

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

In the Matter of	*	
	*	
CITY OF BOSTON	*	Case No. MUP-17-6211
	*	MUP-18-6679
	*	
and	*	Date Issued: March 31, 2020
	*	
SENA, LOCAL 9158	*	
	*	

Board Members Participating:

Marjorie F. Wittner, CERB Chair
Katherine G. Lev, CERB Member
Joan Ackerstein, CERB Member

Appearances:

Kate Kleimola, Esq.
Ellen McClintock, Esq. - Representing the City of Boston
Alfred Gordon O'Connell, Esq. - Representing SENNA, Local 9158

CERB Decision on Review of Hearing Officer's Decision

1 On September 5, 2019, a Department of Labor Relations (DLR) Hearing Officer
2 held that the City of Boston (City) violated Section 10(a)(5) of M.G.L. c. 150E (the Law)
3 when it: 1) required that Lisa Menino (Menino), an administrative assistant in the City's
4 Property Management Department (PMD) and a shop steward, provide details about staff
5 duties when requesting overtime; and 2) transferred the preparation and preapproval of
6 overtime sheets. The Hearing Officer dismissed the remaining allegations before her.

1 SENA (Union) filed a timely request for review with the Commonwealth
2 Employment Relations Board (CERB), claiming both legal and factual error. Specifically,
3 SENA requests that the CERB review the Hearing Officer's denial of the Union's motion
4 to amend the Complaint, her determination that the City did not retaliate against Menino
5 in violation of Sections 10(a)(3) and 10(a)(4) of the Law, and the Hearing Officer's failure
6 to recognize the transfer of exclusive bargaining unit work, at least in part, to non-
7 bargaining unit members and exempt employees, thereby creating shared work. The City
8 filed a reply to the Union's request for review.¹

9 For the reasons stated in the Hearing Officer's decision and below, the CERB
10 affirms the Hearing Officer's conclusion that the City did not violate the Law as alleged.

11 Facts

12 The Hearing Officer made extensive and detailed findings of fact, some of which
13 the Union has challenged on appeal. We summarize the salient portions below,
14 addressing the challenges throughout the decision, as necessary.

15 Background

16 Menino has been employed by the City since 1994 and has worked in the PMD
17 since 2000. Boston Mayor Thomas Menino (Mayor Menino) was Menino's father-in-law.
18 Mayor Menino served as the City's mayor from the time Menino began working for the

¹ The City did not appeal any aspect of the Hearing Officer's decision.

1 City until 2014. Michael Galvin (Galvin) served as Commissioner of the PMD under Mayor
2 Menino. Galvin was a good friend of Mayor Menino.

3 Menino is the PMD's Special Events Coordinator. The job description for this
4 position describes the position generally as, "Under Direct Supervision, Schedules,
5 Coordinates and manages the [PMD's] Special Events unit." At its most basic, her job
6 entails meeting with clients (either other City departments or non-City clients who are
7 holding an event on City Hall Plaza or inside City Hall) and organizing and planning the
8 event. Menino also served as the overall coordinator both during the event itself, and
9 afterwards, during its cleanup. The gist of this charge concerns changes from 2017-
10 2018 to Menino's duties, autonomy and overtime hours before, during and after an event.
11 At issue in this case is the motivation for the changes and whether they triggered a
12 bargaining obligation. We begin by describing Menino's duties and authority before 2017.
13 We then provide a chronology of relevant events.

14 Prior to 2017, Menino was not required to obtain any supervisory approval prior to
15 staffing special events; she unilaterally determined the number and types of employees
16 that were needed to staff the events, including security, custodians, electricians, etc., and
17 how much overtime she and those employees would work. Nor did supervisors modify
18 Menino's staffing plans after she submitted them.² Rather, as Rooney testified and the

² The Hearing Officer found that Galvin took a "hands-off" approach to managing Menino and drew inappropriate conclusions from that based upon her earlier finding that Galvin

1 Hearing Officer found, PMD management took a “hands-off” approach to the way in which
2 Menino staffed her events.

3 Once an event was underway, Menino worked at all City Hall events for their
4 duration to ensure that everything went smoothly. She checked in with security, custodial
5 staff and vendors, and did troubleshooting as necessary.

6 PMD Overtime and Labor Costs

7 Menino’s regular hours are 9 a.m. to 5 p.m. When she works at night and weekend
8 events, she is eligible to receive overtime or compensatory time, as are most of the staff
9 who work the events. Prior to 2017, at the end of each event, Menino prepared overtime
10 documents for the staff who worked at the event, which she would then submit to PMD
11 Deputy Commissioner Joseph Callahan (Callahan).

was friends with Mayor Menino. We decline to disturb the finding itself because it is based on Rooney’s testimony, that prior to his becoming Commissioner of the Department, “it was more or less a hands-off management of [Menino].” The Hearing Officer credited that testimony and there is no basis to disturb it, particularly since she only cited it as a footnote to her otherwise unchallenged finding that prior to 2017, Menino was not required to obtain supervisory approval for staffing decisions and her decisions were not modified by supervisors after she made them. Indeed, the Union concedes in its supplementary statement that “Menino was afforded a great deal of discretion and independent judgment in planning and overseeing special events.” Where Menino herself testified that the SENA CBA states employees need prior authorization to work all hours in excess of their regular workweek, but that was “not how it was done” at the PMD, and where many of the allegations concern the changes that PMD management made to Menino’s staffing decisions, we decline to disturb the Hearing Officer’s decision to credit Rooney’s testimony that previous PMD management took a hand-offs approach to Menino. See Vinal v. Contributory Retirement Appeal Board, 13 Mass. App. Ct. 85 (1982)(court will not disturb credibility determinations unless they are plainly wrong). Unlike the Hearing Officer, however, we do not speculate why this was so.

1 The City has a special events department (SED), which sponsors a number of
2 special events at City Hall Plaza, such as the Donna Summer Disco Night and Portraits
3 of Purpose events discussed below. For non-City events, the sponsor is responsible for
4 reimbursing the City for overtime payments after the event is over, but as described
5 below, not all sponsors pay promptly. The City therefore “fronts” these overtime
6 payments to employees who work overtime at these events. As set forth below, beginning
7 in 2016, the City began scrutinizing those payments, and overtime generally at PMD more
8 closely.

9 **2016**

10 **March 2016**

11 In March 2016, an outside auditor completed an “Operational Audit and Review of
12 the PMD,” which they had begun in 2015. The written report that the auditors released
13 on March 22, 2016, contained a number of “Opportunities,” including Opportunity #5,
14 which was to “Develop policies and procedures around Special Events billing, labor
15 costing and budgeting.” This section, which was labelled “High Priority,” addressed late
16 payments and the lack of formal policies and procedures regarding such costs and
17 payments as follows:

18 If a vendor is late on their payment after an event has occurred, the City is
19 forced to use its own money to pay the security detail, custodian(s), and
20 event coordinator the overtime that they worked for the special event.
21 Vendors have been known to pay extremely late - sometimes up to one
22 year later for the larger, more financially significant events. . . There are no

1 formal policies or procedures in place in regards to the billing, labor costing,
2 and budgeting of special events.

3 The report recommended that:

4 Formal policies and procedures. . . be implemented around billing, labor
5 costing, and budgeting of special events to ensure continued and
6 consistent operations of special events. . .when individuals within Special
7 Events turnover.

