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February 10, 2022

VIA EMAIL
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Melinda Willis, Esq.
Division of Human Resources
100 Cambridge Street, Suite 600
Boston, MA 02114

Re: SUP-21-8836, Commonwealth of Massachusetts and State Police Association of Massachusetts

Dear Mr. Hynes and Ms. Willis:

The State Police Association of Massachusetts (SPAM or Union) seeks review of the dismissal of its prohibited practice charge. This charge, filed on September 16, 2022, alleged that the Commonwealth of Massachusetts (Commonwealth) violated its duty to bargain in good faith in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of M.G.L. c. 150E (the Law) by implementing a policy mandating bargaining unit members to be fully vaccinated against COVID-19 by October 17, 2021, without first bargaining to resolution or impasse over the impacts of that policy on bargaining unit members' terms and conditions of employment.

On December 7, 2021, a Department of Labor Relations (DLR) Investigator dismissed the charge on grounds that exigent circumstances permitted the Commonwealth to implement the policy by October 17, 2021, and to continue to bargain with the Union thereafter. For the reasons set forth below, the Commonwealth Employment Relations Board (CERB) affirms the dismissal of the charge.[1]

[1] On January 24, 2022, the Union requested that the DLR re-open the record for the CERB to consider two "newly-discovered" documents that the Union received on January

Background

The relevant facts, which we derive from the dismissal letter, the parties' investigation exhibits, and by taking administrative notice of a number of orders that Governor Baker has issued in connection with the ongoing COVID-19 pandemic, are largely undisputed and briefly summarized as follows.

Governor's Orders

On March 10, 2020, Governor Baker declared a state of emergency arising out of the COVID-19 pandemic. Since then, the Governor has issued a series of orders, both emergency and executive, to respond to the COVID-19 pandemic in an effort to limit its spread, reduce the pressure placed on the Commonwealth's health care system and protect the safety and health of all residents of the Commonwealth. See Governor's Declaration pursuant to General Laws Chapter 17, Section 2A (May 28, 2021) (describing purpose of emergency orders in second paragraph.)[2] Pertinent to this matter is Executive

21, 2022 from the Massachusetts State Police in response to an information request. DLR Director Philip Roberts denied that request on January 25, 2022.

[2] The COVID-19 emergency orders were issued pursuant to the Governor's authority under the Civil Defense Act and M.G.L. c. 17, §2A, which states:

> Upon declaration by the governor that an emergency exists which is detrimental to the public health the commissioner may, with the approval of the governor and the public health council during such period of emergency, take such action and incur such liabilities as he may deem necessary to assure the maintenance of public health and the prevention of disease.

On May 28, 2021, the Governor rescinded the March 10, 2020 state of emergency effective June 15, 2021, due to, among other things, "sustained improvements in the public health data beginning in February 2021 [that were] attributable most directly to the development and effective distribution to the public of safe, highly effective, and free COVID-19 vaccines." See Order Rescinding Restrictions and Terminating SOE 5.28.21 (No. 69).pdf | Mass.gov (last visited February 7, 2022). On the same day, however, he issued a second order declaring a modified state of emergency pursuant to his authority under M.G.L. c. 17, §2A, to allow the Public Health Commissioner to, among other things, "extend or adopt measures to facilitate COVID-19 testing and vaccination of all populations throughout the Commonwealth. . . " See Signed Public Health Declaration 5.28.21.pdf | Mass.gov (last visited February 7, 2022). In declaring a modified public health emergency, the Governor cited, among other things, varying vaccination rates throughout the Commonwealth, continued hospitalizations due to COVID-19, continued vulnerability to severe disease of certain populations despite high rates of vaccination, and, presciently, the emergence of new variants that may be more contagious or resistant to vaccines.

Order 595 (Order or EO 595), titled, "Implementing a Requirement for COVID-19 Vaccination for the Commonwealth's Executive Department Employees." Unlike the Governor's previous COVID-19 related orders, EO 595 was directed exclusively at all executive department employees and was issued pursuant to the Governor's authority as the "supreme executive magistrate" of the Commonwealth, as set forth in Part. II, c. 2, §1, Art. 1 of the Constitution of the Commonwealth.

