

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of *
* Case No. MUP-19-7532
CITY OF BOSTON *
*
and * Date Issued: December 3, 2021
*
SENA, LOCAL 9158 *
*

Hearing Officer:

Susan L. Atwater, Esq.

Appearances:

Ellen McClintock, Esq. - Representing the City of Boston
Ian O. Russell, Esq. - Representing the SENA, Local 9158

HEARING OFFICER'S DECISION

1 SUMMARY

2 The issue in this case is whether the City of Boston (City or Employer) violated
3 Sections 10(a)(5) and, derivatively, 10(a)(1) of Massachusetts General Laws, Chapter
4 150E (the Law) by transferring Salaried Employees of North America, Local 9158 (SENA
5 or Union) bargaining unit work to non-unit personnel when it created the position of
6 Parking Meter Technology Specialist. I find that the City did not violate the Law as alleged.

7 STATEMENT OF THE CASE

8 SENA filed a charge with the Department of Labor Relations (DLR) on August 21,
9 2019, alleging that the City had engaged in prohibited practices within the meaning of
10 Sections 10(a)(5) and, derivatively, 10(a)(1) of the Law. A DLR investigator investigated

1 the charge and issued a Complaint of Prohibited Practice (Complaint) on December 5,
2 2019. The Complaint alleged that the City violated Sections 10(a)(5) and, derivatively,
3 10(a)(1) of the Law by failing to bargain in good faith when it transferred SENA bargaining
4 unit work to non-unit personnel by creating the position of Parking Meter Technology
5 Specialist.¹ The City filed an Answer to the Complaint on or about December 17, 2019.

6 I conducted a hearing by WebEx video conference on June 26, 2020 and July 16,
7 2020, at which both parties had the opportunity to be heard, to examine witnesses and to
8 introduce evidence. Both parties filed post-hearing briefs on or about October 14, 2020.
9 Based on the record, which includes witness testimony, my observation of the witnesses'
10 demeanor, stipulations of fact, and documentary exhibits, and in consideration of the
11 parties' arguments, I make the following findings of fact and render the following opinion.

12 STIPULATIONS OF FACT

- 14 1. The City is a public employer within the meaning of the Law.
- 15 2. SENA is an employee organization within the meaning of Section 1 of the Law.
- 16 3. American Federation of State County and Municipal Employees, Council 93
17 (AFSCME) also represents a unit of employees employed by the City.
- 18 4. Within the City's Boston Transportation Department ("BTD") there is a Parking
19 Meter Operations Unit.
- 20 5. The Parking Meter Operations Unit consists of two supervisors that hold the title
21 of Supervisor- Parking Meter Operations, SENA positions; one Parking Meter
22 Operations Foreperson, an AFSCME position; one Parking Meter Technology
23
24
25
26

¹ The Complaint included five separate job duties in the Parking Meter Technology Specialist job description which it alleged transferred bargaining unit work in violation of the Law. On the first day of hearing, SENA stated that it would not proceed on the following job duties: "[p]rovides technical assistance and administrative guidance," "[r]epresents Meter Operations Unit in training of new Parking Enforcement Officers," and "provides overview of on street and multi-space parking meters operations." As a result, I do not address whether those job duties violated the Law.

- 1 Specialist ("Technology Specialist"), an AFSCME position; and eight Parking
2 Meter Operations Persons, AFSCME positions.
3
- 4 6. Timothy Hallahan ("Hallahan") and Kevin Ruane ("Ruane") currently hold the title
5 of Supervisor- Parking Meter Operations. Both report directly to Deputy
6 Commissioner of Field Operations, a non-Union position. Bradley Gerratt
7 ("Gerratt") currently holds the position of Deputy Commissioner of Field
8 Operations.
9
- 10 7. On August 1, 2019, the City posted a job bid for the newly created position
11 Technology Specialist in BTM.
12
- 13 8. The City did not provide SENA with the AFSCME job description for the
14 Technology Specialist position prior to posting a job bid for the position. The City
15 did not provide notice to the Union of the contents of the AFSCME job description
16 or have any discussion with SENA regarding the job duties of the Technology
17 Specialist, prior to posting a job bid for the AFSCME position.
18
- 19 9. BTM hired Lisa Bernard-Stapleton ("Stapleton") as the Technology Specialist on
20 August 26, 2019.
21
- 22 10. Prior to Stapleton assuming the position of Technology Specialist, she worked as
23 a Parking Meter Operations Foreperson, a[n] AFSCME position, between March
24 26, 2008 and August 25, 2019; as a Parking Meter Operations Person I, a[n]
25 AFSCME position, between June 18, 2007 and March 25, 2008; as a Parking
26 Meter Operations Person, a[n] AFSCME position, between August 18, 2001 to
27 June 17, 2007.
28
- 29 11. Stapleton also worked temporarily out of grade as a Supervisory of Parking
30 Enforcement, a SENA position, between February 12, 2018 and August 10, 2018.
31 Stapleton paid SENA dues during this period.
32
- 33 12. As Parking Meter Operations Foreperson, Stapleton reported to Hallahan,
34 Supervisor- Parking Meter Operations, a SENA bargaining unit member.
35
- 36 13. Parking Meter Enforcement Unit is also a unit in BTM.
37
- 38 14. The Sign Shop is also a unit in BTM.
39
- 40 15. The Parking Meter Operations Unit maintains and collects revenue from street
41 parking meters throughout the City. The City currently uses single space meters
42 and multi-space parking meters or Pay and Display Meters. Drivers pay at a Pay
43 and Display kiosk and then place receipt of payment in their car. Both single space
44 meters and Pay and Display meters accept quarters, debit or credit cards, and
45 payment from a cell phone-based web application.
46

- 1 16. Single space meters are equipped with two sets of batteries and a solar panel.
 2 One battery is connected to and charged by the solar panel. BTD sources internal
 3 mechanisms in the single space meters from a vendor named IPS. IPS also repairs
 4 some broken single space parking meters at a facility located out of state.
 5
- 6 17. On or around 2016, BTD replaced mechanical single space meters with the
 7 electronic IPS meters currently used.
 8
- 9 18. The Pay and Display Meters are also battery-operated and recharged by solar
 10 power. BTD sources Pay and Display Meters from a vendor called Flowbird,
 11 formerly called Parkeon. BTD started using the Pay and Display Meters sometime
 12 between 2010 and 2012. When Pay and Display Meters were first introduced, BTD
 13 operated approximately 20-25 kiosks. Currently, BTD operates approximately 150
 14 Pay and Display Meters.
 15
- 16 19. The Parking Meter Operations Unit works staggered shifts, Monday through
 17 Friday, with most staff working 6:30 a.m. - 2:30 p.m.
 18
- 19 20. The Parking Meter Operations Unit reports to the Unit's offices at 200 Frontage
 20 Road, Boston, MA at the start of each shift. From there, Parking Meter Operations
 21 persons leave for field work where they collect revenue from the meters and
 22 perform general maintenance and repairs on the meters. At the end of the shift,
 23 Parking Meter Operations persons report back to 200 Frontage Road.
 24
- 25 21. The Parking Meter Operations Unit share[s] 200 Frontage Road with other BTD
 26 units such as Parking Enforcement. The City of Boston also has a tow lot at 200
 27 Frontage Road.
 28
 29

