

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & ISMAEL RAMIREZ-SOTO,
Complainants

v.

DOCKET NO. 04BEM01916

UNIVERSITY OF MASSACHUSETTS
BOSTON
Respondent

Appearances:

Inga S. Bernstein, Esquire and Monica Pastorok, Esquire for
Ismael Ramirez-Soto

Jean Marie Kelley, Esquire for University of Massachusetts-Boston

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 23, 2004, Ismael Ramirez-Soto (“Complainant”) filed a complaint with this Commission charging Respondent University of Massachusetts Boston (“UMB”), Jo Ann Gora and Paul Fonteyn with discrimination in the terms and conditions of employment and hostile work environment on the basis of his race and color, Latino, and national origin, Puerto Rican. The Investigating Commissioner found probable cause to credit the claim of unequal terms and conditions against Respondent UMB only, and dismissed all other claims against UMB and the individually named Respondents Gora and Fonteyn. Thus the sole claim before me is the charge of unlawful terms and conditions of employment against Respondent UMB. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on November 17-21 and 24, 2008. After careful consideration of the entire record and

the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant Ismael Ramirez-Soto was born and raised in San Juan, Puerto Rico. He is Latino and of Puerto Rican national origin.

2. Respondent UMB is part of the five-member University of Massachusetts System. (Tr. I, pp.55-56)

3. Complainant graduated from high school in 1970. He received a bachelor's degree in urban elementary education from the University of Hartford. After teaching in a Headstart program for a year, Complainant attended law school and received a law degree from the University of Puerto Rico in 1977. He received a doctorate in education from UMass Amherst in 1984. While studying for his doctorate, Complainant worked on developing law-related educational materials for Hispanics for the National Street Law Institute at Georgetown University Law Center. He also served as the Chair of the Board of Directors for the student legal services office at UMass Amherst and worked for the National Legal Services Corporation as a consultant, trainer and researcher. Complainant also worked as a Managing Attorney for Greater Boston Legal Services while pursuing his graduate studies. Throughout these years Complainant received a number of Ford Foundation Fellowships. Tr. I, p. 29-54)

4. In 1985, Complainant became a Special Adviser to the Puerto Rico Council on Higher Education, and subsequently became the Executive Director of the Council for nine years. In 1994, Complainant left the Council to join his wife, who had begun a Ph.D. at the University of Indiana, Bloomington, where he began work towards a

master's in law degree. He continued to work for the Puerto Rico Council on Higher Education as a consultant on higher education policy and federal affairs. (Tr. I, p.53)

5. While at Bloomington, Complainant was contacted by Donaldo Macedo, a professor at UMB who informed him that UMB was seeking a new dean for its College of Public and Community Service (hereinafter "CPCS"), whose duties would include revising its curriculum and strengthening its requirements. Complainant submitted an application for the position and was selected to be the new dean of CPCS. (Tr. I, p.55-6) As of the time of his appointment to Dean in 1995 Complainant had never held a tenure track teaching position. He was a lecturer from 1990 to 1993 at the University of Puerto Rico where he taught three courses. (Tr. IV, p.64)

6. Complainant served as the Dean of CPCS for eight years from August 1995 through August 31, 2003. (Tr. I, p. 93; II, pp.91, 96, 115-116). CPCS was established in 1972 to serve urban adults beyond collage age who are engaged in public and community service. The program seeks out non-traditional students and particularly people of color.

7. Jean MacCormack was employed at UMB in various positions for many years. She became Interim Chancellor in 1995 about the time Complainant was hired as Dean of CPCS. Although not involved in Complainant's hiring process or contract negotiations, MacCormack signed the offer letter to Complainant. MacCormack has been chancellor at UMass Dartmouth since September 1999. (Tr. III, 161-167)

8. Jo Ann Gora became Chancellor of UMB in August 2001 and served in that capacity until August 2004. Prior to her appointment at UMB, Gora was Provost at Old Dominion University in Norfolk, Virginia. She is currently President of Ball State University in Indiana. (Tr. II, p.136-6) Gora testified that she had worked in very

traditional academic settings and that when she came to UMB, she encountered a number of, in her words, unusual, “unprofessional” and “anything goes” employment arrangements for faculty and administrators. Some of these arrangements were the result of patronage and she implied that certain individuals did not have the necessary credentials or qualifications to be on the staff. Gora did not wish to be tied into such unorthodox deals, did not want to commit to multi-year contracts with faculty and administrators. and sought to establish uniform professional standards for faculty members and administrators. I credit her testimony that she sought to strengthen the qualifications of faculty and administrators at UMB. Gora hired Paul Fonteyn, a very traditional academic provost and they succeeded in establishing uniform professional standards. (Tr. III, p.141-2)

9. Paul Fonteyn was Provost and Vice-President of Academic Affairs at UMB from September 2002 to August 2004. He is currently President of Green Mountain College in Vermont. (Tr. IV, p.163) Prior to coming to UMB, Fonteyn had served as dean of graduate studies at San Francisco State University. Fonteyn testified that Chancellor Gora hired him for two primary reasons; to raise the professional and academic standards of the institution and to increase the grant portfolio. (Tr.VI, p.34-38)

10. When Complainant was offered a five-year appointment as Dean of CPCS in 1995, he was also offered a concurrent appointment as a non-tenured Assistant Professor in the Law Center, an academic department of CPCS. Pursuant to his employment contract, Complainant’s appointment as Dean would either be extended beyond August 31, 2000 for a term to be determined at that time, or his appointment would expire on August 31, 2000 and would not be renewed. The contract also provided that if he was

not reappointed as Dean, Complainant was to be offered a two-year contract as a full-time Assistant Professor in the Law Center. The 1995 appointment did not include an offer of tenure, nor did it include any provision entitling Complainant to return to the faculty in a tenure track position. At the time, then Provost Esposito and Complainant signed a "Personnel Action" form indicating that credit toward tenure would be determined upon Complainant's relinquishing his appointment as Dean. (Ex. C-7) As indicated in then Chancellor MacCormack's memorandum of June 16, 1995, upon relinquishing his appointment of Dean, Complainant would receive an academic salary of \$65,000.00 and all merit raises and COLAs received by him during the course of his administrative appointment. (Tr. I, p. 98-9)

