Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS
No. SJC-12621

BOARD OF HIGHER EDUCATION,
PLAINTIFF-APPELLANT,

v.

COMMONWEALTH EMPLOYEE RELATIONS BOARD,
DEFENDANT-APPELLEE,

and

MASSACHUSETTS STATE COLLEGE ASSOCIATION,
OTHER INTERESTED PARTY.

ON APPEAL FROM A DECISION OF THE DIVISION OF LABOR RELATIONS

MASSACHUSETTS STATE COLLEGE ASSOCIATION'S INTERVENOR BRIEF

LAURIE HOULE, ESQUIRE
BBO #645206
MASSACHUSETTS TEACHERS ASSOCIATION
Division of Legal Services
2 Heritage Drive
Quincy, Massachusetts 02171-2119
(617) 878-8289/8331
lhoule@massteacher.org

Date: 12/21/2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

ISSUE

The MSCA adopts the issue this Court set forth in its notice inviting amicus briefs:

> Where a provision in the collective bargaining agreement between the Board of Higher Education and the union representing faculty at certain Massachusetts State colleges and universities limits the percentage of courses that may be taught by part-time faculty, whether that provision impermissibly intrudes on the statutory authority under G.L. c. 15A, § 22, to appoint, transfer, dismiss, promote and award tenure to all personnel, or on the board's authority to determine and effectuate educational policy.

STATEMENT OF THE CASE AND FACTS

The MSCA adopts the statement of the case and the facts set forth in the CERB's brief and adds the following relevant facts from the record below.

A. It is undisputed that the cap on the ratio of courses allowed to be taught by part-time faculty is beneficial to students' education.

Article XX, § C(10) of the parties collective bargaining agreement (hereinafter "§ C(10)") 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, *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 the 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 or reduced teaching loads for the purpose of alternative professional responsibilities or Association release time, or any other contractual release time or any unforeseen emergency.

[CERB Decision, pp. 2-3.[1]]

The BHE and MSCA adopted the cap on the ratio of courses taught by part-time faculty in 1986 and it has remained in every subsequent collective bargaining agreement ("CBA"). [CERB Decision, p. 3; RA Vol. III:184.] Not only does the cap protect the work load of full-time faculty members, the BHE's own witnesses confirmed the positive impact of the cap on educational policy.[2] [CERB Decision, p. 8.] For

[1] For the Court's convenience, the CERB's final decision is attached as Appendix A and references to the CERB Decision will be to Appendix A. All other references are to the record appendix and are designated as "RA" followed by the volume and page number.

[2] The BHE witnesses included: Dr. Branson, Senior Vice President of Academic Affairs, Mass. College of Art and Design; Dr. Martin, Vice President of Academic

example, having more full-time faculty helps the college[3] engage in long-term planning and, due to their full-time presence and continuity of teaching, they are "able to make good decisions about curriculum and pedagogy." [RA Vol. II:330, 346 (Branson).] Another noted that full-time faculty are able to be more present for and provide more meaningful academic advising to students. [RA Vol. II:330 (Branson).] The ratio of full-time to part-time faculty also factors into the college's accreditation. [RA Vol. II:349, 354 (Branson).] Another described his college's commitment to increasing full-time faculty (and thus decreasing its reliance on part-time faculty) as part of its commitment to quality education.[4] [RA Vol. III:417-18

Affairs, Framingham State College; Dr. Hayes, Vice President of Academic Affairs, Westfield State College; Dr. Goodwin, Dean of Academic Affairs, Salem State College; Dr. Young, Associate Provost of Academic Planning and Administration, Bridgewater State College; Dr. Kristin Esterberg, Provost and Academic Vice President, Salem State College.

[3] Although after the initiation of this matter the state colleges became state universities, for consistency this brief will continue to refer to them as colleges.

[4] While the BHE cited trade articles noting the upswing in reliance on part-time or adjunct faculty, actual studies indicate that higher percentages of part-time or adjunct faculty have negative effects on education. See, e.g., Florence Xiaotao Ran & Di Xu,

(Young).] In short, the cap is not only "a contractual responsibility but a good idea." [RA Vol. II:332, 334 (Branson).]

Conversely, a higher ratio of part-time faculty negatively impacts both faculty and students. It increases the work load of full-time faculty, which decreases their accessibility to students. Part-time faculty do not have the same presence on campus as full-time faculty. They may not be hired consistently semester to semester or year to year, and they are not as accessible to advise students or write letters of recommendations. Part-time faculty also have fewer office hours and often do not have their own office

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How and Why do Adjunct Instructors Affect Students' Academic Outcomes? 42-43 (Center for Analysis of Postsecondary Education & Employment, Working Paper, January 2017 (study found that part-time instructors typically are not as experienced or educated, students in their classes had lower performance on the next class in the same subject, and students taking introductory classes with part-time instructors had increased dropout rates), *available at* https://ccrc.tc.columbia.edu/media/k2/attachments/how-and-why-do-adjunct-instructors-affect-students-academic-outcomes.pdf; Audrey J. Jaeger & M. Kevin Eagan, *Examining Retention and Contingent Faculty Use in a State System of Public Higher Education*, Educational Policy XX(X) at 24 (high levels of exposure to part-time faculty instruction in first year appears to have significantly negative relationship with student retention in second year), *available at* https://www.aft.org/sites/default/files/ed_policy_jaeger_0610_2.pdf.

space to meet students. [RA Vol. II:185-87, 195, 198 (Markunas); Vol. II:234 (Everitt).]

B. College administrators have many options within their managerial discretion to meet the commitment to cap the ratio of courses taught by part-time faculty.

Contrary to how the BHE repeatedly referred to it, § C(10) does *not* mandate that no more than 15% of faculty may be part-time.[5] Instead, it provides that of the total number of 3-credit courses in qualifying departments, no more than 15% may be taught by part-time faculty. It is a distinction with a difference. Section C(10) does not set a limit on the number of part-time faculty that may be hired. For example, a college may choose to assign a single part-time faculty member to teach five 3-credit courses or five part-time faculty members to teach those same courses. This provision does *not* mandate the overall number of part-time or full-time faculty a college must hire, dictate who the colleges must hire to fill any position, or require any positions to be part-time or full-time. [RA Vol. III:353 (Goodwin), 440-41 (Young).]