FINDINGS OF FACT

30 **Temporary Service Procedures**

31 Article 13, entitled Temporary Service in a Higher or Lower Classification, of the
32 2017 – 2020 collective bargaining agreement between SENA and the City (SENA CBA)
33 provides in pertinent part as follows:

34 **Section 1.** While an employee is performing, pursuant to assignment, the duties
35 of a position classified in a grade lower than the grade of the position in which
36 he/she performs regular service, he/she shall be compensated at the rate of pay
37 for the grade of the position in which he/she performs regular service.
38

39 **Section 2.** An employee who is performing, pursuant to assignment, temporary
40 service in a position classified in a grade higher than the grade of the position in
41 which he/she performs regular service, other than the purpose of filling in for an

1 employee on vacation, shall commencing with the sixth (6th) consecutive day of
 2 actual service in such higher position be compensated at the rate to which he/she
 3 would have been entitled had he/she been promoted to such position. A superior
 4 shall not refuse to provide a written assignment form when requiring an employee
 5 to work in a position classified in a higher grade, as described above. Any remedy
 6 based on a grievance filed under this section shall be limited in effect to a period
 7 not to exceed five (5) days prior to the date of the filing of the grievance in writing.

8
 9 Similarly, Article 11, entitled Temporary Service in a Higher or Lower Classification
 10 and Promotions, of the 2016 – 2020 collective bargaining agreement between AFSCME
 11 and the City (AFSCME CBA) provides in pertinent part as follows:

12 **Section 1.** While an employee is performing, pursuant to assignment, the duties
 13 of a position classified in a grade lower than the grade of the position in which
 14 he/she performs regular service, he/she shall be compensated at the rate of pay
 15 for the grade of the position in which he/she performs regular service.

16
 17 **Section 2. Compensation for Work in a Higher Classification.** For purposes of this
 18 article, a "permanent vacancy" shall be defined as a position that has been vacated
 19 due to resignation, termination, retirement, or other separation of employment
 20 which the employer intends to fill. A "temporary vacancy" shall be defined as a
 21 position that has been vacated due to an extended leave of absence (medical or
 22 non-medical), a workers compensation injury/illness, or other extenuating
 23 circumstances that prevent an incumbent from returning to work for an extended
 24 period of time, which the employer intends to fill on a temporary basis. An
 25 employee who is performing, pursuant to assignment, temporary service in a
 26 position classified in a grade higher than the grade of the position in which he/she
 27 performs regular service (temporary out of grade or "TOG"), other than for the
 28 purpose of filling in for an employee on vacation, shall commencing with the sixth
 29 (6th) consecutive day of actual service in such higher position, be compensated
 30 for such service in such higher position at the rate to which he/she would have
 31 been entitled had he/she been promoted to such position. Such an assignment
 32 shall not exceed sixty (60) working days. In the event a TOG assignment extends
 33 beyond the sixty (60) working day time frame, the position shall be posted as either
 34 a temporary or permanent vacancy at the discretion of the Department. Prior to
 35 selecting an employee to fill a temporary vacancy, the City shall interview
 36 incumbent employees who occupy titles of an equal grade or titles in the next
 37 lowest grade who apply for such position. However, the Department of Public
 38 Works shall not be required to interview anyone other than incumbent Inspectors
 39 who apply for temporary promotion to Foreman.

40 **Parking Meter Operations Unit**

1 The Parking Meter Operations Unit (PMOU or Unit) is one of several units within
2 the Boston Transportation Department (BTD) overseen by the Deputy Commissioner for
3 Field Operations, Bradley Gerratt (Gerratt). The PMOU maintains and collects revenue
4 from the City's parking meters. Until August 1, 2019, the PMOU was staffed by two
5 Supervisors - Parking Meter Operations, SENA positions; Parking Meter Operations
6 Forepersons, AFSCME positions; and eight Parking Meter Operations Persons, AFSCME
7 positions. The PMOU works staggered shifts, Monday through Friday, with most staff
8 working 6:30 a.m. - 2:30 p.m. Employees report to the PMOU's offices at 200 Frontage
9 Road in Boston at the start of each shift. From there, PMOU employees leave for field
10 work, where they either collect revenue from parking meters or perform maintenance. At
11 the end of a shift, Parking Meter Operations Persons report back to 200 Frontage Road.

12 **Office of Human Resources**

13 Patricia Casey (Casey) has been the Human Resources Director for the Office of
14 Streets, Public Works, and Transportation since approximately 2017 and held other roles
15 within that office for the prior five years. Jane Calobrisi (Calobrisi) is a Principal
16 Administrative Assistant and reports to Casey. Casey is responsible for tracking City job
17 descriptions. Specifically, when a BTD department or division decides to upgrade or
18 create a position, Casey meets with its designated manager or other supervisory
19 personnel to define the essential functions and qualifications for the position. In so doing,
20 Casey coordinates with the City's central Office of Human Resources (OHR). OHR
21 reviews and approves all finalized job descriptions that Casey prepares, including the
22 formatting, bargaining unit, description language, compensation, and grade. Once a job

1 description is finalized, Casey notifies the bargaining unit containing the new or upgraded
2 position. Open positions are posted internally and on the City's Career Center website.

3 **Temporary Out-of-Grade Assignments**

4 Temporary Out-of-Grade [TOG] Assignments are made pursuant to Article 13 of
5 the AFSCME CBA. A similar provision exists in the SENA CBA with the City. According
6 to the SENA CBA, an employee is placed in TOG status on the sixth day of their actual
7 service in a vacant, higher position. Usually, this occurs when the employee in the vacant
8 position is either out on an extended leave or leaves the position entirely. Not all
9 vacancies are subject to TOG appointments; whether to appoint a lower-grade employee
10 as a TOG assignment is a case-by-case decision which depends on whether position can
11 stay vacant or if the work performed in that role needs to continue uninterrupted for
12 operational reasons. TOG appointments are only made to higher—not lower or
13 equivalent—grade positions. AFSCME unit employees can be TOG appointed into SENA
14 unit positions. To appoint someone to a TOG assignment, a department head submits a
15 request to the department's internal human resources staff. Once the TOG request is
16 received, the human resources staff follows the TOG assignment process.

