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 ALLIANCE/ AFSCME/SEIU, LOCAL 509	Case No. SUP-20-8334 Date issued: May13, 2022

CERB Members Participating:

Marjorie F. Wittner, Chair
Joan Ackerstein, CERB Member
Kelly Strong, CERB Member

Appearances:

Jennifer Kelly, Esq. -	Representing the Commonwealth of Massachusetts
Ian O. Russell, Esq. -	Representing Alliance/AFSCME/SEIU, Local 509

CERB Ruling on Interlocutory Appeal

Summary

The Alliance/AFSCME/SEIU, Local 509 (Union) appeals from two rulings that denied its motions to amend the complaint in the above-captioned matter. After reviewing the motions, the related documents and the parties' arguments, the Commonwealth Employment Relations Board (CERB) partially grants and partially denies the appeal.

Procedural Background

On June 1, 2021, a Department of Labor Relations (DLR) Investigator issued a two-count complaint (Complaint) alleging that the Commonwealth of Massachusetts, acting through the Secretary of Administration and Finance (Employer), had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of M.G. L. c. 150E (the Law) by failing to provide certain COVID-19 related information to the Union (Count I); and by unreasonably delaying in providing some of that information to the Union (Count II). The Employer filed a timely answer denying all substantive aspects of the Complaint. On February 15, 2022, the Hearing Officer conducted a pre-hearing conference with the parties in which she inquired about the specific information at issue in the Complaint. On February 18, 2022, the Union filed a written motion to amend paragraphs 11, 13 and 19 of the Complaint (Written Motion). The Employer opposed the Written Motion as to paragraphs 13 and 19, only. On March 10, 2022, the Hearing Officer granted the Written Motion as to Paragraph 11, but denied it as to Paragraphs 13 and 19.

The hearing opened the following day, March 11, 2022.[1] At the outset of the hearing, the Hearing Officer listed all of the documents that comprised the official record, including Joint Exhibit (JX) 9, which she described as the March 2021 e-mails between Ann Looney (Looney) and [Jeremy] Weiland (Weiland).[2] After this recitation, the Union

[1] Two more days of hearing are scheduled for June 3 and July 14, 2022.

[2] Ann Looney is the Director of Labor Relations-Health for the Executive Office of Health and Human Services (EOHHS). Weiland, who was a witness at the hearing, indicated that he was a Union officer as of January 2020. Looney's email included a table titled "# of Individuals in DMH Community Congregate Care Settings Testing Positive for COVID by Month (January-March* 2020). The Columns of the table were labeled "Area", January February, March, with each month further broken down into separate "Client" and "Staff" columns. Under the Area column, there were five rows labelled "Central Mass, Metro Boston, North East, South East and Western Mass. Under each of the "Client/Staff

orally moved to amend Paragraphs 13 and 19 of the Complaint (Oral Motion).[3] The Hearing Officer denied the Oral Motion. This interlocutory appeal followed.

Substantive Background

The Complaint stated in relevant part:

> 6. On May 8, 2020, by email to the Commonwealth, the Union requested the following information:
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> A. The number of COVID-19 positive cases associated with DMH in congregate care sites and community programs . . . from patients.
> B. The number of COVID-19 positive cases associated with DMH in congregate care and community programs . . .from staff;
> C. A breakdown of the number of COVID-19 positive cases listed in subsections A and B by location/program.
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> * * *
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> 10. The Commonwealth failed to provide the information requested in paragraph 6, subsections A, B and C, for community programs.
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> * * *
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> 13 On Oct^{ob}er 29th, 2020, the Union requested responses to a survey that contained information relating to positive COVID-19 results in programs or facilities where bargaining unit members worked.
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> * * *
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> 19. On or about March 17th, 2021, the Commonwealth provided information relating to positive COVID-19 test results in DMH congregate care sites, that was responsive to the Union's information request in paragraph 6, subsection C.

According to the Union, it filed the Written Motion in response to certain statements that the Hearing Officer and the Employer made during the pre-hearing conference.

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column, there were numbers ranging from <11 to 29. The table contained no additional information about specific programs or program locations.

[3] In its Interlocutory Appeal, the Union states that it made the second motion on the first day of hearing because "there seemed to be confusion about the Union's written motion to amend Paragraph 19." At hearing, the Union stated that if the Hearing Officer chose not to address its remarks as a new motion, they should alternatively be treated as a request for an interlocutory review of the decision on the [Written] motion. As set forth below, the Hearing Officer treated the Oral Motion as a "renewed" motion to amend.

