In the Matter of COMMONWEALTH OF MASSACHUSETTS/COMMISSIONER OF ADMINISTRATION AND FINANCE

and

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

Case No. SUP-05-5191

68.21	***refusal to implement grievance settlement***
82.11	***back pay***
82.12	***other affirmative action***

October 23, 2009
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

Martha Lipchitz O'Connor, Esq.	*Representing the Commonwealth of Massachusetts/Commissioner of Administration and Finance*
Richard S. Waring, Esq.	*Representing the National Association of Government Employees*

DECISION[1]

Statement of the Case

On May 13, 2005, the National Association of Government Employees (NAGE) filed a charge with the Labor Relations Commission (Commission), alleging that the Commonwealth of Massachusetts/Commissioner of Administration and Finance (Commonwealth), acting through the Massachusetts Office on Disability (MOD), had violated Sections 10(a)(5) and (1) of Massachusetts General Laws, Chapter 150E (the Law). Following an investigation, the former Commission issued a complaint of prohibited practice on December 14, 2006, alleging that the Commonwealth had violated Section 10(a)(5), and, derivatively, Section 10(a)(1) of the Law by repudiating an April 29, 2003 settlement agreement. The Commonwealth filed its answer on December 21, 2006.

On May 22, 2007, Margaret M. Sullivan, Esq., a duly-designated hearing officer (Hearing Officer), conducted a hearing. Both parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. The parties submitted their post-hearing briefs postmarked on July 6, 2007. On August 14, 2008, the Hearing Officer issued her Recommended Findings of Fact. Pursuant to 456 CMR 13.02(2), both parties filed challenges to the Recommended Findings of Fact on August 25, 2008. After reviewing those challenges and the record, we adopt the Hearing Officer's Recommended Findings of Fact, as modified where noted, and summarize the relevant portions below.

For the reasons set forth below, based on these facts, we conclude that, by revealing to an ex-employee's current employer that the employee had been discharged for cause, the Commonwealth repudiated a grievance settlement agreement in violation of Sections 10(a)(5) and (1) of the Law. We further conclude that the Commonwealth's actions led to the employee being terminated from the second employer and accordingly award a make-whole remedy that includes both back pay and front pay.

Findings of Fact[2]

NAGE is the exclusive bargaining representative for employees of the Commonwealth in statewide bargaining unit 6,[3] including certain staff members of the MOD. The MOD is the state advocacy agency whose purpose is to bring about the full and equal participation of people with disabilities in all aspects of life. The agency has fourteen full-time employees and one part-time employee.[4]

Jane Doe (Doe)[5] began work at the MOD on June 26, 2000 as an advocate generalist[6] in its client services program.[7] As an advocate, Doe's duties included answering inquires from members of the public, assessing their needs, and making referrals, if necessary. She also investigated claims of wrongdoing, if those claims were within the MOD's jurisdiction, and obtained information from other state or municipal agencies as part of those investigations.[8] Her areas of concentration included housing, government benefits, health care, and zoning. Doe reported to Barbara Lybarger, Esq. (Lybarger), the MOD's general counsel and assistant director of client services.[9]

In February of 2003, the MOD terminated Doe's employment. Thereafter, NAGE filed a grievance protesting Doe's termination pursuant to the contractual grievance and arbitration procedure. On April 29, 2003, Doe, Donald Sullivan (Sullivan), NAGE's representative, Myra Berloff, the then acting director of the MOD,

1. 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).

2. The Board's jurisdiction in this matter is uncontested.

3. Unit 6 consists of professional employees who provide legal, fiscal, research, statistical, analytical and staff services.

4. The part-time employee and twelve of the full-time employees are members of Unit 6.

5. A pseudonym.

6. Doe's official job classification was program coordinator I.

7. Doe previously earned a bachelor's degree in legal education and a certificate as a paralegal. We amend the findings to include the relevant information that at the date of the hearing, Doe was forty-six years old.

8. Doe regularly read and interpreted releases of information that individuals executed in order that the MOD could carry out investigations or assist them with problems. The MOD also received releases from former clients, who would request that the agency send copies of their records to third parties.

