

of September 2000, Housing Services provided on-campus accommodation for approximately 11,000 undergraduate students and approximately four hundred (400) graduate students who either reside in one of their residence hall accommodations or in family housing apartment units. Housing Services consists of six departments: Residence Life, Planning and Operations, Finance, Child-care Services, Technology Services, and Administration and Personnel. Housing Services is a self-funded department that pays its staff members' salaries out of the funds it generates.

Residence Life

As its name suggests, Residence Life is the department within Housing Services in charge of overseeing all aspects of life within the residence halls. Its mission is to:

[c]reate and sustain communities within the residence halls that are civil, educational, inclusive and socially just...and to foster the individual growth and development of the whole student within the community.

As stated in the Residence Life Manual, Residence Life is intended to “complement the traditional core of academic activities of . . . students' education.” It “strives to fulfill the obligations of a co-academic department by addressing the full breadth of intellectual, interpersonal and physical growth needs of our residents.”

Residence Life - Staff and Administrative Structure

The University's forty-one (41) residence halls are grouped into four residential areas that are overseen by Area Directors (ADs). Those residence halls are organized into twenty-three administrative “clusters” where Housing Services has office space. There are twenty three (23) Residence Directors (RDs), one for each cluster, who oversee the staff and administrative functions of their respective cluster. RDs are expected to have earned a Masters degree in a related field.

There are also approximately thirty-two (32) graduate student Assistant Resident Directors (ARDs) who report to and assist the RDs and co-supervise Resident Assistants (RAs). ARDs must be students in good standing and enrolled in a graduate program. They are members of a bargaining unit comprised of other graduate students. Between 72 and 113 RAs report to each of the ARDs. The compensation of both RDs and ARDs includes a fee-waived apartment in the cluster, a tuition waiver and certain stipends.

As of July 2001, there were approximately 360 (RAs) and six (6) Community Development Assistants (CDAs), whose positions are described below.

Housing Services also employs approximately two hundred (200) undergraduate student security receptionists and 150 undergraduates as clericals in the cluster offices.

RAs and CDAs

RAs are undergraduate students employed by Residence Life for a minimum of one full academic year (two semesters). RAs live on the floor in the residence hall to which they are assigned and are liaisons between the student and the rest of the University, particularly Residence Life. The ratio between RAs and students on each floor is approximately 1:35. Residence Life selects RAs based on

their “demonstrated and potential peer counseling, leadership and communication skills.” The RA Manual lists five roles of the RA: role modeling, programming, advising, administrator and crisis manager, and states “through these roles, you will have an opportunity to assist residents in creating a healthy community that is purposeful, open, caring, just, disciplined and celebrative.” The RA job description, which appears in both the Residence Life staff manual and the RA manual, breaks down RAs' responsibilities and duties into seven categories:

- ◆ Community building – Serving as a positive role model and assisting and encouraging floor members to develop a livable, inclusive and responsible community;
- ◆ Resource and Referral Agent – Displaying information about the University through floor meetings, flyers and one on one interaction;
- ◆ Crisis Intervention – Intervening and assisting in crises on their floor, which may range from loud music, fights, personality conflicts, or physical assault;
- ◆ Administrative duties – Including returning prior to the opening of the residence halls for training and assisting the Assistant Residence Director and Residence Director in opening the hall; distributing keys, conducting floor intervention session and serving as a positive role model by abiding by all university and housing policies;
- ◆ Staff Meeting and Evening Duties – including making rounds and being on-call in the evenings during certain set hours;
- ◆ Training;
- ◆ Performance Appraisals;
- ◆ General – Sets forth hours of employment; etc.

The RA manual, which RAs are given during their training, and which consists of well over one hundred (100) pages, discusses each of these categories in considerable detail, and contains sections on performance appraisal, exit and performance evaluations forms, training, suggested weekly schedules, activities, programming and checklists.

The University does not require RAs to perform any specific academic duties. However, it does expect them to play a supportive role in the academic success of their residents by, among other things, role modeling good study skills, sponsoring study skills workshops, creating floor communities that are supportive of academic success, and referring students to academic support resources.

CDAs are more experienced RAs who have worked for at least two semesters as an RA. They work within designated clusters where the University believes them to be most needed. The University considers CDAs to be “super RAs,” acting as mentors and advisors to RAs in areas of programming, campus resources, leadership and staff development and helping RAs in units where there are ongoing problems. The CDAs' job description indicates that some of the responsibilities and duties of the position are negotiated with the supervisor at the beginning of the semester and are based on the needs of the cluster, the RD and the career goals and skills of the CDA. Although job functions may vary, CDAs' compensation and

other conditions of employment are otherwise identical to those of RAs. At the time of the hearing, there were only six CDAs.

RA and CDA Job Qualifications

RAs must be undergraduate students enrolled in degree-granting programs who have lived in a residence hall for at least one semester. To apply for the position, students must have a 2.4 grade point average (GPA) at the time of application. Thereafter, RAs (including those who apply for a CDA position) must maintain at least a 2.2 cumulative GPA.⁴ Residence Life verifies RAs and CDAs' grades before the beginning of each semester. Both applying and returning RAs and CDAs must be free of any current university judicial sanctions. RAs are not required to take any academic courses, as part of their duties nor do they receive academic credit for their work.

CDA applicants must have a 2.2 GPA and be free of any current University judicial sanctions. If an RA applies for a CDA position, but is not selected, the applicant remains an RA as long as the applicant is otherwise qualified for the RA position.

The University considers the twin indicia of a 2.4 or 2.2 GPA and having no current judicial sanctions as critical to its assessment of whether these students will be effective leaders and role models.

Selection Process

RAs are selected through a multi-step process. Each spring, Residence Life writes to a number of administrative offices on campus, seeking the names of any students whom they have identified as student leaders and invites those recommended students to attend an RA information session. During the spring semester, Residence Life holds from ten to twelve widely advertised recruiting information sessions at various locations around campus.