The policy underpinnings of the vaccine mandate are stated throughout the Order. Its preamble contains six "whereas" declarations concerning the safety and efficacy of vaccines, including that the vaccine is the most effective tool for combating COVID-19 and for preventing hospitalization and severe disease and that "the executive department of the Commonwealth, as the largest employer in the State, can lead in promoting policies to ensure the health and safety of all Massachusetts workers and residents." The final "whereas" declaration states that "achieving full vaccination among the executive department workforce is necessary to ensure that the executive department can provide the full measure of public services due to the residents of the Commonwealth." Following the declarations, Section 1 declares that it is the Commonwealth's policy that "all executive department employees" be "required to demonstrate that they received COVID-19 vaccination and maintain full COVID-19 vaccination as a condition of continuing employment."[3]

Section 2 of the Order requires the Human Resources Division (HRD) to "establish and issue a written policy requiring all executive department employees to require proof of COVID-19 vaccination" within 60 days of the Order (Policy). The Policy, to be implemented by the heads of the various executive department agencies, bureaus, departments, etc., had to include the following five elements:

1. a requirement that all executive department employees demonstrate no later than October 17, 2021 . . .that they have received COVID-19 vaccination and, going forward, that they demonstrate that they are maintaining full COVID-19 vaccination;
2. a procedure to allow limited exemption from the vaccine requirement for medical disability or sincerely held religious beliefs where a reasonable accommodation can be reached;
3. a method for documenting and verifying vaccination status for executive department employees that ensures that all information will be maintained confidentially and separate from personnel files;
4. appropriate allowance for use of Commonwealth provided sick leave or other time off for employees in order to obtain COVID-19 vaccination; and,
5. appropriate enforcement measures to ensure compliance, which shall include progressive discipline up to and including termination for non-compliance and

[3] Section 1 also defines the terms "executive department" and "employee" for purposes of EO 595. There is no dispute that the Order pertained to members of SPAM's bargaining unit.

> termination for any misrepresentation by an employee regarding vaccination status.

Commonwealth Outreach to SPAM and SPAM's Demand to Bargain

On the morning of August 19, 2021, John Langan (Langan), the Director of the Executive Office of Employee Relations (OER), notified the Union about the Order by sending an email to several Union agents, including Union counsel Paul Hynes (Hynes). Langan attached the email that HRD Assistant Secretary and Chief Human Resources Officer Jeff McCue (McCue) would be sending at noon to all Executive Department employees regarding EO 595. Langan asked the Union to provide him with "dates and times that would work for us to meet."

McCue's email stated in pertinent part that, "Today Governor Baker issued an Executive Order requiring all Executive Department employees to provide proof of vaccination against the COVID-19 virus on or before October 17, 2021." The email further stated that, by October 17, 2021, all employees would be required to provide proof that they have received either the required two doses of the Moderna or Pfizer vaccine or the single dose of the Johnson & Johnson (J&J) vaccine. McCue added that, "as new guidance regarding vaccine recommendations are updated by the CDC[4] to include booster doses in the future, Executive Department employees will be required to provide proof that they have received such doses by a deadline to be established."

McCue's email then discussed various elements of the forthcoming HRD Policy and union involvement in the process, stating:

> In line with Governor Baker's Executive Order, the Human Resources Division will issue a corresponding policy explaining how staff can demonstrate receipt of the vaccine. Additional information about the reporting process and the reasonable accommodation process will be provided in the coming weeks. Equally important to these items in development is the engagement of all unions to ensure their interests and perspective are respected in this critical effort.

A few hours later, Hynes sent an email to Langan that included correspondence acknowledging SPAM's receipt of EO 595. Hynes stated that, "[s]ince the policy was announced without any prior notice or opportunity to bargain, SPAM is requesting that the Executive Order be put in abeyance pending the Employer meeting its bargaining obligations under the Law." The letter concluded, "Please be assured of . . . SPAM's commitment to continuing to work with the Employer to address the needs of the Commonwealth during the ongoing-COVID-19 pandemic." Langan responded via email a few hours later asking for a few dates, and stating, "I will strive to meet with you on the first available date." The investigation record does not contain any response from the Union.

[4] CDC is the acronym for the federal Centers for Disease Control and Prevention.

Bargaining – August 30-September 3

On August 23, 2021, Langan sent the Union the first draft of a Vaccine Verification policy. Among other things, the Draft Policy stated that EO 595 requires employees of Executive Department agencies to provide documentation that "they have received COVID-19 vaccination in order to prevent viral infection and transmission" and that it was "Executive Department policy that all employees demonstrate that they have received COVID-19 vaccination by October 17, 2021" with certain limited exemptions addressed in a separate section.

In the cover email, Langan noted that the parties were scheduled to meet for collective bargaining (over a successor contract) on August 30th, and asked whether the Union wished to add the vaccine policy issue to the day's agenda or meet sooner. The parties exchanged emails later that day agreeing to meet on August 30th.

