

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

In the Matter of

COMMONWEALTH OF MASSACHUSETTS/
MASSACHUSETTS EMERGENCY
MANAGEMENT AGENCY

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES

Case No. SUP-20-7917

Date Issued: September 22, 2022

CERB Members Participating:

Marjorie F. Wittner, Chair
Kelly Strong, CERB Member

Appearances:

Emily Sabo, Esq. - Representing the Commonwealth of Massachusetts

Caroline O'Brien, Esq. - Representing NAGE

CERB DECISION ON APPEAL OF A HEARING OFFICER DECISION

1 SUMMARY

2 On January 24, 2022, a Department of Labor Relations (DLR) Hearing Officer
3 issued a decision that concluded that the Commonwealth of Massachusetts
4 (Commonwealth or Employer), acting through the Massachusetts Emergency
5 Management Agency (MEMA), had violated Section 10(a)(5) and, derivatively, Section
6 10(a)(1) of M.G.L. c. 150E (the Law) by transferring certain bargaining unit work to non-
7 unit employees without providing the National Association of Government Employees
8 (NAGE) prior notice and an opportunity to bargain about its decision to transfer this work

1 and the impacts of the decision on bargaining unit employees. Citing errors of both fact
2 and law, the Commonwealth has appealed the decision to Commonwealth Employment
3 Relations Board (CERB). Upon review of the record, including the testimony, exhibits
4 and the parties' arguments on appeal, we affirm.

5 Background

6 We adopt the Hearing Officer's thorough and largely undisputed findings in their
7 entirety and summarize them in pertinent part below.¹

8 NAGE is the exclusive collective bargaining representative for certain
9 Commonwealth employees, including employees employed by MEMA in statewide unit
10 6. Article 2, §2.1 of the parties' collective bargaining agreement provides in pertinent part:

11 The Employer shall have the right to exercise complete control and
12 discretion over its organization and technology including but not limited to
13 the determination of the standards of services to be provided . . . ; the
14 determination of the methods, means and personnel by which its operations
15 are to be conducted; the appointment, promotion, assignment, direction and
16 transfer of personnel; . . . and the taking of all necessary actions to carry
17 out its mission in emergencies.

18 MEMA is the state agency charged with planning for, responding to, and
19 recovering from natural and manmade hazards and threats. MEMA performs these duties
20 in conjunction with a variety of federal, state and local entities. There is a public
21 information and education component to many of MEMA's activities. This decision
22 considers whether, as a result of organizational changes in 2020 and 2021, MEMA
23 transferred certain public information and preparedness duties previously performed by

¹ We address the Commonwealth's factual challenges separately.

1 NAGE bargaining unit members Peter Judge (Judge) and Christopher Besse (Besse) to
2 non-bargaining unit employees.

3 Judge served as a Public Coordinator III from 2000-2005 and as a Public
4 Information Officer (PIO) from 2005 until 2016, when he retired. Judge's duties in both
5 capacities included preparing and disseminating information concerning agency activities
6 during emergencies to the general public through print, radio, television and computers.
7 Judge also developed and implemented outreach activities for the general public, federal
8 agencies and private industry.

9 Besse, who worked closely with Judge, was hired in 2012 in the title of
10 Preparedness Coordinator. In 2015, Besse assumed a new bargaining unit position titled
11 Social Media and Public Information Officer and started reporting directly to Judge. From
12 2016-2017, Besse performed his own work but also assumed Judge's responsibilities as
13 Interim PIO. In 2017, Besse's title was Public Coordinator III and Public Information
14 Coordinator (PIC). In that capacity, Besse posted on social media, handled interviews,
15 and wrote press releases. He also handled all public information requests, including
16 requests from the media, both during and after his regular working hours. Besse also
17 served as the PIO when the MEMA director activated a State Emergency Operations
18 Center (SEOC)² and led public preparedness initiatives and campaigns such as
19 Hurricane Preparedness Week and Emergency Preparedness. The PIC job description
20 further reflected that:

21 Under the supervision of the Director, Deputy Director and Chief of Staff,
22 the [PIC] performs public information activities on behalf of the agency,
23 including . . . coordinating the agency's public information activities with the

² SEOCs are activated when MEMA's Director determines that the emergency has significant impacts or multiple communities are involved.

