

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

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Case No.: SUP-16-5643

COMMONWEALTH OF MASSACHUSETTS /
DEPARTMENT OF MENTAL HEALTH

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Date Issued: November 5, 2019

and

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MASSACHUSETTS NURSES ASSOCIATION

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Hearing Officer:

Will Evans, Esq.

Appearances:

Mark Detwiler, Esq.

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Commonwealth of Massachusetts /
Department of Mental Health

Kristen Barnes, Esq.

-

Massachusetts Nurses Association

HEARING OFFICER'S DECISION

SUMMARY

1 The issue is whether the Commonwealth of Massachusetts / Department of
2 Mental Health (Employer) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of
3 Massachusetts General Laws, Chapter 150E (the Law) by requiring a registered nurse
4 in statewide bargaining unit 7 employed at Taunton State Hospital (Hospital) to provide
5 nursing services to patients of the on-grounds program outside the Hospital without
6 giving the Massachusetts Nurses Association (Union or MNA) prior notice and an
7 opportunity to bargain to resolution or impasse over the decision and the impacts of that
8 decision on employees' terms and conditions of employment. Based on the record and
9 for the reasons explained below, I find that the Employer violated the Law as alleged.

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¹ The DLR reassigned the matter to me on August 22, 2018 from another hearing officer, who had conducted a prehearing conference on March 13, 2018.

1 Upon review of the entire record, including my observation of the demeanor of
2 the witnesses, and in consideration of the parties' arguments, I make the following
3 findings of fact and render the following opinion.

4 STIPULATION OF FACTS

5 The parties stipulated to the following facts:

1. The Commonwealth, acting through the Department of Mental Health (DMH), is a public employer within the meaning of Section 1 of the Law.
2. The Union is an employee organization within the meaning of Section 1 of the Law.
3. The Union is the exclusive collective bargaining representative for health care professionals in statewide bargaining unit 7, including certain registered nurses (RNs) employed at Taunton State Hospital (Hospital).
4. Prior to November 2016, RNs working on the in-patient units at the Hospital were never asked to administer insulin shots to the separately administered programs at the Taunton site.
5. Apart from the Hospital, DMH separately operates and administers other programs at the Taunton site, including the Taunton Attleboro CBFS program, or "on-grounds," program consisting of several residential cottages.

24 FINDINGS OF FACT

The Department of Mental Health (DMH) is a state agency that provides care, both mental and physical, to clients with psychiatric disabilities throughout the state. DMH is organized into four regions: Metro, Southeast, Northeast, and West, each with its own supervisory structure and director. Buddy Baker Smith (Smith) is the director of the Southeast Region and functions as the ultimate decision maker for his region.

1 Within the Southeast Region are the Hospital, the on-grounds program, and the
2 Brockton Multi-Service Program (Brockton program).

3 The Hospital provides medical and rehabilitative care to people with mental
4 illnesses and has three locked in-patient units: Cain 4 East, Cain 4 West, and Cain 3
5 West. Each unit has approximately 15 patients with psychiatric disabilities. The patients
6 at the Hospital receive care, in part, from RNs in statewide bargaining unit 7
7 represented by the Union. RNs are responsible for monitoring patients' health, making
8 notes, and administering medication when necessary. Within the Hospital, the DMH
9 also operates a separate program called the Women's Recovery from Addiction
10 Program (WRAP), and employs RNs represented by the Union to provide care to
11 patients in WRAP.

12 The on-grounds program outside the Hospital consists of seven residential
13 cottages. The purpose of the on-grounds program is to provide transitional assistance to
14 patients with mental illnesses until they can be discharged back into the community.
15 The on-grounds program employs individuals who hold a number of different titles,
16 including but not limited to, Mental Health Workers (WHWs), Licensed Practical Nurses
17 (LPNs), RNs, and various supervisors and managers. These individuals assist in the
18 recovery process by helping the patients with their medical needs and activities of daily
19 living.

