

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

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In the Matter of	*	
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UNIVERSITY OF MASSACHUSETTS,	*	
(AMHERST and BOSTON)	*	Case No. SCR-14-3451
	*	
and	*	Date Issued: March 20, 2015
	*	
MASSACHUSETTS SOCIETY OF	*	
PROFESSORS/FACULTY STAFF	*	
UNION/MTA/NEA	*	
	*	

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CERB Members Participating:

Marjorie F. Wittner, Chair  
Elizabeth Neumeier, CERB Member<sup>1</sup>

Appearances:

Joseph W. Ambash, Esq. - Katharine A. Crawford, Esq.	Representing the University of Massachusetts
Richard Mullane, Esq.	Representing the MSP/FSU/MTA/NEA

DECISION

Summary

1 The issue in this case is whether academic department heads and chairs<sup>2</sup> at the  
2 University of Massachusetts' Amherst and Boston campuses should be included  
3 through an add-on election to the existing bargaining unit of faculty and librarians on the

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<sup>1</sup> CERB Member Harris Freeman recused himself from this decision.

<sup>2</sup> The titles "department heads" and "department chairs" are used interchangeably on both campuses. For ease of reference, this decision uses the title "Department Heads."

1 same campuses. The Commonwealth Employment Relations Board (CERB) finds that  
2 the Department Heads are supervisory employees such that their inclusion in the unit  
3 would lead to a conflict of interest within the bargaining unit. The CERB therefore  
4 dismisses the petition.

5 Statement of the Case

6 On February 3, 2014, the Massachusetts Society of Professors/Faculty Staff  
7 Union/MTA/NEA (MSP or Union) filed the above-referenced representation petition with  
8 the Department of Labor Relations (DLR) seeking to add "academic department heads  
9 and chairs at the University of Massachusetts Amherst and Boston campuses" into its  
10 existing bargaining unit of faculty and librarians on the same campuses.<sup>3</sup> The  
11 University of Massachusetts (University or UMass) opposed an add-on election on the  
12 grounds that the petitioned-for employees do not share a community of interest with the  
13 rest of the faculty because they are supervisory employees and/or because they are  
14 managerial or confidential employees within the meaning of Section 1 of M.G.L.c 150E  
15 (the Law). The Union disagrees.

16 On April 30, 2014, the DLR held an informal conference to discuss the issues  
17 raised by the petition. Both parties submitted position statements, job descriptions and  
18 other supporting documents, including affidavits, both before and after the conference.  
19 Because it did not appear that there were any material facts in dispute, the DLR sent a  
20 letter (Show Cause letter) asking the parties to show cause why it should not resolve  
21 the unit placement issue raised by the petition based on the submitted information as

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<sup>3</sup> The Union filed a unit clarification petition the same day (Case No. CAS-14-3452) seeking to accrete the Department Heads and Chairs into its existing faculty unit. The Union withdrew that petition on June 25, 2014.

1 summarized in the show cause letter.<sup>4</sup> Because there are no materially disputed facts,  
2 the CERB decides this matter based on the following facts.

3 Findings of Fact<sup>5</sup>

4 Bargaining Unit History as it Relates to Department Heads

5 In 1975, the Union petitioned the former Labor Relations Commission (LRC)<sup>6</sup> for  
6 certification as the exclusive representative for faculty and other professionals at the  
7 University's Boston and Amherst campuses. The petitioned-for unit specifically included  
8 Department Heads. Board of Trustees, University of Massachusetts and

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<sup>4</sup> The CERB also requested additional information, which the parties provided and which has been incorporated into the facts set forth below.

<sup>5</sup> As noted throughout this decision, the CERB has both modified and added certain findings in response to the parties' requests. We do not, however, grant the Union's request to add a finding that there have been no material changes to the Department Heads' duties since the Union was first certified. The Union contends that such a finding is warranted because the University conceded this point in its written submissions. This argument is not persuasive for several reasons. First, the CERB makes unit determinations based on a position's actual duties and responsibilities and not a party's characterization of those duties. See, e.g., City of Boston (Boston Public Library), 37 MLC 1, CAS-08-3727 (July 12, 2010). As our opinion in the instant case reflects, there have been changes to Department Heads' duties since 1976 that affect their supervisory status. Second, the University made this statement in its response to the now-withdrawn CAS petition, and only for purposes of arguing that, under the first and second parts of the CERB's accretion analysis, these titles have long been excluded from the MSP's unit and there had been no material changes to their duties that warranted their accretion now. See, e.g., Boston Public Health Commission, 39 MLC 218, 229-231, CAS-11-1091/1092 (February 28, 2013) (setting forth three-part accretion analysis). Finally, even though the University asserted that there had been no material changes in duties warranting accretion, it never conceded that the Department Heads were not supervisory employees, the critical issue in this case. Rather, the University has consistently argued that it believes the CERB wrongly decided in 1976 that Department Heads were not supervisors. It further argues that, even if Department Heads' duties have changed, those changes caused them to exercise even more supervisory authority than they did in 1976.

<sup>6</sup> Hereafter, references to the CERB and the DLR include the former LRC.

1 Massachusetts Society of Professor/Faculty Staff Union, MTA/NEA et al., 3 MLC 1179,  
2 SCR-2079, 2082 (October 15, 1976). The matter went to hearing and one of the issues  
3 litigated was the University's contention that the Department Heads should be excluded  
4 from the petitioned-for unit because they were managerial, confidential or supervisory  
5 employees who lacked a community of interest with the rest of the petitioned-for unit.  
6 After a lengthy analysis, described in greater detail below, the CERB rejected this  
7 argument and directed an election in a unit that included the Department Heads. Id.  
8 Following the election, the Union was certified as the exclusive representative, but the  
9 University refused to bargain, in part because the Department Heads were included in  
10 the unit. Board of Trustees of the University of Massachusetts, 5 MLC 1377, 1379,  
11 SUP-2119A (November 2, 1978). To resolve this dispute, the parties agreed to hold an  
12 election in which the Department Heads could vote on whether to be included in the  
13 unit, represented separately, or not represented at all. Id. at 1380. A majority of the  
14 Department Heads voted not to be included in any bargaining unit. Id. Since then, the  
15 recognition clause of the parties' collective bargaining agreement (CBA) has specifically  
16 excluded "Chairs and Heads of Departments." Until the Union filed this petition, the  
17 Union has not sought at the bargaining table to include Department Heads in the  
18 bargaining unit and they have remained outside it.