11. On October 14, 1998, then Chancellor Sherry Penney offered Complainant an extension of his 1995 contract through the academic year 2002-03. The offer stated that should Complainant return to faculty status at or before the end of the contract, he would be granted a five-year non-tenure track appointment at a salary commensurate with that of senior full professors at CPCS. The non-tenure track appointment could be converted to a tenure track appointment at his discretion, with the tenure decision year to be determined by mutual agreement. (Ex. C-11) Thus, by the terms of the 1998 agreement, Complainant would be given a period of time to work as a professor without the tenure clock ticking, so that he would be able to develop a line of research and teaching. (Tr. IV, p. 72-77)

12. A candidate for tenure at the University of Massachusetts submits a dossier to the department where he or she would become tenured. The dossier containing a curriculum vitae, a personal statement, publications, reports, and documents is then

reviewed and approved first by faculty members, then by the Dean, the Provost, the Chancellor, the President and finally by the Board of Trustees. In order to be recommended for tenure, an applicant must show “excellence” in at least two of three categories and must demonstrate “strength” in one of the three categories: (1) teaching; (2) research, creative or professional activity; and (3) service. Traditionally, publication of articles in peer-reviewed journals is a requirement for tenure. Gora testified that the “Red Book” published by the American Academy of University Professors, is the “bible” for higher education. The Red Book calls for a six-year period in which a professor on a tenure track must establish eligibility for tenure. The professor is evaluated in the sixth year and awarded tenure, in the seventh year, if deemed qualified. (Tr. II, p. 152-153; Tr. IV, p. 52-56)

13. As of the public hearing, Complainant had never published any peer-reviewed articles. During his eight years as Dean of CPCS he did no research and only co-taught one course. (Tr.V, p. 60;Tr. V, p.66-67) However, a number of colleagues attested to his administrative and management skills as Dean.

14. Sarah Bartlett worked in CPCS from 1985 to 2006 as Administrative Dean for Enrollment Management and Student Services. She reported directly to Complainant from 1997 to 2003. Bartlett testified that Complainant was extraordinary in that he reached out to everyone, re-energized CPCS and led them through a process of transformational change. Under his leadership, the school revised its entire curriculum. (Tr. V, p. 134-35.)

15. Evelyn Wong was Assistant Dean for Administration and Finance at UMB. One of Wong’s duties was attending annual budget hearings attended by all colleges, the

Provost, Budget Director, Chancellor, Complainant and Sarah Bartlett. Wong worked very closely with Complainant for eight years and testified that he excelled at reviewing the budget, and was an effective communicator who facilitated communications with faculty and governing groups. (Tr. V, 100-102)

16. Professor Terry McLarney testified that Complainant was a great Dean who developed CPCS and completely revised the school's curriculum and established a much better structure. (Tr. VI, p.12-13)

17. In 2000, then Interim Provost Charles Cnudde asked Complainant to serve for a period of two years as the Dean of Graduate Studies at CPCS and Interim vice Provost for Research in addition to his duties as Dean of CPCS.

18. Jo Ann Gora testified that when she first came to UMB in August 2001, applications and enrollments were declining; the development office and fund-raising functions were in disarray; then UMass President William Bulger was under attack by then Governor Romney and the university had a low student retention rate, requiring the admissions office to recruit not only a freshman class, but to replace students who had been lost through attrition. The most dramatic decline in enrollment had been at CPCS. (Tr. II, p. 162-7) Gora testified that during her three years at UMB, there was a 29% decrease in appropriations. I credit her testimony, which was not disputed.

19. Complainant was part of the search committee for Gora's position. He claimed that at the end of her interview, Gora shook hands with everyone on the interview committee except him and the snub, according to Complainant, "did not appear unintentional." (Tr. I, p. 22) Gora testified that she did not intentionally avoid shaking anyone's hand, and pointed out that it would have been unwise to snub members of the

search committee when interviewing for a job. I do not credit Complainant's testimony that Gora purposely did not shake his hand.

20. Shortly after Gora was appointed, Complainant met with her to discuss issues surrounding CPCS. Complainant testified that as part of the meeting he "interjected" with a discussion of the Graduate Studies program and as a result, they never "got around to" discussing CPCS, despite the fact that Complainant sought Gora's input on some fundamental changes that were occurring in the college at that time. (Tr.I, p. 123-24.)

21. After her appointment, Gora replaced Charles Cnudde as Provost and appointed Arthur MacEwan as Interim Provost. Complainant testified that by November 2001, MacEwan instructed him to focus exclusively on CPCS. All of his functions as Dean of the Graduate Studies program were then assumed by MacEwan. Complainant officially ceased performing the Graduate Studies functions in December 2001 after informing MacEwan that having these functions removed from his domain created an "untenable" situation. He told MacEwan that he would focus on CPCS and no longer pretend to perform the duties of Graduate Studies Dean. (Tr. I, p. 130-132)

22. Complainant was upset that the Graduate Studies duties had been removed from his domain, and he believed that the move undermined his position as Dean of CPCS. Gora testified that she did not make the decision to remove these duties from Complainant because that would have been MacEwan's decision; however she did not consider graduate studies a significant part of UMB's identity and felt Complainant's main duties were as dean of CPCS. (Tr. III, p. 5-6, 132)

23. In the spring of 2002, a university group called Latino Coalition invited Gora to attend a community meeting at a restaurant in Dorchester. Complainant was also

invited to attend, and stated that he was surprised that Gora did not call to notify him of the meeting beforehand. He testified that when he greeted Gora, she passed by him and proceeded to begin the meeting without acknowledging his presence. (Tr. I, p. 134, 3-7)

24. Gora testified that she did not remember whether Complainant was present at the meeting. She did not call Complainant beforehand to inform him of the meeting because a member of the faculty Lucia Myerson had invited her and she presumed he knew about the meeting. Gora believed the meeting was going to be a casual “meet and greet;” with a constituent group however, many attendees were angry about long-standing issues that preceded her tenure at UMB and the meeting became contentious. Gora felt she had been “ambushed” and stated that either Myerson or Complainant should have forewarned her about the concerns of the attendees so she would have been in a better position to respond to their issues. (Tr. III, p.7-11)

