

COMMONWEALTH OF MASSACHUSETTS

Appeals Court

No. 2017-P-1328

BOARD OF HIGHER EDUCATION,
PLAINTIFF-APPELLANT,

v.

COMMONWEALTH EMPLOYEE RELATIONS BOARD,
DEFENDANT-APPELLEE,

and

MASSACHUSETTS STATE COLLEGE ASSOCIATION,
OTHER INTERESTED PARTY.

ON APPEAL FROM A DECISION OF THE DIVISION OF LABOR RELATIONS

**BRIEF FOR THE PLAINTIFF-APPELLANT
BOARD OF HIGHER EDUCATION**

JAMES B. COX
BBO #103300
SPECIAL ASSISTANT ATTORNEY GENERAL
RUBIN AND RUDMAN LLP
53 State Street
Boston, MA 02109
(617) 330-7000
jcox@rubinrudman.com

Dated: March 1, 2018

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GLOSSARY OF RECORD CITATION ABBREVIATIONS

The abbreviations indicate the following individuals and their respective titles at the time of their testimony:

- Bran: Dr. Johanna Branson, Senior Vice President of Academic Affairs, Massachusetts College of Art and Design
- Mart: Dr. Robert Martin, Vice President of Academic Affairs, Framingham State College
- Hayes: Dr. Robert Hayes, Vice President of Academic Affairs, Westfield State College
- Good: Dr. Amie Marks Goodwin, Dean for Academic Affairs, Salem State College
- Young: Dr. Michael Young, Association Provost of Academic Planning and Administration, Bridgewater State College

STATEMENT OF ISSUES

Does a labor contract provision that limits the assignment of part-time faculty to no more than 15% of the course offerings of most academic departments unlawfully impinge upon the non-delegable managerial authority of the Board of Higher Education ("BHE") and the boards of trustees of the nine state colleges in Massachusetts?

If it does, did the Commonwealth Employment Relations Board ("CERB") err in concluding that BHE violated Mass. Gen. Laws c. 150E, §§ 10(a)(5) and 10(a)(1), when it assigned part-time faculty to teach courses in excess of the contractual limitation?

STATEMENT OF THE CASE

In a complaint issued by the Division of Labor Relations ("DLR") on May 6, 2009, DLR alleged that BHE, acting through the nine state colleges,¹ failed to bargain in good faith with the Massachusetts State

¹ As of October 26, 2010, the Legislature conferred university status on the nine state colleges, and six of those institutions changed their respective names to Bridgewater State University, Fitchburg State University, Framingham State University, Salem State University, Worcester State University and Westfield State University. St. 2010, c. 189. BHE, however, shall refer to the institutions as colleges as the DLR did in its decision.

College Association/MTA/NEA ("MTA") by repudiating the provisions of Article XX, § C(10) of the collective bargaining agreement between them ("Agreement") in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1), of Mass. Gen. Laws c. 150E.

The DLR conducted a public hearing in the matter in 2010 and 2011. RA. at V.I:107. On January 16, 2014, a Hearing Officer issued a decision finding that BHE had repudiated both Article XX, § C(10) and a grievance decision that BHE had rendered on February 23, 2006. RA. at V.I:107-08. On February 6, 2015, CERB affirmed the DLR Hearing Officer's decision in its entirety. This timely appeal followed. RA. at V.I:162.

STATEMENT OF FACTS

I. STATUTORY AND CONTRACTUAL BACKGROUND

While each state college is operated by a board of trustees, the nine colleges are under BHE's superintendence. Mass. Gen. Laws c. 15A, §§ 1, 22 (hereinafter, "Chapter 15A"). BHE is the statutory employer of the colleges' employees, including faculty, and BHE coordinates and defines the mission

of the colleges. Mass. Gen. Laws c. 150E, § 1 and c. 15A, § 1.²

BHE employs faculty in the colleges' undergraduate day programs on either a full-time or a part-time (or "adjunct") basis. RA. at V.IV:242-43. Full-time employees hold tenured, tenure-track, or temporary positions. See RA. at V.II:57. Although BHE is the employer, the colleges' boards of trustees possess the statutory authority to effectuate the appointment of the colleges' employees and to operate the colleges. Chapter 15A, § 22.

In terms of the faculty, each college's Academic Affairs division is in charge of all of the academic programs, including the development and delivery of the curriculum, the academic policies, the academic budget, the management of the academic affairs

² While BHE confers upon the colleges' boards of trustees the power to offer degree programs and award degrees, BHE retains the following powers: to authorize new programs; to consolidate, discontinue or transfer existing programs; to propose the closure or consolidation of campuses; to prepare and submit to the Legislature and the secretary of administration and finance a five year master plan for public higher education; to require each college to submit a five year plan and update it annually; and to possess the overall responsibility for the property, real and personal, occupied or owned by the colleges. Chapter 15A, §§ 1, 4 and 9.

resources, and the supervision of faculty, including their hiring and evaluation. See RA. at V.III Mart:64-65.³

The state colleges are funded primarily through legislative appropriation and student fees. See Mass. Gen. Laws c. 15A, § 22 and c. 73, § 12. BHE sets the tuition rates for the day programs at the colleges, and, with the exception of Massachusetts College of Art and Design ("MassArt") and Massachusetts Maritime Academy, the state colleges pay the tuition collected into the Commonwealth's General Fund. Chapter 15A, § 9. The largest financial commitment of each college is the payroll of tenured faculty. RA. at V.III Good:269.

The colleges' faculty members are represented by the MTA for the purpose of collective bargaining. RA. at V.IV:53. BHE and MTA acknowledge in their Agreement that tenure is the single most important type of decision made by a college because it obligates the college to employ the recipient for the balance of his or her professional life. RA. at V.IV:193. Tenure is therefore a major financial commitment by the institution. Id. Accordingly, before

³ See Glossary for full witness identification.

a college can responsibly make such an employment commitment, it must verify that there will exist student demand sufficient to warrant the lifetime financial obligation. See RA. at V.II Bran:325-26.

BHE and the MTA have been parties to a collective bargaining agreement at all times relevant to this dispute. See RA. V.IV:52; V.V:80. The contract provision at the heart of this matter, Section C(10) of Article XX of the Agreement (hereinafter, "Section C(10)"), states:

Part-Time Appointments: Limitations
This subsection shall be of application only to departments with six (6) or more full-time members.

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

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

Not included in the foregoing are courses or sections taught by part-time employees hired to replace unit members on sabbatical leave of absence, on unpaid leave of absence, on reduced teaching loads for the purpose of alternative professional responsibilities or Association release time, or any other

contractual release time, or any unforeseen emergency.

RA. at V.IV:305-06.

In 2006, the MTA filed a grievance in which it contended many of the colleges were not in compliance with the 15% or 20% cap⁴ in Section C(10). RA. at V.V:109. On February 23, 2006, BHE's grievance hearing officer noted that legislative funding shortfalls experienced by the colleges had resulted in the increased use of part-time personnel to meet their instructional needs. Id. She also noted that these budgetary constraints had made it difficult for the colleges to correct the concomitant contractual violations that resulted from the increased use of part-time faculty. Id. The grievance officer consequently required each college to: (1) "cease and desist" from violating Section (C)(10) - with the proviso that none shall expend moneys it lacks or disrupt academic programs of importance to students; (2) reduce its reliance on part-time faculty "in as great a measure as it judges practicable" so that it is in compliance with the contract by the close of the

⁴ For simplification purposes, BHE shall refer to the cap set forth in Section C(10) as the "15% cap."

2008-2009 Academic Year ("AY"); and (3) instruct the appropriate personnel about requirements of her decision. RA. at V.V:110.

During the following AY, certain departments at Bridgewater State College, Framingham State College, Salem State College, Westfield State College, and MassArt employed part-time instructors in percentages that exceeded Section C(10)'s cap. See RA. at V.V:263.

II. THE NECESSITIES OF EMPLOYING PART-TIME FACULTY

The Colleges employ part-time faculty out of the following necessities: to offer core academic programming to all students; to address fluctuating enrollment; to control costs; to bring practical expertise in particular disciplines into the classroom; and to provide instruction in discrete subject matters such as art, music, theater, and certain foreign languages.

A. Delivery of Core Academic Programming

Each college that exceeded the 15% cap imposed by Section C(10) during the 07-08 AY maintains a core curriculum that it requires of each matriculated student. This core curriculum is the common body of learning that the college deems each graduating student should acquire. RA. at V.III Good:277. It is a

combination of basic competencies, such as reading and writing, computer literacy, history, the sciences, literature, and other required courses, including English Composition and Health and Wellness. Id. As explained by Salem's Dean for Academic Affairs, one of the college's responsibilities is to provide to its students, who come from a variety of environments, a new perspective and a new set of tools that, upon graduation, will enable them to serve as "literate, contributing, socially-aware adults ... in the Massachusetts economy." RA. at V.III Good:277-78. Bridgewater's Associate Provost of Academic Planning and Administration testified the core curriculum is necessary so that when students graduate, they are "knowledgeable in a broad spectrum of knowledge and understanding." RA. at V.III Young:383-84.

