COMMONWEALTH OF MASSACHUSETTS, COMMISSIONER OF ADMINISTRATION AND MASSACHUSETTS NURSES ASSOCIATION, SUP-2414 (12/9/80).

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Hearing Officer:

Rachel J. Minter, Esq.

Appearances:

Valerie J. Semensi, Esq. - Counsel for the Commonwealth

Gabriel O. Dumont, Jr., Esq. - Counsel for the Massachusetts Nurses Association

HEARING OFFICER'S DECISION

Statement of the Case and Procedural History

This case arose upon a charge filed May 12, 1980 by the Massachusetts Nurses Association (MNA), which was then investigated by the Labor Relations Commission (Commission) pursuant to its authority under Section 11 of G.L. c. 150E (the Law).

The matter is before me upon the Complaint of Prohibited Practice issued by the Commission on August 1, 1980. The Commission's complaint alleges that the Commonwealth of Massachusetts, Commissioner of Administration (Commonwealth) refused to bargain in good faith, in violation of Sections 10(a)(5) and (1) of the Law, by unilaterally changing private practice policies for Commonwealth employees at Valley Adult Counseling Service, Inc. (VACS) and South Shore Mental Health Center (SSMHC).

After notice, an Expedited Hearing was held before the undersigned, a duly-designated hearing officer, on August 21 and September 19, 1980. All parties were afforded full and fair opportunity to be heard, to examine and cross-examine witnesses, and to present evidence. Prior to the close of the hearing the Commonwealth and VACS appealed rulings by the hearing officer on evidentiary exclusions and motions to the full Commission, pursuant to 402 CMR 13.02(4). The Commission denied these interlocutory appeals on October 29, 1980, see 7 MLC , and the parties subsequently submitted post-hearing briefs, which have been duly considered.

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Jurisdictional Findings

1. The Commonwealth of Massachusetts, acting through the Commissioner of Administration, is a public employer within the meaning of Section 1 of the Law.

2. The Department of Mental Health (DMH) is an agency of the Commonwealth.

3. VACS and SSMHC are non-profit facilities providing mental health services to residents of the Commonwealth through provider agreements with DMH, which are staffed in part by employees of the Commonwealth.

4. MNA is an employee organizationwithin the meaning of Section 1 of the Law, and is the exclusive representative for the purpose of collective bargaining of certain employees of the Commonwealth, including employees in statewide Unit 7.

Findings of Fact

n 1975 Congress enacted legislation creating entities known as Communi-
ıtal Health Centers (CMHCs) through which certain comprehensive mental
ı services would be provided to individuals residing in a defined
ıphic area, known as a "catchment area." Public and nonprofit private
providing required services may be eligible to receive federal grants
ovision of these services. Pub. L. 88-164, Title II, § 202 as added
. 94-63, Title III, § 303, July 29, 1975; codified at 42 USC §2689.

ıt present, there are 26 CMHCs located in Massachusetts. VACS and SSMHC
o of these.

alley Adult Counseling Service, Inc. is the community mental health center
g the catchment area of the Blackstone Valley. It provides a variety
tal health services, including a semi-autonomous alcoholism program which
es some federal funding. VACS' staff is comprised of employees of the
wealth and employees who are paid by VACS under contract for specific
ms. All employees, regardless of status, are under the overall super-
of the center's Executive Director, Benjamin Lewis.

ach VACS clinic has a copy of the VACS policy manual, which consists of
nda on clinic procedures and internal employee policies; these policies
to all employees, contractual and state. The policy memoranda currently
manual at VACS' Bellingham clinic cover such topics as "homicidal
s;" fees; employee grievance procedure; legal rights of clients; and
, promotion and evaluation of VACS employees.

ccording to Eleanor Redrow, a state psychologist at VACS since 1972 and

current MNA Unit Chairperson,[1] shortly after her arrival at VACS several staff members expressed interest in doing private practices outside of their employment at VACS. At that time the clinic staff was much smaller, and a group which included Redrow and then-Executive Director Joel Perlmutter sat down at a staff meeting to formulate a private practice policy. The policy was initiated to avoid potential conflicts of interest caused by referrals and to ensure that clients with third-party payments (health insurance, Medicaid, etc.) were not siphoned off to private practitioners.

