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March 20, 2015

BY HAND DELIVERY
Joseph Stanton, Clerk
Massachusetts Appeals Court
John Adams Court House
One Pemberton Square, Suite 1200
Boston, MA 02108-1705

RE: **No. 2015-J-0076 Board of Higher Education v. Commonwealth Employment Relations Board**

Dear Clerk Stanton:

Enclosed pursuant the March 10, 2015 order of the Single Justice and Mass.R.A.P. 6 please find the Response of the Commonwealth Employment Relations Board to Mass.R.A.P. 6 Motion to Stay and my Notice of Appearance in the above referenced matter. Copies have been served upon the parties to the case before the Department of Labor Relations, Commonwealth Employment Relations Board.

Thank you for your assistance in this matter.

Very truly yours,
DEPARTMENT OF LABOR RELATIONS

T. Jane Gabriel
Chief Counsel
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(617) 626-7139

Enclosures:

Cc: James B. Cox, Esq. (w/ enclosures)
Laurie Houle, Esq. (w/ enclosures)

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

Board of Higher Education Appellant v. COMMONWEALTH EMPLOYMENT RELATIONS BOARD Appellee	C.A. 2015-J-0076

NOTICE OF APPEARANCE OF T. JANE GABRIEL FOR THE COMMONWELATH EMPLOYMENT RELATIONS BOARD

Please enter the appearance of T. Jane Gabriel in the above-captioned case on behalf of the Commonwealth Employment Relations Board ("Board").

Respectfully submitted,
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

By its attorney,

T. Jane Gabriel, BBO# 557370
Chief Counsel
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Dated: March 20, 2015

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

Board of Higher Education Appellant v. COMMONWEALTH EMPLOYMENT RELATIONS BOARD Appellee	)))C.A.15-J-0076)))))

Response of the Commonwealth Employment Relations Board to Mass.R.A.P. 6 Motion to Stay

Statement of the Case

The Board of Higher Education (Board) filed with this Court a motion for a stay of the Commonwealth Employment Relations Board's (CERB) order issued in its February 6, 2015 decision in the matter of the Board and Massachusetts State College Association/MTA/NEA, No. SUP-08-5396. In its decision the CERB adjudicated a prohibited practice complaint against the Board filed by the Massachusetts State College Association/MTA/NEA (Association). [App. 1]. [1] On March 10, 2015, the Single Justice Maldonado, J. ordered the temporary stay of the CERB's decision pending further order of the Court and required a response from the CERB, particularly (1) whether the

[1] References to the CERB's Appendix throughout this Response will be designated as [App.__]. The page number is located at the bottom right corner.

Mass.R.A.P. 6 motion for stay should be filed with the CERB in the first instance, and (2) relative to petitioner's claims of irreparable harm and the public interest at stake in seeking the stay.

The underlying case involves the CERB's affirmance of the January 16, 2014 decision of a Department of Labor Relations hearing officer, 40 MLC 197, finding that the Board repudiated both Article XX, §C(10)(§C(10)) of the collective bargaining agreement (Agreement) [App. 39] between the Association and the Board, and a grievance decision that the Board issued on February 23, 2006 upholding an Association grievance (Grievance Decision) [App. 42] when it employed more part-time faculty members during the 2007-2008 academic year than the Agreement permitted, and thereby violated § 10(a)(5) and, derivatively, § 10(a)(1) of G.L. c. 150E. The CERB ordered the Board to immediately adhere to the terms of §C(10) and the February 23, 2006 Grievance Decision. [App. 36].

Statement of the Relevant Facts

The Board is the statutory employer of faculty and other employees employed at the Commonwealth's nine Colleges pursuant to G.L. c. 15A, §22. [App. 3].

The Association is the exclusive collective bargaining representative for certain faculty employed by the Board. [App. 2-3]. The Board and the Association entered into their first contract for the period 1986-1989 and they have included the language in § C(10) in every subsequent successor agreement that places 15% and 20% limits (or "caps") on the maximum percentage of part-time faculty whom the Board can hire to teach three credit courses in academic departments with six or more full-time faculty. [App. 3-4, 39]. During negotiations for a successor contract to the 2004-2007 contract, the Board proposed deleting §C(10), but later withdrew the proposal after the Union rejected it. [App. 18].

The purpose of the caps is to protect the workload for full-time faculty members, including department chairs, by limiting the number of part-time instructors who teach in qualifying departments. [App.8]. Although neither the Board nor the Association know whether the Colleges have complied with the caps for a given academic year (AY) until the spring semester of that year, prior to the start of an AY, the parties know the core courses offered, the number of full-time faculty and the number of students

enrolled for the fall semester. The Board found that based on this prior knowledge, the Colleges can potentially avoid exceeding the 15 % and 20% caps by: hiring more full-time faculty members; where permissible under the contract, instruct full-time faculty to teach more courses, including lower-level courses; cancel certain courses; reduce certain course offerings, combine low-enrollment courses, increase enrollment caps; use historic data to plan courses more carefully; and control matriculation. [App. 9].

From AY 2001-2002 through AY 2007-2008, eight Colleges had academic departments that violated the 15% and 20% caps for part-time faculty members. In AY 2007-2008, the number of departments at those Colleges that violated the caps totaled 31, while the number of courses in violation of the caps totaled 663. [App. 11]

On September 15, 2005, Salem State University upheld a grievance that alleged that the Board had violated the 2001-2003 Agreement as it pertained only to Salem, finding that seven departments exceeded the caps. [App. 16]. On February 23, 2006, the Chair of the Council of Presidents Dr. Janelle Ashley (Dr. Ashley) upheld the same grievance finding that the

seven remaining Colleges had violated § C(10). Dr. Ashley required the Colleges to comply with the contractual mandate by the end of the 2008-2009 AY and suggested the Colleges consider increasing the "complement of full-time faculty, to alter or reduce its course offerings (including the number of course sections) or to employ some combination of the two." [App. 17-18, App 42-43].

The Council of Presidents subsequently wrote a letter to the Association dated September 11, 2007 ensuring that the Colleges intended to adhere to the Agreement and Dr. Ashley's 2006 Grievance Decision. [App. 19]. However, in April of 2008, the Board provided the Association with information revealing that at least five Colleges had violated the 15% and 20% caps for AY 2007-2008. [App. 20].

Argument

1. The Board Was Required to File Its Motion to Stay with the CERB

The CERB is the lower court for purposes of the requirement in Mass.R.A.P. 6(a)(1) that the request for the stay of the order of a lower court pending appeal, must ordinarily be made in the first instance in the lower court. Secretary of Administration and Finance v. CERB, 81 Mass. App. Ct. 81, 84-85 (2012)

(the CERB is the lower court for purposes of Mass.R.A.P. 3(a) requiring filing a notice of appeal from a CERB decision with the CERB). Because G.L. c. 150E does not provide specific procedures for applying for a stay of its orders, procedural details are governed by the Mass.R.A.P. See Secretary of A&F v. CERB, 81 Mass. App. Ct. at 84-85.

Although the Board asserts that seeking a stay from the CERB is not practicable, it provides no support for its assertion. Rather, the Board argues that because G.L. c. 150E, § 11(i) provides for a direct appeal to the Appeals Court it cannot seek a stay from the Superior Court. This argument incorrectly assumes that the CERB is not the lower court for purposes of the Mass.R.A.P. Consequently, the Board has not shown that it was impracticable to apply to the CERB in the first instance.

A careful reading of G.L. c. 150E, § 11(i), the public sector labor relations statute, supports this position. It provides: "Any party aggrieved by a final order of the board [CERB] may institute proceedings for judicial review in the appeals court within 30 days after receipt of the order. The proceedings in the appeals court shall, insofar as

applicable, be governed by section 14 of chapter 30A. The commencement of such proceedings shall not, unless specifically ordered by the court, operate as a stay of the board's order." When G.L. c. 150E, § 11(i) is silent on a rule of procedure, G.L. c. 30A, § 14 governs. This can be understood by reading together G.L. c. 150E, § 11(i), ("The proceedings in the appeals court shall, insofar as applicable, be governed by section 14 of chapter 30A") and G.L. c. 30A, § 14, ("Insofar as the statutory form of judicial review or appeal is silent as to procedures provided in this section, the provisions of this section shall govern such procedures."). Subsection 3 of G.L. c. 30A, § 14 provides that "the agency may stay enforcement [of its orders]..." Because G.L. c. 30A, § 14 applies, the CERB has the authority to stay enforcement of its final order under subsection 3.

Furthermore, looking at the language of the last sentence of G.L. c. 150E, § 11(i) in its most reasonable light, ("the commencement of such proceedings shall not, unless specifically ordered by the court, operate as a stay of the board's order"), seeking a stay from the CERB in the first instance is not precluded. Rather, the statute only declares that

the initiation of the appeal is not an automatic stay of execution of the CERB's order absent an order of the Court. It does not address or limit the CERB's ability to issue a stay.

From a practical standpoint, seeking the stay from the CERB first would allow the CERB to exercise its expertise and its familiarity with the extensive record in this matter. This practical consideration read together with Mass.R.A.P. 6(a)(1) and this Court's precedent cited above, "render[s] the legislation effective, consonant with sound reason and common sense." Secretary of A&F v. CERB, 81 Mass. App. Ct. at 84, citing Carpenter's Case, 456 Mass 436 (2010).

Furthermore, the CERB has previously has ruled on motions to stay its orders. See e.g. Cambridge Public Health Comm. d/b/a Cambridge Health Alliance and Mass. Nurses Assoc., 37 MLC 105, ftn. 2 (2010)(CERB rejecting the argument that it does not have jurisdiction to stay its own order under G.L. c. 150E, § 11); Commonwealth of Mass. and Massachusetts Correction Officers Federated Union, (unpublished) (2007). [App. 56]. The CERB should be given deference in interpreting the statute it is charged with

enforcing. Berrios v. Dept. of Public Welfare, 411 Mass. 587, 595 (1992). Thus, the Board was required to request the stay from the CERB in the first instance.

2. The Board did not meet the standard for the issuance of a stay.

To succeed on a motion for a stay the Board must demonstrate: (1) the likelihood of success on the merits; (2) that irreparable harm will result from denial of the stay; and, (3) the risk of irreparable harm to the moving party outweighs the potential harm to the non-moving party in granting the stay. Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980). [2] The decision to grant or deny the stay of the CERB's order lies within the discretion of the reviewing court under Mass.R.A.P. 6(a). Cartledge v. Evans, 67 Mass. App. Ct. 577, 578 (2006); G.L. c. 30A, § 14(3) ("the reviewing court may order a stay upon such terms as it considers proper.")

a) Likelihood of Success on the Merits.

The Board has not shown a likelihood of success of its appeal on the merits of its case. The standard

[2] Although the Cheney matter involved an interlocutory appeal pursuant to Chapter 231 § 118 rather than an appeal of a final judgment of the lower court, there is no change in the test applied.

of review of the CERB's decision on appeal shall be governed by G.L. c. 30A, § 14. The CERB's decision must not be arbitrary nor capricious, an abuse of discretion, nor inconsistent with the law and must be based on substantial evidence. G.L. c. 30A, §§ 1(6), 14; Town of Brookfield v. Labor Relations Commission, 443 Mass. 315, 321 (2005). In determining whether a Board decision has such support, the reviewing court will "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as the discretionary authority conferred upon it." G.L. c. 30A, § 14; G.L. c. 150E, § 11.

First, contrary to the Board's position that the record contains no evidence that it deliberately refused to comply with § C(10) of the Agreement, there is overwhelming evidence that the Board deliberately and continuously refused to implement the Agreement and its unambiguous terms. The record demonstrates that for almost a decade the Board failed to adhere to § C(10) despite the February 23, 2006 grievance decision and subsequent contract negotiations, where the Board agreed to be bound to § C(10). The evidence establishes that the Board engaged in a pattern of conduct designed to ignore the parties' Agreement.

Commonwealth of Mass., 26 MLC 87, 89 (2000).

Second, the Board did not argue to the CERB as it does now to the Court that a finding of repudiation was improper because the record evidences differing interpretations of the legal effect of § C(10), and, thus, there was no meeting of the minds. It is improperly raised for the first time on appeal and, therefore it is waived. MacLean v. State Board of Retirement, 432 Mass. 339, 343 (2000); [App. 44-49]. Accordingly, the Board is unlikely to succeed in this argument.

