COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	
COMMONWEALTH OF MASSACHUSETTS, SECRETARY OF ADMINISTRATION AND FINANCE	*	Case No. SUP-19-7487
and	*	
	*	Date issued: January 28, 2021
ALLIANCE, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 1368/ SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO	*	

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Patrick G. Butler, Esq.	-	Representing Commonwealth of Massachusetts, Secretary of Administration and Finance
Joseph L. DeLorey, Esq.	-	Representing Alliance, American Federation of State, County, and Municipal Employees, Local 1368/ Service Employees International Union (SEIU), AFL-CIO

HEARING OFFICER'S DECISION

SUMMARY

The issue in this case is whether the Commonwealth of Massachusetts (Commonwealth), Secretary of Administration and Finance, Department of Youth Services (DYS or Department) (collectively Employer) violated Section 10(a)(5) and,

derivatively, Section 10(a)(1) of G.L. c. 150E (the Law) by repudiating an October 30, 2017 memorandum of understanding (MOU) between it and the Alliance, American Federation of State, County, and Municipal Employees (AFSCME), Local 1368/ Service Employees International Union (SEIU), Local 888, AFL-CIO (collectively Union, AFSCME-SEIU, or Alliance). For the reasons explained below, I find that the Employer did not violate the Law by repudiating the MOU.

STATEMENT OF THE CASE

On July 29, 2019, the Union filed a Charge of Prohibited Practice (Charge) with the Department of Labor Relations (DLR), alleging that the Employer had engaged in prohibited practices within the meaning of Section 10(a)(5) by repudiating the MOU. On December 2, 2019, a DLR Investigator conducted an investigation into the Charge. On December 13, 2019, the Investigator issued a Complaint of Prohibited Practice (Complaint), alleging that the Employer had violated Section 10(a)(5) and, derivatively, Section 10(a)(1)[1] of the Law by repudiating the MOU. On December 17, 2019, the Employer filed its Answer to the Complaint. On August 19, 2020, I conducted a remote hearing via WebEx[2] at which both parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Both the Employer and the Union filed their post-hearing briefs on November 3, 2020.

ADMISSIONS OF FACT

The Employer admitted to the following facts:

[1] At the investigation, the Union added the derivative Section 10(a)(1) allegation to its Charge.

[2] I conducted the hearing remotely pursuant to the Governor Baker's teleworking directive to executive branch employees. Neither party objected to participating remotely in the hearing via WebEx.

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 Unit 2.

3. The Union, a member of the Alliance, is an employee organization within the meaning of Section 1 of the Law and represents certain Group Workers employed in the DYS.

STIPULATIONS OF FACT

The parties stipulated to the following facts:

1. The [Department] is a public employer within the meaning of Section 1 of the Law.

2. The Union is an employee organization within the meaning of Section 1 of the Law.

3. The [Union] and the Department are parties to a [collective bargaining agreement (Contract or Agreement)] signed on June 30, 2017, and in effect until July 1, 2020.

4. Article 14 of the Contract is [titled] "Seniority, Transfers, Promotions, Reassignments, Filling Vacancies, and New Positions." It stated in part:

> In the event it becomes necessary for the Employer to involuntarily transfer or reassign an employee, the Employer will provide the employee at least ten (10) working days prior written notice, except in cases of emergencies involving the protection of the property of the Commonwealth or involving the health and safety to those persons whose care and/or custody have been entrusted to the Commonwealth. In emergency situations management shall, at the Union's request, provide the reason(s) for the transfer/reassignment. However, a declaration of said emergency shall not be used for the purpose of avoiding the payment of overtime. The Employer shall use the joint criteria of ability to do the job and inverse seniority in determining which of the potentially affected employees shall be transferred/reassigned.

5. The Goss Facility of the Department is located in the Southeast Region in Taunton, Massachusetts.

6. On October 30, 2017, the Department and the Union entered into a [MOU].

7. The purpose of the MOU was to clarify the "duties of the Group Workers who are asked to work their assigned shift in another DYS residential program located in the same facility in order to ensure adequate staff coverage[.]"

