COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	
MASSACHUSETTS CONVENTION CENTER AUTHORITY	*	Case No.: SUP-18-6743
and	*	Date Issued: October 10, 2019
NATIONAL CONFERENCE OF FIREMEN AND OILERS, LOCAL 3, SEIU	*	

Hearing Officer:

Will Evans, Esq.

Appearances:

Jasper Groner, Esq.	-	Representing NCFO, Local 3, SEIU
Wendy Chu, Esq.	-	Representing the Massachusetts Convention Center Authority

HEARING OFFICER DECISION

SUMMARY

The issue is whether the Massachusetts Convention Center Authority (Employer or MCCA) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by transferring bargaining unit work to non-bargaining unit personnel without providing the National Conference of Firemen and Oilers, Local 3, SEIU (Union or Local 3) with prior notice and an opportunity to bargain to resolution or impasse over the decision and the impacts of that decision on employees' terms and conditions of employment. Based on the record and for the reasons explained below, I find that the Employer violated the Law as alleged.

STATEMENT OF THE CASE

On June 29, 2018, the Union filed a Charge of Prohibited Practice with the Department of Labor Relations (DLR) alleging that the Employer had engaged in prohibited practices within the meaning of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. A duly designated DLR investigator conducted an investigation of the matter on September 10, 2018. On September 14, 2018, the investigator issued a Complaint of Prohibited Practice (Complaint), alleging that the Employer had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by transferring bargaining unit work to non-unit personnel without providing the Union with prior notice and an opportunity to bargain to resolution or impasse over the decision and the impacts of that decision on employees' terms and conditions of employment. The Employer filed an Answer to the Complaint on September 24, 2018, admitting to certain allegations and denying certain others.

After a pre-hearing conference on May 2, 2019 and a status conference on July 11, 2019, I conducted a hearing on July 16, 2019, at which both parties had the opportunity to be heard, to examine witnesses, and to introduce evidence. On August 20, 2019, the parties filed post-hearing briefs. After careful review of the record evidence and in consideration of the parties' arguments, I make the following findings of fact and render the following opinion.

STIPULATED FACTS

1. NCFO Local 3 (Local 3) is an employee organization as defined in G.L. c. 150E, § 1.

2. The Massachusetts Convention Center Authority is an employer as defined in G.L. c. 150E, § 1.

3. The Boston Convention and Exhibition Center (BCEC), which is operated by the MCCA, opened in 2004.

4. Local 3 is the exclusive bargaining representative for certain employees of the MCCA, including skilled maintenance workers.

5. Frantz Paillant retired effective January 26, 2018.

FINDINGS OF FACT

The MCCA is a state authority charged with operating several convention centers across the Commonwealth, including the B. Hynes Veterans Memorial Convention Center (Hynes) and the BCEC. The two convention centers serve as host facilities for conventions, trade shows, and other events in the Boston area. The MCCA also operates the public parking garage located in the Boston Common (Boston Common Garage).

On October 26, 1987, the MCCA hired Frantz Paillant (Paillant) as a Skilled Maintenance Worker, a bargaining unit position represented by Local 3, at the Boston Common Garage. Paillant was responsible for the cleaning and maintenance of the facility. In or around January 1988, the MCCA reassigned Paillant to the Hynes, where he continued to work as a Skilled Maintenance Worker and a member of the bargaining unit represented by Local 3. His primary duties at the Hynes included overseeing the work of cleaning contractors and scrubbing the floors with heavy machinery. At some point after being reassigned to the Hynes, Paillant began to assist Billy Randolph, the Loading Dock Supervisor at the Hynes (Randolph), with loading dock duties and to fill-in for Randolph in his absence. Randolph was responsible for overseeing the loading dock

operations at the Hynes, which included assigning docks and receiving deliveries. Unlike Paillant's position as a Skilled Maintenance Worker, Randolph's position as Loading Dock Supervisor was not in the bargaining unit.

