

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of:

COMMONWEALTH OF MASSACHUSETTS/
SECRETARY OF ADMINISTRATION AND
FINANCE

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES

Case Nos: SUP-23-9894
SUP-23-9895
SUP-23-9896
SUP-23-9897

Date Issued: May 30, 2025

Hearing Officer:

Gail Sorokoff, Esq.

Appearances:

Melissa Willis, Esq.	-	Representing the Commonwealth of Massachusetts
James Dever, Esq.	-	Representing the National Association of Government Employees

HEARING OFFICER'S DECISION

SUMMARY

1 The issue in this case is whether the Commonwealth of Massachusetts, Secretary of
2 Administration and Finance (Commonwealth) violated Section 10(a)(5) and, derivatively, Section
3 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by failing to provide the
4 National Association of Government Employees (Union or NAGE) with a written explanation as
5 to why former bargaining unit employees who had been terminated for failure to obtain a COVID-
6 19 vaccination after being denied an exemption could not be accommodated as others had been.

1 For the reasons explained below, I find that the Commonwealth violated the Law by failing to
2 provide the Union with the requested information.

3 STATEMENT OF THE CASE

4 On February 28, 2023, the Union filed four charges of prohibited practice (charges)¹ with
5 the Department of Labor Relations (DLR) alleging that the Commonwealth violated Sections
6 10(a)(5) and 10(a)(1) of the Law. A DLR investigator investigated the charges and issued a one
7 count Complaint of Prohibited Practice (Complaint) on June 30, 2023. The Complaint alleged
8 that the Commonwealth violated Section 10(a)(5) and, derivatively, 10(a)(1) of the Law by failing
9 to bargain in good faith by failing to provide the Union with a list of all former employees of Units
10 1, 3 and 6 who were terminated for failure to obtain COVID-19 vaccinations and who had been
11 denied a medical or religious accommodation, including name, unit, agency and job title and, for
12 each such person, a written explanation as to why they cannot be accommodated, providing the
13 specific details performed by each former employee that make a safe accommodation
14 impossible. The Commonwealth filed an Answer to the Complaint on July 6, 2023.

15 Both parties had the opportunity to be heard, to examine and cross-examine witnesses,
16 and to introduce evidence during the in-person hearing that I conducted on August 1, 2024 and
17 September 10, 2024. On November 25, 2024, both parties filed timely post-hearing briefs.²
18 Based on the record, which includes witness testimony, stipulations of fact, and documentary

¹ NAGE Local 219 filed Case No. SUP-23-9894 on behalf of statewide bargaining unit 3; NAGE Local 292 filed Case No. SUP-23-9895 on behalf of statewide bargaining unit 1; NAGE Local 282 filed Case No. SUP-23-9897 on behalf of the Health and Human Services Secretariat Agencies covered in statewide bargaining unit 6; and NAGE Local 207 filed Case No. SUP-23-9896 on behalf of unit 6 employees at other executive branch agencies.

² I have not considered any facts that were referenced in the Commonwealth's brief that were not part of the record in this matter.

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

STIPULATIONS OF FACT

A. The Commonwealth of Massachusetts, Secretary of Administration and Finance is the statutory "Employer" within the meaning of M.G.L. c. 150E;

B. NAGE is an "Employee Organization" within the meaning of M.G.L. c. 150E, which represents employees in Statewide Bargaining Units 1, 3, and 6;

C. On or about August 19, 2021, Governor Charles Baker issued Executive Order 595.

FINDINGS OF FACT

Background

NAGE represents employees within the executive branch of the Commonwealth in bargaining units 1, 3 and 6. For purposes of representation, NAGE splits the representation of approximately 8000 Unit 6 employees between Local 282, which represents the employees within the Health and Human Services Secretariat, and Local 207, which represents employees in the other executive branch agencies. NAGE Local 292 represents non-professional Unit 1 employees and NAGE Local 219 represents Unit 3 skilled trades and crafts employees working in both the executive branch and the Department of Transportation (MassDOT).

Executive Order 595

On August 18, 2021, former Governor Charles Baker issued Executive Order 595 (EO 595), which required employees to be vaccinated against COVID-19.³ The Governor directed the Human Resources Division (HRD) to issue a policy requiring all executive department employees to submit proof of vaccination and to provide a procedure which permitted limited

³ EO 595 was rescinded in May 2023.

1 exemptions from the vaccination requirements where a reasonable accommodation could be
2 reached for any employee who was unable to receive the COVID-19 vaccination due to either a
3 medical disability or a sincerely held religious belief. Otherwise, the policy was to provide that
4 employees who failed to comply with the COVID-19 vaccination mandate would be subjected to
5 progressive discipline, up to and including termination.

