

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

In the Matter of

CAMBRIDGE PUBLIC HEALTH
COMMISSION D/B/A CAMBRIDGE
HEALTH ALLIANCE

and

MASSACHUSETTS NURSES
ASSOCIATION

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Case No. MUP-02-3605

Date Issued:

January 21, 2009

Board Members Participating:

Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member

Appearances:

David M. Mandel, Esq.	-	Representing the Cambridge Public Health
Catherine K. B. Lucas, Esq.	-	Commission d/b/a Cambridge Health Alliance
Mark A. Hickernell, Esq.	-	Representing the Massachusetts Nurses
		Association

RULING¹Statement of the Case

On November 5, 2002, the Massachusetts Nurses Association (Association) filed a charge with the former Labor Relations Commission (Commission), alleging that the Cambridge Public Health Commission d/b/a the Cambridge Health Alliance (Alliance) had engaged in prohibited practices within the meaning of Sections 10(a)(5) and (1) of Massachusetts General Laws, Chapter 150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on May 22, 2003, alleging that the Alliance violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to provide the Association with requested information that is relevant and reasonably necessary to its role as the exclusive bargaining representative, including a report that Applied Management Systems (AMS) had compiled for the Alliance (AMS report) concerning Cambridge Hospital (Count 1) and a list of unit members at Somerville Hospital who had taken maternity or military leave and the dates of those leaves (Count 2). The Alliance filed its answer on June 16, 2003.

On September 19, 2003, Margaret M. Sullivan, a duly-designated Commission hearing officer (Hearing Officer), conducted the first day of hearing. On October 25, 2004, the Association filed a motion to have the Commission conduct an in camera review of the AMS report. A second day of hearing took place on November 1, 2004.

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." References in the decision to the Commonwealth Employment Relations Board (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 On or about March 3, 2005, the parties filed their post-hearing briefs and the Alliance
2 filed its opposition to the Association's motion. On September 19, 2005, the Hearing
3 Officer allowed the Association's motion for an in camera review. On September 29,
4 2005, the Alliance filed an interlocutory appeal of the hearing officer's ruling. On
5 October 6, 2005, the Association filed its opposition to the interlocutory appeal.

6 The Alliance, in its interlocutory appeal, argued that the Hearing Officer erred
7 when she ordered an in camera review of the AMS report, because the Association did
8 not timely file those portions of its charge that concern the Alliance's failure to turn over
9 the AMS report. However, the Association contended that the Alliance's failure to turn
10 over the AMS report constitutes an ongoing violation of the Law and, thus the
11 Association had timely filed those allegations. Upon review of the interlocutory appeal,
12 the Commission decided that, as a preliminary matter, it must rule whether the
13 Association had timely filed those portions of its charge. Therefore, the Commission
14 directed the Hearing Officer to issue Recommended Findings of Fact solely on that
15 issue.

16 On November 7, 2007, the Hearing Officer issued her Recommended Findings of
17 Fact. Pursuant to 456 CMR 13.02(2), the Alliance filed its challenges to the
18 Recommended Findings of Fact on February 1, 2008. The Association filed no
19 challenges to the Recommended Findings of Fact. After reviewing those challenges
20 and the record, we adopt the Hearing Officer's Recommended Findings, as modified
21 where noted, and summarize the relevant portions below.

Findings of Fact²

The Alliance was formed in 1996 with the merger of Cambridge Hospital and its associated ambulatory care centers and Somerville Hospital and its associated ambulatory care centers. The Alliance serves a diverse population and provides a wide range of preventative, ambulatory, acute, subacute, and post hospital services to all age groups from newborns to seniors. The Association is the exclusive collective bargaining representative for a bargaining unit of registered nurses employed by the Alliance at its Cambridge Hospital campus (Cambridge unit)³ and a bargaining unit of registered nurses employed by the Alliance at its Somerville Hospital campus (Somerville unit).⁴ Representatives from the Alliance and the Association participate in regularly scheduled labor/management meetings at Cambridge Hospital and Somerville Hospital.

On or about February or March of 2000, the Alliance hired a new chief operating officer, Dennis Keefe (Keefe), who decided to evaluate the various services that Cambridge Hospital offered. The Alliance subsequently engaged the services of AMS, which is a health care consulting firm, to conduct an assessment of Cambridge Hospital and to incorporate this assessment into a written report. In the summer of 2000, at a labor/management meeting for the Cambridge unit, the Alliance's chief nursing officer,

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

³ The Alliance and the Association, acting on behalf of its bargaining unit at the Cambridge Hospital campus, were parties to a collective bargaining agreement (Cambridge Agreement) that was in effect by its terms from April 1, 1999 through March 31, 2002.

