

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

In the Matter of

COMMONWEALTH OF MASSACHUSETTS/
SECRETARY OF ADMINISTRATION AND FINANCE
AND MEMA

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES

Case No. SUP-20-8314

Date issued:
November 6, 2023

CERB Members Participating:

Marjorie F. Wittner, Chair
Kelly B. Strong, CERB Member
Victoria B. Caldwell, CERB Member

Appearances:

Emily Sabo, Esq. - Representing the Commonwealth of
Massachusetts
Richard Waring, Esq. - Representing the National Association of
Government Employees

CERB DECISION ON REVIEW OF HEARING OFFICER'S DECISION

1 **SUMMARY**

2 The Commonwealth of Massachusetts, acting through the Massachusetts
3 Emergency Management Agency (MEMA, the Commonwealth or the Respondent), has
4 appealed the decision that a Department of Labor Relations (DLR) Hearing Officer issued
5 on January 19, 2023. The Hearing Officer held that the Commonwealth committed a
6 prohibited practice within the meaning of Section 10(a)(5) and, derivatively, Section

1 10(a)(1) of M.G.L. c. 150E (the Law) when it: 1) eliminated a bargaining unit member's
2 stand-by pay during such time that it required the employee to be available for work,
3 without giving the National Association of Government Employees (NAGE or the Union)
4 prior notice and an opportunity to bargain to resolution or impasse over that decision and
5 its impacts on the employee's terms and conditions of employment; and 2) repudiated an
6 agreement to pay that bargaining unit member stand-by pay pursuant to Article 7.6 of the
7 parties' collective bargaining agreement (CBA). After reviewing the hearing record,
8 including the decision and the parties' supplementary statements, the Commonwealth
9 Employment Relations Board (CERB) affirms the Hearing Officer's decision.

10

BACKGROUND

11 The parties entered into stipulations and the Hearing Officer made additional
12 findings of fact. We adopt the facts¹ set forth in the Hearing Officer's decision pursuant
13 to 456 CMR 13.19(3)(b), and summarize only those facts necessary to our decision,
14 reserving some details for further discussion in the Opinion section.²

15 NAGE is the exclusive bargaining representative for certain Commonwealth
16 employees, including employees employed by MEMA in statewide bargaining unit 6.
17 MEMA is a state agency that falls under the purview of the Commonwealth's Executive

¹ The stipulations were: 1) The Commonwealth of Massachusetts is a public employer within the meaning of the Law; 2) The Union is an employee organization within the meaning of the Law; 3) the Union is the exclusive bargaining representative for certain professional employees employed by MEMA in statewide bargaining unit 6; and 4) the Employer and Union were parties to a collective bargaining agreement effective July 1, 2017, through June 30, 2020.

² We address the Commonwealth's factual challenges separately.

1 Office of Public Safety and Security. Its responsibilities include disaster preparedness,
2 planning, response, recovery, and mitigation.

3 The Union and the Commonwealth were parties to a collective bargaining
4 agreement that was in effect from July 1, 2017 to June 30, 2020. Article 7, Workweek
5 and Work Schedules, contained two provisions that are pertinent here:

6 Section 7.5 Call Back Pay
7

- 8 A. An employee who has left his/her work place of employment after
9 having completed work on his/her regular shift, and who is called back
10 to his/her work place prior to the commencement of his/her scheduled
11 shift shall receive a minimum of four (4) hours pay at his/her regular
12 hourly overtime rate. This Section shall not apply to an employee who
13 is called in to start his/her shift early and who continues to work that
14 shift.
15 B. An employee who is called back to work as outlined above but is not
16 called back to a work place shall receive a minimum of two (2) hours
17 pay at his/her regular overtime rate. This shall include situations where
18 an employee fulfills his/her call back assignment through the use of an
19 electronic communication device such as a telephone or "networked"
20 computer.
21

22 Section 7.6 Stand-by Duties
23

- 24 A. An employee who is required by the department head to be available on
25 a stand-by basis to report to duty when necessary shall be reimbursed
26 at a rate not to exceed seventeen dollars and fifty cents (\$17.50) for
27 such stand-by period.
28 B. The stand-by period shall be fifteen (15) hours in duration for any night
29 stand-by duty, [and] shall be nine (9) hours in duration for any day stand-
30 by duty.
31 C. Stand-by duty shall mean that a department head has ordered any
32 employee to be immediately available for duty upon receipt of a
33 message to report to work. If any employee assigned to stand-by duty is
34 not available to report to work when contacted, no stand-by pay shall be
35 paid to the employee for the period.
36 D. An employee who is required by the department head as a condition of
37 employment to be available by electronic pager to report to duty
38 immediately upon being paged shall be reimbursed at a rate not to
39 exceed seventeen dollars and fifty cents (\$17.50) for such stand-by
40 period.
41

1 Christopher Besse (Besse) holds the position of Program Coordinator
2 III/Preparedness Coordinator, which is a position within statewide bargaining unit 6
3 represented by NAGE. Besse's job duties center around engagement and outreach to
4 prepare the public for emergencies. When this charge was filed on November 13, 2020,
5 Besse's Form 30, a Commonwealth form outlining the requirements of his position, stated
6 in Duty #21, that he "[b]e available during non-business hours to receive and screen
7 requests from the media and with, direction from the Director... ensure that time-sensitive
8 requests are appropriately handled." Besse signed the form on July 7, 2017 but noted
9 that he disagreed with the classification grade and title in the form. An email exchange
10 then ensued between Besse and MEMA's then Director, Kurt Schwartz (Schwartz).