6 On September 8, 2021, Marianne Dill (Dill) of HRD sent Kevin Preston (Preston), chief
7 negotiator for NAGE, forms that employees could use to request an exemption for medical or
8 religious reasons. Dill asked Preston and his bargaining team to review the forms in advance of
9 a meeting scheduled for later that day. The forms to request an exemption explained the process
10 as follows:

11 The Diversity Officer will engage in an interactive process with you to determine
12 whether you are eligible for an exemption/accommodation, and if so, will determine
13 what reasonable accommodation can be provided that will enable you to perform
14 the essential functions of your position. A request for accommodation will not be
15 granted if it is unreasonable, if it poses a direct threat to the health and/or safety
16 of others in the workplace and/or to you, the employee, or if it creates an undue
17 hardship.⁴

18
19 On September 20, 2021, NAGE published information about the COVID-19 Vaccine
20 mandate and the parties' recent negotiation session on its webpage. In relevant part, NAGE
21 wrote as follows:

22 NAGE resumed bargaining with the HRD regarding the impact of the COVID
23 vaccine mandate Friday, 9/17. As you know, NAGE strongly supports protecting
24 our member's health and safety in the workplace and the efforts being made to get
25 more individuals within our state vaccinated. However, NAGE does not agree that
26 our members should lose their position or be harmed due to the mandate. Although
27 we are bargaining over this matter, this will **not** prevent HRD from disciplining
28 employees[] not in compliance with the mandate by October 17th. **HRD reiterated**

⁴ In her testimony, Dill confirmed that when considering whether to grant an exemption, the employee first had to demonstrate either a sincerely held religious belief or that the vaccine was medically contraindicated. Then the Commonwealth determined whether, at the time, it could accommodate that employee who had declined to be vaccinated.

1 yet again that anyone not vaccinated as of the deadline of October 17th will
2 be subject to discipline up to and including termination. NAGE will defend
3 any disciplined member for declining to comply with the Governor's
4 Vaccination order. In most cases, grievances will be filed on behalf of the
5 disciplined or terminated member. However, we want all members to be
6 aware that the grievance process can take up to a year or more before
7 arbitration begins.
8

9 Most of this session focused on NAGE's questions regarding the email concerning
10 the attestation and exemption process that was sent to employees last week...
11 [T]he following information was provided during the session:
12

- 13 1. There is no appeal process if an employee is denied a medical or religious
14 exemption, despite NAGE's objections.
- 15 2. Per HRD, religious and medical exemptions will be reviewed on a case-by-case
16 basis in accordance with the executive order and the law.⁵
- 17 3. Regarding the religious exemption, you are not required to provide a letter from
18 a spiritual leader for the religious exemption. However, providing one would be
19 considered evidence of your sincerely held religious belief.
- 20 4. You are required to provide a letter from a physician for the medical exemption
21 form as evidence of medical contraindication to the COVID vaccine....
22

23 HRD has continually refused to extend the deadline and will discipline anyone not
24 in compliance with the vaccine mandate as of the October 17th deadline. HRD
25 indicated that agencies will follow progressive discipline. They will impose a 5-day
26 suspension, then a 10-day suspension, and then termination. NAGE will file
27 grievances for any member disciplined but the process can take a year or more to
28 reach arbitration... (Emphasis in the original).
29

30 After the mandate went into effect in October, 2021, the Commonwealth began
31 disciplining those employees who did not receive the required vaccinations. Over 100 NAGE
32 bargaining unit employees were terminated due to their failure to comply with the COVID-19

⁵ NAGE National Executive Vice President Theresa McGoldrick (McGoldrick) testified that the Commonwealth never informed the Union how it would decide whether a religious or medical exemption would be granted. She testified that the Union did not have information regarding the exemption process "as to how they were denied, or whether they were looked at for either an exemption or accommodation."

1 vaccination mandate.⁶ As a result of actions that the Commonwealth took pursuant to EO 595,
2 NAGE filed numerous grievances on behalf of executive branch and MassDOT employees.⁷

3 The Commonwealth Reinstated Some Terminated Unvaccinated Employees

4 After some time passed, and based on changed circumstances, the Commonwealth
5 began the process to reinstate certain employees who had been terminated for not complying
6 with the vaccination mandate. On October 14, 2022, Dill left a phone message for Preston to
7 advise him that some employees were being offered reinstatement, and that the Commonwealth
8 had drafted a letter to be sent to those employees. When he did not immediately return her call,
9 she followed up that same day with an email with the subject line "Offer of Reinstatement
10 10.12.22." Dill attached a letter⁸ that she had referenced in her voicemail and wrote that "there
11 were approximately 15-20 former employees (former NAGE members) who will be sent the
12 attached letter on Monday." Dill offered to follow up with names and asked Preston to call her
13 when he had the chance.

14 On or about October 26, 2022, Dill called Preston to provide him with the names of former
15 employees that the Commonwealth was going to offer to reinstate. Shortly thereafter, Dill
16 emailed Preston to provide the name of two additional former bargaining unit 6 employees who

⁶ The record does not contain any information regarding whether the Union was aware of which employees may have established a legitimate medical or religious reason for not obtaining the COVID-19 vaccination but were terminated nevertheless because the Commonwealth could not accommodate them.

⁷ NAGE had filed up to 200 grievances. NAGE could have filed up to four grievances on behalf of an individual employee for denial of an exemption, for any resulting discipline, or any resulting suspension, and for termination of the employee for failure to receive the COVID-19 vaccination.

⁸ The letter notes that the Commonwealth was offering to reinstate the employee to his or her former position due, in part, to the high level of immunity, the high level of vaccination of residents and employees, and the availability of other treatments that have reduced the risk for significant illness and death. The full text of the letter is set forth later in this decision.