[5] For ease of reading, this brief will reference the 15% ratio but for the Massachusetts College of Art the ratio is 20%. [CERB decision, pp. 2-3.]

For those departments and courses that fall within the terms of § C(10), college administrators have multiple means within their discretion to comply with the obligation to limit the number of courses taught by part-time faculty. For example, colleges can: increase the number of full-time or full-time temporary faculty in departments that violate the cap through its hiring authority or its right to make budgetary adjustments between departments that routinely fall under the cap and those that routinely exceed the cap;[6] have existing full-time faculty teach more core courses; reduce course or section offerings or how frequently they are offered; combine low enrollment courses or sections; increase class size; plan courses and sections more carefully using historic enrollment data; and control matriculation. [CERB Decision, p. 32.] In fact, one college issued a memo in June 2008, proposing to increase full-time faculty while also addressing class size and the

[6] Contrary to BHE's argument, neither the witnesses or CERB intended that to mean that the college could just transfer a professor holding a full-time position from one department to another. It has to do with positions, not people. The colleges could increase the number full-time faculty positions in departments and decrease them in non-compliant departments as a cost-neutral remedy. [CERB Decision, p. 32.]

frequency of course offerings – a solution that BHE conceded would lead to compliance. [RA Vol. III:358 (Goodwin); Vol. V:280.] The contractual cap thus leaves the administration ample flexibility to deal with fluctuations in enrollment and changes to programming.

Beyond these cost-neutral solutions, colleges also can use other sources of revenue, such as local fee-based revenue, to help cover the costs of employing more full-time faculty. [RA Vol. III:184 (Hayes), 353 (Goodwin), 428-29 (Young).] Indeed, multiple sources of revenue are available in making up their budgets, including state appropriations, tuition, Division of Continuing Education tuition, student fees, grants, and fundraising. [RA Vol. II:321 (Branson); Vol. III:44-45, 47 (Branson), 428-29 (Young).]

College administrators build their annual budgets based on their targets for using full-time faculty and their strategic priorities. [RA Vol. III:139, 222-225 (Hayes); 68, 87 (Martin), 142, 146 (Esterberg); 338-39 (Goodwin).] They look at the size of the program, projected growth, and the need for special expertise to determine how much to allocate towards full-time

faculty positions. [RA Vol. III:68 (Martin); 167 (Hayes).] Although the overall budget level is set by administration and finance, it does not dictate *how* those monies should be allocated; that discretion is left to the colleges. [RA Vol. III:44 (Young); 68, 87 (Martin); 142, 146 (Esterberg); 167, 189, 222-25, 255 (Hayes); 338-39, 352 (Goodwin).] However, not one BHE witness testified that their institution actually drafted budgets to account for the requirements of § C(10). [RA Vol. III:222-25 (Hayes); 68 (Martin; 352 (Goodwin).] At most, the cap was "looked at" or "discussed." [RA Vol. III:223-225 (Hayes); 253 (Goodwin).]

The BHE's claims about the dire straits compliance with § C(10) would cause should be viewed with a skeptical eye. While its witnesses discussed the general challenges of meeting the competing demands for funding, the BHE did not enter into the record any evidence whatsoever regarding the colleges' funding level or, more precisely, how compliance with § C(10) adversely impacted its budget. See discussion in CERB Brief, p. 39. There is nothing in the record to support the BHE's claim that compliance with

§ C(10) would cause budget shortfalls impacting other areas of educational policy.

SUMMARY OF ARGUMENT

The courts consistently recognize the strong public policy supporting collective bargaining over mandatory subjects of bargaining in the Commonwealth. Certain managerial decisions, however, are reserved to the public employer. Though there is tension between these rights, they are not mutually exclusive. The courts have developed a case-by-case analysis to determine if collective bargaining *materially conflicts* with a decision that falls in the exclusive domain of the employer as only then would bargaining impermissibly infringe on a nondelegable decision. (See pp. 19-21.)

City of Lynn v. Labor Relations Commission, 45 Mass. App. Ct. 172 (1997) describes three types of grants of authority behind managerial decisions. In most cases, the public entity acts pursuant to broad grant of authority. There, the courts will only apply the doctrine of nondelegability as far as necessary to preserve the employer's ability to carry out its statutory mandate. Even when a decision may not be delegated to bargaining, parties may still bargain

over procedures related to the decision, the means of implementing the decision, and the impacts of the decision. (See pp. 21-25.) Some grants of authority, not applicable here, are narrow and specific. Such statutes appearing in G.L. c. 150E, § 7(d), may be superseded by collective bargaining. Those narrow and specific authorities not listed in § 7(d) are outside the scope of bargaining. (See pp. 25-27.)

Here, BHE operates under a broad grant of authority, one that closely resembles the powers granted in G.L. c. 71 for elementary and secondary educational institutions:

> Each board of trustees of a community college or state college 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: . . . appoint, transfer, dismiss, promote and award tenure to all personnel of said institution.

G.L. c. 15A, § 22 (hereinafter "§ 22").

The cap on the ratio of part-time faculty found in § C(10) does not infringe on the BHE's exclusive authority to hire or appoint or to determine educational policy. Instead, the BHE's argument is about its finances. But the public policy supporting

collective bargaining inherently means that employers will need to juggle managerial prerogatives with their obligation to comply with contractual terms of employment. Otherwise, G.L. c. 150E is rendered meaningless. (See pp. 28-34.)

The BHE's position that the Court should construe § 22 to give it unfettered control over any subject that touches on managing personnel or determining educational policy would result in a de facto repeal of G.L. c. 150E. It cites no case law to support such an expansion of nondelegable power under a broad grant of authority. (See pp. 35-36.)

The decision in Higher Ed. Coordinating Council/Roxbury Community Coll. v. Mass. Teachers Ass'n/Mass. Community Coll. Council, 423 Mass. 23, 28 (1995) does not support the BHE's quest for an unwarranted expansion of nondelegable power. The BHE relies solely on dicta, ignoring the context and totality of the Court's decision. The Supreme Judicial Court did not construe § 22 differently than other statutes of its kind; to the contrary, it found that the Legislature intended it to be interpreted similarly to the authorities found in G.L. c. 71. (See pp. 36-38.)

Finally, the CERB's findings and conclusions were fully supported by the record and are entitled to deference. (See pp. 39-40.)

