

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

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In the Matter of

UNIVERSITY OF MASSACHUSETTS,  
(AMHERST)

and

MASSACHUSETTS SOCIETY OF  
PROFESSORS/FACULTY STAFF  
UNION/MTA/NEA

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Case No. CAS-14-3424

Date Issued: April 10, 2015

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CERB Members Participating:

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

Appearances:

Joseph W. Ambash, Esq. -  
Katharine A. Crawford, Esq.

Representing the University of  
Massachusetts

Richard Mullane, Esq.

Representing the MSP/FSU/MTA/NEA

1 DECISION

2 Summary

3 The issue in this case is whether unrepresented Continuing and Professional  
4 Education faculty at the University of Massachusetts Amherst (UMass Amherst or UMA)  
5 should be accreted to the bargaining unit represented by the Massachusetts Society of  
6 Professors/Faculty Staff Union/MTA/NEA (MSP or Union). For the reasons set forth

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

1 below, the Commonwealth Employment Relations Board (CERB) concludes that a unit  
2 clarification petition is not the appropriate proceeding to add these CPE instructors to  
3 MSP's unit and we dismiss the petition.

4  
5 Statement of the Case  
6

7 The MSP filed this petition on January 27, 2014. On April 30, 2014, the DLR  
8 held an informal conference to discuss the issues raised by the petition. The parties  
9 submitted position statements, job descriptions, affidavits and other supporting  
10 documents both before and at the conference. Because it did not appear that there  
11 were any material facts in dispute, the DLR requested that the parties show cause why  
12 the CERB should not resolve the unit placement issues raised by the petition based on  
13 the submitted information as summarized in the show cause letter.<sup>2</sup> Both parties  
14 responded to the show cause letter in a timely fashion. After reviewing the responses  
15 and supplementing and modifying certain facts, the CERB has determined that there  
16 are no materially-disputed facts and decides this matter based on the parties'  
17 submissions, as summarized below.

18 The CPE Generally

19 Since at least 1975, CPE (formerly known as DCE)<sup>3</sup> has provided credit courses  
20 and degree programs for non-traditional students to earn academic credit at times when  
21 the University's regular programs are not in session. As described in more detail below,

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<sup>2</sup> The CERB also requested additional information, which the parties provided and which has been incorporated into the facts set forth below.

<sup>3</sup> The DCE's name changed to CPE in 2006. References to the CPE in this decision include the DCE.

1 CPE offers a variety of undergraduate and graduate degree and certificate programs, as  
2 well as non-credit courses. The positions at issue in this proceeding are the instructors  
3 who are hired and paid to teach CPE courses on a course-by-course, contract basis  
4 and who not otherwise represented for purposes of collective bargaining.

5 CPE has four terms: summer, fall, winter and spring. As of 2014, 80% of CPE  
6 courses were taught on-line. Classes that are not taught on-line are taught in the  
7 evening in the fall and spring semesters and during the day during summer and winter  
8 breaks.<sup>4</sup> Prior to the start of each semester, CPE administrators send UMass  
9 Amherst's academic departments a letter requesting a list of courses that CPE should  
10 offer. The course numbers and learning objectives of these CPE courses, including  
11 CPE on-line courses, are the same as those of courses offered during the regular day  
12 program.<sup>5</sup> The decision over which courses a department should offer is made in  
13 accordance with a department-approval process that is the same for both regular  
14 courses and CPE courses.

15 CPE's offices are located in leased office space three miles off-campus.  
16 Pursuant to M.G.L. c. 15A, §27, the University is not permitted to use state funds or  
17 residential student tuition to support CPE programs or courses. Accordingly, CPE is a  
18 self-supporting program and, except in limited circumstances discussed below, all  
19 revenues and program fees generated from the programs are used to pay CPE faculty

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<sup>4</sup> In recent years, a small number of non-CPE courses have been offered in the evenings.

<sup>5</sup> This finding has been modified and supplemented based on the University's response to the Show Cause Notice,

1 and related overhead costs. If a class is under-enrolled, CPE reserves the right to  
2 cancel it if it will not break even.

3 Since at least 1994, University undergraduates have been permitted to take up to  
4 six CPE credit hours a semester to be applied towards their degree. Ordinarily, those  
5 undergraduates are required to pay tuition to CPE, which the program then retains.  
6 Since 1998, the University has, under certain circumstances, permitted non-CPE  
7 University students to enroll in a “shadow section” or a “shadow seat”<sup>6</sup> of a CPE course.  
8 Examples of such circumstances include when the day course a student was planning  
9 to take was overenrolled or cancelled. In those situations, the student continues to pay  
10 their regular tuition to the University. The number of shadow seats or sections made  
11 available to undergraduates has ranged from an average of 200 seats in 2005 – 2012,  
12 to 85 seats in 2012-2015.<sup>7</sup>

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<sup>6</sup> This finding has been modified and supplemented based on the University’s response to the Show Cause Notice, which was not refuted. The original findings were based on a description of shadow sections contained in University of Massachusetts, Amherst, SCR-2241, CAS-01-3481 (October 1, 2001) (unpublished). That decision is described in greater detail below. The University’s response to the show cause notice disputed those findings, claiming, among other things, that it never offered shadow “sections,” but did offer shadow “seats” in CPE classes to day students under certain limited circumstances. Regardless of nomenclature, the salient point is that, since at least 1998, under certain limited circumstances, day undergraduates can take a CPE class for credit and pay their regular tuition to the University.

