

**COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT**

)	
Board of Higher Education)	
Respondent/Appellant)	
)	
v.)	
)	
Commonwealth Employment Relations)	
Board,)	2015-J-0076
Appellee Agency)	
)	
&)	
)	
Massachusetts State College Association,)	
MTA/NEA)	
Charging Party/Intervener)	
)	

**MEMORANDUM IN SUPPORT OF MSCA'S OPPOSITION TO
THE BOARD OF HIGHER EDUCATION'S MOTION TO STAY
ENFORCEMENT OF THE COMMONWEALTH EMPLOYMENT RELATIONS
BOARD'S DECISION PENDING APPEAL**

Pursuant to Massachusetts Rules of Appellate Procedure 5 and 6, the Massachusetts State College Association ("MSCA") respectfully submits its opposition to the Board of Higher Education's ("the Board's") motion to stay enforcement of the decision of the Commonwealth Employment Relations Board ("CERB") pending appeal.

I. RELEVANT BACKGROUND FACTS

Since 1986, the collective bargaining agreement between MSCA and the Board has included a provision that limits the ratio of part-time to full-time

(tenure-track *or* temporary) faculty appointments to 15% for departments with six or more full-time members. [CERB, pp 2-3.¹] This provision is referred to as the "15% Rule," although the ratio for one of the colleges is 20%. [CERB, p. 3.] The purpose of this provision is to protect the work load of full-time faculty and to implement the Board's educational policy. [CERB, pp. 8, 28.] It does not dictate the colleges' ability to determine staffing levels, qualifications, whether positions are tenure-track, or specific appointments. [CERB, p. 9, 28-29.] Moreover, it does not apply when there is a shortage of faculty due to exigent circumstances. [CERB, p. 9.] Finally, the 15% Rule does not dictate how the colleges meet this ratio. [CERB, p. 9-10.]

College administrators testifying for the Board described the educational policy behind the 15% Rule's effort to reduce reliance on part-time faculty: having greater numbers of full-time faculty assists in the ability to do long-term planning and give meaningful advising to students; it facilitates good decision-making about curriculum and pedagogy; and the ratio of

¹ The decision of CERB is attached as Exhibit A to the Board's memorandum in support of its motion.

part-time to full-time faculty factors into accreditation. [Branson, Tr. III:28, 30, 32, 44, 47, 52.²] In short, decreasing reliance on part-time faculty is part of the commitment to educational quality. [Young, Tr. VIII:90-91.] As the CERB noted, there was nothing in the record to show that this educational policy changed. [CERB, pp. 30-31.]

Moreover, the colleges have many different options to reduce reliance on part-time faculty by, for example: increasing their full-time tenured or temporary faculty numbers in non-compliant departments, either by additional hirings or shifting faculty budget line items from compliant departments; having existing full-time faculty teach more core courses; reducing course/section offerings; combining low enrollment courses/sections; increasing enrollment caps for courses; using historic data to more carefully plan need for courses and sections; and controlling matriculation.³ [CERB, pp. 9-10, 32.]

² Copies of transcript pages cited herein are attached at Exhibit A and refer to volume and page number.

³ This factual finding was substantiated by the record, including the Board's grievance response [CERB, p. 16-18] and testimony from college administrators and the former MSCA president [Markunas, Tr. I: 101, II:22-25, 55; Branson, Tr.

The record established that for seven years, eight of the nine colleges had academic departments in violation of the 15% Rule. [CERB, p. 11.] Indeed, it was undisputed that there were an increasing number of violations over this time period, from 14 total non-compliant departments in academic year ("AY") 2001-2002 to 31 departments in AY 2007-2008. And the total number of course sections that were non-compliant rose from 416 in AY 2004-2005 to 664 in AY 2007-2008.

[CERB, p. 11.]

MSCA initiated a grievance regarding violations of the 15% Rule in 2002. The Board upheld this grievance in 2006, agreeing that the colleges must cease and desist from violation the provision and requiring the colleges to take certain steps to reduce the improper reliance on part-time faculty. [CERB, pp. 16-17.] Not only has the Board failed to abide by the 15% Rule provision and the grievance resolution, the upward trend of non-compliance has continued. In AY 2012-2013, there were 53 non-compliant departments. The data for all colleges for AY 2013-2014 is not yet in but of the six colleges for which data had been

III:41; Hayes, Tr. IV:20-21; Martin, Tr. V:41; Goodwin, Tr. VII:52-55; Young, Tr. VIII:71-72, 76-77.]

provided, 42 departments failed to comply with the 15% Rule. Extrapolating from past years' data for the other three colleges, it is projected that at least 57 departments were non-compliant in AY 2013-2014 (compared to 14 in AY 2001-2002, the year the grievance was filed). [Aff. of C.J. O'Donnell, attached as Exhibit B.]

II. ARGUMENT

- A. The stay should be denied because the Board failed to file in the first instance with the Department of Labor Relations without good cause.**

Pursuant to G.L. c. 150E, § 11(i), an appeal of a CERB order does not operate as a stay of that order. An application for a stay of an order "must ordinarily be made in the first instance in the lower court." Appellate Rule 6(a). An application for a stay may only be made to the Appeals Court upon a showing that the application to the lower court is not practicable or the lower court denied the application or failed to order the relief requested. Id.

In an appeal of a decision of an administrative agency, the agency is the "lower court" for purposes of this rule. Here, that is the Department of Labor Relations ("DLR"). The Board has provided no reason as

to why it would not be practicable to make its application for a stay to the DLR or why the DLR should not rule on its application in the first instance. Indeed, the DLR, having heard all the evidence in this matter, is in the best position to determine whether a stay of the CERB's order is warranted. Therefore, the Board's application is procedurally flawed and should be denied.

