

COMMONWEALTH OF MASSACHUSETT
DEPARTMENT OF LABOR RELATIONS

In the Matter of

COMMONWEALTH OF MASSACHUSETTS/
DEPARTMENT OF MENTAL HEALTH

and

ALLIANCE/AFSCME/SEIU, LOCAL 509

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Hearing Officer:

Gail Sorokoff, Esq.

Appearances:

Melissa Thomson, Esq.

- Representing the Commonwealth of
Massachusetts

Ian Russell, Esq.

- Representing Service Employees International
Union, AFL-CIO, Local 509

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this is case whether the Commonwealth of Massachusetts (Commonwealth)
2 violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws
3 Chapter 150E (the Law) by failing to bargain in good faith over the means and manner of safely
4 returning bargaining unit employees to in-person on-site work five days a week, commencing
5 on August 25, 2021, and the impacts on that decision on bargaining unit employees' terms and
6 conditions of employment. For the reasons explained below, I find that the Commonwealth
7 violated the Law as alleged.

STATEMENT OF THE CASE

The Alliance/AFSCME/SEIU, Local 509 (Union) filed a charge of prohibited practice with the Department of Labor Relations (DLR) alleging that the Commonwealth, through the Department of Mental Health (DMH or Employer), engaged in prohibited practices within the meaning of Sections 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law). A DLR investigator investigated the charge. On March 10, 2022, the investigator issued a Complaint of Prohibited Practice and Partial Dismissal (Complaint). The Complaint contained one count, alleging that the Commonwealth violated Section 10(a)(5) and, derivatively, 10(a)(1) of the Law by failing to bargain in good faith over the means and manner of safely returning bargaining unit employees to the office, and the impacts of DMH's decision on unit employees' health and safety, workload, duties, hours of work, and other employees' terms and conditions of employment. The Commonwealth filed an Answer to the Complaint on March 14, 2022.

Both parties had the opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence during the hearing that I conducted on April 12, 2023 and October 18, 2023.¹ On December 20, 2023, both parties filed timely post-hearing briefs. On January 5, 2024, the Union filed a reply brief.² Based on the record, which includes witness testimony, stipulations

¹ The first day of hearing was held in-person. Due to health concerns of a witness, and in order to forestall further delays in the case, the parties jointly agreed to hold the second day of hearing remotely by WebEx video conference.

² On December 21, 2023, the Union requested approval to submit a reply brief to respond to the Commonwealth's waiver by contract argument, which was raised for the first time in its brief, and the Commonwealth's arguments regarding the appropriate remedy. On December 28, 2023, I granted the Union's request to respond to the Commonwealth's new waiver by contract argument. Because I had specifically requested that the parties address the appropriate remedy in their briefs, which they did, I did not grant approval for the Union to further address that topic.

of fact, and documentary exhibits, and my observation of the witnesses' demeanor, in consideration of the parties' arguments, I make the following findings of fact and render the following opinion.

STIPULATIONS OF FACT

1. The Commonwealth, acting through the Secretary of Administration and Finance, is a public employer within the meaning of Section 1 of the Law.
2. The Alliance, AFSCME-SEIU, AFL-CIO (Alliance) is the exclusive bargaining representative for employees in statewide bargaining units 2, 8, and 10.
3. SEIU, Local 509, a member of the Alliance, is an employee organization within the meaning of Section 1 of the Law and represents employees in unit 8 who work for the Department of Mental Health (DMH).
4. DMH is a state agency under the Executive Office of Health and Human Services.

FINDINGS OF FACT

Background

DMH provides services and support to meet the mental health needs of the Commonwealth's residents. Certain DMH employees, including those employed as Social Workers, Rehabilitation Counselors, Human Service Coordinators, and Mental Health Coordinators, are included in state-wide bargaining unit 8. Some of these DMH employees work in the local communities and perform site visits. Others work in various offices and facilities around the Commonwealth and meet with individuals for one-on-one counseling sessions. DMH also staffs two types of in-patient facilities; one provides acute care for short stays and the other provides continuing care for individuals with long-term persistent mental health issues that cannot be served in the community or in an acute care setting.

Collective Bargaining Agreement Provision

Article 14, Section 4D of the parties' collective bargaining agreement (CBA) covers transfers and reassignments and provides as follows:

1. In the event it becomes necessary for the Employer to involuntarily transfer or reassign an employee, the Employer will strive to provide the employee with fifteen (15) working days written notice, but will provide no fewer than ten (10) working days prior written notice, except in cases of emergencies involving the protection of the property of the Commonwealth or involving the health and safety of those persons whose care and/or custody have been entrusted to the Commonwealth. Such written notice will be copied to the Union. In emergency situations management shall, at the Union's request, provide the reason(s) for the transfer/reassignment. However, a declaration of said emergency shall not be used for the purpose of avoiding the payment of overtime. The Employer shall use the joint criteria of ability to do the job and inverse seniority in determining which of the potentially affected employees shall be transferred/reassigned.

2. Reassignment shall not be implemented for disciplinary reasons that are arbitrary and/or capricious.

Article 14, Section 4B defines reassignment as "a change involving different days off, shift or work location, but without a substantial change in duties and without any change in work unit or classification."