A memo entitled "Proposed Policy on Private Practice by VACS Staff Members," which came out of the work of the committee, was placed in the policy manual in 1972 or 1973. This memo provided as follows:

1. The staff member may conduct a private practice only outside those hours which are comitted (six) to VACS.

2. She/he may not use VACS facilities for private practice.

3. Staff are discouraged from taking private clients who are likely to require time outside of therapy hours.

4. Referrals from VACS to private therapist will be made if and only if the client requests private referral. The client will be asked to sign a statement that he sought private referral voluntarily.

5. Decisions about private referrals will be made with due consideration for the client's needs and in a way that will provide him with the most options.

6. Staff engaging in private practice must consult with other professionals on a regular basis.

7. Individuals doing private practice should inform VACS that they are doing so. Barbara Hoffman[2] will monitor this activity.

8. Barbara Hoffman will report regularly to the Board of Directors concerning private practice.

Other than through ad hoc committees such as the one on private practice, employee policies were sometimes changed through the Personnel Committee, which included representatives of different clinic programs, of VACS management, of CETA employees and of the MNA and another union. The Personnel Committee became defunct in the fall of 1979. Although alternative structures were suggested as successors to the Personnel Committee, and the existence of

[1]Findings of fact relative to past practice at VACS are based on exhibits admitted into evidence at the hearing and on Redrow's unrebutted testimony.

[2]DMH Area Director.

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a committee is required for accreditation by the Joint Commission on
ditation of Hospitals, no such committee has been formed or re-activated
ICS management since the demise of the Personnel Committee.

At a staff meeting on March 13, 1980 Clinic Manager Caroline Prout asked
oyees to examine a new policy issued by Lewis and the Board of Directors
nsure that they were in compliance with it. Prout then distributed a
andum entitled "VACS Policy Regarding Private Practice" which read as
ws:

> "Consistent with the intent of Public Law 94-63, Private Practice, (Clinical or Consultative) by any personnel of Valley Adult Counseling Service, Inc. is prohibited within the Blackstone Valley Catchment Area except, and subject to the following conditions:
>
> (1) Any staff member presently having an established Private Practice of any mental health activity within the Catchment Area;
>
> a. Must submit a plan within two months of the effective date in (sic) this policy to the Executive Director to divest himself/herself of such practice for Catchment Area clients.
>
> b. Shall submit monthly reports to the Executive Director until total divestiture takes place.
>
> (2) Private Practice may be permitted at the discretion of the Executive Director in instances where a lack of certain critical diagnostic or treatment services exists.
>
> (3) Private clients from out of the Catchment Area may not be treated during hours committed to VACS.
>
> (4) VACS facilities may not be utilized for Private Practice.
>
> (5) There shall be no referrals of VACS clients to a VACS employee acting as a Private Practitioner, or to a corporation or agency in which a VACS employee can influence decision making, except as in 2) above.
>
> (6) Under no circumstances is any staff person who maintains Private Practice outside of the Blackstone Valley Catchment Area or within the Blackstone Valley Area for Non-Catchment Area clients to identify himself/herself as affiliated with Valley Adult Counseling Service, Inc."

nnouncement at the staff meeting was the first that Redrow, the MNA
hairperson, knew of any change in the clinic's private practice
. A week later Lewis issued a memo asking anyone who was or might be
onflict of interest situation to see him.

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In essence, the change in policy meant that staff could no longer see private patients who lived within VACS' catchment area. In March of 1980 this directly affected three employees. Bonnie Parker, a registered nurse, periodically held divorce counseling workshops, a practice she discontinued after issuance of the new policy. Alva Taylor, a social worker, had a sporadic private practice; he was not seeing patients in March 1980 and did not take any on after the directive. Tara Mezei, the then-Clinical Director, had an active private practice in the catchment area, but left VACS at some point during March, 1980.

Other VACS staffers had had private practices in the past. Redrow knew of one psychiatrist and one psychologist with private offices located in the catchment area, and several other psychiatrists saw patients who lived in the Blackstone Valley although their private offices were located elsewhere. However, these employees had either left VACS prior to March, 1980, or had previously discontinued any practice within the catchment area. Redrow herself has never had a private practice.

SSMHC

Like VACS, South Shore Mental Health, Inc. is a community mental health center and, like VACS, it is staffed by both Commonwealth and contractual employees. Its catchment area is the towns of Quincy, Randolph and Milton. Ronald Hirsch has been VACS' executive director since 1978; Hirsch is paid as a Commonwealth employee.