1 the Commonwealth planned to offer to reinstate. She wrote that she was still waiting to hear
2 confirmation of other names.

3 On October 28, 2022, Dill emailed Preston another list of former employees who the
4 Commonwealth was offering to reinstate. The list contained 6 names and positions as follows:⁹

5 DDS-Wrentham Office	Support Specialist I
6 EHS-Facilities (DVA)	Clerk III
7 DPH-Central Office	PC II
8 EHS-600 Washington Street	Personnel Officer I/Payroll Analyst
9 DCF-Central Regional-Worcester	Paralegal Specialist
10 DPH-BIDLS	Research Analyst I

11 Dill noted that this was the final list of names to date, and she would let the Union know if the
12 Commonwealth added more names in the future.

13 Preston subsequently asked Dill to send a consolidated list that had everyone who was
14 being reinstated on one list. Dill indicated that he should contact someone else for MassDOT
15 employees, but, on November 3, 2022, she sent Preston a consolidated list of former NAGE
16 members who the Commonwealth offered to reinstate. The list included 8 employees.¹⁰ Dill also

⁹ The parties redacted the names on the exhibits offered into evidence during the hearing but agree that the document(s) submitted to the Union contained the names.

¹⁰ The list was a combination of the lists Dill had previously submitted to Preston on October 26 and October 28. Preston testified that he learned about the reinstatement of former employees from one of the presidents or from the media, noting that “we all learned after the fact.” However, the documentary evidence demonstrates that Preston was aware that the Commonwealth was offering reinstatement to at least 8 bargaining unit employees who had been terminated for failure to comply with the vaccine mandate. Accordingly, I do not credit Preston’s testimony regarding when he learned that the Commonwealth was reinstating certain employees. The evidence, though, does not demonstrate that McGoldrick was also given advance notice regarding the reinstatement. Preston testified that McGoldrick probably learned about the reinstatement of some employees from calls “because the employer had sent letters to some of the people that –not all, but some of the people that were being recalled right out of the clear blue sky. So that kind of thing generates calls to the Union.” McGoldrick testified that the Union learned second hand that the Commonwealth had “hand selected a certain group to return without any information as to how that process was arrived at, what criteria was used to select

1 wrote that the Commonwealth offered reinstatement to seventeen other former employees in the
2 executive branch who were not listed because they were either managers or represented by
3 other unions.

4 December 8, 2022 Request

5 As of December, 2022, a number of the terminated employees were still awaiting the
6 arbitration of their grievances. The Union believed it needed to obtain more information from the
7 Commonwealth in order to effectively represent those former employees and to properly field
8 incoming calls from current or former employees about why some unvaccinated terminated
9 employees were reinstated and others were not.¹¹ The Union also was interested in learning
10 whether any similarly situated employees were being treated disparately. For these reasons,
11 the Union submitted an information request.

12 On December 8, 2022, Preston emailed Dill, and copied McGoldrick, as follows:

13 Pursuant to Chapter 150E¹² NAGE hereby requests the following information:

that certain group. And we represented some of those folks since then, because they'd been terminated and we had filed grievances, for at least one that I can recall out of that group that was reinstated."

¹¹ McGoldrick testified that the grievances were ongoing and that the Union "own[ed] those grievances, and we were proceeding with attorneys to go forward, and we needed that information in order to put on our case." Additionally, she testified that "I had other members calling me and asking, 'Why was I not reinstated? Why was this group reinstated?' And I have, obviously, I am the exclusive bargaining representative for the members, one of many for NAGE, and we had no answers." Preston also testified that he wanted to get up to speed and be in a position to effectively represent the affected employees. He testified that "[w]e didn't know the criteria that was used. We didn't know why these people and not other people. We were sort of completely in the dark, so this was our opening attempt to -- to get up to speed and get a position to effectively represent people. This was obviously a very big deal. We'd never had 100 and some odd people fired out of our bargaining unit before. It was a very big deal."

¹² Preston testified that he specifically asked for the information under the Law. He testified "[u]nder the public information law, the employer doesn't have to create documents that don't exist. That's not true under 150E. And ...I didn't reference the public records law on this one. I

1
2 A list of all former employees of Units 1, 3 and 6 who were terminated for failure to
3 obtain covid vaccinations and who had been denied a medical or religious
4 accommodation. Please include name, unit, agency and job title.¹³

5
6 For each such person, please provide a written explanation as to why they cannot
7 now be accommodated as others have been, given the admitted improvement in
8 vaccination rates and in overall covid numbers. Please detail the specific duties
9 performed by each former employee that make a safe accommodation impossible.

10
11 On January 26, 2023, McGoldrick followed up with Dill via email, asking about the status
12 of the Union's December 8, 2022 request. On January 27, 2023, Dill responded and apologized
13 for the delay, stating that she would follow up the following week.¹⁴

14 When Dill did not follow up with a response, McGoldrick emailed Dill again on February
15 8, 2023, writing:

16 As you know we had 130 terminations within NAGE regarding the mandate.
17 Several of these members are still very interested in returning to work and have
18 pending grievances and have been pressing us for this information. This
19 information is critical to assisting us with learning why they were denied exemption
20 and accommodation and also to understand why the Baker Administration failed
21 to rehire these members in addition to the few that were rehired. Therefore, I
22 wanted you to know that we are in the process of filing a potential unfair labor
23 practice charge for failure to provide this information.
24

specifically filed a request under Chapter 150E, where that is not an excuse. The employer has to go find it basically, the information, or you have to write to the agencies and say tell me why you did it or whatever."