<sup>7</sup> The University suggests that this is due to the increase in the number of on-line CPE courses offered since 2012.

1 MSP Bargaining Unit

2 In 1975, affiliates of the Massachusetts Teachers Association, National  
3 Education Association<sup>8</sup> petitioned the former Labor Relations Commission (LRC)<sup>9</sup> for  
4 certification as the exclusive representative for certain faculty and other professionals at  
5 the University's Boston and Amherst campuses. Board of Trustees, University of  
6 Massachusetts and Massachusetts Society of Professor/Faculty Staff Union, MTA/NEA  
7 et al., 3 MLC 1179, SCR-2079, 2082 (October 15, 1976). During the course of the  
8 twenty-five day hearing, the parties entered into stipulations regarding the titles they  
9 agreed should be included and excluded from the unit. Id. at 1181-1182. The hearing  
10 focused on the positions the parties could not agree upon, including part-time and  
11 adjunct faculty members. Regarding part-time faculty members, the CERB concluded  
12 that part-time faculty who had taught at least one course for three consecutive  
13 semesters or who had taught one course for two consecutive semesters and who were  
14 teaching their third semester were eligible for inclusion in the unit. Id. at 1191-1198.

15 Regarding adjuncts, the CERB observed that there were two types: unpaid  
16 adjunct faculty who taught "for the honor and privilege of participating in academic life,"  
17 and those who taught full-time in one department and as adjuncts in another. Id. at  
18 1198. The CERB excluded the unpaid adjuncts for lack of community of interest. It

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<sup>8</sup> The MSP/MTA filed a petition seeking to represent all instructors; assistant, associate, and full professors; and librarians I-V at UMA. The Faculty Staff Union/MTA filed a petition seeking to represent all full and part-time lecturers; instructors; assistant, associate and full professors; staff assistants; associates; and administrators; librarians I-V; and adjunct and visiting professors at UMB. The Amherst and Boston Chapters of the American Association of University Professors intervened in the proceeding.

<sup>9</sup> Hereafter, references to the CERB and the DLR include the former LRC.

1 included the other adjuncts based on their regular University appointment, not their  
2 adjunct appointment. Id. The matter proceeded to election and the DLR certified the  
3 unit on March 10, 1977.<sup>10</sup>

4 As of 2014, the MSP bargaining unit has approximately 1,500 members of which  
5 858 are tenure track faculty, 429 are full-time non-tenure track (NTT) faculty, 176 are  
6 part-time NTT faculty, and 47 are librarians. The full unit description, contained in the  
7 recognition clause of the parties' 2012-2014 collective bargaining agreement (CBA), is  
8 attached as Appendix A.

9 CPE Faculty – Bargaining Unit History

10  
11 As noted above, since 1975, CPE has provided credit courses and degree  
12 programs taught by CPE faculty. However, except for one brief reference listing  
13 “Continuing education teaching” as one of the elements of service to the University  
14 upon which merit increases for Department Chairs could be based, see id. at 1211, the  
15 1976 unit determination did not address the collective bargaining rights or unit  
16 placement of CPE faculty. Accordingly, the unit that the CERB ultimately approved for  
17 collective bargaining did not expressly include or exclude CPE faculty. See id. at 1219-  
18 1221 (full description of unit CERB found appropriate for collective bargaining). There is  
19 no dispute, however, that since the decision issued, the CPE faculty at issue in this  
20 proceeding have never been represented for purposes of collective bargaining by the  
21 MSP or any other employee organization.

22 The CERB first addressed the bargaining unit status of CPE faculty in 2000,  
23 when the Graduate Employees Organization/Local 2322/UAW (GEO), which

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<sup>10</sup> The CERB takes administrative notice of the date of the certification in Case No SCR-2079, 2082.