The colleges' commitment to providing the core curriculum to every enrolled student necessitates a large number of faculty to teach the required introductory-level courses in the numerous core disciplines, including History, English, Mathematics, Computer Science, Communications Studies, Music, Art, Philosophy, Sociology, and Psychology. RA. at V.III Good:279. To deliver the core curriculum within the

colleges' funding and contractual-workload limits on faculty, the colleges assign many of the introductory-level core courses to part-time faculty. RA. at V.III Good:278-79.

The most difficult of the core courses to staff with full-time faculty are introductory English courses. RA. at V.III Mart:78, Hayes:175-177, Good:279, Young:409. In the 07-08 AY at Westfield, for example, of the approximately 4,288 full-time students, approximately 1,072 were freshmen. RA. at V.III Hayes:175. To satisfy the core curriculum, each freshman had to take English Composition I and II. RA. at V.III Hayes:175-76. In that AY, the English Composition sections were limited to 19 students each. RA. at V.III Hayes:176. Typically, Westfield offers 60 sections of English Composition per AY to meet the students' need. Id. Due to the high number of students requiring English Composition sections in that AY, Westfield was unable to staff each section with a full-time faculty member. Id. In an attempt to remain within the 15% cap, the college hired seven employees on a full-time temporary basis to teach only English Composition. RA. at V.III Hayes:177. Due to contractual limitations, however, these full-time

temporary employees could teach only four (4) sections of English Composition per semester. RA. at V.IV:243 (Art. XII,A(2)(a) of the Agreement); see RA. at V.IV:61. Despite the addition of the seven employees, the English Department still exceeded the 15% cap. RA. at V.III Hayes:178.

As another example from the 07-08 AY, Bridgewater had an undergraduate enrollment of approximately 8,160, of which approximately 1,550 were freshmen. RA. at V.III Young:375. When the faculty themselves, through contractual governance procedures and in accordance with the Agreement, overhauled the prior general education requirement at Bridgewater in the prior decade, they emphasized that writing would be a core skill that would impact the curriculum from the first day of class through graduation. RA. at V.III Young:384, 388. At the time of the core curriculum overhaul, Bridgewater also reduced class sizes in several departments, including English. RA. at V.III Young:386-87. The college capped the core freshman English courses, Writing I and II, at 20 students per course. RA. at V.III Young:409. Due to an increase in freshman enrollment in that AY, all 1,550 freshmen had to take Writing I or II in the fall semester. Id.

Bridgewater had to cover those core courses with part-time instructors, partly because its full-time faculty are specialists in literature, not writing. RA. at V.III Young:411.

Framingham and Salem experienced the same difficulties in complying with the 15% cap in their respective English Departments in the 07-08 AY. RA. at V.III Mart:77, Good:279, 298; see V.V:263. Both colleges hired part-time instructors to staff the numerous sections of introductory writing and composition required of the freshmen, largely because there would be "no one left to teach major courses; and there'd be some very unhappy faculty" if the colleges assigned their full-time faculty members to a full load of introductory courses. RA. at V.III Good:279, 298. As Framingham's Vice President of Academic Affairs testified, the colleges do not hire additional full-time faculty to teach writing and composition because "it's very difficult to sustain and nurture a faculty member who teaches only writing courses," and most doctorally-qualified English professors are not interested in teaching those subjects unless their specialization is writing or rhetoric. RA. at V.III Mart:78, 80, 83. Salem's

Academic Dean agreed, explaining that a Shakespearean scholar does not come to a college to teach four sections of English Composition, and if a college makes a commitment to hire a Shakespearean scholar, there is a "professional obligation to ensure that at least part of the time they're going to teach the specialty they were hired to teach." RA. at V.III Good:285.

Outside of the introductory-level core courses in their English Departments, the colleges also had difficulty staffing the core curriculum courses in their History, Communication, Math and Science Departments with full-time faculty in the 07-08 AY. Salem, Bridgewater and Framingham each offered more core courses in those disciplines than they had available full-time faculty to teach them, and no funding was available to hire additional, full-time faculty. See RA. at V.III Hayes:194-96, Good:298-302, Young:413; V.V:263.

B. Fluctuating Enrollments

The colleges' academic leaders uniformly testified that their institutions also rely upon part-time faculty to accommodate increases in overall freshmen enrollment, as well as to support enrollment

surges in particular majors or departments. For example, between 2005 and 2010, student enrollment in the undergraduate program at Westfield increased by 18%, and the number of academic majors also increased. RA. at V.III Hayes:192-95.

Likewise, at Bridgewater, although the college had increased the number of full-time faculty between 2006 and 2007, due to the contractual limitations on faculty teaching loads, it still did not have enough full-time faculty to absorb the increased enrollment. RA. at V.III Young:398. This is because the overall enrollment rose by approximately 223 students in the 07-08 AY. RA. at V.III Young:396. In four major core areas – English, Mathematics, Communications, and Foundations for Logical Reasoning – the college also had to increase part-time hiring to cover the increased number of course sections. RA. at V.III Young:397-98.

Similarly, in the 08-09 AY at Salem, the overall enrollment rose by approximately 100 students, necessitating the offering of an additional five or six sections of each of the courses those students were taking (if they were all taking the same courses). RA. at V.III Good:294-95. Moreover, in core

courses with capped class sizes, such as English Composition, the college had to add even more sections to accommodate the increased enrollment. Id. Also, interest in the college's Communications major grew faster than the college's corresponding capacity to hire full-time faculty to staff it.⁵ RA. at V.III Good:299. According to the Dean, "[e]nrollment outstripped full-time faculty resources." Id.

Likewise in MassArt's Communications Department, which houses Graphic Design, Illustration and Animation, in the 07-08 AY, Graphic Design and Illustration were two of the largest and the most rapidly-growing majors, with each having approximately 130-150 students, and Animation was also growing. RA. at V.II Bran:335. To meet this increased demand, the college hired part-time faculty in excess of the 15% cap. Id.; see also RA. at V.V:122, 247, 263. During that AY, MassArt's Environmental Design Department, which houses Fashion Design, Architecture and Industrial Design, also exceeded the 15% cap. RA. at V.II Bran:338; see also RA. at V.V:122, 247, 263. Architecture added a Master of Architecture program.

⁵ The process to hire a full-time faculty member can take up to 20 months. RA. at V.II Bran:337.

RA. at V.II:338. Industrial Design lost full-time faculty due to retirements and rebuilding. Id. Fashion Design had "taken off like a rocket." Id. Because the college had already added four positions that year, it did not add any full-time faculty positions to Environmental Design to come within the cap. RA. at V.II Bran:339. To further complicate its staffing dilemma, in 2008 MassArt overhauled its curriculum and reduced all full-time faculty from a four-course to a three-course teaching load (maintaining a twelve-credit total), RA. at V.II Bran:340, which limited the number of courses the college could assign to a full-time faculty member.

C. Cost Control

Pursuant to the Agreement, part-time adjuncts are paid less than tenure-track and full-time temporary faculty.⁶ Tenure-track faculty are paid a minimum of \$55,000, and tenured faculty earn more. RA. at V.III Good:281. Salem's Academic Dean estimates that in the 07-08 AY, a full-time temporary faculty member may have been paid a starting salary of \$50,000. RA. at V.III Good:281. The cost of employment benefits also

⁶ All salaries would have been paid out of the Academic Affairs budgets. Id.

added approximately 30% to the salary of a full-time faculty member. RA. at V.III Good:283-84. An adjunct faculty member, however, would be paid only \$32,000 if carrying a full-time-equivalent course-load (which is not in fact permissible under the Agreement). RA. at V.III Good:245.

At other colleges, significant cost savings are also achieved by hiring part-time rather than full-time instructors. Westfield, for example, did not hire additional full-time faculty in the 07-08 AY. RA. at V.III Hayes:180. As Westfield's Vice President of Academic Affairs explained, if the college had hired eight full-time faculty members, it would have cost between \$400,000 and \$500,000 in salary and benefits. RA. at V.III Hayes:240.

D. Outside Expertise and/or Instruction in Non-Mainstream Subjects

Bridgewater, for example, hires part-time instructors if their area of specialization and/or experience in a field is required to fill a niche need, such as in theater or dance. RA. at V.III Young:393-94. Likewise, MassArt hires practicing artists as adjuncts to teach courses when there is a demand for the content, but that demand is

insufficient to justify the offering of the content for three or four courses each semester via a full-time hire. RA. at V.II Bran:327.

III. AFFIRMATIVE EFFORTS TO ACHIEVE COMPLIANCE WITH SECTION C(10)'S OBJECTIVES

Numerous academic leaders testified about the colleges' sensitivity toward and efforts to comply with Section C(10) following the 2006 grievance decision. The Academic Vice President from MassArt identified: biweekly meetings with her department chairs to review staffing plans, including the hiring of adjuncts; the start of searches for tenure-track faculty; and requests for temporary appointments. RA. at V.II Bran:333. She informed her chairs that it was not only a contractual responsibility, but "a good idea to stay within the twenty percent rule." RA. at V.II Bran:334. She never told the chairs, for example, that she did not care about the cap, or to go ahead and hire for whatever positions they needed. RA. at V.II Bran:340.