8. On July 29, 2019, the Union filed this Charge.

FINDINGS OF FACT

The Collective Bargaining Agreement

The parties' Contract was effective from June 1, 2017 until June 30, 2020. Article 7, Section 1 of the Contract pertained to "Scheduled Hours, Workweek and Workday" and stated in pertinent part:

> A. Except as otherwise specified in this Agreement, the regular hours of work for full-time employees shall be thirty-seven and one-half (37.5) hours per week excluding meal periods or forty (40) hours per week excluding meal periods, as has been established for that job title at the particular job location. Any employee whose regular workweek has averaged more than forty (40) hours excluding meal periods in the past shall have a forty (40) hour workweek….
>
> C. When the Employer desires to change the work schedule of employee(s) the Employer shall, whenever practicable, solicit volunteers from among the group of potentially affected employees, and select from among the qualified volunteers.
>
> The Employer shall, except in emergency situations, give any affected employee whose schedule is being involuntarily changed ten (10) days written notice of such contemplated change. The provisions of this subsection shall not be used for the purpose of avoiding the payment of overtime….

Article 14 of the Contract, as stipulated above, pertained to "Seniority, Transfers, Promotions, Reassignments, Filling of Vacancies[,] and New Positions." In addition to the above-stipulated portion, Article 14, Sections 4(A) and 4(B), respectively, defined Transfers and Reassignments:

> A. Transfers
>
> 1. For the purpose of this Section[,] a transfer shall be defined as:

> a. a change from one work unit or work facility to another work unit or work facility in the same Department/Agency without any change in classification, or
>
> b. a substantial change in duties without a change of work unit or facility as long as the requirements for appointment are not substantially different.
>
> ….
>
> B. Reassignment
>
> 1. For the purpose of this [S]ection[,] a reassignment shall be defined as a change involving different days off, shift or work location, but without a substantial change in duties and without any change in work unit or classification.
>
> ….

Article 14, Section 4(E) also defined the term Seniority, which stated in pertinent part: "…. For the purpose of this Section, seniority shall be defined as length of service in the Department/Agency. If seniority in the Department/Agency is equal, then length of state service will be used to determine the more senior employee…."

DYS Personnel

At some point in 2015, the Employer hired Margaret Chow-Menzer (Chow-Menzer) as DYS Deputy Commissioner of Administration and Finance whose duties include participating in labor negotiations and attending monthly labor-management meetings with Union leadership. The Employer hired John Efstratios (Efstratios) 29 years ago. Since January 20, 2015, the Employer has assigned Efstratios to work at Goss as DYS Facility Administrator whose duties include coordinating, implementing, supervising, and overseeing administrative, maintenance, security, and clinical operations, and supervising members of the bargaining unit. At all relevant times, John Pina (Pina) was the Program Director for Detention at Goss, Joseph Blett (Blett) was the Program Director

for Treatment at Goss, and Tom Black (Black) was the Program Director of Revocation at Goss.

The Employer hired Daniel Morse (Morse) "approximately" 14 years ago at DYS.[3] At some point in 2015, Morse became Union President and served in that position "a little over four years."[4] During Morse's tenure as Union President, he participated in labor negotiations and attended monthly labor-management meetings with the Employer. As Union President, Morse also "presided" over bargaining unit members employed by DYS in all five regions, including the Southeast Region. Beginning 23 years ago, the Employer hired Clinton Silva (Silva) at DYS. At all relevant times, Silva has worked as a Group Worker II at Goss and had served as Union Vice President and Chief Steward for the Southeast Region. At all relevant times, Paul Faria (Faria) was a Union staff representative who was succeeded by Morse as Union President.

The Goss Facility

DYS operates facilities for certain youths in several geographic regions within the Commonwealth, including the Southeast Region in Taunton where the Goss facility is located. Each facility provides three separate, co-located[5] residential programs: Detention, Treatment, and Revocation. At Goss, there are two Detention programs, one Treatment program, and one Revocation program. At all relevant times, each facility

[3] The record does not reflect Morse's job title(s) during his employment at DYS.

[4] On July 1, 2019, Morse became a Union staff representative.

[5] Co-located programs are programs that operate within the same facility.

employed Group Workers I, II and III[6] whose general job duties included providing oversight, safety, and security for their assigned programs. In addition, Group Workers II and III supervised Group Workers I.

Staffing Levels at Goss

At all relevant times, there were approximately 30-45 youths who were committed by the Commonwealth to complete one of three residential programs at Goss. At all relevant times, the Employer assigned Group Workers to a specific, co-located program on one of three shifts. The Employer also established minimum staffing levels or staff-to-youth "ratios" for each program on each shift. The ratio for the first shift was always 1:4, the second shift ratio was usually 1:5, and the third shift ratio was usually 1:7. The Employer also assigned at least one supervisor (i.e., Group Worker II or III) to each program per shift.

Prior to 2017, when the Employer experienced staffing levels that fell below the minimum shift ratios at Goss, it responded by first seeking qualified volunteers to work the open shift. For example, if there was an unfilled assignment by a Group Worker I in Treatment on the third shift, the Employer would first ask qualified Group Workers assigned to the third shift in Detention or Revocation to volunteer and cover the open shift on overtime (i.e., primary overtime list). If no one volunteered from the primary overtime list, the Employer would refer to its secondary and tertiary overtime lists which comprised certain employees who agreed to work the open shift on voluntary overtime, such as qualified staff from other regions and other programs, and other managers (e.g., program

[6] In June or July of 2019, the Employer changed the job titles of Group Workers I, II, and III to Juvenile Justice Youth Developmental Specialists (JJYDS) I, II, and III.

directors and assistant program directors). If the Employer exhausted its overtime lists without securing a volunteer, it would next determine if it could assign a Group Worker I to work the open shift on an involuntary overtime basis. If the Employer was still unable to assign a Group Worker I on involuntary overtime due to maximum hourly restrictions,[7] it would determine who was the least senior Group Worker I from one of the two co-located programs (e.g., Detention) and "force" that person via inverse seniority to involuntarily reassign and work the unfilled shift. If a subsequent Group Worker I shortage occurred in Treatment and the Employer was again unable to fill the opening on a voluntary or involuntary overtime basis, it would force the same least senior Group Worker I from Detention to work the unfilled shift without rotating to Revocation to force the next least senior Group Worker I from that program.

The MOU

Following a quarterly[8] statewide labor-management meeting either in the summer or early fall of 2016, the Union raised issues with the Employer about staffing levels, forced overtime, and recruitment and retention of Group Workers at Goss. To address these issues, Chow-Menzer, Morse, and Faria[9] met monthly, beginning in the fall of 2016, to negotiate the terms of the MOU. During that time, the parties exchanged proposals and

[7] Morse gave unrebutted testimony that in the absence of an emergency as defined in the Contract, Group Workers "can't work more than 16 hours straight."

[8] Chow-Menzer testified that the labor-management meetings occurred "every month or every quarter." Morse testified that these meetings occurred "usually quarterly." Based on the overlapping testimonies of both Chow-Menzer and Morse on this point, I find that the labor-management meetings occurred quarterly.

[9] Faria did not testify at the hearing.

counterproposals, and negotiated "at least four different versions of the MOU" before signing it.[10] While the parties discussed the terms "inverse seniority" and "rotation" during their negotiations, at no time during those negotiations did they ever define those terms or include definitions for those terms in the MOU.[11]

[10] Chow-Menzer gave unrebutted testimony about the parties' exchange of proposals and counter proposals, and about their creation of four draft versions of the MOU before agreeing to the final version. Neither party offered into evidence the proposals, counterproposals, or the four draft versions of the MOU.

[11] Chow-Menzer testified that that while the parties never defined the term "inverse seniority" during their negotiations, it "was a language that both parties agreed to without there being specific discussion." She also testified that inverse seniority meant that when there was a staff shortage the Employer would first force the least senior person to fill the shortage, place that person at the bottom of the list for purposes of the next involuntary reassignment, and then go to the next least senior person at the top of the list to fill the next shortage. She testified further that the "Department's reasons for applying inverse seniority in the MOU was to be reflective of the process we were already implementing with regard to mandatory overtime" and that its "intent was to address staff shortage[,]" to try "to reduce the amount of mandatory overtime that occurred during MOU negotiations[,]" and "to avoid the stress and burden of always going to the least senior individual until there's a new hire[.]"

Concerning the rotation method, Chow-Menzer testified that the parties intended for the MOU to allow the Employer to use the rotation system when applying inverse seniority to force the least senior person on involuntary assignment. Similarly, Efstratios testified that "since the MOU" the Employer has always applied "forces" via inverse seniority rotation "to ensure that the same person was not forced day after day[.]" He also testified that between October 30, 2017 and 2018, the Union never raised the issue of rotation with him.

