

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of

BOARD OF HIGHER EDUCATION/  
BRIDGEWATER STATE UNIVERSITY

and

JON L. BRYAN

Case No.: SUP-14-3771

Date issued: July 22, 2016

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Hearing Officer:

Brian K. Harrington, Esq.

Appearances:

Alfred Gray, Esq.	-	Representing the Board of Higher Education/Bridgewater State University
Dr. Jon L. Bryan	-	Pro se

Hearing Officer:

Brian K. Harrington, Esq.

HEARING OFFICER'S DECISION AND ORDER

SUMMARY

1       The issue is whether the Board of Higher Education/Bridgewater State  
2       University (University or BSU), delayed payment of travel expenses to Dr. Jon L.  
3       Bryan (Dr. Bryan) and gave him an unfavorable teaching schedule by restricting  
4       his ability to teach on consecutive days and at his preferred times in retaliation  
5       for engaging in protected, concerted activity in violation of Section 10(a)(3) and

1 derivatively Section 10(a)(1) of Massachusetts General Laws Chapter 150E (the  
2 Law). I find that the University did not violate the Law when it failed to reimburse  
3 Dr. Bryan in a timely fashion for his travel or caused him to have an unfavorable  
4 teaching schedule in 2014.

5 STATEMENT OF THE CASE

6 On June 16, 2014, Dr. Bryan filed a charge with the Department of Labor  
7 Relations (DLR) alleging that BSU had violated Section 10(a)(3) and derivatively  
8 Section 10(a)(1) of the Law on ten separate occasions. The University filed a  
9 Written Response to this charge on July 11, 2014. Following an investigation,  
10 the DLR<sup>1</sup> issued a two count complaint<sup>2</sup> of prohibited practice and partial  
11 dismissal on October 21, 2014, alleging that BSU had violated Section 10(a)(3)  
12 and derivatively Section 10 (a)(1) of the Law by failing to pay Dr. Bryan's travel  
13 expenses and denying Dr. Bryan the opportunity to teach a Tuesday evening  
14 course during the Fall, 2014 semester in retaliation for engaging in protected,  
15 concerted activity. The University filed an answer to the Complaint on November  
16 4, 2014.

17 I conducted two days of hearing on April 30 and May 1, 2015, at which  
18 both parties had the opportunity to be heard, to examine witnesses and to

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<sup>1</sup> Pursuant to Chapter 145 of the Acts of 2007, the Department of Labor Relations (DLR) "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." The Commonwealth Employment Relations Board (Board) is the body within the Department charged with deciding adjudicatory matters. References in this decision to the Board include the former Labor Relations Commission (former Commission).

<sup>2</sup> The DLR Investigator dismissed the remaining eight counts of Dr. Bryan's charge.

1 introduce evidence. The parties filed post-hearing briefs on or about June 15,  
2 2015. Upon review of the entire record, including my observation of the  
3 demeanor of the witnesses, I make the following findings of fact and render the  
4 following decision.

5 STIPULATED FACTS

- 6 1. The Charging Party, Jon Bryan, resides in New Hampshire and is employed as a  
7 Professor at Bridgewater State University.  
8
- 9 2. Bridgewater State University is the largest of nine universities in the state  
10 university system and the eighth largest four-year college or university in the  
11 Commonwealth. The University employs 328 full time faculty members. 94  
12 percent of these faculty members hold doctorate or some other form of terminal  
13 degree. This includes the Charging Party.  
14
- 15 3. Professor Bryan was hired by the University in 1983. Tenure was obtained in  
16 1987.  
17
- 18 4. Professor Bryan currently, and at all times relevant to this matter, is a professor in  
19 the Department of Management within the University's Ricciardi College of  
20 Business (RCOB).  
21
- 22 5. The parties stipulate that Professor Bryan has, prior to the issues that are subject  
23 to the hearing, filed numerous complaints and grievances which constitute  
24 concerted, protected activity.  
25
- 26 6. The University agrees to stipulate that it acknowledges that it is Professor  
27 Bryan's belief that the actions taken which are subject to this matter were in  
28 retaliation for his exercise of concerted or protected activity, although it is  
29 BSU's position that Dr. Bryan was not in fact retaliated against.  
30
- 31 7. Professor Bryan submitted a \$77.75 hotel reimbursement request. As of the  
32 date of the full hearing Dr. Bryan had not yet received the requested  
33 reimbursement.  
34
- 35 8. The parties agree that the emails in the joint exhibits are authentic.  
36
- 37 9. Professor Bryan submitted a proposed teaching schedule in a timely manner  
38 for the Fall, 2014 semester on December 4, 2013.  
39
- 40 10. The proposed schedule was submitted to the Registrar's Office for  
41 publication.