Salem's Academic Dean testified that the inability to replace the faculty lost to early retirement incentives resulted in part-time hiring in excess of the 15% cap for 07-08 AY. RA. at V.III

Good:288. For the 08-09 AY, the college was able to bring the Mathematics, Geography, Art, and Marketing Decision Sciences within the cap; however, it was unable to bring Communications, English, or Computer Science within the cap. RA. at V.V:280; RA. at V.III Good:293, 295; see also RA. at V.V:125.

In terms of hard numbers, at Bridgewater, for example, approximately 343 course sections exceeded the 15% cap in the 07-08 AY. See RA. at V.V:263, 119. To have complied with the cap that year, Bridgewater would have needed to hire approximately 43 full-time instructors. RA. at V.III Young:416. Between 2002 and 2010, however, Bridgewater added 63 (from 246 to 309) full-time faculty to compensate for the increase in student enrollment and to replace full-time positions that had become vacant due to retirement or other reasons. RA. at V.III Young:416-17. The college also attempted to manage the cap by encouraging chairs to combine and/or reduce low-enrollment courses, and to increase the class sizes for areas in which the college could not add faculty positions. RA. at V.III Young:399.

At Westfield, in a similar effort to achieve compliance with the 15% cap in the 07-08 AY, and to

compensate for a surge in enrollment in Economics and Management, the college hired two full-time faculty members. RA. at V.III Hayes:198. As occurred at MassArt, Westfield's dean also had regular conversations with department chairs regarding the percentage of adjuncts that they were hiring and about making every attempt to comply with the cap. RA. at V.III Hayes:183.

IV. THE NEGATIVE IMPACT OF COMPLIANCE WITH SECTION C(10)

The academic leaders identified the limited options to achieve compliance with Section C(10)'s 15% cap: (1) increasing class sizes; (2) cancelling sections; (3) requiring full-time faculty to teach lower-level courses; and (4) hiring more full-time faculty. Each academic leader also testified about the negative impact of each option.

In terms of increasing class sizes so fewer instructors are required, Westfield's Vice President of Academic Affairs explained that if the college were to increase the class size for a lab science class, for example, from 19 to 50 students per section, it would be at the expense of the value of the students' education as there would not be sufficient one-on-one

interaction between the faculty member and each student. RA. at V.III Hayes:179. Bridgewater's Associate Provost echoed that keeping class sizes small benefits the students' experience by giving students a better chance of having one-on-one interaction with their instructor. RA. at V.III Young:400. Framingham's Academic Vice President testified the college has made a commitment to keep its Writing classes small (fewer than 20 students per section), and that increasing class size would both negatively impact the quality of the educational experience for students and increase the amount of work for the instructor. RA. at V.III Mart:101.

Salem's Academic Dean testified that the second option of cancelling sections or courses to avoid hiring part-time instructors would lengthen the amount of time it would take for students to complete their degrees, particularly if they are also working to pay for school, as many of the college's students do. RA. at V.III Good:310-11. Eliminating sections would also make it difficult for the college to coordinate an articulated curriculum, especially for professional programs such as nursing, business administration, occupational therapy, social work, and education. Id.;

V.III Good:332-33. She also explained that lengthened time in college could also negatively impact students' ability to obtain financial aid. RA. at V.III Good: 310-11. If the college did not cancel, but rather combined sections, she explained that such a measure would not be advisable in certain disciplines such as art or freshman composition, which has a heavy writing element, or any discipline in which a course is dependent on specially-outfitted classrooms or laboratories. RA. at V.III Good:309.

Making this point more bluntly, Westfield's Academic Vice President testified that if the college simply did not offer all of the sections of English Composition, it would be failing its obligation to the students. RA. at V.III Hayes:178. "I feel like we would not be educating our students." RA. at V.III Hayes:184. MassArt's Vice President of Academic Affairs testified that if MassArt had not hired adjuncts to staff its courses in the 07-08 AY, it would not have been able to offer the courses to support the curriculum, thereby decreasing the quality of the education it offers. RA. at V.II Bran:340. She explained that the courses offered in the 07-08 AY were offered because, in her academic judgment, it was

the best curriculum the college could provide its students. RA. at V.II Bran:340-41.

As to the third option of requiring full-time faculty to teach lower-level courses, Salem's Academic Dean explained that the lower-level courses for freshmen and sophomores at Salem are occasionally understaffed by full-time faculty because the sections are so plentiful and the full-time faculty are already carrying full teaching loads. RA. at V.III Good:278. The academic leaders at Salem, Bridgewater, and Framingham each explained that requiring full-time faculty to teach lower-level courses would have negative implications for professional development, faculty morale, and departmental spirit. RA. at V.III Mart:80, Good:309, Young:405-06. Additionally, at Bridgewater and Salem, the upper-level courses would be left understaffed. RA. at V.III Good:284-85, Young:405.

As to the fourth option to meet the cap, hiring additional full-time faculty, such large cost increases within a finite budget would severely diminish other aspects of academic life. The colleges' leaders uniformly testified that the Academic Affairs budgets supported more than just faculty salaries

(already the largest financial outlay at each college). The Academic Affairs divisions use their remaining funds to engage in numerous initiatives to improve pedagogy, assist learning, and enhance the quality of the colleges' educational offerings. At Salem, for example, the salary budget is also used for the administration of the following: the Center for Faculty; the Center for Teaching Innovation; Sponsored Programs and Research; the Center for Creative and Performing Arts; the Instructional Learning Program and Instructional Media Services; Writing Across the Curriculum; the Honors Program; Commencement; student writing programs; the Research and Writing Initiative; and the Library. RA. at V.III Good:270-74. According to the Dean, all of the programs that benefit the faculty, including the aforementioned, also benefit the students, and "the students are the reason we're there." RA. at V.III Good:273-75. Explaining further, she stated that "[t]he one thing that would be most detrimental to our students [if full-time faculty carried 85% of the course load] would be the impact" on the non-salary budget, as it would shrink drastically, and "[t]here's nothing in that budget

that if taken away would not have a detrimental impact on teaching and learning.” RA. at V.III Good:275.

SUMMARY OF THE ARGUMENT

1. CERB erred as a matter of law by failing to honor the full scope of the non-delegable statutory powers granted to state colleges boards of trustees under Mass. Gen. Laws. c. 15A. CERB erroneously relied upon cases involving primary and secondary education decided under the more limited Section 37 of Chapter 71, and not the applicable and broader Section 22 of Chapter 15A. (Pp. 32-40)

2. CERB also erred as a matter of law in concluding that Section C(10) is merely a procedure and therefore does not limit the colleges’ authority to hire faculty. Put simply, when BHE is unable to implement its managerial vision because of a contractual limitation such as the 15% cap, that limitation functions as a prohibition that blocks educational objectives and efficient management as opposed to a procedure that makes achieving the stated objectives more difficult. Likewise, Section C(10) impermissibly intrudes upon the colleges’ statutory authority to administratively manage personnel and general institutional decisions. Specifically, the 15%

cap impermissibly interferes with the colleges' decisions to utilize part-time faculty as an exercise of their statutory authority over the "administrative management of personnel and the general business of the institution" in accordance with the nondelegable objectives set forth in Section 22 of Chapter 15A. (Pp. 41-48).

3. Finally, CERB erroneously ignored or misconstrued key record evidence. CERB ignored the ample record evidence of the shifting variables the colleges must reconcile each academic year to deliver optimal and cost-effective educational services, including inadequate funding to support a faculty comprised of 85% full-time professors. CERB simply assumed, in direct contradiction of the record evidence, that Section C(10) did not interfere with the colleges' decision to manage the staffing of their curriculum. When CERB did consult the record evidence, it misinterpreted the evidence to arrive at absurd conclusions, such as its finding that BHE could simply transfer a full-time faculty member from one department to another department as a means to avoid the 15% limitation or its finding that BHE can require full-time faculty to teach more sections than required

by the Agreement. These conclusions are illogical, reflect a fundamental misunderstanding of the record evidence, and would result in other contract violations. (Pp. 49-56).

ARGUMENT

I. LEGAL STANDARD

The applicable standard of review is found in Mass. Gen. Laws c. 30A, § 14(7), which provides that a final administrative agency decision will be set aside if, among other grounds, it is "based upon an error of law" or "[u]nsupported by substantial evidence," or it is "arbitrary or capricious, an abuse of discretion or otherwise not in accordance with the law." See Comm'r of Administration and Finance v. Commonwealth Employment Relations Bd., 477 Mass. 92, 96 (2017).