In contrast, Morse testified that "the purpose of the MOU was to broaden the pool or selection process for people who could be moved from program to program" and "within [their] own unit." The purpose was also "for the safety and security of the programs" and that rotation meant that once the Employer "forced an employee, he or she went to the bottom of the list." While Morse testified that he understood "that the Employer would use inverse seniority to determine transfers," it was not his understanding that inverse seniority would "equal utilizing a rotating list or a rotating program." He testified further that prior to the MOU, the Employer's "ability to move people from program-to-program without giving 10 days' notice" per the Contract "didn't exist" and that the Union raised these issues during the parties' MOU negotiations. Last, Morse testified that while the Employer's use of "a rotating list is the same as rotating between programs[,]" rotation is

On October 30, 2017, the parties signed the MOU which stated, in pertinent part:

> WHEREAS, the [Department] and AFSCME, hereafter collectively referred to as "the Parties," acknowledge the shared value associated with enhanced service delivery and improved operational efficiency.
>
> WHEREAS, AFSCME…Unit 2 represents Group Youth Workers (hereafter referred to as "Group Workers") who work in residential programs operated by the Department;
>
> WHEREAS, in the interest of clarifying the duties of the Group Workers who are asked to work their assigned shift in another DYS residential program located in the same facility in order to ensure adequate staff coverage;
>
> NOW THEREFORE, the Parties agree as follows:
>
> 1. The Parties agree that, notwithstanding Articles 7 and 14 of the collective bargaining agreement, the Department may direct a Group Worker to work, while on his/her regular scheduled shift, in a residential program other than his or her assigned work location that is located within the same facility for the duration of his/her scheduled shift or until adequate staff coverage can be arranged. The Department shall issue such a directive only when there is inadequate staff coverage on a shift caused by an unexpected emergency that will affect the safety and security of the program.

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not the same as inverse seniority and was not discussed by the parties prior to finalizing the MOU. Likewise, Silva testified that the purpose of the MOU was to have more people involved in involuntary reassignments in emergency situations at Goss and that the goal was to accomplish a broader reassignment system "involving more than one particular program" to "make it fair" and to avoid "having one group of staff members subjected to the reassignment." Concerning inverse seniority, Silva testified that while the process requires forcing a different employee depending on who was previously forced, "inverse seniority doesn't need a rotation."

The Union did not rebut Chow-Menzer's testimony that the parties did not define the terms inverse seniority and rotation before finalizing the MOU. Thus, I credit her testimony that the parties did not define those terms during their MOU negotiations. Conversely, the Employer failed to rebut Morse's testimony that inverse seniority was a distinctly separate process from the rotation method, and that the parties had discussed both terms during their negotiations. Further, Morse's testimony on this subject was more detailed than Chow-Menzer's testimony. Thus, based this evidence, I credit Morse's testimony that the parties had discussed both inverse seniority and rotation during their MOU negotiations and treated them as separate processes.

2. In the event [that] both voluntary and involuntary overtime cannot be used in a program, the Department agrees to first solicit Group Workers on duty to volunteer for the temporary work location agreement. In the event no Group Worker volunteers, then the Department may involuntar[ily] mandate a Group Worker to provide the staff coverage based on inverse Department [s]eniority among the co-located programs provided however, that no employee shall be forced to be reassigned to another program unless there is no other option.[12]

3. At the conclusion of the shift or portion of shift on the temporary work location assignment, the Group Worker shall return to work to his assigned work location when the reassignment is no longer necessary.

4. This [MOU] shall be discussed by the parties at regularly scheduled labor management meetings and shall continue in full force and effect until the 31st day of December, 2018.

5. Should a successor agreement not be executed by the 31st day of December, 2018, this [MOU] shall continue in full force and effect until a successor agreement or an impasse in negotiations is reached.

This [MOU] shall be effective on the 30th day of October 2017, and is non-precedent setting.

After executing the MOU, Chow-Menzer attended a statewide labor-management meeting at which she circulated the agreement to regional managers, including Efstratios.

The Post-2017 Staffing Levels

1. October 2017 through April 2019

After October 30, 2017, the Employer responded to staffing shortages at Goss by using inverse seniority based on the rotation method to force involuntary assignments of

[12] While the crux of the parties' dispute hinges on the meaning of the phrase "to provide the staff coverage based on inverse Department [s]eniority among the co-located programs," neither provided specific testimonial evidence about whether the parties intended for the Employer to use the rotation method to effectuate this practice. Therefore, I make no credibility determinations on this matter.

Group Workers from among co-located programs. For example, if there was a Group Worker II shortage in Treatment, the Employer would first seek qualified volunteers from co-located programs on the primary overtime list. If none volunteered, the Employer would next seek qualified volunteers from the secondary and tertiary overtime lists. If the Employer remained unable to staff the shortage on overtime, it would apply inverse seniority and force the least senior Group Worker II from the remaining co-located programs (e.g., Detention) and temporarily transfer them to Treatment on involuntary reassignment. If a subsequent staff shortage occurred in Treatment and, again, no one was available from the overtime lists, the Employer would "rotate" to the other program (i.e., Revocation) and force the least senior person from that program to transfer temporarily to Treatment on involuntary reassignment.

2. May 2019 through July 2019

In May of 2019, Silva notified Morse that the Employer was using the rotation method to force Group Workers at Goss who did not possess the least seniority to transfer temporarily out of their co-located program into another understaffed program on involuntary reassignment. Later at a statewide labor-management meeting, also in May of 2019, the Union complained to the Employer about its use of a rotation list[13] that violated the MOU. At that meeting, Chow-Menzer stated the Employer should follow the MOU "as it was written." After the meeting, the Employer continued to respond to staffing shortages at Goss by using inverse seniority based on the rotation method.

[13] At all relevant times, the parties used the terms "rotation", "rotation list", and "rotation method" interchangeably.

By e-mail dated June 26, 2019, Silva requested to meet with Efstratios to discuss "the force situation that [has] once again begun to plague the [Southeast] region." By reply e-mail later that morning, Efstratios informed Silva that he would "be up to talk soon." By e-mail the next day, Silva reiterated his concerns to all DYS Program Directors and Assistant Program Directors at Goss, including Pina, Blett, and Black, which stated in pertinent part:

> I relayed the Union's concerns to John Efstratios on Wednesday morning regarding the force situations that have occurred within the Goss Building recently. It has been brought to my attention that there have been different protocols used during the implementation of these forces. I have attached a copy of the MOU regarding forces in co-located programs for your records. It is very clear about how these forces are to take place. Moving forward, it is the Union and the Department['s] expectation that this is the only protocol to be followed when implementing these forces. This MOU was bargained over in good faith[,] with members of both the Union and the Department present. I hope this will clarify the procedure that must contractually be implemented when these situations arise in the future….

By follow-up e-mail on June 30, 2019, Silva notified Efstratios of "Safety Concerns," which stated in pertinent part:

> I am sending this email out of great concern for the current conditions within the Goss Building. There has been an extreme shortage of staff on the Revocation unit for the last several months. It has gotten to the point that it is now impacting the other programs in the building. Shortages have created forces, and the forces have matriculated to the other units. The staff burnout rate is steadily increasing, if it hasn't already reached its apex. Morale is very low on Revocation, and the residual effects have become a detriment to morale on the remaining two programs. Couple those factors with the current shortages that exist on both Detention and Treatment and it makes for an environment that is not conducive to our populations positively changing their behaviors. I would like to know if there is a plan in place to fill the vacancies on Revocation and if so, if there is a timeline for the completion of this plan. As you all well know, the safe and efficient operation of any program depends directly on the workforce tasked with caring for the youth. That becomes compromised when the workforce is consistently overworked, not allowing for enough downtime for that workforce to recharge and get back to it the next day. The overall effectiveness of that program takes a drastic hit, and the Department inadvertently does its

> population a disservice by not providing the best care possible to it. The welfare of our population is paramount, but the welfare of our workforce is equally important. The combination of the two[,] increases the Department's positive impact on the lives of the youth in our custody. I look forward to hearing from you, and I hope to come to a resolution post haste so that we may bring some hope to an otherwise pessimistic workforce….

The Employer did not respond to Silva's e-mails. On July 4, 2019, the Employer filled a staff shortage at Goss by forcing a Group Worker with more seniority to transfer temporarily to the Revocation program even though there were other Group Workers with less seniority available for involuntary reassignment to Revocation. Silva met with Pina on July 4, 2019 to discuss the reassignments as they related to the MOU. During their discussion, both Silva and Pina[14] explained their conflicting understandings of the MOU. Specifically, Silva explained that the MOU required the Employer to force only the least senior person from among the co-located programs on the day of the shortage. He also explained that even if consecutive shortages occurred several days in a row, the Employer had to always force the same least senior person without rotating between programs. In response, Pina explained that the Employer would continue to use the rotation method to force the least senior Group Workers from among the co-located programs to fill staff shortages at Goss.