1 represented UMA graduate students employed by the University as teaching assistants,  
2 research assistants, etc., filed a petition with the DLR seeking to represent all CPE  
3 faculty teaching credit courses at UMA. University of Massachusetts, Amherst, SCR-  
4 2241, CAS-01-3481 (October 1, 2001) (unpublished). The MSP intervened in the  
5 petition. The University opposed the petition on a number of grounds, including that the  
6 CPE faculty were casual employees. Id., slip op. at 2. During the course of the  
7 investigation, the University provided information to the DLR and the parties that broke  
8 down the number of employees teaching CPE courses by category, i.e., existing faculty  
9 members (MSP); non-faculty UMA employees; and “temporary contract faculty,” i.e., the  
10 employees at issue in the instant proceeding. Several months later, in January 2001,  
11 GEO narrowed the scope of its petition to seek an add-on election only with respect to  
12 graduate students who taught CPE courses. Id., slip. op. at 3. GEO alternatively filed a  
13 CAS petition seeking to accrete these students into its unit. Id. On the same day, the  
14 MSP filed two petitions seeking to represent/accrete all full-time and regular part-time  
15 faculty who were also teaching in CPE to its existing faculty unit. Id. The Union  
16 withdrew these petitions after the University voluntarily recognized it as the exclusive  
17 representative of existing MSP bargaining unit members who also taught CPE courses  
18 at UMass Amherst. Id. The recognition clause of the MSP collective bargaining

1 agreement (CBA) was amended to reflect this change.<sup>11</sup>

2       The remaining GEO petitions proceeded to hearing. With respect to the CAS  
3 petition, the CERB concluded that accretion was not appropriate under the first prong of  
4 the accretion analysis because there were graduate students teaching CPE credit  
5 courses when the University first recognized GEO's unit and the job duties of their  
6 positions had not changed since the initial recognition. Id., slip op. at 15-17. The CERB  
7 dismissed the CAS petition on the alternative ground that GEO's recognition clause  
8 specifically excluded graduate students who taught CPE classes. With respect to the  
9 representation petition, the CERB concluded that the graduate students teaching CPE  
10 classes shared a community of interest with existing bargaining unit members and  
11 ordered an add-on election. Id., slip op. at 19-22. GEO prevailed in the election and  
12 has represented graduate students teaching CPE courses since then.

13       UMB Faculty

14       Several years ago,<sup>12</sup> the University entered into a Memorandum of  
15 Understanding (MOU) with the MSP in which the University voluntarily recognized the  
16 Union as the exclusive representative of a separate bargaining unit comprised of certain

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<sup>11</sup> The first sentence of the recognition clause of the parties' 2012-2014 CBA states:

The Employer/University Administration agrees to recognize the Union as the exclusive representative for purposes of bargaining for all matters pertaining to wages, hours, standards of productivity and performance and other terms or conditions of employment (**including those related to the Division of Continuing Education**) for bargaining unit faculty and librarians employed at the Boston and Amherst campuses of the University. (Emphasis added).

<sup>12</sup> The record does not reflect the date or year of this agreement.



1 eligible instructors who teach in UMass Boston's continuing education program<sup>13</sup> but  
2 who are not otherwise represented by a union.<sup>14</sup> Compared to UMass Amherst, where  
3 at least a third of the instructors teaching CPE courses teach only in CPE, only about  
4 7% of faculty members who teach in CAPS do not teach any other courses at UMB (25  
5 out of 360 total faculty members).<sup>15</sup>

6 In sum, there are three groups of CPE instructors who are represented for  
7 purposes of collective bargaining: UMA graduate students, UMA and UMB MSP  
8 bargaining unit members who also teach CPE courses, and certain eligible UMB  
9 instructors. The Union seeks to represent the remaining unrepresented CPE instructors  
10 at UMA. The Union contends that there are about 100 such individuals – the  
11 University's figures indicate that 296 individual incumbents have taught CPE courses  
12 over the last three calendar years.

### 13 DCE/CPE from 1975-2012 – Course Offerings and Staff Composition

#### 14 1975 -1977

15 The DCE Annual Report for 1975-1976 states that the program served over  
16 4,000 students during that academic year. The report described its programs as falling  
17 into three general categories:

- 18 • Academic Extension, with primarily credit courses offered in the  
19 evenings, on weekends, on-and off-campus and operating on a  
20 year-round basis;

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<sup>13</sup> This program is referred to in the MOU as "University College," and is also known as the College of Advancing and Professional Studies (CAPS).

<sup>14</sup> In general, individuals who teach eight consecutive semesters of courses (except for brief approved interruptions) are eligible to be in this unit.

<sup>15</sup> This finding has been supplemented by unrefuted information the University provided in response to the show cause letter.

- Continuing Studies, primarily credit-free activities designed to meet personal vocational or community goals; and
- Special Programs, providing primarily research or consulting services.

According to this report, the “most visible portion” of CPE to the general public was the “evening college,” which provided 249 evening courses on a traditional semester basis to students who were unable to attend daytime classes due to work, family or other commitments.<sup>16</sup> Seven weekend courses were also offered in 1975-1976 with 134 course registrations.

