COMMONWEALTH OF MASSACHUSETTS
DIVISION OF LABOR RELATIONS

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| In the Matter of | * | |
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| CAMBRIDGE HEALTH ALLIANCE | * | Case No.: MUP-08-5162 |
| | * | |
| and | * | Date Issued: |
| | * | |
| MASSACHUSETTS NURSES ASSOCIATION | * | July 16, 2010 |
| | * | |

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Christopher J. Perry, Esq. – Representing Cambridge Health Alliance

Olinda R. Marshall, Esq. – Representing Massachusetts Nurses Association

## HEARING OFFICER'S DECISION AND ORDER

### Summary

The issue is whether the Cambridge Health Alliance (Employer or CHA) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws chapter 150E (the Law) by failing to bargain in good faith with the Massachusetts Nurses Association (Association or MNA) by insisting on bargaining over terms and conditions of employment apart from on-going negotiations for a successor collective bargaining agreement and by not giving the Association prior notice and an opportunity to bargain to resolution or impasse over the changes in parking fees at the Employer's Whidden Memorial Hospital facility (WMH). Based on the record and for the reasons

explained below, I conclude that the Employer refused to bargain in good faith by insisting on bargaining over terms and conditions of employment apart from on-going negotiations for a successor collective bargaining agreement and by failing to give the Association prior notice and an opportunity to bargain to resolution or impasse over the changes in parking fees at the WMH, in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

## Statement of the Case

On March 7, 2008, the Association filed a Charge of Prohibited Practice (Charge) with the Division of Labor Relations (Division) alleging that the Employer violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. Following an investigation, Victor Forberger, Esq., a duly-designated Division Investigator issued a Complaint of Prohibited Practice (Complaint) on June 26, 2008, alleging that the Employer failed to bargain in good faith by insisting on bargaining terms and conditions of employment apart from on-going negotiations for a successor collective bargaining agreement and, failed to bargain in good faith by not giving the Association prior notice and opportunity to bargain to resolution or impasse over the changes in parking fees. On September 30, 2008, the Employer filed its Answer. On April 7, 2009, the parties filed stipulated facts and exhibits with the Division in lieu of an evidentiary hearing. On April 10, 2009, the parties filed post-hearing briefs.

## Stipulations of Fact and Exhibits

Now come the Association and the Employer, the parties in the above-captioned proceeding, who acknowledge that this statement of Stipulated Facts and Exhibits, the Charge filed with the Division on March 7, 2008, the Complaint issued on June 26,

2008, the Respondent's Motions to Continue Hearing and the Respondent's Answer filed with the Division on September 30, 2008 in relation to this matter shall constitute the entire record of this case and hereby waive their right to a hearing.

By entering into these Stipulated Facts and Exhibits, the Association and the Employer reserve the right to raise all legal arguments and defenses relative to the adjudication of this matter.

If there is a conflict of fact between this statement of Stipulated Facts and Exhibits and the findings in the Complaint or within the Respondent's Answer, such conflict shall be resolved in favor of this statement of Stipulated Facts and Exhibits.

To the extent the Respondent's Answer was untimely filed, the parties acknowledge that such Answer shall be considered timely.

1. The Cambridge Health Alliance ("CHA") is an employer within the meaning of Section 1 of the Law. CHA is a public, not-for-profit health care system, which operates Whidden Memorial Hospital ("WMH"), Cambridge Hospital, Somerville Hospital, Network Health and various outpatient and ambulatory sites in Revere, Everett, Malden, Somerville and Cambridge, Massachusetts.
2. Massachusetts Nurses Association ("MNA") is an employee organization within the meaning of Section 1 of M.G.L. c. 150E ("the Law"). MNA has several bargaining units at CHA.
3. Since on or after approximately 2000, MNA has been the exclusive collective bargaining agent for a bargaining unit of health care professionals working for CHA's Whidden Hospital facility.