The Onset of the COVID-19 Pandemic

On March 10, 2020, Governor Baker declared a state of emergency due to the COVID-19 pandemic. Employees working on inpatient units continued to work on-site as usual but other DMH employees, who had been working in-person five days a week before the pandemic, began to work remotely. These employees provided telehealth services by phone with some limited in-office rotations. After about four to six weeks, some of these employees began to work a hybrid schedule. For example, most employees in the Adult Community Clinical Support (ACCS) Program in the Southeast region (Southeast region), serving the Brockton Multi Service Center, the Corrigan Mental Health Center in Fall River, and the Hyannis Center, began to work remotely

1 four days a week and on-site one day a week. Generally, Case Managers worked remotely four
2 days a week but went into the office one day a week to perform computer work.³

3 On July 14, 2020, the Director of Labor Relations for Health within the Executive Office
4 of Health & Human Services (EOHHS), Ann Looney (Looney), wrote to the Union Staff Advisor
5 for the DMH Chapter, Jerry Levinsky (Levinsky), and other Union representatives to provide
6 information about changes to telework and staff rotation of in-office work in the Southeast region.
7 Looney wrote that “[d]uring surge period of the COVID 19 pandemic, most face to face
8 encounters were suspended, limiting in-person contact...” but that there was now a need to
9 increase face-to-face encounters. At that time, most of the employees in the Southeast region
10 were only working on-site once a week while teleworking four days a week. In July 2020, DMH
11 increased in-person work, requiring most bargaining unit employees in the Southeast region to
12 work the following alternating schedule: Week 1 - on-site three days a week, and remotely two
13 days a week; Week 2 - on-site two days a week, and remotely three days a week. A smaller
14 number of employees began to work on-site four days a week and remotely one day a week. At
15 least one employee continued to work remotely five days a week.

16 At some point prior to the change at issue in this matter, bargaining unit employees
17 working at the Mass Mental Health Center locations in the Metro Boston Area (Mass Mental
18 Health Center) began working on-site for one week followed by two weeks of remote work.

19 **Labor-Management Meetings**

20 Historically, the Union and DMH representatives met at statewide monthly labor
21 management meetings. After the Governor’s state of emergency declaration, the Union

³ According to Sheelagh O’Connor (O’Connor), who worked as a DMH case manager and served as a regional representative for the Union, only three employees would be in the office at a given time so that “nobody had any interaction with each other.”

1 requested frequent Labor-Management (LM) meetings to address the health and safety issues
2 associated with the COVID-19 pandemic. These LM meetings were held virtually. At the outset,
3 the LM meetings occurred almost daily but by early April 2020, DMH began holding the LM
4 meeting on a weekly basis. Starting in or about June 2020, the frequency was reduced and the
5 parties met for LM meetings every two weeks.

6 The Commissioner of DMH participated in the LR meetings along with the EOHHS Labor
7 Relations Director, Erica Crystal (Crystal). Lonney participated in a few of the early meetings. At
8 some point, the Union specifically requested that the Director of the DMH Office of Inpatient
9 Management, Anthony Riccitelli (Riccitelli), attend to address issues for the employees working
10 at the inpatient facilities and the Commonwealth agreed to include him in the meetings. Levinsky
11 attended on behalf of the Union, along with the President of the Chapter, Cassandra Sampas
12 (President Sampas), and some regional Union representatives, including O'Connor.

13 The participants at the LM meetings discussed wide ranging topics. The topics included
14 issues related to employees' remote work as well as health and safety issues for those who were
15 required to work in-person, whether full-time or on a hybrid basis. The meetings were divided
16 into two parts to discuss issues pertaining to the inpatient facilities and, separately, issues
17 pertaining to those employees working in the communities. In the early stages of the LM
18 meetings, the participants frequently discussed the need for appropriate personal protection
19 equipment (PPE). The Union representatives addressed what PPE it felt was appropriate for the
20 employees working on-site. Riccitelli explained to the participants what PPE DMH was
21 purchasing, pursuant to guidance provided by the Centers for Disease Control and Prevention

1 (CDC) and Department of Public Health.⁴ The parties also discussed concerns about employees
2 working within close range of each other, proper ventilation, and protocols for cleaning facilities
3 if or when an employee working on-site tested positive for COVID-19.⁵ The Union expressed
4 concerns about employees being asked to perform new duties, and being cross trained, when
5 insufficient staff was available on-site to perform certain duties, such as serving meals.⁶

6 On May 28, 2021, Governor Baker issued COVID-19 Order No. 69, terminating the state
7 of emergency and rescinding certain COVID-19 related executive orders, effective on June 15,
8 2021.

⁴ Riccitelli explained “[t]he guidance would advise us in terms of review that certain PPE was appropriate for the inpatient capacity, whether or not somebody was on an inpatient unit with COVID positive patients or not, whether they were just in the building, whether they were in a residential group home or residential kind of programming or in an office setting.” When the Union explained that staff working in office locations preferred N95 masks for safety reasons, Riccitelli testified that he typically provided the Union with the guidance that “supported what our decision was going to be and -- and explain that we really can't go beyond the guidance at this point. Especially in the first year of the pandemic, we were clear, and the guidance was very clear, that we wanted to reserve especially the N95 respirators to inpatient capacity.” Looney testified that, although she only attended a very few LM meetings, she understood that DMH was ‘very collaborative with the Union with regard to safety measures...’. However, she also explained that although the Union requested that clients and patients wear masks, DMH determined that “[g]iven the nature of the health issues that the clients and patients had, it couldn't be a requirement.”

⁵ Levinsky testified that health and safety related issues were addressed “but there was a sense ... we weren't moving on addressing issues that were coming up, and so the issues would come up over and over and over again. That --that was one part of it. And the other part was that there were new issues that were constantly coming up.” The Union had “tremendous frustration” that the issues were not being resolved. Levinsky testified that the Union believed that DMH was not acting “as aggressively as it could or might have to ensure safety precautions under the circumstances.”

⁶ Riccitelli testified that DMH discussed cross training with Union “and explained what we were doing.” He characterized these discussions as negotiations, explaining that the Union brought up concerns “[a]nd I would go back, find out what the issues were at the facility, determine whether or not the concern was a valid concern from my perspective, and then bring it back for discussion and then implemented [a] change, if necessary.”