Prior to June of 1978 the center was divided into four child treatment teams serving different "sub-catchment" areas, and one adult treatment team. The informal, unwritten policy as to private practice by staff members was that a client requesting private services could not be seen by a staff member on the treatment team serving that client's town, but could be referred to the private practice of a staff member on another team.

When Hirsch came on as executive director in January, 1978, some staff members were seeing private patients at the center; some even during office hours. Hirsch was concerned about possible legal liability for VACS (if a private patient fell while in the center, or sued for malpractice) and about the blurring of lines between government-funded services and private practice. Also about this time, VACS became eligible for third-party payments, and Hirsch told staff he wanted to retain as much of this revenue as possible for the center. Finally, in September of 1978, the clinic was reorganized into one child team and one adult team, each serving the entire catchment area. The de facto result of eliminating sub-catchment area teams was that clients living in the catchment area were no longer referred to private practices of any VACS staff members. However, although intra-center referrals ceased, staff members could still maintain private practices within the catchment area.

In the spring of 1979 Hirsch began the process of securing federal funding under Public Law 94-63 for VACS, by preparing a grant application, which included a draft private practice policy. At some point the entire application was reviewed by DMH. VACS staff participated in a "retreat" to discuss the center's grant application, on or about June 6, 1979. At that time Hirsch

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d the staff to read through the entire grant application; this request repeated at subsequent staff meetings. The 300-page grant was made lable to employees through program directors.

In September 1979, VACS' grant application was approved, with funding r P.L. 94-63 to begin March 1, 1980.[3] On December 6, 1979 VACS' Board irectors approved the new private practice policy; and during the first of January, 1980 Hirsch distributed to employees' mailboxes a memo setting the policy. This memo provided, in part, as follows:

1. All requests for services will be evaluated by center staff...

   If the individual for some reason is in need of mental health services which cannot be best provided from South Shore Mental Health Center, Inc., they will be referred to other practitioners in the community (as recommended by the Executive Director or the Directors of Child and Family Services or Adult Services.)

3. No employees or regular consultants of South Shore Mental Health Center, Inc. will be used as referral sources for clients or agencies in the catchment area.

4. No employees of South Shore Mental Health Center, Inc. will engage in the delivery of private mental services to residents of the catchment area being serviced by South Shore Mental Health Center, Inc.

5. No employees ofSouth Shore Mental Health Center, Inc. will conduct an ongoing, regular private practice in any of the buildings either rented, owned, or maintained by South Shore Mental Health Center, Inc.

6. Employees of South Shore Mental Health Center, Inc. may see private clients in the offices of South Shore Mental Health Center, Inc. only in emergency situations.

7. All current employees of South Shore Mental Health Center, Inc. who are engaged in the practice of seeing private patients in any South Shore Mental Health Center building shall submit in writing to the Executive Director on or before February 1, 1980 a plan for the discontinuance of these activities on or before April 1, 1980. This plan will be in writing and shall be agreed upon by the Executive Director. Individuals who are not in compliance with either the submission of a plan or the abiding of their plan shall be subject to termination without notice.

[3] In 1980, federal funds accounted for $850,000 of VACS annual revenues 4.2 million.

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There was no prior announcement or discussion of the policy with employees other than the circulation of the 300-page grant application containing a draft of the private practice policy.

After the memo issued, several employees went to Hirsch to discuss the new policy, including William Rothschild, a psychiatrist at the center since 1975. Dr. Rothschild went to Hirsch on his own behalf sometime in February; he told Hirsch that he didn't believe the policy had been presented to the MNA and that he felt it was "an intrusion on a clinician's right to practice outside state hours" by limiting employees' private practice to non-residents of the area. (Rothschild has never had a private practice himself). In April, Rothschild wrote Hirsch a letter on the policy, and contacted the MNA, presumably setting in motion the chain of events leading to the present charge.

The policy which was issued in January was the one which Hirsch had formulated and backed to the Board, and which had been approved by them. Hirsch told employees that, as far as he was concerned, this was VACS policy, but that if staff didn't like it, it was their responsibility to come up with an alternate proposal for the Board. However, Hirsch testified that he really didn't think any alternate proposal would be acceptable to the federal government. One staff member, Dr. Dennis McCrory, submitted an alternate proposal in June. McCrory told Hirsch that this represented his personal views as well as those of "some of the staff," but Hirsch was not sure what this meant, and who McCrory was representing.