II. CERB ERRED AS A MATTER OF LAW BY FAILING TO HONOR THE FULL SCOPE OF THE NON-DELEGABLE STATUTORY POWERS GRANTED TO STATE COLLEGE BOARDS OF TRUSTEES

The nondelegability doctrine insulates from dilution in a labor agreement decisions of a public employer that are fundamental to the basic direction of the employer's enterprise or within the zone of statutory managerial authority. In other words, the power to make vital, managerial decisions may not be abandoned by the employer in a labor agreement or

limited by an arbitrator. See Massachusetts Coalition of Police v. Northborough, 416 Mass. 252, 255 (1993) (board of selectmen's decision made pursuant to Mass. Gen. Laws c. 41, § 7A, not to reappoint police officer is nondelegable).

A public employer's nondelegable authority is grounded in the powers granted to it by the Legislature. See City of Somerville v. Somerville Mun. Employees Ass'n, 451 Mass. 493, 496 (2008) (mayor's authority to appoint a director of veterans' services, pursuant to Mass. Gen. Laws c. 115, § 10, is exclusive and nondelegable and not subject to collective bargaining or arbitration); Boston v. Boston Police Patrolman's Ass'n, 403 Mass. 680, 684 (1989) (arbitration award prohibiting assignment of only one officer to a car constrained the police commissioner's statutory authority to "appoint, establish and organize the police" and to have control of the department, and must be vacated as decision is nondelegable); Colonel & Superintendent of Massachusetts State Police v. State Police Ass'n of Massachusetts, 2008 Mass. App. Unpub. LEXIS 452, No. 07-P-832, August 6, 2008 (unpublished) (State police colonel has nondelegable, managerial prerogative to

determine officer assignments pursuant to Mass. Gen. Laws c. 22C, § 10).

In addition to the nondelegable authority of the public law enforcement employers cited above, the courts have declared as nondelegable the authority of public elementary and secondary education administrators to formulate educational policy, a power granted to them by the Legislature in Mass. Gen. Laws c. 71, § 37. Likewise, in public higher education, the managerial powers of the boards of trustees of the state and community colleges originate in Section 22 of Chapter 15A. These statutory powers of the boards of trustees are the basis of this appeal.

In 1996, the Supreme Judicial Court ("SJC") had its first opportunity to comment upon the existence of the nondelegability doctrine in the context of public higher education in Higher Education Coordinating Council/Roxbury Community College v. Mass. Teachers Ass'n, 423 Mass. 23 (1996) (hereinafter, "Roxbury Community College"). That case explored the ability of the boards of trustees of the community colleges to cede to an arbitrator their authority in Section 22 of

Chapter 15A to create and fill vacant faculty positions.

After noting that the statutory authority of elementary and secondary school committees originated in Chapter 71,⁷ the SJC then examined Section 22 of Chapter 15A, which provides in part:

Each board of trustees of a community College or state College shall be responsible for establishing those policies necessary for the **administrative management of personnel**, staff services and the **general business of the institution** under its authority. Without limitation upon the generality of the foregoing, each such board shall: ... appoint, transfer, dismiss, promote and award tenure to all personnel of said institution

Chapter 15A, § 22 (emphasis supplied). Contrasting the two statutes, the SJC concluded that the authorities in Section 22 are broader than those in Chapter 71:

The language of § 22 is **more emphatic and detailed than were the cognate provisions of c. 71** in defining the duties and the scope of the authority assigned to the boards of trustees of the Commonwealth's public colleges and universities. Various provisions of c. 15A acknowledge the

⁷ In relevant part, Section 37 of Chapter 71 provides: "The school committee ... shall have the power to select and to terminate the superintendent, shall review and approve budgets ..., and shall establish educational goals and policies for the schools ... consistent with the requirements of law and statewide goals and standards established by the board of education."

importance of providing a high quality and affordable program of higher education At a general level, similar considerations apply to the governance of all public educational institutions.

...

Faculty and teaching appointments, in particular, are the defining elements of an educational institution's quality and programs. **As a matter of policy and legislative directive, the College, through its board of trustees and ... administrators, should retain sole authority for determining the content of its educational curriculum, and the optimum system for the delivery of the academic programs and related services it deems necessary.**

Roxbury Community College, 423 Mass. at 29-30 (emphasis supplied). Accordingly, the scope of authority granted to school committees in Chapter 71 is too limited and narrow to guide the present determination of the nondelegability of the powers granted to the state college boards of trustees in Section 22 of Chapter 15A.

The disparity between the statutory authorizations granted to state college boards of trustees and school committees is emphasized by the Legislature's statement that the state college boards themselves are an integral component of the Commonwealth's "policy" to provide citizens of the

Commonwealth broad access and opportunity to participate in academic and educational programs:

It is hereby declared to be **the policy of the commonwealth** to provide, foster and support institutions of public higher education that are **of the highest quality, responsive to the academic, technical and economic needs of the commonwealth and its citizens, and accountable to its citizens through lay boards,** in the form of the board of higher education and the boards of trustees of each of the system's institutions.

Chapter 15A, § 1 (emphasis supplied). The authority of colleges' boards of trustees thus extends far beyond specific appointment decisions to include the overall "administrative management of personnel" and the "general business" of the institution. As the SJC stated, the legislative powers of the colleges' boards encompass creating "the optimum system for delivery of academic programs and related services." Roxbury Community College, at 31.

Although CERB acknowledged that Roxbury Community College upheld the longstanding premise that specific appointment decisions concerning teachers are nondelegable, RA. at V:I:187-188, CERB took no further guidance from the SJC in that decision. Rather, CERB merely referenced Roxbury Community College's holding to support its conclusion that "appoint" can only mean

the appointment of a specific employee, as opposed to creating the optimal mix of employees (which will vary from campus to campus and time to time, but might be closer to a 1:3 blend of part-time employees and tenure track full-time faculty under certain circumstances). RA. at V:I:189. When analyzing BHE's arguments, CERB failed to even consider the numerous other "more emphatic and detailed" powers granted to state college boards of trustees by Section 22, particularly the powers to administratively manage personnel and the general business of the institution, as recognized by the SJC in Roxbury Community College. See 423 Mass. at 29-30. CERB failed to even note, let alone follow, the SJC's holding that college leaders retain "sole authority for determining ... the optimum system for delivery of the academic programs and related services [they] deem[] necessary." Id., at 30; RA. at V:I:190.

To the contrary, in analyzing BHE's arguments, CERB relied upon cases involving primary and secondary education decided under the more limited Chapter 71, and not the applicable, broader Section 22 of Chapter 15A. Inexplicably, CERB focused on whether there had been a "change in educational policy" since Section

C(10) was negotiated, a concept applicable under Chapter 71,⁸ but not Chapter 15A. RA. at V:I:190. CERB wholly ignored the Commonwealth's "policy" for public higher education set forth in Section 1 of Chapter 15A, which the colleges' boards were created to advance. More specifically, CERB failed to respect the legislative command that the colleges are to be responsive to citizens' academic needs, and that the boards of trustees are to be accountable to the citizenry (and not narrower interest groups such as unions or the faculty) for fostering the "highest quality" higher educational programming possible.

In Roxbury Community College, the SJC expressly recognized that the managerial authority of a state college extends beyond appointing one or several individual members of the faculty. Further, the SJC explained that even an elementary or secondary school administrator must retain:

relatively unfettered discretion to make decisions concerning staffing and personnel in light of **shifts in curricular emphasis,**

⁸ See, e.g., Berkshire Hills Reg. Sch. Dist. Comm. v. Berkshire Hills Ed. Ass'n, 375 Mass. 522, 523 (1978) ("power to appoint a principal comes within the area of the school committee's nondelegable, managerial prerogative over educational policy, which is not a proper subject for collective bargaining.")

fluctuating student enrollments and the availability of resources.

Id. at 28 (emphasis supplied). Whereas the SJC held that the powers of the colleges' boards are even more broad than those of an elementary or secondary school administrator, logic dictates that the colleges' boards must also enjoy the same "unfettered discretion" to manage their personnel and the overall business of the colleges without being limited by a labor contract provision that unduly restricts their staffing decisions (allowing adjuncts to form only 15% of most core departments' faculty body), creates obstacles to curricular choices, and requires the inefficient expenditure of payroll dollars. See Mass. Community Coll. Council v. Mass. Bd. of Higher Ed., 81 Mass. App. Ct. 554, 560-561 (2012). Section C(10) unlawfully intrudes upon the nondelegable powers of college administrators, and potentially handicaps every student hoping to receive an affordable, public college education in Massachusetts.

III. CERB ERRED AS A MATTER OF LAW AS SECTION C(10) PROHIBITS THE COLLEGES FROM HIRING PART-TIME FACULTY IN CONTRAVENTION OF THEIR STATUTORY AUTHORITY TO DELIVER SERVICES IN A MANNER THAT IS EDUCATIONALLY OPTIMAL AND COST EFFECTIVE

Section C(10) limits to 15% the number of course sections in most departments that part-time instructors may teach. The record illustrates numerous instances of departments across the state college system that exceeded the cap during the 07-08 AY, despite the colleges' efforts to work within the cap.