1 The LM meetings with the Commissioner ended on July 15, 2021. DMH never discussed
2 any specific plans to have bargaining unit employees return to full-time on-site work during the
3 LM meetings.⁷

4 **DMH Requires Certain Employees to Work On-site Five Days a Week**

5 On August 4, 2021, Looney wrote to Mike Foster (Foster),⁸ Levinsky, and other Union
6 representatives, that, “[w]ith the lifting of the state of emergency, DMH Mass Mental Health
7 Center ... has experienced continuous rise in the need to increase in-person outpatient mental
8 health services.” Looney continued that Massachusetts Mental Health Center employees would
9 soon be informed that “they will be required to report to work on-site, in-person, five days a
10 week.” She further wrote,

11 As always, employee health, safety and well-being remains a top priority at
12 MMHC. As you know, screening procedures and enhanced safety measures are
13 in place. Additionally, employees will continue to be provided with appropriate
14 personal protective equipment (“PPE”) and training, commensurate with their job
15 duties and responsibilities.

16
17 DMH/MMHC has spent the past year procuring PPE (including but not limited to
18 masks, hand sanitizer, alcohol based cleaning solution) and will continue to
19 provide staff with PPE. MMHC will also continue the practice of offering face masks
20 to non-staff who enter the building. Further, all offices at the Center were measured
21 to ensure that appropriate social distance can be maintained for individual client
22 meetings and that distance, coupled with the use of PPE, allows for clinic staff to
23 meet with clients in their offices in person.
24

⁷ Both Levinsky and O’Connor testified that there were no discussions during the LM meetings that DMH would require employees in the Southeast region and at the Mass Mental Health Center to end their hybrid schedules and report to the office in-person five days a week. Riccitelli testified that they discussed a return to in-person work in general during these meetings, but he also testified that they did not “get into the details of it there.” Although the Commissioner discussed in general about the need for employees to provide in-person care and return to their jobs full time as they did pre-COVID-19, Riccitelli confirmed that the Commissioner never stated during the LM meetings that the DMH employees in the Southeast Region and the Mass Mental Health Center would be returning to in-office work five days a week.

⁸ Mike Foster is a Union representative although the record is silent about his title.

1 MMHC will also be restoring the main front entrance workflow...Screening
2 attestations will also be completed at the front entrance for all people entering the
3 building.
4

5 In an attachment Looney provided a spreadsheet of the impacted employees.

6 On August 9, 2021, Looney wrote to Foster and other Union representatives that DMH
7 was also changing the work schedules for employees in the Southeast region. For most of these
8 employees, DMH ended their hybrid schedules and required them to return to in-person on-site
9 work 5 days a week.⁹

10 Neither letter provided a specific date for the upcoming change.¹⁰ The Union did not
11 respond to Looney's letters.

12 On August 10, 2021, DMH sent employees individualized letters informing them that,
13 effective August 25, 2021, their work schedule would be five days a week in the office to "best
14 serve the needs of our clients."

15 On August 12, 2021, Levinsky wrote to John Langan, Director of Office of Employee
16 Relations, and others, as follows:

17 SEIU Local 509, through its Chapter Leadership with the Massachusetts
18 Department of Mental Health, has received notice that DMH management intends
19 to significantly modify the work location expectations for our members. As SEIU
20 Local 509 believes that these decisions and modifications to the DMH assigned
21 workplace/work locations will result in significant changes for our members,

⁹ The attachments to the email listed approximately 63 impacted employees. DMH ended hybrid work schedules for approximately 60 employees and required them to return to the office five days a week. DMH also changed the work schedule for three other employees, although going forward those three employees would work remotely two days a week and work on-site three days a week. A separate attachment noted certain safety measures in place, including PPE for staff and clients including face masks and hand sanitizer; staff and client screening protocols for COVID-19 symptoms; and outpatient clinic visits by appointment, although clinics continued to provide urgent care with limited capacity in the waiting rooms.

¹⁰ Looney testified that the notice for employees to return to full time on-site in-person work did not include a date for the return "because I would imagine they would presume that we would give the contractually required notice."

1 particularly under the present circumstances of the COVID 19 Pandemic and the
2 associated health and safety concerns raised, the Union believes these changes
3 and their resulting impact on working conditions, needs to be bargained.
4

5 Therefore, we are writing to begin Impact Bargaining pursuant to the provisions of
6 M.G.L.C. 150e over all changes that will take place regarding the work performed
7 and the assigned work locations where said work will be performed by Local 509
8 Members. **We are asking to begin meeting no later than 10:00 am on August**
9 **19, 2021 and can make ourselves available at any time that day, or on an**
10 **earlier date if possible.**
11

12 Finally, given the very significant health and safety concerns of our members, as
13 well as the general legal obligations of the commonwealth under state labor law,
14 we hereby demand that the Massachusetts Department of Mental Health **Cease**
15 **and Desist**, from any further attempt(s) to implement changes to the workplace
16 location assignments for Local 509 members pending good faith bargaining to
17 resolution or impasse. see e.g. In the Matter of Commonwealth of Massachusetts,
18 Commissioner of Administration and Finance/Department of Social Services and
19 ALLIANCE, AFSCME/SEIU, LOCAL 509, 25 MLC 201 (1999), Massachusetts
20 Labor Relations Commission hold that Public Employer(s) must bargain over the
21 impacts of managerial decisions on employees' working conditions prior to
22 implementation,
23

24 Please contact me to schedule bargaining.¹¹ (Emphasis in the original)

25 On August 17, 2021, Levinsky followed up with an email to Matthew Hale (Hale), the
26 designated liaison between HRD's Office of Employee Relations (OER) and the Union. On
27 August 18, 2021, Levinsky again emailed Hale, noting that he had not heard back regarding the
28 Union's demand to bargain. He wrote, in part,

¹¹ Levinsky testified that at the time he sent this letter, the Union had significant concerns about the health and safety of employees being directed back into the office five days a week. There was a surge of COVID-19 cases at the time. Two days before Levinsky sent this letter, the Boston Globe reported on how the more transmissible Delta variant was changing the calculus for what was needed to end the pandemic. Levinsky noted that several employees had contracted COVID-19, and two employees had already died from the disease. He further testified that there were concerns about the sheer number of employees in a closed office setting, because the more people in a space increased the potential that employees would contract COVID-19. The Union was concerned about health and safety issues including the air quality and whether appropriate levels of PPE were available.

