

BOARD OF REGENTS OF HIGHER EDUCATION SOUTHEASTERN MASSACHUSETTS UNIVERSITY AND  
SOUTHEASTERN MASSACHUSETTS FACULTY FEDERATION, LOCAL 1895, AFT, AFL-CIO, SCR-2171  
(3/1/85).

17.5	public employee
17.6	"03" consultant
19.	Independent Contractor
34.1	appropriate unit
34.2	community of interest
34.8	similarity of work (interchangeability)
35.1	casual and temporary employees
35.11	regular part-time employees
35.673	university faculty

Commissioners participating:

Paul T. Edgar, Chairman  
Gary D. Altman, Commissioner  
Maria C. Walsh, Commissioner

Appearances:

Walter R. Smith, Esq.	- Counsel for the Board of Regents of Higher Education/Southeastern Massa- chusetts University
Deborah L. McCutcheon, Esq.	- Counsel for Southeastern Massachusetts Faculty Federation, Local 1895, AFT, AFL-CIO

DECISION AND DIRECTION OF ELECTION

Statement of the Case

On January 20, 1983 the Southeastern Massachusetts Faculty Federation, Local 1895, AFT, AFL-CIO (Federation) filed a petition with the Labor Relations Commission (Commission) seeking to represent a bargaining unit of "All Part Time faculty (visiting lecturers)"<sup>1</sup> employed by the Board of Regents of Higher Education (Regents) at Southeastern Massachusetts University (SMU). The Federation seeks to add the part-time and full-time visiting lecturers to a professional bargaining unit which it currently represents and which is composed of full-time professors, instructors, department chairpersons, librarians and technicians. In the alternative, the Federation asks the Commission to direct an election in a separate bargaining unit composed only of the part-time and full-time visiting lecturers.

<sup>1</sup>The petition referred to all part-time faculty (visiting lecturers) and estimated that there are fifty such individuals. During the hearing in this case, the Federation made clear that full-time visiting lecturers were included in the petition. Both the Regents and the Federation presented evidence concerning full-time visiting lecturers and submitted a joint stipulation of the employees who are the subject of this Petition. The stipulation names the full-time visiting  
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A formal hearing was held on the petition on March 30, 1983 before a Commission hearing officer, and both parties filed timely briefs which have been considered. The Regents argue that the part-time faculty are not "employees" within the meaning of G.L. c.150E but are, instead, independent contractors. The Regents also argue that if the part-time faculty are found to be employees, they do not share a community of interest with the full-time faculty and therefore may not be accreted to that bargaining unit. The Regents take no position concerning either the employee status or the appropriate unit placement of the full-time visiting lecturers.

Because this case raises<sup>2</sup> the significant issue of whether persons compensated for services from the "03" budgetary account for "consultants,"<sup>3</sup> are public employees within the meaning of Section 1 of G.L. c.150E (the Law), the Commission solicited *amicus curiae* briefs from other employers and employee organizations representing Commonwealth employees. Briefs were received from the Office of Employee

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1 (continued)

lecturers. Because we conclude that the evidence warrants separate treatment of the full-time visiting lecturers from the part-time visiting lecturers, we refer to them separately.

<sup>2</sup>Currently pending before the Commission is another representation case, Board of Regents of Higher Education and Massachusetts Teachers Association/NEA, SCR-2172, which also involves individuals compensated from the "consultant" account.

<sup>3</sup>G.L. c.29, Section 29A provides in full as follows:

The commissioner of administration shall make, and may from time to time amend, rules and regulations governing the use of consultants in all departments, offices, boards, agencies, commissions and institutions. Such rules and regulations shall establish, after recommendations by the personnel administrator, the rate of compensation of such services and shall provide for the prior approval by the said administrator of the rate for any such service for which no rate has previously been established by such regulation. Such rules and regulations shall be open to public inspection in the department of personnel administration, and copies thereof shall be available to any person upon request. Such rules and regulations shall not be subject to the provisions of chapter thirty A. Such rules and regulations shall also include, but need not be limited to the following requirements none of which shall be waived: (1) a request therefor on a form prescribed by the commissioner of administration specifically setting forth the need for such services; (2) the period of time for which the services are to be engaged or the scope of work to be done and such other information as shall be required to establish the maximum limit of the commonwealth's obligation for the services; (3) a written contract specifically setting forth the duties and responsibilities of the parties; (4) a resume setting forth the qualifications of the proposed consultant as they relate to the terms of the aforementioned contract; (5) a disclosure statement setting forth any other income derived by the proposed consultant from the commonwealth or any of its political subdivisions; (6) a statement setting forth the names and addresses of all persons with any interest in the said contract. No

