COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of: COMMONWEALTH OF MASSACHUSETTS / SECRETARY OF ADMINISTRATION AND FINANCE and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES	Case Number: SUP-20-7876 Issued: November 16, 2022

Hearing Officer: Sara Skibski Hiller, Esq.

Appearances:

Melinda Willis, Esq. - Representing the Commonwealth of Massachusetts Secretary of Administration & Finance

Caroline O'Brien, Esq. - Representing the National Association of Government Employees

HEARING OFFICER'S DECISION

SUMMARY

The issue in this case is whether the Commonwealth of Massachusetts acting through the Secretary of Administration & Finance (Commonwealth) violated Section 10(a)(5), and derivatively, Section 10(a)(1) of Massachusetts General Laws Chapter 150E (the Law) when it changed the procedure for conducting internal investigations by electronically recording interviews of members of the National Association of Government Employees (Union or NAGE) during internal investigations without their consent and without providing the Union with prior notice and an opportunity to bargain to resolution or impasse over the decision and the impacts of the decision. I dismiss the Union's allegation that the Commonwealth failed to bargain over its decision and the impacts of

its decision to record interviews of bargaining unit members serving as respondents in internal investigations as untimely. I further find that the Commonwealth did not violate the Law by recording witness and complainant interviews in the manner alleged.

STATEMENT OF THE CASE

On February 24, 2020, the Union filed a charge of prohibited practice with the Department of Labor Relations (DLR) alleging that the Commonwealth had violated Sections 10(a)(5) and 10(a)(1) of the Law. On June 3, 2020, an Investigator issued a Complaint of Prohibited Practice and Partial Dismissal (Complaint) alleging that the Commonwealth violated Section 10(a)(5), and derivatively, Section 10(a)(1) of the Law by changing the procedure for conducting internal interviews of bargaining unit members when the Investigations Center of Expertise (COE) electronically recorded interviews without providing the Union with prior notice and an opportunity to bargain to resolution or impasse over the decision and the impacts of the decision. On July 8, 2020, the Commonwealth filed its Answer to the Complaint. On March 15, 2021, April 14, 2021, and April 15, 2021, I conducted a hearing by videoconference during which the parties received a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.[1] On June 25, 2021, the parties filed post-hearing briefs. Based on my review of the record, I make the following findings of fact and render the following opinion.

STIPULATIONS OF FACT

1. The Commonwealth of Massachusetts, acting through the Secretary of Administration and Finance, is a public employer within the meaning of Section 1 of Chapter 150E.

[1] I conducted the hearing remotely pursuant to Governor Baker's teleworking directive to executive branch employees.

2. The National Association of Governmental Employees (Union) is an employee organization within the meaning of Section 1 of Chapter 150E.

3. The Union is the exclusive collective bargaining representative for employees in statewide bargaining units 1, 3 and 6. This includes professional administrative employees in Unit 6, building and trades employees in Unit 3, and non-professional administrative and clerical employees in Unit 1.

4. The Union and the Commonwealth are parties to a collective bargaining agreement (CBAs) for each of the Units described in paragraph 3 above.

5. The CBAs each contain an identical Code of Conduct that applies to all members of the bargaining unit.

ADDITIONAL FINDINGS OF FACT

The Union represents approximately 8,000 bargaining unit members in statewide bargaining units 1, 3, and 6 (Units 1, 3 and 6) who work in over 100 different executive agencies in the Commonwealth. Prior to January of 2019, the Commonwealth required each executive agency to conduct its own internal investigations into allegations of workplace policy violations by bargaining unit members. As part of these investigations, each executive agency conducted in-person interviews of complainants and respondents involved in the matter and interviewed any employee who may have witnessed the conduct. With the exception of the Department of Correction, when executive agencies interviewed bargaining unit members about workplace policy violations, investigators took handwritten notes and did not electronically record the interviews.[2] Prior to January of 2019, the Commonwealth's Code of Conduct Policy (Code of Conduct), incorporated in the collective bargaining agreements for Units 1, 3 and 6, requires in Section 4E that bargaining unit members "respond promptly and fully to administrative inquiries when

[2] The Department of Correction maintains its own department policy which requires bargaining unit members be tape-recorded during interviews conducted during an internal investigation.

directed to do so" and in Section 9(B) states that "an employee will be subject to disciplinary action up to and including termination for intentionally making false or misleading verbal or written statements in matters of official interest." Further, an employee could be subject to discipline, up to and including termination for failure to abide by the Code of Conduct.