4. Since at least 2000, MNA and CHA have executed collective bargaining agreements under the Law that have been in effect consecutively through June 30, 2007, the expiration of the most recent agreement. In 2007, the parties entered into a series of negotiations for a successor collective bargaining agreement to the July 1, 2005 through June 30, 2007 agreement. Exhibit 1.
5. Historically, CHA has provided parking facilities for use by Whidden Hospital employees, including bargaining unit members. Since at least 2000, CHA has provided parking facilities at no cost to bargaining unit members. The parties' collective bargaining agreement is silent on the subject of parking or a parking fee for bargaining unit members.
6. John Gordon (Gordon) is an Associate Director for MNA whose job responsibilities include contract administration at Whidden Hospital. By letter dated January 14, 2008, Barry Hilts (Hilts), CHA's Vice President of Support Services, informed Gordon that CHA was making certain changes to its parking policy with respect to Whidden Hospital employees including the institution of a parking fee. Exhibit 2.[1] In part, Hilts wrote:

> For some time, CHA has faced a significant challenge in providing parking for its staff and patients. While CHA would like to be able to provide adequate parking for all, our sites are very space constrained. As a result, for some time, CHA has had staff park off-site at many locations. Due to the limited availability of parking at many CHA locations, the highest priority for the use of parking is for CHA's patients. Accordingly, CHA may well need to make reasonable adjustments and changes in parking and transportation policies as it may from time to time deem necessary. CHA strives to

[1] The Employer's January 14, 2008 letter is incorporated in its entirety into these findings of fact.

> subsidize parking rates wherever possible and as consistent with market conditions.
>
> The parking rates for all CHA employees are currently subsidized and will continue to be. Rates will be determined based on the particular parking lot to which the employee is assigned. Effective March 1, employees parking at the WH Garage, 92&96 Garland St [sic] & Service lot will be charged $6 per week, and those parking at an off-campus lot (currently Our Lady of Grace) will be charged $3 per week.

Hilts also discussed other changes to CHA parking policies in his letter.

7. By the time of Hilt's January 14, 2008 letter, MNA and CHA had begun negotiations for a successor to the parties' July 1, 2005 – June 30, 2007 collective bargaining agreement.

8. At successor collective bargaining negotiations on or about January 17, 2008, Gordon stated that CHA had an obligation to bargain at the main table successor negotiations over the imposition of the parking fees. CHA representative Steven Perlman (Perlman) stated that, while CHA was willing to bargain over the imposition of the parking fees, it did not have an obligation to do so at the main negotiating table.

9. On or about January 22, 2008, Chris Perry (Perry), Associate General Counsel and Senior Director of Labor Relations for CHA, wrote the following e-mail to Gordon:

> John – I understand from Steve Perlman that you expressed concerns about Barry Hilt's January 14 letter regarding parking. As Barry said in that letter, and as Steve said at the recent negotiations, CHA would be happy to meet and discuss the letter and CHA's position regarding parking at WMH. As the month comes to an end and we move into February, we will be finalizing CHA's plans, so please contact me in the near future if you would like to meet. Thank you.

Exhibit 2.[2]

10. On or about January 22, 2008, Gordon replied to Perry's e-mail, and demanded CHA bargain over the introduction of its parking policy prior to implementation. Gordon stated further that the appropriate forum for such bargaining was in on-going successor negotiations and invited CHA to make its proposal in that forum. Exhibit 2.[3] In that e-mail Gordon wrote:

> I am in possession of your e-mail in regards to parking fees. While we are happy to sit down and discuss your opinion on this issue, we are not interested in negotiating the introduction of a parking fee. As you are aware parking has been free at Whidden Memorial Hospital (WMH) for as far back as anyone can remember. This long standing past practice is the same as having it written in the collective bargaining agreement and as such should be negotiated at the main negotiating table, which is currently open at this time. We have no ground rule stopping either side from adding proposals, so the hospital could put another proposal on the table at this time. If the hospital implements the parking fees without negotiating this change at the main negotiating table, the union will have no choice but to file a Prohibited Labor Practice Charge.

11. Perry responded to Gordon's January 22, 2008 correspondence by e-mail dated January 23, 2008. Exhibit 2.[4] Perry wrote:

> Before responding to the specific points in your email, let me recap a few matters. When you asked Steve Perlman at the January 17 contract bargaining session about Barry Hilts' January 14, letter to you regarding parking rates, Steve clarified (or, if you prefer, amended) Mr. Hilts' letter by stating that it represented CHA's ten-

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[2] The Employer's January 22, 2008 e-mail is incorporated in its entirety into these findings of fact.

[3] The Association's January 22, 2008 e-mail is incorporated in its entirety into these findings of fact.

[4] The Employer's January 23, 2008 e-mail is incorporated in its entirety into these findings of fact.