B. The Board failed to make the requisite showing to justify a stay of the CERB's order.

In determining if a stay is warranted pursuant to Appellate Rule 6(a), a court considers (1) the likelihood of success on appeal, and (2) whether the hardship of irreparable harm from denying the stay outweighs the hardship of granting the stay. In re Patience, 81 Mass. App. Ct. 1137 (2012) (Rule 1:28 Decision).⁴

⁴ This is similar to the preliminary injunction standard argued by the Board. Also similarly, the threshold issue is the Board's likelihood of success on the merits of its underlying claim. See LeClair v. Town of Norwell, 430 Mass. 328, 331 (1999); Packaging Indus. Group, Inc., 380 Mass. 609, 616 (1980). If the plaintiff cannot establish this element of the analysis, the Court need go no further.

1. **The Board has not established a likelihood of success on the merits where the CERB's decision was substantiated by the record and based on sound conclusions of law.**

The Board makes a specious claim that there was no evidence on the record to support a finding of repudiation. The record contained seven years of undisputed data showing that eight of the nine colleges routinely and with increasing frequency violated the 15% Rule. [CERB, p. 11-15, 20.] Yet the Board contends that there was no evidence that the Board "deliberately refused to comply" with the 15% Rule. However, collectively bargained terms are not merely aspirational; rather G.L. c. 150E "requires actual compliance, not just good efforts and intentions." [CERB, p. 23.] The Board's "serial violation" of the CBA and subsequent promises to abide by it⁵ over seven academic years (and counting) was more than substantial evidence of a pattern of conduct designed to ignore their contractual obligations, which constitutes repudiation. See Comm. of Mass., Comm'r of Admin. & Fin./Div. of Med. Assistance, 28

⁵ The Board did not appeal the Hearing Officer's conclusion that it repudiated a grievance resolution wherein the Board agreed that it violated the CBA and ordered the colleges to take steps to come into compliance. [CERB, p. 22, n.19.]

MLC 8, 11 (2001). Its repeated failure to take any of the many options available to it to comply with the 15% Rule is "sufficiently deliberate to violate the Law." Bd. of Higher Educ., 37 MLC 197, 198 (H.O. Decision 2011).

Moreover, the record did not support the Board's position that the parties had differing interpretations of the 15% Rule, which is clear from the Board's failure to cite any record evidence on this point and the record evidence to the contrary. [CERB, pp. 3 (Stipulation of Fact #1), 16-18, 19, 20-21.] The Board's attempt to finesse its argument by asserting that the parties had differing interpretations as to the "legal effect of this section" is of no consequence. The record showed, and the CERB held, that the parties understood and agreed to the deal they struck over the course of successive contracts. This fact was supported by a letter from the chair of the Council of State College Presidents, Dr. Antonucci, reaffirming the Council's commitment to the 15% Rule after its attorney sent the MSCA a letter claiming - twenty years after first negotiating the provision and after the parties just re-authorized it in a successor contract - that the provision was

unlawful. [CERB, pp. 18-19.] Therefore, there was no differing interpretation as to the legal effect of the provision between the parties.

Finally, the CERB correctly concluded that the 15% Rule does not impermissibly infringe on the Board's nondelegable managerial authority. The Board claims that restricting the number of part-time faculty affects its ability to "determine the content of education curriculum, and the optimum system for delivery of services that it deems necessary." [Board memo, p. 9.] But the courts have long recognized the inherent tension that exists between the law authorizing collective bargaining agreements protecting rights of public employees and the recognition that certain matters are the exclusive domain of employers that are protected by the nondelegability doctrine. See Higher Educ. Coordinating Council/Roxbury Community Coll. v. Mass. Teachers Ass'n/Mass. Community Coll. Council, 423 Mass. 23, 28 (1995) ("HECC"). These rights are not mutually exclusive. See Boston Teachers Union, Local 66, Am. Fed'n of Teachers (AFL-CIO) v. Sch. Comm. of Boston, 370 Mass. 455, 461 (1976). To accommodate both interests, "the principle of nondelegability is to be

applied only so far as is necessary to preserve the college's discretion to carry out its statutory mandates" and unless the matter "infringe[s] on an area of educational policy reserved for the exclusive judgment of the administrators of the college, it cannot be disturbed." Mass Bd. of Higher Educ./Holyoke Community Coll. v. Mass. Teachers Ass'n/Mass. Community Coll. Council, 79 Mass.App.Ct. 27, 32 (2011), quoting in part HECC, supra at 27.

The 15% Rule does not impinge upon the Board's statutory authority to determine who to appoint, transfer, dismiss, promote or award tenure. That is not the authority from which this provision flows. Instead, it flows from the general grant of authority to determine educational policy over which the Respondent must negotiate ancillary matters such as methods of implementation, processes or procedures, and impact. See City of Lynn, 43 Mass.App.Ct. 172, 179-80 (1997).

Because the 15% Rule does not limit the Respondent's ability to make educational policy determinations related to staffing levels, qualifications, or specific appointments, it maintains the Respondent's flexibility to respond to

programmatic changes, student enrollment fluctuations, and availability of resources. Compare Local 2071, Int'l Ass'n of Firefighters v. Town of Bellingham, 67 Mass.App.Ct. 502, 510 (2006) (matter of shift hours did not determine who is assigned to a shift or what they do but instead addressed how existing employees divide up coverage that the employer chose to provide); Sch. Comm. of Westport, 61 Mass.App.Ct. 910, 911 (2004) (involuntary movement of employees to satisfy staffing needs is not a "hiring" but a proper subject of bargaining that still leaves authority to direct overall staffing intact); City of Melrose, 2008 WL 5395581 (2008) (distinguishing minimum staffing provision, a core management decision outside bargaining, with staffing per piece of equipment (a ratio of staffing), a mandatory subject of bargaining significantly impacting condition of employment).