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Relations, the Chief Administrative Justice of the Trial Court, the Massachusetts Teachers Association, the National Association of Government Employees, and Local 509, Service Employees International Union, AFL-CIO, a member of the Alliance, as well as from the parties to the instant matter.<sup>4</sup>

#### Findings of Fact

Southeastern Massachusetts University, located in North Dartmouth, has approximately five thousand students. Offering primarily undergraduate degrees, it is comprised of five colleges: Business and Industry, Visual Performing Arts, Engineering, Nursing, and Arts and Sciences. A Division of Continuing Studies, offering night, weekend and summer courses and workshops is located in New Bedford.

#### 3 (continued)

department, office, agency, board, commission or institution within any of the executive offices established by chapters six A and seven shall contract for the provisions of any such services without the prior written approval of such contract by the secretary having charge of such executive office. No payment shall be made to any consultant for any services provided prior to the date upon which the form requesting said services as required by clause (1) has been approved by the secretary having charge of such executive office and a copy of the same has been filed with the comptroller. As used in this section the word "consultant" shall mean any person who, as a non-employee of the commonwealth, gives advice or service regarding matters in the field of his knowledge or training and whose compensation is payable from a subsidiary account coded under "03" in the expenditure code manual. No person employed by the Commonwealth as a consultant so-called shall directly or indirectly supervise another temporary or permanent employee of the commonwealth. The commissioner of administration shall submit copies of the said approved forms within thirty days after receipt to the house and senate committees on ways and means and the joint legislative committee on post audit and oversight of the general court.

<sup>4</sup>The Board of Regents submitted one brief as party to this case and Case No. SCR-2172, and a separate brief through its General Counsel. The former takes the position that the statutory provisions relating to "consultants," G.L. c.29, Section 29A, "are not of direct application to individual institutions of public higher education, but they are applied to the Board of Regents, the employer for all purposes relevant to the instant matter. St. 1973, c.1230, Section 31." The General Counsel argues that because individual institutions are exempt from the provisions of c.29, Section 29A, the Commission may not devise any rule of general application in this case. We do not reach this issue because we decide this case on other grounds.



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There are approximately three hundred full-time faculty members and an unspecified number of permanent part-time faculty, who are represented by the Federation for purposes of collective bargaining and who were covered by the terms of a collective bargaining agreement in effect from July 1, 1980 through June 30, 1983.<sup>5</sup> The regular full-time and permanent part-time faculty (herein referred to collectively as full-time faculty) are supervised by the chairpersons of the approximately twenty-eight departments and teach a maximum of twenty-four units in a year. The average full-time teaching load is nine units a semester, although department chairs and some faculty who are engaged in research or publishing have a reduced teaching load.

Full-time visiting lecturers usually teach a full course load. They are normally hired pursuant to a one-year contract to replace a full-time faculty member who is temporarily absent and they may engage in the other departmental activities of the absent faculty member, including advising students and meeting with faculty department committees. Of the nine full-time visiting lecturers employed in the 1982-83 academic year, eight were under one-year contracts and the ninth had been hired pursuant to a two-year contract which had been extended to three years. They are paid full faculty salaries from the "01" budgetary account.<sup>6</sup> The record does not reveal whether they receive fringe benefits. The full-time visiting lecturers do not participate in sabbatical, tenure or contract renewal procedures, nor do they participate in the faculty senate. They may, however, participate in department governance activities. Full-time visiting lecturers are supervised by department chairpersons and are subject to evaluations. They may participate in the peer evaluation process.

