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

In the Matter of	*	Case No.: SUP-19-7352
	*	
COMMONWEALTH OF MASSACHUSETTS/	*	Date Issued:
SECRETARY OF ADMINISTRATION AND	*	March 8, 2021
FINANCE	*	
and	*	
	*	
SEIU, LOCAL 509	*	

CERB Members Participating:

Marjorie F. Wittner, Chair
Joan Ackerstein, CERB Member
Kelly Strong, CERB Member (Dissenting Opinion)

Appearances:

Ian Russell, Esq.	-	Representing SEIU, Local 509
Melissa A. Thomson, Esq.	-	Representing the Commonwealth of Massachusetts

CERB DECISION IN FIRST INSTANCE

Summary

The issue before the Commonwealth Employment Relations Board (CERB) is whether the Commonwealth of Massachusetts (Commonwealth or Employer) was obligated to give SEIU, Local 509 (Union) notice and an opportunity to bargain to resolution or impasse before MassHealth managers began surreptitiously using a previously-unused feature of MassHealth's computer-based phone system to listen in on phone calls that MassHealth Benefits Eligibility and Referral Social Workers A/B (BERS A/B) had with members of the public. The managers' conduct occurred in the context of

an investigation into the BERS A/Bs. The Commonwealth suspended eleven employees who were the subject of the investigation based on the information gathered by the managers who monitored their calls. For the reasons set forth below, the CERB concludes that the Commonwealth made an unlawful unilateral change when it began listening in on employees' two-way phone conversations.

Statement of the Case

On May 24 2019, the Union filed a Charge of Prohibited Practice with the Department of Labor Relations (DLR) alleging that the Employer had engaged in prohibited practices within the meaning of Section 10(a)(5) and, derivatively, Section 10(a)(1) of M.G.L. c. 150E (the Law) when it began monitoring BERS A/B phone calls without first giving the Union notice and an opportunity to bargain. On September 13, 2019, the DLR issued a single-count Complaint of Prohibited Practice alleging that by monitoring phone calls, the Commonwealth had "changed the criteria by which it evaluates productivity and performance and imposes discipline without giving the Union prior notice and an opportunity to bargain to resolution or impasse about the decision and the impacts of its decision in violation of Section 10(a)(5) of the Law."

Pursuant to 456 CMR 13.03(1)(b), on July 17, 2020, the Commonwealth filed a petition for the CERB to decide this matter in the first instance (Petition).[1] The Petition was accompanied by a written statement of Stipulated Facts and eight joint exhibits. On

[1] Section 11(f) of the Law states: "Upon any complaint made under this section and a petition filed by one or more parties to the proceeding, the [CERB], in its discretion, and for good cause shown, may order that the hearing be conducted by the [CERB] itself." 456 CMR 13.03(1)(b) essentially echoes this statutory provision, providing further that the rules and procedures of 456 CMR 12.00 and 13.00 shall apply to any CERB hearing in the first instance.

August 4, 2020, the CERB issued a preliminary ruling that good cause existed to hear the matter in the first instance, provided the parties clarified and supplemented certain stipulations. On August 28, 2020 and September 4, 2020, respectively, the parties filed a Joint Response and a Second and Final Joint Response, which supplemented Stipulations 7 and 20, and provided a ninth joint exhibit. On September 21, 2020, the CERB issued a final ruling granting the Petition.

On the entire record, the CERB makes the following findings:

Stipulations of Fact

1. The Commonwealth, acting through the Secretary of Administration and Finance, is a public employer within the meaning of Section 1 of the Law.

2. The Alliance, AFSCME-SEIU, AFL-CIO (Alliance) is the exclusive bargaining representative for employees in statewide bargaining units 2, 8, and 10.

3. SEIU, Local 509 ("the Union"), a member of the Alliance, is an employee organization within the meaning of Section 1 of the Law and represents employees in unit 8 who hold the job title of Benefit Eligibility Referral Specialist A/B (BERS A/B) in MassHealth.

4. The job duties of the BERS A/B staff referred to in paragraph 3 include answering phone calls from members of the public seeking information and assistance, as well as the duties in Exhibit 1 (BERS A/B Form 30).

5. BERS D staff (also bargaining unit members of the Union), whose job duties include those in Exhibit 2 (BERS D Form 30), oversee BERS A/B staff. All report to "team managers."

6. The environment in which the BERS A/B staff typically work is like a call center, wherein the BERS A/Bs are assigned cubicles, with walkways in between.

7. In order for BERS A/B staff to take calls from the public, they log in to the phone system through their Commonwealth-owned computer and indicate that they are available. The name of the phone system is Cisco Contact Center Enterprise. Employees cannot take calls from the public without their phone being connected to a computer. For the duration that they are logged in, the system tracks if the BERS A/B staff are busy on a call or available to take the next call in the queue, as well as other status indicators and data. A dashboard shows managers the status indicators that include "Ready," "Talking," "Not Ready," and "On Hold." The

dashboard also shows managers the duration of the particular status. The system has not made a recording of the calls between the BERS A/B and members of the public or otherwise documented what is said during the calls. BERS A/Bs receive a notification of "Authorized Use of Information System Resources" when logging into the Commonwealth owned computers. (Exhibit 9-Authorized Use screenshot) but there is no separate/additional notification upon logging into the phone system to take calls from the public.

8. When a BERS A/B staff answers the phone, a verbal greeting is communicated by the BERS A/B to the caller on the line. The BERS A/B staff then assists the caller.

9. BERS A/Bs are subject to performance evaluations, known as EPRS (Exhibit 3 - BERS NB EPRS). The Commonwealth and the Union are parties to a collective bargaining agreement dated January 1, 2017 through December 31, 2019 (Exhibit 4 - CBA).

10. Prior to February 2019, MassHealth did not utilize a feature of the MassHealth phone system which enables team managers to listen in on phone calls in real time between members of the public and BERS A/B staff.

11. MassHealth commenced an investigation into the conduct of specific BERS A/Bs who were identified through trends in phone data showing what MassHealth believed was a high volume of calls with low call duration.

12. As part of this investigation, during February and March 2019, MassHealth managers listened in on phone calls between the identified BERS A/Bs and members of the public

13. The managers listening in on the calls were not in the same room as the BERS A/Bs.

14. The BERS A/Bs were not informed that calls would be listened to through the phone system prior to MassHealth's investigation commencing February 2019. The BERS A/Bs were not informed during the calls that team managers were listening on the line.

15. The Union was not provided with notice that MassHealth would be listening in on the calls between BERS A/Bs and the members of the public as part of the investigation. The Union and the BERS A/Bs were not informed that the investigation was being conducted.

16. On or around April 20, 2019, MassHealth directed eleven (11) BERS A/B staff to attend investigatory interviews related to their conduct.

17. On or around April 25, 2019, during one of the investigatory interviews referred to in paragraph 15, the Union learned that MassHealth had begun listening in on calls between BERS A/Bs and members of the public through the phone system.

18. Between June and August 2019, MassHealth disciplined eleven (11) BERS A/Bs based upon their conduct during the calls which MassHealth team managers had listened in on as part of the aforementioned investigation. (Exhibit 5A - June 2019 Notices of Discipline; Exhibit 5B - August 2019 Notices of Discipline).

19. The evidence of the conduct of the BERS A/Bs referred to in the notices of discipline issued to eleven (11) BERS A/Bs consists of notes of the calls contemporaneously taken by managers and the managers' recollection of the calls to which they listened. (Exhibit 6A - Notes from Calls; Exhibit 6B Spreadsheet of Additional Notes from Calls).

20. Prior to 2019, BERS A/Bs were eligible to be disciplined for performance reasons involving their conduct on phone calls. Prior to the discipline issued in this matter, no BERS A/Bs had been disciplined for their conduct on phone calls. No BERS A/Bs have been disciplined based solely upon review or monitoring of "status indicators" referred to in Stipulation # 7. The manner in which potentially inappropriate conduct on calls could have come to the attention of team managers is by team managers observing BERS A/Bs as they took phone calls if they were nearby the BERS A/B or by complaints submitted by members of the public. MassHealth has received complaints regarding the conduct of BERS A/B staff on phone calls and has brought the complaints to the relevant A/B staff's attention. MassHealth opted not to pursue discipline.

21. To date, listening in on calls through the phone system has only been used in the course of the investigation that commenced in February 2019.

22. The Executive Office of Health and Human Services, which includes MassHealth, has promulgated an Acceptable Use Policy (Exhibit 7 - Acceptable Use Policy) and a memo on "the Use of EOHHS and Personal Technology Resources" (Exhibit 8 - Memo dated November 2, 2015).

