1 new contract.” There is no reference to the TEC MOU in the 2012-2015 Successor  
2 MOA.

3 Following the execution of the TEC MOU, the parties have not discussed it in  
4 successor contract negotiations.

### 5 Analysis

#### 6 Transfer of Bargaining Unit Work

7 Section 10(a)(5) of the Law requires a public employer to give the exclusive  
8 collective bargaining representative prior notice and an opportunity to bargain before  
9 transferring bargaining unit work to non-bargaining unit personnel. Commonwealth of  
10 Massachusetts v. Labor Relations Commission, 60 Mass. App. Ct. 831 (2004); City of  
11 Boston, 26 MLC 144, MUP-1085 (March 10, 2000); Town of Bridgewater, 25 MLC 103,  
12 104, MUP-8650 (December 30, 1998). To establish that an employer unilaterally  
13 transferred bargaining unit work to non-unit personnel, the union must establish the  
14 following elements: 1) the employer transferred bargaining unit work to non-unit  
15 personnel; 2) the transfer of work had an adverse impact on either individual employees  
16 or on the bargaining unit itself; and 3) the employer did not provide the exclusive  
17 bargaining representative with prior notice or an opportunity to bargain over the decision  
18 to transfer the work. Id.

19 When work is shared by bargaining unit members and non-unit employees, the  
20 Commonwealth Employment Relations Board (Board) has determined that the work will  
21 not be recognized as exclusively bargaining unit work. Higher Education Coordinating

1 Council, 23 MLC 90, 92, SUP-4090 (September 17, 1996). In these shared work cases,  
2 the employer is not obligated to bargain over every incidental variation in job  
3 assignments between unit and non-unit employees. Rather, bargaining must occur only  
4 if there is a calculated displacement of bargaining unit work. Id. Therefore, if unit  
5 employees traditionally have performed an ascertainable percentage of the work, a  
6 significant reduction in the portion of work performed by unit employees, coupled with a  
7 corresponding increase in the work performed by non-unit employees, may demonstrate  
8 a calculated displacement of unit work. Id.

9 Here, no students have taken any TEC online courses for credit. The  
10 Association argues that “although no job loss or reduction *or actual transfer* has been  
11 experienced through the time of hearing, the bargaining unit itself has been injured by  
12 the Committee’s actions...not only by the ever-present *potential transfer of work* but  
13 also by the Program of Studies’ possible limiting of unit members’ ability to teach future  
14 courses.” (Emphasis added) However, this argument must fail as the Association itself  
15 concedes that there was no actual transfer, but only a “potential transfer” of work.  
16 Because the Association is unable to satisfy the first element of the allegation, i.e., that  
17 there has been a transfer of work, there is no need for me to consider the remaining two  
18 elements.

19 Even if I were to analyze the allegation further, I disagree with the Association’s  
20 contention that this is not a shared work scenario due to the “extremely limited  
21 instances of non-unit members teaching Canton High School students for credit.”

1 Rather, because the evidence shows that there are situations where non-unit members  
2 teach online courses to students for credit (e.g., when students: are home schooled and  
3 later enroll in the district; transfer from another school; take credit recovery courses;  
4 take special education programs outside of the district), the Association would have to  
5 establish that there was a calculated displacement of bargaining unit work. However, it  
6 has not provided any evidence showing such displacement. Therefore, even if the work  
7 had already been transferred, the Association has failed to show that the transfer was  
8 unlawful. Accordingly, this allegation is premature and is dismissed.

9 Contract Repudiation

10 The Association also contends that the Committee violated the TEC MOU by  
11 giving students the opportunity to take TEC online courses for credit in the 2013-2014  
12 and 2014-2015 school years.

13 Section 6 of the Law requires public employers and unions to meet at reasonable  
14 times to negotiate in good faith regarding wages, hours, standards of productivity and  
15 performance, and any other terms and conditions of employment. Repudiating a  
16 collectively-bargained agreement by deliberately refusing to abide by or to implement an  
17 agreement's unambiguous terms violates the duty to bargain in good faith. Town of  
18 Falmouth, 20 MLC 1555, MUP-8114 (May 16, 1994), aff'd sub nom. Town of Falmouth  
19 v. Labor Relations Commission, 42 Mass. App. Ct. 1113 (1997); Commonwealth of  
20 Massachusetts, 36 MLC 65, SUPL-03-3008 (January 31, 2009).

