

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

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In the Matter of

BOARD OF HIGHER EDUCATION

and

MASSACHUSETTS STATE  
COLLEGE ASSOCIATION/MTA/NEA

Case No. SUP-08-5396

Date Issued: February 6, 2015

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Board Members Participating:<sup>1</sup>

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

1  
2 A duly-designated Department of Labor Relations (DLR) hearing officer issued a  
3 decision in this case on January 16, 2014. The Hearing Officer found that the Board of  
4 Higher Education (Board or Employer) had repudiated both Article XX, §C(10) of the  
5 collective bargaining agreement (Agreement) between the Massachusetts State College  
6 Association/MTA/NEA (MTA or Association) and the Board, and a decision that the

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<sup>1</sup> Commonwealth Employment Relations Board (CERB) Chair Marjorie Wittner recused herself from this case.

1 Board issued on February 23, 2006 upholding an Association grievance (February 23,  
2 2006 decision) when it employed more part-time faculty members during the 2007-2008  
3 academic year than the Agreement permitted, and thereby violated Section 10(a)(5)  
4 and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the  
5 Law). The Board timely appealed this decision, and both parties filed supplementary  
6 statements.

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

#### 11 ADMISSIONS OF FACT

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

- 14 1. The Board is a public employer within the meaning of Section 1 of the Law.
- 15 2. The Association is an employee organization within the meaning of Section 1
- 16 of the Law.
- 17 3. The Association is the exclusive collective bargaining representative for
- 18 certain faculty employed by the Employer.
- 19 4. The Association and the Board are parties to a collective bargaining
- 20 agreement for the period July 1, 2004 to June 30, 2007 (Agreement).
- 21 Pursuant to a Memorandum of Agreement dated August 27, 2007, the
- 22 Agreement was effective at the time the dispute arose.
- 23 5. Article XX, § C(10) of the Agreement states:
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#### 29 Part-Time Appointments: Limitations

30 This subsection shall be of application only to departments with six (6) or  
31 more full-time members.  
32  
33

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

5  
6 At [Mass. Art], not more than twenty percent (20%) of the total number of  
7 three (3) credit courses taught in a department with six (6) or more full-time  
8 faculty shall be taught by part-time employees during an academic year.

9  
10 Not included in the foregoing are courses or sections taught by part-time  
11 employees hired to replace unit members on sabbatical leave of absence, on  
12 unpaid leave of absence, on reduced teaching loads for the purposes of  
13 alternative professional responsibilities or Association release time, or any  
14 other contractual release time, or any unforeseen emergency.

15 STIPULATIONS OF FACT

- 16 1. On February 23, 2006, the Board issued a grievance decision, requiring, in part,  
17 that each college commencing no later than the fall semester of the academic  
18 year 2006-2007, reduce its improper reliance on part-time faculty.
- 19 2. Certain departments at Bridgewater, Framingham, Salem, Westfield and Mass.  
20 Art employed part-time instructors during the 2007-2008 academic year, and in  
21 prior academic years, that exceeded the assignment limitations of part-time  
22 instructors<sup>2</sup> set forth in Article XX, §C(10).

23 STATEMENT OF FACTS

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

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

28 The Board is the statutory employer of faculty and other employees employed at  
29

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<sup>2</sup> Throughout the Facts and Opinion, unless otherwise specified, the terms part-time instructor, part-time faculty and adjuncts are used interchangeably.

1 the Commonwealth of Massachusetts' nine colleges.<sup>3</sup> Bridgewater State College  
2 (Bridgewater); Fitchburg State College (Fitchburg); Framingham State College  
3 (Framingham); Massachusetts College of Art and Design (Mass. Art); Massachusetts  
4 College of Liberal Arts (Mass. Lib.); Massachusetts Maritime Academy (Mass.  
5 Maritime); Salem State College (Salem); Westfield State College (Westfield); and  
6 Worcester State College (Worcester).

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

#### 10 **Full-time, Benefitted Part-time and Part-time/Adjunct Faculty Members**

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

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

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<sup>3</sup> 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.