Findings Based on Joint Exhibits

BERS A/B Duties

As described in their Form 30s, BERS A/Bs, "in adherence with HIPAA Guidelines, assist individuals in obtaining and maintaining appropriate medical benefits." The detailed statement of duties and responsibilities included on the Form 30s further explains that

they "respond to customer inquiries and provide information regarding eligibility requirements and appeal rights, explain applicable rules, regulations, policies, procedures and eligibility requirements to ensure that all parties understand the availability and eligibility for benefits and by researching case status on agency computer system." They are also required to "[respond] to customer's requests for applications and information in an expedient and efficient manner." The "Work Styles" component of the Form 30 lists several competencies, including, "Attention to Detail," "Cooperation," "Dependability," and "Integrity."

The BERS A/B Employee Performance Review (EPRS) Form lists the title's primary job duties and performance criteria. The first duty is "Provides quality customer service by responding to all inquiries correctly in a professional, efficient and courteous manner." The performance criteria listed in the next paragraph includes, "Handles all contacts professionally and in accordance with MassHealth Operations and HIPAA guidelines/protocols."

Relevant CBA Provisions

Article 2 of the 2017-2019 collective bargaining agreement (CBA), "Managerial Rights/Productivity," states in pertinent part:

> Section 1
>
> Except as otherwise limited by an express provision of this agreement, 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 service to be provided and standards of productivity and performance of its employees; establish and/or revise personnel evaluations programs; the determination of the methods, means and personnel by which its operations are to be conducted; . . . the suspension, demotion, discharge or any other appropriate action against its employees; . . .the establishment of reasonable work rules; . . .

Article 23 of the CBA, "Arbitration of Disciplinary Action," sets forth a just cause standard for discipline (discharge, suspension or demotion) of employees employed for more than nine months.

Article 28 of the CBA, "Technological Resources," states:

> The parties specifically agree that all hardware, software, databases, communications networks, peripherals, and all other electronic technology, whether networked or free-standing, is the property of the Commonwealth and is expected to be used only as it has in the past for official Commonwealth business. Use by employees of the Commonwealth's technological resources constitutes express consent for the Commonwealth and its Departments/Agencies to monitor and/or inspect any data that users create or receive, any electronic mail messages they send or receive, and any web sites that they may access. The Commonwealth retains, and through its Departments/Agencies, may exercise the right to inspect and randomly monitor any user's computer, any data contained in it, and any data sent or received by that computer.
>
> Notwithstanding the above, unless such use is reasonably related to an employee's job, it is unacceptable for any person to intentionally use the Commonwealth's electronic technology:
>
> - in furtherance of any illegal act, including violation of any criminal or civil laws or regulations, whether state or federal;
> - for any political purpose;
> - for any commercial purpose;
> - to send threatening or harassing messages, whether sexual or otherwise;
> - to access or share sexually explicit, obscene, or otherwise inappropriate materials;
> - to infringe upon any intellectual property rights;
> - to gain or attempt to gain, unauthorized access to any computer or network;
> - for any use that causes interference with or disruption of network users and resources, including propagation of computer viruses or other harmful programs;
> - to misrepresent either the Agency or a person's role at the Agency;
> - to intercept communications intended for other persons;
> - to distribute chain letters;
> - to libel or otherwise defame any person; or
> - to access online gambling sites.
>
> The terms of this Section do not alter current practice regarding employee use of telephones.

The parties agree that the foregoing list and policy are not all-inclusive and will meet as needed to make appropriate modifications thereto.

The Department/Agency will disseminate this Section to its employees on an annual basis as part of the employee's performance evaluation and afford said employee the opportunity to request clarification should it be necessary.

This shall not infringe upon any rights within M.G.L. c. 150E or any other right legally granted to employees.

BERS A/B Technology Notifications/Policies

When BERS A/Bs log in to their work computers, the following message appears on the screen:

This computer and all related equipment and information system resources are the property of the Commonwealth and are provided only for authorized use by EOHHS users. EOHHS users must use Commonwealth information system resources in compliance with applicable EOHHS as well as Executive Office for Administration and Finance and Executive Office of Technology Services and Security confidentiality, privacy, and security policies and standards. You are responsible for maintaining the privacy of your authentication information and any data you access and/or use in the course of your work. You may not share your authentication information under any circumstances and may not share data outside of the scope of your authority. Use of the Commonwealth information system resources outside the scope of your authority or any manner contrary to EOHHS, ANF and EOTSS policies and standards are subject to discipline up to and including termination of employment. If you violate state or federal law when using EOHHS information system resources, you may be subject to criminal investigation and prosecution or civil monetary penalties. Network administrators routinely monitor system activity in order to ensure the confidentiality, integrity, and availability of the EOHHS's information systems, your use of EOHHS's computers and/or e-mail and/or internet access and/or any other electronic information system resources constitutes your express consent to monitoring inspection and or copying of all information that you create or receive including any messages you send or receive in any websites you visit.

By using this computer or other Commonwealth information resources, you expressly agree? to abide by the requirements of the EOHHS acceptable use policy, originally published on January 11, 2018.

Acceptable Use Policy

The Acceptable Use Policy referenced in Stipulation 22 states in pertinent part:

> This Policy applies to all Users of EOHHS Information Resources. In furtherance of your job duties, you may be required or requested to access EOHHS Information Resources and only for the purpose of completing such duties. Your use of EOHHS Information Resources may be monitored, recorded, and audited. EOHHS has the right to review your files and emails at any time and for any reason without your prior consent. **Especially when using Technical EOHHS Information Resources, you should have no expectation of privacy.** Unauthorized or improper use of EOHHS Information Resources may result in disciplinary action, as well as civil and criminal penalties. (Boldface in original).
>
> * * *
>
> By using an EOHHS Information Resource, you agree to the terms of this Policy.
>
> * * *
>
> ACCEPTABLE USE
>
> * * *
>
> EOHHS Information Resources are the property of EOHHS and the Commonwealth. EOHHS owns the data created or stored on these systems, including all email messages and the information they contain. **You do not own Information Resources on the EOHHS Network and should have no expectation of privacy in those Information Resources.** (Boldface in original).
>
> ***
>
> **EQUIPMENT**
>
> ***
>
> You must abide by all policies and procedures related to the use of Devices and other office equipment. . . .Your use of Devices and office equipment may be monitored, recorded, and audited. EOHHS has the right to review any information accessed, stored, printed, copied or otherwise utilized on Devices or other office equipment at any time or for any reason.

On November 2, 2014, MassHealth Manager Rick Wilson sent a memo to "MassHealth Operations Staff," regarding "Use of EOHHS and Personal Technology Resources." This memo reiterated various aspects of the technology notifications set forth above. It also attached the "EOHHS agreement," which was identical to the first paragraph of Article 28 of the CBA.

MassHealth Investigation

In February, March, and April 2019, certain MassHealth managers listened in on phone calls of BERS A/B staff who had been flagged because their phone data reports revealed that they had received a high number of calls with a low call duration. These managers used a feature of the phone system that had not previously been utilized that enabled them to listen in on phone calls in real time between members of the public and BERS A/B personnel. The calls were not recorded, but the managers took notes of the calls they listened in on. These notes describe repeated instances in which the caller was connected to the BERS A/B "agent" but, even though the system showed the agent as talking, the manager did not hear the agent greet the caller or respond to the caller's greeting, which caused the manager to believe that the agents were muting themselves, and/or the agent immediately put the caller on hold without greeting the caller. In both scenarios, the call ended without any customer service being provided.

On June 25, 2019, MassHealth sent out seven letters of discipline to seven separate BERS A/Bs. Five of the BERS A/Bs received three-day suspensions and the other two received five-day suspensions. On August 9, 2019, and August 12, 2019, MassHealth sent out letters to four other BERS A/Bs notifying them that, after holding a disciplinary hearing, it was suspending them for ten days. MassHealth provided similar reasons for all of the suspensions – the failure to provide any service to callers on numerous occasions. The length of the suspension was tied to the percentage of calls for which no service was provided.[2] Only one of the letters, to "NK," indicated that the

[2] According to the Commonwealth's brief, the BERS A/B staff who were issued 5-day suspensions were observed by management to fail to assist members in approximately 39% - 63% of calls. The BERS A/B staff who were issued 10-day suspensions were observed by management to fail to assist members in approximately 56% - 100% of calls.

discipline was also based on NK allegedly being rude and unprofessional during three of her calls. NK received a five-day suspension for that reason and for failing to assist twenty out of fifty-one callers on five separate days in February 2019.