20 At the on-grounds program, LPNs and RNs are expected to follow "standard
21 nursing practices," which includes taking a number of steps before medication is

1 administered, such as verifying patient identities, checking medication administration
2 records (MAR), checking that the right medicine is being drawn, ensuring the correct
3 injection site, injecting with care, and noting the injection amount, type, location, and
4 time in the MAR. When giving an insulin injection on the on-grounds program, the above
5 is followed, but first the patient's blood sugar level is tested using a blood test strip and
6 glucometer. If insulin is required, it is administered using an insulin "pen" (a device like
7 an Epi pen) rather than a vial and syringe. As with the Hospital, only licensed nursing
8 staff may give injectable medication in the on-grounds program.

9 Laura Melville has worked as a registered nurse for approximately 18 years and
10 been employed at the Hospital since 2007. Melville oversees the mental health workers
11 assigned to her unit and provides medical care to patients at the Hospital, including
12 those with diabetes. Diabetes is a serious condition which afflicts a number of patients
13 at the Hospital and which, if it is left untreated, can lead to serious medical conditions,
14 up to and including death. All the nurses at the Hospital are trained to give injections of
15 insulin. Melville was trained on how to give injections while attending nursing school at
16 Massasoit College and has given injections throughout her career. Melville estimated
17 that in her 18 years she has given over a thousand injections. While Melville regularly
18 works on one floor in the Hospital, she has worked on other floors and in other wards at
19 the Hospital when there is an emergency.

20 The Hospital has a specific process for delivering insulin. First, the nurse looks at
21 the medication documents and verifies the patient who will receive the medicine, the

1 kind of insulin to administer, and the amount. Next, a nurse will use a glucometer
2 machine, prick the patient's finger, and test a blood sample using the glucometer. Unlike
3 at the on-grounds program, the glucometer used at the Hospital does not require the
4 use of a blood test strip. Depending on the results of the glucometer, the patient may
5 only need a glass of orange juice. However, if the glucometer reading indicates the
6 need for insulin, the RN draws the insulin from a vial and another nurse verifies the
7 dosage. Next, the administering nurse cleans the injection site and administers the
8 medication. Once the insulin has been administered, the time, date, location, amount,
9 and type of insulin is noted in the medical record. The patient is then monitored for
10 several minutes to ensure no negative reaction or side effect.

11 Edward Ferreira (Ferreira) is the Assistant Manager of the on-grounds program
12 and is responsible for staffing, scheduling, budgeting, nursing, and other general
13 supervisory responsibilities. On November 5, 2016, during the first shift from 7:00am-
14 3:00pm, Ferreira received a call stating that an LPN had called out sick for the second
15 shift from 3:00pm-11:00pm, and that no nurse would be available for that shift.
16 Furthermore, the nurse who was scheduled to work the first shift was off that day.
17 Ferreira knew that he needed a nurse for the second shift because a diabetic patient
18 was under doctor's orders to receive an insulin injection at 8:00pm that evening.
19 Ferreira was unable to give the injection himself since his license had expired. Knowing
20 he needed coverage, Ferreira set out to find someone who could fill the shift. Ferreira
21 needed to find someone who could administer the insulin injection because, without it,

1 the patient could go into diabetic shock which could lead to a number of serious medical
2 issues including death.

3 Ferreira tried for hours to find coverage for the shift. First, Ferreira called all eight
4 LPNs in the on-grounds program on the overtime list individually. Ferreira spoke on the
5 phone with 5-6 of the LPNs and asked them if they would be willing to come in and work
6 overtime for the 3:00pm to 11:00pm shift. Ferreira left a voicemail for the other 2-3
7 LPNs on the list asking them to come into work. Each LPN either declined to work the
8 shift or never called him back. Next, Ferreira called each person on that list again and
9 offered them "call back pay" just to come in and administer the shot at 8:00pm. Call
10 back pay meant that the LPNs would be paid for 4 hours, even if the injection took only
11 a few minutes. Again, he called each name on the list individually and spoke with 5-6 of
12 them, asking each to come in and give the injection. He left a voicemail for the
13 remaining names on the list. Each individual either declined to work or did not call him
14 back. Ferreira could have ordered an LPN to report to work, but he chose not to do so.
15 Instead, Ferreira continued searching for a solution to the problem, since the patient
16 could not go without his prescribed medicine.

