

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of

COMMONWEALTH OF MASSACHUSETTS,  
DEPARTMENT OF PUBLIC HEALTH

and

MASSACHUSETTS NURSES ASSOCIATION

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Case No. SUP-15-4331

Date Issued: May 12, 2016

Hearing Officer:

Whitney Eng Coffey, Esq.

Appearances:

Michael Downey, Esq. - Representing the Commonwealth of  
Massachusetts, Department of Public Health

Olinda Marshall, Esq. - Representing the Massachusetts Nurses  
Association

HEARING OFFICER DECISION

SUMMARY

1 The issue in this case is whether the Commonwealth of Massachusetts,  
2 Department of Public Health (Employer) violated Section 10(a)(1) of the Law by failing  
3 to honor Deborah Bethel's (Bethel) request for union representation at an investigatory  
4 meeting that she reasonably believed might result in discipline. I find that the Employer  
5 did not violate the Law in the manner alleged.

STATEMENT OF THE CASE

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2 On February 24, 2014, the Massachusetts Nurses Association (Union) filed a  
3 charge of prohibited practice with the Department of Labor Relations (DLR) in Case No.  
4 SUP-15-4331, alleging that the Employer had violated Section 10(a)(1) of the Law. A  
5 duly-designated DLR investigator conducted an investigation of the matter on May 19,  
6 2015. On May 21, 2015, the investigator issued a Complaint of Prohibited Practice  
7 alleging that the Employer violated Section 10(a)(1) of the Law by refusing bargaining  
8 unit member Bethel's request for Union representation at an investigatory meeting that  
9 Bethel reasonably believed could lead to discipline. The Employer filed an answer to the  
10 Complaint on May 26, 2015.

11 I conducted a hearing on January 28, 2016. Before any witnesses testified, I  
12 allowed the parties' joint motion to sequester all witnesses prior to giving testimony.  
13 Both parties had an opportunity to be heard, to examine witnesses and to introduce  
14 evidence. On April 8, 2015, the Union and the Employer filed post-hearing briefs. Based  
15 on the record, including witness demeanor, I make the following findings of fact and  
16 render the following opinion.

STIPULATIONS OF FACT

- 17
- 18 1. The Commonwealth of Massachusetts, Department of Public Health  
19 ("Commonwealth" or "DPH) is a public employer within the meaning of Section 1  
20 of M.G.L. C. 150E ("the Law").  
21
  - 22 2. The Massachusetts Nurses Association ("Union" or "MNA") is an employee  
23 organization within the meaning of Section 1 of the Law.  
24
  - 25 3. The Union is the exclusive collective bargaining representative for certain  
26 employees including registered nurses in statewide Collective Bargaining Unit 7.  
27 The Lemuel Shattuck Hospital ("the Hospital") is a health care facility run by the  
28 Commonwealth in which MNA Bargaining Unit 7 members are employed.  
29

- 1 4. MNA bargaining unit members at the Hospital are covered under a collective
- 2 bargaining agreement that has continued in effect for many years, the latest of
- 3 which is effective from January 1, 2015 through December 31, 2017.
- 4
- 5 5. Deborah Bethel ("Bethel") is a registered nurse employed by DPH at the
- 6 Hospital.
- 7
- 8 6. Bethel is a member of the MNA Unit 7 bargaining unit.
- 9
- 10 7. Sukhyune Hong ("Hong") is a Nurse Practitioner at the Hospital. Bethel reports
- 11 directly to Hong.
- 12
- 13 8. At the time relevant to this matter, Maria Tricarico ("Tricarico") was the Hospital's
- 14 Executive Vice President of Patient Care Services. At that time, Hong reported
- 15 directly to Tricarico. In June of 2015, Tricarico retired from her employment with
- 16 the Commonwealth.
- 17
- 18 9. On February 2, 2015, Hong, Tricarico and Bethel had a meeting at the Hospital.
- 19 At the February 2, 2015 meeting, Hong, Tricarico and Bethel discussed Bethel's
- 20 office space.

FINDINGS OF FACT<sup>1</sup>

Background

Bethel has worked at the Hospital for approximately nine years as a registered nurse. In or around November 2011, Bethel became the Hospital's wound care nurse. Bethel works at the Hospital Mondays through Fridays from 10:00 a.m. to 6:30 p.m. As the wound care nurse, Bethel is responsible for performing complicated wound dressings, assessing patients' wounds, and reporting any acute changes in patients' wounds to her supervisor. Hong has been Bethel's supervisor for approximately five years. Hong is a nurse practitioner, a wound care specialist, and the Director of Critical Practice at the Hospital. At all times relevant to this matter, Hong reported directly to Tricarico. Prior to her retirement in June 2015, Tricarico was the Executive Vice President of Patient Care Services for the Hospital. Tricarico had been the Executive

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<sup>1</sup> The DLR'S jurisdiction in this matter is uncontested.