August 2016-December 2016

8 Two events critical to understanding the parties' positions regarding these charges
9 occurred in this time period. First, in August 2016, Gregory Rooney (Rooney), a long-
10 time City employee, replaced Galvin as PMD Commissioner. Second, on November 23,
11 2016, Menino filed a grievance challenging her bypass for promotion to an asset
12 management position in the PMD.

13 2017

14 Beginning in February 2017, Rooney began making changes to the way Menino
15 staffed her events.

16 February 2017

17 On February 16, 2017, Rooney sent an email to Menino and other managers
18 stating that all PMD overtime requests must be approved in advance, on an Event
19 Overtime Request form.

20 March/April 2017

1 The annual Boston Marathon Pasta Dinner, which occurs the weekend before the
2 Boston Marathon, was the first major City Hall event that took place after Rooney
3 assumed office. To prepare for this event, Rooney met with Callahan and Menino in
4 March or early April 2017 and inquired as to how many custodial and security personnel
5 would be required for the event. Menino did not provide a number, stating only that she
6 did not know who would be available that day.

7 On March 30, 2017, Callahan sent an email to Menino asking her to provide him
8 with anticipated overtime needs for the month of April. Menino responded with an email
9 that simply stated, in pertinent part, "Boston Marathon Pasta Dinner, Friday, April 14-April
10 17, 2017." Callahan followed up on April 10, 2017, with an email that again asked for
11 details on what support she needed for the event, e.g., how many custodians, security
12 officers, etc. Callahan also asked for a copy of PMD overtime records for the last few
13 years. Menino's response stated that she would not know her needs until she asked, and
14 that it would take a few days to go through the list. Menino never provided the numbers
15 that Rooney and Callahan were seeking. Neither Rooney nor Callahan made any
16 changes to the staffing that Menino eventually put in place for this event or resultant
17 overtime costs. Menino worked the duration of the Marathon Dinner and received all the
18 overtime she had requested.

19 At some point prior to May 2017, Rooney attended meetings with the City's budget
20 office in which he was asked to formulate a plan to reduce the PMD's overtime. In May

1 2017, Rooney and David Sweeney (Sweeney), who was then the City's Chief of
2 Administration and Finance/CFO, emailed one another regarding this issue. On May 3,
3 2017, Sweeney sent an email to Rooney, asking "where we were in terms of timing of
4 having a formal plan in place to reduce the excessive overtime at [PMD]." Sweeney noted
5 that many PMD staff were making over \$30,000 a year in overtime, with some exceeding
6 \$40,000 and \$50,000. Sweeney opined that, "[g]iven the nature of the work and the
7 results we are seeing, it is difficult to understand the [PMD's] justification for this."

8 Rooney replied with a lengthy email on May 8, 2017, which stated in pertinent part
9 that he was aware of and shared Sweeney's concerns about overtime costs, and that he
10 was actively working to reduce them. In particular, Rooney stated:

11 I agree that some of the OT costs are exorbitant. We continue to monitor
12 strategic and fair staff deployment and are working with our governing
13 CBAs to explore current, existing shifts and considering modified work
14 schedules to better deploy personnel during peak events on the plaza and
15 within City Hall.

16 The email concluded with Rooney's hope that:

17 1) Reducing vacancies and maintaining optimal staffing; 2) adjusting work
18 assignments, deployment and schedules; [and] 3) implementing a higher
19 level of fiduciary control[,] will provide the necessary tools [to] reduce and
20 eliminate unnecessary overtime costs.

21
22 Rooney subsequently began learning more about special events and reviewing the
23 Event Overtime Request Forms that he had recently implemented. He also implemented
24 "After Action Reports," which he had utilized in prior positions, to assess what had and had
25 not worked at a particular event to see if it should be staffed differently the next time.

1 June 2017

2 Special Events

3 The Donna Summer Disco Night, an SED event, took place on City Hall Plaza on
4 June 23, 2017.

5 Prior to June 23, Menino submitted an Overtime Request Form seeking to work 4-
6 11 PM for “overall event coordination.” Callahan returned the form on June 22, 2017,
7 denying the request and indicating that “special events [SED] staff to coordinate.”³
8 Callahan reiterated that SED would handle the special events coordination in a June 23
9 email to Menino. That email also indicated that Menino would assist as usual during her

³ SENA challenged the Hearing Officer’s findings regarding Donna Summer Disco Night, and in other places in the Findings of Fact and Opinion sections of the Hearing Officer’s decision, that the City eliminated Menino’s overtime at City sponsored events because the SED had its own coordinator. In her actual Findings of Fact, however, the Hearing Officer did not make a finding as to the City’s actual motivation for eliminating some or all of Menino’s overtime at SED-sponsored event, but only relayed what the City told Menino when it rejected her overtime requests. Those findings are accurate, and we do not disturb them. The remainder of the challenge questions the validity of the City’s claim that it replaced Menino because there already was an event coordinator. The Union implicitly argues that this was not plausible because, as Menino testified, the two jobs are different – the SED Event Coordinator handles talent, and she does not. Although the Hearing Officer found that not all SED events have talent, the Union disputes this finding. The Union does not dispute, however, that, starting with the Donna Summer Disco Night, the City rejected all of Menino’s requests to work beyond her normal hours at SED - sponsored events on grounds that SED had its own coordinator. We address the Hearing Officer’s analysis of the City’s actual motivation for this in the Opinion section of this decision. Because this analysis does not turn on whether or not all SED events had talent, we need not resolve this portion of the challenge.

1 regular shift. This event marked the first time that PMD management had ever restricted
2 Menino's overtime.

3 Also, beginning with this event, Peter Barbuto (Barbuto), the Custodial Supervisor,
4 began completing overtime paperwork at the end of events that Menino did not attend.
5 Menino had previously performed this duty. Barbuto is not a SENA bargaining unit
6 member.

7 On June 25, 2017, Menino requested overtime for herself and other staff for the
8 Caliente Music Festival. This festival is also held by the SED around City Hall. On July
9 20, Callahan denied Menino's personal overtime request on grounds that SED was
10 running the event. Callahan did, however, approve Menino's overtime requests for other
11 staff.

12 July-August 2017

13 The Boston Parks Department Concert series is a series of four summer concerts
14 that take place on City Hall Plaza. On July 11, Callahan informed Menino that the Parks
15 Department would handle special events coordination for the four concerts. Callahan
16 also informed Menino that he would speak with Ken Ryan (Ryan), PMD's Graffiti
17 Manager, and Barbuto to coordinate with the custodians. Neither Ryan nor Barbuto had
18 previously worked during these concerts.

19 Menino wrote back to Callahan on July 12, stating that she did not understand why
20 her duties were being removed from her and given to employees whom she claimed, "had

1 little experience running events.” Menino stressed that she had been successful in
2 running events over the years and had a good reputation that could be lost if the event
3 “had a bad experience.” Callahan did not respond to this email.

4 August 2017

5 Special Events

6 Rooney denied Menino’s request for overtime to work at GospelFest, a night of
7 church music held on City Hall Plaza. In an August 4 email, Rooney told Menino that,
8 “Since GospelFest is run by Special Events, we will not need an event coordinator.”

9 GreenFest is a multi-day event held on City Hall Plaza that is sponsored by the
10 Foundation for a Green Future (Foundation), a non-City organization. GreenFest has
11 been held since 2008. Prior to 2017, Menino had worked as the event coordinator for nine
12 years.

13 Menino submitted a request for overtime to work a total of thirty-three hours at
14 GreenFest spread over three days, from August 11 – August 13. She received approval
15 for fourteen hours. The cuts were mainly to the hours she requested on August 12 and
16 August 13. Instead of working 10 a.m. to 11 p.m. as requested on those days, she was
17 approved for 10 a.m. to 2 pm.