1 Executive Office of Public Safety and Security, the Governor's Office, and
2 other agencies and organizations.

3
4 Samantha Phillips (Phillips) became MEMA Director in early 2019. Phillips
5 supervised Besse from August 2019 through January 2020. Her supervision included
6 having monthly check-ins with him, reviewing and revising his draft press releases, and
7 having input into the content and timing of messages he sent to the public. In late 2019,
8 believing that Besse's public information duties were more than one person could handle,
9 and that certain policy and program work in the public information sphere was more
10 appropriately assigned to management, Phillips posted an opening for a new
11 management position called "Public Engagement Manager." This job posting contained
12 most of Besse's duties. After NAGE filed a prohibited practice charge with the DLR
13 alleging that MEMA had unlawfully transferred bargaining unit work by posting this new
14 position (Case No. SUP-19-7717), the Commonwealth withdrew the job posting.³

15 In January 2020, Dawn Brantley (Brantley) assumed a position titled "Assistant
16 Director of Planning and Preparedness." In that capacity, she reported to Phillips and
17 became Besse's first-line supervisor. When Besse was out, Brantley assumed some of
18 his responsibilities, including answering media calls and writing press releases.

19 Also in January 2020, MEMA posted a job vacancy for a new non-bargaining unit
20 position titled Public Engagement Program Manager. Many of the duties listed on the
21 posting had public information and outreach components, including responding to
22 inquiries from members of the media and coordinating the agency's public information
23 activities with the Executive Office of Public Safety and Security, the Governor's Office

³ NAGE withdrew SUP-19-7717 without prejudice to refiling.

1 and other agencies and organizations. In August 2020, Tom Lyons (Lyons) was hired in
2 this role. Besse began reporting directly to Lyons. Lyons reported to Brantley.

3 In March 2020, MEMA activated a SEOC to deal with the COVID-19 health crisis.
4 The Governor created a COVID-19 Command Center that handled the public information
5 aspect of the pandemic that was separate from MEMA. Before Lyons was hired, the
6 Command Center occasionally contacted Besse if it needed certain information or help
7 drafting certain responses. At the time of hearing, the Command Center contacted Lyons
8 for the same type of assistance. Besse similarly also used to be the main liaison for
9 responding to questions from Mass 211 employees, but at the time of hearing, Lyons was
10 the liaison.

11 In September 2020, MEMA issued an Activation Procedure that formalized MEMA
12 staff roles during a SEOC. This procedure indicated that there were two teams of
13 employees who were responsible for staffing the initial response to the SEOC. Both
14 Lyons and Besse, who were on different teams, were listed as PIOs during a SEOC.
15 During a partial SEOC in 2020, Besse served as the PIC but Lyons provided overnight
16 support. Phillips testified that she also performed some media-related work during this
17 SEOC but did not specify whether she performed the type of media work that Directors
18 had done in the past, such as giving interviews, or whether she performed the type of
19 media work that previously had been exclusive bargaining unit work.

20 In April 2021, MEMA issued a document titled "Public Information Protocol:
21 Responding to Steady-State Media Responses" (Protocol). The Protocol stated that the
22 PIC, i.e., Besse, was the primary point of contact and responsible for coordinating the
23 response to all media requests during regular business hours. The Protocol also stated,

1 however, that after regular business hours, all media calls should be directed to the
2 Communication Center. The Protocol further explained that if the after-hours inquiry
3 required an immediate response, the Communication Center should contact Lyons and,
4 if he was unavailable, Brantley. The Protocol did not list Besse as a contact for any after-
5 hours media inquiries.⁴

6 OPINION⁵

7 The CERB has long used a three-part test to determine whether a transfer of
8 bargaining unit work is a mandatory subject of bargaining. To trigger an employer's
9 bargaining obligation, the exclusive representative must prove that: 1) the employer
10 transferred bargaining unit work to non-unit personnel; 2) the transfer of work had an
11 adverse impact on either individual bargaining unit members or on the bargaining unit
12 itself; and 3) the employer did not provide the exclusive bargaining representative with

⁴ On (unnumbered) page 12 of its supplementary statement, the Commonwealth renews its objection to the admission of the Protocol as Union Exhibit 10. At hearing, the Commonwealth argued that the Protocol was outside the scope and timeframe specified in the Complaint, but the Hearing Officer overruled the objection on grounds that the Protocol was relevant to the issues in the Complaint. We agree. The Complaint issued in August 2020, the same month that MEMA hired Lyons to fill the Public Engagement Program Manager position at issue in the Complaint. Where the issue in this case is whether the Commonwealth violated the Law by transferring bargaining unit work as a result of creating the Public Engagement Program Manager position, documents that reflect what Lyons' duties were after he filled that position are directly relevant to whether an unlawful transfer of bargaining unit of work occurred. While it may be within a Hearing Officer's discretion to limit evidence to events that occurred within the timeframe of the complaint, see, e.g., City of Cambridge, 30 MLC 31, 33, MUP-01-3033 (September 3, 2003), a hearing officer is by no means compelled to do so. That is especially true here, where the passage of time between the issuance of the complaint and the hearing enables the parties to submit evidence regarding the actual duties of bargaining unit members and the individual to whom bargaining unit work was allegedly transferred, instead of merely relying on a much less probative job posting.