Creation of the Investigations Center of Expertise

On or about January 25, 2019, Labor Relations Director for the Commonwealth Thomas Costello (Costello) emailed Union Representatives Bobbi Kaplan (Kaplan), Richard O'Reilly (O'Reilly), and Leo Munroe to inform them that the Commonwealth had established a new department called the Investigations Center of Expertise (COE) in order to standardize investigations of workplace policies regarding sexual harassment, discrimination, workplace violence, domestic violence, sexual assault, stalking and retaliation. Costello further informed Union representatives that executive agencies would begin referring investigations to the COE on February 11, 2019. Subsequently on February 8, 2019, Director of the Commonwealth's Office of Employee Relations (OER) John Langan (Langan) contacted representatives of all executive agency unions, including NAGE State Director Kevin Preston (Preston), to further explain the development and rollout of the COE and to describe resources that would be available to bargaining unit members.

Beginning in February of 2019, executive agencies referred allegations of workplace policy violations to the COE to be investigated by COE investigators (investigators or COE investigators). In or around March of 2019, when investigators interviewed bargaining unit members who were complainants, respondents and witnesses to the matter, investigators told bargaining unit members that the interview

would be recorded. At the start of an interview, the investigator read a script which stated, "[w]e will be tape recording this interview to ensure that we have a reliable record of our conversation today" and placed an audio recorder in full view of the bargaining unit member. If a bargaining unit member who was a complainant or respondent in a matter, or their union representative, objected to the recording of their interview, the investigator ceased recording and rescheduled the interview to bring in a second investigator to take handwritten notes. If a witness objected to the recording of their interview, the investigator noted the objection but proceeded to record and conduct the interview.[3] Investigators allowed Union representatives to sit-in on interviews of bargaining unit members who were complainants or respondents to a matter, but did not allow Union representatives to sit-in on interviews of witnesses unless the bargaining unit member had a reasonable belief that what the witness said could lead to discipline.[4]

After completing the investigation, COE investigators issued a report that included findings of fact and a conclusion as to whether the bargaining unit member's conduct

[3] In its post-hearing brief, the Union argues that the Commonwealth first announced its policy to record witnesses over their objections in COE interviews in February of 2020. At the hearing, COE Investigator John Moore (Investigator Moore), who had been employed by the COE since March of 2019 and conducted over 300 recorded interviews, testified that since March of 2019 investigators recorded witness interviews, even if they objected to the recording. Investigator Moore, however, could not recall an example of an interview he had conducted where a witness was recorded over their objection. Here, I credit Moore's testimony that beginning in March of 2019, the COE maintained a policy that required witnesses to submit to electronic recording of interviews, even if they objected. However, as addressed below, I also find that the Union did not have actual knowledge of this practice until December of 2019.

[4] In the Complaint and Partial Dismissal issued in this case, the DLR Investigator dismissed an allegation of the charge of prohibited practice alleging that the Commonwealth violated Section 10(a)(5) and Section 10(a)(1) of the Law by failing to allow Union representatives to accompany bargaining unit members who were witnesses to an investigation during COE interviews.

constituted a workplace policy violation. The investigator then referred the matter back to the bargaining unit member's executive agency to determine and issue disciplinary action, if appropriate.

In February of 2019, the Commonwealth met with the Union to discuss the establishment of the COE. At this meeting, the Union raised several concerns about the fact that investigations would no longer be handled by each executive agency. In response, the Commonwealth offered to make minor accommodations and stressed the importance of having an independent agency conduct investigations. At this meeting, the Commonwealth did not address, and the Union did not ask any questions about, the procedures the COE used for investigations.

Union's Participation in COE Interviews

In May of 2019, Union representatives contacted Preston and informed him that representatives who accompanied bargaining unit members in COE investigations observed investigators recording interviews. On May 22, 2019, Union Representative Richard O'Reilly (O'Reilly) sat-in on an interview with a bargaining unit member who was a respondent in a COE investigation. During the interview, COE Investigator Patrick Butler (Investigator Butler) informed the bargaining unit member and O'Reilly that he was going to record the interview. Neither the bargaining unit member nor O'Reilly objected to the recording, and Butler proceeded with the interview.