#### 19 Role of Department Heads Generally

20  
21 Department Heads oversee the various administrative, personnel and academic  
22 aspects of an academic department, as described in greater detail below. Department  
23 Heads are appointed by the Dean of their school or college, with or without the  
24 Provost's approval, after consultation with the Department's faculty. The selection

1 process is informal and usually involves the appointment of a department search  
2 committee (Search Committee) whose recommendations the Dean will normally not  
3 reject. The Search Committee is composed of faculty members who are generally  
4 selected from faculty within a given department. Department Heads generally serve  
5 three to five-year terms, but can be appointed for more than one term. At the  
6 conclusion of their term, they return to the faculty and to the faculty bargaining unit  
7 unless they retire, resign or take another administrative position.

8 The University does not maintain job descriptions for Department Heads and  
9 does not create job postings when a Department Head is hired internally. A recent  
10 external job posting for the Chair of a new Department of Art in the College of  
11 Humanities and Fine Arts at UMass Amherst states in pertinent part:

12 The chair will provide leadership and vision in a newly-independent  
13 Department with a long tradition of excellence in creative activity and  
14 undergraduate and graduate programs. We seek an individual committed  
15 to building consensus and facilitating a collaborative environment. The  
16 chair will support the professional growth of faculty, staff and students and  
17 will foster the continued development of a more diverse faculty, student  
18 body and curriculum....

19  
20 The chair will oversee diverse facilities...and will manage a budget that  
21 supports 16 faculty, three technicians, three staff, a Foundations program  
22 integrated with Architecture + Design, and the New York Professional  
23 Outreach Program. The chair will manage a curriculum that supports BA,  
24 BFA, MA in Art Education and MFA degrees.

25 External postings for Department Heads at UMass Boston in the Departments of  
26 Nursing and Mathematics required, among other things, "significant administrative  
27 leadership experience or high potential for administrative leadership" and "superior  
28 leadership" skills.

1 Selected Red Book and Collective Bargaining Agreement Provisions Regarding  
 2 Department Head and Faculty Roles in Personnel Matters

3 The "Academic Personnel Policy of the University of Massachusetts, Amherst &  
 4 Boston," commonly referred to as the "Red Book," describes the Department Heads'  
 5 duties with respect to academic personnel matters as follows:

6 Article III, Section 3.5

7 In academic personnel matters, the Department Chairperson/Head is  
 8 responsible for the proper procedures at the Department Level, as  
 9 outlined in Section 6.4 (a-f),<sup>7</sup> as well as for the following:

10 a) Coordinating all administrative matters relating to personnel actions,  
 11 such as negotiations for initial appointment, notification of impending  
 12 review, maintenance of personnel files, compilation of the basic file of  
 13 material to support a recommendation and notification of action.

14 b) Keeping faculty members informed as to their status, rights and  
 15 responsibilities.

16 c) Developing and maintaining, with appropriate faculty participation as  
 17 stipulated under Section 3.1 (a),<sup>8</sup> long-range plans for the department  
 18 within the context of the current and long-range needs of the college or  
 19 school and the campus, and keeping the department informed of the  
 20 status of those plans.

21 Article XI of the parties' CBA states:<sup>9</sup>

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<sup>7</sup> Section 6.4 (a-f) sets forth the process for recommendations, reviews and decisions for major personnel actions, including reappointments through the tenure decision year, promotion to the ranks of Associate Professor and Professor and the award of tenure. As described below, final decisions regarding such reappointments and tenure are not made by the Chair or at the department level.

<sup>8</sup> This provision sets forth the faculty's right, at the department level, to establish the "procedure for the exercise of primary responsibility in matters of faculty status and academic matters."

<sup>9</sup> All references to CBA provisions are for the CBA that was effective from July 1, 2012 through June 30, 2014.

1 11.1 The faculty shall have primary responsibility in the area of personnel  
2 matters. This shall mean the capacity to initiate or review the faculty  
3 personnel recommendations. Academic administrative officials may make  
4 a recommendation or decision counter to the original faculty  
5 recommendation only in exceptional circumstances and with compelling  
6 reasons in written detail, which shall specifically address the content of  
7 that recommendation as well as the established standards and criteria.

8 11.2 The faculty shall have the right to grieve based on the terms and  
9 conditions of this Agreement any modification or reversal of such  
10 recommendation.

11 A 1981 arbitration award stated that Article 11.1's reference to faculty's "primary  
12 responsibility" to "initiate or review faculty recommendation" "clearly suggests that the  
13 parties intended the word 'primary' to mean first in time or sequence."<sup>10</sup> Another  
14 arbitration award issued by Arbitrator Healey in or around 1985 interpreted the term  
15 "administrative official" to include the Department Chairman, the Dean and the Provost.

16 Regarding faculty roles, the Red Book similarly states in Article III, Section

17 3.1:

18 The faculty has primary responsibility in matters of faculty status, such as  
19 appointments, reappointments, promotions, tenure and salary  
20 adjustments. The faculty also has primary responsibility in academic  
21 matters, and shall, whenever appropriate, relate the two in making  
22 personnel recommendations.

23 Article XII of the CBA is titled Faculty Personnel Standards and Procedures.

24 Among other things, it describes the various faculty personnel committees that must be  
25 convened for the faculty to exercise the responsibilities they have with respect to  
26 personnel actions described in other parts of the contract, including appointing,  
27 promoting, evaluating, distributing merit pay, and reappointing both tenure and non-  
28 tenure track (NTT) faculty. Each department has its own Department Personnel

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<sup>10</sup> AAA Case 1139-0059-81 (September 17, 1981) (Stutz, Arbitrator).

1 Committee (DPC) and each college or school has a College Personnel Committee  
2 (CPC) that reviews departmental level recommendations.

3 Department Heads – Specific Functions

4 The University contends that the Department Heads' role and level of  
5 participation in various personnel and academic functions establish their supervisory  
6 status. Both parties submitted documents and affidavits regarding these functions,  
7 which are summarized below.

