

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the Matter of	*	
	*	
COMMONWEALTH OF MASSACHUSETTS, DEPARTMENT OF CORRECTION	*	Case No.: SUP-13-2604
	*	
and	*	Date Issued: October 19, 2015
	*	
MASSACHUSETTS CORRECTION OFFICERS FEDERATED UNION	*	
	*	

Board Members Participating:

Marjorie F. Wittner, Chair
Elizabeth Neumeier, CERB Member
Harris Freeman, CERB Member

Appearances:

Earl Wilson, Esq.	–	Representing Commonwealth of Massachusetts, Department of Correction
Alan McDonald, Esq. Kristen Barnes, Esq.	–	Representing Massachusetts Correction Officers Federated Union

DECISION ON APPEAL OF HEARING OFFICER DECISION

Summary

1 On November 25, 2014, a Department of Labor Relations (DLR) Hearing Officer
2 issued a decision holding that the Commonwealth of Massachusetts, Department of
3 Correction (Employer or DOC) did not violate Section 10(a)(5) and, derivatively, Section
4 10(a)(1) of Massachusetts General Laws Chapter 150E (the Law) when it transferred
5 the duties associated with the Assistant Assignment Officer (AAO) position at the
6 Souza-Baranowski Correctional Center (SBCC) outside of the bargaining unit

1 represented by the Massachusetts Correction Officers Federated Union (MCOFU or
2 Union) without first giving MCOFU prior notice and opportunity to bargain to resolution
3 or impasse. The Union filed a timely appeal of this decision with the Commonwealth
4 Employment Relations Board (CERB) pursuant to Section 11 of the Law and 456 CMR
5 13.15. The Union filed a supplementary statement in support of the appeal and the
6 DOC filed a response. The CERB has considered the record and the decision in light of
7 the Union's appeal and the parties' statements and affirms the decision for the reasons
8 set forth below.

Facts

9 This matter was decided on a stipulated record.¹ We adopt the stipulations and
10 the Hearing Officer's supplemental findings and reiterate those facts necessary to an
11 understanding of our Opinion. Further reference may be made to the facts set out in the
12 Hearing Officer's decision, reported at 41 MLC 136 (2014) and attached to the slip
13 opinion of this decision.

Opinion²

14
15 The DOC operates eighteen penal facilities throughout the Commonwealth. The
16 Union represents the correction officers (COs), sergeants and lieutenants in statewide
17 bargaining Unit 4, which include SBCC. The issue on appeal is whether the Hearing
18 Officer properly dismissed the complaint alleging that the DOC violated Section 10(a)(5)
19 and, derivatively, Section 10(a)(1) of the Law by transferring AAO duties at SBCC from

¹ The parties submitted factual stipulations and joint exhibits. The Hearing Officer summarized the joint exhibits in supplemental findings.

² The CERB's jurisdiction is not contested

1 COs to correctional program officers (CPOs) without first bargaining with the Union to
2 resolution or impasse. CPOs are members of statewide bargaining Unit 8, which is
3 represented by the Alliance AFSCME/SEIU, Local 509.

4 Under well-settled CERB precedent, to establish that an employer has unlawfully
5 transferred work outside of a bargaining unit, the employee organization must show: 1)
6 the employer transferred bargaining unit work to non-unit personnel 2) the transfer of
7 unit work had an adverse impact on individuals, employees or the bargaining unit itself;
8 and 3) the employer failed to give the employee organization prior notice and an
9 opportunity to bargain to resolution or impasse over its decision. Commonwealth v.
10 Labor Relations Commission, 60 Mass. App. Ct. 831, 833 (2004) (citing Town of
11 Bridgewater, 25 MLC 103, 104, MUP-8650 (December 30, 1998)).

12 The Hearing Officer's analysis focused on the first element of this test, which, as
13 a threshold matter, examines whether the work at issue belongs exclusively to the
14 bargaining unit or is shared with members of other bargaining unit. City of Lawrence,
15 23 MLC 213, MUP-9876 (March 31, 1997). In cases where job duties have traditionally
16 been shared by bargaining unit members and persons who are not members of the
17 bargaining unit, the CERB has held that the work at issue is not exclusively bargaining
18 unit work. Higher Education Coordinating Council, 23 MLC 90, 93, SUP-4090
19 (September 17, 1996). In shared work situations, an employer does not have to
20 bargain over every incidental variation in work. Id. Rather, the duty to bargain arises
21 only if there has been a calculated displacement of unit work. Id. Whether there has
22 been a calculated displacement of unit work is determined by examining whether
23 bargaining unit members performed an ascertainable percentage of the work, and the

1 employer has taken action that results in a significant reduction in that percentage, with
2 a corresponding increase in the percentage of the work performed by non-unit
3 personnel. City of New Bedford, 15 MLC 1732, 1737, MUP-6488 (May 31, 1989); City
4 of Boston, 6 MLC 1117, 1126, MUP-2863 (June 4, 1979).

