

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 01

BERKLEE COLLEGE OF MUSIC

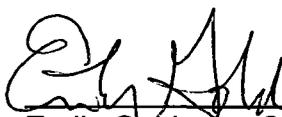
and

BERKLEE FACULTY UNION, AMERICAN  
FEDERATION OF TEACHERS, LOCAL 4412,  
AFT-MA, AFL-CIO

CASE 01-CA-089878

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-  
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Respectfully submitted by



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## **INTRODUCTION**

As indicated in Counsel for the General Counsel's Brief in Support of the Decision of the Administrative Law Judge, filed with the Board on November 18, 2013, Counsel for the General Counsel supports the Judge's findings of fact and conclusions of law, except to the extent described herein. Counsel for the General Counsel's cross-exceptions both relate to the remedy in the case. More specifically, the cross-exceptions set forth Counsel for the General Counsel's objection to the Judge's finding that bargaining unit employee Joyce Lucia was not impacted by Respondent's unilateral change when her PSVC 231-001 voice course was cancelled. Should the Board find, as argued by Counsel for the General Counsel, that the Judge erred in relying on the proposed stipulation, in finding that Linda Gorham was the only part-time faculty member affected by Respondent's unilateral change, and in failing to find that Joyce Lucia was also affected by the change, she respectfully requests that the Board reverse the Judge, but only as argued herein.

## **EXCEPTIONS**

**Cross-Exception #1 – The Judge erred in relying on the stipulation offered by Counsel for the General Counsel concerning the scope of the remedy for Respondent's unilateral increase in minimum course populations because Respondent refused to join in the proposed stipulation.**

Counsel for the General Counsel excepts to the Judge's reliance on a stipulation proposed at trial by Counsel for the General Counsel which was subsequently nullified in its entirety by Respondent's refusal to enter into it. (JTX-1; T. 8-11, 454-55).<sup>1</sup> The

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<sup>1</sup> References to Judge Flynn's decision are cited as "ALJD" followed by the page and line number, where appropriate. References to Respondent's Brief in Support of its Exceptions are designated "R. Br. to Board at \_," followed by the page number. References to Counsel for the General Counsel's Brief in Support of Judge Flynn's Decision are cited as "GC Br. To Board at \_," followed by the page number. References to the exhibits of Counsel for the General Counsel and Respondent are cited herein as "GCX- \_\_\_" and "RX- \_\_\_," respectively, followed by the

Judge's reliance on this stipulation is apparent in her assertion that, at trial, Counsel for the General Counsel contended that three bargaining unit members had been affected by Respondent's unilateral change. (ALJD 17, fn 28). While her assertion is correct, Counsel for the General Counsel made clear, prior to the conclusion of the trial, that Respondent's failure to enter into the stipulation raised a question about whether it could legitimately be relied upon by the Judge. (Tr. 454, lines 23-25 and Tr. 455, lines 1-4). By definition, a stipulation is a

[v]oluntary agreement *between opposing counsel* concerning disposition of some relevant point so as to obviate need for proof or to narrow range of litigable issues...[which is] used to simplify and expedite trials by dispensing with the need to prove formally uncontested factual issues.

*Black's Law Dictionary* at 1415 (6<sup>th</sup> Edition) (emphasis added). Given Respondent's admitted refusal to enter into the proposed stipulation, the Judge's reliance on it in this case, for any purpose, is inappropriate and counter to established law.<sup>2</sup>

As argued in Counsel for the General Counsel's Brief in Support of the Administrative Law Judge's Decision, and in its Brief in Support of its Cross-Exceptions, as of the conclusion of the trial, two employees, Linda Gorham and Joyce Lucia, had been impacted by Respondent's unilateral change in minimum course population size. The Judge concluded, relying on information contained in the proposed stipulation, and disregarding uncontroverted record factual evidence, that the classes Lucia taught, and which Respondent cancelled as a result of the unilateral change, "did not even meet the previous minimums." (ALJD 17, fn. 28). In fact, at the time Lucia's PSVC 231-001 voice

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exhibit number(s). References to joint exhibits are cited herein as "JTX-\_\_\_\_." References to the official transcript of the hearing are cited as "Tr. \_\_\_\_," followed by the page number.