18 By email dated August 12 to Menino, with copies to Rooney and the Boston
19 Municipal Police Department, Karen Weber (Weber), the Foundation’s President and
20 Executive Director, expressed dismay over Menino’s reduced hours and sought

1 reassurance that Menino would continue through the hours of the festival.⁴ Menino's
2 hours were not changed, but Weber was assured that Menino would continue to be her
3 contact person.

4 On August 23, Weber wrote a letter complaining about a number of incidents that
5 occurred during GreenFest, (e.g., a theft of a sculpture, inability to locate sandbags, police
6 not near stage, limited interaction with Barbuto). Weber stated that in the past, when
7 Menino was present, she had never had to worry about locating persons or equipment.

8 Weber continued to communicate with Rooney and/or Callahan from 2017-2018
9 about her dissatisfaction with the manner in which GreenFest had been handled. At some
10 point, Weber asked not to pay for Barbuto's time, claiming that she had only seen him
11 once during the entire Festival and did not know what his duties had been. The City
12 denied this request.

13 The invoice for the August 2017 event was approximately \$22,000. That bill was
14 not paid in full until June 2018.

15 September 2017

16 Grievance/Charge

⁴ Weber wrote:

Please – anyone on this list, get back to me and reassure me that Lisa will continue through the hours of the festival to take care of Boston GreenFest. We have budgeted her overtime into our plans, and this should not be an issue. . . . Please get back to me ASAP since the festival is in full swing and I need the reassurance that Lisa [Menino] will be there with us.

1 The first day of Menino's promotional bypass hearing was held on September 7.
2 On September 11, Menino filed the first of the two charges in this case – MUP-17-6211.
3 The charge alleged that, beginning on November 23, 2016, the date she filed her
4 grievance and continuing to date, the City retaliated against Menino for filing the
5 grievance, in violation of Section 10(a)(3) and Section 10(a)(1) of the Law by: changing
6 the way it wanted Menino to staff events, taking duties away from her, and preventing her
7 from working at special events despite this having been part of her job duties for eighteen
8 years. The charge further alleged that Menino had lost significant overtime as a result.

9 Special Events

10 The SED held three events on City Hall Plaza in September 2017; Unity Concert,
11 Country in the City and Hub on Wheels. Menino's request to work overtime hours for all
12 three events was denied on grounds that SED sponsored and managed the events.

13 Menino also requested to work from 4pm - 8 pm for the duration of a new non-SED
14 event, the City of Champions Beer Garden, sponsored by TD Garden Delaware North,
15 on City Hall Plaza. This request was approved.

16 October 2017

17 Special Events

18 Hub Week is a multi-day event organized by the Boston Globe and held by SED
19 on City Hall Plaza. Prior to 2017, Menino served as the overall events coordinator.

1 In 2017, Hub Week was held from October 12 to October 15. Menino requested
2 to work overtime for each of the four days and also requested overtime for custodial and
3 security staff. On October 12, Callahan sent Menino an email indicating that he had
4 compared her request for custodial and security services to the schedule of events on
5 Hub Week's website and was confused by the start and end times for some of the
6 overtime that she had requested for custodial staff. He also proposed deferring to the
7 Boston Police Department's request for additional security. Callahan also reduced the
8 amount of overtime that Menino had requested to work by one or more hours.

9 December 2017

10 DLR Charge

11 On December 8, 2017, the DLR held an in-person investigation of MUP-17-6211.
12 Menino attended the investigation and provided information to the Investigator.

13 Alleged Changes in Access/Duties

14 Around December 2017, the City notified Menino that it was removing her badge
15 access to the "loft." The loft is a storage area where supplies, such as trash bags and
16 paper towels, are kept. Employees can access the area with a key, with a badge or by
17 asking security. Prior to 2017, Menino could access it with a key and/or her badge. At
18 hearing, Menino did not know whether she still had her key because she hadn't accessed
19 the loft in 2017. At hearing, the City provided evidence showing that Menino had not
20 accessed the loft with her badge from 2010-2017.

1 Also, sometime in 2017, Callahan informed Menino that she would no longer
2 coordinate extermination for City Hall and outside buildings with Terminix, the City's pest
3 control contractor.⁵ This duty involved receiving a pest complaint and contacting Terminix
4 to schedule extermination services. Menino had performed these tasks for around ten
5 years. The City assigned these duties to Building Superintendent and SENA bargaining
6 unit member Leon Graves (Graves). The Hearing Officer found that the City assigned
7 Graves instead of Menino to perform these duties in the belief that coordinating pest
8 control duties was more in line with Graves' duties as Building Superintendent than with
9 Menino's special events duties.⁶

10 **2018**

11 **February 2018**

12 **Charge/Grievance**

13 On February 26, 2018, a DLR Investigator issued a complaint in MUP-17-6211
14 alleging that the City had violated Sections 10(a)(3) and, derivatively, Section 10(a)(1) of

⁵ The Hearing Officer did not make a specific finding as to when this change occurred. However, the complaint in MUP-18-6269 alleged that it occurred on or about December 13, 2017 and the Union's post-hearing brief provides transcript citations that support this timeframe.

⁶ The Union challenges this. We discuss the City's motivation in our Opinion.

1 the Law by either eliminating or reducing Menino’s overtime at the various special events
2 described above.⁷

3 February 28 was the second and final day of Menino’s promotional bypass
4 arbitration hearing.

5 Special Events

6 The second annual Portraits of Purpose was held in February 2018. This event
7 takes place inside City Hall as part of Black History Month.

8 Callahan was not involved in planning or coordinating the first Portraits of Purpose
9 event but took a more active role in planning the 2018 event. On February 7, Menino sent
10 an email to Callahan complaining about his conduct at a planning meeting where he
11 deferred to Barbuto’s recommendations on staffing, whom she referred to as an
12 “inexperienced new employee.”⁸ Menino stated, as she had in previous emails, that she
13 felt that this was a personal attack on the way that she performed her job.⁹

⁷ The Investigator also dismissed two independent Section 10(a)(1) allegations. SENA did not appeal the dismissal.

⁸ Menino indicated that the meeting was also attended by Rooney and A&F Director Steven Stephanou.

⁹ Menino stated that she had “performed [her] duties and responsibilities as special events coordinator flawlessly for over a decade and I feel this behavior is a flagrant attack at me personally.” Nowhere in her correspondence with the City over similar topics does Menino suggest that the changes were due to her grievance filing or DLR-related activities.

1 Callahan responded with a lengthy email, explaining that Barbuto was present at
2 the February 6 planning meeting because he is the Assistant Superintendent of
3 Custodians and is often present at these meetings. Callahan also indicated that the
4 meeting was requested by Mayor's Office representatives because they expressed
5 concern that Menino had not responded to several of their emails and they were
6 concerned about PMD's readiness for the event. The remainder of Callahan's email
7 stated in pertinent part:

During the February 6, meeting, at which Mayor's Office representatives were present, you were asked for input several times and chose not to engage. You responded to direct questions by shrugging your shoulders and saying "whatever" or words to that effect. Our Custodial Supervisor was included in this meeting because you had not communicated the custodial needs to him prior to the meeting, except for the number of chairs needed. He was unaware of the hours of the event, the number of guests expected, or that the event would include a catered meal. Further, you had not notified Chief Joyce, head of security, about the security needs for the event nor the loading dock manager about the delivery of materials to the dock for the event. It is important for you to communicate these needs to the appropriate supervisors so events can proceed in an orderly fashion.