17 Ferreira reported the situation to Regional Director Smith, and said he was still
18 working on finding a solution. Next, Ferreira called the Brockton program, which is
19 another mental health center within the Southeast Region. Ferreira asked a staff
20 member at the Brockton program to accept the patient solely to give the injection.

1 Ferreira offered to send the patient over in a DMH vehicle with the doctor's orders;
2 however, the Brockton program refused.²

3 Ferreira then called the Hospital and spoke to Melville's supervisor, Karl Rogers
4 (Rogers). Ferreira began by explaining to Rogers the steps he had taken to find
5 coverage for the second shift. Although Ferreira had sent patients at the on-grounds
6 program to the emergency room for insulin injections previously, he viewed it as a last
7 resort. Ferreira asked Rogers if he would be willing to send someone over at 8:00pm to
8 administer an insulin shot. He also asked Rogers to send someone over at 4:00pm to
9 conduct a glucometer test on another patient and, if necessary, an insulin shot. Rogers
10 agreed to help Ferreira by sending someone over at 4:00pm and 8:00pm.

11 Rogers instructed Melville to go to the on-grounds program with Hospital LPN
12 Pat Connally (Connally), who worked in a different unit than Melville, to conduct a
13 glucometer test at 4:00pm and, if necessary, an insulin injection. Rogers also instructed
14 Melville to return to the on-grounds program at 8:00pm to perform a prescribed insulin
15 injection. Rogers did not indicate that any of Melville's duties would be removed while
16 she was at the on-grounds program. As such, Melville was uncertain about the
17 implications for her job if something were to happen during her absence, but she knew
18 that, at the very least, she would be responsible for documenting any incident that
19 happened while she was away.

² It is unclear from the record why the Brockton program refused Ferreira's request.

1 Melville and Connally walked the distance of 1.5 to 2 football fields (i.e., 150 to
2 200 yards), taking them approximately four minutes, and arrived at cottage 8 for the
3 4:00pm blood sugar test. The patient and a mental health worker were present in the
4 cottage. Melville was unfamiliar with the on-grounds program, its staff, and any policies,
5 procedures, or practices governing the provisions of care. Unlike when she performed
6 her duties at the Hospital, the on-grounds program is not a "locked unit" with restricted
7 access for patients and visitors. Melville did not know the patient, nor had she ever met
8 the mental health worker who helped to identify the patient. Like all patients in the on-
9 grounds program, the patient Melville was treating did not wear an identifying wristband.
10 As such, Melville had concerns about providing medical care to the wrong patient.
11 Melville was aware that providing medical treatment to the wrong patients could cause
12 damage and jeopardize her nursing license. Nevertheless, she was forced to rely on the
13 patient himself and the unfamiliar mental health worker for identification purposes.

14 Melville reviewed the patient's MAR and noticed that the MAR used at the on-
15 grounds program had a different format and was handwritten, rather than the
16 computerized form produced by the pharmacy that is used in the Hospital. Because of
17 this difference, it took Melville additional time to determine the correct dosage, the
18 injection route, and prescribed time for treatment. Moreover, since Melville received no
19 training on using the MAR for the on-grounds program, she had to figure it out herself
20 on the spot in front of the patient. Furthermore, Melville did not have access to the
21 patient's complete medical record at the on-grounds program, including his diagnosis,

1 medical condition, and behavioral issues. At the Hospital, Melville can review the
2 complete medical records of her patients, which allows her to better respond to negative
3 behaviors and use various tools to de-escalate potentially dangerous situations.

