

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of

CITY OF NEW BEDFORD

and

AFSCME, COUNCIL 93

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Case No. MUP-09-5582

Date Issued:

March 21, 2012

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Hearing Officer:

Kerry Bonner, Esq.

Appearances:

Jane Medeiros Friedman, Esq. - Representing the City of New Bedford

Joseph L. DeLorey, Esq. - Representing AFSCME, Council 93

HEARING OFFICER'S DECISION AND ORDER

SUMMARY

This case presents the following issues: whether the City of New Bedford (City or Employer) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by 1) implementing a layoff of a bargaining unit member without giving AFSCME, Council 93 (Union) prior notice and an opportunity to bargain over the decision to achieve a reduction in force by layoffs and the impacts of the decision; and 2) by unlawfully transferring bargaining unit work to non-unit personnel. I find that the City violated the Law by 1) implementing a layoff of a bargaining unit member without giving the Union prior notice and an opportunity to

1 bargain over the impacts of the decision to achieve a reduction in force by layoffs, and  
2 2) unlawfully transferring bargaining unit work to non-unit personnel. I also find that the  
3 Union waived its right to bargain over the City's decision to achieve a reduction in force  
4 by means of a layoff and dismiss that portion of the complaint.

5 STATEMENT OF THE CASE

6 On August 10, 2009, the Union filed a two-count charge with the Division of  
7 Labor Relations,<sup>1</sup> alleging that bargaining unit member Jeanine Walker was laid off and  
8 the City transferred her duties and responsibilities to non-bargaining unit employees  
9 without giving the Union notice or an opportunity to bargain over the decision to transfer  
10 the work and the impacts of the decision. The DLR docketed the charge as MUP-09-  
11 5582. On October 9, 2009, a DLR investigator held an in-person investigation and on  
12 October 30, 2009, she issued a two-count complaint, alleging that the City violated  
13 Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by: 1) implementing a  
14 layoff of a bargaining unit member without giving the Union prior notice and an  
15 opportunity to bargain over the decision to achieve a reduction in force by layoffs and  
16 the impacts of the decision; and 2) by unlawfully transferring bargaining unit work to  
17 non-unit personnel. The City filed an answer to the complaint on November 12, 2009.  
18 Erica Crystal conducted a hearing on March 18, 2010 at which both parties had the  
19 opportunity to be heard, to examine witnesses and to introduce evidence.<sup>2</sup> On April 13,

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<sup>1</sup> Pursuant to Chapter 3 of the Acts of 2011, the Division of Labor Relations' name is now the Department of Labor Relations (DLR).

<sup>2</sup> Following the hearing, Erica Crystal was promoted to the DLR's Chief Counsel and in January 2012, she was promoted to Director of the DLR. In light of these changes, on January 23, 2012, counsel for both parties agreed to allow me to review the hearing record and render a decision in this case, rather than Ms. Crystal.

2010, the City filed a Motion to Re-Open the Record (Motion), seeking to submit a letter from the City to the Union. Hearing Officer Crystal denied the Motion on May 5, 2010. The City and Union filed timely post-hearing briefs. On the entire record, I make the following findings of fact and render the following opinion.

### STIPULATIONS

1. The City of New Bedford 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 bargaining representative for all non-professional employees of the City, including clerical and blue collar employees.
4. Jeanine Walker (Walker) was employed by the City in the position of temporary Clerk Typist for the New Bedford Police Department (Department) from December 7, 1998 through February 13, 2009.
5. On January 28, 2009, the City was advised that the Governor had exercised his authority pursuant to M.G.L. c. 29, Section 9C and due to an overestimate of State revenues, the City would be receiving a reduction in non-school State Aid for the 2009 fiscal year, in the amount of \$2,789,923.00.
6. Upon receiving notice of the 9C cuts, the City had five months remaining in the fiscal year in which to address the resulting budget shortfall. In order to address the FY09 budget shortfall, the City was forced to implement cost saving measures that included the elimination of 176 positions during the second half of the 2009 fiscal year, including the temporary position Walker held.
7. Walker was laid off from her temporary position on February 13, 2009, due to the lack of funds resulting from the 9C cuts.
8. During her tenure with the Department, Walker was assigned to the Third District Court to assist the two Police Officers who are assigned to the Third District Court as Court Liaisons.