¹³ Counsel for the Union clarified during the hearing that the Commonwealth provided the information requested in the first paragraph of the December 8 request, a list of the former employees, and therefore that part of the information request was not litigated during the hearing.

¹⁴ Dill broke her right hand on December 30, 2022. and testified that her resulting physical limitations "clearly impacted my ability in responsiveness."

1 On February 14, 2023, in response to a separate request by Preston, Dill forwarded him
2 the email she originally sent him on November 3, 2022, naming eight NAGE members who the
3 Commonwealth offered to reinstate.

4 On February 16, 2023, Dill responded to the Union's December 8, 2022 information
5 request. As to the second part of that request, which is at issue in this proceeding, Dill responded
6 as follows:

7 I have attached the template letter for the offer of reinstatement as a reminder to
8 the content of the letter. The letters were sent to those individuals who at the time
9 of the original exemption request were found to have met the first prong of the
10 requirements to receive an exemption (by demonstrating either a sincerely held
11 religious belief or that the vaccine was medically contraindicated), but could not be
12 accommodated at that time. As the letter indicated, based on the change in
13 circumstances, and where a position was available, those individuals who had
14 previously met the first piece of the standard for an exemption were offered an
15 unconditional reinstatement. It is our understanding that [the Executive Office of
16 Health and Human Services, the Executive Office of Environmental Affairs] and
17 MASSDOT were the only Secretariats with individuals who met this criteria.¹⁵

18 There are no written records available for individuals who were not offered
19 reinstatement. However, for your members who were found to have demonstrated
20 either a sincerely held religious belief or that the vaccine was medically
21 contraindicated - but were unable to be accommodated, we are willing to inquire

¹⁵ Dill testified that "the determination [for reinstatement] was based on the job available for them and what they were doing. So this didn't just go up to thousands of people, this went out to the designated people that were selected based on meeting the criteria." When asked why all the employees were not offered their jobs back, she replied "I don't know how to answer it any differently than I have." On cross examination, NAGE's Counsel noted that the form letter Dill provided to the Union explained why an individual was offered their job back. He asked whether the Commonwealth ever answered the Union's inquiry about "why their members were not offered their jobs back. Did the Commonwealth ever answer that question for NAGE? Did they give a written explanation as to why members were not offered their jobs back?" Dill replied, "[b]ecause they didn't meet the criteria of the people who were offered their jobs back." There was no evidence in the record that Dill ever informed the Union, in writing or otherwise, that employees who did not receive an offer of reinstatement did not meet the criteria. I do not interpret Dill's testimony here to suggest that she explained that to the Union. To the extent that her testimony could be interpreted that way, I do not credit that testimony and do not find that Dill ever provided the Union with the Commonwealth's rationale as to why other terminated bargaining unit employees were not offered reinstatement.

1 about the specific circumstances of an agency's ability to currently accommodate
2 an individual who is willing to accept an offer of reinstatement.¹⁶

3 Dill again provided a copy of the draft offer of reinstatement which she had previously
4 sent to Preston on October 14, 2022. The letter was entitled "Offer of Reinstatement" and
5 provided as follows:

6
7 Given that the Centers for Disease Control and Prevention (CDC) has concluded
8 that "[h]igh levels of immunity and availability of effective COVID-19 prevention and
9 management tools have reduced the risk for medically significant illness and
10 death,"[footnote excluded] and the fact that here in the Commonwealth more than
11 80% of residents and more than 90% of state agency employees are vaccinated,
12 the Agency is offering you reinstatement to [your former position of [TITLE]/the
13 position of [TITLE]. Your duties and responsibilities and reporting relationships will
14 be the same as they were when you were last employed by the Agency.

15
16 This offer of reinstatement is effective [immediately/as of [DATE]] and is
17 unconditional. By accepting this offer, you are not required to dismiss or release
18 any claims, lawsuits, charges, or proceedings you have brought against
19 [EMPLOYER NAME].

20
21 Your reinstated employment will be consistent with the terms and conditions as
22 existed at the time your employment terminated, in that Executive Order 595 and
23 related policies remain in effect and you maintain that you have a sincerely held
24 religious belief. You will be required to follow Agency and/or facility COVID-19 and
25 reinstatement protocols, including the requirement to mask while in-person at a
26 Commonwealth workplace and to social distance, as feasible, while in-person at a
27 Commonwealth workplace....

28
29 If you wish to accept reinstatement to your former position, please sign below and
30 return this letter agreement to [name] by [DATE]. This offer will remain open for
31 you to accept until [SAME DATE], at which time it will expire by its terms...
32

¹⁶ Dill testified that certain individuals who "had previously been approved [an] exemption but couldn't be accommodated, the Commonwealth could go back and look at -- and determine, based on the certain circumstances, the job was available and the type of work they did, that they could now have an accommodation granted." When asked by Union Counsel if the Commonwealth ever gave the specific reasons that the Union was seeking for why each NAGE member could not be accommodated, Dill responded "[t]here was no more specific information than what I provided." However, Dill also testified that in her response she had let the Union know that if there was someone else who the Union specifically wanted her to look into, the Union could "let us know, and we can do that."