At the August 30th meeting, the Union requested bargaining over three topics: 1) "reasonable alternatives" to the vaccine mandate itself, i.e., allowing those members who previously had contracted COVID or those that choose not to get the vaccine for personal, religious or medical reasons, to take a weekly test and wear a mask instead of becoming vaccinated; 2) "presumptive protection," i.e., allowing any COVID-related illnesses, including illness from vaccination, retirements or deaths to be considered line of duty injuries; entitling the member to benefits under M.G.L c. 41, §111F; 3) a deadline for beginning the vaccine regimen, i.e., that October 17, 2021 would be the date of starting, rather than completing the vaccination process. Throughout bargaining and during the investigation, the Union characterized its proposals as impact bargaining.[5] On August 30, Langan agreed that the policy was subject to impact bargaining, but told the Union that its proposals conflicted with the Order.

On September 3, Hynes sent an email to the Commonwealth that attached the Union's response to the first Draft Policy. Hynes stated that the proposal would be discussed at the parties next "impact bargaining meeting," scheduled for September 13th. In addition to memorializing the three proposals that the Union raised at the August 30th session, the Union's revisions included requiring employees to demonstrate that they continue to maintain their vaccinations only "until the expiration of the pandemic" as determined by several external criteria; proposals regarding the types of leave employees would be entitled to take for vaccinations, testing or any related periods of quarantine; and replacing the requirement for progressive discipline for employees who fail to comply with the policy with being placed on "no duty status until obtaining COVID-19 vaccination,

[5] The Union's position, as characterized by the Investigator and Judge Cowin, in the ruling on the Union's request for an injunction, described infra, was that it was not contesting the issuance of a policy requiring mandatory vaccination, but was seeking to bargain over impacts of the mandate. We address which of the Union's proposals were and were not appropriate topics of impacts bargaining infra.

exemption or expiration of the pandemic." The Union also proposed that employees would be permitted to use accrued time during said period of no duty without loss of rights.

HRD's September 10th Email to Executive Department Employees and Union Response

On September 10, 2021, three days before the parties' next scheduled bargaining session, McCue sent an email to all Executive Department employees regarding "Mandatory Vaccination Update: Issue # 3." Reminding employees again that EO 595 required all Executive Branch employees to demonstrate proof of vaccination by October 17, the email informed recipients that HRD would begin a self-attestation process beginning September 13th. The email further stated that employees would be receiving a more detailed email with instructions for filling out the forms, but, in the meantime, informed employees of the two alternative means of successfully completing the attestation form – 1) receiving full COVID-19 vaccination, committing to receiving booster vaccinations and authorizing a match against the Massachusetts Immunization Information System to verify vaccination status; *or* 2) receiving an agency-approved medical or religious exemption from a Diversity Officer or ADA Coordinator. The email included links with forms for employees seeking medical or religious exemptions, and notified employees that requests for exemptions should be submitted by October 8, 2021 to their agency's Diversity Officer or ADA Coordinator. The email ended with the following bolded statement, "**Plan ahead, October 17th is the deadline to be fully vaccinated, please note the days required between doses."** To that end, the bottom of this update contained a link to Frequently Asked Questions (FAQs), which, among other things, addressed whether employees who had not yet been vaccinated still had time to comply with the October 17th deadline. The response stated that employees still had time, but that they should schedule their vaccination "immediately" as "time is running out." The response also "clarified" the timelines as follows:

> **Moderna**: your first dose must be administered by September 19 to ensure your second dose can be delivered by October 17 (28 days between doses).
> **Pfizer**: your first dose must be administered by September 26 to ensure second dose compliance by the October 17 deadline (21 days between doses).
> **J&J/Janssen**: you can have this dose administered any time prior to October 17 (only one dose required).

After receiving this update, Hynes wrote to Langan the same day, noting that the Union had not yet received the Commonwealth's response to its September 3rd demands. Hynes stated that that he was "extremely concerned" that McCue's email "would have direct contact with SPAM members on issues that we are presently discussing at the table." Hynes expressed his hope that this was "not a signal that the Commonwealth viewed "the vaccination policy as a *fait accompli* and is simply going through the motions of meeting with SPAM." Hynes concluded by stating that he was looking forward to meeting with Langan's team on the 13th and getting a response to the counteroffer. Hynes also suggested that an off-the-record response prior to the meeting could be even more productive.

Langan replied on the morning of September 13th, stating that:

> [W]hile there is certainly urgency surrounding the deadlines of the Executive Order to help end this pandemic, please be assured that we have every intention to comply with our bargaining obligation. Unfortunately, many of the elements of your counterproposal are directly at odds with the EO. We think the most effective way to respond will be directly at the bargaining table.

The parties met on September 13, 2021. At this meeting, Langan reviewed the Union's proposals, rejecting any which he believed conflicted with the Order, including extending the October 17th deadline for vaccination. The Commonwealth agreed, however, to consider other proposals regarding paid leave to get vaccinated, establishing criteria for an end date for the vaccination requirements, changes to the attestation form and changes to the progressive discipline process prior to termination for non-compliance.