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

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

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

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

1 with six or more full-time faculty, the number of adjunct faculty hired is governed by the  
2 15% and 20% cap contained in the parties' Agreement.

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

### 9 **Department Chairs and Committee Assignments**

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

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<sup>4</sup> 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.

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

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

#### 11 **Core Curriculums and Student Enrollment**

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

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<sup>5</sup> 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.

<sup>6</sup> 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.

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

5 Enrollment numbers for first-year students at Westfield, Bridgewater,  
6 Framingham and Salem during AY 2007-2008 were higher than expected and the  
7 colleges did not have enough full-time faculty members to teach all the core courses,  
8 including: English, Economics, Mathematics, Music, Theater, History, Computer  
9 Science, Communications, Psychology, Sociology, Science and Philosophy. The  
10 colleges addressed this higher than anticipated enrollment of first-years by hiring  
11 additional part-time instructors to teach those core courses. This resulted in the 15%  
12 cap being exceeded in departments at each of these colleges. Also, during AY 2007-  
13 2008, Mass. Art hired additional part-time instructors to teach core courses in the  
14 Environmental Design (including Fashion Design, Architectural and Industrial Design)  
15 and Communications programs (including Graphic Design, Illustration and Animation),  
16 which exceeded the 20% cap.

#### 17 **The 15% and 20% Caps**

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

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<sup>7</sup> 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.

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

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

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<sup>8</sup> 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.

<sup>9</sup> We modify this finding at the Board's request to note contractual workload limitations in the parties' Agreement.

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

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

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

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<sup>10</sup> 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.

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

### 8 **Colleges in Violation of the 15% and 20% Caps**

9 For seven years, from AY 2001-2002 through AY 2007-2008, eight colleges  
10 reported having academic departments in violation of the 15% or 20% cap for part-time  
11 faculty members.<sup>11</sup> The total number of departments that violated the 15% and 20%  
12 caps rose from 14 in AY 2001-2002 to 31 in AY 2007-2008. The total number of course  
13 sections that violated those caps rose from 416 in AY 2004-2005 to 664 in AY-2007-  
14 2008. Specifically, in AY 2005-2006, five colleges had 20 departments and 346 course  
15 sections taught by part-time faculty members that exceeded the 15% cap.<sup>12</sup> In AY  
16 2006-2007, seven colleges reported having 27 departments and 551 course sections in  
17 violation of the 15% and 20% caps. In AY 2007-2008, eight colleges had 31  
18 departments and 663 course sections in excess of the caps as set forth below.

#### 19 **1. Bridgewater**

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

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<sup>11</sup> Fitchburg reported zero departments/courses in excess of the 15% cap.

<sup>12</sup> Mass. Art reported zero violations for AY 2005-2006.

1 During the spring semester of AY 2001-2002, 17 departments violated the 15% rule with  
2 adjuncts teaching 76 courses exceeding the cap. During the fall semester of AY 2002-  
3 2003, 18 departments violated the 15% rule, for a total of 157 courses in excess of the  
4 cap. During the fall semester of AY 2002-2003, 16 departments violated the 15% rule  
5 with a total of 182 courses in excess of the cap. During the spring semester of AY  
6 2003-2004, 20 departments violated the 15% rule with 161 courses exceeding the 15%  
7 cap.

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

#### 14 **1. Framingham**

15 In the fall of AY 2001-2002, Framingham had 14 departments with 35 courses  
16 that exceeded the 15% cap. In the spring of AY 2001-2002, 13 departments violated  
17 the 15% rule, with a total of 22 courses in excess of the cap. In AY 2002-2003,  
18 Framingham had 13 departments with 102 courses in excess of the 15% cap. For AY  
19 2003-2004, the College had 13 departments with 48 total courses in excess of the 15%  
20 cap. For AY 2004-2005, the college had 5 departments in violation of the 15% rule, with  
21 a total of 29 courses in excess of the cap. For AY 2005-2006, it had three departments  
22 that violated the 15% rule with three courses exceeding the cap. In AY 2006-2007,