Part-time visiting lecturers (herein referred to as part-timers) generally teach one course (three units a semester), although one or two of the forty part-timers taught as many as nine units during one semester in the 1982-83 year. Like full-time faculty and full-time visiting lecturers, part-timers are supervised by the department chairpersons. The department chairpersons assign teaching sections, class meeting times and office space and discuss the course textbook and office

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<sup>5</sup>The recognition clause of the collective bargaining agreement recognizes the Federation as the representative of the following employees: Commonwealth Professor, SMU; Professor, SMU; Associate Professor, SMU; Assistant Professor, SMU; Instructor, SMU; Department Chairperson, SMU; Librarian, SMU; Associate Librarian, SMU; Assistant Librarian, SMU; Library Assistant, SMU; Professional Technician I, SMU; Professional Technician II, SMU; Professional Technician III, SMU; and Professional Technician IV, SMU. The collective bargaining agreement specifies the terms and conditions of all full-time and permanent part-time employees holding such titles.

<sup>6</sup>The budget system in the Commonwealth is organized into 20 subsidiary accounts. Each subsidiary account is numerically coded. The "01" account includes salaries for "permanent" positions, the "02" account contains salaries for "temporary" positions, while the "03" account includes costs for services by consultants and others classified, for budgetary purposes, as "non-employees."



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hours with the faculty member. Of the forty part-timers employed in the 1982-83 academic year, eight also were employed in the previous academic year. Part-timers are paid usually from the "03" budget account and do not receive fringe benefits. Their pay ranges from \$1200 to \$5500 per semester. Regular full-time faculty salaries range from \$12,500 to over \$25,600 per year. On occasion, the part-timers are paid from the "02" budget account. Part-timers are responsible for teaching and maintaining office hours.<sup>7</sup> Part-timers do not participate in the standing committees or university councils established under the SMU-Federation collective bargaining agreement or in any academic councils.<sup>8</sup> Although part-timers may participate in some department committees on an informal basis, they usually are not entitled to vote in the faculty senate or to participate in tenure evaluation procedures, sabbatical leave, the promotion process or on college or university curriculum committees.

Some part-timers have participated in department meetings, student clubs and organizations, and have participated in workshops, all functions which also are performed by full-time faculty. One part-timer once coordinated a graduate program. Part-timers and full-time faculty may teach the same students, and some courses taught by full-time faculty have also been taught by part-timers.

Full-time faculty, full-time visiting lecturers and part-timers are evaluated at least annually on some aspects of their job performance. All faculty are evaluated by students on a form distributed by the students, which is then transmitted to the department chairperson. The department chairperson in turn transmits student evaluation forms to a department committee elected by the full-time members of the department. The department committee then advises the department chairperson on the preparation of written evaluations for all full-time faculty. In some cases, part-timers are also evaluated by department committees who recommend whether to rehire the part-timer for an additional semester or semesters.

When full-time faculty are evaluated, their evaluation includes the following five specific areas: teaching effectiveness based upon student and faculty committee evaluations; research and publications; professional activities; service to the academic community; and participation in community affairs. The evaluation of part-timers appears to be based only on teaching effectiveness.

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<sup>7</sup>Only two witnesses testified in the hearing in this case. One, Joseph A. Bronstad, an Associate Professor at SMU, testified primarily about the working conditions of the part-time faculty in the Department of Foreign Literature and Languages. The other, William C. Wild, Jr., the Dean of Administration at SMU, testified more generally about practices or policies throughout the University. Because Dean Wild distinguished more clearly between the duties and status of full-time visiting lecturers and of the part-timers, we have relied upon his more specific description of the duties of the part-timers.

<sup>8</sup>The parties' collective bargaining agreement provides for seven "College Academic Councils," composed of two members elected by each department from full-time faculty. Each council is charged with establishing a permanent committee on faculty evaluation. A "University Council," composed of one member elected from each of the Academic Councils is also charged with establishing a faculty evaluation committee.



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### Opinion

#### Full-Time Visiting Lecturers

The evidence demonstrates that the full-time visiting lecturers form a distinct group, whose working conditions differ in several respects from those of the part-timers. Therefore, we consider the unit placement of full-time visiting lecturers separately.