9. Lybarger also is the MOD's coordinator for the Americans with Disabilities Act.

and Eric Klein, Esq., a representative of the Commonwealth's Human Resources Division/Office of Employee Relations (OER), executed the following settlement agreement (April 29, 2003 Agreement):[10]

> This settlement is entered into by the Commonwealth of Massachusetts, through the Human Resources Division/Office of Employee Relations, the Massachusetts Office on Disability (the Department), and the National Association of Government Employees (NAGE). The terms of this settlement agreement resolve fully all outstanding issues concerning Step III grievances #03-33388 and 03-33536,[11] filed by the Union on behalf of the grievant [Doe]. It shall be agreed by the parties that:
>
> As soon as administratively possible, the Department shall rescind the Grievant's termination from employment and shall accept the Grievant's voluntary layoff. The Grievant's voluntary layoff shall be considered to have been tendered on February 4, 2003. The Grievant agrees to waive any recall rights that might otherwise arise from a layoff in accordance with Article 18 of the current Unit 6 collective bargaining agreement.
>
> As soon as administratively possible, the Department shall remove all warnings, written reprimands and suspensions given to the Grievant during her employment with the Department from her personnel file. The documentation to be removed shall include the memorandum dated January 17, 2003 that is part of the subject matter of this grievance.
>
> The Department agrees not to contest the Grievant's eligibility for unemployment compensation arising from her separation from employment with the Department.
>
> The Department agrees to draft a letter of reference in support of the Grievant's efforts to obtain alternative employment.
>
> It is understood that this agreement is for settlement purposes only and shall not serve as precedent or evidence in any other proceeding except a proceeding in which either party alleges a breach of this Agreement.
>
> The Union and the Grievant agree to withdraw any and all pending and future actions against the Massachusetts Office on Disability or the Commonwealth relating to or arising out of the matter upon which these grievances are based.

On May 13, 2003, Lybarger[12] wrote the following letter on behalf of the MOD in accordance with the terms contained in the fifth paragraph of the April 29, 2003 Agreement:

> To Whom It May Concern:
>
> [Doe] worked for the Massachusetts Office on Disability as a general advocate for approximately two years. I was [Doe']s immediate supervisor. She worked as an advocate for people with disabilities, who were having difficulty obtaining government services to which they were entitled.
>
> [Doe] was particularly interested in housing issues and civil rights enforcement during her tenure. The volume of work she produced exceeded expectations. She mastered all the basic advocacy skills of her jobs. She often volunteered for tasks.

Thereafter, Doe engaged in a search for new employment with the assistance of the Massachusetts Commission for the Blind (MCB),[13] which included sending out copies of her resume and filling out job applications. In June of 2004, a representative[14] of the Social Security Administration (SSA) contacted Lybarger. The SSA representative indicated that she already had a copy of Lybarger's May 13, 2003 letter, but that she wanted to ask Lybarger some additional questions about Doe. Lybarger replied that she could not give out any additional information about Doe, because the MOD's ordinary practice was not to give out more information than was contained in the May 13, 2003 letter.

On September 7, 2004, Doe began to work at the SSA as a claims representative.[15] On that date, Doe signed the following authorization for release of information (September 7, 2004 release):

> **United States of America Authorization for Release of Information** [Emphasis in original]
>
> Carefully read this authorization to release information about you, then sign and date it in black ink.
>
> I Authorize any investigator, special agent, or other duly accredited representative of the authorized Federal agency conducting my background investigation, to obtain any information relating to my activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information. This information may include, but is not limited to, my academic, residential, achievement, performance, attendance, disciplinary, employment history, and criminal history record information.
>
> I Understand that, for some sources of information, a separate specific release will be needed, and I may be contacted for such a release at a later date.
>
> I Authorize custodians of records and sources of information pertaining to me to release such information upon request of the investigator, special agent, or other duty accredited representative of any Federal agency authorized above regardless of any previous agreement to the contrary.
>
> I Understand that the Information released by records custodians and sources of information is for official use by the Federal Government only for the purposes provided in this Standard Form 85, and may be redisclosed by the Government only as authorized by law.