> tative decision on the topic, which CHA tentatively intended to implement on March 1. Steve further stated that CHA planned to make a final decision on this matter by February 1, and that if MNA wished to bargain about the matter, CHA would be happy to do so. Steve also made clear, however, that as CHA is not seeking any change in the contract language, such bargaining should not be conducted as part of the current successor collective bargaining agreement negotiations (what you called "the main negotiating table" in your email yesterday). You stated that MNA wished to negotiate about this matter only as part of the current successor collective bargaining agreement negotiations, and you invited CHA to make a contract proposal on the matter if it wished to do so. Steve responded that this condition was not agreeable to CHA, and that since there was no applicable contract language, CHA was largely free to address this matter as a change in practice outside the scope of the current successor collective bargaining agreement negotiations. You noted that MNA had a proposal "on the table" for contract language about parking fees, and Steve confirmed that CHA would bargain in good faith about this proposal, but that the pendency of MNA's proposal and negotiations about it did not prohibit CHA from separately proposing to change the practice in the meanwhile.
>
> I understand your contention that the absence of a parking fee is a practice that "should be negotiated at the main negotiating table", but I disagree with your view of the law. What Steve Perlman told you on January 17, as set forth above, remains CHA's view. As Steve told you then, and as I stated in my email to you yesterday, CHA will not make a final decision on this matter until February 1 and is willing to meet with MNA – apart from the current successor collective bargaining agreement negotiations ("the main negotiating table") – to negotiate about this tentatively-decided change in practice. If you change your mind about rejecting CHA's proposal ("we are not interested in negotiating the introduction of a parking fee") and wish to meet as I've indicated, please call me to schedule a meeting that will allow a final decision to be made within the February 1 time frame of which Steve apprised you on January 17.

12. On January 24, 2008,[5] Gordon responded to Perry's January 23rd e-mail, as follows:

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[5] Neither party provided a copy of the Association's January 24, 2008 e-mail; therefore, this document is not incorporated in its entirety into these findings of fact.

> I have read your e-mail of 1-23-2008, 3:18pm [sic] and understand what you are saying, but [sic] believe you may be misunderstanding the MNA's position. I did speak to Steve Perlman at our negotiations [sic] January 17, 2008 on this issue, but was also told that from that point forward we were only to deal with you. As you are not at our negotiation sessions it would make it difficult to discuss this at those sessions. I believe we do understand each other as to our positions on whether or not this long standing past practice should be negotiated at [sic] main table or outside the ongoing negotiation process. I believe since we disagree with each other I have no other recourse then to file a charge at the SLRC [sic].
>
> If you would like to discuss this any further please feel free to contact me anytime.

13. A parking policy for bargaining unit members at Whidden was not discussed at the parties' successor negotiations and CHA made no proposals as part of the parties' successor negotiations.

14. On or about March 1, 2008, CHA implemented its parking policy as provided in Hilts' January 14, 2008 letter.

15. On or about March 7, 2008, the MNA filed the prohibited practice charge with the Division of Labor Relations that is the subject of this case.

## Opinion

A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) of the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first giving its employees' exclusive bargaining representative notice and an opportunity to bargain to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983); Commonwealth of Massachusetts, 30 MLC 64 (2003).

To establish a violation, the union must show that: (1) the employer changed an existing practice or instituted a new one; (2) the change had an impact on a mandatory subject of bargaining; and, (3) the change was implemented without prior notice to the union or an opportunity to bargain to resolution or impasse. Commonwealth of Massachusetts, 30 MLC 63, 64 (2003); Town of Shrewsbury, 28 MLC 44, 45 (2001); Commonwealth of Massachusetts, 27 MLC 11, 13 (2000). The obligation to bargain extends not only to contract terms, but also to working conditions that have been established through past practice. City of Newton, 35 MLC 286, 298 (2009); City of Boston, 35 MLC 289, 291 (2009). The Commonwealth Employment Relations Board (Board) holds that certain amenities provided by an employer at the workplace constitute mandatory subjects of bargaining. Town of Shrewsbury, 28 MLC at 45. Free parking and parking rates are mandatory subjects of bargaining. Commonwealth of Massachusetts, 30 MLC at 64; Commonwealth of Massachusetts, 27 MLC at 13; Board of Trustees of the University of Massachusetts, 21 MLC 1795, 1802 (1995); Commonwealth of Massachusetts, 9 MLC 1634, 1638 (1983).