The record and the reasonable inferences drawn from all of the evidence show that full-time visiting lecturers perform the same teaching duties, perform equivalent extracurricular duties, and enjoy similar working conditions (including salary, supervision and evaluations) as their regular full-time counterparts. We conclude that full-time visiting lecturers teach the same courses to the same students as do the full-time faculty and that the two groups share equivalent qualifications. These conclusions flow from the fact that the visiting lecturers are hired to replace an absent regular full-time faculty member and to assume that faculty member's responsibilities and activities. The evidence also shows that the full-time visiting faculty perform other job duties similar to those of the full-time faculty including advising students and meeting with department and student committees. The record does not reveal what research or publication duties are expected of either the regular full-time faculty or of the full-time visiting faculty. The record does reveal, however, that full-time visiting lecturers are evaluated, are eligible for reappointment, and may participate in all the activities of their department like regular full-time faculty. Full-time visiting lecturers are paid salaries equivalent to those of regular full-time faculty. The record does not indicate that the two groups differ in their eligibility for fringe benefits. Although the full-time visiting faculty are not eligible to participate in tenure or sabbatical procedures, we do not consider that fact sufficient to destroy the community of interest that they otherwise share with the regular full-time faculty. See Board of Trustees, University of Massachusetts, 3 MLC 1179, 1188-89 (1976) (hereinafter University of Massachusetts) (non-tenure track faculty share a community of interest with tenure track faculty). Differences between the two types of faculty are insufficient to destroy the community of interest which they share.

Our inquiry does not end with a finding of community of interest between full-time visiting lecturers and regular full-time faculty, however. There remains the issue of whether the full-time visiting lecturers should be accorded the right to bargain collectively with SMU, or whether their relationship to the University is too insubstantial or "casual" to warrant their participation in collective bargaining. See e.g., Boston School Committee, 7 MLC 1947, 1951 (1981). Whether an employee has sufficient interest in wages, hours and working conditions to warrant collective bargaining rights is determined by reference to such factors as continuity of employment, regularity of work, the relationship of the work performed to the needs of the employer, and the amount of work performed by the employee. See, e.g., Town of Leicester, 9 MLC 1014 (1982). No one factor is necessarily dispositive; rather, the Commission looks at the function, nature and character of





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the worker's employment relationship to the employer. One prior Commission decision mentions the unit placement of full-time visiting faculty. In University of Massachusetts, the parties stipulated that full-time visiting faculty in their first year of employment should be excluded from the unit, while full-time visiting faculty in their second and subsequent years of employment should be included in the regular full-time faculty unit. 3 MLC 1190-91. Because the issue was not litigated, the Commission did not decide whether full-time visiting faculty in their first year of employment could appropriately be included in a unit of regular full-time faculty.

At the time of the hearing in the instant case, only one of the nine full-time visiting faculty would meet the University of Massachusetts criterion because she was serving in a second or subsequent year of employment at SMU. We are reluctant to disturb the University of Massachusetts standard for full-time visiting faculty even though it was a product of stipulation, especially since neither the Regents nor the Federation has argued the issue before us or offered any reason for adoption of a different standard. Nonetheless, we have decided that the University of Massachusetts "two-year rule" does not adequately measure the nexus between SMU and its full-time visiting faculty. The Commission, in other contexts, has afforded collective bargaining rights to employees whose employment tenure may be limited to one year or less. E.g., Boston School Committee, 7 MLC at 1951 (substitute teachers who taught 60 of 180 days in a year); Massachusetts Bay Transportation Authority, 6 MLC 1419, 1444 (1979) (temporary change foremen in position 6 months or more). In City of Cambridge, 2 MLC 1450 (1976), the Commission concluded that hospital house officers on one year contracts, who were eligible for continued employment, were not temporary employees and had the right to bargain collectively. Although the measure of an employee's continuity of interest in the employer's enterprise will vary from industry to industry, the Commission tries to balance labor's interest in affording bargaining rights to the greatest number of employees with management's interest in protecting the employing enterprise from disruption attendant to an obligation to bargain with an ever-changing workforce. See City of Gloucester, 1 MLC 1170 (1974); Town of Lincoln, 1 MLC 1422 (1975).

