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February 9, 2021

Quesiyah Ali, Esq
Mass. Teachers Association
2 Heritage Drive, 8th Floor
Quincy, MA 02171

Amy Lindquist
Melrose School Committee
360 Lynn Fells Parkway
Melrose, MA 02176

RE: MUP-20-8369 and MUP-20-8370, Melrose School Committee

Dear Ms. Ali and Ms. Lindquist:

On December 21, 2020, the Melrose Education Association (MEA) filed two charges with the Department of Labor Relations (DLR) alleging that the Melrose School Committee (School Committee) had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by repudiating the parties' Memorandum of Agreement (MOA). The DLR docketed MEA's charge on behalf of unit A as MUP-20-8369 and docketed MEA's charge on behalf of unit C as MUP-20-8370. During the investigation, the MEA amended both charges to also allege that the School Committee violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by making changes to the MOA without providing the MEA with notice and the opportunity to bargain. Pursuant to Section 11 of the Law, as amended by Chapter 145 of the Acts of 2007, Section 15.05 of the DLR's Rules, and the DLR's Interim Investigation Procedures issued on April 13, 2020, I conducted an investigation on January 20, 2021.[1] Based on the information presented during the investigation, I have decided to dismiss the charges for the reasons explained below.[2]

[1] I conducted the investigation remotely after Governor Baker directed state employees to stay at home during the state of emergency.

[2] I did not consider the School Committee's proposed exhibit which was submitted after the close of the record.

Background

The MEA represents approximately 338 teachers in bargaining unit A and 95 paraprofessionals in bargaining unit C.

The Melrose Public Schools closed in mid-March 2020 due to COVID-19. On June 25, 2020, the Department of Elementary and Secondary Education required districts to prepare a reopening plan that addressed three possible learning models for the 2020-2021 school year: in-person learning, remote learning and a hybrid of in-person and remote learning.

On August 4, 2020, the parties commenced negotiations concerning reopening for the 2020-2021 school year. On August 14, 2020, the School Committee submitted its Reopening Plan (Plan), providing for in-person instruction for students designated as high needs but remote instruction for the start of the school year for other students, with a hybrid learning-model phased in at a later point.

On August 5, 2020, the MEA proposed that employees "return to school buildings once certain community metrics and school health and safety benchmarks are met." The MEA provided the following list of proposed health and safety benchmarks, noting that this list did not necessarily constitute the complete list of concerns to be met:

> **Community Metrics**
> ● For educators and staff to return and remain in person, the positive test rate in Massachusetts should be no more than 2% over a 14-day period.
> ● The City will have no increases in positive cases for fourteen (14) days before shifting from a full remote to a hybrid model.
> ● Test results from labs must be happening within 48 hours in order for real time contact tracing and containment to occur.
> ● Rate of transmission (RT) should be below one (1) in Massachusetts and the counties the District serves.
> ● If the District meets these community metrics and moves to any in-person model (hybrid or full) these benchmarks must be maintained, or the District will revert to full remote.

During a subsequent August 2020 negotiation session, the School Committee submitted a proposed agreement which, in part, required it to work with the Melrose Department of Public Health to monitor metrics related to positive case rates and trends. The School Committee further proposed the following:

> If the percent positivity rate in the City of Melrose increases over 2%, the Superintendent, prior to making a decision to return to a remote-only model, will, in consultation with the Melrose Department of Public Health, review other such relevant metrics, including but not

> limited to the case count in Melrose (last 14 days); the relative change in case counts; and the Average Daily Incidence rate per 100,000.

The School Committee also slightly modified a proposal originally offered by the MEA, by offering the following proposal:

> If the District meets these community metrics and moves to any in-person model (hybrid or full), these benchmarks must be maintained, or the District will, at the direction of the Superintendent, revert to full remote.