1 Vice President of Patient Care Services at the Hospital for approximately 26 years.  
2 Tricarico was responsible for planning, directing, organizing, evaluating, and securing  
3 resources for all patient care delivery in the Hospital.

4 Bethel's Documentation

5 As the wound care nurse, Bethel is also responsible for completing various forms  
6 of documentation, including: a wound care log; daily patient notes that are entered into  
7 Meditech, the Hospital's electronic patient medical records system; a weekly schedule  
8 delineating which patients she saw and when she saw them; a weekly work schedule  
9 outlining when she intends to see specific patients; and handwritten notes on wound  
10 measurements for her supervisor. On multiple occasions, Bethel complained to Hong  
11 that her documentation responsibilities were too voluminous, repetitive, and duplicative.

12 Approximately two weeks prior to February 2, 2015, Bethel met with Hong to  
13 discuss her documentation responsibilities. Due to recent holidays, Bethel was not able  
14 to complete all of her paperwork for the week. When Hong asked Bethel for her  
15 paperwork, Bethel told Hong that she was not able to complete all of it because she was  
16 doing patient care and she had too much paperwork. Hong told Bethel that she needed  
17 Bethel's documentation so that she could give it to another nurse to create a quality  
18 insurance document.

19 After her conversation with Hong, Bethel went to speak to a Union representative  
20 at the Hospital. Bethel showed the Union representative all of the documentation  
21 paperwork she was doing. Bethel also told the Union representative that Hong was

1 giving Bethel's documentation to another nurse to put in the computer, and that Bethel  
2 thought it was unfair that another nurse was taking credit for Bethel's work.<sup>2</sup>

3 Respiratory Department Staff

4 Bethel's office is located in the middle of the 7-North wing of the Hospital in the  
5 nursing unit. This wing contains many ventilator dependent patients. In or around  
6 January 2015, the Director of Respiratory asked Tricarico for office space in the 7-North  
7 wing of the Hospital for respiratory department staff. Respiratory therapists needed a  
8 quiet space to document their notes when monitoring ventilator dependent patients in  
9 the 7-North wing. On February 2, 2015, at 5:52 a.m., the Director of Respiratory sent an  
10 email to Tricarico stating in relevant part:

11 I wanted to follow up regarding our discussion a few weeks ago regarding  
12 designating a space for Respiratory on 7-North to do charting and remain  
13 on the unit. I was not sure if you had a chance to discuss the office  
14 sharing space on 7-North with the wound care team. When you get a  
15 chance could you give me an update?

16 February 2, 2015 Meeting

17 On February 2, 2015, at 11:10 a.m., Tricarico sent Hong an email stating, "I think  
18 that Respiratory staff can share with Deb [Bethel] on 7N [7-North] just to chart. Please  
19 let her know." Shortly after receiving the email, Hong went to Tricarico's office and  
20 asked Tricarico to tell Bethel that she needed to share her office with the respiratory  
21 staff because Hong did not feel comfortable telling Bethel on her own. Tricarico agreed  
22 and asked Hong to page Bethel. Hong paged and then called Bethel. When Bethel

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<sup>2</sup> Although Bethel believed another nurse was entering Bethel's documentation into the computer and taking credit for Bethel's work, Hong and Tricarico both testified that the other nurse was using Bethel's documentation for another purpose, to create a quality insurance document. I need not resolve this dispute because it is not germane to my decision.

1 answered the phone, Hong told Bethel to go to Tricarico's office because Tricarico  
2 wanted to discuss something with her.

