

COMMONWEALTH OF MASSACHUSETTS

**BOARD OF CONCILIATION
AND ARBITRATION**

MASSACHUSETTS TEACHERS ASSOCIATION/-)	
MASSACHUSETTS STATE COLLEGE ASSOCIATION)	
)	FACT-FINDING
and)	
)	
BOARD OF HIGHER EDUCATION)	

**POST-HEARING BRIEF OF THE
BOARD OF HIGHER EDUCATION**

The Board of Higher Education submits the following points and argument in support of the position it takes in the matter of the present proceedings in fact-finding.

A. Statement of Facts: The Parties' Negotiations

The Board of Higher Education (the "Board") is the employer of persons who are employed as full-time and part-time faculty and as librarians at the State Colleges of the Commonwealth. G.L. c.150E, §1; and see Jt. Exh. 1, p. 2. The Massachusetts Teachers Association, acting by the Massachusetts State College Association (jointly, the "Association"), is the certified bargaining representative of those persons. See Jt. Exh. 1, p. 2. The Board and the Association are parties to a collective bargaining agreement (Jt. Exh. 1: the "Agreement") whose initial term expired on June 30, 2003.¹ Prior to that date of its expiration, representatives of the Board and of the Association commenced, and they thereafter continued, to negotiate concerning the terms on which the Agreement might be extended for the period of the single fiscal year -- the fiscal year 2004 -- that was then to commence on July 1, 2003.

¹ The Agreement remains in force by the terms of its "evergreen clause" (Agreement, Art. XXI, §A, p. 270.)

While discussions at the bargaining table had begun earlier, it was on June 23, 2003, that the Association's representatives presented to the Board's the Association's "Proposal for a One-Year Successor Agreement." See Un. Exh. 11. The proposal contemplated a not inconsiderable number of changes to the parties' Agreement (id., passim), and contained pay increases in amounts described as being worth 3% across the board (id., Arts. XIII and XIII A).

On June 24, 2003, the Board's representatives submitted the Board's own proposal -- it is styled a counterproposal -- in response to the Association's. See Un. Ex. 10. Like the latter, the Board's proposal would have extended the Agreement for a single year but sought to amend its existing terms in only five particulars. Id., pp. 1-2, items 1-5. The Board proposed as well -- the Association had done the same (Un. Exh. 11, "Summary", p. 3) -- to incorporate into the Agreement the terms of several prior existing ancillary agreements. Un. Exh. 10, p.2, item 6. The Board's proposal contained no offer of a salary increase.

On July 29, 2003, the Board's representatives submitted to the Association's a new statement of its earlier set of proposals. See Jt. Exh. 2. In their document of the 29th, the Board's representatives restated every one of the proposals set out in the proposal of June 23 but supplemented those with eight proposals under the heading "Additional Agreement."² Each of these latter represented the Board's acceptance, in whole or in part, of proposals the Association had made on June 23. Tr. vol. I, pp.42-47 (Tsaffaras). The Board's document of July 29 contained, again, no proposal for a salary increase.

Except on a single occasion in November of 2003, the Board has proffered and continues to proffer at the bargaining table a pay increase of 0% for the persons whom the Association represents. Tr., vol. I, pp.48, 53-54/70. Throughout the period of the negotiations, therefore, it

² Nine items are set out under this heading. But item 4 -- it concerns leave for someone serving in an elective public office -- appeared in the document of June 24 under the heading "Technical Changes:" so only eight of the nine were newly proposed on July 29.