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

### 3 **2. Mass. Art**

4 In AY 2001-2002, Mass. Art had eight departments with 116 total courses above  
5 the 20% cap. For AY 2002-2003, eight departments with 48 courses exceeded the 20%  
6 cap, and during AY 2003-2004, eight departments with 133 courses exceeded the 20%  
7 cap. In AY 2004-2005, the College had three departments that violated the 20% rule  
8 with six courses above the cap. Although Mass. Art had zero departments that violated  
9 the 20% rule in AY 2005-2006, it had two departments with 19 courses in excess of the  
10 20% cap in AY 2006-2007, and reported two departments with 16 course violations in  
11 AY 2007-2008.

### 12 **3. Mass. College of Liberal Arts**

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

22

**1 4. Mass. Maritime**

2 During AY 2001-2002, AY 2002-2003, AY 2003-2004, AY 2004-2005 and AY  
3 2005-2006, Mass. Maritime had zero departments in violation of the 15% rule.  
4 However, in AY 2006-2007 and AY 2007-2008, it had two total departments that  
5 exceeded the cap.

**6 5. Salem**

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

12 Between 2002 and 2004, Salem offered an early retirement incentive that a  
13 significant number of faculty members accepted. Based on the faculty response, the  
14 College was only able to fill 20% of those positions with full-time instructors, resulting in  
15 an increased use of part-time adjuncts during AY 2005-2006 through AY 2007-2008.  
16 Specifically: in AY 2005-2006, Salem had five departments in violation of the 15% rule  
17 with 148 courses in excess of the cap; in AY 2006-2007, the College had seven  
18 departments with 210 courses in excess of the 15% cap; and, in AY 2007-2008, it had  
19 10 departments with 203 courses that violated the 15% rule.

**20 6. Westfield**

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

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

### 7 **7. Worcester**

8 During AY 2001-2002, Worcester had zero departments that violated the 15%  
9 rule, and in AY 2002-2003, it had three departments that exceeded the 15% cap. In AY  
10 2003-2004, the College had six departments that violated the 15% rule and, in AY 2004-  
11 2005, it had only one department with six courses in violation of the 15% cap. In AY  
12 2005-2006, Worcester had two departments with five courses in excess of the 15% cap.  
13 For AY 2006-2007, it had three departments in violation of the 15% rule with 14 courses  
14 exceeding the cap. In AY 2007-2008, the College had one department with 25 courses  
15 in excess of the 15% cap.

### 16 **The 2002 Grievance**

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

1 C(9)<sup>13</sup> of the Agreement, and “all other applicable articles...by exceeding the 15%  
2 provision relating to maximum amount of part-time faculty in each academic  
3 department.”

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

9 At Step I, this grievance is upheld. There is no doubt that [Salem] is in  
10 violation of Article XX.C.9. However, the data shown in Table I presents  
11 evidence of a good faith effort to mitigate the effect of faculty retirements.  
12

13 I assure the Association that [Salem] will continue its commitment to  
14 continue focusing new position requests on those departments that are  
15 out of compliance with Article XX.C.9.  
16

### 17 **The 2006 Grievance Ruling**

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

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

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<sup>13</sup> 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.

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

3  
4 ...considering all of the data collectively, the Colleges have most  
5 significantly exceeded the contractual limits on the employment of part-  
6 time faculty during the academic year 2004-2005. That year culminates,  
7 indeed, what the data depict as an upward (i.e., negative) trend. I have no  
8 doubt...that trend is...a product of the funding shortfalls the Colleges have  
9 experienced in recent years. While that may not excuse the contractual  
10 violation I have identified, it goes far to explain it, and it puts real and  
11 serious impediments in the way of the prompt effectuation of a remedy.  
12