The Employer contends that: (1) its implementation of the parking fees did not contravene any provision of the Agreement and, therefore, the Section 9[6] requirement to exhaust mediation and fact-finding before unilateral implementation does not apply; (2) it did not seek or "need to secure" any change in the Agreement; (3) "the bargaining process concerning the parking fee proposal had run its course" and, therefore, the parties had reached impasse; (4) the Association had waived its right to bargain because it

[6] Neither the Charge nor the Complaint alleges that the Employer violated Section 9 of the Law. Both the Charge and the Complaint allege violations of Section 10(a)(1) and 10(a)(5).

rejected the Employer's proposal to bargain over parking fees as a "mid-term" bargaining issue; and, (5) Board precedent ignores the distinction between changes made to matters covered by the contract versus changes made to matters not covered by the contract. Specifically, the Employer argues that Board case law is "premised on a flawed reading of Chapter 150E," and that National Labor Relations Board precedent and public policy should control this issue.

With respect to the Employer's first two contentions, the Board holds that the obligation to bargain extends not only to contract terms, but also to working conditions that have been established through past practice. City of Newton, 35 MLC at 298. The Board also holds, and the Employer does not dispute, that parking and parking rates are mandatory subjects of bargaining. Commonwealth of Massachusetts, 30 MLC at 64. When an employer implements unilateral changes to mandatory subjects of bargaining without prior notice to the union or an opportunity to bargain to resolution or impasse, the employer violates the Law. Id. Here, the stipulated facts show that since at least 2000 the Employer had established a past practice of providing parking facilities at no cost for use by bargaining unit members at WMH. While the Agreement may be silent on the matters of parking and parking fees, this does not relieve the Employer of its obligation to bargain with the Association over that established past practice. Newton, 35 MLC at 298. However, the Employer contends that the parties had reached impasse on the matter of parking because the Association had "flatly reject[ed] the proposal".

With respect to the Employer's impasse and waiver claims, the Board will not find impasse where a party insists upon bargaining separately over mandatory subjects of

bargaining rather than at on-going successor negotiations. Boston School Committee, 35 MLC 277, 286 (2009) (citing Town of Brookline, 20 MLC 1570, 1594 (1994)). While the Law does not prohibit either party from proposing to bargain over terms and conditions of employment separate from on-going successor contract negotiations, either party's *insistence* on bargaining over terms and conditions of employment apart from on-going successor contract negotiations constitutes a refusal to bargain in good faith, precluding a finding of impasse. City of Boston, 31 MLC at 32. (Emphasis added.) On January 17 and 23, 2008, the Employer rejected the Association's demand to make a proposal and bargain at the main negotiating table during successor contract negotiations. On January 23, 2008, the Employer insisted on bargaining separately with the Association over the parking policy while successor contract negotiations were on-going. Further, the parties stipulated that a parking policy for bargaining unit members at WMH was not discussed and that the CHA made no proposals to include the issue as part of the parties' successor contract negotiations. Accordingly, the Employer's insistence on bargaining over the parking policy separate from on-going successor contract negotiations and, against the Association's demands constitutes a refusal to bargain in good faith and precludes a finding of impasse. City of Boston, 31 MLC at 32.

Finally, the Employer claims that the Board's reasoning in the following cases is flawed: City of Boston, 31 MLC 25, (2004); Town of Brookline, 20 MLC 1570 (1994); and, City of Leominster, 23 MLC 62 (1996). Relying on Fowler v. Labor Relations Commission, 56 Mass. App. Ct. 96 (2002) and Stone Container Corp., 313 NLRB 336

(1993),[7] the Employer argues that the Board cases are flawed because they ignore the distinction between changes made to matters covered by the contract versus changes made to matters not covered by the contract. The Employer also argues that public policy does not support the Board's cases because "[p]ublic employers have a legitimate interest in being able to react quickly to changed circumstances" and that "mediation and fact-finding is a time consuming process."

The Board, entrusted to interpret public sector law, has previously weighed public policy concerns and determined the balance between union and employer interests in collective bargaining. Here, the Employer violates the Law, ignores Board precedent, and disregards public policy when it refused to bargain with the Association over the parking policy at the main negotiating table, insisted on bargaining apart from on-going successor contract negotiations and unilaterally implemented parking fees on bargaining unit members at WMH, effective March 1, 2008.

## Conclusion

For the foregoing reasons, I conclude that the Employer violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to bargain in good faith with the Association by insisting on bargaining over terms and conditions of employment apart from on-going negotiations for a successor collective bargaining agreement, and by not giving the Association prior notice and an opportunity to bargain to resolution or impasse over the changes in parking fees at WMH.

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[7] The Employer cites to "Stone Container Corporation, 303 NLRB 1 (1993)," but since there is no case that matches this citation, I understand that the Employer is, instead, citing to Stone Container Corp., 313 NLRB 336 (1993).

## Order

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the Cambridge Health Alliance shall:

1. Cease and desist from:

   a) Collecting parking fees implemented and increased for members of the bargaining unit represented by the Association on March 1, 2008 without giving the Association an opportunity to bargain to resolution or impasse;
   b) Failing to bargain in good faith with the Association to resolution or impasse before increasing parking fees;
   c) Insisting on bargaining over terms and conditions of employment apart from on-going negotiations for a successor collective bargaining agreement; and,
   d) In any like or similar manner interfering with, restraining or coercing employees in the exercise of their rights protected under the Law.

2. Take the following affirmative action that will effectuate the policies of the Law:

   a) Reinstate the parking rate that was in effect immediately before the implementation of parking fees on March 1, 2008;
   b) Upon request by the Association, bargain to resolution or impasse before implementing and increasing parking fees;
   c) Make whole members of the bargaining unit affected by any economic losses they may have suffered as a result of the implementation of parking fees by reimbursing them for every week that they paid the increased parking rate implemented on March 1, 2008, plus interest on any sums owing at the rate specified in M.G.L. c.321, s.6I compounded quarterly;
   d) Post immediately in all conspicuous places where members of the Association's bargaining unit usually congregate and where notices to these employees are usually posted, including electronically, if the Employer customarily communicates to its employees via intranet or email, and maintain for a period of thirty (30) consecutive days thereafter, signed copies of the attached Notice to Employees;[8] and,
   e) Notify the Division in writing within ten days of receipt of this Decision and Order of the steps taken to comply with it.

SO ORDERED.

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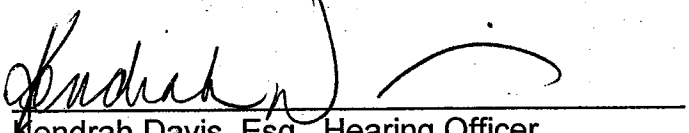
[8] In City of Boston, 35 MLC 289, 292 (2009), the Commonwealth Employment Relations Board announced that it will now order respondents that customarily communicate to employees via intranet or email to post both hard and electronic copies of the Board's Notice to Employees.

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF LABOR RELATIONS



Kendrah Davis, Esq., Hearing Officer

## APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 456 CMR 13.02(1)(j), and 456 CMR 13.15, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Division of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.

THE COMMONWEALTH OF MASSACHUSETTS
DIVISION OF LABOR RELATIONS

# NOTICE TO EMPLOYEES

**POSTED BY ORDER OF A HEARING OFFICER OF THE MASSACHUSETTS DIVISION OF LABOR RELATIONS**
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

A Hearing Officer of the Massachusetts Division of Labor Relations has held that the Cambridge Health Alliance (Alliance) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by failing to bargain in good faith with the Massachusetts Nurses Association (Association) by insisting on bargaining over terms and conditions of employment apart from on-going negotiations for a successor collective bargaining agreement and, by not giving the Association prior notice and an opportunity to bargain to resolution or impasse over the changes in parking and parking fees at the Alliance's Whidden Memorial Hospital (WMH) facility.

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

The Alliance posts this Notice in compliance with the Hearing Officer's Order.

WE WILL NOT implement parking fees for employees represented by the Association without first affording the Association notice and an opportunity to bargain.

WE WILL NOT in any like or similar manner interfere with, restrain, or coerce employees in the exercise of their rights protected under the Law.

WE WILL reinstate the parking rate that was in effect prior to the March 1, 2008 increase.

WE WILL, upon request by the Association, bargain to resolution or impasse before increasing parking fees for employees represented by the Association.

WE WILL make employees represented by the Association for parking fees they paid pursuant to the parking fees implemented on March 1, 2008.

_____ _____
For the Cambridge Health Alliance 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 Division Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).