1 As the issues raised are of deep concern--directly impacting on the health and
2 safety of our members, please accept this email communication as **FINAL**
3 **NOTICE** that a continued failure to respond and immediately schedule a first
4 session with the Union, will leave us with no alternative but to seek redress through
5 the Department of Labor Relations pursuant to M.G.L.C. 150e.
6

7 I hope this is not necessary and that we hear from you very soon.
8 (Emphasis in the original)
9

10 A few minutes later, Crystal replied that she did not think this type of threat was particularly
11 helpful. She also wrote that she and Looney would respond to the bargaining request.¹²

12 On August 20, 2021, Looney responded to Levinsky as follows:

13 I am writing in response to your Demand to Bargain, dated August 12, 2021, filed
14 with the Office of Employee Relations and involving the DMH's Future of Work
15 (FOW) plans. Specifically, you declare that DMH's FOW plans, will result in
16 significant changes to your members, "particularly under the present
17 circumstances of the COVID 19 Pandemic and ..." associated health concerns
18 raised.
19

20 As you know, you and others from SEIU have engaged in weekly and then bi-
21 weekly meetings from the beginning of April 2021 through July 2021¹³ with the
22 Commissioner of DMH, the EHS Deputy General Counsel/Secretariat Labor
23 Director and the DMH Director of Inpatient Management, wherein the safety and
24 health of DMH bargaining unit (BU) employees during the pandemic was a
25 significant and constant discussion topic. Specifically, 509 received the DMH
26 safety protocol on in-person visits from the DMH Commissioner herself. Further,
27 you have been advised a myriad of times that the CDC and DPH guidelines
28 regarding COVID -19 are followed in all DMH workplaces.
29

30 Additionally, at the SEIU 509 DMH Statewide Labor Management meeting on
31 August 4, 2021, President Sampas requested that clients be greeted with masks
32 upon screening at our facilities and that BU members be provided with extra PPE
33 including masks so that they could also supply clients with PPE. Later, on August

¹² The next day, on August 19, 2021, Governor Baker issued an executive order requiring all Executive Department employees, with limited exceptions, to submit proof of a COVID-19 vaccination by October 17, 2021 or face potential termination, because widespread vaccination was the "only means the Commonwealth has over the long-term to ensure protection from COVID-19 in all its variations and to end the many negative consequences COVID-19 produced in our daily lives."

¹³ Looney explained there was a scrivener's mistake, and that the correct time frame was from April 2020 through July 2021.

1 4, 2021, I sent President Sampas, yourself and Mr. Foster notice of MMHC's FOW
2 for outpatient clinics which pointedly provided in pertinent part:

3
4 'As always, employee health, safety and well-being remains a top priority
5 at MMHC. As you know, screening procedures and enhanced safety
6 measures are in place. Additionally, employees will continue to be
7 provided with appropriate personal protective equipment ("PPE") and
8 training, commensurate with their job duties and responsibilities.
9 DMH/MMHC has spent the past year procuring PPE (including but not
10 limited to masks, hand sanitizer, alcohol based cleaning solution) and
11 will continue to provide staff with PPE. MMHC will also continue the
12 practice of offering face masks to non-staff who enter the building.
13 Further, all offices at the Center were measured to ensure that
14 appropriate social distance can be maintained for individual client
15 meetings and that distance, coupled with the use of PPE, allows for clinic
16 staff to meet with clients in their offices in person.'

17
18 Additionally, the Southeast Area FOW notice sent on August [9, 2021] contained
19 two documents regarding safety and health of employees; one that listed specific
20 and general Safety measures for employees in specific Southeast Area programs
21 and the other which was entitled *Screening Procedures for In-person Visits*. In
22 each of the aforementioned notices, I asked that you please contact me regarding
23 any questions or concerns. I was not contacted.

24
25 In your Demand letter, you assert that SEIU Local 509 believes the Departments'
26 decisions and modifications to assigned workplace/work locations will result in
27 significant changes for members, particularly under the present circumstances of
28 the COVID 19 Pandemic and the associated health and safety concerns. This is
29 confusing as the DMH is simply, after a declared state of emergency, returning to
30 the status quo ante,¹⁴ enhanced by all of the safety and health protective measures
31 now in place after sixteen months of discussion with SEIU 509. Although we
32 believe we have exhausted conversations on this matter, we are happy to meet to
33 discuss [] any new health and safety issues you may have. Please provide a list
34 of these issues as well as several dates and times that you are available to meet.
35 I look forward to your list.
36

¹⁴ Looney explained that because of the pandemic DMH had implemented emergency responses including changes in work schedules. She wanted to make it clear that "we weren't changing anything, we were going back to the status quo ante. We didn't bargain over telling people to come into the office less. I believe that was definitely something that the governor had publicly stated and just wanted to make it clear that this is not any kind of real change, this is a return."

1 DMH did not offer dates to meet with the Union to negotiate over the change.¹⁵ The Union
2 did not provide a list of issues or any dates and times to meet.

3 On August 25, 2021, the employees working in the Mass Mental Health Center and in the
4 Southeast region returned to on-site, in-person work five days a week.¹⁶ Other DMH employees
5 outside those areas continued to work hybrid schedules, including bargaining unit employees
6 who had worked in-person in the office full time prior to the pandemic.

7 OPINION

8 The issue in this case is whether the Commonwealth, through DMH, violated Section
9 10(a)(5) and, derivatively, Section 10(a)(1), of the Law when DMH required its employees to
10 return to on-site, in-person work effective August 25, 2021. A public employer violates the Law
11 when it unilaterally alters a condition of employment involving a mandatory subject of bargaining
12 without first bargaining with the exclusive collective bargaining representative to resolution or
13 impasse. School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983).
14 An employer's duty to bargain before changing conditions of employment extends to working
15 conditions that have been established through custom and past practice. City of Boston, 16 MLC
16 1429, 1434, MUP-6697 (December 19, 1989). To establish a violation, a union must show that:
17 1) the employer changed an existing practice or instituted a new one; 2) the change impacted a
18 mandatory subject of bargaining; and 3) the employer implemented the change without prior

¹⁵ Looney explained that there was no impact bargaining obligation given the "myriad, extensive, exhaustive discussions we had previously had." Therefore, she did not offer any dates, however, she wrote that the Union could contact her with issues. Looney also testified that if OER believed that impact bargaining was required, it would have met with the Union but that, as far as she was aware, OER never responded to the Union either.