25. As is customary, Gora’s inauguration as Chancellor took place in September 2002, one year after her arrival at UMB. Complainant testified that when he arrived at the dressing room, shortly before the participants were to proceed to the stage, he learned that his name was not on the list of persons to be seated on the stage. He saw the person with the list of names speak to Gora, the person with the list then told him to sit with members of the public and faculty members. All the other college deans were seated at the podium, where he believed a seat remained vacant. (Tr. I, p. 140-144)

26. Gora testified that her inauguration was a “public relations event,” for which seating arrangements were made by Respondent’s communications and public relations office. She was not involved in setting up the stage and testified that usually vice presidents and other senior administrators are seated on the stage, but she did not

remember whether the college deans were seated on the stage. She never told anyone to exclude Complainant from the stage and did not know that Complainant felt slighted on that day. I credit her testimony and do not believe that this was a deliberate slight or disrespect on her part. (Tr. III, p.11-14)

27. Complainant testified that at the first annual budget meeting he attended with Gora, he submitted a document outlining how he would implement budget cuts. According to Complainant, Gora ridiculed his submission telling him she did not understand the document. She began to discuss the “minute details” of the budget and asked Evelyn Wong to explain the plan instead. According to Complainant, Gora treated him as incompetent when she proceeded to discuss the fundamentals of the budget cuts directly with Wong. (Tr. I, p. 147-149)

28. Wong testified that she was present at the annual budget meeting with Provost Fonteyn when Complainant was asked to state the rationale for CPCS’s resources. She stated there were occasions when Fonteyn dismissed Complainant’s remarks and looked to either Bartlett or Wong for clarifications or answers about CPCS budget matters. (Tr.V, p. 100)

29. Complainant was due for a performance review in the spring of 2002; however at the time, Interim Provost MacEwan told him they would postpone his review until the arrival of a new Provost. (Tr. I., p. 151)

30. In the fall of 2002, Gora appointed Paul Fonteyn as Provost of UMB. As Provost, Fonteyn was responsible for appointing deans and faculty members and for reviewing and recommending tenure decisions. Fonteyn testified that in his previous position at San Francisco State, he played a pivotal role in hiring several Latino

professors into the biology department. He also wrote two grant proposals the purpose of which was to double the number of minorities receiving baccalaureate degrees in the sciences in the California State University system with the goal of becoming a masters' degree institution that awarded Ph.D.s to more students of color. The program was ranked fifth in the nation for graduating Ph.D. students of color by the time he left. Fonteyn testified that it was considered the flagship program of the National Science Foundation. (Tr.VI, p.34-38) I credit his testimony.

31. Fonteyn testified that during the fall of 2002, Associate Dean Winston Langley informed him that Complainant's evaluation was due and that Langley, a long time employee of UMB, was to conduct the evaluation, as he had done on many previous occasions. On December 18, 2002, Complainant was notified that he was scheduled for an external review. (Tr. VI, p. 39)

32. Complainant testified that on occasions when he met with Fonteyn, he sought to discuss issues surrounding CPCS, but Fonteyn instead spent a lot of time talking about baseball and Latino baseball players. Complainant, who does not follow baseball, stated that he was never able to have a real discussion with Fonteyn about any of the issues facing CPCS. (TR I, p. 142-146) Fonteyn testified that he certainly talked about the Red Sox with others at UMB, although he could not remember a specific conversation with Complainant about the subject, and stated that it would be difficult to do so without mentioning the Latino players, who were the predominant players at the time. He thereby dismissed as ridiculous the inference that he discussed Latino players with Complainant because Complainant was Latino. (Tr. VI, p. 60-61) I credit Fonteyn's testimony.

33. In the spring of 2003, Complainant learned that his review committee would include two faculty members who he believed were biased against him; Frank Caro, director of the Gerontology Institute and Professor Estella Estow from the Hispanic Studies department. Caro and Complainant had disagreed about issues surrounding academic programs and Estow had been a very strong vocal opponent of the formation of the Latino Studies program as an intercollegiate program in CPCS. Professor Caro was appointed as the Chair of the review committee, whose major responsibility was to coordinate and write Complainant's review. (Tr. I, p. 154)

34. Complainant raised concerns to Winston Langley about Professor Caro serving as the Chair of the review committee. Langley responded that unless Complainant was prepared to put his concerns in writing, then he did not see any objection. Langley informed Fonteyn and Gora about Complainant's concerns but told them that Caro was a fair and impartial, despite his disagreements with Complainant. Complainant did not pursue the matter because he thought it would be more damaging to go through the process of challenging the appointment. (Tr. I, p.157)

35. In June of 2003 Complainant received the final report of his review, which was very positive, despite his misgivings about Caro being the chair of the review committee. He testified that the report validated and was very supportive of his leadership of CPCS.

36. In May of 2003, the "AQUAD" review of CPCS was issued. (Tr. II, 20-21.) AQUAD is an external review of a program or department that is mandated by the Board of Trustees. The AQUAD External Review Committee called CPCS a "unique asset" and the reviewers were "impressed by" the re-examination and re-construction that CPCS had undertaken. The review also recognized the level of professional engagement and

distinction of the faculty and the considerable academic and research production of that faculty. The primary area of concern in the AQUAD review was CPCS's declining enrollment. (Ex. C-21) In June of 2003, the AQUAD external review for the Graduate Program in Dispute Resolution, part of CPCS, stated that the program was a signature program with a major role to play in the future of the University that "ha[d] achieved remarkable quality in a relatively short time" and was "well positioned to grow and adapt as the field of dispute resolution itself continues to expand and evolve." (Tr.II, p. 25); Ex. C-23) The review also commended Complainant's role in supporting the program from the very beginning. (Tr. II, p.24.)