17 **New Meter Technology**

18 Prior to 2010, BTM parking meters were primarily mechanical and single space.
19 Between 2010 and 2012, BTM began to use electronic multi-space parking meters. In
20 2016, BTM also began replacing any remaining mechanical, single space parking meters
21 with electronic ones. Prior to 2019, the City conducted a two-year pilot program which
22 tested variable parking rates for high profile events and areas. In 2019, BTM started

1 permanently varying its parking rates by meter, instead of charging a flat rate across the
2 City.

3 Electronic meters require software and wireless connectivity to operate. Electronic
4 meters are managed by back-office software (Back Office), internal software programs
5 that manage electronic meters and contain individual meter profiles or identities.
6 Individual meters are identified in Back Office by a letter and number series. Back Office
7 controls parking meters via an RFID card installed in each meter. The parking meter's
8 profile identifies its location, hours of operation, rate, and time limit. Back Office also
9 controls what a parking meter displays to the public. Employees in the Supervisor -
10 Parking Meter Operations and Parking Meter Operations Foreperson roles have Back
11 Office access.²

12 Employees who service electronic meters do so via a meter access card.
13 Collections staff insert a collections card into meters from which they collect money.
14 Maintenance staff bring a diagnostic card that they insert into meters they repair and put
15 in codes depending on the type of maintenance they perform. In both instances, the card
16 functions to create an activity log which tracks employee work. Meter cards often
17 malfunction because they must be inserted into every single meter accessed by an
18 employee regardless of weather conditions.

19 **Supervisor - Parking Meter Operations - Hallahan**

20 Since 2007, Timothy Hallahan (Hallahan) was the Supervisor – Parking Meter
21 Operations (Supervisor) for PMOU repair and maintenance, responsible for managing
22 parking meter repair and maintenance operations. During the same period, Kevin Ruane

² The Technology Specialist position also has Back Office access.

1 (Ruane) was the Supervisor for PMOU collections, responsible for managing parking
2 meter collections. Both supervisors report directly to Gerratt. Hallahan usually works from
3 6:30 a.m. to 3:30 p.m., while Ruane usually works from 7:00 a.m. to 4:00 p.m.

4 The two Supervisor positions collectively oversee the daily operations of the
5 PMOU, performing similar duties for their separate sections of the PMOU and following
6 Unit policies. Hallahan assigns the work of maintenance staff by creating pre-set schedule
7 templates. Pre-set schedules assign maintenance staff to standardized parking meter
8 routes which have been assigned alphabetical labels and are serviced on a rotating basis.
9 Maintenance staff assigned to a route perform a visual inspection of parking meters and
10 perform on-site repairs as needed. Maintenance staff are notified of their schedule via an
11 assignment board that is updated each morning. Changes to the pre-set schedule
12 primarily occur when there is a staffing issue or when the PMOU receives a priority call.
13 Hallahan verbally communicates any changes to the pre-set schedule in the morning,
14 prior to dispatching any employees. If Hallahan is absent but Ruane is not, Ruane
15 approves any necessary changes to the pre-set schedule. Similarly, Hallahan approves
16 any necessary changes to the pre-set schedule for collection staff when Ruane is absent.
17 Either Hallahan or Ruane is in the PMOU office most of the time. Hallahan occasionally
18 assigns maintenance staff to special projects in lieu of assigning them to a standard route.
19 Special projects are defined as anything out of the ordinary compared to the routine, daily
20 preventative maintenance that Hallahan's staff performs, including battery replacement,
21 parking meter dome covering, post replacement, oiling, and installation/removal of
22 meters. Hallahan administers special projects by individually planning them, scheduling
23 specific staffing, and allocating resources. Hallahan also has access to Back Office.

1 Hallahan, along with Ruane, is also responsible for less routine matters, like
2 maintenance staff personnel issues. Hallahan performs annual performance reviews for
3 the maintenance staff who reported to him - in whole or in substantial part - over the prior
4 year. Hallahan also monitors employee performance and responds to personnel issues,
5 communicating any problems to individual maintenance staff members on a daily or
6 weekly basis, as needed. At least once a week, Hallahan meets with individual staff
7 members to address questions, problems, and other discrete issues. Similarly, Hallahan
8 investigates potential maintenance staff disciplinary issues reported by members of the
9 public or other employees, discusses them with staff members as appropriate, and
10 forwards acute issues to Gerratt or the City's Human Resources Department. Hallahan
11 also drafts PMOU-specific policies, such as those related to breaktime, and
12 communicates directly with Casey regarding general human resources issues like hiring.

13 In addition to personnel matters, Hallahan also prepares the maintenance staff
14 budget and manages it on an ongoing basis throughout the year. In his budgetary role,
15 Hallahan analyzes the daily and annual usage of materials and consumables, particularly
16 regarding special projects. Hallahan then uses his analysis to prepare the maintenance
17 budget for the year and justify any additional requests. In preparing the budget, Hallahan
18 receives requests and feedback from maintenance staff members regarding specific
19 needs or shortages. Once a budget is approved, Hallahan monitors expenditure
20 categories to ensure that maintenance funding lasts through the fiscal year. Hallahan is
21 more involved in managing and tracking the PMOU budget than SENA supervisors at
22 other units within the BTD.

1 Operationally, Hallahan manages the process of shipping and receiving electronic
2 single-space parking meters for repair. Third-party vendor IPS repairs malfunctioning
3 single space parking meters at an out-of-state facility. Specifically, IPS repairs single
4 space meters' internal units, defined as the piece that accepts payment and displays
5 transaction information to the user. When electronic single space meters were first
6 introduced, Hallahan received training from IPS regarding the new technology. Hallahan
7 then created an internal PMOU maintenance training process, as well as the
8 removal/repair/return procedure for defective meters. Single space meter repair training
9 is given to new employees as part of the hiring process, as well as to existing employees
10 when necessary. Any changes to the repair process template³ are made by Hallahan.

11 Processing a single space meter for repair is a multi-step process. First, a
12 maintenance staff member identifies a defective meter in the field and - if initial corrective
13 action does not fix an issue - brings it back to the PMOU shop after recording its individual
14 ID number. Once a meter is in the PMOU maintenance shop, staff run a diagnostic test
15 on it (referred to as "bench work"). Per the repair process template, if the meter unit still
16 cannot be repaired internally following diagnostic testing, maintenance staff then submit
17 a paper to have it shipped to IPS. Once a standardized repair return material authorization
18 (RMA) template is completed, Hallahan forwards it to the vender for an RMA number.
19 Upon receipt of the RMA, Hallahan signs the attached invoice and gives final payment

³ Template is the internal term for the standardized forms used by PMOU employees. Different templates are used for different purposes, such as repair processing, scheduling, and equipment returns.

