

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of:

COMMONWEALTH OF
MASSACHUSETTS/MASSACHUSETTS
EMERGENCY MANAGEMENT AGENCY

and

NAGE, UNIT 6, LOCAL 207

Case Number: SUP-20-8314

Date Issued: January 19, 2023

Hearing Officer:

James Sunkenberg, Esq.

Appearances:

Emily Sabo, Esq. - Representing Commonwealth of Massachusetts

Richard Waring, Esq. - Representing NAGE, Unit 6, Local 207

HEARING OFFICER'S DECISION

SUMMARY

1 The issues in this case are whether: I) the Commonwealth of Massachusetts
2 (Commonwealth) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of
3 Massachusetts General Laws, Chapter 150E (the Law) by eliminating a bargaining unit
4 member's stand-by pay without giving NAGE, Unit 6, Local 207 (Union) prior notice and
5 an opportunity to bargain to resolution or impasse; and II) the Commonwealth violated
6 Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by repudiating an
7 agreement to pay that bargaining unit member stand-by pay pursuant to Article 7.6 of the

1 parties' collective bargaining agreement (Unit 6 CBA). Based on the record, and for the
2 reasons explained below, I find that the Commonwealth violated the Law on both counts.¹

3 STATEMENT OF CASE

4 On November 13, 2020, the Union filed a charge of prohibited practice (Charge)
5 with the Department of Labor Relations (DLR) alleging that the Massachusetts
6 Emergency Management Agency (MEMA) had violated Section 10(a)(5) and,
7 derivatively, Section 10(a)(1) of the Law. On February 2, 2021, a DLR investigator
8 investigated the Charge. On March 26, 2021, the investigator issued a Complaint of
9 Prohibited Practice (Complaint) and Ruling on Motion to Dismiss.² The two-count
10 Complaint alleged that the Commonwealth violated Section 10(a)(5) and, derivatively
11 Section 10(a)(1) of the Law by: I) eliminating a bargaining unit member's stand-by pay
12 without giving the Union prior notice and an opportunity to bargain to resolution or
13 impasse over the decision and the impacts of that decision; and II) repudiating an October
14 25, 2018 agreement to pay that bargaining unit member stand-by pay pursuant to Article
15 7.6 of the Unit 6 CBA. On or around March 26, 2021, the Commonwealth filed its Answer
16 to the Complaint. On October 13 and 14, 2021, I conducted a remote hearing via WebEx,
17 during which the parties received a full opportunity to be heard, to examine and cross-
18 examine witnesses, and to present evidence. On or before January 18, 2022, the parties
19 filed post-hearing briefs.

20 STIPULATIONS OF FACT

¹DLR case number SUP-20-7917 involves the same parties. I have decided this case solely on the record before me.

²The investigator denied the Commonwealth's motion to dismiss the Charge as untimely.

- 1 1. The Commonwealth of Massachusetts is a public employer within the meaning
- 2 of Section 1 of the Law.
- 3
- 4 2. The Union is an employee organization within the meaning of Section 1 of the
- 5 Law.
- 6
- 7 3. The Union is the exclusive bargaining representative for certain professional
- 8 employees employed by the Employer in statewide bargaining unit 6.
- 9
- 10 4. The Employer and Union were parties to a collective bargaining agreement,
- 11 effective July 1, 2017, through June 30, 2020.
- 12
- 13

FINDINGS OF FACT

14 Relevant Collective Bargaining Agreement Provisions

15
16 **Article 7 Workweek and Work Schedules**

17
18 **Section 7.5 Call Back Pay**

- 19
- 20 A. An employee who has left his/her work place of employment after having
- 21 completed work on his/her regular shift, and who is called back to his/her work
- 22 place prior to the commencement of his/her scheduled shift shall receive a
- 23 minimum of four (4) hours pay at his/her regular hourly overtime rate. This
- 24 Section shall not apply to an employee who is called in to start his/her shift early
- 25 and who continues to work that shift.,
- 26
- 27 B. An employee who is called back to work as outlined above but is not called
- 28 back to a work place shall receive a minimum of two (2) hours pay at his/her
- 29 regular overtime rate. This shall include situations where an employee fulfills
- 30 his/her call back assignment through the use of an electronic communication
- 31 device such as a telephone or “networked” computer.
- 32

33 **Section 7.6. Stand-by Duties**

- 34
- 35 A. An employee who is required by the department head to be available on a stand
- 36 by basis to report to duty when necessary shall be reimbursed at a rate not to
- 37 exceed seventeen dollars and fifty cents (\$17.50) for such stand-by period.
- 38
- 39 B. The stand-by period shall be fifteen (15) hours in duration for any night stand-
- 40 by duty, and shall be nine (9) hours in duration for any day stand-by duty.
- 41
- 42 C. Stand-by duty shall mean that a department head has ordered any employee
- 43 to be immediately available for duty upon receipt of a message to report to
- 44 work. If any employee assigned to stand-by duty is not available to report to

1 duty when contacted, no stand-by pay shall be paid to the employee for the
2 period.
3

4 D. An employee who is required by the Department head as a condition of
5 employment to be available by electronic pager to report to duty immediately
6 upon being paged shall be reimbursed at a rate not to exceed seventeen dollars
7 and fifty cents (\$17.50) for such stand-by period.
8

9 General Background

10 MEMA is an agency within the Commonwealth's Executive Office of Public Safety
11 and Security (EOPSS) that works on disaster preparedness, planning, response,
12 recovery, and mitigation. During certain emergencies, MEMA activates the State
13 Emergency Operations Center (SEOC), from which it coordinates the Commonwealth's
14 response across the state. MEMA also operates a media line, whereby the news media
15 can contact MEMA 24/7 to request information. In 2012, MEMA hired Christopher Besse
16 (Besse) as a Program Coordinator III/Preparedness Coordinator.³ Besse's position is
17 within statewide bargaining unit 6.