During this period, CPE also offered a number of concentrations in its own degrees, including, in particular, the Bachelor of General Studies (BGS).<sup>17</sup> Under the BGS program, students were able develop their own majors in special or interdisciplinary studies. CPE also gave its students access to regular University programs leading to Bachelor’s degrees. Schedule and space permitting, CPE students could also take regular day courses to pursue their degree.<sup>18</sup> During academic year 1975-76, 53 students completed baccalaureate degrees through CPE, 45 of which were BGS degrees.

CPE also offered a number of certificate and training programs from 1975-1977, including a Legal Assistant Training Program, an Adult Nurse Practitioner Program, a

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<sup>16</sup> The reference to “Evening College” was eliminated in 1976.

<sup>17</sup> The first BGS degree was awarded in 1972.

<sup>18</sup> The Annual Report reflects that CPE provided registration and records services for these students.

1 Classroom Aid certificate program and a Teacher Education Program in conjunction  
2 with the Teacher Education Council of the School of Education.

3 The CPE launched Winter Session in 1975 and 41 students enrolled in credit  
4 courses. The University's Summer Session was also administratively assigned to CPE  
5 that year and the courses were fee (as opposed to tuition) based.

6 In sum, during academic year 1975-76, CPE offered 231 graduate and  
7 undergraduate classes for credit across eleven academic disciplines. Further, at least  
8 as of the 1976-1977 academic year, full time UMass Amherst students were able to  
9 take courses offered by CPE for credit toward their degree. The 1976-1977 CPE  
10 annual report shows that during the winter intersession program offered that year, 152  
11 of the 195 enrollees were regularly-enrolled University undergraduates.<sup>19 20</sup>

### 12 Teaching Staff

13  
14 The 1975-1976 annual report described CPE's teaching staff as follows:

15  
16 The teaching faculty in credit courses is drawn predominantly from the  
17 University of Massachusetts. Faculty and staff may teach on an overload  
18 basis with the approval of the academic department. Graduate students,  
19 however, continue to staff a majority of classes. Qualified "visiting  
20 lecturers" are hired where faculty cannot be located within the University.  
21 These visiting appointments are made with the approval of the appropriate  
22 department and academic dean.<sup>21</sup>

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

<sup>20</sup> Thus, the Union's claim in its initial position statement that there were no CPE programs employing educators who were compensated to teach degree-level coursework for credit when the MSP unit was first certified is inaccurate.

<sup>21</sup> The 1976-1977 CPE Annual Report contained substantially the same description.

1 During the 1975-1976 academic year, 254 instructors taught CPE courses. Graduate  
2 students taught 51.5% of all courses offered. UMA faculty taught 24% of the courses;  
3 Outside instructors taught 19%, and UMA non-faculty staff taught the remaining 5% of  
4 courses.

5 CPE around 2001<sup>22</sup>  
6

7 The University provided a copy of the CPE spring 2001 course catalogue. In  
8 addition to the BGS degree described above, the catalogue contained descriptions of  
9 several Masters degree programs offered through CPE, including a Masters in Public  
10 Policy and Administration, Masters of Science in Labor Studies, Masters in Education,  
11 Library and Information Studies, and a professional MBA program at three locations.<sup>23</sup>

12 CPE began offering on-line courses in 1999, and in the spring of 2001, it offered  
13 at least two on-line Masters degree programs, including an on-line Master of Public  
14 Health and an on-line Master of Science (Nursing) Community School Health. It also  
15 offered three graduate degree "Video Instructional Programs" (VIP) in Computer  
16 Science, Electrical and Computer Engineering and Engineering Management. These  
17 programs videotaped and broadcast courses as they were taught by resident graduate  
18 faculty members and then delivered the tapes to VIP enrollees. Students enrolled in  
19 these programs were not required to attend any classes on campus.

20 As described above, there are limitations on the number of CPE courses that  
21 undergraduates can take to complete their degrees. Undergraduates can take no more

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<sup>22</sup> In addition to the materials provided by the parties, administrative notice is taken of the facts contained in the 2001 University of Massachusetts/Amherst/GEO decision, described above.

<sup>23</sup> The University states that graduate degree programs have been offered through CPE since 1989.

1 than six credits of CPE classes per semester. Graduate programs typically accept only  
2 six non-degree credits towards a full-time Masters degree.

### 3 CPE as of 2014

4 The number of students enrolled in CPE courses and the number of CPE  
5 courses offered has increased significantly since 1975. As of the 2012-13 academic  
6 year, CPE had over 27,000 student enrollments in 1,329 credit classes. Of these  
7 students, 321 students completed Bachelor's degrees through CPE (as compared to 53  
8 in 1975-1976) and 602 completed Master's degrees. Since 2001, the University has  
9 added at least nine degree-granting CPE programs.