¹⁶ Levinsky testified that although DMH returned these employees to the same pre-pandemic schedules, and the employees were working the same number of hours in the same location as before the pandemic, things were not the same as previously because the Commonwealth was now in the midst of a public health crisis.

1 notice or an opportunity to bargain. Commonwealth of Massachusetts, 20 MLC 1545,1552,
2 SUP-3460 (May 13, 1994).

3 **DMH Changed the Past Practice**

4 To determine whether a past practice exists, the Commonwealth Employment Relations
5 Board (Board) analyzes the combination of facts upon which the alleged practice is predicated,
6 including whether the practice has occurred with regularity over a sufficient period so that it is
7 reasonable to expect that the practice will continue. City of Boston, 41 MLC 119, 125, MUP-13-
8 3371, MUP-14-3466, MUP-14-3504, (November 7, 2014).

9 It is undisputed that commencing in March 2020, many DMH employees began to work
10 remotely, and then transitioned to a hybrid schedule in April 2020. It is also undisputed that DMH
11 ended the hybrid schedule at the end of August 2021 for employees working at the Mass Mental
12 Health Center and the Southeast region. The Union maintains that the hybrid work schedule,
13 which was in effect for almost 1 ½ years, was an established past practice. In this regard, the
14 Union asserts that, at the very least, the employees understood that hybrid work schedules would
15 continue while safety concerns due to the pandemic remained. Conversely, the Commonwealth
16 argues that the Union failed to establish that DMH changed a condition of employment. The
17 Commonwealth maintains that when Governor Baker lifted the state of emergency, DMH simply
18 returned employees to their pre-pandemic schedules, thereby returning to the status quo.

19 I disagree with the Commonwealth's position that there was no change to the past
20 practice. The Board has never set a definitive length of time that is required for a practice to
21 become binding as a condition of employment, stating "[n]or do we believe that it is practical to
22 consider an artificial or arbitrary length of time as a proper standard to be applied in making
23 these decisions. A case-by-case approach appears to be the sensible method." City of Boston,

20 MLC 1603, 1608-1609, MUP-7976 (May 20, 1994). Considering the facts here, I find that DMH changed working conditions by moving certain employees who had been working fully remotely or on a partially remote schedule for 17 months, to an in-person on-site work schedule five days a week while safety concerns due to COVID-19 remained. In DMH's communication regarding the July 2020 reduction in the number of remote workdays, DMH referenced that during a "surge period of the COVID-19 pandemic," it had limited face-to face encounters due to safety concerns. Although the Governor had ended the state of emergency by the time the change at issue in this matter took place, COVID-19 was still a serious concern with new variants emerging, as evidenced by and resulting in the Governor's August 19, 2021 order that employees, with limited exceptions, must be vaccinated by October 17, 2021, or lose their jobs. Given all the facts, I find that the Union and the employees had a reasonable expectation that a hybrid work schedule would continue as the past practice while COVID-19 remained such a concern for employee's health and safety.

DMH Failed to Bargain over a Change to a Mandatory Subject of Bargaining

DMH's decision to require employees to return to the workplace is a level of public services decision, and as such, is a core management decision that is not subject to decisional bargaining. School Committee of Newton v. Labor Relations Commission, 388 Mass. at 563. Nevertheless, a public employer's prerogative to make certain types of core managerial decisions without prior bargaining does not relieve the employer of all associated bargaining obligations. City of Boston, 31 MLC 25, 31, MUP-1758 (August 2, 2004). An employer may still be required to bargain over the method and manner in which to implement a decision, as well as the impacts of the decision on mandatory subjects of bargaining, before implementing a decision. Id.; School Committee of Newton v. Labor Relations Commission, 388 Mass. at 562. For

1 instance, in City of New Bedford, 38 MLC 239, MUP-09-5581 (April 3, 2012), the employer
2 reduced employees' hours of work via weekly half-day furloughs. The Board found that the
3 decision to implement a level of service change and close its offices for one-half day a week to
4 comply with the budgetary reduction was reserved for the public employer. However, the manner
5 in which the reduction is accomplished, whether by voluntary or involuntary reduction in hours,
6 attrition, or otherwise, is a mandatory subject of bargaining. Id. at 247.

7 Although DMH was not required to bargain over its decision to return employees to on-
8 site in-person work five days a week, DMH was required to bargain over the method and means
9 by which DMH achieved the return to in-person work and the resulting impacts on employee
10 safety.¹⁷ COVID-19 clearly imposed a threat to employee health and safety. See generally,
11 Boston Firefighters Union, Local 718, et. al. v. City of Boston, 491 Mass. 556, 564 (March 30,
12 2023) (addressing the "unique circumstances of the COVID-19 pandemic and its threat to the
13 health and safety of the public..."). Employee safety is a mandatory subject of bargaining. Town
14 of Bridgewater, 12 MLC 1612, 1615-1617, MUP-5356 (February 7, 1986).

15 Having determined that DMH was obligated to bargain over the method and means of its
16 decision to return employees to full-time in-office work, including providing PPE, and the impacts
17 resulting from DMH's decision, the next question is whether DMH fulfilled its bargaining

¹⁷ The Complaint alleged that DMH's failure to bargain over the means and manner of safely returning bargaining unit employees to the office and the impacts of DMH's decision on bargaining unit employees' health and safety, workload, duties, hours of work and other employees' terms and conditions of employment violated the Law. However, the evidence at the hearing focused on the impact on employees' health and safety. There was limited testimony that DMH required some employees at in-patient facilities, who never had a hybrid schedule, to assume new duties such as serving meals, due to a lack of personnel, but the Union did not present evidence regarding any impacts on employees' workload, hours of work, or other conditions of employment that resulted from DMH's order that Southeast region and Mass Mental Health Center employees return to full-time on-site work.