Further, on additional occasions throughout the summer of 2019, Union representatives observed the COE record interviews of bargaining unit members who were respondents in COE investigations. On June 6, 2019, Union representative Jack Snow (Snow) sat-in on an interview with a bargaining unit member who was a respondent in a COE investigation. At the start of the interview, Investigator Moore read a script

informing the bargaining unit member and Snow that he would be recording the interview. Neither Snow nor the bargaining unit member objected to the recording and Investigator Moore proceeded to record the interview.[5] In addition, in or around June and July of 2019, Union representative Kaplan sat-in on a COE interview of Investigation Respondent D, who was a respondent in a COE investigation.[6] Kaplan told the Investigator that she objected to the recording of the interview. The Investigator ceased recording, brought in a second investigator to take notes, and then proceeded with the interview without recording it.[7]

Bargaining

In or around August of 2019, Preston contacted Langan and OER Assistant Director Joel Boone (Boone) to share the Union's concerns about the recording of COE interviews. The parties engaged in discussions over the phone. On August 22, 2019, Langan emailed Preston a proposal in the form of a draft memorandum of agreement that the Commonwealth had reached with another bargaining unit. The proposal stated, in part, that "the parties agree that investigatory interviews will be audio recorded by the HRD's investigation COE investigators" and that "the parties agree that the recordings will be used to assist in ensuring accurate note taking in anticipation of writing the report

[5] In or around July of 2019, Union representative Kate Kelly (Kelly) attended an investigatory interview with a bargaining unit member during which the COE investigator recorded the interview. During her testimony, Kelly did not state whether the bargaining unit member was a respondent, complainant or witness to the matter, only that the member was "directed to attend a COE interview."

[6] I am using the pseudonyms for bargaining unit members involved in COE investigations that the parties previously agreed to and used at the hearing.

[7] Kaplan did not recall the name of the investigator.

for the agency." The proposal also clarified that the Commonwealth would not introduce the recording at a disciplinary hearing or argue an adverse inference for not introducing the recording, and that the recordings will be maintained in the COE investigation file subject to the Commonwealth's record retention rules.

On October 23, 2019, Preston emailed Langan and Boone requesting dates for bargaining. On November 6, 2019, the Union sent Langan and Boone a counter proposal, again in the form of a draft memorandum of agreement. In the counter proposal, the Union agreed that recordings would only be used to assist in ensuring accurate "notetaking" in anticipation of writing the report for the agency and that it would not be introduced at a disciplinary hearing or used as an adverse inference. However, the Union counter proposed notice to bargaining unit members informing bargaining unit members that they have a right to refuse to be recorded and proposed that interviews may only be recorded with the agreement in writing of all participants. The Union further proposed that should a transcript be made of the recording, it would not be used for examination or cross examination of a witness, and that the investigatory case file would be provided to the Union.

On November 25, 2019, COE Investigator Sean Mullen (Investigator Mullen) contacted a bargaining unit member requesting she participate in an interview as a witness about conduct she may have observed that was the subject of a COE investigation (Investigation Witness A). On the day of the interview, Investigator Mullen spoke with Investigation Witness A about the COE procedures and discussed the anticipated interview; however, Investigation Witness A left without participating. On or about December 9, 2019, Union Representative Chris Cook (Cook) emailed Preston about Investigation Witness A's experience. Cook wrote, "one of my members…was

brought in as a witness to be interviewed. The COE investigator, Sean Mullen, repeatedly tried to convince her that the interview had to be taped. [Investigation Witness A] held firm and refused to be interviewed and eventually walked out."[8] Preston subsequently emailed Langan expressing his discontent with the situation and indicating "if this is repeated, we will almost certainly file a charge."

On December 11, 2019, Boone forwarded the Union a response in the form of a draft memorandum of understanding, which stated that "the parties agree that investigatory interviews would be audio recorded by the HRD's Investigation COE investigators. In the event that a NAGE member who is the Complainant or is the Respondent does not wish to be audio recorded, the Investigator will secure a second investigator to take notes." Further, the Commonwealth's counter proposal included several of the provisions of the Union's proposal with slight modifications.