18 As a Preparedness Coordinator, Besse's job duties generally included
19 engagement and outreach to prepare the public for emergencies.⁴ Upon hire, Besse
20 reported to John Giarrusso (Giarrusso). Besse worked with a variety of divisions and

³The official title for the position was Program Coordinator III; the functional title was Preparedness Coordinator.

⁴Besse's 2012 Form 30, which is the individual job description for the Commonwealth's executive branch employees, states, in relevant part that:

The primary responsibilities of the Preparedness Coordinator include developing and implementing programs and initiatives that serve to better prepare the private sector to respond to, recover from, and mitigate the consequences of disasters, and strengthening communication, collaboration and coordination between MEMA and the private sector in order to build greater resilience to disasters.

1 departments, but he worked most closely with MEMA's then Public Information Officer
2 (PIO) Peter Judge (Judge), whose responsibilities included the dissemination of
3 information to the media. For example, in anticipation of an approaching hurricane, Besse
4 would distribute preparedness information to the public, and Judge would communicate
5 with the media.

6 Besse Becomes Social Media and Public Information Coordinator

7 In or around 2015, Besse began reporting to Judge instead of Giarrusso. Although
8 Besse officially remained a Program Coordinator III, MEMA changed his functional title to
9 Social Media and Public Information Coordinator, and Besse increasingly handled
10 MEMA's social media communications in addition to continuing to perform his public
11 preparedness duties. He also began to assist Judge more regularly with Judge's public
12 information work, especially with responding to media inquiries. If the SEOC was
13 activated, Besse functioned as Judge's backup. On February 25, 2015, MEMA updated
14 Besse's Form 30 to reflect the day-to-day work he was doing to support Judge, and Besse
15 signed his 2015 Form 30 on June 26, 2015.⁵

16 Besse Becomes Interim Public Information Officer

⁵Besse's 2015 Form 30 states, in relevant part that:

The primary responsibilities of the Social Media and Public Information Coordinator are to support MEMA's mission by increasing public awareness of hazards and MEMA programs, promoting personal, family, business and community preparedness, and sharing information with the public during disasters, emergencies, and pre-planned events. The Social Media and Public Information Coordinator will utilize social media and other public facing communications platforms to disseminate preparedness tips and accurate, timely, and coordinated information regarding disasters/emergencies and planned events.

1 In or around August 2016, Judge retired. MEMA's then Director, Kurt Schwartz
2 (Schwartz) appointed Besse as the interim PIO and announced Besse's interim
3 appointment by agency-wide email on August 24, 2016. Schwartz wrote that:

4 I am pleased to announce that Chris Besse will serve as our Public Information
5 Officer on an interim basis until the current hiring freeze is lifted and we've had
6 time to determine when/if our budget is able to support us posting to fill the PIO
7 position and continuing to have a 2-person Public Information Unit. Please forward
8 all press inquiries to Chris and include Chris on emails, and in meetings, where
9 there may be a public information component. Please also look for opportunities
10 to support Chris; we are not asking him to do the work of two people! Chris will
11 continue to coordinate our social media and website content activities, as well as
12 handle traditional media matters, but we should expect that in each of these areas,
13 we may have less of a presence, at least while we have a 1-person Public
14 Information Unit.

15
16 Besse assumed the public information job duties that Judge had previously performed,
17 including responding to media inquiries. Given the nature of MEMA's work, it receives
18 and often responds to media inquiries at all hours of the day and night. Around this time,
19 Besse began reporting to Schwartz.

20 Besse's 2017 Form 30

21 In 2017, MEMA again updated Besse's Form 30. Besse's official title remained
22 Program Coordinator III, but his functional title again changed, this time to Public
23 Information Coordinator. For the first time, Besse's Form 30 now required, at Duty #21,
24 that he, "Be available during non-business hours to receive and screen requests from the
25 media and, with direction from the Director...ensure that time-sensitive requests are
26 appropriately handled."⁶ On June 23, 2017, Schwartz signed Besse's 2017 Form 30. On

⁶Previously, Besse's 2015 Form 30 provided that Besse, "May be required to work extended hours, including during nights and weekends in the event of an emergency affecting the Commonwealth." Both the 2012 and 2015 Form 30s provided that periods of "heightened activation levels" "may require working extended hours, including during nights and weekends."

1 July 7, 2017, Besse signed his 2017 Form 30, writing on the signature page that, "I
2 disagree with the classification/grade and title in this form."

3 By email on the morning of July 6, 2017, Schwartz wrote to Besse, regarding "Form
4 30," that:

5 The new Form 30 that you signed yesterday is attached.⁷ I am not accepting it at
6 this point. I understand that you believe that you should not be classified as a
7 Program Coordinator III and that you may pursue a Desk Audit to see if there is a
8 more appropriate classification. However, the note you added to the Form 30
9 indicates that may not agree with your job responsibilities [sic]. It is imperative that
10 we have a clear and common understanding of, and agreement on your job
11 responsibilities, which is why you were given an opportunity to review and
12 comment on the draft before it was finalized. I remind you that you did not offer
13 any comments on, or suggested changes to the job responsibilities, which is why
14 we went ahead and finalized the draft.

15
16 If you intended only to indicate that you think that your job responsibilities require
17 a different classification, then please get a clean copy of the Form 30 from Deb,
18 amend your comment on it, and submit it to me for my signature. I reiterate that
19 we cannot have a Form 30 on which you indicate in any way that you don't agree
20 with the description of your responsibilities. Your Form 30 provides guidance on
21 your daily work functions and responsibilities; we must agree on what they are,
22 even if we disagree on the overall job classification and title.

23
24 Please let me know today if you have any questions or concerns. Otherwise please
25 submit a revised Form 30 to Deb today.