1                                    RELEVANT CONTRACT LANGUAGE

2            The Union and City are parties to a collective bargaining agreement effective July  
3    1, 2006 through June 30, 2009 (Agreement). Article XXV, the Management Rights  
4    clause, of the Agreement provides in relevant part:

5            Except as otherwise provided in this Agreement, the City retains all right  
6    [sic] of management, including the right to direct employees, to hire,  
7    classify, promote, train, transfer, assign and retain employees and to  
8    suspend, demote, discharge or take other disciplinary action against  
9    employees for just cause; to relieve employees from duty because of lack  
10   of work, lack of funds, or causes beyond the City's control; to provide  
11   uniforms and equipment when required, to determine organization and  
12   budget, to maintain the efficiency of the operations entrusted to the City  
13   and to determine the methods, technology, means and personnel by  
14   which such operations are to be conducted, including contracting and  
15   subcontracting; similarly, to take whatever action may be necessary  
16   regardless of prior commitments to carry out the responsibilities of the City  
17   in an emergency or any unforeseen combination of circumstances which  
18   calls for immediate action. The City and its management officials have the  
19   right to make reasonable rules and regulations pertaining to employees  
20   consistent with this Agreement. The City agrees, however, pursuant to  
21   the above, that whenever it wishes to transfer an employee from a position  
22   identified under Unit C of said plan, it will notify the Union at least thirty  
23   (30) days before such a transfer is planned to take place.

24                                    ...  
25

26                                    FINDINGS OF FACT  
27

28    The Temporary Clerk Typist Position

29            The City first established the temporary Clerk Typist position in the Third District  
30    Court in the mid-1990s to assist the Court Liaison Officers with clerical duties. Prior to  
31    that time, police officers exclusively performed the court liaison work, including the  
32    clerical duties. The Court Liaison Officers are not members of the same bargaining unit  
33    as the temporary Clerk Typist.

1 Walker's duties included work that she performed exclusively and work that she  
2 shared with the Court Liaison Officers.<sup>3</sup> Duties that Walker occasionally shared  
3 included: notifying officers of court appearances;<sup>4</sup> notifying officers' of cancelled court  
4 appearances; confirming court appearances with officers; and notifying the Evidence  
5 Officer that evidence<sup>5</sup> should be available on the date of a trial or hearing. Walker  
6 predominantly performed these duties and they made up approximately 65-70% of her  
7 job.<sup>6</sup> When Walker was not available, the Court Liaison Officers would perform these  
8 duties. Both Walker and the Court Liaison Officers printed officer citation narratives for  
9 traffic citation hearings, printed reports for the DA, probation and clerk's offices, and  
10 obtained traffic accident reports from the headquarters' record room for hearings.  
11 Although both Walker and the Court Liaison Officers had access to information  
12 regarding when officers would be unavailable for court because of vacation or officer  
13 training, Walker was responsible for receiving and maintaining this information to

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<sup>3</sup> Typically, there were two Court Liaison Officers assigned to the Third District Court. However, in approximately late 2007, one of the officers took a leave of absence. Detective Carol O'Shea (O'Shea) remained as the only Court Liaison Officer from that point until Walker's layoff in 2009.

<sup>4</sup> Although the complaint alleges that Walker scheduled court appearances, Walker received the schedule of appearances from the District Attorney's (DA) office and then notified the officers of such appearances or notified the DA's office if the officer was unavailable for the court appearance because of vacation or training.

<sup>5</sup> Such evidence would include drugs, laboratory drug certifications, rape kits, and weapons.

<sup>6</sup> While Walker testified that these duties were approximately 65-70% of her job, Lt. Richard Rezendes (Rezendes), a former Court Liaison Officer, testified that Walker performed these duties approximately one to three hours per day. I credit Walker's testimony because Rezendes had not been in the Court Liaison Officer position at the Third District Court since July 2007.

