

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

\*\*\*\*\*

In the Matter of

CHIEF JUSTICE FOR THE ADMINISTRATION  
AND MANAGEMENT OF THE TRIAL COURT

and

NATIONAL ASSOCIATION OF  
GOVERNMENT EMPLOYEES,  
LOCAL 254

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

Case No. SUP-04-5126

Date Issued: April 14, 2009

\*\*\*\*\*

Board Members Participating:

Marjorie F. Wittner, Chair  
Elizabeth Neumeier, Board Member

Appearances:

- Jean Strauten Driscoll, Esq. - Representing the Chief Justice for the Administration and Management of the Trial Court
- Rebecca Lee Proakis, Esq. - Representing the National Association of Government Employees, Local 254

DECISION<sup>1</sup>

1 On July 25, 2004, the National Association of Government Employees, Local 254  
2 (NAGE) filed a charge with the Commission alleging that the Chief Justice for the  
3 Administration and Management of the Trial Court (CJAM or the Employer) had violated  
4 Sections 10(a)(5) and (1) of Massachusetts General Laws, Chapter 150E (the Law).  
5 Following an investigation, the Commission issued a complaint of prohibited practice on  
6 October 21, 2005, alleging that the CJAM had violated Section 10(a)(5), and,  
7 derivatively, Section 10(a)(1) of the Law by: a) failing to give NAGE notice and an  
8 opportunity to bargain to resolution or impasse over unit members' job duties and  
9 workload (Count 1), and b) refusing to bargain on demand with NAGE (Count 2). The  
10 CJAM filed its answer on or about November 3, 2005.

11 On April 25, 2005 and June 12, 2006, Margaret M. Sullivan, Esq., a duly-  
12 designated Commission hearing officer (Hearing Officer) conducted a hearing. Both  
13 parties had an opportunity to be heard, to examine witnesses, and to introduce  
14 evidence. On April 25, 2005, before any witnesses testified, the Hearing Officer allowed  
15 the CJAM's motion to sequester witnesses prior to giving testimony, except Carmen  
16 Sanabria, the Union's acting steward, and Michael Ghazil (Chief Ghazil), the chief  
17 probation officer for Hampden County Superior Court (HCSC). At the close of NAGE's

---

<sup>1</sup> Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) "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 Division charged with deciding adjudicatory matters. References in this decision to the Board include the former Labor Relations Commission (Commission). Pursuant to Section 13.02(1) of the Commission's Rules in effect prior to November 15, 2007, the Commission designated this case as one in which it would issue a decision in the first instance.

1 case-in-chief, the CJAM filed a motion to dismiss Count 2 of the Complaint, and the  
2 Hearing Officer took the motion under advisement.

3 The parties submitted their post-hearing briefs postmarked on August 10, 2006.  
4 On August 4, 2008, the Hearing Officer issued her Recommended Findings of Fact.  
5 Neither party challenged the Hearing Officer's Recommended Findings of Fact.  
6 Therefore, we adopt them in their entirety and summarize the relevant portions below.

7 After considering the facts and the parties' arguments, we conclude, for the  
8 reasons set forth below, that the CJAM violated Section 10(a)(5) and, derivatively,  
9 Section 10(a)(1) of the Law by unilaterally increasing the workload of probation officers  
10 and assistant probation officers who are employed at the HCSC. However, we dismiss  
11 the allegation that the CJAM violated the Section 10(a)(5) and, derivatively, Section  
12 10(a)(1) of the Law by unilaterally changing the job duties of those probation officers  
13 and assistant probation officers.

14 Findings of Fact<sup>2</sup>

15 Pursuant to a union internal reorganization, NAGE, on or about August of 2004,  
16 succeeded the Service Employees International Union, Local 254 (SEIU, Local 254) as  
17 the bargaining representative for all full-time and regular part-time probation officers,  
18 associate probation officers, and court officers employed by the CJAM, but excluding all  
19 chief probation officers, all chief court officers, all court officers in the Middlesex  
20 Superior and Suffolk Superior Court Officers' bargaining units, all associate court  
21 officers, and all managerial, confidential, temporary and casual employees. The

---

<sup>2</sup> The Board's jurisdiction in this matter is uncontested.

1 collective bargaining agreement in effect between NAGE and the CJAM at the time of  
2 the events in dispute contained the following contractual provision:<sup>3</sup>

3 Article XVI (Management Rights)

4 Section 16.01-The listing of specific rights of management in this  
5 Agreement is not intended to be, nor shall be, restrictive of, or a waiver of,  
6 the rights of management not listed and specifically surrendered herein,  
7 whether or not such rights have been exercised by the Employer in the  
8 past. Rights vested exclusively in the Employer include, but are not  
9 limited to, establishing standards of service and performance of its  
10 employees, including establishment of qualifications for ability to perform  
11 work; the supervision of employees and of their work; determining the  
12 competency of employees; determining its budget, its mission, and the  
13 methods, means and personnel necessary to fulfill that mission, including  
14 the contracting out, or the discontinuation of services, positions or  
15 programs in whole or in part; the determination of the content of job  
16 classifications; the appointment, promotion, assignment, direction and  
17 transfer of personnel; the suspension, demotion, discharge or any other  
18 disciplinary action against its employees for just cause; the relief from duty  
19 of its employees because of lack of work or other legitimate reason;  
20 determining the hours and days when, and locations where, the Courts will  
21 be in operation; establishing rules and regulations to assure orderly and  
22 effective work and work schedules; enforcing existing rules and  
23 regulations as it deems appropriate; and taking whatever actions may be  
24 deemed necessary to carry out its responsibilities in situations of  
25 emergency.