13 Having regard to the point just made and to my factual findings generally, I  
14 decline to adopt as a remedy here the immediate and categorical directive  
15 to "cease and desist" that the Association has sought. But I acknowledge  
16 that the Colleges must in fact, without being expected to expend moneys  
17 they lack or to disrupt academic programs of importance to their students,  
18 "cease and desist" from violating Article XX, § C(10), of the Agreement. I  
19 therefore require the following:  
20

- 21 1. That each College, commencing no later than the fall  
22 semester of the academic year 2006-2007, reduce its  
23 improper reliance on part-time faculty in as great a  
24 measure as it judges practicable;  
25
- 26 2. That each College continue thereafter to reduce its  
27 improper reliance on part-time faculty and bring itself into  
28 compliance with the contractual mandate (but subject to  
29 the requirements of any collective bargaining agreement  
30 then in force) no later than at the conclusion of the  
31 academic year 2008-2009; and  
32
- 33 3. That each College, either by its Vice President for  
34 Academic Affairs or otherwise as the President may  
35 determine, publish to the chair of each academic  
36 department notice of the obligation depicted in the  
37 preceding items 1 and 2; each College shall do so prior  
38 to the scheduling of courses and teaching assignments  
39 for the academic year 2006-2007 and, again, prior to the  
40 scheduling of courses and teaching assignments for the  
41 academic years 2007-2008 and 2008-2009. In this  
42 context I encourage, perhaps unnecessarily, that the Vice  
43 Presidents and appropriate Deans meet with Department  
44 Chairs to discuss the means for bringing the Colleges  
45 into compliance with the contractual requirements in the  
46 manner I require.

1  
2 In fulfilling the obligations that this decision imposes on it, every College is  
3 at liberty to increase its complement of full-time faculty (including  
4 temporary full-time faculty), to alter or reduce its course offerings  
5 (including the number of course sections) or to employ some combination  
6 of the two. Nothing in this decision shall be thought to limit any College's  
7 authority in any of those respects.  
8

9 By memorandum on April 6, 2006, Dr. Lapkin informed all Department Chairs at  
10 Salem about the College's "Use of Part-Time Faculty" and Dr. Ashley's ruling on the  
11 2002 grievance. Specifically, Dr. Lapkin reminded the Chairs of Salem's obligation to  
12 comply with Article XX, § C(10) of the Agreement beginning in AY 2006-2007 and to  
13 reduce improper reliance on part-time faculty members "no later than at the conclusion  
14 of the 2008-2009 academic year."

#### 15 **2007 Successor Contract Negotiations**

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

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

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

1 unlawful because [it] intrudes upon and impairs an authority that the law of  
2 this Commonwealth vest[s] exclusively in the persons charged with  
3 managing the State Colleges...in other words, [it is a matter] of  
4 managerial prerogative. All of the proposals I made on behalf of the  
5 Board of Higher Education therefore included a specific proposal to delete  
6 [that provision] from the agreement. The Association consistently rejected  
7 that proposal.  
8

9 Because those whom I represent have wished to consummate an  
10 agreement rather than to reach impasse concerning [that matter]...we  
11 have elected to allow [Article XX, § C(10)] to remain in the new  
12 agreement. But because [that contractual provision is] unlawful...[it is,] in  
13 our view, unenforceable as a matter of law and both...a legal and  
14 contractual nullity.  
15

16 By letter dated September 27, 2007, Sirutis responded to Peters' August 27,  
17 2007 letter, stating that Article XX, § C(10) is "legal and enforceable" and she expected  
18 the Board to enforce that provision.

19 Sometime between August 27, 2007 and September 11, 2007, Dr. Markunas, on  
20 behalf of the Association, complained to Fitchburg President Robert Antonucci (Dr.  
21 Antonucci) about Peters' August 27, 2007 letter. By response letter dated September  
22 11, 2007, Dr. Antonucci informed Dr. Markunas that he had presented the Association's  
23 concerns to the Council. By that letter, Dr. Antonucci also assured Dr. Markunas that:

24 Speaking for all of the Colleges, we wish you to know that we intend, in  
25 fact, to adhere to the provisions of the new collective bargaining  
26 agreement now at issue. With respect to the use of part-time faculty,  
27 therefore, the Colleges will continue to implement the grievance decision  
28 that Janelle Ashley rendered on February 23, 2006.  
29