4 Before conducting the blood sugar test of the patient, Melville noticed that the
5 particular glucometer used for the on-grounds program was different than the one used
6 at the Hospital. In fact, Connolly had to show Melville how to use the machine properly.
7 The glucometer used for the on-grounds program required Melville to stick the patient's
8 finger to draw blood, collect the blood sample on a strip, and insert the strip into the
9 glucometer to check the patient's blood sugar. This method of checking blood sugar
10 levels was different than the method used at the Hospital, which did not involve the use
11 of a blood strip. If Melville did not use this particular glucometer correctly, she could
12 have received an inaccurate reading. Melville and Connolly determined that the
13 patient's sugar levels were appropriate and they left without needing to administer an
14 insulin shot.

15 At 8:00pm, Melville and Connolly returned to the cottages, walking the same
16 distances, to administer the insulin shot. Again, Melville reviewed the unfamiliar MAR
17 and identified the patient by confirming with the MHW and the patient himself. Next,
18 using a glucometer and test strip, Melville and the LPN tested the patient's blood sugar
19 levels. Melville determined that the patient needed insulin in accordance with the
20 doctor's orders. Although Melville had given insulin at the Hospital using a vial and
21 syringe, she had never used an insulin pen previously. The syringe used at the Hospital

1 retracts after use to avoid accidental sticks, the insulin pen used at the on-grounds
2 program did not retract and remained in the extended position. Melville received no
3 training on how safely to administer insulin using such an insulin pen. Moreover, Melville
4 was aware that an accidental needle stick could result in the transmission of diseases
5 like hepatitis and HIV. Nevertheless, the pen was disposed of without issue, and
6 Melville entered a record in the MAR.

7 Melville observed the patient briefly after the injection and saw no signs of
8 distress. Normally, after administering insulin to a patient at the Hospital, Melville
9 monitors the patient for longer to ensure there are no harmful side effects like
10 hypoglycemia. However, Melville was only able to observe the patient at the on-grounds
11 program for a few minutes before having to return to the Hospital. Had the patient at the
12 on-grounds program had a negative reaction to the injection once Melville left, she
13 would not have been there to provide medical assistance, which could have jeopardized
14 her job and license.

15 In total, Melville spent approximately one hour away from the Hospital at the on-
16 grounds program. Neither Melville nor any other Union member had ever been asked to
17 provide nursing services to the patients of the on-grounds program prior to November 5,
18 2016; nor has anyone been asked to do so since November 5, 2016. Nevertheless, the
19 Employer takes the legal position that requiring Hospital RNs to provide nursing
20 services to patients of the on-grounds program outside the Hospital is not a change in
21 employment conditions and, even if so, amounts at most to a *de minimis* change. As

1 such, the Employer has reserved the right to assign Hospital RNs to the on-grounds
2 program, should a similar situation arise in the future. Furthermore, no evidence was
3 introduced that the Employer had taken steps since November 5, 2016 to avoid using
4 Hospital RNs at the on-grounds program in the future.

5 OPINION

6 A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) of the Law
7 when it unilaterally changes an existing condition of employment or implements a new
8 condition of employment involving a mandatory subject of bargaining without first giving
9 its employees' exclusive bargaining representative notice and an opportunity to bargain
10 to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations
11 Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations
12 Commission, 388 Mass. 557 (1983); Commonwealth of Massachusetts, 30 MLC 63,
13 SUP-4784 (October 9, 2003), aff'd Secretary of Administration and Finance v.
14 Commonwealth Employment Relations Board, 74 Mass. App. Ct. 91 (2009). A public
15 employer's duty to bargain includes working conditions established through custom and
16 practice as well as those governed by the provisions of a collective bargaining
17 agreement. Town of Winthrop, 28 MLC 200, MUP-2288 (January 4, 2002). To establish
18 a violation, the union must show that: 1) the employer altered an existing practice or
19 instituted a new one; 2) the change affected a mandatory subject of bargaining; and 3)
20 the employer implemented the change without giving the union prior notice and an
21 opportunity to bargain. Id.