Even if the Court were to consider this argument, the Board offers no support for its contention that there was no meeting of the minds. Rather, the record demonstrates that the Board adopted the Union's interpretation of § C(10) when it entered into the Agreements with this language present on numerous occasions. [App. 3]. Furthermore, the February 2006 Grievance Decision affirmed the College's acceptance of the Union's interpretation of § C(10). [App. 42].

Finally, the Board argues that § C(10) is an impermissible delegation of it managerial authority to appoint personnel under G.L. c. 15A, § 22 and its ability to establish educational policy. The CERB

properly declined to read the statute as narrowly as the Board urged, and properly held that § C(10) does not infringe on the Board's statutory powers of appointment because it in no way limits the colleges' decision to appoint a specific person to a specific position. Higher Education Coordinating Council/Roxbury Community College v. MTA, 423 Mass. 23 (1996) [App. 27]. The CERB recognizes that G.L. c. 15A, § 22 gives public college administrators the authority to determine educational policy. Mass. Community College Council v. Board of Higher Ed., 81 Mass. App. Ct. 554, 560-561 (2012). However, the CERB found no evidence that the Board changed or sought to change any educational policy affecting or underlying the agreed-upon balance between the use of part-time instructors and full-time faculty. Boston Teachers Union et. al. v. School Committee of Boston, 370 Mass. 455, 462 (1976). [App. 29-313]. The CERB also rejected the Board's argument that the Agreement limited the form of employment that it determines to be the best means of delivering academic services because it merely defines the percentage of part-time instructors who can teach three credit courses in departments with six or more full-time members. [App. 24-27].

The cases cited by the Board are inapposite. Boston v. Patrolmen's Assoc. involved the interpretation of the Boston Police Commissioner's statutory authority to assign officers. 403 Mass. 680, 684 (1989). Such cases involve public safety considerations reserved for the Police Commissioner and deployment of law enforcement priorities and are not comparable to the circumstances of this case. Similarly, the Mass. Coalition of Police v. Northborough decision involves the power of a town board of selectmen to appoint a specific police officer to a specific position. 416 Mass. 252 (1993). Thus, the Board has not shown a likelihood of success on this third argument either.

b) Irreparable Harm

The Board suggests that hiring more full time faculty is the only means of compliance with the CERB's order. However, the Board has not argued that the colleges could not comply with the caps by employing a number of other options outlined in the CERB's decision such as instruct full-time faculty to teach more courses, cancel certain courses, reduce certain course offerings, combine low-enrollment courses, increase enrollment caps, use historic data

to plan courses more carefully, and control matriculation. [App. 9. 31-34]. The record clearly shows that at the beginning of each academic year, the Colleges have the information necessary to avoid exceeding the 15 % and 20% caps by employing the options the CERB suggests. Moreover, employing these options would avoid the types of hardships the Board claims its students would suffer. [App. 31-34]. Nor has the Board shown irreparable financial harm because it has presented no financial evidence to support its claim of economic hardship,[3] and, therefore, insufficient to satisfy the "irreparable harm" requirement. Cheney, 380 Mass. at 617.

Second, there is no monetary award associated with the order in this case and the CERB's decision outlined non-monetary ways the colleges could comply with the caps. Employing these options would avoid the types of hardships the Board claims its students would suffer.

Last, the Board argues that "the public interest weighs heavily in favor of a [s]tay." However, the Board fails to state the exact public interest

[3] Similarly, there is no past data to consider because the Board explicitly refrained during the hearing from presenting evidence that related to specific budgetary data. [App. 50, 53].

affected; thus the Appeals Court should discount this argument in its entirety.

Rather if the stay is allowed, the harm discussed in the CERB's decision would continue to the hundreds of faculty members employed at the Commonwealth's nine public universities who were adversely affected by the Board's unfair labor practice in the underlying case. This includes increased workloads to supervise adjuncts and the resulting decreased ability to work with students outside of the classroom and to serve on committees.

Finally, in light of the strength of the CERB's decision that the Board violated its Agreement with the Association and its likelihood of success on the merits in the appeal, a stay of its order would undermine the declared public policy of the Commonwealth that encourages parties in public sector labor relationships to enter into agreements and abide by them. G.L. c. 23, § 90.

Conclusion

For the reasons stated above, the Board should be directed to file its motion to stay with the CERB. In the alternative, the Court should deny the Board's motion to stay.

Respectfully submitted,
COMMONWEALTH EMPLOYMENT
RELATIONS BOARD
By its attorney,

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CERTIFICATE OF SERVICE

I certify that on March 20, 2015, copies of the above Response of the Commonwealth Employment Relations Board to Mass.R.A.P. 6 Motion to Stay and the Notice of Appearance of T. Jane Gabriel in the matter of Board of Higher Education v. Commonwealth Employment Relations Board, Appeals Court No. 2015-J-0076 have been served by mailing a copy, postage prepaid, to the following:

James B. Fox, Esq.
Rubin and Rudman, LLP
50 Rowes Wharf
Boston, MA 02110

Laurie Houle, Esq.
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20 Ashburton Place-6th Floor
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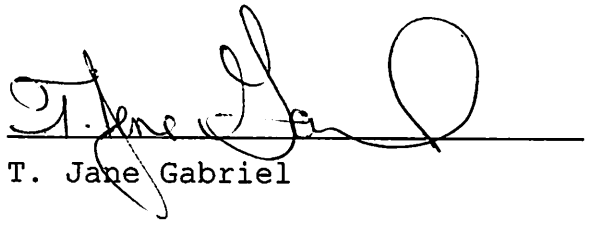

T. Jane Gabriel

APPENDIX

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the Matter of		
BOARD OF HIGHER EDUCATION		Case No. SUP-08-5396
and		
MASSACHUSETTS STATE COLLEGE ASSOCIATION/MTA/NEA		Date Issued: February 6, 2015

Board Members Participating:[1]

Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

Appearances:

James B. Cox, Esq.	-	Representing the Board of Higher Education
Laurie R. Houle, Esq.	-	Representing the Massachusetts State College Association/MTA/NEA

CERB DECISION ON APPEAL

SUMMARY

A duly-designated Department of Labor Relations (DLR) hearing officer issued a decision in this case on January 16, 2014. The Hearing Officer found that the Board of Higher Education (Board or Employer) had repudiated both Article XX, §C(10) of the collective bargaining agreement (Agreement) between the Massachusetts State College Association/MTA/NEA (MTA or Association) and the Board, and a decision that the

[1] Commonwealth Employment Relations Board (CERB) Chair Marjorie Wittner recused herself from this case.

Board issued on February 23, 2006 upholding an Association grievance (February 23, 2006 decision) when it employed more part-time faculty members during the 2007-2008 academic year than the Agreement permitted, and thereby violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law). The Board timely appealed this decision, and both parties filed supplementary statements.

On appeal, the Board objects to a number of the Hearing Officer's factual findings and disputes her legal analysis and conclusions. Upon our review of the Hearing Officer's decision, applicable portions of the record, and the arguments of the parties on appeal, we affirm her decision in its entirety.

ADMISSIONS OF FACT

The Board admitted the following facts in its Answer to the Complaint of prohibited practice:

1. The Board is a public employer within the meaning of Section 1 of the Law.

2. The Association is an employee organization within the meaning of Section 1 of the Law.

3. The Association is the exclusive collective bargaining representative for certain faculty employed by the Employer.

4. The Association and the Board are parties to a collective bargaining agreement for the period July 1, 2004 to June 30, 2007 (Agreement). Pursuant to a Memorandum of Agreement dated August 27, 2007, the Agreement was effective at the time the dispute arose.

5. Article XX, § C(10) of the Agreement states:

> Part-Time Appointments: Limitations
>
> This subsection shall be of application only to departments with six (6) or more full-time members.

> Except at the Massachusetts College of Art [(Mass. Art)], not more than fifteen percent (15%) of an academic department's total number of three (3) credit courses and sections shall be taught by part-time employees during an academic year.
>
> At [Mass. Art], not more than twenty percent (20%) of the total number of three (3) credit courses taught in a department with six (6) or more full-time faculty shall be taught by part-time employees during an academic year.
>
> Not included in the foregoing are courses or sections taught by part-time employees hired to replace unit members on sabbatical leave of absence, on unpaid leave of absence, on reduced teaching loads for the purposes of alternative professional responsibilities or Association release time, or any other contractual release time, or any unforeseen emergency.

STIPULATIONS OF FACT

1. On February 23, 2006, the Board issued a grievance decision, requiring, in part, that each college commencing no later than the fall semester of the academic year 2006-2007, reduce its improper reliance on part-time faculty.

2. Certain departments at Bridgewater, Framingham, Salem, Westfield and Mass. Art employed part-time instructors during the 2007-2008 academic year, and in prior academic years, that exceeded the assignment limitations of part-time instructors[2] set forth in Article XX, §C(10).

STATEMENT OF FACTS

Pursuant to DLR Rule 13.15(5), 456 CMR 13.15(5), we adopt the Hearing Officer's findings of fact and summarize the relevant portions below.

The language in Article XX, § C(10) of the parties' Agreement first appeared in their 1986-1989 contract and has remained in effect through the 2004-2007 Agreement.

The Board is the statutory employer of faculty and other employees employed at

[2] Throughout the Facts and Opinion, unless otherwise specified, the terms part-time instructor, part-time faculty and adjuncts are used interchangeably.

the Commonwealth of Massachusetts' nine colleges:[3] Bridgewater State College (Bridgewater); Fitchburg State College (Fitchburg); Framingham State College (Framingham); Massachusetts College of Art and Design (Mass. Art); Massachusetts College of Liberal Arts (Mass. Lib.); Massachusetts Maritime Academy (Mass. Maritime); Salem State College (Salem); Westfield State College (Westfield); and Worcester State College (Worcester).

Each college is governed by a Board of Trustees pursuant to G.L. c. 15A, § 9 and 22 (Chapter 15A). Chapter 15A, § 9 authorizes the Council of Presidents of the Massachusetts State Universities to establish salaries and tuition rates for the colleges.

Full-time, Benefitted Part-time and Part-time/Adjunct Faculty Members

The colleges employ faculty on a full-time and part-time basis. The categories of employment are full-time tenure, full-time tenure-track, full-time temporary and adjunct (or part-time). Mass. Art also employs faculty members on a "benefitted" part-time basis.

All full-time faculty members teach 12 credits (of three or four-credit courses) per semester and receive an annual salary with benefits. Tenured and tenure-track faculty members participate in ongoing governance at their particular college, including structuring academic programs, designing curriculum, and serving on one of the many departmental committees. Tenure-track faculty members are eligible for tenured evaluation at the conclusion of a set number of years. A college's decision to grant

[3] Governor Deval Patrick signed legislation giving university status to all Massachusetts state colleges on July 28, 2010. As a result, the Commonwealth's nine state colleges are now known as state universities. The Hearing Officer referred to them as colleges in her decision, and in the interests of clarity, we do the same.

tenure to a faculty member is a major financial decision for that college because the prospective candidate is entitled to employment at the college for the remainder of their professional academic career. Full-time temporary faculty members teach from one to four consecutive semesters, advise students who are assigned to them, and have the same workload as tenured or tenure-track faculty members.

Each college allocates a portion of its yearly budget toward full-time salaried positions based on the size of particular departmental programs and projected growth for those programs. The colleges use education and "rank" (i.e., professor, associate professor, assistant professor and instructor) as factors to determine minimum and maximum salaries for its faculty members.

Mass. Art refers to certain faculty members as "benefitted" part-time, which is similar to full-time status in that: (1) benefitted part-time employees possess the same rights and benefits as full-time faculty members and hold similar academic ranks; (2) they have the same workload as full-time faculty members and are evaluated under the same rules; (3) they share the same salary scale and are entitled to professional development monies (on a pro rata basis); and, (4) they are eligible for sabbatical leaves of absence.

The colleges consider hiring adjunct faculty when the number of courses needed exceeds the current ability of full-time faculty (and benefitted part-time faculty at Mass. Art) to deliver those courses. Another consideration that results in the hiring of adjunct faculty is to acquire teachers with specialization in a particular area. The decision to hire adjunct faculty is made on a college-level each academic year (AY) based on the number of students enrolled in particular programs and related courses. In departments

with six or more full-time faculty, the number of adjunct faculty hired is governed by the 15% and 20% cap contained in the parties' Agreement.

