

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

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In the Matter of	*	
	*	
CITY OF WORCESTER	*	Case No. MUP-14-3596
	*	
and	*	Date Issued: April 25, 2017
	*	
NATIONAL ASSOCIATION	*	
OF GOVERNMENT EMPLOYEES	*	
	*	

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CERB Members Participating:  
  
Marjorie F. Wittner, Chair  
Katherine G. Lev, CERB Member

Appearances:

William R. Bagley Jr., Esq.	-	Representing the City of Worcester
John J. Mackin, Esq.	-	Representing the National Association of Government Employees

**CERB DECISION ON APPEAL OF HEARING OFFICER DECISION**

SUMMARY

1 On October 17, 2016, a Department of Labor Relations Hearing Officer held that  
2 the City of Worcester (City or Employer) violated Section 10(a)(5) and, derivatively,  
3 Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by  
4 transferring certain custodial services at the main branch of the City's public library  
5 (Main Library) to a private vendor without first giving the National Association of  
6 Government Employees (NAGE or Union) notice and an opportunity to bargain over the

1 transfer decision.<sup>1</sup> The Hearing Officer concluded that the Union had established all  
2 three elements of the well-established transfer of bargaining unit work analysis, i.e., that  
3 the Employer had transferred bargaining unit work to non-unit personnel; the transfer of  
4 work had an adverse impact on individual employees or the bargaining unit itself; and  
5 that the Employer failed to give the Union prior notice and an opportunity to bargain to  
6 resolution or impasse over the decision to transfer the work. See, e.g., City of Boston,  
7 38 MLC 201, 202, MUP-08-5253 (March 9, 2012). As to the third element, the Hearing  
8 Officer found that, although the City told the Union that it intended to “supplement”  
9 custodial services, the City never explained to the Union what that term meant and the  
10 parties had different beliefs as to the meaning of the term. She therefore concluded that  
11 the parties had not achieved a meeting of the minds, and, thus, that the City violated the  
12 Law when it began using a private vendor to perform certain custodial services at the  
13 Main Library before bargaining with the Union to resolution or impasse over this issue.  
14 As to remedy, the Hearing Officer ordered the City to bargain in good faith with the  
15 Union to resolution or impasse over the decision and the impacts of its decision to  
16 transfer cleaning duties at the Main Library, and to refrain from renewing its contract  
17 with the private vendor to clean the Main Library or enter into a similar contract until it  
18 satisfied its bargaining obligation.

19 The City filed a timely appeal with the Commonwealth Employment Relations  
20 Board (CERB), specifically appealing the Hearing Officer’s conclusion that it failed to  
21 give the Union notice and an opportunity to bargain over the transfer decision. The

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<sup>1</sup> The full text of the Hearing Officer’s decision is reported at 43 MLC 113. We adopt the Hearing Officer’s facts and address the City’s challenges thereto in the body of our Opinion.

1 City also contends that the Hearing Officer erroneously failed to give any weight to  
2 bargaining notes from a Union representative and contests aspects of the remedy.<sup>2</sup>  
3 The Union did not file a response to the City's appeal. We affirm.

4 OPINION<sup>3</sup>

5 Except where noted and discussed below, the City does not contest the Hearing  
6 Officer's findings. We therefore adopt them and summarize them briefly below.

7 On June 28, 2013, the parties held a single meeting in which the issue of  
8 contracting out custodial services at the Main Library was discussed. At that meeting,  
9 the City notified the Union that it intended to "supplement" its custodial workforce.  
10 However, the record reflects that the City never explained to the Union what the term  
11 "supplement" meant in this context, and, in particular, that it would mean hiring a private  
12 vendor to perform, on a daily basis, most of the custodial work that Union members had  
13 performed for over twenty years at the Main Library.

14 The remainder of the meeting was spent discussing a proposed reorganization of  
15 custodial services. Bargaining over this reorganization continued for several months,  
16 and culminated in a Memorandum of Agreement (MOA), which contained several  
17 favorable provisions for the Union.<sup>4</sup> There is no dispute that the issue of supplementing  
18 custodial services at the Main Library was not discussed at any negotiations or in any

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<sup>2</sup> The City does not appeal from the Hearing Officer's conclusions regarding the first two elements of the transfer of bargaining unit work test. Nor does it dispute the Hearing Officer's conclusion that the Union did not waive by contract its right to bargain over this issue.

<sup>3</sup> The CERB's jurisdiction is not contested.

<sup>4</sup> Among other things, pursuant to the terms of the MOA, the City promoted five unit members and gave them pay increases. The plant engineer was also included in the bargaining unit as a result of negotiations over the custodial reorganization.

1 correspondence that took place after the June 28<sup>th</sup> meeting. Nor does the MOA  
2 address this issue.