After further negotiations, the parties executed a MOA for unit A on September 10, 2020 and executed a MOA for unit C on September 22, 2020. Both agreements contain the following Health and Safety provision in Section 3:

> 3. **Health and Safety:**
>
> **A. Community Metrics**:
>
> i. The District will work closely with the Melrose Department of Public Health to monitor metrics related to positive case rates and trends in the City of Melrose, individual schools, the District as a whole, and the Commonwealth.
>
> ii. The parties will rely on the Massachusetts Department of Public Health COVID-19 dashboard for all COVID-19 data.
>
> iii. If the percent positivity rate in the City of Melrose increases over 2%, the Superintendent, prior to making a decision to return to a remote-only model, will, in consultation with the Melrose Department of Public Health, review other such relevant metrics, including but not limited to:
> a. Case count in Melrose (last 14 days);
> b. Relative change in case counts; and
> c. Average Daily Incidence rate per 100,000.
>
> iv. If the decision is made to return to a full remote-model due to current health and safety metrics, the Superintendent will, upon consultation with the Melrose Department of Public Health, decide whether to continue to provide in-person instruction to vulnerable students (including but not limited to those with disabilities, English learners, and students who have not engaged or cannot engage with remote learning).

v. If Melrose is within the yellow, green or white color-coded metric established by the DPH/COVID-19 Command, for the time period of October 5, 2020 through October 16, 2020, the District will, in the discretion of and at the direction of the Superintendent, move from the remote-only model to the best-fit model, with students designated as "Group A" and "Group B" (in the MPS Comprehensive Return to Instruction Plan approved by the Committee on August 11, 2020) returning to school for in-person instruction.

vi. Melrose will maintain a white or green color-coded metric, established by the DPH/COVID-19 Command, for at least 14 days before shifting from a hybrid model to a full in-person model.

vii. If the District meets these community metrics and moves to any in-person model (hybrid or full), these benchmarks must be maintained, or the District will, at the direction of the Superintendent, revert to full remote.

At the beginning of the 2020-2021 school year, the Melrose Public Schools provided in-person instruction for high needs students; remote instruction for Grades 2 through 12; and hybrid instruction for kindergarten and first grade students. On October 19, 2020 the School Committee commenced hybrid instruction for Grades 2-12.[3]

On November 6, 2020, the Commonwealth of Massachusetts Department of Public Health (DPH) made changes to its color-coded metrics. The MEA questioned if this change required a change to the MOA. On November 10, 2020, Superintendent Kukenberger (Superintendent or Kukenberger) responded that she did not believe the parties needed to change the MOA based on the release of DPH's COVID-19 Health Metrics but, she added "we should confirm the agreement."[4]

In December of 2020, the positivity rate in Melrose began to rise; a December 3 report showed a 3.55% positivity rate and a December 10 report reflected a 5% positivity rate. Noting this positivity rate, on December 11, 2020, Association President Lisa Donovan emailed Kukenberger, writing "[g]iven these factors, the MEA is insisting that the agreed upon metrics be adhered to and that the Melrose Public Schools returns (sic) immediately to a fully remote learning

[3] At the parent's request, any student could receive remote instruction.

[4] Neither party presented any evidence that the agreement was modified in any way at that time.

model for all." Kukenberger did not respond and did not return to fully remote learning for all students as requested.

On the same day, the MEA filed a grievance at Step 2, asserting "that contractual language was not followed and is in violation of the memorandum of Agreement between the Melrose School Committee and Melrose Education Association generally and specifically, but not limited to, Section 3A iii and vii Community Metrics." As a remedy, the MEA sought that the schools move to a fully remote learning model for all and continue with that model until the "metrics meet the agreed upon MOA benchmarks for a return to inperson instruction."

On December 11, 2020, during a meeting with the public-school community, via Facebook Live, Kukenberger stated words to the effect that she would not direct the school district to revert to remote status unless directed by the state. On December 15, 2020, during a virtual forum for Melrose employees, Kukenberger repeated similar comments.[5]

After the holiday break, Kukenberger returned all students to full remote learning from January 4 to January 8, 2021 to allow all staff and students to participate in a testing clinic.[6] The Superintendent reviewed these results and other COVID-related data for evidence of clusters of cases. On three occasions, Kukenberger decided to have a whole class transition to remote learning for a period of time due to specific concerns related to the specific class.[7]

Position of the Parties[8]

The MEA asserts that the School Committee repudiated the MOA when the Superintendent did not direct the schools to return to remote learning in December 2020 when the positivity rate rose above 2%, as required by Sections 3A iii and 3A

[5] The School Committee maintains that these words were taken out of context and Kukenberger asserts that her comments were meant to apply to special needs students. The MEA disputes these contentions. Given my decision to dismiss the charges on other factors, there is no need to resolve this dispute of facts.