1 approval. If a parking meter is returned without being repaired, Hallahan stops payment
2 on any connected invoice and emails the vendor directly regarding the issue.

3 **Parking Meter Operations Foreperson Bernard-Stapleton⁴**

4 Between March 2008 and August 2019, Lisa Bernard-Stapleton (Stapleton) was a
5 Parking Meter Operations Foreperson (Foreperson) in the PMOU and part of the
6 AFSCME bargaining unit.⁵ Stapleton was originally hired in 2001 and held two other
7 AFSCME bargaining unit positions within the PMOU before her promotion in 2008. In her
8 Foreperson role, Stapleton reported directly to Hallahan. The Foreperson job description
9 contains the following description of the essential functions of the job:

10 under general supervision, assists, trains and directly supervises the work of
11 employees in the Parking Meter Operations unit in the installation, repair and
12 maintenance of all parking meters and appurtenances. Assist[s], trains and directly
13 supervises the collection and security of all revenue from parking meters; assists
14 the supervisor of Parking Meter Operations. Schedules daily repair and collection
15 routes; prepares work orders for meter installations and removals; regularly
16 monitors and prepares reports from data collected from electronic meter
17 maintenance divisions. Assists in the preparation of the division's budget; prepares
18 month [sic] reports through the use of DOS and Windows environment programs.
19 Does related work as required.

20 Stapleton had access to the Back Office software used to control electronic parking
21 meters and used it more often than her collections Foreperson counterpart, Kevin Vaughn
22 (Vaughn). Stapleton generally accessed Back Office each morning, upon arriving at work.
23 After logging in, Stapleton checked both multi-space and single space meters for any

⁴ Unless otherwise specified, all job duties described in this section refer to work performed as a Parking Meter Operations Foreperson prior to August 1, 2019.

⁵ Stapleton also worked TOG as a Supervisor of Parking Enforcement, a SENA unit position, between February 12, 2018, and August 10, 2018. Stapleton paid SENA dues during this period. SENA filed a grievance over Stapleton's TOG assignment, arguing that another SENA member was more qualified for the assignment.

1 indicator lights which signal a problem, such as paper shortages or malfunctioning card
2 readers. Stapleton performed this parking meter status work since electronic meters were
3 installed in 2016. In addition to using Back Office, Stapleton collected daily worksheets
4 from field maintenance staff and compiled lists of meters requiring repair. Stapleton also
5 monitored PMOU supply levels and notified Hallahan when something needed to be
6 ordered. When Stapleton required office supplies, she would request them from Hallahan.

7 As a Foreperson, Stapleton played a limited role in assigning work to subordinate
8 employees. Under the direction of Hallahan and Ruane, Stapleton assigned maintenance
9 staff members to maintenance routes and, occasionally, special projects by entering their
10 names into standardized scheduling templates. Stapleton also participated in special
11 projects herself but did not manage them. In the event maintenance staff were absent or
12 finished work early, Stapleton consulted her Supervisors and modified their schedules as
13 needed. Stapleton rarely made scheduling changes without oversight because a
14 supervisor was usually present. However, Stapleton generally arrived at work between
15 thirty minutes and one hour before her Supervisors.

16 Stapleton also played a limited role in supervising staff in the field. Specifically,
17 Stapleton responded to radio or phone calls from maintenance staff seeking assistance
18 and answered routine inquiries. Routine inquiries included maintenance staff losing their
19 meter access card, suffering injuries, needing vehicle assistance, or relaying citizen
20 questions. If maintenance staff were locked out of their vehicle, Stapleton would report
21 the issue to Hallahan and either she, Ruane, Hallahan or Vaughn would bring them a key.

1 Stapleton followed a similar procedure for broken collection keys. ⁶ However, Stapleton
2 routed more complicated questions to her Supervisors. If neither Hallahan or Ruane was
3 available, Stapleton wrote a report of the issue and, occasionally, contacted Gerratt for
4 guidance in their place. Hallahan, Ruane, or Vaughn also answered some radio calls
5 themselves, without involving Stapleton. In her supervisory actions, Stapleton followed
6 previously established policy and did not draft or authorize new policies.⁷

7 On two occasions, Stapleton responded to personnel issues involving staff in the
8 field. First, Stapleton fielded a complaint from a Starbucks employee after PMOU
9 employee Owen Mahoney (Mahoney) became belligerent after he was denied use of the
10 café's bathroom. Second, on a different day, Stapleton responded to Mahoney himself
11 after he complained about his route assignment and requested permission to leave his
12 route.⁸ The City's Human Resources Department performed a follow-up investigation of
13 the second incident. Neither Hallahan nor Ruane was in the PMOU office during the
14 second incident. Both incidents involving Mahoney happened prior to 2018. For each
15 incident, Stapleton provided a written report to her supervisors and interacted directly with
16 Casey. However, during her time in the Foreperson role, Stapleton never completed a
17 performance review of another PMOU employee.

⁶ Stapleton also testified that she kept track of staff breaks which are called in over the radio as part of a posted procedure. However, Stapleton stated that this occurred only on a de facto basis due to a vacant dispatcher position after August 2019. Therefore, I do not understand this as part of her regular job duties in any position.

⁷ Stapleton also performed some duties related to collections. Stapleton had access to the "money room" keys and would unlock it for collections staff to deposit money canisters. However, Vaughn plays a more active role in controlling money room access, including the distribution of meter keys.

⁸ Mahoney was performing collection duties that day as part of Ruane's staff.

1 Stapleton participated in the single space meter internal unit repair process.
2 Stapleton began performing this work six months after single space electronic meters
3 were installed in 2016. After field maintenance staff removed an internal unit for repair,
4 Stapleton inputted the information from their handwritten documents recording the
5 removal into a spreadsheet. Once a unit received diagnostic testing and was designated
6 for further repair, Stapleton extracted its information from daily worksheets, completed a
7 standardized repair template, and submitted the template for Hallahan's approval.
8 Stapleton occasionally performed diagnostic troubleshooting herself. Following the
9 vendor's issuance of an RMA, Stapleton usually printed the packing labels and shipping
10 labels for the returning units, unless Hallahan did it instead.

11 When repaired units were received from the vendor, Stapleton or Hallahan
12 examined the packing slip to ensure all units were present. Once meter units were
13 received, Stapleton performed additional diagnostic testing to ensure they were repaired
14 correctly. When meter units were returned unrepaired, Stapleton would create a separate
15 RMA and forward the issue to Hallahan for resolution. Stapleton would sometimes review
16 and sign repair invoice slips but would forward them to Hallahan for payment. Stapleton
17 followed essentially the same process for diagnosing and repairing multi-space meter
18 units as for single space meter units. Stapleton did perform some additional duties for
19 multi-space units, such as compiling lists of affected units. However, Hallahan still
20 communicated directly with multi-space unit vendors and approved final payment.