has had a salary offer on the table and technically still does.³ The Board's decision to offer no more than a 0% pay increase for the fiscal year 2004 has been prompted throughout by the dealings it has had with representatives of the Governor. On regular occasions its chief negotiator, Peter Tsaffaras, has sought to know from the Director and from other officers of the Commonwealth's Office of Employee Relations ("OER") what increases in compensation for fiscal year 2004 the Governor was willing to submit to the Legislature for funding under chapter 150E of the General Laws. Tr., vol. I, pp.49, 50-54(Tsaffaras); vol. II, p.131 (Jesensky).⁴ And he was told with equal regularity that the administration's "financial parameters" for the period in question were zero, that a request to fund any cost item, in other words, would be summarily rejected. Id. pp.52-54, 70. Judith Gill, the Board's Chancellor, and Stephen Tocco, its chair, made like enquiries of OER and, going beyond that, made efforts to persuade the administration at its highest levels to adopt financial parameters in some amount greater than zero. Tr., vol. III, pp.173-74, 177-78 (Gill); and see vol. II, pp. 131, 140 (Jesensky). These efforts yielded nothing: the Governor's representatives asserted throughout (and did so most recently in July of 2004) that the Governor would seek legislative funding for no agreement that contained incremental cost items in any amount for fiscal year 2004. Id. pp.175-77, 178-180 (Gill); and see Emp. Exhs. 2 and 3.

The Board itself has chosen as a matter of policy not to make at its bargaining tables financial offers whose cost would exceed the Governor's stated financial parameters. Tr., vol. III, pp.180-81 (Gill). It has done so for two nearly self-evident reasons: it knows that there can be no wisdom or profit in its being seen to attempt to embarrass the Governor by presenting him

³ For the legal significance of this, see Un. Exh. 9. The Association has filed no charge of an unfair labor practice in connection with these negotiations. Tr., vol. III, p.187.

⁴ For the Governor's authority to inform independent state employer's of his willingness (or not) to seek funding for agreements they might reach at the bargaining table, see Emp. Exh. 1, and Tr., vol. II, pp.138-39 (Jesensky).

with a request to fund a labor agreement in an amount that he has said in advance he will reject; and it recognizes the damaging and demoralizing consequences, especially for those represented at the bargaining table, if it is known in advance that an agreement arrived at for their benefit has been arrived at futilely and is simply going to be rejected following its ratification. Id. pp.181-82.

Nonetheless, on the one occasion already spoken of, the Board abandoned the Governor's financial parameters and proposed that State College faculty be granted a salary increase for fiscal year 2004. It did so on November 14, 2003: in consideration for the Association's accepting every element of the proposal the Board had made on July 29, it offered an across-the-board salary increase of 2%. Tr., vol. I, pp. 54-55 (Tsaffaras). It made its proposal in these particular circumstances: the Association had asserted repeatedly and categorically that it would accept no agreement for the period of the fiscal year 2004 in the absence of salary increases, and the Board itself recognized that its own proposal to make use of student evaluations in the then-current academic year was on the point of being rendered meaningless by the simple passage of time. Id. When making the offer, the Board's representatives, speaking by Mr. Tsaffaras, stated with perfect candor that the Board's request to fund an agreement containing a 2% pay increase would never be submitted by the Governor for legislative appropriation, would never, indeed, make its way up the administrative chain of command to the Governor's desk, and that it would be, he said, "dead on arrival." Id., p. 55.⁵ That being so, an agreement made at the bargaining table to grant State College faculty a 2% pay increase would be something of a fiction: it would not in fact yield any increase in their salaries. Id.

⁵ This was a simple recitation of what the Governor's representatives had said in the most categorical fashion on every occasion on which a representative of the Board had asked to know whether the Governor would seek funding for any pay increase. Tr., vol. I, pp. 49-54, 70 (Tsaffaras); vol. II, pp.132-34 (Jesensky); and vol. III, pp. 175-77, 180 (Gill).

The Board's proposal was not warmly received. This was so, not because the amount was thought inadequate -- the Association's own proposal had, at 3%, sought a pay increase only slightly larger (see Un. Exh. 11, Arts. XIII and XIII A) -- but because the offer was deemed fraudulent, deceitful, dishonest and immoral. Tr., vol. I, pp.56-57 (Tsaffaras); vol. III, p.190 (Art); vol. IV, pp.25-26, 28 (Markunas). The fraud, in the Association's view, lay in the fact that the Board made its offer knowing that the administration would summarily reject it, that it was "dead on arrival" and would never, in any effective sense, reach the Governor's desk. Id.⁶

The Association rejected the proposal, therefore, and the Board promptly withdrew it. Tr., vol. II, pp.56-57. The Board thereafter restated its proposal for a 0% pay increase and has made no different offer at any time since November 14 of 2003. Id. Within a month following that date, representatives of the Association met with Mr. Tocco, chair of the Board, to express their displeasure at the Board's making an offer whose funding it knew could not be secured. He assured them in response that the Board would not again make an offer whose funding the Governor had not undertaken to support. Tr., Vol. IV, pp.191-92.