[6] A total of 1,632 individuals were tested. Of these, 2 students and 4 adults tested positive for COVID-19. However, 2 of the adults who tested positive were not part of the public-school system.

[7] The parties did not provide the dates for when these classes transitioned, temporarily, to the remote-learning model.

[8] The School Committee advocated that unless I dismissed the charge, the MEA's allegation regarding repudiation should be deferred to the parties' grievance and arbitration procedure. The MEA objected. Given my decision to dismiss the charges, I decline to defer the repudiation allegation to the parties' grievance and arbitration procedure.

vii. The MEA contends that the language in the MOA is not ambiguous. Although other provisions in the MOA give discretion to the Superintendent, Section 3A vii does not. That provision clearly requires that the Superintendent will direct a return to full remote learning unless the benchmarks are maintained. The community metrics and benchmarks mentioned in this provision refer to the items specified in Section 3A iii. The Superintendent has operational authority so she must direct the action, but the provision does not specify that she has discretion whether or not to direct the action.

Although the Superintendent did direct a return to remote learning for one week in January 2021, that was not done in compliance with the requirements in the MOA. She made that decision in order to allow for testing, but this action was not directed as a result of the higher than 2% positivity rate in the City of Melrose.

MEA also contends that the Superintendent changed the MOA when she stated, twice, in December that she would not return to remote learning unless directed by the State. The MEA contends that this change in working conditions is negotiable as it does not implicate a core education policy because the predominant effect of a decision is directly upon the employment relationship rather than upon the level or type of education in a school system. Boston School Committee, 3 MLC 1603, 1607, MUP-2503, 2528 and 2541 (April 15, 1977). Moreover, the Superintendent's change of the MOA impacts the employees' safety and workload. Therefore, the MEA asserts that the School Committee violated the Law by failing to provide the MEA with notice and the opportunity to bargain over both the decision to make the change to the MOA and the impacts of that change.

In contrast, the School Committee maintains that it did not violate the Law as alleged. The School Committee, too, contends that the language of the MOA is unambiguous. However, the School Committee asserts that the clear language of the MOA gives the Superintendent discretion in making decisions regarding the learning method. The MEA originally proposed that under certain circumstances, schools would automatically revert to remote learning. The School Committee, believing that the decision about whether to offer instruction through an in-person, remote or hybrid model, is a core managerial decision that is not negotiable, instead proposed that the Superintendent had discretion in determining which learning model was used. The final agreement provides for the Superintendent to consider various factors but gives her discretion to make the final decision. The one part of the MOA which may be ambiguous is the reference to community metrics and benchmarks in Section 3A vii. Although the MEA asserts that this refers back to the metrics spelled out in Section 3A iii[9], the School Committee notes that Section 3A v refers to the color-coded metric and this was the metric referenced in Section 3A vii. In any case, the Superintendent had full discretion to

[9] The School Committee also points out that this provision does not only refer to the positivity rate, but also includes other metrics which should be, and were, considered.

decide whether to revert to fully remote instruction, and she did not repudiate the MOA when she did not revert to fully remote instruction in December.

The School Committee also maintains that the MOA was not changed and therefore there can be no allegation of a unilateral change. The Superintendent's comments in December were taken out of context. She merely noted that there would not be fully remote learning, to accommodate special needs students who could not learn remotely, unless there was a similar emergency such as the Commonwealth's emergency order closing schools in March 2020. The Superintendent's actions further demonstrate that she did not change the MOA. The Superintendent did direct fully remote learning for the week of January 4, 2021, so that students and staff could participate in a testing program. This testing provided additional information for her to use when exercising her discretion to determine which learning model would be used. She returned to fully remote learning for a period of time even though there was no order from the state directing such a return to remote learning. The Superintendent also closed three classrooms when the data showed that was in the best interest of the students and employees. She made these decisions on her own after considering various relevant data.

Moreover, the School Committee argues that the decision as to which educational model to utilize is one of those core governmental decisions. The School Committee establishes educational policies for the district, consistent with the requirements of law and the statewide goals and standards established by the Massachusetts Department of Elementary and Secondary Education. See G.L. c. 71,§ 37. The Superintendent is vested with all operational decisions for the District and is required to manage the system in a manner that is consistent with state law and the policy determinations of the Committee. G.L. c. 71, §52. The educational model to be utilized for the District is inherently a policy decision of the School Committee. Given this, any decision as to which educational model to utilize is a non-delegable management right that cannot be susceptible to the process of collective bargaining. School Comm. of Newton v. Newton School Custodians Association, Local 454, SEIU, 438 Mass. 739, 746–748 (2003).