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

1 1. The total number of three-credit sections (four-credit sections at  
2 Framingham State College) being taught by part-time employees during  
3 each of the Fall 2007 and Spring 2008 semesters,  
4

5 2. The number of those three-credit sections (four credit sections at  
6 Framingham State College), above, being taught by part-time employees  
7 during each of the Fall 2007 and Spring 2008 semesters that fall under the  
8 exemption provisions (the last paragraph of Article XX.C.9) from the  
9 overall limit of 15%, and  
10

11 3. The grand total number of three-credit sections (four-credit sections at  
12 Framingham State College) being taught by all employees during each of  
13 the Fall 2007 and Spring 2008 semesters.

#### 14 **Board's Confirmation of AY 2007-2008 Violations**

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

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

23 In all but one of the severe cases (English), current full-time faculty  
24 staffing increases scheduled for Fall 2008 and requested for Fall 2009 will  
25 bring the college into compliance by 2008-09 (Communications, Sport &  
26 Movement Science) or 2009-2010 (Computer Science, History,  
27 Mathematics).  
28

29 In the case of English, approximately 15 full-time faculty would need to be  
30 added in order to bring the department into compliance. Three positions  
31 will be added in 2008-2009 and three more have been requested for 2009-  
32 2010. This will result in reducing the part-time faculty utilization from  
33 almost 50% to only approximately 36%.  
34



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

5 Repudiation

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

13 The Board does not dispute that the parties entered into a collective bargaining  
14 agreement which included the language of Article XX, § C(10), and that it issued a  
15 grievance decision on February 23, 2006 requiring each college to reduce its improper  
16 reliance on part-time faculty commencing no later than the fall semester of the AY 2006-  
17 2007.<sup>15</sup> Indeed, the Board stipulated that certain departments at Bridgewater,  
18 Framingham, Salem, Westfield and Mass Art employed part-time instructors during the  
19 2007-2008 academic year, and in prior academic years, that exceeded the assignment

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<sup>15</sup> 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.

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

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

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

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

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

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

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

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

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

1 Board of Higher Education/Roxbury Community College, 81 Mass. App. Ct. 554, 560-  
2 561 (2012) (citing Board of Higher Educ. v. Massachusetts Teachers Association/NEA,  
3 62 Mass. App. Ct. 42, 49 (2004) and Higher Education Coordinating Council/ Roxbury  
4 Community College v. Massachusetts Teachers Association/Massachusetts Community  
5 College Council, 423 Mass. 23, 29 (1996)).

6 Section 22 has been found to place a “gloss on public sector collective  
7 bargaining statutes [ . . . ] in order that the collective actions of public employees do not  
8 distort the normal political process for controlling public policy.” Boston Teachers  
9 Union, Local 66 v. School Comm. of Boston, 386 Mass. 197, 211 (1982). However, the  
10 principle of non-delegability applies “only so far as is necessary to preserve the  
11 college’s discretion to carry out its statutory mandates.” Massachusetts Board of Higher  
12 Education/Holyoke Community College v. Massachusetts Teachers Association, et al.  
13 79 Mass. App. Ct. 27, 32 (2011). The Supreme Judicial Court has explained that the  
14 “means of implementing” non-delegable decisions reserved to management by statute  
15 may nevertheless properly be the subject of an enforceable collective bargaining  
16 agreement. School Committee of Newton v. Labor Relations Commission, 388 Mass.  
17 557, 564 and n. 5 (1983). Accordingly, colleges are permitted to bind themselves  
18 through the process of collective bargaining to the procedures used to implement such  
19 decisions. Massachusetts Board of Higher Education/Holyoke Community College, 79  
20 Mass. App. Ct. at 33-34.