26 A. Job Duties of Assistant Chief Probation Officers and Probation Officers.

27 The CJAM employs approximately 980 probation officers in 104 court locations  
28 throughout the state, including juvenile, district, superior, probate and family, and

---

<sup>3</sup> SEIU, Local 254 and the CJAM were parties to a collective bargaining agreement (the Agreement) that, by its terms, was in effect from July 1, 2000 through June 30, 2003. Section 29.01 of the Agreement stated:

This Agreement shall be for the three year period from July 1, 2000 to June 30, 2003, and terms and conditions herein shall become effective on July 1, 2000, unless otherwise specified in this Agreement. Should a successor Agreement not be executed by June 30, 2003, this Agreement shall remain in full force and effect until a successor Agreement is executed or an impasse in negotiations is reached.

The Agreement continued to remain in effect after NAGE became the successor bargaining representative.

1 Boston Municipal Court Departments.<sup>4</sup> Each probation office has a chief probation  
2 officer, a first assistant chief probation officer,<sup>5</sup> if necessary, assistant chief probation  
3 officers and probation officers. Assistant chief probation officers and probation officers  
4 have the following job duties:

5 1. Assistant Chief Probation Officers

6 Under the oversight of chief probation officers and first assistant chief probation  
7 officers, where applicable, assistant chief probation officers, as supervisors, have dual  
8 responsibilities to help those employees whom they supervise carry out their jobs with  
9 increasing competence and to see that the court work is carried out.<sup>6</sup> Assistant chief  
10 probation officers orient and train personnel under their supervision by: a) scheduling  
11 regular conferences to discuss and review cases and/or policies of the court and the  
12 probation service; b) being available to probation officers for consultation on specific  
13 cases, as needed, concerning supervision of probationers and related problems; c)  
14 following and outlining to probation officers uniform policies for supervising various  
15 cases; d) reviewing and approving all dictation and recording of case records in  
16 accordance with prescribed standards and procedures; and e) familiarizing probation  
17 officers with statutes related to their work and changes pertaining thereto. Assistant  
18 chief probation officers assign court duties and cases to personnel under their  
19 supervision for appropriate action. They establish methods of scheduling employees for

---

<sup>4</sup> The Commissioner of Probation is responsible for setting policies, procedures, and standards for the probation service that are approved by the CJAM.

<sup>5</sup> The position of first assistant chief probation officer is not included in NAGE's bargaining unit.

<sup>6</sup> Assistant chief probation officers also have their caseloads of probationers and perform many of the same job duties as probation officers, described below, although at a reduced level.

1 particular duties, including to serve as channels through which probation officers can  
2 inform their offices when they become ill or emergencies arise and to coordinate plans  
3 for staff vacations. They evaluate the performances and professional conduct of the  
4 probation officers whom they supervise, using established personnel practices when  
5 necessary and appropriate.

6 Incumbents in the position have a working knowledge of appropriate community  
7 agencies and share responsibility with chief probation officers for strengthening  
8 relationships with other agencies in the community and their mutual provisions of helpful  
9 services. They serve as resource persons by which other agencies checking  
10 information or services can make contact with the probation department, and they keep  
11 chief probation officers informed of gaps in local resources or services. They perform  
12 various community relations activities, such as addressing neighborhood groups,  
13 serving on committees, and participating in conferences, panels and other approved  
14 community planning activities which address service delivery to the court. Assistant  
15 chief probation officers also supervise and train field work students who are accepted by  
16 the court from local colleges and universities.

17 Assistant chief probation officers keep the chief probation officers or first  
18 assistant chief probation officers, when applicable, informed about staff problems and  
19 keep the staff informed on the ideas and thinking of judges and chief probation officers.  
20 They prepare monthly statistical reports on the probation department and submit them  
21 to the chief probation officer. They are responsible for the supervision and control of  
22 interstate and intrastate matters as assigned. Should the need arise, assistant chief  
23 probation officers may assume the supervision of other probation offices than the  
24 probation office to which they are regularly assigned, should the need arise. Assistant

1 chief probation officers perform such other duties as may be assigned by judges, chief  
2 probation officers or first assistant chief probation officers, in accordance with the  
3 standards of the probation service and any specialized needs of the court.