The CERB has long-held that a decision is insulated from bargaining only if it goes directly to the issue of how much education or what types of educational programs are provided. See Boston Sch. Comm., 3 MLC 1603, 1607 (1977). Here, it found the ratio of part-time to full-time faculty is not directly tied to the number or types of courses

offered. Accordingly, the CERB soundly concluded that this provision does not hinder the Board's ability to determine educational policy. [CERB, pp. 32-34.] Because the Board has not shown it will likely succeed on the merits of its appeal, its motion to stay the CERB order should be denied.

2. The Board's claim of injury is speculative at best and insufficient to support a stay.

Although it is not necessary to continue the analysis, the Board also has not established there would be irreparable harm caused by the CERB's order. Given the Board's stated commitment to an educational policy of limiting part-time faculty, the many options available to comply with the negotiated ratio, and the flexibility the parties negotiated to address exigent circumstances, its predictions that compliance would be "disastrous" must be taken with a grain of salt. The Board focuses on how much it would cost to come into compliance solely based on hiring more full-time faculty. It does not provide information on the costs if it reduced the ratio of part-time faculty by utilizing the other options available. Moreover, "[E]conomic necessity is not a cognizable defense to the unilateral repudiation of monetary provisions in a

collective bargaining agreement." Excelsior Pet Products, Inc., 276 NLRB 759 (1985), quoting Triangle Appliance, 265 NLRB 1473, 1475-76 (1982).

Therefore, the Board has not and cannot substantiate irreparable harm to students and the public interest if the CERB's order is enforced pending appeal.⁶ In fact, it failed to address the harm to the educational policy behind reducing part-time faculty it repeatedly endorsed for twenty years if the order is stayed. On the other hand, the harm to the MSCA and its members is significant. The now-institutionalized repudiation of the CBA continues unabated, harming members' interest in protecting the negotiated ratio as well as the perceived status of the MSCA as their exclusive representative. Allowing the Board to continue to disregard its obligations to negotiate *and* honor its CBA terms flouts the strong public policy favoring collective bargaining embraced

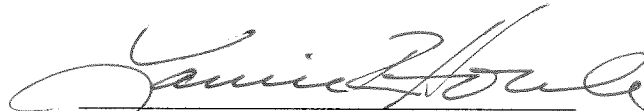
⁶ To be clear, the CERB's order that the Board "immediately adhere to the terms" of the 15% Rule and grievance decision [CERB, p. 36] means that it must immediately start taking steps to ensure compliance for the next academic term. The MSCA recognizes that reaching compliance mid-term is not feasible without extraordinary disruption to student learning that it would not endorse.

by the Commonwealth in G.L. c. 150E and cannot be abided.

III. CONCLUSION

For the reasons set forth above, the Court should deny the Board's motion.

Respectfully submitted,
MASSACHUSETTS STATE COLLEGE
ASSOCIATION,
by its attorney,



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DATE: March 20, 2015

#243374

CERTIFICATE OF SERVICE

Pursuant to Appellate Rule 13, I hereby certify under the pains and penalties of perjury that on March 20, 2015, a true copy of the above document was served via first class mail, postage-prepaid, upon the following counsel of record:

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EXHIBIT A

Volume: I
Pages: 150
Exhibits: 22

COMMONWEALTH OF MASSACHUSETTS

Suffolk County, ss.

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

In the Matter of
BOARD OF HIGHER EDUCATION

and

MASSACHUSETTS STATE COLLEGE
ASSOCIATION/MTA/NEA

Before: Kendrah Davis

March 3, 2010
Division of Labor Relations
19 Staniford Street, 1st Floor
Boston, MA 02114

APPEARANCES:

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1 violation, certain academic departments are in violation
2 and others are not. In fact, other colleges even have
3 presented data that they're minus, which means they're
4 below the number of part-time sections that they presumably
5 could offer. So some transfer of personnel could occur
6 among those departments to bring all the departments into
7 compliance instead of leaving some very much out of
8 compliance and others with, you know, very few part-time
9 sections that fall well within the exemptions or well under
10 the cap.

11 Q I just want to ask you, in regard to the template
12 which was Joint Exhibit 7.

13 A Yes.

14 Q And I had already asked you earlier that the
15 designation and you recall and appears maybe where it says
16 "PT 03 faculty" on Joint Exhibit 7.

17 A Yes, I see that.

18 Q -- 03. Now is -- you mentioned that that's a
19 separate source of funding from, say, an 01 funding?

20 A Yes. The 03 salary line is for part-time
21 employees. And the 01 salary line is for fulltime
22 employees.

23 MR. COX: And just an objection. His question
24 was is it a separate source of funding, if you know.

25 HEARING OFFICER: That was the question. So

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COMMONWEALTH OF MASSACHUSETTS

Suffolk County, ss.

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

In the Matter of
BOARD OF HIGHER EDUCATION

and

MASSACHUSETTS STATE COLLEGE
ASSOCIATION/MTA/NEA

Before: Kendrah Davis

April 21, 2010
Division of Labor Relations
19 Staniford Street, 1st Floor
Boston, MA 02114

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1 the contractual maximum of part-time faculty that they
2 could have. So that some adjustment or reassignment of
3 positions, not faculty members per se but positions, could
4 occur so that departments that are in violation of the
5 fifteen percent cap could reduce that the violation; and
6 individuals who are far under the cap on part-time faculty
7 could, in fact, hire more part-time faculty to -- with the
8 number of full-time faculty remaining the same.