21 **Creation of Technology Specialist Position**

22 Prior to February 2019, Gerratt - in conjunction with Hallahan and Ruane -
23 identified a need to upgrade the Foreperson position occupied by Stapleton. Gerratt

1 believed an upgrade was necessary because the position had grown in responsibility -
2 both generally within the PMOU and specifically regarding the technical challenges
3 occasioned by the introduction of electronic meters - and no longer reflected the duties in
4 the Foreperson job description. Thus, Gerratt wanted Stapleton to receive a higher grade
5 for the work she was already doing as Foreperson.

6 On or about February 15, 2019, Gerratt sent an email to Hallahan and Ruane.
7 Attached to the email were two documents, a draft job description for a position of
8 Assistant Supervisor - Parking Meter Operations (Assistant Supervisor), and a draft
9 proposal of a personnel restructuring of the PMOU which included that position. The draft
10 proposal discussed, in part, the reason for the creation of the Assistant Supervisor
11 position, saying:

12 In addition, as the City has increased the number of electronic parking
13 meters on City streets and also has expanded its Performance Parking
14 program, the role of one of our current meter shop Parking Meter
15 Operations Foreperson has expanded and requires this person to assume
16 more responsibility for managing the IPS and Parkeon back office meter
17 databases and reporting on parking meter performance, to lead the staff in
18 repairing the much more complex multi-space meters being installed in
19 growing numbers on the City's streets and to assist in the Supervision of all
20 meter shop activities.

21 Among other responsibilities, the draft Assistant Supervisor description stated that the
22 employee would supervise meter staff under the direction of the Supervisors; assist in the
23 preparation and management of the PMOU budget; and manage the process of shipping
24 single space mechanisms for repair. The draft Assistant Supervisor description placed it
25 within the AFSCME bargaining unit.

26 Gerratt forwarded the Assistant Supervisor description to Hallahan and Ruane for
27 their information and review, though they had already had a role in drafting it. During the
28 drafting process, Gerratt and Hallahan discussed whether the role might be placed in the

1 SENA bargaining unit, instead of the AFSCME unit. However, this possibility was never
2 discussed with a SENA officer. At some point, the title of "General Foremen" was also
3 discussed as an alternative to both Technology Specialist and Assistant Supervisor.

4 The proposed Assistant Supervisor job description eventually became the
5 Technology Specialist job title. Hallahan and Ruane helped draft and revise the
6 Technology Specialist job description as well. Casey and Calobrisi also played a role in
7 drafting the final Technology Specialist job description. As drafted, Gerratt and Casey
8 understood the provision that an employee "assume full responsibility for daily operations"
9 of the PMOU as one applicable to situations where both Hallahan and Ruane were
10 absent. However, they did not understand this provision to require the Technology
11 Specialist to take on the full responsibilities of the supervisors, defined as activities
12 beyond daily tasks. Once it was finalized, Calobrisi shared the Technology Specialist job
13 description with AFSCME. On or about August 1, 2019, after resolving any issues
14 AFSCME had with the description, the Technology Specialist position was posted on the
15 Career Center website, as well as internally posted within different divisions of BTD.

16 The finalized Technology Specialist job description included, among others, three
17 requirements. First, at bullet point five, that "in the absence of the supervisor of parking
18 meter operations, [the Technology Specialist] assumes full responsibility for supervising
19 the daily operation of parking meter operations, including scheduling and assigning work
20 of all parking meter collections and repair staff." Second, at bullet point four, that the
21 Technology Specialist "participate[] in the preparation and management of the [PMOU's]
22 budget." Finally, at bullet point ten, that the Technology Specialist is responsible for

1 “manag[ing] the process of shipping single space mechanisms for repair, including
2 removing meters being shipped from the web-based database...”

3 On or about August 22, 2019, SENA President Joseph Smith called Casey
4 regarding his concerns over the Technology Specialist position. Specifically, Smith
5 objected to the Technology Specialist language which stated that the role was responsible
6 for taking on the “full responsibility for supervising the daily operation of parking meter
7 operations” in the absence of PMOU supervisors. Smith also communicated other,
8 additional objections to Calobrisi. At the time, Casey identified the Technology Specialist
9 role as the one she would consider first, should she need to make a TOG assignment for
10 the Supervisor role, because that role would have the knowledge and qualifications to
11 perform at the higher grade. Thus, Casey responded to Smith via email, writing:

12 The new position of Parking Technology Specialist will assume full
13 responsibility for supervising the daily operation of the Parking Meter
14 Operations Division only in the event that both of the two Supervisors of
15 Parking Meter Operations are absent from work on the same day(s) and if
16 they assume these responsibilities for more than 5 days, the Specialist will
17 be TOG'd into the Supervisor of Parking Meter Enforcement position.

18
19 Despite her response, Casey did not intend to communicate that the Technology
20 Specialist would immediately take on all Supervisor responsibilities prior to receiving a
21 formal TOG assignment.

22 **Technology Specialist Stapleton**

23 PMOU hired Stapleton as a Technology Specialist on August 26, 2019. Since
24 taking her new position, Stapleton’s actual job duties have not changed.⁹ Stapleton

⁹ In his testimony, Gerratt described some of Stapleton’s Technology Specialist responsibilities more expansively than did Stapleton and Hallahan. For example, he disagreed with Stapleton’s testimony that she played no role in preparing or managing

1 continues to consult Hallahan regarding disciplinary matters. Stapleton continues to
2 perform the same limited role in supervising field staff and has taken on no new
3 responsibilities related to special projects. Stapleton continues to perform the same role
4 in the single space meter unit repair process. Stapleton continues to play no role in
5 preparing and managing the PMOU budget. The record contains no evidence that Gerratt,
6 Hallahan or Ruane have told Stapleton that she should be performing any new duties that
7 she is not currently performing, or that the Technology Specialist job description requires
8 her to perform any duties that she is not performing.

9 **Supervisory Responsibility in Other Departments**

10 The Systems and Operations Unit¹⁰ and Tow and Hold Unit of BTM are also located
11 at 200 Frontage Road. The Sign Shop, the Signal Shop, and the Investigators are also
12 BTM units, located on Channel Street. The position of Assistant Supervisor exists in the

the Unit's budget and did not supervise its daily operations. Gerratt also testified that Stapleton judges whether a single space mechanism order has been fulfilled and advises on whether an invoice should be paid. To the extent that Stapleton's and Gerratt's testimony conflicts regarding what Stapleton is actually doing, I credit Stapleton's testimony. Additionally, Gerratt's testimony acknowledged the distinctions between Stapleton's role and Hallahan and Ruane's responsibilities, thereby illustrating that there are no significant differences between Stapleton's current and prior role. For instance, Gerratt testified that the Technology Specialist's role is to support the managers with their budget work. However, he also acknowledged that Stapleton does not help to put the budget together and that - except for reviewing specific meter repair invoices and advising Hallahan on whether the invoices should be paid - Stapleton still has no role in monitoring the budget during the year. In other words, while Gerratt believes Stapleton is "managing" the budget, he recognizes that she also advises as to individual invoices, and it is Hallahan who ultimately decides whether an invoice should be paid. Similarly, while stating that Stapleton has some supervisory duties, Gerratt also agreed that Hallahan and Ruane have the overall responsibility for the PMOU, Stapleton acts under their general direction, and she needs their approval to make any major changes to daily operations.