8 Appointments – Tenure Track Faculty

9 Department Heads are responsible for overseeing the tenure track hiring process  
10 for faculty within their department, but do not have formal hiring authority. According to  
11 Article III, Section 3.2 of the Red Book, that authority is statutorily vested in the Board of  
12 Trustees, who may delegate that authority "only to appropriate administrative officials."

13 Department Heads are, however, responsible for identifying the need for a new  
14 tenure track hire in their department. Depending on the department, the faculty and/or  
15 the DPC may also be involved in this decision. Once a need is identified, the  
16 Department Head recommends the need for a search to the Dean and a Search  
17 Committee is convened to identify acceptable candidates.

18 At UMass Amherst, the Department Head appoints the Search Committee. At  
19 UMass Boston, in some, but not all schools, the Department Head effectively  
20 recommends who is on the committee. In others, the Department Head just makes a

1 recommendation. In either case, the Dean or Provost has the authority to overturn its  
2 composition.<sup>11</sup>

3 At UMass Amherst, once the Search Committee has made its selections, it  
4 provides its list of candidates to the Department Head, who is responsible for ranking  
5 the candidates and providing the Dean with his/her rankings. In many colleges at  
6 UMass Amherst, the Department Head also makes his own independent  
7 recommendation to the Dean, which the Dean may accept or reject. For example, in  
8 the Biochemistry and Molecular Biology Department in the College of Natural Sciences  
9 at UMass Amherst, the Dean relies on the Department Head, Professor Jennifer  
10 Normanly, to make a hiring selection for all faculty, including tenure track faculty, and  
11 would overrule this recommendation only in very unusual circumstances.<sup>12</sup>

12 On the Boston campus, the Search Committee submits their selection to the  
13 Department Head, who then makes an effective recommendation to the Dean if the  
14 Department Head agrees with the Search Committee's recommendation. If the  
15 Department Head does not agree, further discussion is required. Regardless of the

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<sup>11</sup> At UMass Boston, the composition of a Search Committee must also be approved by the equal opportunity/diversity office.

<sup>12</sup> This finding is based on Professor Normanly's uncontested affidavit. In its response to the Show Cause letter, the Union requested that the CERB delete the finding that, at UMass Amherst's College of Humanities and Fine Arts (CHFA), the Dean has delegated all hiring authority for both tenure and non-tenure track faculty to Department Heads. This finding was based on the affidavit of Professor William Oedel, who chairs the Art, Architecture and Art History Department, which is located within the CHFA. After reviewing the affidavits that both parties provided from other CHFA Department Heads, the CERB has omitted this finding because it is contradicted by an affidavit the Union provided and because none of the affidavits provided by the University confirmed that finding, at least with respect to their authority to hire *tenure track* faculty. The CERB's uncontested findings with respect to Department Heads' authority to hire non-tenure track faculty are not affected by the omission of this finding.

1 specific procedure followed, the Department Head signs off on all hiring  
2 recommendations.

3 Appointments – NTT Faculty

4 The Department Heads have a much broader role with respect to hiring NTT  
5 faculty, although the scope of their authority with respect to part-time<sup>13</sup> and full-time NTT  
6 faculty is slightly different and varies at both the campus and department level.

7 Regarding part-time NTT faculty, Department Heads can unilaterally determine  
8 the need to hire them and usually can hire them without establishing a Search  
9 Committee or involving the DPC. Particularly with respect to short-term or emergency  
10 appointments, the Dean does not get involved in the selection process beyond  
11 authorizing the hire. In some cases, the Department Head may involve the faculty in  
12 the hiring decision, but this does not appear to be mandated by any specific procedure.

13 When an NTT faculty member is hired for a longer period of time or to teach  
14 more than four courses, the hiring process sometimes, but does not always, includes a  
15 Search Committee or a DPC. At UMass Boston, Department Heads hire both full-time  
16 and part-time NTT faculty without any involvement by the Dean, except to formally  
17 authorize the hire. When hiring a full-time NTT at UMass Amherst, the Department  
18 Head serves as the hiring authority, who identifies the need for the position and asks  
19 the Dean to authorize a search. Once the search has been authorized, the Department  
20 Head is responsible for filling the position and in some but not all cases, does so without

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<sup>13</sup> A part-time NTT is any NTT who works less than full-time. However, only those part-time NTT's who work more than 50% of the time receive benefits. A Department Head's hiring authority with respect to part-time NTTs is not affected by the number of hours they work.

1 Dean input or final review.<sup>14</sup> The record does not make clear the degree to which a  
2 Search Committee or the DPC is involved in this determination. However, a number of  
3 affidavits reflect that the Department Head sometimes, but not always, consults with the  
4 faculty before making a hiring decision. There is no evidence that this consultation is  
5 mandated by any formal procedure. In cases where a Search Committee makes a  
6 recommendation that is different from the Department Heads' recommendation, the  
7 Department Head can overrule the recommendation and make his or her own  
8 recommendation to the Dean.

9 At UMass Boston, there are a total of 653 NTT employees, of which 511 are part-  
10 time. On the Amherst campus, there are a total of 604 NTT faculty members, of which  
11 429 are full-time and 175 are part-time.<sup>15</sup> At the College of Education at UMass  
12 Amherst, each Department Head hires 3-4 part-time faculty per year.

### 13 NTT Renewals and Reappointments

14 On both campuses, Department Heads have the right not to renew the  
15 appointments of probationary (less than three year) NTT faculty. In Boston,  
16 approximately 20-25% of NTT faculty fall within this category. In Amherst, Department  
17 Heads have the authority to renew NTT faculty based on their assessment of the  
18 Department's needs and faculty qualifications unless it leads to a "continuing  
19 appointment," i.e., an appointment where certain rights under the CBA, including

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<sup>14</sup> According to the University, in many schools and colleges, including the School of Public Health and Health Sciences, the College of Natural Sciences and the College of Education, the Dean plays no role in interviewing or selecting the candidates.

<sup>15</sup> On both campuses, part-time NTT faculty do not become members of the unit until they have completed one year of service. Although the University did not know how many part-time NTT faculty were in the unit, it estimated that it is the "vast majority of them."