4           2. Probation Officers

5           Under the direct supervision of chief probation officers, first assistant chief  
6 probation officers, or assistant chief probation officers, probation officers investigate  
7 thoroughly an offender's personal history, background and environment. They report  
8 their findings to the court and are prepared to make appropriate recommendations on  
9 dispositions. They periodically interview probationers to determine the effectiveness of  
10 probation supervision and areas in which casework counseling are needed, and they  
11 refer probationers to social services in the community for assistance in rehabilitation.  
12 Probation officers enforce court orders and recommend the revocation of probation  
13 and/or modification of court orders when necessary. Pursuant to the Standards of  
14 Supervision,<sup>7</sup> probation officers complete an initial risk/need offender assessment and  
15 supervision plan in which they classify offenders as requiring maximum supervision,<sup>8</sup>  
16 moderate supervision<sup>9</sup> or minimum supervision.<sup>10</sup>

---

<sup>7</sup> The Standards of Supervision are contained in a manual entitled "The Standards of the Office of the Commissioner of Probation", upon which all assistant chief probation officers and probation officers rely.

<sup>8</sup> Probationers, who are classified as requiring maximum supervision, must have face-to-face contact with a probation officer every fourteen days to verify their residences and employment and that they have satisfied any special conditions of probation.

<sup>9</sup> Probationers, who are classified as requiring moderate supervision, must have face-to-face contact with a probation officer every thirty days to verify their residences and employment and that they have satisfied any special conditions of probation.

<sup>10</sup> Probationers, who are classified as requiring minimum supervision, must have some contact with a probation officer, which could be face-to-face, in writing, or via the telephone.

1 Probation officers perform certain casework and counseling functions, including  
2 conducting interviews with assigned probationers, according to approved counseling  
3 techniques, in order to determine and clarify the problems of probationers, suggesting  
4 constructive methods for addressing such problems, and consulting with supervisors  
5 when necessary. Following a thorough and complete evaluation, they refer  
6 probationers to community agencies, which offer specialized services that are required  
7 for a particular individual's needs. They also contact those agencies to secure their aid  
8 in attempting to solve a probationer's problems. Incumbents in the position establish  
9 ongoing relationships with their probationers in order to carry out the orders of the court.  
10 They conduct investigations, prepare appropriate reports focused on the "why" of an  
11 individual's behavior, and are prepared to make recommendations based on those  
12 investigations. Probation officers gather and evaluate data pertinent to individual cases  
13 in connection with both investigation and supervision, data which may include  
14 information about the offender's home, school, church, neighborhood, and about  
15 relevant social agencies.<sup>11</sup>

16 Probation officers also perform law enforcement functions, including enforcing all  
17 orders handed down by the court, determining when circumstances warrant modification  
18 of court orders, and initiating necessary action to procure a decision by the court on  
19 such modifications. Probation officers carefully document facts and testify in court with  
20 respect to probationers' activities, behavior and quality of adjustment while under  
21 supervision. Following established legal procedures, they bring alleged violations by

---

<sup>11</sup> Probation officers regularly are out of the office and in the field on certain days, which are known as "district days". On district days, probation officers conduct home visits for probationers who are classified as requiring maximum and moderate supervision, conduct court-ordered drug tests, and verify probationers' places of employment.

1 probationers to the attention of the court and/or bring probationers before the court as  
2 required. Following court policy, they have responsibility for monitoring payment orders  
3 of the court, e.g. restitution, fines, support orders, etc.

4 Additionally, probation officers perform certain administrative functions, including  
5 performing all assigned duties relating to cases scheduled for court appearances  
6 assisting, as needed, in courtroom procedure during court sessions.<sup>12</sup> They plan office  
7 activities, conferences and field visits in connection with their investigation and  
8 supervision functions. They maintain accurate and up-to-date case records and  
9 prepare and submit monthly statistical and performance reports on the status of  
10 individual caseloads. They also perform such other duties as may be directed by  
11 judges or chief probation officers in accordance with the standards of the Probation  
12 Service and any specialized needs of the court.

13 Finally, they perform certain public relations functions, which include representing  
14 judges, chief probation officers, and other court officials in many phases of meeting the  
15 public. They address community groups and participate in other agencies' conferences,  
16 panels, etc.

17 B. The Front Counter at the Hampden County Superior Court's (HCSC) Probation  
18 Office.

19 The front counter at the HCSC's probation office is fully accessible to the public.  
20 Visitors to the front desk include probationers, police officers, attorneys, family members  
21 and/or friends of probationers, and members of the general public. Seventy-five to

---

<sup>12</sup> The Employer regularly assigns probation officers to work certain days, which are known as "court days", at their local courts. Typically, probation officers try to schedule any proceedings involving probationers' alleged violations of the terms of their probation on their court days.

1 eighty percent of the visitors to the front desk are probationers. Probationers must  
2 complete probation reports,<sup>13</sup> which are also known as "green sheets", each time they  
3 report to the probation office.<sup>14</sup> Probationers must also provide verification of their  
4 home addresses, employment and counseling. Probationers, whom the courts have  
5 ordered to make payments to the probation office, also do so at the front counter.<sup>15</sup>  
6 Police officers typically want to speak to a specific probation officer about a pending  
7 case as do the family and friends of particular probationer. Attorneys sometimes want  
8 to speak to a particular probation officer about an alleged probation violation or make  
9 records requests. Other members of the public raise various issues, not necessarily  
10 related to a pending case at the probation department.<sup>16</sup> One or two individuals per day  
11 simply need directions to another location.