¹⁰ This unit is also referred to as the Enforcement "bubble" unit. However, the Parking Enforcement Unit is separate.

1 Systems and Operations Unit and is an AFSCME position. The Systems and Operations
2 Unit has one manager, a SENA unit position, and up to six supervisors, AFSCME
3 positions, who report to that supervisor. No manager works on the Systems and
4 Operations Unit night shift, and it is supervised by a night supervisor instead.

5 Similar to the Systems and Operations Unit, the Tow and Hold, Parking
6 Enforcement, and Sign and Signal units also use supervisory systems wherein “assistant
7 supervisor” positions in the AFSCME bargaining unit act in a limited supervisory capacity
8 in the absence of SENA unit supervisors. Some of the job descriptions for AFSCME
9 positions expressly include this fill-in requirement. For example, the job description for the
10 Assistant Traffic Sign Supervisor, which is an AFSCME position that reports to a SENA
11 position, states that the position “assumes all responsibilities of the Traffic Sign
12 Supervisor in his absence.” The Sr. Parking Meter Supervisor II job description – an
13 AFSCME position - states that the incumbent “assumes all duties of the Supervisor of
14 Parking Enforcement in his/her absence.” The Supervisor of Parking Enforcement is a
15 SENA position. Assistant supervisor positions also play a more active role in managing
16 budget and inventory needs.

17 OPINION

18 **Section 10(a)(5) Allegation**

19 Section 10(a)(5) of the Law requires a public employer to give the exclusive
20 collective bargaining representative prior notice and an opportunity to bargain before
21 transferring bargaining unit work to non-bargaining unit personnel. Commonwealth of
22 Massachusetts v. Labor Relations Commission, 60 Mass. App. Ct. 831 (2004). To
23 establish that an employer unilaterally transferred bargaining unit work to non-unit

1 personnel, the union must prove the following elements: 1) the employer transferred
2 bargaining unit work to non-unit personnel; 2) the transfer of work had an adverse impact
3 on either individual employees or on the bargaining unit itself; and 3) the employer did not
4 give the union prior notice and an opportunity to bargain over the decision and the impacts
5 of the decision to transfer the work. Id.

6 To establish the first element of its prima facie case, the union must show that the
7 unit work at issue traditionally has been performed by bargaining unit employees. City of
8 New Bedford, 15 MLC 1732, 1737, MUP-6488 (May 31, 1989). When work is shared by
9 bargaining unit members and non-unit employees, the Commonwealth Employment
10 Relations Board (CERB) has determined that the work will not be recognized as
11 exclusively bargaining unit work. Higher Education Coordinating Council, 23 MLC 90, 92,
12 SUP-4090 (September 17, 1996). In shared work cases, the employer is not obligated to
13 bargain over every incidental variation in job assignments between unit and non-unit
14 employees. Rather, bargaining must occur only if there is a calculated displacement of
15 bargaining unit work. Id. Therefore, if unit employees traditionally have performed an
16 ascertainable percentage of the work, a significant reduction in the portion of work
17 performed by unit employees, coupled with a corresponding increase in the work
18 performed by non-unit employees, may demonstrated a calculated displacement of unit
19 work. Id.

20 The issue in this case is whether the City transferred SENA bargaining unit work
21 when it posted a job description for the newly-created position of Technology Specialist
22 in the PMOU and filled it with an AFSCME unit member. SENA challenges three specific
23 duties that are listed in the job description and argues that they constitute SENA

1 bargaining unit work. The challenged duties are: 1) in the absence of the Supervisor of
2 Parking Meter Operations, assumes full responsibility for supervising the daily operation
3 of the Parking Meter Operations Unit, including scheduling and assigning work of all
4 parking meter collections and repair staff; 2) participates in the preparation and
5 management of the division's budget; and 3) manages the process of shipping single
6 space mechanisms for repair, including removing meters being shipped from the web-
7 based database, preparing meters for shipping, creating packing slips, maintaining
8 records of items shipped, packaging and preparing mailing labels.

9 The Union asserts that Stapleton is not performing the disputed work at issue.
10 Nevertheless, it argues that the City unlawfully transferred bargaining unit work by
11 announcing – via the Technology Specialist job description - that Stapleton is performing
12 the disputed work, and by insisting that she should be performing the work. In the Union's
13 view, the announcement of a unilateral change violates the Law even if the change is not
14 implemented at the time of the announcement or thereafter. Conversely, the City argues
15 that it has not unlawfully transferred any work from SENA to AFSCME; indeed, that it has
16 not transferred any work at all. Rather, it contends that Stapleton is performing that same
17 work as a Technology Specialist that she previously performed as a Foreperson. In the
18 City's view, there has been no change, no transfer, and thus no bargaining obligation. I
19 am not persuaded by the Union's arguments and find no unlawful transfer of bargaining
20 unit work.

21 I. Supervising the Daily Operations of the Parking Meter Operations Unit

22 The first disputed duty of the Technology Specialist reads in the job description as
23 follows: "Under [the] general direction of the Supervisor of Parking Meter Operations....In

1 the absence of the Supervisor of Parking Meter Operations, assumes full responsibility
2 for supervising the daily operation of the Parking Meter Operations Unit, including
3 scheduling and assigning work of all parking meter collections and repair staff.” As stated,
4 Stapleton’s job description gives her “full responsibility for supervising the daily operation
5 of the Parking Meter Operations Unit” only when Hallahan and Ruane are both absent.
6 As the parties agree, and as the facts – including Stapleton’s prior job description - show,
7 Stapleton already performed supervisory work as a Parking Meter Operations
8 Foreperson. Thus, the focus here is only on the new “full responsibility” she now has of
9 filling in for Hallahan and Ruane in their absence. Therefore, I must consider whether the
10 work of filling in for an absent supervisor is work that AFSCME unit members previously
11 performed. It is.