11 Specifically, on July 6, 2017, Schwartz emailed Besse regarding the Form 30 he
12 signed.³ Schwartz stated that the note Besse added to the form indicated that Besse
13 may not agree with the position's job responsibilities and that it was "imperative" that they
14 have a "clear and common understanding" of what his responsibilities are. Citing
15 comments⁴ that Besse previously provided on June 13, 2017 regarding the Form 30,
16 Schwartz sent a second email on July 6 emphasizing that Besse's note on the signed
17 form must be clear as to its meaning to avoid any misinterpretation that Besse disagreed
18 with his duties and responsibilities. Besse responded that evening, seeking more
19 clarification on the language in Duty #21. Besse stated that "this duty was not in my

³ The Hearing Officer noted in his decision that the record did not resolve the discrepancy as to when Besse signed the 2017 Form. Schwartz claimed that Besse had signed it on July 5, 2017. For purposes of our decision, we need not resolve the discrepancy.

⁴ Besse's June 13 email to Schwartz stated, "I do not have any proposed changes to the wording of either the general or detailed responsibilities. I think that the duties and responsibilities are consistent with what I have been doing ..."

1 previous job description ... so I want to make sure I understand your expectations of the
2 position after hours.”

3 Schwartz responded the next morning, on July 7th, and reminded Besse that
4 Schwartz had previously told Besse that he was not subject to mandatory recall to the
5 office during non-business hours and that is why Besse does not receive stand-by pay.
6 Schwartz indicated that he had also informed Besse that the CBA's call-back pay
7 provisions compensate him for work performed outside of business hours. Schwartz
8 asked if Besse was suggesting that he would not make himself reasonably available
9 during non-business hours unless he received stand-by pay. Schwartz then suggested
10 that he could change Duty #21, which stated, “Be available during non-business hours to
11 receive and screen requests...” to read, “Subject to availability, receive and screen
12 requests ...” Later that morning, Besse responded to Schwartz, stating:

13 We can leave the wording as is, I just wanted to make sure that it was
14 acknowledged that there are times that I am not available or not online.
15 With the wording, I was concerned that it meant that I always had to be
16 available, which I am not. I will get a copy of the form 30 ... and revise my
17 note.

18 At some point after July 2017, Besse sought to have his position reclassified to
19 Public Information Officer, which he believed would compensate him for additional public
20 information duties, including work he performed outside his normal working hours. His
21 initial request was denied, and Besse appealed the initial decision denying his
22 reclassification request to the Commonwealth's Human Resources Division (HRD). In
23 response, Nancy Daiute (Daiute), Senior Human Resources Advisor of the Organizational
24 Development Group, informed Besse that the Public Information Officer (PIO) title was
25 no longer in use and that the classification of Information Officer III best covered the duties

1 he was performing. Daiute's letter further stated that since the Information Officer III was
2 a grade 11 title and Besse was currently in a grade 14 title, the reclassification he
3 requested would result in a demotion. Besse further appealed the reclassification denial
4 to the Civil Service Commission.

5 In the late summer or early fall of 2018, Kevin Preston (Preston), NAGE's State
6 Director for Massachusetts and Chief Negotiator, became involved in Besse's attempt to
7 reclassify his position. Through his involvement, Preston concluded that Besse was
8 entitled to stand-by pay since he was required to be available after hours. Pursuant to
9 what Preston called an "informal resolution" with Executive Office of Public Safety and
10 Security (EOPSS) labor relations representative Penny O'Reilly (O'Reilly)
11 (Preston/O'Reilly agreement), Schwartz issued a memorandum to Besse on October 25,
12 2018, stating that effective October 28, 2018, Besse was required to be available on
13 stand-by duty and, in accordance with the parties' CBA, would receive compensation for
14 being so required.⁵ As a result, Besse began receiving stand-by pay for being available
15 after-hours and he withdrew his classification appeal.

16 Besse would self-report on his time sheet each week whether he had been
17 available to work after-hours. If he had made himself available, he requested stand-by
18 pay and received it. When Besse performed work outside of his normal working hours,
19 he also received call-back pay in accordance with Article 7.5 of the CBA.