The suspension notices that MassHealth sent to BERS A/Bs who received three- and five-day suspensions for placing employees on mute were mostly identical in describing the BERS A/B's responsibilities and the specific number of times the employee failed to provide service. For example, JG's suspension notice stated in pertinent part:

> This letter shall serve to notify you that just cause exists to suspend you from your [BERS A/B] position without pay for a period of three days. . . .
>
> This action is taken for the following reasons:
>
> As you know, MassHealth provides health insurance benefits to residents of the Commonwealth. Residents call our agency seeking assistance with benefits which can be complicated and confusing. As a BERS A/B with MassHealth, you are responsible for ensuring that residents receive the services they are entitled to receive. Engaging in appropriate, effective and timely customer service is one of the most important aspects of your job and you have been trained to provide such service.
>
> Despite this and in direct conflict with our agency commitment, you failed to provide any customer service to a number of applicants/members who called MassHealth for services on at least five separate days. Specifically, on three separate dates in February and March 2019, you received thirty-two (32) calls but failed to assist fourteen (14) of those callers at all. In each of those fourteen calls, there is evidence that you answered the calls, however you did not immediately greet the member prior to placing them on mute. Because the calls were placed on mute, the applicant/member did not hear your greeting and terminated the call.[3] This conduct is entirely unacceptable.
>
> [Managers] met with you on April 25, 2019 along with your Union representative . . . to discuss this matter. You stated that you did not do what management is alleging in the manner in which it was stated but provided no further explanation.

[3] In its brief, the Union notes that this is what MassHealth alleges happened and states that both the Union and the BERS A/Bs dispute these allegations

> There is no evidence to support that there were issues with the phone system that would justify the reason you gave for failing to assist callers. You failed to provide acceptable customer service to approximately 44% of the individuals who called you on the dates for which your work was reviewed.
>
> In the future, you are expected to assist applicants/members fully, professionally and respectfully ensuring each applicant is greeted immediately upon call acceptance. If you are experiencing an inordinately high volume of calls that you are unable to manage or having technical difficulties in any way you must notify a supervisor or manager immediately. I must warn you that if you should ever again engage in this or a similar type of conduct, you will be subject to severe disciplinary action, up to and including termination.
>
> Your rights in this matter are set forth in the Commonwealth/Alliance collective bargaining agreement.

The letters to individuals who received ten-day suspensions included an introductory paragraph stating that a hearing had been held and that they had been represented at the hearing by the Union representative. The remainder of the letters were substantially the same as above, with similar reasons provided for the suspensions. As noted above, both the Union and the BERS A/Bs dispute these allegations.

Majority Opinion[4]

The question before us is whether the Commonwealth violated the Law when it surreptitiously began listening in on BERS A/B phone conversations without first giving the Union notice and an opportunity to bargain over the decision and the impacts of its decision to do so. We start with the well-established principle that a public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first giving its

[4] The CERB's jurisdiction is uncontested.

employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse. City of Springfield, 41 MLC 383, MUP-12-2466 (June 30, 2015) (citing Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124 (1989)). To establish that the Commonwealth violated the Law here, the Union had to demonstrate that: 1) the Commonwealth changed an existing practice or instituted a new one; 2) the change affected employees' wages, hours or working conditions, and thus implicated a mandatory subject of bargaining; and 3) the Commonwealth implemented the change without giving the Union prior notice and an opportunity to bargain to resolution or impasse. Commonwealth of Massachusetts, 404 Mass. at 127.

We first consider whether the Commonwealth changed an existing practice or instituted a new one. Based on the stipulations indicating that prior to early 2019, MassHealth had not listened in on phone calls through the phone system, we find that MassHealth instituted a new practice by doing so. The Commonwealth contends that this did not constitute a change because the Acceptable Use Policy and the other related policies and notifications to employees that are in the stipulated record put employees on notice that MassHealth could conduct an investigation into their conduct by monitoring their phone systems. As the Union points out, however, none of those policies specifically reference the Commonwealth's right to monitor phone calls. Further, although the Commonwealth reserves its right in Article 28 of the CBA to "randomly monitor any user's computer . . . and any data sent or received by that computer," this provision also does not state that managers may monitor phone calls. To the contrary, it expressly states that this provision does "not alter current practice regarding employee use of telephones." Although the precise practice is not spelled out in the CBA, there is no dispute that prior

to the incident at issue here, phone calls were not listened in on or recorded through the phone system, and thus contrary to our dissenting colleague, based on these provisions, we do not believe it was reasonable for employees to expect that anyone would secretly be listening to their phone conversations.[5]

We next consider whether this change affected underlying conditions of employment, thereby implicating a mandatory subject of bargaining. The Commonwealth makes two main arguments in this regard. First, citing Duxbury School Committee, 25 MLC 22, MUP-1446 (August 7, 1998), the Commonwealth claims that this change merely altered a procedural mechanism for enforcing existing work rules - it did not affect underlying conditions of employment and was thus not a mandatory subject of bargaining. Based on our decision in City of Springfield, supra, we disagree.

In Duxbury, the CERB concluded that the employer did not make an unlawful unilateral change when it installed surveillance cameras to monitor the discrepancies between employees' actual departure times and the times recorded on their timecards. The CERB found that because employees had always been required to accurately report their time, the cameras were simply a procedural device for enforcing an existing work rule.

[5] Indeed, it is unclear whether the Union or employees were aware that the phone system even had listening-in capability. Moreover, although the dissent suggests that listening in on the phone calls did not constitute a change in past practice because the stipulations reflect that managers have always had the ability to observe inappropriate conduct while BERS/ABs are on calls and that they are subject to discipline for improper performance on calls, we note that the stipulation merely refers to the "potential" for managers to observe calls. There is no evidence, nor does the Commonwealth argue, that such observation was routine. We thus disagree that the audio surveillance put in place here was, as the dissent characterizes it, merely a continuation of a "practice of listening in on calls" that had no impact on working conditions.

In City of Springfield, the CERB considered whether the employer made an unlawful unilateral change when it surreptitiously installed Global Positioning System (GPS) devices in vehicles driven by Springfield employees without first giving the union notice and an opportunity to bargain. The CERB held that it did, reasoning that even if the installation of the devices did not alter the most "basic of work rules", i.e., "showing up to work," it nevertheless changed working conditions because the GPS devices enabled the employer to monitor real-time data about the vehicles' speed, locations, idle times, and other information that the employer had not previously been able to obtain nor required employees to report.

In so holding, the CERB was guided by BP Exploration of Alaska, Inc., Case no. 19-CA-29566 (July 11, 2005), an NLRB Advice Memo that addressed a similar issue involving GPS-like devices.. There, the NLRB observed that the installation of the devices provided the employer with "far more information about employee driving behaviors" than it had previously been able to obtain via radio or personal observation, which in turn increased employees' chances of discipline, thereby having a "material, substantial and significant impact on employee working conditions." City of Springfield, 41 MLC at 385 (citing BP Exploration, slip op. at 9-10). In reaching this conclusion, the CERB also distinguished Duxbury, finding a significant difference between the "open installation of surveillance cameras to monitor discrepancies between employees' departure times and the times recorded on their time card" via a time clock versus the "clandestine" installation of a device that, for the first time, provided a formal method of data collection and allowed

the employer to have continuous access to information about employee job performance and productivity that it did not previously have. City of Springfield, 41 MLC at 384.[6]

We reach a similar conclusion here. Although there is no dispute that BERS A/Bs were expected to provide quality customer service by responding to callers' inquiries in a professional, efficient and courteous manner, MassHealth managers had not previously monitored BERS A/Bs' two-way phone conversations or required employees to provide details about them.[7] Accordingly, surreptitiously listening in to phone conversations through the previously unused feature of MassHealth's phone system changed both the type and amount of information available to managers, including in particular whether the BERS A/B actually ever spoke to or assisted the caller. It also increased employees' chances of being disciplined, as demonstrated by the suspension letters listed above and the undisputed fact that, prior to listening in on employee phone conversations, the Commonwealth had not disciplined employees for their conduct during phone calls, despite receiving customer complaints.

For all these reasons, we find that the BERS A/Bs' working conditions changed once MassHealth managers began listening to their calls. Id. at 384-385. See also,

[6] Our dissenting colleague points out that aspects of the Duxbury decision suggest that the employer did not "openly" install the surveillance camera as suggested in the Springfield decision. While that may be true in terms of the employer actually notifying employees or the union when it installed the camera, we still find that the hearing officer in Springfield made a valid distinction between installing a single surveillance camera in an "open and fixed location" where employees could see the device versus the "surreptitious" installation of GPS devices in city vehicles. 41 MLC at 384. Furthermore, regardless of whether the surveillance in Duxbury was covert or not, the other distinctions between the Springfield and Duxbury decisions, as described above, remain accurate and relevant to our decision here.