1           In order for the parties to have an agreement, there must be a meeting of the  
2 minds on the actual terms of the agreement. Town of Ipswich, 11 MLC 1403, MUP-  
3 5248 (February 7, 1985), aff'd sub nom. Town of Ipswich v. Labor Relations  
4 Commission, 21 Mass. App. Ct. 1113 (1986). To achieve a meeting of the minds, the  
5 parties must manifest assent to the terms of the agreement. Suffolk County Sheriff's  
6 Department, 30 MLC 1, MUP-2630, MUP-2747 (August 19, 2003). If the evidence is  
7 insufficient to find an agreement or if the parties hold differing good faith interpretations  
8 of the language at issue, the Board concludes that no repudiation has occurred. City of  
9 Boston, 26 MLC 215, MUP-2081 (May 31, 2000). If the language is ambiguous, the  
10 CERB examines applicable bargaining history to determine whether the parties reached  
11 an agreement. Commonwealth of Massachusetts, 16 MLC 1143, SUP-3127 (August 8,  
12 1989). There is no repudiation of an agreement if the language of the agreement is  
13 ambiguous, and there is no evidence of bargaining history to resolve the ambiguity.  
14 Commonwealth of Massachusetts, 28 MLC 8, SUP-4345 (June 29, 2001); Town of  
15 Belchertown, 27 MLC 73, MUP-2397 (January 3, 2000).

16           *Non-Delegable Educational Policy Decision*

17           In the public education setting, school committees have the exclusive prerogative  
18 to determine matters of educational policy without bargaining. Taunton School  
19 Committee, 28 MLC 378, MUP-1632 (June 13, 2002). The Supreme Judicial Court has  
20 determined that certain decisions are within the zone of management prerogative over  
21 educational policy, and are therefore committed to the judgment of the school

1 committee alone. See, e.g., Boston Teachers Local 66 v. School Committee of Boston,  
2 386 Mass. 197 (1982) (size of teaching staff); Berkshire Hills Regional School District  
3 Committee v. Berkshire Hills Educational Association, 375 Mass. 522 (1978)  
4 (appointment of principal); School Committee of Danvers v. Tyman, 372 Mass. 106  
5 (1977) (tenure determinations); School Committee of Braintree v. Raymond, 369 Mass.  
6 686 (1976) (decision to abolish positions). Similarly, decisions determining the level of  
7 services that a governmental entity will provide lie within the exclusive prerogative of the  
8 public employer. Town of Danvers, 3 MLC 1554, MUP-2292, MUP-2299 (April 6, 1977).

9 The Supreme Judicial Court has also recognized that other subjects are not so  
10 intertwined with educational policy as to be beyond the scope of collective bargaining.  
11 See, e.g., School Committee of Watertown v. Watertown Teachers Association, 397  
12 Mass. 346 (1986) (granting of sabbatical leaves); School Committee of Boston v.  
13 Boston Teachers Union, 378 Mass. 65 (final school examination schedules); Bradley v.  
14 School Committee of Boston, 373 Mass. 53, 56-57 (1977) (transfer requests of  
15 principal); Boston Teachers Local 66 v. School Committee of Boston, 370 Mass. 455  
16 (1976) (class size, teaching load, and the number of substitute teachers to be hired  
17 where there has been no change in educational policy).

18 The Committee argues that there cannot be a repudiation of the TEC MOU,  
19 because its decision to grant students credit for online courses is a non-delegable  
20 educational policy decision outside the scope of bargaining pursuant to M.G.L. c. 71,

1 Section 37,<sup>18</sup> which grants school committees the power to establish educational goals  
2 and policies for schools in the district. In support of its argument, the Committee  
3 highlights the fact that the DLR dismissed the portion of the Association's charge which  
4 alleges that its decision was an unlawful unilateral change. However, the DLR found  
5 that the Committee's decision to grant students credit for online courses is an  
6 educational policy decision that lies outside the scope of bargaining based on the  
7 management rights clause of the parties' CBA.<sup>19</sup>

8 While the Association recognizes that certain decisions are within a school  
9 committee's exclusive managerial authority, it argues that the decision to allow students  
10 to take TEC online courses for credit is not one of them. Rather, "while the [School  
11 Committee] can decide what courses will be offered, it has an obligation to bargain with  
12 the Association over both the decision and the impacts of who will be teaching courses  
13 to Canton Public School students for credit and graduation requirements." The  
14 Association maintains that the decision is akin to decisions to alter class size or  
15 teaching load, which are bargainable, and unlike non-bargainable decisions such as  
16 granting tenure or abolishing a position.