⁵ Preston testified that the Preston/O'Reilly agreement may not have been enforceable and acknowledged that the claim in the present matter was not that MEMA repudiated his resolution with O'Reilly, but rather that the agency had repudiated the CBA. We note that the Hearing Officer analyzed the repudiation count of the complaint as alleging as repudiation of Article 7.6 of the CBA. Neither party challenged this analysis on appeal.

1 At the time the Preston/O'Reilly agreement was implemented, Besse was
2 reporting to Schwartz. Beginning in February 2019, however, Besse started reporting to
3 MEMA's new Director Samantha Phillips (Phillips). In January 2020, he began reporting
4 to Dawn Brantley (Brantley) after she was hired as the Assistant Director for Planning and
5 Preparedness.

6 In 2020, the State Emergency Operations Center (SEOC) was activated with the
7 arrival of the COVID-19 pandemic in the Commonwealth. In May 2020, Besse was
8 assigned to the SEOC and his hours of work were 8:00 a.m. to 4 p.m. or 5 p.m. depending
9 on the day. Besse worked both in the office and remotely and continued to be available
10 for, and perform, after-hours work.

11 On or around May 1, 2020, Brantley advised Besse that he would no longer receive
12 stand-by pay. Besse emailed Brantley on May 2, 2020, to ask what MEMA's expectations
13 were of him performing work outside of his normal working hours now that he would no
14 longer be receiving stand-by pay.⁶ Based on Brantley's May 4, 2020 email response,
15 Besse assumed he was no longer required to be available outside of normal working

⁶ Besse's email stated:

I wanted to make sure I understood the expectation of me for today in terms of work for both PIO related items and regional POD related work. Do you know what if anything I should be doing for either? For the week of 5/3 – 5/9, I am not supposed to be available on stand-by and will not be expected to respond to emails & calls on Sunday 5/3, Saturday 5/9 and anytime outside my 7.5 hour workday Monday – Friday, is that correct?

POD refers to "point of distribution", a place where people would bring "stuff" and then distribute it.

1 hours, and he reverted to his normal pre-COVID 19 schedule of working 7:00 a.m. – 3:00
2 p.m.⁷

3 Because he continued to receive after-hours queries, at 1:41 p.m. on May 15,
4 2020, Besse emailed Brantley listing the after-hours inquiries he had received since
5 Phillips decided to suspend his stand-by pay. In his email, Besse stated that “[t]here are
6 also incidents outside coronavirus (today is the 5th? weather event that has generated
7 situational awareness statements since the COVID state of emergency began) that
8 do/may require PIO support. I wanted to share all this with you so you had the relevant
9 information as the temporary standby suspension is reassessed.” Besse advised
10 Brantley that, pursuant to her direction, he had addressed the listed matters not when
11 they were received, but on the next workday morning. When Besse did not hear back
12 from Brantley before his workday ended at 3:00 p.m., Besse assumed that there was no
13 change in the prior direction he had received. He subsequently went out with his family
14 and did not check his work email and phone until later that evening.

⁷ On May 4, 2020, Brantley emailed Besse:

My apologies for missing this email. The direction from Sam was that we are not doing the public information for this event so she is temporarily suspending stand-by. You are no longer working in a regional/HQ POD and the PIO position appears to have been removed completely from the SEOC Roster. Given all that, you should work remotely on normal work, reporting as you would on a blue sky day. Please track what you work on and send that to me when you submit your time each week as I am required to validate everyone’s telework or remote work hours.

“This event” refers to the COVID-19 pandemic.

1 At 4:00 p.m. on May 15, 2020, Phillips texted Besse and asked him to “retweet the
2 tornado watch info.”⁸ At 4:01 p.m. that same day, Brantley responded to Besse’s earlier
3 email and stated that Phillips “said that anything urgent should be handled immediately
4 including those related to severe weather or COVID. She trusts [his] judgment but can
5 advise/assist if necessary.” Later that evening at 6:35 p.m., Brantley emailed Besse that
6 Phillips had asked him to post some information about that night’s weather conditions
7 and, after Besse did not respond to her, Phillips had posted the information herself.⁹
8 Brantley went on to state that despite Besse not being on stand-by, she thought he would
9 be responsive when needed and add the time to his time sheet. Brantley specifically
10 asked Besse to advise if he was not intending to respond to emails or calls after hours or
11 on the weekends. She concluded her email with an offer either to further discuss the
12 matter or that Besse provide a plan as to how after-hours inquiries should be handled.¹⁰
13 Besse received these three communications – the text message from Phillips and the two
14 emails from Brantley – later in the evening on May 15. On May 16, 2020, Besse
15 responded to Brantley and stated that due to the recent instructions to work no more
16 stand-by, he was not on stand-by the previous night and was unavailable due to his
17 personal commitments. He expressed his willingness to work stand-by, if he was
18 available, and offered to discuss these issues. That evening, Besse notified the Union of

⁸ This pertains to the “weather event” that Besse referenced in his email earlier in the day.

⁹ Brantley testified that Phillips “had expressed some frustration about Chris not responding to it and asked me to follow up.”