In the instant case, we do not perceive a significant difference between the interests of full-time visiting faculty in their first year of employment and the interests of the one full-time visiting faculty member who is in a second year of employment. Nor do we perceive any reason, on the record presented, for denying to the first year full-time visiting faculty collective bargaining rights. Like the house officers in City of Cambridge, 2 MLC at 1454, the full-time visiting faculty who hold one-year contracts are eligible for reappointment to SMU. During the term of their contract, their duties, hours and supervision are equivalent to that of the regular full-time faculty. They contribute significantly to the business of the University and we see no reason to believe that they cannot contribute to the process of collective bargaining. Accordingly, for all of the foregoing reasons, we conclude that the full-time visiting faculty in their first and subsequent years are entitled to bargain collectively. Moreover, as discussed above, we have concluded that the full-time visiting faculty share a community of interest with the regular full-time faculty that warrants their inclusion in the same unit with the regular full-time faculty.



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### Part-Time Visiting Lecturers

We turn next to the issue of the part-timers. As a threshold matter, we must determine whether G.L. c.29, Section 29A, which establishes certain minimum requirements for the use of "consultants" by departments and agencies of the Commonwealth and defines "consultant" as a "non-employee," precludes a finding that any individual, including the part-time visiting lecturers in this case, compensated pursuant to its provisions is a public employee for purposes of G.L. c.150E. The definition of public employee in Section 1 of G.L. c.150E provides a starting point for our discussion. A public employee is

"any person in the executive or judicial branch of a government unit employed by a public employer except elected officials, appointed officials, members of any board or commission, representatives of any public employer, including the heads, director and executive and administrative officers of departments and agencies of any public employer, and other managerial employees or confidential employees, and members of the militia or national guard and employees of the commission, and officers and employees within the departments of the state secretary, state treasurer, state auditor and attorney general."

The Regents, through their briefs, raise two major arguments with respect to the relationship between Section 1 of G.L. c.150E and Section 29A of G.L. c.29. First, the Regents argue that an overview of the entire statutory scheme regulating the relationship between the Commonwealth and the individuals whom it compensates for services leads to the conclusion that persons paid from the "03" account<sup>9</sup> under Section 29A of G.L. c.29 were never intended by the legislature to be covered by G.L. c.150E. In support of this argument, the Regents point out that "03" consultants are expressly termed "non-employees" and are not covered by the statutes which govern wages, hours, and terms and conditions of employment of persons compensated from other budgetary accounts.

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<sup>9</sup>The Commonwealth's expenditure code manual describes the "03 account" as follows:

#### 03 SERVICES--NON-EMPLOYEES

All services and related expenses conforming to the following conditions rendered or incurred by non-employees, except contractual services classified under any other subsidiary account:

1. Professional: The service (a) must be of recognized professional status requiring discretion and judgment in a formal field of knowledge and academic study, training or experience; (b) must be for a limited specified period of time; and (c) must be a service which personnel in the classified service of the Commonwealth ordinarily do not render or are not currently available to render.

121 Architects and Engineers

124 Instructors and Lecturers

125 Legal Services, including Judges

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We note that in the context of other statutes, the fact that "03 consultants" are referred to in G.L. c.29, Section 29A as "non-employees" is not determinative of their employee status. For example, the Attorney General has issued opinions interpreting the "Claims and Indemnity Act," G.L. c.258 to potentially extend immunity from liability to persons paid from the "03" account. "...[T]he label attached to the employment relationship is not dispositive of the issue. Rather, it is the substance of the relationship which is determinative of employee status." 1983/84 Op. Atty. Gen. No.2, Rep. A.G., Pub. Doc. No.12 (1983). We also note that we have not previously considered the source of an individual's compensation to preclude a finding that the individual is a public employee within the meaning of G.L. c.150E. See City of Springfield, 2 MLC 1233 (1975) (CETA workers are public employees of City).

The Regents raise a more significant concern, however. They claim that if all of the statutes governing wages, hours and working conditions of persons providing services to the Commonwealth are viewed as a whole, two separate patterns emerge. One body of law covers persons paid from the "01" and "02" accounts (the "employees"), and the other covers persons paid from the "03" account (the "non-employees").

The "01" and "02" subsidiary accounts include salaries for permanent positions, compensation for temporary positions, and all overtime. Rates of pay, hours

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126 Medical, Dental, Veterinary and Medical Laboratory Services

127 Religious Services

\*130 Data Processing Services: Includes expenditures for services rendered to analyze, develop, design, document, program, test, and/or operate data processing equipment, systems and related activities, including: service bureau operations; facilities management, maintenance of systems; software packages; and word-processing systems.

149 Other Professional Services: Includes auditors, accountants, examiners

11. Non-Professional: All services which meet the conditions of Clauses (b) and (c) of Paragraph 1 above but not the conditions of Clause (a).

201 Cleaners

202 Students, Patients, Inmates and Institution Residents

203 Court Reporters and Secretaries to Special Commissioners

204 Janitors

205 Exterminators

219 Other Non-Professional Services: Includes charges for slaughtering animals, equipment inspection (except motor vehicle and power plant boilers), time service (Western Union, etc.), appraisers, monitors, sheriffs, constables, military services, witness fees, artisans, testers and testing service, graders, guides, workers and blind consignors (Div. of Blind). Clerks, typists, and stenographers and laborers must be included under 01 or 02 subsidiary.

\*220 Special Services

All regular compensation not classified in any other subsidiary account paid  
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of work, and fringe benefits for persons who hold positions in the Commonwealth's position classification plan are specified by G.L. c.30, Sections 45-50, G.L. c.149, Sections 30A and 30B, as well as the rules and regulations promulgated pursuant to G.L. c.7, Sections 28 and 28A. The Regents claim that G.L. c.150E is applicable onto to persons paid from the "01" or "02" subsidiary account. The Regents argue that G.L. c.150E establishes an alternative to the statutory mechanism of G.L. c.30, Sections 45-50, G.L. c.149, Sections 30A and 30B and G.L. c.7, Sections 28 and 28A for setting terms and conditions of employment. The Regents contend that such legislative intent can be gleaned from the fact that G.L. c.150E, Section 7(d) specifies that the conflicting terms of any collective bargaining agreement shall prevail over certain enumerated statutes, including G.L. c.30, Sections 45-50, G.L. c.149, Sections 30A and 30B, G.L. c.7, Sections 28 and 28A. Since G.L. c.29, Section 29A is absent from this list, the Regents argue that the Legislature intended to exclude any person employed pursuant to provisions of G.L. c.29, Section 29A from the application of G.L. c.150E.<sup>10</sup>

After having considered carefully the Regents' analysis, we do not agree that such a legislative purpose can be divined by focussing on this statutory structure.<sup>11</sup> To do so, we would have to ignore the realities of state agency budgeting, expenditure and hiring practices. Individuals may be compensated from the "03" account and perform the same duties, under the same working conditions and

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to persons performing a service to the commonwealth, which service is not subject to the jurisdiction of chapters 30 and 31 of the General Laws. Persons compensated under this object code shall not be eligible for membership in the state retirement system but may be eligible for group insurance.

<sup>10</sup>Massachusetts Probation Association v. Commissioner of Administration, 370 Mass. 651, 663 (1976), which reads Section 7(d) of G.L. c.150E so as to add weight to its conclusion that probation officers were not "public employees" within the meaning of Section 1 of G.L. c.150E, does not support a contention that the provisions of G.L. c.29, Section 29A so limit the ability of the Commonwealth to bargain over wages, hours and other terms or conditions of employment that persons compensated from the "03" account were intended by the legislature to be excluded from c.150E coverage. Despite the constraints of Section 29A, there remain a significant number of potentially bargainable issues over which the Regents retain control.

<sup>11</sup>Moreover, the statutory separation of the "01" and "02" employees from "03 consultants" is not as complete as the Regents suggest. For example, the regulations covering the "03 consultants" provide that "any service which corresponds substantially with the scope of duties of a position in the Commonwealth's classification plan may be compensated at a rate not exceeding twenty-five percent above Step 1 of the salary schedule." Therefore, the compensation paid to "03 consultants" may be linked to current "01" and "02" salaries and to future pay increases for these positions.



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supervision, as persons paid from the "01" and "02" accounts.<sup>12</sup> See e.g., Commissioner of Administration and Finance v. Local 509, Service Employees International Union, AFL-CIO, 15 Mass. App. Ct. 985 (1983); Commonwealth of Massachusetts and Local 509, Service Employees International Union, Alliance, AFSCME/SEIU, AFL-CIO, American Arbitration Association, Case Number 1139-0818-82 (1983) (James Cooper, Arb.); Commonwealth of Massachusetts, Department of Mental Health and Service Employees International Union, Local 509, Massachusetts Board of Conciliation and Arbitration, CA-605, OER 80-247 (1981) (Robert Stutz, Arb.). In fact, the Regent's own witness in this case explained that part-timers are sometimes paid out of the "02" account rather than the "03" account. Thus, SMU's own payroll practices illustrate the fact that the budgetary account from which an employee is paid may bear no relation to the employee's duties, privileges or employment status at the University.