17 As held by the Board:

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<sup>18</sup> Although the Committee's post-hearing brief references M.G.L. c. 71, § 37H, I take administrative notice that the correct citation is M.G.L. c. 71, § 37.

<sup>19</sup> The investigator also dismissed the allegation because the Association did not provide evidence that "an actual change in teachers' working conditions occurred." The investigator did not address whether the Committee would have an impact bargaining obligation if the Association were able to show an actual change in working conditions.

1           The determination of what is a condition of employment, as opposed to a  
2           core educational policy matter, is not subject to hard rules. We must  
3           balance the competing interests. Is the predominant effect of a decision  
4           directly upon the employment relationship, with only limited or speculative  
5           impact on core educational policy? Or is the predominant effect upon the  
6           level or types of education in a school system, with only a side effect upon  
7           the employees?  
8

9           Boston School Committee, 3 MLC 1603, 1607, MUP-2503, MUP-2528, MUP-2541 (April  
10          15, 1977) (citing Town of Danvers, 3 MLC 1554, MUP-2292, MUP-2299 (April 6, 1977)).

11          Granatino explained the reasons for allowing the online courses for credit, which are to  
12          benefit the students by giving them the opportunity to take courses that would otherwise  
13          not be available in a public school setting, and to experience online learning and the  
14          associated technology. In addition, credit for TEC online courses is only available when  
15          the course is not currently offered, or has been recently offered, at Canton High School.  
16          In considering this, it is apparent that the decision to allow students to take TEC online  
17          courses for credit is one where the predominant effect is upon the level and types of  
18          education in the school system.

19                 Although the Association argues that the students may still take courses for  
20          enrichment in accordance with the TEC MOU, a student may be deterred from taking a  
21          course for which he or she may not receive credit, especially since the course would  
22          have to be taken in addition to courses for credit. Further, contrary to the Association's  
23          argument, the determination of which courses a student may take for credit is far  
24          different from decisions regarding tenure or whether to abolish a position. Those are  
25          decisions where, unlike here, the predominant effect is on the employment

1 relationship.<sup>20</sup> Notably, in Boston Teachers Local 66, the Court qualified that class size,  
2 teaching load, and the number of substitutes to be hired are subject to bargaining *where*  
3 *there is no change in educational policy*. Here, the Committee has decided to now  
4 allow students to take the TEC online courses for credit because of the advantages for  
5 the students, described above, which is a change in its educational policy from prior  
6 years when it did not permit students to take such classes for credit.

7 The Association also notes that “most cases involving the transfer of bargaining  
8 unit work as within the exclusive managerial prerogative of a public agency contrast  
9 legitimate transfers with other cases where the employer made an economically  
10 motivated decision to transfer work out of the bargaining unit.” However, even if the  
11 Committee had transferred work, there is no evidence that this was an economically  
12 motivated decision. Rather, as explained above, the decision is about giving an  
13 advantage to students. For these reasons, I conclude that the decision was non-  
14 delegable and, therefore, outside the scope of bargaining. Accordingly, this allegation is  
15 dismissed.<sup>21</sup>

16 Conclusion

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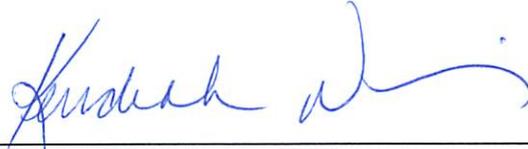
<sup>20</sup> The Association also argues that the Committee has, at minimum, an obligation to bargain over the impacts of the decision, and that it failed to provide notice and an opportunity to bargain before implementing the change. This is an argument supporting the unilateral change violation, which was dismissed by the DLR investigator.

<sup>21</sup> The Committee makes additional arguments in support of dismissal. Because I have determined that the decision was within the Committee's exclusive managerial prerogative, I need not address its other arguments.

- 1 Based on the record and for the reasons explained above, I find that the
- 2 Committee did not violate the Law as alleged and dismiss the complaint.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS



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KENDRAH DAVIS, ESQ.

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11 and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.