On February 3, 2020, the Union and Commonwealth met to discuss the COE.[9] Specifically, the parties discussed the December 9, 2019 email from Cook, and Preston indicated that the Union would not file a charge of prohibited practice unless a bargaining unit member was under threat of discipline for not participating in a taped interview. Generally, the parties engaged in productive conversations about the COE and the

[8] Investigator Mullen testified that while he discussed the COE procedures, he did not repeatedly ask Investigation Witness A why she didn't want to be recorded and Investigation Witness A did not inform him that she did not want to be recorded. Neither Cook nor Investigation Witness A testified at the hearing and the Commonwealth was not able to cross-examine them about the statements made in the email. However, the email is relevant to show that Cook informed Preston in December of 2019 that a COE investigator intended to record an interview of a bargaining unit member serving as a witness in a COE investigation, over their objection.

[9] Preston, Kaplan, Cook and Union Counsel Caroline O'Brien were present as part of the Union's bargaining team.

Union's concerns, and the parties agreed to schedule another meeting on February 19, 2020. Further, on February 7, 2020, Boone sent the Union an email reiterating its position and stating "as mentioned during our meeting, the COE has been in place for approximately 12 months. COE is committed to providing the accurate reporting and unbiased findings. Therefore, to suspend the current COE practice as offered by NAGE in lieu of filing charges is not an acceptable option for HRD." Boone indicated willingness to continue discussions at their meeting scheduled for February 19th in hopes of reaching a mutual agreement.

Witness Interviews in February of 2020

On or about January 17, 2020, COE Investigator Justine Plaut (Investigator Plaut) contacted a bargaining unit member (Investigation Witness B) to schedule an interview because she believed Investigation Witness B had witnessed conduct by another employee pertaining to a complaint filed with the COE. Subsequently, Investigation Witness B contacted Kelly, who informed Investigator Plaut that she wished to sit-in on the interview and if a recording device was to be used, the Union objected to the recording. Investigator Plaut informed Kelly that Union representatives were not allowed to sit-in on witness interviews and that all witness interviews are required to be recorded. On the date of the scheduled interview, Kelly attended and objected to the recording of Investigation Witness B and to the recording of another bargaining unit member and witness (Investigation Witness C). Investigator Plaut decided to postpone the interviews of Investigation Witness B and Investigation Witness C to another date. Kelly then informed Preston about the investigator's requirement that the bargaining unit members submit to a recorded interview.

Investigator Plaut conducted the rescheduled interviews of Investigation Witness B and Investigation Witness C on February 11, 2020. Kelly was not present during the witness interviews. At the beginning of each interview, Investigator Plaut told Investigation Witness B and Investigation Witness C that the interview was going to be recorded, noted their objections, and proceeded to record and conduct the interviews over their objection.[10] After learning about the interviews on February 11, 2020, the Union canceled the February 19th meeting and filed the charge of prohibited practice with the DLR.

OPINION

Timeliness

The Commonwealth argues that the allegations of the Complaint are untimely because the Union had actual knowledge that COE Investigators were recording interviews more than six months prior to the date the charge of prohibited practice was filed. The Commonwealth Employment Relations Board (CERB) holds that "except for good cause shown, a charge of prohibited practice must be filed with the [DLR] within six months of the alleged violation." See 456 CMR 15.04. Absent a showing of good cause, a charge must either be filed within six months of the alleged violation, or within six months of the time at which the charging party knew or should have known about the incident in order to be timely. Id.; See also Felton v. Labor Relations Commission, 33 Mass. App. Ct. 926 (1992); Town of Lenox, 29 MLC 51, MUP-01-3214, MUP-01-3215 (September 5, 2002) (citing Town of Dennis, 26 MLC 203, 205, MUP-1868 (April 21, 2000)). An employer

[10] Kelly had advised Investigation Witness B and C that if Investigator Plaut insisted on recording them, they were to object, but nevertheless comply so that they were not found to be insubordinate.

can claim untimeliness as an affirmative defense if it is able to show that the charging party had knowledge of the alleged violation prior to the expiration of the six-month limitations period, in the present matter, August 24, 2019. Diane McCormick v. Labor Relations Commission, 412 Mass. 164, 171, n.13 (1992); Commonwealth of Massachusetts, 35 MLC 268, 269, SUP-07-5371 (Dec. 31, 2008); Town of Dennis, 28 MLC 297, 301, MUP-2634 (April 3, 2002).