[7]

Meenan Oil Co, L.P., (29-CA-2046, 1998 WL 1985094 (NLRB Div. of Judges, July 8, 1998) (citing Colgate Palmolive, 323 NLRB 515 (1997) (employer that surreptitiously expanded its practice of monitoring phone conversations of customer service representatives affected working conditions)).[8]

The Commonwealth further defends its conduct on grounds that it has no duty to bargain over evidence it opts to gather as part of an investigation into suspected employee misconduct. We disagree. While we do not doubt or diminish the Commonwealth's legitimate interest in investigating employees whom it reasonably suspects of misconduct, when considering whether the Commonwealth should nevertheless have provided the Union with notice and an opportunity to bargain before listening in to employees' phone conversations, we must balance the Commonwealth's stated interests with employees' interest in bargaining over terms and conditions of their employment. See generally Town of Danvers, 3 MLC 1559, 1577, MUP-2292, 2299 (April 6, 1977). On several occasions, the CERB has determined that an employer's interest in investigating employee misconduct or fitness for duty did not outweigh the employees' interest in bargaining over the methods an employer uses to do so because such methods "have a direct and profound effect on employees' job security and are therefore a

[8] While the Commonwealth argues that it did not change an underlying condition of employment because managers could always by proximity overhear a BERS A/B on the telephone speaking with a caller, it could not without the monitoring hear the entire conversation consisting of both the BERS A/B and the caller. There is no dispute that prior to this monitoring, the Commonwealth never disciplined a BERS A/B for conduct on the telephone. Furthermore, the Commonwealth already identified the BERS A/Bs they suspected of improper phone conduct by the data showing those with a high volume of calls with low call duration. The Commonwealth could have investigated by positioning managers in proximity to those BERS A/Bs, conduct, which, based on the stipulations, would not have constituted a change of an underlying condition of employment.

quintessential condition of employment, subject to collective bargaining." Massachusetts Port Authority, 36 MLC 5, 11-12, UP-04-2669 (June 30, 2008) (employer required to bargain over methods for determining fitness for duty in conjunction with its investigation into employee's alleged threats of violence) (citing City of Haverhill, 16 MLC 1077, 1081, MUP-7194 (H.O. July 6, 1989), *aff'd* 17 MLC 1215 (August 21, 1990) (methods used for determining fitness for duty are mandatory subjects)); see also Town of Dedham, 10 MLC 1252, MUP-5054 (Sept. 29, 1983) (conditioning suspended employee's return to work on fitness for duty evaluation is a mandatory subject).

Similar concerns were at issue in City of Fall River, 20 MLC 1352, MUP-7659 (January 6, 1994), where, after a police officer was arrested for drug possession, the employer ordered him to submit to a drug test pursuant to an unbargained-for zero tolerance drug policy, and then terminated the officer based in part on the positive result. The CERB, relying on an Advisory Opinion in which it opined that drug testing was a mandatory subject of bargaining (Town of Fairhaven, AO-13 (unpublished slip op., August 20, 1992)), held that the employer was obligated to bargain with the union to resolution or impasse before implementing the zero tolerance policy notwithstanding the employer's interest in investigating the officer's suspected drug use. 20 MLC at 1358. As described in Fall River, the CERB's opinion in Fairhaven that drug testing is a mandatory subject of bargaining was based on its determination that the interests of a public employer in maintaining a work force unimpaired by drug use did not outweigh the interests of employees in bargaining over the effects of drug testing on employees' terms and conditions of employment. Id.

Here, other than arguing generally that it is under no obligation to bargain over evidence obtained during an investigation, the Commonwealth has not identified any overriding interests or prerogatives that would cause us to reach a different conclusion about the weight of the different interests at stake here than articulated in Fall River and related cases, where, as here, the change is as intrusive as for the first time surreptitiously listening in to phone conversations through the phone system. Accordingly, we conclude that MassHealth's interests in investigating high call volume/short duration phone calls did not outweigh the interests of BERS A/Bs in bargaining about the monitoring of phone calls as a means of evaluating their productivity and performance and imposing discipline.[9]

The Commonwealth's reliance on NLRB v. J Weingarten, Inc., 420 U.S. 251, 260 (1975), and Commonwealth of Massachusetts, 9 MLC 1567, SUP-2665 (January 11, 1983), do not change this result. The references to bargaining in those cases pertain to

[9] Indeed, while the Commonwealth defends its action on the grounds of a workplace investigation, the warnings issued to BERS A/Bs make clear that the Commonwealth's overarching goal was to improve customer service. While we do not diminish the importance of this goal, particularly given MassHealth's services, there are many ways to accomplish that goal besides the one MassHealth chose, including directly addressing with the identified BERS A/Bs the reports of their high volume, short duration calls. Such investigation could have taken place at the same time the Commonwealth bargained over its decision and the impacts of its decision to listen in on phone conversations to investigate future instances of such behavior. In making this observation, we are not, as the dissent asserts, substituting our judgment for the Commonwealth's in determining whether discipline was required. Rather, in conducting the Danvers balancing test to determine the scope of bargaining here, as the Duxbury ruling described *infra* requires us to do, we are simply according less weight to the Commonwealth's stated interests in investigating potential misconduct because, among other things, the Commonwealth had other means of addressing its concerns that did not change employees' terms and conditions of employment. Moreover, had the Employer given the Union notice and an opportunity to bargain to resolution or impasse over this issue, the employees' knowledge that the Employer could listen in on their phone calls would likely have had a deterrent effect on any future, similar behavior.

the role of a union representative at an investigatory interview. Contrary to the Commonwealth's suggestion, this line of cases does not stand for the general proposition that an employer is under no obligation to bargain over changes to employees' terms and conditions of employment arising out of investigations simply because they occurred in an investigatory context. Commonwealth of Massachusetts, 9 MLC at 1571 (citing Weingarten, 402 U.S. at 258 ("The employer need not bargain with the union representative *at an investigatory interview;* neither may the union representative interfere with legitimate employer prerogatives *by virtue of its participation")*(emphasis supplied) (further citing Climax Molyhendrum Corp., 584 F. 2d 350 (10th Cir., 1978) (criticizing union for obstructing employer investigation by counseling employees to remain silent)).

Moreover, the CERB rejected a similar argument when it issued a separate ruling denying the employer's pre-hearing motion to dismiss in the Duxbury School Committee decision described above. Citing Town of Ayer, 9 MLC 1376, MUP-4829 (October 26, 1982), ***aff'd sub nom.*** International Brotherhood of Police Officer v. Labor Relations Commission, 391 Mass. 429 (1984), which held that the employer had no obligation to bargain before requiring police officers suspected of criminal activity to submit to a polygraph as part of an ongoing criminal investigation, the Duxbury School Committee argued that a public employer had no obligation to bargain over the means of investigating its employees suspected criminal activity. The CERB disagreed. Distinguishing both the facts and rationale in Town of Ayer, the CERB stated, "[W]e have not found that employers may implement surveillance measures generally without bargaining with the employees' exclusive representative to resolution or impasse." Duxbury School

Committee, 23 MLC 165, 166 (January 2, 1997).[10] Rather, the CERB held that in accord with the Danvers balancing test, the scope of mandatory bargaining on this topic required a full consideration of the facts. Id.

The Commonwealth cites no other CERB decisions, and we find none, where the mere fact that an alleged unilateral change took place during an investigation removes a change in working conditions from the scope of mandatory bargaining.[11] Accordingly, for all the reasons discussed above, we find that the Commonwealth was obligated to provide the Union with notice and an opportunity to bargain to resolution or impasse before using MassHealth's phone system to monitor employees' phone calls as a means of evaluating their productivity and performance and imposing discipline.

Therefore, as set forth below, we order the Commonwealth to restore the status quo ante by ceasing to listen in to BERS A/B phone calls using a feature of the MassHealth phone system without first giving the Union notice and an opportunity bargain

[10] We further note that in Ayer, the CERB itself expressly limited its holding to "situations where the investigation is of an alleged crime and not simple department misconduct." 9 MLC at 1386. While our dissenting colleague apparently weighs the employer's interests in investigating potential misconduct differently than we do, we find a material and substantial difference in the suspected criminal activities being investigated in Duxbury (time theft) and Ayer (police officers' alleged breaking and entering and malicious destruction of property) and the misconduct here, which resulted in unsatisfactory customer service.