---

<sup>13</sup> Blank probation reports, which are written in either English or Spanish, are kept at the front counter.

<sup>14</sup> When completing a green sheet, a probationer must provide the following information: name, telephone number, address, including whether the address has changed since the probationer last completed a green sheet, the name of any person that the probationer resides with and the relationship of that person to the probationer, employer's name, address, and telephone number, the type of work that the probationer performs and whether it is full-time or part-time, an explanation of the probationer's means of support if the probationer has changed jobs or is not employed, confirmation whether the probationer has been arrested, been before any court, or been involved in any difficulty since the last report, confirmation whether the probationer is under court order to make payments to the probation department and/to perform community service, and an indication of whether or not the probationer has complied with those requirements, a description of whether the probationer has any other special conditions of probation and an indication of whether or not the probationer has complied with those conditions, the name of the probation officer to whom the probationer is assigned and the frequency by which the probationer must report. The probationer then signs and dates the green sheet.

<sup>15</sup> Probationers can pay with either cash or checks.

<sup>16</sup> Individuals regularly ask whether criminal records can be sealed.

1           1. Staffing prior to May 1, 2004

2           Prior to May 1, 2004, either clerical employees<sup>17</sup> or associate probation officers<sup>18</sup>  
3 staffed the front counter.<sup>19</sup> After a probationer submitted a green sheet, a clerical  
4 employee or an associate probation officer reviewed the green sheet to ensure that the  
5 probationer entirely completed it and verified that the probationer had attached the  
6 necessary supporting documentation.<sup>20</sup> The clerical employee or the associate  
7 probation officer made copies of the green sheet and the supporting documentation and  
8 initialed and dated the documents. The employee staffing the front counter then  
9 contacted the probation officer to whom the probationer was assigned in order to  
10 ascertain whether the probation officer needed to meet with the probationer or whether  
11 the probationer could be released and allowed to leave.<sup>21</sup> When a probationer came to  
12 the front desk, who had just been released from incarceration and who had not yet

---

<sup>17</sup> The job descriptions for the job titles of probation case specialist I, II, III and IV at the CJAM were introduced into the record as a joint exhibit. However, the record is silent concerning whether the clerical employees at the HCSC Probation Office held those job titles during the events in question and, if so, which titles they held.

<sup>18</sup> Associate probation officers, who are members of NAGE's bargaining unit, began to work at the HCSC probation office in 1996 and commenced staffing the front counter at that time.

<sup>19</sup> During this period of time, courts in other counties used probation officers to staff the front counters in their probation offices, including Taunton District Court from 1980 to 1992, courts in Barnstable and Norfolk counties on or about 1992, and Lowell District Court from 1995 to 1999.

<sup>20</sup> When a probationer had questions about how to complete the green sheet, the clerical employee or the associate probation officer would attempt to answer the probationer's questions.

<sup>21</sup> Pursuant to the Standards of Supervision, only a probation officer can release a probationer. Thus, when a probationer came to the front desk and his/her probation officer was unavailable, a clerical employee would need to contact the chief probation officer, the first assistant chief probation officer, or an assistant chief probation officer to get approval to release a probationer. The record is silent as to whether associate probation officers could decide whether or not to release a probationer.

1 assigned a probation officer, the employee staffing the front counter would locate that  
2 probationer's file and contact a supervisor. When a probationer made a payment in  
3 cash, only a clerical employee could accept that payment.<sup>22</sup>

4 When a police officer, attorney or the family and friends of a probationer asked to  
5 speak to a particular probation officer, the employee staffing the front counter would try  
6 to contact the probation officer. When the probation officer was unavailable, the  
7 employee at the counter would contact a supervisor. When an attorney requested a  
8 records check, a clerical employee would perform that task.<sup>23</sup>

9 As of February 27, 2004,<sup>24</sup> Chief Ghazil had assigned two groups, consisting of  
10 five employees in each group, to staff the front counter from either 1:00 PM to 1:30 PM  
11 or 1:30 PM to 2:00 PM each day. Those employees included clerical employees,  
12 assistant chief probation officers, and certain probation officers.<sup>25</sup> Chief Ghazil made  
13 the assignment to ensure adequate coverage of the front counter during the lunch  
14 breaks of the clerical employees and the associate probation officers (lunch coverage).

15 Chief Ghazil instructed his probation officers and assistant chief probation  
16 officers to tell their probationers not to report from 1:00 to 2:00 PM. During those thirty-  
17 minute stints, the probation officers and the assistant chief probation officers performed

---

<sup>22</sup> Associate probation officers were not permitted to process cash payments, although they could receive checks.

<sup>23</sup> Only clerical employees performed record checks.

<sup>24</sup> The record does not indicate when probation officers and assistant chief probation officers first began this assignment, but does show that unit members continued to provide lunch coverage, if needed, as of the date of the hearing.

<sup>25</sup> Chief Ghazil assigned only those employees who had elected to arrive at 8:30 AM and to take a thirty-minute lunch period and did not include those employees who had opted to arrive at 8:00 AM and to take a sixty-minute lunch period

1 the same types of duties at the front counter that are described above.<sup>26</sup> They also  
2 answered the telephone. Because five employees were assigned to staff the front  
3 counter at the same time, all five employees did not need to remain at the front counter  
4 for the entire thirty-minute period. The assistant chief probation officers determined  
5 which of the probation officers needed to remain at the front cover, although all of the  
6 probation officers were expected to be available. Also, a clerical employee typically was  
7 present during the entire thirty-minute period.