3 The City argues that, in holding that it failed to bargain over the transfer of  
4 bargaining unit work, the Hearing Officer erroneously credited Union President Sean  
5 Maher's (Maher) testimony that he understood the term "supplement" to mean that the  
6 City intended to hire more bargaining unit members. However, the CERB will not  
7 disturb a hearing officer's credibility determinations absent a clear preponderance of all  
8 relevant evidence that the resolutions are incorrect. Town of Hudson, 29 MLC 52, 53,  
9 n. 7, MUP-2425 (September 19, 2002). The City has not provided such evidence.

10 Here, the City argues that Maher's interpretation conflicted with the City's labor  
11 counsel's interpretation and the Hearing Officer improperly gave more weight to Maher's  
12 interpretation than to labor counsel's interpretation, which was based on his many years  
13 of experience as the City's labor negotiator. However, the Hearing Officer's finding that  
14 the parties had not achieved a meeting of the minds was not based on her crediting one  
15 witness over the other, but rather on the disparity in the witnesses' testimony. Further,  
16 the Hearing Officer's determination that the parties had not achieved a meeting of the  
17 minds was based, in part, on a statement that Maher made in a letter that he wrote to  
18 the Assistant City Manager regarding the MOA stating that "[w]e cannot accept shared  
19 work at any level." Although Maher was referring to the parties' negotiations over  
20 including the plant engineer in the bargaining unit as part of the custodial  
21 reorganization, Maher's statement on this issue makes it highly unlikely that he would  
22 have agreed to contract out Main Library custodial services if he had understood the  
23 meaning of the term "supplement."

1           The City further asserts that the notes that a Union national representative took  
2 at the June 28<sup>th</sup> meeting contradict Maher's testimony and the Hearing Officer  
3 improperly ignored this "clear evidence" that the parties had reached agreement on the  
4 supplementation issue. However, the Hearing Officer found, and we agree, that the  
5 notes were not a complete transcription of this meeting, but rather the representative's  
6 impressions and conclusions. Because the representative was not present to explain  
7 his notes, the Hearing Officer properly declined to base any findings of fact on them.<sup>5</sup>

8           Based on the foregoing, the City has failed to demonstrate, by a preponderance  
9 of the evidence, that the Hearing Officer's credibility resolution was incorrect. Nor do  
10 the City's arguments provide any other basis to overturn the Hearing Officer's  
11 conclusion that the parties had not reached a meeting of the minds. We therefore affirm  
12 her conclusion that the City implemented its decision to transfer certain custodial  
13 services at the Main Library outside of the bargaining unit without giving the Union  
14 notice and an opportunity to bargain over the transfer to resolution or impasse.

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<sup>5</sup> For example, the six handwritten pages consist mainly of sentence fragments like "will work within the guidelines" that, without further explanation from the note taker, do not provide a reliable source upon which to base findings of fact. The City claims that the reference to "our guys," followed by the phrase, "no more day to day cleaning," meant that the national representative understood that Union members would no longer be performing that work. The City does not, however, point to anywhere in the notes that clearly states who would be performing the work or whether the work would even continue to be performed. The City's reliance on these two sentence fragments to counter the conclusion that it failed to provide the requisite notice and opportunity to bargain is not persuasive.

1 Remedy

2 The Hearing Officer ordered the City to “do what it should have done in the first  
3 place,” i.e., bargain with the Union.<sup>6</sup> The City disagrees with this remedy, arguing that,  
4 if the CERB upholds the determination that the parties had no meeting of the minds on  
5 the term “supplement,” then it should not order the City to bargain over the transfer  
6 issue while allowing the Union to retain the full benefits of the MOA. The City contends  
7 that it entered into the MOA in the belief that the parties had discussed and resolved the  
8 supplementation issue. The City further contends, however, that given the Hearing  
9 Officer’s findings that the parties had not achieved a meeting of minds on the transfer of  
10 bargaining unit work issue, its decision to enter into the MOA was also based on a  
11 mutual misunderstanding. The City argues, therefore, that the Hearing Officer should  
12 have ordered the parties to bargain over *all* the issues on the table, not just the transfer  
13 of bargaining unit work.

14 We disagree because the City never made clear to the Union that its agreement  
15 to the terms of the MOA were premised on the Union’s agreeing to allow the City to  
16 outsource certain custodial services. Indeed, it is the very lack of clarity around the  
17 nature and meaning of its proposal to supplement the custodial workforce that forms  
18 the basis of the violation.

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<sup>6</sup> As noted above, the Hearing Officer did not order the City to restore the work to the bargaining unit because the City had entered into a contract with a private vendor. See City of Gardner, 10 MLC 1218, 1222, MUP-4917 (September 14, 1983). Nor did she order a make-whole remedy because there was no evidence that bargaining unit members had lost any overtime opportunities. The Union did not file an appeal from this remedy.

1           Instead, the record shows that, from the outset and at all material times  
2 thereafter, the City treated the contracting out and custodial reorganization as two  
3 separate issues. The City initiated discussions over these issues by making two  
4 separate proposals in two separate letters that it sent to the Union on May 7, 2013.  
5 When, on May 13, 2013, the Union sent a single demand to bargain to the City over  
6 both issues, the City responded on May 21, 2013 by discussing its reorganization  
7 proposal only,<sup>7</sup> and setting up an impact bargaining session. At the June 28<sup>th</sup> meeting  
8 that ensued, the City denied that it would be contracting out custodial services, and  
9 indicated without further detail or explanation, that it was going to “supplement”  
10 custodial services. The remainder of this meeting and all subsequent negotiations  
11 were spent discussing the reorganization without further mention of the transfer issue.  
12 Consistent with this pattern, the MOA does not reference the transfer.

13           Under these circumstances, we decline to modify the Hearing Officer's remedy.  
14 Had the City wished to condition its agreement to the terms of the MOA upon the  
15 Union's agreement to outsource Main Library custodial services, or in any other way tie  
16 the two issues together, it could have done so. Absent evidence that it did, however,  
17 and consistent with the allegations before her, the Hearing Officer properly limited her  
18 bargaining order to the transfer of unit work issue.

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<sup>7</sup> The City indicated that it was supplementing this proposal by advising that it was transferring all Library and Meade Street custodians to a new maintenance division with the Department of Administration and Finance.

1 Conclusion

2 For the reasons stated above and in the Hearing Officer's decision, we conclude  
3 that the City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by  
4 transferring certain bargaining unit duties at the Main Library to non-unit personnel  
5 without first giving the Union notice and an opportunity to bargain to resolution or  
6 impasse.

7 **ORDER**

8 WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED that the City shall:

9 1. Cease and desist from:

- 10  
11 a. Unilaterally transferring bargaining unit work at the Main Library to non-  
12 bargaining unit personnel without first giving the Union notice and an  
13 opportunity to bargain to resolution or impasse about the decision and the  
14 impacts of that decision.  
15  
16 b. In any like or related manner, interfering with, restraining and coercing its  
17 employees in any rights guaranteed under the Law.

18  
19 2. Take the following action that will effectuate the purposes of the Law:

- 20  
21 a. Refrain from renewing the portion of its contract with Brand-Nu to clean  
22 the Main Library and from entering into any similar contract until the City  
23 has bargained in good faith to resolution or impasse over the decision to  
24 transfer bargaining unit work and the impacts of that decision on unit  
25 members' terms and conditions of employment.  
26  
27 b. Bargain in good faith with the Union to resolution or impasse over the  
28 decision to transfer cleaning duties at the Main Library and the impacts of  
29 that decision on unit members' terms and conditions of employment.  
30  
31 c. Post immediately in all conspicuous places where members of the Union's  
32 bargaining unit usually congregate, or where notices are usually posted,  
33 including electronically, if the City customarily communicates with these  
34 unit members via intranet or email and display for a period of thirty (30)  
35 days thereafter, signed copies of the attached Notice to Employees.  
36  
37 d. Notify the DLR in writing of steps taken to comply with this decision within  
38 ten (10) days of receipt of this decision.



SO ORDERED

COMMONWEALTH OF MASSACHUSETTS  
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

  
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MARJORIE F. WITTNER, CHAIR

  
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KATHERINE G. LEV, CERB MEMBER

**APPEAL RIGHTS**

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



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

**NOTICE TO EMPLOYEES**  
**POSTED BY ORDER OF THE**  
**DEPARTMENT OF LABOR RELATIONS**  
**COMMONWEALTH EMPLOYMENT RELATIONS BOARD**  
**AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

The Commonwealth Employment Relations Board has held that the City of Worcester (City) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (Law) when it transferred certain cleaning duties at the Main Library from the National Association of Government Employees (NAGE) bargaining unit to a private company without bargaining to resolution or impasse.

Section 2 of Chapter 150E gives public employees the right to:

- form, join or assist a union;
- to participate in proceedings at the DLR; 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 City assures its employees that:

**WE WILL NOT** fail and refuse to bargain in good faith by unilaterally transferring bargaining unit work at the Main Library to non-bargaining unit personnel without first giving the Union notice and an opportunity to bargain to resolution or impasse about the decision and the impacts of that decision.

**WE WILL NOT** in any like or similar 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:

- Refrain from renewing the portion of our contract with Brand-Nu to clean the Main Library and from entering into any similar contract until we have bargained in good faith to resolution or impasse over the decision to transfer bargaining unit work and the impacts of that decision on unit members' terms and conditions of employment.
- Bargain in good faith with the Union to resolution or impasse over the decision to transfer cleaning duties at the Main Library and the impacts of that decision on unit members' terms and conditions of employment.

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For the City of Worcester

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Date