Interested students then complete an extensive application, the top of which states that "by completing an application you're expressing your interest in one of the most important student leadership positions available at the University of Massachusetts." The application seeks basic information about the student, including his or her social security number, and includes a copy of the RA job description. Applicants do not apply for a specific area or cluster; however, the application allows students to indicate their three top choices for residential area, and also to indicate whether they have any special housing options in which they are interested.

After screening out applicants who fail to meet the minimum GPA and other application criteria, Residence Life interviews the remaining applicants individually and in a group setting. Once the interviews have been completed, Residence Life makes its selections. Residence Life places all unsuccessful applicants on an alternate's list.

Employment Contract

Before starting work, RAs are required to sign a copy of their job description and the *Resident Assistant Memo of Understanding* (MOU). The introductory paragraph states that:

"I _____, indicate by my signature below and by my signature on the enclosed Resident Assistant Job description, my acceptance of the RA position and my acceptance of the following conditions of employment..."

The MOU then enumerates nine terms and conditions of employment, including compensation, work hours, duration of contract, GPA requirements and the signatory's agreement to abide by "any and all regulations of the Personnel Office, Student Employment and Financial Aid Officer regarding employment."

Training

The University requires RAs and CDAs to arrive on campus before the start of each semester for training and building preparation. New RAs arrive eleven days before the beginning of the fall semester. They receive the RA manual, which they are expected to bring to all training sessions. Training topics include listening skills and communication, student and community development, enforcing the Student Code of Conduct and diversity issues, dealing with drugs and alcohol and sexual assault and diversity awareness. Before the spring semester begins, RAs and CDAs are required to participate in five and a half days of training and building preparation. Returning RAs and CDAs also participate in training, but attend different sessions.

Compensation

RAs and CDAs receive a waiver of the charge for a double room in the residence halls, valued at \$3,286.00; a waiver of certain computer fees, valued at \$36.00; a waiver of wellness center membership valued at \$100.00 and a cash stipend of \$1709.86 for the 2001-2002 academic year. The RAs receive weekly paychecks from which federal and state income tax is deducted. To determine the RAs' and CDAs' pay rate, the University calculates the combined value of their compensation package, including fee waivers and stipends, and breaks that down into an hourly rate to ensure that the RAs receive above the statutory minimum wage.

Financial Aid

If students are recipients of federal work-study funds, part or all of their work study award must be directed towards their stipend. Whether a student receives work-study funding is not relevant to the University's hiring decision.

Hours

The job description indicates that, over the course of an academic year, the position averages twenty hours per week. However, some periods of time require greater staffing demands (such as training, opening, closing, special activities, campus crisis, etc.) and all staff are expected to be available and respond as required. RAs are

4. The University requires students to maintain a 2.0 GPA to be in "good standing." To make the University Dean's List, students must have a 3.5 GPA or higher.

expected to sleep in their own room each night. They are generally expected to be in their rooms from 11 p.m. through 7 a.m. daily and at a minimum, are to be in their hall by 1 a.m. on weeknights and 2 a.m. on weekend nights.

Each cluster is staffed by an “RA on duty” from 7 p.m. until 7 a.m. the following morning, Sunday through Thursday and 8 p.m. until 8 a.m. on Fridays and Saturdays. The RA on duty must remain in the building all night, and must be available by telephone. The RD determines the number of staff on duty in a cluster, in consultation with the Area Director and other RDs in the area. RAs on duty are required to work in the cluster office or make rounds at least twice nightly from 7:00 p.m. to 11:00 p.m. Sunday through Thursday and from 8 p.m. to 1 a.m. on Friday. RAs are on-call on average once a week. The RA Manual states that RDs may expect additional rounds and will set expectations on when rounds should occur. RAs are encouraged to take off at least one weekend a month.

Appointment and Continuity of Employment

Under the terms of their contracts, RAs are required to work one full academic year. RAs have an annual turnover rate of approximately 50-60%, including turnover that results from RAs graduating. In the fall of 2001, the University renewed the contracts of 181 (out of 360) RAs. In the fall 2000, there were 146 new RAs out of a total of 342. The remaining 196 RAs had been RAs for at least one semester.

Supervision and Personnel Files

RAs report to and work closely with the RDs who have primary hiring and supervision responsibility. The ARDs work closely with the RDs to provide direction, supervision and support to the RA staff. RDs are expected to maintain personnel files for RAs containing all application, interview and evaluation materials, all personnel letters and resignation letters or exit evaluations if applicable. The RA’s supervisor is also expected to maintain a working supervisory file containing weekly reports and supervisory notes.

Personnel Appraisals

RD/ARDs are expected to meet with each RA once every two weeks to review progress, performance, skills, development etc. The RA manual contains an extensive description of the RA evaluation process, which consists, in the fall semester, of an RA self-evaluation, resident feedback surveys, a formal, written evaluation by the RD/ARD⁵ and a performance review meeting by the end of the first semester. In the spring, the RD or ARD is expected to meet with the RA to review fall performance goals and plans.

5. The written evaluation form has six categories: community development and student relationships, programming, advising and helping skills, discipline/confrontation, staff relations, interpersonal dynamics and other assignments.

6. The enumerated violations are: Missing duty-unexcused; Late for duty – unexcused; Failure to communicate emergency situation; Under the influence of alcohol or drugs while performing RA duties; Failure to complete rounds during duty period; Not fulfilling programming requirements; Failure to confront policy violation; Failure to communicate policy violation; Violation of any University policy; Missing or being late for staff meeting - unexcused; Missing or being late for one training session – unexcused; Missing or being late for one on one –

Discipline

RAs and CDAs are subject to a progressive discipline procedure. The Residence Life Staff manual contains detailed student staff discipline guidelines outlining what level of progressive discipline should be taken for each of twenty-four separately listed violations⁶ falling into three categories: violations that can potentially impact the safety of the resident, community development and policy enforcement expectations, and administrative expectations. In academic year 2000-2001, Residence Life terminated, suspended, or did not rehire fifteen RAs. The grounds included failure to attend meetings, serving alcohol to a minor, illegal use of alcohol or drugs or theft of property.