1 The Union did not follow up with Dill regarding any specific employees after receiving her
2 response.

3 The Union, believing that the Commonwealth did not provide it with the information it had
4 requested, filed four charges alleging that the Commonwealth violated the Law by failing to
5 provide the requested information.¹⁷

6 OPINION

¹⁷ McGoldrick testified that the Commonwealth never provided NAGE with information regarding how employees were brought back to work even though they were not in compliance with the EO. I do not credit this statement because the documentary evidence demonstrates that the Commonwealth provided information about why it offered reinstatement to certain employees. However, the issue here is whether the Commonwealth provided information about why other terminated employees were not offered reinstatement. As to that question, Preston credibly testified that the Commonwealth “didn’t tell us anything about any particular -- we had 115, let’s say, people who didn’t get offered their job back. We didn’t have a reason for any particular one of them. We had a generality...It wasn’t enough to say, Oh, it was either this or that. We need to know for Joe Blow, was it because the nature of his job didn’t permit it? Was it because there was no vacancy? If... it was that the nature of his job didn’t permit it, what is the nature of his job? Give us the Form 30 that describes what his job is. What we needed to do -- and we --this was the conversation that we had ad nauseam, was we needed to see whether some receptionists got to come back and others didn’t. And if that was the case, then what explained, if anything, the difference between the two. So we never received a shred of information that was applicable to any particular individual ever.” Preston further testified that although the Commonwealth gave the Union a list of employees who had been fired “[b]ut what they didn’t give us was the guts of what we wanted, which was, what’s the difference between these people and all the people that didn’t get brought back so that we can understand that difference. I mean, one of the standard things we look at any time anything comes out, aside from the other merits of the case, we always look at the issue of disparate treatment. You know... have they treated people who are similarly situated in a similar way?” Preston felt that the Commonwealth’s response was basically “[w]e decided that you didn’t qualify. We’re not going to explain to you how or why, but we’re just... we reached the conclusion.” Preston further testified “I don’t think they -- they had it. I don’t think they ever asked the people who decided not to offer the job to Joe Blow. I don’t think anybody ever said, can you just send us something that explains why you reached that conclusion?” When asked by counsel about whether NAGE received any sort of analysis in response to its request, Preston testified “Nothing. Nothing. Absolutely nothing. And we never received an e-mail where they asked their managers to -- any indication that there was ever any effort to collect the information.”

1 The issue in this case is whether the Commonwealth violated Section 10(a)(5) and,
2 derivatively, Section 10(a)(1), of the Law by failing to provide information pursuant to its
3 December 8, 2022 request for the following information:

4 A list of all former employees of Units 1, 3 and 6 who were terminated for failure to
5 obtain covid vaccinations and who had been denied a medical or religious
6 accommodation. Please include name, unit, agency and job title.
7

8 For each such person, please provide a written explanation as to why they cannot
9 now be accommodated as others have been, given the admitted improvement in
10 vaccination rates and in overall covid numbers. Please detail the specific duties
11 performed by each former employee that make a safe accommodation impossible.
12

13 For the following reasons, I find that the Commonwealth violated the Law by failing to
14 provide the Union with information it requested in the second part of its request regarding the
15 reasons why some employees who had been terminated for failure to obtain the COVID-19
16 vaccination could not be accommodated as others had been.¹⁸

17 Section 6 of the Law requires public employers and exclusive bargaining representatives
18 to negotiate collectively in good faith with respect to wages, hours, standards of productivity and
19 performance, and any other terms and conditions of employment. Commonwealth of
20 Massachusetts v. Labor Relations Commission, 404 Mass. 124, 127 (1989). The Commonwealth
21 Employment Relations Board (CERB) has long held that an employee organization's right to
22 receive relevant and reasonably necessary information stems from the parties' statutory
23 requirement to engage in good faith collective bargaining. Boston School Committee, 13 MLC

¹⁸ As noted earlier in this decision, the Union clarified during the hearing that the Commonwealth had provided it with the information requested in the first two sentences of its December 8, 2022 request. Additionally, at no point did the Union allege that the information was provided in an untimely manner. Accordingly, the only matter that remains before me is whether the Commonwealth violated the Law by failing to provide the Union with the information it requested in the second part of the December 8, 2022 information request.

1 1290, 1294, MUP-5905 (November 21, 1986). If a public employer possesses information that
2 is relevant and reasonably necessary to an employee organization in the performance of its
3 duties as the exclusive collective bargaining representative, the employer is generally obligated
4 to provide the information upon request of the employee organization. City of Boston, 32 MLC
5 1, MUP-1687 (June 23, 2005) (citing Higher Education Coordinating Council, 23 MLC 266, 268,
6 SUP-4142 (June 6, 1997)).

7 **Relevant and Reasonably Necessary Information**

8 The standard for determining whether the information requested by a union is relevant is
9 a liberal one, comparable to the standard for determining relevance in civil litigation discovery
10 proceedings. Board of Higher Education, 26 MLC 91, SUP-4509 (January 11, 2000).
11 Information about the terms and conditions of employment of bargaining unit members is
12 presumptively relevant and reasonably necessary for an employee organization to perform its
13 statutory duties. City of Lynn, 27 MLC 60, MUP-2236 and MUP-2237 (December 1, 2000).