⁵ The CERB's jurisdiction is uncontested.

1 prior notice and an opportunity to bargain over the decision to transfer the work.
2 Commonwealth of Massachusetts v. Labor Relations Commission, 60 Mass. App. Ct. 831
3 (2004). Where job duties are shared by bargaining unit members and non-unit
4 employees, the Law imposes a bargaining obligation only when there is a calculated
5 displacement of bargaining unit work or where the employer has unilaterally changed a
6 pre-existing pattern of shared work. City of Newton, 35 MLC 142, 146, MUP-02-3634
7 (December 31, 2008) (additional citations omitted).

8 Exclusive Bargaining Unit Work

9 Here, based on the facts set out above and other facts detailed in her decision, the
10 Hearing Officer first found that the Commonwealth had transferred what was once
11 exclusive bargaining unit work to non-unit personnel. Specifically, the Hearing Officer
12 found that once Lyons was hired, Besse ceased serving as the lead on public
13 preparedness initiatives and campaigns; serving as the primary contact for PIOS at other
14 agencies; and coordinating public information with other agencies for large emergency
15 events. She further found that Lyons and, to a lesser extent, Brantley, became
16 responsible for performing Besse's former duties of responding to after-hours media calls
17 and posting on social media after hours, for which Besse had previously received over
18 time and standby pay.⁶ The Hearing Officer also found that after Lyons was hired, Besse
19 began sharing the following duties with non-unit members that he and/or Judge had
20 previously performed exclusively, unless they were on leave or otherwise unavailable:
21 serving as PIO during an SEOC, writing press releases, and updating MEMA's website.

⁶ Besse's loss of standby pay is the subject of a different prohibited practice charge and is not at issue here.

1 The Commonwealth disputes that the Union established that these duties were
2 exclusive bargaining unit work. It first challenges the finding that before 2020, Judge and
3 Besse exclusively served as PIOs. The Commonwealth argues that this was incorrect
4 because one of its witnesses, Michael Russas (Russas),⁷ testified that a manager named
5 Scott MacLeod (MacLeod) also served as the PIO.⁸ We reject the challenge.

6 The Hearing Officer considered Russas' testimony in footnote 18 of her decision
7 but accorded it no weight because his testimony contained no timeframe or detail about
8 MacLeod's duties. Noting that no other witnesses had provided testimony regarding
9 MacLeod's involvement with MEMA's public information, the Hearing Officer instead
10 credited Judge's and Besse's "consistent" testimony that bargaining unit employees had
11 exclusively served as the PIO during their tenures. The Commonwealth claims that was
12 error based on other hearing exhibits that Russas referenced during his testimony,
13 including one that defined the PIO duties during an emergency and others showing that
14 Russas and MacLeod had both served as Section Chiefs in 2016. The Commonwealth
15 also asserts that Russas reiterated on cross-examination that non-NAGE staff members
16 had served as PIO, even when Besse and Judge were available. However, a review of
17 Russas' testimony shows that he specifically mentioned MacLeod by name only once,
18 when he stated on direct examination that MacLeod had served as a PIO. It fell well
19 within the Hearing Officer's discretion not to accord any weight to this testimony, because,
20 as she found, Russas did not provide any details or even a timeframe regarding

⁷ Russas, who was one of the Employer's witnesses, served as the Assistant Director for MEMA's Operations Division.

⁸ The Hearing Officer spelled the name as "Maclead." We adopt the spelling used by the parties and in the transcript.

1 MacLeod's service, and because there was clear, specific and consistent testimony from
2 Besse and Judge that they had previously not shared their PIO duties. Although an
3 employer may defend against an allegation that it unlawfully transferred bargaining unit
4 work outside of the unit by arguing that the work at issue was never exclusively bargaining
5 unit work, see, e.g., City of Boston, 38 MLC 85, 88, MUP-08-5253 (H.O. September 28,
6 2011) *aff'd* 38 MLC 201, 202-203 (March 9, 2012), an employer must provide concrete
7 facts in support of its claim. Id. The Commonwealth did not do so, and we therefore find
8 no basis to overturn the HO's finding.