If an RA is terminated, he or she must vacate his or her room within seven days of the effective date of termination. Terminated RAs have the right to file a written appeal to Residence Life. The RA manual contains a section giving RAs tips on how to construct a good appeal.

If an RA is charged with a violation of the Student Code of Conduct, he or she has the right to request a judicial conference or a hearing. Students may appeal results of hearings. If an RA or CDA has an active judicial sanction as a result of having been found to have violated the Code of Conduct, he or she will be terminated.

The University also grants to all students, including RAs, the right to resolve academic grievances through the University’s academic grievance procedure. However, the University specifically excludes matters of academic judgment⁷ and the substance (as opposed to the administration) of University, campus, Faculty Senate or School and College policies and regulations under that procedure from its definition of academic grievance.

Re-Hire Policy

At the end of each year of employment, RAs and CDAs fill out a form indicating whether they wish to continue in their position for another year, transfer to a different cluster, or leave the position (voluntarily or not). Barring mediocre or poor performance, if an RA/CDA has maintained the minimum GPA and has no live judicial sanctions, Residence Life will generally re-hire them for another year.

Residence Assistant Council

As described in the RA Manual, this council exists to provide an opportunity for RAs to provide input to Housing Services and Residence Life on issues related to the RA position and residential living and to serve as an advocate on behalf of the constituent RAs.

unexcused; Tampering with U.S. Mail; Misuse or mishandling of keys, access cards, etc.; Non-approved time away; Failure to be present for residence hall opening or closing; Failure to post information distributed in mailboxes; Failure to complete other administrative tasks.

7. Under the Academic Grievance Procedure, the evaluation of a student’s academic performance and the assignment of a grade as a result of that evaluation is considered a matter of academic judgment, and therefore not subject to the grievance procedure except where the grade has been determined in an arbitrary and capricious manner or where the procedure used in the evaluation is found to be in violation of University policy or state or federal statute.

One Residence Life staff member sits on this council. The council has discussed issues like compensation, hours of work and work responsibilities with residence life staff. The Director of Housing Services actively encourages the council's existence.

Other Undergraduate Students Employed in the Residence Halls

In addition to RAs and CDAs, Housing Services employs a number of other undergraduates, including approximately two hundred (200) student security receptionists who work in the evenings, monitoring residence hall doors and greeting students as they come in. Those students are recruited, trained, selected and supervised by the University's Public Safety Department, although they work for, and are paid by Housing Services. Housing Services also employs approximately one hundred forty (140) undergraduates as clerical workers in the cluster offices on an hourly basis. The RDs or ARDs hire these clerical employees. The University does not require these students to maintain a minimum grade point average to be employed as security receptionist or clerical cluster workers. There is frequent interaction between the cluster workers and the RAs working in the cluster office although the University considers their assignments and duties to be quite separate.

Academic Mentors

The University has a number of residence halls that cater specifically to students enrolled in academic programs or majors. These include the Commonwealth College honors program and the Talent Advancement Programs (TAP(s)), where first year students live and study with other students in their major. Approximately 1200 undergraduates live in these academic corridors. RAs and CDAs are not required to share the same academic interests as students in these corridors, but their preferences are taken into account during the selection process. However, TAPs have "academic mentors" associated with them who are selected, supervised and paid by the Residential Academic Programs (RAP) Office, a division of the office of Academic Affairs. Approximately 1% of residence hall floors have academic mentors assigned to them. Approximately eight academic mentors receive a stipend of \$500 and a single room for their services. Academic mentors report to staff within the RAP program. There may be some interaction between mentors and RAs pertaining to programming for a particular floor.

Other Student Leadership Roles

Each residence hall has a "house council," which is a student leadership organization that is responsible for providing Housing Services and Residence Life staff with feedback about the quality of life in residence halls. House Councils are considered the local branch of the University's Student Government Association system (SGA). Each house council has four officers who elect members of the Student Senate. The Senate elects a Speaker.

A student elected president leads the SGA. Students holding SGA cabinet positions during the school year receive some compensa-

tion. During the summer, the President and the Speaker of the SGA work full-time. Their paychecks are financed out of student fees.

Collective Bargaining/Other Student Units

In 1991, the University signed an agreement recognizing the Graduate Employee Organization (GEO) of the petitioning Union as the collective bargaining representative of a single campus unit of a number of graduate student positions, including teaching and research assistants and ARDs.⁸ As of the dates of the hearing, GEO represented 2500 graduate student employees at the University. The original recognition agreement, as well as the recognition clause contained in the parties' most recent collective bargaining agreement (Agreement) explicitly excludes from collective bargaining matters relating to academic policies. The recognition clause also excludes all work performed solely in pursuit of an academic degree, while any work performed for compensation is covered by the terms of the Agreement.

Graduate students must remain in good academic standing to remain in their TA or research positions. The Agreement specifically prohibits unit members from grieving either the procedures or the criteria developed by academic departments concerning graduate student appointments or reappointment. In addition, the agreement states that "no grievance concerning the provisions of the appointments and reappointment article shall result in the substitution of any person's judgment for that of the department chair."⁹

In addition to GEO, other unions represents various units of University employees for the purposes of collective bargaining, including the Professional Staff Union, Local 509, SEIU, representing the RDs in a unit of professional employees and the Massachusetts Society of Professors Faculty Staff /MTA/NEA, representing certain faculty and library staff.

During the course of the hearing, the University discussed its collective bargaining experience with GEO over the course of the past ten years. Susan Pearson, Provost for Faculty Relations and Development has served as Chief Negotiator for the University for all collective bargaining agreements negotiated with GEO. Pearson opined that bargaining with GEO had been problematic because it had proposed issues that she believed centered on student or academic issues, rather than employment issues. For example, GEO demanded that no graduate student be administratively withdrawn from the University for the nonpayment of housing fees and that graduate students living in dormitories be considered tenants under Massachusetts law. GEO also demanded that the University increase the amount of funding allotted to support diversity on campus, arguing that a more diverse graduate student body would lead to a more diverse bargaining unit. Pearson also testified regarding a graduate student who had filed a grievance over not having been offered a job for the next year. Because that graduate student had been removed from her program for not making

8. Teaching assistants assist professors in teaching, grading, and counseling students in courses for which he or she does not have primary responsibilities. Research assistants perform work related to academic research for work that is primarily for his or her own research and secondarily for the benefit of the University faculty or academic staff supervisor or granting agency.