1 obligations. On August 4, 2021, and August 9, 2021, DMH informed the Union that it was ending
2 hybrid work for certain employees and requiring those employees to return to in-person work five
3 days a week. Neither notice specified a date when this change would take effect. On August 10,
4 2021, DMH informed the impacted employees that their schedules would be fully in-person and
5 on-site effective August 25, 2021. Within two days, the Union demanded to bargain over the
6 “significant changes for our members, particularly under the present circumstances of the COVID
7 19 Pandemic” and the “associated health and safety concerns,” no later than August 19, 2021.
8 DMH failed to respond until eight days later. On Friday, August 20, 2021, Looney wrote that
9 although they had “exhausted conversations on this matter,” they would meet with the Union to
10 discuss new health and safety issues. Looney asked the Union to provide a list of the issues and
11 dates and times to meet. However, DMH implemented the change three workdays later, without
12 bargaining.

13 DMH asserts that the parties engaged in 16 months of continuous discussions about the
14 Union’s safety and health concerns while employees were working a hybrid schedule. DMH
15 categorizes these discussions as bargaining. Even if the parties’ discussions constituted
16 bargaining over health and safety issues when the Southeast region and Mass Mental Health
17 Center employees were working a hybrid schedule, when there were only a limited number of
18 employees working in-person at a time, the evidence is clear that DMH did not bargain with the
19 Union over the impacts of its decision to return the employees to in-office, in-person work five
20 days a week or the method and means of doing so. Looney’s testimony demonstrated that DMH
21 believed that it was not obligated to bargain at all. Riccitelli’s testimony made it clear that the
22 parties did not negotiate over how employees would be returned to full-time in-office work or
23 over the impact of that decision. In its brief, the Commonwealth argues that there was no change

1 that required bargaining because DMH merely returned to the status quo after a temporary
2 change, and, additionally, that the health and safety of in-office employees was “thoroughly and
3 completely bargained by the time employees were increased from 2-3 days in the office to 5.”
4 Apparently, the Commonwealth assumes that the Union could not have any additional safety
5 proposals it wished to negotiate once all bargaining unit employees in those specific offices were
6 required to return to in-person on-site work five days a week. Accordingly, DMH implemented
7 the change before any bargaining took place. Had DMH bargained with the Union, it is entirely
8 reasonable to believe that the Union could have different concerns when all employees in certain
9 offices were required to report back in-person five days a week verses when only some of the
10 staff were in-person at the workplace on any given day while working a hybrid schedule. In its
11 brief, the Union provides some examples it could have bargained if given the opportunity such
12 as (1) where within DMH’s offices the returning employees would work; (2) how close those
13 employees would be to their co-workers, (3) how often they would be engaging in face-to-face
14 meetings, (4) whether ventilation needed to be further improved to account for the increased
15 number of people in the office, and (5) whether there was sufficient PPE for the increased
16 number of people in the office.

17 I find that DMH changed working conditions by requiring employees who had not been
18 working full-time in-person for 17 months to report to the workplace, in-person, five days a week
19 while the COVID-19 pandemic was ongoing. I also find that the DMH did not negotiate with the
20 Union over the method and means of the new requirement that employees report to full-time in-
21 person work or the impact of that decision on working conditions.

22 **Waiver by contract**

1 Although I have determined that DMH did not fulfill its bargaining obligations, DMH argues
2 that it had no bargaining obligation because the Union waived its right to bargain by contract.
3 DMH asserts that the provisions in Article 14 Section 4D permit it to reassign employees to
4 different locations as long as the reassignment is not due to a disciplinary matter.

5 To establish the affirmative defense of waiver by contract, a respondent bears the burden
6 of proving that the parties consciously considered the situation that has arisen, and that the
7 Union knowingly and unmistakably waived its bargaining rights. City of Boston v. Labor Relations
8 Commission, 48 Mass. App. Ct.169, 174 (1999). Such a waiver will not be lightly inferred and
9 must be “clear and unmistakable.” City of Taunton, 11 MLC 1334, 1336, MUP-5198 (January 17,
10 1985). No waiver will be found unless the contract language “‘expressly or by necessary
11 implication’ confers upon the employer the right to implement the change in the mandatory
12 subject of bargaining without bargaining with the union.” Commonwealth of Massachusetts, 19
13 MLC 1454, 1456, SUP-3528 (October 16, 1992) (quoting Melrose School Committee, 9 MLC
14 1713, 1725, MUP-4507 (March 24,1983)). If the language is ambiguous, the Board will review
15 the parties’ bargaining history to determine whether there was a clear intent to waive bargaining.
16 Town of Marblehead, 12 MLC 1667, 1670, MUP-5370 (March 28, 1986).

17 The Commonwealth maintains that, based on the following CBA provision, it was not
18 required to bargain when it ended the employees’ hybrid schedule and required the employees
19 to work in the office five days a week:

20 In the event it becomes necessary for the Employer to involuntarily transfer or
21 reassign an employee, the Employer will strive to provide the employee with fifteen
22 (15) working days written notice, but will provide no fewer than ten (10) working
23 days prior written notice, except in cases of emergencies...Such written notice will
24 be copied to the Union
25

26 A reassignment, as defined by Section 4B, includes a change to work location.

1 The Commonwealth admits that the parties did not contemplate a pandemic, which
2 resulted in a hybrid work schedule, and a subsequent return to in-office work, but asserts that
3 the parties did contemplate that DMH would involuntarily reassign employees to a different work
4 location. Accordingly, the Commonwealth argues that pursuant to the above CBA language,
5 DMH was only required to provide the requisite notice, which it provided.