1 termination for just cause, vest. This generally occurs after three years of full-time  
2 equivalent (FTE) service. In that case, according to Article 21A.7 of the CBA, the  
3 Department Heads make a recommendation to the Dean regarding the appointment.

4 At UMass Boston, pursuant CBA Article 21(B).5(c)(3), "Final determinations on  
5 whether a lecturer ought to be retained beyond his or her probationary period shall be  
6 made by the department chair/program director and shall not be subject to the  
7 Grievance and Arbitration provisions contained in Article 25." At Amherst,  
8 appointments/promotions to the position of Senior Lecturer I and II are made following  
9 the procedures set forth in Articles 21A.9 and 21A.10. The Department Head does not  
10 have final hiring authority under this procedure and the Chair, DPC and CPC each  
11 make their own recommendations to the Dean.

#### 12 Grievances

13 Article XXXV of the CBA, Grievance Procedure, sets forth both a formal and  
14 informal grievance procedure. Under Section 25.3, "Informal Procedure," when a  
15 potential grievance arises, the Union and/or the bargaining unit "shall meet with the  
16 representative(s) of the Employer/University Administration (chairperson/  
17 head/dean/director of libraries or provost) closest to and best able to discuss the matter  
18 and possessing the authority to resolve the disputes." In most cases, the Department  
19 Head serves as the first step in the informal grievance procedure. Affidavits submitted  
20 by the University show that the Department Heads routinely deal with potential  
21 grievances and have the authority to commit department funds to resolve them.

22

1           Discipline and Other Personnel Actions

2           Department Heads do not have the independent or ultimate authority to suspend  
3 or terminate tenure-track or NTT faculty. When potential disciplinary matters arise,  
4 Department Heads have the authority to counsel both tenured and NTT faculty,  
5 strategize and negotiate solutions, issue letters of warning and reprimand, remove  
6 classes and conduct investigations into student or faculty complaints. Depending on the  
7 department, Department Heads can spend quite a bit of time dealing with such  
8 preliminary disciplinary issues. Such actions lay the groundwork for more serious  
9 discipline, like suspensions and termination, which are governed by the procedure set  
10 forth in Article XVIII of the CBA.

11           When dismissal is contemplated for performance-based reasons, the informal  
12 procedure set forth in Article 18.5 is followed. Under this provision, the DPC and the  
13 Department Head, along with the affected individual and his or her union representative,  
14 review the matter and explore a mutually acceptable resolution. If the matter does not  
15 settle, the Provost makes a formal recommendation to proceed and the matter is  
16 referred through various stages that lead up to a hearing, including a preliminary review  
17 by the DPC and the CPC. If the discipline is based on employee misconduct, the  
18 preliminary review is skipped and a formal hearing is convened.

19           Evaluations

20           Pursuant to Article XXXIII of the CBA, DPCs, Department Heads and Deans are  
21 each responsible for annually evaluating faculty using the Annual Faculty Review (AFR)  
22 form. Decisions regarding merit pay (described below), retention, promotion, tenure,  
23 workload composition and future professional development are based on the AFR.

1 According to Appendix A of the CBA, "Policy on Periodic Multi-Year Review of Faculty  
2 (PMYR)," when preparing AFR's, DPCs engage in "peer review," while Department  
3 Heads and Deans undertake "administrative review."

4 Although both the DPC and Department Heads are responsible for preparing  
5 AFR's, their evaluations may be viewed and weighted differently by the Dean given their  
6 different roles within the department and the fact that Department Heads typically have  
7 greater access to student evaluations and complaints about faculty than the DPC.

8 Ability to determine merit increases

9 Pursuant to Articles XXVI(A) (Salaries, Amherst) and XXVI(B) (Salaries, Boston),  
10 both Department Heads and DPCs make recommendations to the Dean regarding the  
11 allocation of merit pay. Recommendations are based on the AFR. The specific  
12 allocation procedures and number of available merit pools are different on each  
13 campus. Briefly stated, both procedures require the Department Heads and the DPC to  
14 make separate merit pay allocation recommendations. The Department Head forwards  
15 both the DPC's and his or her recommendations and comments to the Dean, who then  
16 makes his own recommendation regarding the distribution of the merit pay pools. The  
17 Dean then forwards all recommendations to the Provost, who makes the final  
18 distribution determination. At UMass Amherst, Department Heads effectively  
19 recommend the distribution of 15% of the total pool of merit money; the DPC  
20 recommends 50% and the Dean recommends 35%. In Boston, there are two pools of  
21 money: one that is recommended first by the DPC and then the Department Head, and  
22 one that is essentially controlled by the Dean and higher levels of administration.

23

1           Scheduling and Assignments

2           Department Heads have the authority to assign and schedule courses each  
3 semester without the Dean's involvement. This task requires them to balance a number  
4 of different considerations, including the total number of NTT and tenure track faculty,  
5 how frequently a course will meet and at what time, which faculty are qualified and  
6 available to teach what courses, and whether to decrease or increase a faculty  
7 member's workload.<sup>16</sup> Some of these considerations are clerical in nature and, in some  
8 departments, course scheduling is delegated to other faculty or to clerical staff.  
9 However, in many departments, the Department Head performs these functions  
10 independently. Scheduling decisions may require a Department Head's independent  
11 judgment in terms of delivering a program that meets student needs as well as  
12 decisions to adjust faculty members' workload depending on the Department's  
13 assessment of faculty members' research and scholarship output. Such decisions may  
14 also require a Department Head to consider faculty members' requests for certain  
15 schedules, leaves of absence, professional service commitments, etc.

16           Department Heads also have some authority over other aspects of faculty  
17 members' assignments and schedule. Pursuant to the University's policy on "Faculty  
18 Consulting and Outside Activities in Amherst and Boston," faculty must receive approval  
19 from their Department Heads before commencing any outside activities. According to  
20 this policy, the Department Head's decision may be appealed to the Vice Chancellor for

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<sup>16</sup> Dean approval of workload changes may also be required in some, but not all colleges or departments. For example, the Department Head of the Biochemistry and Molecular Biology Department and the Chair of the Educational Policy, Research and Administration in the College of Education at UMass Amherst both averred that they had the authority to change faculty members' workloads without their Dean's approval.