[11] Although the Commonwealth relies on a 2017 DLR dismissal letter, it is well-established that dismissal letters have no precedential value. City of Taunton, 38 MLC 96, 98-99, n. 7, MUP-06-4836, MUP-08-5150 (November 2, 2011). Just as the issuance of a complaint reflects only the DLR's determination that there is probable cause to believe that the alleged conduct could violate the Law and not that the alleged conduct does violate the Law, the dismissal of a charge reflects only that the evidence presented at the investigation was insufficient to establish probable cause to believe the Law has been violated. Id. (citing Quincy Employees Union, H.L.P.E., 15 MLC 1340, 1368, n. 54 (1989) *aff'd sub nom*. Pattison v. Labor Relations Commission, 309 Mass. App. Ct. 9 (1991), *further rev. den'd*, 409 Mass. 1104 (1991)).

to resolution or impasse over the decision and its impacts, to bargain upon request with the Union over this issue and to rescind all discipline and make whole all employees affected by this change. See Fall River, 20 MLC at 1361-62 (ordering rescission of unilaterally implemented zero tolerance drug policy and reinstatement of officer terminated after he tested positive on a drug test that was implemented pursuant to the policy).[12]

ORDER

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

1) Cease and desist from:

   a) Failing to bargain collectively in good faith with SEIU, Local 509 by unilaterally changing terms and conditions of employment by using a previously-unused feature of MassHealth's phone system to listen in on phone calls that BERS A/Bs had with members of the public.

   b) In any similar 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 policies of the Law:

   a) Cease and desist from unilaterally changing BERS A/Bs' terms and conditions of employment by listening in to their telephone conversations with members of the public using a previously-unused feature of MassHealth's phone system.

   b) Immediately rescind the suspensions imposed on BERS A/Bs as a result of the Commonwealth's unilateral conduct and make these employees whole for any loss

[12] Although the dissent suggests that this remedy allows employees to escape consequences for their misconduct, we note that the parties dispute whether the employees actually engaged in misconduct, and it is beyond the scope of these proceedings for us to determine whether in fact they did. In any event, unlike the NLRB, the CERB's broad remedial authority is not curtailed by any provision similar to Section 10(c) of the National Labor Relations Act, which states that "no order of the Board shall require the reinstatement of an individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

of wages or benefits that they may have suffered, plus interest on any sums owed at the rate specified in M.G.L. c. 231, § 6I, compounded quarterly.

c) Upon request by SEIU, Local 509, bargain in good faith to resolution or impasse over the decision and the impacts of the decision to listen in on BERS A/Bs' phone calls with members of the public using a feature of MassHealth's phone system.

d) Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically, if MassHealth customarily communicates with these unit members via Internet or email and display for a period of 30 days thereafter, signed copies of the attached notice to employees; and

e) Notify the DLR in writing of the steps taken to comply with this decision within ten (10) days of receipt of this decision.

SO ORDERED

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

Marjorie F Wittner

_____
MARJORIE F. WITTNER, CHAIR

Joan Ackerstein

_____
JOAN ACKERSTEIN, CERB MEMBER

Opinion of CERB Member Strong [dissenting]

Although my colleagues conclude above that the Commonwealth made an unlawful unilateral change, for the reasons set forth below, I would find that the Commonwealth did not violate the Law when, in response to a specific concern about BERS A/B staff not performing their job duties, the Commonwealth employed a more dependable and efficient means of enforcing existing rules and standards and did so

without changing underlying conditions of employment. Accordingly, I respectfully dissent.

First, my colleagues agree with the Union that only one of the twenty-two stipulations in the record is necessary to demonstrate that the Commonwealth changed an existing practice or created a new one. Specifically, as similarly asserted by the Union in its brief, the majority states that "[b]ased on the stipulations indicating that prior to early 2019, MassHealth had not listened in on phone calls, we find that MassHealth instituted a new practice by doing so."[13] In support of its conclusion, the majority cites to language contained in Article 28 of the CBA that the section's terms "do not alter current practice regarding employee use of telephones." According to the majority, this language, which occurs after other contractual language related to MassHealth's computer systems, supports their position that the current practice between the parties is that phone calls are not monitored and that MassHealth was required to bargain with the Union prior to MassHealth monitoring phone calls between members of the public and BERS A/Bs. While both the stipulation and contractual language are undisputed facts, neither should be the basis for concluding that a new practice was instituted in February 2019. A review of the record reveals that a combination of undisputed facts calls for a different result.

The CERB, in determining whether a binding practice exists, "analyzes the combination of facts upon which the alleged practice is predicated, including whether the practice has occurred with regularity over a sufficient period of time so that it is reasonable

[13] In the July 7, 2020 Stipulated Record, the parties agree that "Prior to February 2019, MassHealth did not utilize a feature of the MassHealth phone system which enables team managers to listen in on phone calls in real time between members of the public and BERS A/B staff."

to expect that the practice will continue." City of Newton, 32 MLC 37, 48-49, MUP-2849 (June 29, 2005) (citing Commonwealth of Massachusetts, 23 MLC 171, 172, SUP-3586 (January 30, 1997)). In its analysis, the CERB "inquires whether employees in the unit have a reasonable expectation that the practice in question will continue." Id. at 49 (citing City of Westfield, 22 MLC 1394, 1404, MUP-9697 (H.O. January 10, 1996), *aff'd* 25 MLC 163 (April 20, 1999)). "The definition of 'practice' necessarily involves the [CERB's] policy judgement as to what combination of circumstances establishes the contours of a past practice for purposes of applying the law prohibiting unilateral changes." Bristol County, 23 MLC 114, 116, MUP-9844 (November 15, 1996). A review of the stipulated facts, the lack of evidence demonstrating the bargaining history and intent behind the contractual language contained in Article 28, and the unreasonable BERS A/B staff expectation that managers could only physically stand nearby an employee to determine if an individual was following existing work rules and standards after data had shown potential BERS A/B non-performance of required job duties, all lead to the conclusion that MassHealth did not change an existing practice, nor did it implement a new one.

First, although it is stipulated that prior to early 2019 managers did not listen in on BERS A/B staff customer service phone calls through the phone system, the parties agree that managers have always had the ability to observe inappropriate conduct occurring while BERS A/Bs are on customer phone calls and that BERS A/Bs are subject to discipline for the improper performance of their customer service responsibilities.[14] It is

[14] Pursuant to their joint agreement to expand Stipulation #20, the parties agree that "Prior to 2019, BERS A/Bs were eligible to be disciplined for performance reasons involving their conduct on phone calls… The manner in which potentially inappropriate conduct on calls could have come to the attention of team managers is by team managers observing BERS A/Bs as they took phone calls if they were nearby the BERS A/Bs…"

obvious that when anyone is observing inappropriate conduct on a phone call, such observation includes the act of listening to what is being said. When MassHealth managers observed the BERS A/Bs phone calls by listening in on the calls through the employer computer and telephone system instead of managers listening to the calls from a location nearby, MassHealth was continuing its practice of listening in on such calls.

Despite the parties' stipulation that management could learn of BERS A/B staff engaging in inappropriate customer service calls by listening to such calls from a nearby location, the majority finds that management's use of the audio surveillance phone feature was not a continuation of the practice of observing BERS A/B customer calls because management did not routinely observe such calls, The majority also states that the Commonwealth could have lawfully investigated the data indicating potential rules and standards violations by having managers position themselves nearby the identified BERS A/B staff to listen to those employees' customer service calls. It is interesting that the majority first proclaims that the Commonwealth's use of the telephone feature as opposed to the naked ear, to listen to employee customer service calls **was not** a continuation of the parties' stipulated practice that management could learn of improper customer service by management listening to such calls, and then later asserts that it would have been **lawful** for management to listen to staff customer service calls by positioning themselves nearby despite, as the majority previously asserted, no evidence of a Commonwealth practice of having management routinely listen to BERS A/B staff from a nearby location. I agree with the majority's latter assertion that MassHealth could have had managers listen to employee customer service calls because the parties' stipulation recognizes the

practice of management's right to do so regardless of the number of times managers had previously listened to such calls.

How managers listened to employee phone calls may have changed, but the practice of management having the undisputed ability to listen to calls to discern if inappropriate conduct was occurring remained the same and, as more fully explained later, a public sector employer's use of a more efficient and dependable means of enforcing work rules is not a violation of the Law. Therefore, the evidence demonstrates that no change in practice occurred in February 2019 because it was always known that managers could listen to employee customer service calls and that BERS A/B employees could be subject to disciplinary action for inappropriate conduct on such calls based on management observations.