Specifically, with respect to Paragraph 13, the Union stated that during the conference, the Employer questioned whether the "Survey Monkey" data was requested on October 29, 2020, but agreed that the Union had sent an email requesting that information on February 3, 2020. The Union therefore sought to amend Paragraph 13, by, among other things, clarifying that the survey responses that the Union had asked for referred to "Survey Monkey" responses, and to indicate that the Union had requested this information not only on October 29, but on November 3, 2020 and February 3, 2021.[4]

As to Paragraph 19, the Union stated in its Written Motion that during the pre-hearing conference, the Hearing Officer questioned whether the "current language accurately reflected its arguments." The Union clarifies in this appeal that the Hearing Officer stated that she could interpret paragraph 19 as alleging that the Employer had responded in whole to the information requested as described in Paragraph 6(C). The Union sought to correct what it believed was a misconception by adding the following bolded language to Paragraph 19:

> On or about March 17, 2021 the Commonwealth provided information relating to positive COVID-19 test results in DMH congregate care sites that was **partially** responsive to the Union's information request in paragraph 6, subsection c, **in that it contained information about positive COVID-19 test results in DMH Community Congregate Care settings for January-March 15, 2021, broken down by DMH region.**[5]

[4] The Union also sought to add that it was seeking this information for "DMH vendors in community settings." The Hearing Officer denied this request and the Union does not appeal the denial of the request. We therefore do not consider it.

[5] The Union also sought to add a final sentence stating, "This information was not provided for any period before or after January -March 15, 2021." In its Interlocutory Appeal, the Union states that this sentence is "relatively inconsequential" and "unnecessary." We agree and decline to address this aspect of the request.

The Employer opposed the Written Motion on a variety of grounds, including that it was untimely pursuant to 456 CMR 15.06(2). The Employer also contended that the proposed amendments sought to introduce new allegations. It argued that because the Written Motion was filed so close to the first day of hearing, allowing the amendment prejudiced its ability to defend itself.

On March 9, 2022, the Hearing Officer issued a written ruling denying both requests (Ruling) on grounds that they raised new allegations that fell outside the scope of the Complaint. In particular, she ruled that that the Union failed to show that it had presented any evidence at the investigation regarding its proposed amendments to Paragraph 13. Regarding Paragraph 19, the Hearing Officer stated that amending this paragraph to state that the Employer had only "partially" responded to the information request set forth in Paragraph 6(C) would substantively change the Complaint because "there was no evidence [and the Charging Party did not argue] that Paragraph 6(C) contained an error or omission that requires correction."

The Union addressed aspects of these rulings during its Oral Motion.[6] With respect to Paragraph 13, the Union stated that the Hearing Officer erred when she stated that it had not presented any evidence to support its amendments because during the Investigation, it had submitted three exhibits that supported the amendments.[7]

[6] In its interlocutory appeal, the Union stated that it made the Oral Motion because there "seemed to be confusion about the basis" for the Written Motion to amend Paragraph 19.

[7] The Union supplemented its interlocutory appeal with the transcript from the first day of hearing. This information is based on the transcript.

The Union made a similar argument with respect to Paragraph 19. It stated that the allegations in Paragraph 19 were based on a March 17, 2020 email from Looney to Weiland, which had been part of the investigation record and was now a joint hearing exhibit, JX 9. Because that email demonstrates that the Employer provided only regional, but not location information in its March 17 response, the Union contended that the proposed amendment was supported by JX-9 and falls within the scope of the Complaint. The Employer orally opposed the Oral Motion for reasons similar to those stated in its written opposition to the Union's Written Motion.

Treating the Oral Motion as a "renewed" motion to amend, the Hearing Officer issued a bench ruling denying it on grounds that investigation exhibits were not evidence at hearing and because neither party had referenced JX 9 in the Written Motion or the response. The Hearing Officer indicated that the Union could file an interlocutory appeal of her ruling, which it did on March 18, 2022. The Employer filed an opposition on March 25.

In the interlocutory appeal, the Union reiterates many of the arguments it made at hearing. It did not specifically address the Employer's arguments that any of its motions to amend were untimely under the DLR's regulations. It does, however, tie its decision to file the motions so close in time to the hearing to statements that the Employer and the Hearing Officer made during that conference. The Union also contends that the Employer would not be prejudiced by an amendment that merely alleges that this document was only partially and not fully responsive to the Union's information request, and that the Hearing Officer erred by finding otherwise.