6 The Union disagrees that this CBA language waives the Union's right to bargain. The
7 Union notes that the Commonwealth first broached this argument in its brief. It did not present
8 any evidence during the hearing about this language and therefore, there was no evidence
9 presented that the language about reassignments was intended to apply to the end of a hybrid
10 work arrangements or that hybrid work arrangements even existed when the parties agreed to
11 the language. The Union argues that the CBA provision primarily addresses the amount of notice
12 that must be provided to an employee; it does not clearly waive the Union's right to bargain over
13 a change to the worksite. The Union sees this as a prerequisite to being able to demand
14 bargaining rather than a waiver of a right to bargain. The Union also contends that an argument
15 could be made that DMH did not "reassign" employees by ending hybrid work schedules,
16 because the start and end of hybrid work schedules do not change the office to which the
17 employee is assigned.

18 I find that the Commonwealth's affirmative defense of waiver by contract fails because
19 the Commonwealth did not demonstrate that the parties consciously considered the situation
20 that has arisen and that the Union knowingly waived its bargaining rights. The Commonwealth
21 did not demonstrate that the parties consciously considered the elimination of hybrid schedule
22 to be a reassignment. Furthermore, the matter in dispute regards bargaining over how to return
23 employees to full-time in-person work and the impacts of that decision, not the decision itself.

1 The language of the cited CBA provision does not demonstrate that the Union clearly and
2 unequivocally waived its right to engage in impact bargaining. Board of Regents, 15 MLC 1265,
3 1271, SUP-2959 (November 18, 1988). The Commonwealth does not dispute that impact
4 bargaining obligations may not be waived where the CBA does not clearly and unequivocally
5 waive the parties' right to engage in impact bargaining. Instead, the Commonwealth argues that
6 there is no impact bargaining obligation here because the parties had engaged in health and
7 safety bargaining for in-office employees for months prior to the involuntary transfer. As
8 addressed earlier though, I have already determined that the Commonwealth did not satisfy its
9 bargaining obligation regarding the method and means and the impacts of its decision that the
10 employees of the Southeast region and Mass Mental Health Center return to in-person work five
11 days a week during the ongoing pandemic. Even if I found that the language of the CBA provision
12 to be ambiguous, the record is silent regarding the bargaining history. Accordingly, I am not
13 persuaded by the Commonwealth's assertion that it was relieved of its bargaining obligations
14 due to a waiver by contract.

15 CONCLUSION

16 Based on the record and for the reasons stated above, I find that the Commonwealth,
17 through the DMH, failed to bargain in good faith over the means and manner of returning
18 bargaining unit employees to on-site work five days a week, and the impact of that decision, in
19 violation of Section 10(a)5) and, derivatively, Section 10(a)(1) of the Law.

20 REMEDY

21 The Board's goal of fashioning appropriate remedies is to place a charging party in the
22 position that it would have been but for the unfair labor practice. Commonwealth of
23 Massachusetts, 36 MLC 65, 69, SUP-05-5191 (October 23, 2009). In cases concerning a failure

1 to bargain over the impacts and the means and methods of implementing a managerial decision,
2 the Board traditionally orders restoration of the status quo ante only to affected mandatory
3 subjects. City of Everett, 48 MLC 32, MUP-19-7133 (August 27, 2021). Additionally, where the
4 effects of an employer's decision are certain and impact bargaining cannot substantially change,
5 but only ameliorate those effects, the Board, guided by Transmarine Navigation Corp., 170
6 NLRB 389 (1968), does not restore the full status quo ante. The Board instead issues a
7 bargaining order and if employees have suffered economic losses, the Board will order
8 restoration of the economic equivalent of the status quo ante for a period of time sufficient to
9 allow bargaining to take place. City of Somerville, 42 MLC 170, 172, MUP-13-2977 (December
10 30, 2015). Where the effects of the decision are not inevitable and could have been changed
11 by a union's efforts to impact bargain, employers must make affected employees whole
12 retroactively. City of Boston, 31 MLC at 33.

13 The Union asserts that there is no evidence that the managerial decision to end hybrid
14 work schedules on August 25, 2021 was certain because the parties could have delayed the
15 timing of the change had DMH bargained with the Union over the means and manner of ending
16 the hybrid work schedules. The Union therefore requests that the remedy include the restoration
17 of the status quo from the time of the violation until the parties conclude bargaining, in addition
18 to a make whole remedy such as commuting costs from the time of the violation until the
19 conclusion of bargaining. Although the Union does not agree that the change that DMH
20 implemented was inevitable, the Union argues that if a Transmarine remedy is ordered, it should
21 include a make whole order for the period in which the parties engage in impact bargaining and
22 that any uncertainty of economic losses can be resolved by the parties or through a compliance
23 proceeding. The Union also requests an appropriate notice posting.

1 Conversely, the Commonwealth argues that the remedy should include, at most, a
2 posting. The Commonwealth emphasizes that any order to return to the pandemic-imposed
3 remote work schedule would have “devastating effects on the vulnerable population DMH serves
4 and would be a disservice to the residents of the Commonwealth who rely on DMH’s services.”
5 Additionally, the Commonwealth argues that a return to the previous work schedules would not
6 be appropriate because the complaint does not allege a failure to bargain over the decision, it
7 merely alleges a failure to bargain over the means and method and impacts of the decision. The
8 Commonwealth further contends that “means and methods” is not defined as the Union
9 suggests; rather the Complaint clarifies that “means and methods” includes “providing PPE.”
10 Lastly, the Commonwealth also maintains that because the main health and safety impacts have
11 been resolved, it would not effectuate the purposes of the Law to order impact bargaining.

12 I disagree with the Commonwealth’s arguments that the remedy should be limited to an
13 appropriate posting. DMH did more than implement its decision to return employees to full-time
14 on-site work. It unilaterally imposed a method for doing so. Although the parties discussed many
15 health and safety issues while employees were working a hybrid schedule, DMH did not bargain
16 with the Union about the impacts of returning employees to on-site in-person work five days a
17 week while COVID-19 was still a very present concern, or the method for doing so. Moreover,
18 although the Complaint notes that “means and methods” includes providing PPE, it does not
19 limit it to just providing PPE.