14 The Commonwealth argues that the Union has not established that the requested
15 information was relevant or reasonably necessary. In this regard, the Commonwealth notes that
16 the parties had previously worked together to develop a list of affected employees and prioritized
17 cases for arbitration. The Commonwealth further argues that McGoldrick's testimony that the
18 Union was unaware about the criteria for medical and religious exemptions was inaccurate
19 because the evidentiary record demonstrates that the Commonwealth had provided the Union
20 with the forms that employees needed to complete to request exemptions, and the criteria to be
21 applied. The Commonwealth also points to Preston's inaccurate claim that he learned about the
22 reinstatements only after the fact. Although I agree with the Commonwealth that it had previously
23 provided the Union with certain information about the exemptions, and worked together with the

1 Union regarding the arbitrations, and that Preston's testimony that he learned that employees
2 were reinstated after the fact was inaccurate, I do not agree that, therefore, the information
3 requested by the Union was not reasonably necessary.

4 The Commonwealth reinstated certain employees who had been terminated for failing to
5 receive the COVID-19 vaccination. The Union continued to represent the employees who were
6 terminated through ongoing arbitrations. McGoldrick's uncontested testimony revealed that the
7 Union was fielding calls from members asking why some employees were reinstated but others
8 were not. The Union was unable to answer these questions. These factors motivated the request.
9 The fact that the Commonwealth had previously provided the Union with some information
10 regarding the available exemptions from the vaccination mandate and provided the names of
11 the employees who were reinstated in no way indicates that the Union's request for other
12 information, specifically why some employees were not reinstated as others had been, was not
13 relevant and reasonably necessary. As Preston credibly testified,¹⁹ the Union was trying to "get
14 up to speed" so it could effectively represent its members. A union's entitlement to information
15 extends to information that will assist it to monitor compliance with the contract; which will permit
16 it to determine whether a grievance should be arbitrated; or which otherwise will promote its
17 performance of its duties. Worcester School Committee, 14 MLC 1682, 1685, MUP-6169 (April,
18 20 1988). Additionally, the Union needed this information to determine how similarly situated
19 employees were treated and to investigate whether there was disparate treatment. The CERB
20 has previously determined that a union may seek information to probe for disparate treatment in

¹⁹Although I do not credit Preston's testimony that he only learned about the reinstatement of certain employees after the fact, I do credit his uncontested testimony about why the Union needed the requested information. See Town of Weymouth, 19 MLC 1126 MUP-6839 (August 4, 1992) (a hearing officer may believe parts of a witness' testimony and disbelieve other parts).

1 the enforcement of a policy. See City of Newton, 36 MLC 71, MUP-05-4489 (October 28, 2009).
2 Because the Union needed the requested information to respond to members' inquiries, to
3 effectively pursue grievances through the arbitration procedure, and to determine whether there
4 was disparate treatment which might require further Union action, I find that the Union has
5 established that the information requested was relevant and reasonably necessary.

6 **The Respondent's shifting burden**

7 After the union establishes the relevance and necessity of the requested information, the
8 burden shifts to the employer to establish that it has legitimate and substantial concerns about
9 disclosure, and that it has made reasonable efforts to provide the union with as much of the
10 requested information as possible, consistent with those concerns. Board of Higher Education,
11 26 MLC at 93. Here, there is no argument that the Union's request implicated any concerns
12 about the disclosure of confidential information.

13 The Commonwealth's Defenses

14 The Commonwealth argues that it did not violate the Law in the manner alleged because:
15 1) it fully replied to the Union's request, even if it did not do so in the form preferred by the Union;
16 2) there is no obligation for an employer to create documents in response to an information
17 request; and 3) the Union never responded to the Commonwealth's offer to provide other details
18 about specific employees upon request.

19 The Commonwealth asserts that it fully replied to the request by providing the Union with
20 "detailed criteria about who received offers of reinstatement including copies of reinstatement
21 letters and additional explanation about the information in those letters," and by informing the
22 Union that there were no written records available for individuals who were not offered

1 reinstatement. I disagree that the information provided by the Commonwealth was fully
2 responsive to the Union's request.

3 In its brief, the Commonwealth notes that it offered reinstatement only to individuals who
4
5 were determined to have met the first prong for a medical or religious exemption
6 (by demonstrating that they had a medical contraindication to the vaccine or that
7 the vaccination conflicted with a sincerely held religious belief) **and** (2) worked in
8 specific locations where there was a vacancy, and higher vaccination rates meant
9 that the individual that was unable to be accommodated previously could now be
10 accommodated. Thus, individuals who did not receive offers of reinstatement
11 either did not demonstrate that they had a sincerely held religious belief or medical
12 contraindication to the vaccine; or worked in a location where there was no
13 vacancy that could safely accommodate the presence of an unvaccinated
14 individual in the workplace.

15
16 Although Dill testified that employees who were not offered reinstatement did not meet the
17 criteria of the people who were offered their jobs back, there was no direct testimony that Dill
18 ever actually informed the Union of this, and I do not find that she so informed the Union.
19 Moreover, the Union's request sought information as to *why* each of the former bargaining unit
20 employees who were terminated could not be accommodated. That remained unanswered. The
21 Commonwealth did not shed any light on whether the employees were not reinstated because
22 the Commonwealth determined that they did not have a valid medical or religious reason to forgo
23 vaccination *or* because there was no vacancy *or* because they could not otherwise safely
24 accommodate an unvaccinated individual. Nor did the Commonwealth provide the Union with
25 any specifics as requested.

26 The Commonwealth defends itself by asserting that there were no responsive documents.
27 The Commonwealth asserts that Preston understood that there were no documents, testifying
28 that he did not think that "they had it," but that he incorrectly believed that an employer must
29 create a document that otherwise did not exist. The Commonwealth cited Commonwealth of
30 Massachusetts, 34 MLC 148, SUP-03-4695 (June 6, 2008), among other cases, for the

1 proposition that the Law does not require an employer to either provide documents that do not
2 exist or create a document in order to respond to an information request. In that case, the union
3 requested copies of any plans, directives, studies, or documents related to the consolidation of
4 functions. The CERB confirmed that an employer is not obligated to provide information that is
5 not in its possession or control and, as the Commonwealth correctly notes, the CERB did not
6 direct the employer to conduct studies or develop plans in order to provide them to the union. I
7 concur that a public employer has no obligation to provide information that is not within its
8 possession or control. However, I disagree that additional information responsive to the Union's
9 request was not within the Commonwealth's possession or control. When considering Preston's
10 testimony in context, he intimated that Dill did not have responsive information, but only because
11 neither she nor anyone else sought the information after receiving the Union's request. Preston
12 testified that "I don't think they -- they had it. I don't think they ever asked the people who decided
13 not to offer the job to Joe Blow. I don't think anybody ever said, can you just send us something
14 that explains why you reached that conclusion?" I conclude that more information existed that
15 the Commonwealth could have provided to the Union. I reach this conclusion based on Dill's
16 offer to, upon request, "inquire about the specific circumstances of an agency's ability to currently
17 accommodate an individual who is willing to accept an offer of reinstatement." Her offer to make
18 an inquiry suggests that there is more information that she could have obtained had she made
19 the inquiries herself. No evidence was presented that she did so.

20 The Commonwealth argues that because there were no written documents to provide, it
21 met its obligation when it informed the Union that there were no written records available.
22 However, the Law requires employers to provide relevant and reasonably necessary information,
23 not just written documents. In Northeast Metropolitan Regional Vocation School Committee, 49

1 MLC 281, MUP-21-8485 (April 20, 2023), the employer failed to provide information that the
2 union requested pertaining to its remote work policy and requests to work remotely. The CERB
3 determined that the employer had previously provided the staff with a chart providing some
4 information regarding how the employer made decisions about remote work requests. The CERB
5 reasoned that “there is no reason why it could not have responded to the Union by *explaining*
6 and/or expanding upon the information already provided to the Union.” *Id.* at 288. (Emphasis
7 added).

8 In Dracut School Committee, 13 MLC 1281, MUP-6143 (H.O. November 21, 1986), a
9 union sought all information/criteria used in the selection process of one employee over another
10 for a specific position. The employer argued that the administrators’ thought processes were not
11 subject to disclosure and that only information that exists in written form needed to be provided.
12 The Hearing Officer observed that the employer did not cite any authority to support its
13 contention that the Law compels it to supply only written data to the union. She then cited to a
14 number of National Labor Relations Board (NLRB) decisions that appeared to support the
15 opposite principle, including Sonat Marine, Inc., 279 NLRB No. 16, 122 LRRM 1007
16 (1986)(NLRB required an employer to explain to the Union the “factual basis” for its claim that
17 certain job categories were supervisory and outside the bargaining unit) and Equitable Gas Co.,
18 227 NLRB 800 (1977)(the NLRB compelled the employer to write an explanation of the
19 scoring method it used in grading a promotional examination, stating that the Union needed to
20 know how certain “subjective considerations” had influenced the employer in evaluating the
21 exam answers, in order for the Union to fully comprehend and deal with the test results).²⁰ In

²⁰ Although NLRB precedent is not binding on the CERB, it can provide useful guidance. Alliance, AFSCME, SEIU and Luther E. Allen, Jr., 8 MLC 1518, SUPL-2024, 2025 (November 13, 1981).

1 Dracut, the Hearing Officer further determined that an employer who has agreed that it will not
2 discharge employees except for cause would be expected to disclose its reasons for terminating
3 an employee even if those reasons were never reduced to writing. Accordingly, the Hearing
4 Officer determined that the employer violated the Law by not providing the Union with
5 information/criteria used in selecting one employee over another for the position at issue even if
6 that information was not in written form.

7 Another Hearing Officer adopted this reasoning when considering whether an employer
8 violated the Law by refusing to provide a detailed statement of the reasons it involuntarily
9 transferred two police officers. In City of Cambridge, 48 MLC 75, MUP-19-7408 (September 23,
10 2021), the Hearing Officer found that the employer was required to provide the union with a
11 detailed statement of its reasons for transferring the two officers, concluding that memorializing
12 the information would allow the union to verify that the employer was complying with its statutory
13 and contractual obligations without forcing the union to take the employer at its word.