1 determine officer availability.<sup>7</sup> One morning per week for two to three hours, Walker  
2 printed driver histories for use at citation hearings for the week, but the Court Liaison  
3 Officers never performed this duty.

4 Walker's Layoff

5 After receiving notice of the 9C cuts, Mayor Scott Lang (Mayor Lang) sent a letter  
6 to all City unions on January 29, 2009, in which he proposed several measures to  
7 address the budget shortfall and avoid layoffs. Mayor Lang stated:

8 Effective January 28, 2009, the State has reduced New Bedford's local aid  
9 by \$2,789,923.00 for the remaining 21 weeks of the fiscal year. City  
10 government must cut \$139,496.00 per week between now and June 30,  
11 2009.

12  
13 Ordinarily, a local government would meet this type of budget shortfall by  
14 calculating the number of employees to lay off. In this particular case, a  
15 massive number of layoffs would be necessary. I don't believe, however,  
16 that these are ordinary times. Our country is in the midst of an economic  
17 crisis that we have not experienced in three-quarters of a century. Every  
18 sector of our economy is experiencing potentially catastrophic stress. The  
19 United States' economy is hemorrhaging jobs at a rate of over 500,000  
20 per month. New Bedford is following this national trend and the City's  
21 unemployment rate is steadily climbing. Layoffs in this economic  
22 environment, whether in the public or private sector, are devastating to  
23 employees, their spouses or significant others, and their children. As we  
24 know, the loss of a job can negatively affect individuals and their families  
25 for their entire lives. Let's try to preserve our workforce by acting together  
26 for the greater good.

27  
28 With your commitment, I would like to propose an innovative solution to  
29 resolving our budget shortfall. To avoid hundreds of layoffs, I am  
30 proposing several measures in response to the state cuts in local aid. The  
31 following combination of cost-saving measures will amount to  
32 \$2,770,046.00 in budgetary reductions over the next 5 months.  
33

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<sup>7</sup> The complaint also alleges that Walker was responsible for releasing officers after a hearing. However, the testimony shows that this was the Court Liaison Officers' responsibility, although Walker would notify officers that a case was over when the Court Liaison officers were not available.

1 The proposed reductions for February 1, 2009 through June 30, 2009 are  
2 as follows:

3  
4 A ten (10%) percent reduction in the base salary of every  
5 city employee across the board. Three and one-half (3.5)  
6 payless holidays, i.e., Presidents' Day, Patriot's Day,  
7 Memorial Day and the one-half holiday on Good Friday.  
8 Flexibility to control overtime costs for police and fire in daily  
9 non-emergency situations only.

10  
11 ***Action for Fiscal Year 2010***

12  
13 The state has reduced New Bedford's FY 2010 local aid allocation by  
14 \$8,173,602.00. I intend to work with all employee unions to again  
15 maintain full employment. This will require a combination of the 10%  
16 reduction in base salary for the year, as well as seven (7) payless  
17 holidays, to be determined. In addition, continued flexibility regarding  
18 police and fire overtime will be required.

19  
20 In an attempt to preserve all of our employees' positions, there are several  
21 other measures the City will take, among these are:

- 22  
23 • A salary freeze effective July 1, 2009  
24 Limit on all non-public safety overtime  
25 Bi-weekly payroll periods; Requiring direct deposit  
26 • Hiring freeze for all but essential personnel positions  
27 Consolidation of several departments in order to pool resources  
28 and efficiencies  
29 Assimilating some school department functions to City departments  
30 Merging 911 public safety call services and proposing New Bedford  
31 as a regional site for Emergency Dispatching Services  
32 Proposing New Bedford as a regional provider for Veterans'  
33 Services  
34 • Participation in all regionalization efforts in Southeastern  
35 Massachusetts  
36 • Merging EMS and the Fire Department to better serve our citizens  
37 • Continuing to monitor the cost of our health care plan with our  
38 Section 19 Committee  
39 • Working with the New Bedford Retirement Board and the State to  
40 arrive at an appropriate pension contribution actuarial table  
41 regarding City payments to the New Bedford Retirement Plan  
42 Elimination of the use of city vehicles to and from work, except for  
43 approved police and firefighter personnel  
44 Reduction in hours for some personnel as a last resort  
45 Implement energy efficient measures to cut utility expenses, as well  
46 as possible energy utilization

1 These cost-saving measures are necessary to balance the Fiscal Year  
2 budgets of 2009 and 2010 over the next 17 months. I am receptive to any  
3 other suggestions or bold ideas to keep our government fully functional.  
4 As the state's cuts have already taken effect, immediate action is  
5 necessary. I ask that each of you consult with your elected union  
6 representatives, fellow brothers and sisters, and families regarding how  
7 we resolve this challenge to New Bedford's stability.

8  
9 I respectfully ask that you participate and accept the collective sacrifice  
10 that is required to keep our employee team intact and provide the critical  
11 services that our fellow residents deserve and require. Employment with  
12 the City should be thought of as a long-term commitment and lifetime  
13 career; short-term hurdles should not waylay our employees' lives or the  
14 tremendous potential that exists for our City and its citizens.

15  
16 If history is a lesson, our economy will recover. If we sacrifice for the  
17 greater good at this time, we will preserve our City's capacity to participate  
18 in the country's and state's economic revival. Upon our recovery, I am  
19 sure that your efforts will be rewarded.

20  
21 I am hopeful that Gov. Patrick's Municipal Partnership Act may ease the  
22 severity of the diminished funding and that the President's Economic  
23 Stimulus Package will provide opportunities to the City. If so, we will make  
24 every attempt to ease up on these reductions.

25  
26 There is no doubt that accepting reductions across the board will cause  
27 collective hardships, but such action will save hundreds of jobs for our  
28 fellow workers. Restructuring our budget will make us all part of an effort  
29 that is far greater than preserving our own specific self-interest. Shared  
30 sacrifice for this period of time can help strengthen our community spirit  
31 and act as an example for future generations. At this time, this cut is a  
32 matter of dollars and cents, but in the long-term, how we confront the  
33 economic challenges before our City will be a defining moment for New  
34 Bedford.

35  
36 The Union did not accept Mayor Lang's proposal or offer a counterproposal. At  
37 some point one to three days prior to February 13, 2009, Mayor Lang met with the  
38 Union.<sup>8</sup> Angela Natho (Natho), the City's Personnel Director, also attended the meeting

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<sup>8</sup> The witnesses at the hearing were not able to provide the exact date of this meeting. Based on the testimony, I find that the meeting occurred one to three days before Walker's layoff on February 13, 2009.



1 on behalf of the City. Mark Messier (Messier), President of the Union's Local 851, and  
2 Michael Medeiros (Medeiros), Union Staff Representative, attended the meeting on  
3 behalf of the Union. At this meeting, the City notified the Union of upcoming layoffs, but  
4 did not offer to bargain over the decision to lay off the employees.<sup>9</sup> The City provided  
5 two letters to the Union in connection with the layoff, the first of which only identified the  
6 department, title, and civil service status of the selected employees. A few days later, in  
7 response to a request by the Union, the City provided a letter that identified the names  
8 of the employees that were selected for layoff. Both letters were provided to the Union  
9 at or very shortly after the February meeting with Mayor Lang.<sup>10</sup> By letter dated  
10 February 13, 2009, the City notified Walker of her layoff.

11 No bargaining unit members assisted the Court Liaison Officers with clerical  
12 duties at the Third District Court following Walker's layoff. In May 2009, the Union  
13 learned that non-unit personnel, specifically O'Shea and Sergeant Pam Melo (Melo),  
14 were performing Walker's former job duties.

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<sup>9</sup> The City claims that the employees selected for layoff were only "contemplated" at the time it provided notice to the Union. However, Natho testified that by the time the City identified Walker for layoff, it was "relatively certain" it would have to lay her off because she was a temporary civil service employee, and temporary employees must be laid off before permanent employees. Natho also testified that the City offered to bargain the impacts of the layoff, but Messier testified that the City did not offer to bargain over the impacts. Because I find that the layoff notice was a fait accompli, as further explained below, I do not need to resolve this conflicting testimony.