1  
2 11. Subsequent to the schedule being submitted to the Registrar's Office, the  
3 teaching schedule was rejected by Associate Dean Jeanean Davis-Street  
4 (Davis-Street).  
5

6 12. The primary issue in dispute between the parties concerned the impact of an  
7 evening course with regard to the three (3) day on campus requirement.  
8

9 13. Professor Bryan filed a grievance concerning Respondent's denial of his  
10 ability to teach an evening course with his "day load".  
11

12 14. While the above grievance was pending and on or about June 6, 2014,  
13 Professor Bryan was offered the opportunity to add a "Tuesday evening"  
14 course. It was stated that the evening course that was offered may be  
15 cancelled for insufficient enrollment.  
16

17 15. The condition of the evening course potentially being cancelled for under  
18 enrollment was not satisfactory to Professor Bryan.  
19

20 16. Dr. Bryan did not teach an evening class during the Fall semester of 2014.  
21

22 17. The University stipulates that it acknowledges that Dr. Bryan believes that his  
23 proposed teaching schedule was denied due to retaliation for his engaging in  
24 concerted, protected activity although it is BSU's position that Professor  
25 Bryan was not retaliated against.  
26

### 27 Findings of Fact

  
28

#### 29 Count I: Hotel Reimbursement

  
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31 When the BSU hired Dr. Bryan, he was also employed as a  
32 commercial airline pilot. Dr. Bryan continued to hold both positions until 1999  
33 when he retired from his pilot position. At that point, he was solely employed  
34 by BSU. Dr. Bryan is a member of the Massachusetts State College  
35 Association, which is the Union that represents the full-time faculty at the  
36 University. Due to his airline background, Dr. Bryan was involved in the  
37 creation of the aviation course of study at BSU. Dr. Bryan ceased being  
38 involved with the aviation program in 1992 or 1993. Since that time, Dr. Bryan  
39 has been primarily teaching courses in the RCOB's management program.

1 While at BSU, Dr. Bryan has been a professor of significant scholarship and  
2 achievement which has been recognized by the University and other outside  
3 entities.

4 In the course of his career as an airline pilot, Dr. Bryan became familiar  
5 with the travel industry in general, particularly how to travel to domestic and  
6 foreign destinations for a significantly reduced cost. When he became a  
7 professor at BSU, he would frequently travel to academic seminars and  
8 educational conferences in foreign countries, particularly in Europe, as both an  
9 attendee and a presenter. This travel included trips to Bosnia, Lithuania,  
10 Germany, Rome and Ireland. In these instances, Dr. Bryan would make the  
11 travel arrangements for attending these conferences himself and then request  
12 reimbursement from the University for part of the costs. This generally resulted  
13 in a lesser expenditure of funds for Dr. Bryan's travel both by him and by BSU.

14 BSU maintains a travel office which functions like a travel agency to  
15 assist faculty, staff, athletes, and others with their travel plans, including  
16 planning the travel of the University's intercollegiate sports teams. This office  
17 processes roughly 3600 requests for travel every academic year.  
18 Once a trip is approved by the appropriate source, all travel expenses must be  
19 then approved by the travel office. In 2010, the University issued a  
20 travel policy which specifically referenced prior approval of travel  
21 expenses and advised the traveler that they "may not authorize their own  
22 travel nor approve their own travel reimbursements." Dr. Bryan was aware of  
23 this travel policy but continued to make his own travel arrangements with the  
24 assent of the travel office subsequent to the issuance of the 2010 policy. There

1 were no prior incidents where Dr. Bryan's reimbursements for travel were  
2 delayed for an extended period of time.

3 Dr. Bryan's travel to Ireland in 2013, and specifically, the University's  
4 failure to reimburse him for \$77.75 in hotel expenses, is at issue in Count I of the  
5 Complaint. Dr. Bryan presented at the Collaborative European Research  
6 Conference in Cork, Ireland on October 17 and 18, 2013, for which he  
7 traveled from October 15, 2013 through October 21, 2013. On September 18,  
8 2013, Dr. Bryan informed travel coordinator Gregory DeMelo (DeMelo) that he  
9 had been approved by the BSU's Center for Advancement of Research and  
10 Scholarship (CARS) for travel to this conference, and he requested approval for  
11 a rental car expense. CARS is a University entity that funds travel for research  
12 and academic purposes. On the same day, DeMelo forwarded this request to his  
13 supervisor, who approved it on October 11, 2013. As he was unaware of the  
14 status of his rental car request prior to that date, Dr. Bryan did not make his hotel  
15 arrangements until after he received the rental car approval on October 11.

16 Dr. Bryan did not inform the travel office of his hotel booking prior to his  
17 departure on October 15, 2013. Dr. Bryan paid for the hotel with his own funds  
18 using his "affinity" rate which was significantly less than the standard room rate  
19 for the hotel in which he stayed.<sup>3</sup> Upon his return, Dr. Bryan sought  
20 reimbursement for his \$77.75 of hotel expense. What followed was an exchange

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<sup>3</sup> Dr. Bryan paid for hotel stays at conferences in Bosnia (2012) and Lithuania (2013) in the same fashion and was reimbursed by the University for both promptly.

1 of emails over a three month period (October 2013 – January 2014) between  
2 DeMelo, Dr. Bryan and the CARS coordinator.

3 First, DeMelo attempted to verify that Dr. Bryan's arrangements  
4 comported with the University travel policy. Next, there was a misunderstanding  
5 as to whether the CARS office needed to give any further approval or whether  
6 DeMelo needed to obtain approval from his supervisor. Finally, DeMelo  
7 assumed that the matter had been taken care of and took no further action,  
8 believing that the CARS office reimbursed Dr. Bryan at the end of 2013. DeMelo  
9 did not become aware that the reimbursement had not been paid until Dr. Bryan  
10 emailed him in September, 2014 regarding the delay.<sup>4</sup> DeMelo finally approved  
11 Dr. Bryan's hotel reimbursement request on September 10, 2014.<sup>5</sup> There were  
12 other occasions where employees' reimbursements, especially reimbursements  
13 with relatively low dollar amounts, were delayed.