DECISION

Repudiation

Section 6 of the Law requires public employers and unions that represent their employees to meet at reasonable times to negotiate in good faith regarding wages, hours, standards of productivity and performance, and any other terms and conditions of

[14] Pina did not testify at the hearing.

employment. The statutory obligation to bargain in good faith includes the duty to comply with the terms of a collectively bargained agreement. Commonwealth of Massachusetts, 26 MLC 165, 168, SUP-3972 (March 13, 2000) (citing City of Quincy, 17 MLC 1603, MUP-6710 (March 20, 1991)). Repudiating a collectively bargained agreement by deliberately refusing to abide by or to implement the agreement's unambiguous terms violates the duty to bargain in good faith and constitutes a prohibited practice under Section 10(a)(5) of the Law. Town of Falmouth, 20 MLC 1555, MUP-8114 (May 16, 1994), aff'd sub nom., Town of Falmouth v. Labor Relations Commission, 42 Mass. App. Ct. 1113 (1997); Commonwealth of Massachusetts, 36 MLC 65, 68, SUP-05-5191 (Oct. 23, 2009).

Prior to October 30, 2017, the Employer filled staffing shortages at Goss by seeking qualified volunteers from co-located programs, seeking eligible staff from the secondary and tertiary overtime lists, or by forcing the least senior Group Worker to fill the shortage via inverse seniority without rotating among programs. The parties do not dispute this past practice. Nor do the parties dispute that after finalizing the MOU on October 30, 2017, the Employer filled staffing shortages at Goss by seeking qualified volunteers, seeking eligible staff from the secondary and tertiary overtime lists, or by rotating among the co-located programs to force the least senior Group Worker from those programs. In dispute is when the Union first became aware of the rotation practice, and whether the parties had reached a meeting of the minds on that issue when they finalized the MOU. The Employer asserts that the MOU required it to rotate among co-located programs to force the least senior Group Worker to fill staff shortages, while the Union maintains that the MOU required the Employer to force only the least senior person from among the co-located programs, and even if consecutive shortages occurred several

days in a row, the Employer had to always force the same least senior person without rotating between those programs.

1. Timeliness

DLR Rules and Regulations, 456 CMR 15.04 (Rule 15.04) states in full: "[E]xcept for good cause shown, no charge shall be entertained by the [DLR] based upon any prohibited practice occurring more than six months prior to the filing of a charge with the [DLR]." It is well established that a charge of prohibited practice must be filed with the DLR within six months of the alleged violation or within six months of the date that the violation became known or should have become known to the charging party. Felton v. Labor Relations Commission, 33 Mass. App. Ct. 926 (1992); Town of Dennis, 26 MLC 203, 205, MUP-1868 (April 21, 2000). A challenge to the timely filing of a charge is an affirmative defense. City of Boston, 26 MLC 177, 181, MUP-1431 (March 23, 2000); Town of Wayland, 5 MLC 1738, 1741, MUP-2294 (March 29, 1979).

The Employer argues that between October 30, 2017 and 2018, the Union never complained about the Employer's use of the rotation method to fill staff shortages. To the extent that this argument alleges that the Charge is untimely based on the Union's failure to raise the issue of rotation between October 30, 2017 and 2018, I reject this argument for the following reasons. First, the Employer failed to demonstrate that the Union knew about the Employer's use of the disputed rotation method from October 30, 2017 through 2018. Rather, the record shows that the Union did not become aware of this practice until May of 2019, when Silva first complained to Morse about the change and Morse subsequently complained to the Employer. The Union filed the instant Charge on July 29, 2019, which is less than six months from when it first learned of the Employer's alleged

wrongdoing in May of 2019. Based on this evidence, I find that the Charge is timely, and that the Employer is unable to satisfy its affirmative defense. City of Boston, 26 MLC at 181; Town of Wayland, 5 MLC at 1741.