In some instances, it costs the colleges less to hire a part-time faculty member than a full-time faculty member because part-time adjuncts are paid per course rather than per semester or on a yearly salary. Part-time faculty members are not eligible to become members of the bargaining unit until they complete three consecutive semesters. The Employer is prohibited from hiring them for more than four consecutive semesters.

Department Chairs and Committee Assignments

Department chairs are full-time faculty who are responsible for supervising and evaluating other full-time and part-time faculty members in their respective departments. The department chairs serve on at least 17 different departmental committees at the nine colleges.[4] At Mass. Art, the department chairs also meet biweekly with the Senior Vice President for Academic Affairs Dr. Johanna Branson to review staffing plans, the hiring of adjuncts and tenure-track faculty, and to discuss requests for temporary appointments.

[4] The Board challenges this finding arguing that it is correct that these committees exist, but "it is incorrect that chairs serve on all of them or that all of the committees are active at any point in time." We decline to disturb the Hearing Officer's finding, since the Board cited no evidence to show that there are certain committees that do not have department chairs. Also, the hearing officer did not state that all of the committees are continuously active, and the fact that some committees may be temporarily inactive is not relevant to our decision.

At the colleges, five committees exist at the departmental level, eleven at the college level, along with two "other" committees.[5] Full-time faculty as well as Departmental Chairs serve on committees. The five departmental committees have 396 full-time faculty members; the 11 college committees have over 963 full-time faculty members; and the two "other" committees have at least 92 full-time faculty members.

An increased number of part-time faculty members impacts the full-time faculty's obligation to serve on committees in two ways. First, it generally results in an increased workload for department chairs.[6] Second, when the ratio of part-time faculty to full-time faculty increases, the pool of full-time faculty members available to staff committee assignments is smaller.

Core Curriculums and Student Enrollment

The colleges require all students to enroll in designated core curriculum courses as a prerequisite to earning their degree. Each college develops its core curriculum with significant input from faculty members, and teaching the lower level core curriculum

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[5] The departmental committees are: (1) Undergraduate Curriculum Committee; (2) Graduate Committee; (3) Ad Hoc Committee; (4) Search Committee; and (5) Peer Evaluation Committee. The college committees are: (1) All-College Committee; (2) Curriculum Committee; (3) Academic Policies Committee; (4) Student Affairs Committee; (5) Special Committee; (6) Ad Hoc Committee; (7) College-Wide Advisory Committee such as Dean/Vice President Search Committee; (8) Other School/College Committees; (9) Committee on Promotions; (10) Committee on Tenure; and (11) Committee on Termination of a Tenured Faculty Member. The two "other" committees are the System-Wide Task Force and the Inter-Segmental Committee.

[6] The Board challenges the Hearing Officer's finding that an increased number of part-time faculty members generally results in an increased workload for the department chairs, arguing that an increased number of full-time faculty would have a similar effect. We decline to modify the Hearing Officer's finding. It is accurate, and does not state that an increase in full-time faculty would *not* increase the workload for department chairs. Moreover, we decline to interpret the Agreement to draw the conclusions that the Board suggests in the absence of testimonial or other evidence supporting those conclusions.

courses usually requires a large number of part-time faculty members. Part-time faculty are also hired to teach certain program/degree-specific courses. The colleges balance the need to offer lower level core courses against the availability of full-time instructors to teach those courses.[7]

Enrollment numbers for first-year students at Westfield, Bridgewater, Framingham and Salem during AY 2007-2008 were higher than expected and the colleges did not have enough full-time faculty members to teach all the core courses, including: English, Economics, Mathematics, Music, Theater, History, Computer Science, Communications, Psychology, Sociology, Science and Philosophy. The colleges addressed this higher than anticipated enrollment of first-years by hiring additional part-time instructors to teach those core courses. This resulted in the 15% cap being exceeded in departments at each of these colleges. Also, during AY 2007-2008, Mass. Art hired additional part-time instructors to teach core courses in the Environmental Design (including Fashion Design, Architectural and Industrial Design) and Communications programs (including Graphic Design, Illustration and Animation), which exceeded the 20% cap.

The 15% and 20% Caps

The purpose of the 15% cap in Article XX, § C(10) of the Agreement is to protect the work load for full-time faculty members, including department chairs, by limiting the

[7] The Board argues that the Hearing Officer's finding on this point over-simplifies and misstates the testimonial evidence. The Board stresses that core, lower level courses must be taught and that adjuncts are hired because administrators are responding to the wishes of full-time faculty who "do not wish to teach only these lower level courses." We decline to disturb the Hearing Officer's finding because it does not state or imply that offering core, lower courses is optional.

number of part-time instructors who teach in qualifying departments. When there is a shortage of faculty due to exigent circumstances (such as retirement, medical leave of absence, sabbatical, death or increase in student enrollment), Article XX, § C(10) does not limit the colleges' ability to hire faculty members on a full-time temporary (semester-by-semester) or part-time temporary (course-by-course) basis under Article XX, § C(10) of the Agreement. The colleges may also respond by arranging tenured and tenure-track faculty to assume more courses than required by the Agreement or by shifting full-time faculty members from compliant to non-compliant departments.[8]

Because the caps are set for an entire academic year and not by semester, neither the Board nor the Association know whether the colleges have satisfied the 15% or 20% compliance rule for a given AY until the spring semester of that year. However, prior to the start of an AY, the parties know the core courses offered, the number of full-time tenured faculty, full-time tenure-track faculty and full-time temporary faculty and the number of students enrolled for the fall semester. Given this information, a potential violation of the 15% and 20% rules can be avoided by the colleges utilizing, in some combination, the following steps. The colleges can: (1) hire more full-time faculty members; (2) where permissible under the contract, instruct full-time faculty to teach more courses, including lower-level core courses;[9] (3) cancel courses; (4) reduce

[8] The Board challenges this finding, stating that there is no evidence that the colleges could transfer a member of the Mathematics faculty to teach English composition. We do not disturb the finding. The Hearing Officer did not state or suggest that the colleges would assign a faculty member to a course that they were not qualified to teach, and the Board did not cite any limitation on a college's ability to shift faculty members from one area of competence to another.

[9] We modify this finding at the Board's request to note contractual workload limitations in the parties' Agreement.

course offerings; (5) combine low-enrollment courses; (6) increase student enrollment caps for courses; (7) use historic data to plan courses more carefully; and (8) control matriculation.

Although colleges could require full-time faculty to teach more lower-level courses, they have not chosen to do so. Increased teaching of lower-level courses could adversely impact bargaining unit members by diminishing professional development opportunities and faculty morale. Canceling courses could impact a student's financial aid and lengthen the amount of time that a student has to complete his/her degree because they would have to wait until the college offers the required course. Combining courses, effectively increasing student/teacher ratios, could also increase faculty workloads and negatively impact a faculty member's ability to evaluate students' work in subjects such as in English Composition, which requires heavy-writing assignments.

As the number of part-time faculty increases, so does the work load for full-time faculty who are department chairs because they have to oversee more frequent hiring as well as supervise and evaluate a larger number of faculty.[10] As the number of part-time faculty increases, the need for supervision increases and the number of full-time faculty available for committee assignments and to pursue continuing scholarship (e.g., research, publishing and presentation at conferences) declines. There is also a

[10] The Board challenges the Hearing Officer's finding that full-time faculty other than department chairs supervise part-time employees, citing Article VI, § A(8) of the Agreement. The Association claims that the Board takes the Hearing Officer's finding out of context, but it does not dispute the Board's assertion on this specific point. We have amended the Hearing Officer's finding accordingly. We note, however, that the modified finding still supports the conclusion regarding the effect of increased numbers of part-time faculty.

corresponding decrease in a full-time faculty member's ability to meet and work one-on-one outside the classroom with an increased number of students. A larger contingent of adjunct faculty also makes it more difficult for students who are taught by adjuncts. It may be harder for students to acquire letters of recommendation due to adjunct faculty's short employment period (four consecutive semesters or less). Students may not be able to meet with the part-time faculty who teach them because many part-time faculty members do not have their own office space.

Colleges in Violation of the 15% and 20% Caps

For seven years, from AY 2001-2002 through AY 2007-2008, eight colleges reported having academic departments in violation of the 15% or 20% cap for part-time faculty members.[11] The total number of departments that violated the 15% and 20% caps rose from 14 in AY 2001-2002 to 31 in AY 2007-2008. The total number of course sections that violated those caps rose from 416 in AY 2004-2005 to 664 in AY-2007-2008. Specifically, in AY 2005-2006, five colleges had 20 departments and 346 course sections taught by part-time faculty members that exceeded the 15% cap.[12] In AY 2006-2007, seven colleges reported having 27 departments and 551 course sections in violation of the 15% and 20% caps. In AY 2007-2008, eight colleges had 31 departments and 663 course sections in excess of the caps as set forth below.

1. **Bridgewater**

During the fall semester of AY 2001-2002, 21 departments at Bridgewater violated the 15% rule, with adjuncts teaching 113 courses that exceeded the cap.

[11] Fitchburg reported zero departments/courses in excess of the 15% cap.

[12] Mass. Art reported zero violations for AY 2005-2006.

During the spring semester of AY 2001-2002, 17 departments violated the 15% rule with adjuncts teaching 76 courses exceeding the cap. During the fall semester of AY 2002-2003, 18 departments violated the 15% rule, for a total of 157 courses in excess of the cap. During the fall semester of AY 2002-2003, 16 departments violated the 15% rule with a total of 182 courses in excess of the cap. During the spring semester of AY 2003-2004, 20 departments violated the 15% rule with 161 courses exceeding the 15% cap.

In AY 2004-2005, Bridgewater had seven departments that violated the 15% rule for a total of 140 courses in excess of the cap. For AY 2005-2006, Bridgewater had nine departments in violation of the 15% rule with a total of 129 courses in excess of the cap. For AY 2006-2007, 11 departments violated the 15% rule with 230 total courses above the 15% cap. In AY 2007-2008, 12 departments violated the 15% rule with 343 courses in excess of the cap.

1. Framingham

In the fall of AY 2001-2002, Framingham had 14 departments with 35 courses that exceeded the 15% cap. In the spring of AY 2001-2002, 13 departments violated the 15% rule, with a total of 22 courses in excess of the cap. In AY 2002-2003, Framingham had 13 departments with 102 courses in excess of the 15% cap. For AY 2003-2004, the College had 13 departments with 48 total courses in excess of the 15% cap. For AY 2004-2005, the college had 5 departments in violation of the 15% rule, with a total of 29 courses in excess of the cap. For AY 2005-2006, it had three departments that violated the 15% rule with three courses exceeding the cap. In AY 2006-2007,

Framingham had zero departments in excess of the 15% cap, but in AY 2007-2008, it had two departments that violated the 15% rule with 16 courses in violation of the cap.

2. Mass. Art

In AY 2001-2002, Mass. Art had eight departments with 116 total courses above the 20% cap. For AY 2002-2003, eight departments with 48 courses exceeded the 20% cap, and during AY 2003-2004, eight departments with 133 courses exceeded the 20% cap. In AY 2004-2005, the College had three departments that violated the 20% rule with six courses above the cap. Although Mass. Art had zero departments that violated the 20% rule in AY 2005-2006, it had two departments with 19 courses in excess of the 20% cap in AY 2006-2007, and reported two departments with 16 course violations in AY 2007-2008.

3. Mass. College of Liberal Arts

During AY 2001-2002, Mass. Lib. had four departments in violation of the 15% rule with a total of 18 courses that exceeded the cap. During the spring semester of AY 2002-2003, the College had six departments that violated the 15% rule with 15 total courses in excess of the cap. During AY 2003-2004, Mass. Lib. had seven departments in violation of the 15% rule with a total of 28 courses exceeding the cap. In AY 2004-2005, it had two departments that violated the 15% rule with a total of 11 courses over the cap. In AY 2005-2006, the College had zero departments in violation of the 15% rule but, in AY 2006-2007, it had one department and one course in excess of the cap and, in AY 2007-2008, it had one department and three courses in violation of the cap.

4. Mass. Maritime

During AY 2001-2002, AY 2002-2003, AY 2003-2004, AY 2004-2005 and AY 2005-2006, Mass. Maritime had zero departments in violation of the 15% rule. However, in AY 2006-2007 and AY 2007-2008, it had two total departments that exceeded the cap.