The MNA never received notice of the change in private practice policy from Hirsch, from DMH or from the Office of Employee Relations.

When Hirsch drafted the private practice policy as part of VACS' federal grant application, he did so because of his understanding that P.L. 94-63 required the center to have a policy which established "a non-conflict competitive situation between the center and employees for provision of services to people from the catchment area." Section 206(c)(1)(L)(ii) of that law requires that a community mental health center "adopt and enforce a policy...which prohibits health professionals who provide [mental health] services to patients through the center from providing such services to such patients except through the center." In addition, the CMHC Reporting Package is issued by the federal Department of Health and Human Services[4] as a monitoring guide by which regional offices can evaluate a center's compliance with the requirements of P.L. 94-63. In evaluating compliance with Section 206 (c)(1)(L), the Reporting Package lists as "deficiency states" "(1) Center does not have a policy developed on private practice or outside employment, and (2) evidence that center staff receive payments from center clients on a private basis." Hirsch testified that his understanding of the term "probable client" is anyone living in the catchment area.

Joan Tighe, director of the Office of Federal Affairs at DMH, testified that Section 206(c)(1)(L) was intended to protect centers from a practice known in the mental health field as "skimming:" a client comes to a CMHC, is dis-

[4]Formerly HEW.

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red to have third-party payment status (e.g., comprehensive health rance which will cover mental health services) and is siphoned off by ate referral to a staff member. According to Tighe, CHMC's must have a ten private practice policy. If not, the center would be "out of compliance" could theoretically jeopardize its federal funding. To Tighe's knowledge, only defunding of a clinic had been under the predecessor law to P.L. 94-63; did not know whether that law contained a comparable private practice ision, or whether the non-compliance of the defunded center was related to ate practice policies.[5]

Opinion

An employer is obligated to bargain with the exclusive representative of employees before changing a contractual provision or established past tice affecting a mandatory subject of bargaining. Town of North Andover, 1103 (1974).

On the record in the present case, I find that a past practice existed at since 1972 or 1973 that staff members could have private practices, in or without the catchment area, and could accept referrals from the center ne client voluntarily requested private referral. Thus, the policy issued arch 13, 1980, prohibiting treatment of private clients residing in the ment area and prohibiting referrals from VACS to employees' private tices, was a change in past practice. This change was made unilaterally, it was announced at a staff meeting without prior notice to the MNA or rtunity to bargain.

As to SSMHC, the policy permitting referral by the center to employees' ate practices effectively ended in September, 1978 when the sub-catchment structure was reorganized. However, employees were still permitted to tain private practices in the catchment area, and so the policy issued in ary 1980 represented a change in past practice. I also find that the ge was made unilaterally, i.e., without notice and opportunity to bargain. inclusion of a draft policy in a 300-page grant application does not titute sufficient affirmative notice to the MNA of an intent to change private practice policy. Information conveyed to a union must be sufficiently for the union to make a judgment as to an appropriate response. Boston ol Committee (Administrative Guild), 4 MLC 1912 (1978); Town of Burlington, 1273 (1980). In any event, the grant was circulated among individual oyees and no copy was sent to the MNA; inclusion of individual bargaining employees in discussions of possible policy changes do not make these oyees agents of the union as to notice of a proposed change in terms and itions of employment, unless these employees are officers of the union. of Cambridge, 5 MLC 1291 (1978); Leominster School Committee, 3 MLC 1530 . 1977), modified on other grounds, 4 MLC 1572 (1977). In addition to lack otice, there was no opportunity to bargain afforded the MNA. Although

[5]Findings made which are based upon Tighe's testimony are limited to SSMHC, ne testified she was not familiar with VACS and did not know if it was a rally-funded CMHC.

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Hirsch told individual employees they could suggest alternate policies, the policy which was unilaterally promulgated had been backed by Hirsch, already approved by the Board of Directors, and Hirsch made clear his feelings that other proposals would probably be unacceptable. It was clear that any subsequent "bargaining" would be futile, and thus the change in private practice policy was in reality a fait accompli.

Mandatory Subject

The final element of the union's prima facie case for an alleged unilateral change is that the change affected a mandatory subject of bargaining. The Commission has held that restriction on outside employment is a mandatory subject. City of Pittsfield, 4 MLC 1905 (1975). The Commonwealth argues, however, that there was no actual change inasmuch as the policies merely prohibit activities which were already proscribed under G.L.c. 268A, Section 23,[6] and that prior Commission decisions have removed promulgation of rules regulating conduct under c.268A §23 from the scope of mandatory bargaining.