On this footing the negotiations foundered. By the Association's petition, a mediator was appointed (Tr., vol. I, p. 68; and see G.L. c.150E, §9). After fewer than five sessions with the mediator, the Association sought the appointment of a fact-finder (id.), and the present proceedings have ensued.

⁶ In the course of his testimony on this subject, Prof. Art indulged either his naiveté or his skills in sophistry. Having said that it was "fraudulent" for the Board to make a money offer with the foreknowledge that the Governor's staff would reject it out of hand, he tried to rescue himself and his bargaining team from the logical consequences of this view by asserting that the Board might perfectly appropriately make such an offer if it were prepared to be an advocate for what the Governor's representatives had already told the Board was unacceptable. Whether the product of naiveté or sophistry, Prof. Art's statements amount to perfect nonsense, and the honest logic of his position is precisely congruent with the logic of the Board's own: no agreement made at the bargaining table is of the least financial value if it contains cost items that the Governor has stated in advance he will not support. On this point, see the history of the parties' dealings with a succession of Governors as that history was recounted in the testimony of Prof. Minasian: Tr., vol. III, pp.238-242, especially at p.242, where Prof. Minasian's answered "Yes" to this question: "It would be a fair summary of this history as you've described it to us that the only labor contracts that have been funded for faculty for state colleges are labor contracts whose financial components met the requirements of the then Governor of the Commonwealth, isn't that the case?"

B. The Position of the Board of Higher Education

The Board takes the view in this matter that an increase in the salaries of faculty at the State Colleges is much to be desired: the dealings that its chair, its chancellor and its chief negotiator have repeatedly and persistently had with representatives of the Governor have always had it as their purpose to see, in the words of Chancellor Gill,

if there was some way we could do something to put some kind of an economic package on the table. As I stated when I first started to speak, I am very concerned about the faculty salaries at the state colleges, and we do need to do something to increase the salaries of the faculty at the state colleges.

Tr. vol. III, p.184.

And see id., p.175. There exists on this score, then, no principled difference between the Board and the Association: both wish to increase the salaries of State College faculty. Nor does there exist any principled difference on a second point of central consequence here: the Board is unwilling to propose and the Association is unwilling to accept an agreement when, as they sit at the bargaining table, they know it to be the case that the Governor will reject the Board's request that he seek to fund its financial components. That is precisely, of course, what has been known through the whole course of the parties' negotiations in this matter, and it is precisely what was known to the parties as they presented their cases to the fact-finder in the instant proceedings. See Tr., vol. II, pp.132-34 (Jesensky).

Given the points just made -- the desirability of salary increases for the College's faculty and the infeasibility of securing, in advance or otherwise, the Governor's support for the needed funding -- the Board takes the further view -- and in this it departs from the Association -- that there is no merit to seeking pay increases for the period of fiscal year 2004, a fiscal year that has now come and gone. The reasons for this are found in the circumstances that have just been described.