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10. The April 29, 2003 Agreement bore the following caption:

COMMONWEALTH OF MASSACHUSETTS

In the Matter of THE MASSACHUSETTS OFFICE ON DISABILITY
and
[JANE DOE]

SETTLEMENT AGREEMENT

(Upper case in original)

11. Grievance #03-33388 concerned a suspension that the MOD had issued to Doe and grievance #03-33536 concerned her termination.

12. Lybarger previously had reviewed several drafts of the April 29, 2003 settlement agreement.

13. Doe indicates that she has low vision and is legally blind.

14. The record does not identify the representative.

15. Doe's annual salary at her date of hire was $34,888.

> Copies of this authorization that show my signature are as valid as the original release signed by me. This authorization is valid for two (2) years from the date signed.[16]

Shortly thereafter, Lybarger received a two-page document[17] from the United States Office of Personnel Management (OPM form) [18] requesting certain information about Doe[19] to determine her suitability for employment or security clearance.[20] The OPM form also contained the following certification:

> THE PERSON WE ARE INVESTIGATING HAS GIVEN WRITTEN CONSENT FOR THIS INVESTIGATIVE INQUIRY. WE KEEP THAT CONSENT ON FILE. IF A COPY IS REQUIRED IN ORDER TO COMPLETE THIS FORM OR YOU WOULD LIKE TO KEEP YOUR IDENTITY CONFIDENTIAL, PLEASE INDICATE THIS REQUIREMENT IN WRITING ON THE REVERSE.

(Upper case in original)

After reviewing the form, Lybarger wrote a notation on it that written consent to discuss was required in advance. She did not complete any other part of the form, except to correct a misspelling of her name, before she returned the form.

In early November of 2004, Lybarger again received the OPM form requesting information about Doe along with a copy of Doe's September 7, 2004 release. When Lybarger completed the form on or about November 16, 2004,[21] she indicated that:[22] a) the MOD had discharged Doe for "unfavorable employment or conduct;" b) Doe was not eligible for re-hire for reasons relating to her unfavorable employment; c) she had adverse information about Doe's employment with the MOD that called into question Doe's honesty or truthfulness, mental or emotional stability, and general behavior or conduct; and d) she would not recommend Doe for government security clearance or employment. She also wrote the following comments:

> [Doe]'s behavior was unacceptable in that she regularly accused coworkers of illegal and abusive conduct. Those accusations were thoroughly investigated and found to be baseless. She also shared them publicly undermining the agency.

On February 1, 2005, Betty Flaven (Flaven),[23] Doe's direct supervisor at the SSA, interviewed Doe about alleged contradictions between information that Doe had provided on her application for employment with the SSA, especially Doe's statement that she had taken a voluntary layoff from the MOD, and information that the MOD had provided.[24] On February 28, 2005,[25] Flaven again interviewed Doe and inquired whether Doe had taken a voluntary layoff from the MOD in lieu of a termination.[26] Doe admittedly was not forthcoming with Flaven as to whether she had executed a settlement agreement with the MOD.[27]

In a March 21, 2005 memorandum, Laurie Zastrow (Zastrow), the SSA's district manager in Quincy, terminated Doe's employment.[28] Zastrow referenced statements in the memorandum that Doe had made on her application for employment with the SSA, information that Lybarger submitted on the OPM form, and Doe's two meetings with Flaven. In the final two paragraphs of the four-page memorandum, Zastrow stated:

> Your actions during this investigation have been inconsistent and uncooperative. Given the unresolved conflict between the information provided by you and the State, along with the inconsistencies in your own explanations over time, I am left to believe that you have failed to accurately present the circumstances under which you left your previous job with the State of Massachusetts and that your certification for Question 12 [on the employment application] is in doubt. In addition, you have failed to cooperate by allowing SSA to re-contact your former employer for additional information to clear up the issue, and you have not provided any evidence to refute the information that was provided to SSA by the State. Your explanation of the situation has been highly inconsistent as you have contradicted and denied information that you reported during your first interview.
>
> Based on the above information, I have concluded that the only appropriate course of action is to terminate your employment. The Standards of Conduct, which you signed that you received on September 7, 2004, Subpart A, 2635,101 (B)(1) states that: "Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain." The Agency must be able to rely upon the honesty, integrity, trust-

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16. Doe did not contact either NAGE or OER to discuss any possible interplay between the September 7, 2004 release and the April 29, 2003 Agreement.

17. The document bore the heading "Investigative Request for Employment Data and Supervisor Information".

18. On some unspecified date, Doe had supplied Lybarger's name to the SSA as a reference. However, Doe never notified Lybarger or the MOD that she had done so.

19. Lybarger was not the custodian of records for the MOD.

20. The OPM form contained instructions stating that because Doe had provided Lybarger's name to assist in the background investigation, Lybarger should not forward the form for completion by someone else.

21. Lybarger interpreted the September 7, 2004 release as permitting her to rely on her personal knowledge of Doe's employment history at the MOD, rather than relying upon the terms of the April 29, 2003 Agreement. Therefore, she did not review the April 29, 2003 Agreement or Doe's personnel file or contact the MOD's human resources director before completing the OPM form.

22. Portions of the OPM form were in a multiple-choice format.

23. Flaven also advised Doe, who was a probationary employee, to have a representative of Doe's federal union present at the meeting, which she did. The record does not contain the name of the federal union.

24. During a lunch break on February 1, 2005, Doe contacted her former NAGE representative Sullivan to confirm her belief that the April 29, 2003 Agreement was confidential.

The hearing officer declined to make any findings about conversations that Sullivan allegedly had with the MOD's human resources director Michael Dumont (Dumont), because neither Sullivan nor Dumont testified at the hearing. Although Doe testified that Sullivan had told her about certain remarks, which Dumont allegedly had made, that portion of Doe's testimony consists of two layers of hearsay and, thus, is inherently unreliable.

25. In response to the Commonwealth's challenge, we correct a typographical error in the text that referred to 2008 rather than 2005.

26. A representative of the federal union was also present at the February 28, 2008 meeting.

27. Doe was not forthcoming about the settlement agreement, because she believed the agreement was confidential in nature.

28. As of March 21, 2005, Doe earned an annual salary of $36,219.

29. With the assistance of the MCB, JobNet, and her local Career Center, Doe applied for thirty to forty positions. She stopped actively seeking employment in the summer of 2006, while she explored the possibility of obtaining an advanced de-

> worthiness, judgment and ethics of its employees. I am not able to trust your ability to answer consistently or truthfully when questioned about issues, which calls into question your ability to work for SSA. Accordingly, you are hereby notified that your employment with the Social Security Administration will terminate at the close of business on March 21, 2005.

Doe subsequently has been unable to secure[29] other employment.[30]

Opinion

Section 6 of the Law requires public employers and unions that represent their employees to meet at reasonable times to negotiate in good faith regarding wages, hours, standards of productivity and performance, and any other terms and conditions of employment. The statutory obligation to bargain in good faith includes the duty to comply with the terms of a collectively bargained agreement, *Commonwealth of Massachusetts*, 26 MLC 165, 168 (2000), (citing *City of Quincy*, 17 MLC 1603 (1991)); *Massachusetts Board of Regents of Higher Education*, 10 MLC 1196 (1983), and to implement settlement agreements reached in the process of resolving grievances that arise over the interpretation and application of the agreement. *Essex County*, 22 MLC 1556, 1565 (1996); *Massachusetts Board of Regents of Higher Education*, 10 MLC 1196, 1205 (1985). A public employer's deliberate refusal to abide by an unambiguous collectively bargained agreement constitutes a repudiation of that agreement in violation of the Law. *Town of Falmouth*, 20 MLC 1555 (1984), *aff'd. sub nom*, *Town of Ipswich* v. *Labor Relations Commission*, 21 Mass. App. Ct. 1113 (1986). If the evidence is insufficient to find an agreement or if the parties hold differing good faith interpretations of the language at issue, the Board will conclude that no repudiation has occurred. *Commonwealth of Massachusetts*, 18 MLC 1161, 1163 (1986). If the language is ambiguous, the Board examines applicable bargaining history to determine whether the parties reached an agreement. *Id.*; *Commonwealth of Massachusetts*, 16 MLC 1143, 1159 (1989). There is no repudiation of an agreement if the language of the agreement is ambiguous, and there is no evidence of bargaining history to resolve the ambiguity. *Commonwealth of Massachusetts*, 28 MLC 8, 11 (2001) (citing *Town of Belchertown*, 27 MLC 73 (2000)).

The issue before us is whether the Commonwealth repudiated the April 29, 2003 Agreement when Lybarger indicated on the OPM form in November 2003 that the MOD had discharged Doe for "unfavorable employment or conduct." A reading of the plain language of the April 29, 2003 Agreement shows that the parties to the settlement, the Commonwealth, the Union, and Doe, agreed that the Commonwealth would rescind Doe's termination and accept her voluntary layoff. Lybarger's written responses on the OPM form, stating that the MOD had discharged Doe, were clearly contrary to the terms of the settlement agreement. Further, it is undisputed that Lybarger, the MOD's general counsel, was an agent of the Commonwealth and had actual authority to speak about Doe's employment with the MOD.

However, the Commonwealth argues that Doe waived the terms of the April 29, 2003 Agreement when she executed the September 7, 2004 release. In particular, the Commonwealth relies upon the portion of the release stating that the signatory agrees to the release of information "regardless of any previous agreement to the contrary." Upon review of the release, we do not find the Commonwealth's argument to be persuasive. Reading the release carefully, giving its words their plain and normal meaning, it contains no language indicating that Doe assented to the revocation of the April 29, 2003 Agreement and to a reinstatement of her termination. Rather, the release merely allows the dissemination of information. Moreover, even assuming *arguendo* that Doe's execution of the release constituted a waiver of the April 29, 2003 Agreement, the Union, the other party to the matter, never agreed to such a waiver. Finally, the record contains no evidence showing that upon receipt of the OPM form and Doe's release, the Commonwealth ever contacted the Union and inquired whether the Union would agree to the waiver of the April 29, 2003 Agreement. Accordingly, the Commonwealth repudiated the agreement in violation of Sections 10(a)(5) and (1) of the Law.

Remedy

When a public employer repudiates a settlement agreement, the traditional remedy is to order the employer to cease and desist from its unlawful conduct; to adhere to the settlement agreement; to make whole any employee who sustained an economic loss as a result of the employer's unlawful action; and to post a notice to employees. *City of Lawrence*, 27 MLC 57, 59 (2000) (further citations omitted). The Commonwealth contends that the traditional remedy is not appropriate here because any economic loss that Doe incurred was the result of her own actions rather than the Commonwealth's repudiation of the settlement agreement. First, the Commonwealth argues that when Doe executed the September 7, 2004 release, she waived the right to receive any remedy. For the reasons discussed above, we do not find this argument to be persuasive and decline to adopt it.

Next, the Commonwealth claims that there is no nexus between the comments on the OPM form and Doe's termination from the SSA. Instead, the Commonwealth asserts that the SSA terminated Doe because of her lack of cooperation, honesty and candor during meetings with her supervisors about her prior employment with the Commonwealth. However, upon review of the record, we conclude that the Commonwealth's statement that it had discharged

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gree. However, at the hearing, she expressed an interest in securing further employment.

30. In late summer or fall of 2006, Doe, as a *pro se* litigant, filed a civil action in federal district court against the MOD. On November 16, 2006, United States District Court Judge Rya Zobel (Judge Zobel) denied without prejudice Doe's motion for appointment of *pro bono* counsel. Judge Zobel noted in her order that: a) Doe had an educational background in the legal field; b) Doe had legal expertise and training in connection with her employment; c) Doe was familiar with legal terms, concepts and legal procedures; and d) Doe was computer literate in a variety of applications.

31. In *City of Boston*, 35 MLC 289, 292 (2009), the Board announced that, henceforth, it would order respondents that customarily communicate to employees via

Doe, and the apparent discrepancy of that statement with Doe's prior statements to the SSA that the Commonwealth had laid her off, were the reasons that the SSA carried out an investigation that included the meetings between Doe and her supervisor. Further, a review of the SSA's March 21, 2005 letter reveals that its concerns about Doe's honesty, candor and cooperation were not just related to her meetings with her supervisors, but were also intertwined with unlawful conduct, *i.e.* what the SSA described as "the unresolved conflict between the information provided by you and the State." This distinguishes Doe's circumstances from those in *Commonwealth of Massachusetts*, 29 MLC 132, 133 (2003) (employee did not suffer a loss of pay solely because the employer made an unlawful unilateral change, but rather because he refused to perform the unilaterally imposed duties) and *Commonwealth of Massachusetts*, 9 MLC 1337, 1341 (1982) (ruling that an individual who had resigned after the Commonwealth had unilaterally and unlawfully ordered him to give up his outside law practice was ineligible for back pay because there was no evidence that individual was coerced into resigning).

Therefore, we conclude that Doe sustained an economic loss, the loss of earnings and benefits from her SSA position, as a direct and proximate result of the Commonwealth's unlawful conduct. Accordingly, we order the Commonwealth to make Doe whole for her economic losses, including an order of back pay. In this case, back pay is an amount equal to the lost wages and benefits from her SSA position less interim earnings, for the period from March 21, 2005, the date of her termination from the SSA, until the date of this award. *See Commonwealth of Massachusetts*, 30 MLC 43, 46 (2003) (employer must retroactively pay wage increases that were lost as a result of its repudiation of a settlement agreement).

The Union also urges us to order the Commonwealth to pay a monetary sum to Doe for her loss of anticipated future earnings and benefits (front pay) resulting from the Commonwealth's unlawful repudiation. We next consider the appropriateness of a front pay award.

Pursuant to Section 11 of the Law, once the Board determines that a prohibited practice under Section 10 of the Law has been committed, it is authorized to issue a cease and desist order to the offending party "and shall take such further affirmative action as will comply with the provisions of this section ...." The phrase "further affirmative action" has been construed as granting the Board broad authority to fashion appropriate orders to remedy unlawful conduct, including remedial measures not specified in Section 11. *Labor Relations Commission* v. *City of Everett*, 7 Mass. App. Ct. 826, 829 (1979). Moreover, Section 11 of the Law broadly commits the design of appropriate remedies to the Board's discretion and expertise. *Town of Brookfield* v. *Labor Relations Commission*, 443 Mass. 315, 326 (2005).

Upon review of the unique circumstances in the present case, we conclude that an award of front pay is necessary to effectuate the goals of the statute. *See Conway* v. *Electro Switch Corp.*, 402 Mass. 385, 387 (1988) (no award of front pay is appropriate in a discrimination case without a finding that such a pay effectuates the goals of the governing statute). Front pay is intended to compensate a plaintiff for the loss of future earnings resulting from the defendant's unlawful conduct. *Haddad* v. *Wal-Mart Stores, Inc.*, 455 Mass. 91 (2009). In particular, we find front pay appropriate here because the SSA is not a party to this proceeding and, thus, we cannot order reinstatement for Doe, a standard component of the Board's traditional status quo remedy. *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557, 575-576 (1983); *cf. Wildman* v. *Lerner Stores Corp.*, 771 F.2d 605, 614-616 (1st. Cir. 1985) (front pay is an appropriate remedy in an age discrimination action where reinstatement is impracticable or impossible).

While we find that front pay should be awarded in this case, we must next determine the appropriate time period for which Doe should receive front pay. The Union seeks an award of front pay that would compensate Doe for lost earnings and benefits until she reaches age sixty-five, about a sixteen or seventeen year period. We decline to so, because, based on the evidence before us, an award of sixteen or seventeen years of front pay is highly speculative. *Haddad* v. *Wal-Mart*, 455 Mass. at 102 (judge properly instructed jury that front pay damages must be "proven with reasonable certainty"); *Conway* v. *Electro Switch Corp.* 402 Mass. at 388 (damages may not be determined by speculation or guess). We cannot conclude with any degree of certainty that Doe would have worked for the SSA until she was sixty-five years old. *See Wynn & Wynn, P.C.* v. *Massachusetts Commission Against Discrimination*, 431 Mass. 655, 676-677 (2000) (front pay was not reasonably ascertainable because of the resignations or layoffs of other employees at the same law firm). Furthermore, we cannot reasonably determine that she would not successfully secure other comparable employment for the next sixteen or seventeen years. *Cf. Haddad* v. *Wal-Mart*, 455 Mass. at 103 (lengthy front pay award justified under G.L. c. 151B as well as Federal law, where circumstances indicated that the plaintiff would have difficulty in obtaining comparable employment); *Handrahan* v. *Red Roof Inns, Inc.*, 43 Mass. App. Ct. 13, 24 (1997) (front pay award in discrimination case erroneously did not take into account the likelihood that the plaintiff would secure other full-time employment); *see generally School Committee of Newton* v. *Labor Relations Commission*, 338 Mass. at 580 (employee has a duty to mitigate damages by seeking other employment).

Instead, we order a more limited front pay award for a period of time that has a nexus with the facts before us. *Haddad* v. *Wal-Mart*, 455 Mass. at 103 (jury's front pay award justified by evidence of plaintiff's tendency towards job stability based on her ten years of employment with Wal-Mart). After the parties executed the April 29, 2003 settlement agreement, Doe secured new employment in slightly less than one and one-half years. Therefore, we conclude that it would be reasonable for the Commonwealth to pay Doe an award of one and one-half years of front pay in order to provide her with an adequate period of time to secure comparable employment to her SSA position. *Cf. City of Lawrence*, 27 MLC at 59 (under the facts presented, it was reasonable to start the accrual of interest, not from the date of the settlement agreement, but six weeks later). Finally, because front pay is an award for future damages, the award must be reduced to present value. *See Conway* v. *Electro-Switch*, 402 Mass. at 338, n.3 (citing

Trinity Church v. *John Hancock Mut. Life Ins. Co.*, 399 Mass. 43, 52 (1987)).

Conclusion

Based on the record and for the reasons stated above, we conclude that the Commonwealth violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by repudiating the April 29, 2003 Agreement.

Order

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

1. Cease and desist from:

a) Failing to bargain in good faith by repudiating the April 29, 2003 Agreement.

b) 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) Immediately adhere to all terms of the parties' April 29, 2003 Agreement.

b) Make the affected employee whole for any economic losses that she suffered for the period from March 21, 2005 to the date of this decision, which were a direct result of the Commonwealth's failure to adhere to the April 29, 2003 Agreement, plus interest on any sums owed at the rate specified in MGLc.231, Section 6I, compounded quarterly.

c) Make the affected employee whole with a sum of money reduced to present value that is equal to her anticipated economic losses for the eighteen month period commencing upon the date of this decision, which are the direct result of the Commonwealth's repudiation of the April 29, 2003 Agreement.

d) Post immediately in all conspicuous places where members of the Association's bargaining unit usually congregate and where notices to these employees are usually posted, including electronically, if the City customarily communicates to its employees via intranet or email, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the attached Notice to Employees.[31]

SO ORDERED.

THE COMMONWEALTH OF MASSACHUSETTS
DIVISON 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 Commonwealth of Massachusetts (Commonwealth), acting through the Massachusetts Office on Disability (MOD), has violated Section 10(a)(5), and, derivatively Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by repudiating the terms of a April 29, 2003 settlement agreement with the National Association of Government Employees (Union).

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

WE WILL NOT repudiate the terms of the April 29, 2003 settlement agreement with the Union.

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) Immediately adhere to all terms of the parties' April 29, 2003 Agreement.

2) Make the affected individual whole for any economic losses that she has suffered for the period from March 21, 2005 to the date of this decision, which were a direct result of the Commonwealth's failure to adhere to the April 29, 2003 Agreement, plus interest on any sums owed at the rate specified in MGL c.231, Section 6I, compounded quarterly.

3) Make the affected individual whole with a sum of money reduced to present value that is equal to her anticipated economic losses for the eighteen month period commencing upon the date of this decision period, which are the direct result of the Commonwealth's repudiation of the April 29, 2003 Agreement.

[signed]
For the Commonwealth of Massachusetts

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, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).

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intranet or email to post both hard and electronic copies of the Board's Notice to Employees.