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

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

10 On the other hand, the Supreme Judicial Court has listed a host of circumstances  
11 where school committees could be obligated to adhere to provisions of collective  
12 bargaining agreements that relate to the means of implementing exclusive, non-  
13 delegable functions of a school committee. School Committee of Newton, 388 Mass. at  
14 564 and n. 5. The Court explained the non-delegation principle does not preclude  
15 bargaining over and enforceability of labor agreements addressing job security clauses,  
16 Boston Teachers Union, Local 66 v. School Committee of Boston, 386 Mass. 197, 213  
17 (1982), or procedures to be followed in reappointment of non-tenured teachers, School  
18 Comm. of W. Springfield v. Korbut, 373 Mass. 788, 796 (1977). Similarly, the Court  
19 found an agreement on class size, teaching load, and the use of substitute teachers to  
20 be enforceable where there were adequate funds and no change in educational policy.  
21 Boston Teachers Union, Local 66 v. School Comm. of Boston, 370 Mass. 455, 464  
22 (1976). The Court has also held that an arbitrator's award directing a school committee  
23 to consult with the union prior to implementing elementary school final examinations

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

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

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

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

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

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

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

12 The interpretation of the term "appoint" in Section 22 that the Board urges we  
13 adopt extends the principle of non-delegability far beyond what is necessary to preserve  
14 its statutory mandate. See Massachusetts Board of Higher Education, 79 Mass. App.  
15 Ct. at 33-34. We reject the logic of the argument because it would undermine the  
16 balance that the courts have instructed the CERB to achieve when addressing the  
17 tensions that exist between protecting the rights of public employees under Chapter  
18 150E and the exclusive domain of authority granted to educational policy-makers by the  
19 non-delegability doctrine. See Higher Education Coordinating Council/ Roxbury  
20 Community College, 423 Mass. at 28.

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

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

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

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

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

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

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

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

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

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

1 insulated from the bargaining process only if the decision goes directly to the issue of  
2 how much education or what types of educational programs to provide. See Boston  
3 School Committee and Boston Teachers Union, Local 66, et. al, 3 MLC at  
4 1607(decision of school committee does not fall outside the scope of bargaining merely  
5 because decision made with “an eye toward the interest of the public in a sound  
6 educational system.”)

7 Here, as we have explained, the decision on whether to hire a certain number of  
8 adjunct faculty or full-time faculty is not so closely or directly tied to the number or types  
9 of courses to be offered by the colleges that it can be deemed a managerial decision  
10 outside the bargaining process. See Boston School Committee and Boston Teachers  
11 Union, Local 66, et. al, 3 MLC at 1607 (determining whether a term or condition of  
12 employment is outside of bargaining as a matter of core educational policy is “not  
13 subject to hard rules” and requires balancing competing interests). The Board’s  
14 contention that this issue is a matter of core educational policy is particularly  
15 problematic since it claims that its decision to hire more adjuncts instead of full-time  
16 faculty is driven by financial considerations tied to the costs of hiring adjuncts as  
17 compared to full-time faculty. However, in comparable situations, the CERB has not  
18 permitted school committees to convert what are essentially financial decisions into  
19 decisions insulated from bargaining merely by labeling their conduct as effectuating  
20 educational policy. See Peabody School Committee, 13 MLC 1313,1319-1320, MUP-  
21 5626 (December 11, 1986) (finding bargaining over class size was obligatory under c.  
22 150E and not precluded as a matter of educational policy when evidence did not  
23 establish that school committee was motivated by such policy considerations).

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

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

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

11 The parties' obligation to balance their respective rights and obligations under c.  
12 15A, § 22 and Chapter 150E may at certain moments give rise to difficulties related to  
13 implementation of their collectively- bargained Agreement. However, these internal  
14 challenges do not vitiate the [Board's] obligation to "aggressively implement the letter  
15 and the spirit" of the Agreement. Massachusetts Board of Regents of Higher Education,  
16 10 MLC 1196, 1205, SUP-2673 (September 8, 1983).

#### 17 CONCLUSION

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

ORDER<sup>16</sup>

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.

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<sup>16</sup> 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, 1<sup>st</sup> Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).