Second, for several reasons the contractual provision regarding technological resources, which states "[t]he terms of this section do not alter current practice regarding employee use of telephones," cannot be relied upon to support the conclusion that a new practice was implemented.[15] The majority states that the contractual language gives credence to their view that the employer was not permitted to use the phone feature to listen in on employee calls without first bargaining with the Union because the "current

[15] The Union cites to this language in support of its argument that the CBA specifically reserves the Union's bargaining rights related to technology issues. Specifically, the Union asserts that "[t]he current practice regarding employee use of telephones, or one of the current practices, was that MassHealth was not listening to employee phone calls when the agreement was executed in 2017." Similarly, for the reasons explained above, the Union's self-serving statement should not be relied upon as evidence that the meaning and intent of the provision included the "practice" as described by the Union.

practice" means phone calls were not monitored. However, such a finding is not supported by the evidence in this case.

Two stipulations in the record clearly demonstrate that MassHealth has monitored employee phone calls and has always retained the right to do so. The first is that the parties expressly stipulated that for the duration that BERS A/B staff are logged in to their work computers, the system tracks (or monitors[16]) if staff are busy on a call or available to take a call, as well as other status indicators and data. The second stipulation, as noted previously, is that the parties agree that managers can monitor BERS A/B staff customer service calls by positioning themselves nearby BERS A/B staff as customer service calls take place, regardless of whether staff know or do not know they are being monitored. The fact that the parties agree that MassHealth never-before had used a phone feature to monitor employee-customer calls does not change the fact that employee customer service calls have always been subject to being monitored, including but not limited to, managers listening to phone calls. Therefore, the majority should not rely on a single stipulation concerning the phone feature used in this case to define the meaning of "monitor" nor should the majority rely upon the meaning it has assigned to the contractual language it cites, i.e., "not alter current practice regarding employee use of telephones."

Without a specific stipulation from the parties on the contractual language's meaning or a stipulation on the bargaining history and intent of the language or other evidence submitted by the parties, the CERB is left to guess as to what was meant or

[16] "Monitor" is "to watch, keep track of, or check usually for a special purpose." See Merriam-Webster Online Dictionary at *https://www.merriam-webster.com/dictionary/monitor* (last visited February 15, 2021).

intended at the time the language was negotiated and ultimately agreed upon. Does the phrase "current practice," which is singular, encompass one particular practice or several "practices" (which the Union admits there are) regarding employee use of telephones? Does the phrase "**employee use** of telephones" specifically mean that the practice is limited to how employees use the telephone? For example, are employees permitted to use their phones for personal calls or are they responsible for the cost of repair or replacement of a phone if they damage it, or does "employee use of telephones" include how management oversees that use? The language cited by the majority to stand for the proposition that "current practice" means phone calls are not monitored and thus, employees had a reasonable expectation that MassHealth was required to bargain with the Union prior to using the phone feature at issue, is not supported by the record. Both parties had ample opportunity to submit evidence on bargaining history or other facts and circumstances that would shed light on why the language was included in the CBA and that would help the CERB define the meaning and intent of the words "current practice." For whatever reason, the parties chose not to submit such evidence. Therefore, the majority should refrain from giving the language its own meaning and should not now rely on the CBA provision to support its belief that the contract prohibits management from monitoring employee customer service phone calls.

Third, even if the practice in this case is narrowly defined as "potentially inappropriate conduct on calls by BERS A/Bs has come to the attention of managers by managers hearing such calls from a nearby location," BERS A/B staff could not have reasonably expected that management's verification of information, which indicated conduct in violation of existing rules and standards, would be limited to a manager

physically placing herself near a BERS A/B to confirm misconduct. There is nothing reasonable about a BERS A/B's expectation that he or she can participate in wrongdoing and then later only be held accountable if a manager had learned of the misconduct by physically positioning themselves close enough to listen to the employee's unacceptable behavior.

It is undisputed that employees know that they are subject to disciplinary action for inappropriate customer service calls if a manager hears the employee engaging in such conduct. Thus, implicitly, employees are aware that if they choose not to correctly perform their customer service responsibilities 39% to 100% of the time, they run the risk of discipline if management hears their improper conduct.[17] The common factor found in all

[17] The majority comments in a footnote that the Commonwealth has many ways to accomplish the goal of employees rendering proper customer service other than disciplining employees for their failure to perform the job duties for which they are being paid. The majority suggests that MassHealth could have continued its investigation and simultaneously bargained over the phone feature that management planned to use to better listen in on the BERS A/Bs that data indicated were potentially violating recognized customer service call standards. The majority suggested in another footnote that the investigation could have lawfully continued had management simply placed managers in proximity to the suspected rules offenders to listen to their calls instead of using a more efficient method that would allow management to better hear the customer service calls.

As more fully explained later in this dissent, a public sector employer need not bargain in advance with a union over management's plans to use during an ongoing investigation into employee misconduct, a new investigatory tool that assists the employer with better enforcement of existing rules, provided that no changes to underlying conditions occur. Thus, the Commonwealth was under no legal obligation to bargain with the Union over its use of a more efficient way to listen to customer service calls and simultaneously continue its investigation of BERS A/B staff suspected of wrongdoing by using managers placed physically nearby BERS A/Bs to listen to customer service calls.

Furthermore, the majority's opinion that "**there are many ways**…" to accomplish the goal of improving BERS A/Bs customer service "…**besides the one MassHealth chose**", i.e., disciplinary action (**bold** added for emphasis), goes against longstanding CERB precedent that the CERB should not opine on how the employer should or could have addressed a disciplinary matter. "It is not the function of the [Board] to substitute

situations where the evidence establishes that an employee failed to properly perform her job, regardless of whether it was heard by a manager standing close by or listening in on the call, is that the employee engaged in a prohibited act that they knew could result in discipline.[18] Therefore, it is counterintuitive to allow BERS A/Bs to escape corrective action after having been directly observed engaging in wrongful conduct simply because the employees' "expectation," an unreasonable expectation, was that their improper

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our judgement for that of the employer in matters of discipline." Town of Natick, , 7 MLC 1048, 1058, MUP-2883 (May 30, 1980) (citing Watuppa Oil Co., 1 MLC 1032 (1975)).

[18] The majority in several places points out that the conduct for which the BERS A/B staff were disciplined are Commonwealth "allegations" and that the Union and BERS A/B staff dispute these allegations. First, the majority states that "According to the Commonwealth's brief …" BERS A/B staff were issued different levels of disciplinary suspensions based on the percentage of calls an employee failed to assist a caller seeking assistance. While this is an accurate statement by the majority, it is important to note that the unrebutted evidence in this case is that 11 BERS A/Bs were disciplined for conduct that violated established rules. The majority also notes that a particular employee "NK" was disciplined for allegedly being rude; however, the disciplinary letter is not an allegation. The letter is a determination after a full investigation that NK engaged in the conduct described therein and is in the record as unrebutted evidence that NK was disciplined because she was found to have engaged in the misconduct described,

Twice the majority states that the Union's brief notes that the conduct described in the discipline letters is what MassHealth alleges happened and states that both the Union and the employees dispute these allegations. It is accurate that the Union's brief states this in a footnote, but the Union also states in the same footnote that the issue before the CERB is whether MassHealth violated the Law by making a unilateral change, not whether the employees engaged in conduct in violation of rules and standards. Although the Union asserts that it disputes MassHealth's disciplinary findings, it has produced zero evidence that it did or is contesting those findings. Pursuant to Articles 23 and 23A of the parties' collective bargaining agreement, the Union may grieve and if it chooses, arbitrate the disciplinary decisions. As it acknowledged in its May 24, 2019 filing of the Charge of Prohibited Practice, the Union did not file a grievance. The Union can say that it is disputing MassHealth's disciplinary findings and the majority can note this, but without any evidence that the conduct for which the employees were disciplined remains in dispute, not the legality of the unilateral change at issue in this case, the facts are that the unrebutted evidence in this case is that BERS A/Bs failed to perform a primary job function 39 to 100 percent of the time and were disciplined for such failure.

behavior could only be discovered by a manager physically situated nearby at the time the BERS A/B was engaged in such behavior.