8       2. Staffing after May 1, 2004

9       In an April 2004 meeting<sup>27</sup> Chief Ghazil informed the probation officers, the  
10 assistant chief probation officers, and the first assistant chief probation officer that he  
11 was assigning each of them to staff the front counter one-half day per week.<sup>28</sup> When an  
12 assistant chief probation officer asked what would happen to an employee who did not  
13 perform the assignment, Chief Ghazil stated that he would deal with it later, but that the  
14 employee could be written up. At that time, there were seven probation officers, two

---

<sup>26</sup> Some probation officers would release a probationer who had completed a green sheet and submitted supporting documentation, even if the probation officer to whom the probationer was assigned was unavailable. Other probation officers would refer the decision whether or not to release the probationer to a supervisor or would instruct the probationer to return at a later date to meet with his/her probation officer.

<sup>27</sup> The record does not contain the exact date.

<sup>28</sup> Chief Ghazil made the assignment because of a reduction in the number of clerical employees and in the number of associate probation officers.

1 assistant chief probation officers, and one first assistant chief probation officer.<sup>29</sup>

2 On or about May 5, 2004, Chief Ghazil distributed a weekly schedule that  
3 showed when the first assistant chief probation officer, the two assistant chief probation  
4 officers, and the seven probation officers had court days and district days and when  
5 Chief Ghazil had assigned each of them to staff the front counter for four hours.<sup>30</sup> When  
6 probation officers and assistant chief probation officers staffed the front counter for the  
7 four-hour periods, they performed the same types of duties that clerical employees and  
8 associate probation officers had performed when they staffed the front counter prior to  
9 May 1, 2004, except they did not need to answer the telephone during their four-hour  
10 shifts.

11 Probation officers and assistant chief probation officers performed this  
12 assignment for approximately two months.<sup>31</sup> While working at the front counter for four  
13 hours, probation officers and assistant probation officers could not conduct interviews or

---

<sup>29</sup> Prior to 2002, there were thirteen probation officers at the HCSC. Due to fiscal constraints and the resulting layoffs, the number of probation officers decreased to seven in 2002, which caused the remaining probation officers to experience marked increases in their caseloads, including a rise in the number of cases involving probationers, who required maximum supervision. SEIU, Local 254 protested in writing about the reduction in the number of probation officers and the increase in their caseloads on July 29, 2002 and in a grievance that it filed on August 13, 2002, which it subsequently withdrew. As of May of 2004, probation officers were still carrying high caseloads with a significant number of probationers requiring maximum supervision.

<sup>30</sup> Chief Ghazil only assigned one probation officer or assistant chief probation officer to each four-hour period and did not assign any clerical employees to staff the front counter. However, clerical employees were available, if needed, to do record checks, to answer the telephone, and to accept cash payments during those periods.

<sup>31</sup> The record does not contain the exact date when the assignment ended. However, Chief Ghazil has stated that, if necessary, he again will assign probation officers and assistant chief probation officers to staff the front counter for blocks of time, exclusive of lunch coverage.

1 counseling sessions<sup>32</sup> with the probationers, who were assigned to them.<sup>33</sup> They also  
2 could not make telephone calls to social services agencies on behalf of their  
3 probationers. They often were too busy at the front counter to complete paperwork  
4 involving their current cases.<sup>34</sup>

5 C. NAGE's Demand to Bargain

6 On May 20, 2004, Rebecca Proakis, Esq. (Proakis), counsel for NAGE, sent the  
7 following letter to Paul Edgar, Esq., the CJAM's director of human resources:

8 As you may be aware I, as Union Counsel, represent and assist the  
9 above-stated local bargaining unit with a variety of concerns which may  
10 directly affect the terms and conditions of employment. It has recently  
11 come to my attention that each probation officer and assistant chief  
12 probation officer is required to perform an additional and time-consuming  
13 task (i.e. counter coverage).

14  
15 M.G.L. c.150E, s. 6 requires that you give the union advance notice and  
16 an opportunity to bargain prior to effectuating a change in an established  
17 condition of employment that affects a mandatory subject of bargaining.  
18 The order that (given on or about May 5, 2004) that probation officers and  
19 assistant chief probation officers are required to conduct counter coverage  
20 for one-half day per week constitutes a change in an established condition  
21 of employment that affects a mandatory subject of bargaining. See  
22 Medford School Committee, 1 MLC 1250 (1975); Town of Danvers, 3 MLC  
23 1559 (1977); Lawrence School Committee, 3 MLC 1034 (1976) (holding  
24 that an employer's unilateral change of a bargaining unit member's  
25 working hours, workload, work assignments and job duties fall clearly  
26 within a mandatory scope of bargaining). The union demands that you  
27 offer the union notice and an opportunity to bargain prior to effectuating  
28 any such change.