Analysis

Repudiation

Section 6 of the Law requires public employers and unions that represent their employees to meet at reasonable times to negotiate in good faith regarding wages, hours, standards of productivity and performance, and any other terms and conditions of employment. The statutory obligation to bargain in good faith includes the duty to comply with the terms of a collective bargaining agreement. Commonwealth of Massachusetts, 30 MLC 43, 45, SUP-4768 (September 17, 2003). A public employer's deliberate refusal to abide by an unambiguous collectively bargained agreement constitutes a repudiation of that agreement, in violation of the Law. Id.; Town of Falmouth, 20 MLC 1555, 1559, MUP-8114 (May

16, 1994) *aff'd sub nom.* Town of Falmouth v. Labor Relations Commission, 42 Mass. App. Ct. 1113 (1997). However, if the evidence is insufficient to find an agreement underlying the matter in dispute, or if the parties hold differing good faith interpretations of the terms of the agreement, then the Commonwealth Employment Relations Board (CERB) will find that no repudiation has occurred. City of Everett, 26 MLC 25, 27, MUP-1542 (July 22, 1999). If the language at issue in the agreement is ambiguous, the CERB will look to the underlying bargaining history to determine whether there was a clear agreement between the parties. Commonwealth of Massachusetts, 18 MLC 1161, SUP-3356, SUP-3439 (October 16, 1991).

Although both parties assert that the MOA is unambiguous, they provide differing good faith interpretations of the MOA. The School Committee reasonably interprets the agreement as providing the Superintendent with discretion to decide when to change the offered learning model. The MEA, though, also reasonably asserts that although various sections of the MOA provide for the Superintendent to make decisions and reference her discretion, Section 3A vii notably does not use the words decision or discretion. Rather, Section 3A vii states that the benchmarks must be maintained, or the District *will*, at the *direction* of the Superintendent, revert to full remote. The parties disagree whether this provision provides the Superintendent with any discretion.

I find that the language in the MOU is ambiguous and internally inconsistent. The plain language in Section 3A vii does not provide the Superintendent with discretion regarding when schools must revert to remote learning, while the plain language in Section 3A iii allows the Superintendent to decide whether to revert to a remote learning, after considering various metrics. Moreover, the reference to the community metrics and benchmarks in Section 3A vii is ambiguous; it is unclear if this refers to the metrics listed in Section 3A iii or the color-coded metrics referenced in Sections 3A v and 3A vi.

A review of the bargaining history does not fully clarify the parties' intent. The bargaining history makes clear that the parties agreed to give the Superintendent certain discretion in making decisions about moving between different learning models. The MEA first proposed that in-person education would only be provided if certain metrics were met, including that the positive test rate in Massachusetts is no more than 2% over a 14-day period. The School Committee did not accept this language, which did not allow the Superintendent to exercise any discretion, and instead proposed language which would not automatically revert the schools to remote learning if the positivity rate increased above 2%. The School Committee's proposal, which was agreed upon, permitted the Superintendent to decide when to revert to remote-only learning, after considering the positivity rate in Melrose as well as other metrics.

The bargaining history pertaining to Section 3A vii is less clear. The MEA's original proposal was "[i]f the District meets these community metrics and moves

to any in-person model (hybrid or full) these benchmarks must be maintained, or the District will revert to full remote." The School Committee modified this proposal by adding in the words "the District will, *at the direction of the Superintendent*, revert to full remote." (emphasis added). Presumably, this change was not meant of be meaningless, however the parties did not provide sufficient information to explain the intent of this language. Moreover, neither party presented bargaining history pertaining to the meaning of the terms "community metrics" and "benchmarks" in Section 3A vii.

Accordingly, I find that the MOA is ambiguous, and the bargaining history does not sufficiently clarify the parties' intent. Therefore, I do not find probable cause to believe that the School Committee repudiated the MOA and I dismiss that portion of the charges.