1. The Faculty Salary Deficit

The State Colleges, in consultation with the Board, commissioned the comparative study of their faculties' salaries whose results are depicted in Joint Exhibit 27.⁷ The data recorded there -- they pertain to the academic year 2003-2004 (Study, p.1) -- disclose that, for all academic ranks, faculty employed at the State Colleges are undercompensated either by 19% (Exhibit A: Comparison Group: Industrialized States, Public, Masters I, Unionized institutions) or by 15% (Exhibit B: Comparison Group: Industrialized States, Public, Masters I, All (Unionized/Non-unionized) institutions).⁸ The amount by which faculty at the State Colleges are undercompensated does differ, however, from rank to rank; and even within ranks it differs significantly from discipline to discipline. Id., Exhs. A and B. The 19% and the 15% just referenced are actually only gross aggregates of subsets of discrepant rates of compensation that differ greatly across a spectrum of disciplines and ranks and across, therefore, a very large spectrum of individual members of the faculty.⁹ Each measure of the discrepancy, moreover -- whether in the aggregate, by rank or by discipline -- uses the 75th percentile as its touchstone: elimination of the discrepancy, in other words, would place State College faculty at the 75th percentile on the scale of the salaries paid their counterparts.¹⁰

This last proposition masks the rather more fine-grained quality of the data. Because the salary deficits that the Study discloses do differ significantly both from rank to rank and from

⁷ Joint Exhibit 27 comprises a four-page cover letter and the study itself; references to the "Study" in what follows are references to this second part of the Exhibit.

⁸ The data depicted in the Study and the comparative analysis set out there make irrelevant much of the other data that are found in the record of these proceedings: the 3.5% increase in the cost of living from fiscal year 2003 to fiscal year 2004 (Jt. Exh. 6); comparative salary data from the year 2002-2003 (Jt. Exhs 7 and 9); increases in the cost of health insurance benefits for state employees in Massachusetts (Jt. Exhs. 8A and 8B); additional comparative salary data from the year 2003-2004 (Jt. Exh. 10); the 4.8% estimated increase in weekly wages in Massachusetts from fiscal year 2003 to fiscal year 2004 (Jt. Exh. 12; Un. Exh. 8); and the AAUP Salary Study for 2003-2004 (Un Exhs. 3, 4, 5, 13, 14 and 15) are all subsumed within the salary deficits depicted in the Study.

⁹ None of these data pertains to librarians.

¹⁰ Comparisons at the 50th percentile are also depicted in the Study but without the particularized sets of data that appear in its Exhibits A and B. See Study, esp. Tables 2 (p. 3) and 4 (p.5).

discipline to discipline, a 19% across-the-board increase in faculty salaries at the State Colleges would fail to redress the salary deficit of faculty at certain ranks in certain disciplines and would cause other members of the faculty to be overcompensated. The Study makes it apparent, in other words, that across-the-board salary increases (at least if they are percentage increases) will fail to address and redress the salary deficit at the level, by rank and by discipline, at which it truly exists.

These objective data disclose, then, that during the academic year 2003-2004, faculty employed at the State Colleges were undercompensated in varying amounts by rank and discipline relative to their counterparts at the institutions examined in the Study, and that was true at both the 50th and the 75th percentile. But that academic year -- it corresponds to fiscal year 2004 -- has come and gone without the parties having arrived at an agreement that addressed any portion of those salary deficits. Despite the parties' common view that faculty salaries should be increased and the salary deficit ameliorated, the Governor's position (and the Board's and the Association's common unwillingness to offer or accept an agreement inconsistent with the Governor's position) has made it impossible for them to do so during fiscal year 2004.

2. The Lapse of Time

For several reasons, this passage of time, the fact that fiscal year 2004 has come and gone, is of crucial present consequence. The first is found in the rationale the Association itself gives in support of its demand that faculty be granted a salary increase for that now-defunct fiscal year. In the testimony she gave at the hearing in this matter, Patricia Markunas, president of the Massachusetts State College Association, asserted that the compensation deficit for faculty at the State Colleges must be closed so that the Colleges will "be able to attract the highest

quality of faculty and librarians.” Tr. Vol. I, p.92.¹¹ That assertion is indisputably true in some large and abstract sense, but it is quite decidedly not true in any sense whatever for the academic year 2003-2004: faculty for that year (and for the ensuing, current one) have long since been “attracted” or not. See id., pp.114-15. A salary increase, therefore, that first has effect no sooner, for example, than July 1, 2004, the first day of fiscal year 2005, will, for the accomplishment of the purpose Prof. Markunas describes, be just as efficacious as a salary increase that has effect, in the manner now demanded, during fiscal year 2004: which is to say that the passage of time has rendered moot and meaningless the rationale for the Association’s demand.

The passage of time has had a second deleterious effect on the legitimacy of the demand the Association makes for a salary increase retroactive to fiscal year 2004. In the course of the negotiations that led the parties to the present impasse, the Board sought to secure two substantive changes in the Agreement for the then-current academic year 2003-2004: the first would have moved from September 1 to January 1 the date on which personal leave accrued for the benefit of faculty (see Jt. Exh. 2, item 1, p.1; Tr., vol. I, p.39); the second would have restored student evaluations as an element in the assessment of each faculty member’s performance (see Jt. Exh. 2, item 3, p.1; Tr., vol. I, p.40). The Board judged these changes, particularly the second of them, to be of contractual value, and the Association understood this. See Tr., vol. III, pp.193-94 (Art). The need to implement student evaluations while time still permitted during the academic year 2003-2004 was quite explicitly linked to the offer of a 2% pay increase that the Board made on November 14, 2003. Tr., vol. I, p. 55 (Tsaffaras); vol. III, pp. 193-94, 196 (Art). For its part the Association regarded the Board’s substantive proposals as demands that it relinquish something of value to faculty; they were not “concessions” the

¹¹ Prof. Art proffered the same rationale. Tr., vol. III, pp.194-95.

Association was prepared to “give away” absent consideration in the form of money. *Id.*, vol. III, p.196 and, especially, pp.199-200: “[Student evaluations are] clearly something that management wants and that we believe they need to make some concessions, make some payment for” (Art). During the course of their negotiations, in other words, both parties have quite explicitly understood that concessions on the part of the Association required money, meaning salary increases, from the Board and, to state the now crucial converse of the proposition, that money from the Board required concessions on the part of the Association.

But the passage of time has now made any such transaction impossible. For a salary increase of application to fiscal year 2004, the Association can offer the Board nothing of what one might call coeval value: none of those agreements the Board sought at the bargaining table - - student evaluations most saliently among them -- can now be made to operate during the academic year 2003-2004. *Tr.*, vol. III, pp. 218-19. So the passage of time has forced the Association into this position: it demands a retroactive salary increase but can offer nothing of value in return; it has nothing, in other words, with which to negotiate at the bargaining table.

C. Summary

The parties to the present proceedings find themselves very curiously postured. They agree that the salaries of faculty at the State Colleges should be increased. They agree as well that an agreement made at the bargaining table on financial terms they know the Governor will reject is an agreement more damaging than no agreement at all. It was this common set of views that kept them at perfect stalemate on matters financial through the whole of fiscal year 2004. Because the Association took the view that there could be no agreement in the absence of money, it also kept them at perfect stalemate on every other matter during the whole of that year.

The Association now therefore seeks a salary increase for a fiscal and academic year that has passed into history. It does so in the face of what remains the Governor’s adamant refusal to

seek funding for any such salary increase or for any other cost item whatever. And it does so now with this further debility: it can offer nothing at the bargaining table of any value or relevance to academic year 2003-2004. In these intractable circumstances, there exists no basis on which the fact-finder might properly adopt or endorse the Association's proposal that those whom it represents should be given an across-the-board 3% pay increase: (i) an offer from the Board in that amount would be of no more value than the offer of a 2% pay increase that it made on November 14, 2003; (ii) the Association can itself offer nothing of corresponding value for the one-year period of the pay increase it seeks; and (iii), even were such an offer one of any true value, it would, like any across-the-board increase, operate in no measure whatever to address the actual discipline-by-discipline and rank-by-rank salary deficits that do now exist within the population of State College faculty. The Board of Higher Education therefore submits that the parties' negotiations, including the present fact-finding proceedings, are, as they address themselves in isolation to fiscal year 2004, ultimately an idle exercise. In order to address the matter of faculty salaries and every other issue of necessary concern to them, the parties must give their attention, not to fiscal year 2004, but to the negotiations, already in progress, that concern themselves with an agreement for the three-year period that commences with fiscal year 2005.

Respectfully submitted,
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