The fourth reason for my dissent, as argued by the Commonwealth, is that the CERB has consistently recognized that an employer, such as MassHealth, does not violate the Law when, without bargaining, it implements a new technique to investigate potential rule violations or to ensure compliance with established standards, and does so without changing underlying conditions. An employer's implementation of never-before-used investigation tools to enforce existing rules, without first providing the union notice and an opportunity to bargain, is not a violation of the Law "provided that the employer's action does not change underlying conditions of employment." Duxbury School Committee 25 MLC 22, 24, MUP-1446 (August 7, 1998) (citing Board of Trustees of the University of Massachusetts, 7 MLC 1577, SUP-2178 (February 8, 1980) (UMass's unilateral implementation of a disclosure requirement for professors seeking outside consulting employment was a lawful change because it allowed the University to better enforce existing standards and conflicts of interest rules)). When examining whether an employer unlawfully changed how it monitors compliance with its rules, the CERB looks at whether the underlying requirement that the change is meant to better enforce remains the same. Town of Wilmington, 9 MLC 1694, MUP-4688 (March 15, 1983) (CERB reversing hearing officer decision that the Town violated the Law when it implemented a requirement that absent fire fighters complete a written sickness/injury/off-duty report). The CERB has found that an employer can unilaterally implement an alternate method to administer current work rules if the possible consequences for a rule violation are the same as they were prior to implementation of such method. Brookline School Committee,

7 MLC 1185, MUP-3560 (July 24, 1980) (CERB reversing hearing officer decision that School Committee unlawfully implemented a requirement that custodians appearing unfit for work would be sent to the Health Center for an evaluation).

I agree with the Commonwealth's reliance on Duxbury, supra, to support its position that it did not violate the Law when it unilaterally implemented use of a surveillance feature on its telephone system to investigate possible employee rule violations. The facts in Duxbury are clearly analogous to those in the present matter. Other than the type of surveillance used in Duxbury and the type used by MassHealth, the facts in each case are indistinguishable. Both employers became aware of information that indicated potential employee misconduct, which in both cases neither the employees nor the Union knew was in the employer's possession. Management in both cases subsequently decided to employ covert surveillance to determine if employees were adhering to existing work standards and, like the initial information obtained by each employer, neither the employees nor the Union were aware that the employees were under surveillance. Finally, similar to the employer's use of surveillance in Duxbury to investigate employee compliance with its time-keeping standards after it became aware of information indicating potential infractions, MassHealth's use of surveillance was limited to determining employee compliance with established customer service call standards after data it obtained called into question the employees' compliance, and nothing in the record indicates that MassHealth intends to continue the surveillance beyond use in a specific investigation. Given the similarities between Duxbury as well as

other comparable cases,[19] and the present matter, the CERB should follow its precedent and conclude that MassHealth's use of covert surveillance did not violate the Law where the use of the surveillance employed was simply a more efficient and dependable means of enforcing existing work rules and did not change an underlying condition of employment, and was limited to investigating a specific concern that employees were actively engaged in conduct that violated established customer service standards.

The majority declines to follow Duxbury and instead relies on City of Springfield, 41 MLC 383, MUP-12-2466 (June 30, 2015), as well as cases involving management unilateral decisions related to employers using medical examinations for already

[19] In another case, the CERB concluded that although a town at no time in the past required fire fighters upon their return from an absence to complete a written report detailing the reasons why they were absent, the newly required report did not change the underlying condition that the report enabled the town to better enforce a work rule, which was compliance with existing sick leave use and attendance standards. Town of Wilmington, 9 MLC 1694.Although MassHealth never before used a feature in its telephone system to listen in on employee customer service calls, similar to the town's use of its newly required written report in Wilmington, the underlying condition of compliance with existing customer service call standards, which the telephone feature was used to better enforce, never changed.

In another CERB ruling upholding an employer's unilateral change to how the employer enforced existing standards, the CERB found important the fact that the possible consequences for non-compliance with the established standards did not change after a more effective means to enforce compliance was implemented. In Brookline School Committee, 7 MLC 1185the CERB held that the School Committee did not violate the Law when it unilaterally implemented a new requirement that management send any potentially unfit custodians directly to its health center for a medical evaluation instead of sending the employees, as it had historically done, to the Director of the School Plant for him to handle the situation. The CERB found no violation because the requirement was merely an alternate means for enforcing established fitness for duty standards and because the custodians faced the same possible consequences as those they faced prior to the new requirement. Likewise, the possible consequences BERS A/B employees faced did not change after MassHealth's implementation of an alternate means to enforce existing standards. Prior to MassHealth's use of the telephone feature, BERS A/B employees were subject to disciplinary action for inappropriate customer service calls, and this remained the same after MassHealth used the telephone feature.

suspended employees, to find an unlawful change by MassHealth. The majority states that the employer in Duxbury had "openly" installed the surveillance camera and, as the CERB found in City of Springfield, the majority believes that there is a significant difference between an employer openly installing a surveillance device like the one in Duxbury and the secret installation of GPS devices on vehicles like those in City of Springfield, and the use of a phone feature like the one activated by MassHealth to covertly verify employee misconduct. However, the CERB's motion to dismiss ruling in Duxbury and its subsequent full decision demonstrate that the employer did use a covertly installed surveillance camera in its investigation into ongoing employee misconduct and that, in ruling in favor of the employer, the CERB did implicitly approve of the surveillance because it was used during an investigation.

In its ruling on the motion to dismiss in Duxbury, the CERB specifically highlighted that an arbitrator refused to overturn the custodians' terminations based on the fact that the employer's use of the surveillance camera to monitor and observe employees did not occur with full knowledge of the employees or the union. Duxbury School Committee, 23 MLC at 165-166..[20] [21] In its full decision in Duxbury, the CERB expressly notes in a

[20] The CERB in Duxbury refused to grant the employer's motion in part because the underlying arbitration award did not address another part of the CBA that the union had relied upon for its charge that the employer unlawfully repudiated the parties' contract. Id.

[21] The majority also relies on language in the Duxbury motion ruling to reject the Commonwealth's argument that an employer is under no obligation to bargain over changes in terms and conditions of employment arising out of investigations simply because they occur in an investigatory context. Specifically, the majority points to the CERB statement in Duxbury that "we have not found that employers may implement surveillance measures generally without bargaining with the employees' exclusive representatives to resolution or impasse." Duxbury School Committee, 23 MLC at 166. However, the CERB in its ruling also expressly stated that it was not closing the door on

footnote that at the arbitration the Union had proposed the following issue for the arbitrator to decide "… whether the employer violated the collective bargaining agreement by conducting undercover monitoring, video observation and investigation of custodians without notifying them." Duxbury School Committee 25 MLC at 23. Furthermore, the only facts discussed in the case concerning the installation of the surveillance camera is the fact that "[a] stationary video camera was subsequently installed for surveillance of the parking lot where custodians park their cars." Id.

Despite the aforementioned Duxbury fact being the only fact in that case's record regarding the camera's installation, which neither identifies its location nor whether it was visible, the majority insists that the Hearing Officer in the City of Springfield case made a valid distinction between that case and Duxbury because of the difference between the Duxbury School Committee installing a single surveillance camera in an "open and fixed location" where employees could see the device versus the Springfield "surreptitious" installation of GPS devices in city vehicles. While such a distinction might have some merit in another case, it was an incorrect distinction in the Springfield case, and has no relevance in the present matter, where the Duxbury record does not state that the surveillance camera was installed openly or that it was visible to employees, or even that it remained in the same location for the duration of the surveillance, i.e., "fixed." What is

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the possibility that the facts in the case may warrant a finding that an employer can implement surveillance measures without first bargaining with union representatives. In footnote 4 of that decision, the CERB informed the parties that "We note that, by issuing a complaint and denying the School Committee's motion to dismiss, we have not decided that implementing surveillance under the facts of this case is a mandatory subject of bargaining. Rather, we have decided that the matter requires a full consideration of the facts to determine whether the School Committee violated the Law in the manner alleged by the Union." Id.

clear in the Duxbury record is that neither the Union nor custodians knew of the camera's existence, that the employees were unknowingly being monitored, and that the surveillance of the custodians occurred from multiple locations;[22] thus, the School Committee did engage in covert, or "surreptitious," use of a surveillance device. Based upon the specific references to the arbitration award and the single factual statement that a surveillance video camera was installed with no factual finding as to how it was installed, openly or clandestinely, the CERB in Duxbury clearly upheld the employer's surreptitious use of surveillance during an investigation into employee misconduct as a more efficient means of enforcing existing work rules. Furthermore, in accordance with its prior denial of the School Committee's motion to dismiss where the CERB stated that the Danvers balancing test required a full consideration of the facts to determine whether the School Committee violated the Law, the CERB in Duxbury subsequently found after its complete examination of the facts that the surveillance was not subject to mandatory bargaining implicitly in part because the surveillance took place during an investigation. [23]

[22] The Duxbury Findings of Fact includes the installation of a surveillance camera to monitor the parking lot where custodians parked their cars, and makes no reference to the location or visibility of the camera other than the fact that the Union and employees were completely unaware that custodians were under surveillance. The case also includes a factual finding that covert surveillance was conducted on multiple days by a private investigator using a handheld video camera, without any reference to his location or visibility other than the fact that again the Union and custodians were completely unaware of his existence and that the investigator was recording their movements. Duxbury School Committee 25 MLC at 23.