¹⁰ The Hearing Officer found that after May 15, Besse accurately believed that the Commonwealth expected him to continue to perform stand-by duty without receiving stand-by pay. We agree with the Hearing Officer’s finding.

1 his situation because he was concerned about receiving discipline for not responding
2 immediately to the communications.

3 On May 18, 2020, Phillips emailed Besse, with a copy to Brantley, and advised
4 him that based on the NAGE contract, call-back pay is more appropriate for the work
5 performed by Besse after-hours. She also stated that she understood his
6 communications to mean that he is generally unavailable after normal business hours
7 and instructed that the following go into effect immediately:

- 8 1. His work hours would be 8 a.m. – 4 p.m.
- 9 2. He was to cc Brantley on all emails related to press inquiries and emails with
10 the Governor's Office and Command Center about media releases, reviewing
11 docs, etc.
- 12 3. By 3:45 p.m. each day, he must email Brantley and Phillips a summary
13 of the work he did during the day, with special attention to media
14 inquiries and pressing issues, so they were fully briefed to cover the PIO
15 functions from 4 p.m. – 8 a.m.

16
17 Besse responded that he would comply with the direction given, and that it was not that
18 he was generally unavailable, but that there would be times that he would not be available.

19 On May 18 or May 19, Besse, Phillips, and Brantley spoke. Besse explained that
20 he believed that he was not expected to be available after-hours because he was no
21 longer receiving stand-by pay. Phillips responded that Besse was expected to respond
22 to after-hours communications and that he would be compensated with callback pay when
23 he did respond. After their discussion, Besse understood that he was expected to be
24 available after-hours, and again made himself available to respond to after-hours
25 inquiries. As discussed, when Besse responded, he received pay pursuant to the call-
26 back provision of the CBA but did not receive stand-by pay.

27 In or around August 2020, Tom Lyons (Lyons) was hired as MEMA's new public
28 engagement manager. Subsequently, both Lyons and Besse performed some of the

1 after-hours work. In April 2021, MEMA transferred the Media Line to Lyons and he
2 assumed more of the after-hours work that Besse previously performed.¹¹ Besse,
3 however, continued to hold himself available after-hours, on stand-by, as he was never
4 instructed otherwise.

5 **OPINION¹²**

6 Section 6 of the Law provides in relevant part that “[t]he employer and the exclusive
7 representative ... shall negotiate in good faith with respect to wages, hours, standards of
8 productivity and performance, and any other terms and conditions of employment...” The
9 CERB has long maintained that Section 6’s duty to bargain inherently places on the
10 employer an obligation to refrain from changing established terms and conditions of
11 employment without first bargaining with the employees’ exclusive representative.
12 Commonwealth of Massachusetts, 49 MLC 295, 298, SUP-20-7856, SUP-20-7945 (May
13 3, 2023). When a public employer unilaterally changes a term and condition of
14 employment without giving notice and an opportunity to bargain to resolution or impasse
15 to the employees’ exclusive bargaining representative, such an employer has failed to
16 bargain in good faith in violation of Section 10(a)(5) of the Law. School Committee of
17 Newton v. Labor Relations Commission, 388 Mass. 557 (1983). An employer’s obligation
18 to bargain before changing conditions of employment extends to working conditions
19 established through past practice as well as those specified in a collective bargaining
20 agreement. Spencer – East Brookfield Regional School District, 44 MLC 96, 97, MUP-

¹¹ MEMA operates a “Media Line,” through which news media can contact MEMA 24/7 to request information.

¹² The CERB’s jurisdiction is not contested.

1 15-4847 (December 5, 2017) (citing Town of Wilmington, 9 MLC 1694, 1699, MUP-4688
2 (March 18, 1983)). To establish an unlawful change, a union must show that: 1) the
3 employer has changed an existing practice or instituted a new condition of employment,
4 2) the change affects a mandatory subject of bargaining, and 3) the change was
5 implemented without giving prior notice and an opportunity to bargain to resolution or
6 impasse to the employees' exclusive bargaining representative. Commonwealth of
7 Massachusetts and MOSES, 20 MLC 1545, 1552, SUP-3460 (May 13, 1994) (citing Town
8 of North Andover, 1 MLC 1103, 1106, MUP-529 (September 3, 1974)). In determining
9 terms and conditions of employment, a past practice cannot overcome explicit contract
10 language. City of Somerville, 44 MLC 123, 125, MUP-16-5023 (January 30, 2018).

11 An employer's obligation under the Law to bargain in good faith also includes the
12 duty to refrain from repudiating an agreement reached as a result of collective bargaining.
13 Commonwealth of Massachusetts/Commissioner of Administration and Finance and
14 Alliance, AFSCME-SEIU, Local 509, 28 MLC 36, SUP-4345 (June 29, 2001). To
15 establish that an employer's conduct constituted a repudiation of a contract provision, a
16 union must demonstrate that the employer deliberately refused to follow the agreement.
17 Commonwealth of Massachusetts, 18 MLC 1161, 1163, SUP-3356, SUP-3439 (October
18 16, 1991) (additional citations omitted). If the evidence is insufficient to find an agreement
19 underlying the matter in dispute, or if the parties hold differing good faith interpretations
20 of the provisions at issue, the CERB will find no violation. Id.