1 Research, and, if the disagreement still persists, the faculty member may receive an  
2 advisory opinion from an ad hoc faculty committee composed of three members  
3 appointed by the Chancellor for the campus and three members appointed by the  
4 Faculty Senate. There is a further right of appeal to the President, who considers the  
5 written statements by the Faculty Member and the Vice Chancellor for research as well  
6 as the advisory opinion rendered by the ad hoc committee.

7 Department Heads can also approve or disapprove requests for sick leave.  
8 While they do not have final authority to grant sabbatical or other lengthier leave  
9 requests, they make recommendations to the Provost based on their assessment of the  
10 department's needs. The University is unaware of any occasion when the request was  
11 denied. Department Heads also have the authority to deny "no-teaching" semester  
12 requests.

### 13 Participation in Departmental Committees and Other Service Obligations

14 Department Heads can select faculty to serve as members or leaders on  
15 departmental committees and other University governance and service committees but  
16 cannot compel a faculty member to accept the position. One Department Head  
17 described his role in this regard as that of "negotiation." Department Heads can also  
18 decline faculty requests to serve on departmental committees. As described in previous  
19 sections, Department Heads also have the authority to adjust faculty members'  
20 instruction workload as a result of their committee and service obligations.

21

1           Budgets

2           Approximately 90% of a department's budget is devoted to salaries. The other  
3 10% are discretionary funds that Department Heads control and do not need their  
4 Dean's approval to spend. Department Heads also administer other monies that a  
5 department may receive, such as grants, awards, gifts or revenues from continuing  
6 education programs. The degree of independent discretion involved in administering  
7 these extra funds varies depending on the terms of the grant, gift or award. Because  
8 these funds are typically spent to benefit or support the faculty, i.e., by hiring teaching  
9 assistants, approving travel for research or conferences,<sup>17</sup> and/or supporting research,  
10 the way in which they are allocated has the potential to favor one faculty member over  
11 another.

12           When budgets are cut, Department Heads have the authority to move money  
13 around from one department program to another. They also have the authority to  
14 decide whether or not to fill NTT vacancies. The approval of every faculty members'  
15 request for money requires a Department Head's signature although additional  
16 signatures may be required.

17           Meetings

18           Department Heads regularly attend meetings with other chairs, associate deans  
19 and other administrative officials of the school or college at which personnel issues,  
20 potential faculty searches and faculty discipline issues are discussed. They report back  
21 to faculty on some, but not all of the issues discussed these meetings. At the Union's

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<sup>17</sup> Although there may be other sources of travel funds, including grants, faculty committees and the CBA, see, e.g., Article 26(B).13(3), that Department Heads may not control, there is no dispute that their control over discretionary funds may include control over funds used for faculty travel.

1 request, the Boston campus began conducting orientation and retreats for Department  
2 Heads on issues like faculty evaluations and major personnel reviews. At Amherst, they  
3 are invited by the Provost and Chancellor to annual leadership retreats. As described  
4 below, Program Directors have also attended these retreats and sometimes participate  
5 in these meetings.

6 Role in Collective Bargaining

7  
8 Deans may ask Department Heads for their input in collective bargaining  
9 proposals for bargaining with the Union.<sup>18</sup> Furthermore, in academic year 2012 – 2013,  
10 Roberta Wollens, the Chair of the History Department at UMass Boston, sat at the  
11 bargaining table representing the administration during discussions over NTT faculty  
12 and Article 21A of the CBA. Although the parties dispute whether it was the Union or  
13 the administration that sought to have a Department Head at the negotiating table, there  
14 is no dispute that the Professor Wollens represented the administration during this  
15 round of bargaining.<sup>19</sup>

16 During the round of bargaining that took place while this petition was pending,  
17 the University's bargaining team also included UMass Amherst Department Head  
18 Jennifer Normanly. The University's chief negotiators during that round of negotiations  
19 were the Associate Provost for Academic Personnel in Amherst and the Director of  
20 Employee Relations in Boston.

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<sup>18</sup> There is no evidence and University does not claim that Department Heads routinely or as a regular part of their duties have access to confidential labor relations information.

<sup>19</sup> The CERB has modified this finding to reflect the parties' responses to the show cause letter.

1           Office Assignments

2           Department Heads have the authority to assign and change faculty office (but not  
3 overall department space allocation) assignments without the Dean's approval.  
4 According to at least one Department Head, these decisions are extremely important to  
5 faculty, and faculty preferences can sometimes conflict.

6           Non-MSP Bargaining Unit Employees

7           Department Heads supervise the work of non-bargaining unit personnel within  
8 their department and can effectively recommend their hiring, firing, discipline, promotion  
9 and salary increases.

10          Program Directors<sup>20</sup>

11          Program Directors are responsible for running and coordinating academic  
12 programs. There are currently 83 Program Directors on the Boston campus and at least  
13 100 on the Amherst campus. They are members of the MSP unit.

14          At UMass Boston and with very limited exceptions at UMass Amherst, the  
15 programs are headed by program directors within academic departments that have their  
16 own Department Heads and their duties are much narrower in scope than Department  
17 Heads.<sup>21</sup> They have no formal role in the AFR process, faculty discipline, tenure

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<sup>20</sup> This section has been revised to reflect the University's unrefuted response to the show cause letter.

<sup>21</sup> At one time, UMass Boston had a number of free-standing interdisciplinary programs that were headed by Program Directors who were not members of the MSP's bargaining unit. As set forth in Article 21(B).5(c)(3) of the Boston CBA, such program directors on the Boston campus had the same authority not to reappoint/renew part-time NTT's as Department Heads. At some point before this petition was filed, the University converted these freestanding programs into departments run by Department Heads. There are currently 83 Program Directors on the Boston campus. There are at least 100 Program Directors on the Amherst campus.