37. In approximately March of 2003 Gora received an anonymous letter complaining about cuts to the CPCS budget. At the same time, Gora began receiving letters and emails from all over the world urging her not to close CPCS, although there was, in fact, no plan to close CPCS. In response to receiving this unsolicited correspondence, Gora sent an email to Complainant asking him why he had sent the letter. Gora also asked him to explain why he had started a letter-writing campaign in support of CPCS stating this was not conduct she expected from a dean. Complainant testified that he was dumbfounded by her email because he had not sent the letter and knew nothing about it. Through a series of emails, they established that Complainant had not sent the letter. (Tr. I, p. 168-72; Ex. C-16)

38. On April 7, 2003 Gora held a meeting with faculty and staff of CPCS, including Complainant, Terry McLarney, and Sarah Bartlett. They discussed the cutbacks at CPCS and their concerns about the fact that negotiations over Complainant's new contract had not yet begun. At the meeting Gora was very upset about the letter

writing campaign stating that it was hurting the school and that she expected better leadership from Complainant. According to McLarney, Gora said that under other circumstances, she would make a commitment not to close CPCS, but because of the letters she would not make that promise. (Tr.I, p. 175-77)

39. Gora testified that in March and April of 2003, she received numerous letters imploring her not to close CPCS. She had never before experienced such a campaign, which was based solely on rumor, as there were no plans to close CPCS. At first she mistakenly assumed that Complainant had written the anonymous letter to her and organized the letter writing campaign. Gora testified that she viewed these letters as a childish attempt to get her attention, and believed they were extremely damaging to both CPCS and the entire university because rumors of CPCS closing would make enrollment in the college even more challenging. She later learned the letters had been solicited by faculty members Marilyn Frankenstein and David Rubin. (Tr. III, p. 21-26)

40. Gora testified that Complainant's close relationship with his faculty could hinder his effectiveness as a dean, because deans have to make tough decisions. Gora stated that Complainant was great at representing the concerns of his faculty and CPCS, but not so good at explaining university-wide concerns to his faculty. As a result, CPCS had an "us versus them" mentality and its faculty was too focused on the "little CPCS world" while the entire university was facing a financial crisis with declining enrollments and budget cuts. Gora therefore felt that she had to provide the leadership that Complainant had not provided and she took it upon herself to inform the CPCS staff that empty positions could not be filled because of budget cuts. (Tr. III, p.19-27)

41. On June 10, 2003 Complainant met to discuss his contract with Winston

Langley and Provost Fonteyn. Terry McLarney was also there to support Complainant in his negotiations. At that meeting Complainant told Fonteyn that he wanted a five-year contract, the same “return to faculty clause” as was contained in his 1998 contract, as well as a merit increase. According to Complainant, Fonteyn told him that, given the University’s dire financial situation, Complainant would receive no merit increase and that Gora had instructed him to issue no multi-year contracts. Fonteyn would not agree to the “return to faculty” and the “right to seek tenure” clause. At one point Fonteyn asked McLarney whether the terms of the 1998 clause sounded unfair or unusual to him. (Tr. VI, p.18.) McLarney responded that under the circumstances they did not. (Tr.VI, p. 18.) McLarney explained that he thought that the circumstances of Complainant’s coming to CPCS in 1995 without an offer of tenure were unusual, and the return to faculty clause seemed like a perfectly reasonable way to acknowledge that. (Tr.VI, p.19.)

42. Complainant told Fonteyn that being recognized as a faculty member should be inherent in the Dean’s position, and stressed that he was a senior Dean and the only Dean of color then at the university. He told Fonteyn that while he would consider a shorter contract; the return to faculty clause was important and that he needed some time to develop a line of research and flexibility surrounding the decision as to when to convert his position to a tenure-track position.

43. Fonteyn testified that at the June 2003 meeting with Complainant he knew that the “return to faculty” clause would be a sticking point. Fonteyn understood that Complainant’s 1998 contract allowed him to become a faculty member with the option of tenure at his discretion; however, Fonteyn refused to include such a provision in the new contract stating, it was “totally out of line with anything that I had ever seen” and

“million dollar deal.” Fonteyn testified that it was not financially prudent to create another tenured faculty position at CPCS, which was already overstaffed and was costing UMB close to \$7,000 per student. Fonteyn testified that he wanted Complainant to remain in his position as Dean, but would never have agreed to contract terms allowing Complainant to seek tenure at his discretion upon returning to the faculty. (Tr. IV, p.187; Tr. VI, p.49) I credit Fonteyn’s testimony.

44. Members of the CPCS staff and faculty were anxious to see Complainant’s contract resolved, and on June 16, 2003 several, including Terry McLarney and Evelyn Wong went to lobby Gora on his behalf. The faculty members were worried about having no leadership and pressured Gora to speed up the process, which Gora characterized as another example of “hysterical behavior” by the faculty. Gora was aware that Fonteyn was offering Complainant the option to either live out his current contract or sign a new contract with “more standard language.” Gora told the faculty that she was leaving the negotiation of Complainant’s contract to Fonteyn, and she never told Fonteyn not to offer Complainant a contract. (Tr. III, p. 34-36) I credit her testimony.

45. Complainant went on a pre-planned vacation to France with his family from July 7 to August 8, 2003. On August 14, 2003, Complainant met with Fonteyn. Complainant testified that at this meeting Fonteyn told him that he did not view Complainant as a tenured faculty member and the right to seek tenure was “out of the question.” Complainant said that was “very problematic” for him.(Tr.II, p.70) I credit this testimony.

46. During the month of August, Fonteyn wrote Complainant a letter proposing additional contract language and reiterated that if he chose to step down as dean, under

his current contract; Complainant would be teaching three courses in the fall.

Complainant wrote back to Fonteyn that as dean and faculty member he was entitled to a sabbatical at his full administrative salary and that his contract provided for a five year non-tenure track appointment with a conversion to tenure-track at his discretion, with the tenure date to be determined by mutual agreement. (Ex. C-35)

47. Fonteyn testified that he interpreted the contract term defining Complainant's salary should he return to the faculty to mean a salary "commensurate" with professors at CPCS, with "commensurate" meaning the "average," which was \$80,000.00. However, during the summer, he and Complainant did not discuss their interpretation of the salary clause. Complainant interpreted the 1998 contract language to include the average salary of professors at CPCS, in addition to the COLAs and merit increases that he had received as dean. (Tr. VI, p.53-55)

48. On August 29, 2003, Complainant rejected Fonteyn's final offer of a one year contract as Dean, with a concurrent two year non-tenure track faculty appointment and wrote to Fonteyn that he was invoking the return to faculty clause contained in his current contract and would step down as dean. Complainant believed that he had been given no viable alternative despite his strong desire to continue as dean. He calculated his salary by his interpretation of the 1998 clause. (Ex. C-39)

49. Fonteyn testified credibly that he did not offer Complainant a tenure track position because if Complainant stepped down as Dean of CPCS, there would be an additional tenure track faculty member in a college that was already overstaffed and with insufficient student enrollment and because the agreement Complainant sought was out of line. Fonteyn was aware that if Complainant stepped down as Dean, that UMB would

have to honor the terms of his 1998 return to faculty clause. (Tr. VI. 51-52) I credit his testimony.