[23] The majority finds a material difference between the suspected "criminal activity" of "time theft" being investigated in Duxbury and what it characterizes as the investigation of mere "unsatisfactory customer service" involved in the present matter. The majority's description of the disciplined BERS A/Bs' conduct grossly understates the misconduct. The BERS A/B discipline letters describe how many calls each employee received and

The CERB in Duxbury concluded that "[b]ecause the use of the surveillance was limited to recording the custodians' departure times and was in response to a specific concern about the accuracy of the existing method of timekeeping, we find that the School Committee's use of video surveillance in this case was a more efficient and dependable means of enforcing existing work rules and did not affect an underlying term or condition of employment." Duxbury School Committee, 25 MLC at 24. Although the CERB in

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how many of those calls did not receive any assistance, or improper assistance. Below is a summary of the level of non-job performance by each of the eleven (11) BERS A/Bs:

1. On five separate days in Feb. 2019, employee provided no assistance at all to 20 out of 51 callers (39%)
2. On five separate days in Feb. and Mar. 2019, employee provided no assistance at all to 14 out of 32 callers (44%).
3. On four separate days in Feb. and Mar. 2019, employee provided no assistance at all to 13 out of 32 callers (41%)
4. On five separate days in Feb. and Mar. 2019, employee provided no assistance at all to 17 out of 32 callers (52%)
5. On three separate days in Apr. 2019, employee provided no assistance at all to 5 out of 15 callers and minimal service to one other call (40%)
6. On three separate dates in Apr. 2019, employee provided no customer service to 6 out of 11 callers and failed to assist one other call at all (63%)
7. On two separate dates in Apr. 2019, employee provided no assistance at all to 5 out of 9 callers (55%)
8. On two separate dates in Apr. 2019, employee provided no assistance at all to 17 out of 19 callers (89%)
9. On two separate dates in Feb. 2019, employee provided no assistance at all to 38 out of 38 callers (100%)
10. On four separate dates in Feb. and Mar. 2019, employee provided no assistance at all to 22 out of 39 callers (56%)
11. On three separate dates in Feb. and Mar. 2019, employee provided no assistance at all to 27 out of 29 callers (93%)

The description of the conduct in each of the BERS A/B discipline letters is much more akin to the misconduct of the Duxbury employees than the majority suggests. It is undisputed that a primary function of the BERS A/Bs is to answer calls from members of the public seeking benefits assistance and to help those individuals. Based on the contents of the disciplinary letters, the BERS A/Bs did not merely give "unsatisfactory customer service," they in fact received pay for time that they did not perform their primary job responsibilities just like the custodians in Duxbury who left work early but received pay for time that they did not perform their job duties.

Duxbury did not expressly state, "we find no violation of the Law in this case because the surveillance was used during the course of an investigation into employee misconduct," the CERB's ultimate finding implies that the employer's use of surveillance was not a violation of the Law in part because the surveillance was used during the course of an investigation into violations of existing rules.

The CERB expressly stated "we find … use of surveillance in this case was merely a more efficient and dependable means of enforcing existing work rules …" because its use "… was in response to a specific concern…", which was employee misconduct. Duxbury School Committee, 25 MLC at 24 (emphasis added). An employer need not ever enforce an existing rule if it is never violated. How does an employer enforce existing rules if it becomes aware of a specific concern indicating a possible rule violation? It investigates whether an employee is violating the rule so that it may take action to enforce the rule. That is precisely what happened in Duxbury and the CERB implicitly found that an employer's use of surveillance during its investigation so that it could enforce existing work rules is not a violation of the Law. There is little difference between what the Commonwealth did in the present matter and what the School Committee did in Duxbury. Both employers obtained information that indicated possible employee misconduct, and both employed surveillance techniques for a limited duration to enforce existing rules. In summary, Duxbury is not as distinguishable as the majority suggests and is in fact more analogous to the present matter than City of Springfield.

A review of the Hearing Officer's rendition of the facts in City of Springfield, as adopted by the CERB in that case's decision, shows very little commonality to the facts in the present matter. The majority stresses as part of its reliance on City of Springfield

that the present matter is more akin to Springfield rather than Duxbury because like Springfield, MassHealth clandestinely installed a device that for the first time provided the employer with the ability to have continuous access to information about employee job performance and productivity that it did not previously have. Unlike the current case and Duxbury, nothing in City of Springfield establishes that the employer installed the surveillance devices in response to specific information indicating ongoing employee misconduct. Looking deeper at the employer's intended use of the surveillance devices in City of Springfield also reveals nothing to suggest that the employer intended to limit such use for the purposes of investigating a pre-existing specific concern, which is precisely one of the reasons why the CERB upheld the employer's actions in Duxbury. These facts, coupled with the parties' stipulation in the present matter that MassHealth has only used the phone feature to monitor employee customer service calls the one time during its investigation into employee misconduct,[24] demonstrate that the majority's Springfield-esque concern about MassHealth now having continuous access to troves of employee information is purely hypothetical and is simply not supported by the record in this case. These distinctions are significant and, where the Commonwealth in the present matter has clearly demonstrated that its use of real-time surveillance was in response to undisputed data indicating possible misconduct and the surveillance was limited to investigating such conduct, reliance on City of Springfield, which contains none of these facts, is a mistake, especially when Duxbury is clearly analogous to the present matter and calls for a different result than the one espoused by the majority.

[24] In the July 7, 2020 Stipulated Record, the parties agree that "To date, listening in on calls through the phone system has only been used in the course of the investigation that commenced in February 2019."

For all of the reasons set forth above, I respectfully dissent, and I am compelled to find that the Commonwealth did not violate the Law. To hold otherwise does nothing more than unjustly restrict an employer's ability to better enforce existing work rules and address ongoing employee violations more effectively, and also sends the message to employees engaging in prohibited conduct that they need not fear disciplinary action because they will have ample time to avoid detection now that employers must reveal to union representatives exactly what investigatory tools they plan to use prior to starting an investigation into inappropriate workplace behavior.

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Kelly Strong, CERB Member

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

The Commonwealth Employment Relations Board (CERB) has held that the Commonwealth of Massachusetts has violated Section 10(a)(5), and derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by unilaterally changing terms and conditions of employment of Benefits Eligibility and Referral Social Workers A/B (BERS A/Bs) at MassHealth by listening in on BERS A/Bs' phone calls with members of the public using a previously-unused feature of MassHealth's phone system without first giving SEIU, Local 509 prior notice and an opportunity to bargain. The Commonwealth posts this Notice to Employees in compliance with the CERB's order.

Section 2 of M.G.L. Chapter 150E gives public employees the following rights: to engage in self-organization; to form, join or assist any union; to bargain collectively through representatives of their own choosing; to act together for the purpose of collective bargaining or other mutual aid or protection; and to refrain from all of the above.

WE WILL NOT fail to bargain in good faith with SEIU, Local 509 by unilaterally changing terms and conditions of employment by listening in on BERS A/Bs' phone calls using a previously-unused feature of MassHealth's phone system without first giving SEIU, Local 509 prior notice and an opportunity to bargain.

WE WILL NOT otherwise interfere with, restrain or coerce employees in the exercise of their rights guaranteed under the Law;

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

- Cease and desist from unilaterally changing BERS A/Bs' terms and conditions of employment by listening in on bargaining unit members' phone calls using a previously-unused feature of MassHealth's phone system.
- Immediately rescind the suspensions that MassHealth imposed on BERS A/Bs as a result of the Commonwealth's unilateral conduct and make the affected BERS A/Bs whole for any loss of wages or benefits that they may have suffered, plus interest on any sums owed at the rate specified in M.G.L. c. 231, § 6I, compounded quarterly.
- Upon request by SEIU, Local 509, bargain in good faith to resolution or impasse over the decision and the impacts of the decision to listen in on BERS A/Bs' phone calls using a feature of MassHealth's phone system.

_____ _____
Commonwealth of Massachusetts Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED
This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132.)