ARGUMENT

A. CERB appropriately determined that § C(10) does not infringe on the BHE's exclusive authority but was an enforceable provision of the parties' CBA.

1. The courts only need to make a determination where to draw the line between the strong public policy supporting collective bargaining and the doctrine of nondelegability when there is an actual material conflict between the two based on the facts of the case.

A public employer is required to "negotiate in good faith with respect to wages, hours, standards or productivity and performance, and any other terms and conditions of employment." G.L. c. 150E, § 6. Massachusetts courts have consistently recognized the strong public policy supporting collective bargaining over these mandatory subjects of bargaining. See, e.g., See Chief Justice for Admin. and Mgmt. of the Trial Ct. v. Office of Prof. Employees Int'l U., Local 6, AFL-CIO, 441 Mass. 620, 630 (2004); Sch. Comm. of Pittsfield v. United Educators of Pittsfield, 438 Mass. 753, 761-62 (2003). Certain managerial decisions, however, fall into a domain reserved

exclusively to the public entity, whether by statutory command or as a matter of public policy. See Higher Ed. Coordinating Council/Roxbury Community Coll. v. Mass. Teachers Ass'n/Mass. Community Coll. Council, 423 Mass. 23, 28 (1995) ("Roxbury Comm. Coll."). An inherent tension exists between collective bargaining and managerial control, complicated by the fact that many managerial decisions touch on both. See Chief Justice for Admin. and Mgmt. of the Trial Ct. v. Comm. Employment Relations Bd., 79 Mass. App. Ct. 374, 381-82 (2011). Regardless, these rights are not mutually exclusive. See id.; Boston Teachers Union, Local 66, Am. Fed'n of Teachers (AFL-CIO) v. Sch. Comm. of Boston, 370 Mass. 455, 462-63 (1976).

An impermissible intrusion into the public manager's exclusive domain only arises if there is a *material conflict* with a decision reserved exclusively to the employer. See City of Somerville v. Somerville Mun. Employees Ass'n, 451 Mass. 493, 497 (2008); Roxbury Comm. Coll., supra at 27. To be material, the conflict must "usurp[] the discretionary power granted by the Legislature to a public authority that, by statute, cannot be delegated to another." City of Somerville, 451 Mass. at 497. Making that

determination requires a case-by-case analysis. See City of Worcester v. Labor Relations Comm'n, 438 Mass. 177, 180-81 (2002) ("The list of factors so fundamental to the effective operation of an enterprise as to be exempt from mandatory bargaining requirements will of necessity vary with the nature of the employer."); Roxbury Comm. Coll., 423 Mass. at 31-32. The most comprehensive and clear exposition of this analysis appears in City of Lynn v. Labor Relations Commission, 45 Mass. App. Ct. 172 (1997). The Appeals Court found three broad categories of cases (set forth below) based on the type of statute purportedly authorizing an employer's decision.[7]

a. Most statutory grants of authority are broad and therefore determinations of exclusive authority are narrowly construed to preserve collective bargaining rights to the greatest extent possible.

Every action by a political subdivision in the Commonwealth must be made pursuant to some statutory authority, whether in the form of an enabling statute

[7] The Supreme Judicial Court has cited City of Lynn favorably in analyzing cases where the scope of the grant of authority to public employers is at issue. See, e.g., City of Somerville v. Somerville Municipal Employees Ass'n, 451 Mass. 493 (2008); City of Worcester v. Labor Relations Comm'n, 438 Mass. 177 (2002).

that confers general administrative and managerial powers or a specific grant of authority elsewhere in the law. The courts have long recognized the inherent danger in interpreting broad grants of authority to provide exclusive, nondelegable power because doing so could substantially undermine the equally compelling role of collective bargaining in the public sector. See G.L. c. 150E, § 6; City of Lynn, supra at 182, citing Sch. Comm. of Newton v. Labor Relations Comm'n, 388 Mass. 557, 564-66 (1997). Accordingly, the doctrine of nondelegability applies only as far as necessary to preserve the employer's ability to carry out what is mandated explicitly by statute, tradition, or policy. See id.; Massachusetts Board of Higher Education/ Holyoke Community College v. Massachusetts Teachers Association/Massachusetts Community College Council/ National Education Association, 79 Mass. App. Ct. 27, 32 (2011). This is consistent with the canon of statutory interpretation that courts construe conflicting statutes to give reasonable effect to all statutory provisions; that is, to harmonize the statutes rather than read one to undercut the other. See, e.g., Sch. Comm. of Newton v. Newton Sch.

Custodians Ass'n, Local 454, SEIU, 438 Mass. 739, 749, 751 (2003).

Moreover, even when the courts find that an underlying decision is reserved exclusively to the employer, the law and policy favoring collective bargaining allows the parties in a labor relationship to negotiate over the *procedures* precedent to exclusive decision, over the *means* of implementing the decision, and over the *impact* of the managerial decision, and agreements reached on those issues are fully enforceable. See City of Lynn, supra at 179. Thus have the Legislature and the courts balanced managerial prerogatives and collective bargaining.

The courts have found that a wide variety of subjects addressing staffing issues do not materially conflict with an employer's exclusive authority. See, e.g., Boston Teachers Union, Local 66, Am. Fed'n of Teachers (AFL-CIO) v. Sch. Comm. of Boston, 370 Mass. 455, 462-63 (1976) ("BTU, Local 66") (hiring substitute teachers to meet contractual limits on class size and teacher work load); Boston Teachers Union, Local 66 v. School Comm. of Boston, 386 Mass. 197, 204 (1982) (annually funded job security provisions); Local 2071, IAFF v. Town of Bellingham,

67 Mass. App. Ct. 502, 512 (2006) (implementing 24-hour shifts to ensure round-the-clock fire protection services mandated by the town); CJAM, 441 Mass. at 630 (permanent transfers where the exclusive statutory authority only extended to temporary transfers).