The Legislature may have originally intended the "03" account to be used by agencies to pay for "non-employee" services, but it would be less than forthright not to recognize what arbitrators and the courts have concluded about the actual practices of a number of state agencies. Rather than categorically exclude all persons compensated from the "03" account from the ambit of G.L. c.150E based upon a budgetary fiction, we conclude that it is more appropriate to apply on a case-by-case basis the well-settled legal standards which differentiate employees from independent contractors. This is the analysis used by the Attorney General to interpret G.L. c.258, discussed above, and is the alternative proposed by the Regents in the present case. In Massachusetts, "the existence of the master-servant relationship depends primarily upon the right of a principal to control the way in which work is performed for him." Marino v. Trawler Emil C., Inc., 350 Mass. 88, 95 (1966), cert denied 384 U.S. 960 (1966). This common law "right to control" test is also applied to cases arising under the National Labor Relations Act,<sup>13</sup> see, e.g., The Beacon Journal Publishing Co., 188 NLRB 218, 220 (1971); NLRB v. United Insurance Co., 390 U.S. 254, 67 LRRM 2649, 2650 (1968) (general agency principles should be applied in distinguishing between employees and independent contractors).

The definition of "public employee" contained in Section 1 of G.L. c.150E is very broad: "any person...employed by a public employer..." The Commission has applied that definition without regard to the source of compensation. E.g., City of Springfield, 2 MLC at 1236-1237 (workers paid from federal funds are public employees). See also Board of Trustees, University of Massachusetts, 5 MLC 1896 (1979) (in separate opinions, both Commissioners found "03" funding irrelevant to determination of employee status and focussed opinions on student status

<sup>12</sup>G.L. c.29, Section 29A does not expressly forbid such arrangements, although the regulations for the use of "03 consultants" do require that the service performed must be one which "personnel in the classified service of the Commonwealth ordinarily do not render or are not currently available to render."

<sup>13</sup>29 U.S.C. Sections 151 et. seq.



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of disputed workers). Where individuals perform services for a public employer for compensation and with supervision, we will recognize, as a rebuttable presumption, that an employment relationship exists. See, e.g., Town of Plympton, 5 MLC 1231 (H.O.), aff'd, 5 MLC 1410 (1978) (individuals paid by Town paycheck from which taxes and retirement deductions were withheld were found to be employees). The presumption of employee status may be rebutted by evidence demonstrating that the employer does not retain "control" over the worker. The Commission's inquiry focuses upon the "duties of the workers, the type of supervision they receive, the method in which they are paid and the manner in which they are treated by the employer." City of Worcester, 4 MLC 1373, 1375 (1977).

In the instant case, the record demonstrates that the part-timers teach courses assigned to them under the supervision of department chairpersons.<sup>14</sup> We know that the part-timers are compensated by SMU and their performance evaluated. We conclude that the evidence does not rebut the presumption of employee status, but instead supports a finding that the part-timers are employees within the meaning of G.L. c.150E.

We next consider whether the part-time visiting lecturers should be afforded the right to bargain collectively, and if so, in what unit. As with the full-time visiting lecturers, we must consider whether the part-timers' relationship to SMU is too "casual" to warrant collective bargaining. In University of Massachusetts, part-time faculty who had taught at least one course for three consecutive semesters were included in the full-time unit. 3 MLC at 1197. The Commission devised that standard to measure the sufficiency and continuity of part-time faculty interest in their working conditions. The parties have not suggested any reason why that standard is inappropriate for this case, and we think it strikes a reasonable balance between the interests of labor and management. Accordingly, we conclude that part-time visiting lecturers who have taught at least one course for three consecutive semesters, or who are now teaching in their third consecutive semester, have a sufficient and continuous interest in their SMU employment to warrant their participation in collective bargaining.