### 10 On-line Courses

11 On-line courses, both graduate and undergraduate, now comprise 80% of CPE's  
12 offerings, including many fully on-line undergraduate and graduate degree programs. A  
13 very small number of residential (non-CPE) classes are also taught fully on-line. In the  
14 fall of 2013, such courses constituted only .12% of the total number of non-CPE courses  
15 offered by the University.

16 Article XXXV of the parties' July 1, 2012 - June 30, 2014 CBA, Continuing  
17 Education and Distance Learning, addresses a number of issues pertaining to "credit-  
18 bearing courses utilizing the distance learning (DL) mode of instruction." This provision  
19 states in pertinent part:

20 35.1 The procedure for the development and approval of DL courses shall  
21 be determined through the established governance procedure on each  
22 campus. Normally courses shall be developed and taught by members of  
23 the bargaining unit. However, if no member of the bargaining unit is  
24 willing or qualified to develop and/or teach a course, the Division of  
25 Continuing Education (DCE) may, with academic department approval,  
26 contract with individuals outside the unit to develop and/or teach such  
27 course.

\* \* \*

35.9 At the Amherst campus, the teaching stipends that are currently paid in the various degree programs . . . shall serve as the minimum stipends for faculty teaching courses in those programs for the duration of the Agreement. The minimum stipends for all other credit-bearing DL courses shall be as follows:

Undergraduate courses - \$4,000  
Graduate courses - \$4,300

At the Boston campus, the current stipends shall serve as the minimum stipends for the duration of the Agreement.

35.10 To ensure quality, the MSP will receive a report by September 1<sup>st</sup> of each year indicating the proportion of DL courses offered through the Amherst campus DCE during the preceding academic year that were taught by adjunct faculty.

#### Teaching Staff

As of 2014, the breakdown of individuals teaching CPE courses was as follows:

UMass faculty (Professor, Associate Professor, Assistant Professor, Lecturer) – 42%;  
Graduate students (undergraduate courses only) – 25%; UMass staff – 2%; Visiting  
Lecturers (petitioned-for positions) – 31%. Of the incumbents in the disputed titles, 65%  
had taught two or more courses in the past three years. Between 6 and 10% of MSP  
Faculty taught at least one CPE course in academic year 2012-2013.

#### CPE Instructors – Terms and Conditions of Employment

##### Hiring

Once an academic department determines that there is a need for a CPE instructor, the Department Chair is responsible for recruiting the instructor and hiring the instructor. The Academic Dean approves the hire. The process is casual – the department is not required to post the position or utilize a hiring committee. CPE instructors are hired for the duration of the course and do not receive any assurance

1 that their employment will continue beyond the course they are teaching. In most  
2 respects, this process parallels the hiring process for part-time NTT faculty at UMA.<sup>24</sup>  
3 Some, but not all, departments prepare letters of agreement or memoranda of  
4 understanding. The University provided examples of five such agreements, all for on-  
5 line courses. The MOUs were signed by the instructor, a department or program head  
6 or dean, and William S. McClure, CPE's executive director.

7 CPE instructors teach courses in the same manner as non-CPE instructors.  
8 Except for the significant increase in the number of on-line courses taught, CPE  
9 instructors' teaching duties have not changed since 1975. Unlike regular day  
10 instructors, however, CPE instructors are not required to maintain office hours and,  
11 particularly in the case of on-line instructors, their presence on campus is extremely  
12 limited. In fact, pursuant to Article XXXV of the CBA, although UMA faculty teaching  
13 distance learning courses may provide for an "in-person student-instructor opportunity,"  
14 it may not make this opportunity a course requirement, nor may it do so without prior  
15 CPE approval.

16 CPE instructors are also not involved in department curriculum planning. Based  
17 on the sampling of CPE letters of agreement that the University provided, however, it  
18 appears that, at least with respect to certain on-line courses, CPE hired some  
19 instructors not only to teach these courses but also to develop them.<sup>25</sup>

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<sup>24</sup> Under the CBA, NTT faculty are eligible for MSP membership after one year of service.

<sup>25</sup> The University claims in its response to the show cause notice that while some CPE instructors may develop their own courses, this is not a prevalent practice or expectation.

### Compensation

The salary for CPE instructors depends on three variables – rank (University professor, graduate student or other category of instructor),<sup>26</sup> course level; and enrollment. For example, the compensation for a three-credit undergraduate level course with enrollment between 8 and 51 students ranges from \$4000 to \$8,382 for UMA MSP bargaining unit members; between \$3,260 - \$8,144 for other instructors; and between \$3,244 and \$8,275 for graduate students. Some departments also have their own compensation schedules. If a class is underenrolled, CPE may negotiate with non-MSP/GEO instructors to teach for less than the standard minimum compensation.