By contrast, managerial staffing decisions deemed nondelegable largely center around employer's right to hire and to deploy staff, see, e.g., Sch. Comm. of Holbrook v. Holbrook Educ. Ass'n, 395 Mass. 651, 656 (1985) (appointment of guidance counselor) or when public safety or determining the priorities of law enforcement are involved, see, e.g., Burlington v. Labor Relations Comm'n, 390 Mass. 157, 164 (1983) (re-assigning prosecutorial duties); Boston v. Boston Police Patrolmen's Ass'n, 403 Mass. 680, 684 (1989) (determining number of officers assigned to a police cruiser); City of Boston v. Boston Police Superior Officers Fed'n, 466 Mass. 210, 215-16 (2013) (transferring or reassigning police officers to address changing public safety conditions).

Determining whether a decision is nondelegable, however, is not the end of the analysis. The impact or effect of those decisions on terms and conditions of employment are mandatory subjects of bargaining. See

City of Worcester, 438 Mass. at 185; City of Lynn, supra at 179. The courts have found a variety of issues related to managerial decisions to be mandatory subjects of bargaining. See, e.g., Sch. Comm. of Pittsfield v. United Educators of Pittsfield, 438 Mass. at 764 (involuntary transfers as a means to address district-wide staffing needs); Sch. Comm. of Newton, 388 Mass. at 564 (the means to achieve a reduction in services such as attrition, shorter hours, or layoffs and, if applicable, the method of determining who to lay-off); Sch. Comm. of Hull v. Hull Teachers Ass'n, MTA/NEA, 69 Mass. App. Ct. 860, 865-66 (2007), rev. denied, 450 Mass. 1104 (2007) (procedures for evaluating qualifications for professional teacher status); Burlington, 390 Mass. at 164 (impact of decisions to assign or re-assign duties, such as effect on loss of pay).

b. Specific statutory grants of authority listed in G.L. c. 150E, § 7(d) are narrow and may be superseded by collective bargaining.

General Laws, chapter 150E, section 7(d) contains a limited list of statutes involving the exercise of managerial authority granted that may be superseded by collective bargaining. See City of Lynn, supra at 177.

All of the enumerated statutes "contain *specific* mandates regarding terms and conditions of employment of public employees." City of Somerville v. Commonwealth Employment Relations Board, 470 Mass. 563, 572 (2015) (emphasis added). The § 7(d) list contains no statutes of broad authority because no such enumeration is necessary or even possible. The purpose and function of G.L. c. 150E is to introduce a limitation on the unfettered exercise of broad authority. The statute at issue here, G.L. c. 15A, § 22, does not appear in G.L. c. 150E, § 7(d) because *no* such statutes of this type appear in § 7(d).[8] Therefore, this category is not applicable.

c. In some cases, a statutory grant of authority is specific and narrow, foreclosing collective bargaining over those decisions the Legislature explicitly conferred to management's exclusive authority.

Finally, a small number of cases involve employer decisions made under the authority of a specific, narrow statute that is not enumerated in G.L. c. 150E,

[8] Conversely, the exclusion of § 22 from G.L. c. 150E, § 7(d) does not give the BHE free reign to act without regard to its collective bargaining obligations under G.L. c. 150E. See Sch. Comm. of Newton v. Labor Relations Comm'n, 388 Mass. 557, 566 (1983).

§ 7(d). See City of Lynn, supra at 180. Collective bargaining and arbitration over such decisions would "defeat a declared legislative purpose" of allowing the employer to act freely within the confines of the narrow authority granted. Id. at 180-81. The distinction from the majority of cases involving a broad grant of authority lies in the "explicitness of the statutory authorization." Id. at 182. See, e.g., Sch. Comm. of Natick v. Educ. Ass'n of Natick, 423 Mass. 34, 38-39 (1996) (three year limitation on appointment of school athletic coach cannot be superseded by contractual just cause provision); Mass. Coalition of Police, Local 165 v. Northborough, 416 Mass. 252, 255-56 (1993) (similar result involving police appointment); City of Lynn, supra at 182 (department head's decision to file an application for involuntary retirement for a department employee specifically authorized by retirement statute).

Where a manager's statutory authority is specific and narrow, it may leave no room for bargaining. See City of Lynn, 45 Mass. App. Ct. at 183.

2. BHE's statutory authority in this case is broad and a cap on the ratio of courses taught by part-time faculty does not materially conflict with a nondelegable authority.

a. G.L. c. 15A, § 22 provides a broad grant of authority to BHE and its colleges.

G.L. c. 15A, § 22 is a broad grant of discretionary authority to the boards of trustees of the individual colleges to administer their staff, programs and operations. Like other such statutes, it includes the *general* managerial authority to hire and deploy personnel. See G.L. c. 15A, § 22. In fact, the Supreme Judicial Court found that powers granted in § 22 "closely resemble" those broad authorities found in G.L. c. 71 and it concluded that the Legislature "would approve a comparable interpretation" of the nondelegability doctrine with respect to those authorities. Roxbury Comm. Coll., 423 Mass. at 30; see also Holyoke Comm. Coll., 79 Mass. App. Ct. at 33, n.9 ("the principles of nondelegability recognized as applying to public elementary and secondary schools [apply] at the college level").

b. A cap on the ratio of courses taught by part-time faculty does not infringe on an exclusive authority of the BHE.

In accommodating both the collective bargaining rights of employees and the exclusive authority of employers in certain matters concerning education policy, "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." Holyoke Comm. Coll., 79 Mass. App. Ct. at 32, quoting in part Roxbury Comm. Coll., supra at 27. Whether in a K-12 or higher education CBA, a negotiated provision is unenforceable *only* if it "infringe[s] on an area of educational policy reserved for the exclusive judgment of the administrators of the college." Id.

The CERB found that § C(10) does not limit or interfere with the colleges' right to appoint; they retain the right to decide if and who to appoint to a specific position. [CERB Decision, pp. 27-28.] In contrast, the cases in which the courts found a material conflict between a CBA and nondelegable decision to appoint involved specific appointment decisions; that is, *if* and *who* to hire or appoint to a

position. See, e.g., Roxbury Comm. Coll., 423 Mass. at 28; Holyoke Comm. Coll., 79 Mass. App. Ct. at 33. The colleges also maintain full discretion to determine whether an appointment should be part-time or full-time. Therefore, their ability to control faculty appointments, a "defining element[] of an educational institution's quality and programs," is not limited by § C(10). Roxbury Comm. Coll., 423 Mass. at 30.