5. Salem

During the fall semester of AY 2001-2002, Salem had three departments in violation of the 15% cap. In AY 2002-2003, the College had 11 departments that violated the 15% rule and, for AY 2003-2004 it had five departments that violated the cap. In AY 2004-2005, seven departments violated the 15% rule, for a total of 158 courses in excess of the cap.

Between 2002 and 2004, Salem offered an early retirement incentive that a significant number of faculty members accepted. Based on the faculty response, the College was only able to fill 20% of those positions with full-time instructors, resulting in an increased use of part-time adjuncts during AY 2005-2006 through AY 2007-2008. Specifically: in AY 2005-2006, Salem had five departments in violation of the 15% rule with 148 courses in excess of the cap; in AY 2006-2007, the College had seven departments with 210 courses in excess of the 15% cap; and, in AY 2007-2008, it had 10 departments with 203 courses that violated the 15% rule.

6. Westfield

During AY 2001-2002, Westfield had 10 departments in violation of the 15% rule. In AY 2004-2005, the College had four departments that violated the 15% rule with a total of 66 courses in excess of the cap. In AY 2005-2006, it had two departments that

violated the 15% rule with 61 courses exceeding the cap. In AY 2006-2007, the College had two departments in violation of the 15% rule with 75 courses in excess of the cap. In AY 2007-2008, it had three departments in violation of the 15% rule with 58 courses above the cap. Although Westfield hired seven full-time temporary faculty members to teach four sections of English Composition in AY 2007-2008, its English Department still violated the 15% rule by exceeding the cap on part-time adjuncts.

7. Worcester

During AY 2001-2002, Worcester had zero departments that violated the 15% rule, and in AY 2002-2003, it had three departments that exceeded the 15% cap. In AY 2003-2004, the College had six departments that violated the 15% rule and, in AY 2004-2005, it had only one department with six courses in violation of the 15% cap. In AY 2005-2006, Worcester had two departments with five courses in excess of the 15% cap. For AY 2006-2007, it had three departments in violation of the 15% rule with 14 courses exceeding the cap. In AY 2007-2008, the College had one department with 25 courses in excess of the 15% cap.

The 2002 Grievance

By a memorandum dated March 7, 2002, Association Grievance Committee Chair Frank S. Minasian (Minasian) and Association President Dr. Markunas (Dr. Markunas) filed a consolidated grievance with Dr. Frederick Woodward, Chair of the Council of State College Presidents, alleging that the Board had violated Article XX §

C(9)[13] of the Agreement, and "all other applicable articles....by exceeding the 15% provision relating to maximum amount of part-time faculty in each academic department."

By memorandum on September 15, 2005, Salem Vice President of Academic Affairs Dr. Diane R. Lapkin (Dr. Lapkin) notified Association Grievance Officer Margaret Vaughan (Vaughan) about the status of the grievance as it pertained to Salem, which the Employer had held in recess since May 9, 2003. Dr. Lapkin found that seven departments at the College had violated Article XX, § C(10), stating, in pertinent part:

> At Step I, this grievance is upheld. There is no doubt that [Salem] is in violation of Article XX.C.9. However, the data shown in Table I presents evidence of a good faith effort to mitigate the effect of faculty retirements.
>
> I assure the Association that [Salem] will continue its commitment to continue focusing new position requests on those departments that are out of compliance with Article XX.C.9.

The 2006 Grievance Ruling

By letter dated February 23, 2006, Dr. Woodward's successor, Dr. Janelle C. Ashley (Dr. Ashley) notified Dr. Markunas that the Board had upheld the MTA's 2002 grievance, finding that the Employer had violated the parties' Agreement pertaining to excessive use of part-time faculty in violation of the 15% and 20% rules. Dr. Ashley's letter stated, in part:

> I find no reason to question the sufficiency of the factual basis for the Association's claim. I conclude from it that seven of the Colleges — Fitchburg and the Maritime Academy are...exceptions—have at different points (though not at every point in every case) violated the Agreement by

[13] Article XX, §C(9) of the parties' 2001-2003 Agreement is referenced as Article XX, § C(10) in the parties' 2004-2007 successor Agreement. For purposes of this decision, all references to Article XX, § C(10) of the current Agreement include Article XX, § C(9) of the prior Agreement.

employing, in various departments at various times, more part-time faculty to teach three-credit courses than the Agreement permits.

...considering all of the data collectively, the Colleges have most significantly exceeded the contractual limits on the employment of part-time faculty during the academic year 2004-2005. That year culminates, indeed, what the data depict as an upward (i.e., negative) trend. I have no doubt...that trend is...a product of the funding shortfalls the Colleges have experienced in recent years. While that may not excuse the contractual violation I have identified, it goes far to explain it, and it puts real and serious impediments in the way of the prompt effectuation of a remedy.

Having regard to the point just made and to my factual findings generally, I decline to adopt as a remedy here the immediate and categorical directive to "cease and desist" that the Association has sought. But I acknowledge that the Colleges must in fact, without being expected to expend moneys they lack or to disrupt academic programs of importance to their students, "cease and desist" from violating Article XX, § C(10), of the Agreement. I therefore require the following:

1. That each College, commencing no later than the fall semester of the academic year 2006-2007, reduce its improper reliance on part-time faculty in as great a measure as it judges practicable;

2. That each College continue thereafter to reduce its improper reliance on part-time faculty and bring itself into compliance with the contractual mandate (but subject to the requirements of any collective bargaining agreement then in force) no later than at the conclusion of the academic year 2008-2009; and

3. That each College, either by its Vice President for Academic Affairs or otherwise as the President may determine, publish to the chair of each academic department notice of the obligation depicted in the preceding items 1 and 2; each College shall do so prior to the scheduling of courses and teaching assignments for the academic year 2006-2007 and, again, prior to the scheduling of courses and teaching assignments for the academic years 2007-2008 and 2008-2009. In this context I encourage, perhaps unnecessarily, that the Vice Presidents and appropriate Deans meet with Department Chairs to discuss the means for bringing the Colleges into compliance with the contractual requirements in the manner I require.

> In fulfilling the obligations that this decision imposes on it, every College is at liberty to increase its complement of full-time faculty (including temporary full-time faculty), to alter or reduce its course offerings (including the number of course sections) or to employ some combination of the two. Nothing in this decision shall be thought to limit any College's authority in any of those respects.

By memorandum on April 6, 2006, Dr. Lapkin informed all Department Chairs at Salem about the College's "Use of Part-Time Faculty" and Dr. Ashley's ruling on the 2002 grievance. Specifically, Dr. Lapkin reminded the Chairs of Salem's obligation to comply with Article XX, § C(10) of the Agreement beginning in AY 2006-2007 and to reduce improper reliance on part-time faculty members "no later than at the conclusion of the 2008-2009 academic year."

2007 Successor Contract Negotiations

The parties commenced successor contract negotiations in 2007. During that summer, the Employer proposed to delete Article XX, § C(10). The Association rejected that proposal and the Employer withdrew it. Also in the summer of 2007, the Association discovered that some colleges had failed to reduce their reliance on part-time faculty for AY 2006-2007 and had, in fact, increased the number of part-time faculty members who were hired in excess of the 15% and 20% rules and in contravention of Dr. Ashley's February 23, 2006 letter.

Although the parties finalized their successor agreement on August 27, 2007, by letter on the same date, Board counsel Mark Peters (Peters) notified Association Representative Donna Sirutis (Sirutis) about the Employer's concern regarding Article XX, § C(10) , stating in pertinent part:

> Throughout the course of the negotiations now just concluded, the Board of Higher Education took the position that...[Article XX, §C(10) ...is]

> unlawful because [it] intrudes upon and impairs an authority that the law of this Commonwealth vest[s] exclusively in the persons charged with managing the State Colleges...in other words, [it is a matter] of managerial prerogative. All of the proposals I made on behalf of the Board of Higher Education therefore included a specific proposal to delete [that provision] from the agreement. The Association consistently rejected that proposal.
>
> Because those whom I represent have wished to consummate an agreement rather than to reach impasse concerning [that matter]...we have elected to allow [Article XX, § C(10)] to remain in the new agreement. But because [that contractual provision is] unlawful...[it is,] in our view, unenforceable as a matter of law and both...a legal and contractual nullity.

By letter dated September 27, 2007, Sirutis responded to Peters' August 27, 2007 letter, stating that Article XX, § C(10) is "legal and enforceable" and she expected the Board to enforce that provision.

Sometime between August 27, 2007 and September 11, 2007, Dr. Markunas, on behalf of the Association, complained to Fitchburg President Robert Antonucci (Dr. Antonucci) about Peters' August 27, 2007 letter. By response letter dated September 11, 2007, Dr. Antonucci informed Dr. Markunas that he had presented the Association's concerns to the Council. By that letter, Dr. Antonucci also assured Dr. Markunas that:

> Speaking for all of the Colleges, we wish you to know that we intend, in fact, to adhere to the provisions of the new collective bargaining agreement now at issue. With respect to the use of part-time faculty, therefore, the Colleges will continue to implement the grievance decision that Janelle Ashley rendered on February 23, 2006.

By letter on January 30, 2008, Dr. Markunas requested certain information from Dr. Antonucci to ensure compliance with Article XX, § C(10) of the Agreement. Specifically, Dr. Markunas requested that the Employer provide the following information:

> 1. The total number of three-credit sections (four-credit sections at Framingham State College) being taught by part-time employees during each of the Fall 2007 and Spring 2008 semesters,
>
> 2. The number of those three-credit sections (four credit sections at Framingham State College), above, being taught by part-time employees during each of the Fall 2007 and Spring 2008 semesters that fall under the exemption provisions (the last paragraph of Article XX.C.9) from the overall limit of 15%, and
>
> 3. The grand total number of three-credit sections (four-credit sections at Framingham State College) being taught by all employees during each of the Fall 2007 and Spring 2008 semesters.

Board's Confirmation of AY 2007-2008 Violations

In or about April of 2008, the Board provided the Association with the requested information, showing that certain departments at Bridgewater, Framingham, Salem, Westfield and Mass. Art had violated the 15% and 20% rules for AY 2007-2008 by increasing reliance on part-time faculty members in excess of the Article XX, § C(10) caps.

By memorandum on June 27, 2008, Dr. Lapkin notified Salem President Patricia Maguire Meservey (Dr. Meservey) about Salem's eight departments that were in violation of the 15% rule for AY 2007-2008, stating, in part:

> In all but one of the severe cases (English), current full-time faculty staffing increases scheduled for Fall 2008 and requested for Fall 2009 will bring the college into compliance by 2008-09 (Communications, Sport & Movement Science) or 2009-2010 (Computer Science, History, Mathematics).
>
> In the case of English, approximately 15 full-time faculty would need to be added in order to bring the department into compliance. Three positions will be added in 2008-2009 and three more have been requested for 2009-2010. This will result in reducing the part-time faculty utilization from almost 50% to only approximately 36%.

There is no doubt that class size and frequency of course offering must be managed to further reduce the number of sections offered by the department.

OPINION[14]

At issue in this appeal is the enforceability of Article XX, § C(10) of the parties' Agreement, which, as set forth in the facts, establishes a ratio of full-time to part-time faculty in certain departments at the public colleges in the Commonwealth governed by this labor Agreement. This contract provision was first bargained for and included in the parties' agreements in 1986 and remained in each of the subsequent contracts, including the 2004-2007 agreement under which this dispute arose. Resolution of this issue requires an examination of the long-recognized tensions between the statutory obligation to bargain in good faith, including a duty to comply with the terms of collectively bargained agreements, Commonwealth of Massachusetts, 26 MLC 165, 168, SUP-3972 (March 13, 2000) and G.L. c.15, § 22, which reserves to the Board the non-delegable, management right to set educational policy.

On appeal, the Board argues for reversal of the Hearing Officer's decision on two grounds. First, the Board contends that the Hearing Officer erred by finding that the Board *deliberately* refused to implement the terms of the Agreement. Second, the Board challenges the legality of Article XX, § C(10), a clause negotiated and approved by the Board that has been in the parties' collective bargaining agreements since 1986. Specifically, the Board argues that Article XX, § C(10) is an impermissible delegation of the statutory authority that G.L. c.15A, § 22 grants the Board, and an unlawful limitation on its ability to establish effective educational policy. We are not persuaded by either of

[14] The CERB's jurisdiction is not contested.

these arguments and agree with the Hearing Officer that the Board unlawfully repudiated the Agreement and that the contractual provision at issue does not unlawfully delegate the Board's statutory authority to establish effective educational policy.

Repudiation

A public employer's deliberate refusal to implement or to abide by the unambiguous terms of an agreement constitutes a repudiation of that agreement in violation of the Law. Commonwealth of Massachusetts, 36 MLC 65, 68, SUP-05-5191 (October 23, 2009). To establish that an employer acted deliberately, a union must show that the employer engaged in a pattern of conduct designed to ignore the parties' collectively bargained agreement. Commonwealth of Massachusetts, 26 MLC 87, 89, SUP-4281, SUP-4324 (January 7, 2000).

The Board does not dispute that the parties entered into a collective bargaining agreement which included the language of Article XX, § C(10), and that it issued a grievance decision on February 23, 2006 requiring each college to reduce its improper reliance on part-time faculty commencing no later than the fall semester of the AY 2006-2007.[15] Indeed, the Board stipulated that certain departments at Bridgewater, Framingham, Salem, Westfield and Mass Art employed part-time instructors during the 2007-2008 academic year, and in prior academic years, that exceeded the assignment

[15] The Board's supplementary statement does not reference or challenge the Hearing Officer's conclusion that the Board repudiated the Feb. 13, 2006 grievance decision. Consequently, we limit our consideration to the Hearing Officer's conclusion regarding repudiation of the collective bargaining agreement, noting that the analysis we provide regarding repudiation of the Agreement applies with equal force to the grievance decision.

limitations of part-time instructors in Article XX, §C(10). Thus, there is no dispute that the Board failed to comply with the terms of the Agreement.

We uphold the Hearing Officer's finding that the Board acted with the requisite deliberateness to establish a repudiation of Article XX, § C (10). To show that it did not deliberately repudiate the Agreement, the Board cites testimony from various college administrators who tried, but ultimately failed, to comply with the Agreement. This argument misses the point. The Law requires actual compliance, not just good efforts and intentions. As detailed in the Hearing Officer's Decision, evidence of deliberate action can be seen in the Board's continuing failure to comply with Article XX, § C(10) in successive years. The language of Article XX, § C(10) first appeared in the 1986-1989 contract, yet from AY 2001-2002 through AY 2007-2008, eight colleges had departments that violated the Agreement. In AY 2007-2008, 31 departments violated the Agreement, having risen from 14 departments who violated the Agreement in AY 2001-2002.

The deliberateness of the Board's conduct is evidenced by its serial violation of an Agreement that it had repeatedly promised to follow over the course of seven successive academic years. Moreover, the violation continued even though Dr. Ashley stated in her February 23, 2006 grievance decision that the colleges must "cease and desist" from violating Article XX, § C(10) and required each college to reduce its improper reliance on part-time facility. Next, in the subsequent 2007 contract negotiations, the Board again agreed to include Article XX § C(10) in the parties' Agreement, even after its attorney suggested that the provision was a "legal and contractual nullity." In September of 2007, after the parties' approved the Agreement,

Dr. Antonucci - speaking for all of the colleges - assured the Association that "...we intend...to adhere to the provisions of the new collective bargaining agreement now at issue. With respect to the use of part-time faculty, therefore, the Colleges will continue to implement the [February 23, 2006] grievance decision...."

Notwithstanding these express commitments, for successive years the Board persisted in employing part-time faculty in numbers that exceeded the 15% requirement. Indeed, the number of adjunct-taught classes in multiple departments at numerous colleges indicates that the Board did not miss the 15% mark narrowly. Cf. Commonwealth of Massachusetts, 26 MLC at 89 (no deliberate action where employer provided information seven days beyond established time frame). We therefore find that the record provides substantial evidence to support the Hearing Officer finding a repudiation of the contract provision at issue, in accordance with the Law.

G.L. c. 15A, Section 22 and the Meaning of Appoint

We next consider the Board's arguments that it is excused from compliance with the negotiated Agreement because the assignment limitation in Article XX, § C(10) falls within the exclusive power of appointment that G.L. c. 15A, § 22 reserves to the Board. In pertinent part, G.L. c. 15A, § 22 reads as follows:

> Each board of trustees of a community college or state university shall be responsible for establishing those policies necessary for the administrative management of personnel, staff services and the general business of the institution under its authority. Without limitation upon the generality of the foregoing, each such board shall: ... (c) appoint, transfer, dismiss, promote and award tenure to all personnel of said institution...

This statute grants public college administrators "unfettered authority to make decisions bearing on core issues of educational policy in an effort to provide the most effective education for students." Massachusetts Community College Council v. Massachusetts

Board of Higher Education/Roxbury Community College, 81 Mass. App. Ct. 554, 560-561 (2012) (citing Board of Higher Educ. v. Massachusetts Teachers Association/NEA, 62 Mass. App. Ct. 42, 49 (2004) and Higher Education Coordinating Council/ Roxbury Community College v. Massachusetts Teachers Association/Massachusetts Community College Council, 423 Mass. 23, 29 (1996)).

Section 22 has been found to place a "gloss on public sector collective bargaining statutes [. . .] in order that the collective actions of public employees do not distort the normal political process for controlling public policy." Boston Teachers Union, Local 66 v. School Comm. of Boston, 386 Mass. 197, 211 (1982). However, the principle of non-delegability applies "only so far as is necessary to preserve the college's discretion to carry out its statutory mandates." Massachusetts Board of Higher Education/Holyoke Community College v. Massachusetts Teachers Association, et al, 79 Mass. App. Ct. 27, 32 (2011). The Supreme Judicial Court has explained that the "means of implementing" non-delegable decisions reserved to management by statute may nevertheless properly be the subject of an enforceable collective bargaining agreement. School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 564 and n. 5 (1983). Accordingly, colleges are permitted to bind themselves through the process of collective bargaining to the procedures used to implement such decisions. Massachusetts Board of Higher Education/Holyoke Community College, 79 Mass. App. Ct. at 33-34.

More specifically, the non-delegation principle prohibits public colleges from delegating decisions concerning staffing and personnel. Massachusetts Community College Council v. Massachusetts Board of Higher Education/Roxbury Community

College, 81 Mass. App. Ct. at 560 (further citations omitted). The non-delegation principle has been found to give wide berth to decisions of the Board when it comes to specific appointment determinations because "hiring faculty, like granting tenure, necessarily hinges on the subjective judgments regarding the applicant's academic excellence, teaching ability, creativity, contributions to the university community, rapport with students and colleges, and other factors that are not susceptible of quantitative measurement." Massachusetts Board of Higher Education/Holyoke Community College, 79 Mass. App. Ct. at 33 (citing Berkowitz v. President & Fellows of Harvard College, 58 Mass. App. Ct. 262, 269 (2003)).

On the other hand, the Supreme Judicial Court has listed a host of circumstances where school committees could be obligated to adhere to provisions of collective bargaining agreements that relate to the means of implementing exclusive, non-delegable functions of a school committee. School Committee of Newton, 388 Mass. at 564 and n. 5. The Court explained the non-delegation principle does not preclude bargaining over and enforceability of labor agreements addressing job security clauses, Boston Teachers Union, Local 66 v. School Committee of Boston, 386 Mass. 197, 213 (1982), or procedures to be followed in reappointment of non-tenured teachers, School Comm. of W. Springfield v. Korbut, 373 Mass. 788, 796 (1977). Similarly, the Court found an agreement on class size, teaching load, and the use of substitute teachers to be enforceable where there were adequate funds and no change in educational policy. Boston Teachers Union, Local 66 v. School Comm. of Boston, 370 Mass. 455, 464 (1976). The Court has also held that an arbitrator's award directing a school committee to consult with the union prior to implementing elementary school final examinations

was enforceable because the award did not improperly intrude into an area reserved for the judgment of the school committee regarding educational policy. Id. (citing School Comm. of Boston v. Boston Teachers Union, Local 66, 378 Mass. 65, 72-73 (1979)).

With these principles in mind, we address the Board's contention that the term "appoint" in Section 22 should be broadly construed to encompass the right to exclusive decision-making on the number of full versus part-time faculty members deemed necessary to teach the number of courses that the Board determines is appropriate each semester in any given subject. Although the Board asserts that any other construction would render the term "appoint" meaningless, it cites no case holding that the power to appoint applies as broadly as it contends or that the term "appoint" prohibits the Board from entering into a binding agreement with the Association to balance the employment ratio of part-time and full-time faculty.

Further, the parties' Agreement in no way limits or interferes with the Board's authority to appoint a specific person to a specific position. The only case cited in the Board's Supplementary Statement, Higher Education Coordinating Council/Roxbury Community College, 423 Mass. 23, is not to the contrary. That case addressed whether an arbitrator's award that required a community college to create a vacancy that otherwise would not have existed infringes on management's exclusive control over educational policy established by the non-delegability doctrine. Id. The arbitrator had ordered that a faculty member who was laid off when the college closed an electronics technology program be placed in a "vacancy" in the math department created by the death of a math department faculty member. Id. The Court overturned the arbitrator's ruling because management had "the right to determine whether a vacancy exists and

whether to fill it." Id. In so ruling, the Court recognized that the power to appoint the teacher, like a decision to abolish a particular position, is a decision within the exclusive managerial prerogative. Because the college did not decide to fill the vacancy, the Court held that awarding the position to the grievant pursuant to the terms of the collective bargaining agreement encroached on an exclusive managerial prerogative of the college administrators. Id.

Here, Article XX, § C(10) does not encroach on the managerial prerogative at issue in the Higher Education Coordinating Council case, i.e., the right to determine whether to fill a vacancy. Indeed, Article XX only comes into play once the Board of Higher Education determines the number of students it will admit and the number of classes that must be taught in any given college and/or department and after the Board makes a decision whether to hire additional faculty to meet those needs. For this reason, we find that Article XX, § C(10) is a "means of implementing" the Board's educational policy. See School Committee of Newton, 388 Mass. at 563-564. As the Hearing Officer concluded, this provision of the Agreement functions as a procedural mechanism for establishing the complement of faculty who will deliver educational services to students. It does not require that the Board bargain over its decision to create or eliminate a position. See Higher Education Coordinating Council/Roxbury Community College, 423 Mass. at 23. Nor does it interfere with the Board's decisions on how many students to enroll or how many classes of any given subject will be taught.

More specifically, contrary to the Board's contention, Article XX, § C(10) does not restrict the total number of part-time instructors that a college can employ in an academic department irrespective of other considerations, and it does not limit the size

of its staff. The assignment limitation that the Board agreed to - essentially, a ratio of part-time to full-time faculty for certain courses in certain departments - is not a numerical cap on part-time faculty. One need look no further than Dr. Ashley's February 23, 2006 grievance decision to see the flexibility that the colleges retain. Their options include increasing its complement of full-time faculty, including temporary full-time faculty, and/or altering its course offerings. The extent to which the cap impacts the number of part-time faculty that can be hired is a function of the number of three-credit courses offered by a given department in a given semester or academic year and the number of full time faculty employed. Thus, the 15% cap neither dictates the number of three-credit courses the Employer decides to offer nor the number of faculty members needed to teach these courses.

The interpretation of the term "appoint" in Section 22 that the Board urges we adopt extends the principle of non-delegability far beyond what is necessary to preserve its statutory mandate. See Massachusetts Board of Higher Education, 79 Mass. App. Ct. at 33-34. We reject the logic of the argument because it would undermine the balance that the courts have instructed the CERB to achieve when addressing the tensions that exist between protecting the rights of public employees under Chapter 150E and the exclusive domain of authority granted to educational policy-makers by the non-delegability doctrine. See Higher Education Coordinating Council/ Roxbury Community College, 423 Mass. at 28.

Non-Delegability of Educational Policy and the Delivery of Academic Services

For similar reasons, we reject the Board's characterization of the parties' collective bargaining agreement as an unlawful limitation on the form of employment

that the Employer determines to be the best means of delivering academic services. As noted, the Agreement does not prohibit the colleges from employing part-time faculty or broadly restrict how they serve; rather it sets a ratio for the number of adjuncts who may be hired each semester based on the number of three credit courses offered by a given department. In this regard, we follow the holding and reasoning of Boston Teachers Union, Local 66, American Federation of Teachers, AFL-CIO, et. al. v. School Committee of Boston, 370 Mass. 455, 462 (1976). In that case, the Court concluded that a labor agreement on class size, teaching load, and the use of substitute teachers was enforceable where there were adequate funds and no change in educational policy. Id. Of particular note in that case is the contractual provision to hire substitute teachers to replace absent teachers, which the Court held did not encroach on the school committee's singular authority to establish educational policy and was a proper subject of collective bargaining. Id. The Court explained that the school committee established an educational policy when it agreed with the union to assure class size and teaching burdens by replacing absent teachers with substitutes, and it did not change that policy when it failed to hire substitute teachers on certain days in December of 1972 in violation of the agreement. Id. at 464. (finding enforceability of these provisions because agreement was consistent with school committee's view of established fiscal management and educational policy).