14 Dr. Bryan began to engage in concerted, protected activity sometime in  
15 2011 by filing complaints and grievances<sup>6</sup> against an earlier administration. His  
16 prior disputes with the University, one of which included a dispute over his

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<sup>4</sup> Dr. Bryan did not explain why he waited until September, 2014 to renew his request for the hotel reimbursement.

<sup>5</sup> At the time of the hearing in this matter in April and May of 2015, the BSU had not yet reimbursed Dr. Bryan for his hotel. DeMelo testified that he was surprised that Dr. Bryan's hotel reimbursement had not yet been paid. I credit this testimony because the email trail supports it. Also, Dr. Bryan clarified in his post hearing brief that he is no longer seeking reimbursement because he received it on May 8, 2015.

<sup>6</sup> The exact starting point and full extent of Dr. Bryan's protected, concerted activity was not detailed at the hearing.

1 schedule, were acrimonious<sup>7</sup>. Dr. Bryan filed a grievance under the collective  
2 bargaining agreement and an arbitration hearing was held on August 25, 2013.  
3 Dr. Bryan also filed charge no. SUP-12-2192<sup>8</sup> on (August 27, 2012) (is currently  
4 awaiting judicial review. Neither of these cases involved DeMelo, and DeMelo  
5 had no knowledge of either of them.

6 While DeMelo knew that Dr. Bryan had traveled to conferences overseas  
7 in years prior and subsequent to 2013, he was unaware of Dr. Bryan's protected  
8 concerted activity until Dr. Bryan filed this case with the DLR in June of 2014..<sup>9</sup>  
9 DeMelo was not part of the University's grievance procedure and had no reason  
10 to be aware of any protected concerted activity that did not concern him or his  
11 office. No evidence was presented that DeMelo spoke with anyone regarding Dr.  
12 Bryan's concerted protected activity prior to the travel dispute. There was no  
13 suggestion that anyone informed DeMelo about grievances and other forms of  
14 protected concerted activity that did not directly involve his office. In the day to  
15 day operation of the travel office, there was simply no reason for DeMelo to know  
16 about such matters.

17 Count II- Teaching Schedule

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<sup>7</sup> In his testimony, Dr. Bryan characterized his prior disputes with the University as "acrimonious", and the University did not challenge that assessment.

<sup>8</sup> This charge is currently awaiting judicial review.

<sup>9</sup> I find DeMelo's testimony that he was somewhat familiar with Dr. Bryan before the October, 2013 reimbursement dispute but had no knowledge of Dr. Bryan's protected, concerted activity to be credible. No evidence was presented to suggest that DeMelo was aware of Dr. Bryan's protected, concerted activity prior to June of 2014.



1 A scheduling dispute arose in the fall of 2013 between Dr. Bryan and the  
2 Respondent regarding Dr. Bryan's schedule for academic year 2013-2014. At  
3 that time, the RCOB was led by Dean Elmore Alexander (Dean Alexander)  
4 who was hired from outside the University in the Fall of 2013. Shortly after  
5 his arrival, and on at least one other occasion, Dr. Bryan had a conversation with  
6 Dean Alexander about some issues involving himself and the prior Dean.<sup>10</sup>  
7 Jeanean Davis-Street (Davis-Street) is the Associate Dean of the RCOB and  
8 reports to Dean Alexander. Prior to becoming the Associate Dean in the Fall  
9 of 2013, Davis-Street was employed within the Accounting and Finance  
10 Department of RCOB, serving as both Assistant Professor and Department  
11 Chairperson. Dean Alexander delegated faculty scheduling responsibilities to  
12 Davis-Street. The Fall, 2014 semester schedule was the first opportunity for  
13 Dean Alexander and Davis-Street to work together on scheduling issues and  
14 neither had previously scheduled classes for the Management Department.

15 For the Fall, 2014 semester, the University shortened the time period to  
16 complete teaching schedules from one year to 10 weeks that commenced  
17 around February 1, 2014. The 10 week time period was divided as follows: the  
18 first 7 weeks were allotted to departments to create and electronically enter the  
19 Fall 2014 schedule; the next 1 week was allotted to the Deans' Office to review  
20 the schedule for accuracy and compliance with scheduling guidelines; and the

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<sup>10</sup> Although Dean Alexander could not specifically recall whether Dr. Bryan specifically mentioned union activities, I find that he was aware of Dr. Bryan's protected, concerted activities due to Dr. Bryan's statements referencing issues that he had had with the prior dean. Both Dean Alexander and Dr. Bryan testified that Dean Alexander was sympathetic to Dr., Bryan's concerns during this conversation and sought to have a "fresh start".

1 final 2 weeks were allotted to the Registrar's Office for the final upload of the  
2 Fall 2014 schedule into the University system. Once the final upload took place  
3 sometime in April, students could begin registering for courses for the Fall  
4 semester.