In response, the Employer reiterated its previous arguments. Relying on an unspecified section in the on-line "A Guide to the Massachusetts Public Employee Collective Bargaining Law,"[8] it also contends for the first time that the Union's interlocutory appeal is untimely because it was filed less than fourteen days prior to the start of the hearing.

Ruling

Timeliness

As a threshold matter, we address the timeliness of the interlocutory appeal. Pursuant to 456 CMR 13.04, "Interlocutory Appeals," a party may seek relief from a hearing officer ruling, "prior to the close of the hearing." Here, on the first day of hearing, the Hearing Officer heard the Union's Oral Motion, and, treating it as a "renewed" motion to amend the complaint, denied the motion. The Union filed this interlocutory appeal "prior to the close of the hearing," and thus, the appeal is timely.

The regulations do not otherwise discuss appeals of a hearing officer's ruling on a motion to amend a complaint. Although the Green Book does, its statement on page 36, that "the CERB will not consider an appeal of a hearing officer's dismissal of a pre-hearing Motion to amend if it is filed less than fourteen days before hearing," is not supported by anything in the regulations, and in any event, is followed by the statement that "Appeals of a Hearing Officer's decision concerning Motions to Amend made at hearing should be filed as Interlocutory Appeals."[9] Because the regulations support this statement, and

[8] This guide, which is also referred to as the DLR "Green Book" may be found here: *https://www.mass.gov/a-guide-to-the-Massachusetts-public-employee-collective-bargaining law*(last accessed May 4, 2022).

[9] See Green Book, at p. 17.

because as discussed below, a charging party is free during the course of a hearing to file motions to amend a complaint to conform to evidence presented, see, e.g., Town of Reading, 9 MLC 1730, 1731, MUP-4541 (March 29, 1983), we disagree with the Commonwealth that the Hearing Officer's denial of the pre-hearing Written Motion precluded the Union from making a second motion to amend after the hearing opened and the joint exhibits were entered into evidence. Having determined that the interlocutory appeal was timely filed, we turn to its merits.

Standard of Review

Prior to the close of a hearing, DLR Rule 13.04, 456 CMR 13.04, permits a party to seek relief from a hearing officer's ruling or order. DLR Rule 13.03(2) grants hearing officers the authority to "make all rulings and orders necessary to decide the case based on the record of the proceedings." DLR Rule 13.07 similarly grants to hearing officers "the right to inquire fully into the facts relevant to the subject matter of the hearing" including the right in Rule 13 (16) to "take any other action authorized by 456 CMR 13.00." Inherent in this grant of authority is the discretion to exercise it responsibly. City of Worcester, 6 MLC 1475, 1476-1477, MUP-3369 (September 21, 1979). Accordingly, when ruling on interlocutory appeals under Section 13.04 of the DLR's rules, the CERB generally applies an abuse of discretion standard. City of Cambridge, 30 MLC 31, 32, MUP-01-3033 (September 3, 2003); Commonwealth of Massachusetts, 7 MLC 1477, 1480, SUP-2414 (October 29, 1980).

Motions to Amend

The regulation that governs this appeal, 456 CMR 15.06, permits a charging party to file motions to amend a complaint both before and after the hearing has opened. 456

CMR 15.06 (2) permits parties to file a motion to amend a complaint with the investigator who issued the complaint within ten days after issuance to "correct an error or omission." As the regulation states, after the hearing has opened, a hearing officer "may allow amendment of any complaint, provided that such amendment is within the scope of the original complaint." Amendments that seek to add more specificity to an existing allegation fall clearly within the scope of a complaint. See Quincy City Employees Union, H.L.P.E. and Nina Pattison; City of Quincy and Nina Pattison, 13 MLC 1129, MUPL-2883, MUP-6037 (Ruling on Preliminary Motions) August 28, 1986). However, the DLR limits amendments to a complaint to avoid the addition of material allegations that have never been the subject of DLR investigation and probable cause determination. Id. at 1129.

This case concerns the Union's efforts to obtain information about COVID-19 rates at various facilities where its unit members work. The Complaint alleges that the Employer either failed to provide the information or delayed in providing it. The proposed amendment to paragraph 13 seeks to add two more dates on which the Union requested the information and clarifies that the March 17th email described in Paragraph 19 contained only a partial, albeit delayed, response to the request described in Paragraph 6(C). Because the amendments seek to add more specificity to the existing allegations, but do not change the theory of the case, or add allegations that have never been the subject of the DLR's investigation, we find that they clearly fall within the scope of the Complaint. Id.