Similarly here, there is no evidence that the Board's repudiation of Article XX, § C(10) was premised on a change to any educational policy affecting or underlying the agreed-upon balance of part-time instructors and full-time faculty that was negotiated by the Board and the Association. See id. Indeed, with respect to our understanding of

the Board's educational policy, we find it significant that the Board repeatedly maintained its obligation to abide by this provision. Dr. Ashley's grievance decision is particularly noteworthy in that it contains no hint of a changed educational policy on the use of full-time and adjunct faculty. Rather, it reaffirms the Board's commitment to the assignment limitations. By acknowledging that the colleges must cease and desist from violating Article XX, § C (10), "without being expected to expend moneys they lack or to disrupt academic programs of importance to their students," Dr. Ashley, in effect, acknowledges that adherence to the Agreement does not require academic sacrifices, deficit spending or other steps that might be considered to be an alteration of the Board's educational policies. This view of Article XX, § C(10) was reaffirmed yet again after the most recent Agreement was signed by the Employer as indicated by Dr. Antonucci's September 11, 2007 promise that the "Colleges will continue to implement the grievance decision that Janelle Ashley rendered on February 23, 2006."

Additionally, nothing in the evidentiary record indicates that the Board's original agreement to the 15% assignment limitation was inconsistent with its educational goals, including the optimization of the delivery of educational programs and services. As the CERB discussed in the context of elementary and secondary education, we presume that all of the Board's decisions are made with the goal of providing quality higher education in the Commonwealth, yet not all decisions are insulated from collective bargaining. Boston School Committee, 3 MLC 1603, 1607, MUP-2503, 2528, 2541 (April 15, 1977).

Our conclusion, that Article XX, § C(10) does not unlawfully compromise the Board's core decision-making over educational policy also rests on the fact that there

are a variety of important situations regarding the hiring of part-time faculty that are in no way restricted by Article XX, § C(10). For example, the Board retains exclusive authority over the hiring of part-time faculty to replace full-time faculty who are taking various leaves or reducing their course loads to accommodate other professional responsibilities.

The record also shows that the 15% cap does not prevent a department from offering a particular course. As the Hearing Officer indicated, there are a variety of options that the Employer can utilize to ensure that a course is offered. Those options include: increasing its complement of full-time faculty, including temporary full-time faculty; shifting full-time faculty members from compliant to non-compliant departments within their areas of competence; altering course offerings; combining low-enrollment courses; increasing student enrollment caps for courses; using historic data to plan courses more carefully; and controlling matriculation.

The Employer contends that many of these options are not viable. In particular, throughout its post-hearing brief, the Board argues that if the colleges were to replace part-time faculty with full-time faculty in compliance with the 15% cap, the finite pool of funds from which budgets are drawn will be devoted almost exclusively to faculty salaries. Essentially, the Board argues that hiring adjunct faculty at lower costs gives the colleges the ability to provide other services fundamental to a complete college education as well as to fully staff all courses it determines should be part of the curriculum. We recognize and in no way minimize these practical concerns. At the same time, we have held that where an employer's decision will impact directly on the employment relationship with bargaining unit members, that decision should be

insulated from the bargaining process only if the decision goes directly to the issue of how much education or what types of educational programs to provide. See Boston School Committee and Boston Teachers Union, Local 66, et. al, 3 MLC at 1607(decision of school committee does not fall outside the scope of bargaining merely because decision made with "an eye toward the interest of the public in a sound educational system.")

Here, as we have explained, the decision on whether to hire a certain number of adjunct faculty or full-time faculty is not so closely or directly tied to the number or types of courses to be offered by the colleges that it can be deemed a managerial decision outside the bargaining process. See Boston School Committee and Boston Teachers Union, Local 66, et. al, 3 MLC at 1607 (determining whether a term or condition of employment is outside of bargaining as a matter of core educational policy is "not subject to hard rules" and requires balancing competing interests). The Board's contention that this issue is a matter of core educational policy is particularly problematic since it claims that its decision to hire more adjuncts instead of full-time faculty is driven by financial considerations tied to the costs of hiring adjuncts as compared to full-time faculty. However, in comparable situations, the CERB has not permitted school committees to convert what are essentially financial decisions into decisions insulated from bargaining merely by labeling their conduct as effectuating educational policy. See Peabody School Committee, 13 MLC 1313,1319-1320, MUP-5626 (December 11, 1986) (finding bargaining over class size was obligatory under c. 150E and not precluded as a matter of educational policy when evidence did not establish that school committee was motivated by such policy considerations).

The record indicates that the inclusion of Article XX, § C(10) in the parties' Agreement arose to address certain burdens that could be placed on faculty members' terms and conditions of employment. These burdens implicate core terms and conditions of employment that are subject to the collective bargaining process. We do not doubt that maintaining these assignment limitations utilizing the options outlined in the Hearing Officer decision or doing so in a manner consistent with Dr. Ashley's grievance settlement may create difficulties and frustrations. But, that is not the same as asserting that the implementation of the Agreement is at odds with Board control over educational policy, particularly where the evidence does not show that the Board's new, recent objection to bargaining over the ratio of the adjunct faculty to full-time faculty was motivated by a change in educational policy. Moreover, the Board did not challenge the fact that when there is a shortage of faculty due to exigent circumstances (such as retirement, medical leave of absence, sabbatical, death or increase in student enrollment), the colleges may hire faculty members on a full-time temporary (semester-by-semester) or part-time temporary (course-by-course) basis under Article XX, § C(10) of the Agreement.

The Employer erroneously contends that the Hearing Officer's conclusion that it did not have the exclusive managerial prerogative to hire more part-time faculty members than permitted by Article XX, § C(10) was premised solely on her determination that the Board had options that it failed to explore. In fact, the Hearing Officer did properly consider whether the contractual language impermissibly infringed on the Board's non-delegable duty to appoint personnel pursuant to G.L. c.15A, § 22. Further, although the Board argues that the Hearing Officer wrongly focused on the

Board's failure to explore various options, it does not challenge the fact that it could have implemented certain measures as a means to adhere to the Agreement. Furthermore, some factors that the Board contends limits its options, such as the tenured faculty's objection to teaching more lower-level required courses, or the contractual provisions on course load, are matters that are subject to collective bargaining and could have been discussed at the bargaining table. The fact that the Board retained these options shows that the terms of the Agreement and the obligation to bargain over the caps did not unduly restrict the Board's ability to manage and structure its academic services or impermissibly limit the level or types of educational programs that the colleges provide their students.

The parties' obligation to balance their respective rights and obligations under c. 15A, § 22 and Chapter 150E may at certain moments give rise to difficulties related to implementation of their collectively- bargained Agreement. However, these internal challenges do not vitiate the [Board's] obligation to "aggressively implement the letter and the spirit" of the Agreement. Massachusetts Board of Regents of Higher Education, 10 MLC 1196, 1205, SUP-2673 (September 8, 1983).

CONCLUSION

For the reasons explained above, the Hearing Officer correctly concluded that the Board violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by repudiating Article XX, § C(10) of the Agreement and the February 23, 2006 grievance decision.

ORDER[16]

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the Board of Higher Education shall:

1. Cease and desist from:

   a) Failing to bargain in good faith by repudiating Article XX, § C(10) of the parties' collective bargaining agreement.

   b) Failing to bargain in good faith by repudiating the February 23, 2006 grievance decision.

   c) In any like manner, interfering with, restraining and coercing its employees in any right guaranteed under the Law.

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

   a) Immediately adhere to the terms of Article XX, § C(10) of the collective bargaining agreement and the February 23, 2006 grievance decision.

   b) A representative of the Board and either the president or the human resources director for each of the colleges shall read the decision and notice, sign the notice, acknowledge the college's obligation under the Law to bargain in good faith, and post immediately in each college, in conspicuous places where members of the Association usually congregate and where notices to employees are usually posted, including but not limited to the Board's internal e-mail system, and maintain for a period of 30 consecutive days thereafter, signed copies of the attached Notice to Employees; and,

   c) Notify the DLR in writing of the steps taken to comply with this decision within thirty (30) days of receipt of this decision.

[16] Neither party challenged any aspect of the Hearing Officer's remedy, and we affirm her order in its entirety for the reasons she stated.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

ELIZABETH NEUMEIER, BOARD MEMBER

HARRIS FREEMAN, BOARD MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. c.150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such an appeal, the appealing party must file a Notice of Appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board (CERB) has held that that the Board of Higher Education (Board) has violated Section 10(a)(5) and, derivatively Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by repudiating Article XX, § C(10) of the collective bargaining agreement (Agreement) between the Board and the Massachusetts State College Association/MTA/NEA (Association), and the Board's February 23, 2006 grievance decision. The Board posts this Notice to Employees in compliance with the CERB's order.

Section 2 of the Law gives all employees the right to engage in concerted protected activity, including the right to form, join and assist unions, to improve wages, hours, working conditions, and other terms of employment, without fear of interference, restraint, coercion or discrimination; and the right to refrain from either engaging in concerted protected activity, or forming or joining or assisting unions.

The Board assures its employees that WE WILL NOT:

- Repudiate Article XX, § C(10) of the Agreement;
- Repudiate the February 23, 2006 grievance decision; and,
- In any like manner, interfere with, restrain and coerce its employees in any right guaranteed under the Law.

WE WILL immediately adhere to the terms of Article XX, §C(10) of the collective bargaining agreement and the February 23, 2006 grievance decision.

WE sign this notice as an acknowledgment of this college's obligation under the Law to bargain in good faith with the Association.

_____ _____
Board of Higher Education Date

_____ _____
For the Colleges 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 of Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).

AGREEMENT

BETWEEN

THE BOARD OF HIGHER EDUCATION

AND

THE MASSACHUSETTS TEACHERS ASSOCIATION/NEA

MASSACHUSETTS STATE COLLEGE ASSOCIATION

JULY 1, 2004, TO JUNE 30, 2007

PVM

she then holds an appointment or at another College; he or she, if granted the appointment so sought, shall be granted it, as he or she and the College shall then agree, either as a transfer (a "Transfer") or as a new, initial appointment (an "Appointment"). The terms upon which a Transfer and an Appointment shall be made are the following:

a. Transfer. Any such member of the bargaining unit who is granted and accepts an appointment as a Transfer shall, as a term of such appointment, retain such academic rank (including, in the case of a librarian, such rank as a librarian), such salary, such entitlement to tenure (including, in the case of any member of the bargaining unit who does not hold tenure, any eligibility to be considered therefor), such accrued eligibility to be considered for sabbatical leave, if any, and such accrued sick leave and vacation as such member of the bargaining unit has at the State College where he or she is employed on the date immediately prior to the date on which such appointment takes effect.

b. Appointment. Any such member of the bargaining unit who is granted and accepts an appointment as an Appointment shall, as a term of such appointment, retain such accrued sick leave, if any, and such accrued eligibility to be considered for sabbatical leave, if any, as such member of the bargaining unit holds at the State College where he or she is employed on the date immediately prior to the date on which such appointment takes effect; but no such member of the bargaining unit shall retain such academic rank (including, in the case of a librarian, such rank as a librarian), such salary, such accrued vacation, if any (and for all of which he or she shall be compensated in the manner required by law in respect of an employee terminating his or her employment), or such entitlement to tenure (including, in the case of any member of the bargaining unit who does not hold tenure, any eligibility to be considered therefor) as he or she has at the State College where he or she is employed on the date immediately prior to the date on which such appointment takes effect; and every such member of the bargaining unit shall be accorded such academic rank and salary as the College granting the appointment as an Appointment determines, and, anything in section A(3) of Article IX or section C(8) of this Article to the contrary notwithstanding, every such member of the bargaining unit shall have such entitlement, then and thereafter, to be considered for tenure as the Agreement otherwise confers.

Neither an Appointment nor a Transfer shall deprive a member of the bargaining unit of any then-accrued seniority.

10. Part-Time Appointments: Limitations

This subsection shall be of application only to departments with six (6) or more full-time members.