21 There are two issues in this case: 1) whether the Commonwealth was required to
22 give the Union notice and an opportunity to bargain prior to discontinuing Besse's stand-
23 by pay while still requiring him to remain available after-hours to respond to

1 communications; and 2) whether the Commonwealth repudiated Article 7.6 of the CBA
2 by eliminating Besse's stand-by pay.

3 With respect to the unilateral change, the Hearing Officer found that the
4 Commonwealth changed Besse's terms and conditions of employment when Phillips
5 expected Besse to continue holding himself available after-hours despite revoking the
6 compensation that he received for being available after-hours. The Hearing Officer
7 further found that Phillips' revocation of Besse's stand-by pay affected wages, a
8 mandatory subject of bargaining. Finally, finding that it was undisputed that Phillips
9 revoked Besse's stand-by pay without giving the Union notice and an opportunity to
10 bargain, the Hearing Officer concluded that the Commonwealth violated Section 10(a)(5)
11 of the Law. As to the second count, the Hearing Officer held that the Commonwealth's
12 actions constituted a deliberate repudiation of Article 7, Section 7.6 of the parties' CBA.

13 **Unilateral Change**

14 The first issue in dispute is whether MEMA's decision to discontinue Besse's
15 stand-by pay while requiring him to be available after-hours to respond to communications
16 as necessary constituted a bargainable change that required MEMA to give the Union
17 notice and an opportunity to bargain prior to implementing this change. The
18 Commonwealth argues that the Hearing Officer made several erroneous findings of fact
19 and conclusions of law that warrant dismissal of the charge. The Union disagrees that
20 the Hearing Officer made any legal or factual errors warranting reversal of his decision.
21 We agree with the Union that the Hearing Officer committed no errors.

22 In its supplementary statement, the Respondent claims that the Hearing Officer
23 incorrectly found that Besse's work schedule was 7:00 a.m. to 3:00 p.m. on May 15, 2020,

1 and that email communications on that date and on May 18, 2020, demonstrated its
2 expectation that he was to be available immediately after his working hours. The
3 Commonwealth argues that Besse's hours were actually 8:00 a.m. to 4:00 p.m. and thus,
4 the email did not communicate an expectation that Besse was to be available after hours.

5 The record shows, however, that in response to Besse's email regarding after-
6 hours inquiries, Brantley told Besse that he had to respond immediately to anything urgent
7 including severe weather or COVID-related inquiries.¹³ Thus, even if we agreed with the
8 Respondent that this particular finding of fact was in error, it would not affect our decision,
9 as there is an abundance of evidence in the record, in particular Phillips' own testimony,
10 demonstrating that MEMA expected Besse to be available to respond to inquiries after
11 his regularly scheduled work hours. Even assuming *arguendo* that Besse's schedule was
12 8:00 a.m. to 4:00 p.m., the May 15 Brantley email to Besse was sent at 4:01 p.m.,
13 technically after hours.

14 The Respondent also asserts that the Hearing Officer erroneously found that
15 Besse continued to perform stand-by duties at the behest of the Commonwealth. In
16 support of this assertion, the Commonwealth points to record evidence that Besse
17 acknowledged that there were times when he would not be available, and argues that
18 Phillips recognized this possibility when she required that Besse submit a summary fifteen
19 minutes prior to the end of his workday of the work that he did during the day, so that she
20 and Brantley would have this information in the event Besse was unavailable.

¹³ Footnote 24 of the Hearing Officer's decision contains excerpts from Phillips' testimony regarding her expectations as to Besse's availability. As stated above, we agree with the Hearing Officer that this testimony establishes that Phillips expected Besse to continue to be available after-hours despite rescinding his stand-by pay.

1 The Respondent is correct that Besse acknowledged there would be times that he
2 was unavailable to respond, and that Phillips required the summary of work as a
3 safeguard to ensure that she or Brantley could respond to after-hours inquiries when he
4 could not. Phillips' testimony, however, is clear that this was the exception and not the
5 norm as she and Brantley continued to expect him to be available to respond to inquiries
6 outside of his normal working hours. The fact that Besse could not always respond does
7 not negate the fact that he was, at other times, on stand-by status and available at his
8 supervisor's request, to respond to after-hours issues that arose. That Besse was not
9 available 100% of the time does not transform the times he was available to anything
10 other than stand-by duty. Therefore, we find that the Hearing Officer correctly concluded
11 that Besse continued to perform stand-by duties.