### Benefits

The University offers no benefits to CPE faculty.

### Policies

The petitioned-for CPE instructors are not bound by the University's personnel policies for faculty set forth in the Redbook and the University places no restriction on their outside employment. They are bound, however, by University-wide human resources policies.

### Privileges

Both CPE and non-CPE employees share some of the same University-wide privileges, such as library access and use of University IT support.<sup>27</sup> They do not have an office on campus.

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<sup>26</sup> Other instructors include professional staff holding non-academic or MSP excluded titles, classified or hourly employees who are members of other unions and non-University employees (the category at issue here).

<sup>27</sup> Non-University CPE instructors must sign up for a courtesy IT account.



1           Contact with Other MSP members and Service to University

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3           The petitioned-for employees do not attend department meetings or otherwise  
4 participate in service to the University, i.e., by getting involved in governance, serving  
5 on departmental, school/college or University committees, serving as student advisors  
6 or on dissertation committees, or supervising independent studies. With limited  
7 exceptions, the same is true for part-time NTT employees.<sup>28</sup>

8           Evaluations

9           Unlike non-tenured MSP bargaining unit members, there does not appear to be a  
10 formal evaluation process beyond requiring student evaluations. With respect to  
11 evaluating on-line courses offered by MSP bargaining unit members, Article XXXV  
12 states in pertinent part:

13           35.5 The evaluation of teaching in DL courses shall be subject to the  
14 provisions of Article XXXIII of the Agreement.<sup>29</sup>

15           35.7 Generally, faculty teaching online shall not be monitored by anyone  
16 without the faculty member's consent. However, in the event of student  
17 complaints about the instructor of a DL course, the instructor shall be  
18 notified and given an opportunity to address the problem. Only after  
19 notification, and after sufficient opportunity has been provided for the  
20 instructor to address the concern shall electronic monitoring be allowed.  
21 Instructors shall be informed if they are subject to electronic monitoring. . .

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<sup>28</sup> The University states that it has confirmed several examples of part-time NTTs extending themselves to non-instructional activities by: 1) serving on graduate-student thesis committees advising and mentoring students; 2) organizing public lectures; 3) serving on department and college committees; 4) organizing University-sponsored events; 4) attending and participating in faculty meetings; and 5) attending departmental events.

<sup>29</sup> Article 33.1 indicates that this provision applies to the annual evaluation of full-time faculty members.

Opinion<sup>30</sup>

1 As a rule, a unit clarification petition is the appropriate procedural vehicle to  
2 determine whether newly-created positions should be included or excluded from a  
3 bargaining unit or to determine whether substantial changes in the job duties of existing  
4 positions warrant either their inclusion or exclusion from a bargaining unit. City of  
5 Malden, 32 MLC 97, 99, CAS-04-3599 (November 2, 2005) (citing Sheriff of Worcester  
6 County, 30 MLC 132, 136, CAS-03-3543 (April 7, 2004); North Andover School  
7 Committee, 10 MLC 1226, 1230, CAS-2525 (September 27, 1983)). Further, a unit  
8 clarification petition is appropriate if the outcome sought by the petition is clearly  
9 supported by an apparent deficiency in the scope of the existing unit and must be, at  
10 least arguably, within the realm of what the parties intended when the unit was first  
11 formulated. City of Malden, 32 MLC at 99 (citations omitted). However, the CERB will  
12 not allow a petitioner in a unit clarification proceeding to accomplish what it cannot gain  
13 at the bargaining table. North Andover School Committee, 10 MLC at 123.

14 In analyzing whether employees should be accreted into an existing bargaining  
15 unit, the CERB uses a three-step test. It first determines whether the position was  
16 included in the original certification or recognition of the bargaining unit. Absent a  
17 material change in job duties and responsibilities, the CERB will not accrete a position  
18 into a bargaining unit if it existed at the time of the original certification but was neither  
19 sought nor included in the unit. Town of Granby, 28 MLC 139, 141, CAS-3477 (October  
20 10, 2001). Second, if that examination is inconclusive, the CERB will examine the  
21 parties' subsequent conduct, including bargaining history, to determine whether the

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<sup>30</sup> The CERB's jurisdiction is not contested.

employees' classifications were considered by the parties to be included in the unit. Finally, if that inquiry is also inconclusive, the CERB examines whether the positions sought to be included in the unit share a community of interest with the existing positions. If the CERB determines that the requisite community of interest exists, it accretes the petitioned-for position into the existing bargaining unit. Id.

#### First Prong

The facts reflect that the CPE faculty or instructor position existed in 1977 when the MSP was certified and that this position were not included in the certified unit. Therefore, to accrete this position, the evidence must show that its job duties have materially changed. Id.