50. Gora testified that Complainant had been hired for his skills as an administrator, that he did not have a traditional academic background, and he had not taught or published for many years. Gora knew that Complainant wanted to invoke the “return to faculty clause” because it would give him a period of time to be on the faculty before the “tenure clock” began to run; however, in her view, Complainant was asking to compete for tenure over an 11 year period, which she viewed as highly unusual. I credit her testimony. (Tr. III, p.113)

51. After invoking the return to faculty clause from his 1998 contract and stepping down as Dean, Complainant became a Lecturer in the Legal Education Center at CPCS from September 1, 2002 through August of 2006. He resigned that position to become Executive Assistant to Chancellor MacCormack at UMass Dartmouth.

52. Fonteyn testified credibly that he comes from a traditional academic background and considers the title professors to include only those who are in tenure-track teaching positions at the university. He considers every other teacher to be a "lecturer." This was the reason Complainant’s position was called a “lecturer” after he stepped down as dean, even though while dean he was deemed to be a “professor.” The title of lecturer was not intended as a demotion but was a matter of semantics, according to Fonteyn. (Tr.IV, p. 212-216) I credit his testimony.

53. In January of 2004, Complainant learned that the previous March, Fonteyn had extended a three-year contract to the Dean of the Graduate College of Education, Lester Goodchild, who is white and non-Hispanic. Fonteyn acknowledged offering Goodchild a

multi-year contract, prior to entering into contract negotiations with Complainant. He testified that Goodchild was the first Dean he hired and after informing Gora about the Goodchild's contract, she informed him it was her policy to offer only one year contracts to deans. Gora corroborated Fonteyn's testimony. Subsequently, Fonteyn offered no multi-year contracts to deans. (Tr. II, p.171; Tr. VI, p.45-46; Tr. VI, p. 45-47) I credit their testimony.

54. Gora was aware that Complainant felt his compensation had not been fairly calculated and in the spring of 2004, she offered Complainant a position as her assistant. She also offered to increase his salary and to assist him in finding another job. However, she would not recognize his right to a tenure-track position as a faculty member. (Tr. II, p. 119; Tr. III, p.125-6)

55. In Fall of 2005, Jean MacCormack, who is the Chancellor at UMass Dartmouth, offered Complainant a position as a consultant in Graduate Studies and Strategic Planning Chancellor.

56. In the summer of 2006, Complainant resigned his position at UMB to become MacCormack's Executive Assistant and Assistant Professor in the Department of Education in the College of Arts and Sciences at UMass Dartmouth. (Tr. II, p.155-116)

57. At the time of the public hearing, Complainant was Interim Dean of the Graduate School of Education, Public Policy and Civic Engagement at UMass Dartmouth, a newly created school at that campus. (Tr. II, p. 117)

58. Andrew Leong was a member of Respondent's Personnel Board and was its chair in 2003. Leong was involved in the tenure review processes for Raul Ybarra and Lorna Rivera, Hispanic faculty members of CPCS. At all stages of review, Ybarra and

Rivera received “excellents” on all three criteria; however, Fonteyn downgraded their evaluations from “excellent” to “strength” in the categories of research, creative or professional experience. Leong testified that he vehemently disagreed with Fonteyn’s assessment of their capability in these areas. Leong acknowledged that Ybarra and Rivera were still awarded tenure, despite the changes to their evaluations by Fonteyn. (Tr.V, p.162-166)

59. Fonteyn testified that, in accordance with Gora’s directive to raise the academic standards at UMB, during his first year as provost he denied tenure to four out of the ten people who became eligible for tenure, one of whom was a Caucasian man. That same year, he recommended Raul Ybarra, a Hispanic man, for tenure. (Tr. VI, p. 61-65)

60. Daniel Ortiz, who was Hispanic, was interim director of the library during Fonteyn’s tenure at UMB. Since then he has been hired as the full time university librarian. (Tr. IV, p.201)

61. On July 3, 2003, Fonteyn offered Kenneth P. Sebens a one year appointment as Dean of the College of Science and Mathematics, along with a tenured appointment as professor. (Exh. C-54)

62. On March 9, 2004, Fonteyn offered Donna Kuizenga a one year appointment as Dean of the College of Liberal Arts and an appointment as a tenured professor. (Ex. C-56)

63. On April 30, 2004 Fonteyn offered Philip Quaglieri an appointment as Dean of the College of Management, along with an appointment as tenured Associate Professor (Ex. C-57)

64. On August 19, 2004, Fonteyn offered Greer Glazer an appointment as Dean of the College of Nursing and Health Sciences, along with an appointment as tenured Professor. (Ex. C-58)

65. On May 20, 2005, Fonteyn offered Adenrele Awotona a one year appointment as Dean of CPCS along with an appointment as tenured Professor. (Ex. C-59)

66. On April 21, 2006, Fonteyn offered Stephen Crosby a one year appointment as founding Dean of the John W. McCormack Graduate School of Public Policy. Crosby was not offered tenure. (Ex. C-60)

67. Fonteyn testified credibly that he offered tenure to each of the deans, except Crosby, because they already had achieved tenure elsewhere when offered the position and would not be likely to accept a position at UMB without tenure.¹ (Tr. V, p.85-86) I credit his testimony.

68. Gora awarded a five year contract to Keith Motley, an African-American, as Vice President for Student Affairs. Motley later became Chancellor of UMass Boston. Motley does not have tenure and was chosen for his administrative skills. Tr. III, p. 50-51)

III. CONCLUSIONS OF LAW

A. Jurisdiction

Respondent argues that the complaint in this matter was not timely filed pursuant to G.L. c. 151B, § 5, which requires that a complaint to be filed within 300 days of the last discriminatory act. The statute of limitations begins to run from the date when an employee is unequivocally informed of an adverse action against him. Wheatley v. Am.

¹ There was no evidence as to the race, color or national origin of the deans awarded contracts by Fonteyn. It is presumed that none of these deans was Hispanic, given the evidence that Complainant was the only dean of color at UMB at the time of the events in question.

Tel. & Tel. Co., 418 Mass. 394, 398 (1994); (holding that a “discharge” notice which held out the possibility of other employment within the company did not trigger the statute of limitations); Brownlie v. Kanzaki Specialty Papers, Inc., 44 Mass. App. Ct. 408, 412-13 (1998) (holding that limitations period began to run on date of discharge, not on dates of earlier demotions, where employee’s theory was that demotions were part of employer’s plan to reach the result of accomplishing the discharge, which was the actual discriminatory event).

Respondent made the offer of reappointment to the Complainant on July 2, 2003, more than 300 days before he filed his complaint on June 23, 2004. However, Complainant did not receive unequivocal notice of the failure to negotiate a contract for the renewal of his position as Dean until at least August 29, 2003.

Complainant and Provost Fonteyn discussed the contract and their differing views regarding its terms at a meeting on June 10, 2003. Throughout July they continued to exchange memoranda regarding their respective positions. They met again to discuss the renewal of the contract on August 14, 2003, at which time they agreed to further negotiate possible terms. On August 29, 2003, Complainant learned that his contract as Dean would not be renewed on terms that would be acceptable to him. He and Provost Fonteyn each testified that the negotiations surrounding his contract remained active until that date and Complainant did not know, until that date, whether they might reach agreement on a new contract. Complainant filed his complaint at the MCAD 299 days later, on June 23, 2004. His filing fell within the requisite 300 day statute of limitations and therefore is timely. M.G.L. c. 151B, § 5

B. Discrimination

Complainant contends that UMB discriminated against him by subjecting him to disparate treatment with regard to salary and tenure as compared to similarly situated white administrators, by failing to negotiate in good faith to renew his contract and by failing to honor provisions in his then current contract regarding his return to faculty. He alleges the disparate treatment included, but was not limited to, paying him less than he was entitled to pursuant to his contract and university policy, and demoting him from an associate professor to a lecturer.

M.G.L. c. 151B, s. 4(1) prohibits discrimination in the terms and conditions of employment based on race and national origin. Absent direct evidence of discrimination, Complainant must establish that: (1) he is a member of a protected class; (2) he was performing his position in a satisfactory manner; (3) he suffered an adverse employment action; and (4) similarly-situated, qualified persons not of his protected class were not treated in a like manner in circumstances that give rise to an inference of race and national origin discrimination. See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000); Matthews v. Ocean Spray Cranberries, Inc., 326 Mass. 122, 129 (1997). Complainant has established a prima facie case.

As a Latino from Puerto Rico, Complainant is a member of a protected class on the basis of his race and national origin. Complainant performed his job as Dean of CPCS at a more than acceptable level. Formal reviews of his performance in 1998 and in 2003 concluded that his performance was superior. Formal AQUAD reviews of CPCS and its Graduate Program in Dispute Resolution were also positive. In addition,

Complainant's colleagues and co-workers testified positively about his performance as Dean of CPCS.

Complainant contends that he was subjected to an adverse action in the terms and conditions of his employment because he was essentially constructively discharged from his position as Dean of CPCS when Respondent declined to offer him a multi-year contract with a provision for returning to a tenure-track teaching position. He consequently was demoted from associate professor to the position of lecturer. Respondent argues that it took no adverse employment action against Complainant and that he suffered no harm. Respondent asserts that Complainant was offered an appointment to a senior academic position at a salary of nearly \$128,000 which he turned down. He was then able to invoke the favorable provisions of his 1998 contract and returned to a faculty appointment with an option of converting to a tenure track within five years. Respondent asserts that inability to come to terms on a contract under these circumstances does not constitute adverse action. I do not agree. The term "adverse action" encompasses all "effects on working terms, conditions, or privileges that are material, and thus governed by the statute, as opposed to those effects that are trivial and so not properly the subject of a discrimination action." King v. City of Boston, 71 Mass. App. Ct. 460, 468 (2008). Material disadvantage to a complainant arises when "objective aspects of the work environment are affected." Id. Complainant may fairly argue that a failure to come to terms on a contract favorable to him is an adverse action.

Complainant contends that similarly situated persons, who were offered the position of Dean by Fonteyn, were extended more favorable contract terms than he was. After declining to enter into a multi-year contract with Complainant, on March 19, 2003,

Fonteyn offered Lester Goodchild a three-year contract as Dean of the Graduate School of Education, with tenure. In addition Complainant offered evidence that from 2003 to 2005 Respondent entered into several one year contracts with individuals who were not in protected classes to serve as Deans which included terms for tenured professor appointments, a favorable contract provision that was not extended to Complainant.

The terms of the contracts offered to these deans are facially more favorable than the contract offered to Complainant, in that they included tenure at the level of professor or associate professor. Given this apparent disparity, I conclude that Complainant has established a prima facie case of discrimination.

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondent to offer legitimate, non-discriminatory reasons for its conduct. Abramian v. President and Fellows of Harvard College, 432 Mass 107(2000); Wheelock College v. MCAD, 371 Mass. 130 136 (1976); Blare v. Husky Injection Molding Systems Boston, Inc. 419 Mass 437 (1995). Respondent must "produce credible evidence to show that the reason or reasons advanced were the real reasons." Lewis v. Area II Homecare, 397 Mass 761, 766-67 (1986)²

Respondent's articulated reasons for not agreeing to the favorable contract terms Complainant sought are that his proposed terms, (including a multi-year contract, a return to faculty clause and the right to seek tenure) were highly unorthodox and unusually favorable, would have required a "million dollar" financial commitment by UMB, and

² To the extent that Complainant asserts that Respondent's failure to award him tenure at the time of his hire in 1995 was discriminatory and entitles him to a contract with tenure rights in 2003 to compensate him for that failure, his argument fails. Evidence regarding his 1995 and 1998 contracts was admitted only as background information and those earlier contracts are not a part of this case.

essentially would have allowed Complainant eleven years to compete for tenure.³ In addition, Fonteyn did not feel it was prudent from a resource perspective to create another tenured professorship in CPCS at a time when the school had an excessive number of professors given the number of students and its dwindling enrollment. Respondent argues that creating another tenured professorship in CPCS would not have been prudent, given the financial difficulties at UMB and in particular, within CPCS. Since tenure reviews typically involve consideration of up to six years of faculty performance, the provision Complainant sought could have bound UMB to a ten or eleven-year commitment, depending on when Complainant chose to exercise the tenure option. Fonteyn testified that he had never encountered a term like this before and would have never considered such a contract term for anyone. Moreover, in June of 2003, there was no need for another tenured faculty position in CPCS. Enrollments at CPCS had decreased significantly, and there was already an unusually high faculty-to-student ratio in that college. Fonteyn testified that the other departments at the university required far more faculty positions than CPCS. At the time, CPCS cost UMass almost \$7,000 per student, whereas a comparable discipline such as liberal arts, cost \$4,000 per student. CPCS also had the highest "course load releases" of any college, whereby the faculty were released from teaching. Fonteyn did not believe that it was appropriate or financially prudent to extend the college any more tenured faculty positions.

With respect to the multi-year contract extended to Lester Goodchild as Dean of the Graduate School of Education on March 19, 2003, prior to any negotiations over Complainant's contract, Respondent contends that both Gora and Fonteyn were newly

³ Typically faculty had six years in which to establish tenure. Complainant's 1998 contract essentially allowed him five years in which to declare his intent to seek tenure, and six more years to establish tenure, for a total of eleven years.

appointed at the time, and this was Fonteyn's first contract. Once Gora had the opportunity to review Goodchild's contract, she instructed Fonteyn not to enter into any more multi-year contracts with deans. This instruction comported with her long-standing policy of extending only one-year renewable contracts to deans, which she carried over from her previous appointment as a provost at Old Dominion University in Virginia. Once given this instruction, Fonteyn never again negotiated a multi-year contract with a dean. Thus, Respondent has articulated a legitimate non-discriminatory reason which I find credible for the more favorable treatment Goodchild received.

Complainant argues that since most of the other deans had tenure, the denial of tenure to him was discriminatory. However, Gora testified that during the time that she was at UMass Boston, all the individuals offered the position of dean, with the exception of Complainant, had already been awarded tenure at their previous universities, so including the tenured professor appointment in their contracts was merely acknowledging the position they already had achieved. Fonteyn testified that because those individuals had secured tenure, they would not have taken a position as a dean unless tenure was part of the deal. By contrast, at the time Complainant was initially hired by UMB, he had not been awarded tenure by any institution and his initial 1995 contract did not include an offer of tenure or the right to seek tenure in the future, nor was his acceptance of UMB's offer contingent upon tenure.

The offer to Dean Crosby, who lacked traditional academic credentials, did not contain an offer of tenure and contained no language regarding a return to faculty. He was offered a 12-month contract, with annual evaluations and a formal evaluation at the

end of three years. If Crosby had been asked by UMB to relinquish his position as dean prior to the end of three years, he would have received one-year full salary.

Once Respondent has proffered evidence of legitimate, non-discriminatory reasons for its actions, the Complainant must show that Respondent's reasons were a pretext for unlawful discrimination. Complainant offers evidence of incidents which he believes demonstrate that Respondent's actions in failing to renew his contract on favorable terms were a pretext for discrimination. I will address each in turn.

Attempt to create a negative evaluation

Complainant asserts that Fonteyn and Gora deliberately sought to sabotage his performance evaluation by appointing Frank Caro as chair of the committee conducting his evaluation. In the Fall of 2002, Fonteyn was advised by Winston Langley that Complainant was due to be evaluated. Langley, a long-time administrator who had been at UMB for over 30 years was assigned to oversee the process. Langley told Gora and Fonteyn that Complainant had concerns about the Frank Caro heading the evaluation committee. However, Langley assured them that there was no need for concern because Caro was respected for his thoroughness and fairness and was committed to high standards. Ultimately, the committee's report was favorable to Complainant and his concerns about the make-up of the committee were unfounded. I conclude that the appointment of Caro to head the evaluation committee is not evidence of discriminatory animus toward Complainant.

Delay in contract negotiations

Complainant alleges that Fonteyn attempted to delay the contract negotiation process to pressure Complainant to assent to less favorable terms, and that

this is evidence of discriminatory animus. However, after Complainant and Fonteyn met to discuss the Complainant's contract, Complainant himself sought more time to consider Fonteyn's proposal and preferred to schedule a meeting after he returned from his month-long vacation and did not contact Fonteyn while he was away. Thus I conclude that Fonteyn did not deliberately delay contract negotiations with Complainant.

Unfair criticism of Complainant regarding the letter-writing campaign

Complainant argues that Gora unfairly criticized him in connection with a letter-writing campaign in support of CPCS, for which he denies responsibility. In approximately April, 2003, Gora began to receive many letters and e-mails from around the country and around the world, asking her not to close CPCS. Gora reasonably believed that the rumors about closing CPCS had originated with members of the CPCS faculty and that Complainant must have been responsible. In a series of e-mails with Complainant, she asked him how such a campaign could have started; and asked whether he was aware of how damaging it was to the college's reputation. Gora believed that Complainant wasn't doing enough to educate the CPCS faculty about the financial problems of the university at large. While there is no doubt that Gora was dissatisfied with what she viewed as Complainant's failure to communicate to the CPCS faculty the fiscal restraints under which UMB administration was operating, I conclude that there is no evidence that her unfavorable view of his leadership in this regard was related to his race, color or national origin.

Gora's alleged snubs

Complainant alleges that Gora didn't shake his hand when she came to be interviewed at UMB and that she did not acknowledge him at a dinner sponsored by Casa

Latina and that he was the only dean not on the stage at her inauguration.

I did not find credible Complainant's testimony that Gora intentionally snubbed Complainant by refusing to shake his hand when she was interviewed by the search committee at UMB. With respect to the inauguration, Gora testified credibly that she had no knowledge of who was on the stage and that the public relations department was responsible for seating arrangements. With respect to the Casa Latina dinner, I conclude that Complainant's upset that she did not call him before the meeting or acknowledge him at the meeting was not evidence of discriminatory animus.⁴

Salary dispute

Complainant argues that he was entitled to more than \$111,000 in salary after his return to faculty in fall 2003 and that Fonteyn's insistence on a salary commensurate with that of senior full professors at CPCS is evidence of discrimination. When Complainant was first hired as Dean of CPCS in June, 1995, Complainant and then Provost Lou Esposito agreed that if the dean were to relinquish his administrative appointment, he would return to an academic salary of \$65,000, plus the amount of the merit and COLA increases he received during his deanship. Complainant had sought the merit increase and COLA language in 1995 in order to ensure that if he stepped down as dean after several years, he wouldn't be locked into a salary of \$65,000.

When Complainant's contract was renewed in 1998, the contract language was changed by Provost Dick Lyon to state that if he should return to faculty status before or

⁴ There is no doubt that Gora felt some animosity toward Complainant, but I do not attribute this to discrimination but rather to their divergent views of leadership and the importance of CPCS vis a vis the entire university community. MacCormack called Gora "brash" and stated that she got herself in trouble by speaking before she thought. Gora's reputation for being outspoken was evident at the public hearing.

at the end of the contract period, he would be granted a five-year non-tenure track appointment at a salary commensurate with that of senior full professors at CPCS. Respondent argues that the intent and effect of the return to faculty salary provisions contained in the 1995 letter and personnel action form on the one hand, and the 1998 letter on the other are essentially the same: to place Complainant's salary in line with that of the full professors at CPCS as of the date of his return to faculty. Complainant asserts that he was entitled to the higher salary envisioned by the language allowing him to retain the percentage of merit and COLA increases he earned while an administrator. Respondent contends that this is an unreasonable interpretation of the 1998 contract. While Complainant asserts that Respondent's interpretation of the contract is unfair, I conclude that Fonteyn's interpretation of the contract is reasonable and grounded in financial prudence given the university's decline in resources and not evidence of discriminatory animus or a pretext for discrimination.

Title of Lecturer

Complainant argues that Fonteyn's decision to give him the title of "lecturer" instead of "professor" when he returned to the faculty is evidence of discriminatory animus. However, Fonteyn testified credibly that having come from a traditional academic background, he considers the term "professor" to apply to only tenure-track teaching positions at the university, and that all other teachers are in the position of "lecturer." I conclude that Fonteyn's interpretation of the terms "professor" and "lecturer" is not evidence of a discriminatory motive towards Complainant.

Sabbatical

Complainant argues that Fonteyn's refusal to acknowledge his right to a

sabbatical in the fall of 2003 is evidence of discriminatory animus. Complainant claims that under UMB guidelines, he should have been entitled to a sabbatical in the fall of 2003 and that Fonteyn's failure to acknowledge that right is evidence of discriminatory animus. Fonteyn testified credibly that his proposals to Complainant included sabbatical provisions. However, neither Complainant's 1995 contract nor his 1998 contract contained any sabbatical provisions and his unwillingness to provide Complainant with a sabbatical during the fall semester of 2003 was based upon the fact that there was no contractual provision providing such a benefit and is not evidence of discriminatory animus.

Tenure of Hispanic Professors

Complainant argues that Fonteyn downgraded the research category of two Hispanic professors who were up for tenure and this is evidence of his bias based on race or national origin. During the time that Fonteyn was provost, Hispanic professors Raul Ybara and Lorna Rivera came up for tenure review. In his review Fonteyn downgraded both of candidates from "excellent" to "strength" in the category of research, creative and professional activity. Fonteyn testified credibly that he made the decision that these candidates merited "strength" in the category of research, creative and professional activity based upon his professional observations and judgment as Provost and because the Board of Trustees were looking to him for higher standards in tenure decisions. Fonteyn frequently disagreed with recommendations on tenure made by various departments. In his first year as Provost he denied tenure to four of ten individuals up for tenure, including a Caucasian biologist who had received strong support from his department. There was no evidence that downgrading of Ybara and

Rivera from excellent to strength in the category of research, creative and professional activity was because of racial or ethnic animus, particularly since the downgrading did not ultimately affect their eligibility for tenure.

Adrian Walker

Complainant asserts that Fonteyn told Boston Globe columnist Adrian Walker that he was not qualified even to seek tenure; and the statement was evidence of discriminatory animus. After Complainant stepped down as dean, Provost Fonteyn was interviewed by Adrian Walker at the request of UMB administrators. During the interview Walker asked Provost Fonteyn whether Complainant was tenurable at that time; and he responded that he was not. Fonteyn was not asked whether Complainant might ever be eligible to seek tenure in the future. Fonteyn's response was based upon the fact that, at the time, Complainant had minimal teaching experience and had published no peer-reviewed articles. Given that Complainant was in fact deficient in two of the major criteria required for tenure, Provost Fonteyn's response was not evidence of discriminatory animus.

I believe that Complainant's view that he was not being treated fairly by Respondent led him to view all of Respondent's actions as motivated by discriminatory intent based on his race and national origin. However, not every personality conflict, dispute about contract terms, or adverse decision is evidence of discriminatory motive. The record in this matter does not support Complainant's interpretation of events. While Complainant sought to offer evidence of pretext, there is insufficient credible evidence to support a conclusion that the reasons Respondent articulated for its actions were not the real reasons for the failed negotiations, or that Respondent was motivated by

discriminatory intent, motive or state of mind. Lipchitz v. Ratheon Company, 434 Mass. 493, 503 (2001).

I conclude that the failure to come to terms on a contract satisfactory to Complainant was because Respondent believed that the terms he sought were very extremely unorthodox and not financially prudent and would allow Complainant up to eleven years to compete for tenure, when he had been hired as an administrator and not a professor. Moreover, the precarious financial status of CPCS, the fact that it had an excess number of professors for too few students, was a legitimate reason for rejecting a contract that included a provision granting Complainant the right to return to a tenure-track teaching position.⁵ Therefore Complainant has not persuaded me that but for his race, color and national origin, he would have been offered more favorable contract provisions. I conclude that Complainant has failed to prove by a preponderance of the evidence that Respondent's conduct was a pretext for unlawful race and national origin discrimination.

IV. ORDER

For the reasons stated above, the complaint in this matter is hereby dismissed. This constitutes the final decision of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal within ten days of receipt of this order and a Petition for Review within 30 days of receipt of this order.

SO ORDERED, this the 17th day of July, 2009.

JUDITH E. KAPLAN
Hearing Officer

⁵ When he rejected Fonteyn's final contract offer, Complainant returned to faculty under the terms of his 1998 contract which allowed him to compete for tenure.