9 Q Perhaps I didn't understand you. So are you
10 saying that, if the -- let's say, at Salem, I'll tell you,
11 make a concrete example here. In Exhibit 18, if you turn
12 to the page for Salem -- yeah, 18 is a table of charts.
13 Bridgewater is the first, and Salem is the next to last.
14 I'm sorry, not to next last, but very near the back of my
15 package. I'm looking at a grid in Joint 18 which reads, on
16 the left, "Salem State College;" in the center, "07-08
17 information requested relating to fifteen percent cap
18 article," and then there's a date of March 18, 2008 on the
19 right. Do we have the same exhibit in front of us?

20 A Right, Salem State College is on the left.

21 Q Correct. "March 18, '08" is on the right?

22 A That's correct.

23 Q Okay. So I see that, in the accounting finance
24 department, there's zero percentage of courses taught by
25 part-time members in excess of exemptions; and in English,

1 there's 49.86 percent. So using those two departments as
2 an example, are you suggesting that we shift faculty from
3 the accounting department to the English Department?

4 A No, I said that we would not shift faculty per se
5 but, in terms of the assignment of hiring for new
6 positions, some adjustment could be made so that English is
7 not far in violation while there are several departments
8 there that, in fact, have no part-time faculty in excess of
9 the caps. You would not, obviously, shift an accounting
10 faculty department member to the English Department.

11 Q So you said, in terms of hiring for new
12 positions, so implicit in your response is that the College
13 employ new faculty in the English Department. Am I
14 correct?

15 A That's one of the ways that the violations, in
16 terms of the fifteen percent cap, could be reduced, yes.

17 Q Is that the way that you mean when you answered
18 "transfers in personnel?"

19 A Without seeing my testimony, that is one of the
20 ways that that could be accomplished.

21 Q Okay. Well, then let's ignore your -- not ignore
22 it -- but we'll not focus upon what you said the last time.
23 Let's -- let me ask you how, in your opinion, can the
24 colleges satisfy the fifteen percent cap? So we've just
25 identified that they can hire new personnel. Are there

1 other ways that the colleges can satisfy the fifteen
2 percent cap?

3 A Presumably, they could offer fewer courses.

4 Q Why would that satisfy the cap?

5 A Well, you would have fewer -- if fewer courses
6 were taught by part-time faculty, that would reduce the
7 percentage of them.

8 Q I see. And implicit in that is that the colleges
9 could choose to let fewer students enroll?

10 A Not necessarily.

11 Q What's the alternative to letting fewer students
12 enroll?

13 A Students could enroll in other courses.

14 Q All right. So if a student wants to teach in
15 English but we've decided to live within the English cap --
16 excuse me -- they want to take an English course but we've
17 decided to live within the English cap. We haven't been
18 able to hire in the English Department. That student,
19 under your alternative now, would just take a course in a
20 different department.

21 A That's the way students enroll for courses now.
22 Courses close --

23 Q Okay.

24 A -- departments' enrollments close, and students
25 go to second and third choices every semester.

1 Q Any other ways in which you can think that the
2 colleges can satisfy the caps? We've identified, offer
3 fewer courses or sections, I would assume and --

4 A Sections would probably be a better term.

5 Q -- okay -- and hiring new personnel. Anything
6 else?

7 A You could increase the course limits, the
8 enrollment limits on existing courses.

9 Q Are there limits now set by the contract for the
10 number of students that can be enroll in a section?

11 A A maximum?

12 Q Correct.

13 A No.

14 Q Would you agree with me that the teacher who
15 instructs a section has their workload determined, in part,
16 by the number of students in the course?

17 A Not the contractual workload per se but, in
18 general, the persons -- their -- the number of students
19 that they would be responsible for, yes, in their classes.

20 Q Which -- and implicit in that is the number of
21 exams they have to grade, the number of students that might
22 need advising pertaining to the course, am I correct?

23 A That's correct.

24 Q And does the contract provide for a higher level
25 of composition for faculty that teach a larger section -- a

1 sometimes in excess of \$90,000 a year, at Salem State.

2 Q Now, in achieving compliance with the rule in
3 question here, fifteen percent, what -- how can -- what
4 other option does the College have to meet the needs of
5 compliance in English than utilizing the money for hiring
6 full-time English professors in terms of meeting the -- you
7 mentioned about how to deal with transfers from one
8 department or another or something like that. Can you
9 explain that?

10 MR. COX: I'm sorry, I got lost in that question.

11 MR. SALINI: I'll rephrase it.

12 BY MR. SALINI:

13 Q You had mentioned that there was some other
14 option they had beside increasing class size, beside hiring
15 full-time faculty as such. But the disparity between
16 accounting and finance and English, how can they
17 accommodate the fifteen percent?

18 A They could lessen the violations in English by
19 hiring more full-time faculty in English and hiring more
20 part-time faculty in the departments that are either at
21 zero, in terms of excess of exemptions, or people who --
22 departments that are below the fifteen percent cap above
23 exemptions.

24 MR. SALINI: I'd like to take a lunch break at
25 this time. Obviously, I can't talk to her. I may have

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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
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1 do have. Most of the other art schools in our size range
2 have exactly the opposite: they have 70 to 80 percent
3 adjunct faculty. As an accreditor I see the toll that
4 takes on the institution in terms of its ability to do
5 long-range planning, and really adequate and truly
6 meaningful student advising.

7 I think that each kind of faculty member has a
8 great deal to offer my institution; and I think I'm lucky
9 to have them both.