Even if, arguendo, the MOA was not ambiguous, I would still dismiss the charge. Some managerial decisions cannot be delegated by public employers or be made the subject of collective bargaining. Town of Dennis, 12 MLC 1027, 1030, MUP-5247 (1985). For example, school committees have the exclusive prerogative to determine certain matters of educational policy without bargaining. Lowell School Committee, 26 MLC 111, 113, MUP-1775 (January 28, 2000). To determine if a decision falls within the core educational policy exception to bargaining, the CERB ascertains whether the "predominant effect" of a decision is directly upon the employment relationship or is upon the level or type of education in a school system. Boston School Committee, 3 MLC 1603, 1606 – 1607, MUP-2541 (April 15, 1977). The School Committee's decision here, regarding which learning model to utilize during the COVID-19 pandemic, i.e. all in-person, remote, or hybrid, predominantly affects the level or type of education in the school system and is therefore insulated from the bargaining process. When parties do negotiate over a nondelegable right of management, the resulting agreement is not enforceable. See Town of Billerica v. IAFF, Local 1495, 415 Mass. 692 (1993). Accordingly, to the extent that the MOA infringed on the School Committee's managerial prerogative to determine which learning model is utilized, it is unenforceable, and the School Committee did not unlawfully repudiate the MOA when the Superintendent chose not to revert to remote learning in December 2020.

Unilateral Change

A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it unilaterally changes a condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first giving its employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations Comm'n, 404 Mass. 124, 127 (1989); School Committee of Newton v. Labor Relations Commission, 338 Mass. 557 (1983). The duty to bargain extends to both conditions of employment that are established through past practice as well as conditions of employment that are

established through a collective bargaining agreement. Town of Burlington, 35 MLC 18, 25, MUP-04-4157 (June 30, 2008), aff'd sub nom., Town of Burlington v. Commonwealth Employment Relations Board, 85 Mass. App. Ct. 1120 (May 19, 2014); Commonwealth of Massachusetts, 27 MLC 1, 5, SUP-4304 (June 30, 2000). To establish a unilateral change violation, the charging party must show that: 1) the employer altered an existing practice or instituted a new one; 2) the change affected a mandatory subject of bargaining; and 3) the change was established without prior notice and an opportunity to bargain. City of Boston, 20 MLC 1603, 1607, MUP-7976 (May 20, 1994); Commonwealth of Massachusetts, 20 MLC 1545, 1552, SUP-3460 (May 13, 1994).

I find that the MEA failed to provide sufficient facts that the School Committee instituted a change. The MEA alleges that the School Committee unilaterally changed working conditions when Kukenberger stated that she would not return the schools to remote learning unless directed to by the state, thereby changing the terms of the MOA. The School Committee argues that Kukenberger's comments were taken out of context and that she was referring to high-needs students.[10] Regardless of exactly what the Superintendent said, or intended, the facts do not demonstrate that the School Committee implemented any change to the MOA. Although it is factually correct that the positivity rate in Melrose rose above 2% in December and Kukenberger did not revert to remote learning, there is no evidence that she did not revert to remote learning because the Commonwealth did not so direct. As noted above, Kukenberger was acting in accordance with the School Committee's reasonable interpretation of the MOA, which permitted her to consider various metrics before deciding if or when to revert to remote learning. Additionally, Kukenberger did revert to fully remote instruction for a week in January to allow for testing to provide additional data for her to consider. She took this action, even though she was not directed to do so by the Commonwealth. She also returned certain classes to remote learning when she determined the circumstances warranted that action. Given her actions, I find that the MEA has not provided sufficient evidence to demonstrate that the School Committee made a change in working conditions as alleged.

Accordingly, I do not find probable cause to believe that the School Committee violated the Law by making a unilateral change to working conditions, and I dismiss the charges.

[10] During the investigation, the MEA never disputed that Section 3 iv permits the Superintendent to decide whether to continue to provide in-person instruction to vulnerable students even if she decides to return others to a remote-model due to health and safety metrics.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

Gail Sorokoff

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GAIL SOROKOFF, INVESTIGATOR

APPEAL RIGHTS

The charging party may, within ten (10) days of receipt of this order seek a review of the dismissal by filing a request with the Commonwealth Employment Relations Board pursuant to Department Rule 456 CMR15.05(9). The request shall contain a complete statement setting forth the facts and reasons upon which such request is based. The charging party shall include a certificate of service indicating that it has served a copy of its request for review on the opposing party or its counsel. Within seven (7) days of receipt of the charging party's request for review, the respondent may file a response to the charging party's request.