9. The Union's February 15, 2001 bargaining demands sought, among other things, that the entire contract be subject to the Grievance Procedure, including Level Three, arbitration.

satisfactory progress, Pearson contended that that grievance turned into a grievance over the reasons the student had been dropped from her academic program. During the course of negotiations, when Pearson objected to the GEO's raising subjects that she believed dealt with student rather than employment issues, the GEO representative criticized her for making a phony distinction.

The University has voluntarily agreed to certain of GEO's proposals that it believed addressed non-mandatory subjects of bargaining, but has rejected others.

FERPA

As set forth in the University's pamphlet entitled "Undergraduate Rights and Responsibilities 2000-2001," the Family Educational Rights and Privacy Act (FERPA) grants basic protections of privacy to a student's educational records¹⁰. However, the University is free to disclose what it has deemed to be directory information to third parties. The University defines directory information as including, among other things, a student's name, local address, home address, e-mail address, major, local telephone number, date and place of birth. The University does not define as directory information the names of graduate teaching or research assistants, RAs or CDAs.

The Family Policy Compliance Office (FPCO) of the federal Department of Education administers FERPA and provides technical assistance to education agencies and institutions regarding issues related to education records. In a letter dated September 17, 1999, LeRoy Rooker, director of FPCO, stated that FPCO considers records containing a student's name, address and status as a teaching assistant to be "education records" because one cannot be a teaching assistant unless one is a student. Rooker stated that unless there were an exception under FERPA to the disclosure of the names and addresses of teaching assistants, educational institutions that disclosed the names of teaching assistants to comply with a state law may jeopardize an educational institution's continued eligibility to receive federal education funds. In a letter dated August 21, 2000 to counsel for the American Federation of Teachers, Rooker suggested that to avoid losing federal funding by improperly disclosing educational records, educational institutions could designate the names and addresses of teaching assistants as directory information. Rooker reasoned that that would be permissible because that information is "similar to those types of information that are specified by the statute under the definition of directory information and are of a nature of being common knowledge to those who are in the individual's class or who pass by the class." Rooker also suggested that to avoid non-compliance with FERPA while still complying with a union's information request, an educational institution could obtain the consent of the graduate student fellow/assistant before disclosing the information to the union. Alternatively, the educational institution could provide information to the students on behalf of the union and the students could then submit the required information to the union. In the

1999 letter, Rooker also noted that FERPA permits the nonconsensual disclosure of education records when the disclosure is made in compliance with a lawfully issued subpoena or court order.¹¹

In the fall 2000, the University became aware that FERPA affected the information it could provide to GEO. The University therefore proposed redefining directory information to include information that GEO was presently seeking, including graduate students' job status, salary and names. The University sent a letter to the graduate students informing them of this proposal and giving them the opportunity to opt out of this disclosure. In response to this letter, a graduate student sent the University a copy of the August 21, 2000 letter from Rooker. As of the date of the hearing, the University had not broadened the definition of directory information to include the names and addresses and bargaining unit status of GEO bargaining unit members, RAs, or CDAs as it had originally planned. It has nevertheless continued to provide the names and job status of both graduate students and RAs in a number of contexts.

University Exhibit 2 is an organization chart of Housing Services/Residence Life dated January 2001 that lists ARDs' names and assignments. In January 2001, the University prepared a calendar of events for its mid-year RA/CDA training. The third page of that calendar listed the names of all new RAs and their training section assignment. In *University of Massachusetts*, Case No. SCR-2241; CAS-01-3481 (October 1, 2001) the University, after initially refusing, provided the Commission with a list of the names and addresses of all graduate students employed by the University's Department of Continuing Education. The University did not raise the FERPA issue in that hearing, which took place after the date when the University claims to have first learned about FERPA's prohibition on release of information.

In addition, the signature or authorization cards that the Union distributed to RAs and CDAs in the course of its organizing campaign specifically authorize and direct the University to provide the Union with all records made and maintained in the normal course of business by the University that relate to them in their capacity as an RA or CDA.

Opinion

Because the University concedes that the RAs and CDAs are employees within the meaning of Section 1 of the Law, the question before the Commission is whether the dual student/employee status of the RAs/CDAs, should, as a matter of policy, preclude the Commission from granting them collective bargaining rights. The petition also raises a number of other issues like the RAs/CDAs' status as casual or temporary employees and whether or not the federal laws mandating the privacy of educational records renders bargaining with the RAs/CDAs impossible.

It is well established that dual student/employee status does not bar students who work at the same institution that employs them from exercising collective bargaining rights. In *City of Cambridge*, 2

10. FERPA broadly defines "educational records" as "all records, files documents and other materials which (i) contain information directly related to a student; and (ii) are maintained by the educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. §1232g(a)(4)(A); 34 CFR §99.3.

11. FPCO has taken the position that if a subpoena is issued in compliance with state law, it is "lawfully issued."

MLC 1450, 1463 (1976), the Commission held that the fact that house officers, medical interns and residents at a hospital may be students for some purposes and employees for others does not deprive them of rights under the Law. In *University of Massachusetts (Amherst)*, 4 MLC 1384, 1390 (1977) (petition dismissed on other grounds), the Commission held that the fact that the employees were also students whose employment may have contributed substantially to their financial ability to complete their education did not sufficiently vitiate their interest in their wages, hours and working conditions.

In *City of Cambridge*, the Commission adopted a case-by-case approach in determining whether the employee status of student employees rose to a level significant enough to effectuate the policies of the Law and thereby come within the ambit of its protection. In so doing, the Commission examined the traditional indicia of employee status, both objective and subjective¹² and weighed them against the other interests in the relationship. 2 MLC at 1461 – 1462. In *Board of Trustees*, 5 MLC 1896, 1910 (1979) (plurality opinion) (*Board of Trustees I*), Commissioner Cooper, citing *City of Cambridge* dismissed a petition seeking to represent graduate students as “inappropriate” based on what he characterized as the “close connection between their academic and employment interests.” However, in *Board of Trustees*, 20 MLC 1453 (1994) (*Board of Trustees II*), the Commission revisited that decision and concluded that the Law permitted the teaching and research assistants at the University of Massachusetts’ Lowell campus to exercise collective bargaining rights. The Commission specifically declined to infer a negative impact on education policies where the employer had voiced no general opposition to the petition and cited no specific examples of an adverse impact. *Id.* at 1466-67.

The National Labor Relations Board (Board) has also addressed the issue. In *New York University*, 332 NLRB No. 111, 165 LRRM 1241 (2000), the Board granted bargaining rights to graduate students. Relying on its recent decision in *Boston Medical Center*, 330 NLRB No. 30, 162 LRRM 1329 (1999), the Board concluded that despite their student status, graduate assistants plainly fell within the meaning of employee as defined in Section 2(3) of the National Labor Relations Act.¹³ In *Boston Medical Center*, the Board held that interns, residents, and fellows (house staff) were employees under Section 2(3), notwithstanding that they were also students. There, the Board held that “nothing in the statute suggests that persons who are students but also employees should be exempted from the coverage and protection of the Act.” *Id.* 162 LRRM at 1340.¹⁴

Here, the record contains overwhelming objective and subjective indicia that the University primarily treats RAs and CDAs as its employees. RAs and CDAs are University’s liaison to the students in the residence hall. They perform tasks designed to ensure that Residence Life’s mission is met and the University’s policies in the residence halls are enforced. They receive compensation for those services from the University in the form of fee waivers and stipends. The University deducts taxes from the stipend and calculates their stipend based on the statutory minimum wage rate. They are covered by Workers’ Compensation. Their terms and conditions of employment and the University’s expectations regarding them are set forth in an employment contract and job description, which they must sign, as a condition of their employment. The RA and Residence Life Staff Manuals further detail the University’s numerous expectations regarding hours, job duties, job performance, and standards of conduct. The RAs are subject to regular oral and written performance appraisals and are subject to well-planned and highly structured training and supervision. Their inability or failure to participate in that training, perform the functions of their job or otherwise meet the University’s specific performance standards results in documented, progressive discipline up to and including termination. If RAs resign or are terminated, they must participate in an exit interview.

The attention the University gives to RAs’ supervision, training and hours of work is in marked contrast to the circumstances described in *Board of Trustees I*. There, Commissioner Cooper noted the University’s apparent lack of concern whether the teaching assistants worked a minimum number of hours and characterized the University’s supervision and evaluation of the graduate assistants at issue as “minimal.” 5 MLC at 1909. According to Commissioner Cooper, those facts “run counter to a finding that the paramount concern of the University in operating the teaching assistant program is in the provision of educational services to undergraduates.” By contrast, here, as in *City of Cambridge*, the detailed and organized manner in which the University structures and monitors the RAs’ duties and job performance manifests a convincing concern for and control of the ultimate service provided by the RAs. 2 MLC at 1463.

Nevertheless, despite the overwhelming subjective and objective evidence of the RAs’ and CDAs’ employee status, including the fact that the University does not dispute that they are employees within the meaning of the Law¹⁵, the University argues that the unique nature of those positions make collective bargaining impossible and inappropriate. Specifically, the University contends that, because RAs’ hiring and continued employment is dependent upon their student attributes, i.e. maintaining a minimum GPA and

12. The Commission defined objective indicia as those that are primarily imposed upon the employee/employer relationship from an external source, e.g. income tax laws. The subjective indicia are those that the employer itself imposes, e.g. fringe benefits, as well as the way the employer perceives the relationship. In the case of house officers, the Commission looked at whether the employer placed primary emphasis on their services to the hospital rather than the educational benefit they received in return. 2 MLC at 1461-1463.

13. Section 2(3) of the NLRA broadly defines the term “employee” to include “any employee.” 29 U.S.C. §152(3).

14. We also note that in *Brown University*, 1-RC-21368, slip. op. at 36 (November 16, 2001), the Regional Director of Region 1 of the Board ordered an election in a unit comprised of graduate teaching and research assistants, finding that, even if their work were primarily educational, students who perform services for a university in exchange for compensation are entitled to collective bargaining rights. The University has appealed that decision to the full Board.

15. The University did not concede the Chapter 150E employee status of the petitioned-for employees until after the close of the hearing.

otherwise acting as exemplary student role models, it would be impossible to separate its student relationship with them from its employment relationship. Thus, the University claims that collective bargaining would substantially and inevitably impact core aspects of the RAs' positions.

In support of that claim, and in an attempt to distinguish this case from *Board of Trustees II*, 20 MLC 1453 (1994), the University argues that its prior bargaining experience with GEO has been so difficult and problematic as to warrant dismissing the instant petition. In particular the University contends that the safeguards provided by the Law's distinguishing between mandatory and permissive subjects of bargaining has not been sufficient to protect core University decisions. We are not persuaded by those arguments and find instead that collective bargaining here would effectuate the policies of the Law.

Although RAs and CDAs are only eligible to apply for and continue in their position by virtue of maintaining particular academic and disciplinary standards, we do not find that bargaining with those positions would inevitably intrude into the University's managerial prerogative over matters of academic policy, financial aid and campus management. Rather, this record reflects that the actual work performed by the RAs and CDAs work is not primarily educational and therefore not as inextricably tied in with their student status as the University contends. RAs and CDAs do not receive academic credit for their work, nor do they, unlike many of the graduate students already represented by GEO, have any formal academic responsibilities. Although we do not doubt that these employees may acquire some important life skills as a result of holding this position, this ancillary educational benefit is neither acknowledged nor quantified in any formal manner by the University. Residence Life specifically defines itself as a "co-academic" department, intended only to "complement" the University's academic functions.

The one discrete academic aspect of the RA position is the minimum GPA requirement. If the University wished to shield that or other academic matters from collective bargaining, (as it has done in its collective bargaining agreements with GEO) it could do so through the collective bargaining process, which does not compel either party to agree to a proposal or make a concession while engaged in collective bargaining. M.G.L. c. 150E, §6. Notably, the University already has an academic grievance procedure allowing students to file a grievance when they believe their grade has been determined in an arbitrary and capricious manner or in violation of University policy or state or federal law. The University specifically excludes matters of "academic judgment" from that procedure and therefore must necessarily employ some screening procedure to enforce that exclusion. The University could employ the same sort of screening procedure in the context of collective bargaining to avoid bargaining over what it deems to be matters of academic judgment.

Similarly, the fact that RAs and CDAs must remain free from current University judicial sanctions does not significantly alter the employer/employee relationship so as to preclude collective bargaining altogether. Most employers expect their employees to conform to certain standards of conduct; the fact that RAs can be terminated for discipline that is imposed upon them in their capacity as students does not make collective bargaining generally inappropriate for RAs and CDAs for a number of reasons. First, as set forth in the Residence Life Staff manual, violating a University policy is only one out of twenty four separate infractions for which the University can discipline or terminate RAs. The other listed infractions directly relate to the RAs' job performance and therefore have a direct impact on the terms and conditions of their employment.¹⁶ Second, although it is conceivable that the Union could make bargaining proposals or file grievances over the imposition of judicial sanctions, the University again may not be required to bargain over these issues and in any event, does not have to agree to any of the Union's proposals. Third, the University already affords students who are facing judicial sanctions the right to a hearing and to appeal the results of that hearing. This established procedure renders it less likely that collective bargaining over matters of RA discipline would inevitably intrude into the University's right to discipline or set standards for its students according to set procedures and rules.¹⁷

The University also raises concerns about bargaining about subjects like financial aid and housing, contending that those are core managerial prerogatives that have more than a marginal effect on the RAs' terms and conditions of employment. However, the evidence shows that an RA's receipt of financial aid has no bearing on his or her hire or continued employment except that RAs are required to apply any federal work study funds they receive toward their stipend. In any event, although a student receiving federal work study may place certain limitations on the scope of bargaining on this topic, again, such considerations more appropriately pertain to the bargaining process, rather than to the determination of coverage under the Act. *University of Massachusetts*, 4 MLC 1384, 1391, n. 3 (1977)(additional citations omitted). Moreover, the University has already engaged in discussions with RAs regarding compensation and other terms and conditions of employment at meetings with the Residents Advisors Council, an organization whose existence is sanctioned and encouraged by the University. The University also permits RAs who have been terminated to file an appeal, and even gives the RAs tips on how to construct an effective appeal. This further indicates to us that the policies underlying the Law will be effectuated by extending its protections to this on-going process. *City of Cambridge*, 2 MLC at 1464. Ultimately, most of the concerns the University raises turn largely on speculation over what the Union might seek to achieve in collective bargaining, or what might become part of an agreement between the University and the Union. As the Board has stated, such "conjecture does not establish infringement." *New York University*, 165 LRRM at 1244.

16. The other listed violations include: missing duty, failure to complete rounds during duty period, lack of availability on the floor, late for staff meeting, missing training session, failure to be present for residence hall opening or closing.

17. RAs are terminated if they have live judicial sanctions. Thus, by the time the RA is terminated, the RA will have already had a hearing or judicial conference and exhausted or waived his or her right to an appeal.

Finally, although bargaining with GEO may have been problematic to the University at times, and may have even resulted in bargaining over non-mandatory subjects of bargaining, the University has not provided evidence demonstrating that this has had an actual *adverse* impact on the University's *educational* policy, and we decline to infer one. *Board of Trustees II*, 20 MLC at 1466. Although the University may have agreed to certain of GEO's demands on topics that it considers to be non-mandatory subjects of bargaining, it has rejected others. That does not strike us as materially different from the normal give and take of collective bargaining and labor-management relations, and thus, standing alone, certainly does not warrant denying RAs and CDAs collective bargaining rights. Moreover, whenever a party to collective bargaining negotiations challenges the negotiability of a written proposal submitted to it by the opposing party, either party may petition the Commission for an advisory ruling to determine whether the challenged proposal is within the scope of mandatory negotiations as defined in the Law. 456 CMR 16.06. This is a further procedural safeguard against the University's concern that bargaining with the RAs will inevitably intrude into matters of managerial prerogative.

In conclusion, where the University requires the RAs and CDAs to sign employment contracts and job descriptions, has prepared comprehensive RA and Residence Life Staff manuals containing detailed terms and conditions of employment, evaluates those employees at least three times a year both orally and in writing, imposes no formal academic requirements on the position and already engages in informal bargaining with these employees over many of their terms and conditions of employment, it appears that the employee status of those individuals rises to a level significant enough to effectuate the policies of the Law. The fact that one must be a student to obtain and maintain employment does not vitiate the student's legitimate interest in his or her terms and conditions of employment, particularly where, as here, the vast majority of those terms and conditions are totally divorced from the student's academic endeavors. Thus, we find that the policies of the Law would be effectuated by granting collective bargaining rights to the University's RAs and CDAs.

Temporary Status

The University alternatively argues that, even if the Commission were to find that RAs are employees entitled to collective bargaining, the evidence in this case establishes that RAs are temporary employees who do not have a sufficient interest in their ongoing employment entitle them to collective bargaining. To determine whether an employee's relationship to his or her employer is too insubstantial or casual to warrant participation in collective bargaining, the Commission examines 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 employees. *Worcester County*, 17 MLC 1352, 1358 (1990) citing *Board of Regents/SMU*, 11 MLC 1486, 1491 (1985) (additional citations omitted). No one factor is dispositive, but the Commission looks at the function, nature and character of the worker's employment relationship to the employer. *Id.* To assess continuity of employment and regularity of work, the Commission examines employees' work schedules and has excluded employees from collective bargaining where, *inter alia*, the em-

ployees' work schedules demonstrated that the workforce was unstable, its hours were irregular and the contours of the proposed unit were poorly defined. *Town of Wenham*, 22 MLC 1237, 1245 (1995). Usually, the necessary continuity is satisfied if a significant proportion of the proposed unit works regularly, as opposed to sporadically, over the course of a year or more, so that the confines of the unit at any given time are identifiable. *Massachusetts Board of Higher Education*, 13 MLC 1173, 1183 (1986). The number of hours worked per week does not control the determination whether an employee is an employee within the meaning of the Law. *University of Massachusetts*, 4 MLC 1384, 1390 (1977).