2. Meeting of the Minds

To show that an employer has repudiated an agreement, the charging party must prove that the employer deliberately refused to abide by the agreement. Worcester County Sheriff's Department, 28 MLC 1, 6, SUP-4531 (June 13, 2001); City of Quincy, 17 MLC at 1608. If the language of the agreement is ambiguous, the Commonwealth Employment Relations Board (CERB) looks to the parties' bargaining history to determine whether there was an agreement between the parties. City of Waltham, 25 MLC 59, 60, MUP-1427 (Sept. 8, 1998). Where the evidence is insufficient to show an agreement underlying the matter in dispute, or if the parties hold differing good faith interpretations of the terms of the agreement, the CERB will not find repudiation because the parties did not achieve a meeting of the minds. City of Boston/Boston Public Library, 26 MLC 215, 216, MUP-2081 (May 31, 2000); Town of Ipswich, 11 MLC 1403, 1410, MUP-5248 (Feb. 7, 1985), aff'd sub nom., Town of Ipswich v. Labor Relations Commission, 21 Mass. App. Ct. 1113 (1986). To achieve a meeting of the minds, the parties must manifest an assent to the terms of an agreement. Suffolk County Sheriff's Department, 30 MLC 1, MUP-2630, MUP-2747 (Aug. 19, 2003); City of Boston, 26 MLC at 217.

The Union argues that the parties not only established a meeting of the minds when they negotiated the MOU, but they manifested assent to its terms when they finalized it. Conversely, the Employer argues that the parties did not reach a meeting of the minds when they finalized the MOU because the Union never raised the issue of

rotation during negotiations. It also argues that the parties held differing good faith interpretations of the MOU phrase permitting the Employer to "involuntary[ily] mandate a Group worker to provide the staff coverage based on inverse Department [s]eniority among co-located programs" and that the Union failed to present evidence of the parties' bargaining history on the meaning of that phrase.

The MOU states expressly that its purpose is to "[clarify] the duties of Group Workers who are asked to work their assigned shift in another DYS residential program located in the same facility in order to ensure adequate staff coverage." Further, the express language of the MOU permits the Employer to force Group Workers from among the co-located programs to fill staff shortages on involuntary reassignment based on inverse seniority. However, the MOU is silent concerning both the term "rotation" and whether the Employer could use rotation as a mechanism to effectuate involuntary reassignments. While both parties offered testimonial evidence showing that they discussed the issues of inverse seniority and rotation during their MOU negotiations, neither offered any evidence showing that they agreed on the meaning of "rotation" or whether it applied to involuntary reassignments. Additionally, neither party offered evidence of their bargaining history, including the draft versions of the MOU, the exchanged proposals and counter proposals from their MOU negotiations, or corroborating testimony from Faria who was the only other person present during those negotiations.

Considering the entire record and having before me only the subjective, conflicting memories of the parties' respective witnesses, especially Chow-Menzer and Morse, I conclude that each party honestly thought it had reached a different agreement on the

matter of rotation. Both Chow-Menzer and Morse discussed inverse seniority and rotation during their MOU negotiations. I credited Chow-Menzer's testimony that the parties did not define the terms inverse seniority and rotation before finalizing the MOU; and, I credited Morse's testimony that inverse seniority was a distinctly separate process from the rotation method. However, nothing in the record shows that the parties intended to apply the rotation method to involuntary assignments. Consequently, I find that the parties held differing good faith interpretations of the MOU and did not manifest assent to its terms. City of Boston/Boston Public Library, 26 MLC at 216.

Based on the evidentiary void in the record, including the absence of any relevant bargaining history, I find that the Union has failed to satisfy its burden to prove, by a preponderance of the evidence, that the parties had reached a meeting of the minds on the issue of rotation. See Commonwealth of Massachusetts, 28 MLC 8, 11, SUP-4448 (June 15, 2001) (citing Town of Belchertown, 27 MLC 73, 74, MUP-2397 (Jan. 3, 2000) (there is no repudiation of an agreement if the language of the agreement is ambiguous and there is no evidence of bargaining history to resolve the ambiguity)); see, also, Town of Hanson, 39 MLC 158, 158-159, MUP-11-1064 (Dec. 13, 2012) (CERB affirmed hearing officer's finding that employer's statements were not specific enough to establish verbal assent to the agreement); see, generally, City of Marlborough, 9 MLC 1708, 1711, MUP-4738 (March 21, 1983) (no meeting of the minds where union witnesses were no more consistent in their recollection of facts surrounding the negotiations than were witnesses for the city, and union witnesses never specifically stated that the employer's representatives agreed to the union's position). Thus, I cannot find that the Employer

repudiated the MOU because the parties held differing views and did not establish a meeting of the minds on its terms. City of Boston, 26 MLC at 217.

CONCLUSION

The Employer did not violate Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by repudiating the MOU. Therefore, I dismiss the Complaint in its entirety.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

KENDRAH DAVIS, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.19, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for Review with the Department of Labor Relations within ten days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties.