

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

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BOSTON SCHOOL COMMITTEE

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Case No. MUP-13-2551

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and

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Date Issued: June 6, 2014

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SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 888

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Hearing Officer:

Zachary See, Esq.

Appearances:

John Magner, Esq.

- Representing the Service Employees
International Union, Local 888

Joseph Bevington IV, Esq.

- Representing the Boston School Committee

HEARING OFFICER DECISION

1 The issue in this case is whether the Boston School Committee (Employer or
2 Committee) violated Section 10(a)(5) and derivatively, 10(a)(1) of M.G.L. c. 150E (the
3 Law) by unilaterally transferring Service Employees International Union, Local 888
4 (SEIU or Union) bargaining unit work to non-unit personnel. For the reasons explained
5 below, I find that the Employer violated the Law by transferring Principal Clerk Typist 23
6 (PCT 23) bargaining unit duties to non-bargaining unit personnel without providing the
7 Union with notice and an opportunity to bargain to resolution or impasse over the

1 Employer's decision to transfer the duties to non-bargaining unit personnel and the
2 impacts of that decision on employees' terms and conditions of employment.

3 Statement of the Case

4 On January 17, 2013, the Union filed a Charge of Prohibited Practice (Charge)
5 with the Department of Labor Relations (DLR), alleging that the Employer violated
6 Sections 10(a)(5) and 10(a)(1) of the Law by failing to bargain in good faith. A duly-
7 designated DLR investigator investigated the Charge and issued a Complaint of
8 Prohibited Practice on April 18, 2013, alleging that the Employer failed to bargain in
9 good faith by transferring bargaining unit work to non-unit personnel without giving the
10 Union prior notice and an opportunity to bargain to resolution or impasse over the
11 decision to transfer the work and the impact of the decision on employees' terms and
12 conditions of employment. The Employer filed its Answer to the Complaint on February
13 4, 2014.

14 I conducted a hearing on March 12, 2014, at which both parties had an
15 opportunity to be heard, to examine witnesses and to introduce evidence. On April 18,
16 2014, the Union and the Employer filed their post-hearing briefs. Based on the record,
17 which includes witness testimony and documentary exhibits, and in consideration of the
18 parties' arguments, I make the following findings of fact and render the following
19 opinion.

20 Stipulations of Fact

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

- 1 2. The Union is an employee organization within the meaning of Section 1 of the
2 Law.
- 3 3. The Union is the exclusive bargaining representative for all full-time and part-time
4 clerical, accounting, technical, and purchasing employees of the Boston School
5 Department.
- 6 4. The Boston Public Schools created a new managerial position in OSPSS [Office
7 of Special Education and Student Services] called Technician for Special
8 Education Operations, which was posted on or about November 1, 2012.
- 9 5. The School Committee hired Jasny Vasquez as the new Technician for Special
10 Education Operations.
- 11 6. Jasny Vazquez held the position of Principal Clerk Typist 23 until November 5,
12 2012.
- 13 7. On or about January 17, 2013, the Union filed a charge of prohibited practice
14 with the Department of Labor Relations alleging a violation of M.G.L. c. 150E, §
15 10(a).
- 16 8. On April 4, 2013, an in-person investigation was held in this matter.
- 17 9. On April 18, 2013, a complaint issued in this matter on a single count alleging
18 violation of G.L. c. 150E, § 10(a)(5), and derivatively G.L. c. 150E, §10(a)(1).

19 Findings of Fact

21 The Union and the Employer entered into a collective bargaining agreement
22 (Agreement), effective from September 1, 2007 to August 31, 2010. Article 20 of the
23 Agreement pertains to management rights, and states:

24 Except as otherwise provided in this Agreement, the Committee retains
25 all powers, rights, duties and authority that they had prior to entering into
26 the Agreement provided that such rights shall not be exercised in conflict
27 with the terms of this Agreement. Such rights include, but are not limited
28 to, the following rights:

1. Manage the schools and offices and direct the working forces, including the right to hire and suspend, discipline, or discharge employees for just cause.
2. Maintain discipline and efficiency.
3. Layoff employees from service because of lack of work or for other legitimate reasons.
4. Promote and/or transfer employees to positions and classifications not covered by this Agreement, it being understood employees in the bargaining unit cannot be forced to take a position outside the bargaining unit.

Vasquez's Duties as Principal Clerk Typist 23

Prior to her hire as the Technician for Special Education Operations in November 2012, Vasquez performed the following duties as PCT 23:

1. Worked in large department, one manager/multi-administrators.
2. Word processed/typed from rough draft, plain copy or dictation.
3. Prepared forms, record cards, reports, and spreadsheets.
4. Composed routine correspondence.
5. Maintained alphabetical, numerical and subject matter files.
6. Answered the telephone and provided information.
7. Compiled information for complex statistical analysis and tabulated and provided data from files and complex reports.
8. Had substantial contact with the public.
9. Supervised subordinate employees.
10. Maintained the calendar/schedule for the department and/or manager.

1 11. Input and monitored information relative to requisitions and supplies.

2 12. Performed related duties of a similar nature as requested by supervisor,
3 which are commensurate with job classification.
4

5 The PCT 23 duties were also performed by non-bargaining unit positions
6 employed by the Committee, and none of the above listed duties were or are exclusive
7 to the Union. As of March 2014, seven employees answered the same telephone line in
8 the special education office that the PCT 23 answered, including three SEIU bargaining
9 unit members and four non-bargaining unit employees.¹

10 **Vasquez's Additional Responsibilities**

11 As a Principal Clerk Typist 23, Vasquez also supported Katherine C. Grogan
12 (Grogan), former Manager of Compliance and Quality Assurance for Special Education
13 (MCQASE) in Boston Public Schools during 2010-2012 and who, as of 2014, holds the
14 Special Education and Student Services Coordinator position. Grogan had worked with
15 Vasquez since approximately 2004. As the MCQASE, Grogan was in the Boston
16 Association of School Administrators and Supervisors (BASAS) bargaining unit, and she
17 reported to the Assistant Superintendent for Special Education. Grogan was responsible
18 for coordinator program reviews, compliance, Medicaid, and the daily operation of the
19 Campbell Resource Center including the clerks and coordinators who worked there.
20 Grogan's duties as of fall 2012 included: interacting with the budget, human resources

¹ The evidence shows that the PCT 23 duties are shared among different bargaining units as well as managers, and the record contains no other detail regarding the distribution of the duties.

1 and labor relations offices concerning hiring, consulting in layoffs, distribution of
2 coordinators and clerks and disciplinary actions affecting bargaining unit members; and
3 participating in joint labor-management meetings.

4 During 2010-2012, Vasquez alone performed other additional duties in support of
5 Grogan, including reading Grogan's emails and having access to information regarding
6 budgets, employee discipline and layoffs. In the fall of 2012, Grogan created the non-
7 unit managerial Technician for Special Education Operations position to formally
8 recognize Vasquez's responsibilities which Grogan believed exceeded those of a PCT
9 23. Vasquez continued to perform both the PCT 23 duties as well as her additional
10 responsibilities in support of Grogan after the Committee hired her as Technician for
11 Special Education Operations.

12 **Vasquez's Duties as Technician for Special Education Operations**

13 The Committee hired Vasquez as Technician for Special Education Operations in
14 November 2012 to perform the following duties:

- 15 1. Support the OSESS [Office of Special Education and Student Services] with
16 the improvement of student outcomes and strengthen the engagement of
17 families as partners, but maintaining and providing technical support to
18 operational systems necessary for the OSESS to maintain compliance with
19 State Regulations.
 - 20 2. Provide technical support to OSESS including:
 - 21 a. Maintaining up to date information on the MyBPS Website and the SEIMS
22 Website.
 - 23 b. Setting up access for email and internet/intranet for OSESS staff.
 - 24 c. Posting and updating documents on SEIMS tab and adding and deleting
25 access to SEIMS and FRC tab.
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- d. Providing access to SEIMS for OSESS staff according to role restrictions and provide access to appropriate schools.
 - e. Logging and entering ESP information into SEIMS system.
3. Manage the confidential Department of Elementary and Secondary Education [DESE] Complaints by:
 - a. Logging onto the security portal and providing information regarding compliance to the appropriate personnel.
 - b. Gather documentation and obtain appropriate approval to send information to DESE.
 - c. File and maintain historical DESE complaints.
 4. Manage OSESS projects including:
 - a. Maintain State Performance Plan Indicators by collecting information for indicators, entering the information onto DESE templates, and submitting to security portal in appropriate timeframe.
 - b. Monitor contracted personnel availability and work hours.
 - c. Provide technical assistant to professional development presenters.
 5. Maintain the random moment process:
 - a. Follow up on missing students consents, update list of eligible participants for Random Moments on quarterly basis.
 - b. Collect information for Indicators, enter the information onto DESE templates, and submit to security portal in appropriate timeframe.
 6. Organize and maintain State Performance Plan Indicators:
 - a. Collect information for Indicators, enter the information onto DESE templates, and submit to security portal in appropriate timeframe.
 7. Support the smooth and efficient operations of the OSESS office and complete other duties as deemed necessary by supervisor.

The Committee posted Vasquez's vacant PCT 23 position in or around November 2012. The Committee screened applicants and selected five candidates by January 2, 2013. Grogan interviewed three of the candidates for the Principal Clerk Typist 23 position and offered the position to two of the candidates who declined the

1 offers. On January 17, 2013, the Union filed its charge of prohibited practice with the
2 DLR.

3 On March 21, 2013, the parties held a labor management/impact bargaining
4 meeting. Prior to the meeting, the Union requested to address the list of positions cut in
5 the Boston Public School's "probable org."² The Union received a list of deleted
6 positions at the March 21, 2013 meeting which included the PCT 23 position. The
7 parties did not discuss the list of deleted positions at the March 21, 2013 meeting. The
8 Committee subsequently eliminated the vacant PCT 23 position in the spring of 2013
9 during the "probable org" process.

10 Opinion

11 The Law requires a public employer to give the exclusive collective bargaining
12 representative of its employees prior notice and an opportunity to bargain before
13 transferring bargaining unit work to non-bargaining unit personnel. Commonwealth of
14 Massachusetts vs. Labor Relations Commission, 60 Mass. App. Ct. 831 (2004). To
15 determine whether an employer has unlawfully transferred bargaining unit work, the
16 Commonwealth Employment Relations Board (CERB) considers the following factors:
17 1) whether the employer transferred bargaining unit work to non-unit personnel; 2)
18 whether the transfer of unit work to non-unit employees has an adverse impact on
19 individual employees or the unit itself; and 3) whether the employer gave the bargaining

1 representative prior notice and an opportunity to bargain over the decision to transfer
2 the work. Commonwealth, 60 Mass. App. Ct. at 833; Lowell School Committee, 28 MLC
3 29, 31, MUP-2074 (June 22, 2001).

4 When work is shared by bargaining unit members and non-unit employees, the
5 work will not be recognized as exclusively bargaining unit work. City of Boston, 29 MLC
6 122, 125, MUP-2419 (January 15, 2003); Town of Saugus, 28 MLC 13, 17, MUP-
7 2343/CAS-3388 (June 15, 2001); Higher Education Coordinating Council (HECC), 23
8 MLC 90, 92, SUP-4090 (September 17, 1996); City of Quincy/Quincy Hospital, 15 MLC
9 1239, MUP-6490 (November 9, 1988). In these shared work situations, the employer is
10 not obligated to bargain over every incidental variation in job assignments between unit
11 and non-unit employees. City of Boston, 29 MLC at 125; Town of Saugus, 28 MLC at
12 17. Rather, bargaining must occur only in situations where there is a calculated
13 displacement of bargaining unit work. City of Boston, 29 MLC at 125; Town of
14 Bridgewater, 25 MLC 103, 104, MUP-8650 (December 30, 1998). Accordingly, if unit
15 employees traditionally have performed an ascertainable percentage of the work, a
16 significant reduction in the portion of work performed by unit employees coupled with a
17 corresponding increase in the work performed by non-unit employees may demonstrate
18 a calculated displacement of unit work. City of Boston, 29 MLC at 125; Commonwealth

² "Probable Org" refers to a budgeting process by which the Boston Public School's human resources office meets with school leaders and departments regarding staffing needs for the upcoming year's budget.

1 of Massachusetts, 27 MLC 52, 56, SUP-4091 (November 21, 2000); City of Boston, 26
2 MLC 144, 146, MUP-1085 (March 10, 2000); Town of Bridgewater, 25 MLC at 104.

3 In shared work cases, the analysis focuses on the pre-existing pattern of shared
4 work and the impact that any change in that pattern may have on the allegedly
5 aggrieved party. City of Boston, 29 MLC at 125; City of Boston, 26 MLC at 147. The
6 CERB has previously determined that an employer may not unilaterally alter a pre-
7 existing pattern of shared work. City of Boston, 29 MLC at 125; City of Boston, 28 MLC
8 194, 195, MUP-2185 (January 4, 2002).

9 *Parties' Arguments*

10 The Union argues that all of the work done by Vasquez prior to November 5,
11 2012 was SEIU bargaining unit work, and that Vasquez continued to perform the same
12 PCT 23 work when the Committee promoted her to Technician for Special Education
13 Operations. The Union further argues that because the Committee never filled the
14 Principal Clerk Typist 23 position vacancy, only three Union clerk positions remained as
15 opposed to the prior four, showing a displacement of work.

16 The Committee argues that it has the contractual right to promote and transfer
17 employees to positions not covered in the Agreement, that the Union did not show that
18 Vasquez's work was traditionally performed by the Union, and thus the Union cannot
19 show that the Committee transferred any bargaining unit work. The Committee further
20 argues that Vasquez' work was shared among members of multiple bargaining units
21 and managerial employees, and that the Union has not established a clear pattern of

1 assignment or a calculated displacement of bargaining unit work. Lastly, the Committee
2 argues that Vasquez's PCT 23 position and duties evolved into a confidential role,
3 excluded from the Union, and thus her duties were not bargaining unit work.

4 *Management Rights*

5 Pursuant to Article 20 of the Agreement, the Committee has the right to promote
6 and transfer employees to positions not covered by the Agreement. However, a public
7 employer violates Section 10(a)(5) of the Law when it transfers work performed by
8 bargaining unit members to non-bargaining unit personnel without first giving the
9 exclusive representative of its bargaining unit members prior notice and an opportunity
10 to bargain to resolution or impasse. City of Boston, 29 MLC at 124; City of Cambridge,
11 23 MLC 28, 36, MUP-9171 (June 28, 1996); aff'd sub. nom., Cambridge Police Superior
12 Officers Association v. Labor Relations Commission, 47 Mass. App. Ct. 1108 (1999).

13 While the Committee may create positions not covered in the Agreement and promote
14 or transfer willing employees to those positions, the Committee may not unilaterally
15 transfer bargaining unit work to non-unit employees. See id. Here, the Committee
16 promoted Vasquez to a new position, not covered in the Agreement, and there is no
17 dispute that Vasquez continued to perform the same work she did as a bargaining unit
18 member. Therefore, the Union did not contractually waive its right to bargain over the
19 alleged transfer of the PCT 23 work.

20 *Transfer of Bargaining Unit Work*

1 To determine whether the Committee unlawfully transferred Vasquez's PCT 23
2 duties, I start with the question of whether these duties were exclusive bargaining unit
3 work or whether Vasquez shared these duties with non-bargaining unit employees. The
4 evidence shows that Vasquez, as a PCT 23, exclusively performed the following tasks:
5 supported Grogan by reading Grogan's emails and having access to information
6 regarding budgets, employee discipline and layoffs. The record shows that these are
7 additional responsibilities assigned to Vasquez between 2010 and 2012, which she
8 performed as a bargaining unit member.

9 The Committee argues that the Union did not show that Vasquez's work was
10 traditionally bargaining unit work, and thus the Committee never transferred any
11 bargaining unit work. However, the evidence shows that the Committee assigned these
12 additional responsibilities to Vasquez, this work was exclusive to Vasquez, and
13 Vasquez performed the additional work for two years as a bargaining unit member.
14 Therefore I find that the additional responsibilities were not shared work, and the fact
15 that the Committee assigned the work to Vasquez as a bargaining unit employee for two
16 years then promoted her and continued to assign her the same work following her
17 promotion is sufficient to show a transfer of bargaining unit work.

18 *Shared Work*

19 In addition to her exclusive responsibilities in support of Grogan, the evidence
20 also shows that Vasquez performed the following duties in her PCT 23 position: word
21 processed/typed from rough draft, plain copy or dictation; prepared forms, record cards,

1 reports, and spreadsheets; composed routine correspondence; maintained alphabetical,
2 numerical and subject matter files; answered the telephone and provided information;
3 compiled information for complex statistical analysis and tabulated and provided data
4 from files and complex reports; interacted with the public; supervised subordinate
5 employees; maintained the calendar/schedule for the department and/or manager, input
6 and monitored information relative to requisitions and supplies; performed related duties
7 of a similar nature as requested by supervisor, which are commensurate with job
8 classification. There is no dispute that both bargaining unit and non-bargaining unit
9 employees performed these PCT 23 duties. The record shows that clerks in the special
10 education office do PCT 23 work together, that none of these PCT 23 duties are
11 exclusive to the Union, and that bargaining unit and non-bargaining unit employees
12 perform the same work. I therefore conclude that these duties constitute shared work.

13 In shared work cases, the CERB focuses on the pre-existing pattern of shared
14 work and the impact that any change in that pattern may have on the allegedly
15 aggrieved party. City of Boston, 29 MLC at 125; City of Boston, 26 MLC at 147. In City
16 of Boston, 26 MLC 144, police officers shared patrol duties with non-unit housing
17 authority officers. The City subsequently assigned other non-unit municipal police
18 officers to perform the shared duties in addition to the police and housing authority
19 officers. The CERB found that the increase in non-unit personnel performing the shared
20 duties changed the pattern of assigning the patrol duties to the bargaining unit, and was
21 a transfer of bargaining unit work.

1 In Town of Bridgewater, 25 MLC 103, bargaining unit members and non-unit
2 personnel performed crossing guard duties. When the employer laid off the bargaining
3 unit members, non-unit personnel performed all of the crossing guard duties that were
4 previously shared with bargaining unit members. The CERB found a calculated
5 displacement of the crossing guard duties.

6 In City of Boston, 29 MLC 122, patrol officers shared the work of assistant to the
7 supervisor of cases at various courts with non-unit detectives. Patrol officers held the
8 majority of the assistant positions, while the detectives held a smaller number of those
9 positions. When the City promoted a patrol officer to detective, and subsequently
10 assigned that detective to perform work he previously performed as a patrol officer in
11 the bargaining unit, the CERB explained that the City's appointment did not change a
12 pre-existing pattern of how the patrol officers and detectives shared the work because
13 the patrol officers still held a majority of the assistant to the supervisor of cases
14 positions after the appointment. Accordingly, the CERB did not find that the appointment
15 of the detective caused a calculated displacement of shared bargaining unit work. City
16 of Boston, 29 MLC at 125.

17 Here, after Vasquez's promotion to the non-unit Technician for Special Education
18 Operations position, she continued to perform PCT 23 work, and the PCT 23 position
19 remained vacant until the Committee eliminated it in the spring of 2013. In other words,
20 the Union lost a bargaining unit position, and the bargaining unit work continued to be
21 performed by a non-unit position. The Employer changed a pattern of assigning unit

1 work to the PCT 23 position by assigning Vasquez's former bargaining unit duties to her
2 new non-unit position, and subsequently eliminating an entire bargaining unit position.
3 Ultimately, the Committee tipped the balance by having one less bargaining unit
4 position and one more non-unit position perform the work. This is more than an
5 incidental variation in job assignments; it is a calculated displacement of work. But cf.
6 City of Somerville, 23 MLC 256, 260, MUP-8160 (May 2, 1997) (no calculated
7 displacement of work where bargaining unit member continued to perform shared work
8 and the record showed no non-unit personnel actually assumed responsibility for the
9 specific work the bargaining unit member previously performed nor did the record show
10 any increase in shared work performed by non-unit personnel).

11 The Committee argues that the Union did not present a clear pattern of assigning
12 the shared work to show a calculated displacement of the work, that there is no
13 information on how long the duties have been performed by the Union, and no specific
14 task or percentage of shared work that the Union traditionally performed that it no longer
15 performs after Vasquez's promotion. However, specific percentages are not always
16 necessary to show a calculated displacement of work. See City of Boston, 26 MLC at
17 145-146 (finding an alteration in the assignment of shared work where bargaining unit
18 and non-bargaining unit employees performed essentially the same work, and the
19 record showed no specific percentage of what work bargaining unit members
20 performed, but rather an increase in the number of non-bargaining unit employees
21 performing the work after the alleged transfer); cf. City of Boston, 29 MLC at 125 (no

1 alteration of the assignment of bargaining unit work where a majority of bargaining unit
2 members continued to perform the shared work after the alleged transfer). While the
3 record does not specifically provide detail of how long the Principal Clerk Typist 23
4 position work has been shared among unit and non-unit employees, and exactly what
5 positions performed which duties and how many, the record does show that Vasquez
6 worked as a clerk for Grogan since 2004, that none of the PCT 23 duties were exclusive
7 to the Union, and neither party disputes that the PCT 23 work performed by Vasquez
8 (not including her exclusive 2010-2012 support work of Grogan discussed above) was
9 shared work. The evidence also shows that seven employees, both bargaining unit and
10 non-unit, answer the same phone line. Prior to Vasquez's promotion, four of these
11 employees were in the bargaining unit and three were not. After Vasquez's promotion,
12 three of these employees are in the bargaining unit and four are not. Thus, the
13 Committee's act decreased the number of bargaining unit employees performing PCT
14 23 work, which corresponds with an increase in non-unit employees performing the
15 same work.

16 *Adverse Impact*

17 The Committee argues that the Union failed to establish that it or any individual
18 member experienced any continuing adverse impact because the PCT 23 position
19 remained vacant only temporarily. The Committee asserts that the Union filed its charge
20 on January 17, 2013 prematurely because any loss of opportunity to perform work was
21 only temporary at the time, and when the Committee ultimately made its decision to

1 eliminate the PCT 23 position, the Committee notified the Union and provided it with an
2 opportunity to bargain.

3 An employer must bargain about a transfer of unit work if the transfer results in
4 adverse impact on individual employees or the bargaining unit as a whole. Town of
5 Weymouth, 40 MLC 18, 23, MUP-10-6020 (H.O. Decision, July 12, 2013), aff'd 40 MLC
6 253 (March 10, 2014); City of New Bedford, 15 MLC 1732, 1737, MUP-6488 (May 31,
7 1989). A transfer of bargaining unit work, accompanied by no apparent reduction in
8 bargaining unit positions, constitutes a detriment to the bargaining unit because it could
9 result in an eventual elimination of the bargaining unit through gradual erosion of
10 bargaining unit opportunities. City of Boston, 26 MLC at 147. Here, the Union was
11 adversely impacted by the Committee's decision to transfer Vasquez's bargaining unit
12 work. Although the bargaining unit PCT 23 position remained vacant for only a few
13 months, the Committee ultimately eliminated the position, thus actualizing the potential
14 for eliminating the SEIU bargaining unit through gradual erosion of bargaining unit
15 opportunities. The bargaining unit lost a position and an opportunity to perform the work,
16 both of which are adverse impacts within the meaning of the Law. Franklin School
17 Committee, 6 MLC 1297, 1299, n.4, MUP-3206 (July 18, 1979).

18 The Committee's argument relies on a hearing officer decision, Boston School
19 Committee, 16 MLC 1012, 1016-17, MUP-7210 (June 5, 1989), in a case where the
20 employer temporarily contracted with a private trucking company to perform bargaining
21 unit work for approximately three months. In that case, the hearing officer found no

1 adverse impact in part because after temporarily assigning the work to the private
2 contractor, the employer reassigned the same number of bargaining unit positions to
3 perform the work. Consequently, there was no continuing adverse impact on the
4 bargaining unit. Id. In that same case, the hearing officer did find that the employer
5 deprived the unit of a future bargaining unit position when it transferred a portion of
6 bargaining unit mail delivery work to non-unit employees after a bargaining unit member
7 died, and the employer chose not to fill the vacant unit position. Id.

8 *Notice and Opportunity to Bargain*

9 The Committee argues that it notified the Union of its decision to eliminate the
10 PCT 23 position and provided the Union with an opportunity to bargain when it
11 presented the Union a list of positions deleted by "probable org" at the March 21, 2013
12 meeting which included the Principal Clerk Typist 23 position. However, in a transfer of
13 bargaining unit work case, notice and opportunity to bargain is required prior to the
14 transfer of bargaining unit work. Lowell School Committee, 28 MLC 29, 31, MUP-2074
15 (June 22, 2001). The evidence in this case shows that the transfer of bargaining unit
16 work occurred in November 2012 when the Committee promoted Vasquez to a non-unit
17 position and she continued to perform the same work she did as a bargaining unit
18 member. Accordingly, the Committee did not provide the Union any prior notice or
19 opportunity to bargain to resolution or impasse over this decision and the impacts of this
20 decision to transfer the work.

21 *Confidential Exclusion*

1 Lastly, the Committee argues that it did not transfer bargaining unit work because
2 Grogan should be considered a managerial employee and Vasquez should be
3 considered a confidential employee due to her relationship with Grogan and her access
4 to confidential information. The Committee contends that Grogan's job duties
5 (participation in joint labor-management meetings; involvement in hiring, layoff and
6 disciplinary decisions affecting bargaining unit members; interaction with budget, human
7 resources and labor relations office) required substantial responsibility involving the
8 exercise of independent judgment in personnel administration and therefore she should
9 be considered managerial. However, as the Committee correctly notes, Grogan was not
10 classified as a managerial employee during this period, and the evidence is insufficient
11 to show she was a managerial employee under the Law.³

12 The Committee also claims that Vasquez's additional responsibilities supporting
13 Grogan during 2010-2012 made her a confidential employee. However, the vast

³"Employees shall be designated as managerial employees only if they (a) participate to a substantial degree in formulating or determining policy, or (b) assist to a substantial degree in the preparation for or the conduct of collective bargaining on behalf of a public employer, or (c) have a substantial responsibility involving the exercise of independent judgment of an appellate responsibility not initially in effect in the administration of a collective bargaining agreement or in personnel administration." M.G.L. Ch. 150E Section 1. The Committee did not present enough evidence to show that Grogan made policy decisions and determined mission objectives; significantly assisted in the preparation of collective bargaining; or had authority to exercise discretion regarding personnel or collective bargaining issues without consultation or approval. See City of Boston, (Boston Public Library), 37 MLC 1, 9, CAS-08-3727 (July 12, 2010); Town of Holden, 25 MLC 175, 177, MCR-4655 (May 18, 1999).

majority of Vasquez's work during this period consisted of PCT 23 duties, while her access to budgetary, discipline, and layoff information comprised a lesser amount of her work.

Section 1 of the Law defines the "confidential" exclusion as follows:

Employees shall be designated as confidential employees only if they directly assist and act in a confidential capacity to a person or persons otherwise excluded from coverage under this chapter.

The CERB has construed this statutory language to exclude those individuals who have a direct and substantial relationship with a managerial employee, so there is a legitimate expectation of confidentiality in their routine and recurrent dealings. Town of Medway, 22 MLC 1261, 1269, MCR-4350 and 4352 (October 23, 1995). Regular exposure to confidential material directly related to labor relations policy or equally sensitive policy information while directly assisting an excluded employee is grounds for finding an employee confidential. North Attleborough Electric Department, 32 MLC 66, MCR-04-5091 (June 29, 2005).

The confidential employee exclusion does not apply here because there is no dispute that Grogan's position during the time that Vasquez worked with her was not classified as a managerial position, and Grogan's position remained in the BASAS bargaining unit. Thus, even if the Committee showed that Vasquez directly assisted and acted in a confidential capacity to Grogan, the Committee did not show that Grogan was excluded from coverage under Chapter 150E. Furthermore, even if Vasquez is considered a confidential employee in her new Technician for Special Education

1 Operations position, the Committee still unlawfully transferred Vasquez's former PCT 23
2 bargaining unit duties to her.

3 Conclusion

4 Based on the record and for the reasons stated above, I conclude that the City
5 violated Section 10(a)(5) and derivatively, Section 10(a)(1) of the Law by transferring
6 Vasquez's Principal Clerk Typist 23 duties, including her additional support
7 responsibilities which she performed between 2010-2012, to the Technician for Special
8 Education Operations position, without giving the Union prior notice and an opportunity
9 to bargain over the decision and the impact of that decision.

10 Order

11 IT IS HEREBY ORDERED that the Boston School Committee shall:

12
13 1. Cease and desist from:

14 a. Transferring Principal Clerk Typist 23 bargaining unit work to non-
15 bargaining unit employees without first bargaining to resolution or impasse
16 with SEIU, Local 888 over the decision to transfer the work and the impact
17 of that decision on bargaining unit members' terms and conditions of
18 employment;

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

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

24 a. Upon request, bargain in good faith with Local SEIU, Local 888 to
25 resolution or impasse concerning the decision and impact of the decision
26 to transfer Principal Clerk Typist 23 bargaining unit work to a non-
27 bargaining unit employee.

28
29 b. Restore to the bargaining unit the duties of the Principal Clerk Typist 23
30 that Jasny Vasquez performed prior to her promotion. The obligation to

1 restore these duties to the bargaining unit shall continue until the earliest
2 of the following conditions is met:

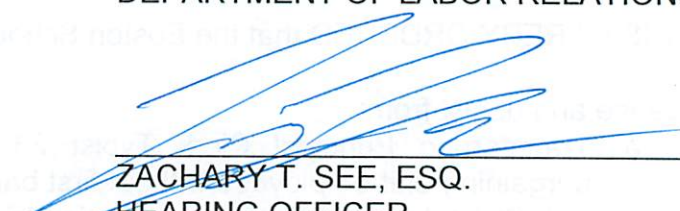
- 3 i. Mutual agreement is reached with SEIU, Local 888 relating to the
4 subjects of bargaining set forth in paragraph 2(a) above; or
5 ii. Good faith bargaining results in a bona fide impasse.
6

7 c. Post immediately in all conspicuous places where members of SEIU,
8 Local 888's bargaining unit usually congregate and where notices to these
9 employees are usually posted, including but not limited to the Employer's
10 internal e-mail system, and maintain for a period of thirty (30) consecutive
11 days thereafter, signed copies of the attached Notice to Employees; and,
12

13 d. Notify the DLR within thirty (30) days of receipt of this Decision and Order
14 of the steps taken to comply with it.
15

16 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



ZACHARY T. SEE, 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.



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 Boston School Committee (Committee) violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E when it unlawfully transferred Principal Clerk Typist 23 unit work to non-unit personnel without first giving the SEIU, Local 888 (Union) notice and an opportunity to bargain to resolution or impasse over the decision and impacts of that decision.

Chapter 150E gives public employees the right to form, join or assist a union; to participate in proceedings at the Department of Labor Relations; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities.

The Employer assures its employees that:

WE WILL NOT transfer bargaining unit work to non-unit personnel without first giving the Union notice and an opportunity to bargain to resolution or impasse over the decision and impacts of that decision.

WE WILL NOT fail or refuse to bargain in good faith with the Union to resolution or impasse over the decision and impacts of the decision to transfer bargaining unit work to non-unit personnel.

WE WILL restore to the bargaining unit the duties of the Principal Clerk Typist 23 position formerly performed by Ms. Vasquez that the Committee transferred to non-bargaining unit employees until the earliest of the following conditions are met: (i) the Union and the Committee reach agreement over the decision and impacts of the decision to transfer the Principal Clerk Typist 23 duties to non-unit personnel; or (ii) good faith bargaining results in bona fide impasse.

For the Employer

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