<sup>2</sup> Despite its admission in its Brief in Support of Exceptions filed with the Board that it was not a party to the proposed stipulation, Respondent argues that a subpoena dispute between the parties was resolved "by the Union and General Counsel stipulating that only three faculty were affected..." (R. Br. to Board, p. 18 and 57).

course was cancelled, there were three (3) students enrolled.<sup>3</sup> Thus, just as Gorham was adversely impacted by Respondent's unilateral change when her PM-320 course was cancelled with three (3) students enrolled, Lucia was adversely impacted by the change when her PSVC 231-001 course was cancelled with three (3) students enrolled. In conclusion, the Judge's erroneous reliance on information contained in the proposed stipulation, and her failure to acknowledge uncontroverted record factual evidence to the contrary, caused her to incorrectly conclude that faculty member Joyce Lucia was not adversely impacted by Respondent's unilateral change.

**Cross-Exception #2 – The Judge erred in finding that only one part-time faculty member, Linda Gorham, was adversely affected by Respondent's unilateral increase in minimum course population size during the Fall of 2012, and in her failure to find that Joyce Lucia was also adversely impacted by the change.**

Counsel for the General Counsel also excepts to the Judge's finding that Linda Gorham was the only part-time faculty member adversely affected by the unilateral change, and to her failure to find that faculty member Joyce Lucia was also adversely impacted by the change. In her analysis of the facts in the instant case, the Judge correctly stated the law, as set forth in *Kendall College*, 228 NLRB 1083 (1977), that a violation may occur if the replacement course is not comparable to the originally-scheduled class, for example if it is more demanding in terms of time spent in preparation and grading. (ALJD 20, lines 16-19, 40-43 and fn. 29; ALJD 21, lines 1-4). The Judge also appropriately credited the testimony of part-time faculty member Joyce Lucia to the effect that, after the cancellation of her PSVC 231-001 voice class, in which

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<sup>3</sup> As discussed more fully in Counsel for the General Counsel's Brief in Support of the Decision of the Administrative Law Judge, in response to a request for information from the Union related to Respondent's unilateral change, Respondent provided a spreadsheet in which it represented that there were three students enrolled in Lucia's PSVC 231-001 class when it was cancelled. (GCX-25, pages 3 and 5, line 25). This evidence was uncontroverted. (GC Br. to Board, p. 19).

three (3) students were enrolled, she obtained a second LHUM-100 class, which, the Judge noted, was far more demanding than the voice classes that had been cancelled. (ALJD 10, lines, 37-40; ALJD 11, lines 1-3). Despite her findings with regard to Lucia, and her correct statement of the law, the Judge incorrectly concluded that, based on the record, Joyce Lucia was not impacted by Respondent's unilateral change because her classes did not meet the prior minimums. While the record clearly establishes that the Judge's conclusion is accurate with respect to Lucia's PSVC 131-001 and PSVC 232-001 courses, it also makes clear that her conclusion was factually inaccurate with respect to her PSVC 231-001 course, which had three (3) students enrolled at the time of cancellation. Thus, contrary to the Judge's findings, Counsel for the General Counsel met her burden of establishing that Lucia was adversely impacted by Respondent's unilateral implementation of the new minimum course population policy when Respondent cancelled her PSVC 231-001 course with three (3) students enrolled, even though, under the past practice, such an enrollment level would have been sufficient to run the class. Moreover, as acknowledged by the Judge, Counsel for the General Counsel met her burden of establishing that the replacement course that Lucia managed to procure for herself was far more demanding than the cancelled class. Finally, the Judge correctly concluded that Gorham was adversely impacted by Respondent's unilateral change when, having had her course cancelled with 3 students enrolled, she was not offered a replacement course. Under these circumstances, it is clear that the Judge erred in finding that Lucia was not adversely impacted by Respondent's unilateral change when her PSVC 231-001 voice course was cancelled with an enrollment level identical to that of Gorham's cancelled class, resulting in Lucia

teaching an additional LHUM-100 course which was significantly more demanding than the course that had been cancelled as a result of Respondent's new policy.

**CONCLUSION**

In conclusion, although Counsel for the General Counsel agrees with the majority of Judge Flynn's decision, the Judge's misplaced reliance on the proposed stipulation, and facts contained therein, is inappropriate given Respondent's refusal to join in it. Moreover, the Judge's conclusion that enrollment in Lucia's PSVC 231-001 voice course did not meet the previous minimum course population at the time it was cancelled is factually inaccurate, resulting in the Judge's erroneous conclusion that Lucia was not entitled to a remedy. Under these circumstances, Counsel for the General Counsel respectfully requests that the Board reverse the Judge's findings as argued herein.

Dated at Boston, Massachusetts, this 6th day of January, 2014.

Respectfully submitted by,

A handwritten signature in black ink, appearing to read "Emily Goldman", written over a horizontal line.

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