1 Increases in workload and job duties are mandatory subjects of bargaining.
2 Town of Lakeville, 38 MLC 219, MUP-09-5590 (March 22, 2012), aff'd 38 MLC 290
3 (May 23, 2012) (citing Medford School Committee, 1 MLC 1250, 1252-53 MUP-690
4 (Jan. 20, 1975)). Issues affecting workplace safety are also mandatory subjects of
5 bargaining. Commonwealth of Massachusetts, 34 MLC 143, SUP-04-5052 (June 17,
6 2008).

7 The parties do not dispute that RNs at the Hospital had not been required to
8 provide nursing services to patients of the on-grounds program prior to November 5,
9 2016. In fact, with the exception of Melville on November 5, 2016, RNs at the Hospital
10 have performed nursing duties only on the three in-patient units at the Hospital.
11 Nevertheless, the Employer argues that it did not violate the Law by directing Melville to
12 provide nursing services to patients of the on-grounds program on November 5, 2016,
13 since the alleged change was at most *de minimis*. As the Employer notes, the
14 Commonwealth Employment Relations Board will not find an unlawful change to
15 employees' terms and conditions of employment where the action complained of is only
16 a slight departure from what is normally required. See Town of Danvers, 3 MLC 1559,
17 1576-77, MUP-2292 and MUP-2299 (April 6, 1977). However, where the change is
18 more than a slight departure and, where it amounts to a material increase in workload
19 and job duties, the CERB will not find the complained of action to be *de minimis*. See
20 Chief Justice of Administration and Management of the Trial Court (CJAM), 35 MLC
21 230, 235, SUP-04-5126 (April 14, 2009).

1 1. Duties at the On-Grounds Program were Materially Different

2 The Employer argues that any change should be viewed as *de minimis* because
3 measuring blood sugar levels and performing injections of insulin are part of the RN's
4 regular job duties at the Hospital. The Employer reasons that, whenever a nurse
5 administers insulin injections, she must perform the same duties: verify the patient,
6 conduct a blood sugar test, check the medical record, check the medication and
7 dosage, administer the injection, monitor the patient, and input the injection in the
8 medical record. In this particular case, the Employer maintains that Melville was not
9 asked to perform any duty at the on-grounds program that she did not regularly perform
10 in the Hospital.

11 While it is true that the duties were similar, the circumstances and safety risks of
12 performing insulin injections at the Hospital versus the on-grounds program were
13 materially different. Melville was required to leave the Hospital for approximately one
14 hour in total and travel to another location to provide nursing services. Melville was
15 unfamiliar with the on-grounds program, its staff, and any policies, procedures, or
16 practices governing the provisions of care. Unlike when she performed her duties at the
17 Hospital, the on-grounds program is not a "locked unit" with restricted access for
18 patients and visitors. Because the patients in the on-grounds program do not wear
19 identifying wristbands, Melville had concerns about providing medical care to the wrong
20 patients. Melville did not know the patients, nor had she ever met the mental health
21 worker who helped to identify the patients. Melville was aware that providing medical

1 treatment to the wrong patients could cause damage and jeopardize her nursing
2 license. Nevertheless, she was forced to rely on the patients themselves and an
3 unfamiliar mental health worker for identification purposes.

4 Melville did not have access to the medical records of the patients at the on-
5 grounds program, including their diagnosis, medical condition, and behavioral issues. At
6 the Hospital, Melville could review the complete medical records of her patients, which
7 allowed her to better respond to negative behaviors and use various tools to de-
8 escalate potentially dangerous situations. Although Melville was given the patient's
9 MAR, the MAR used at the on-grounds program had a different format and was
10 handwritten, rather than the computerized form produced by the pharmacy. Because of
11 this difference, it took Melville additional time to determine the correct dosage, the
12 injection route, and prescribed time for treatment. Moreover, since Melville received no
13 training on using the MAR for the on-grounds program, she had to figure it out herself
14 on the spot in front of the patients.