---

<sup>32</sup> Interviews or counseling sessions need to be conducted in the privacy of an office and typically can last thirty to forty-five minutes.

<sup>33</sup> When a probation officer or an assistant chief probation was staffing the front counter and a probationer appeared, with whom the probation officer or assistant chief probation officer needed to meet, the unit member typically would schedule a meeting at a later date with the probationer or ask the probationer to wait.

<sup>34</sup> Jason Harder (Harder), a probation officer, also expressed concerns about bringing some of his files to the front counter to work on, while he was assigned there. He contended that a probationer, who was checking in at the front desk, could view the contents of another probationer's file, while he was photocopying a green sheet.

1  
2 As a result and at this date, the Union hereby demands that you rescind  
3 said change in job duties. The Union also demands that you immediately  
4 meet with the Union with regard to this matter, and properly offer the  
5 Union notice and an opportunity to bargain prior to effectuating any such  
6 change in the future. If you do not adhere to this demand to bargain, we  
7 will file with the Massachusetts Labor Relations Commission.

8  
9 More specifically, please respond, verbally or in writing, to this Demand to  
10 Bargain within seven (7) days of its receipt or the Union will find it  
11 necessary to file with the Massachusetts Labor Commission. Thank  
12 you.<sup>35</sup>

13 The record contains no information showing that the CJAM responded to Proakis's May  
14 20, 2004 letter. On July 15, 2004, NAGE filed its charge of prohibited practice.<sup>36</sup>

### 15 Opinion

#### 16 A. Mootness

17 As a threshold question, we consider the CJAM 's argument that Count 1 of the  
18 Complaint is moot and should be dismissed. The CJAM contends that Count 1 is moot,  
19 because the probation officers and assistant chief probation officers stopped staffing the  
20 front counter for one-half day per week in approximately July 2004. Although an alleged  
21 transgressor may render a case moot by correcting its actions, it must establish that  
22 there is no reasonable expectation that the conduct will be repeated. Boston School  
23 Committee, 15 MLC 1541, 1546 (1989). The public interest favors adjudication of a  
24 controversy over the legality of an employer's actions, even when the employer corrects  
25 the complained of action, where there is a possibility that the conduct will recur and  
26 where a Board remedial order could prevent the employer from reverting to its prior

---

<sup>35</sup> The CJAM stipulated that Edgar received the letter.

<sup>36</sup> The parties submitted four letters dated March 28, 2006, April 11, 2006, April 19, 2006, and April 24, 2006 respectively, as joint exhibits. However, the Hearing Officer declined to make any findings concerning those letters, because the letters involved an entirely different matter and were written nearly two years after the events that are the subject of the present case.

1 allegedly unlawful conduct. Town of Brookline, 20 MLC 1570, 1573, n.5 (1994); City of  
2 Boston, 7 MLC 1707 (1980). Here, because the CJAM insists that it acted properly and  
3 because it claims to have the right to make similar assignments in the future, there is a  
4 possibility that the conduct could recur. Consequently, we find that this case is not moot  
5 and turn now to an examination of the merits of the case. Massachusetts Board of  
6 Regents of Higher Education, 10 MLC 1196, 1203 (1983) (Employer's alleged  
7 repudiation of a settlement agreement was not rendered moot by its eventual  
8 compliance, because the employer continued to assert that its prior actions were  
9 appropriate and not violative of the Law).

10 B. Section 10(a)(5) Allegations

11 1. Unilateral Change

12 A public employer violates Section 10(a)(5) of the Law when it implements a  
13 change in a mandatory subject of bargaining without first providing the employees'  
14 exclusive collective bargaining representative with prior notice and an opportunity to  
15 bargain to resolution or impasse. School Committee of Newton v. Labor Relations  
16 Commission, 338 Mass. 557 (1983). The duty to bargain extends to both conditions of  
17 employment that are established through past practice as well as conditions of  
18 employment that are established through a collective bargaining agreement.  
19 Commonwealth of Massachusetts, 27 MLC 1, 5 (2000); City of Gloucester, 26 MLC 128,  
20 129 (2000); City of Boston, 16 MLC 1429, 1434 (1989); Town of Wilmington, 9 MLC  
21 1694, 1697 (1983). To establish a unilateral change violation, the charging party must  
22 show that: 1) the employer altered an existing practice or instituted a new one; 2) the  
23 change affected a mandatory subject of bargaining; and 3) the change was established  
24 without prior notice or an opportunity to bargain. Commonwealth of Massachusetts, 20

1 MLC 1545, 1552 (1984); City of Boston, 20 MLC 1603, 1607 (1994). To determine  
2 whether a practice exists, the Board analyzes the combination of facts upon which the  
3 alleged practice is predicated, including whether the practice has occurred with  
4 regularity over a sufficient period of time so that is reasonable to expect that the practice  
5 will continue. Swansea Water District, 28 MLC 244, 245 (2002); Commonwealth of  
6 Massachusetts, 23 MLC 171, 172 (1997); Town of Chatham, 21 MLC 1526, 1531  
7 (1995). A condition of employment may be found despite sporadic or infrequent activity  
8 where a consistent practice that applies to rare circumstances is followed each time the  
9 circumstances precipitating the practice recur. Commonwealth of Massachusetts, 23  
10 MLC at 172.