9 The Commonwealth further challenges what it claims is the Hearing Officer's
10 finding in footnote 32 of the decision that, before Lyons was hired in August 2020, Besse
11 was 100% responsible for coordinating media inquiries and triaging with leadership.⁹ The
12 Commonwealth claims this finding is erroneous based on Phillips' testimony that she
13 handled some media inquiries during the late 2019-2020 holiday period and Brantley's
14 testimony that Besse's job responsibilities would "roll" to her or Phillips if Besse was out.
15 The Commonwealth also points to Russas' testimony that duty officers also coordinated
16 media inquiries. For the following reasons, these challenges fail.

17 First, footnote 32 pertains to Lyons' assuming Besse's responsibility for responding
18 to media calls *after hours*, and not for generally coordinating media inquiries. The Hearing
19 Officer's findings in this footnote and the accompanying text form the basis of her
20 conclusion that the Commonwealth transferred this after-hours responsibility to Lyons,

⁹ While the Commonwealth's challenge focuses only on footnote 32, we note that the Hearing Officer made similar findings in footnote 37 and the accompanying text. As stated infra, those findings are also supported by the record evidence.

1 and to a lesser extent, Brantley. Phillips' testimony that she responded to some media
2 inquiries when Besse was on vacation during the 2019 holiday season¹⁰ and Brantley's
3 testimony that work "rolled" to her when Besse was on leave¹¹ provide no basis to disturb
4 this finding because their testimony did not reflect that this filling-in for Besse included
5 filling in after-hours.

6 Even if we were to find that the fact that Phillips and Brantley occasionally filled in
7 for Besse when he was out rendered some media duties shared, the evidence shows that
8 there was a calculated displacement of unit work when the Commonwealth posted the
9 Public Engagement Manager position, filled it with Lyons, and implemented the April 2021
10 Protocol. As described in the decision and above, before that occurred, Besse was the
11 only employee who *regularly* handled media relations both during the workday and after
12 hours. After April 2021, although the Protocol provided that the PIC, i.e., Besse, remained
13 "responsible for coordinating the response to all media requests during *regular* business
14 hours," all after-hour requests that required an immediate response were routed to Lyons,
15 and in his absence to Brantley. Accordingly, Phillips and Brantley's testimony provides no
16 basis to disturb the Hearing Officer's findings regarding Besse's workday or after-hours
17 media responsibilities.

18 Nor is there any basis to disturb these findings based on the Commonwealth's
19 arguments that duty officers were also responsible for handling media requests. The

¹⁰ See Transcript, Day 3, p. 101.

¹¹ See Transcript, Day 2, pp. 195-196. To the extent the Commonwealth argues that Brantley and Phillips shared some of Besse's duties, we address that argument later in this opinion.

1 Hearing Officer addressed and rejected this argument in footnote 37 of her decision,
2 where, relying on other parts of Russas' testimony, and noting a possible mistake in the
3 transcript, she found that while duty officers may coordinate initial emergency responses,
4 they did not give interviews or respond to media inquiries. We defer to those findings as
5 they are supported by the record evidence.¹² See Vinal v. Contributory Retirement
6 Appeal Board, 13 Mass. App. Ct. 85 (1982).

7 In a similar vein, the Commonwealth contends that the Hearing Officer erred when
8 she ignored other testimony establishing that leading public preparedness initiatives was
9 not exclusive bargaining unit work. The Commonwealth first cites Russas' testimony
10 regarding David Cramer (Cramer), a contract employee who served as the "Citizen Corps
11 Program (CCP) Coordinator" between 2012-2014. Russas testified that during this
12 period, Cramer coordinated with local volunteer organizations called "Community
13 Emergency Response Teams" (CERTs), which help prepare a city or town to respond to
14 an emergency. According to Russas, Cramer's duties included sharing lessons and best
15 practices with the CERTs, developing related publications and providing trainings.

¹² As footnote 37 of the Hearing Officer's decision suggests, the portions of Russas' testimony regarding duty officers that the Commonwealth relies upon are somewhat confusing. In particular, it is unclear to whom Russas was referring when he used the pronoun "we." It is also unclear what Russas meant by the term "coordinate" or when using that term, whether he was referring to duty officers "coordinating" directly with the media, or only with the PIO. These ambiguities were somewhat clarified on cross-examination when Russas confirmed that prior to 2020, no duty officers regularly responded to media inquiries or did media interviews. See Transcript, Day 3, p. 142. The fact that duty officers may have provided content to PIOs does not affect the conclusion that the Commonwealth transferred bargaining unit work. The issue before us is not whether management and duty officers would at times, provide the PIC/PIO with information and content for further distribution. This is not in dispute. Rather, the issue is whether Judge and Besse were exclusively responsible for *distributing* that information to the public or media before the Public Engagement Program Manager Position was created and filled. The record supports the conclusion that they were.