15 Although Melville had conducted numerous blood sugar tests at the Hospital, the
16 particular glucometer used at the on-grounds program was different than the one used
17 at the Hospital. In fact, Connolly had to show Melville how to use the machine properly.
18 The glucometer used for the on-grounds program required Melville to stick the patient's
19 finger to draw blood, collect the blood on a strip, and insert the strip into the glucometer
20 to check the patient's blood sugar. This method of checking blood sugar levels was
21 different than the method used at the Hospital, which did not involve the use of a blood

1 strip. If Melville did not use this particular glucometer properly, she could have received
2 an inaccurate reading.

3 Based on the results of the blood sugar test, Melville was required to administer
4 insulin to the patient. Unlike the Hospital, the on-grounds program uses a pen to
5 administer insulin rather than a vial and syringe. While the syringe used at the Hospital
6 retracts after use to avoid accidental sticks, the pen used at the on-grounds program did
7 not retract and remained in the extended position. Melville received no training on how
8 to administer insulin safely using such an insulin pen. Furthermore, an accidental
9 needle stick could result in the transmission of diseases like hepatitis and HIV.

10 After administering insulin to a patient at the Hospital, Melville normally monitors
11 the patient to ensure there are no harmful side effects like hypoglycemia. However,
12 Melville was not able to observe the patient at the on-grounds program for as long as
13 she does a patient at the Hospital. Had the patient at the on-grounds program had a
14 negative reaction to the injection once Melville left, she would not have been there to
15 provide medical assistance, which could have jeopardized her job and license.

16 In sum, the change in requiring Melville, a Hospital RN, to provide nursing
17 services to patients at the on-grounds program was more than *de minimis* in nature
18 because it materially increased the risk of physical harm and jeopardized her job and
19 license.

20 2. Melville Experienced an Increase in Workload

1 The Employer also argues that the change should be viewed as *de minimis*
2 because Melville did not spend any more time than usual in performing her duties. The
3 Employer notes that there was no evidence demonstrating that Melville spent more time
4 at work as a result of providing nursing care to patients in the on-grounds program, or
5 that her unit was short-staffed in her absence.

6 Although it is true that Melville's workday was not extended, Melville was still
7 responsible for the care provided to patients in the Hospital and the performance of her
8 staff while she was at the on-grounds program for nearly an hour in total. No evidence
9 was introduced that any of Melville's existing job duties were removed while she was
10 sent to the on-grounds program. Melville could have used the hour at the on-grounds
11 program to complete her existing job duties. Additionally, one of Melville's duties was to
12 oversee the mental health workers assigned to her unit, which she was unable to do
13 while at the on-grounds program. Although Melville was uncertain about the implications
14 for her job if something were to happen during her absence, she knew that, at the very
15 least, she would be responsible for documenting any incident that happened while she
16 was away. Accordingly, the change in requiring Melville to provide nursing services to
17 patients at the on-grounds program was more than *de minimis* in nature because it
18 increased her workload.

19 3. The Employer Implemented a New Condition of Employment

20 The Employer argues that the change should be viewed as *de minimis* because it
21 made a one-time request for assistance in administering a lifesaving insulin shot. The

1 parties do not dispute that the Employer had never requested for RNs at the Hospital to
2 provide nursing services at the on-grounds program prior to November 5, 2016 and has
3 not done so ever since. Nevertheless, the Employer takes the legal position that
4 requiring Hospital RNs to provide nursing services to patients of the on-grounds
5 program outside the Hospital is not a change in employment conditions and, even if so,
6 amounts at most to a *de minimis* change. Consistent with this position, the Employer
7 has reserved the right to assign RNs at the Hospital to the on-grounds program, should
8 a similar situation arise in the future. Furthermore, the Employer has not indicated that it
9 has taken any steps (e.g., increasing on-grounds staff, ordering employees into work,
10 renewing Ferriera's expired license, etc.) to avoid using Hospital RNs again at the on-
11 grounds program. Under such circumstances, I do not find the change to be a one-time
12 request for assistance. Rather, the Employer has implemented a new condition of
13 employment for RNs at the Hospital. Namely, they may be required to provide coverage
14 for the on-grounds program when it is short nursing staff. See City of Haverhill, 42 MLC
15 273, MUP-13-3066 (May 24, 2016) (first-time directive that bargaining unit members
16 complete an online training program while on duty and in the presence of a training
17 officer constitutes a new term or condition of employment).