⁴ The Alliance and the Association, acting on behalf of its bargaining unit at the Somerville Hospital campus, were parties to a collective bargaining agreement (Somerville Agreement) that was in effect by its terms from April 1, 2000 through March 31, 2002.

- 1 Patricia Crombie (Crombie), notified the Association that the Alliance had hired AMS.
2 Crombie also informed the Association that information the Alliance might learn from the
3 AMS report would help the parties frame their discussions⁵ about staffing levels.⁶
4 In October of 2000, Carol Collord (Collord)⁷ succeeded Crombie as chief nursing

⁵ Article 25.03 of the Cambridge Agreement and Article 22.05 of the Somerville Agreement contain the following language:

Safe Staffing

A staffing committee will be established consisting of equal numbers of nurses appointed by the executive committee of the [particular bargaining unit] and managers appointed by the [particular hospital]. The charge of the committee will be to define a framework for staffing by:

- Defining core staffing: including RN complement for each unit, shift and census
- Establishing a process and criteria for adjusting staffing levels in response to (including but not limited to); changes in levels of acuity, admissions, numbers of patients seen in a session, discharges and internal transfers; overtime patterns
- Reviewing staffing variances and short fall reports

The framework is due within three months of ratification. Thereafter the staffing committee will schedule meetings as needed but at least quarterly.

If the staffing committee is unable to reach agreement on any aspect of the framework for staffing, the issue will be referred to a nurse/ombudsperson mutually chosen by both the Association Executive Committee and the Hospital. Neither the Hospital nor the Association will unreasonably reject the proposal of the ombudsperson.

⁶ In response to the Alliance's challenge, we have modified this finding to more accurately reflect the record.

⁷ We amend the findings to correct a misspelling of Collord's name.

1 officer.⁸ Shortly thereafter, AMS began collecting data at Cambridge Hospital, which
2 included distributing questionnaires to managers, interviewing bargaining unit members
3 and other personnel, observing the interactions between bargaining unit members and
4 patients in different areas of the hospital, and reviewing records and fiscal data. At a
5 labor/management meeting⁹ in either October or November of 2000, the Association
6 asked Collord whether the Alliance planned to turn over a copy of the AMS report.
7 Collord did not give the Association a definitive answer as to whether the Alliance would
8 provide the Association with a copy of the report, but instead indicated that AMS was
9 still in the process of compiling data.¹⁰

10 The Association subsequently made several requests for the AMS report at
11 labor/management meetings for the Cambridge bargaining unit, and the Alliance
12 repeatedly informed the Association that AMS had not finished its report and that AMS
13 was still involved in data collection. In March or April of 2001, Collord informed
14 Feldberg that AMS was finalizing its report. From the period between April of 2001 and

⁸ On or about October of 2000, Crombie became associate vice-president for care management and accreditation and no longer attended labor/management meetings. In response to the Alliance's challenge, we modify this finding to accurately reflect the record.

⁹ The labor/management meeting concerned the Cambridge bargaining unit.

¹⁰ Roslyn Feldberg (Feldberg), the Association's assistant director of labor relations, testified that Lee Swislow (Swislow), Collord's predecessor as chief nursing officer, had agreed in late 1998 or early 1999 to turn over a copy of the AMS report to the Association. However, Crombie testified that Swislow already had left the employ of the Alliance, when Keefe engaged the services of AMS. However, the Hearing Officer did not need to reconcile the contradictory testimony on this point, because it was not material to the issue in dispute in the present case.

1 December of 2001, the Association verbally asked three or four times¹¹ for a copy of the
2 AMS report. Certain requests were made at labor/management meetings,¹² while other
3 requests were made during telephone conversations.¹³ In a December 7, 2001 letter,
4 Lisa Van Pelt (Van Pelt), the Alliance's labor counsel, replied in part:

5 I ... received a telephone message from you regarding a copy of the AMS
6 Report on Staffing for the Cambridge Hospital. As you are aware,
7 pursuant to M.G.L. c.150E, a union may be entitled to relevant and
8 reasonably necessary information upon request. Because you only left
9 me a message stating you wanted a copy of that report, I am unable to
10 determine the relevance and/or reasonable necessity of that report for the
11 MNA [Association]. Accordingly, please provide me with the reason(s) for
12 the Association's request for this report.