1 Russas also testified that Cramer performed similar duties for the Department of Public
2 Health's Medical Reserve Corps (MRC). Based on this testimony, the Commonwealth
3 argues that the Hearing Officer erred when she concluded that bargaining unit members
4 were exclusively responsible for leading public preparedness initiatives and developing
5 related publications.

6 We disagree. The Hearing Officer's conclusion regarding bargaining unit members
7 leading preparedness campaigns related narrowly to Besse attending meetings with
8 management officials concerning certain preparedness campaigns such as Hurricane
9 Preparedness and implementing the plan. There was no evidence that Besse or Judge
10 had anything to do with coordinating CERTs or working with local CCPs or MRC's before
11 Lyons was hired, or that Cramer's functions extended into Besse's former exclusive realm
12 of leading and implementing general public preparedness campaigns. The fact that
13 Cramer may also have prepared publications regarding CCP programs also does not
14 change this result. There is no contention that PIO/PICs were the only employees within
15 MEMA that drafted any public-facing publications. Rather, the Hearing Officer found only
16 that the Commonwealth had transferred Judge's and Besse's bargaining unit duties with
17 respect to writing press releases, posting on social media and updating the website.

18 The Commonwealth finally contends that the Hearing Officer erroneously ignored
19 the former management position "Chief of Staff" when concluding that serving as the
20 primary contract for other PIOs, and coordinating public information with other agencies
21 for large scale events was exclusive bargaining unit work.¹³ The Commonwealth relies

¹³ Before the reorganization, the Chief of Staff supervised the Public Information Officer and Preparedness Coordinator.

1 on the Chief of Staff's job description, which states that the Chief of Staff is responsible
2 for overseeing "public information activities, including media releases, social media
3 postings, MEMA's monthly newsletter and responding to media requests," and for
4 "[e]nsuring effective communications and information sharing with, and responsiveness
5 to [various state agencies]." The Commonwealth also relied on Phillips's testimony that,
6 in deciding to eliminate the Chief of Staff position, MEMA wanted to create a public
7 engagement program manager to "oversee and support" programs, and that the Acting
8 Chief of Staff was responsible for coordinating with and serving as a liaison to the
9 Executive Office of Public Safety and Security (MEMA's Secretariat), the Governor's
10 Office and "other agencies" that she did not name.

11 These portions of the record are insufficient to overturn the Hearing Officer's
12 conclusion that these duties had previously been exclusive bargaining unit duties.
13 Standing alone, the job description does not establish that any former Chief of Staff
14 actually served as the *primary contact for PIOs* at other agencies. Rather, both Phillips'
15 testimony and the job description reflects that the Chief of Staff's role was one of
16 "coordination" and "oversight." As the Hearing Officer stated elsewhere in the decision,
17 work is not shared merely because managers review it. Moreover, even if the Chief of
18 Staff shared these duties with the PIO in the past, evidence reflecting that Lyons took
19 over serving as the main liaison to Mass 211 and the COVID-19 Command Center
20 establishes that an ascertainable percentage of this work has been transferred outside of
21 the bargaining unit. We therefore reject this challenge.

22 Adverse Impact

1 Turning to the adverse impact portion of the transfer analysis, the Hearing Officer
2 concluded that this transfer of bargaining unit work adversely affected Besse because
3 Besse has less work and less job security and, due to lost opportunities to earn overtime
4 after hours, had suffered financial harm. The Hearing Officer also found that the
5 bargaining unit as a whole had been adversely affected because, even though it had not
6 lost any bargaining unit positions, the transfer of all of these duties could result in an
7 eventual elimination of the bargaining unit through gradual erosion of bargaining unit
8 duties. She distinguished the facts from those in Chief Justice for the Administration and
9 Management of the Trial Court v. Commonwealth Employment Relations Board, 79 Mass.
10 App. Ct. 374 (2011) (CJAM), where the Appeals Court found that no unlawful transfer of
11 bargaining unit work had occurred where the evidence showed that the work would have
12 gone undone if it had not been assigned to non-bargaining unit personnel. The Hearing
13 Officer found that, in contrast, Judge and Besse had previously performed the transferred
14 responsibilities and the Commonwealth had not introduced evidence demonstrating why
15 Besse would not have continued to do so.