18 4. No Prior Notice and Opportunity to Bargain

19 It is undisputed that the Employer never provided the Union with prior notice or
20 an opportunity to bargain to resolution or impasse over the change to the nursing
21 services provided by bargaining unit members. The Employer, however, argues that it

1 was appropriate to suspend bargaining since it was an “emergency” situation. Because
2 the patients were diabetics and required medical attention, the Employer maintains that
3 it would have been impractical to demand to bargain with the Union before
4 administering life-saving drugs.

5 Based on the evidence presented at hearing, the Employer has failed to show
6 that the situation was an emergency. For some time, the Employer was aware that
7 several patients in the on-grounds program were diabetic and prescribed insulin
8 injections and, accordingly, that there needed to be a nurse for the 3:00pm-7:00pm shift
9 on November 5, 2016. During his 7:00am-3:00pm shift, Ferriera was notified that no
10 nurse was available for the 3:00pm-11:00pm shift, which was of particular concern since
11 one patient was scheduled for an insulin injection at 8:00pm and another patient with
12 diabetes might also need an injection. Ferriera spent over two hours calling members
13 of the nursing staff at the on-grounds program to cover the shift or just to administer the
14 injection. Finding no volunteers from the on-grounds program, Ferriera then reached out
15 to the Brockton program to ask for help. Seeking to avoid a trip to the emergency room,
16 Ferriera contacted Rogers who said he would have someone from the Hospital provide
17 care to the two on-grounds patients later in the day.³

³ Even in the event of an emergency, the Employer could have notified the Union at this time of its intent to use a Hospital RN to provide nursing services to patients in the on-grounds program later in the day. An employer must still put the union on notice of its proposed change, even if the change is due to exigent circumstances beyond the employer's control. Cambridge Public Health Commission, 37 MLC 47, 54-55, MUP-10-5888 (August 27, 2010).

1 Undermining the Employer's argument that the situation was an emergency was
2 Ferriera's testimony that he could have ordered a nurse in the on-grounds program to
3 cover the 3:00pm-11:00pm shift, but he chose not to do so. Although the nurses that
4 Ferriera asked to take the shift declined, Ferriera provided no explanation as to why he
5 chose not to order them into work, when he had the authority to do so, rather than seek
6 assistance from the Hospital. Similarly, the Employer provided no reason as to why
7 Smith could not have ordered the Brockton program to accept the patient since it was
8 also part of the Southeast Region and under his direction. Finally, Ferriera could have
9 taken the patient to the Hospital's emergency room for the insulin injection, as he had
10 done with patients in the past, but chose not to do so this time. Although the Employer
11 provided reasons as to why the emergency room was less desirable, it provided no
12 explanation as to why it viewed this particular situation to be an emergency, yet not
13 worthy of a trip to the Hospital's emergency room like on prior occasions. If the
14 Employer had chosen any one of these options, it would have avoided changing the
15 duties of the Union's bargaining unit members and violating the Law.

16 CONCLUSION

17 Based on the record and for the reasons explained above, I find that the
18 Employer violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by
19 requiring a registered nurse in statewide bargaining unit 7 employed at the Hospital to
20 provide nursing services to patients in the on-grounds program outside the Hospital
21 without giving the Union prior notice and an opportunity to bargain to resolution or