Several hearing officers have considered the Commonwealth's "268A defense" to charges of unlawful unilateral change. In Commonwealth of Massachusetts, 5 MLC 1800 (H.O. 1979); Commonwealth of Massachusetts, 6 MLC 1371 (H.O. 1979), and Commonwealth of Massachusetts, 7 MLC 1202 (H.O. 1980, appeal pending), hearing officers have concluded that, where the work rules promulgated restrict employee conduct beyond the scope of c. 268A §23's prohibitions, to this extent the new rules constitute a change in past practice over which the employer must bargain. I am persuaded by the wisdom of this analysis.

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[6] ...No officer or employee of a state, county or municipal agency shall:

(a) accept other employment which will impair his independence of judgment in the exercise of his official duties.

(b) accept employment or engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority.

(c) improperly disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests.

(d) use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others or give the appearance of such action.

(e) by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is unduly affected by the kinship, rank, position or influence or any party or person.

(f) pursue a course of conduct which will raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.

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While the Commission cannot usurp the powers of the State Ethics Commis- to interpret c. 268A, in order to determine the extent of the bargaining gation it is necessary to examine the scope of c. 268A's restrictions ublic employee activities. Based on evidence in the record, I can perceive roblems which arose where clients seeking services at CMHCs were referred ie private practices of center staff. Where the center employee is evalu- and making recommendations as to availability and appropriateness of ces, that employee's "independence of judgment" might be impaired if his r outside practice, or that of a colleague, would stand to benefit from vate referral. Such a situation might pose a conflict of interest under 8A §23, although the screening of such referrals by clinic management alleviate potential problems.

However, a blanket prohibition on private practices within the catchment seem to me far broader than the scope of the conflict of interest law. there is no actual connection, such as referral, between employment at linic and a private practice, and no appearance of any overlap or impro- y, such as by use of clinic facilities, the possibility of conflict of est is too remote to be per se a violation of c.268A. Therefore, while ommonwealth can excuse its failure to bargain over the change in practice ing to private referrals by the center to staff,[7] it must bargain with nion before changing the policy of permitting private practices within the ment area, as this prohibition regulates conduct outside the scope of A §23.

Therefore, I find that the MNA has made out a prima facie case of unilateral e in past practice. The Commonwealth has raised a number of affirmative ses, which shall be dealt with seriatim.

native Defenses

ess Necessity

First, the Commonwealth raises as a defense that VACS and SSMHC were ed to set the new private practice policies in order to comply with Law 94-63, an argument which may be characterized as the Commonwealth's ness necessity" defense. See Lynn Housing Authority, 6 MLC 2059 (H.O. . I note, initially, that this defense is only applicable to SSMHC, as ecord does not support a finding that VACS receives federal funding under 94-63.

In Lynn Housing Authority, supra, the employer argued that its unilateral ion in employee benefits was excused because that action was requested ite and federal funding agencies. This argument was rejected by the g officer, on the basis that a potential loss of federal funds was ative and did not justify a unilateral reduction in wages. While recog- the differences between the private sector and the public, I note that

[7] A defense which relates only to VACS, because, as previously noted, ceased making such referrals in 1978.

the NLRB has also considered this type of defense in refusal to bargain cases. The Board has repeatedly held that financial necessity is not a defense to unilateral action. See e.g., Oak Cliff -Golman Baking Co., 202 NLRB 614, 82 LRRM 1688 (1973), enfd. 505 F2d 1302, 90 LRRM 2615 (5th Cir. 1974); Osage Manufacturing Co., 173 NLRB 458 (1968). Similarly, in Architectural Fiberglass, 165 NLRB 238, 65 LRRM 1331 (1967), the Board rejected a defense that the Equal Pay Act necessitated wage increases during bargaining, where the evidence showed that this was not the real reason for the raises.

In the present case, even assuming that the Commonwealth is correct when it asserts that the new policy at SSMHC was required by P.L. 94-63, I do not find that this excuses its failure to notify and bargain with the MNA.[8] Even where a federal grant may place restrictions on the final product, there is no reason why the MNA should have been denied its consultative role in formulating a new private practice policy, where such change affected terms of employment of bargaining unit members. Under the most restrictive interpretation, the federal grant did not prevent the employer from going to the table and bargaining for a policy which would be acceptable to the MNA, to SSMHC and to the federal government. Although the grant might place strictures on the bargaining process, I find that it did not prevent it.

Waiver by Bargaining

The Commonwealth next raises as an affirmative defense that its actions were permissible under the collective bargaining agreement. It relies on Article 33, the Savings Clause[9] and Article 28, Management Rights/Productivity.[10]

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[8] By rejecting this defense I need not second-guess Congress and the Department of HHS by reaching the various interpretations of P.L. 94-63 and the implementation guidelines which have been urged upon me by the parties. (For example, the MNA argues that the term "probable client" in the CMHC Reporting Package refers only to identified clients who have been interviewed by the clinic or who are on waiting lists, rather than to any resident of the catchment area). I need not interpret federal law as I find that nothing in the federal funding guidelines precluded the Commonwealth from bargaining.

[9] Article 33 - Savings Clause
In the event that any Article, Section or portion of this agreement is found to be invalid or shall have the effect of loss to the Commonwealth of funds made available through federal law, rule or regulation, then such specific Article, Section or portion shall be amended to the extent necessary to conform with such law, rule or regulation, but the remainder of this Agreement shall continue in full force and effect. Disputes arising under this Article shall be discussed with the Division of Employee Relations and may be submitted by the Association to expedited arbitration. (emphasis added in the Commonwealth's brief).

[10] Article 28 - Managerial Rights/Productivity
Section 1:
Except as otherwise limited by an express provision of this Agreement,
(footnote continued on following page)

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Savings Clause provides that a specific portion of the contract may be ided if it would have the effect of loss of federal funds to the Commonwealth. s savings provision does not apply in the present case, where the private tice policy was a non-contractual but long-standing past practice. The onwealth additionally argues that the management rights clause gives it power to set "reasonable work rules," and thus the MNA has waived by ract its right to bargain over private practice policy. Where a manage- rights clause is asserted as a defense to a prohibited practice charge, Commission will interpret the contract language to determine whether the uted action is within its scope. Commonwealth of Massachusetts, 5 MLC 1097, (1978). A broad management rights clause is not an effective waiver. of North Andover, supra; City of Everett, 2 MLC 1471 (1976). I do not find the right to set "work rules," regulating the conduct of employees on the was contemplated by the parties to include regulation of employee activities ng non-working hours. Thus, the management rights clause is not sufficiently icit to constitute a contractual waiver of bargaining rights under Commis- precedent. Melrose School Committee, 3 MLC 1299 (1976); City of Boston, C 2035 (1980); Commonwealth of Mass., 5 MLC 1097, supra.

er by Inaction

Finally, the Commonwealth asserts as an affirmative defense that the MNA ed its rights by failing to make a demand to bargain over private practice cy. It argues that VACS' policy was issued in March, 1980 and the MNA has to date made a demand to bargain; and that Hirsch circulated the SSMHC t policy in the grant application in the spring of 1979 and no member of union requested bargaining.

A waiver of bargaining rights must clear and unmistakable, and such er will not be lightly inferred. Town of Andover, 4 MLC 1086, 1089 7). To prove waiver by inaction, an employer must show that the union ally knew or had notice of the proposed change, had a reasonable opportunity egotiate over the change, and failed to do so, without explanation. Boston ol Committee (Administrative Guild), supra; Town of Avon, 6 MLC 1290 (1979). e a change has been presented as a fait accompli, however, a union may onably conclude that bargaining is futile, and a finding of fait accompli relieve a union of the obligation to make a formal demand to bargain;

[10](footnote continued from previous page)
the Employer shall have the right to exercise complete control and discretion over its organization and technology including but not limited to the determination of the standards of services to be provided and standards of productivity and performance of its employees; establish and/or revise personnel evaluation programs; the determination of the methods, means and personnel by which its operations are to be conducted; the determination of the content of job classifications; the appointment, promotion, assignment, direction and transfer of personnel; the suspension, demotion, discharge or any other appropriate action against its employees; the relief from duty of its employees because of lack of work or for other legitimate reasons; the establishment of reasonable work rules; and the taking of all necessary actions to carry

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City of Cambridge, 5 MLC 1291 (1978); Administrative Guild, supra; Town of Andover, supra.