5 The University maintains a variety of faculty class schedule requirements,  
6 including: 1) a requirement that faculty members teach classes on campus at  
7 least three days per week; 2) a limitation on the proportion of web/web hybrid  
8 classes<sup>11</sup> to face-to-face teaching which requires at least 50% of the faculty  
9 member's day course load to be face-to-face class time 3) various rules  
10 governing efficient use of limited classroom space ("Vernon rules"<sup>12</sup>); and 4)  
11 whether evening classes count towards day course load requirements.<sup>13</sup>

12 On December 4, 2013, Dr. Bryan submitted his proposed Fall, 2014  
13 teaching schedule to Management Department Chairman Peter Sietins  
14 (Sietins).<sup>14</sup> At the same time, Dr. Bryan also provided Chairman Sietins with an  
15 alternative schedule in the event that his request for a research scheduling

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<sup>11</sup>Web courses are taught entirely online with no face to face classroom time. Web-hybrid, or "X" courses are taught partially in a classroom and partially online, with classroom time comprising less than 100% of the course time.

<sup>12</sup> The Vernon rules attempted to ensure that adequate classroom space existed for the courses offered and appeared to prioritize giving that time to courses that were 100% classroom based before web-hybrid courses.

<sup>13</sup> The definition of "day load" is unclear from the record, to me but it seems to reflect the course load of a full time professor versus that of an adjunct, or part time professor who would generally teach more courses in the evening.

<sup>14</sup> Dr. Bryan had been on sabbatical for the Spring, 2013 semester and therefore was not directly informed of the new condensed scheduling procedure.

1 accommodation,<sup>15</sup> detailed in the Collective Bargaining Agreement, was denied.  
2 These schedules requested two different combinations of MGMT 130  
3 (Principles of Management), MGMT 140 (Human Resources Management) and  
4 MGMT 340 (Contemporary Employee Relations) courses solely in web and  
5 web hybrid formats. Dr. Bryan's proposed schedules reflected that was seeking  
6 to teach on consecutive days and limit his time on campus through teaching web  
7 and web-hybrid courses.

8 Sietins took Dr. Bryan's proposed schedule, along with his own and those  
9 of the rest of the faculty in the management department, applied the University's  
10 scheduling guidelines as best as he knew them and gave them to his  
11 administrative assistants to be entered into the University's scheduling system.<sup>16</sup>

12 The computerized scheduling system "closed" for each department's  
13 administrative assistants on March 24, 2014, which meant that under the new  
14 scheduling system, the deadline for department heads to make adjustments had  
15 ended. On March 24, Davis-Street examined the online schedule for the  
16 management department of the RCOB for the first time pursuant to the new time  
17 period for scheduling. She reviewed each faculty member's schedule for  
18 compliance with the various University scheduling rules: the need for faculty  
19 to be on campus for at least three days per week; the limitation on the

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<sup>15</sup> A research scheduling accommodation, which is granted at the sole discretion of the University, would have allowed Dr. Bryan to teach a class schedule that was not subject to restriction by some or all of the scheduling rules.

<sup>16</sup> Sietins was not called by either party to testify at the hearing.

1 proportion of web/web hybrid classes to face-to-face teaching; and the so-  
2 called "Vernon rules". At this point, Davis-Street was unaware of Professor  
3 Bryan's earlier protected, concerted activity.<sup>17</sup>

4 Davis-Street reviewed both of the proposed schedules submitted by Dr.  
5 Bryan through Sietins. Based upon her understanding at the time, she  
6 determined that his proposed schedules were not in compliance with the  
7 University scheduling rules because they 1) consisted entirely of web based  
8 and web hybrid courses; 2) did not make efficient use of classroom space; 3)  
9 did not meet the requirement that at least fifty percent of the course load  
10 involved face-to-face class time,<sup>18</sup> and 4) did not satisfy the so-called "Vernon  
11 rules."

12 From March 24 through April 2, 2014, Davis-Street had brief  
13 conversations with Sietins about Dr. Bryan's proposed schedule. On April 3,  
14 2014, an email exchange<sup>19</sup> between Davis-Street, Sietins, Dr. Bryan and later,  
15 Dean Alexander, commenced over Dr. Bryan's schedule for the Fall, 2014

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<sup>17</sup> Davis-Street testified that she had no knowledge of Dr. Bryan's prior protected, concerted activity until the spring of 2014 when Dr. Bryan raised it during the scheduling dispute over the Fall, 2014 semester. I find Davis-Street's testimony on this issue to be credible because she came from the accounting department of the RCOB and did not work in the business department until 2013.

<sup>18</sup> At the hearing, Dr. Bryan suggested that if his X courses met more than 50% of the time in classrooms versus web sessions, that these X courses would count towards the day load face-to-face requirement. Regardless if that was the case, Davis-Street was not familiar with that concept in the Spring of 2014.

<sup>19</sup> Davis-Street had some face-to-face discussion of the matter with Sietins as well.

1 semester.<sup>20</sup> Dr. Bryan and Sietins proposed various schedules, but the  
2 schedules still did not comply with the rules according to Davis-Street and/or  
3 Dean Alexander. Later in the day, Dr. Bryan submitted a schedule variation  
4 which included teaching an undergraduate evening class. As previously noted,  
5 Dr. Bryan was seeking to teach on consecutive days and limit his time on  
6 campus through teaching web and web-hybrid courses.

7 Davis-Street, and later Dean Alexander, held the position that the  
8 requested undergraduate evening course did not satisfy the necessary criteria.  
9 Specifically, both believed that teaching an undergraduate evening course did  
10 not count towards a faculty member's day load requirement when combined  
11 with the other four web and web hybrid courses. Dr. Bryan disagreed with that  
12 assessment based on his experience teaching at the RCOB. At one point,  
13 Bryan suggested that he teach an evening undergraduate course on the  
14 Attleboro campus. Sietins rejected this request because he thought that the  
15 MGMT 340 class would better meet student needs.