Here, the COE began recording interviews in or around March of 2019. The record shows that the Union became aware that the COE was recording interviews of respondents as early as May of 2019. Since May of 2019, Union representatives accompanied bargaining unit members who were named as respondents to COE investigations during their COE interviews because they could be subject to disciplinary action depending on the findings of the investigation. Specifically, Union representative O'Reilly and Snow participated in COE interviews of respondents in May and June of 2019 and observed the COE's recording practices. Union representatives also informed Preston of the recording practices in May of 2019, and Preston communicated his concerns to the attention of Langan and Boone in August of 2019.

In addition, the Union was aware in July of 2019 that COE Investigators ceased recording interviews of respondents if they objected to the recording and brought in a second investigator to take notes. In July of 2019, Union Representative Kaplan sat-in on an interview of a bargaining unit member who was a respondent in a COE investigation. When Kaplan objected to being recorded, the COE Investigator ceased recording and brought in a second investigator to take handwritten notes. Here, Kaplan's observance of the COE's recording practices is the first event reasonably likely to put the Union on notice that the Commonwealth brought in a second investigator to take notes if

a respondent objected to being recorded. See Secretary of Admin. & Finance v. CERB, 81 Mass. App. Ct. 21, 88 (2012); (citing Szymanski v. Boston Mutual Life Ins. Co. 56 Mass. App. Ct. 367, 371 (2002)). Her knowledge of the Commonwealth's recording practices for respondents in COE investigations is imputed to the Union. In her role as Union representative, Kaplan previously received notice from the Commonwealth on behalf of the Union about the COE's establishment and was a member of the Union's negotiation team. Compare Town of Ludlow, 17 MLC 1191, 1200, MUP-7040 (August 3, 1990).

On this basis, the Union had actual knowledge that COE Investigators recorded interviews with bargaining unit members who were respondents in COE investigations, unless the member objected, at which point a second investigator was brought in to take notes, more than six months prior to filing the charge of prohibited practice. Furthermore, the Union submitted no evidence establishing that it had good cause to file the allegation late or that the alleged unlawful conduct was a continuing violation. Boston Police Superior Officers Federation v. Labor Relations Commission, 410 Mass. 890 (1991); Miller v. Labor Relations Commission, 33 Mass. App. Ct. 404 (1992); Suffolk County Sheriff's Department, 27 MLC 155, MUP-1498 (June 4, 2001). For these reasons, this allegation is untimely under the DLR's Rules.

However, the Union did not learn of the Commonwealth's recording practices for interviews of bargaining unit members whose conduct was not the focus of the investigation, namely complainants and witnesses, until December of 2019. The Commonwealth has failed to provide evidence of an instance where a bargaining unit member who was a complainant or a witness objected to recording during a COE Interview prior to December of 2019. Further, there is no indication that the

Commonwealth informed the Union of its recording practices regarding complainants or witnesses prior to December of 2019. Thus, the remaining allegations were timely filed.

10(a)(5)

The remaining allegations of the Complaint allege that the Commonwealth violated Section 10(a)(5), and derivatively, Section 10(a)(1) of the Law when it failed to bargain in good faith by electronically recording interviews of bargaining unit members serving as complainants and witnesses to COE investigations, without providing the Union notice and an opportunity to bargain to resolution or impasse over the decision and the impacts of that decision. Section 6 of the Law requires public employers to negotiate in good faith with respect to wages, hours, standards of productivity and performance, and any other terms and conditions of employment. The statutory obligation to bargain in good faith includes the duty to give the exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse before changing an existing condition of employment or implementing a new condition of employment involving a mandatory subject of bargaining. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124, 127 (1989); School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983). The duty to bargain also extends to both conditions of employment that are established through a past practice as well as conditions of employment that are established through a collective bargaining agreement. Spencer-East Brookfield Regional School District, 44 MLC 96, 97, MUP-15-4847 (Dec. 5, 2017) (citing Town of Wilmington, 9 MLC 1694, 1699, MUP-4688 (March 18, 1983)).