5 When an employer operates multiple facilities and assigns employees to the
6 same position where they perform the same duties at those facilities, the CERB
7 examines the employer's pattern of assignment of those duties at all of the facilities, not
8 just the one where the transfer occurred. City of Boston, 29 MLC 122, 124-125, MUP-
9 2419 (January 15, 2003). Relying on City of Boston, the Hearing Officer determined
10 that AAO work was shared work because the Employer operates eighteen penal
11 facilities and both bargaining unit and non-bargaining unit members performed AAO
12 duties on a system-wide basis. Id. at 124-125. She then examined whether the
13 Employer had altered the pre-existing pattern of shared work between CO's and CPOs
14 and determined that it had not. The Hearing Officer next rejected the Union's
15 alternative argument that, even if the work were shared, the assignment of the
16 contested work to CPOs amounted to an unlawful displacement of unit work. The
17 Hearing Officer determined that the Union could not show that unit members performed
18 an ascertainable percentage of that work for the Employer on a system-wide basis, and
19 that the CPOs experienced a corresponding increase in the work performed. See City
20 of New Bedford, 15 MLC at 1737.

21 The Union takes issue with almost every aspect of the Hearing Officer's
22 analysis. It first claims that the Hearing officer improperly relied on City of Boston, 29
23 MLC 122, and the cases cited therein to determine that the work at issue here was

1 shared work. Although the Union does not quarrel with City of Boston in principle, it
2 argues that because no Unit 4 members are assigned to work at the Pondville
3 Correctional Center (Pondville) or South Middlesex Correctional Center (South
4 Middlesex), bargaining unit members did not have the opportunity to perform AAO
5 duties at those facilities. The Union therefore contends that the Hearing Officer should
6 not have counted those facilities when determining whether the AAO work was shared
7 or exclusive bargaining unit work. We disagree.

8 The City of Boston analysis did not turn on whether bargaining unit members
9 actually worked at all of the employer's facilities where the shared work was performed.
10 Rather, it examined the City's pattern of assigning the shared duties at all of the
11 facilities where the duties were performed. 29 MLC at 124-125. Thus, the proper
12 inquiry under the first element of the transfer of bargaining unit work test focuses on the
13 nature of the functions performed and who performs those duties. Id. at 125 (citing
14 Town of Norwell, 13 MLC 1207-1208, MUP-5644 (October 15, 1986)). Here, the record
15 reflects that, as in City of Boston, AAO duties were performed at multiple facilities,
16 including, at a minimum, SBCC, Pondville, South Middlesex and MCI-Norfolk (Norfolk).³
17 The Hearing Officer therefore properly examined who performed those duties at those
18 facilities before the transfer occurred. Based on stipulations showing that CPOs
19 performed AAO duties at Pondville, South Middlesex and Norfolk, but that Unit 4
20 members performed them at SBCC, the Hearing Officer correctly concluded that AAO
21 duties were shared between Unit 4 and Unit 8 bargaining unit members on a system-
22 wide basis. The Union's arguments provide no basis for us to conclude otherwise.

³ As discussed further below, the record is not clear whether the Employer assigns employees to perform the duties of AAOs at the other fourteen facilities.

1 The remainder of the Union's arguments challenge the Hearing Officer's
2 conclusion that the Union failed to present evidence showing that a) unit members
3 performed an ascertainable percentage of the disputed work on a system-wide basis; or
4 b) CPOs experienced a corresponding increase in the work performed in February
5 2013, when the Employer assigned a Unit 8 CPO to perform the AAO duties that had
6 previously been assigned to a Unit 4 member in February 2013. In this regard, the
7 Union contends that the record shows that, before the transfer at SBCC, MCOFU
8 bargaining unit members performed AAO duties at fifteen facilities and Unit 8 CPOs
9 performed them at three, but after the transfer, MCOFU bargaining unit members
10 performed AAO duties at fourteen facilities and Unit 8 CPOs performed them at four.
11 The Union asserts that this is a change in an ascertainable percentage of the work
12 performed by bargaining unit members, and that the DOC should have bargained
13 before making this change.

14 This argument is flawed for two reasons. First, it is premised on the erroneous
15 assumption that, before the transfer, AAO duties were performed by Unit 4 bargaining
16 unit members at fourteen DOC facilities in addition to SBCC. Implicitly acknowledging
17 that there is no stipulation that directly states this, the Union reasons that because
18 AAOs assist AOs in the performance of AO duties, and the stipulations show that AO's
19 duties at those fourteen facilities were performed exclusively by bargaining unit
20 members, then AAO duties must also be performed by bargaining unit members at
21 those fourteen facilities. We decline to draw this inference where the stipulations: a)
22 otherwise distinguish between individuals serving in an AO, versus an AAO capacity; b)
23 clearly set forth who performed AAO duties at SBCC, Pondville, MCI-Norfolk and

1 Southern Middlesex; but c) are silent as to whom, if anyone, performs those duties at
2 the other fourteen facilities.⁴