10 Q You described that the college utilized part-
11 timers because they can bring special expertise to the
12 institution. Are there other reasons for utilizing part-
13 timers or have you touched upon them all?

14 A No. Another thing can happen. As you're
15 planning an academic program and moving forward, and you
16 have unanticipated student registrations in certain majors
17 or, indeed, in certain classes and demand for that, and you
18 don't have tenure-track or full-time temporary faculty in
19 place to offer that it gives you increased flexibility in
20 being able to meet the student demand and the student need.

21 We keep resumes of people on file who will be
22 happy to come in to teach on shorter notice. It makes it
23 much more possible for me to be able to deliver the
24 curriculum to have that.

25 Q When is the planning undertaken of who will teach

1 A Special interests, you know? They may have
2 watched Project Runway and decide that they all want to
3 take fashion. That, in fact, happens.

4 Q You're aware, of course, that your faculty is
5 unionized?

6 A Yes.

7 Q Are you aware of Article XX of the contract?

8 A Yes.

9 Q You're aware of the limitation it imposes upon
10 utilizing adjunct faculty?

11 A I am.

12 Q Do you know why the limitation is 20 percent as
13 Massachusetts Art when it's 15 percent at other colleges?

14 A I don't know the history of that. I always
15 assumed it was because we're a professionalized -- we offer
16 professional degrees, the only professional degree -- only
17 a BFA -- and that we have a wide range of specialized
18 instruction that we have to offer and a relatively small
19 general education program. But I don't know for a fact
20 that's the history. That was my assumption.

21 Q As the Vice President of Academic Affairs do you
22 try to stay within the 20 percent limitation?

23 A I do. Again I do take into consideration all of
24 the indicators I mentioned. I think 20 percent is a great
25 figure for me to have in mind.

1 chairs' meetings where we review staffing as a whole and
2 their evaluation of faculty as a whole and many issues
3 before the academic year starts.

4 Q What is the message you give to the chairs?

5 A That it's not only a contractual responsibility,
6 but a good idea to stay within the 20 percent rule. It is
7 more of a struggle for some departments than others, the
8 ones that have been rapidly growing; and we discuss that.

9 (Pause)

10 It also can come up at other times with the
11 faculty as a whole. This spring we had an all-faculty
12 staff day where I was asked to stand up in front of --

13 MR. SALINI: Excuse me, I don't mean to interrupt
14 you, but we are outside the 2007-2008 period.

15 THE WITNESS: Fair enough.

16 MR. SALINI: Thank you.

17 MR. COX: Let me put before you some of our
18 Exhibits. I'm going to give you Association Exhibits 1, 2
19 and 5.

20 (Association Exhibits 1, 2 and 5 proffered to the
21 witness.)

22 MR. COX: They're identified on the [inaudible]
23 corner.

24 BY MR. COX:

25 Q Would you look at Association Exhibit 5, Dr.

1 Q What do you have to do if they're tenure-track
2 positions to satisfy the need for more man hours, so to
3 speak, in the classroom in the spring of 2008?

4 A The positions are not structured in such a way to
5 have that kind of flexibility.

6 Q Here's my point. Is it just two and two-thirds
7 faculty you'd have to hire or would you have to hire more
8 than that?

9 A One solution would be to hire people on temporary
10 contracts on a semester-by-semester basis and to hire,
11 perhaps, one full-time person in the fall. Since we don't
12 this at Mass Art we could make up the numbers.

13 I'm saying hypothetically we could hire one and a
14 half people in the fall and three in the spring on
15 temporary contracts. That's one possible solution.

16 Other than that it's hard to know how to meet the
17 different demands without using semester-by-semester
18 faculty hires.

19 Q Does the contract have any limitation upon the
20 number of semesters in which you can hire a full-time
21 temporary person?

22 A It has a limitation in the maximum number, not
23 more than two years consecutively.

24 Q So the solution you just thought of would only
25 work for two years.

1 THE COURT: Back on the record.

2 Charging party cross.

3 CROSS EXAMINATION

4 BY MR. SALINI:

5 Q Dr. Branson, in your direct testimony you had
6 stated the 20 percent limitation was a good idea, is that
7 correct?

8 A Correct.

9 Q You were referring in the 20 percent limitation
10 in the collective bargaining agreement not of the 20?

11 A Not of the what?

12 Q You were referring to the 20 percent limitation
13 that is referenced in Article XX of the collective
14 bargaining agreement, the MSCA collective bargaining
15 agreement?

16 A Yes.

17 Q Can you tell us why it's a good idea?

18 A I thought I did.

19 I like very much to have critical mass of the
20 faculty at an institution have a long-term vested interest
21 in that institution and in its students and to understand
22 enough about the student body over a period of time to be
23 able to make good decisions about curriculum and pedagogy.

24 I think having a full-time faculty that's a
25 mixture of tenure-track and tenured and some temporary is

1 national accreditation for the program?

2 MR. COX: I just object to the term too many.
3 It's very vague. don't know if the witness can respond.

4 MR. SALINI: All right.

5 BY MR. SALINI:

6 Q Having a large number of part-time faculty in a
7 program, is that a factor that could work adverse to a
8 national accreditation for that program? Yes or no.

9 A This standard for faculty in the National
10 Accrediting Association never refers to any specific
11 percentages or numbers. It only refers to a ratio
12 favorable to support the education given the mission of the
13 existing institution.

14 My personal observation when I visited those
15 schools -- and that's why I testified the way I did earlier
16 -- was I believe that it's good to have a significant full-
17 time faculty. But, you know, when you're visiting another
18 institution you have to set that aside. Many of them have
19 very different missions than we do.

20 We try to be not judgmental based on rubrics or
21 numbers, but look at what the mission is of the individual
22 institution and figure out if they're able to deliver the
23 education they say they are.