8
9 Callahan closed by indicating that all the work done by other City employees fell
10 "squarely within their job duties. There is no intent of taking work away from you."

11 At hearing, Menino disputed most of the Callahan's description of her behavior at
12 the meeting, and claimed, among other things, that she did not respond to certain
13 requests because she did not have sufficient information to respond, particularly
14 regarding catering. Menino did not, however, dispute that she remained silent during at
15 least a portion of the meeting. She claimed that this was because she did not understand

1 what Callahan was doing. Although Menino disputed that she never communicated with
2 security or Barbuto prior to the event, she provided no details about those
3 communications.

4 Menino had no further involvement in planning or attending Portraits of Purpose.
5 Rooney, Callahan and Barbuto handled the event.¹⁰

6 April 2018

7 Other Changes

8 As previously noted, in June 2017, Barbuto began completing overtime records at
9 the end of the event for custodial staff when Menino was not there at the end of the event.
10 Starting in April 2018, Barbuto began completing these records even when Menino
11 attended the event.

¹⁰ SENA challenges the Hearing Officer's reliance on the contents of Callahan's email for several reasons, including that Callahan did not testify at the hearing. SENA does not, however, dispute that Callahan sent this email. There is therefore no basis to disturb the Hearing Officer's extended quotation of it in her findings of fact. As to its contents, the Hearing Officer specifically noted that Menino disputed most of the claims made in the email and apparently credited her explanation that she could not provide information that she did not yet have regarding catering. Finally, the Union challenges the Hearing Officer's finding that Menino remained silent during the meeting because "Callahan did not know what he was doing." Although, as the Union's supplementary statement indicates, Menino did testify early in her testimony regarding this email that Callahan did not understand what was going with Portraits of Purpose, we agree with the Union that Menino testified that she remained silent, not because *Callahan* did not know what he was doing, but because *Menino* did not understand what Callahan was doing. We have modified the finding accordingly, retaining the salient aspect of this testimony, which is Menino's admission that she remained silent for a portion of the meeting.

1 May 20182 Special Events

3 Youth Pride is an annual, one-day event that include a daytime job networking
4 event and an evening dance geared toward LBGTO students.¹¹ Prior to 2018, Menino
5 made all security and custodial staffing decisions about the event. In 2018, Menino sent
6 Director of Security William Joyce (Joyce) information about the event's hours and he
7 made the security staffing decisions. Joyce is a SENA member.

8 Menino requested to work the event from 6 am to 9 pm, along with two custodians,
9 and requested an electrician from 8 am to 9 pm. On May 11, 2018, Menino provided
10 Rooney and Callahan with details about who would be doing what. Rooney advised
11 Menino that he and Barbuto were reducing the total hours of custodians and splitting the
12 day into four separate shifts. He also questioned why Menino required a fifteen-hour shift.
13 After she replied with an email that was similar to those she had written in the past,
14 explaining that she was needed to ensure that things ran smoothly, Menino worked the
15 duration of the event.

16 Other Changes

17 On May 3, Rooney sent an email to Menino instructing her to list the specific duties
18 to be performed by staff when submitting Event Overtime Request Forms. Although
19 Menino had been submitting Event Overtime Request Forms since at least February

¹¹ Neither the decision nor the record reflects whether Youth Pride was an SED event.

1 2017, she had not previously been required to list the specific duties each staff member
2 would be expected to perform.

3 June 2018

4 Charge

5 On June 7, 2018, SENA filed the second charge at issue here, MUP-18-6269. The
6 charge alleged that the City violated Sections 10(a)(1), 10(a)(3), 10(a)(4) and 10(a)(5) of
7 the Law by unilaterally changing Menino's job duties and transferring the work she had
8 performed outside of the bargaining unit in retaliation for her filing and participating in
9 MUP-17-6211.

10 Special Events

11 As she had in 2017, Menino sought overtime for the Boston Parks Department
12 Concert Series. In response, Rooney sent Menino an email stating that he was not
13 approving an events coordinator because the event was being managed by the Parks
14 Department. He indicated however that they could discuss custodial and security staffing
15 at a Special Events meeting.

16 The Boston Pride Festival is a large annual event that is held on the second
17 Saturday in June on City Hall Plaza. The event is run by a Board of Directors that is
18 overseen by Linda Demarco (DeMarco), with the help of approximately 150 volunteers.

19 Before 2018, Menino made staffing recommendations and worked the full event
20 without her hours being reduced. In 2018, Joyce made security recommendations for the

1 event and Rooney reduced the overtime for Menino and an electrician from seventeen
2 hours to eight hours. In an email dated June 8, 2018, Rooney advised Menino that he
3 was approving a reduced number of hours because, among other things, he felt that a
4 seventeen-hour shift was “excessive and could lead to potential unsafe conditions.” He
5 also indicated that the Pride Event had its own event coordinator and, based on their
6 “After Action” report from the previous year, there had not been any significant issues.

7 Rooney’s email also reflected that another event, the Portuguese Festival, was
8 being held the day after Pride Day. This was a new event for which Rooney did not have
9 an After Action Report. Recognizing that there could be issues transitioning one event to
10 the next, he approved some but not all of the overtime that Menino had requested for the
11 beginning of the Portuguese Festival.

12 The Pride event took place right after the “Scooper Bowl,” an annual ice-cream
13 themed event on City Hall Plaza, and on June 21, 2018, DeMarco wrote a letter to Rooney
14 complaining about various aspects of the Pride event, including inadequate trash pickup
15 and cleanup after Scooper Bowl, and not being informed in advance that the “usual
16 management team” was not going to be there. The only response that DeMarco got was
17 that the City was trying to save them overtime costs. Although the Pride Committee had
18 never complained about this, the record shows that, at hearing, DeMarco conceded that
19 the Pride Committee pays its bills a little late, and he could not remember if it had paid

1 the December 2017 bill at all. The record also shows that, as of December 28, 2018, the
2 Pride Committee had not submitted payment for the June 2018 event.¹²

3 July 2018

4 The Puerto Rican Festival of Massachusetts is a three-day event that takes place
5 in July. Before 2018, the President of the event, Edwin Alicea (Alicea), relied on Menino
6 to coordinate the event. Menino's hours working at the festival were reduced in 2018 and
7 Graves handled the event. The Department told Alicea that it wanted to save him money.
8 However, the cost of the Festival was the same (\$34,500) in both 2017 and 2018.

9 August 2018

10 Special Events

11 As he had in 2017, Rooney denied Menino's request for overtime to work at
12 GospelFest on grounds that it was run by SED.

13 GreenFest was again scheduled to occur on City Hall Plaza, and Weber requested
14 that Menino be present throughout. Menino sought overtime and was approved to work
15 from 11 am to 7 pm. Although this was more overtime than Rooney had approved in 2017,

¹² The Hearing Officer found that the Pride Committee had not paid either the 2017 or 2018 Bill as of December 2018. SENA challenges this finding. However, DeMarco testified that, as of December 2018, the 2018 bill had not been paid. As to the 2017 bill, he conceded that the Pride Committee sometimes pays its bills a "little late" and "was not sure" if it had been paid. Although we agree with the Union that this does not constitute definitive proof that the Pride Committee had not paid its 2017 bill as of December 2018, it nevertheless demonstrates that the City had reason for concerns about the Pride Committee paying its bills on time. We have modified the finding accordingly.