Earlier in this opinion I concluded that the change in private practice policy at SSMHC was presented as a fait accompli in January of 1980. This conclusion was based on the failure to affirmatively notify the MNA of the proposed change and to afford them an opportunity to bargain before the change was implemented. The change at VACS was also presented as a fait accompli when it was announced at the staff meeting. The policy had already been voted upon and adopted by VACS' Board of Directors. Yet, no prior notice had been given to employees or to Eleanor Redrow, who is the MNA Unit Chairperson, and no attempt was made to solicit employee or union input into the process of formulating a new policy. As at SSMHC, a demand to bargain after the policy was issued in March, 1980 would have been futile. Therefore, I find that the MNA did not, by failing to make a demand to bargain, waive its right to bargain over private practice policies at VACS and SSMHC; where new policies were implemented without prior notice and opportunity to bargain and were presented as a fait accompli, a demand to bargain would have been futile.

Summary and Conclusions

For the reasons set forth in this opinion, I find that the MNA has established the existence of past practices at VACS and SSMHC relating to private practice by employees, and that these policies were unilaterally altered. I further find that the Commonwealth was not required to bargain over that portion of the policy at VACS relating to referrals, as the new policy merely reinforced conduct already arguably prohibited under G.L.c. 268A, Section 23. Finally, I find that the Commonwealth has failed to meet its burden of proving affirmative defenses of waiver by contract and by inaction, and business necessity.

Order

WHEREFORE, pursuant to the authority vested in the Commission by Section 11 of the Law, IT IS HEREBY ORDERED that the Commonwealth of Massachusetts, through the Commissioner of Administration and any others acting in its interests in dealing with Unit 7 employees, shall:

1. Cease and desist from:

   a. Unilaterally instituting, revising or enforcing policies relating to the maintenance of private practices by Unit 7 employees of the Commonwealth at VACS and SSMHC, until the MNA has been given full opportunity to bargain over these policies, except that the Commonwealth may enforce policies relating to referrals by VACS and SSMHC to private practices of their employees;

   b. in any like or related manner, refusing to bargain in good faith with the exclusive representative of its employees;

[10](footnote continued from previous page)
out its mission in emergencies. (emphasis added in the Commonwealth's brief).

c. restraining, coercing or interfering with employees in the exercise of their rights guaranteed under G.L.c. 150E.

2. Take the following affirmative action which will effectuate the policies of the Law:

a. Immediately rescind the private practice policies issued at VACS in March, 1980 and at SSMHC in January, 1980, except as those policies relate to referrals from the center.

b. Upon request by the MNA, bargain collectively in good faith over the issue of employees' private practices.

c. Remove from its records all references to any adverse action which may have been taken against Unit 7 employees as a result of the unlawfully promulgated private practice policies.

d. Post immediately in a conspicuous place where notices to VACS and SSMHC employees are habitually located and maintain posted for thirty (30) days thereafter copies of the attached Notice to Employees.

e. Notify the Commission, in writing, within ten (10) days of receipt of this Decision and Order, of the steps taken to comply herewith.

DERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

RACHEL J. MINTER
Hearing Officer

Commonwealth of Massachusetts, Commissioner of Administration and Massachusetts Nurses Association, 7 MLC 1553

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE MASSACHUSETTS LABOR RELATIONS COMMISSION
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

Chapter 150E of the General Laws gives all employees the following rights:

To engage in self-organization;
To form, join or assist unions;
To bargain collectively through representatives of their own choosing;
To act together for collective bargaining or other mutual aid or protection;
To refrain from any and all of these activities.

WE WILL NOT do anything to interfere with these rights. More specifically,

WE WILL rescind the private practice policies issued at VACS in March, 1980 and at SSMHC in January, 1980 except as these policies relate to referrals from the center.

WE WILL NOT unilaterally institute, revise or enforce policies relating to the maintenance of private practices by Commonwealth employees in Statewide Unit 7 at VACS and SSMHC, until the MNA has been given full opportunity to bargain over these policies. We may, however, enforce policies relating to referrals by the center to employees' private practices.

WE WILL remove from our records references to any adverse action which may have been taken against Unit 7 employees as a result of the unlawfully issued private practice policies.

COMMONWEALTH OF MASSACHUSETTS

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For the Office of Employee Relations

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For the Department of Mental Health

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Benjamin Lewis, Executive Director
Valley Adult Counseling Service, Inc.

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Ronald Hirsch, Executive Director
South Shore Mental Health Center, Inc.