1 recommendations or discretionary pay or merit pay allocations. According to a  
2 document titled "Roles and Responsibilities of the Graduate Program Director"  
3 Graduate Program Directors at UMass Boston "supervise scheduling and instructional  
4 assignments of the program's offering, in collaboration with the Chair or Director of the  
5 academic unit in which the graduate program may be housed." With respect to faculty  
6 evaluations, this document indicates that the Graduate Program Director "also  
7 participates in evaluations of instruction in graduate courses in a manner appropriate to  
8 the procedures of the program's academic unit (e.g., by periodically reviewing course  
9 evaluations for faculty teaching graduate courses)." Their duties may also include  
10 recommending hires for probationary part-time NTTs, but those recommendations are  
11 subject to review and approval by the Department Head. Program Directors may be  
12 invited to attend management meetings although such meetings are also held without  
13 them.

14 At UMass Amherst, there are a handful of programs headed by Program  
15 Directors that do not fall within an academic department. Of those programs, only two  
16 hire their own faculty. In such programs, Program Directors are in charge of hiring and  
17 reappointing probationary non-tenure track faculty.

18 Unit Placement of Department Heads at Other State Institutions of Higher  
19 Learning

20 Department Heads are in the same bargaining unit as regular faculty at each of  
21 the following: Massachusetts state colleges and universities (Massachusetts State  
22 College Association); Massachusetts community colleges (Massachusetts Community

1 College Council); UMass Lowell (MSP) and UMass Dartmouth (UMass Faculty  
2 Federation, Local 1895).<sup>22</sup>

3 Opinion<sup>23</sup>

4 The CERB must decide whether to allow an add-on election for the Department  
5 Heads who have been excluded from the MSP's faculty and librarians unit for the past  
6 40 years. The University mainly argues that Department Heads are supervisory  
7 employees who should not be included in a bargaining unit with the faculty they  
8 supervise.<sup>24</sup> The Union contends that there have been no material changes to  
9 Department Heads' duties since 1976 when the CERB included the Department Heads  
10 in the faculty unit over the University's objection and, therefore, the CERB should  
11 decide, as it did in 1976, that the Department Heads are appropriately included in the  
12 unit. The CERB disagrees with the Union. For the reasons set forth below, we find that  
13 the Department Heads do not share a community of interest with the rest of the  
14 bargaining unit based on their supervisory duties and responsibilities.

15 Applying the criteria set forth in Section 3 of the Law, the CERB generally  
16 establishes separate bargaining units for supervisory employees and the employees  
17 they supervise. Sheriff of Worcester County, 30 MLC 132, 137, CAS-03-3543 (April 7,  
18 2004) (additional citations omitted). This policy is rooted in the judgment that

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<sup>22</sup> The CERB has made this additional finding in response to the Union's request. It is not in dispute. The weight the CERB accords this finding is discussed below.

<sup>23</sup> The CERB's jurisdiction is not contested.

<sup>24</sup> Although the University's opposition to the petition is primarily based on its claim that Department Heads are supervisory employees, it argued in its initial position statement that they are also managerial or confidential employees within the meaning of Section 1 of the Law. Because the CERB dismisses the petition on other grounds, it does not reach this issue.

1 supervisors and the employees they direct have different obligations to the employer in  
2 personnel and policy matters, therefore to retain them in the same bargaining unit would  
3 likely lead to a conflict of interest within the bargaining unit. City of Chicopee, 1 MLC  
4 1195, 1197-1198, MCR-1228 (November 18, 1974). In determining whether an  
5 employee is a supervisory employee, a line must be drawn between a true supervisor  
6 who possesses authority to recommend or effectively recommend personnel decisions  
7 and an employee with limited supervisory authority who instead acts as a conduit for the  
8 employer's actions. Somerville School Committee, 6 MLC 2092, 2094, CAS-2312 (April  
9 18, 1980). In determining whether an employee is a true supervisor, the CERB  
10 considers the following factors: whether the employee has the independent authority  
11 and judgment to assign and to direct the work of employees, Worcester School  
12 Committee, 22 MLC 1762, 1766, MCR-4429 (May 28, 1996); City of Westfield, 7 MLC  
13 1245, 1252; MCR-2912 (August 28, 1980); the authority to initiate and to recommend  
14 discipline, Id.; the authority to adjust grievances, Id.; Eastham School Committee, 22  
15 MLC 1190, 1197, MCR-4345 (September 22, 1995); and the independent authority to  
16 make, or the power to recommend effectively, personnel decisions about whether to  
17 hire, to transfer, to suspend, to promote or to discharge employees. Greater New  
18 Bedford Regional Vocational School Committee, 15 MLC 1040, 1045, MCR-3769 (July  
19 13, 1980).

20 The CERB's 1976 determination that the Department Heads did not exercise  
21 sufficient supervisory authority to warrant their exclusion from the faculty unit was based  
22 on similar principles. The CERB emphasized that supervisors are not statutorily  
23 excluded from collective bargaining under Chapter 150E as they are under the National

1 Labor Relations Act (NLRA) and, therefore, in considering the Department Heads'  
2 appropriate unit placement, the CERB was concerned more with the potential for  
3 inherent conflicts than with the mere possession of specific supervisory power. 3 MLC  
4 at 1205. Nevertheless, in analyzing this issue, the CERB was guided by the criteria the  
5 National Labor Relations Board (NLRB) relied on in determining the supervisory status  
6 of department heads at private universities.<sup>25</sup> Specifically, the CERB analyzed the  
7 degree to which Department Heads had the authority to: 1) make personnel decisions;  
8 2) effectively recommend certain personnel decisions; and 3) responsibly direct faculty.  
9 Id.<sup>26</sup> It ultimately determined that the Department Heads did not possess significant  
10 supervisory authority in any of these criteria and concluded that they were appropriately  
11 placed in the faculty unit. Id. at 1213.

12 We conduct a similar analysis here, but reach a different conclusion based on the  
13 facts before us, which demonstrate that, in several keys areas, the supervisory authority  
14 exercised by the Department Heads today is greater than that exercised in 1976.

#### 15 **Authority to Make Personnel Decisions**

16 The factors the CERB considered under this category were the Department  
17 Heads' unilateral authority to allocate total dollar amounts for merit increases and the  
18 authority to hire and reappoint faculty, including part-time faculty. Id. at 1205-1206.  
19 The CERB found that the Department Heads had no authority to make personnel

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<sup>25</sup> The 1976 decision was issued before the Supreme Court decided NLRB v. Yeshiva University, 444 U.S. 672 (1980), which held that the University's full-time faculty members were managerial employees excluded from the NLRA's coverage.