After the MCCA opened the BCEC in June 2004, it transferred Paillant from the Hynes to the BCEC. Paillant's title remained Skilled Maintenance Worker and he continued to be represented by Local 3, but he no longer performed any cleaning duties. According to his new job description, as of June 2004, Paillant performed the following duties, in part:

- Coordinate and assign loading dock bays to incoming and outgoing truckers on the basis of delivery and departures times, as specified in the resume or as otherwise directed;
- Assign storage areas for empty crates delivered and used by drayage companies;
- Inspect incoming freight to prevent dangerous cargo such as chemicals and explosives from entering the facility;
- Monitor and control vehicle access into the facility's loading dock;
- Act or assist the loading dock receiver on behalf of the Authority, as required; and
- Notify appropriate departments of incoming parcels and deliver same.

Paillant also was responsible for shipping and receiving deliveries, working with private companies to keep the docks clean, signing for vendors, reporting all damages to loading docks, ensuring safe operation of equipment, using FMS software to track packages, and general policing of the loading dock area. Although Paillant and Randolph held different titles, Paillant performed the same duties at the BCEC as Randolph did at the Hynes.

When Randolph retired, the MCCA hired Pat Rooney (Rooney) to be the Loading Dock Supervisor at the Hynes. Like Randolph before him, Rooney was a non-unit

employee. Rooney's duties as the Loading Dock Supervisor were the same as those of his predecessor Randolph at the Hynes and as those of Paillant at the BCEC.

Later, in or around 2014, the MCCA established a new position, Loading Dock Manager, to oversee Rooney and Paillant's work, and hired Daniel Puopolo (Puopolo) for the position. The Loading Dock Manager was classified as a non-unit position, and Puopolo was not represented by a union. Puopolo would occasionally fill in for both Rooney and Paillant in their absences; however, Paillant continued to be the individual primarily responsible for loading dock duties at the BCEC. After Rooney's separation from employment, Puopolo took over the loading dock duties at the Hynes. Puopolo performed the same loading dock duties at the Hynes as Paillant performed at the BCEC.

When Paillant retired on January 26, 2018, the MCCA hired a non-unit employee, Michael Cook (Cook), to perform the loading dock duties at the BCEC. Cook performed the same duties[1] as those previously performed by Paillant, but he was not given the title "Skilled Maintenance Worker" or included in the bargaining unit represented by Local 3.

[1] The MCCA did not challenge the Union's claim that Cook was performing each of the loading dock duties performed previously by Paillant. As such, I find that Cook performed, in part, the following loading dock duties at the BCEC: coordinate and assign loading dock bays to incoming and outgoing truckers on the basis of delivery and departures times, as specified in the resume or as otherwise directed; assign storage areas for empty crates delivered and used by drayage companies; inspect incoming freight to prevent dangerous cargo such as chemicals and explosives from entering the facility; monitor and control vehicle access into the facility's loading dock; act or assist the loading dock receiver on behalf of the Authority, as required; notify appropriate departments of incoming parcels and deliver same; take responsibility for shipping and receiving deliveries; work with private companies to keep the docks clean; sign for vendors; report all damages to loading docks; ensure safe operation of equipment; use FMS software to track packages; and generally police the loading dock area.

Cook was given the title of "Loading Dock Supervisor," like Randolph and Rooney before him at the Hynes, and classified as a non-unit employee. Cook

During all relevant times, Local 3 never sought to accrete the Loading Dock Supervisor or Loading Dock Manager positions into the bargaining unit. Similarly, it never filed any grievances challenging Paillant's assignment of loading dock duties while holding the position title "Skilled Maintenance Worker." Paillant has been the only Local 3 employee regularly assigned to work in the loading dock. Finally, throughout Paillant's employment, there have been only two other Skilled Maintenance Workers, neither of whom performed loading dock duties.