11 The issue in the present case is whether the CJAM unilaterally changed the job  
12 duties and/or workload of probation officers and assistant chief probation officers at  
13 HCSC, when it assigned each of them to staff the front desk for one half day per week  
14 for an eight-week period beginning on or about May 5, 2004. For the reasons set forth  
15 below, we conclude that the probation officers and assistant chief probation officers did  
16 not perform new job duties as a result of the assignment but that their workload  
17 increased.

18 The facts before us show that the duties that probation officers and assistant  
19 chief probation officers performed while staffing the front desk for the eight-week period  
20 were similar to their regular job duties. Prior to May 5, 2004, probation officers and  
21 assistant chief probation officers routinely reviewed green sheets and supporting  
22 documentation from probationers whom they supervised, and they also performed  
23 various public relations functions. However, from May 2004 through June 2004,  
24 probation officers and assistant chief probation officers also had to review the green

1 sheets and supporting documentation of any probationer who came to the front desk  
2 while they were staffing it, even probationers who were assigned to other probation  
3 officers for supervision. After May 5, 2004, the CJAM expanded the number of  
4 probationers for whom the probation officers and assistant chief probation officers were  
5 responsible for reviewing their green sheets and verifying the supporting  
6 documentation.

7 Although Chief Ghazil previously had assigned certain probation officers and  
8 assistant chief probation officers to staff the front counter for thirty-minute periods to  
9 provide lunch coverage, those probation officers and chief probation officers performed  
10 that assignment as part of a five-member team. Because they had been part of a five-  
11 member team, which usually included a clerical employee, they did not need to remain  
12 at the front counter for the entire thirty minute period. In contrast, when Chief Ghazil  
13 assigned the probation officers and assistant chief probation officers to staff the front  
14 counter for the four-hour periods, they were required to remain at the counter for the  
15 entire time or to find a suitable replacement. Also, when Chief Ghazil set up the lunch  
16 coverage schedule, he instructed the probation officers and assistant chief probation  
17 officers not to have their probationers report from 1:00 PM to 2:00PM, when two of the  
18 five-member teams were staffing the front counter. Here, the facts before us do not  
19 show that Chief Ghazil gave any similar instruction for the four-hour periods that  
20 probation officers and assistant probation officers staffed the front counter and instead it  
21 was a normal workday.

22 Section 6 of the Law requires public employers and employee organizations to  
23 negotiate in good faith about wages, hours, standards of productivity and performance,  
24 and any other term and condition of employment. It is well established that workload is

1 a mandatory subject of bargaining. Commonwealth of Massachusetts, 27 MLC 70, 72  
2 (2000). However, the CJAM contends that no statutory bargaining obligation attached,  
3 because a portion of Section 16.01 of Article XVI of the Agreement waives NAGE's right  
4 to bargain. Specifically, the CJAM points to the language in Section 16.10 that  
5 references the employer "taking whatever actions may be deemed necessary to carry  
6 out its responsibilities in situations of emergency." Where an employer raises the  
7 affirmative defense of waiver by contract, it bears the burden of demonstrating that the  
8 parties consciously considered the situation that has arisen and the union knowingly  
9 waived its bargaining rights. Massachusetts Board of Regents, 15 MLC 1265, 1269  
10 (1988); Town of Marblehead, 12 MLC 1667, 1670 (1986). The initial inquiry focuses  
11 upon the language of the contract. Town of Mansfield, 25 MLC 14, 15 (1998). If the  
12 language clearly, unequivocally and specifically permits the public employer to make the  
13 change, no further inquiry is necessary. City of Worcester, 16 MLC 1327, 1333 (1989).  
14 If the language is ambiguous, the Board will review the parties' bargaining history to  
15 determine their intent. Peabody School Committee, 28 MLC 19, 21 (2001); Town of  
16 Marblehead, 12 MLC at 1670. Upon review of the language, we conclude that this  
17 provision does not constitute a waiver of NAGE's statutory right to demand bargaining in  
18 this case.

19 Even assuming arguendo that a reduction in the number of clerical employees  
20 and in the number of probation officers who worked at the HCSC in the spring of 2004  
21 constitutes an emergency as referenced in Section 16.03, we must consider whether a  
22 waiver of NAGE's right to seek bargaining is encompassed within the scope of the  
23 disputed language. A plain reading of the phrase reveals no limits on NAGE's right to  
24 seek bargaining over an increase in unit members' workload when the CJAM takes

1 certain actions to carry out its responsibilities in cases of emergency. On the other  
2 hand, even if we were to conclude that the disputed language is ambiguous, the record  
3 contains no evidence of the parties' bargaining history to clarify exactly what the parties  
4 intended. Town of Marblehead, 12 MLC at 1670 (history and previous dealings between  
5 the employer and the union show that the parties did not intend that disputed  
6 contractual language serve as a waiver of the union's right to bargain over the  
7 employer's decision to transfer unit work). Therefore, the CJAM was obligated under  
8 the Law to give the NAGE notice and an opportunity to bargain to resolution or impasse  
9 over the change in the workload of the probation officers and assistant chief probation  
10 officers that resulted from the imposition of the requirement that they staff the front  
11 counter for four-hour periods.