16 The Commonwealth contests several aspects of this analysis. First, it claims that
17 there is no support in the record for the finding that Besse earned less in overtime due to
18 the transfer. The Commonwealth argues that because Besse never testified how much
19 he earned in overtime in 2020, the Hearing Officer's finding that he earned less overtime
20 in 2020 than in prior years is not supported. As explained above and in the decision,
21 however, there is ample support for the finding that Besse's after-hours media and social
22 media responsibilities were transferred to management. Moreover, Besse testified that
23 his ability to earn overtime was affected once MEMA implemented the new procedure

1 and stopped routing media calls to him on Saturdays.¹⁴ This testimony supports the
2 Hearing Officer's finding in the Remedy portion of her decision that there is "sufficient
3 information to find that Besse suffered financial harm as a result of the transfer of
4 bargaining unit work that he previously performed after hours on an overtime basis."
5 Although the Commonwealth complains that the Union did not submit Besse's overtime
6 earnings before 2020, neither did the Commonwealth. Accordingly, Besse's testimony
7 that he lost overtime opportunities was un rebutted. Any uncertainty as to the precise
8 amounts of backpay can be resolved, if necessary, through a compliance proceeding.
9 Town of Burlington, 35 MLC 18, 27, MUP-04-4157 (June 30, 2008).

10 The Commonwealth further contends that the Hearing Officer erred when she
11 found that Besse suffered an adverse impact because he lost some of his previous
12 responsibilities to Brantley and to Phillips. In this regard, the Commonwealth contends
13 that the Hearing Officer erred by making any findings whatsoever about work being
14 transferred to Brantley and Phillips. It argues that both the Union's charge and the DLR's
15 Complaint were limited to bargaining unit work being transferred to the Public
16 Engagement Program Manager. The Commonwealth thus claims that any findings
17 regarding work being transferred to other non-bargaining unit positions were outside of
18 the scope of the Complaint. The Commonwealth also argues that because Phillips was
19 hired one year before Lyons, any findings that Phillips performed Besse's duties
20 demonstrates that the work was shared, not exclusive, bargaining unit work.

¹⁴ See Transcript Day 2, pp. 102-103.

1 Based on the CJAM decision, we agree with the Commonwealth that Besse did
2 not personally suffer any adverse impact based on any bargaining unit work that Phillips
3 and Brantley performed when Besse was otherwise unavailable. We further decline to
4 find that Besse suffered an adverse impact when Phillips performed some media-related
5 duties in 2020 because the record is unclear whether Phillips was actually performing
6 bargaining unit work at the time.

7 The record is clear, however, that, in accord with the Protocol, the Communications
8 Center contacted Brantley if an after-hours media call required an immediate response
9 and Lyons was unavailable. Thus, Brantley's assumption of these duties was directly
10 related to the transfer of after-hours media duties to Lyons. The Hearing Officer did not
11 go outside the scope of the Complaint when determining that Besse, who formerly
12 performed these duties, suffered an adverse impact when those duties were transferred
13 to Lyons and, to a lesser extent Brantley, if Lyons was unavailable.

14 In sum, despite our finding no adverse impact to Besse based on work that Phillips
15 and Brantley may have performed in his absence, we affirm the Hearing Officer's
16 determination that both Besse and the bargaining unit as a whole suffered an adverse
17 impact as a result of the transfer of the specific duties outlined in the decision that Besse
18 performed before Lyons assumed the position of Public Engagement Program Manager.
19 As the Hearing Officer found, there is no evidence in the record that Besse could not have
20 continued to perform those duties had they not been transferred.

21 Bargaining Obligation

22 There is no dispute that the Commonwealth did not provide the Union with prior
23 notice and an opportunity to bargain over the decision to transfer bargaining work. As it

1 did at hearing, however, it defends its failure to bargain on grounds that the Civil Defense
2 Act and Article 2, §2.1 of the CBA gave MEMA's Director the managerial right to
3 implement the transfer without bargaining. The Hearing Officer rejected this argument
4 and so do we.