A. Section C(10) is a Prohibition on Robust Alternative Faculty Hiring, Not a Procedure for Hiring Faculty

CERB upheld the DLR hearing officer's conclusion that Section C(10) is merely a procedure, *i.e.*, a means of implementing an educational policy, and therefore does not limit the colleges' authority to hire faculty. RA. at V:I:188. Putting aside the underlying flaw in CERB's application of a Chapter 71 concept to its analysis of authorities granted to the colleges' boards under Chapter 15A, CERB reasoned that Section C(10) comes into play only after the college has decided how many students to admit and, therefore, how many classes must be taught and how many faculty members will be required. RA. at V:I:190. CERB concluded that Section C(10)'s limitation does not

interfere with the colleges' managerial decisions regarding how many students to admit or which and how many classes to teach.

While BHE agrees with CERB that the number of students to admit, faculty to be hired, and classes to be offered are managerial decisions, RA. at V:I:192, so, too, are policy decisions concerning the proper modality of instruction, the curriculum, and class size. When BHE is unable to implement its managerial vision because of a contractual limitation such as the 15% cap, that limitation functions as a prohibition that blocks educational objectives and efficient management, not simply a procedure that makes attaining goals more complicated. When there is tension between multiple managerial determinations, such as the number of students to admit, the size of classes, and the number of faculty to hire within a set budget, the alleviation of such tension inherently constitutes an exercise of managerial authority.

To reiterate, it is the stated policy of the Commonwealth to provide affordable access to an expansive, high-quality college education to the Commonwealth's citizens, and the colleges' boards were created to help fulfill the Commonwealth's goal.

Chapter 15A, § 1. Like every public agency, the colleges receive such funding as has been appropriated by the Legislature, plus the fees they are statutorily permitted to collect from students. In many cases, the academic leaders determined that employing specialized part-time faculty in a ratio exceeding 15% of the whole faculty body⁹ would be the "optimum system" to satisfy the Commonwealth's objective of serving as large a student population as possible, utilizing the fiscal resources available to them. As the record demonstrates repeatedly, however, hiring at the level required to meet this goal and fulfill the Commonwealth's policy exceeded Section C(10)'s cap and was thereby prohibited.

This contractual limitation forces the colleges to accept one of two negative consequences: either

⁹ Adjunct, contingent faculty now constitute approximately 70% of faculty providing instruction at colleges and universities nationwide. *See The Way Forward, Envisioning New Faculty Models for a Changing Professoriate*, The College and University Professional Association for Human Resources (Winter, 2017-18), https://www.cupahr.org/hew/files/HEWorkplace-Vol9No3-New%20Faculty%20Models_Feature.pdf.; Audrey Williams June, *Adjuncts Build Strength in Numbers; The New Majority Generates a Shift in Academic Culture*, The Chronicle of Higher Education (November 5, 2012), <https://www.chronicle.com/article/Adjuncts-Build-Strength-in/135520>.

students are denied appropriate educational services; or, the colleges' "optimum system" for delivering the educational experience must be abandoned. See 423 Mass. at 30. In either case, the Commonwealth's stated mission in § 1 of Chapter 15A to provide and support quality higher education to as many citizens as possible, while relying on a modest legislative appropriation, can never be fully realized. Contrary to CERB's conclusion, Section C(10) does not guide the colleges in the process of delivering educational services; at a certain point it operates as blanket prohibition on the efficient delivery of educational services.

In light of the lack of abundant economic resources, there is no method, system, or strategy by which the state colleges can engage part-time faculty in strict compliance with the 15% cap without sacrificing other nondelegable objectives at the expense of the very citizenry they have been created to serve. Once the 15% limit is reached, the further hiring of part-time faculty, regardless of their merit or the needs of or consequences to students, is prohibited. Section C(10) is absolute and unyielding, impervious to the academic judgment of the colleges'

administrators and unaffected by the needs of the students they serve.

B. Section C(10) Impermissibly Intrudes Upon the Colleges' Authority to Administratively Manage Personnel and General Institutional Business

The contractual cap on the hiring of part-time faculty usurps more than the colleges' nondelegable authority "to appoint." The cap impermissibly interferes with the colleges' decisions to utilize part-time faculty as an exercise of their statutory authority over the "administrative management of personnel and the general business of the institution." See Chapter 15A, § 22. It is axiomatic that the general business of a college is the education of students, which cannot be achieved without hiring *and supporting* faculty, establishing a curriculum, and scheduling classes.

Although the definition of "management of personnel" is largely self-evident, it encompasses far more than hiring and firing. To BHE, "management of personnel" means administering employment in a manner to most efficiently utilize available resources and achieve the goals of the colleges. This definition is supported by the language of Section 22 of Chapter

15A, and by the SJC's interpretation of that language in Roxbury Community College.

Several of the colleges' academic leaders testified that their institutions lacked sufficient funds to achieve their curricular goals without the engagement of substantial numbers of part-time instructors. RA. at V:III Mart:85, Hayes:180, Good:312. As they uniformly testified, Section C(10)'s limitation on their utilizing less expensive part-time faculty threatens a deleterious impact upon virtually every aspect of the college education they are able to provide. Similarly, they testified that any mechanism¹⁰ by which the colleges could avoid the hiring of part-time instructors would negatively impact the college community.

For example, without part-time instructors, the colleges simply cannot fully deliver their core

¹⁰ In addition to the alternative mechanisms discussed above, CERB also identified controlling matriculation as an option available to BHE, RA. at V:I:192, but CERB's finding in that respect is contrary to the Legislature's policy and the statutory mission of BHE and the colleges.

curriculum¹¹ with an acceptable level of quality and accessibility. Classes would either have to be greatly increased in size, thereby lowering the value and quality of the education the colleges could provide by limiting students' ready access to their professors, or course sections would have to be dropped, thereby lengthening the time necessary for students to obtain their degrees, at an increased personal cost and with the potential for loss of financial aid. RA. at VIII Good:311, Young:405. Moreover, without part-time instructors, full-time faculty would be relegated to teaching mainly introductory courses and be deprived of the ability to focus on the upper-level courses in their areas of expertise. RA. at V:111 Mart: 80, 84, Good:279, 284.

Similarly, without part-time instructors, the colleges will have difficulty coordinating a complex, sequential curriculum necessary for certain majors. RA. at V:III Good:311, 332, 333. Without part-time instructors, the colleges will not be able to bring

¹¹ Bridgewater adopted a core curriculum in the fall semester of 2006. RA. V.III Young:387. Massachusetts College of Art reduced faculty workloads in the 07-08 AY. RA. V.VII Branson:338,339. If CERB sought a policy change, there was evidence of more than one on the record.

the level of specialization and content expertise necessary to support other majors' curricula. RA. at V:III Hayes:188-190, Good:270-274, Young:376-377.

Further, without part-time instructors to offset the cost of full-time faculty, other important initiatives of the Academic Affairs divisions cannot be sustained. RA. at V:III Hayes:169, Good:297, Young:407, 408, 413. The finite pool of funds from which the Academic Affairs budgets are drawn will be devoted nearly exclusively to faculty salaries, leaving only a pittance available for other programmatic efforts that support both students and faculty. Everything that Academic Affairs does to improve the education the colleges provide — undertakings such as faculty training, professional development, faculty travel, student honors programs, etc. — will be starved if cost savings cannot be achieved through the efficient hiring of faculty. Hiring adjuncts at a lower cost gives the colleges the ability to provide other services fundamental to a complete college education.

C. CERB Ignored the Ample Record Evidence of the Shifting Variables the Colleges Must Reconcile Each AY to Deliver Optimal and Cost-Effective Educational Services

In Chapter 15A, the Legislature created a system of state and community colleges to provide affordable public higher education of the highest quality to the Commonwealth. These state institutions are the best, and, possibly, the only, opportunity for many to obtain an affordable college education. This system of public higher education operates through the governance of colleges' boards of trustees, which have been entrusted and empowered by the Legislature to have comprehensive control over the colleges' general business and personnel. No part of the boards' nondelegable statutory authority can be lawfully hobbled by a labor contract.

By focusing only on the colleges' authority to "appoint" faculty, CERB failed to consider the record evidence of the constellation of shifting variables that the colleges confront each AY in their effort to comply with the Commonwealth's statutory directives. The colleges' authority to staff their curriculum cannot be considered in only a sterile vacuum of statutory interpretation; rather, it must be evaluated

in full consideration of the factual realities that inform the colleges' decision-making. As the record evidence abundantly demonstrates, these realities include:

- inadequate funding to support a faculty comprised of 85% full-time professors;
- the need to provide instruction in a multitude of mandatory courses for **all** freshmen in their first year;
- the need to maintain a reasonable class size and student-to-faculty ratio;
- the need to employ experienced faculty in a manner that capitalizes on their expertise;
- the need to reserve a considerable pool of funds for non-payroll pedagogical programming; and
- the need to fulfill the Commonwealth's directive to keep their doors open to all interested and qualified citizens.

See RA. at V.III Hayes:240; V.III Good:277; V.III Hayes:179; V.III Mart:80, 84; V.III Good:279, 284; V.III Good:270-745.