A public employer's unilateral change of a condition of employment involving a mandatory subject of bargaining without first negotiating to resolution or impasse with the Union before implementing the change constitutes a prohibited practice under Section

10(a)(5) of the Law. School Committee of Newton, 388 Mass. at 574. To establish a unilateral change violation, the charging party must show that: (1) the employer changed an existing practice or instituted a new one; (2) the change affected a mandatory subject of bargaining; and, (3) the change was implemented without prior notice and an opportunity to bargain. City of Boston, 20 MLC 1545, 1552, SUP-3460 (May 13, 1994); Boston School Committee, 3 MLC 1603, 1605, MUP-2503, MUP-2528, MUP-2541 (April 15, 1977).

However, it is well established that an employer does not violate the Law when, without bargaining, it unilaterally alters procedural mechanisms for enforcing existing work rules, 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, University of Massachusetts, 7 MLC 1577, SUP-2178 (December 11, 1980)). In Duxbury School Committee, the CERB considered whether surveillance cameras installed by an employer to observe employee arrival and departure times constituted a change to employee's terms and conditions of employment. Duxbury School Committee, 25 MLC at 24. Because the employer maintained an existing method of timekeeping, the CERB found that the surveillance cameras were instituted as merely a more efficient and dependable means of enforcing the existing timekeeping rules, and that the employer was not obligated to bargain with the Union. Id.

Similarly, the Commonwealth's decision to require COE investigators electronically record complainant and witness interviews modified the procedural mechanism of notetaking and did not change an underlying condition of employment. The Commonwealth told the Union, and agreed in writing, that the recording would only be used for notetaking to assist the COE investigator in writing their reports. The

Commonwealth argues that it intended to electronically record interviews to modernize the notetaking procedure, to ensure the accurate recording of witness statements and to reduce the number of personnel required to participate in witness interviews as notetakers. There is no evidence in the record to suggest that the Commonwealth used or intended to use the electronic recording of complainant or witness statements in a manner different than they had used a COE investigator's handwritten notes. Further, the Commonwealth's policy allowed complainants to object to recording at which time a second investigator was brought in to take notes, a practice that had been in place prior to the COE's inception in February of 2019.[11]

Moreover, there is no evidence in the record to indicate that COE investigators received more or different information from complainants or witnesses when recording their statements than they otherwise would have received when a second investigator took handwritten notes. Compare Commonwealth of Massachusetts / Secretary of Administration & Finance, 46 MLC 160, 165, SUP-19-7352 (March 8, 2021) (The CERB held that the Commonwealth's use of a phone system to listen to the conversations of bargaining unit members with the public was not a change in a procedural mechanism for enforcing an existing work rule where the practice changed the type and amount of information available to managers and increased an employee's chances of being disciplined where they were not previously subject to discipline for their conduct during phone calls). Further, the Union did not substantiate that bargaining unit members were

[11] Although the Complaint alleges in paragraph 7 that the Commonwealth ceased recording of witnesses if they objected, the evidence presented at hearing indicates this was not the case. Since March of 2019, the COE's policy required witness interviews be recorded, but allowed complainants or respondents to object to recording and have a second investigator brought in for notetaking.

more likely to be subject to discipline based on their recorded statements versus their verbal statements to COE investigators. Id. Thus, the Commonwealth's decision to electronically record interviews was clearly a change in the procedural mechanism for receiving statements in COE investigations.