## 12 2. Refusal to Bargain

13 Failing and refusing to bargain on demand concerning mandatory subjects of  
14 bargaining is a violation of Section 10(a)(5) of the Law. New Bedford Housing Authority,  
15 27 MLC 21, 27 (2000); Boston School Committee, 11 MLC 1219, 1225 (1984).  
16 Although NAGE's attorney, Proakis, sent a letter on May 1, 2004 seeking to bargain  
17 over the effects of the CJAM's requirement that probation officers and assistant chief  
18 probation officers staff the front counter for four-hour shifts each week on the  
19 employees' terms and conditions of employment, there is no evidence that the CJAM  
20 responded to the request to bargain. Thus, we conclude that the CJAM failed and  
21 refused to bargain over the change in the workload of the probation officers and  
22 assistant chief probation officers on demand by NAGE.<sup>37</sup>

---

<sup>37</sup> Although the CJAM filed a motion to dismiss the refusal to bargain allegation on the grounds that NAGE failed to submit sufficient information, we disagree and deny the motion.

Conclusion

Based on the record and for the reasons stated above, we conclude that the CJAM violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally increasing the workload of probation officers and assistant chief probations and by refusing to bargain on demand. As set forth above, we dismiss the allegation that the CJAM violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally changing the job duties of the probation officers and assistant chief probation officers.

Order

WHEREFORE, based upon the foregoing, it is hereby ordered that the CJAM shall:

## 1) Cease and desist from:

- a) Unilaterally assigning probation officers and assistant chief probation officers to staff the front counter at the HCSC for four-hour periods without first giving NAGE prior notice and an opportunity to bargain to resolution or impasse over the increase in workload resulting from the assignment.
- b) Failing and refusing to meet and to bargain with NAGE over the increase in the workload of probation officers and assistant chief probation officers resulting from assigning them to staff the front counter at HCSC for four-hour periods.
- c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed under the Law.

## 2) Take the following affirmative action that will effectuate the purposes of the Law:

- a) Refrain from assigning probation officers and assistant chief probation officers to staff the front counter at HCSC for four-hour periods until the CJAM has bargained with NAGE to resolution or impasse about the increase in employees' workload.
- b) Upon request, meet and bargain in good faith with NAGE over the increase in workload of probation officers and assistant chief probation officers resulting from assigning them to staff the front counter at HCSC for four-hour periods.

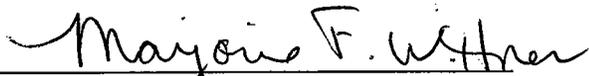
1  
2  
3  
4  
5  
6  
7  
8

- c) Post in all conspicuous places where its employees represented by NAGE usually congregate, or where notices are usually posted, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.
- d) Notify the Division in writing of the steps taken to comply with this decision within ten days of receipt of the decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF LABOR RELATIONS

COMMONWEALTH EMPLOYMENT  
RELATIONS BOARD

  
MARJORIE F. WITTNER, CHAIR

  
ELIZABETH NEUMEIER, BOARD MEMBER

Pursuant to M.G.L. c.150E, Section 11, decisions of the Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such an appeal, the appealing party must file a Notice of Appeal with the Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.



THE COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF LABOR RELATIONS

# NOTICE TO EMPLOYEES

POSTED BY ORDER OF  
**THE MASSACHUSETTS DIVISION OF LABOR RELATIONS**  
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Massachusetts Division of Labor Relations, Commonwealth Employment Relations Board (Board) has held that the Chief Justice for the Administration and Management of the Trial Court (CJAM) violated Section 10(a)(5), and, derivatively Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by unilaterally increasing the workload of probation officers and assistant chief probation officers at Hampden County Superior Court (HCSC) as a result of assigning them to staff the front counter at the probation office for four-hour shifts and by failing and refusing to bargain on demand with the National Association of Government Employees (NAGE).

The CJAM posts this Notice to Employees in compliance with the Board's order.

WE WILL NOT unilaterally assign probation officers and assistant chief probation officers to staff the front counter at the HCSC's probation office for four-hour periods without first giving NAGE prior notice and an opportunity to bargain to resolution or impasse over the increase in employees' workload.

WE WILL NOT fail and refuse to meet and to bargain on demand with NAGE over the increase in the workload of those probation officers and assistant chief probation officers.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights guaranteed under the Law.

WE WILL take the following affirmative action that will effectuate the purposes of the Law:

- 1) Refrain from assigning probation officers and assistant chief probation officers to staff the front counter at the HCSC's probation office for four-hour shifts until the CJAM has bargained with NAGE to resolution or impasse about the increase in employees' workload that resulted from the assignment;
- 2) Upon request, meet and bargain in good faith with NAGE over the increase in workload of those probation officers and assistant chief probation officers.

\_\_\_\_\_  
Chief Justice for the Administration  
and Management of the Trial Court

\_\_\_\_\_  
Date

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED**

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Division of Labor Relations, Charles F. Hurley Building, 1<sup>st</sup> Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).