<sup>26</sup> The CERB also considered the degree to which Department Heads possessed certain supervisory perquisites. 3 MLC at 1205. In this case, neither party made any significant argument regarding this factor. We therefore do not address it.

1 decisions regarding the hiring, transfer, suspension, lay-off, recall, promotion or  
2 discharge of faculty. Rather, all such decisions were made by higher administrative  
3 officials, in consultation with the faculty. Id.

4 The facts before us now show that, on both campuses, Department Heads have  
5 the unilateral authority, without the involvement of the DPC or the need for Dean  
6 approval, to hire part-time NTT faculty and not to renew the appointments of  
7 probationary NTT faculty. Also in Boston, the Department Head has the unilateral  
8 authority to hire all NTT, not just part-timers, as well as the unilateral authority to  
9 determine whether to reappoint NTTs beyond their probationary period. Those  
10 decisions are not subject to the grievance and arbitration procedure. At UMass  
11 Amherst, Department Heads in some colleges also hire full-time NTTs without Dean  
12 input or final review, and there is no evidence of any procedure requiring the  
13 Department Head to consult with the faculty before doing so. Given that there are over  
14 600 full and part-time NTT faculty on each of the campuses, and that some UMass  
15 Amherst Department Heads hire as many as 3-4 part-time faculty a year, we view  
16 Department Heads' hiring and reappointment authority with respect to NTT employees  
17 as a material change in their duties since 1976 and, in accord with our earlier decision,  
18 a significant indicator of supervisory status. See 3 MLC at 1205-1206.

19 **Authority to Effectively Recommend Personnel Decisions**

20 In the 1976 decision, the CERB recognized that even where employees do not  
21 have authority to make personnel recommendations, the authority to make effective  
22 recommendations may be tantamount to the actual decision. 3 MLC at 1206. Although  
23 the CERB found that the Department Heads had the authority to make personnel

1 recommendations that could affect hiring, termination, promotion or approval for tenure,  
2 it further found that they did not make those decisions in a vacuum, but rather in  
3 conjunction with department faculty. Id. at 1206. Because the evidence did not show  
4 that Department Heads' recommendations were weighted more heavily than the  
5 faculty's, the CERB declined to find that the Department Heads exercised authority to  
6 effectively recommend personnel actions.

7 The record before us now shows that, in addition to the unilateral hiring and  
8 reappointment authority with respect to NTTs described above, at least in one  
9 department at UMass Amherst, the Department Head effectively makes hiring  
10 selections for all faculty, including tenure track faculty.

11 Although the 1976 decision did not address the Department Heads' authority to  
12 award merit pay directly,<sup>27</sup> its description of the Department Heads' authority regarding  
13 "major personnel decisions," states, generally, that all such decisions are made by  
14 "higher administrative officials *in consultation with the faculty.*" Id. at 1205-6 (emphasis  
15 added). The record before us now reflects that UMass Amherst Department Heads  
16 effectively recommend the distribution of 15% of the total pool of merit money, with the  
17 Dean and DPC recommending the remaining 85%. This is another change since 1976.

18 **Department Head's Authority "Responsibly to Direct" Faculty**

19 The factors that the CERB considered under this category in its 1976 decision  
20 were the authority to administer department budgets, to schedule and assign courses,  
21 to discipline or reward faculty and to adjust grievances. As described below, there have

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<sup>27</sup> Elsewhere in the decision, the CERB indicated that the University had not awarded merit pay for several years because of an austerity budget. Id. at 1210.

1 been changes in several of these categories that increase the level of supervisory  
2 authority exercised.

3 Budgets

4 In 1976, Department Heads had no unilateral control over any portion of the  
5 budget or travel disbursements, even over the 10% of the budget that was not allocated  
6 to staff salaries. Id. at 1208. The record before us now shows that Department Heads  
7 have unilateral control and complete discretion over this portion of the budget. They  
8 also have discretion over certain other funds departments may receive and have the  
9 authority to use that money in ways that can potentially benefit one faculty member over  
10 another, e.g., through approving certain travel or hiring teaching assistants.  
11 Conversely, when budgets are cut, Department Heads can decide whether or not to fill  
12 NTT vacancies, and can move money from one department program to another without  
13 the Dean's approval. There is no evidence in this record, as there was in the 1976  
14 record, that their actions in this regard are limited only to making a recommendation to  
15 withhold or grant funds as a means of disciplining or rewarding members. Id. at 1210.  
16 Based on these facts, we find that Department Heads' control over this money,  
17 particularly in ways that can either reward or penalize faculty members, is evidence of  
18 supervisory authority that creates the potential for conflicts within the unit that did not  
19 exist in 1976.

20 Assigning and Scheduling Courses

21 In 1976, the CERB found that Department Heads' role in assigning courses was  
22 mainly clerical because most faculty were hired based on a particular expertise. The  
23 CERB therefore concluded that Department Heads' assignment duties were mainly a

1 matter of coordinating voluntary faculty self-assignment. Id. at 1208. Further, although  
2 the CERB found that Department Heads had the authority to order a faculty member to  
3 teach a particular course, the CERB found that their authority was more in the nature of  
4 persuasion than decree. Id. at 1209. Although they further found that the Department  
5 Heads had the authority to make course assignments in situations where there was a  
6 conflict that could not be resolved, that authority did not change their view that  
7 Department Heads' overall scheduling and assignment duties were insufficient to  
8 warrant their exclusion from the unit.