<sup>10</sup> Natho denied that either letter was provided at the meeting with Mayor Lang, although Medeiros testified that the letter identifying Walker and others as being selected for layoff was provided at the meeting with the mayor. Neither letter was entered into evidence, nor could any of the witnesses specifically recall the dates of the letters. Therefore, I find that both letters were provided to the Union at or very shortly after the February meeting with Mayor Lang.

## 1. The Layoff

It is well-established that a public employer must bargain over the decision to  
 ve a reduction in force through a layoff. School Committee of Newton v. Labor  
Relations Commission, 388 Mass. 557 (1983); Boston School Committee, 10 MLC 1501  
 ). If the parties agree that the employer will achieve the reduction in force through  
 s, this triggers further bargaining responsibilities over the impacts of such a  
 on, such as the timing of the layoff and the identity of the employees to lay off. Id.

10

1 Relations Board<sup>11</sup> reviews the parties' bargaining history to determine their intent. Town  
2 of Marblehead, 12 MLC 1667, 1670 (1986).

3 Applying these principles to the contract clause at issue here, I conclude that the  
4 language of Article XXV, which provides the employer the right to relieve employees  
5 from duty because of a lack of funds, is not ambiguous. Rather, it constitutes a clear  
6 and unmistakable waiver of the right to bargain over a layoff decision when a reduction  
7 in force is caused by a lack of funds. The Union offered no bargaining history to  
8 contradict the express language of Article XXV. In addition, there is no dispute that  
9 the layoff at issue here resulted from a lack of funds. Therefore, I find that the Union  
10 contractually waived its right to bargain over the City's decision to achieve a reduction in  
11 force by layoffs and dismiss this portion of the Complaint.

12 b. The Union Did Not Waive by Inaction Its Right to Bargain Over the Impacts of  
13 the Layoff.  
14

15 Although the Union waived its right to bargain over the layoff decision, the  
16 Agreement does not waive the Union's right to bargain over the impacts because it does  
17 not contain language addressing the impacts of a layoff. The City, however, argues that  
18 the Union waived its right to bargain over the impacts of the layoff because it did not  
19 respond to the City's offer to do so. Where a public employer asserts the affirmative  
20 defense of waiver by inaction, it bears the burden of proving by a preponderance of the  
21 evidence that a union had: 1) actual knowledge or notice of the impending change; 2) a  
22 reasonable opportunity to negotiate prior to the employer's implementation of the  
23 change; and 3) unreasonably or inexplicably failed to demand to bargain. School

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<sup>11</sup> The Commonwealth Employment Relations Board (Board) is the body within the DLR charged with deciding adjudicatory matters. References in this decision to the Board include the former Labor Relations Commission.

1 Committee of Newton v. Labor Relations Commission, 388 Mass. at 578; City of  
2 Cambridge, 23 MLC 28, 37-38 (1996) aff'd sub nom., Cambridge Police Superior  
3 Officers Association & another v. Labor Relations Commission, 47 Mass. App. Ct. 1108  
4 (1999). The Board will not apply the doctrine of waiver by inaction where the union is  
5 presented with a fait accompli, where, "under all the attendant circumstances, it can be  
6 said that the employer's conduct has progressed to a point that a demand to bargain  
7 would be fruitless." Town of Hudson, 25 MLC 143, 148 (1999); Holliston School  
8 Committee, 23 MLC 211, 212-13 (1997), quoting Scituate School Committee, 9 MLC  
9 1010, 1012 (1982); City of Everett, 2 MLC 1471 (1976).

10 The City argues that it did not present the Union with a fait accompli because  
11 Mayor Lang proposed other cost saving measures in order to avoid layoffs on January  
12 29, 2009, which the Union rejected. According to the City, this was notice to the Union  
13 that the City was contemplating layoffs. It further argues that it offered to bargain the  
14 impacts of the layoffs when it provided the Union with the list of layoffs, but that the  
15 Union made no effort to bargain. Here, even if the City offered to bargain over the  
16 impacts of the layoffs when it provided notice, I find that it did not provide the Union with  
17 a reasonable opportunity to negotiate prior to implementation, as it did not provide  
18 notice until one to three days before Walker's February 13, 2009 layoff. See Town of  
19 Hudson, 25 MLC at 148 (the information that an employer conveys to a Union must be  
20 received far enough in advance to allow effective bargaining to occur). Further, despite  
21 the City's claim that the employees to be laid off were only "contemplated" when it gave  
22 notice to the Union, in fact the City had already decided that it must lay off Walker

1 because of her temporary civil service status. A demand to bargain at that point would  
2 have been fruitless.

3 I also find that the City's January 29, 2009 proposal of measures to avoid layoffs  
4 does not constitute adequate notice of the layoff. The City sent the letter to all of its  
5 unions, but it does not include any details of a potential layoff, or of how such a layoff  
6 may affect the Union's members specifically, if at all. See Boston School Committee, 4  
7 MLC 1912, 1915 (1978) (notice must be sufficiently clear for the union to form an  
8 appropriate response). Therefore, the City presented the Union with a fait accompli  
9 when it notified the Union of the upcoming layoff one to three days prior to Walker's  
10 layoff, and the Union had no obligation to attempt to bargain over the impacts of the  
11 layoff.

12 2. Transfer of Bargaining Unit Work

13 An employer must bargain with the exclusive representative of its employees  
14 before transferring work that traditionally has been performed by bargaining unit  
15 employees to non-unit personnel. City of New Bedford, 15 MLC 1732, 1736 (1989).  
16 To determine whether an employer has unlawfully transferred bargaining unit work, the  
17 Board considers the following factors: 1) whether the employer transferred bargaining  
18 unit work to non-unit personnel; 2) whether the transfer of unit work to non-unit  
19 employees has an adverse impact on either individual employees or the unit itself; and  
20 3) whether the employer gave the bargaining representative prior notice and an  
21 opportunity to bargain over the decision to transfer the work. Commonwealth of  
22 Massachusetts, 27 MLC 52, 55 (2000), aff'd sub nom., Commonwealth of  
23 Massachusetts v. Labor Relations Commission, 60 Mass. App. Ct. 831, 833 (2004).

1       Where job duties have traditionally been shared by bargaining unit members and  
2 non-unit employees, the Board has held that the work in question will not be recognized  
3 as exclusively bargaining unit work. City of Quincy/Quincy City Hospital, 15 MLC 1239  
4 (1988). In shared work situations, bargaining must occur where there is a "calculated  
5 displacement" of bargaining unit work or where the employer unilaterally changed a  
6 previously existing pattern of shared work. City of Boston, 10 MLC 1539, 1541 (1984);  
7 City of Quincy, 15 MLC at 1241. In determining whether there has been a calculated  
8 displacement of unit work, the Board considers whether unit members have traditionally  
9 performed an ascertainable percentage of the work and whether the employer has  
10 taken action that results in a significant reduction of that percentage, with a  
11 corresponding increase in the percentage of the work performed by non-unit personnel.  
12 City of Newton, 35 MLC 142, 146 (2008).

13       Here, the City does not dispute that it transferred Walker's duties to non-unit  
14 personnel, but contends that it was shared work and therefore not bargaining unit work.  
15 However, the record shows that Walker performed certain duties exclusively, such as  
16 printing driver histories for citation hearings and maintaining officers' vacation and  
17 training schedules. Moreover, the Court Liaison Officers performed many of the duties  
18 only in Walker's absence, such as notifying officers of court appearances, cancelling  
19 and confirming court appearances with officers, and notifying the Evidence Officer that  
20 evidence should be available on the date of a trial or hearing. Once Walker was laid off,  
21 non-unit personnel performed all of Walker's duties. Because a unit member no longer  
22 performs Walker's exclusive job duties, or the shared job duties, there was a significant  
23 reduction in unit work. Further, there was a corresponding increase in non-unit work

1 because the Court Liaison Officers now exclusively perform Walker's duties, as well as  
2 the shared duties. Accordingly, I find that the Union has established the first element of  
3 its transfer of bargaining unit work claim. See Town of Marion, 30 MLC 11, 14 (2003).

4 I also find that the Union established that both Walker and the Union suffered an  
5 adverse impact from the transfer of unit work to non-unit personnel, as Walker lost her  
6 job and the Union lost the temporary Clerk Typist position. See Commonwealth of  
7 Massachusetts, 35 MLC 105, 108 (2008).

8 Lastly, I find that the City did not give the Union notice and an opportunity to  
9 bargain over the transfer of Walker's duties to the Court Liaison Officers. There is no  
10 evidence that the City, at any point, notified the Union that it intended to transfer  
11 Walker's duties to non-unit personnel. Rather, the Union learned that Court Liaison  
12 Officers were performing Walker's duties in May 2009, approximately two months after  
13 Walker's layoff. The City suggests that the Union should have demanded bargaining  
14 over the transfer of bargaining unit work when it learned that the City would lay off  
15 Walker. However, the City's notice of an impending layoff does not constitute notice of  
16 the transfer of unit work. Moreover, even if the City had provided notice of its intention  
17 to transfer Walker's duties to non-unit personnel when it provided the Union with notice  
18 of Walker's impending layoff, as explained above, this decision was presented as a fait  
19 accompli, and the Union had no obligation to demand bargaining.

#### 20 CONCLUSION

21 Based on the record and for the reasons explained above, I conclude that the  
22 City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by 1)  
23 implementing a layoff of a bargaining unit member without giving the Union prior notice

1 and an opportunity to bargain over the impacts of the decision to achieve a reduction in  
2 force by layoffs; and 2) unlawfully transferring bargaining unit work to non-unit  
3 personnel. I also find that the Union waived its right to bargain over the City's decision  
4 to achieve a reduction in force by means of a layoff and dismiss this portion of the  
5 complaint.

#### 6 REMEDY

7 Section 11 of the Law grants the Board broad authority to fashion appropriate  
8 orders to remedy unlawful conduct. Labor Relations Commission v. City of Everett, 7  
9 Mass. App. Ct. 826 (1979); Millis School Committee, 23 MLC 99 (1996). The traditional  
10 remedy where a public employer has unlawfully refused to bargain over a decision to  
11 transfer bargaining unit work is an order to restore the status quo until the employer has  
12 fulfilled its bargaining obligation and to make all affected employees whole for any  
13 economic losses they may have suffered. School Committee of Newton v. Labor  
14 Relations Commission, 388 Mass. 557 (1983); Commonwealth of Massachusetts, 26  
15 MLC 161 (2000); Massachusetts Board of Regents of Higher Education, 14 MLC 1469  
16 (1988).<sup>12</sup>

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<sup>12</sup> With regard to the City's failure to provide notice or an opportunity to impact bargain over the layoff, the appropriate remedy does not include reinstatement and full back pay when the layoff decision was inevitable. Rather, the employer is ordered make the affected employee whole for the period of time between the receipt of the decision and the point at which the employer fulfills its bargaining obligation. See Town of Wakefield v. Labor Relations Commission, 45 Mass. App. Ct. 630 (1998) (court affirmed hearing officer's remedy in Town of Wakefield, 20 MLC 1279 (1993), which did not include reinstatement or full back pay when employer failed to impact bargain over inevitable decision). Because my decision is not limited to this issue, I need not decide whether the layoff decision was inevitable.



ORDER

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the City of New Bedford shall:

1. Cease and desist from:

- a. Failing to bargain collectively in good faith to resolution or impasse with the Union about the impacts of the decision to reduce the City's work force by laying off a temporary Clerk Typist;
- b. Failing to bargain collectively in good faith with the Union over the decision to transfer bargaining unit work to non-unit personnel and the impacts of the decision;
- c. In any like or similar manner, interfere with, restrain, or coerce any 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 offer Jeanine Walker reinstatement to her former position of temporary Clerk Typist without prejudice to her seniority or other rights and privileges;
- b. Within five (5) days from the date of receipt of this decision, offer to bargain in good faith with the Union to resolution or impasse over:
  - i. The impacts of the decision to reduce the City's work force by means of a layoff upon wages, hours and conditions of employment;
  - ii. The decision to transfer the temporary Clerk Typist duties to non-bargaining unit employees, and the impacts of that decision upon wages, hours and conditions of employment;
- c. Restore to the bargaining unit the temporary Clerk Typist position and the duties that were transferred to non-bargaining unit employees until the earliest of the following conditions are met:
  - i. The Union and the City reach agreement over the decision to transfer the temporary Clerk Typist duties to non-unit personnel and its impacts; or
  - ii. Good faith bargaining results in bona fide impasse;

- 1 d. Make whole Jeanine Walker for any loss of wages and benefits  
2 suffered as a result of the City's unlawful actions, plus interest on any  
3 sums owned at the rate specified in G.L. c. 231, Section 6I from  
4 February 13, 2009 until the earliest of the following conditions are met:  
5  
6 i. The Union and the City reach agreement over the decision and  
7 impacts of the decision to transfer the temporary Clerk Typist  
8 duties to non-unit personnel and the impacts of the decision to  
9 reduce the City's work force by means of a layoff; or  
10  
11 ii. Good faith bargaining results in a bona fide impasse;  
12  
13 e. Post immediately in all conspicuous places where members of the  
14 Union's bargaining unit usually congregate and where notices to these  
15 employees are usually posted, including but not limited to the City's  
16 internal email system, and maintain for a period of thirty (30)  
17 consecutive days thereafter, signed copies of the attached Notice to  
18 Employees; and  
19  
20 f. Notify the DLR within thirty (30) days of receipt of this Decision and  
21 Order of the steps taken to comply with it.

22 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

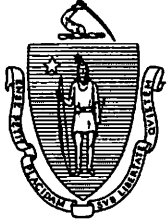


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KERRY BONNER, ESQ., HEARING OFFICER

**APPEAL RIGHTS**

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



THE COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

# **NOTICE TO EMPLOYEES**

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

A hearing officer of the Massachusetts Department of Labor Relations has held that the City of New Bedford (City) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by: 1) failing to bargain over the impacts of the decision to reduce the City's work force by laying off a temporary Clerk Typist and 2) unlawfully transferring bargaining unit work to non-unit personnel. The City posts this Notice to Employees in compliance with the hearing officer's order.

Section 2 of M.G.L. Chapter 150E gives public employees the following rights:

to engage in self-organization; to form, join or assist any union;  
to bargain collectively through representatives of their own choosing;  
to act together for the purpose of collective bargaining or other mutual aid or protection; and  
to refrain from all of the above.

WE WILL NOT fail to bargain in good faith by failing to bargain to agreement or impasse about the impacts of the decision to reduce the City's work force by layoffs.

WE WILL NOT unlawfully transfer bargaining unit work to non-bargaining unit personnel.

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

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

- Within five (5) days from the receipt of the decision in Case MUP-09-5582, offer to bargain in good faith with the Union to resolution or impasse over: 1) the impacts of the decision to reduce the City's work force by means of a layoff of a temporary Clerk Typist and 2) the decision to transfer the temporary Clerk Typist duties to non-bargaining unit employees, and the impacts of that decision;
- Restore to the bargaining unit the temporary Clerk Typist position and the duties that were transferred to non-bargaining unit employees until we fulfill our bargaining obligation;
- Reinstate Jeanine Walker to her former position of temporary Clerk Typist without prejudice to her seniority or other rights and privileges;
- Make whole Jeanine Walker for any loss of wages and other benefits suffered as a result of the City's unlawful actions, plus interest on any sums owed at the rate specified in M.G.L. c. 231, Section 6I, compounded quarterly.

\_\_\_\_\_  
City of New Bedford

\_\_\_\_\_  
Date

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

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