1 it was still less than the 11 am to 11 pm schedule that Menino had requested in 2018.
2 Weber wrote a long email to Rooney, Callahan and others in August 2018, detailing
3 various issues that occurred during the festival, including issues with trash, electricity,
4 access, set-up, etc.. The email also praised Menino for her efforts that year.

5 As of January 2019, the Foundation had not paid its 2018 bill. Weber testified that
6 this was because the organization was negotiating with the City to reduce the bill because
7 property was damaged at the event.¹³ In 2019, GreenFest was held on the Greenway,
8 not at City Hall.¹⁴

¹³ Rooney denied that there were any negotiations over the bill but conceded that GreenFest could have been negotiating with another department.

¹⁴ Based on Rooney's un rebutted testimony, the Hearing Officer found that the reason for the location change was that in January 2019, Rooney rejected GreenFest's application to hold the festival at City Hall because GreenFest had not yet paid its 2018 bill. In crediting Rooney, the Hearing Officer noted that Weber never mentioned in her testimony that the Foundation had applied to hold the 2019 event on City Hall Plaza but had been rejected. SENA challenges this finding on grounds that, other than Rooney's "self-serving" testimony, Rooney never provided any proof that he rejected the Foundation's application. SENA also notes that Weber did in fact testify that the Foundation applied to hold the event on City Hall Plaza, but only as a backup. SENA thus claims that the Hearing Officer erred when she credited Rooney's testimony over Weber's, who testified that she decided not to return to City Hall because City Hall Plaza was undergoing construction and because of Menino's diminished role in the event. We find no error. Although Weber testified that she applied to hold the event on City Hall Plaza, the Hearing Officer accurately found that Weber never testified that the application was rejected. Rooney's testimony was therefore un rebutted, and we defer to the Hearing Officer's determination that he credibly testified that he rejected GreenFest's application. See Vinal v. Contributory Retirement Appeal Board, supra. We need not, however, resolve the Hearing Officer's ultimate finding that this rejection was the primary reason that GreenFest was not held on City Hall Plaza in 2019. Regardless of the actual reason, it

1 September 20182 DLR Charge

3 On September 13, a DLR investigator issued a fourteen-count complaint and
4 partial dismissal in MUP-18-6679. As discussed below, the charge alleged that the City
5 violated Sections 10(a)(1), (3), (4) and (5) of the Law in connection with the September
6 2017-May 2018 incidents described above.¹⁵

7 October 20188 Hub Week

9 In preparation for the 2018 event, Menino sent Rooney an email describing her
10 staffing needs. Rooney replied with an email asking for more details. Menino responded
11 with a lengthy email detailing her role and others, including electricians, and custodial and
12 security staff. In the final paragraph, Menino emphasized that Director of Security Joyce
13 and Building Superintendent Graves had been attending meetings with Hub Week

is clear from Weber's 2017 and 2018 communications to the City that she was dissatisfied with the way the City had handled her event, including its decision to shorten Menino's hours.

¹⁵ The Union did not appeal the dismissed allegations. Also, prior to the start of the hearing, the Union orally withdrew Counts IV, VIII and XIV of MUP-18-6679. It also sought to amend Count XIV to allege a Section 10(a)(3) and/or a Section 10(a)(4) violation. We address the motion to amend below.

1 Coordinator Alex Richman and “the Commissioners”¹⁶ without her to discuss staffing
2 issues and thus, she wanted to “make clear that none of this information on staffing has
3 been shared with me for any of the events since they have been reporting to the
4 Commissioners.”

5 Other 2018 Changes

6 At some point after 2018, Menino ceased working with event organizers to make
7 detailed plans for security. The City put Joyce in charge of this responsibility. Menino
8 also ceased determining the number of custodial staff for an event. Graves assumed this
9 role.

10 Menino’s Change in Overtime Earnings

11 From 2013-2015, Menino earned between \$44,000 and \$45,000 in overtime pay.
12 In 2016, she earned \$53,741.11. She earned \$33,028.86 in 2017 and \$20,563 in 2018.
13 Other PMD employees’ 2018 overtime earnings are as follows: Barbuto - \$9,431; Graves
14 - \$15,621; Ryan - \$42,681.

15 Opinion¹⁷

16 Motions to Amend Complaint

¹⁶ We presume that Menino was referring to PMD Commissioner Rooney and Deputy Commissioner Callahan.

¹⁷ The CERB’s jurisdiction is not contested.

1 We first address the Union's claim that the Hearing Officer erred when she denied
2 the Union's motion to amend Count XIV of the Complaint to allege a Section 10(a)(3)
3 and/or Section 10(a)(4) violation instead of a Section 10(a)(5) transfer of bargaining unit
4 work allegation. The Union orally made this motion on December 12, 2018, the first day
5 of hearing and the City objected, stating that the new allegation was untimely and that the
6 City would be unduly prejudiced. The Hearing Officer orally denied the motion on the
7 second day of hearing on grounds that there had not been a probable cause
8 determination that the City had violated Section 10(a)(3) by the conduct alleged in Count
9 XIV. The Union renewed its motion to amend Count XIV in its post-hearing brief, and,
10 for the first time, also sought to amend Counts X and XII to allege Section 10(a)(3) and
11 or 10(a)(4), instead of Section 10(a)(5) transfer of bargaining unit work violations.

12 We deny the motions. Counts X, XII and XIV alleged that the City unlawfully
13 transferred bargaining unit work to Joyce and/or Graves¹⁸. In its Supplementary
14 Statement, the Union indicates that Joyce and Graves are SENA members, and thus,
15 because transfer of bargaining unit allegations require a charging party to demonstrate
16 that the work be transferred *outside* of the bargaining unit, see, e.g., Town of Bridgewater,
17 25 MLC 103, 104 (1998), it seeks to amend the three counts to allege that the City's
18 conduct described therein was retaliatory, rather than an unlawful transfer of bargaining

¹⁸ As discussed below, Count XII alleges that, in May 2018, the City transferred bargaining unit work to Barbuto as well as "Boston City Hall Security."

1 unit work. In her decision, the Hearing Officer denied the renewed motion to amend Count
2 XIV and did not address the new motion to amend Counts X and XII. The Union appeals
3 this determination.

4 We deny the Union's appeal for three reasons. First, 456 CMR 15.06(2) allows a
5 party that believes that an investigator has made an error or omission to file a motion to
6 amend the Complaint with the investigator who issued it within **ten days** of the Complaint
7 being issued. Here, although the Union recognizes that it was error to allege an unlawful
8 transfer of bargaining unit work based on transfers to bargaining unit members, it has
9 provided no explanation for why it failed to file a motion with the Investigator within ten
10 days of the Complaint being issued. Where Graves and Joyce are members of its own
11 bargaining unit, the erroneous allegations should have been evident to it upon issuance.

12 Second, having failed to timely file a motion to amend with the Investigator, the
13 Union's remaining option was to file a motion to amend pursuant to 456 CMR 15.06(2)
14 after the start of the hearing. Pursuant to this regulation, the Hearing Officer "may" grant
15 such motion, "provided that such amendment is within the scope of the original
16 complaint." 456 CMR 15.06(2). The Union contends that the Hearing Officer erred by not
17 granting its motion because the allegations fell within the scope of the complaint.
18 However, even if they did, the applicable regulation does not compel the Hearing Officer
19 to grant the motion, but, through the use of the word "may," leaves it to the Hearing

1 Officer's discretion. The question therefore becomes whether the Hearing Officer abused
2 her discretion by denying the motion to amend. We conclude that she did not.

3 It is well-established that the CERB limits amendments to the complaints to avoid
4 the inclusion of material allegations that have not been the subject of a DLR investigation
5 or probable cause determination. Quincy City Employees Union, 13 MLC 1129, MUPL-
6 2883, MUP-6037 (1986). Here, the Investigator denied the Motion to Amend Count XIV
7 on grounds that there had not been a probable cause determination on this issue. Where
8 the Union does not dispute that it never raised these allegations during the investigations
9 of its charges, and where the Investigator consequently never considered them, the
10 Hearing Officer did not abuse her discretion by denying the motion on these grounds. Id.

11 As to the motions to amend Counts X and XII, which the Hearing Officer did not
12 address, it is well-established that the CERB will only consider and decide allegations not
13 pled in the complaint if the conduct relates to the general subject matter of the complaint
14 and the issue has been fully litigated. Town of Norwell, 18 MLC 1263,1264, MUP-6962
15 (January 22, 1992). At minimum, "full" litigation requires that the respondent be given
16 some notice that the subject is in issue, and thus be given an opportunity to present
17 evidence concerning the facts material to the subject. Whitman-Hanson Regional School
18 Committee, 10 MLC 1606, 1607-1608, MUP-5249 (May 17, 1984). The test is one of
19 fairness under the circumstances of each case – whether the employer knew what
20 conduct was in issue and had a fair opportunity to present its defense. Town of Randolph,

1 8 MLC 2044, 2051, SUP-3869 (June 10, 1998) (citing Soule Glass and Glazing Co. v.
2 NLRB, 652 F. 2d 1055 (1st Cir. 1981)). Here, even if the additional retaliation allegations
3 relate to the general subject matter of the consolidated Complaints, they were not fully
4 litigated because the Union did not seek to amend Counts X and XII until after the hearing
5 was over and the record was closed.¹⁹ Thus, as evident by the fact that the City's post-
6 hearing brief contains no argument on these issues, the City was not on notice during the
7 hearing that these allegations would be treated as anything other than Section 10(a)(5)
8 allegations. Whitman-Hanson. 10 MLC at 1607-1608. Under these circumstances, we
9 deny the Union's motion to amend these counts.

10 The Section 10(a)(3 and Section 10(a)(4) Allegations

11 The Complaint in MUP-17-6211 alleged that the City refused to allow Menino to
12 work overtime and/or reduced her overtime in retaliation for Menino filing a grievance in
13 November 2016 challenging her bypass for a promotion and for participating in the
14 arbitration hearing on September 7, 2017.²⁰ The Complaint in MUP-18-6679 included

¹⁹ Footnote 34 of the Hearing Officer's decision indicates that the hearing record closed on February 27, 2019. The Union filed its post-hearing brief on May 27, 2019.

²⁰ The Complaint listed the following events: the Donna Summer Concert, the Parks Department Concerts, the Caliente Festival, the Gospel Fest, the Unity Benefit Concert and Hub Week in October 2017. It further alleged that the City reduced Menino's overtime with respect to GreenFest on August 11-13, 2017, Country in the City on September 14, 2017, and the Wachusett Beer Garden on September 21, 2017.

1 three separate allegations that the City discriminated against Menino in retaliation for her
2 filing and participating in MUP-17-6211 by: 1) denying Menino's access to the loft (Count
3 I); 2) removing and reassigning her pest control duties (Count III); and 3) removing and
4 reassigning her Portraits of Purpose duties (Count V).

5 The Hearing Officer dismissed all the retaliation allegations and the Union appeals
6 from all but one.²¹ We affirm the dismissal for the following reasons.

7 To establish a prima facie case of a Section 10(a)(3) violation, a charging party
8 must show that: (1) the employee engaged in concerted activity protected by Section 2 of
9 the Law; (2) the employer knew of the concerted, protected activity; (3) the employer took
10 adverse action against the employee; and (4) the employer's conduct was motivated by
11 a desire to penalize or discourage the protected activity. Town of Carver, 35 MLC 29, 47,
12 MUP-03-3094 (June 30, 2008).

13 If a union establishes a prima facie case of retaliation, the employer may rebut it
14 by producing evidence that the action was motivated by a legitimate reason. City of
15 Boston, 35 MLC 289, 291, MUP-04-4077 (May 20, 2009) (citing Trustees of Forbes
16 Library, 384 Mass. 559, 565-566 (1981)). Finally, if the employer produces one or more
17 lawful reasons for taking the adverse action against the employee, the charging party

²¹ The Union did not appeal the Hearing Officer's dismissal of Count I of MUP-18-6679. The Union also does not appeal from the Hearing Officer's dismissal of Count VII of MUP-18-6679, which alleged an independent Section 10(a)(1) violation.

1 must establish that “but for” the protected activity, the employer would not have taken the
2 adverse action. Trustees of Forbes Library, 384 Mass. at 565-566.

3 We affirm the Hearing Officer’s dismissal of the Section 10(a)(3) allegations. The
4 Hearing Officer found that the Union had failed to establish the fourth elements of the
5 prima facie case of unlawful discrimination because the only circumstantial evidence the
6 Union offered was the timing of the adverse actions relative to Menino’s grievance filing
7 activity.²² The Union challenges this on review, stating that the Hearing Officer
8 erroneously failed to consider its evidence that the City transferred Menino’s duties to
9 other PMD employees as evidence of discriminatory motive. Despite concluding that the
10 Union had failed to establish a prima facie case, however, the Hearing Officer alternatively
11 analyzed the evidence under the remainder of the Forbes Library shifting burden analysis,
12 ultimately concluding that the Union had failed to establish that, “but for” Menino’s
13 protected, concerted activity, the City would not have eliminated or reduced Menino’s
14 overtime at both City and non-City events. We agree.

15 There is ample evidence in the record showing that, starting in March 2016, with
16 the publication of an independent auditor’s report flagging the need to reduce and
17 establish policies regarding overtime in PMD, to the May 2017 correspondence between

²² We do not even find the timing to be that suspicious. As the City pointed out in its post-hearing brief, Menino filed her grievance at the end of 2016 and it was not until June 2017, after Rooney’s correspondence with Sweeney, that Rooney began instituting measures to monitor and reduce PMD overtime expenditures.

1 Rooney and Sweeney regarding this issue, to Rooney's 2017 implementation of Overtime
2 Request Forms and After Action reports, that the City was intent on reducing overtime at
3 PMD, and that the events that Menino handled, without supervision, was one area where
4 overtime could be reduced. While it may be true that other individuals' overtime was not
5 cut as much as Menino's at these events, we agree with the Hearing Officer that the City
6 offered legitimate business reasons for this – that it saw no need to duplicate event
7 coordination in cases where the SED had its own event coordinator, but that it still needed
8 to provide custodial and security services to these events, as it had in the past. Even if
9 the City failed to fully appreciate that the duties performed by the SED coordinator may
10 not have been the same as those performed by Menino –and even if non-City sponsors
11 were sincerely unhappy with the way their events had been handled and staffed - at the
12 second stage of a discrimination analysis, it is not the CERB's role to second guess the
13 wisdom of an employer's business decisions, but only that the employer had reasons for
14 the decision and facts to support it. Trustees of Forbes Library, 384 Mass. at 565.

15 The City provided such evidence. Starting in June 2017, after Sweeney and
16 Rooney's correspondence, Rooney denied every one of Menino's requests for overtime
17 for SED-run events. The fact that Rooney continued to allow Menino to work at least
18 some of the overtime she had requested for non-City events, such as Boston Pride and
19 the Portuguese Festival, after this correspondence, demonstrates that the City's proffered
20 reason for eliminating the SED event overtime was legitimate. As to the reduction in

1 overtime at non-City events, the evidence shows that the City reduced Menino's overtime
2 in cases where it had concerns over the ability of the sponsor to timely pay their bill. And,
3 again, although those events may not have run as smoothly as a result, this does not
4 mean that the City's reasons were pretextual, but only that the City may have misjudged
5 how to staff such events to avoid problems like those experienced by Weber and
6 DeMarco. The fact that the City did not completely eliminate Menino's overtime
7 demonstrates that it recognized her value at these events, but nevertheless believed that
8 it should still be reduced. As to the fact that other PMD employees continued to receive
9 overtime under Rooney's command, as the Hearing Officer found, the City proffered other
10 legitimate reasons why other employees' overtime was not reduced as much as Menino's,
11 including the undisputed fact that overtime costs had been driven by vacancies.
12 Moreover, there is no dispute that prior to Rooney's tenure as Commissioner, Menino had
13 been given free rein over staffing Special Events. While, unlike the Hearing Officer, we
14 decline to speculate as to the reasons for this, we agree with the Hearing Officer that it
15 was not surprising that a new Commissioner, under pressure to reduce overtime costs,
16 would begin to scrutinize a significant source of overtime costs that had gone unchecked
17 for years. Notably, Rooney's conduct not only included reducing or eliminating Menino's
18 overtime, but consistent with the City's stated motivation for its conduct, instituting
19 processes, such as the Overtime Request forms and After Action reports that were
20 specifically designed to analyze the need for the overtime, both before and after an event.

1 For these reasons, we agree with the Hearing Officer that the City met its burden of
2 persuasion under the second prong

3 We finally agree with the Hearing Officer that Menino failed to establish that, but
4 for her protected, concerted activities, she would not have suffered the overtime losses.
5 First, there is no evidence in the record showing that the City bore any hostility towards
6 Menino for filing the promotion bypass grievance. Second, we agree that it is unlikely
7 that the City would risk reducing the services it provided because Menino filed the
8 grievance. The Union points to the various problems experienced by Boston Pride and
9 GreenFest after Menino's hours were cut to argue that that is exactly what the City did.
10 However, where there is a dearth of evidence, direct or circumstantial, showing that the
11 City's conduct was unlawfully motivated, but where the City provided extensive evidence
12 showing that the reason Rooney did this was in an effort to reduce overtime costs that he
13 had been pressured to reduce, we cannot conclude that Rooney would not have taken
14 the same actions but for Menino's protected conduct.

15 The elements of proof of a Section 10(a)(4) allegation are the same as those for a
16 Section 10(a)(3), except that the protected behavior is participating in DLR proceedings.
17 Town of Carver, 35 MLC at 47.

18 The Investigator dismissed the two Section 10(a)(4) allegations on grounds that
19 removing pest control duties and reducing her duties regarding Portraits of Purpose did
20 not constitute adverse actions under the third prong of a prima facie case She did not

1 undertake any additional analysis. The Union protests this on appeal, arguing that as a
2 matter of law, an employer's decision to eliminate responsibilities that result in the loss of
3 prestige and authority constitutes an adverse action. Commonwealth of Massachusetts,
4 12 MLC 1818, 1823, SUP-2940 (May 30, 1986). For all the reasons stated in the Hearing
5 Officer's decision, we affirm her conclusion that transferring the pest control duties to
6 Graves did not constitute an adverse action under relevant CERB precedent. Even if it
7 did, however, the only evidence that the Union provided that it was discriminatory was its
8 timing relative to the in-person investigation in MUP-17-6211. Timing alone is insufficient
9 to establish unlawful motivation. City of Malden, 5 MLC 1752, 1764, MUP-3017 (March
10 20, 1979). Although the Union disputes the City's claim that the duties were more suited
11 to Graves, as the Building Superintendent, it does not dispute that this duty was not in
12 Menino's job description and had nothing to do with coordinating special events. It is also
13 consistent with the other steps that Rooney took after 2017 to ensure that both Graves
14 and Joyce were performing duties that were consistent with the respective superintendent
15 positions. For these reasons, we affirm the dismissal of Count III of MUP-18-6679.

16 We affirm the dismissal of Count V for similar reasons. Even assuming that
17 assigning Barbuto and Callahan to take over the Portraits of Purpose event constituted
18 an adverse action, the City presented ample reasons for this decision that had nothing to
19 do with Menino's DLR charge. Regardless of whether Callahan's description of Menino's
20 behavior during the Portraits of Purpose meeting was accurate, it is clear that he was

1 frustrated with the way Menino had been handling the event up to that point, and the way
2 that she had comported herself during the meeting. Other than pointing to the
3 coincidence of timing of the removal of these duties with Menino's DLR activity, the Union
4 provides no evidence that the reasons proffered for the reassignment were a pretext for
5 unlawful discrimination. Where timing alone is insufficient to establish unlawful
6 discrimination, we affirm the dismissal of the Section 10(a)(4) allegations in MUP-18-
7 6679.

8 Transfer of Bargaining Unit Work Allegations²³

9 To prove that there has been an unlawful transfer of bargaining unit work, a union
10 must not only show that there has been a transfer of work, but that the transfer had an
11 adverse impact on individual employees or the unit itself. Commonwealth v. Labor
12 Relations Commission, 60 Mass. App. Ct. 831, 833 (2004) (citing Town of Bridgewater,
13 25 MLC 103, 104, MUP-8650 (December 30, 1998)). In situations where the work is
14 shared work that is traditionally performed by both bargaining unit and non-bargaining

²³ The Complaint in MUP-18-6679 also contained three allegations that the City violated Section 10(a)(5) of the Law by making changes to Menino's terms and conditions of employment without first giving the Union notice and an opportunity to bargain, as required by Section 6 of the Law: Count II, which alleged that the City unilaterally restricted Menino's access to the loft, Count VIII, which alleged that the City unilaterally increased Menino's work duties by requiring her to fill out After Action reports and Count XI, which alleged an increase in duties when submitting event overtime request forms. The Union withdrew Count VIII at the outset of the hearing. The Hearing Officer found a violation with respect to Count XI, but not Count II. The Union does not appeal from the dismissal of Count II, so we do not address it.

1 unit personnel, the CERB has held that the work in question will not be recognized as
2 exclusively bargaining unit work. City of Quincy/Quincy City Hospital, 15 MLC 1239,
3 MUP-6490 (November 9, 1988). In these shared work situations, there is no obligation
4 to bargain over every incidental variation in job assignments between unit and non-unit
5 personnel. Rather, bargaining must occur only in situations where there is a calculated
6 displacement of bargaining unit work. City of Boston, 10 MLC 1539, 1541, MUP-4967
7 (April 24, 1984).

8 The Complaint in MUP-18-6679 contained six counts alleging that the City
9 unlawfully transferred bargaining unit work to non-bargaining unit personnel. The Union
10 withdrew one of those counts on the first day of hearing,²⁴ leaving the following for the
11 Hearing Officer's consideration: Count VI, alleging that the City unlawfully transferred
12 Menino's duties with respect to Portraits of Purpose to Barbuto and Callahan; Count IX
13 alleging that on April 17, 2018, Rooney transferred the duty of preparing and pre-
14 approving overtime sheets for special events to Barbuto; Count X, alleging that around
15 April 2018, the City transferred the duty of coordinating security for special events to
16 Joyce; Count XII, alleging that, on or about May 16, 2018, Rooney unlawfully transferred
17 the duty of coordinating overtime staffing needs for special events to Barbuto and "City
18 Hall Security;" and Count XIII, alleging that on or about May 18, 2018, the City transferred
19 coordinating staff for an upcoming special event to Rooney.

²⁴ Count IV alleged an unlawful transfer with respect to Menino's pest control duties.

1 The Hearing Officer found that during the hearing, the Union had alleged just three
2 transfer violations: having Callahan and Barbuto coordinate Portraits of Purpose;
3 assigning Barbuto to approve overtime staffing for special events; and assigning Joyce
4 and Graves to coordinate security and custodial staffing for special events. She found a
5 violation as to Barbuto approving overtime staffing but dismissed the other two
6 allegations.

7 She dismissed the Portraits of Purpose allegation on grounds that Callahan “had
8 no choice” but to continue to oversee the event after the Mayor’s office had raised
9 concerns about her responsiveness and Menino’s behavior during the meeting. The
10 Hearing Officer found that the decision was simply “necessary supervision” and not a
11 transfer. Alternatively assuming that a transfer had occurred, she found that there had
12 been no adverse impact on the bargaining unit or Menino. On appeal, the Union reiterates
13 its challenges to the Hearing Officer’s findings regarding this event and argues that the
14 City’s behavior was not justified and that Menino suffered as a result.

15 We affirm the dismissal of this count. For all the reasons stated in footnote 10, we
16 find that the City’s concerns over the manner in which Menino had handled the event
17 were genuine. Although the Union disputes the Hearing Officer’s conclusion that this was
18 just a one-time event, pointing to other evidence in the record that the City had transferred
19 Menino’s duties to other personnel, we note that this incident was pled as a separate

1 count in the Complaint, and, thus, the Hearing Officer did not err by analyzing it as a
2 stand-alone event.

3 The Union does not appeal from the Hearing Officer's dismissal of the counts
4 alleging unlawful transfers to Graves or Joyce. It contends however, that she completely
5 ignored evidence showing that, starting in May 2018, Rooney and Callahan began
6 consulting with Barbuto to determine the staffing needs for special events. We agree that
7 the Hearing Officer did not address these allegations, which are pled in Counts XII and
8 XIII and addressed in the Union's post-hearing brief. Moreover, the Hearing Officer's
9 findings reflect that, with respect to the Youth Pride Event in May 2018, Rooney advised
10 Menino that he and Barbuto were reducing the total hours for custodians and splitting the
11 day into three shifts.

12 The Hearing Officer also found, however, and the Union does not dispute, that
13 since 2017, Graves and Joyce, both SENA bargaining unit members, have been
14 determining custodial and security staff needs for special events. Accordingly, even if
15 there may have been a transfer of bargaining unit work to Barbuto in May 2018, the record
16 also reflects that since 2017, two, rather than one, bargaining unit members have been
17 performing the custodial and security staffing coordination that Menino previously
18 performed. Accordingly, with the exception of the May 2018 email that Rooney wrote to
19 Menino indicating that he had consulted with Barbuto (as well as Graves) regarding
20 staffing for Youth Pride, the record does not support the conclusion that there has been

1 a calculated displacement of unit work – rather, as with Portraits of Purpose, and indeed,
2 his general oversight over overtime expenditures since early 2017, Rooney was merely
3 exercising appropriate managerial control over bargaining unit member decisions. Under
4 these circumstances, we cannot conclude that there has been a transfer of bargaining
5 unit work that has adversely impacted the bargaining unit as a whole, and dismiss this
6 allegation.

7 Conclusion

8 For the foregoing reasons, we deny the Union’s motion to amend the complaint in
9 MUP-18-6269; affirm the dismissal of the Section 10(a)(3) and (4) allegations;, and the
10 dismissal of the Section 10(a)(5) allegation pertaining to Portraits of Purpose.

11 Order

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

13 1. Cease and desist from:

- 14
- 15 a) Unilaterally requiring that Menino provide details about staff duties at
16 special events when requesting overtime without first providing the
17 Union with notice and the opportunity to bargain to resolution or
18 impasse over the decision and the impacts of the decision;
19
 - 20 b) Transferring the preparation and preapproval of staff overtime sheets
21 for special events to non-bargaining unit employees without first
22 bargaining to resolution or impasse with the Union over the decision
23 to transfer the work and the impacts of that decision on bargaining
24 unit members’ terms and conditions of employment;
25
 - 26 c) In any like manner, interfering with, restraining and coercing its
27 employees in any right guaranteed under the Law.
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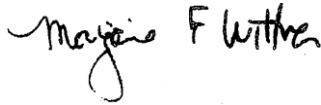
2. Take the following action that will effectuate the purposes of the Law:

- a) Rescind the requirement that Menino provide details about staff duties at special events when requesting overtime until the City satisfies its obligation to bargain about the decision and the impacts of that decision;
- b) Upon request, bargain in good faith with the Union to resolution or impasse about the decision and impacts of the decision to require that Menino provide details about staff duties at special events when requesting overtime;
- c) Restore to the bargaining unit the preparation and preapproval of staff overtime sheets for special events until the City satisfies its obligation to bargain about the transfer of unit work and the impacts of that decision;
- d) Upon request, bargain in good faith with the Union to resolution or impasse about the decision and impacts of the decision to transfer the preparation and preapproval of staff overtime sheets for special events to non-unit employees;
- e) Post immediately in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically, if the City customarily communicates with these unit members via intranet or email and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees;

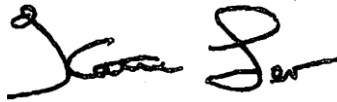
- 1 f) Notify the DLR in writing of the steps taken to comply with this
2 decision within ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH EMPLOYMENT RELATIONS BOARD



MARJORIE F. WITTNER, CHAIR



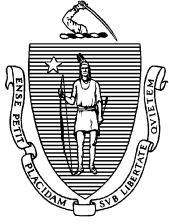
KATHERINE G. LEV, CERB MEMBER



JOAN ACKERSTEIN, 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 (CERB) has held that the City of Boston (City) has violated Section 10(a)(5), and derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by: 1) Unilaterally requiring that Lisa Menino provide details about staff duties at special events when requesting overtime; and 2) transferring the preparation and preapproval of staff overtime sheets for special events to non-bargaining unit employees.

The City posts this Notice to Employees in compliance with the CERB'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 unilaterally require that Lisa Menino provide details about staff duties at special events when requesting overtime without first providing the Union with notice and the opportunity to bargain to resolution or impasse over the decision and the impacts of the decision;

WE WILL NOT transfer the preparation and preapproval of staff overtime sheets for special events to non-bargaining unit employees without first providing the Union with notice and the opportunity to bargain to resolution or impasse over the decision and the impacts of the decision;

WE WILL NOT otherwise interfere with, restrain or coerce employees in the exercise of their rights guaranteed under the Law;

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

- Rescind the requirement that Menino provide details about staff duties at special events when requesting overtime;
- Restore to the bargaining unit the preparation and preapproval of staff overtime sheets for special events; and
- Upon request, bargain with the Union about the decisions to require Menino to provide details about staff duties at special events when requesting overtime and to transfer unit work to non-unit members and the impacts of those decisions on unit members' terms and conditions of employment.

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