Here, pursuant to the terms of their employment contract, the University appoints RAs for at least one academic year. The turnover rate is between 50 and 60% per year. However, although the identity of the RAs may change from year to year, the University offers continued employment to approximately 360 RAs and 6 CDAs per year. The University renews all RAs' contracts subject only to graduation, termination or other job performance problems. RAs work a minimum of 20 hours per week but may work more, depending on the University's needs. The University expects RAs to be in their own rooms each night and they are on on-call for twelve hours a night at least one day a week. Those working conditions lead us to conclude that the RAs and CDAs constitute a well-defined unit that works regular hours on behalf of the University over the course of a year or more. *Massachusetts Board of Higher Education*, 13 MLC 1173, 1183 (1986). Consistent with our prior decisions, the RAs and CDAs therefore have more than sufficient continuity and regularity of employment to entitle them to collective bargaining rights. *See City of Cambridge, supra*, 2 MLC at 1464-1465 (hospital interns, residents and fellow constituted a regular work force based on one year contracts and regularity of hours); *Boston School Committee*, 7 MLC 1947, 1951 (1981)(substitute teachers who worked at least sixty (60) days in an approximately 180 day school year have sufficient continuity of employment to justify to enjoy collective bargaining rights); *Board of Trustees II, supra*, 20 MLC at 1464 (where close to 90% of the teaching assistants worked two semesters in single academic year, worked eighteen (18) hours per week in either one or both of those academic semesters, and their continued employment was contingent on available funding, satisfactory work performance and attaining established academic standards, Commission concluded that the assistants possessed sufficient regularity in and expectation of continued employment to warrant participation in collective bargaining); *Worcester County*, 17 MLC 1352, 1359 (1990)(where County renewed temporary jail position twice within a 100 day period, the tenure of the temporary position was sufficiently stable to warrant inclusion in the bargaining unit, notwithstanding fact that different individuals may have held position).

Appropriateness of Unit

The Union seeks to represent all the RAs and CDAs employed by the University. Although the University does not contest the appropriateness of the unit, Section 3 of the Law requires the Commission to determine appropriate bargaining units that are consistent with the purpose of providing for stable and continuing labor relations while giving due regard to the following statutory considerations: 1) community of interest; 2) efficiency of operations and effective

dealings; and 3) safeguarding the rights of employees to effective representation. *City of Everett*, 27 MLC 147, 150-151 (2001); *Town of Bolton*, 25 MLC 62 (1998). The proposed unit must only be an appropriate unit, not the most appropriate unit. *City of Boston*, 18 MLC 1036, 1043 (1991). Where a union's petition describes an appropriate unit, the Commission will not reject the unit because another appropriate unit exists. *Board of Trustees II*, 20 MLC at 1465, citing *Lynn Hospital*, 1 MLC 1046, 1050 (1974). In considering efficiency of operations and effective dealing, the Commission has created a policy of historically favoring broad, comprehensive units over small, fragmented units. See *Higher Education Coordinating Council*, 23 MLC 194, 197 (1997). *City of Boston*, *supra*, 18 MLC at 1043. However, where there exists a community of interest among employees which will guarantee effective representation to employees, while at the same time not inhibit the efficiency of the employer's operations or protection of the public interest, then the Commission will find a unit to be appropriate. *Board of Trustees*, 3 MLC 1179, 1187 (1976). The Commission also assesses bargaining history and the extent of organization when structuring bargaining units. *Board of Trustees II*, *supra*, 20 MLC at 1465.

This record reflects that the full-time faculty at the Amherst campus, as well as GEO's bargaining unit and other non-faculty professional and clerical employees are organized into campus specific units. Consequently, although a unit containing all RAs and CDAs not presently organized may also constitute an appropriate unit, we find that the petitioned-for unit of the RAs and CDAs employed only at the Amherst campus is an appropriate bargaining unit. In addition, the RAs and CDAs share a unique community of interest based on the identity of virtually all of their terms and conditions of employment, including method of compensation, supervision, job duties and qualifications, few of which are shared by any other presently unorganized group of employees on campus. We therefore find that the petitioned-for unit of the RAs and CDAs employed at the Amherst campus is an appropriate bargaining unit.

FERPA

The University contends that its obligations to maintain the privacy of its students' educational records under FERPA, as interpreted in FPCO opinion letters, is incompatible with effective collective bargaining, and that the Commission should therefore dismiss the petition. Specifically, the University argues that it cannot provide the Union or the Commission with the requisite payroll or election list information or information about their GPA and student disciplinary records without the individual consent of the students involved, thereby making collective bargaining and grievance processing very difficult. We disagree and find that the parties have a number of options available to them to resolve the potential conflicts between the University's collective bargaining and FERPA obligations.

The FPCO's opinion letters suggest a variety of methods by which the University could comply with FERPA and its obligations to the Union and the Commission.¹⁸ These include: (1) redefining directory information to include the job titles of graduate students (or in this case, RAs or CDAs) based on the fact that the students in the graduate students' classes already know the identity of their teaching or research assistant; (2) obtaining the consent of the student prior to releasing any confidential information; (3) providing the information pursuant to a valid subpoena and/or (4) providing the information to the student who could then pass it on to the Union. The University summarily rejects these proposals, arguing that a subpoena would be neither a proper nor practical solution and that the other proposals are likely to be unacceptable to the Union. However, the Union has already distributed authorization cards to RAs and CDAs that, once signed, authorize and direct the University to provide the Union with any records it maintains on their behalf in their capacity as an RA or CDA. There is no basis for the University's statement that the Union would reject similar solutions to deal with the FERPA issue.

In addition, as the University concedes, FERPA permits the non-consensual disclose of education records when the disclosure is made in compliance with a lawfully issued subpoena. 20 U.S.C. 1232g(b)(2)(B). The Commission's regulations, as authorized by M.G.L. c. 30A, §12, permit parties to request a subpoena to compel the attendance of witnesses or the production of books, records, documents or correspondence. 456 CMR 13.12(1). There is no basis for the University's claim that using a subpoena to obtain information would be impractical or improper.

Finally, although the University's definition of directory information does not presently include the names of RAs or CDAs, an August 2000 FPCO opinion letter suggests that it could. That letter suggested that a University could disclose the identities of its graduate assistants because their identities were known to the students in their class or who passed by their class. Here, the University makes no effort to hide the RAs' identities from the students living in their residence halls. In fact, it would be counterproductive for it to do so. Thus, the identity of the RAs would appear to be analogous to other commonly (but not necessarily widely) known directory information that the University could lawfully disclose.

Ultimately, the entire FERPA is premature and not appropriately raised in a representation proceeding. If and when the University determines that its FERPA obligations prevent it from complying with its obligations under chapter 150E, the parties can either attempt to resolve these matters among themselves¹⁹ or seek redress through the filing of a prohibited practice charge with this agency.

18. A reasonable statutory interpretation contained in an opinion letter issued by an administering agency is entitled to respect, but is not binding on courts. *Christensen v. Harris County*, 120 S. Ct. 1655, 1662 (2000).

19. We take administrative notice that pursuant to the Commission's order in *University of Massachusetts*, Case No. SCR-2241, CAS-01-3481 (October 1, 2001), the University provided the Commission with an election list comprised of graduate students teaching Division of Continuing Education courses. The University has also published the names of graduate students and even RAs and CDAs in a number of other contexts, without apparent reprobation.

CONCLUSION AND DIRECTION OF ELECTION

We, therefore, conclude that a question of representation has arisen concerning certain employees of the University of Massachusetts, Amherst and that the following employees constitute an appropriate bargaining unit for collective bargaining within the meaning of Section 3 of the Law.

All Resident Assistants and Community Development Assistants employed by the University of Massachusetts at its Amherst Campus, excluding all other employees.

IT IS HEREBY DIRECTED that an election by secret ballot shall be conducted to determine whether a majority of the employees in the above-described bargaining unit desires to be represented by the United Automobile, Aerospace and Agricultural Implement Workers, Local 2322 or by no employee organization. The eligible voters shall include all those persons within the above-described unit whose names appear on the Employer’s payroll for the payroll period for the week ending January 18, 2002 and who have not since quit or been discharged for cause. To ensure that all eligible voters shall have the opportunity to be informed of the issues and the 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 DIRECTED that three (3) copies of an election eligibility list containing the names and addresses of all eligible voters must be filed by the University of Massachusetts, Amherst with the Executive Secretary of the Commission, 399 Washington Street, 4th floor, Boston, MA 02108 not later than fourteen (14) days from the date of this direction of election.

The Executive Secretary shall make the list available to all parties to the election. Failure to submit this list in a timely manner may result in substantial prejudice to the rights of the employees and the parties, therefore, no extension of time for filing the list 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.

SO ORDERED.

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In the Matter of BOARD OF HIGHER EDUCATION
and
MASSACHUSETTS COMMUNITY COLLEGE
COUNCIL/MTA/NEA
Case No. SUP-4512

- 52.1 breach
- 67.2 failure to support contract
- 82.12 other affirmative action

January 23, 2002
Helen A. Moreschi, Chairwomen
Mark A. Preble, Commissioner
Peter G. Torkildsen, Commissioner

Cynthia Denehy, Esq. Representing the Board of Higher Education
Richard Mullane, Esq. Representing the Massachusetts Teachers Association

DECISION¹

Statement of the Case

On September 23, 1998, the Massachusetts Community College Council/MTA/NEA (the Union) filed a charge with the Labor Relations Commission (the Commission) alleging that the Board of Higher Education (the Board) had violated Sections 10(a)(5) and (1) of M.G.L. c. 150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on April 28, 1999 alleging that the Board had violated Sections 10(a)(5) and (1) of the Law by: 1) not providing the Union with information that is relevant and reasonably necessary to its function as the exclusive collective bargaining representative; and 2) repudiating the terms of the parties’ 1995-1998 collective bargaining agreement.

On July 20, 1999, August 30, 1999 and October 8, 1999, Margaret M. Sullivan, Esq., a duly designated hearing officer of the Commission (the Hearing Officer), conducted a hearing at which all parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. Both parties submitted post-hearing briefs on or about December 7, 1999.² In accordance with Section 13.02(2) of the Commission’s rules, the hearing officer issued Recommended Findings of Fact on September 18, 2001. Neither party filed challenges to the Recommended Findings of Fact pursuant to 456 CMR 13.02(2). The Commission has reviewed the

1. Pursuant to 456 CMR 13.02(1), the Commission has designated this case as one in which the Commission shall issue a decision in the first instance.

2. The parties jointly requested that the Hearing Officer take administrative notice of the proceedings in Case No. SUP-4036. On March 30, 1995, the Administrative Law Judge (the ALJ) who presided over the hearing in Case No. SUP-4036 issued a decision ordering the Higher Education Coordinating Council to provide the Union with proper, useful and workable seniority lists. Thereafter, the Commission

ruled upon a request for enforcement of the ALJ’s order on August 20, 1995 and remanded the case back to the ALJ for further clarification of the order. The ALJ scheduled the remanded case for hearing on January 15, 1997, but the hearing was never held. Instead, on February 24, 1997, counsel for the Union submitted to the ALJ an agreement for satisfaction of the decision and order that both parties had executed. Subsequently, the Commission marked Case No. SUP-4036 as closed.