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Except at the Massachusetts College of Art, not more than fifteen percent (15%) of an academic department's total number of three (3) credit courses and sections shall be taught by part-time employees during an academic year.

At the Massachusetts College of Art, not more than twenty percent (20%) of the total number of three (3) credit courses taught in departments with six (6) or more full-time faculty shall be taught by part-time employees during an academic year.

Not included in the foregoing are courses or sections taught by part-time employees hired to replace unit members on sabbatical leave of absence, on unpaid leave of absence, on reduced teaching loads for the purposes of alternative professional responsibilities or Association release time, or any other contractual released time, or any unforeseen emergency.

D. REQUIREMENTS FOR ELIGIBILITY OF LIBRARIANS FOR APPOINTMENT AND PROMOTION

Librarians may be appointed initially at any rank in keeping with the following requirements; provided only that no appointment shall be made at the rank of Library Assistant after the date of execution of this Agreement. For sound academic reasons, exceptions to these requirements may be made in certain specialized areas and under rare and extraordinary circumstances by the Board of Trustees.

1. Library Assistant

   a. a baccalaureate degree from an accredited institution in an academic or professional discipline that forms a part of the curriculum of the College at which such appointment is to be made; and

   b. demonstrated potential to fulfill the applicable performance criteria.

2. Library Associate

   a. the degree of Master of Library Science (MLS) or an equivalent Master's degree, including the degree of Master of Library Science and Information Science (MLSIS), from, in all cases, an institution accredited to grant such degrees by the American Library Association; or, for certain specialized professional activities within the Library, a Master's degree, from an institution accredited to grant such degrees, in a discipline directly related to such a specialized professional activity;

   b. evidence of the potential for a successful career in librarianship at an academic or research library; and

   c. demonstrated potential to fulfill the applicable performance criteria.

WORCESTER STATE COLLEGE

AFFIDAVIT OF PATRICIA MARKUNAS

486 Chandler Street • Worcester, MA 01602-2597

508-929-8020 • FAX: 508-929-8191 • email: jashley@worcester.edu

February 23, 2006

Dr. Patricia Markunas
President, MSCA/MTA/NEA
352 Lafayette Street
Sullivan Building – 202B
Salem, MA 01970

RE: Grievance No. 03/01-02/C/A (Excess Use of Part-Time Faculty)

Dear Dr. Markunas:

I write at Step 2 of the contractual grievance procedure for the purpose of rendering my decision in the grievance I reference above. That grievance, a consolidated one, arose initially under the 2001-2003 Agreement between the Board of Higher Education and the Massachusetts Teachers Association, but it has been presented to me most recently as a claim made under the 2004-2007 Agreement. Because the Association has pursued the claim under both Agreements as a consolidated grievance, I have heard it in my capacity as Chair of the Council of Presidents. I make my decision in that capacity and do so, therefore, on behalf of the entire Council.

By the claim it makes, the Association asserts that, to some greater or lesser extent, most of the Colleges – Fitchburg and the Maritime Academy are not among them – have from time to time in various of their academic departments violated the contractual rule – it appears at Article XX, §C(10), of the 2004-2007 Agreement – that limits the number of part-time faculty whom a College can employ to teach three-credit courses. The data on the basis of which the Association makes its claim are data the Colleges themselves have provided to it. For present purposes, therefore, I find no reason to question the sufficiency of the factual basis for the Association's claim. I conclude from it that seven of the Colleges – Fitchburg and the Maritime Academy are, again, the exceptions – have at different points (though not at every point in every case) violated the Agreement by employing, in various departments at various times, more part-time faculty to teach three-credit courses than the Agreement permits.

In fashioning a remedy for the violations I find, I take note of the fact that, considering all of the data collectively, the Colleges have most significantly exceeded the contractual limits on the employment of part-time faculty during the academic year 2004-2005. That year culminates, indeed, what the data depict as an upward (i.e., negative) trend. I have no doubt that the circumstance, that trend, is, in some significant measure, a product of the funding shortfalls the Colleges have experienced in recent years. While that may not excuse the contractual violation I have identified, it goes far to explain it, and it puts real and serious impediments in the way of the prompt effectuation of a remedy.

Having regard to the point just made and to my factual findings generally, I decline to adopt as a remedy here the immediate and categorical directive to "cease and desist" that the Association has sought. But I acknowledge that the Colleges must in fact, without being expected to expend moneys they lack or to disrupt academic programs of importance to their students, "cease and desist" from violating Article XX,§C(10), of the Agreement. I therefore require the following:

1. That each College, commencing no later than the fall semester of the academic year 2006-2007, reduce its improper reliance on part-time faculty in as great a measure as it judges practicable;

2. That each College continue thereafter to reduce its improper reliance on part-time faculty and bring itself into compliance with the contractual mandate (but subject to the requirements of any collective bargaining agreement then in force) no later than at the conclusion of the academic year 2008-2009; and

3. That each College, either by its Vice President for Academic Affairs or otherwise as the President may determine, publish to the chair of each academic department notice of the obligation depicted in the preceding items 1 and 2; each College shall do so prior to the scheduling of courses and teaching assignments for the academic year 2006-2007 and, again, prior to the scheduling of courses and teaching assignments for the academic years 2007-2008 and 2008-2009. In this context I encourage, perhaps unnecessarily, that the Vice Presidents and appropriate Deans meet with Department Chairs to discuss the means for bringing the Colleges into compliance with the contractual requirements in the manner I require.

In fulfilling the obligations that this decision imposes on it, every College is at liberty to increase its complement of full-time faculty (including temporary full-time faculty), to alter or reduce its course offerings (including the number of course sections) or to employ some combination of the two. Nothing in this decision shall be thought to limit any College's authority in any of those respects.

Please let me hear if you have questions about any of these points.

Sincerely,

Janelle C. Ashley

Janelle C. Ashley
Chair, Council of Presidents

cc: Council of State College Presidents
Mark Peters, Esquire

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

Massachusetts State College Association MTA/NEA Charging Party, and Board of Higher Education, Respondent.	)	SUP-08-5396

RESPONDENT'S SUPPLEMENTARY STATEMENT

Pursuant to 456 CMR 13.15, Respondent Board of Higher Education (the Board) hereby submits this Supplementary Statement in conjunction with it request for review by the Commonwealth Employee Relations Board of the Decision of the Hearing Officer issued on January 16, 2014. In support of its request for review, the Respondent states as follows:

1. The Hearing Officer erred as a matter of law by concluding that the Respondent failed to produce sufficient evidence of an intention to comply with Art. XX, § C(10), and therefore the Respondent deliberately intended to repudiate § C(10). Numerous academic affairs administrators testified to their efforts to comply with the section and the reasons why their institutions were unable to comply and still deliver the level of service necessary to educate their student population. Branson Vol. III: 30-44; Martin Vol. V: 19, 21, 24; Goodwin Vol. VII: 30-35; Hayes Vol. VI: 25, 40; Young Vol. VIII: 76-80. Furthermore, and alternatively, if the provision is an unlawful delegation of statutory authority, the Board did not violate the law by failing to abide by the improper provision.

2. The Hearing Officer erred as a matter of law by concluding that Art. XX, C(10) does not constitute an impermissible delegation of the Board's statutory authority

granted by M.G.L. c. 15A, §22. Section C(10) limits the number of part-time instructors an institution can employ in an academic department regardless of the needs of the institution and its students. The Board's statutory authority to make appointments, abolish positions and determine the size of its teaching staff is impermissibly curtailed by the contract provision.

The Hearing Officer bases her decision "that the principle of non-delegability does not apply in this case" upon her conclusion that the 15% limitation is merely a procedure, and the HECC court, 423 Mass. 23, 28 (1996), acknowledged that an employer may bind itself to a procedure by which a managerial prerogative will be exercised. The Hearing Officer's conclusion that the limitation of Art. XX, C(10) upon the form of employment and number of employees the Board can hire is merely procedural is plainly, legally erroneous. In their labor agreement the parties agreed upon numerous procedures by which managerial authority will be exercised, the most notably of which probably are the process for shared governance and the process for awarding tenure. In these procedures, the institution retains the final authority to determine the governance matter or to award or deny tenure. See, Art. VII, C and Art. VIII, E (6) and (7). By contrast, a limitation that the institution may not utilize the form of employment it determines to be the best means of delivering its academic services and a limitation upon the number of employees it may hire even though the institution believes a greater number is necessary to achieve its purpose is not merely a procedure, this limitation is a bar against effective government and effective educational policy.

The Hearing Officer at page 28 next identifies a series of alternatives the Board may have undertaken to address a shortage of faculty, and then makes the wholly

unsupported statement that the record failed to show the Board explored these options.[1] Her discussion misses the essence of the managerial decision being made by the Board when appointing faculty to teach. The Board must exercise its responsibility to provide a public college education within the resources available to it. The Hearing Officer's listing of other possible exercises of managerial discretion – all of which impact upon the quality of the academic experience according to the testimony of the Provosts and Vice Presidents[2] — does not render the decision the Board ultimately made any less the exercise of managerial prerogative. The Hearing Officer's noting the existence of alternatives is not the correct analysis. The Hearing Office should have considered the nature of the authority being exercised and determined whether it went to the core of the reasons the legislature established the Board and the authority the legislature entrusted to the Board.

3. The Hearing Officer erred as a matter of law when she suggested that G.L. c. 15A, § 22, which includes the authority to "appoint, transfer, dismiss, promote and award tenure," does not authorize the Board's employing on a full-time or part-time basis faculty members to teach certain three-credit courses. Under this narrow construction, "appoint" would have no meaning at all. The word surely encompasses all forms of appointment: acting, temporary, tenure-eligible, tenured, full-time, part-time, and any other form the employer may determine.

4. The Hearing Officer made erroneous factual findings regarding the workload of department chairs. At page 7 the Hearing Officer appears to say that chairs serve on seventeen different committees. It is correct these committees exist, it is incorrect

[1] Academic administrators testified about the inadequacy or unfeasibility of these options, which demonstrated that the options had been considered and rejected. They also testified about their efforts to comply with the cap. See 1, above.

[2] The Hearing Officer acknowledged the effects of these choices in her findings on p.9, line 13 of the decision.

that chairs serve upon all of them or that all of the committees are active at any point in time. There is no evidence in the record to support this finding.

At page 7 the Hearing Officer concluded an increased number of part-time faculty members generally results in an increased workload for the department chairs. The Hearing Officer failed to acknowledge that an increased number of full-time and full-time temporary faculty members also results in an increased workload for department chairs. Indeed, newly-hired full-time faculty may represent a larger increase in the workload of a chair than newly-hired part-time faculty. Full-time faculty are evaluated by chairs more frequently than part-time faculty during the first six years of employment. See labor agreement, Art. VIII, B(1) and (3). Furthermore, the criteria upon which part-time faculty are evaluated are less extensive than the criteria applied to full-time faculty, suggesting the evaluation of part-time faculty consumes less of a chair's time to complete. Compare Art. VIII, A(1) and A(2).

5. At page 8 the hearing Officer found: "The colleges balance the need to offer lower level core courses against the availability of full-time instructors to teach those courses." This finding overly simplifies and misstates the testimony provided by many witnesses. The colleges must provide core, lower level courses. Testimony from the vice presidents and administrators of academic affairs established that faculty do not wish to teach only these lower level courses, and that part-time instructors are hired to teach many of the lower level courses. Martin Vol. V: 19, 21; Goodwin Vol. VII, 41; Young Vol. VIII:78-79. The balance the Board must strike is how the colleges will appoint instructors for the core and specialty courses, not simply whether the courses will or will not be available to students.

6. At page 8-9 the Hearing Officer concluded the colleges could shift faculty from compliant to non-compliant departments. There is no evidence supporting the finding that the colleges could transfer a member of the Mathematics faculty to teach English composition.

7. At page 9 the Hearing Officer found the colleges could require full-time faculty to teach more courses. The workload of full time faculty is set by the labor agreement at four courses each semester, however. Young Vol. VIII: 88.

8. At page 10 the Hearing Officer concluded that full-time faculty supervise part-time instructors, thereby limiting their time for other required aspects of their positions such as committee work or continuing scholarship. There is no evidence in the record to support this erroneous conclusion. Faculty other than a department chair do not supervise part-time unit members. Art. VI, A (8) lists as a chair's duty the supervision of faculty (which is defined to include part-time unit members, Art. I,D(23)). The workload of faculty does not include the duty to supervise part-time employees. See, Art. XII, A(1)(a).