3 Second, the record lacks evidence as to how much AAO work was actually
4 performed by either Unit 4 or Unit 8 members either before or after the transfer on a
5 system-wide basis. The most that can be gleaned from the stipulations is that this work
6 is performed "if needed" or "as necessary" at SBCC, Pondville, MCI-Norfolk and
7 Southern Middlesex. Moreover, as discussed above, there is no evidence that any AAO
8 duties were performed at the other 14 facilities, much less evidence showing by whom
9 and how often. The absence of such evidence makes it impossible to ascertain if the
10 percentage of shared work performed by bargaining unit members on a system-wide
11 basis decreased in any significant way, or if the amount of non-bargaining unit work
12 increased, as a result of the transfer of work at SBCC. It also makes it impossible to
13 discern whether there was a change in a pre-existing pattern of shared work. The
14 absence of such information distinguishes this case from those cited by the Union.
15 Instead, the record in this case is comparable to the facts in Town of Saugus, 28 MLC

⁴ Stipulation 21 states:

The DOC operates a total of 18 facilities. At MCI-Norfolk, Pondville Correctional Center and South Middlesex Correctional Center, the duties of Assignment Officer and Assistant Assignment Officer, if needed, are performed by CPOs. No members of bargaining Unit 4 are assigned at Pondville Correctional Center and South Middlesex Correctional Center. At SBCC, the performance of the duties of the Assignment Officer is in dispute. At the remaining 14 facilities where members of bargaining Unit 4 are deployed, the duties of the Assignment Officer are performed exclusively by a member of bargaining Unit 4.

Regarding this stipulation, the Hearing Officer noted that, "The record does not indicate whether the Employer assigned other employees (*i.e., besides CPOs or unit members*) to perform the duties of the [AAO] at the remaining fourteen facilities." (Emphasis added).

1 13, 18, MUP-2343/CAS-3388 (June 15, 2001), and City of Somerville, 23 MLC 256,
 2 259-260, MUP-8160 (May 2, 1997), where the CERB dismissed transfer of bargaining
 3 unit work allegations based on the charging parties' failure to demonstrate that non-
 4 bargaining unit members performed any portion of the shared duties after the transfer.
 5 See also City of Lawrence, MUP-9876 (March 31, 1977) (no unilateral transfer of
 6 bargaining unit work where record did not show the percentage of work performed by
 7 bargaining unit members and prisoners before some of the shared work was reassigned
 8 to welfare recipients and the percentage performed by bargaining unit members after
 9 the reassignment).

Conclusion

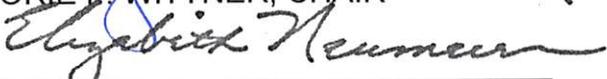
11 For the reasons stated above, the Employer did not violate Section 10(a)(5) and,
 12 derivatively, Section 10(a)(1) of the Law when it transferred AAO job duties at SBCC
 13 away from unit members to non-bargaining unit members on February 4, 2013. We
 14 affirm the dismissal of the complaint.

15 **SO ORDERED.**

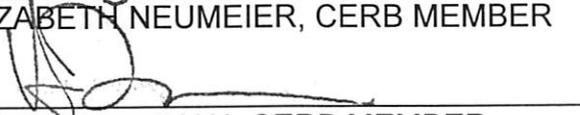
COMMONWEALTH OF MASSACHUSETTS
 COMMONWEALTH EMPLOYMENT RELATIONS BOARD



 MARJORIE F. WITTNER, CHAIR



 ELIZABETH NEUMEIER, CERB MEMBER



 HARRIS FREEMAN, CERB MEMBER

APPEAL RIGHTS

Pursuant to M.G.L. c. 150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of *

*

COMMONWEALTH OF MASSACHUSETTS, *
DEPARTMENT OF CORRECTION *

Case No.: SUP-13-2604

and *

Date Issued: November 25, 2014

*

MASSACHUSETTS CORRECTION *
OFFICERS FEDERATED UNION *

*

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Earl Wilson, Esq. – Representing Commonwealth of
Massachusetts, Department of Correction

Alan McDonald, Esq. – Representing Massachusetts
Correction Officers Federated Union

HEARING OFFICER'S DECISION AND ORDER

SUMMARY

1 The issue is whether the Commonwealth of Massachusetts, Department of
2 Correction (Employer or DOC) violated Section 10(a)(5) and, derivatively, Section
3 10(a)(1) of Massachusetts General Laws Chapter 150E (the Law) by transferring the
4 bargaining unit work associated with the Assistant Assignment Officer position to non-
5 bargaining unit personnel without first giving the Massachusetts Correction Officers
6 Federated Union (Union or MCOFU) prior notice and opportunity to bargain to resolution
7 or impasse about the decision to transfer bargaining unit work to non-bargaining unit

1 personnel and the impact of that decision. Based on the record and for the reasons
2 explained below, I conclude that the DOC did not fail to bargain in good faith with the
3 Union by the transferring bargaining unit work associated with the Assistant Assignment
4 Officer position to non-bargaining unit personnel and thus, did not violate Section
5 10(a)(5) and, derivatively, Section 10(a)(1) of the Law in the manner alleged.

6 STATEMENT OF THE CASE

7
8 On February 6, 2013, MCOFU filed a Charge of Prohibited Practice (Charge)
9 with the Department of Labor Relations (DLR) alleging that the DOC violated Section
10 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. Following an investigation, a
11 duly-designated DLR Investigator issued a Complaint of Prohibited Practice (Complaint)
12 on June 27, 2013, alleging that the DOC had failed to bargain in good faith with MCOFU
13 by transferring unit work to non-unit personnel without first giving the Union notice and
14 an opportunity to bargain over the decision to transfer the unit work and the impacts of
15 the decision. On July 5, 2013, the DOC filed its Answer. On May 30, 2014, the parties
16 filed stipulated facts and exhibits with the DLR in lieu of an evidentiary hearing. On
17 August 8, 2014, the Employer filed its post-hearing brief. On August 11, 2014, the
18 Union filed a Motion to Allow Late Filing of Post-Hearing Brief (Motion), which I granted
19 on the same day. On August 11, 2014, the Union filed its post-hearing brief.

20 STIPULATIONS OF FACT AND EXHIBITS

- 21
- 22 1. The Department of Correction ("DOC" or "Employer") is a public employer within
23 the meaning of Section 1 of G. L. c. 150E ("the Law").
 - 24 2. The Massachusetts Correction Officers Federated Union ("MCOFU" or "Union")
25 is an employee organization within the meaning of Section 1 of the Law.
26
27

- 1 3. The Union is the exclusive bargaining representative for correction officers
2 ("COs"), sergeants, and lieutenants in statewide bargaining Unit 4 who work at
3 various penal facilities in the Commonwealth.
4
- 5 4. Souza-Baranowski Correctional Center ("SBCC"), located in Shirley,
6 Massachusetts, is one of the Employer's penal facilities where members of the
7 Union are employed. The Employer first opened SBCC in 1998.
8
- 9 5. The Superintendent and chief executive officer for SBCC is Bruce Gelb [(Gelb)].
10 Superintendent Gelb is an authorized representative for the Commonwealth
11 under the Law with respect to collective bargaining matters for COs who are
12 employed at that facility and represented by MCOFU.
13
- 14 6. In or about 1998, the Employer assigned Sergeant Ricardo Bennett [(Bennett)], a
15 correction officer II ("CO II") within the MCOFU bargaining unit, to the post of
16 Assignment Officer. Bennett held the Assignment Officer post within the
17 bargaining unit until in or about 2009. During the period that Bennett served as
18 Assignment Officer, from approximately 2000 to 2003, he was sometimes
19 assisted by Judy Columbus [(Columbus)], a Clerk IV in Bargaining Unit 1
20 represented by NAGE, Local 292. Ms. Columbus processed inmate payroll, a
21 function performed by the Assistant Assignment Officer. In performing the payroll
22 function, Columbus was responsible for collecting inmate payroll sheets and
23 faxing those sheets to the Treasurer's office.
24
- 25 7. As the Assignment Officer, Bennett was responsible for assigning inmates to
26 work assignments and to cell assignments.
27
- 28 8. In or about 2009, bargaining unit Sergeant Ronald Raymond [(Raymond)], a CO
29 II, was assigned to the Assignment Officer post. Raymond held the post of
30 Assignment Officer within the bargaining unit until in or about January 2013.
31
- 32 9. In or about 2009, the Employer began "double bunking" inmates at SBCC.
33
- 34 10. The duties of the Assignment Officer, with the respect to the assignment of
35 inmates to cell assignments, increased as a result of the decision to double bunk
36 inmates. Following the commencement of double bunking, the Assignment
37 Officer was required to evaluate certain criteria to determine whether inmates
38 being double bunked were compatible.
39
- 40 11. In or about 2009, at the time the Employer began double bunking inmates at
41 SBCC, the Employer began assigning a bargaining unit CO to assist the
42 Assignment Officer as needed. The CO assigned to assist the Assignment
43 Officer (the "Assistant Assignment Officer") appeared on the daily roster under
44 the "Special Details" section with the notation "Assignments."
45

- 1 12. The Assistant Assignment Officer generally performed the duties previously
2 performed by the Assignment Officer with respect to the assignment of inmates
3 to work assignments.
4
- 5 13. In or about July 2011, the Employer added the position Assignment CO to the
6 daily roster to designate the Assistant Assignment Officer post.
7
- 8 14. From in or about 2009 until January 2013, the duties performed by the Assistant
9 Assignment Officer were completed exclusively by members of the MCOFU
10 bargaining unit. The Employer assigned a CO as the Assistant Assignment
11 Officer, as necessary, from in or about 2009 until January 2013.
12
- 13 15. From in or about 2009, when the Employer first began assigning an Assistant
14 Assignment Officer, until 2011, the Employer predominately assigned CO
15 Heather Gleason [(Gleason)] as the Assistant Assignment Officer. Thereafter,
16 from approximately 2011 to January 2013, the Employer predominately assigned
17 CO David Bolduc [(Bolduc)] as the Assistant Assignment Officer. During the
18 period Gleason served as the Assistant Assignment Officer, the Assistant
19 Assignment Officer began inputting payroll information into a spreadsheet as a
20 part of performing the payroll function. The payroll function comprised no more
21 than 20% of the Assistant Assignment Officer's duties.
22
- 23 16. On February 1, 2013, Brian Jansen [(Jansen)], then President of the Union,
24 emailed Superintendent Gelb, indicating that he learned that the Employer
25 intended to fill the Assistant Assignment Officer post with a Correctional Program
26 Officer. Jansen requested that the DOC cease and desist from such a plan.
27
- 28 17. Correctional Program Officers (CPOs) are not part of Unit 4 but are instead part
29 of Unit 8, represented by the Alliance AFSCME/SEIU, Local 509.
30
- 31 18. On February 1, 2013, Superintendent Gelb replied to Jansen by email, indicating
32 that effective Monday, February 4, 2013 a CPO would be assigned to assist the
33 Assignment Officer. This was the first notice the Union received regarding the
34 proposed change. Gelb indicated that he was acting within his rights under
35 Article 25 of the parties' collective bargaining agreement entitled "Managerial
36 Rights/Productivity."
37
- 38 19. Beginning on February 4, 2013, and continuing to date, a CPO was assigned, as
39 necessary, to provide assistance to the Assignment Officer. Since February of
40 2013 and continuing, no member of Unit 4 has been assigned to assist the
41 Assignment Officer. The assignment of a CPO, as necessary, to assist the
42 Assignment Officer did not result in the reduction of any Unit 4 positions at
43 SBCC.
44

1 20. The CPO assigned to assist the Assignment Officer performs the duties
2 performed exclusively by the Assistant Assignment Officer from in or about 2009
3 until January 2013.

4
5 21. The DOC operates a total of 18 facilities. At MCI-Norfolk, Pondville Correctional
6 Center and South Middlesex Correctional Center, the duties of Assignment
7 Officer and Assistant Assignment Officer, if needed, are performed by CPOs. No
8 members of bargaining Unit 4 are assigned at Pondville Correctional Center and
9 South Middlesex Correctional Center. At SBCC, the performance of the duties of
10 the Assignment Officer is in dispute. At the remaining 14 facilities where
11 members of bargaining Unit 4 are deployed, the duties of the Assignment Officer
12 are performed exclusively by a member of bargaining Unit 4.⁵

13
14 Supplementary Facts⁶

15 **The Collective Bargaining Agreement**

16 On January 25, 2011, the parties entered into a single collective bargaining
17 agreement (Agreement) covering the periods from July 1, 2009 to June 30, 2010 and
18 July 1, 2010 to June 30, 2013. Article 1, Recognition, Section 1 stated, in pertinent part,
19 "The Commonwealth recognizes the Union as the exclusive collective bargaining
20 representative for employees of the Commonwealth in Bargaining Unit 4, as certified by
21 the [DLR] in its certification of representation, Case No. SCR-2216, dated December 22,
22 1994. Article 25, Managerial Rights/Productivity, stated in pertinent part:

23 Section 1.

24 Except as otherwise limited by an express provision of this Agreement, the
25 Employer shall have the right to exercise complete control and discretion
26 over its organization and technology including but not limited to the
27 determination of the standards of services to be provided and standards of
28 productivity and performance of its employees; establish and/or revise
29 personnel evaluation programs; the determination of the methods, means
30 and personnel by which its operations are to be conducted; the
31 determination of the content of job classifications; the appointment,

⁵ The record does not indicate whether the Employer assigned other employees (i.e., besides CPOs or unit members) to perform the duties of the Assistant Assignment Officer position at the remaining 14 facilities.

⁶ The supplemental facts come from the joint exhibits submitted by the parties.

1 promotion, assignment, direction and transfer of personnel; the
 2 suspension, demotion, discharge or any other appropriate action against
 3 its employees; the relief from duty of its employees because of lack of
 4 work or for other legitimate reasons; the establishment of reasonable work
 5 rules; and the taking of all necessary actions to carry its mission in
 6 emergencies.

7
 8 Section 2.

9
 10 Delivery of services to the public in the most efficient, effective, and
 11 productive manner is of paramount importance to the Employer and the
 12 Union. Such achievement is recognized to be a goal of both parties as
 13 they perform their respective roles and meet their responsibilities.

14
 15 Section 3.

16
 17 It is acknowledged that during the negotiations which resulted in this
 18 Agreement, the Union had the unlimited right and opportunity to make
 19 demands and proposals with respect to all proper subjects of collective
 20 bargaining. Therefore, for the life of the Agreement, this Agreement shall
 21 constitute the total Agreement between the parties and the Union agrees
 22 that the Employer shall not be obligated to any additional collective
 23 bargaining.

24
 25 **The Class Specification**

26 Revised in March of 2007, the Commonwealth of Massachusetts, Human
 27 Resources Division issued the Class Specification for the CPO, which described the
 28 position's job characteristics and stated, in pertinent part:

29 Based on assignment, employees in this series provide non-therapeutic
 30 counseling, rehabilitation, or custodial care and treatment to inmates;
 31 perform classification duties; interview inmates; obtain inmate criminal
 32 histories through correspondence with other Law Enforcement
 33 agencies...facilitate, collect and analyze assessment information; counsel
 34 inmates on programming and placement recommendations available in
 35 accordance with established placement criteria and individual needs; and
 36 describe, explain, or answer inquiries regarding institutional rules,
 37 regulations, policies, procedures, programming, custody levels,
 38 classification, and institutional placement...Employees in this series may
 39 work as generalists or be assigned to one of the following specialty areas:

- 40
 41 • Correctional Program Officers (Classification) obtain, review,
 42 analyze and prepare summarized reports of information obtained

1 through inmate records, interviews, personal observation and
2 assessments and court documents; make recommendations
3 regarding inmate placement and programming needs in the
4 Department of Correction; and interact with inmates in housing
5 units and service, work, program and recreation areas.

- 6
- 7 • Correctional Program Officers (Housing Assignment Officer)
8 assigns inmates their units, rooms and beds.
- 9
- 10 • Correctional Program Officers (Job Assignment Officer) assigns
11 inmates to institutional jobs and assures compliance with the
12 community work crew policy.
- 13

14 **The Daily Shift Rosters**

15 On the DOC's October 7, 2010 SBCC daily shift roster, the Employer scheduled
16 approximately 140 employees to approximately 160 possible position assignments on
17 the 7:00 a.m. to 3:00 p.m. shift. Under "Special Details" section on the roster, the
18 Department scheduled Gleason to the "Assignments" position on the 7:00 a.m. to 3:00
19 p.m. shift. On the DOC's August 11, 2011 SBCC daily shift roster, the Employer
20 scheduled Gleason to the "Assignment C.O." position on the 7:00 a.m. to 3:00 p.m.
21 shift.

22 **The E-mail Correspondence**

23 By e-mail on February 1, 2013 at 3:57 p.m., Union President Jansen contacted
24 Superintendent Gelb, stating in pertinent part:

25 It is my understanding that SBCC intends to fill the assistant assignment
26 officer position with a correctional program officer. This position,
27 previously being held by a correction officer. The MCOFU objects to any
28 assignment of a correctional program officer to this correction officer
29 position and would ask that you cease and desist from any such plan
30 immediately.

31
32 By reply e-mail on February 1, 2013 at 4:22 p.m., Superintendent Gelb
33 responded to Jansen, stating in pertinent part:

1 Brian, this assignment that you are referring to was the job assignment,
2 that assisted the assignment officer which is a supt. pick position, which in
3 fact was done by one person for many years. The job assignment post
4 was one that...has never existed in the facilities' FTE formula. It was also
5 a post that was pulled almost on a daily basis. We have not eliminated a
6 C.O. from the roster, he has been reassigned. In order to have a better
7 control of the inmate climate, I have decided to have a CPO assigned
8 there effective Monday, Feb. 4th.

9
10 I believe in accordance with Article 25 of the CBA I am within my rights to
11 do this. I certainly welcome any further discussion.⁷

12 DECISION

13
14 A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) of the Law
15 when it unilaterally changes an existing condition of employment or implements a new
16 condition of employment involving a mandatory subject of bargaining without first giving
17 its employees' exclusive bargaining representative notice and an opportunity to bargain
18 to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations
19 Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations
20 Commission, 388 Mass. 557 (1983). The Law requires a public employer to give the
21 exclusive collective bargaining representative of its employees prior notice and an
22 opportunity to bargain before transferring bargaining unit work to non-bargaining unit
23 personnel. Commonwealth of Massachusetts v. Labor Relations Commission, 60 Mass.
24 App. Ct. 831 (2004).

25
26 The Commonwealth Employment Relations Board (Board) holds that the
27 unilateral transfer of job duties from unit employees to non-unit employees violates an
28 employer's bargaining obligation under Section 10(a)(5) of the Law. Commonwealth of
29 Massachusetts, 35 MLC 105, 108, SUP-04-5054 (Dec. 10, 2008) (citing City of Boston,

⁷ The record contains no evidence of subsequent communication between the parties over this issue.

1 26 MLC 144, 146, MUP-1085 (May 10, 2000), aff'd sub nom., City of Boston v. Labor
2 Relations Commission, 58 Mass. App. Ct. 1102, further rev. den'd, 440 Mass. 1106
3 (2003)); Board of Regents of Higher Education, 19 MLC 1485, 1487-88, SUP-3376
4 (October 23, 1992) (citing City of Quincy, 15 MLC 1239, 1240, MUP-6490 (Nov. 9,
5 1988).

6 To determine whether that a public employer has unlawfully transferred
7 bargaining unit work, the Board looks for evidence that: (1) the employer transferred
8 bargaining unit work to non-unit personnel; (2) the transfer of unit work to non-unit
9 personnel had an adverse impact on individual employees or the unit itself; and (3) the
10 employer failed to give the union prior notice and an opportunity to bargain over the
11 decision to transfer the work. Commonwealth of Massachusetts, 60 Mass. App. Ct. at
12 833; see also Lowell School Committee, 28 MLC 29, 31 (2001); Higher Education
13 Coordinating Council, 23 MLC 90, 92, SUP-4090 (Sept. 17, 1996); City of Gardner, 10
14 MLC 1218, 1219, MUP-4917 (Sept. 14, 1983).

15 **Transfer of Bargaining Unit Work**

16 To establish the first element of its prima facie case for unilateral transfer, the
17 Union must show that the duties of the Assistant Assignment Officer position have been
18 exclusively performed by bargaining unit employees. City of Boston, 29 MLC 122, 124,
19 MUP-2419 (Jan. 15, 2003) (citing Higher Education Coordinating Council, 23 MLC at
20 92)); City of New Bedford, 15 MLC 1732, 1736, MUP-6488 (May 31, 1989). In
21 determining whether the Employer transferred bargaining unit work to non-unit
22 personnel, it is necessary to define the scope of the bargaining unit work. City of
23 Quincy, 15 MLC at 1240. In analyzing what constitutes bargaining unit work, the Board

1 focuses on the nature of the functions performed. City of Boston, 29 MLC at 124-25
2 (citing Town of Norwell, 13 MLC 1200, 1207-08, MUP-5655 (Oct. 15, 1986)). When
3 bargaining unit members and non-unit employees share work, the Board will not
4 recognize the work as belonging exclusively to the bargaining unit. Higher Education
5 Coordinating Council, 23 MLC at 92.

6 Here, the Union argues that the duties of the Assistant Assignment Officer
7 position constitute exclusive bargaining unit work because the DOC exclusively
8 assigned those duties to Unit 4 members between 2009 and 2013. The Employer
9 contends that the duties of the Assistant Assignment Officer position have not been
10 exclusively performed by members of bargaining Unit 4 because, historically, those
11 duties have been shared by non-bargaining members beginning with NAGE Clerk IV
12 Judy Columbus (Columbus) who performed the inmate payroll duties of the Assistant
13 Assignment Officer position between 2000 and 2003. The Employer also contends
14 Assistant Assignment Officer duties have been shared with non-bargaining unit CPOs
15 who perform those duties at the DOC's MCI-Norfolk, Pondville and South Middlesex
16 Correctional Centers. Further, pursuant to their class specification, the Employer
17 asserts that CPOs also perform housing and job duties, when needed.

18 From 1998 until 2000, the duties of the disputed Assistant Assignment Officer
19 position, including collecting and forwarding inmate payroll information, were performed
20 by unit member Bennett whom the Employer assigned as the Assignment Officer. From
21 2000 to 2003, the duties of collecting and forwarding inmate payroll information were
22 shared between Assignment Officer Bennett and Clerk IV Columbus, after the Employer
23 determined that on certain occasions Bennett would need assistance with those tasks.

1 At some point after 2003, the Employer stopped assigning Columbus to assist Bennett
2 at the SBCC, and instructed Bennett to exclusively perform the duties of both his
3 position as Assignment Officer and Columbus' former duties of processing inmate
4 payroll information. Beginning in 2009, the Employer exclusively and consistently
5 assigned members of bargaining Unit 4 to the position of Assistant Assignment Officer.
6 Like Columbus, the Employer assigned these unit members to the Assistant
7 Assignment Officer position, on an-as-needed basis.

8 Although Columbus may have shared the duties of the Assistant Assignment
9 Officer position with bargaining unit member Bennett between 2000 and 2003, the
10 Employer terminated that practice of work-sharing in 2003 when Bennett began
11 performing those duties exclusively, without any assistance, for approximately six
12 consecutive years between 2003 and 2009. Beginning in 2009 and continuing until
13 February 4, 2013, the Employer exclusively assigned unit members to assist Bennett
14 (and later Raymond) as the Assistant Assignment Officer at the SBCC. Between 2009
15 and 2013, those unit members performed the duties of the Assistant Assignment Officer
16 position on an uninterrupted, as-needed basis.

17 While the class specification indicates that the duties of CPOs include housing
18 and job assignments, and CPOs actually perform those duties at the DOC's other
19 facilities, there is no evidence that any CPO ever performed the work of Assistant
20 Assignment Officer at the SBCC facility prior to February 4, 2013. Instead, the
21 stipulated record shows that between 2009 and 2013, the DOC exclusively assigned
22 members of bargaining Unit 4 to perform the duties of Assistant Assignment Officer at
23 the SBCC, even though assignments to that position were made on an as-needed

1 basis. While the staff composition at the SBCC is different from the composition at the
2 DOC's other facilities (especially in terms of where the Employer deploys Unit 4
3 members), the evidence shows that the Employer exclusively deployed bargaining unit
4 members to the Assistant Assignment Officer position at the SBCC for four consecutive
5 years. Thus, I find that the disputed work of the Assistant Assignment Officer position at
6 the SBCC had been exclusively performed by members of the MCOFU bargaining unit.
7 City of New Bedford, 15 MLC at 1736.

8 However, where an employer has multiple facilities and assigns employees to the
9 same position where they perform the same duties at those facilities, the Board will
10 examine the employer's pattern of assignment of those duties at all of the facilities
11 rather than looking only at one facility. City of Boston, 29 MLC at 124-25 (citing Town of
12 Norwell, 13 MLC at 1207-08). When work is shared by bargaining unit members and
13 non-unit employees, the Board has determined that the work will not be recognized as
14 exclusively bargaining unit work. City of Quincy, 15 MLC at 1240; City of Boston, 10
15 MLC 1539, 1541, MUP-4967 (April 24, 1984); City of Boston, 26 MLC at 146. In those
16 cases, the Board focuses on the pre-existing pattern of shared work and the impact that
17 any change in the pattern may have on the bargaining unit. City of Boston, 29 MLC at
18 125 (citing City of Boston, 26 MLC at 147). An employer may not unilaterally alter a
19 pre-existing pattern of shared work. City of Boston, 29 MLC at 125 (citing City of
20 Boston, 28 MLC 194, 195, MUP-2185 (Jan. 4, 2002)).

21 Here, the Employer's pre-existing pattern of assignment shows that it assigns
22 employees to perform the duties of Assignment Officer and/or Assistant Assignment
23 Officer at all of its 18 facilities. At three of those facilities, it exclusively assigns CPOs to

1 perform the duties of both those positions, on an-as needed basis. At one facility (i.e.
2 SBCC), it exclusively assigns unit members to perform the duties of the Assignment
3 Officer position from 1998 to present. At that same facility, it also exclusively assigned
4 unit members to perform the duties of the Assistant Assignment Officer position, on an
5 as-needed basis, for four consecutive years between 2009-2013. At the remaining 14
6 facilities, the Employer only assigns unit members to perform the duties of Assignment
7 Officer.

8 While the Employer exclusively assigned unit members to the perform the duties
9 of Assistant Assignment Officer at the SBCC between 2009 and 2013, its decision to
10 assign CPOs to that position at that facility on February 1, 2013 did not change the pre-
11 existing pattern of how CPOs and unit members shared the work of the Assistant
12 Assignment Officer position at the DOC's remaining 17 facilities. This is because while
13 the Employer only assigned unit members to exclusively perform the duties of the
14 Assistant Assignment Officer position at the SBCC, on an as-needed basis; it
15 contemporaneously and exclusively assigned non-unit members to perform those same
16 duties at the Pondville Correctional Center and South Middlesex Correctional Center.
17 Based on the record, I find that the Union failed to show that the Employer's change in
18 2013 of exclusively assigning CPOs instead of unit members to the position of Assistant
19 Assignment Officer at the SBCC, amounted to anything more than an incidental
20 variation in job assignments between unit and non-unit employees because the
21 disputed work is shared with non-unit members in other facilities at the DOC; thus,
22 obviating the Employer's need to bargain. City of Boston, 29 MLC at 125 (citing Town

1 of Saugus, 28 MLC 13, 17, MUP-2343 and CAS-3388 (June 15, 2001); City of
2 Somerville, 23 MLC 256, 259, MUP-8160 (May 2, 1997)).

3 **Calculated Displacement**

4 In the alternative, the Union argues that even if the AAO's duties were shared
5 work, the Department's decision to transfer those duties on February 4, 2013,
6 constituted a calculated displacement of unit work over which the Department was
7 obligated to bargain because the transfer decreased the work performed by Unit 4
8 members from one to zero, while doubling the amount of work assigned to non-Unit 4
9 members.

10 An employer is required to bargain over a calculated displacement of unit work.
11 City of Boston, 26 at 146 (citing Higher Education Coordinating Council, 23 MLC at 92).
12 If bargaining unit members had performed an ascertainable percentage of work and the
13 employer significantly reduces a portion of that work along with a corresponding
14 increase the same work performed by non-unit employees, such action may
15 demonstrate a calculated displacement unit work. City of Boston, 29 MLC at 125 (citing
16 Commonwealth of Massachusetts, 27 MLC 52, 56, SUP-4091 (Nov. 21, 2000); City of
17 New Bedford, 15 MLC at 1737).

18 However, I do not find any calculated displacement of the work shared between
19 the CPOs and the unit members because even though the number of unit members
20 who exclusively performed the duties of the Assistant Assignment Officer at the SBCC
21 went from one to zero in 2013, and while a corresponding number of CPOs performing
22 that same work went from zero to one at the SBCC during that time, there is no
23 evidence that the unit members performed an ascertainable percentage of that work on

1 a system-wide basis. Instead, between 2009 and 2011, and 2011 to 2013, the
2 Employer assigned unit members Gleason and Bolduc, respectively, to perform the
3 duties of the AAO position at the SBCC, on an exclusive and as-needed basis.
4 Likewise, the Employer also deployed CPOs to exclusively perform the same work at
5 three other facilities, also on an as-needed basis. Thus, while the Employer's February
6 4, 2013 change may have impacted the pre-existing pattern of shared work at the
7 SBCC, it did not impact the pattern on a system-wide basis. City of Boston, 29 MLC at
8 125 (citing Town of Norwell, 13 MLC at 1208). Based on this evidence, I cannot find
9 that the Employer's decision to transfer the job duties of the Assistant Assignment
10 Officer position at the SBCC to employees outside of the bargaining unit on February 4,
11 2013, amounted to an unlawful calculated displacement of unit work over which it was
12 obligated to bargain because the Union cannot show that unit members performed an
13 ascertainable percentage of that work for the Employer on a facility-wide basis or that
14 the CPOs experienced a corresponding increase in the work performed. City of Boston,
15 29 MLC at 125 (citing Commonwealth of Massachusetts, 27 MLC at 56).

16 **CONCLUSION**

17 Based on the record and for the reasons explained above, I conclude that the
18 DOC did not violate section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when
19 it transferred the job duties of Assistant Assignment Officer at the SBCC away from unit
20 members to non-bargaining unit personnel on February 4, 2013. Accordingly, I dismiss
21 the Complaint in its entirety.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

KENDRAH DAVIS, 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.