12 Equivalent job descriptions for various positions in AFSCME’s bargaining unit state
13 that the individual in the position is responsible for performing the duties of an absent
14 SENA supervisor. Specifically, the job description for the AFSCME Assistant Traffic Sign
15 Supervisor who reports to a SENA position, states that the position “assumes all
16 responsibilities of the Traffic Sign Supervisor in his absence.” Similarly, the AFSCME Sr.
17 Parking Meter Supervisor II job description states that the incumbent “assumes all duties
18 of the Supervisor of Parking Enforcement in his/her absence,” and the Supervisor of
19 Parking Enforcement is a SENA position. Consequently, SENA unit members’
20 supervisory responsibilities in the Transportation Department have consistently been
21 shared with AFSCME unit members in their absence, and thus the fill-in duties included
22 in the Technology Specialist job description can be viewed as shared work.

1 Accordingly, I next consider whether there has been a calculated displacement of
2 this shared work. As the job description clearly states, and Casey reiterated in her August
3 22, 2019 email to Smith, the Technology Specialist only assumes “full responsibility” for
4 supervising the PMOU in the absence of the Supervisor of Parking Meter Operations.
5 Thus, the full responsibility for supervising the Unit’s daily operations continues to
6 permanently rest with SENA members, and at best, is only temporarily transferred to an
7 AFSCME unit member. As of the date of the hearing, Stapleton had not performed any
8 new duties in her position as Technology Specialist. The Union does not dispute this
9 testimony, and there is no contrary evidence. Consequently, there is no evidence of an
10 increase in the percentage of work that AFSCME members perform, and no evidence of
11 a corresponding decrease in the percentage of supervisory responsibilities that SENA
12 members perform. Thus, the Union has failed to establish a calculated displacement of
13 shared work.

14 Further, there is no evidence of an adverse impact to any SENA member or the
15 bargaining unit as a whole. As noted, Stapleton would only fill in for Hallahan and Ruane
16 if they were both absent, so neither they, nor the bargaining unit, will lose any duties so
17 long as they stay in their positions. Additionally, the SENA and AFSCME Contract TOG
18 procedures, which apply if Stapleton began performing Hallahan or Ruane’s duties for
19 longer than five days, would ensure that Stapleton received SENA wages, paid SENA
20 dues, and was otherwise considered a SENA member if she temporarily performed their
21 job duties for a longer period. Although the Union alleges that the Technology Specialist
22 position will prompt a gradual erosion of the bargaining unit, it has not produced evidence
23 to establish this result or shown that such a result is likely. See Chief Justice for

1 Administration and Management of the Trial Court v. CERB, 79 Mass. App. Ct. 374 (2011)
2 (finding no violation where there was no evidence of an eventual elimination of the
3 bargaining unit through gradual erosion of bargaining unit duties and that hypothetical
4 detriments do not establish the requisite proof).

5 The Union's arguments to the contrary are unpersuasive. First and fundamentally,
6 the Union disputes the City's position that Stapleton already performed the Technology
7 Specialist duties at issue when she held the Foreperson position. Although both parties
8 agree that Stapleton's duties did not change when she took on the Technology Specialist
9 position, the Union argues that the job description unlawfully "announced" that she would
10 perform them going forward. The Union further contends that she will be required to
11 perform new, additional duties when both Hallahan and Ruane are both absent, even if
12 this hasn't previously occurred. However, the Union cannot turn the City's posting of the
13 Technology Specialist job description into unlawful conduct merely by characterizing it as
14 an "announcement" of newly imposed duties, particularly where Stapleton is not actually
15 performing new SENA duties and has not been told to do so. The Union provided no
16 persuasive case to support its theory, and the cases it cites are factually distinguishable
17 as none of them concern an employee accepting a new position with overlapping duties.¹¹

¹¹ For example, the Union cited ABC Auto Prod. Corp. 307 NLRB 248 (1992) where the National Labor Relations Board (NLRB) held that an employer unlawfully announced the implementation of a new health and welfare plan. However, announcing the implementation of a new health and welfare plan that will change terms and conditions of employment for all employees is different than creating a new position and drafting a new job description to reflect an employee's broader and more technical responsibilities. The Union further argued that the City's action conveyed the message that it no longer intended to deal with the Union. However, such a theory could apply to every unilateral change case. Contrary to the Union's contention, the City did not uniquely convey - by its words or actions - such a message here.

1 Second, as noted above, there is no evidence that Stapleton's supervisors have
2 insisted that she perform any additional duties or stated that the job description requires
3 her to do so. If anything, Gerratt's stated motivation in creating the Technology Specialist
4 was to enable Stapleton to receive a higher grade for the work she was already doing as
5 a Foreperson, not to transfer additional responsibilities. Indeed, Gerratt acknowledged in
6 his testimony that the way the operations have been supervised has not changed since
7 Stapleton took on the Technology Specialist position. Although Gerratt may have
8 described her responsibilities more broadly in his testimony, he was only involved in
9 drafting the job description and does not supervise her on a daily basis. In other words,
10 at most, any difference between Stapleton's prior job duties and her new position is
11 attributable to an issue in drafting, not an actual transfer of work.

12 Third, the Union has not presented persuasive case law holding that the
13 Technology Specialist's fill-in duties cannot be considered shared work because SENA
14 was not aware that other AFSCME job descriptions contained supervisory fill-in
15 requirements. See generally, City of Newton, 35 MLC 142, MUP-02-3634 (December 31,
16 2008) (civilian employees shared certain duties with traffic officer by performing duties
17 when the officer was not present in the office); City of New Bedford, 39 MLC 126, MUP-
18 09-5582 (November 15, 2012) (court liaison officers shared work with clerk typist and
19 performed certain duties when clerk typist was not available). Moreover, the shared work
20 analysis is applicable here even though certain SENA supervisors' duties were shared
21 with AFSCME members who worked in departments other than the PMOU. See
22 Commonwealth of Massachusetts, 42 MLC 109, SUP-13-2604 (October 19, 2015)

1 (hearing officer properly found that work was shared between unit members and non-unit
2 members on a system-wide, rather than individual facility basis.)

3 Consequently, the Union has not established by a preponderance of the evidence
4 that the City unlawfully transferred SENA bargaining unit work to AFSCME's bargaining
5 unit when it gave the Technology Specialist the duty of assuming full responsibility for
6 supervising the daily operation of the Parking Meter Operations Unit in the absence of the
7 Supervisors of Parking Meter Operations.

8 II. Participates in the Preparation and Management of the Budget

9 The Technology Specialist job description requires Stapleton to "participate in the
10 preparation and management of the division's budget." Stapleton's Parking Meter
11 Operations Foreperson job description required her to "assist[] in the preparation of the
12 Division's budget." The evidence clearly shows that Stapleton's budgetary duties did not
13 change when she took on the Technology Specialist job, and that she does not manage
14 the budget or participate in the management or creation of the budget. Rather, the
15 evidence shows, and the Union acknowledges, that Hallahan, not Stapleton, prepares
16 and manages the Unit's budget.

17 Further, the words used in the job description did not create any new expectations
18 or responsibilities for the Technology Specialist. Gerratt confirmed that Stapleton does
19 not do any work "putting together" the budget, Hallahan does most of the budget-related
20 work himself, and the Technology Specialist's role is to support the managers in their
21 work with the budget. Although Gerratt may believe that Stapleton's knowledge about
22 whether certain invoices have been paid causes her to "manage" the budget, he again
23 did not state that there are any new duties in the new job description that she should or

1 will be performing. In short, Stapleton has not been given new SENA work regarding the
2 budget; she is not doing any new work; there was and continues to be a distinction
3 between Stapleton and Hallahan's budgetary work; and the new job description did not
4 blend their budgeting responsibilities. Consequently, the Union did not establish by a
5 preponderance of the evidence that the City transferred SENA work to an AFSCME
6 bargaining unit member.

7 III. Process of Shipping Single Space Mechanisms

8 I similarly find that the City did not transfer any SENA duties to the AFSCME
9 bargaining unit when it stated in the Technology Specialist job description that the
10 Technology Specialist, "under [the] general direction of the Supervisor of Parking Meter
11 Operations"... "manages [the] process of shipping single space mechanisms for repair
12 including removing meters being shipped from the web-based database, preparing
13 meters for shipping, creating packing slips, maintaining records of items shipped,
14 packaging and preparing labels." Pursuant to the Parking Meter Operations Foreperson
15 job description, Stapleton was already responsible for preparing work orders for meter
16 installations and removals. Stapleton testified that she currently performs the same duties
17 with respect to the process of shipping single space parking mechanisms that she did
18 while holding the position of Foreperson, and the Union acknowledges that Hallahan, not
19 Stapleton, manages the process of shipping single space mechanisms. Thus, the
20 evidence shows that Stapleton is performing the same duties as Technology Specialist
21 that she performed as Foreperson, and that she is not actually performing any of SENA's
22 work.

1 The Union argues, however, that the wording of the job description, coupled with
2 the City's argument that Stapleton should be managing the process of shipping single
3 space mechanisms, shows that the City expects her to perform new SENA duties. As a
4 result, the Union claims that such an expectation constitutes a transfer of work, even if
5 Stapleton is not actually performing the new duties. I disagree.

6 Gerratt expansively described Stapleton's duties in his testimony and emphasized
7 that she determines whether an order has been fulfilled as it should, including advising
8 Hallahan about paying specific invoices. However, Gerratt also acknowledged that
9 Hallahan – not Stapleton - ultimately decides whether an invoice should be paid.
10 Significantly, there is no evidence that Gerratt has told Stapleton to perform tasks that
11 she is not performing or that he has advised Hallahan to redistribute responsibilities
12 following her elevation to Technology Specialist.

13 Further, the Technology Specialist job description only requires Stapleton to
14 “manage the process for shipping single space mechanisms” *under the general direction*
15 of the Supervisor of Parking Meter Operations. Consequently, though the new job
16 description uses the term “manage,” it does not give the AFSCME position the sole or
17 independent responsibility for the entire process. Instead, as the Union points out,
18 Hallahan is still in charge of the single space meter return process. Although Gerratt may
19 have used different words to describe Stapleton's responsibilities, he did not identify any
20 duties that she should – but does not – perform. Rather, Gerratt characterized the work
21 that Stapleton was performing as a Foreperson as “managing the process of shipping
22 single-space mechanisms” and noted that this work has not changed since she assumed
23 the Technology Specialist position. Consequently, it is clear that regardless of any

1 differences between the wording of the two job descriptions, Gerratt does not expect the
2 Technology Specialist to have any new or expanded responsibilities with respect to the
3 process of shipping single space mechanisms and no actual job duties have changed.¹²
4 Simply put, the evidence does not show a transfer of new work; instead, the job
5 description simply uses new words to describe old duties. Consequently, the Union has
6 not established by a preponderance of the evidence that the City unlawfully transferred
7 SENA work to an AFSCME unit position.

8 **Section 10(a)(1) Allegation**

9 In the alternative, the Union argues in its post-hearing brief that it is an independent
10 violation of Section 10(a)(1) for an employer to announce a unilateral change, even if it
11 does not subsequently implement that change. I decline to consider this allegation
12 because it was not included in the Complaint or litigated at the hearing.

13 Conduct not specifically pleaded in a complaint may form the basis for an unfair
14 labor practice finding when the conduct relates to the general subject matter of the
15 complaint, and the issue has been fully litigated. Town of Norwell, 18 MLC 1263, 1264,
16 MUP-6962 (January 22, 1992). At minimum, “full litigation” requires that the respondent
17 be given some notice that the subject is in issue, and thus be given an opportunity to
18 present evidence concerning the facts material to the subject. Whitman-Hanson Regional
19 School Committee, 10 MLC 1606, 1607-1608, MUP-5249 (May 17, 1984). The test is

¹² In the representation case context, the CERB generally does not decide questions of unit placement based solely on job descriptions and seeks testimony regarding the actual duties of disputed positions. See generally, Marion School Committee, 30 MLC 101, CAS-02-3531 (January 2, 2004). Similarly, here, the wording of the Technology Specialist job description is less significant than the reality of what Stapleton is doing and what she has – and has not – been expected to do.

1 one of fairness under the circumstances of each case - whether the respondent knew
2 what conduct was in issue and had a fair opportunity to present its defense. Town of
3 Randolph, 8 MLC 2044, 2051, MUP-4589 (April 23, 1982). Further, even if a newly raised
4 allegation is related to the general subject matter of the complaint, it is not considered
5 fully litigated when a charging party did not seek to amend the complaint until after the
6 hearing was over and the record was closed. See City of Boston, 46 MLC 191, 197-198,
7 MUP-17-6211, MUP-18-6679 (March 31, 2020).

8 I have not found that the City implemented a unilateral change that could have
9 been announced. However, even if I did, I would not consider this new Section 10(a)(1)
10 allegation. The allegation was not included in the Complaint, the Union did not raise the
11 argument in its opening statement, and the City did not include the argument in its brief.
12 Consequently, it is clear that the independent 10(a)(1) allegation was not litigated at the
13 hearing.

14 CONCLUSION

15 Based on the record and for the reasons explained above, I conclude that the City
16 did not unlawfully transfer bargaining unit work to non-bargaining unit personnel as
17 alleged in the Complaint.¹³

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



SUSAN L. ATWATER, ESQ.
HEARING OFFICER

¹³ I make no finding on whether the City would violate the Law if, in the future, it used the Technology Specialist job description to engage in an actual transfer of work, such as by requiring Stapleton to assume additional job duties under an expansive reading of her job description.

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L.c.150E, Section 11 and 456 CMR 13.19, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for Review with the Department of Labor Relations within 10 days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties.