

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of: *

Case Number: SUP-20-7851

COMMONWEALTH OF MASSACHUSETTS/
SECRETARY OF ADMINISTRATION AND
FINANCE *

Date Issued: February 15, 2022

and *

ALLIANCE, AFSCME – SEIU, LOCAL 509 *

Hearing Officer:

James Sunkenberg, Esq.

Appearances:

Melissa A. Thomson, Esq. - Representing Commonwealth of Massachusetts

Joseph L. Delorey, Esq. - Representing Alliance, AFSCME – SEIU, Local 509

HEARING OFFICER’S DECISION

SUMMARY

1 The issue is whether the Commonwealth of Massachusetts (Commonwealth),
2 acting through the Secretary of Administration and Finance, violated Section 10(a)(5) and,
3 derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law)
4 by changing the procedures for new employee orientation(s) (NEO(s)) without giving
5 AFSCME, Council 93 (Union) prior notice and an opportunity to bargain to resolution or
6 impasse. Based on the record, and for the reasons explained below, I find that the
7 Commonwealth did not violate the Law.

8 STATEMENT OF CASE

1 in Grafton, MA.² Faria last attended a DYS NEO in Grafton in or around April 2015, before
2 he went to work for the Union as a staff representative. After Faria became a Union staff
3 representative, responsibility for attending DYS NEOs passed to the new Local 1368
4 President.³

5 In April 2019, DYS employees began attending NEO at 600 Washington Street in
6 Boston, which is the location of DYS' Central Office and the Central Office of EOHHS.⁴

7 Other New Employee Orientations

8 As the Union's Unit 2 staff representative, Faria participated, as needed or to
9 observe, in at least 20 NEOs for bargaining unit members of other, non-DYS agencies
10 within EOHHS, such as the Department of Mental Health (DMH) and the Department of
11 Public Health (DPH). These other NEOs occurred at various worksite locations of the
12 individual agencies. Faria identified: the Chief Medical Examiner's Office, whose
13 members Local 470 represents; the Shattuck Hospital, whose members Locals 1114 and
14 470 represent; Worcester Recovery Hospital, whose members Local 137 represents; and
15 the Hogan Regional Center in Wrentham, whose members Local 646 represents. During

²Faria also testified about a separate, two-week training course for new DYS employees that has occurred in Grafton. Faria's testimony about the training course is beyond the scope of this Complaint.

³Faria testified: "DYS particularly would have been handled then by the incoming acting president and then forthcoming the president of the Local or his designee."

⁴Faria testified that "subsequently after the fact I found that out later."

1 the period directly at issue in this matter, which begins in January 2020, the
 2 Commonwealth did not change the location of any of these NEOs.⁵

3 Erica Crystal's January 3, 2020 Email and Union Demand to Bargain

4 By email on January 3, 2020, regarding "Orientation," Erica Crystal (Crystal),
 5 Deputy Counsel and Secretariat Director of Labor Relations for EOHHS, wrote to Mark
 6 Bernard (Bernard), the Executive Director of the Union that:

- 7 •Effective January 13, 2020, EOHHS Human Resources will be rolling out an
 8 updated New Employee Orientation program hosted by EOHHS Human
 9 Resources.
 10 •We will first focus on all central office new hires (list below) and anticipate
 11 expansion of this new format to off-site offices/agencies through regional
 12 locations and/or virtual webinar later in the new year.
 13 •Orientation will occur weekly on Monday from 8:30 – 4:30. Unions representing
 14 the employees to be oriented will be invited to attend the last hour of the day from
 15 3:30 – 4:30.⁶ EOHHS HR can notify the appropriate union contact in advance with
 16 a list of who is scheduled to attend.
 17 •Please advance the Union contact information as soon as possible. We are
 18 working at having a consistent EHS-HR contact and I will send that information as
 19 soon as I have it.
 20 •We hope to provide notice of the names and agency for whom the new employee
 21 will be working the Wednesday or at the latest the Thursday before the orientation.
 22 •Calendar is attached of all the dates for 2020.⁷
 23 •The identification information below is provided in case you don't have it in order
 24 to facilitate reading the schedule of employee information we will be providing.⁸

⁵On cross-examination, Faria acknowledged this fact. The record does not identify any Unit 2 NEOs occurring in Boston during the relevant period other than NEO for DYS employees on January 21, 2020.

⁶The record does not establish the timing of Union access during NEO prior to January 2020, especially during NEO for DYS employees.

⁷The attached calendar indicated that "New Hire Orientation" would occur at 600 Washington Street, Boston, MA.

⁸The email contained identification codes for the following agencies: Soldier's Home in Chelsea; DMH Central Office; DDS Central Office; DDS Central Office Field; Dept. of Public Health – Central Office; Department of Children and Families; Dept. of Youth Services; Executive Office of Health and Human Services; MassHealth; Executive Office of Elder Affairs; Mass Commission for the Blind; Commission for the Deaf and Hard of

1 By email on January 3, 2020, Bernard responded to Crystal:

2 Again, please coordinate this with Paul Faria, the Human Services Coordinator.
3 Also, this is a complete change from our current practice. The Union hereby
4 recommends that this new approach to new employee orientation be held off until
5 the completion of bargaining. Further, I would suggest that this matter be
6 discussed at main table negotiations which are to commence over the next month
7 or so.

8
9 Still on January 3, 2020, Crystal responded that “we are going to coordinate with
10 the unions, so I am looking for the contact person.” She added that, “I do not see this as
11 an issue for bargaining, but if you have any specific concerns please let me know, as we
12 are always happy to discuss.” Later on January 3, 2020, Faria responded to Crystal:

13 Attached is an LRC decision from the early 90's.⁹
14 In that case, the Employer discontinued access to orientation that the Union had
15 enjoyed as a well-established practice....
16 The LRC held “we find that the City’s unilateral cessation of the past practice of
17 allowing a Union representative to address new employees during their training
18 program affected a mandatory subject of bargaining.”
19 While your office is not intending to discontinue our access, we have long-standing
20 practices as to means and methods, and we suggest that there is a bargaining
21 obligation on the part of the Employer before unilaterally altering the means and
22 methods through which we get to engage in a dialogue with new employees.
23 To that end, we request you hold off implementing the program till both of our
24 offices have a chance to make sure we know the current practices in the various
25 departments and locations within your jurisdiction, so that we can then both have
26 an informed platform on which to discuss this issue.
27 I must also suggest that by sending this email, I am not diluting Mark’s suggestion
28 that such changes go through “main table” negotiations.

29
30 Still on January 3, 2020, Crystal responded to Faria that:

31 I don’t see this as a change. I will read the case over the weekend, but as you
32 point out we are not limiting access. In fact, the initial roll out is for the Boston
33 Central office. The Union will be invited to orientation and to meet with its
34 members. As I noted in my earlier email, we will be providing information to the

Hearing; Mass Rehabilitation Commission; Office of Refugees and Immigrants; Dept. of Veterans Services; and Department of Transitional Assistance.

⁹ The case is City of Boston/Deer Island House of Correction and AFSCME, Council 93, Local 419, 19 MLC 1613, MUP-7322 (December 24, 1992).

1 unions concerning the employees attending the orientation session in advance of
2 the session. I hope you will send the name of the Union's contact person.

3

4 By email on January 6, 2020, Crystal wrote to Faria that she did not view the case

5 that he cited as "on point." Crystal requested that Faria "forward the name of the Union

6 contact person, so that we can send information regarding orientation participants." By

7 email on January 9, 2020, Crystal wrote to Faria, with a copy to Helena Braithwaite

8 (Braithwaite), Human Resources Operations Manager for EOHHS, that:

9 By way of this email I would like to introduce you to EOHHS' Orientation contact
10 person Helena Braithwaite, who is copied here. Please let us know who Helena
11 should reach out to regarding employee participants and scheduling as described
12 in my earlier communication. I provided a calendar attached to my earlier email
13 but it is attached here as well for your convenience. I know based upon our
14 conversation, that you don't think it likely that AFSCME employees are part of this
15 initial orientation phase.

16

17 By email on January 17, 2020, Braithwaite forwarded to Faria the "list of hires...for

18 next week's orientation." The list included seven newly hired DYS employees. Their

19 assignments included the Southeast Region; Southeast Secure Revocation; Northeast

20 Region; Southeast Secure Treatment; Central Region; and Suffolk Detention Unit.

21 January 21, 2020 New Employee Orientation

22 On January 21, 2020, John Killoy (Killoy), the Union's Assistant Director of

23 Legislation, Communication, and Political Action, attended NEO at 600 Washington

24 Street in Boston. From time to time, Killoy assists Unit 2 locals with NEOs, and he

25 attended on January 21, 2020, because neither the Union staff representative nor the

26 Local 1368 President, Frank Ojeda (Ojeda), were able to attend.¹⁰ This was the only

27 NEO that Killoy has attended at 600 Washington Street.

¹⁰The Union did not produce any Local 1368 officers to testify in this matter. Killoy could not identify any previous NEO for DYS employees that he had attended.

1 The Union's session started at 3:30 pm. Of the seven employees that Braithwaite
2 identified in her January 17 email, four attended the Union's session. The Union had its
3 own room to meet with these bargaining unit members. During the meeting, Killoy
4 perceived these employees to be tired and disinterested.¹¹ He had concerns about the
5 NEO, including the amount of time afforded to the Union and a lack of organization.¹²

6 By email on January 22, 2020, Killoy, wrote to Faria, with a copy to Ojeda,
7 regarding "01.21.20 Orientation" that:

8 Yesterday's NEO was not ideal.

9 -It was a large orientation for multiple agencies across the state.

10 -It was chaotic trying to get the right people in the room. Luckily we were the only
11 union there so it made it a little easier, but if more start showing up then that is
12 going to be a major issue trying to get people to the right spot.

13 -Only 4 of the 7 people on our list were there (the woman from HR had a list with
14 only the 4 that were there and didn't know where the list of 7 was from or who they
15 were)

16 -Luis No Card (Working in South East Region)

17 -Kerry Lynne Card (very interested in getting involved and had some specific
18 questions for Paul or Frank)

19 -Jasmine No Card fell asleep in the meeting (Working in Worcester)

20 -Jayson No Card (Working in Worcester)

21 -Left Kerry Lynne's card with HR but even they didn't seem too sure what to do
22 with it.

23

24 Is that the first time they have done an orientation session like that?

¹¹Killoy testified that it was late in the day, the employees had a lot of information to absorb throughout the day, many wanted to start travelling home from Boston, and by the time he got to speak with them they were "clearly disinterested for the most part."

¹²Killoy testified: "It was extremely chaotic. There were dozens of new employees leaving this orientation session at the same time, trying to get the four or seven – there was a concern about how many people should have been in the room." He added that at other NEOs he has participated in – he did not identify which ones – the Union has had "up to two hours." Additionally, he testified that "the woman at the front desk didn't seem to have a clue what to do" with a signed Union card that he left with her for processing. The record contains no evidence that the Commonwealth failed to properly process that signed Union card.

1 By email on Friday, January 24, 2020, Crystal wrote to Faria that she had
2 confirmed that no Union bargaining unit employees would be attending NEO on Monday,
3 January 27, 2020. No additional Union bargaining unit members attended NEO at 600
4 Washington Street in Boston prior to the suspension of all in-person NEOs in March 2020,
5 due to the outbreak of the COVID-19 pandemic.

6 February 26, 2020 Union Meeting with Office of Employee Relations

7 Faria contacted the Office of Employee Relations (OER) regarding the Union's
8 concerns about NEOs. OER is the unit within the Human Resources Division (HRD) that
9 has responsibility for collective bargaining with the statewide bargaining units.¹³ John
10 Langan (Langan) has been the Director of OER since 2017, and he has worked for OER
11 since 1999.

12 On February 26, 2020, Faria met with Langan and Crystal at OER's offices located
13 at 100 Cambridge Street, Boston to discuss the Union's concerns. By email on February
14 27, 2020, Faria forwarded his notes from the meeting to Langan; Faria did not include
15 Crystal in this communication. In relevant part, these notes state:

16 ISSUES and CONCERNS

17
18 1. Time of notice attending orientation need prior than (Wednesday) to our
19 representatives.

20
21 Rational[e]: Release time for Local Representatives form agency notice to
22 ensure correct Local representative is available. [sic]

23
24 Response¹⁴: EOHHS will strive to provide prior notice of new hires to union
25 before Wednesday the week before but no later than. The total count may
26 change due to last minute additional people coming in.

¹³HRD is within the Secretariat of Administration and Finance.

¹⁴ In the document, the Commonwealth's "Response" to each issue appears in red text.

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2. Location of orientation in region of hire.

Rational[e]: Time issues, Travel concerns, Hire concerns,

Response: The policy will be that regional locations will be establish over the next month March, so by April we will receive notice to the locations. DYS has been sending all new hires to Boston that remains open as to why Erica Crystal will follow up to provide answer. [sic]

3. Requesting we have different meeting rooms at the orientation.

Rational[e]: all the attendees for all unions are sent to the same room, this cause Union Rep. i.e. NAGE and AFSCME to just assume all were in group, speaking to them ALL about our union and signing wrong dues cards.

Response: Each union will have a designated room and all hires will be instructed to report to the designed rooms to meet with union's representatives for orientation. [sic]

Erica Crystal will forward the scripted language as to what the EOHHS training instructors are telling the new hire when directed to meeting rooms.

4. Verification at the orientation when someone is missing as the reason.

Rational[e]: Missing from list of attendees to know who we (union) might need to follow up with when no show at the meeting.

Response: The training instructors or EOHHS will provide up-date status of new hire[.]

5. Time Change of the meeting to the morning or middle of the day.

Rational[e]: So going forward the union is to have access to meet new hires during normal schedule working hours we have the opportunity to meet with them before their released for the day. [sic]

Response: The new time for the union 3pm hour prior to release of the day [sic] All new hires will be given notice.

6. Contact Person to send signed authorization for dues deductions[.]

Rational[e]: ensure dues cards are processed to have Council 93 Human Services Secretary email to the contract person in payroll. [sic]

Response: Erica Crystal is to be sent the original signed card directly to her office also a email would be helpful of the scan cards. [sic]

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Schwarzenbach Letter and Related Agreements

By letter dated July 17, 2003 (Schwarzenbach Letter), Peter Schwarzenbach, then Undersecretary for Administration and Finance and Chief Administrative Officer, wrote to Anthony Caso, then Executive Director of the Alliance, the following:

I am writing to reiterate the Commonwealth's policy with respect to the execution of agreements between organized labor and management in Commonwealth executive departments.

The Human Resources Division/Office of Employee Relations is the sole designee for the conduct of Commonwealth labor relations, and as such it is the only office authorized to enter into agreements affecting terms and conditions of employment for bargaining unit employees within executive departments. Any agreement between an exclusive bargaining representative and a Commonwealth agent, whether verbal or written, that is entered into without the explicit authority of the Human Resources Division/Office of Employee Relations, shall not be considered valid by the Commonwealth. This limitation applies both to mid-term and successor agreements.

Effective July 1, 2006, through June 30, 2007, the Commonwealth and the Alliance entered into a Memorandum of Understanding (Master MOU) regarding statewide Unit 2. The Master MOU authorized appointing authorities within EOHHS to develop site-specific agreements to supplement compensation rates for certain Licensed Practical Nurses (LPNs). Under the Master MOU, the site-specific agreements "must be approved" by HRD. Pursuant to the Master MOU, AFSCME, Council 93, Local 72 entered into a site-specific agreement with the DMH, and SEIU, Local 888 entered into a site-specific agreement with the Holyoke Soldiers' Home. HRD approved both site-specific agreements, and both expired by their terms on June 30, 2007.

OPINION

The issue is whether the Commonwealth violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by changing the procedures for NEOs without

1 giving the Union prior notice and an opportunity to bargain to resolution or impasse.
2 Specifically, the Complaint alleges that in January 2020, the Commonwealth changed the
3 duration of NEOs from 2-3 hours to a full day, and that the Union learned that the
4 Commonwealth had changed NEO locations from local work sites to a central location in
5 Boston.¹⁵

6 Unilateral Change

7 A public employer violates Section 10(a)(5) of the Law when it unilaterally changes
8 wages, hours, or other terms and conditions of employment without first bargaining to
9 resolution or impasse with the employees' exclusive bargaining representative. School
10 Comm. of Newton v. Labor Relations Commission, 388 Mass. 557, 572 (1983);
11 Commonwealth of Massachusetts, 30 MLC 63, 64, SUP-4784 (October 9, 2003). The
12 duty to bargain extends to both conditions of employment established through past
13 practice and to conditions of employment established through a collective bargaining
14 agreement. Commonwealth of Massachusetts, 27 MLC 1, 5, SUP-4304 (June 30, 2000).
15 To establish a unilateral change violation, a charging party must show that: (1) the
16 employer altered an existing practice or instituted a new one; (2) the change affected
17 employee wages, hours, or working conditions and thus affected a mandatory subject of
18 bargaining; and (3) the change was implemented without prior notice and an opportunity
19 to bargain to resolution or impasse. Bristol County Sheriff's Department, 31 MLC 6, 18,
20 MUP-2872 (July 15, 2004) (citing City of Boston, 26 MLC 177, 181, MUP-1431 (March
21 23, 2000)).

¹⁵I note that the Complaint does not allege that the Commonwealth violated the Law by changing the timing of Union access to new employees during NEO.

1 Employer Altered an Existing Practice

2 The Union argues that the Commonwealth changed a “long-standing practice as
3 to how the Union was able to engage” in NEO. According to the Union, “Before Jan. 3,
4 2020, the well-established practice was that the Union was able to attend NEO’s at
5 various locations within the department that are within the jurisdiction” of EOHHS. The
6 Commonwealth argues that, “The Union failed to sustain its burden of proving that there
7 was a change of an existing condition of employment when EOHHS updated its NEO, as
8 only DYS employees were affected and the location was the same for nine (9) months.”

9 To determine whether a binding past practice exists, the Commonwealth
10 Employment Relations Board (CERB) analyzes the combination of facts upon which the
11 alleged practice is predicated, including whether the practice has occurred with regularity
12 over a sufficient period of time so that it is reasonable to expect that the practice will
13 continue. Town of Chatham, 21 MLC 1526, 1531, MUP-9186 (January 5, 1995). The
14 CERB focuses on whether the practice is “unequivocal, has existed substantially unvaried
15 for a reasonable period of time, and is known and accepted by both parties.” Dedham
16 School Committee, 5 MLC 1836, 1839, MUP-3002 (November 14, 1978).

17 Here, the Union did not produce evidence sufficient to establish that in January
18 2020, the Commonwealth changed a practice that was unequivocal and had existed
19 substantially unvaried for a reasonable period of time. The only bargaining unit members
20 implicated in this matter are the DYS employees who attended NEO on January 21, 2020.
21 The Union produced no evidence of the state of the parties’ practice for DYS NEO from
22 2015, after Faria departed DYS, until January 2020, when this issue arose. The only fact
23 in the record about DYS NEO during this timeframe is that DYS employees began

1 attending NEO in Boston in April 2019. Accordingly, the Union did not establish that the
2 Commonwealth changed an unequivocal, substantially unvaried practice in January 2020
3 when DYS employees reported to Boston for NEO.

4 To the extent that the Union argues that it did not have notice of this April 2019
5 relocation for DYS bargaining unit members, I disagree. Faria testified that the Local 1368
6 President or the President's designee was responsible for attending DYS NEO. The
7 Union did not produce anyone from Local 1368 to vary or elaborate on this testimony.
8 Accordingly, I conclude that the Union's own evidence establishes that it knew or should
9 have known that DYS employees began attending NEO in Boston in April 2019.¹⁶

10 Finally, the Union argues that the Commonwealth's decision to not call Crystal as
11 a witness, despite identifying her as a witness prior to the hearing, should give rise to an
12 adverse inference against the Commonwealth that Crystal changed a well-established
13 past practice. The Commonwealth argues that no such inference is warranted due to its
14 strategic decision, based upon the state of the Union's evidence, to not call Crystal at the
15 hearing. I agree with the Commonwealth.

16 The Union did not explain why it was unable to produce a witness, such as the
17 Local 1368 President, who had current, first-hand knowledge about the "long-standing"
18 practice. Moreover, based upon this record, drawing an adverse inference against the
19 Commonwealth that Crystal changed a binding practice would improperly shift the burden
20 of proof in this matter from the Union to the Commonwealth. See, Massachusetts Board

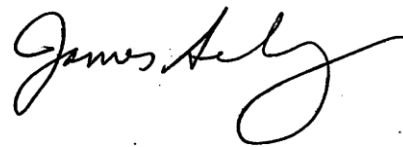
¹⁶Because the Union did not file the Charge until February 7, 2020, the Charge is also untimely as it pertains to the changed location for DYS NEO. Town of Lenox, 29 MLC 51, MUP-01-3214, 3215 (September 5, 2002) (A charge of prohibited practice must be filed with the DLR within six months of the alleged violation or within six months from the date that the violation became known or should have become known to the charging party.)

1 of Regents of Higher Education, 14 MLC 1397, 1399-1400, SUP-2901 (December 21,
2 1987) (adverse inferences are a matter of discretion for the factfinder; and it would be
3 unreasonable to apply the rule where a party has good reason to believe he will prevail
4 without introduction of all his evidence). Accordingly, I deny the Union's request for an
5 adverse inference.¹⁷

6 CONCLUSION

7 The Union did not offer evidence sufficient to prove that the Commonwealth
8 changed a binding past practice related to NEO procedures in January 2020. I therefore
9 need not address the Union's argument that OER rather than EOHHS should have
10 bargained the alleged change. I dismiss the Complaint.
11 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



JAMES SUNKENBERG, ESQ.
HEARING OFFICER

APPEAL RIGHTS

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

¹⁷Because the Union did not establish the first element of its unilateral change allegation, I need not address the Union's request that I draw additional adverse inferences. These relate to: Crystal's reasoning for denying the request to bargain; the source of Crystal's authority to determine what belongs at "main table" bargaining;" and how she ended up in the office of OER during the February 26 meeting.