16 Dr. Bryan believed that an evening undergraduate course could be  
17 considered part of the day load, and that such courses had been considered  
18 part of the day load in the Management Department of the RCOB in prior  
19 academic years.<sup>21</sup> Davis-Street disagreed with Dr. Bryan's position based on

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<sup>20</sup> This email exchange continued until April 8, 2014.

<sup>21</sup> Significant portions of testimony and some exhibits entered into evidence by the Charging Party came from the 2013 hearing in his 2011 arbitration case that focused on whether an undergraduate evening course could count towards the day load requirement. While Dr. Bryan referred to testimony and exhibits from

1 her prior experience as Chairperson in the Accounting and Finance Department  
2 where only graduate evening courses could be counted towards a faculty  
3 member's day load requirement. Throughout the scheduling process, Davis-  
4 Street and Dean Alexander consistently maintained that evening undergraduate  
5 courses could not be part of the day load requirement.

6 Nearly all of Dr. Bryan's proposed schedules included the same three  
7 classes: MGMT 130, MGMT 140, and MGMT 340. In each schedule that Dr.  
8 Bryan proposed, he would not have held face-to-face classes on campus each  
9 week more than three days per week. In all of his proposed schedules, Dr.  
10 Bryan sought to teach a Tuesday night MGMT 340 course from 6:00 p.m. to  
11 8:40 p.m. Davis-Street examined the five prior academic years and  
12 determined that MGMT 340 had never been offered in the evening during that  
13 time period. Dr. Bryan's proposed schedule required Dr. Bryan to teach three  
14 consecutive days (Monday, Tuesday, Wednesday) while Davis-Street's  
15 proposed schedule also required him to teach three days, two of which were  
16 non-consecutive (Monday, Wednesday, Thursday). While teaching on  
17 consecutive days is seen as desirable to professors at BSU, eleven of the  
18 fifteen faculty members of the Management department in Fall 2014 taught on  
19 non-consecutive days.<sup>22</sup>

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that matter in his emails with the Dean's office, Davis-Street's or Dean Alexander's responses to those references did not contain anti-Union sentiments.

<sup>22</sup> A twelfth professor of the department taught a class every weekday. The other fourteen professors all were in compliance with the University's scheduling guidelines or had recognized exceptions. These exceptions usually were in the form of "spending" so called "banked credits". Essentially, if a professor taught

1        On April 7, 2014, Dr. Bryan emailed Dean Alexander, asking him to waive  
2        the online course limitation so that he could teach MGMT 130 online. Dean  
3        Alexander responded "that the rule was not his to waive." In an email dated April  
4        8, 2014, the Dean described what he perceived to be the problems with Dr.  
5        Bryan's schedule and proposed a schedule which did not include an evening  
6        course in an attempt to resolve the matter, namely that he teach a MGMT 340  
7        class on Thursday afternoons. Dr. Bryan accepted this schedule, which did not  
8        include an evening course, by email on April 8, 2014.

9        As a result of this email, Davis-Street and Dean Alexander believed that  
10       the matter had been resolved. However, Dr. Bryan filed a grievance over his  
11       Fall, 2014 schedule. Dr. Bryan accepted the schedule proposed by Dean  
12       Alexander, but believed that he was denied the evening course and other  
13       scheduling attempts as a result of retaliatory animus exhibited by the Dean's  
14       office and other individuals.

15       On May 25, 2014, the then Academic Provost Howard London (London)  
16       emailed Davis-Street and Dean Alexander and indicated that faculty members in  
17       other colleges of the BSU could sometimes teach evening courses as part of  
18       their day load.<sup>23</sup> There was at least one meeting between Davis-Street, Dean

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more courses than were required in any one semester, they could "bank" those credits and "spend" them in a later semester to meet their teaching load requirements. Dr. Bryan did not seek to spend any banked credits in his Fall, 2014 teaching schedule.

<sup>23</sup> The Respondent acknowledges this to be the case but no evidence was presented demonstrating which other BSU colleges counted undergraduate night courses as part of the day load prior to the Fall, 2014 semester.

1 Alexander and either London or Associate Academic Provost Michael Young to  
2 discuss scheduling issues.<sup>24</sup>

3 As a result of this meeting and London's email, Davis-Street  
4 and Dean Alexander learned that other colleges and departments at  
5 the University were permitting undergraduate evening courses to count  
6 towards the day load requirement.<sup>25</sup> Davis-Street also discovered that, while  
7 doing scheduling in prior academic years for the Accounting and Finance  
8 Department of the RCOB and the Fall, 2014 scheduling for the entire RCOB,  
9 she had misapplied the day load rule with regard to undergraduate evening  
10 courses for all of the professors for which she had been responsible for  
11 scheduling. Essentially, Davis-Street had not allowed undergraduate  
12 evening courses to count towards the day load of any professor from the  
13 time she assumed a role in scheduling courses for the University.

14 On June 6, 2014, as a result of this discovery, Davis-Street offered Dr.  
15 Bryan an evening MGMT 340 course to teach. The course was conditioned  
16 upon sufficient student enrollment.<sup>26</sup> Sietins supported this proposal because  
17 he believed that it would meet the needs of the students. However, Dr.

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<sup>24</sup> The date, or whether there was more than one meeting, is unclear in the record.

<sup>25</sup> The distinction appeared to be that undergraduate evening courses would count towards the day load requirement if the entire program of study in that discipline was offered as night courses.

<sup>26</sup> All courses offered at the University are conditioned upon sufficient student enrollment.



1 Bryan believed that since students had been registering for classes for nearly six  
2 weeks at this point, that it was too late to determine if there was sufficient  
3 interest for enrollment. As a result, Dr. Bryan stated that he would only accept  
4 the offer if the condition of enrollment was removed or the course was offered  
5 on-line on a one-time basis.

6 Davis-Street and Dean Alexander believed that accepting  
7 either of Dr. Bryan's counter proposals would have caused his schedule not to  
8 conform to the other scheduling requirements. By email dated June 12, 2014,  
9 Dr. Bryan indicated that he would teach the Thursday afternoon MGMT 340  
10 course, but if the University offered a Tuesday evening session of MGMT 340  
11 and sufficient students registered for the class, he would teach it on Tuesday  
12 evenings instead. However, in this email Dr. Bryan made clear that doing so  
13 would not resolve the grievance he had filed over the matter. The Dean's  
14 office decided not to offer the Tuesday evening session of MGMT 340 since  
15 offering it would not resolve the pending grievance. The schedule that Dr.  
16 Bryan ended up teaching consisted of courses that met on Monday, Tuesday  
17 and Thursday instead of consecutive days.

18 Opinion

19 Count I: The Hotel Reimbursement

20 A public employer violates Section 10(a)(3) of the Law when it retaliates or  
21 discriminates against an employee for engaging in concerted, protected activity.  
22 Southern Worcester Regional Vocational School District v. Labor Relations  
23 Commission, 386 Mass. 414 (1982); School Committee of Boston v. Labor  
24 Relations Commission, 40 Mass. App. Ct. 327 (1996).

1 To establish a prima facie case of a violation under Section 10(a)(3) of the  
2 Law, a charging party must show that: 1) the employee engaged in  
3 concerted activity protected by Section 2 of the Law; 2) the employer knew of the  
4 concerted, protected activity; 3) the employer took adverse action against the  
5 employee; and 4) the employer's conduct was motivated by a desire to penalize  
6 or discourage the protected activity. Town of Carver, 35 MLC 29, 47, MUP-03-3894  
7 (June 30, 2008) (citing Quincy School Committee, 27 MLC 83, 92, MUP-1986  
8 (December 29, 2000)); Commonwealth of Massachusetts, 25 MLC 44, SUP-4128  
9 (August 24, 1998).

10 To support a claim of unlawful motivation, the last element of a prima facie  
11 case, a charging party may proffer direct or indirect evidence of discrimination.  
12 Lawrence School Committee, 33 MLC 90, 97, MUP-02-3631 (December 13, 2006)  
13 (citing Town of Brookfield, 28 MLC 320, 327-328, MUP-2538 (May 1, 2002), *aff'd*  
14 *sub nom.*, Town of Brookfield v. Labor Relations Commission, 443 Mass. 315  
15 (2005)). Direct evidence is evidence that, "if believed, results in an inescapable,  
16 or at least a highly probable inference that a forbidden bias was present in the  
17 workplace." Wynn & Wynn. P.C. v. Massachusetts Commission Against  
18 Discrimination, 431 Mass. 655, 667 (2000) (quoting, Johansen v. NCR  
19 Comten. Inc., 30 Mass. App. Ct. 294, 300 (1991)). "Unlawful motivation also  
20 may be established through circumstantial evidence and reasonable inferences  
21 drawn from that evidence." Town of Carver, 35 MLC at 48 (citing, Town of  
22 Brookfield, 28 MLC at 327-328). Several factors may suggest unlawful motivation,  
23 including the timing of the alleged discriminatory act in relation to the  
24 protected activity, triviality of reasons given by the employer, disparate treatment,  
25 an employer's deviation from past practices, or expressions of animus or hostility

1 towards a union or the protected activity. Town of Carver, 35 MLC at 48 (citing  
2 Melrose School Committee, 33 MLC 61, 69, MUP-02-3549 (September 27, 2006));  
3 Cape Cod Regional Technical High School District Committee, 28 MLC 332,  
4 335, MUP-2541 (May 15, 2002);, Bristol County,  
5 26 MLC 105, 109, MUP-2100 (January 28, 2000).

6 Once the charging party has established a prima facie case, the employer  
7 may rebut it by producing evidence that the action was motivated by a  
8 legitimate reason. Suffolk County Sheriff's Department, 27 MLC 155, 159, MUP-  
9 1498 (June 4, 2001). Finally, if the employer produces one or more lawful  
10 reasons for taking the adverse action against the employee, the charging  
11 party must establish that "but for" the protected activity, the employer would not  
12 have taken the adverse action. Id.

### 13 The Charging Party's Prima Facie Case

#### 14 *Protected, Concerted Activity, Knowledge, and Adverse Action*

15 The element of protected, concerted activity, is not in dispute. Both  
16 parties agree that Dr. Bryan engaged in protected, concerted activity beginning in  
17 2012 through the filing of grievances and making complaints.

18 I also find that the University's failure to reimburse Dr. Bryan for his hotel  
19 expense constitutes adverse action. The Commonwealth Employment Relations  
20 Board (Board) has consistently defined "adverse action" as an adverse personnel  
21 action, such as a suspension, discharge, involuntary transfer, or reduction in  
22 supervisory capacity. City of Boston, 35 MLC 289, 291 MUP-04-4077 (May 20,  
23 2009) (citing City of Holyoke, 35 MLC 153, 156, MUP-05-4503, (January 9,  
24 2009)). Many management decisions, though possibly inconvenient or even

1 undesirable, do not constitute adverse employment actions unless the  
2 charging party is materially disadvantaged in some way. See City of Boston,  
3 35 MLC at 291.

4 The Respondent argues that since Dr. Bryan eventually received the  
5 reimbursement after the hearing was held, the delay should be found as merely  
6 inconvenient. However, I must rule on the matter as it was presented before me  
7 without regard for subsequent events. As of the date of the hearing, DeMelo had  
8 approved the hotel reimbursement request, but Dr. Bryan had not yet received  
9 payment. I find that the BSU's failure to pay Dr. Bryan constituted adverse action  
10 because at that time, he had suffered an economic loss.

11 With respect to the knowledge element of the Charging Party's prima facie  
12 case, there is no dispute that the University knew of Dr. Bryan's complaints and  
13 grievances. However, I have found that DeMelo had no knowledge of Dr. Bryan's  
14 protected, concerted activity at the time surrounding the delayed reimbursement  
15 until the filing of the instant case, and there are no facts demonstrating that the  
16 University's awareness of Dr. Bryan's protected activity should be imputed to  
17 DeMelo. Nevertheless, even if the parties' stipulation is deemed to satisfy the  
18 requirement of employer knowledge, Dr. Bryan's prima facie case fails because  
19 there is no evidence that the delayed reimbursement was unlawfully motivated.

20 *Unlawful Motivation*

21 A charging party can prove unlawful employer motivation, the last element  
22 of its prima facie case, with direct or indirect evidence of discrimination.  
23 Lawrence School Committee, 33 MLC 90, 97, MUP-02-3631 (Dec. 13, 2006).  
24 Dr. Bryan did not demonstrate that there is any direct evidence of discrimination

1 by DeMelo; therefore, I will consider his arguments under the circumstantial  
2 evidence standard set forth below.

3 *The Relationship between Dr. Bryan and the University*

4 Dr. Bryan perceived an environment of hostility to exist between himself  
5 and management. Such general hostility can show unlawful employer motive.  
6 Town of Halifax, 1 MLC 1486, MUP-2059 (June 30, 1975). However, such  
7 evidence is not sufficient by itself to prove unlawful employer motive, and there  
8 needs to be evidence of disparaging comments or maltreatment of union officials  
9 to prove such a motive. Town of Andover, 17 MLC at 1483. No evidence was  
10 presented that the Employer disciplined any Union officials or denied them any  
11 rights or benefits. DeMelo showed no hostility to Dr. Bryan or the Union in  
12 general. There was no record evidence that management made any disparaging  
13 comments about the Union or Union officials. While Dr. Bryan's prior disputes  
14 with the University were acrimonious, this factor alone does not prove anti-union  
15 animus on the part of the University.

16 *Timing/Disparate Treatment*

17 Dr. Bryan argues that the timing of the denial of reimbursement, coming  
18 so soon after his protected, concerted activity, establishes improper motivation  
19 by itself. I disagree because the Board has held that timing alone does not show  
20 unlawful motivation. City of Malden, 5 MLC 1752, 1764-5, MUP-3017 (March 20,  
21 1979). He also argues that since there had been no prior problems with his  
22 travel reimbursement, that retaliation should be implied. However, the travel  
23 office at BSU processes some 3600 travel requests every academic year and  
24 demonstrated that others had received delayed reimbursements as well. While

1 the timing of the adverse action closely followed the arbitration hearing over his  
2 earlier schedule dispute, the timing does not show improper motivation.

3 *Triviality of Reasons*

4 Dr. Bryan's argument - that the sheer length of time it took DeMelo to  
5 respond to several of his emails demonstrates unlawful motivation- is also  
6 unpersuasive. Although DeMelo had no specific explanation for the delayed  
7 reimbursement, the email trail showed that DeMelo was engaged in attempting to  
8 reimburse Dr. Bryan for the hotel expense shortly after he returned from the  
9 Ireland trip. They reflect DeMelo's belief that the CARS office needed to release  
10 the funds necessary to pay the expenditure. The lengthy gap in communication  
11 between Dr. Bryan and DeMelo is also consistent with DeMelo's assertion that  
12 he thought the expense had been paid. Once Dr. Bryan renewed the discussion  
13 with DeMelo in September, 2014, DeMelo again attempted to get the hotel  
14 expense reimbursed. Also, DeMelo was unaware of Dr. Bryan's protected,  
15 concerted activity until the filing of the instant case. He did not speak to anyone  
16 else in the administration of the University about Dr. Bryan's filing of grievances  
17 and complaints. Thus, the delay does not show unlawful animus. Accordingly  
18 Dr. Bryan has failed to establish a prima facie case of discrimination.

19 Count II: The Teaching Schedule

20 The Charging Party's Prima Facie Case

21 *Protected, Concerted Activity and Knowledge*

22 As previously noted, Dr. Bryan's participation in protected, concerted  
23 activity is not in dispute. Both parties agree that Dr. Bryan engaged in protected,  
24 concerted activity through the filing of grievances and making complaints. Dean

1 Alexander was aware of Dr. Bryan's protected, concerted activity at the time that  
2 he made the scheduling decisions at issue in this case. Consequently, Dr. Bryan  
3 satisfied these elements of his prima facie case.

4 *Adverse Action*

5 However, I find that the actions of Davis-Street and Dean Alexander  
6 regarding his Fall, 2014 schedule do not constitute adverse action. In order to  
7 be an adverse action, Dr. Bryan must have been materially disadvantaged in  
8 some way. See City of Boston, 35 MLC at 291. While the Board has held that  
9 an involuntary transfer to a less desirable position constitutes adverse action,  
10 Boston City Hospital, 11 MLC 1065, 1072, MUP-4893, (July 25, 1984), I find that  
11 Dr. Bryan's inability to teach his course load on consecutive days was a mere  
12 inconvenience and does not rise to the level of adverse action. Dr. Bryan's  
13 compensation was not affected, indeed he was teaching the same courses he  
14 desired to teach but at different times. City of Holyoke, 35 MLC 153, 156; MUP-  
15 05-4503 (January 9, 2009). Simply put, Dr. Bryan was not materially  
16 disadvantaged in terms of traditional terms and conditions of employment.  
17 Somerset School Committee, 41 MLC 335, 338-339; MUP-13-3085 (May 21,  
18 2015).

19 *Unlawful Motivation: Timing/Disparate Treatment/Triviality of Reasons*

20 Dr. Bryan did not demonstrate that there is any direct evidence of  
21 discrimination by Davis-Street or Dean Alexander; therefore, I will consider his  
22 arguments under the circumstantial evidence standard set forth below. Dean  
23 Alexander was new to the University and this was his first experience  
24 with scheduling at BSU. Davis-Street was the primary person responsible

1 for scheduling, but was new to the Management Department. Davis-Street  
2 applied her understanding of the day load requirements when she approved  
3 schedules, and she believed that an undergraduate evening course did not  
4 count towards the so-called day load requirement. She applied this rule  
5 consistently with all faculty members, not just Dr. Bryan. Dean Alexander  
6 relied upon his subordinate's interpretation of the scheduling rules as he had  
7 no other frame of reference at the University. Even though Davis-Street's (and  
8 by extension, Dean Alexander's) interpretation regarding counting an  
9 undergraduate evening course was incorrect, it was consistently applied  
10 based upon their belief as to what was the required rule.

11 The Charging Party correctly pointed out that other faculty members were  
12 permitted to teach evening courses, and that he was treated differently.  
13 However, there is no evidence that this different treatment was due to Dr.  
14 Bryan's protected concerted activity. While other faculty members were  
15 permitted to teach evening courses, they were permitted to do so due to  
16 recognized exceptions to the scheduling rules. All were legitimate reasons as  
17 to why others were permitted to teach evening classes, usually through  
18 spending banked credits by professors. Dr. Bryan did not spend banked credits  
19 in the Fall, 2014 semester schedule. None of the exceptions that applied to  
20 these professors pertained to Dr. Bryan. Any disparate treatment between  
21 Dr. Bryan and other professors stemmed from Davis-Street's mistaken  
22 interpretation of the scheduling rules of the University, which she  
23 applied during her first experience creating a schedule for the entire



1 RCOB, when the scheduling processes was newly condensed from  
2 eleven months to ten weeks.

3 Similarly, Dean Alexander's decision not to waive the online course  
4 limitation and permit Dr. Bryan to teach MGMT 340 online shows no  
5 unlawful motivation. Instead, Dean Alexander's statement that the rule  
6 was not his to waive reflects his understanding of the BSU scheduling  
7 rules in the Spring and Summer of 2014.

8 Here, the Respondent applied the rules as it understood them to Dr.  
9 Bryan in the exact same manner that they were applied to all other employees.  
10 There was no evidence that Dean Alexander or Davis-Street selectively  
11 enforced or misapplied any rules to punish Dr. Bryan. While Davis-Street and  
12 Dean Alexander did misapply the scheduling rules, their actions stemmed from  
13 their relative newness in their positions and the compression of time to make a  
14 semester schedule. Moreover, when made aware of the misapplication,  
15 Davis-Street attempted to correct her misapplication in Dr. Bryan's favor by  
16 offering the Tuesday evening course.

17 Davis-Street's conduct after learning that other departments at the University  
18 permitted undergraduate courses to count toward the day load further  
19 demonstrates that unlawful animus did not motivate her actions. When Davis-  
20 Street learned that the preferred practice was to permit one undergraduate  
21 evening course to count toward the day load requirement, she attempted to  
22 correct her misapplication of the rule in the June, 2014 email exchange, offering  
23 the Tuesday evening MGMT 340 class if it populated. Dr. Bryan declined to

1 accept this class. I find that no unlawful motivation can be attributed to the  
2 Respondent and, therefore, the Charging Party has failed to make a prima facie  
3 case under Section 10(a)(3) of the Law.

4 CONCLUSION

5 The University did not violate Section 10(a)(3) or, derivatively 10(a)(1) of  
6 the Law when it failed to reimburse Dr. Bryan in a timely fashion for his travel  
7 request or gave him an unfavorable teaching schedule in 2014. Therefore, both  
8 counts of the Complaint are dismissed.

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS



\_\_\_\_\_  
BRIAN K. HARRINGTON, ESQ.

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.