The Legislature has determined that it is the colleges' boards of trustees who must grapple with all of the above - sometimes clashing - realities, in addition to other - always unpredictable - factors such as shifting enrollments and spikes in demand for certain academic content. CERB assumed, without regard for and in direct contradiction of the actual record

evidence, that Section C(10) did not interfere with the colleges' ability to readily manage the staffing of their curriculum. See RA V:I:9, 133-134. The record evidence of the colleges' struggles to staff their curriculum over the last decades proves CERB's assumption to be fatally flawed.

Section C(10) obstructs the colleges' authority to deliver educational services to deserving students in a manner that is educationally first-rate and cost effective. Without the ability to hire part-time instructors as they see necessary and appropriate, college leaders are unable to execute their statutory authority to optimally manage their personnel and institutional business in fulfillment of the Commonwealth's mission to provide a quality, affordable higher education to its citizens.

D. CERB's Misinterpretation of Other Record Evidence Resulted in Unsupported and Illogical Conclusions

When CERB did consult the record evidence, it misinterpreted the evidence to arrive at absurd conclusions. For example, as an alternative to hiring part-time faculty in excess of the 15% cap, CERB found BHE could simply reassign faculty from a department that had complied with Section C(10) to a department

that had not complied. RA. V:I:115. CERB's finding that a transfer of a full-time faculty member from one department to another as a means to avoid the 15% cap is not only illogical – one cannot assume that historians can teach philosophy¹² – but also reflects a misunderstanding of the record evidence. When the union president testified regarding a “transfer of personnel,” she was not referring to an exchange of faculty from one department to another. RA. V.II Markunas: 173. Rather, she was suggesting the college could terminate a full-time position in a compliant department, replace that position with part-time positions, reallocate the full-time position to a non-compliant department, and then hire a full-time position in the second department. RA. V.II:103,172-

¹² After commenting that BHE could avoid a Section C(10) 15% cap violation “by shifting full-time faculty members from compliant to non-compliant departments,” the CERB decision remarks in a footnote that “the [BHE] did not cite any limitation on a college’s ability to shift faculty members from one area of competence to another.” RA. at V:I;115 n.8. But it can hardly be disputed that, at the university level, areas of teaching competence are generally *defined* by academic departments and shifting faculty from one department to another, especially involuntarily, would typically be wholly infeasible.

173.¹³ CERB's inapposite conclusion is unsupported by substantial record evidence.

Even if CERB's interpretation of the MSCA president's testimony were correct, the termination of a full-time faculty member in one department to make room elsewhere for a different full-time employee would implicate the job security rights under the labor agreement of the terminated employee and trigger a right to a hearing before the college's board. See V.IV: 197-201, 310. Equally important, such a realignment of personnel implicates the same statutory powers of the college to organize the institution, declare and fill vacancies, and terminate or retrench employees as does Section C(10). In fact, CERB's approved means of achieving Section C(10) compliance - the removal of full-time personnel from one department in order to engage different full-time personnel in another department (acts that are plainly within the employer's prerogatives) - only serves to more fully

¹³ Besides the fact that such reorganization clearly implicates educational policy and is not the sort of bureaucratic "procedure" that might appropriately be the subject of bargaining, this suggestion plainly cannot be implemented rapidly and fails to account for the fact that student demand for academic content often shifts markedly from semester to semester.

demonstrate the extent to which Section C(10) impedes the colleges' statutory powers. Moreover, CERB's misinterpretation of the record evidence in suggesting this method of Section C(10) compliance results - absurdly - in a violation of the job security provisions of the Agreement. Here, too, CERB's conclusion is legally and factually unsupported.

Additionally, in its finding that the colleges can require full-time faculty to teach more sections than required by the Agreement (CERB decision at 9, line 7; RA V:I:115), CERB's misinterpretation of the evidence encourages a similar contract violation. The contract precludes college administrators from requiring faculty to teach more than four sections each semester. RA. V.II:242; see RA. V:IV:243 (Article XII,A(2)(a) of the Agreement limits teaching workload to 12 credits per semester/24 per AY). The colleges have no contractual power to require a faculty member to teach additional sections. Again, CERB's unsupported reading of the record evidence would result in yet another contract violation.

Furthermore, CERB's conclusion that an increase in the number of part-time employees has an adverse impact on department chairs by unduly increasing their

supervisory responsibilities is unsupported by substantial record evidence. RA. V:I:116. The parties anticipated the occasions when department chairs might face increased workload due to additional personnel and accordingly negotiated increases in release time for chairs based upon the number of faculty in their department. See id.

Finally, CERB incorrectly interprets the record evidence to find that:

[a]s the number of part-time faculty increases, ... the number of full-time faculty available ... to pursue continuing scholarship (e.g., research, publishing and presentation at conferences) declines [along with] a corresponding decrease in a full-time faculty member's ability to meet and work one-on-one outside the classroom with an increased number of students.

RA. V:I:116-117. The record shows, however, that the colleges are hiring more adjuncts to teach required lower-level core courses so that full-time faculty can teach primarily upper-level courses in their subject matter expertise with *fewer* students, see RA. at V:III Mart:80, 84, Good:279, 284. By logical extension, therefore, full-time faculty would have *more* time for scholarship. To implement CERB's prescriptions for contract violation avoidance (nos. 2, 5, or 6, on pp. 9-10 of its Decision, see RA. V:I:115-116) would

actually mean the colleges' full-time faculty would assume *greater* responsibility for the time-consuming remedial needs of far-*larger* numbers of freshmen.

By these factual errors, misinterpretations of facts, illogical conclusions, and misunderstanding of Section C(10), CERB is plainly implying that maintaining a department comprised of more than 15% part-time faculty can rarely, if ever, be a positive method of educating college students. Whether increased reliance on adjunct faculty (an inescapable nationwide reality: see footnote 8, supra) entails more negatives than positives is, of course, a determination that belongs to the boards of trustees of the colleges, not CERB. *E.g.*, Chapter 15A, §§ 1 and 22.

CONCLUSION

For all of the foregoing reasons, and most notably because Section C(10) encroaches upon the core statutory and nondelegable authority of the colleges' boards of trustees, and is thus contrary to law, CERB's decision must be overturned.

Respectfully submitted,

/s/ James B. Cox

JAMES B. COX
BBO #103300
SPECIAL ASSISTANT ATTORNEY GENERAL
RUBIN AND RUDMAN LLP
53 State Street
Boston, MA 02109
(617) 330-7000
jcox@rubinrudman.com

Dated: March 1, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this first day of March 2018, I have served the Brief and Appendix (Volumes I - V) in Appeals Court No. 2017-P-1328 via the Massachusetts Tyler Host electronic filing system upon:

T. Jane Gabriel
Department of Labor Relations
19 Staniford Street, 1st Floor
Boston, MA 02114-2997
Efile.DLR@massmail.state.ma.us
Jane.Gabriel@state.ma.us

Laurie R. Houle
Mass. Teachers Association
2 Heritage Drive, 8th Floor
N. Quincy, MA 02171-2119
lhoule@massteacher.org

/s/ James B. Cox

JAMES B. COX

MASS. R. A. P. 16(k) CERTIFICATION

In accordance with Mass. R. A. P. 16(k), I certify that this brief complies with the rules of court that pertain to the filings of briefs, including Mass. R. A. P. Rules 16(a)(6); 16(e); 16(f); 16(h); 18; and 20.

/s/ James B. Cox

JAMES B. COX

ADDENDUM

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§ 1. Policy and goals, MA ST 15A § 1



KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)

Chapter 15A. Public Education (Refs & Annos)

M.G.L.A. 15A § 1

§ 1. Policy and goals

Effective: July 1, 2015

Currentness

It is hereby declared to be the policy of the commonwealth to provide, foster and support institutions of public higher education that are of the highest quality, responsive to the academic, technical and economic needs of the commonwealth and its citizens, and accountable to its citizens through lay boards, in the form of the board of higher education and the boards of trustees of each of the system's institutions. The board of higher education shall provide orientation, professional development and support for the boards of trustees in areas including, but not limited to, system-level initiatives, trustee accountability, recruitment and board responsibilities.

It is hereby further declared that in pursuit of its stated goals, the system of public higher education will strive for excellence in its programming and strengthen the access of every individual in the commonwealth to educational opportunities.

It is hereby further declared that by maintaining a high quality system of public colleges and universities, the commonwealth moves toward achieving the following goals:--

(a) to provide its citizens with the opportunity to participate in academic and educational programs for their personal betterment and growth, as well as that of the entire citizenry;

(b) to contribute to the existing base of research and knowledge in areas of general and special interest, for the benefit of our communities, our commonwealth and beyond; and

(c) to understand the importance of higher education to the future of the economic growth and development of the commonwealth, and, by so doing, prepare its citizens to constitute a capable and innovative workforce to meet the economic needs of the commonwealth at all levels.

The board of higher education, in this chapter called the board or the council, shall be responsible for defining the mission of and coordinating the state's system of higher education in accordance with the provisions of this chapter. The council shall work with boards of trustees to identify and define institutional missions, taking into account regional needs, as well as to define each institution's role within the greater system. Said institutional missions shall also relate to the mission the council shall identify for each category of institution within the system, including the University of Massachusetts, the state university, and community college segments. All mission statements shall be subject to review and approval by the secretary of education, in this chapter called the secretary. The council shall be responsible for publishing such mission statements, which shall be used for purposes of accountability, efficiency, and focus.

§ 1. Policy and goals, MA ST 15A § 1

The board shall work in conjunction with boards of trustees to hold the system accountable for achieving its goals and establishing a comprehensive system to measure quality by defining educational achievement and success with the use of standards and measurements. The council shall encourage an economical and effective use of the resources of the commonwealth with particular emphasis upon the development of regional and local consortia and related co-operative arrangements by and between public and independent institutions of higher education.

The board shall,¹ work to coordinate its activities within a framework of an integrated public education system extending from early childhood programs through the university level, to promote coordination and greater benefits to students. The council shall also encourage collaboration between educational institutions and business and industry in order to promote employment opportunities and educational improvements.

In achieving these ends the council shall foster decision-making close to the actual learning environment. The council shall encourage participation in that process by students, faculty, and the general public in an effort to create and maintain a system of higher education which provides the cultural, economic and personal growth opportunities to enrich and empower the lives of the people of this commonwealth.

Credits

Added by St.1991, c. 142, § 7. Amended by St.1996, c. 151, §§ 43 to 45; St.1996, c. 365, § 4; St.1997, c. 66, § 3; St.2008, c. 27, § 10, eff. Mar. 10, 2008; St.2010, c. 189, § 7, eff. Oct. 26, 2010; St.2015, c. 46, § 35, eff. July 1, 2015.

Footnotes

1 So in enrolled bill.

M.G.L.A. 15A § 1, MA ST 15A § 1

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§ 22. Board of trustees of community colleges or state..., MA ST 15A § 22



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Proposed Legislation

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)

Chapter 15A. Public Education (Refs & Annos)

M.G.L.A. 15A § 22

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

Effective: April 13, 2017

Currentness

Each board of trustees of a community college or state university shall be responsible for establishing those policies necessary for the administrative management of personnel, staff services and the general business of the institution under its authority. Without limitation upon the generality of the foregoing, each such board shall: (a) cause to be prepared and submit to the secretary and the council estimates of maintenance and capital outlay budgets for the institution under its authority; provided further, that the local board of trustees of a community college shall annually submit a report detailing estimates of maintenance, capital outlay budgets and proposed property acquisitions for the institution under its authority to the house and senate committees on ways and means, the secretary of administration and finance and the commissioner of capital asset management and maintenance on or before December 31; (b) establish all fees at said institution subject to guidelines established by the council. Said fees shall include fines and penalties collected pursuant to the enforcement of traffic and parking rules and regulations. Said rules and regulations shall be enforced by persons in the employ of the institution who throughout the property of the institution shall have the powers of police officers, except as to the service of civil process. Said fees established under the provisions of this section shall be retained by the board of trustees in a revolving fund or funds, and shall be expended as the board of the institution may direct; provided that the foregoing shall not authorize any action in contravention of the requirements of Section 1 of Article LXIII of the Amendments to the Constitution. Said fund or funds shall be subject to an audit by the state auditor, in accordance with generally accepted government auditing standards, as often as the state auditor determines is necessary; (c) appoint, transfer, dismiss, promote and award tenure to all personnel of said institution; (d) manage and keep in repair all property, real and personal, owned or occupied by said institution; (e) seek, accept and administer for faculty research, programmatic and institutional purposes grants, gifts and trusts from private foundations, corporations, federal agencies, alumnae and other sources, which shall be administered under the provisions of section two C of chapter twenty-nine and may be disbursed at the direction of the board of trustees pursuant to its authority; (f) implement and evaluate affirmative action policies and programs; (g) establish, implement and evaluate student services and policies; (h) recommend to the council admission standards and instructional programs for said institution, including all major and degree programs provided, however, that said admission standards shall comply with the provisions of section thirty; (i) have authority to transfer funds within and among subsidiary accounts allocated to said institution by the council; (j) establish and operate programs, including summer and evening programs, in accordance with the degree authority conferred under the provisions of this chapter; (k) award degrees in fields approved by the council; either independently or in conjunction with other institutions, in accordance with actions of the boards of trustees of said other institutions and the council; (l) submit a 5-year master plan to the secretary and the council, which plan shall be subject to the secretary's approval, in consultation with the council, and shall be updated annually according to a schedule determined by the secretary and the board in consultation with the board of trustees; (m) submit financial data and other data as required by the secretary and the board of higher education for the careful and responsible discharge of their purposes, functions, and duties. The data shall be reported annually to the secretary and the board of higher education according to a schedule determined by the secretary and the board of higher education in consultation with the board of trustees. The board of

§ 22. Board of trustees of community colleges or state..., MA ST 15A § 22

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

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

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

Credits

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

Notes of Decisions (5)

M.G.L.A. 15A § 22, MA ST 15A § 22

Current through the 2017 1st Annual Session

§ 37. Powers and duties; superintendent serving joint districts, MA ST 71 § 37



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Proposed Legislation

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XII. Education (Ch. 69-78a)

Chapter 71. Public Schools (Refs & Annos)

M.G.L.A. 71 § 37**§ 37. Powers and duties; superintendent serving joint districts****Effective: July 27, 2010****Currentness**

The school committee in each city and town and each regional school district shall have the power to select and to terminate the superintendent, shall review and approve budgets for public education in the district, and shall establish educational goals and policies for the schools in the district consistent with the requirements of law and statewide goals and standards established by the board of education. The school committee in each city, town and regional school district may select a superintendent jointly with other school committees and the superintendent shall serve as the superintendent of all of the districts that selected him.

Credits

Amended by St.1993, c. 71, § 35; St.2010, c. 188, § 59, eff. July 27, 2010.

Notes of Decisions (234)

M.G.L.A. 71 § 37, MA ST 71 § 37

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§ 10. Prohibited practices, MA ST 150E § 10



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Proposed Legislation

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XXI. Labor and Industries (Ch. 149-154)

Chapter 150E. Labor Relations: Public Employees (Refs & Annos)

M.G.L.A. 150E § 10

§ 10. Prohibited practices

Currentness

(a) It shall be a prohibited practice for a public employer or its designated representative to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

(2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;

(3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;

(4) Discharge or otherwise discriminate against an employee because he has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because he has informed, joined, or chosen to be represented by an employee organization;

(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section six;

(6) Refuse to participate in good faith in the mediation, fact-finding, and arbitration procedures set forth in sections eight and nine;

(b) It shall be a prohibited practice for an employee organization or its designated agent to:

(1) Interfere, restrain, or coerce any employer or employee in the exercise of any right guaranteed under this chapter;

(2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section six;

(3) Refuse to participate in good faith in the mediation, fact finding and arbitration procedures set forth in sections eight and nine.

§ 10. Prohibited practices, MA ST 150E § 10

Credits

Added by St.1973, c. 1078, § 2. Amended by St.1974, c. 589, § 2.

Notes of Decisions (115)

M.G.L.A. 150E § 10, MA ST 150E § 10

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

In the Matter of

BOARD OF HIGHER EDUCATION

and

MASSACHUSETTS STATE
COLLEGE ASSOCIATION/MTA/NEA

Case No. SUP-08-5396

Date Issued: February 6, 2015

Board Members Participating:¹

Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

Appearances:

James B. Cox, Esq. - Representing the Board of Higher Education
Laurie R. Houle, Esq. - Representing the Massachusetts State College
Association/MTA/NEA

CERB DECISION ON APPEAL

1 SUMMARY

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

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

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

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

11 ADMISSIONS OF FACT

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

- 14 1. The Board is a public employer within the meaning of Section 1 of the Law.
- 15 2. The Association is an employee organization within the meaning of Section 1
- 16 of the Law.
- 17 3. The Association is the exclusive collective bargaining representative for
- 18 certain faculty employed by the Employer.
- 19 4. The Association and the Board are parties to a collective bargaining
- 20 agreement for the period July 1, 2004 to June 30, 2007 (Agreement).
- 21 Pursuant to a Memorandum of Agreement dated August 27, 2007, the
- 22 Agreement was effective at the time the dispute arose.
- 23 5. Article XX, § C(10) of the Agreement states:
- 24
- 25
- 26
- 27
- 28

29 Part-Time Appointments: Limitations

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

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

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

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

15 STIPULATIONS OF FACT

- 16 1. On February 23, 2006, the Board issued a grievance decision, requiring, in part,
 17 that each college commencing no later than the fall semester of the academic
 18 year 2006-2007, reduce its improper reliance on part-time faculty.
- 19 2. Certain departments at Bridgewater, Framingham, Salem, Westfield and Mass.
 20 Art employed part-time instructors during the 2007-2008 academic year, and in
 21 prior academic years, that exceeded the assignment limitations of part-time
 22 instructors² set forth in Article XX, §C(10).

23 STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

³ Governor Deval Patrick signed legislation giving university status to all Massachusetts state colleges on July 28, 2010. As a result, the Commonwealth's nine state colleges are now known as state universities. The Hearing Officer referred to them as colleges in her decision, and in the interests of clarity, we do the same.

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

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

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

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

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

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

9 **Department Chairs and Committee Assignments**

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

⁴ The Board challenges this finding arguing that it is correct that these committees exist, but "it is incorrect that chairs serve on all of them or that all of the committees are active at any point in time." We decline to disturb the Hearing Officer's finding, since the Board cited no evidence to show that there are certain committees that do not have department chairs. Also, the hearing officer did not state that all of the committees are continuously active, and the fact that some committees may be temporarily inactive is not relevant to our decision.

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

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

11 **Core Curriculum and Student Enrollment**

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

⁵ The departmental committees are: (1) Undergraduate Curriculum Committee; (2) Graduate Committee; (3) Ad Hoc Committee; (4) Search Committee; and (5) Peer Evaluation Committee. The college committees are: (1) All-College Committee; (2) Curriculum Committee; (3) Academic Policies Committee; (4) Student Affairs Committee; (5) Special Committee; (6) Ad Hoc Committee; (7) College-Wide Advisory Committee such as Dean/Vice President Search Committee; (8) Other School/College Committees; (9) Committee on Promotions; (10) Committee on Tenure; and (11) Committee on Termination of a Tenured Faculty Member. The two "other" committees are the System-Wide Task Force and the Inter-Segmental Committee.

⁶ The Board challenges the Hearing Officer's finding that an increased number of part-time faculty members generally results in an increased workload for the department chairs, arguing that an increased number of full-time faculty would have a similar effect. We decline to modify the Hearing Officer's finding. It is accurate, and does not state that an increase in full-time faculty would *not* increase the workload for department chairs. Moreover, we decline to interpret the Agreement to draw the conclusions that the Board suggests in the absence of testimonial or other evidence supporting those conclusions.

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

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

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

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

⁷ The Board argues that the Hearing Officer's finding on this point over-simplifies and misstates the testimonial evidence. The Board stresses that core, lower level courses must be taught and that adjuncts are hired because administrators are responding to the wishes of full-time faculty who "do not wish to teach only these lower level courses." We decline to disturb the Hearing Officer's finding because it does not state or imply that offering core, lower courses is optional.

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

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

⁸ The Board challenges this finding, stating that there is no evidence that the colleges could transfer a member of the Mathematics faculty to teach English composition. We do not disturb the finding. The Hearing Officer did not state or suggest that the colleges would assign a faculty member to a course that they were not qualified to teach, and the Board did not cite any limitation on a college's ability to shift faculty members from one area of competence to another.

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

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

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

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

¹⁰ The Board challenges the Hearing Officer's finding that full-time faculty other than department chairs supervise part-time employees, citing Article VI, § A(8) of the Agreement. The Association claims that the Board takes the Hearing Officer's finding out of context, but it does not dispute the Board's assertion on this specific point. We have amended the Hearing Officer's finding accordingly. We note, however, that the modified finding still supports the conclusion regarding the effect of increased numbers of part-time faculty.

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

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

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

19 **1. Bridgewater**

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

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

¹² Mass. Art reported zero violations for AY 2005-2006.

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

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

14 **1. Framingham**

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

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

3 **2. Mass. Art**

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

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

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

4. Mass. Maritime

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

5. Salem

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

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

6. Westfield

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

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

7 **7. Worcester**

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

16 **The 2002 Grievance**

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

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

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

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

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

17 **The 2006 Grievance Ruling**

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

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

¹³ Article XX, §C(9) of the parties' 2001-2003 Agreement is referenced as Article XX, § C(10) in the parties' 2004-2007 successor Agreement. For purposes of this decision, all references to Article XX, § C(10) of the current Agreement include Article XX, § C(9) of the prior Agreement.

1 employing, in various departments at various times, more part-time faculty
2 to teach three-credit courses than the Agreement permits.
3

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

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

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

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

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

15 **2007 Successor Contract Negotiations**

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

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

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

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

8
9 Because those whom I represent have wished to consummate an
10 agreement rather than to reach impasse concerning [that matter]...we
11 have elected to allow [Article XX, § C(10)] to remain in the new
12 agreement. But because [that contractual provision is] unlawful...[it is,] in
13 our view, unenforceable as a matter of law and both...a legal and
14 contractual nullity.

15
16 By letter dated September 27, 2007, Sirutis responded to Peters' August 27,
17 2007 letter, stating that Article XX, § C(10) is "legal and enforceable" and she expected
18 the Board to enforce that provision.

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

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

29
30 By letter on January 30, 2008, Dr. Markunas requested certain information from
31 Dr. Antonucci to ensure compliance with Article XX, § C(10) of the Agreement.
32 Specifically, Dr. Markunas requested that the Employer provide the following
33 information:

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

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

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

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

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

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

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

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

1 There is no doubt that class size and frequency of course offering must be
2 managed to further reduce the number of sections offered by the
3 department.

4 OPINION¹⁴

5 At issue in this appeal is the enforceability of Article XX, § C(10) of the parties'
6 Agreement, which, as set forth in the facts, establishes a ratio of full-time to part-time
7 faculty in certain departments at the public colleges in the Commonwealth governed by
8 this labor Agreement. This contract provision was first bargained for and included in the
9 parties' agreements in 1986 and remained in each of the subsequent contracts,
10 including the 2004-2007 agreement under which this dispute arose. Resolution of this
11 issue requires an examination of the long-recognized tensions between the statutory
12 obligation to bargain in good faith, including a duty to comply with the terms of
13 collectively bargained agreements, Commonwealth of Massachusetts, 26 MLC 165,
14 168, SUP-3972 (March 13, 2000) and G.L. c.15, § 22, which reserves to the Board the
15 non-delegable, management right to set educational policy.

16 On appeal, the Board argues for reversal of the Hearing Officer's decision on two
17 grounds. First, the Board contends that the Hearing Officer erred by finding that the
18 Board *deliberately* refused to implement the terms of the Agreement. Second, the
19 Board challenges the legality of Article XX, § C(10), a clause negotiated and approved
20 by the Board that has been in the parties' collective bargaining agreements since 1986.
21 Specifically, the Board argues that Article XX, § C(10) is an impermissible delegation of
22 the statutory authority that G.L. c.15A, § 22 grants the Board, and an unlawful limitation
23 on its ability to establish effective educational policy. We are not persuaded by either of

¹⁴ The CERB's jurisdiction is not contested.

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

5 Repudiation

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

13 The Board does not dispute that the parties entered into a collective bargaining
14 agreement which included the language of Article XX, § C(10), and that it issued a
15 grievance decision on February 23, 2006 requiring each college to reduce its improper
16 reliance on part-time faculty commencing no later than the fall semester of the AY 2006-
17 2007.¹⁵ Indeed, the Board stipulated that certain departments at Bridgewater,
18 Framingham, Salem, Westfield and Mass Art employed part-time instructors during the
19 2007-2008 academic year, and in prior academic years, that exceeded the assignment

¹⁵ The Board's supplementary statement does not reference or challenge the Hearing Officer's conclusion that the Board repudiated the Feb. 13, 2006 grievance decision. Consequently, we limit our consideration to the Hearing Officer's conclusion regarding repudiation of the collective bargaining agreement, noting that the analysis we provide regarding repudiation of the Agreement applies with equal force to the grievance decision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 CONCLUSION

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

ORDER¹⁶

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the Board of Higher Education shall:

1. Cease and desist from:

- a) Failing to bargain in good faith by repudiating Article XX, § C(10) of the parties' collective bargaining agreement.
- b) Failing to bargain in good faith by repudiating the February 23, 2006 grievance decision.
- c) In any like manner, interfering with, restraining and coercing its employees in any right guaranteed under the Law.

2. Take the following action that will effectuate the purposes of the Law:

- a) Immediately adhere to the terms of Article XX, § C(10) of the collective bargaining agreement and the February 23, 2006 grievance decision.
- b) A representative of the Board and either the president or the human resources director for each of the colleges shall read the decision and notice, sign the notice, acknowledge the college's obligation under the Law to bargain in good faith, and post immediately in each college, in conspicuous places where members of the Association usually congregate and where notices to employees are usually posted, including but not limited to the Board's internal e-mail system, and maintain for a period of 30 consecutive days thereafter, signed copies of the attached Notice to Employees; and,
- c) Notify the DLR in writing of the steps taken to comply with this decision within thirty (30) days of receipt of this decision.

¹⁶ Neither party challenged any aspect of the Hearing Officer's remedy, and we affirm her order in its entirety for the reasons she stated.

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SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



ELIZABETH NEUMEIER, BOARD MEMBER



HARRIS FREEMAN, BOARD MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. c.150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such an appeal, the appealing party must file a Notice of Appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.