3 Bethel immediately went to Tricarico's office, where she met with both Tricarico  
4 and Hong. Tricarico informed Bethel that she was going to have to share her office in  
5 the 7-North wing with respiratory therapists.<sup>3</sup> At that time, Bethel requested Union  
6 representation.<sup>4</sup> Tricarico told Bethel that this was not disciplinary action and denied  
7 Bethel's request for Union representation.<sup>5</sup> Tricarico then reiterated that Bethel needed

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<sup>3</sup> Bethel claims that after discussing the office space issue, Tricarico stated, "Next topic," and then asked Bethel, "who did you tell the Union is doing your work for you?" Bethel testified that Hong went to get Bethel's documentation and then Tricarico and Hong proceeded to discuss Bethel's documentation between themselves. Based on all of the witnesses' testimony, I find that Bethel is confusing two different meetings: one about office space that occurred on February 2, 2015, and one about documentation that occurred at some other point in time. Both Hong and Tricarico testified that they only discussed office space at the February 2, 2015 meeting, and I credit their testimony. Hong and Tricarico also testified that they did have other meetings with Bethel regarding her documentation because Bethel had turned in some of her documentation late in or around a holiday in January 2015. In particular, both Hong and Tricarico testified about a meeting with Bethel where Tricarico reviewed all of the documentation Bethel was doing and told her that she did not have to do certain documentation anymore, in an effort to lighten Bethel's work load and eliminate duplicative documentation.

<sup>4</sup> Although Tricarico testified that she did not recall Bethel requesting Union representation, both Bethel and Hong testified that Bethel requested Union representation at the February 2, 2015 meeting. Accordingly, I credit Bethel and Hong's testimony that Bethel requested Union representation at the February 2, 2015 meeting. This is also consistent with Hong and Tricarico's testimony that Bethel always requested Union representation any time they had a meeting.

<sup>5</sup> Bethel and Hong presented conflicting testimony on whether Tricarico stated that the meeting was disciplinary action. Bethel claims that Tricarico stood up beside her desk and stated, "This is disciplinary action." Hong testified that Tricarico said, "This is not disciplinary action." I do not credit Bethel's testimony. I find it unlikely that Tricarico suddenly stood up and announced that the meeting was disciplinary action because Bethel testified that after Tricarico allegedly made that statement, Tricarico and Hong just discussed Bethel's documentation amongst themselves. Bethel testified that she asked to leave because she "realized that the conversation was between them [Hong

1 to share her office with the respiratory therapists and Bethel, Hong and Tricarico  
2 discussed the office space issue. Bethel objected to sharing her office because she has  
3 confidential patient information on her desk and was concerned about the security of  
4 her personal belongings, which she stores in the office. Tricarico and Hong offered to  
5 find a locker for Bethel to use to store her belongings.<sup>6</sup> Neither Hong nor Tricarico  
6 raised any other issue during the meeting.

7 Union Representative Kevin Hayes

8 Later that same week, Bethel spoke to Union representative Kevin Hayes  
9 (Hayes) on the phone about the February 2, 2015 meeting. Bethel told Hayes that  
10 Tricarico and Hong wanted Bethel to share her office with the respiratory therapists.  
11 Bethel also told Hayes that she had requested Union representation in the February 2,  
12 2015 meeting, but that Tricarico denied her request.<sup>7</sup> On February 5, 2015, Hayes sent  
13 an email to Tricarico stating:

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and Tricarico].” Also, Bethel did not testify that Tricarico or Hong proceeded to discuss any discipline or discipline related matters at the meeting, despite Bethel’s claims that Tricarico stated, “This is disciplinary action.” Further, the Union did not present any evidence that Bethel ever received discipline after this meeting. Accordingly, I credit Hong’s testimony that Tricarico stated, “This is not disciplinary action.”

<sup>6</sup> There is conflicting testimony about the length of the February 2, 2015 meeting. Hong testified that the meeting lasted approximately 10 minutes. Tricarico testified that the February 2, 2015 meeting lasted “no more than half an hour.” Bethel also testified that the office space conversation lasted approximately 20 minutes. Accordingly, I find that the meeting lasted somewhere between 10 to 30 minutes.

<sup>7</sup> Bethel claims that she also told Hayes that Tricarico had said, “next topic,” and then proceeded to ask her about the conversation Bethel had with a Union representative and her documentation. Bethel also testified that she told Hayes that Tricarico had stated, “This is disciplinary action.” However, Hayes testified that he only recalled Bethel telling him about the office space issue and how she had requested Union representation, but was denied. Hayes testified that he did not recall Bethel raising “the documentation issue” in her conversation with him. Hayes also testified that he filed the charge of prohibited practice at issue in this case under the impression that Bethel was

1 I have been contacted by Deborah Bethel regarding the hospital's plan to  
2 have her share her office with other staff. As you might expect, Deborah  
3 takes issue with this, as does the MNA [Union]. As you may recall in the  
4 past, one of the issues that had arisen concerning Deborah's employment  
5 was her lack of access to a computer. She needed to roam the hospital  
6 looking for a terminal on which to do her work. Now that she finally has a  
7 dedicated space and computer it is being taken away.

8 We oppose this action for a number of reasons. First is the  
9 aforementioned step backwards in Deborah's working conditions. This  
10 action will force her to once again compete for desk space and a computer  
11 terminal. Second, having been in the office on several occasions, I can  
12 attest that it can be cramped when only two people [sic] in there. Having  
13 others in the office is certainly not conducive to efficient work, and I  
14 believe it will be disruptive. Third, this will be an environment that lacks  
15 privacy. By sharing the office with others, whose work is unrelated to her  
16 own, it will force Deborah to always have to keep confidential patient  
17 materials off of her desk. Although those who would be sharing the office  
18 are hospital employees, I think we can both agree that they would not be  
19 privy to the patient information maintained by Deborah on a day to day  
20 basis.

21 I believe these are sound reasons for maintaining the status quo in this  
22 matter. However, if you disagree, please accept this email as a demand to  
23 bargain over this issue. The MNA expects that the status quo be  
24 maintained until this matter is fully bargained. I offer the following dates for  
25 bargaining if necessary: March 6 or March 11.

26 Tricarico responded to Hayes' email stating:

27 The plan is only to let Respiratory Therapy use the office when she is not  
28 there. No one is touching her computer. They will use their own laptop.  
29 She does not have to share the space when she is there. This was made  
30 clear to her. Also, she should not be leaving patient information open on  
31 her desk. She has access to as many manilla [sic] folders as she needs.  
32 The therapists involved have just as much access to patient information as  
33 she does. If you wish, please contact [ ] to set up a meeting to discuss this  
34 issue, which isn't really an "issue."

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reasonable in her belief that discipline could have resulted from the office space meeting. I find that Hayes' testimony corroborates Hong and Tricarico's testimony that they only discussed the office space issue with Bethel at the February 2, 2015 meeting. I find it unlikely that Hayes would recall the office space issue, but not the documentation portion of the conversation, especially since Bethel was very upset about the alleged "next topic" part of the meeting. Additionally, Hayes did not mention the documentation issue in his email on February 5, 2015 to Tricarico.



1 Hayes did not follow up with Tricarico to schedule a meeting to discuss Bethel's sharing  
2 of her office with the respiratory staff.

3 Opinion

4 In determining whether an employer has unlawfully denied union representation  
5 to an employee during an investigatory interview in violation of Section 10(a)(1) of the  
6 Law, the Commonwealth Employee Relations Board (Board) is guided by the general  
7 principles enunciated in NLRB v. Weingarten, 420 U.S. 251 (1975). Suffolk County  
8 Sheriff's Department, 28 MLC 253, 259, MUP-2840 (January 30, 2002). For an  
9 employee to be entitled to union representation, the meeting must be investigatory in  
10 nature. Commonwealth of Massachusetts, 8 MLC 1287, 1289, SUP-2443 (August 20,  
11 1981). The right to union representation arises when the employee reasonably believes  
12 that the investigatory meeting will result in discipline, and the employee makes a valid  
13 request for union representation. Commonwealth of Massachusetts, 22 MLC 1741,  
14 1747, SUP-4105 (May 16, 1996).

15 Nature of the Meeting

16 I turn first to consider whether the February 2, 2015 meeting between Bethel,  
17 Hong, and Tricarico was investigatory in nature. It is well-established that not every  
18 meeting that an employer has with an employee is an investigatory interview. See  
19 Commonwealth of Massachusetts, 26 MLC 139, 141, SUP-4301 (March 9, 2000)  
20 (meeting where the employer's sole purpose is to inform an employee of, or to impose  
21 previously determined discipline and no investigation is involved triggers no right to  
22 union representation). A meeting is investigatory when the employer's purpose is to  
23 investigate the conduct of an employee and the interview is convened to elicit

1 information from the employee or to support a further decision to impose discipline. See  
2 Id.

3 Here, the Employer contends that the meeting between Bethel, Hong, and  
4 Tricarico was not investigatory in nature. Rather, Hong and Tricarico's intent was to  
5 inform Bethel that she was going to have to share her office space with respiratory  
6 therapy department staff. Hong and Tricarico were not gathering information about  
7 Bethel's conduct for disciplinary purposes. Also, the fact that Tricarico asked Bethel why  
8 she objected to sharing her office space did not convert the meeting into an  
9 investigatory interview. In the February 2, 2015 meeting, Hong and Tricarico told Bethel  
10 that she was going to have to share her office with the respiratory therapists and then  
11 worked to address Bethel's concerns regarding this matter. Accordingly, I conclude that  
12 the meeting on February 2, 2015 between Bethel, Hong, and Tricarico was not  
13 investigatory in nature.