The parties disagree over whether there have been material changes. The University argues that the role and teaching duties of CPE instructors have not materially changed. The Union argues however, that, due to the significant expansion of the program in terms of student enrollment, on-line courses, graduate programs, degrees offered and the number of regular undergraduates taking CPE courses to complete their degrees, the nature of the work has changed significantly, particularly in the past ten years, resulting in a greater community of interest between CPE and non-CPE faculty.

There is no doubt that that the size of student enrollment, course offerings and number of degrees offered has increased since the first CPE classes were offered for credit in the 1970's. However, as the University points out, the first prong of the accretion test focuses on material changes to a position's job duties, not to the program in which those duties are performed. There is no dispute that, except for the fact that

1 80% of CPE courses are now taught on-line, CPE instructors' teaching duties have not  
2 changed since 1975. Notably, the parties do not dispute that CPE instructors teach  
3 courses in the same manner as non-CPE instructors. Further, the record contains no  
4 evidence showing how the job duties associated with planning and conveying the  
5 content of such courses, and/or evaluating students' work in those courses, differs from  
6 that of courses taught in-the classroom. We therefore decline to find that the increase  
7 in the number of CPE on-line courses taught, standing alone, constitutes a material  
8 change in CPE faculty job duties or responsibilities.

9 In any event, the Union does not argue that teaching courses on-line, instead of  
10 in-person, has materially altered CPE faculty's job duties. Rather, it argues that the  
11 increased availability of on-line courses have caused more regular faculty to teach them  
12 and more regular undergraduates to take them.

13 However, these allegedly changed circumstances existed, albeit on a smaller  
14 scale, when the unit was first certified in 1977. Since at least 1976, regular  
15 undergraduates have taken CPE courses for credit that were offered at times, e.g.  
16 winter intersession, when day undergraduate classes were not offered. Further, regular  
17 University faculty taught CPE courses at the time of the certification and have continued  
18 to do so for nearly 40 years. Similarly, although the Union emphasizes the number of  
19 undergraduates now taking CPE courses to help satisfy their regular degree  
20 requirements, this is nothing new. The record shows that in 1976, regularly-enrolled  
21 undergraduates were taking CPE courses for credit towards their degree and there is no  
22 evidence that the increase in their numbers has materially altered CPE instructors' job  
23 duties.

1       The Union's claim that the nature of work has changed within in the past ten  
2 years is also not supported by the evidence. Since at least 1998, there have been CPE  
3 and regular University courses offered with the same course numbers and learning  
4 objectives. Credit-bearing courses have been offered through CPE since at least 1975.  
5 The fact that CPE may now offer more degree granting programs does not change the  
6 fact that CPE offered programs leading to a BA degree when the unit was first certified.

7       In sum, because there were CPE instructors teaching CPE credit courses who  
8 were not included in the bargaining unit when it was first certified and because we find  
9 no material changes in job duties, we conclude that accretion is not appropriate under  
10 the first prong of the accretion analysis.

11 Second Prong

12       Even if the first prong of the CERB's analysis were inconclusive, the information  
13 presented by the parties demonstrates that CPE positions should remain excluded from  
14 the existing unit under the second prong. Under that prong, the CERB examines how  
15 the University and the Union treated the CPE instructors in their dealings with each  
16 other and in their collective bargaining. Boston Public Health Commission, 39 MLC  
17 218, 230, CAS-11-1091, CAS-11-1092 (February 28, 2013). The CERB will not accrete  
18 a position into an existing bargaining unit if the parties have executed a collective  
19 bargaining agreement demonstrating their intent to exclude or include the petitioned-for  
20 positions unless the job duties of the positions have changed materially. Id. Here, the  
21 University claims that the litigation in 2001 involving GEO and the MSP demonstrates  
22 that the MSP and the University reached an agreement to exclude the unrepresented  
23 CPE instructors from MSP's unit. We disagree. We do not view the series of events

1 leading up to the University's voluntary recognition of MSP as the exclusive  
2 representative of MSP faculty members who also teach CPE courses as the equivalent  
3 of a collectively-bargained agreement to exclude the remaining unrepresented CPE  
4 faculty from the MSP unit. Nevertheless, other factors persuade us that the parties  
5 have reached an agreement that excludes the disputed title from their unit.

6 Specifically, as set forth above, Article 35 of the parties' July 1, 2012-June 30,  
7 2014 CBA states:

8 35.1 The procedure for the development and approval of DL courses shall  
9 be determined through the established governance procedure on each  
10 campus. Normally courses shall be developed and taught by members of  
11 the bargaining unit. However, if no member of the bargaining unit is  
12 willing or qualified to develop and/or teach a course, the Division of  
13 Continuing Education (DCE) may, with academic department approval,  
14 contract with individuals outside the unit to develop and/or teach such  
15 course.