20 It is unclear whether the Union’s request for the restoration of the status quo is a request
21 that DMH return the impacted employees to their hybrid schedule until the parties’ bargain over
22 the method and means of returning the employees to the office and the impacts of that decision
23 on employees’ conditions of employment. To the extent that is the remedy that the Union seeks,

1 I decline to order such a remedy. DMH was not obligated to bargain over the decision to return
2 the employees to in-office work five days a week.¹⁸ Given that fact, along with a consideration
3 of the adverse impacts on the community that relies on DMH's services if I made a different
4 decision, I find that DMH need not restore the status quo ante by rescinding its decision to end
5 the hybrid work schedules and return its employees to full in-person on-site work. I do not find it
6 would effectuate the purposes of the Law to return employees to a hybrid schedule merely so
7 that the parties can negotiate how to safely return them to in-person work, where the employees
8 have been working fully in-person for a considerable amount of time and the Commonwealth is
9 no longer in a pandemic.

10 The Board, in City of Boston, 31 MLC at 33-34, considered the appropriate remedy in a
11 situation where the employer failed to bargain over a core managerial decision. The Board
12 ordered the restoration of the economic equivalent of the status quo during the make-whole
13 period only as to the impacts that inevitably flowed from the managerial decision while ordering
14 a full, retroactive make-whole remedy to the non-inevitable impacts. Here, the record contains
15 no evidence that any bargaining unit members lost wages or suffered monetarily in any respect.
16 In its brief, the Union notes that it could have bargained to delay the employees' full-time return
17 to in-person work, which would have reduced employees' commuting costs. The record, though,
18 does not demonstrate that DMH pays for any commuting costs for its employees, nor did the
19 Union cite to any decisions ordering a public employer to pay commuting costs to its employees.
20 Because the record contains no evidence that bargaining unit members suffered an economic

¹⁸ At the time that the decision was made, the Union had legitimate concerns about how to return employees safely to full in-person work because COVID-19 cases remained prevalent. However, circumstances have changed since that time and the Commonwealth is no longer suffering from a surge of COVID-19 cases. Changes in circumstances can affect the appropriate remedy. See generally Taunton School Committee, 28 MLC 378, 391, MUP-1632 (June 13, 2002).

1 loss, I do not order a make whole remedy. See City of Somerville, 42 MLC at 172 (finding it
2 appropriate to not order a make-whole remedy of any type where there was no evidence that
3 employees lost wages or benefits as a result of a managerial decision).

4 Although there was some testimony regarding changed duties for some in-patient staff,
5 the record does not demonstrate that the change at issue here, returning employees of the
6 Southeast region and the Mass Mental Health Centers to full-time on-site work, resulted in any
7 changes to workload, duties, hours of work, or other terms and conditions of employment other
8 than health and safety. DMH's decision to return bargaining unit employees to the office full time
9 while COVID-19 cases surged necessarily implicates employee health and safety concerns.
10 Impact bargaining over this matter would have only ameliorated those impacts. Under these
11 circumstances, and in the absence of any economic impacts, I order the DMH to bargain in good
12 faith with the Union to resolution or impasse over the means and method of implementing its
13 decision to return bargaining unit employees to in-person on-site work five days a week, including
14 providing PPE, and the impacts of implementing that decision on employees' health and safety
15 and to post an appropriate notice.

16 ORDER

17 WHEREFORE, based on the foregoing, I hereby order the Commonwealth/DMH to:

18 1. Cease and desist from:

- 19 a. Failing to bargain in good faith by terminating hybrid work schedules and ordering
20 bargaining unit employees to in-person on-site work five days a week without
21 bargaining with the Union to impasse or resolution over the means and method of
22 implementing its decision and the impacts of that decision on mandatory subjects of
23 bargaining.
24
25 b. In any like or similar manner interfering with, restraining, or coercing employees in the
26 exercise of their rights guaranteed under Law.

27 2. Take the following affirmative action that is necessary to effectuate the purposes of the
28 Law:

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- a. Upon request, bargain in good faith with the Union to resolution or impasse over the means and method of implementing its decision to terminate hybrid work schedules for certain bargaining unit employees and order those employees to in-person, on-site work five days a week, including providing personal protective equipment, and the impacts of that decision on employee health and safety.
 - b. Immediately post signed copies of the attached Notice to Employees 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 union members via intranet or email and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.
 - c. Notify the DLR within 10 days of the steps taken to comply with this order.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



GAIL SOROKOFF, 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 no later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.

THE COMMONWEALTH OF MASSACHUSETTS

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 has held that the Commonwealth of Massachusetts, Department of Mental Health has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by ending certain employees' hybrid work schedules and ordering those employees to return to full-time in-person work during the COVID-19 pandemic, without providing the Alliance/AFSCME/SEIU, Local 509 with notice and the opportunity to bargain as required by Law.

The Law gives public employees the right to form, join or assist a union; to participate in proceedings at the Department of Labor Relations; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities. Based on these rights, the Commonwealth of Massachusetts/Department of Mental Health assures its employees that:

WE WILL NOT terminate hybrid work schedules and order bargaining unit employees to in-person on-site work five days a week without bargaining with the Alliance/AFSCME/SEIU Local 509 to impasse or resolution over the means and methods of implementing our decision and the impacts of that decision on mandatory subjects of bargaining.

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

WE WILL upon request of Alliance/AFSCME/SEIU Local 509, bargain in good faith, to agreement or impasse, over the means and method of implementing our decision to terminate hybrid work schedules for certain bargaining unit employees and order those employees to in-person, on-site work five days a week commencing on August 25, 2021, and the impacts of that decision on employee health and safety.

Commonwealth of Massachusetts/ Department
of Mental Health

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).