5 Civil Defense Act

6 Citing Department of State Police v. Massachusetts Organization of State
7 Engineers and Scientists (MOSES), 456 Mass. 450 (2010), the Commonwealth contends
8 that the portion of the Civil Defense Act that authorizes MEMA's Director to "appoint such
9 experts, clerks and other assistants as the work of [MEMA] may require and may remove
10 them" is a specific statutory mandate that precluded it from bargaining with the Union
11 before transferring the work at issue here. We disagree. Although the statute in the
12 MOSES decision is similar to the Civil Defense Act, in that it provides the State Police
13 Colonel with the right of appointment and removal, MOSES may be distinguished
14 because it squarely presented the issue of whether the State Police Colonel could remove
15 an employee. Here, by contrast, the issue is not one of appointment or removal but
16 whether the Commonwealth had to bargain before transferring certain duties outside of
17 the bargaining unit.

18 We find the SJC's recent decision in Board of Higher Education v. Commonwealth
19 Employment Relations Board, 483 Mass. 310 (2019) to be more instructive on this issue.
20 There, the Court construed statutory language in M.G. L. c. 15A, §22, which granted the
21 Board of Higher Education the right to "appoint, transfer, dismiss, promote and award
22 tenure to all personnel" as a broad, general grant of management authority that placed
23 within the "realm of nondelegable management authority only the 'authority to make

1 specific appointment determinations, and decisions to abolish positions.” Id. at 320-321
2 (citing Massachusetts Community College Council, 81 Mass. App. Ct. 554, 560, quoting
3 Board of Higher Education v. Massachusetts Teachers Association, 62 Mass. App. Ct.
4 42, 49 (2004)). In Board of Higher Education, the Court determined that a collective
5 bargaining agreement provision that limited the percentage of courses that could be
6 taught by part-time faculty in certain departments did not interfere with the employer’s
7 general managerial right to appoint, transfer, dismiss promote, and award tenure. Id. at
8 321. Likewise, in this case, we find nothing in the Civil Defense Act that prohibits the
9 Commonwealth from giving the Union notice and an opportunity to bargain before
10 transferring public information duties out of the unit that have belonged to bargaining unit
11 members since at least the early 2000’s.¹⁵

12 We similarly reject the argument regarding the CBA’s management rights clause.
13 To successfully invoke the affirmative defense of contractual waiver, an employer bears
14 the burden of proving that the “contract clearly, unequivocally and specifically authorizes
15 its actions.” City of Newton v. Commonwealth Employment Relations Board, 100 Mass.
16 App. Ct. 574, 584 (2021) (quoting City of Boston v. Labor Relations Commission, 48
17 Mass. App. Ct. 169, 174 (1999)); City of Newton, 29 MLC 135, 138, MUP-2629 (July 18,

¹⁵ To the extent the Commonwealth argues that these decisions were level of services decisions or non-delegable public safety decisions, we find no conflict between the right to determine the level of public information services to provide during an emergency, e.g., having two PIOs instead of one, and the right to bargain over whether unit or non-bargaining unit members will perform those duties. Further, the Commonwealth has not explained how public safety has been impacted by the particular duties transferred outside of the unit, e.g., responding to media requests after hours, or serving as the primary contact for other public information officers. Finally, we note that the Commonwealth has not defended its actions here on grounds that exigent circumstances required that it take action before completing its bargaining obligation.

1 2001). Absent bargaining history showing that the union knowingly and unequivocally
2 waived its bargaining rights, waiver of the right to bargain over a particular topic cannot
3 be found on the basis of a broad but general management right clause. School
4 Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 569 (1983); Town
5 of Marblehead, 12 MLC 1667, 1670, MUP 5370 (March 28, 1986). Here, the broad
6 language of Article 2, §2.1 of the parties' management rights clause, which include
7 granting to the employer the right to determine the standards of service to be provided
8 and taking all necessary actions to carry out its mission in emergencies is a broad
9 management rights clause that did not confer upon the Commonwealth the specific right
10 to transfer bargaining unit work outside of the bargaining unit. Further, the parties
11 presented no evidence of bargaining history that would shed light on the intent of the
12 parties when they negotiated that clause. Compare Newton Police Association, 35 MLC
13 142, MUP-02-3624 (December 31, 2008) (no duty to bargain over decision to transfer
14 bargaining unit work where the management rights clause contained specific and narrow
15 language granting employer the discretion to determine whether work should continue to
16 be performed by the bargaining unit) to Town of Marblehead, 12 MLC at 1670 (absent
17 bargaining history to the contrary, management rights clause that granted the town the
18 right to determine departments' missions and the methods, means and number of
19 personnel needed to carry out its mission did not operate as a waiver of union's right to
20 bargain over the transfer of bargaining unit work to non-bargaining unit employees). We
21 therefore affirm the Hearing Officer conclusion that the language of that clause is too
22 vague to demonstrate a clear and conscious waiver of the Union's right to bargain about
23 the removal of Union work. Id. at 1671.