Notwithstanding this response, on September 15, 2021, Hynes informed Langan that SPAM would be filing a charge with the DLR on September 16, 2021, and a complaint seeking injunctive relief in Superior Court on September 17, 2021. Hynes explained that this was due to its belief that McCue's September 10, 2021 email rendered the deadlines and forms that SPAM had hoped to negotiate a "fait accompli" and even accelerated those deadlines. Langan wrote back stating that he thought "that would be unfortunate as I believe we can continue to make progress on this issue." Langan pointed to the fact that as a result of concerns raised by SPAM at the September 13th bargaining session, HRD would ensure that its communications regarding the attestation form were consistent with the attestation itself. Hynes replied in part::

> We will continue to meet with your team, however unless the Commonwealth is prepared to postpone the deadlines while we do so then SPAM is being forced to seek its recourse through the DLR and the Courts.

The Union filed the instant charge the next morning. In an attachment, the Union set out its version of the events detailed above and alleged that, by this conduct, the Commonwealth had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. In particular, SPAM stated that:

> Where the parties have not concluded impact bargaining and we are up against immovable deadlines from the October 17, 2021 deadline, [SPAM's] members are left with the choice of complying with the Order or face termination even though the impact bargaining process is not complete. In other words, if the Order is not suspended, [SPAM's] members will be forced to comply with the Order even though HRD has not bargained in good faith to resolution or impasse.

Later on September 16, Langan responded to Hynes' September 15th email. He disagreed that McCue's email setting forth the dates on which employees would have to receive the various vaccines to be in full compliance accelerated the October 17th deadline, noting that employees could receive the J&J shot by October 17 and still be in compliance. Langan concluded by stating, "While I cannot move the October 17th deadline, I do believe that there is more that we can accomplish at the bargaining table to continue the discussion."

On November 4, four days before the investigation conference, the Commonwealth provided a response to the charge. Among other things, the response expressed the Commonwealth's position that it had "fulfilled any obligation it has to bargain over the impacts of other remaining terms of Executive Order 595 by continuing negotiations after the October 17, 2021 deadline for implementation of the policy as to those impacts that remain ripe for continued discussion."[6]

SPAM's Complaint for Injunctive Relief

On September 17, 2021, the Union filed a complaint in Superior Court against the Commonwealth.[7] The complaint sought: 1) a declaration that the defendants had violated their obligations under the Law by failing to bargain over the impacts of the vaccination policy; and 2) an injunction enjoining enforcement of the October 17, 2021 deadline for full vaccination until either the parties negotiated to resolution or impasse or the DLR proceedings were concluded. State Police Association of Massachusetts vs. Commonwealth of Massachusetts et. al., Mass. Sup. Ct., No. 21840- CV-02117, slip op. at 1 (Suffolk County, September 23, 2021). The Union argued that, absent an injunction, its members who opted not to comply with the mandate would suffer irreparable harm because they would lose the ability to choose which vaccine they would receive, as it was already too late to be fully vaccinated with the Moderna vaccine by October 17 and there were only a few days remaining in which one could timely get a first Pfizer shot. Id. at 67. The Union also argued that it would be irreparably harmed by being deprived of its statutory right to bargain over at least some of the terms of the policy, including the deadline for compliance.

[6] The Commonwealth cited Secretary of Admin. & Fin. v. Commonwealth Employment Relations Board, 74 Mass. App. Ct. 91, 98 (2009) for the principle that, under certain circumstances, a party could implement a policy and continue post-implementation bargaining without "running afoul" of its statutory bargaining obligation. Although the Commonwealth also argued in its response that the parties had reached impasse as to a number of issues, it does not appear to have pressed this argument at the investigation, and it does not raise it on review. We therefore do not reach the issue of whether the parties reached impasse on any of the legitimate impact topics that they negotiated.

[7] SPAM also named the Department of State Police and State Police Colonel Christopher Mason as defendants.

On September 23, the court issued a ruling denying injunctive relief. Id. After summarizing the basic facts set out above, and noting that the parties were continuing to communicate regarding their respective proposals, the court agreed with the Commonwealth that the alleged irreparable harms that the Union and its bargaining unit members would suffer if the injunction was not granted, were, "at bottom, economic harms that could be remedied through the administrative process." Id. at 6. That is, bargaining unit members were still free to receive whatever vaccine they wanted or to refuse to comply with the mandate altogether. The court acknowledged that such choices might subject the employees to progressive discipline. The court reasoned however, that such discipline was not irreparable harm because if the DLR ultimately determined that the Commonwealth had implemented the discipline without first satisfying its bargaining obligations, the employees could still be made whole through backpay awards, removal of dismissal, or like measures. Id. at 6-7.