The CERB also found that § C(10) does not interfere with the colleges' power to decide their educational programs or the courses offered. [CERB Decision, p. 32.] Instead, the agreement only affects how courses set by administration are staffed, which in turn protects the work load of full-time faculty. See BTU, Local 66, 370 Mass. at 463 (hiring of substitutes aided in part the protection of teacher work load). Moreover, the cap only applies in certain departments and it does not apply in exigent circumstances when administration needs to hire part-time faculty to cover courses taught by full-time faculty who retire, take leave, pass away, reduce their workload due to other professional responsibilities, or other emergencies determined by administration. Therefore, even with the cap, the

colleges are left with flexibility to respond to changing needs that may arise over the duration of the agreement.

As CERB concluded:

> [Section C(10)] 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 [§ C(10)] is a "means of implementing" the Board's educational policy.

[CERB Decision, p. 28.] It does not matter if an agreement is reached as the result of bargaining a decision or bargaining over the means of implementing, the procedures related to, or the impacts of a decision – the BHE is obligated by law to uphold its contractual commitments. See Sch. Comm. of Newton, 438 Mass. at 749 (school committee may establish procedures/means for carrying out personnel policies through collective bargaining). This is true even when the agreement addresses matters of fiscal management or educational policy. See BTU, Local 66, 370 Mass. at 464. "When, however, an agreement is made on these subjects consistent with the committee's view of fiscal management and educational policy, the terms of that agreement may be enforced where there has been no

change in educational policy and funds are available to implement the terms of the agreement." Id. As the CERB found, there was no change in educational policy. [CERB Decision, pp. 30-31.]

At its core, the BHE's argument is about its finances, not about its educational prerogative. Meeting its obligations under § C(10), so it claims, hinders its ability to fund other programs or initiatives and thus infringes on its general authority to set educational policy.[9] By that reasoning, all bargained provisions requiring a budget allocation would be off limits. The courts, however, have never recognized the public employers' right to control their budgets to remove mandatory subjects of bargaining from the scope of bargaining. General Laws chapter 150E, section 6 cannot be rendered meaningless. Many terms and conditions of employment necessarily implicate financial considerations, starting most basically with wages. To hint, as BHE

[9] The BHE also is misleading by stating that there is "inadequate funding to support a faculty comprised of 85% full-time professionals." Nothing in § C(10) requires the overall faculty to be 85% full-time, only that the number of 3-credit courses in qualifying departments be capped at 15%. This was an important distinction in the CERB's decision. [CERB Decision, pp. 28-29.]

does here, that § C(10) is unlawful because of the financial costs associated with it is to suggest the evisceration of a central purpose of G.L. c. 150E: bargaining over cost items. See G.L. c. 150E, §§ 7(b)-(c).

The BHE is responsible for requesting an appropriation sufficient to cover its contractual obligations, including § C(10). See G.L. c. 150E, § 7(c). There is no evidence it does so. Moreover, its assertions that § C(10)'s financial impact interferes with educational policy is speculative; the BHE failed to enter any budgetary data to support this claim. The fact that the BHE must contend with the "tension between multiple managerial determinations, such as the number of students to admit, the size of classes, and the number of faculty to hire within a set budget," [BHE Brief, p. 42] does not mean that § C(10) *materially conflicts* with a *nondelegable* authority. The public policy supporting collective bargaining inherently means that a public employer will need to juggle decisions concerning managerial prerogatives while fulfilling its statutory obligation to comply with contractual terms of employment. See Sch. Comm. of Pittsfield, 438 Mass. at 761-62.

BHE is not without options – it can propose changes to § C(10) at the bargaining table. And if true budgetary issues of an exigent nature arise, it can give notice and opportunity to the union to bargain before making changes to address the exigent circumstances. See New Bedford v. Comm. Employment Relations Bd., 90 Mass. App. Ct. 1103 (2016), rev. denied, 476 Mass. 1106 (2016) (economic exigency is an affirmative defense for circumstances beyond the employer's control whereby it may implement without fulfilling its bargaining obligation but instead engage in post-implementation bargaining). What it cannot do is engage in self-help and routinely repudiate the CBA, as the CERB found it has done.

The record clearly shows that there is no material conflict between a cap on the ratio of courses taught by part-time faculty and the colleges' authority to hire and deploy faculty or its ability to determine and effectuate educational policy. Accordingly, the CERB did not err by finding that the BHE repudiated § C(10) in violation of G.L. c. 150E.

3. The BHE's view of § 22 would result in an unwarranted expansion of its exclusive rights, rendering G.L. c. 150E meaningless.

a. The BHE provides no legal basis to expand its broad authority beyond the test set forth in City of Lynn.

The BHE posits that the Court should construe § 22's broad grant of authority to give it unfettered control over any subject that touches on managing personnel or determining educational policy. Read in this way, the result would be a de facto repeal of G.L. c. 150E as it currently applies to BHE and its institutions. Indeed, it would be hard to articulate why the broad grant of authority in § 22 is entitled to oust subjects of bargaining in a way that other broad grants of authority for other public entities do not. See City of Lynn, supra at 182 (cautioning against expanding broad grants of authority in a way that would render collective bargaining meaningless).

Not surprisingly, the BHE does not cite any case law supporting such an expansion of exclusive rights. Indeed, case law stands against the BHE's position. See Roxbury Comm. Coll., 423 Mass. at 30 (finding that the authorities in § 22 and G.L. c. 71 should be interpreted similarly); Holyoke Comm. Coll., 79 Mass.

App. Ct. at 33, n.9. See discussion, supra, section A.2.a. The Legislature did not intend to pass a "largely ineffective collective bargaining statute as to public school employees" nor is there any evidence the Legislature intended collective bargaining to be ineffective for public higher education employees. Sch. Comm. of Newton, 388 Mass. at 566.

b. The BHE's reliance on Roxbury Community College is unavailing.

The BHE's argument is built almost exclusively on dicta in Roxbury Community College; specifically, the Supreme Judicial Court's observations that "the language of § 22 is more emphatic and detailed than were the cognate provision of c. 71 in defining the duties and scope of authority assigned" and that the colleges "should retain the sole authority for determining the content of its educational curriculum, and the optimum system for the delivery of the academic programs and related services it deems necessary." 423 Mass. at 30. It is important first to note that the Court's observations were made in the course of examining an arbitrator's overreaching decision that (a) found a vacancy existed; (b) deemed the grievant qualified for the vacant position; and

(c) ordered the grievant appointed to the vacant position.[10] See id. at 24-25.