13
14 Finally, as I requested at the labor-management earlier this week, please
15 submit the MNA's request for information in writing to me, for Cambridge
16 Hospital related requests, and to Ed [Loughman] for Somerville Hospital
17 related requests.

18 In a December 21, 2001 letter, Feldberg responded in part:

19 I am writing in response to your letter of December 7 in which you
20 requested that requests for information be made in writing.

21
22 I am requesting a copy of the AMS Report of Staffing for the Cambridge
23 Hospital to assist me in preparing for up-coming negotiations.

24
25 I would appreciate receiving this information as soon as possible.

¹¹The record does not reveal whether those requests were made at labor/management meetings for the Cambridge Hospital campus or the Somerville Hospital campus or at combined meetings for both campuses.

¹² Feldberg made many of the requests on behalf of the bargaining unit at the Cambridge Hospital campus, but some of the requests were made on behalf of the bargaining unit at the Somerville Hospital campus.

¹³ Although Feldberg made the telephone requests, she could not recall specifically to whom she made the requests.

1 Thereafter, Feldberg sent a second letter requesting the AMS Report.¹⁴ On February 1,
2 2001, Feldberg sent a third letter stating:

3 I am writing to remind you that I have not yet received the report that I
4 requested in order to prepare for negotiations. This is my third letter on
5 the subject.

6 Please let me know when this will be available. If you do not intend to
7 make it available please let me know that.

9 On February 11, 2002 Van Pelt replied in part:

10 I am writing in response to your request for a copy of the AMS Report.

11
12 In your December 21, 2001 letter you state that you need the report to
13 assist you in preparing proposals for upcoming negotiations. Please be
14 advised that the Alliance has confidentiality concerns with respect to
15 turning over this entire report. However, the Alliance is willing to provide
16 non-confidential information and/or redact certain details in an effort to
17 satisfy your request. Accordingly, please let me know what specific
18 information related to appropriate collective bargaining topics you are
19 seeking from the report so that I may accommodate your request.

20 In a February 12, 2002 letter, Feldberg responded:

21 I am writing in response to your letter of February 11, 2002 regarding my
22 on-going request for the AMS report.

23
24 Since I have not seen the report, I cannot identify the specific information
25 in it that is related to collective bargaining topics. Therefore, I am
26 renewing my request for that report.

27
28 This request is made without prejudice to the Association's right to file
29 subsequent requests. If any part of this report is withheld or redacted,
30 please provide the remaining materials by February 20, 2002, which the
31 Association will accept without prejudice to its position that it is entitled to
32 the document and all the information called for in this request.

When the February 20, 2002 deadline passed and Feldberg received no response from

¹⁴ The record does not contain a copy of the second letter.

the Alliance, Feldberg believed that Van Pelt¹⁵ was not going to send the AMS report to the MNA.¹⁶

1 On February 26, 2002, Van Pelt sent a letter to Feldberg stating:¹⁷

2 I am writing in response to your letter dated February 12, 2002 regarding
3 the above-referenced information request.

4
5 As you are aware, I have asked you to specifically identify how this report
6 is relevant and reasonably necessary to assist you in preparing for up-
7 coming negotiations and/or what specific information from the report
8 related to collective bargaining topics you are seeking so that I could
9 properly accommodate your information request while also protecting the
10 Alliance's confidentiality concerns. In response, you informed me that you
11 could not identify the specific information in the report that is related to
12 collective bargaining topics. Consequently, I am confused by your
13 request: you assert that it is relevant and reasonably necessary for
14 preparations for upcoming negotiations, yet you cannot identify how or
15 why it is. As such, because your request for this report appears to be
16 nothing more than a "fishing expedition," the Alliance respectfully declines
17 your request for this report. However, should you determine what relevant
18 and reasonably necessary information it is that you are seeking from this
19 report, please let me know and I will gladly reconsider your request.

20 On April 12, 2002, Feldberg wrote to John O'Brien (O'Brien), the Alliance's chief
21 executive officer, and requested a copy of the AMS report under the Freedom of
22 Information Act. O'Brien subsequently did not respond to Feldberg's letter. On
23 September 5, 2002, Feldberg again wrote to O'Brien stating in part:

24 I wrote to you on April 12, 2002 seeking a copy of the so-called "AMS
25 Report". To date, I have not received a reply. Please consider this a

¹⁵ Feldberg was aware that the Alliance had designated Van Pelt as the person to whom the MNA should direct all information requests regarding Cambridge hospital.

The Alliance argues that this fact should have been included in the findings. Upon review of the record, we agree with the employer and have amended the finding.

¹⁶ Upon review of the record, we agree with the Alliance that the record supports this fact and have added it to the findings.

¹⁷ In response to the Alliance's challenge, we have amended the findings to specifically identify to whom Van Pelt addressed her February 26, 2002 letter.

1 formal request, under G.L.c.66, section 10 that you 1) make that report
2 available to me for inspection and examination and 2) furnish me a copy
3 thereof. Please let me know the "reasonable fee" if any that is to be
4 charged for the production of one copy of this public record.

5 On October 30, 2002, James Lamond (Lamond), labor counsel for the Association, sent
6 the following letter to Edward Loughman, the Alliance's senior director of labor relations,
7 stating in part:

8 You may know that Roslyn Feldberg has tried unsuccessfully to obtain a
9 copy of the so-called "AMS" report under c.150E and the Massachusetts
10 Public Records statute. I have reviewed the relevant correspondence
11 and, respectfully, have seen nothing to indicate that the Association is not
12 entitled to the document under c.150E, notwithstanding Lisa's legal
13 analysis to the contrary. Indeed, I am informed that the former chief
14 nursing officer told MNA [Association] representatives that the report
15 would contain important information pertaining to the subject of staffing
16 plans. I cannot see how this information would not be relevant and
17 reasonably necessary to the MNA in carrying out its statutory duties.

18
19 Separately, I am unaware of any basis to rebut the legal presumption [see
20 905 CMR 32.08] that the document is a public record subject to mandatory
21 disclosure.

22
23 I would hope that we could avoid unnecessary litigation at the Labor
24 Relations Commission and/or before the Secretary of State's Supervisor
25 of Public Records over this issue. Toward that end, I would appreciate it if
26 you could let me know by November 8 if CHA [Alliance] will voluntarily
27 produce the report.¹⁸

28
29 On November 5, 2002, the Association filed the instant charge. In a November

30 7, 2002 letter to Lamond, Loughman states in pertinent part:

31 This letter is in response to your letter dated October 30, 2002 concerning
32 an information request in the above-referenced matter which request
33 previously had been answered by Attorney Lisa Van Pelt on or about

¹⁸ On September 10, 2003, the Attorney General's Office determined that the AMS report was exempt from disclosure under M.G.L. c.66, §10 (Public Records Law). The Alliance successfully argued that the AMS report was the type of marketing strategy, strategic plan, analysis or evaluation that was referenced in its enabling legislation and that it was statutorily exempt pursuant to M.G.L. c.4, §7, cl.26(a).

1 February 26, 2002. Please be advised that the Alliance's position in this
2 matter, as set forth in that letter from Attorney Van Pelt, has not changed.
3 Please also be advised that as the union initiated no action relative to
4 Attorney Van Pelt's response until your letter of October 30, 2002, some
5 eight months after said response, the Alliance further maintains that the
6 union has waived any cause of action or any right to that information, even
7 if it ever had any such right, through its inaction in this matter. ...¹⁹

8 As of the final date of hearing, the Alliance still had not turned over a copy of the AMS
9 report to the Association.

10 Opinion

11 Section 15.03 of the Commission's regulations in effect prior to November 15,
12 2007, 456 CMR 15.03, provides: "Except for good cause, no charge shall be entertained
13 by the Commission based upon any prohibited practice charge occurring more than six
14 months prior to the filing of the charge with the Commission." To meet this requirement
15 a charge of prohibited practice must be filed with the Commission within six months of
16 the alleged violation or within six months from the date the violation became known or
17 should have become known to the charging party, unless good cause is shown. Felton
18 v. Labor Relations Commission, 33 Mass. App. Ct. 926 (1992).

19 Here, the Alliance contends that the Association should have filed its charge
20 within six months after receipt of Van Pelt's February 26, 2002 letter, in which she
21 declined to provide the AMS report, instead of waiting until November 5, 2002 to do so.
22 The Alliance argues that the charge is time-barred, including those requests that the
23 Association made for the AMS report subsequent to February 26, 2002. Conversely,
24 the Alliance contends that the charge is timely, because it continued to need the AMS

¹⁹ We amend the findings to include this additional, relevant information.

1 report and subsequently requested it on April 12, 2002, September 5, 2002 and October
2 30, 2002.

3 Turning first to the requests for the AMS report that the Association made prior to
4 February 26, 2002, we agree with the Alliance's contention that, upon receipt of Van
5 Pelt's February 26, 2002 letter, the Association knew or should have known that the
6 Alliance would not turn over the AMS report. Id. at 928 (period of limitations began
7 running when events occur or facts surface which would cause a reasonably prudent
8 person to become aware that she or he had been harmed); Town of Lenox, 29 MLC 51,
9 52 (2002) (period of limitations began to run when the party adversely affected received
10 actual or constructive notice of the conduct alleged to be an unfair labor practice).
11 Therefore, the Association should have filed those portions of its prohibited practice
12 charge alleging that the Alliance violated Section 10(a)(5) of the Law when it declined to
13 turn over the AMS report in February 26, 2002, within six months of receipt of the
14 Alliance's refusal. However, the Association did not file its charge until almost two and
15 one-half months after the expiration of the six-month period. Further, we do not find
16 good cause to excuse the untimely filing. Wakefield School Committee, 27 MLC 9
17 (2000) (union's decision to wait until final denial of grievance did not constitute good
18 cause to file its prohibited practice charge late). Accordingly, we dismiss those portions
19 of the Association's charge as untimely.

20 Next, we consider whether the Alliance timely filed those portions of its prohibited
21 practice charge alleging that the Alliance failed to respond to information requests that
22 the Association submitted on April 12, 2002, September 5, 2002, and October 30, 2002
23 in violation of Section 10(a)(5) of the Law. For the purpose of this ruling, we do not

1 consider the information requests that the Association submitted on April 12, 2002 and
2 September 5, 2002, because those requests were made pursuant to the Freedom of
3 Information Act and Public Records Law respectively rather than under M.G.L. c.150E.
4 Therefore, we direct our attention to the Association's October 30, 2002 request for the
5 AMS report.

6 In an October 30, 2002 letter, the Association again requested information that
7 the AMS report might contain about staffing and stated that it still needed the
8 information to perform its duties as the exclusive bargaining representative. The
9 Alliance continued to have a duty under the Law to bargain collectively with the
10 Association, which included providing information that was relevant and reasonably
11 necessary to the Association in its role as exclusive bargaining representative. Boston
12 School Committee, 10 MLC 1501, 1513 (1984). The fact that the Association had made
13 prior requests for the same information and that the Alliance previously had refused to
14 provide the information does not forever relieve the Alliance of its statutory obligation,
15 because the Association asserted in its letter that it still needed the information and
16 provided reasons in support of that assertion. Compare Suffolk County Sheriff's
17 Department, 27 MLC 155, 159 (2001) (because an employer had an ongoing obligation
18 not to retaliate against employees, its actions had the effect of punishing a bargaining
19 unit member on a day-to-day basis for engaging in concerted, protected activity and
20 constituted a continuing violation) with Wakefield School Committee, 27 MLC at 10
21 (period of limitations began when employee received his two-day suspension, because
22 the suspension was a discrete action). We conclude that the Association's October 30,
23 2002 request for information and the Alliance's November 8, 2002 refusal to provide the

1 information constitute a separate and independent allegation that the Alliance had
2 violated Section 10(a)(5) of the Law. See generally, Chesapeake & Potomac Telephone
3 Co., 259 NLRB 225, 23 (1981), enf'd, 687 F.2d 633 (2d Cir. 1982) (each request for
4 information by a bargaining representative and each denial by an employer constitute a
5 separate and independent violation). Because the Association filed its charge of
6 prohibited practice six days after it made the October 30, 2002 request, it placed the
7 Alliance on notice that the Association would pursue any and all causes of action to
8 obtain the information. Thus, we conclude that those portions of the Association's
9 charge are timely filed.

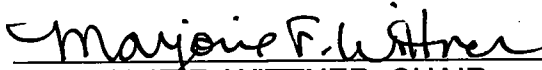
10 Conclusion

11 For the above reasons, we conclude that that the Association timely filed those
12 portions of its charge, alleging that the Alliance failed to respond to the Association's
13 October 30, 2002 information request in violation of Sections 10(a)(5) and (1) of the
14 Law, and we continue to process those allegations. However, we conclude that the
15 Association did not timely file those portions of its charge pertaining to the Alliance's

- 1 February 26, 2002 refusal to provide requested information to the Association in
- 2 violation of Sections 10(a)(5) and (1) of the Law and, thus, dismiss those allegations.

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF LABOR RELATIONS

COMMONWEALTH EMPLOYMENT
RELATIONS BOARD


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