12 Turning to the Respondent's claims that the Hearing Officer made erroneous
13 conclusions of law, we begin with its argument that the Hearing Officer erred in finding
14 that the charge was timely filed. The Respondent points to the fact that as early as 2017,
15 Besse knew that he was not receiving stand-by pay for those times he was required to
16 make himself available after hours to screen and respond to after-hours requests. There
17 are two problems with this assertion. First, the Union, not Besse, is the Charging Party
18 in this case. Accordingly, the period of limitations runs when the *Union* first knew or
19 should have known of the violation alleged in its charge. Felton v. Labor Relations
20 Commission, 33 Mass. App. Ct. 926 (1992); See also Town of Wayland, 5 MLC 1738,
21 1740, MUP-2294 (March 29, 1979) (declining to impute knowledge of violation to union
22 based solely on knowledge of bargaining unit members). Second, Besse's concerns
23 about not receiving stand-by pay resulted in the Preston/O'Reilly agreement, which

1 provided Besse with stand-by pay until May 2020, when Phillips ended it. It is Phillips'
2 conduct in 2020 that forms the basis of the Union's charge. Preston's unrebutted
3 testimony reflects that the Union first became aware that Besse had stopped receiving
4 stand-by pay sometime in May of 2020 when Preston saw emails dated May 15 and May
5 18 pertaining to the issue. Because the instant charge was filed on November 13, 2020,
6 within six months of Preston viewing those emails, we find, as did the Hearing Officer,
7 that the charge was timely filed.

8 The Respondent also argues that the Hearing Officer erred in finding that the
9 Charging Party had met its burden of establishing that Besse performed stand-by duties
10 after May 2020 and, that he therefore erroneously concluded that MEMA violated Section
11 10(a)(5) of the Law. The Respondent claims that this was error because, pursuant to
12 Article 7.6(C), three conditions must be satisfied before an employee is eligible for stand-
13 by pay: 1) receipt of an order of the Department Head; 2) immediate availability for duty;
14 3) upon receipt of a message to report to work. The Respondent cites to Preston's
15 testimony that to receive stand-by pay, an employee must be available to work
16 immediately and in a "fit" state. In explaining his belief on how Article 7.6 (C) of the CBA
17 worked, Preston used the example of a snowplow driver, who would not be on stand-by
18 status if he was not required to respond to messages to plow snow. Besse, according to
19 the Respondent, was operating under the same conditions as the snowplow driver in
20 Preston's example – he was not required to respond. Respondent cites Preston's
21 testimony to show how restrictive being on stand-by is to an employee:

22 [Y]ou can't go off the grid, basically. You have to be physically within reach.
23 You have to be electronically within reach, and you have to hold yourself in
24 a condition that you are fit for work, in terms – you know ..., particularly now
25 we have legalized marijuana, you can't smoke a joint. You can't have ... a

1 couple of beers, those kind of things. And, you know, there are restrictions
2 on where you can go. You have to go places where you're within reach.
3 So that's the stand-by provision.

4 The Respondent argues that Besse testified that he was not under such restrictions and
5 the Union presented no evidence that he was in any way limited from participating in non-
6 work-related activities outside of his 37.5 hours/week schedule. According to the
7 Respondent, the Union also failed to produce any evidence that established that Besse
8 was directed to report to a work site.

9 The Respondent further believes that the three conditions required to receive
10 stand-by pay are explicit and non-ambiguous and therefore binding on the parties
11 pursuant to a 1999 arbitration award in the matter of NAGE v. Commonwealth of
12 Massachusetts, Arb. 2886 (Greenbaum, 1999) (Award or Greenbaum Award).¹⁴ The
13 Greenbaum Award involved the application of the first three provisions (A, B, and C) of
14 Article 7.6 of the CBA, which were substantially the same as they are in the 2017-2020

¹⁴ Although the Respondent refers to this award as "Employer Exhibit 5" in its supplementary statement, a review of the hearing record shows that the Commonwealth never sought to enter the award into evidence during the hearing but rather submitted it as an attachment to its post-hearing brief. Preston was questioned about arbitration awards pertaining to stand-by pay; however, neither he nor any other witness testified or was questioned about the Greenbaum Award. The Hearing Officer did not reference the Greenbaum Award or any other arbitration awards in his decision. As discussed in more detail in this opinion, in its response to the Respondent's supplementary statement, the Union argued that the Greenbaum Award was inapposite because it was issued over 20 years ago and involved different groups of employees. The Union did not, however, seek to strike the award and/or any references thereto from the Respondent's brief or supplementary statement. In fact, it submitted two other arbitration awards with its post-hearing brief to support its claim that Besse was performing stand-by duty in accordance with Article 7.6 (C) of the CBA. Although the better practice would have been for the Commonwealth to seek to admit this award as an exhibit prior to the close of the hearing, absent objection by NAGE, we nevertheless consider it as part of the Commonwealth's argument in support of its position.