9       The record before us now shows that Department Heads have the independent  
10 authority to assign and schedule courses each semester without Dean involvement.  
11 Unlike the facts in the earlier decision, however, there is no evidence or argument that  
12 they exercise this authority through persuasion rather than by decree. Further, where  
13 scheduling is merely a matter of giving effect to faculty members' self-selected  
14 assignments based on their area of expertise, we would agree that scheduling is more  
15 of a clerical than supervisory task. See Boston School Committee, 12 MLC 1175, 1200,  
16 CAS-2598 (August 30, 1985) (registrars were appropriately placed in teachers' unit,  
17 where their role was limited to accommodating teachers' scheduling preferences and  
18 implementing Head Masters' and Department Heads' directives regarding scheduling).  
19 The facts found above, however, show that scheduling decisions can involve weighing a  
20 number of factors, including the Department's and students' overall needs and  
21 assessing a faculty member's research and scholarship output and participation in  
22 University service. These are not purely clerical decisions and in some departments,  
23 Department Heads also have the independent authority to adjust faculty members'

1 workloads, based on their assessment of faculty members' research and scholarship  
2 output or level of non-academic service to the University. We consider this authority  
3 significant, especially since such authority extends to granting or denying requests for  
4 "no-teaching" semesters. Department Heads further have the independent authority to  
5 grant other requests for time off, including sick leave, and make recommendations for  
6 lengthier leaves of absence based on their assessments of their departments' needs.  
7 While those recommendations need the Provost's approval, there is no evidence that  
8 such approval has ever been denied. In sum, the record before us now shows  
9 Department Heads' role in scheduling and assignment and adjusting workload is greater  
10 than what it was in 1976 and, thus, is further indicia of supervisory authority.

#### 11 Grievances

12 In 1976, as now, although Department Heads acted as the first step in the  
13 grievance procedure, they had no independent authority to resolve grievances that  
14 arose out of University action. Rather, their role was to "serve as a conduit of faculty  
15 dissatisfaction and to try to provide a forum for faculty expressions of discontent." The  
16 CERB concluded that this role was not indicative of supervisory status. Department  
17 Heads now both have the authority to resolve "informal" grievances and to commit  
18 department funds to resolve them. This changes again are indicative of supervisory  
19 authority and provide another example of Department Heads' ability to allocate  
20 department funds in ways that can potentially benefit or penalize bargaining unit  
21 members.

22

1        Discipline

2            In 1976, the CERB found that the Department Heads did not have the authority  
3 to discipline or reward bargaining unit members in any way that was different from the  
4 DPCs. It further observed that neither the Department Heads nor the DPC had much  
5 occasion to exercise this authority due to their “professional independence and the  
6 sense of collegial responsibility, shared by faculty.” Id. at 1209-1210. The CERB  
7 further found that although the Department Heads could recommend action to discipline  
8 or reward faculty, they did not generally employ such tactics and, if they did, their  
9 actions would be limited to making a recommendation. Id.

10           Here, there is evidence showing that Department Heads can issue letters of  
11 warning and reprimand, remove classes and conduct investigations into student or  
12 faculty complaints. Further, there is no evidence of any reluctance on the part of  
13 Department Heads to take such action and the record shows that, depending on the  
14 department, Department Heads can spend quite a bit of time dealing with preliminary  
15 disciplinary issues. Even assuming that DPCs also have the authority to issue  
16 reprimands, they do not have the authority to mete out discipline in other ways, such as  
17 by removing classes, denying travel funds, changing office space, etc.

18           In sum, Department Heads’ independent hiring authority over NTT’s, control of  
19 10% of the budget, assignment and scheduling duties, including the ability to grant or  
20 deny requests for time off, and their ability to resolve certain first level grievances and  
21 punish and reward employees by issuing letters of warning and reprimands or by  
22 allocating funds in ways that can reward or penalize faculty member, leads us to  
23 conclude that their presence in the unit now would create the very types of conflicts the

1 CERB seeks to avoid when making unit determinations. While it is true that DPCs and  
2 a very limited number of Program Directors also perform certain duties indicative of  
3 supervisory status, this fact does not reduce Department Heads' unilateral supervisory  
4 authority in the areas outlined above. Further, although Department Heads' authority  
5 with respect to preparing evaluations and determining merit pay may not, standing  
6 alone, be sufficient to warrant excluding them from the unit because the DPC also  
7 performs these duties, the facts show that Department Heads have meaningful and  
8 separate input into both personnel actions. When viewed in light of the unilateral  
9 supervisory authority they exercise over faculty members, as outlined above,  
10 Department Heads' input into faculty hiring and evaluations reinforces, rather than  
11 diminishes, our conclusion that they should remain outside of the unit based on the  
12 potential for conflict within the unit.

13 Nor is our conclusion altered by the fact that many Department Heads return to  
14 the faculty bargaining unit once their term is over, because for at least three years, and  
15 in many cases longer, Department Heads will be performing the supervisory duties set  
16 forth above.

17 Finally, the Union also urges us to consider the fact that Department Heads are  
18 included in faculty bargaining units at other state universities and colleges. However,  
19 we take administrative notice of the fact that the DLR certified only two of the four units  
20 that the Union references and our records do not reflect that the Department Heads'  
21 supervisory status was litigated in either of those units. See Massachusetts Board of  
22 Regional Community Colleges, SCR-2083 (February 10, 1976)(certifying unit of  
23 professional faculty personnel and academic support personnel including Department

1 Chairmen and Division Chairmen; Division Chairmen voted under challenge); Board of  
2 Trustees, University of Lowell, SCRE-2006 (April 28, 1976)(pursuant to agreement for  
3 consent election, certified unit comprised of faculty members including Department  
4 Chairs). The DLR's records otherwise contain no evidence regarding how or why the  
5 Department Heads at the state colleges or universities, or at UMass Dartmouth came to  
6 be included in those faculty units. Consequently, the mere presence of Department  
7 Heads in other faculty units, without any evidence regarding their duties at the time of  
8 the certification or recognition, or even now, does not affect our unit determination here.  
9 Rather, each case must be decided on its own facts. The facts here establish that after  
10 decades of being excluded from the faculty bargaining unit, the position has evolved to  
11 include more supervisory duties, such that including them in the unit now would create  
12 conflicts that did not exist when the unit was first certified.

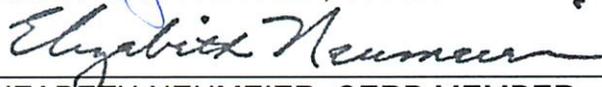
13 Conclusion:

14 For all of the foregoing reasons, we dismiss the Union's petition.

COMMONWEALTH OF MASSACHUSETTS  
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



MARJORIE F. WITTNER, CHAIR



ELIZABETH NEUMEIER, CERB MEMBER