

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

In the Matter of

CITY OF BOSTON

and

AFSCME COUNCIL 93,
LOCAL 1526, AFL-CIO

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Case No.: MUP-04-4077

Date Issued:

May 20, 2009

Board Members:

Marjorie F. Wittner, Esq. – Chair
Elizabeth Neumeier, Esq. – Board Member

Appearances:

Stephen B. Sutliff, Esq.	-	Representing the City of Boston
Jaime Lynn DiPaola-Kenney, Esq.	-	Representing the AFSCME Council 93, Local 1526, AFL-CIO

DECISION¹

Statement of the Case

- 1 On March 3, 2004, AFSCME Council 93, Local 1526, AFL-CIO (Union) filed a
2 charge with the former Labor Relations Commission (Commission), alleging that the

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.

NOTICE: This opinion is subject to formal revision before publication on the Division's website and/or the bound volume of Board decisions. Readers are requested to notify the Executive Secretary of any typographical or other formal errors so that corrections can be included.

1 City of Boston (City) had violated Sections 10(a)(5), 10(a)(4), 10(a)(3), 10(a)(2), and
2 10(a)(1) of M.G.L. c.150E (the Law). Following an investigation, the former Commission
3 issued a complaint of prohibited practice and partial dismissal on October 19, 2005,
4 dismissing some allegations and alleging that the City had violated: (Count I) Sections
5 10(a)(4) and, derivatively, 10(a)(1) of the Law by discriminating against John Kenneally
6 (Kenneally) for participating in proceedings before the former Commission in Case No.
7 MUP-01-2940; and (Count II) Sections 10(a)(5) and, derivatively, 10(a)(1) of the Law by
8 unilaterally changing Kenneally's job duties without giving the Union notice and an
9 opportunity to bargain to resolution or impasse.² The City filed its answer to the
10 complaint on November 8, 2005.

11 On January 5, 2006, Victor Forberger, Esq., a duly-designated Division Hearing
12 Officer (Hearing Officer), conducted a hearing at which all parties had the opportunity to
13 be heard, to examine witnesses, and to introduce evidence.³ On March 16, 2006, the
14 City filed its post-hearing brief, and the Union filed its post-hearing brief on March 20,
15 2006. Neither party filed challenges. Accordingly, we adopt the parties' stipulations and
16 the Hearing Officer's Recommended Findings of Fact as set forth below.

17 Stipulations⁴

18 The parties agree to the following stipulations of fact.

- 19 1. The City is a public employer within the meaning of Section 1 of the Law.
20 2. The Union is an employee organization within the meaning of Section 1 of the
21 Law.

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.

- 1 3. The Union is the exclusive representative for certain employees employed by
2 the City, including principal account clerks in the Boston Public Library (BPL
3 or Library).
- 4 4. At all relevant times, Kenneally was employed in the position of principal
5 account clerk at the BPL.
- 6 5. At all relevant times, Kenneally was a member of the bargaining unit referred
7 to in paragraph 3, above.
- 8 6. On September 12, 2003, the former Commission issued a decision in Case
9 No. MUP-01-2940 in which the former Commission found that the City
10 unilaterally changed Kenneally's job duties by requiring him to make bank
11 deposits of Library monies to a bank outside of the Library.⁵
- 12 7. Kenneally participated in the proceedings before the former Commission in
13 Case No. MUP-01-2940.
- 14 8. On or about September 22, 2003, the City required a non-bargaining unit
15 member to take Library monies to the bank for deposit.
- 16 9. On or about September 22, 2003, the City began to require Kenneally to be
17 present when a non-unit employee counted the bank deposit money in the
18 Library's Accounting Department.
- 19 10. Prior to September 22, 2003, neither Kenneally nor any other member of the
20 bargaining unit referred to in paragraph 3, above, performed the job duties
21 referred to in paragraph 9, above.
- 22 11. On one occasion subsequent to September 22, 2003, Kenneally's lunch was
23 delayed 39 minutes because the courier was late in arriving. Kenneally was
24 still able to go to lunch prior to 12:30 PM on that day.
- 25 12. The Union filed a grievance related to Kenneally's 39-minute delayed lunch,
26 which was ultimately withdrawn by the Union.
- 27 13. The parties do not dispute the factual findings in Case No. MUP-01-2940.

Findings of Fact

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

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

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

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

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.

1 while he or she recounted the funds to be deposited.⁸

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

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.

1 Kenneally. The couriers are unaware that two other managers fill in for Monahan when
2 he is absent and that these managers would assume responsibility on Monahan's behalf
3 for resolving the discrepancy.

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

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

21 Opinion

22 Section 10(a)(4)

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

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

5 The same elements of proof apply to alleged violations of both Section 10(a)(3)
6 and Section 10(a)(4) of the Law. Commonwealth of Massachusetts, 6 MLC 1396, 1400
7 (1979). First, we determine whether the charging party has established a prima facie
8 case of discrimination, by producing evidence to support each of four elements: 1) that
9 the employee engaged in protected activity; 2) that the employer knew of the protected
10 activity; 3) that the employer took adverse action against the employee; and 4) that
11 the employer's conduct was motivated by a desire to penalize or discourage the
12 protected activity. If the charging party establishes a prima facie case, the employer
13 may offer evidence of one or more lawful reasons for taking the adverse action.
14 Finally, if the employer produces that evidence, the employee must establish that, "but
15 for the protected activity, the employer would not have taken the adverse action."
16 Trustees of Forbes Library v. Labor Relations Commission, 384 Mass. 559, 565-566
17 (1981); Bristol County, 26 MLC 105, 109 (2000).

18 The City knew that Kenneally was the subject of, and participated in, Case No.
19 MUP-01-2940 and thus the Union established the first two elements of the prima facie
20 case. The Union encounters greater difficulties with the third element, adverse action.
21 Citing Sallis v. University of Minnesota, 408 F. 470, 476 (8th Cir. 2005), the Union
22 contends that the additional job duties assigned to Kenneally constitute an adverse
23 action because they represented a departure from what Kenneally had been required to
24 do before the decision issued in Case No. MUP-01-4290. The Union, however,

1 misapprehends the adverse action standard. The Board has consistently defined
2 adverse action as an adverse personnel action, such as a suspension, discharge
3 involuntary transfer or reduction in supervisory activity. City of Holyoke, 35 MLC 153,
4 156 (2009) (citing Town of Dracut, 25 MLC 131, 133 (1999)). The mere assignment of
5 additional responsibilities, though possibly inconvenient or even undesirable, does not
6 constitute an adverse employment action unless it materially disadvantages the plaintiff
7 in some way. MacCormack v. Boston Edison Co., 423 Mass. 652, 662 (1996) (plaintiff
8 failed to adverse action element of a prima facie case of unlawful retaliation where there
9 was no evidence that he had been disadvantaged in respect to salary, grade, or other
10 objective terms and conditions of employment). Accord, Sallis v. Univ. of Minnesota,
11 408 F. 2d at 476 (termination, reduction in pay or benefit, and changes in employment
12 that significantly affect an employee's future career prospects constitute material
13 employment disadvantage but minor changes that merely inconvenience an employee
14 or alter work responsibilities do not). Here, the Union concedes that requiring Kenneally
15 to oversee a courier's recount of bank monies constituted, at most, a change in his work
16 responsibilities. In the absence of a showing of any significant detriment to Kenneally's
17 career, job benefits or salary, we decline to find that the City took adverse action against
18 him. We therefore dismiss Count I of the Complaint.

19 Count II – 10(a)(5) – Refusal to Bargain

20 A public employer violates Section 10(a)(5) of the Law when it implements a
21 change in a mandatory subject of bargaining without first providing the employees'
22 exclusive collective bargaining representative with prior notice and an opportunity to
23 bargain to resolution or impasse. School Committee of Newton v. Labor Relations
24 Commission, 338 Mass. 557 (1983). The duty to bargain extends to both conditions of

1 employment that are established through past practice as well as conditions of
2 employment that are established through a collective bargaining agreement.
3 Commonwealth of Massachusetts, 27 MLC 1, 5 (2000); City of Gloucester, 26 MLC 128,
4 129 (2000); City of Boston, 16 MLC 1429, 1434 (1989); Town of Wilmington, 9 MLC
5 1694, 1697 (1983). To establish a unilateral change violation, the charging party must
6 show that: 1) the employer altered an existing practice or instituted a new one; 2) the
7 change affected a mandatory subject of bargaining; and 3) the change was established
8 without prior notice or an opportunity to bargain. Commonwealth of Massachusetts, 20
9 MLC 1545, 1552 (1984); City of Boston, 20 MLC 1603, 1607 (1994).

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

19 In its defense, the City argues that it was not required to bargain before imposing
20 the duties because they were de minimis and were encompassed within Kenneally's job
21 description. We disagree. Kenneally's new duties required him to oversee another
22 employee in a context in which Kenneally could be blamed for discrepancies in cash.
23 There is no evidence that, prior to the change, the City required Kenneally to exercise
24 any type of oversight over employees. Regardless of whether the duties were

1 supervisory, this alone constitutes a material change in Kenneally's duties. In addition,
2 watching the courier count the bank deposits took time out of Kenneally's day that he
3 would otherwise have devoted to his regular work duties. This necessarily impacted
4 Kenneally's workload, a mandatory subject of bargaining. Chief Justice of
5 Administration and Finance, slip. op. MUP-04-5126 (April 14, 2009) (CJAM unilaterally
6 changed the workload of probation officers and assistant chief probation officers when it
7 assigned each of them to staff the front desk for one half day per week for an eight-
8 week period).

9 In reaching this conclusion, we note that the City made these changes the very
10 same day that it posted and signed the former Commission's notice in Case No. MUP-
11 01-2940, stating that it would not "unilaterally change John Kenneally's job duties" and
12 would further "provide the Union with prior notice and an opportunity to bargain prior to
13 any proposed change to Kenneally's job duties." Thus, the City's action not only
14 violates Section 10(a)(5) of the Law, but it constitutes a manifest disregard of this
15 agency's remedial authority. Town of Plymouth, MUP-02-3551 (February 28, 2006)
16 (Board deemed town's repudiation of agreement settling a prohibited practice charge
17 "egregious" where town repeated the same behavior towards the same individual that
18 had caused union to file the original charge).

19 Conclusion

20 Based on the record before us, we conclude that the City did not violate Section
21 10(a)(4) of the Law when it assigned additional duties to Kenneally. We also conclude,
22 however, that the City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the
23 Law by unilaterally assigning Kenneally to oversee a non-unit employee count bank
24 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).

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.

1 Finally, although we have found that the City, by assigning new duties to
2 Kenneally, violated the terms of the Board's order in Case No. MUP-01-2940, the Union
3 did not opt to seek enforcement of that order pursuant to former Rule 456 CMR 16.08
4 (Compliance with Enforcement of Commission Orders). We are therefore constrained
5 from ordering the City to comply with former Commission or Board orders as part of the
6 remedy in this case. We nevertheless remind the parties that the Board has a strong
7 interest in ensuring that parties comply with its orders promptly, completely, and in good
8 faith. Town of Dennis, 30 MLC 119, 120 (2004). We further note that under Section
9 11(i) of the Law, the Board has the authority to institute appropriate proceedings in the
10 appeals court for enforcement of its final orders.

11 Order

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

13 1) Cease and desist from:

14 a) Unilaterally changing Kenneally's job duties
15
16

17 b) In any like or related manner, interfering with, restraining or
18 coercing employees in the exercise of their rights guaranteed
19 under the Law.
20

21 2) Take the following affirmative action that will effectuate the purposes of
22 the Law:
23

24 a) Immediately rescind the requirement that Kenneally be present
25 when employees count bank deposit money in the Library's
26 Accounting department.
27

28 b) Provide the Union with prior notice of any proposed change in
29 Kenneally's job duties and, upon request, bargain in good faith to
30 resolution or impasse before implementing any changes to
31 Kenneally's job duties.
32

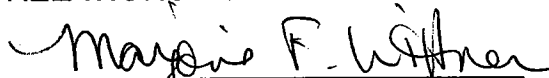
33 c) Post in all conspicuous places where its employees represented
34 by the Union usually congregate, or where notices are usually
35 posted, including, but not limited to, the City's internal e-mail

1 system, and display for a period of thirty (30) days thereafter,
2 signed copies of the attached Notice to Employees.

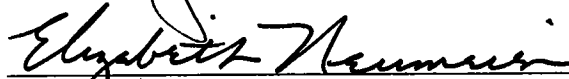
- 3
4 d) Notify the Division in writing of the steps taken to comply with this
5 decision within ten days of receipt of the decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT
RELATIONS BOARD



MARJORIE F. WITTNER, CHAIR



ELIZABETH NEUMEIER, BOARD MEMBER

Pursuant to M.G.L. c.150E, Section 11, decisions of the 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 Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

THE COMMONWEALTH OF MASSACHUSETTS
DIVISION 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.

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.

City of Boston

Date

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

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Division of Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).