1 CBA, except that the amount of stand-by pay has increased. Arbitrator Greenbaum
2 interpreted those provisions and a related “call-in pay” provision¹⁵ as providing stand-by
3 pay only to those employees who were ordered by a department head to be immediately
4 available for duty and, upon receiving a message to report to work, reported to an actual
5 work site. The Award therefore denied stand-by pay to technology employees who wore
6 pagers and who, upon being paged, could generally perform their duties without having
7 to report to work, i.e., by resolving the technical problem by telephone or by accessing a
8 mainframe from a Department issued-laptop. Because Besse was similarly not required
9 to report to an actual worksite to perform his duties, the Respondent claims that the Union
10 failed to establish that Besse met the three criteria for receiving stand-by pay set forth in
11 Article 7.6 (C), and accordingly, the Hearing Officer’s determination must be reversed.

12 We disagree that the Union failed to establish an unlawful unilateral change. First,
13 it is clear that the Respondent’s decision to discontinue Besse’s stand-by pay affected a
14 mandatory subject of bargaining, wages. It is also undisputed that the Respondent made
15 this decision without giving the Union prior notice and an opportunity to bargain to
16 resolution or impasse. It is the first prong that we must scrutinize – whether the
17 Commonwealth changed an existing practice or instituted a new condition of employment
18 when it discontinued Besse’s stand-by pay but still required him to be available after work
19 hours to respond to inquiries. We find that it did.

¹⁵ According to the Award, the last sentence of Article 7, Section 5, pertained to call-in pay, and appeared to “exclude an employee’s home from the list of places employees were expected to report to work” in order to receive such pay. Arbitrator Greenbaum thus reasoned that it would be unlikely that the parties intended that employees who could perform their duties from home were “reporting to work” for purposes of receiving stand-by pay under Article 7.6 (C).

1 Besse's testimony that he believed he was directed to respond to emergencies
2 and inquiries after-hours was corroborated by emails to and from senior officials in MEMA,
3 in particular Phillips, stating that they expected Besse to respond after hours and, thus,
4 that he was required to make himself available to do so. Respondent's assertion that a
5 department head never required Besse to be immediately available after hours
6 contravenes the evidentiary record which demonstrates that this was precisely what was
7 expected of him.

8 While Besse may not have been required to be immediately available 24/7,
9 Brantley's and Phillips' emails show that they expected Besse to be available to respond
10 unless he had some legitimate reason for not doing so, in which case they required Besse
11 to submit a report to Phillips and Brantley to provide them with the necessary information
12 to respond to an after-hours request if he could not.

13 The Respondent argues that because this self-imposed safeguard gave Besse
14 leeway not to respond, it is erroneous to conclude that they directed Besse to be
15 immediately available. However, the Commonwealth cannot have it both ways. There
16 would have been no reason for MEMA officials to create a process for Besse to tell them
17 when he was not available and provide any necessary information unless he was
18 expected to be available to respond after hours in the first place. As the Union states in
19 its Response to the Respondent's Request for Review, the issue is about the times when
20 Besse was not paid stand-by pay when he made himself immediately available pursuant
21 to a direction from a department head - it is not about receiving such pay for times when
22 he was unavailable. As such, we find that Besse was directed to be immediately available
23 to respond to requests after work hours.

1 The question then is whether Besse was entitled to call-in pay, even if he did not
2 have to report to work. The Employer relies upon the Greenbaum Award to argue that
3 he was not. However, unlike as described in the Greenbaum Award, Article 7.6 now
4 contains a fourth provision, 7.6 (D), which entitles those employees who are “required by
5 a Department head as a condition of employment to be available by electronic pager to
6 report to duty immediately upon being paged,” to stand-by pay at the same rate set forth
7 in Article 7.6 (A). Further, unlike the “call-in pay” provision described in the Greenbaum
8 award, Article 7.5 (B) now explicitly provides call-in pay to employees who are called back
9 to work but not back to a workplace, including situations where an employee “fulfills
10 his/her call back assignment through the use of an electronic communication device such
11 as a telephone or ‘networked’ computer.” Because it would appear that these provisions
12 did not exist when the Greenbaum Award issued, that award is both outdated and
13 inapposite and we do not rely upon it in any way. Rather, reading Articles 7.5 (B), 7.6 (C)
14 and 7.6 (D) together demonstrates that the term “report to work” in Article 7.6 (C) includes
15 situations where the employee can, from their home or another remote location, fulfill the
16 duties they have been ordered to be available to perform. We therefore affirm this aspect
17 of the decision for these reasons and those stated in the Hearing Officer’s decision.