OPINION

The issue before me is whether the MCCA violated Sections 10(a)(5) and, derivatively, 10(a)(1) of the Law by transferring certain loading dock duties performed by the Union's bargaining unit member to a non-bargaining unit member. A public employer violates Section 10(a)(5) of the Law when it transfers work performed by the bargaining unit to non-bargaining unit personnel without first giving the exclusive bargaining representative prior notice and an opportunity to bargain to resolution or impasse. City of Cambridge, 23 MLC 28, 36, MUP-9171 (June 28, 1996), aff'd sub nom., Cambridge Police Superior Officers Association v. Labor Relations Commission, 47 Mass. App. Ct. 1108 (1999). To establish that a public employer has violated the Law, an employee organization must demonstrate that: 1) the employer transferred bargaining unit work to non-unit personnel; 2) the transfer of unit work had an adverse impact on individual

employees or the bargaining unit itself; and 3) the employer failed to give the employee organization prior notice and an opportunity to bargain to resolution or impasse over the decision and the impacts of the decision to transfer the work. Lowell School Committee, 28 MLC 29, 31, MUP-2074 (June 22, 2001); City of Gardner, 10 MLC 1216, 1219, MUP-4917 (September 14, 1983).

1. Bargaining Unit Work

To determine whether the MCCA unlawfully transferred bargaining unit work, I must first determine whether the disputed loading dock duties are bargaining unit work and, if so, whether unit members share the work with non-bargaining unit personnel. In order to make a prima facie case, the union must show that the work at issue has been performed traditionally by bargaining unit employees. City of Lawrence, 23 MLC 213, 215, MUP-9876 (March 31, 1997).

The MCCA urges me to find that the loading dock duties are not bargaining unit work and belong exclusively to non-unit personnel. In support of its position, the MCCA argues that non-unit personnel have been performing loading dock duties exclusively at the Hynes for approximately 30 years and, except for Paillant, no bargaining unit member has ever performed loading dock duties at the BCEC. The MCCA notes that the DLR has found an unlawful transfer only when the work has been previously performed by bargaining unit members. The MCCA, citing City of Boston and Boston Superior Officers' Federation, 38 MLC 73, MUP-06-4699 (September 12, 2011) (hereinafter, "Boston Superiors"), states, "the hearing officer [in Boston Superiors] noted that there was no

overlap in the duties performed by the bargaining unit member at issue and other members of the bargaining unit holding the same or similar job titles." The MCCA has misread the facts in the Boston Superiors case. The employee at issue in Boston Superiors was **not** a member of the Boston Superior Officers' Federation. The parties reached an agreement that the assignment given to the non-unit employee would be "red-circled" and later made into a bargaining unit position once the non-unit employee departed the assignment. After the non-unit employee departed the assignment, the employer assigned the work to another non-unit employee and the union filed charges at the DLR alleging both repudiation and an unlawful transfer of bargaining unit work. The hearing officer found that the employer repudiated the agreement, but she dismissed the unlawful transfer allegation because no bargaining unit member had ever performed the work.

The facts in the present case are starkly different than those in Boston Superiors. The Union established that Paillant was a member of the bargaining unit throughout his employment and performed loading dock duties at BCEC from 2004 to 2018. The fourteen years that Paillant performed the loading dock duties is sufficient to establish that the work was traditionally performed by a bargaining unit member. See e.g., City of Boston, 38 MLC 201, 202, MUP-08-5253 (March 9, 2012) (two and one-half years of assigning police captains to command a particular division was sufficient to establish a binding practice); City of Boston, 28 MLC 369, 372, MUP-2267 (May 31, 2002) (seven years sufficient to establish a practice of assigning patrol officers exclusively to identify latent

fingerprints at crime scenes). Although the MCCA argues that the loading dock duties should not be considered unit work since no other bargaining unit member besides Paillant, including those with the same title of "Skilled Maintenance Worker," performed loading dock duties, the MCCA has provided no case law in support of this position, and I have found none. Similarly, the fact that Local 3 did not attempt to accrete the Loading Dock Supervisor or Loading Dock Manager positions does not diminish its right to challenge the transfer of bargaining unit work. Under such circumstances, I find that the loading dock duties were traditionally performed by a bargaining unit member and, accordingly, are bargaining unit work.

2. Calculated Displacement of Shared Work

The Union does not dispute that loading dock duties have been performed traditionally by non-unit personnel at the Hynes and concedes that the work is shared. When bargaining unit members and non-unit members share work, the Commonwealth Employment Relations Board (CERB) has determined that the work will not be recognized as belonging exclusively to the bargaining unit. Higher Education Coordinating Council, 23 MLC 90, 92, SUP-4090 (September 17, 1996); City of Boston, 6 MLC 1117, 1125, MUP-2683 (June 4, 1979). In shared work situations, there is no obligation to bargain over every incidental variation in job assignments between unit and non-unit personnel. Rather, bargaining must occur only in situations where there is a calculated displacement of bargaining unit work. City of New Bedford, 15 MLC 1732, 1737, MUP-6488 (May 31, 1989); City of Boson, 10 MLC 1539, 1541, MUP-4967 (April 24, 1984);

City of Boston, 6 MLC at 1126. In determining whether a calculated displacement of unit work has occurred, the CERB examines how the work has been shared in the past. If unit employees traditionally have performed an ascertainable percentage of the work, a significant reduction in the portion of work performed by unit employees with a corresponding increase in the work performed by non-unit employees may demonstrate a "calculated displacement" of the unit work. The CERB may also examine whether non-unit employees constitute a greater percentage of the work force performing the disputed work than previously and whether non-unit employees are performing the duties which were previously performed by unit personnel. Town of Bridgewater, 25 MLC 103, 104, MUP-8650 (December 30, 1998) (citing City of New Bedford, 15 MLC at 1737).

The evidence at hearing clearly shows that Paillant traditionally performed loading dock duties at the BCEC from 2004 until his retirement on January 16, 2018. Although non-unit personnel performed loading dock duties at the Hynes and occasionally filled-in for Paillant at BCEC in his absence, Paillant was the employee who primarily performed loading dock duties at the BCEC for 14 years. Upon Paillant's retirement, the MCCA transferred all loading dock duties at the BCEC to non-unit personnel. As a result of the Employer's actions, no member of the bargaining unit performed any loading dock duties after Paillant's retirement. The bargaining unit went from sharing approximately half the loading dock duties with non-unit personnel to performing none. At the same time, loading dock duties for non-unit personnel essentially doubled. This is plainly more than an incidental variation in the division of work, which warranted giving the Union notice and

an opportunity to bargain. See Town of Bridgewater, 25 MLC at 104, (calculated displacement found where Town eliminated all crossing guard duties from bargaining unit). On this basis, I conclude that there was a calculated displacement of the Union's bargaining unit work.

3. Adverse Impact

The second part of the three-part test is whether the transfer of bargaining unit work has had an adverse impact on either individual employees or the bargaining unit itself. Town of Norwell, 13 MLC 1200, 1208, MUP-5655 (October 5, 1986). An employer must bargain about a transfer of unit work, if the transfer results in adverse impacts on individual employees or the bargaining unit as a whole. See City of New Bedford, 15 MLC at 1737. The CERB has held that a transfer of unit work coupled with the elimination of a bargaining unit position can constitute a substantial detriment to the union through an erosion of the bargaining unit. City of Quincy, 13 MLC 1436, 1443, MUP-5786 (February 3, 1987); Franklin School Committee, 6 MLC 1297, 1299-1300, MUP-3206 (July 18, 1979) (the loss of a bargaining unit job had a sufficient adverse impact to mandate bargaining without a finding of adverse impact on any individual employee). Moreover, the adverse impact standard is the same whether the work transferred is shared work or exclusive to one bargaining unit. City of New Bedford, 15 MLC at 1739. In the instant case, the transfer of the loading dock duties resulted in the loss of the bargaining unit position formerly held by Paillant. No evidence was introduced at hearing to suggest that the MCCA had filled, or planned to fill in the future, the position vacated by Paillant. The

loss of a position and loading dock duties alone constituted a substantial detriment to the Union and, therefore, created a bargaining obligation on the part of the MCCA.

4. Notice and Opportunity to Bargain

The CERB has held that notice and opportunity to bargain is required prior to the transfer of bargaining unit work. Lowell School Committee, 28 MLC at 31. The Employer presented no evidence that it provided to the Union prior notice and an opportunity to bargain to resolution or impasse over the decision to transfer loading dock duties to non-bargaining unit personnel and the impacts of that decision on employees' terms and conditions of employment.

5. Contract Waiver

Based on language in the management rights and classification provisions, the MCCA argues that it had the right under the CBA to assign job duties to employees outside of their job classification on a temporary or permanent basis. The Employer contends that, when it assigned loading dock duties to Paillant in 2004, it did so for the purposes of reclassifying him to a different position. The Employer's argument is legally irrelevant and not supported by the record. The Union did not challenge the right of the Employer to assign loading dock duties to Paillant nor was it legally required to do so. However, once the Employer gave the work to Paillant, who remained a "Skilled Maintenance Worker" and member of the bargaining unit, and after Paillant traditionally performed the work for 14 years, it became bargaining unit work.

The MCCA also contends that the management rights clause gave it complete control and discretion over its organization, which included the right to assign loading dock duties to non-unit personnel. As such, it argues that the Union has contractually waived the right to bargain over the assignment of loading dock duties. The MCCA's reliance on the management rights clause is misplaced.

Article 5: Managerial Rights/ Productivity provides, in pertinent part, the following:

> Except as otherwise limited by an express provision of this Agreement, the Authority shall have the right to exercise complete control and discretion over its organization and technology, including but not limited to: determination of the standards of service to be provided; establishment and/or revision of personnel evaluation programs; the determination of the methods, means and personnel by which its operations are to be conducted; the right to alter scheduled work periods where necessary; the determination of the content of job classifications; the number of employees required in each classification; appointment, promotion and demotion of supervisors; assignment, direction and transfer of personnel; the suspension, discharge or any other appropriate disciplinary action against its employees for just cause; the relief from duty of its employees because of lack of work or for other legitimate reasons; the establishment of reasonable work rules; and taking of all reasonable actions to carry out its mission in emergencies.

In order to successfully invoke the contract waiver doctrine, an employer bears the burden of proving that the "contract clearly, unequivocally and specifically authorizes its actions." City of Boston v. Labor Relations Commission, 48 Mass. App. Ct. 169, 174 (1999); City of Newton, 29 MLC 135, 138, MUP-2629 (February 5, 2003); Town of East Longmeadow, 28 MLC 67, 68, MUP-1568 (July 18, 2001) (waiver of a statutory right to bargain over a particular subject cannot be inferred lightly. Rather it must be shown clearly, unmistakably, and unequivocally). If the contract is silent on an issue, the

employer must prove that the matter allegedly waived "was fully explored and consciously yielded." City of Newton, 29 MLC at 138. Waiver will not be found based on a "broad, but general, management rights clause." School Committee of Newton and Labor Relations Commission, 388 Mass. 557, 569 (1983). In the present case, I do not read the general language in the management rights clause to "clearly, unequivocally and specifically" waive the MCCA's duty to bargain over the transfer of all loading dock work to non-unit personnel.

For all the foregoing reasons, I find that the MCCA has transferred bargaining unit work without bargaining to resolution or impasse with the Union over the decision and the impacts of that decision in violation of Section 10(a)(5) of the Law.

6. Remedy

The CERB fashions remedies for violations of the Law by attempting to place a charging party in the position that it would have been in but for the unfair labor practice. Natick School Committee, 11 MLC 1397, 1400, MUP-5157 (February 1, 1985). The traditional remedy where a public employer has unlawfully refused to bargain over a decision to transfer unit work is an order to restore the status quo ante until the employer has fulfilled its bargaining obligation and to make all affected employees whole for any economic losses they may have suffered. Commonwealth of Massachusetts, 35 MLC 105, 110, SUP-04-5054 (December 10, 2008).

In this case, the record does not indicate whether specific employees suffered any economic loss as a direct result of the transfer of loading dock duties from the

unit. Although the Union makes a general statement in its post hearing brief that unit members lost overtime opportunities, the record before me contains no specific information about those overtime opportunities, including how they would be assigned and how they would interplay with unit members' regular work schedules. See Town of Marion, 30 MLC 11, MUP-02-3329 (August 20, 2003) (no make-whole remedy awarded where there was no evidence that bargaining unit members would have performed duties formerly performed by retired bargaining unit member if they had not been transferred outside of the unit) and Commonwealth of Massachusetts, 35 MLC at 110 (no restoration of duties ordered where transfer was of a limited duration and duties had already been restored). Therefore, I do not award damages for lost overtime opportunities.

CONCLUSION

Based on the record and for the reasons explained above, I find that the Employer violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by transferring bargaining unit work to non-bargaining unit personnel without providing the Union with prior notice and an opportunity to bargain to resolution or impasse over the decision and the impacts of that decision on employees' terms and conditions of employment.

ORDER

WHEREFORE, based on the foregoing, it is hereby ordered that the Massachusetts Convention Center Authority shall:

1) Cease and desist from:

   a) Transferring bargaining unit work to non-bargaining unit employees without first bargaining to resolution or impasse with the Union over the decision to transfer

loading dock duties and the impact of that decision on bargaining unit members' terms and conditions of employment; and

b) In any like manner, interfering with, restraining and coercing its employees in any right guaranteed under the Law.

2) Take the following affirmative action that will effectuate the purpose of the Law:

a) Restore the status quo ante by returning the loading dock duties that Paillant previously performed at the BECE to the Union's bargaining unit members until the MCCA satisfies its obligation to bargain over the decision to transfer loading dock duties and the impacts of that decision on employee's terms and conditions of employment;

b) Upon request, bargain in good faith with the Union to resolution or impasse over the decision to transfer loading dock duties to non-bargaining unit personnel and the impacts of that decision on employees' terms and conditions of employment;

c) Sign and post immediately in conspicuous places where employees usually congregate or where notices to employees are usually posted, including electronically, if the Employer customarily communicates to its employees via intranet or e-mail, and maintain for a period of thirty (30) consecutive days thereafter signed copies of the attached Notice to Employees; and

d) Notify the DLR in writing of the steps taken to comply with this decision within thirty (30) of the steps taken by the Employer to comply with the Order.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

WILL EVANS, HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 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 Executive Secretary of the Department of Labor Relations within ten 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.

NOTICE TO EMPLOYEES

POSTED BY ORDER OF A HEARING OFFICER OF THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

1

A Hearing Officer of the Massachusetts Department of Labor Relations has held that the Massachusetts Convention Center Authority (MCCA) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of G.L. Chapter 150E (the Law) by failing to bargain in good faith with the National Conference of Firemen and Oilers, Local 3, SEIU (Union) by not providing the Union with prior notice and an opportunity to bargain to resolution or impasse over the decision and impacts of the decision to transfer loading dock duties to non-bargaining unit personnel.

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

- WE WILL NOT transfer bargaining unit work to non-bargaining unit employees without first bargaining to resolution or impasse with the Union over the decision to transfer loading dock duties and the impact of that decision on bargaining unit members' terms and conditions of employment;

- WE WILL NOT in any like manner, interfere with, restrain and coerce employees in any right guaranteed under the Law;

- WE WILL restore the status quo ante by returning the loading dock duties performed by the Union's bargaining unit members at the BCEC until the MCCA satisfies its obligation to bargain over the decision to transfer loading dock duties and the impacts of that decision on employee's terms and conditions of employment; and

- WE WILL, upon request, bargain prospectively with the Union in good faith to resolution or impasse over the decision to transfer bargaining unit work to non-unit members and the impacts of that decision on unit members' terms and conditions of employment.

_____ _____

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