Because the Union was seeking to enjoin government action, the court also considered whether the Union had met its burden of showing that the requested relief promoted the public interest, or, at a minimum, had not adversely affected the public. Id. at 7-9. The court held that it had not. It found that while the Union has a significant interest in effecting its right to bargain over the terms and conditions of its members' employment, even assuming without deciding that the Commonwealth had impinged on this interest, that interest was outweighed by the Commonwealth's "more significant interest in protecting the health and safety of its workforce (including the State Police), those who come into contact with its workforce and the public in general." Id. at 8. Finding that the Commonwealth "had established that the best way to promote this interest was by vaccinating as many people as possible, as quickly as possible," the court held that "suspending the deadline for Union members to obtain full vaccination would be against the public interest which the defendants are charged with protecting, and [would] cause more harm to the Commonwealth than is caused by the denial of such relief." Id. at 9.

Having found that the Union had not met its burden as to these elements, the court stated that it need not decide whether the Union had established that it was likely to succeed on the merits of its underlying Chapter 150E claims. Id. at 6.

Post-Litigation Bargaining

After the injunction was denied, the parties continued to bargain and the Commonwealth modified its stance on a number of outstanding issues. Specifically, on September 23, Langan sent an email to Hynes stating that the Commonwealth would agree that if an employee received one shot of a two-shot regimen by October 17 (as opposed to completing the full two-shot regimen), the employee would not be subject to disciplinary action. As set forth in updated draft guidelines that Langan attached to that email, employees who had received the first dose and scheduled a second would be placed on unpaid leave with the option of using accrued paid leave. This draft also outlined the procedure and consequences in several other scenarios involving employees who were not fully vaccinated by October 17, e.g., employees who refused to be vaccinated, or employees who filed for an exemption on or before October 8, 2021 but

who had not received a decision by October 17. For example, if an employee who had been suspended for not being in compliance by October 17 became fully vaccinated after suspension, the guidelines provided that they could return to work without completing their suspension days and the suspension letter would be removed from their personnel file, but the Commonwealth would not reimburse the employee for unpaid suspension time.

On October 8, 2021, Langan sent a draft Memorandum of Agreement (MOA) to the Union. In the cover email, Langan expressed his hope that the MOA would address concerns that the Union had raised during recent bargaining sessions, including requests for additional paid leave. Langan also hoped to discuss the MOA at the parties' upcoming October 12 bargaining session.

The draft MOA contained a preamble with "whereas" policy declarations concerning vaccines that were similar to those contained in EO 595. After the preamble, there were eleven numbered paragraphs, some of which memorialized the scenarios and procedures for non-compliant employees contained in previous draft policies. The MOA also addressed other topics, such as providing mobile vaccination clinics; contacting employees before contacting a health provider to make a determination regarding a medical exemption; HRD conducting systematic audits of exemption requests; removing the phrase "under pains and penalty of perjury" from the attestation form provided to employees on September 9, 2021; providing the Union with notice and an opportunity to bargain the impacts of potential booster shot requirements; providing five additional days of leave time for fully-vaccinated employees who have exhausted their allotted time under the Massachusetts Emergency Paid Sick Leave under certain circumstances; and allowing employees to voluntarily resign at any point prior to termination due to non-compliance with the vaccine requirements, subject to recall if fully vaccinated.

The parties discussed these guidelines at their October 12th bargaining session. On October 14, Langan sent updated compliance guidelines that, among other things, permitted employees who had filed for exemptions before October 8, 2021, but who had not received a decision by October 17 to continue working until they received a decision.

Post-October 17, 2021 Bargaining

There is no dispute that the parties continued to engage in impact bargaining after October 17, 2021. Although the investigation contains no details regarding those sessions, the fact that they continued to have discussions is evident in an email that Langan sent to the Union on October 29th, attaching "revised Compliance Guidelines that were discussed with you this afternoon."[8]

[8] Although mostly identical to previous draft guidelines, it appears that this draft allowed employees who requested an exemption prior to October 17 and who got their first shot within three calendar days of being denied an exemption to work in the waiting period between their first and second shots instead of having to take paid or unpaid leave, provided they provided proof and an attestation regarding the date of the second shot.

Dismissal and Request for Review

The investigator dismissed the charge in its entirety. He rejected the Union's argument that the Commonwealth violated the Law by implementing its policy without bargaining to resolution or impasse over the impacts of the policy. The Investigator concluded instead that the Commonwealth had satisfied the three elements of an exigency defense, i.e., that circumstances beyond the Commonwealth's control required it to set a deadline to conclude bargaining, the deadline imposed was reasonable and necessary, and the Union was on notice that the change would be implemented by a date certain. See generally, City of New Bedford, 38 MLC 239, 251, MUP-09-5581, MUP-09-5599 (April 3, 2012), aff'd sub. nom. 90 Mass. App. Ct. 1103 (2016), further appellate review den'd, 476 Mass. 1106 (2016). The Investigator also rejected the Union's assertion that McCue's September 10, 2021 email created a *fait accompli* because it included forms and accelerated the October 17 deadline for compliance.

On review, the Union states that the Investigator overlooked certain facts and arguments and made errors of fact or law in allowing the Commonwealth's exigency defense and concluding that Commonwealth had not presented its proposals as a fait accompli. The Union expanded on its contentions that the Investigator ignored that McCue's September 10 memo was improper direct dealing and evidence that the Commonwealth was engaging in improper surface bargaining. Throughout its supplementary statement, the Union stresses what it perceives as unfairness - that its bargaining unit members, who worked diligently and under dangerous conditions throughout the pandemic, were one of the few public sector groups of employees in the Commonwealth and nationwide who were required to take a vaccine at the peril of losing their jobs.

The Commonwealth urges affirmance of the dismissal for the reasons stated in the dismissal letter. We affirm.

Analysis

We begin by acknowledging the service of SPAM's bargaining unit members, many of whom, unlike other Executive Department employees, did not have the option of working remotely in the nearly two years since the onset of the COVID-19 pandemic. Especially in the earlier phases of the pandemic, these bargaining unit members were confronted with uncertainties as to the transmission of the virus and the effectiveness of measures designed to protect them from transmission. They nevertheless continued to report to work, notwithstanding that, as the Union persuasively states, "their extremely dangerous job had become even more dangerous."

While the pandemic is still with us, times are different now. As stated in EO 595, this is due in part to the emergence of safe vaccines that are proven to prevent hospitalization and severe disease in fully-vaccinated individuals. As also stated in the injunction ruling, as of September 2021, CDC data showed that the virus spreads more

easily through unvaccinated persons than vaccinated, and that the unvaccinated are ten times more likely to be hospitalized or die if they become infected. Id. at 4. Since that ruling, the Delta and Omicron variants emerged, the latter of which brought COVID-19 test positivity rates to nearly the same as they were in the early stages of the pandemic,[9] once more causing concern that the stress on the Commonwealth's hospitals due to new cases would be more than they could handle.[10] Fortunately, as of the date of this ruling, we now appear to be on the downward slope of this latest surge.[11] Even amid the Omicron surge, however, data from the Massachusetts Department of Public Health showed that fully vaccinated individuals had a hospitalization rate of 0.11% and a .02% death rate.[12] More recent CDC data shows that the rate of COVID-19 hospitalizations was twelve times higher in unvaccinated adults ages 18-48 years old, and 17 times higher in unvaccinated adults 50-64 years old and 65 years and older.[13]

It is in this context that we consider whether the Investigator properly dismissed this charge. We begin by reviewing the Policy that HRD developed pursuant to EO 595. As set forth in the August 23, 2021 Draft Policy that Langan provided to Hynes, the Policy requires all Executive Department employees to demonstrate that they have received COVID-19 vaccination by October 17, 2021 with certain limited religious and medical exemptions that could be addressed through reasonable accommodations. Although SPAM initially sought to bargain over the October 17th deadline, and what it deemed to be reasonable alternatives to the Policy that would allow masking and testing in lieu of vaccines, we disagree that these were proper subjects of impact bargaining. As a matter of safeguarding both the public and its employees, we find it well within the Commonwealth's core managerial authority to not only require mandatory vaccination for all executive department employees, as opposed to just masking or frequent testing, but to set a deadline by which this goal should be accomplished. As a policy matter, this decision was not subject to bargaining. Furthermore, where the data concerning

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[9] See COVID-19 Interactive Dashboard, Overview Trends, Testing (available at COVID-19 Response Reporting | Mass.gov (showing a 30.6% weighted average or percent positivity as of March 7, 2020, that dipped to a low of .31% in June 25, 2021 only to rise to 22.56% as of January 5, 2022) (last visited February 7, 2022).

[10] See Ellement and Little Endara, "ER providers are 'overwhelmed' amid Omicron surge," *Boston Globe* (Jan. 3, 2022) (available at ER providers are 'overwhelmed' amid Omicron surge - The Boston Globe, last visited February 7, 2022).

[11] See COVID-19 Interactive Dashboard, Overview Trends, Cases, state trends as of February 6, 2022, set forth in COVID-19 Response Reporting | Mass.gov (last visited February 7, 2022).

[12] See COVID-19 Cases in Fully Vaccinated Individuals, January 18, 2021 Massachusetts Department of Public Health Report, available at CCC structure and update (mass.gov) (last visited February 7, 2022).

[13] See CDC COVID Data Tracker (last accessed February 7, 2022).

vaccinations justified the Commonwealth, as Judge Cowin stated in the injunction ruling, "vaccinating as many people as possible, as quickly as possible," SPAM v. Commonwealth, supra, slip op. at 9, as a means of safeguarding employees and allowing SPAM members to interact with the public without unnecessarily endangering the very people they were charged with protecting, the Commonwealth is to be commended for setting a deadline that allowed two months for the parties to engage in appropriate impact bargaining with SPAM while allowing employees at least one month from the time of the initial announcement to schedule their first vaccination.[14]

We agree with the Investigator that the announcement of these timelines on September 10, 2021, did not constitute a *fait accompli*. As the Investigator correctly stated, a public employer's duty to notify a union of a potential change before it is implemented is not satisfied by presenting the change as a *fait accompli* and then offering to bargain. A *fait accompli* exists only where, under all the attendant circumstances, it can be said that the employer's conduct has progressed to the point that a demand to bargain would be fruitless. See Commonwealth of Massachusetts, 28 MLC 36, 40-41, SUP-4345 (June 29, 2001). Here, because we have found that the vaccination policy included not only the mandate but the deadline itself, we reject the Union's assertion that McCue's September 10th memo that included the deadlines for obtaining first doses of Pfizer or Moderna in order to be compliant with the October 17th deadline was tantamount to a *fait accompli*. And, even if the announcement included other topics that were appropriate for impact bargaining, such as the consequences of non-compliance or the content of the forms, the investigation record demonstrates that the parties met on several occasions to discuss these issues and made progress, even before the deadline. This demonstrates that as of September 10th further bargaining over these issues was not futile. Although the Union complains that the deadline did not provide for enough time to complete bargaining, in fact, the Commonwealth notified SPAM of this deadline on August 19, 2021, the day the Governor issued EO 595, roughly two months before the mandate was scheduled to go into effect. The CERB has previously found two months between the announcement of a change and a scheduled date for implementation to be sufficient time to complete bargaining. Everett School Committee, 43 MLC 55, 58, MUP-09-5665 (August 31, 2016).

Furthermore, even though the parties were unable to conclude their impact bargaining sessions by the October 17th deadline, we agree with the Investigator that exigent circumstances permitted the Commonwealth to continue to bargain with the Union after the October 17, 2021 deadline. As the dismissal letter reflects, an employer relying on an exigency defense has the burden of establishing that: 1) circumstances beyond its control require the imposition of a deadline for negotiations; 2) the bargaining representative was notified of those circumstances and the deadline; and 3) the deadline

[14] Because employees getting the Moderna vaccine had to receive their first dose on September 19 to be fully vaccinated by October 17, and those getting Pfizer had until September 26, the announcement of the October 17th deadline on August 19 gave employees at least a month to schedule their first dose of Moderna and five weeks to get schedule their first Pfizer vaccine.

imposed was reasonable and necessary. City of New Bedford, 38 MLC at 251 (citing Cambridge Public Health Commission, 37 MLC 39, 46, MUP-10-5888 (August 18, 2020) (additional citations omitted)). Here, for the reasons stated above and in the dismissal letter, including for all the policy reasons stated in EO 595, we find that the ongoing COVID-19 pandemic coupled with the development of safe and effective vaccines justified setting a deadline of October 17, 2021 to have a fully vaccinated executive workforce, subject to the limited exemptions. There is no doubt that despite being two years into the pandemic, these are still extraordinary times. A pandemic of this duration and scope constitutes a basis for setting a deadline to complete bargaining over a vaccine mandate intended to protect the health and safety of Executive Department employees and the public they serve, and to ensure that the Commonwealth's Executive Department keeps functioning. For similar reasons, and for those stated above and in the dismissal letter, we find that the October 17th deadline was both reasonable and necessary. This is the case even though the Governor lifted the original state of emergency on May 28, 2021. As we note above, on the very same day, the Governor declared a modified state of emergency for several reasons, including that the pandemic was ongoing, many residents were still unvaccinated and the need to monitor new and potentially more contagious or vaccine-resistant variants.

We finally find that the Union was on notice that the policy would be implemented on October 17th. Starting on August 19, 2021, this deadline was reiterated in virtually every correspondence between Langan and Hynes, as well as in McCue's September 10th email, the draft policies, the compliance guidelines, and the MOA. Further, as the Investigator points out, the Union's charge and Superior Court complaint demonstrate that the Union was well aware of the deadline and repeatedly sought to extend it.

We therefore conclude that the Commonwealth established that exigent circumstances permitted it to implement the Policy on October 17, 2021, and continue to bargain thereafter. It is evident from the record that the parties have done so over appropriate impact bargaining topics, including, but not limited to, the consequences of employee non-compliance, exemption forms and information provided, and they are encouraged to continue doing so, consistent with their respective good faith bargaining obligations under Section 6 of the Law, until reaching resolution or impasse.

None of the Union's arguments persuade us otherwise. First, we disagree that the Investigator improperly considered an exigency argument because the Commonwealth did not make this argument during the investigation. The Commonwealth's response to the charge plainly raises exigency as a defense on page four.

Second, even assuming that the Union has properly raised its arguments that the Commonwealth engaged in improper direct dealing when McCue sent the September 10 email, that argument lacks merit for two reasons. First, as the Commonwealth points out, it is well-established that the duty to bargain collectively with the employees' exclusive bargaining representative prohibits the employer from dealing directly with employees in the bargaining unit on matters that are properly the subject of negotiations with the bargaining agent's exclusive representative. Suffolk County Sheriff's Department, 28

MLC 253, 258-259, MUP-2840 (January 30, 2002) (citing SEIU, Local 509 v. Labor Relations Commission, 431 Mass. 710, 715 (2000)). Because we have found that the October 17th deadline was not a proper subject of collective bargaining, simply informing employees of the dates by which they should get their first dose of Moderna and Pfizer vaccines to comply with that deadline did not constitute improper direct dealing. Id. at 258.

As to claims of surface bargaining, the Commonwealth's conduct from August 19 to October 17 does not demonstrate that the Commonwealth intended to "merely shadow box to impasse." Everett School Committee, 43 MLC at 59. Rather, it modified its stance as to several impact bargaining issues, including the wording on the attestation form, changes to the exemption procedure, procedures for compliance, progressive discipline for non-compliance, paid leave, discharge status, and booster shots.

The fact that two different DLR investigators issued complaints on impact bargaining counts pertaining to the same Executive Department vaccine mandate does not affect this ruling for several reasons.[15] Preliminarily, we note that, unlike here, different statewide unions alleged that the decision to impose a mandatory vaccine policy was subject to mandatory bargaining. Both investigators concluded that the decision to require two doses of the Moderna or Pfizer vaccines or a single dose of the J&J vaccine by October 17 was a policy decision that fell outside the scope of mandatory bargaining and dismissed that aspect of the charge. To that extent, the dismissals were consistent with our affirmance here, and neither union filed a request for review with the CERB. However, unlike in this matter, both investigators also found that the Commonwealth implemented the policy without first bargaining to resolution or impasse over the impacts of that decision and both cases are scheduled for a hearing before a DLR hearing officer in the next few months.[16] Although SPAM argues, at least with respect to SUP-21-8824, that the legal issues involving impact bargaining are identical and that the same result should obtain, this argument ignores the fact that the only matter pending before the CERB now is the dismissal in the instant matter, which we have decided based on the investigation record before us. We will do the same in the other two cases as necessary.

In closing, while we acknowledge that it is never ideal for a union to bargain after a decision has already been implemented, we note, like the court, that any personnel decisions that may have already been made regarding bargaining unit members who are not in compliance with the vaccine mandate policy are, at their core, economic harms,

[15] We take administrative notice of the complaints and partial dismissals in Commonwealth of Massachusetts and MCOFU, SUP-21-8824 and Commonwealth of Massachusetts and Coalition of Public Safety, SUP-21-8845.

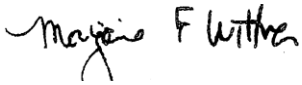
[16] The investigators also found that the Commonwealth did not satisfy its bargaining obligation to bargain over the decision, as well as the impacts of the decision to require booster shots. Because SPAM only sought to bargain over the impacts of the Commonwealth's decision to mandate two doses of Moderna/Pfizer or one dose of J&J by October 17, that issue was not before the Investigator, and we do not address it here.

which, in this case, can be redressed through bargaining should the parties ultimately reach agreement as to compliance procedures, progressive discipline, paid leave, or other like matters that require a different outcome for the affected individuals.

Conclusion

For the foregoing reasons, and those stated in the dismissal letter, the CERB affirms the dismissal of the charge for lack of probable cause.

Very truly yours,
COMMONWEALTH EMPLOYMENT RELATIONS BOARD



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MARJORIE F. WITTNER, CHAIR

_____
JOAN ACKERSTEIN, CERB MEMBER

_____
KELLY STRONG, CERB MEMBER

APPEAL RIGHTS

Pursuant to the Supreme Judicial Court's decision in Quincy City Hospital v. Labor Relations Commission, 400 Mass. 745 (1987), this determination is a final order within the meaning of M.G.L. c. 150E, § 11. Any party aggrieved by a final order of the Board may institute proceedings for judicial review in the Appeals Court pursuant to M.G.L. c.150E, §11. To claim such an appeal, the appealing party must file a Notice of Appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.