26
27 Later that morning, Schwartz sent an additional email to Besse, stating that:

28
29 As a follow up to my earlier email, here's what you said in an email on June 13
30 about the draft statement of your job responsibilities:

31
32 I do not have any proposed changes to the wording of either the general or
33 detailed duties and responsibilities. I think that the duties and
34 responsibilities outlined are consistent with what I have been doing since
35 Peter's retirement in August 2016 and also generally consistent with what
36 the public information officer at MEMA is currently and has been historically
37 responsible for.

38

⁷Besse dated his 2017 Form 30 July 7, 2017. The record does not resolve the discrepancy between the differing signature dates.

1 As I said in my email, I am okay with you noting on your Form 30 that you disagree
2 with the classification of your position, but your comment needs to be clear so that
3 it is not susceptible of being interpreted that you disagree with the statement of
4 your duties and responsibilities.

5
6 That evening, July 6, 2017, Besse responded that:

7 Can you please provide more clarification on the language (duty#21) about having
8 to be available during non-business hours? The Form 30 says that I have to be
9 available after hours. Your previous email indicates that you are not asking me to
10 be available to work and that it's a choice. If I don't have to be available, then I'm
11 not sure if duty #21 should be included as a required responsibility. This duty was
12 not in my previous job description, or Peter's, or as far as I am aware in the job
13 descriptions of most other MEMA employees, so I want to make sure I understand
14 your expectations of the position after hours.

15
16 Other than that clarification and potential need to change that duty, I will get a clean
17 copy of the form 30 from Deb and change my comment to reflect the disagreement
18 with the classification/title and not the duties and responsibilities.

19
20 On the morning of July 7, 2017, Schwartz responded to Besse that:

21 I previously said to you that you are not subject to mandatory recall to the office
22 during non-business hours, which is why you don't get stand-by pay. However, I
23 believe that I also said that your call-back provisions in your contract are sufficient
24 in terms of compensating you for non-business hours work that you perform,
25 subject to your availability and schedule. We are in the emergency management
26 business, which means that we must handle emergencies, crises, and other
27 matters when, and as they occur. Many of our staff members have similar
28 provisions in their Form 30's - - it is important that you know that they may be asked
29 to perform work during non-business hours, or be recalled to work during non-
30 business hours, subject to availability.

31
32 Are you suggesting that unless you receive stand-by pay you will not make yourself
33 reasonably available during non-business hours? I hope not.

34
35 Will it make you more comfortable if #21 says, "Subject to availability, receive and
36 screen requests from the media, and with..."

37
38 Later that morning, Besse wrote to Schwartz that:

39
40 We can leave the wording as is, I just wanted to make sure that it was
41 acknowledged that there are times that I am not available or not online. With the
42 wording, I was concerned that it meant that I always had to be available, which I
43 am not.

1 I will get a copy of the form 30 from Deb and revise my note.

2

3 Besse Seeks Reclassification

4 On an unidentified date, Besse sought to have his position reclassified to
5 compensate him for the additional public information duties, including work he performed
6 outside his normal working hours, he had assumed in addition to his public preparedness
7 duties. The reclassification was denied, and Besse appealed to the Commonwealth's
8 Human Resources Division (HRD). By letter dated June 1, 2018, Nancy Daiute, Senior
9 Human Resources Advisor, Organizational Development Group, wrote to Besse that:

10 On March 28, 2018, the Human Resources Division received your appeal of the
11 classification of your position. You requested the reallocation of your position from
12 the title of Program Coordinator III to the title of Public Information Officer.

13

14 Public Information Officer is a grandfathered title and no longer in use. After
15 reviewing the current job specifications along with your appeal documentation, we
16 find that the classification of Information Officer III best covers the duties being
17 performed by you.

18

19 However, since Information Officer III is a grade 11 title and you are currently in a
20 grade 14 title, this would be a demotion. Therefore, we will not move forward with
21 this classification change and you will remain in your current Program Coordinator
22 III position.

23

24 You may appeal this decision to the Civil Service Commission as provided in the
25 General Laws, Chapter 30, Section 49.

26

27 Besse subsequently appealed this determination to the Civil Service Commission.

28 Besse Named Public Information Officer

29 By email on June 18, 2018, Schwartz wrote to Besse, regarding "PIO," that:

30 We are updating our spreadsheet and I think it makes sense to amend your
31 functional title to Public Information Officer, rather than Public Information
32 Coordinator. At one point I was keeping open the possibility of having a two-person
33 public information unit, but I'm no longer thinking along those lines. Thus, it would
34 seem most appropriate to change your title to PIO. Okay with you? Do you want
35 to discuss?

36

1 October 25, 2018 Memorandum: Besse on Stand-by Duty

2 Sometime in the late summer or early fall of 2018, Kevin Preston (Preston),
3 NAGE's State Director for Massachusetts and Chief Negotiator, became involved in
4 Besse's attempt to reclassify his position.⁸ In the course of discussions with Besse about
5 reclassification, Preston came to believe that Besse was entitled to stand-by pay for being
6 required to hold himself available after-hours. Preston initiated a conversation with
7 management to attempt to resolve Besse's situation, and after discussion with Penny
8 O'Reilly, then labor relations representative for EOPSS, they reached an informal
9 resolution whereby Besse would receive stand-by pay for holding himself available after-
10 hours.⁹ Accordingly, by memorandum dated October 25, 2018, regarding "Stand-by
11 Duty," Schwartz wrote to Besse, with a copy to David Mahr, Chief Administrative Officer,
12 that:

13 Effective Sunday, October 28, 2018 you are required to be available on stand-by
14 duty. You will receive salary compensation for the time period you are on stand-by
15 duty; this is in accordance with your collective bargaining agreement National
16 Association of Government Employees, NAGE, Unit 6.

17
18 Following, you will find the NAGE, Unit 6 Collective Bargaining Agreement Article
19 7, Section 7.6 contract language, which pertains to Stand-by Duty.

20
21 Should you require further information, please contact Debra Tata....

⁸Preston has been NAGE's chief negotiator for every collective bargaining agreement between NAGE and the Commonwealth since 2002. Preston negotiated the 2017 – 2020 Unit 6 CBA, and he is familiar with the administration of the contract, including the stand-by and call-back provisions of Article 7.

⁹Besse testified that he had been "making myself available nights and weekends and holidays, having my phone around all the time, and being available, which is what the public information officer job entailed." Preston testified regarding the "informal resolution" that management agreed to pay Besse stand-by pay, and although not explicitly required, Besse would not pursue his classification appeal. The parties did not execute a written settlement or agreement.

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Section 7.6 Stand-by Duties

A. An employee who is required by the department head to be available on a stand by basis to report to duty when necessary shall be reimbursed at a rate not to exceed seventeen dollars and fifty cents (\$17.50) for such stand-by period.

B. The stand-by period shall be fifteen (15) hours in duration for any night stand-by duty, and shall be nine (9) hours in duration for any day stand-by duty.

C. Stand-by duty shall mean that a department head has ordered any employee to be immediately available for duty upon receipt of a message to report to work. If any employee assigned to stand-by duty is not available to report to duty when contacted, no stand-by pay shall be paid to the employee for the period.

D. An employee who is required by the Department head as a condition of employment to be available by electronic pager to report to duty immediately upon being pages shall be reimbursed at a rate not to exceed seventeen dollars and fifty cents (\$17.50) for such stand-by period.¹⁰

Pursuant to the Unit 6 CBA, Besse began receiving stand-by pay for holding himself available after-hours, and he withdrew his classification appeal. Each pay period, Besse received stand-by pay for every stand-by period that he was available outside of his normal working hours.¹¹ Besse did not receive stand-by pay when he we was unavailable outside of his normal working hours, for example if he was on vacation or out sick. In addition to receiving stand-by pay for holding himself available outside of his normal working hours, Besse also received overtime pursuant to the call-back pay

¹⁰Preston testified that: "I wouldn't say that this document is enforceable.... The agreement wasn't that they would keep him on standby forever or for some period. So I... don't see that they violated this document so much as the contract itself."

¹¹Besse testified that "each pay period, when I did my time sheet, I went through, and if I was available, which I essentially always was, and carried my phone and made myself available, I would put it into that specific day."

1 provision, Article 7.5 of the Unit 6 CBA, for instances when he performed work outside of
 2 his normal working hours.¹²

3 January 2019 Communications

4 By email on January 3, 2019, Besse wrote to Schwartz, regarding “functional title,”
 5 that:

6 Kurt – when we did my EPRS in August, we agreed and changed my functional
 7 title to Public Information Officer.

8
 9 I’m not sure how many different systems/spots have titles in them, but I am still
 10 seeing many instances of older functional titles being used for me.

- 11
 12 •Deb’s 10/25/18 letter to me about Stand-by Duty has “Public Information
 13 Coordinator”¹³
 14 •The recent COOP plan has “Public Information Coordinator”
 15 •MEMA Call Signs file from Communications has “Social Media and PIO
 16 Coordinator”
 17 •Outlook Global Address Book has “Preparedness Coordinator”
 18 •Certain State HR systems have “Preparedness Coordinator”
 19 •My office nameplate has “Social Media and Public Information Coordinator”

20
 21 Ideally, I’d like to have the updated PIO title used across the board. Is there a way
 22 to update any centralized locations that have my title to Public Information Officer?
 23 Outside any system changes, I am not sure how to make the title consistent when
 24 other people are using it because I don’t know what their sources for titles are.
 25 Perhaps Deb would be able to help?
 26

¹²In other words, stand-by pay is compensation for holding oneself available outside of normal hours, whereas call-back pay is compensation for performing work outside of normal hours. The two are not mutually exclusive. Paula DiMichele-Pizzi (DiMichele), a senior labor relations advisor in HRD’s Office of Employee Relations, who serves as a Commonwealth hearing officer for Unit 6 grievances and has extensive experience utilizing the Unit 6 CBA, testified that stand-by duties are “something that’s more predetermined” than call-back. Stand-by is “something that the employee’s oblige[d] to do. It is something that’s set up in writing ahead of time.” DiMichele, a Commonwealth witness, described stand-by duty as a “condition of employment.” Preston testified that “it’s not one or the other. They’re independent of each other.”

¹³The October 25, 2018 memorandum from Schwartz refers to Besse as “Public Information Coordinator.” It is the only document in the record bearing this date.

1 That evening, Schwartz responded: "Please go ahead and let people/groups know
2 including those listed in your email, that your title is now Public Information Officer
3 (PIO)... As necessary, let me know if you need me to send an email, or communicate
4 this change to anyone."

5 By email on January 4, 2019, Besse wrote to Debra Tata (Tata), MEMA's Human
6 Resources Director, to ask that she "please make sure from an HR perspective that my
7 "Public Information Officer" functional title is updated in any personnel
8 records/systems/etc?" That morning, Tata responded, "Yes will do. You are PIO on the
9 org chart – I will update the HRCMS system as well, and anything else w/in my purview."

10 MEMA Gets New Director and Assistant Director

11 In February 2019, Samantha Phillips (Phillips) became MEMA's Director, and
12 Besse began reporting to her. On or around January 21, 2020, Dawn Brantley (Brantley)
13 became Assistant Director for Planning and Preparedness. Upon Brantley's hiring, Besse
14 began reporting to Brantley instead of Philips.

15 May 2020: Phillips Revokes Besse's Stand-by Pay

16 In 2020, with the arrival of COVID-19, the SEOC was activated. Until May 2020,
17 Besse was assigned to the SEOC and was generally working extended hours, usually
18 8:00 A.M. – 4 p.m. or 5 p.m., depending on the day. Besse worked some days in the
19 office and some remotely, but regardless of where he was working, he continued to hold
20 himself available for, and perform, after-hours work.¹⁴

¹⁴Besse testified that "there were still things that were typically coming up after hours." By way of example, he testified that, "The Governor's Office or the COVID Command Center would call or email me at 7:00 at night or 8:00 at night because a question had come in to them, and they were looking for our assistance in that response."

1 On or around Friday, May 1, 2020, Brantley called Besse and informed him that
2 he would no longer receive stand-by pay; Brantley did not communicate to Besse whether
3 MEMA would still require him to perform his stand-by duties outside of his normal working
4 hours.¹⁵ By email on May 2, 2020, Besse sought clarification from Brantley regarding
5 MEMA's expectations of him performing public information work outside of normal
6 working hours in light of the change to his pay that she had communicated the prior day.
7 He wrote, regarding the "week ahead," that:

8 I wanted to make sure I understood the expectation of me for today in terms of
9 work for both PIO related items and regional POD related work.¹⁶ Do you know
10 what, if anything I should be doing for either?
11

12 For the week of 5/3 – 5/9, I am not supposed to be available on stand-by duty and
13 will not be expected to respond to emails & calls on Sunday 5/3, Saturday 5/9 and
14 anytime outside my 7.5 hour workday Monday – Friday, is that correct?
15

16 By email on May 4, 2020, Brantley responded to Besse:

17 My apologies for missing this email. The direction from Sam was that we are not
18 doing the public information for this event so she is temporarily suspending
19 standby.¹⁷ You are no longer working in a regional/HQ POD and the PIO position
20 appears to have been removed completely from the SEOC Roster.

The SEOC is different from the COVID-19 Command Center, which directed the Commonwealth's response to COVID-19. The COVID-19 Command Center had its own public information component.

¹⁵Besse testified: "It was about they were not going to pay me standby anymore. There was never any mention or discussion of not having to be available anymore, but it was just about the pay." Brantley testified that she was generally unfamiliar with stand-by pay, call-back pay, and the Unit 6 CBA.

¹⁶"POD" refers to "point of distribution." Brantley described a POD as, "A place where we bring stuff and then distribute it."

¹⁷The "event" refers to COVID-19. Brantley testified that she was communicating Phillips' decision to suspend stand-by pay due to "not needing it." Phillips testified that she found it "bizarre" and "particularly problematic" that Besse received stand-by pay but other employees of MEMA did not. I do not credit Phillips' testimony that in the spring of 2020 "we were not fielding public information calls" because the record contradicts her

1
2 Given all that, you should work remotely on normal work, reporting as you would
3 on a blue sky day. Please track what you work on and send that to me when you
4 submit your time each week as I am required to validate everyone's telework or
5 remote work hours.

6
7 Upon receiving this communication from Brantley, Besse assumed that he was no
8 longer required to hold himself available outside of normal working hours, and he reverted
9 to working his normal, pre-COVID-19 schedule, 7:00 a.m. – 3:00 p.m. He continued,
10 however, to receive after-hours queries, e.g., from the media or the Governor's Office, so
11 he sought additional clarification. By email at 1:41 p.m., on Friday, May 15, 2020, Besse
12 wrote to Brantley, regarding "after hours inquiries," that:

13 You said that Sam said we are not doing the public information for this event so
14 she is temporarily suspending standby status. In addition to all the coronavirus PIO
15 work that I've been doing each workday, I wanted to share the media inquiries and
16 some of the communications from other agencies, all of which were *after* the end
17 of my normal workday in the last two weeks that I did not address until the next
18 morning based on your direction. Additionally, often the governor's social media
19 updates are late in the day, which I then share on our platforms the next day.

20
21 There are also incidents outside coronavirus (today is the 5th? weather event that
22 has generated situational awareness statements since the COVID state of
23 emergency began) that do/may require PIO support. I wanted to share all this with
24 you so you had relevant information as the temporary standby suspension is
25 reassessed.

26
27 Chris

28
29 Mon 5/4

30 Command center looking for information on a media inquiry
31 Media inquiry

32
33 Wed 5/6

34 Two media inquiries

35
36 Mon 5/11

testimony: Besse was still regularly receiving and responding to public information calls, including queries related to COVID-19 despite the COVID-19 Command Center having its own public information component.

1 Emails from A&F COS and communications director looking for feedback on time
2 sensitive documents and by 8AM next day, gov's office looking for our approval.
3

4 Tue 5/12

5 EOPSS/EOHSS looking for information on a media inquiry
6

7 Wed 5/13

8 Email/call/text from governor's office looking for information
9

10 Besse did not hear back from Brantley before his workday ended at 3:00 p.m.¹⁸

11 Upon going off duty he went out with his family and did not check his work email and
12 phone until later that evening. Meanwhile, at 4:00 p.m., that afternoon, Phillips texted
13 Besse to ask him to "retweet the tornado watch info."¹⁹ At 4:01 p.m, still on May 15, 2020,
14 Brantley responded to Besse's earlier email that, "Sam said that anything urgent should
15 be handled immediately including those related to severe weather or COVID. She trusts
16 your judgment but can assist/advise if necessary."²⁰ That evening, at 6:35 p.m., Brantley
17 sent an additional email to Besse, regarding "Responding to calls and emails over the
18 weekend," that states:

19 Sam said she'd asked you via email to post some information on social media
20 about tonight's weather and you did not respond. She logged in a little while ago
21 and made the posts herself.²¹
22

¹⁸Besse testified that he did not hear back, so he assumed what he had "been assuming all that week, which was I was working my normal day based on the May 4th email" from Brantley. He added that, "Prior to COVID, my regular work hours had been 7:00 to 3:00, and because I wasn't part of the SEOC activation, I was working those hours."

¹⁹This pertains to the "weather event" that Besse referenced in his email.

²⁰Brantley testified that, "if it's urgent, we might need it to be handled after hours." This testimony and the email undercut Brantley's testimony that Besse "could" respond after-hours "if he was available."

²¹Brantley testified that Phillips "had expressed some frustration about Chris not responding to it and asked me to follow up."

1 I had assumed that even though you aren't on standby, you would be responsive
2 when needed and add the time to your time sheet the way others are doing.²² Are
3 you planning to not check or respond to email and calls at all after hours and on
4 weekends? If so, I need to know in advance so that we can ensure things get taken
5 care of in a timely manner whether it's assigning those tasks to someone else or
6 to Dispatch.

7
8 Please let me know if we need to talk through this; otherwise please let me know
9 as soon as possible how you plan to handle things that come up after hours and
10 on weekends going forward.

11
12 Besse received these three communications – the text message from Phillips and
13 the two emails from Brantley – later in the evening on May 15. Based upon these
14 communications, including Brantley informing him that “anything urgent should be
15 handled immediately,” Besse now understood that management expected him to continue
16 holding himself available after-hours despite not receiving contractual stand-by pay for so
17 doing.²³ That evening Besse notified the Union of his situation because he was concerned
18 about receiving discipline for not responding immediately to the communications.

19 By email on Saturday, May 16, 2020, at 6:32 p.m., Besse responded to Brantley
20 that:

21 I take my job and MEMA's mission seriously and am happy to work out a system
22 that works for everybody including the residents of Massachusetts. I have been
23 following your recent instructions to work no more stand-by but only my normal
24 “blue-sky” schedule. I am willing to work stand-by, overtime, during emergencies
25 and anytime MEMA needs me, if I am available. As I was not on standby last night,

²²Brantley testified that, “[I]f you're the PIO, you at least monitor email and then respond as necessary.”

²³Besse testified that from May 4th – May 15th, “because they had said they weren't paying standby pay, I had initially assumed that I didn't need to be available 24/7 with my phone like I had been previously.” On the 15th, it became “clear” to Besse “that they were asking me to be responsive after-hours.” I find that Besse's understanding of management's expectations was accurate: management expected Besse to continue performing stand-by duty without receiving stand-by pay.

1 I was unavailable due to my personal commitments. Talking through this probably
2 would work best and I'm available whenever works for you.

3
4 By email on May 18, 2020, Phillips wrote to Besse, with a copy to Brantley,
5 regarding "Continuity of PIO Duties," that:

6 I know Dawn communicated a change in your stand-by pay. I made this change
7 because the entire agency has been asked to be available during this response.
8 It's not fair to pay you stand-by pay when others are not granted the same. I have
9 reviewed the NAGE contract and I think call-back pay is more appropriate for you
10 and is also what is afforded to other personnel.

11
12 Without stand-by pay, it sounds like you are generally unavailable after normal
13 hours (please let me know if I misunderstood this). With this in mind, I'd like the
14 following changes to go into effect immediately:

- 15
16 1. Your hours of work are 8AM – 4PM to align with the SEOC hours of operation.
17 We are not at the point of approving multi-day vacations, but please work
18 through normal channels (Dawn) if you need time off.
- 19 2. Please Cc Dawn on all emails related to press inquiries and emails with the
20 Governor's Office and Command Center about media releases, reviewing
21 docs, etc.
- 22 3. By 3:45PM daily, please email Dawn and me a summary of the work you did
23 during the day, with special attention to media inquiries and pressing issues,
24 so we are briefed to cover the PIO functions during 4PM – 8AM.

25
26 I was disappointed on Friday that you stopped communicating abruptly without
27 putting a plan in place for the evening and weekend, especially with severe
28 weather arriving. It is your responsibility to ensure there is a succession plan for
29 your job responsibilities on a daily basis. The guidance outlined above will ensure
30 our bases are covered.

31
32 Please confirm receipt. If needed, we can find time for a conference call today to
33 touch base on this.

34
35 That morning, Besse responded:

36 I am in receipt of this and will do all of the things you asked. It's not that I'm
37 generally unavailable after normal hours but there are times that I'm not available.

38
39 If you have time, I would like to discuss as I want to make sure I'm meeting your
40 expectations and I'm sorry if I did not do so on Friday.

41

1 After these email exchanges, on either May 18 or May 19, Besse spoke further
2 with Brantley and Phillips. Besse apologized for not being available and explained that
3 based upon the communications he had received about no longer receiving stand-by pay,
4 he did not think management expected him to continue to make himself available after-
5 hours in the same way that he previously had made himself available. Phillips
6 communicated that she expected Besse to continue to respond to after-hours
7 communications; Phillips did not communicate to Besse that he did not have to be
8 available after-hours.²⁴

9 Besse Continues to Perform After-Hours Work

10 After May 18, 2020, Besse continued to handle PIO duties, including for COVID-
11 19 related matters. He continued to make himself available in the same way he had

²⁴Besse testified that this conversation was similar to the May 18 email from Phillips. He stated that, “[A]t no time was I ever told that I don’t have to be available after hours.”

Although Phillips did not recall this conversation, her testimony established that she expected Besse to continue to be available after-hours despite rescinding his stand-by pay: “My expectations for Mr. Besse are the same for other employees in the organization. That...they are provided a government-issued cell phone, they have access to their email after hours, and if they are contacted and they can field those calls, great.” Phillips continued, “I...understand that at times they will not be able to do that, but they need to kind of work with their units, their leadership to have good continuity in those instances.”