18 **Repudiation**

19 To establish repudiation, a union must show that an employer deliberately
20 engaged in a pattern of conduct designed to ignore the parties’ collective bargaining
21 agreement. Board of Higher Education and Massachusetts State College
22 Association/MTA/NEA, 41 MLC 217, 223 SUP-08-5396 (February 6, 2015), aff’d sub
23 nom., Board of Higher Education v. Commonwealth Employment Relations Board 483

1 Mass. 310 (2019). If the language of the agreement is unambiguous, the CERB gives
2 effect to the clear meaning of the bargained-for language and does not inquire into the
3 parties' intent. Boston School Committee, 22 MLC 1365, 1375, MUP-8125 (January 9,
4 1996). If the language is ambiguous, the CERB looks to the parties' bargaining history to
5 determine whether there was an agreement between the parties. Id. If the evidence is
6 insufficient to find an agreement underlying the matter in dispute, or if the parties hold
7 differing good faith interpretations of the terms of the agreement, the CERB will not find
8 a repudiation because the parties did not achieve a meeting of the minds. City of Everett,
9 26 MLC 25, 27, MUP-1542 (July 22, 1999).

10 Here, for the reasons set forth in the preceding section, we find it unambiguous
11 that the term "report to duty" or "report to work" as appearing in Article 7.6 does not require
12 an employee to report to a workplace in order to receive stand-by pay. Accordingly, we
13 agree with the Hearing Officer that Phillips deliberately refused to abide by the
14 unambiguous terms of Article 7.6 when she eliminated Besse's stand-by pay but still
15 required him to be available on a stand-by basis to report for duty when necessary. We
16 therefore affirm the conclusion that when Phillips ignored Article 7.6 in its entirety, the
17 Commonwealth repudiated that CBA provision and violated the Law.

18 CONCLUSION

19 For the foregoing reasons, and those stated in the Hearing Officer's decision, we
20 affirm the Hearing Officer's decision that the Commonwealth violated Section 10(a)(5) of
21 the Law when it discontinued Besse's stand-by pay while continuing to require him to
22 perform stand-by duties and failed to provide the Union with an opportunity to bargain to
23 resolution or impasse prior to its implementation of its decision. We also affirm the Hearing

1 Officer's determination that the Commonwealth unlawfully repudiated the parties' CBA.
2 Thus, we issue the following Order.

3 **ORDER**

4 WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the
5 Commonwealth shall

6 1. Cease and desist from:

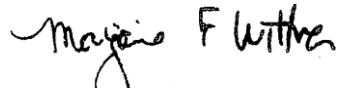
- 7
8 a. Failing to bargain collectively in good faith by eliminating stand-by pay but
9 not stand-by duty for bargaining unit member Christopher Besse without
10 giving the Union prior notice and an opportunity to bargain to resolution or
11 impasse over the decision to eliminate stand-by pay and the impacts of that
12 decision on Besse's terms and conditions of employment.
13
14 b. Repudiating Article 7.6 of the Unit 6 CBA by requiring Besse to work stand-
15 by duty without receiving stand-by pay; and
16
17 c. In any similar manner, interfering with, restraining or coercing employees in
18 the exercise of their rights guaranteed under the Law.
19

20 2. Take the following affirmative action that will effectuate the purposes of the Law:

- 21
22 a. Pursuant to Article 7.6 of the Unit 6 CBA, make Besse whole for every
23 stand-by period for which he was required to be available but was not
24 reimbursed, from May 1, 2020, through the date of this Order, plus interest
25 at the rate specified by M.G.L. c. 231, Section 6I, compounded quarterly,
26 up to the date that the Commonwealth complies with this Order.
27
28 b. Upon request by the Union, bargain in good faith to resolution or impasse
29 before changing any condition of employment established through Article
30 7.6 of the Unit 6 CBA.
31
32 c. Post immediately, signed copies of the attached Notice to Employees in all
33 conspicuous places where members of the Union's bargaining unit usually
34 congregate or notices are usually posted, including electronically if the
35 Commonwealth customarily communicates with these unit members by
36 email or intranet, and display for a period of thirty days thereafter; and,
37
38 d. Notify the DLR in writing of the steps taken to comply with this Order within
39 30 (thirty) days of its receipt.
40

1 **SO ORDERED.**

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



MARJORIE F. WITTNER, CHAIR



KELLY B. STRONG, CERB MEMBER



VICTORIA B. CALDWELL, 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.



**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD
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 held 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 Massachusetts General Laws, Chapter 150E (the Law) by unilaterally eliminating stand-by pay for a bargaining unit member while still requiring that member to perform stand-by duty, and by repudiating Article 7.6 of the Unit 6 collective bargaining agreement. The Commonwealth posts this Notice to Employees in compliance with the CERB's Order.

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

WE WILL NOT fail to bargain collectively in good faith with the Union by unilaterally eliminating stand-by pay while still requiring employees to perform stand-by duty.

WE WILL NOT deliberately refuse to abide by the unambiguous terms of the Unit 6 CBA.

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

WE WILL make Christopher Besse whole for every stand-by period he was required to be available but not reimbursed for, from May 1, 2020, through the date of compliance with the accompanying Order.

For the Commonwealth of Massachusetts

Date

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

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Lafayette City Center, 2 Avenue de Lafayette, Boston, MA 02111 (Telephone: (617) 626-7132).