For these reasons, the Board requests the Commonwealth Employee Relations Board to correct the errors in the Hearing Officer's decision and find that the contract provision in question impermissibly limits the statutory authority of the Board of Higher Education (and the Boards of Trustees of the individual state colleges) to assign part-time employees to teach in a

number necessary to satisfy educational objectives, and that the contract provision in question, Art XX, (C) is unenforceable.

Respectfully submitted,
THE BOARD OF HIGHER EDUCATION
By its attorneys

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February 11, 2014

CERTIFICATE OF SERVICE

I, James B. Cox, hereby certify I caused a copy of the foregoing Supplementary Statement to be served this 11 day of February, 2014, upon the representative of the Charging Party, by first class mail, postage prepaid.

James B. Cox

Volume: III
Pages: 101
Exhibits: 0

COMMONWEALTH OF MASSACHUSETTS

Suffolk County, ss.

DIVISION OF LABOR RELATIONS
COMMONWEALTH LABOR RELATIONS BOARD
Case SUP-08-5396

IN THE MATTER OF

MASSACHUSETTS STATE COLLEGE ASSOCIATION/MTA/NEA

and

BOARD OF HIGHER EDUCATION

****
Before: Hearing Officer Kendrah Davis
****

Monday, April 26, 2010
Department of Labor Relations
First Floor
19 Staniford Street
Boston, Massachusetts 02114

APPEARANCES:

Americo A. Salini, Attorney at Law
For the Charging Party
James Cos, Attorney at Law
For the Respondent

****
EVIDENTIARY HEARING
****

DLR JUN 3'11 PM 3:12

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PROCEEDINGS

(The proceeding commenced at 10:25 a.m.)

THE COURT: We're on the record.

Good morning. This is day three in the formal hearing in the matter of Case Number SUP-08-5396 involving the Commonwealth of Massachusetts Board of Higher Education, hereafter employer or respondent, and Massachusetts State College Association, hereinafter association or charging party.

Today's date is Monday, April 26, 2010. My name is Kendrah Davis. I am the Hearing Officer assigned to this case. As the Hearing Officer I will decide this case first instance pursuant to 456 CMR 1301.1. The parties may appeal my decision to the Commonwealth Employment Relations Board pursuant to 456 CMR 1350.

Before we proceed there are some preliminary matters we need to address. The first regards the charging party Motion *in limine*. Charging Party?

MR. SALINI: With regard to the Motion *in limine* it was submitted to the Administration Magistrate Kendrah Davis relating to my request that any witness on behalf of the Board of Higher Education, now I guess the Department of Higher Education, on any financial data relating to alleged inability to have funds available to hire any full-time faculty bring to the hearing documents from the

college or from the state that indicate the financial data upon which they were relying for their testimony as to the inability to have funds available to hire full-time faculty, allegedly.

THE COURT: Respondent?

MR. COX: That's the same motion that you denied on April 21. I think it's premature since no evidence has been introduced. Also, I think there's a legal opposition to it.

The case that you need included goes to a Court not permitting oral evidence of a regulation when the regulation does exist in writing. It's not all applicable to a situation that you'll hear about from a number of five presidents of academic affairs when they talk about the constraints within which they do their work.

Certainly every piece of financial information at a state college is a public document that the union could have requested whenever they wanted it.

I think no ruling is necessary right now. When the issue comes up I'll be happy to argue if there's an objection.

MR. SALINI: Is this witness going to that about any financial data in testimony?

MR. COX: She's not going to talk about financial data.

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COMMONWEALTH OF MASSACHUSETTS

DIVISION OF LABOR RELATIONS

In the matter of:	
MASSACHUSETTS STATE COLLEGE ASSOCIATION/MTA/NEA Charging Party,	
vs.	SUP-08-5396
BOARD OF HIGHER EDUCATION, Respondent	

BEFORE: Hearing Officer Kendra Davis

DATE: May 16, 2011

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P R O C E E D I N G S

HEARING OFFICER: Okay. And we're on the record. Good morning. This is day eight of a formal hearing in the matter of Case Number SUP-08-5396 involving the Commonwealth of Massachusetts Board of Higher Education, hereinafter Employer, and Massachusetts State College Association, hereinafter Association.

Today's date is Monday, May 16, 2011, and my name is Kendra Davis, the Hearing Officer assigned to this case.

The last hearing date, we suspended the hearing to explore the Charging Party's motion in limine. And by e-mail dated Friday, April 1, 2011, the Charging Party determined that it was not pursuing its motion in limine at this time. Is that correct?

MS. HOULE: That is correct, with the stipulation that we reserved our right to continue to object to the budget testimony as irrelevant and immaterial.

HEARING OFFICER: And, Respondent, do you have a response at this time?

MR. COX: No, I don't.

HEARING OFFICER: Okay. At this time, Respondent, you may proceed with your witness.

MR. COX: Thank you.

DIRECT EXAMINATION (continued)

BY MR. COX:

Q Doctor Goodwin, you're still under oath, so let's pick up where we left off. You used a phrase in your testimony when we last were together, "coordinating an articulated career offering." And as I was listening to the recording of that day, I wasn't sure I understood what you meant. Could you elaborate on what those words mean?

A I was referring to the fact that a professional program at Salem State University is not exclusively work preparation courses, that it's a complete curriculum that includes the core curriculum, which ensures what's most easily referred to as a common core of knowledge for all students who graduate from the University, regardless of their major.

Department of Labor Relations (formerly LRC)

LABOR RELATIONS COMMISSION
In the Matter of COMMONWEALTH OF MASSACHUSETTS/COMMISSIONER OF ADMINISTRATION AND FINANCE and MASSACHUSETTS CORRECTION OFFICERS FEDERATED UNION

Case No.: **Case No. SUP-03-4988**

Parties: **In the Matter of COMMONWEALTH OF MASSACHUSETTS/COMMISSIONER OF ADMINISTRATION AND FINANCE and MASSACHUSETTS CORRECTION OFFICERS FEDERATED UNION**

Commissioners Participating:[1]
Michael A. Byrnes, Chairman
Paul T. O'Neill, Commissioner

Appearing:
Wendy Chu, Esq. - Representing the Commonwealth of Massachusetts/Commissioner of Administration and Finance
Stephen C. Pfaff, Esq. - Representing the Massachusetts Correction Officers Federated Union
Decision Date: **October 31, 2007**

SUPPLEMENTARY DECISION AND ORDER ON COMPLIANCE

Statement of the Case[2]

On July 27, 2007, the Labor Relations Commission (Commission) issued a decision in this case, finding that the Commonwealth of Massachusetts/Commissioner of Administration and Finance (Commonwealth) had violated Sections 10(a)(5) and, derivatively, (1) of M.G.L. c. 150E (the Law) by repudiating Paragraph 4 of the parties' October 10, 2000 memorandum of understanding. In that decision, the Commission ordered the Commonwealth to:

1. Cease and desist from:
   a. using the $300,000.00 fund established by Paragraph 4 of the Commonwealth-Massachusetts Correction Officers Federated Union (MCOFU) Memorandum of Understanding of October 10, 2000 (Paragraph 4) to defray the regular compensation of Commonwealth employees to fulfill their regular duties.
   b. using the $300,000.00 fund established by Paragraph 4 for purposes other than hiring additional personnel, paying overtime for existing personnel, or engaging neutrals to resolve Step III grievances pending pursuant to Commonwealth/MCOFU collective bargaining agreements.
2. Take the following affirmative action which will effectuate the purposes of the Law:
   a. use $300,000.00 from the current budget or appropriation of HRD/OER to hire additional personnel, pay overtime for existing personnel, or engage neutrals to resolve Step III grievances pending pursuant to Commonwealth-MCOFU collective bargaining agreements.
   b. make employees represented by MCOFU whole for losses incurred because of the delay in processing Step III grievances due to the use of $300,000.00 provided by Paragraph 4 and Chapter 354 to defray the regular compensation of HRD employees to fulfill their regular duties instead of hiring additional personnel, paying overtime to existing

personnel, or engaging neutrals to resolve grievances pending at Step IIII of Commonwealth/MCOFU collective bargaining agreements.

c. file with the Labor Relations Commission and the House and Senate Committees on Ways & Means on or before September 1, 2007

1. a detailed financial report of all expenditures from the $300,000.00 Chapter 354 Appropriation. The Financial Report shall provide the date, amount, purpose, and recipient of each expenditure, and the grievance (by grievant and number) for which
the expenditure was incurred, and
2. a detailed grievance status report which shows the number of MCOFU grievances filed, pending, and resolved at Step III for each fiscal year from 2000 to the present, the time in months and days from filing to resolution for each such grievance, and the method used to resolve each such grievance (i.e. the contractual dispute resolution process or alternate dispute resolution);

d. to the extent that prior expenditures from the Chapter 354 Appropriation do not conform with the requirements of Chapter 354, Item 1599-4005 and Paragraph 4 as determined herein, the Commonwealth shall refund equivalent amounts to the General Fund out of the current appropriation for the Human Resources Division, item 1750-0100, or in the alternative shall use the equivalent amount to establish and implement an alternative dispute resolution system no later than January 1, 2008 that is consistent [with] Paragraph 4 and Chapter 354 in order to reduce the number of and time that MCOFU grievances are pending at Stage III.

e. post in conspicuous places where employees represented by MCOFU usually congregate, or where notices are usually posted, and display for thirty (30) days thereafter, signed copies of the attached Notice To Employees.

On August 27, 2007, the Commonwealth filed a Notice of Appeal.

On September 12, 2007, MCOFU filed a Request for Enforcement of Commission Order pursuant to 456 CMR 16.08, seeking enforcement of the Commission's entire July 27, 2007 order. On September 21, 2007, the Commonwealth filed its response. On October 4, 2007, MCOFU filed a Motion to Strike the Respondent's Response to the Charging Party's Request for Enforcement, and the Commonwealth filed its response to that motion on October 9, 2007.[3]

On October 4, 2007, the Commission issued a show cause notice, directing the parties to show cause why the Commission should not find that the Commonwealth is failing to comply with the Commission's order. On October 19, 2007, the Commonwealth filed its response to the Commission's show cause notice. MCOFU did not file a response to that notice.

Opinion

Section 11 of the Law provides in relevant part: "Any party aggrieved by a final order of the commission may institute proceedings for judicial review in the appeals court. . . . The commencement of such proceedings shall not, unless specifically ordered by the court, operate as a stay of the commission's order."

In paragraph 6 of its September 21, 2007 response to MCOFU's request for enforcement, the Commonwealth tacitly admits its refusal to obey the Commission's July 27, 2007 order and indicates that it does not intend to comply with that order unless it is unsuccessful on appeal. In reply to the Commission's October 4, 2007 show cause notice, the Commonwealth acknowledges that filing an appeal does not operate as a stay of the Commission's July 27,
2007 order under Section 11 of the Law. Nevertheless, the Commonwealth argues that complying with that order would be costly, and recouping those monies would be difficult if the Commonwealth were to win its appeal.

Here, it is undisputed that the Commonwealth has not sought a stay of the Commission's July 27, 2007 order and has no intention of complying with

that order unless its appeal efforts fail. In the face of the unambiguous language in Section 11 of the Law quoted above, the Commonwealth's arguments lack merit and do not excuse its willful and deliberate defiance of the Commission's July 27, 2007 order.

Conclusion

Based upon the record on compliance before us, we conclude that the Commonwealth is failing and refusing to comply with all of the Commission's July 27, 2007 order and is in continuing violation of Sections 10(a)(5) and, derivatively, (1) of the Law.

Order

WHEREFORE, based upon the foregoing, it is hereby ordered that the Commonwealth shall immediately comply with the Commission's July 27, 2007 order, set forth above, in its entirety.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS LABOR RELATIONS COMMISSION

/s/MICHAEL A. BYRNES, CHAIRMAN

/s/PAUL T. O'NEILL, COMMISSIONER

APPEAL RIGHTS

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Labor Relations Commission are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such an appeal, the appealing party must file a notice of appeal with the Labor Relations Commission within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

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[1] Commissioner John F. Jesensky has recused himself from this case.

[2] The Commission has designated this case as one in which the Commission will issue a decision in the first instance pursuant to 456 CMR 13.02(2).

[3] Due to the outcome reached here, it is unnecessary for the Commission to rule on MCOFU's motion.

End Of Decision

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