1 impasse over the decisions and the impacts of those decisions on employees' terms
2 and conditions of employment. Section 11 of the Law grants the DLR broad authority to
3 fashion appropriate orders to remedy a public employer's unlawful conduct. Labor
4 Relations Commission v. Everett, 7 Mass. App. Ct. 826 (1979). When an employer
5 refuses to bargain, the traditional remedy includes an order to bargain, and to return the
6 parties to the positions they would have been in if the violation had not occurred. Town
7 of Dennis, 12 MLC 1027, 1033, MUP-5247 (June 21, 1985). To effectively restore the
8 *status quo ante* in this case, I order the Employer to stop requiring bargaining unit
9 members at the Hospital to provide nursing services to patients in the on-grounds
10 program until it satisfies the obligation to bargain with the Union to resolution or impasse
11 over the decision and the impacts of that decision. Town of Dennis, 12 MLC at 1033.
12 Even though the Employer's decision to require RNs at the Hospital to provide nursing
13 services to patients at the on-grounds program increased their workload, no evidence
14 was introduced that Melville or any other RN suffered an economic loss as a result of
15 their increased workload. Absent such evidence, I decline to issue a monetary remedy
16 on this violation.

ORDER

WHEREFORE, based on the foregoing, it is hereby ordered that the Employer shall:

1. Cease and desist from:
 - a. Failing and refusing to bargain in good faith with the Union over the decision to require a registered nurse in statewide bargaining unit 7 employed at the

Hospital to provide nursing services to patients in on-grounds program outside the Hospital, and the impacts of that decision on bargaining unit members' terms and conditions of employment.

- b. In any like manner, interfering with, restraining and coercing its employees in any right guaranteed under the Law.
2. Take the following affirmative action that will effectuate the purpose of the Law:
- a. Restore the *status quo ante* by not requiring registered nurses in statewide bargaining unit 7 employed at the Hospital to provide nursing services to patients in on-grounds program outside the Hospital until the Employer satisfies its obligation to bargain over the decision and the impacts of that decision on employee's terms and conditions of employment.
 - b. Upon request of the Union, bargain in good faith to impasse or resolution with the Union over the decision to require registered nurses in statewide bargaining unit 7 employed at the Hospital to provide nursing services to patients in on-grounds program outside the Hospital, and the impacts of that decision on bargaining unit members' terms and conditions of employment.
 - c. Sign and post immediately in conspicuous places where employees usually congregate or where notices to employees are usually posted, including electronically, if the Employer customarily communicates to its employees via intranet or e-mail, and maintain for a period of thirty (30) consecutive days thereafter signed copies of the attached Notice to Employees;
 - d. Notify the DLR in writing of the steps taken to comply with this decision within thirty (30) of the steps taken by the Employer to comply with the Order.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



WILL EVANS, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for Review with the Executive Secretary of the Department of Labor Relations within ten days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties.



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

A Hearing Officer of the Massachusetts Department of Labor Relations (DLR) has held that the Commonwealth of Massachusetts, Department of Mental Health (Employer) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of G.L. Chapter 150E (the Law) by failing to bargain in good faith with the Massachusetts Nurses Association (Union) by not providing the Union with prior notice and an opportunity to bargain to resolution or impasse over the decision and impacts of the decision to require a registered nurse in statewide bargaining unit 7 employed at the Hospital to provide nursing services to patients in on-grounds program outside the Hospital.

Chapter 150E gives public employees the right to form, join or assist a union; to participate in proceedings at the DLR; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities. The Employer assures its employees that:

- WE WILL NOT fail or refuse to bargain in good faith with the Union over the decision to require a registered nurse in statewide bargaining unit 7 employed at the Hospital to provide nursing services to patients in on-grounds program outside the Hospital, and the impacts of that decision on bargaining unit members' terms and conditions of employment;
- WE WILL NOT in any like manner, interfere with, restrain and coerce employees in any right guaranteed under the Law.
- WE WILL restore the *status quo ante* by not requiring a registered nurse in statewide bargaining unit 7 employed at the Hospital to provide nursing services to patients in on-grounds program outside the Hospital until the Employer satisfies its obligation to bargain over the decision and the impacts of that decision on employee's terms and conditions of employment.
- WE WILL upon request of the Union, bargain in good faith to impasse or resolution with the Union over the decision to require a registered nurse in statewide bargaining unit 7 employed at the Hospital to provide nursing services to patients in on-grounds program outside the Hospital, and the impacts of that decision on bargaining unit members' terms and conditions of employment.

Commonwealth of Massachusetts,
Department of Mental Health

Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).