In the Matter of CITY OF BOSTON

and

AFSCME COUNCIL 93, LOCAL 1526, AFL-CIO

Case No. MUP-04-4077

54.58	*work assignments and conditions*
63.2	*filing a charge or testifying*
67.8	*unilateral change by employer*
82.21	*posting orders*

May 20, 2009
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member

Stephen B. Sutliff, Esq. *Representing the City of Boston*

Jaime Lynn DiPaola-Kenney, Esq. *Representing the AFSCME Council 93, Local 1526, AFL-CIO*

DECISION[1]

Statement of the Case

On March 3, 2004, AFSCME Council 93, Local 1526, AFL-CIO (Union) filed a charge with the former Labor Relations Commission (Commission), alleging that the City of Boston (City) had violated Sections 10(a)(5), 10(a)(4), 10(a)(3), 10(a)(2), and 10(a)(1) of MGL c. 150E (the Law). Following an investigation, the former Commission issued a complaint of prohibited practice and partial dismissal on October 19, 2005, dismissing some allegations and alleging that the City had violated: (Count I) Sections 10(a)(4) and, derivatively, 10(a)(1) of the Law by discriminating against John Kenneally (Kenneally) for participating in proceedings before the former Commission in Case No. MUP-01-2940; and (Count II) Sections 10(a)(5) and, derivatively, 10(a)(1) of the Law by unilaterally changing Kenneally's job duties without giving the Union notice and an opportunity to bargain to resolution or impasse.[2] The City filed its answer to the complaint on November 8, 2005.

On January 5, 2006, Victor Forberger, Esq., a duly-designated Division Hearing Officer (Hearing Officer), conducted a hearing at which all parties had the opportunity to be heard, to examine witnesses, and to introduce evidence.[3] On March 16, 2006, the City filed its post-hearing brief, and the Union filed its post-hearing brief on March 20, 2006. Neither party filed challenges. Accordingly, we adopt the parties' stipulations and the Hearing Officer's Recommended Findings of Fact as set forth below.

Stipulations[4]

The parties agree to the following stipulations of fact.

1. The City is a public employer within the meaning of Section 1 of the Law.

2. The Union is an employee organization within the meaning of Section 1 of the Law.

3. The Union is the exclusive representative for certain employees employed by the City, including principal account clerks in the Boston Public Library (BPL or Library).

4. At all relevant times, Kenneally was employed in the position of principal account clerk at the BPL.

5. At all relevant times, Kenneally was a member of the bargaining unit referred to in paragraph 3, above.

6. On September 12, 2003, the former Commission issued a decision in Case No. MUP-01-2940 in which the former Commission found that the City unilaterally changed Kenneally's job duties by requiring him to make bank deposits of Library monies to a bank outside of the Library.[5]

7. Kenneally participated in the proceedings before the former Commission in Case No. MUP-01-2940.

8. On or about September 22, 2003, the City required a non-bargaining unit member to take Library monies to the bank for deposit.

9. On or about September 22, 2003, the City began to require Kenneally to be present when a non-unit employee counted the bank deposit money in the Library's Accounting Department.

10. Prior to September 22, 2003, neither Kenneally nor any other member of the bargaining unit referred to in paragraph 3, above, performed the job duties referred to in paragraph 9, above.

11. On one occasion subsequent to September 22, 2003, Kenneally's lunch was delayed 39 minutes because the courier was late in arriving. Kenneally was still able to go to lunch prior to 12:30 PM on that day.

12. The Union filed a grievance related to Kenneally's 39-minute delayed lunch, which was ultimately withdrawn by the Union.

13. The parties do not dispute the factual findings in Case No. MUP-01-2940.

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1. Pursuant to 456 CMR 13.02(1) of the former Labor Relations Commission's regulations, this case was designated as one in which the former Labor Relations Commission would issue a decision in the first instance. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." The Commonwealth Employment Relations Board (Board) is the Division agency charged with deciding adjudicatory matters. References to the Division or the Board include the former Labor Relations Commission.

2. The Union did not request reconsideration of the dismissed allegations.

3. At the hearing, the City orally moved to dismiss the complaint. The Hearing Officer took this motion under advisement. For the reasons set forth in this opinion, the motion is DENIED.

4. The Board's jurisdiction is uncontested.

5. This decision is reported as *City of Boston*, 30 MLC 38, 40 (2003).

Findings of Fact

The following facts were derived from the testimonial and documentary evidence introduced during the hearing.

As a principal account clerk in the Library's Accounting Department, Kenneally is responsible for collating the cash and checks from various BPL branches and operations and preparing these cash and checks for deposit in a bank account.[6] After Kenneally initially counts the funds to be deposited and prepares a deposit slip, he places the cash, checks, and deposit slip in the Accounting Department's safe. The funds remain in the safe until deposited in a local bank.

Soon after the Board issued its decision in Case No. MUP-01-2940 on September 12, 2003, the BPL decided to ask for volunteers from non-bargaining unit positions to take on this responsibility. Three individuals from the Library's Cataloging Department offered to undertake this courier work. On September 22, 2003, the City posted the Board's Notice to Employees pursuant to the Board's Order in Case No. MUP-01-2940,[7] and Kenneally's supervisor, Sean Monahan (Monahan), informed Kenneally that a courier, in place of Kenneally, would henceforth transport the monies to be deposited on a daily basis. Monahan further instructed Kenneally that, when the courier arrived to make the deposit, Kenneally should be present and watch the courier while he or she recounted the funds to be deposited.[8]

The City requires the courier to count the monies again with Kenneally present, because the monies are changing hands and the City wants to account for any discrepancies when custody of the monies changes.[9] A June 30, 2000 audit report of the Library's financial operations noted that the BPL's handling of cash receipts was deficient and made numerous recommendations for improvement, including that bank deposits be "made in a more timely manner" and that cash draws be counted more often and by individuals other than the employee who maintains that particular cash draw. Kenneally is concerned that if a discrepancy between his count and the courier's count should arise, he will be blamed for it, as the monies are stored in a safe that is left open and unmonitored at times during the work day.[10] Kenneally is also concerned that he would have to take disciplinary action of some kind regarding a courier who possibly took some of the monies to be deposited. Monahan, however, has instructed the couriers to report any discrepancies in the counts to him to resolve. Nevertheless, if, for some reason Monahan was not at work, the couriers would report the discrepancy to Kenneally. The couriers are unaware that two other managers fill in for Monahan when he is absent and that these managers would assume responsibility on Monahan's behalf for resolving the discrepancy.

For the first year and a half after this new deposit procedure was instituted, Kenneally had to leave his desk to watch the courier recount the monies to be deposited. After the layout of the Accounting Department was changed, the courier performs his or her count at a table that is approximately three feet from the desk where Kenneally works. During his or her count, the courier usually has his or her back to Kenneally, so Kenneally cannot see exactly what the courier is doing. Kenneally's initial count or the courier's count can take just a few minutes or as much as forty or so minutes, depending on the amount to be deposited.

Since the City implemented this new deposit procedure, discrepancies between the count by Kenneally and the courier have occurred on three occasions.[11] In one instance, a discrepancy occurred because the courier mistook an old dime for a penny. The courier and Kenneally corrected the mistake together. In the second, Kenneally was off by approximately $200, because of an addition mistake on the deposit slip he completed. After the courier completed her count, she reported the discrepancy to Monahan and Kenneally. They re-counted the monies and discovered the mistake on the deposit slip. The third discrepancy was for a dollar. Monahan and Kenneally recounted the monies and resolved the discrepancy to their satisfaction.

Opinion

Section 10(a)(4)

We first consider the Union's allegation that the City assigned courier oversight duties to Kenneally because he participated in proceedings before the former Commission in Case No. MUP-01-2940. For the reasons stated below, we dismiss this allegation.

The same elements of proof apply to alleged violations of both Section 10(a)(3) and Section 10(a)(4) of the Law. *Commonwealth of Massachusetts*, 6 MLC 1396, 1400 (1979). First, we determine whether the charging party has established a *prima facie* case of discrimination, by producing evidence to support each of four elements: 1) that the employee engaged in protected activ-

6. Kenneally's job description specifies that he is responsible for receiving and preparing cash and transmittal forms for deposits with banks and City collector-treasurers.

7. The Board's Notice stated that the City: (a) will not unilaterally change Kenneally's job duties; (b) will not in any like manner, interfere with, restrain and coerce any employees in the exercise of their rights guaranteed under the Law; (c) will immediately rescind the requirement that Kenneally take the Boston Public Library's revenue to the bank for deposit; and (d) will provide the Union with prior notice and an opportunity to bargain prior to any proposed change to Kenneally's job duties.

8. Kenneally testified at several points that Monahan's instruction was for Kenneally to watch the couriers count money to make sure they do not steal. It is unclear from Kenneally's several points of testimony on this issue whether Kenneally was referring to what Monahan literally said or what Kenneally understood Monahan's instructions to mean. Because Kenneally's testimony is ambiguous about what was actually said, the Hearing Officer credited Monahan's testimony regarding what he actually said to Kenneally.

9. The record was silent regarding whether the courier deposits Library monies when Kenneally is absent from work or whether another Accounting Department employee, rather than Kenneally, can watch the courier count the monies to be deposited.

10. The safe is open during the Accounting Department's regular hours of operation, Monday through Friday, 9 AM to 5 PM, because several employees, including Kenneally, need daily access to it but do not know the combination. Only three BPL employees know the safe's combination. The record does not contain an instance of monies missing from this safe.

11. The record is silent regarding the date these discrepancies occurred.

ity; 2) that the employer knew of the protected activity; 3) that the employer took adverse action against the employee; and 4) that the employer's conduct was motivated by a desire to penalize or discourage the protected activity. If the charging party establishes a *prima facie* case, the employer may offer evidence of one or more lawful reasons for taking the adverse action. Finally, if the employer produces that evidence, the employee must establish that, "but for the protected activity, the employer would not have taken the adverse action." *Trustees of Forbes Library* v. *Labor Relations Commission*, 384 Mass. 559, 565-566 (1981); *Bristol County*, 26 MLC 105, 109 (2000).

The City knew that Kenneally was the subject of, and participated in, Case No. MUP-01-2940 and thus the Union established the first two elements of the *prima facie* case. The Union encounters greater difficulties with the third element, adverse action. Citing *Sallis* v. *University of Minnesota*, 408 F. 470, 476 (8th Cir. 2005), the Union contends that the additional job duties assigned to Kenneally constitute an adverse action because they represented a departure from what Kenneally had been required to do before the decision issued in Case No. MUP-01-4290. The Union, however, misapprehends the adverse action standard. The Board has consistently defined adverse action as an adverse personnel action, such as a suspension, discharge, involuntary transfer, or reduction in supervisory activity. *City of Holyoke*, 35 MLC 153, 156 (2009) (citing *Town of Dracut*, 25 MLC 131, 133 (1999)). The mere assignment of additional responsibilities, though possibly inconvenient or even undesirable, does not constitute an adverse employment action unless it materially disadvantages the plaintiff in some way. *MacCormack* v. *Boston Edison Co.*, 423 Mass. 652, 662 (1996) (plaintiff failed to [show] adverse action element of a *prima facie* case of unlawful retaliation where there was no evidence that he had been disadvantaged in respect to salary, grade, or other objective terms and conditions of employment). *Accord*, *Sallis* v. *Univ. of Minnesota*, 408 F. 2d at 476 (termination, reduction in pay or benefit, and changes in employment that significantly affect an employee's future career prospects constitute material employment disadvantage but minor changes that merely inconvenience an employee or alter work responsibilities do not). Here, the Union concedes that requiring Kenneally to oversee a courier's recount of bank monies constituted, at most, a change in his work responsibilities. In the absence of a showing of any significant detriment to Kenneally's career, job benefits or salary, we decline to find that the City took adverse action against him. We therefore dismiss Count I of the Complaint.

Count II - 10(a)(5) - Refusal to Bargain

A public employer violates Section 10(a)(5) of the Law when it implements a change in a mandatory subject of bargaining without first providing the employees' exclusive collective bargaining representative with prior notice and an opportunity to bargain to resolution or impasse. *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. *Commonwealth of Massachusetts*, 27 MLC 1, 5 (2000); *City of Gloucester*, 26 MLC 128, 129 (2000); *City of Boston*, 16 MLC 1429, 1434 (1989); *Town of Wilmington*, 9 MLC 1694, 1697 (1983). 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 or an opportunity to bargain. *Commonwealth of Massachusetts*, 20 MLC 1545, 1552 (1984); *City of Boston*, 20 MLC 1603, 1607 (1994).

The parties have stipulated that before September 22, 2003, the City did not require Kenneally or any other bargaining unit member to be present when a non-unit employee counted bank deposit money. The parties further stipulated that on or about September 22, 2003, the City began requiring Kenneally to perform these duties. Workload and job duties are mandatory subjects of bargaining. *Commonwealth of Massachusetts*, 27 MLC 70, 72 (2000); *Town of Danvers*, 3 MLC 1559 (1977). There is also no evidence that the City gave the Union prior notice and an opportunity to bargain before imposing these additional responsibilities. The Union has therefore established the necessary elements of an unlawful unilateral change.

In its defense, the City argues that it was not required to bargain before imposing the duties because they were *de minimis* and were encompassed within Kenneally's job description. We disagree. Kenneally's new duties required him to oversee another employee in a context in which Kenneally could be blamed for discrepancies in cash. There is no evidence that, prior to the change, the City required Kenneally to exercise any type of oversight over employees. Regardless of whether the duties were supervisory, this alone constitutes a material change in Kenneally's duties. In addition, watching the courier count the bank deposits took time out of Kenneally's day that he would otherwise have devoted to his regular work duties. This necessarily impacted Kenneally's workload, a mandatory subject of bargaining. *Chief Justice of Administration and Finance*, slip op. MUP-04-5126 (April 14, 2009) (CJAM unilaterally changed the workload of probation officers and assistant chief probation officers when it assigned each of them to staff the front desk for one half day per week for an eight-week period).

In reaching this conclusion, we note that the City made these changes the very same day that it posted and signed the former Commission's notice in Case No. MUP-01-2940, stating that it would not "unilaterally change John Kenneally's job duties" and would further "provide the Union with prior notice and an opportunity to bargain prior to any proposed change to Kenneally's job duties." Thus, the City's action not only violates Section 10(a)(5) of the Law, but it constitutes a manifest disregard of this agency's remedial authority. *Town of Plymouth*, MUP-02-3551 (February 28, 2006) (Board deemed town's repudiation of agreement settling a prohibited practice charge "egregious" where town repeated the same behavior towards the same individual that had caused union to file the original charge).

Conclusion

Based on the record before us, we conclude that the City did not violate Section 10(a)(4) of the Law when it assigned additional duties to Kenneally. We also conclude, however, that the City vio-

lated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally assigning Kenneally to oversee a non-unit employee count bank deposit money in the Library's Accounting Department.

Remedy

There are several issues to address on remedy. First, the traditional remedy for an unlawful unilateral change is restoration of the *status quo ante*, including a make-whole remedy for affected employees, where appropriate. *Massachusetts Board of Regents of Higher Education*, 14 MLC 1459, 1486 (1988). There is no evidence that Kenneally lost wages because of the increase in his workload or job duties and as a result, we do not order a make-whole remedy. *Commonwealth of Massachusetts*, 26 MLC 165, 169 (2000)(declining to order make-whole remedy as too speculative).

We nevertheless take this opportunity to clarify that, in this case and henceforth, the Board's order that respondents post notices "in places where notices to employees are usually posted" shall include electronic postings via a respondent's internal e-mail or intranet system in workplaces where employers customarily communicate to employees via e-mail or intranet.[12] Requiring respondents to post both hard and electronic copies of Board notices reflects the realities of the 21st century workplace, especially in places like libraries where computers are integral and prevalent. Questions as to whether particular respondents customarily communicate with their employees via intranet or e-mail can be addressed either as part of the Board's evidentiary hearing or as part of a compliance proceeding. *Nordstrom, Inc.* , 347 NLRB 294 (2006) (Liebman, Member, dissenting) (seeking to modify standard notice-posting language to require intranet posting when a respondent customarily communicates to employee via intranet and leaving for compliance whether or not respondent customarily communicates in this manner).

Finally, although we have found that the City, by assigning new duties to Kenneally, violated the terms of the Board's order in Case No. MUP-01-2940, the Union did not opt to seek enforcement of that order pursuant to former Rule 456 CMR 16.08 (Compliance with Enforcement of Commission Orders). We are therefore constrained from ordering the City to comply with former Commission or Board orders as part of the remedy in this case. We nevertheless remind the parties that the Board has a strong interest in ensuring that parties comply with its orders promptly, completely, and in good faith. *Town of Dennis*, 30 MLC 119, 120 (2004). We further note that under Section 11(i) of the Law, the Board has the authority to institute appropriate proceedings in the appeals court for enforcement of its final orders.

Order

WHEREFORE, based upon the foregoing, it is hereby ordered that the City shall:

1) Cease and desist from:

a) Unilaterally changing Kenneally's job duties

b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed under the Law.

2) Take the following affirmative action that will effectuate the purposes of the Law:

a) Immediately rescind the requirement that Kenneally be present when employees count bank deposit money in the Library's Accounting department.

b) Provide the Union with prior notice of any proposed change in Kenneally's job duties and, upon request, bargain in good faith to resolution or impasse before implementing any changes to Kenneally's job duties.

c) Post in all conspicuous places where its employees represented by the Union usually congregate, or where notices are usually posted, including, but not limited to, the City's internal e-mail system, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

d) Notify the Division in writing of the steps taken to comply with this decision within ten days of receipt of the decision.

SO ORDERED.

THE COMMONWEALTH OF MASSACHUSETTS
DIVISON OF LABOR RELATIONS

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE MASSACHUSETTS DIVISION OF LABOR RELATIONS

AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Massachusetts Division of Labor Relations, Commonwealth Employment Relations Board (Board) has held that the City of Boston violated Section 10(a)(5), and, derivatively Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by unilaterally changing the job duties and work load of John Kenneally, a member of the bargaining unit represented by AFSCME, Council 93, AFL-CIO (Union) without providing the Union with notice and an opportunity to bargain.

The City posts this Notice to Employees in compliance with the Board's order.

WE WILL NOT unilaterally change John Kenneally's workload job duties.

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

12. We take administrative notice of the findings of fact in *City of Boston*, 32 MLC 173, 175 (2006), which reflect that the Boston Public Library has an internal e-mail system with which it communicates with employees.

WE WILL take the following affirmative action that will effectuate the purposes of the Law:

> 1) Immediately rescind the requirement that John Kenneally be present when employees count the bank deposit money in the Library's Accounting department.
>
> 2) Upon request, provide the Union with prior notice and an opportunity to bargain prior to any proposed change to John Kenneally's job duties.

[signed]
City of Boston

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 of Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).

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In the Matter of CITY OF BOSTON, BOSTON PUBLIC LIBRARY

and

PROFESSIONAL STAFF ASSOCIATION, CWA LOCAL 1333, AFL-CIO

Case No. CAS-08-3727

23. *Contract Bar*
45.1 *contract bar*
92.47 *motion to dismiss*

May 21, 2009
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member

Samantha E. Doepkin, Esq. *Representing the City of Boston, Boston Public Library*

Indira Talwani, Esq. *Representing the Professional Staff Association, CWA Local 1333, AFL-CIO*

RULING ON MOTION TO DISMISS

On May 7, 2008, the Professional Staff Association, CWA Local 1333, AFL-CIO (Union) filed a petition with the Division of Labor Relations (Division) seeking to clarify whether certain positions should be accreted into the Union's existing bargaining unit. On October 6, 2008, the City of Boston, Boston Public Library (City) filed a Motion to Dismiss the petition. On October 10, 2008, the Union filed its opposition to the City's Motion. For the reasons discussed below, the City's motion to dismiss is denied.

The City and the Union were parties to a series of collective bargaining agreements, the first of which was effective January 1, 1973 - June 30, 1975. Since then, the parties have negotiated successor agreements. On September 15, 2004, the parties entered into a collective bargaining agreement which expired on September 30, 2006 (2004 - 2006 agreement). The parties did not enter into a subsequent collective bargaining agreement until June 12, 2008, which retroactively covers the period from September 1, 2007 through August 31, 2010 (2007 - 2010 agreement). The recognition clause, designated as "Article I" in all of the agreements, has not changed since 1973.

Article I, *Persons Covered by this Agreement*, states:

> The City recognizes the Association as the exclusive representative, for the purpose of collective bargaining relative to wages, hours and other conditions of employment, of all employees in grades P-1 through P-4, all employees in grades LA-10, M-10 and C-10, but excluding personnel officers and all other employees.

In dispute are five positions, which the Union argues were created by the City after the parties entered into their 2004 - 2006 agreement: (1) Quality Services Manager, created on November of 2004; (2) Coordinator of Services to Libraries, created on January of 2005; (3) Manager of Digital Services, created on May of 2005; (4) Digital Imaging Production Manager, created on August of 2005; and, (5) Assistant Neighborhood Services Manager, created on April of 2007.

CITY'S CONTENTIONS

The City contends that the Division should dismiss the Union's petition because it violates the Division's contract bar rule under 456 CMR 14.06. The City states that the petitioner's filing date on May 7, 2008, was filed "nearly 800 days prior to the expiration date of the parties' current collective bargaining agreement." The City states further that the Union cannot establish good cause for the Division to grant an exception to the contract bar rule. The City also contends that the disputed positions have existed for years and were last revised in 2004, 2005, and 2007. The City asserts that the job descriptions, duties and responsibilities for the disputed positions have not been substantially altered since their creation and original posting. Last, the City contends that the Union's petition is not vital to the stability of employer-employee relations because the petitioner "would have raised it during the two-year long collective bargaining negotiations completed on June 12, 2008." The City does not dispute that it was aware of the pendency of the petition on June 8, 2008 when it executed the 2007 - 2010 agreement.

UNION'S CONTENTIONS

A. Contract Bar

The Union argues that the City's motion to dismiss seeks to impose a retroactive contract bar based on a contract that was not entered into until June 12, 2008. Thus, the Union contends that the contract bar does not apply because its petition was filed on May 7,