Furthermore, the change in the procedural mechanism for obtaining complainant and witness statements did not change any underlying term or condition of employment for bargaining unit members. Under the Code of Conduct, prior to the inception of the COE, bargaining unit members who reported or may have witnessed workplace policy violations were required to participate in administrative inquiries, respond promptly and fully, and refrain from making false or misleading verbal statements. The change did not institute a new work rule or amend any existing work rules regarding bargaining unit members' participation in COE investigations or apply existing work rules more stringently. Compare City of Taunton, 38 MLC 96, 98, MUP-06-4836, MUP-08-5050 (November 2, 2011) (Employer failed to bargain in good faith when it installed new time clocks accompanied by new standards with increased responsibility on employees). Further, bargaining unit members were not required to report more information than they previously shared with the Commonwealth during interviews for workplace investigations. Compare City of Springfield, 41 MLC 383, 385, MUP-12-2466 (June 30, 2015) (The CERB held that an employer's use of GPS in vehicles driven by bargaining unit members had a substantial impact on employee working conditions where the device reported far more information about driving behavior than was previously available to the employer). Although the parties met regarding the creation of the COE and the recording of respondents – an issue I found to be untimely – the Union did not raise any impacts specific to bargaining unit members giving statements as complainants or witnesses,

where the member's conduct was not at issue and there was no threat of disciplinary action or discernable basis for a grievance. Further, the Union has failed to identify how audio recording versus recording a bargaining unit member's statement in writing impacts their terms and conditions of employment.

Although the Union argues that bargaining unit members who refuse to be recorded may be subject to discipline, the employer's expectations that members participate in COE investigations and answer questions fully and truthfully existed prior to the creation of the COE and did not change after COE investigators began recording interviews. The CERB has held 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) (finding an employer's bulletin with directives changing the procedure for dealing with unfit custodians constituted an alternative means for enforcing a clearly established work rule that existed prior to its issuance.) The Commonwealth has substantiated that prior to the establishment of the COE and recording of witness interviews, bargaining unit members were required under the Code of Conduct to participate in administrative inquiries and could be subject to discipline for failing to participate. The Commonwealth's decision to record witness interviews did not change the existing disciplinary policy.[12]

[12] In its brief, the Union also argues the Commonwealth's change violated G.L. c. 272, s. 99, the Massachusetts Wiretap statute, because the Commonwealth recorded witnesses without their consent. However, there is no indication that the Commonwealth secretly recorded bargaining unit members as prohibited by the statute. Rather, the facts show that COE Investigators announced that the interview would be recorded and displayed the recording device in plain view of the bargaining unit member.

Finally, contrary to its argument, the Union failed to present any evidence that prohibiting witnesses from objecting to audio recording in the manner that respondents and complainants could, constituted a change in terms and conditions of employment. Prior to the inception of the COE, witnesses were required to participate in COE interviews and could not object to giving a witness statement. Although extending the same conditions of respondent and complainant interviews to witnesses may have been a Union proposal to resolve the underly dispute, the Commonwealth's refusal to agree does not constitute a prohibited practice where there is no evidence of a unilateral change.[13]

For these reasons, the Commonwealth's decision to change the procedural mechanism for notetaking by recording witness and complainant interviews constitutes a more efficient and accurate means of enforcing an existing work rule. Duxbury School Committee, 25 MLC at 24. Further, the Commonwealth had no duty to bargain as there were no discernable impacts on bargaining unit members' terms and conditions of employment.

[13] Although not binding in the present matter, this finding is consistent with the CERB's opinion on an identical issue rendered in a probable cause determination in Commonwealth of Massachusetts and Massachusetts Correction Officers Federated Union. Order of Dismissal, (unpublished), SUP-05-5174 (March 30, 2007). In that case, Department of Correction internal investigators previously recorded responses to questions by making handwritten notes during investigatory interviews and created investigatory reports. Id. The Union filed a charge of prohibited practice when the Department of Correction implemented a policy requiring investigatory interviews be tape recorded and subjecting employees who failed to cooperate to discipline. Id. The CERB dismissed the matter for lack of probable cause, finding that the recording of internal interviews of correctional officers as a method of notetaking does not constitute a change in terms and conditions of employment and that the charging party failed to establish a change in disciplinary procedures which existed prior to the recording. Id.

CONCLUSION

Based on the record and for the reasons explained above, I conclude that the Commonwealth did not violate Section 10(a)(5), and derivatively, Section 10(a)(1) of the Law by electronically recording interviews of bargaining unit members serving as witnesses and complainants during COE investigations without their consent. I further find that the Union's allegation that the Commonwealth failed to bargain over its decision to record interviews of bargaining unit members serving as respondents in internal investigations is untimely under the DLR's Rules. Accordingly, I dismiss the Complaint.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

SARA SKIBSKI HILLER, 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.