That does not end the inquiry, however, because, by stating that a hearing officer "may allow" amendments, 456 CMR 15.02 grants the hearing officer discretion in amending complaints, even if the amendments fall within the scope of the complaint. We

must therefore consider whether the Hearing Officer abused her discretion in denying the motions. The Hearing Officer denied the Oral Motion to amend Paragraph 13 on grounds that the exhibits that the Union claimed supported the Motion were part of the investigation record and therefore not part of the record before her. That is an accurate statement, which is consistent with the DLR's general policy of maintaining separate investigatory and hearing records and requiring hearing officers to render decisions based on the hearing record only. Accordingly, the Hearing Officer did not abuse her discretion when she declined to amend paragraph 13. We affirm her denial of the motion to amend paragraph 13 on those grounds.

We reach a different conclusion with respect to the proposed amendments to paragraph 19. First, both counts of the Complaint the amendments concern the adequacy of the Employer's response to the Union's information request. Thus, the requested amendment, which clarifies the extent of the response to the requested information described in paragraph 6(C), does not change the theory of the case or add allegations that were not part of the investigation. It therefore falls within the scope of the Complaint.

Second, we agree with the Union that JX 9 was only partially responsive to the request for the number of COVID-19 positive cases associated with DMH in congregate care sites because, on its face, JX 9 breaks down that information by region, and not by location/program. Accordingly, because the substance of the amendment is supported by JX 9, which was part of the hearing record when the Union made the oral motion, the motion to amend Paragraph 19 does not implicate the same evidentiary concerns that the Hearing Officer articulated with respect to Paragraph 13. Rather, it is appropriate after a hearing opens for a hearing officer to allow amendments that conform to the evidence in

a particular matter, provided the amendment falls within the scope of the complaint, and further provided that the respondent has a full and fair opportunity to fully litigate the amendments. City of Boston, 46 MLC 191, 197, MUP-17-6211, MUP-18-6679 (March 31, 2020).

Finally, we find that the Union would be prejudiced if this amendment is not allowed because the Investigator's allegation in paragraph 19, that the Employer responded to the information requested in paragraph 6(C) with respect to congregate care settings, albeit in a delayed manner, was tantamount to a dismissal of that portion of the Union's charge that the Employer had failed to provide or unreasonably delayed in providing that information. However, the Investigator did not formally dismiss this allegation, and thus the Union was unable to challenge it by filing a request for review pursuant to 456 CMR 15.05 (9). Rather, its only recourse was through filing a motion to amend pursuant to 456 CMR 15.02 with either the Investigator or the Hearing Officer to amend paragraph 19 of the Complaint. Thus, unless this motion to amend was granted, the Union would have no other opportunity to demonstrate that the Commonwealth's March 17, 2021 response was not fully responsive and, if proven by a preponderance of the evidence, to obtain an appropriate remedy. By contrast, allowing the amendment, as modified below, would not unduly prejudice the Employer, who has already had to prepare a defense to the allegations that it did not provide or delayed in providing certain COVID-19-related information – this is just one additional aspect of that defense. Further, given that there are two more days of hearing scheduled in June and July 2022, respectively, the Employer will have appropriate notice, time and opportunity to defend against this allegation.

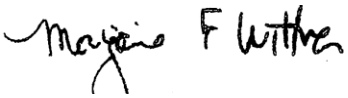
Conclusion

For the foregoing reasons, we affirm the Hearing Officer's denial of the Motion to Amend Paragraph 13 of the Complaint. We reverse the Hearing Officer's denial of the Motion to Amend Paragraph 19, and remand this matter to her to amend paragraph 19 of the Complaint as follows:

> 19. On or about March 17, 2021, the Commonwealth provided information relating to positive COVID-19 test results in DMH congregate care sites that was **partially** responsive to the Union's information request in paragraph 6, subsection C [**in that it contained information about positive COVID-19 test results in DMH Community Congregate Care settings for January – March 15, 2021, broken down by DMH region].**

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



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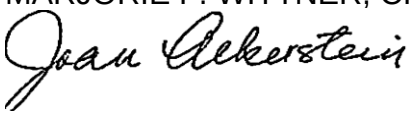
MARJORIE F. WITTNER, CHAIR



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JOAN ACKERSTEIN, CERB MEMBER

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KELLY STRONG, CERB MEMBER