24 Q Does each program in Architectural Design have to
25 be accredited?

1 program properly given our mission and the ratios of
2 faculty that we would argue would be appropriate.

3 Did that answer your question.

4 Q So there is faculty standard for purposes of
5 accreditation for a program.

6 A Yes. I just mentioned that one.

7 Q That' is that proportion you referred to?

8 A Ratios.

9 Q Ratios.

10 A Yes.

11 Q Of full-time to part-time?

12 A Yes, among other things.

13 Q Among other things.

14 A Um-hum.

15 (Pause)

16 Q You testified that over the course of your
17 position as the Senior Vice President a call to hire, up
18 until 2007-2008, 30 tenure-track faculty, approximately?

19 A FTE, yes. Overall we've gone up 30 FTE.

20 Q Over what period of time? What's the span of
21 time you're talking about?

22 A I may not be able to be completely accurate. It
23 would be around ten to twelve years.

24 Q When you mention that figure that when a full-
25 time tenure-track professor leaves and you hire a new

Volume: IV
Pages: 58
Exhibits: 1

COMMONWEALTH OF MASSACHUSETTS

Suffolk County, ss. DIVISION OF LABOR RELATIONS
 COMMONWEALTH LABOR RELATIONS BOARD
 SUP-08-5396

 IN THE MATTER OF
MASSACHUSETTS STATE COLLEGE ASSOCIATION/MTA/NEA
 and
BOARD OF HIGHER EDUCATION

Before: Hearing Officer Kendrah Davis

June 14, 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 Cox, Attorney at Law
 For the Respondent

EVIDENTIARY HEARING

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Cambridge, MA 02139
(617) 547 - 5690
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1 that in prior years, they've been in the system before
2 2007-2008?

3 A I don't know.

4 Q There could be?

5 A It's possible.

6 Q Do you have any knowledge as to if the part-time
7 non-benefited faculty continue to teach from semester to
8 semester each academic year?

9 A Yes.

10 Q They do?

11 A They do.

12 Q Okay.

13 A Some do.

14 Q Matter of fact, they can go on for a long period
15 time, is that right?

16 A That's correct.

17 Q In Association 18, Communication Design -- Is
18 that correct? Maybe you'll be able to help me. There are
19 majors in Communication Design, is it correct?

20 A Yes.

21 Q One of them is Graphic Design?

22 A Correct.

23 Q Another one is Illustration?

24 A Correct.

25 Q And the other one is Animation?

- 1 A That's right.
- 2 Q Are they the only majors?
- 3 A In Communication Design, yes.
- 4 Q These majors [inaudible] courses, is that
- 5 correct?
- 6 A Yes.
- 7 Q Being majors they take courses, is that correct?
- 8 A Yes.
- 9 Q And a course, such as "Information on
- 10 Architecture," is one of those courses that be taught in
- 11 Communication Design?
- 12 A Correct.
- 13 Q Would it be taught in all three majors?
- 14 A No.
- 15 Q What major would that be?
- 16 A Graphic Design.
- 17 Q Is it taught in any other area?
- 18 A In terms of content, yes; but structured by name,
- 19 no. Parts of it are taught in a number of majors.
- 20 Q How long has it been part of the curriculum in
- 21 Graphic Design to have a course in information on
- 22 architecture?
- 23 A I don't recall.
- 24 Q Has it been one year, two, years, three years?
- 25 A Oh, no. It's been at least -- around five or

Volume: V
Pages: 100
Exhibits: 2

COMMONWEALTH OF MASSACHUSETTS

Suffolk County, ss.

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

IN THE MATTER OF
MASSACHUSETTS STATE COLLEGE ASSOCIATION/MTA/NEA
and
BOARD OF HIGHER EDUCATION

Before: Hearing Officer Kendrah Davis

July 20, 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 Cox, Attorney at Law
For the Respondent

EVIDENTIARY HEARING

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1 department to another if there is a need in Math, for
2 instance, but no longer such a strong need in English?

3 A Theoretically? I think theoretically probably
4 so. I say theoretically because I think in practical terms
5 that would be very, very hard to do if only because you
6 would want to take account of people's qualifications and
7 skills.

8 Q Let's focus specifically on your English
9 Department. If you are unable to utilize instructors in
10 excess of the cap what are your alternatives?

11 A If you think of it like an equation there are
12 only basically so many points of intervention. If you've
13 established as a condition that we're not going to hire
14 additional full-time faculty -- and I've essentially said
15 that to you -- then the option is to increase the class
16 sizes of the existing sections so that the number of part
17 timers that you're using falls within the 15 percent. I
18 think there are good reasons why you would not want to do
19 that.

20 In our case we've made a commitment to keep our
21 Writing classes small and we've worked very hard with our
22 faculty in the English Department to keep our classes at
23 something like 18 to 20.

24 Q Students?

25 A Students per section.

Volume: VII
Pages: 70
Exhibits: 3

COMMONWEALTH OF MASSACHUSETTS

Suffolk County, ss.

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

IN THE MATTER OF
MASSACHUSETTS STATE COLLEGE ASSOCIATION/MTA/NEA
and
BOARD OF HIGHER EDUCATION

Before: Hearing Officer Kendrah Davis

January 19, 2011
Department of Labor Relations
First Floor
19 Staniford Street
Boston, Massachusetts 02114

APPEARANCES:

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

EVIDENTIARY HEARING

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1 That's one way of doing it. Increase the size of the
2 sections that are being run by combining sections. That's
3 not -- that will achieve some reduction, but not all of it.

4 Have the full-time faculty in the department
5 teach only, in the case of English, the core courses; and,
6 again, that's got professional development, faculty morale,
7 departmental spirit implications. It's numbers.

8 MR. COX: Let me back you up a little bit; you
9 said combine sections.

10 BY MR. COX:

11 Q So instead of two sections of twenty apiece,
12 twenty students in each, you'd have one section of forty
13 students?

14 A Right. That would eliminate one section. That
15 would eliminate one -- potentially one adjunct faculty
16 assignment.

17 Q Are there disciplines in which that's not
18 advisable, to have forty students in a section?

19 A Yes.

20 Q Could you give some examples?

21 A Art being one; any discipline in which the
22 enrollment of the class is dependent upon a specially-
23 outfitted classroom or laboratory; freshman Composition by
24 virtue of it being the first and one of the most critical
25 tools that our first-year students develop.

1 Faculty are assigning a tremendous amount of
2 writing in that Composition class and to double the
3 enrollment to forty, from twenty to forty would be a
4 sizeable burden on the faculty member teaching that class
5 in terms of work done outside of class.

6 HEARING OFFICER DAVIS: Wait just one moment.

7 THE WITNESS: I'm sorry.

8 HEARING OFFICER DAVIS: If you'd just face me?

9 THE WITNESS: Okay.

10 To double the enrollment in a course which is
11 writing-intensive such as English Composition at least
12 doubles the work that needs to be done by the faculty
13 member to assess and return and react to all of the writing
14 that's being done. So writing definitely is a discipline
15 that can't just be arbitrarily upped to a hundred and fifth
16 because you have a room that fits a hundred and fifty.

17 BY MR. COX:

18 Q What's the implication of closing sections? By
19 that you meant not offering as many sections.

20 A Correct.

21 Q What's the implication of that decision?

22 A In general it will lengthen the amount of time it
23 takes a student to complete a degree. It will make it
24 increasingly difficult for our students -- most of whom are
25 working in addition to go to school full time -- to be able

1 to deal with the logistics and scheduling of their lives.

2 It makes it very difficult to plan for
3 coordinating an articulated curriculum offering to ensure
4 that students can get out in a reasonable amount of time,
5 four to six years. Sometimes a course is the only course a
6 student is taking or it's one of four courses they're
7 taking to maintain full-time status for financial aid
8 purposes. You drop them in that course and they lose
9 financial aid.

10 So there are a lot of factors that need to be
11 considered before cancelling a class.

12 Q Okay, so we've got --

13 A A fully-subscribed class, to be sure.

14 Q Before cancelling a fully-subscribed --

15 A A fully-enrolled class, yes.

16 Q So we have close sections, combine sections --
17 again we're going over the tools available for the college
18 --

19 A Yes.

20 Q -- have full-time faculty teach only core
21 courses.

22 A Increase the number of full-time faculty employed
23 by the institution.

24 Q What are the implications of increasing the
25 number of full-time faculty employed by the institution?

1 A Given the current -- given the then-state and the
2 current state of the Commonwealth, disastrous.

3 Q How so?

4 A The budget is not there to do it.

5 MR. SALINI: Objection.

6 I made a motion *in limine*. We're going to start
7 talking money I want to see data. I don't know want to see
8 someone's disaster opinion.

9 HEARING OFFICER DAVIS: Response?

10 MR. SALINI: They're claiming insufficient funds
11 here. I want to see data. I don't want to hear about --

12 MR. COX: I think the witness' testimony stands
13 for itself. She has spoken specifically --

14 MR. SALINI: It has no [inaudible]. I move to
15 strike because --

16 MR. COX: I'd really like to speak without being
17 spoken over.

18 MR. SALINI: That proves nothing.

19 HEARING OFFICER DAVIS: All right, please
20 respond, Attorney Shaw.

21 MR. COX: It's Cox, by the way.

22 HEARING OFFICER DAVIS: I apologize, Mr. Cox.

23 MR. COX: I know it was James Shaw recently so I
24 know to whom you're speaking.

25 HEARING OFFICER DAVIS: I'm sorry.

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

DUNN REPORTING SERVICES, INC.
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1 who actually decided to come to Bridgewater.

2 Q Could those students have been covered without
3 hiring part-timers?

4 A The full-time faculty are allowed by contract to
5 teach four courses in the day program, and they
6 can teach -- at Bridgewater, they can teach two
7 overload courses under the DGCE contract, the
8 other faculty contract. Those would not have
9 been able to be taught during the day.

10 We had an increase in full-time
11 faculty, full-time tenured or tenure-track
12 faculty between 2006 and 2007 of fifteen; we
13 added fifteen new faculty between fall of '06 and
14 fall of '07.

15 And even with that, had we had our
16 enrollments maintain the trajectory that they
17 typically were, we would have been fine. I think
18 in 2007/2008, it was an unusual bubble that came
19 about at the same time that our president was
20 executive assistant or an adviser to the
21 governor, so perhaps visibility -- I think many
22 of the other state universities also had
23 enrollment increases that particular fall.

24 Q The new faculty added '06/'07, were those tenure-

1 track positions?

2 A Yes.

3 Q So to deal with exceeding the cap, what tools,
4 what options are available to the institution?

5 A Our primary option is to encourage departments to
6 increase the course cap if it's in a course area
7 that they're not interested in increasing the
8 faculty position in.

9 For instance, the English department,
10 you could have a whole group within English that
11 taught only writing, but that's not the way the
12 English department has their permanent setup.
13 That's not a part of their plan for the English
14 department.

15 We encourage the deans to reduce the
16 number of low-enroll courses, courses that fall
17 well below the cap by either combining those if
18 they're offered at the same point in time during
19 the day or at least close enough. The provision
20 is that we have to review student schedules to
21 make sure that if there was a contraction of
22 sections, that it was not going to impede the
23 students' ability to continue to progress toward
24 getting their degree.

1 going into a different section.

2 It's a two-way street there, because
3 if you were, at the exact same moment in time,
4 just going to this room versus that room, it's a
5 little different metric than if you're trying to
6 combine them across time periods.

7 Q Okay. So other than the two that you have
8 identified, are there other options available to
9 the institution?

10 A One thing that we've worked very strongly with
11 the department chairs through the deans and the
12 provost on is to encourage the departments to
13 plan more carefully the number of sections that
14 they need. Otherwise, looking at historical
15 data, looking at the trends in terms of
16 enrollment, they can essentially triangulate and
17 decide whether or not they need to have five
18 sections of this particular course or if they
19 need ten sections of the course.

20 That can help you have more courses
21 that are closer to the caps, closer to the
22 twenty, twenty-five, thirty-five caps instead of
23 having multiples that have seventeen, eighteen
24 students in them, when they are allowed to have

1 up to thirty-five.

2 Q Any other options?

3 A Those are the primary options. I mean, we've
4 also controlled the incoming class enrollments
5 since 2007/2008. We've pulled the reins back on
6 the number of people accepted following the
7 2007/2008 year to allow that to normalize back
8 closer to the trim line we were on before that
9 one-year blip.

10 Q Would it be possible for the University to cancel
11 sections that would have been taught by part-
12 timers?

13 A We can and we do cancel sections that are
14 assigned to part-time faculty. If we have a need
15 for that section -- for instance, there are
16 occasions where a full-time faculty member has a
17 section that does not make, otherwise there are
18 not enough people enrolled in the class for the
19 class to run, that full-time faculty member may
20 take over the spot of a part-time faculty member
21 in a different course in order to cover that
22 course and the contractual arrangement with the
23 full-time faculty member to allow them to accrue
24 their four courses per semester.

1 309, and we're committed to put in another 40 new
2 faculty over the coming years.

3 The issue, of course, is whether the
4 faculty departments or the academic departments
5 are wanting -- to have the faculty may or may not
6 alleviate all of the issues related to this even
7 for that year. Otherwise, you may have --

8 Q "Related to this," you're referring to the number
9 of courses in excess of the core?

10 A The number of courses in the specific
11 departments.

12 Q Would you repeat those numbers for me, please?
13 246 was when?

14 A 246 was fall of 2002. And we were, as I
15 remember, full-time with all categories, not just
16 tenured, tenure-track, would have been either 292
17 or 299 in 2007, 2008. And this past fall we were
18 at 309.

19 HEARING OFFICER: "This past fall"
20 meaning fall of --

21 DR. YOUNG: Fall of 2010.

22 Q Why is the school adding so many tenure-track
23 lines?

24 A Because we believe that we need more tenure-track

1 lines. We've begun to hold the line on our
2 student enrollments. They've continued to
3 increase, but we've got at least a target of full
4 enrollment and the number of faculty that we need
5 to be able to cover the need for those students.

6 So an increase of more than fifty
7 lines since 2002 or fifty -- we say new faculty
8 lines because they're not just replacements; I
9 mean, there's also replacement going on during
10 this when people retire or leave for whatever
11 reason, but more than fifty new lines to this
12 point, and we've got a commitment, President
13 Mohler-Faria has committed to another forty lines
14 over the next four or five years to increase the
15 number of faculty that we've got.

16 Q Did I understand you to say, though, that there
17 still will be a reliance upon part-time
18 instructors?

19 A There could be in some areas, if areas of
20 specialization require it. I mean, I could still
21 see the need to have people who have specific
22 area knowledge, where that's beneficial to the
23 student experience. Whether it would be in
24 excess of the fifteen percent, I'm unclear about

EXHIBIT B

**COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT**

Board of Higher Education)	
Respondent/Appellant)	
)	
v.)	
)	
Commonwealth Employment Relations)	
Board,)	2015-J-0076
Appellee Agency)	
)	
&)	
)	
Massachusetts State College Association,)	
MTA/NEA)	
Charging Party/Intervener)	
)	

AFFIDAVIT OF C.J. O'DONNELL

I, C.J. O'Donnell, hereby depose and affirm under oath that I have personal knowledge of the factual statements set forth in this Affidavit, and that such statements are true and correct to the best of my knowledge and belief.

1. I have been president of the Massachusetts State College Association ("MSCA") since June 1, 2008.
2. The MSCA is party to a collective bargaining agreement ("CBA") with the Board of Higher Education.
3. The CBA contains a provision in Article XX, § C(10) that limits the ratio of part-time to full-time (tenured and temporary) faculty to 15% for departments with six or more full-time members. For

one college, the ratio is 20%. This is referred to as the 15% Rule.

4. In response to on-going requests for information pursuant to G.L. c. 150E, the MSCA receives data from the Board of Higher Education, through its respective colleges, regarding how many part-time and full-time faculty are being used by the colleges' respective departments to determine compliance with the 15% Rule. That data is attached to this affidavit as Exhibit A.

5. Based on this data, the MSCA learned that the number of departments in violation of the 15% Rule rose to 53 in academic year 2012-2013.

6. The reporting is incomplete for academic year 2013-2014 but the total number of non-compliant departments for 6 of the 9 colleges is 42. By using academic year 2012-2013 numbers for the remaining 3 colleges, the MSCA estimates that there were 57 departments in academic year 2013-2014 that violated the 15% Rule.

Signed under the pains and penalties of perjury, this 19~~th~~ day of March, 2015.


C. J. O'Donnell