14 I find the analysis in these cases persuasive. Although neither of these cases were
15 appealed, and therefore the CERB did not have the opportunity to review these decisions,²¹ the
16 CERB has considered situations where information existed although not necessarily in written
17 form. For instance, in Boston School Committee, 25 MLC 181, MUP-9795 (May 20, 1999), the
18 CERB determined that the employer complied with the Law by not only providing existing
19 documents that were responsive to the Union's request for information about overtime budgets
20 and the anticipated costs of complying with a court order, but also explaining verbally and in
21 writing about the methodology that it used to calculate the overtime budget. In Suffolk County

²¹ Unappealed Hearing Officer decisions do not constitute precedent for subsequent decisions.
Town of Ludlow, 17 MLC 1191, 1196 n.11, MUP-7040 (August 3, 1990).

1 Sheriff's Department, 29 MLC 63, 68, MUP-01-2979 (October 9, 2002), the union sought
2 information relating to the discipline of two of its bargaining unit members under a specific policy.
3 The CERB determined that the employer violated the Law where it did not initiate a discussion
4 with the union or endeavor to find an acceptable method to convey the requested information to
5 the union. In that case, the union was asking for the reasons why the employer disciplined
6 bargaining unit employees. Similarly, here, the Union was asking for reasons why the
7 Commonwealth could not accommodate certain bargaining unit employees. The CERB's
8 decisions in Boston School Committee and Suffolk County Sheriff's Department provide support
9 for the conclusions that the Hearing Officers reached in Dracut School Committee and City of
10 Cambridge. Although the requested information may not be in written form, it is still information
11 within the Commonwealth's possession and control. I find that additional information could have
12 been provided had the Commonwealth merely taken steps to gather the information, even
13 though it may not have been in written form.

14 The Commonwealth sets forth one additional defense. The Union failed to respond to
15 Dill's offer to make inquiries about the specific circumstances about an agency's ability to
16 accommodate specific employees, choosing instead to file the instant charges. The
17 Commonwealth argues that the Union's lack of follow-up is sufficient to conclude that the
18 Commonwealth satisfied its obligations. In support of this contention, the Commonwealth refers
19 again to Commonwealth of Massachusetts, 34 MLC 148, where the CERB determined that the
20 Commonwealth had not violated the Law because, after providing the Union with information
21 concerning the projected cost savings of a consolidation of communication function, the Union
22 did not press the Commonwealth for further information or challenge the adequacy of the
23 provided information. The Commonwealth argues that, similarly, there is no violation here

1 because after the Commonwealth fully responded to the Union's request for information,
2 indicated the limits of the documentation that it had, and offered to obtain additional details about
3 the individuals who did not receive offers of reinstatement, the Union did not respond. I find the
4 case cited by the Commonwealth is distinguishable. In that case, in response to the union's
5 request for projected cost savings, the employer provided a salary chart showing the salaries of
6 the affected unit members and the aggregate amount of those salaries. The union argued that
7 the salary chart did not reveal the actual cost savings of the consolidation, because it did not
8 indicate whether the affected employees had bumped into other positions and therefore were
9 still employed by the employer. The CERB determined that because the union did not ask
10 questions about the chart or request further information about the actual cost savings, the
11 employer had satisfied its obligation by providing the salary chart and aggregate amount of the
12 salaries. In contrast, here, the Commonwealth did not provide any information regarding *why*
13 certain employees were not offered reinstatement. This is not a case where the employer
14 provided information which the union considered unsatisfactory, but the union then failed to make
15 further inquiries. Here, the Union asked for information which was not provided. Although the
16 Union could have followed up with Dill, the burden does not rest on the Union to repeat its
17 request. Instead, I find that the Commonwealth should have gathered the requested information
18 based on the Union's original request.²²

²² The Commonwealth did not argue that gathering the information would be burdensome. Given the Commonwealth's stance that, at the time that the Union requested the information, only those employees who had successfully established that they had a valid religious or medical reason for seeking an exemption to the COVID-19 vaccination mandate, the Commonwealth would only need to provide the Union with a list of employees who did not meet that threshold, and then provide reasons why the remaining employees who did meet that threshold could not be accommodated.

CONCLUSION

Based on the record and for the reasons stated above, I find that the Union's information request was relevant and reasonably necessary to the execution of its duties as the exclusive representative, and that the Commonwealth violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it failed to provide the Union with a written explanation as to why all former employees of Units 1, 3 and 6 who were terminated for failure to obtain the required COVID-19 vaccinations and who had been denied a medical or religious accommodation, could not be accommodated.

ORDER

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

1. Cease and desist from:

- a. Failing to bargain in good faith by refusing to provide the Union with information that is relevant and reasonably necessary to the execution of its duties as the exclusive bargaining representative.
- b. In any like or similar manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under Law.

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

- a. Provide the Union with information that is relevant and reasonably necessary to the execution of its duties as the exclusive bargaining representative, including a written explanation as to why all former employees of Units 1, 3 and 6 who were terminated for failing to obtain the required COVID-19 vaccinations and who had been denied a medical or religious accommodation, could not be accommodated at the time of the Union's request for information, as had other former employees, along with the specific duties performed by each former employee that made a safe accommodation impossible.
- 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.

- 1 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.