There remains for consideration the question of unit placement of the part-timers. We have traditionally declined to establish units for part-time employees separate from a unit of full-time employees where we have evidence that both groups share a community of interest. E.g., Town of Sterling, 4 MLC 1704 (1978). Separation of employees who perform the same duties, in the absence of some evidence of conflict between the groups, does not promote stable labor relations. It is in part for this reason that the Commission favors broad, comprehensive units. Town of Swansea, 4 MLC 1527 (1977).

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<sup>14</sup> We recognize that the teaching profession requires the exercise of a great degree of independent judgment by the teacher. The fact that the part-timers must determine their own pedagogic methodology does not alter the conclusion that the part-timers are supervised by the department chairpersons.



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Like the full-time visiting lecturers, the part-timers are supervised in the same manner as full-time faculty. The record reveals no distinction between the students and courses taught by the part-timers and those taught by other faculty. It appears that the part-timers have the opportunity to interact with the full-time faculty at departmental meetings and that part-timers are subject to the same student evaluation process applied to full-time faculty. Although part-timers are not expected to engage in the research and publication duties required of the full-time faculty, the record does not provide a basis for us to conclude that this difference is significant to the community of interest that these groups of employees otherwise share. The fact that part-timers are paid less than the full-time faculty and are ineligible to receive the benefits negotiated by the full-time faculty in their collective bargaining agreement does not demonstrate a lack of community of interest. The discrepancy between the salaries and fringe benefits of the unionized full-time faculty and that of the non-unionized part-timers may reflect only the gains achieved by the unionized workers as a result of collective bargaining, rather than a fundamental divergence in their community of interest. In sum, we conclude that the evidence reflects that the part-timers share a sufficient community of interest with the full-time faculty to warrant inclusion in the full-time faculty unit.

Accordingly, for the reasons stated above, the Commission concludes that both the full-time and part-time visiting lecturers are entitled to bargain collectively and that both share sufficient community of interest with the full-time faculty to warrant their inclusion in the bargaining unit.

#### Direction of Election

We therefore conclude that a question has arisen concerning the representation of certain employees of the Board of Regents of Higher Education/Southeastern Massachusetts University within the meaning of Section 4 of G.L. c.150E.

The unit appropriate for the purpose of collective bargaining consists of employees currently included within the professional bargaining unit and full-time visiting lecturers and part-time visiting lecturers who have taught at least one course for three consecutive semesters or who are now teaching in their third consecutive semester.

IT IS HEREBY ORDERED that an election shall be held for the purposes of determining whether a majority of the full and part-time visiting lecturers described immediately above wish to be included in the existing bargaining unit currently represented by the Southeastern Massachusetts Faculty Federation, Local 1895, AFT, AFL-CIO, or whether they wish to be represented by no employee organization.

The eligible voters shall consist of all full-time visiting lecturers, and also all part-time visiting lecturers who have taught at least one course for three consecutive semesters or who are now teaching in their third consecutive semester whose names appear on the payroll of the Board of Regents/Southeastern



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Massachusetts University for the payroll period immediately preceding this decision, and who have not since quit or been discharged for cause.

In order to ensure that all eligible voters shall have the opportunity to be informed of the issues and of their statutory right to vote, all parties to this election shall have access to a list of voters and their addresses which may be used to communicate with them.

Accordingly, IT IS HEREBY FURTHER ORDERED that three (3) copies of an election eligibility list be filed by the Board of Regents/Southeastern Massachusetts University with the Executive Secretary of the Commission, Leverett Saltonstall Building, 100 Cambridge Street, Room 1604, Boston, Massachusetts 02202, no later than fourteen (14) days from the date of this decision.

The Executive Secretary shall make the list available to all parties to the election. Since failure to make timely submission of this list may result in substantial prejudice to the rights of the employees and the parties, no extension of time for the filing thereof will be granted except under extraordinary circumstances. Failure to comply with this direction may be grounds for setting aside the election should proper and timely objections be filed.

COMMONWEALTH OF MASSACHUSETTS  
LABOR REALTIONS COMMISSION

PAUL T. EDGAR, CHAIRMAN  
GARY D. ALTMAN, COMMISSIONER  
MARIA C. WALSH, COMMISSIONER