16 In Plymouth County Sheriff's Department, 40 MLC 238, CAS-11-1442 (February  
17 21, 2014), the CERB dismissed a petition seeking to accrete Immigration and Custom  
18 Enforcement (ICE) Service transportation officers to an existing correction officers unit.  
19 In that case, we found the second prong of the accretion analysis conclusive based on a  
20 CBA provision that permitted the Plymouth County Sheriff's Department to assign  
21 certain duties to persons outside of the bargaining unit, including the ICE transportation  
22 officers at issue in the proceeding. Id. at 242. The CERB concluded that this provision  
23 reflected the parties' agreement that the ICE transportation officers performing those  
24 duties were not part of the bargaining unit. Id. The same may be said of Article 35.1,  
25 which permits the CPE, with academic department approval, to contract with  
26 **"individuals outside the unit"** to develop and teach distance learning CPE courses.  
27 Since this provision clearly refers to the unrepresented CPE instructors at issue here,

1 and in the absence of a material change to job duties, we consider the second prong of  
2 the accretion analysis also to be conclusive. As we stated in Plymouth County case, we  
3 will not allow a petitioner in a unit clarification proceeding to accomplish what it has  
4 been unable to gain at the bargaining table. Id. (citing Boston Public Health  
5 Commission, 39 MLC at 229; City of Malden, 32 MLC at 99-100)).

6 Because first and/or second prongs of the accretion analysis are conclusive, we  
7 end our analysis here and dismiss the petition. We note, however, that in situations  
8 where accretion is not allowed, the DLR may permit a self-determination election or  
9 add-on election among employees holding the disputed titles. Boston Public Health  
10 Commission, 39 MLC at 233 (citing Boston School Committee, 7 MLC 1947, 1952,  
11 MCR-3074 (March 23, 1981); City of Quincy, 3 MLC 1517, MCR-2434 (March 10,  
12 1977). An add-on election may be ordered where: 1) the representation petition is  
13 accompanied by a sufficient showing of interest; 2) there is a sufficient community of  
14 interest between the employees in disputed titles and employees in the existing unit; 3)  
15 the petition seeks to include all such employees; and 4) the reasons for the original  
16 exclusion no longer exist. City of Quincy, supra. However, because such a petition is  
17 not currently before us, we do not address these issues.

18

1     Conclusion

2             For the reasons stated above, the Union's unit clarification petition is dismissed.

3                     SO ORDERED

COMMONWEALTH OF MASSACHUSETTS  
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

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MARJORIE F. WITTNER, CHAIR

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ELIZABETH NEUMEIER, CERB MEMBER



## APPENDIX A

Recognition Clause (Article 2.1) of MSP CBA, Effective 7/1/12 to 6/30/14

The Employer/University Administration agrees to recognize the Union as the exclusive representative for purposes of bargaining for all matters pertaining to wages, hours, standards of productivity and performance and other terms and conditions of employment (including those related to the Division of Continuing Education) for bargaining unit faculty and librarians employed at the Boston and Amherst campuses of the University including full-time and part-time Professors; Associate Professors; Assistant Professors; Instructors; Research Professors; Research Associate Professors; Research Assistant Professors; Faculty of Stockbridge School; Programs Directors (not otherwise excluded); Non-tenure Track Faculty who are less than half-time at the beginning of their second consecutive year of employment; all other Non-Tenure Track Faculty; Lecturers; faculty in University Without Walls; Clinical Nursing Faculty; Faculty on Terminal Contract; Visiting Faculty, after two consecutive years of employment at the University, at the beginning of their third consecutive year of employment; Faculty Members of the Campus Governance and Personnel Committees; Librarians I-V; Coaches holding Faculty rank; and "Soft Money" Faculty subject to the conditions and limitations of the controlling grant; **but excluding** Chancellors; Assistant and Associate Chancellors; Vice Chancellors; Assistant and Associate Vice Chancellors; Provosts; Assistant and Associate Provosts; Deans, Assistant and Associate Deans; Teaching Fellows; Teaching Associates; Students; Senior Post-Doctoral Research Associates; Senior Research Fellows; Research Fellows; Professors Emeriti, including those on post-retirement appointments; Academic Coordinators; Directors, Deputy associate Directors and Associate Directors of the Libraries; Chairs and Heads of Departments; Center Heads; Division Chairpersons; Ombudsmen; Extension Specialists; County Extension Agents; Visiting Faculty employed by the Federal Government; Director of the Computing Center; Director of Athletics; Trainers and Physiotherapists; Director of Public Health; Director of Nursing; Director and Associate Directors of the Institute for Learning and Teaching; Director of the School of Physical Education; Adjunct (unpaid) Faculty; Director of the Center for International Agriculture; Associate Director of the Fine Arts Center; Deputy Associate Director of Extension Services; Director of Environmental Sciences Program; and all other employees.