1 Conclusion

2 For the foregoing reasons, we conclude that the Commonwealth violated Section
3 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it transferred certain public
4 information bargaining unit duties without first giving the Union prior notice and an
5 opportunity to bargain over the decision to transfer the work and the impacts of that
6 decision on mandatory subjects of bargaining.

7 ORDER

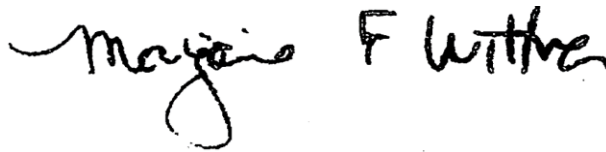
8 WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the
9 Commonwealth, acting through MEMA, shall:

- 10 1. Cease and desist from
- 11 a. Transferring public information and preparedness duties performed by
12 bargaining unit employees to non-bargaining unit employees without giving
13 NAGE prior notice and an opportunity to bargain to resolution or impasse.
14
- 15 b. In any like or related manner, interfering with, restraining, or coercing
16 employees of their rights guaranteed under the Law.
17
- 18 2. Take the following affirmative action, which will effectuate the policies of the Law:
19
- 20 a. Restore to the bargaining unit the following duties, serving as PIO during
21 SEOCs, responding to after-hours media calls, writing press releases,
22 updating MEMA's website, posting on social media after hours, leading
23 preparedness campaigns, serving as the primary contact for other PIOs,
24 and coordinating public information with outside organizations for large-
25 scale events.
26
- 27 b. Upon demand, bargain in good faith with the Union to resolution or impasse
28 about the decision and the impacts of the decision to transfer the duties
29 referenced in paragraph 2(a) to non-bargaining unit employees.
30
- 31 c. Make whole Christopher Besse for overtime pay lost as a direct result of
32 MEMA's decision to transfer his after-hours duties to Tom Lyons, plus
33 interest at the rate specified by M.G.L. c. 231, §6I compounded quarterly up
34 to the date that MEMA complies with this Order.
35
36

- d. Post immediately in all conspicuous places where members of NAGE's bargaining unit usually congregate, or where notices are usually posted, including electronically if MEMA customarily communicates with these union members via email, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.
- e. Notify the DLR in writing of the steps taken to comply with this decision within thirty(30) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



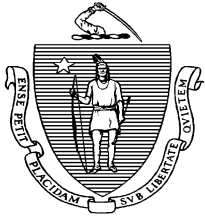
MARJORIE F. WITTNER, CHAIR



KELLY STRONG, CERB MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To obtain such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.



NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board (CERB) has affirmed a Hearing Officer's decision concluding that the Commonwealth of Massachusetts, acting through the Massachusetts Emergency Management Agency (MEMA), violated Section 10(a)(5) and derivatively, Section 10(a)(1) of M.G.L. c. 150E (the Law) by unilaterally transferring bargaining unit work outside of the unit without providing the National Association of Government Employees (NAGE) with notice and an opportunity to bargain. The CERB therefore orders that MEMA post this notice to reflect the violations found.

Section 2 of M. G. L. c. 150E gives public employees the following rights: to engage in self-organization, to bargain collectively through representatives of their own choosing; to act together for the purpose of collective bargaining or other mutual aid or protection, and to refrain from all of the above. MEMA therefore assures its employees that:

WE WILL NOT fail or refuse to bargain with NAGE by failing to provide it with prior notice and the opportunity to bargain over the transfer of bargaining unit work to non-unit employees;

WE WILL restore the following duties to the bargaining unit: serving as Public Information Officer (PIO) during activation of State Emergency Operations Center (SEOC); responding to after-hours media calls, writing press releases, updating MEMA's website, posting on social media after hours, leading preparedness campaigns, serving as the primary contact for other PIOs, and coordinating public information with outside organizations for large scale events;

WE WILL upon request, bargain in good faith with NAGE to resolution or impasse over the decision and the impacts of the decision to transfer the bargaining unit duties listed above to non-unit employees;

WE WILL make Christopher Besse whole for any overtime pay that he lost as a direct result of MEMA's decision to transfer his after-hours duties to non-unit personnel;

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

MEMA

Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Lafayette City Center, 2 Avenue de Lafayette, Boston, MA 02111 (Tel: 617-626-7332).