I do not credit Phillips’ testimony that Besse “was not expected to be on standby duty” because Phillips qualified that testimony by adding: “but like every other employee” of MEMA, “at times our phones ring, we receive e-mails outside of normal working business hours....And...employees often do...respond to those communications, and in that case, they are compensated for doing so.” Additionally, I note that the documentary evidence corroborates Besse’s testimony, whereas a tension exists between management’s instructions to Besse that he immediately respond to anything urgent and the testimony that Besse was not expected to be on stand-by duty. Further, Phillips testified that she expected Besse, like all MEMA employees, to “check in periodically” because “it doesn’t necessarily just end at the end of the workday.” Finally, Phillips acknowledged on cross-examination that she eliminated Besse’s stand-by pay but not his stand-by duties.

1 before Phillips rescinded his stand-by pay.²⁵ He continued to receive after-hours inquiries
2 and he continued to respond to them, as necessary, upon receipt.²⁶ Besse continued to
3 receive overtime for work performed pursuant to the call-back provision of the Unit 6 CBA,
4 but he did not receive stand-by pay for holding himself available to respond after Phillips
5 suspended his stand-by pay on May 1, 2020.

6 In or around August 2020, MEMA hired Tom Lyons (Lyons) as a public
7 engagement manager.²⁷ After Lyons was hired, Besse continued to perform after-hours
8 work, but Lyons also performed some of the after-hours work. In April 2021, MEMA
9 transferred the Media Line to Lyons via MEMA's dispatch center, after which Lyons
10 assumed more of the after-hours work that Besse had previously performed.²⁸ After April

²⁵Besse testified, "I still continued to carry my phone and make myself available as I always had been because... that's what I understood was expected."

²⁶Besse testified that, "Not... much changed in terms of media reaching out to me directly. MEMA staff, other agencies, the Governor's Office, the Command Center; EOPSS, our parent agency, would still regularly reach out to me after hours expecting me to respond." The Union submitted into the record, as a representative sample, numerous after-hours media and other inquiries from May 2020 – January 2021. Besse testified regarding these inquiries that, "[T]hese are different media inquiries that were still coming to me...essentially 24/7 after hours, even after MEMA was not paying me standby pay, that I received because, again, nothing in the process had changed. They were still coming to me. I was still handling them... like I always had been."

The Commonwealth offered testimony that some of these inquiries did not require an immediate response. I decline to make such a finding, especially where Besse credibly testified that a timely response is important, even in situations where MEMA has nothing to report, and Phillips had instructed Besse to use his judgment to determine what inquiries required an immediate response.

²⁷Besse testified that at one point, he was told that part of the reason for eliminating his stand-by pay was that MEMA was considering giving his after-hours duties to this new position.

²⁸The Media Line existed before Besse started. The Line connected directly to Judge's desk before Judge retired. After Judge retired, it became a separate line that directed to

1 2021, Besse continued to hold himself available after-hours because management never
2 told him that he no longer needed to be available after-hours, and he continued to perform
3 at least some stand-by duties after-hours.

4 OPINION

5 The issues in this case are whether: I) the Commonwealth violated Section
6 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by eliminating Besse's stand-by
7 pay without giving the Union prior notice and an opportunity to bargain to resolution or
8 impasse; and II) the Commonwealth violated Section 10(a)(5) and, derivatively, Section
9 10(a)(1) of the Law by repudiating an agreement to pay Besse stand-by pay pursuant to
10 Article 7.6 of the Unit 6 CBA.²⁹ For the following reasons, I find that the Commonwealth
11 violated the Law as to both counts.

12 Unilateral Change

13 A public employer violates Section 10(a)(5) of the Law when it changes wages,
14 hours, or other terms and conditions of employment without first bargaining to resolution
15 or impasse with the employees' exclusive bargaining representative. School Comm. of

Besse. Preston testified that in the spring of 2021, MEMA gave most of Besse's stand-by work to Lyons.

²⁹Although the Complaint alleges that the Commonwealth repudiated an October 25, 2018 agreement, I analyze Count II as alleging a repudiation of Article 7.6 of the Unit 6 CBA because the memorandum alleged to constitute the agreement expressly incorporated Article 7.6 of the Unit 6 CBA; the Union offered testimony that it viewed the repudiation allegation as pertaining to the Unit 6 CBA; and both parties addressed whether the Commonwealth repudiated the Unit 6 CBA in their post-hearing briefs. The agreement alleged in the Complaint did no more than invoke Article 7.6 of the Unit 6 CBA. Consequently, Count II, in substance if not in form, alleges a repudiation of Article 7.6 of the Unit 6 CBA, and the parties fully litigated the repudiation allegation. See Hueter and Local 285, SEIU, 3 MLC 1646, 1650 – 1651, SUPL-2006 (December 7, 1976).

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

12 Here, Phillips rescinded Besse's stand-by pay while requiring him to continue to
13 perform stand-by duty.³⁰ Although the Commonwealth argues that Phillips did not require
14 Besse to continue holding himself available outside of normal working hours after she
15 revoked his stand-by pay, the record does not support this position. To wit: Besse's Form
16 30 requires him to be available during non-business hours; management never
17 affirmatively released Besse from stand-by duty; on May 15, 2020, Brantley instructed
18 Besse that urgent after-hours inquiries "should be handled immediately;" Besse's single
19 failure to respond after-hours resulted in Phillips telling him she was "disappointed;"
20 Phillips testified repeatedly that she expected Besse to handle after-hours inquiries when

³⁰The Union did not dispute that the Commonwealth possesses the discretion under Article 7.6 to revoke Besse's stand-by duty at any time. Rather, the Union argued, and I agree, that the Commonwealth cannot revoke stand-by pay while still requiring Besse to perform stand-by duty. In other words, the Commonwealth cannot unilaterally require Besse to continue performing the same job duties at a reduced wage.

1 he was available, which is what he had been doing all along as part of his stand-by duty;
2 and Phillips acknowledged on cross-examination that she rescinded Besse's stand-by
3 pay but not his stand-by duty. In sum, Phillips expected Besse to continue holding himself
4 available after-hours despite revoking the compensation that he received for being
5 available after-hours.³¹ In so doing, Phillips changed a condition of employment
6 established through a collective bargaining agreement. The Union has therefore
7 established the first element of a unilateral change violation.

8 The elimination of stand-by pay, but not stand-by duty, affected Besse's wages.
9 Section 6 of the Law expressly includes wages among the "terms and conditions" of
10 employment that are mandatory subjects of bargaining. Accordingly, the elimination of
11 Besse's stand-by pay affected a mandatory subject of bargaining. Town of Hudson, 25
12 MLC 143, 146, MUP-1714 (April 1, 1999) (employer changes to existing practices that
13 directly impact "wages and hours" are mandatory subjects of bargaining); See also,
14 Commonwealth of Massachusetts, 28 MLC 308, 312, SUP-4740 (April 11, 2002)
15 (employer required to bargain prior to transferring stand-by duty to non-unit personnel).

16 There is no dispute that Phillips revoked Besse's stand-by pay, but not his stand-
17 by duty, without giving the Union prior notice and an opportunity to bargain to resolution
18 or impasse. Accordingly, the Union has established that the Commonwealth violated the

³¹The Commonwealth's argument that the COVID-19 pandemic allowed for this change is misplaced. The issue is not whether Phillips could require Besse to be available after-hours, but whether she could require him to continue to hold himself available after-hours at a reduced wage. The Commonwealth has cited no authority to support the position that Phillips was empowered to override the terms and conditions of employment that the Unit 6 CBA established for Besse. Similarly, the argument that the Commonwealth was acting pursuant to its Article 2 management rights is also misplaced where Article 7.6 specifically limits those general rights.

1 Law by unilaterally eliminating Besse's stand-by pay while still requiring him to perform
2 stand-by duty.

3 Repudiation

4 A public employer's deliberate refusal to abide by an unambiguous collectively
5 bargained agreement constitutes a repudiation of that agreement in violation of the Law.
6 Commonwealth of Massachusetts, 36 MLC 65, 68, SUP-05-5191 (October 23, 2009).

7 There is no repudiation of an agreement if the language of the agreement is ambiguous
8 and there is no evidence of bargaining history to resolve the ambiguity. Id.

9 Here, Phillips deliberately refused to abide by the unambiguous terms of Article
10 7.6 when she eliminated Besse's stand-by pay but still required him to be available on a
11 stand-by basis to report for duty when necessary. Regardless of whether Phillips
12 disapproved of Besse's receipt of stand-by pay, she possessed no authority to override
13 the Unit 6 CBA, pursuant to which he had been receiving stand-by pay. Phillips' May 18,
14 2020 statement to Besse that, "I think call-back pay is more appropriate for you and is
15 also what is afforded to other personnel," ignored the express terms of Article 7.6. When
16 Phillips ignored Article 7.6 in its entirety, the Commonwealth repudiated the Unit 6 CBA
17 and violated the Law.

18 CONCLUSION

19 Phillips eliminated Besse's stand-by pay but not his stand-by duty. In so doing,
20 the Commonwealth unilaterally changed a condition of Besse's employment established
21 through the Unit 6 CBA in violation of Section 10(a)(5) of the Law. Additionally, the
22 Commonwealth repudiated the Unit 6 CBA by deliberately refusing to abide by the
23 unambiguous terms of Article 7.6.

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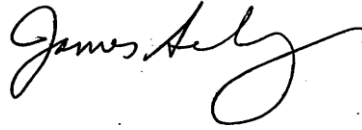
ORDER

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the Commonwealth shall:

1. Cease and desist from:
 - a. Failing to bargain in good faith by eliminating stand-by pay but not stand-by duty for bargaining unit member Christopher Besse without giving the Union prior notice and an opportunity to bargain to resolution or impasse over the decision to eliminate stand-by pay and the impacts of that decision on Besse's terms and conditions of employment;
 - b. Repudiating Article 7.6 of the Unit 6 CBA by requiring Besse to work stand-by duty without receiving stand-by pay; and
 - c. In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed under the Law.
2. Take the following affirmative action that will effectuate the purpose of the Law:
 - a. Pursuant to Article 7.6 of the Unit 6 CBA, make Besse whole for every stand-by period for which he was required to be available but not reimbursed, from May 1, 2020, through the date of this Order, plus interest at the rate specified by M.G.L. c. 231, Section 6I, compounded quarterly, up to the date that MEMA complies with this Order.
 - b. Upon demand, bargain to resolution or impasse with the Union prior to changing any condition of employment established through Article 7.6 of the Unit 6 CBA.
 - c. Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically if the Commonwealth customarily communicates with these members via intranet or email, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.
 - d. Notify the DLR in writing of steps taken to comply with this Order within ten (10) days of receipt.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



JAMES SUNKENBERG, ESQ.
HEARING OFFICER

APPEAL RIGHTS

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



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NOTICE TO EMPLOYEES

**POSTED BY ORDER OF A HEARING OFFICER OF
THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

A hearing officer of the Massachusetts Department of Labor Relations (DLR) has held that the Commonwealth of Massachusetts (Commonwealth) 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.

Section 2 of the Law gives public employees the right to engage in self-organization; to form, join or assist any union; to bargain collectively through representatives of their choosing; to act together for the purpose of collective bargaining or other mutual aid or protection; and to refrain from all the above.

WE WILL NOT fail to bargain 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 in any like or similar manner interfere with, restrain, or coerce the Union in the exercise of its rights guaranteed under Section 2 of the Law.

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

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 (Telephone: (617) 626-7132).