Recognizing the tension between the nondelegability doctrine and the right to collective bargaining, the Court noted in passing that "the language of § 22 is more emphatic and detailed" than similar authorities found in G.L. c. 71. Within the same paragraph, however, the Court acknowledged that the importance of high quality and affordable education program applies at all levels of public education, not just higher education. See id. at 29-30. It further found the language in § 22 and G.L. c. 71 "closely resembled" each other and that the Legislature intended them to be treated in a consistent manner. Id. at 30-31. While the language of § 22 may be more emphatic and detailed, the Court did

[10] The Court focused its analysis on whether the arbitrator overstepped his authority; it did not rule that the underlying contract provisions on vacancy and retrenchment were not mandatory subjects of bargaining or on their own materially conflicted with an exclusive authority. See id. at 32-33; see also Sch. Comm. of Holbrook, 395 Mass. at 657 (after concluding the district violated the contract regarding recall rights, the arbitrator was entitled to fashion a remedy of one year of wages that fell short of infringing on its exclusive authority); Holyoke Comm. Coll., 79 Mass. App. Ct. at 35, n.10 (arbitrator exceed authority by overturning college judgment as to best qualified candidate but CBA provision could be read congruently with nondelegable authority).

not construe it differently from other statutes of its kind, including G.L. c. 71. See Holyoke, Comm. Coll., 79 Mass. App. Ct. at 33, n.9.

The BHE's contention that its grant of authority should be treated more like that of a law enforcement entity is also without legal support. [BHE Reply, pp. 14-15.] The statutory grants of authority and even more so the public policy behind decisions regarding exclusive authority within these two areas are so different as to defy such analogy. Nothing in the Appeals Court decision in Town of Framingham v. Framingham Police Officers Union, 93 Mass. App. Ct. 537 (2018) signals a judicial intent to start construing these disparate grants of authority similarly. Cf. City of Worcester, 438 Mass. at 180-81 (analysis of exclusive authorities varies with the nature of the employer).

Moreover, no court has said that the colleges' power to determine the "optimum system for delivery of [] academic programs" ousts its duty to bargain or allows it to avoid contractual commitments that require it to expend financial resources. BHE certainly has not cited any. Accordingly, BHE's reliance on Roxbury Community College is unavailing.

B. CERB's findings and conclusions are fully supported by the record and are entitled to deference.

In reviewing a final decision of a state administrative agency, the courts "shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G.L. c. 30A, § 14(7). And while the interpretation of a statute is a question of law for the court, where an agency must interpret legislative policy only broadly set forth in its governing statute, "giving deference to an administrative interpretation of a statute [is] 'especially significant.'" W. Bridgewater Police Ass'n v. Labor Relations Comm'n, 18 Mass. App. Ct. 550, 552 (1984), quoting Mass. Org. of State Eng'rs. & Scientists v. Labor Relations Comm'n, 389 Mass. 920, 924 (1983); see also City of Worcester, 438 Mass. at 180.

> The fundamental premise of the administrative agency, and indeed the principal reason for the enormous growth of administrative agency power in the twentieth century, has been the conviction that the administrative agency, by virtue of its acquisition or expertise, is better able to make intelligent, effective, and continuing decisions in the public interest in its areas of delegated responsibility than either the legislature or the judiciary.

40 Mass. Prac., Administrative Law & Practice § 1639.

In the proceeding below, the Hearing Officer heard eight days of hearing. On appeal, the CERB issued a thirty-five page decision, explaining in detail the facts on which it upheld the decision that the BHE repudiated § C(10) as well as a grievance resolution on the issue. Its decision was certainly supported by a very substantial record. Moreover, the CERB's expertise and experience in determining the legislative policy behind the broad grant of authority in § 22 is entitled to deference. See G.L. c. 30A, § 14(7); W. Bridgewater Police Ass'n, supra.

CONCLUSION

For the reasons set forth above as well as those set forth in the CERB's brief, the MSCA requests that this Court find that Article XX, § C(10) addressed a mandatory subject of bargaining and its terms do not materially conflict with an exclusive authority under G.L. c. 15A, § 22. Because CERB's findings were supported by the substantial record evidence and its conclusions consistent with the law, the MSCA requests that this Court uphold the CERB decision and order.

Respectfully submitted,

/s/ Laurie Houle

LAURIE HOULE, ESQUIRE
BBO #645206
MASSACHUSETTS TEACHERS ASSOCIATION
Division of Legal Services
2 Heritage Drive
Quincy, Massachusetts 02171-2119
(617) 878-8289/8331
lhoule@massteacher.org

Date: 12/21/2018

ADDENDUM

ADDENDUM
TABLE OF CONTENTS

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)
Chapter 15A. Public Education (Refs & Annos)

M.G.L.A. 15A § 22

§ 22. Board of trustees of community colleges or state universities; powers and duties

Effective: April 13, 2017
Currentness

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: (a) cause to be prepared and submit to the secretary and the council estimates of maintenance and capital outlay budgets for the institution under its authority; provided further, that the local board of trustees of a community college shall annually submit a report detailing estimates of maintenance, capital outlay budgets and proposed property acquisitions for the institution under its authority to the house and senate committees on ways and means, the secretary of administration and finance and the commissioner of capital asset management and maintenance on or before December 31; (b) establish all fees at said institution subject to guidelines established by the council. Said fees shall include fines and penalties collected pursuant to the enforcement of traffic and parking rules and regulations. Said rules and regulations shall be enforced by persons in the employ of the institution who throughout the property of the institution shall have the powers of police officers, except as to the service of civil process. Said fees established under the provisions of this section shall be retained by the board of trustees in a revolving fund or funds, and shall be expended as the board of the institution may direct; provided that the foregoing shall not authorize any action in contravention of the requirements of Section 1 of Article LXIII of the Amendments to the Constitution. Said fund or funds shall be subject to an audit by the state auditor, in accordance with generally accepted government auditing standards, as often as the state auditor determines is necessary; (c) appoint, transfer, dismiss, promote and award tenure to all personnel of said institution; (d) manage and keep in repair all property, real and personal, owned or occupied by said institution; (e) seek, accept and administer for faculty research, programmatic and institutional purposes grants, gifts and trusts from private foundations, corporations, federal agencies, alumnae and other sources, which shall be administered under the provisions of section two C of chapter twenty-nine and may be disbursed at the direction of the board of trustees pursuant to its authority; (f) implement and evaluate affirmative action policies and programs; (g) establish, implement and evaluate student services and policies; (h) recommend to the council admission standards and instructional programs for said institution, including all major and degree programs provided, however, that said admission standards shall comply with the provisions of section thirty; (i) have authority to transfer funds within and among subsidiary accounts allocated to said institution by the council; (j) establish and operate programs, including summer and evening programs, in accordance with the degree authority conferred under the provisions of this chapter; (k) award degrees in fields approved by the council; either independently or in conjunction with other institutions, in accordance with actions of the boards of trustees of said other institutions and the council; (*l*) submit a 5-year master plan to the secretary and the council, which plan shall be subject to the secretary's approval, in consultation with the council, and shall be updated annually according to a schedule determined by the secretary and the board in consultation with the board of trustees; (m) submit financial data and other data as required by the secretary and the board of higher education for the careful and responsible discharge of their purposes, functions, and duties. The data shall be reported annually to the secretary and the board of higher education according to a schedule

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determined by the secretary and the board of higher education in consultation with the board of trustees. The board of trustees shall also submit an annual institutional spending plan to the secretary and the council for review, comment, and transmittal to the secretary of administration and finance, the house and senate committees on ways and means and the joint committee on higher education. Spending plans shall be reported using a standardized format developed by the secretary, in consultation with the board of higher education and the institutional boards of trustees, in a manner to allow comparison of similar costs between the various institutions of the commonwealth. Said plan shall include an account of spending from all revenue sources including but not limited to, trust funds; (n) develop a mission statement for the institution consistent with identified missions of the system of public higher education as a whole, as well as the identified mission of the category of institution within which the institution operates. Said mission statement shall be forwarded to the secretary and the council for approval. The board of trustees shall, after its approval, make said mission statement available to the public; (*o*) submit an institutional self-assessment report to the secretary and the council, which the board of trustees shall make public and available at the institution. Said assessment report shall be used to foster improvement at the institution by the board of trustees and shall include information relative to the institution's progress in fulfilling its approved mission. Said report shall be submitted annually to the secretary and the board of higher education according to a schedule determined by the secretary and said board in consultation with the board of trustees. Said assessment report shall include an analysis of the collaboration between the community college and vocational technical schools and the training and job development programs implemented by the community college and vocational technical schools. (p) The board of trustees of an institution with the potential to expand its mission, profile, and orientation to a more regional or national focus may submit to the secretary and the board of higher education, for approval, a 5-year plan embracing an entrepreneurial model which leverages that potential in order to achieve higher levels of excellence pursuant to section 7.

The board of trustees of each institution may delegate to the president of such institution any of the powers and responsibilities herein enumerated.

The commonwealth shall indemnify a trustee of a community college or state university against loss by reason of the liability to pay damages to a party for any claim arising out of any official judgment, decision, or conduct of said trustee; provided, however, that said trustee has acted in good faith and without malice; and provided, further, that the defense or settlement of such claim shall have been made by the attorney general or his designee. If a final judgment or decree is entered in favor of a party other than said trustee, the clerk of the court where such judgment or decree is entered shall, within twenty-one days after the final disposition of the claim, provide said trustee with a certified copy of such judgment or entry of decree, showing the amount due from said trustee, who shall transmit the same to the comptroller who shall forthwith notify the governor; and the governor shall draw his warrant for such amount on the state treasurer, who shall pay the same from appropriations made for the purpose by the general court.

Credits

Added by St.1991, c. 142, § 7. Amended by St.2003, c. 26, §§ 55, 692, eff. July 1, 2003; St.2008, c. 27, §§ 67 to 72, eff. Mar. 10, 2008; St.2010, c. 189, § 31, eff. Oct. 26, 2010; St.2012, c. 139, §§ 49, 50, eff. July 1, 2012; St.2016, c. 463, § 8, eff. April 13, 2017.

Notes of Decisions (5)

M.G.L.A. 15A § 22, MA ST 15A § 22
Current through Chapter 322 of the 2018 2nd Annual Session

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 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 150E. Labor Relations: Public Employees (Refs & Annos)

M.G.L.A. 150E § 6

§ 6. Negotiations; meetings

Currentness

The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process and shall negotiate in good faith with respect to wages, hours, standards or productivity and performance, and any other terms and conditions of employment, including without limitation, in the case of teaching personnel employed by a school committee, class size and workload, but such obligation shall not compel either party to agree to a proposal or make a concession; provided, however, that in no event shall the right of any employee to run as a candidate for or to hold elective office be deemed to be within the scope of negotiation.

Credits
Added by St.1973, c. 1078, § 2. Amended by St.1986, c. 412; St.1989, c. 470.

Notes of Decisions (100)

M.G.L.A. 150E § 6, MA ST 150E § 6
Current through Chapter 322 of the 2018 2nd Annual Session

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Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 150E. Labor Relations: Public Employees (Refs & Annos)

M.G.L.A. 150E § 7

§ 7. Collective bargaining agreements; term; appropriation requests; provisions; legal conflicts, priority of agreement; review of agreement by retirement board

Effective: November 4, 2014
Currentness

(a) Any collective bargaining agreement reached between the employer and the exclusive representative shall not exceed a term of three years; provided, however, that the employer and the exclusive representative through negotiation may agree to include a provision in a collective bargaining agreement stating that the agreement's terms shall remain in full force and effect beyond the 3 years until a successor agreement is voluntarily negotiated by the parties. The agreement shall be reduced to writing, executed by the parties, and a copy of such agreement shall be filed with the commission and with the house and senate committees on ways and means forthwith by the employer.

(b) The employer, other than the board of higher education or the board of trustees of the University of Massachusetts, the chief justice for administration and management, a county sheriff, the PCA quality home care workforce council, the alcoholic beverage control commission, or the state lottery commission, shall submit to the appropriate legislative body within thirty days after the date on which the agreement is executed by the parties, a request for an appropriation necessary to fund the cost items contained therein; provided, that if the general court is not in session at that time, such request shall be submitted at the next session thereof. If the appropriate legislative body duly rejects the request for an appropriation necessary to fund the cost items, such cost items shall be returned to the parties for further bargaining. The provisions of the preceding two sentences shall not apply to agreements reached by school committees in cities and towns in which the provisions of section thirty-four of chapter seventy-one are operative.

(c) The provisions of this paragraph shall apply to the board of higher education, the board of trustees of the University of Massachusetts, the chief justice for administration and management, a county sheriff, the PCA quality home care workforce council, the department of early education and care with regard to bargaining with family child care providers, the alcoholic beverage control commission, Massachusetts Department of Transportation and the state lottery commission.

Every such employer shall submit to the governor, within thirty days after the date on which a collective bargaining agreement is executed by the parties, a request for an appropriation necessary to fund such incremental cost items contained therein as are required to be funded in the then current fiscal year, provided, however, that if such agreement first has effect in a subsequent fiscal year, such request shall be submitted pursuant to the provisions of this paragraph. Every such employer shall append to such request an estimate of the monies necessary to fund such incremental cost items contained therein as are required to be funded in each fiscal year, during the term of the agreement, subsequent to the fiscal year for which such request is made and shall submit to the general court within the aforesaid thirty days, a copy of such request and such appended estimate; provided, further, that every such employer shall append to such request

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copies of each said collective bargaining agreement, together with documentation and analyses of all changes to be made in the schedules of permanent and temporary positions required by said agreement. Whenever the governor shall have failed, within forty-five days from the date on which such request shall have been received by him, to recommend to the general court that the general court appropriate the monies so requested, the request shall be referred back to the parties for further bargaining.

(d) If a collective bargaining agreement reached by the employer and the exclusive representative contains a conflict between matters which are within the scope of negotiations pursuant to section six of this chapter and any municipal personnel ordinance, by-law, rule or regulation; the regulations of a police chief pursuant to section ninety-seven A of chapter forty-one or of a police commissioner or other head of a police or public safety department of a municipality; the regulations of a fire chief or other head of a fire department pursuant to chapter forty-eight; any of the following statutory provisions or rules or regulations made thereunder:

(a) the second paragraph of section twenty-eight of chapter seven;

(a ½) section six E of chapter twenty-one;

(b) sections fifty to fifty-six, inclusive, of chapter thirty-five;

(b ½) section seventeen *I* of chapter one hundred and eighty;

(c) section twenty-four A, paragraphs (4) and (5) of section forty-five, paragraphs (1), (4) and (10) of section forty-six, section forty-nine, as it applies to allocation appeals, and section fifty-three of chapter thirty;

(d) sections twenty-one A and twenty-one B of chapter forty;

(e) sections one hundred and eight D to one hundred and eight *I*, inclusive, and sections one hundred and eleven to one hundred and eleven *I*, inclusive, of chapter forty-one;

(f) section thirty-three A of chapter forty-four;

(g) sections fifty-seven to fifty-nine, inclusive, of chapter forty-eight;

(g ½) section sixty-two of chapter ninety-two;

(h) sections fourteen to seventeen E, inclusive, of chapter one hundred and forty-seven;

(i) sections thirty to forty-two, inclusive, of chapter one hundred and forty-nine;

(j) section twenty-eight A of chapter seven;

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(k) sections forty-five to fifty, inclusive, of chapter thirty;

(*l*) sections thirty, thirty-three and thirty-nine of chapter two hundred and seventeen;

(m) sections sixty-one, sixty-three and sixty-eight of chapter two hundred and eighteen;

(n) sections sixty-nine to seventy-three, inclusive, and seventy-five, eighty and eighty-nine of chapter two hundred and twenty-one;

(*o*) section fifty-three C of chapter two hundred and sixty-two;

(p) sections eighty-four, eighty-five, eighty-nine, ninety-four and ninety-nine B of chapter two hundred and seventy-six;

(p ½) the third paragraph of section 58 of chapter 31;

(q) section eight of chapter two hundred and eleven B, the terms of the collective bargaining agreement shall prevail.

(e) If the commonwealth has agreed under a collective bargaining agreement with an employee organization to exercise statutory rights of the commonwealth regarding the removal of employees in a certain manner with respect to the members of that employee organization, then the commonwealth shall exercise such rights of removal in accordance with the terms of the collective bargaining agreement.

An employer entering into a collective bargaining agreement with an employee organization shall provide a copy of the agreement to the retirement board to which the employees covered by the agreement are members. All retirement systems shall maintain files of all active collective bargaining agreements which cover the systems members. The retirement board shall review collective bargaining agreements for compliance with chapter 32.

Notwithstanding any general or special law to the contrary, employee and employee exchange of tours shall be governed by this chapter.

Credits

Added by St.1973, c. 1078, § 2. Amended by St.1974, c. 589, § 1; St.1976, c. 480, § 21; St.1977, c. 278, § 4; St.1977, c. 937, § 3; St.1978, c. 478, § 77; St.1979, c. 342, § 13B; St.1980, c. 329, §§ 125, 126; St.1980, c. 354, § 17A; St.1983, c. 248; St.1986, c. 222; St.1987, c. 40; St.1991, c. 142, §§ 26, 27; St.1992, c. 379, §§ 31, 32; St.1996, c. 12, §§ 7, 8; St.1997, c. 66, § 23; St.1998, c. 9; St.1998, c. 194, §§ 186, 187; St.2003, c. 140, § 36, eff. July 1, 2003; St.2007, c. 42, § 8, eff. May 16, 2007; St.2009, c. 25, § 100, eff. July 1, 2009; St.2010, c. 359, § 24, eff. Oct. 15, 2010; St.2011, c. 176, § 54, eff. Feb. 16, 2012; St.2011, c. 198, § 1, eff. Nov. 22, 2011; St.2012, c. 189, § 3, eff. Oct. 30, 2012; St.2012, c. 236, eff. Nov. 4, 2012; St.2013, c. 38, § 110, eff. July 1, 2013; St.2014, c. 250, eff. Nov. 4, 2014.

Notes of Decisions (121)

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M.G.L.A. 150E § 7, MA ST 150E § 7
Current through Chapter 322 of the 2018 2nd Annual Session

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APPENDIX A

CERB Decision

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).

CERTIFICATE OF COMPLIANCE

This brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

/s/ Laurie Houle

Laurie Houle, Esquire