14 Reasonableness of Bethel's Belief that Meeting Could Result in Disciplinary Action

15 To determine reasonableness, the standard is not Bethel's subjective belief, but  
16 whether a reasonable person in the employee's situation would have believed adverse  
17 action would follow. Commonwealth of Massachusetts, 8 MLC at 1289. Here, the Union  
18 contends that Bethel's belief that discipline could result from the meeting was  
19 reasonable because Hong and Tricarico were discussing Bethel's ongoing  
20 documentation issues. However, as addressed above, I have found that Hong and  
21 Tricarico did not raise documentation issues, and only discussed the office space issue

1 with Bethel in the February 2, 2015 meeting.<sup>8</sup> Tricarico and Hong informed Bethel that  
2 she was going to have to share her office space, and then discussed finding a locker for  
3 Bethel to store her personal belongings in. The February 2, 2015 meeting was,  
4 essentially, a run-of-the mill shop floor conversation, where Tricarico was instructing  
5 Bethel to share her office space with the respiratory staff. See NLRB v. Weingarten, 420  
6 U.S. at 262-263 (describing the giving of instructions or training or needed corrections of  
7 work techniques as examples of shop floor conversations that did not trigger  
8 Weingarten protections). Additionally, in the meeting, Tricarico told Bethel that, "This is  
9 not disciplinary action." See generally Commonwealth of Massachusetts, 22 MLC 1741,  
10 1750, SUP-4105 (May 16, 1996) (employer assurances were sufficient to dispel  
11 employee's belief that discipline would result from the meeting). Accordingly, I conclude  
12 that a reasonable person in Bethel's situation would not have believed that discipline  
13 would result from the February 2, 2015 meeting.

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<sup>8</sup> As discussed supra, it is possible that Tricarico and Hong discussed the documentation issue with Bethel in a separate meeting that may have occurred around the same time. The Union argues that the specific date of the meeting is not necessary for the Board to find that the Employer violated Section 10(a)(1) of the Law by denying Bethel's request for Union representation. The Union states that there is no dispute that Tricarico, Hong, and Bethel met around February 2, 2015 to discuss Bethel's documentation issues. As such, the Union alleges that that meeting was investigatory in nature and that Bethel reasonably believed that discipline could have resulted because she had had ongoing issues with her documentation. Additionally, the Union argues that Bethel requested Union representation at that meeting, but was unlawfully denied. However, I decline to find that the Employer violated Section 10(a)(1) of the Law based on a second meeting regarding documentation that allegedly occurred at some unidentified point in time because such an allegation is not within the scope of the Complaint. The Complaint alleges that one meeting occurred on or around February 2, 2015, where Bethel and her supervisors discussed both Bethel sharing her office space and Bethel's documentation work.

1 Request for Union Representation

2 An employer has no obligation to provide a union representative at an  
3 investigatory interview that the employee reasonably believes might result in discipline  
4 absent a valid request by the employee. See Town of Hudson, 29 MLC 52, 57, MUP-  
5 2425 (September 19, 2002), aff'd 69 Mass. App. Ct. 549 (2007). The Board does not  
6 require the request to be in a particular form, so long as it is sufficient to place the  
7 employer on notice that representation is desired. See Suffolk County Sheriff's  
8 Department, 39 MLC 143, 146, MUP-06-4774 (November 29, 2012) (not requiring  
9 specific or magic words to invoke Weingarten rights). As discussed supra, I credited  
10 Bethel's testimony that she made a request for Union representation at the February 2,  
11 2015 meeting. However, because the February 2, 2015 meeting was not investigatory in  
12 nature and a reasonable person in Bethel's situation would not have believed discipline  
13 could result from the meeting, Bethel did not have a statutory right to Union  
14 representation during the February 2, 2015 meeting.

15 CONCLUSION

16 Based on the record and for the reasons stated above, I conclude that the  
17 Employer did not violate Section 10(a)(1) of the Law by failing to honor Bethel's request  
18 for union representation at the February 2, 2015 meeting. The Complaint is dismissed.  
SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

  
WHITNEY ENG COFFEY, ESQ.  
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c.150E, Section 11, 456 CMR 13.15, and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within ten days, the decision shall become final and binding on the parties.