COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

CITY OF BOSTON

and

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
AFL-CIO, COUNCIL 93

Case No.: MUP-16-5525

Date Issued: May 9, 2018

Hearing Officer:

Will Evans, Esq.

Appearances:

Meghan Ventrella, Esq. - Representing AFSCME, AFL-CIO, Council 93
Louis Scapicchio, Esq. - Representing the City of Boston

HEARING OFFICER DECISION

SUMMARY

1. The issue is whether the City of Boston (Employer or City) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by transferring animal quarantining duties to non-bargaining unit personnel without providing the American Federation of State, County and Municipal Employees, AFL-CIO, Council 93 (AFSCME or 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. 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 October 3, 2016, 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. The Employer filed a Response on October 7, 2016, denying the charges. A duly designated DLR investigator conducted an investigation of the matter on December 1, 2016. On December 12, 2016, 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 animal quarantining duties 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. The Employer filed an Answer to the Complaint on December 15, 2016, admitting to certain allegations and denying certain others.

After a pre-hearing conference on September 19, 2017, Will Evans, Esq., a duly designated Hearing Officer employed by the DLR, conducted a hearing on October 24, 2017, at which both parties had the opportunity to be heard, to examine witnesses, and to introduce evidence. On December 15, 2017, 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.
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3. The City of Boston is a public employer within the meaning of Section 1 of the
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Law.
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6. The Union is an employee organization within the meaning of Section 1 of the
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9. The Union is the exclusive bargaining representative for all employees covered in
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the recognition article in the parties' contract.
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12. Mike Mackan is a member of SENA.
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14. Mike Mackan holds the position of Principal Administrative Assistant.
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16. The Union is the exclusive bargaining representative for Animal Control Officers
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employed by the City.
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19. Patricia Jones is a member of the bargaining unit and is one of the AFSCME
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members who performs animal quarantine duties within Local 1631.
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22. On September 14, 2016, the City appointed a member of a different bargaining
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unit to perform the same animal quarantine job duties that Ms. Jones and the
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other AFSCME Council 93, Local 1631 members perform.
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26. Mike Mackan of the bargaining unit SENA was the employee appointed by the
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City to perform the same animal quarantine job duties that Ms. Jones and the
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other AFSCME Council 93, Local 1631 members perform.
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30. From September 14, 2016 to October 17, 2017, Mr. Mackan has performed
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approximately 209 quarantines while other AFSCME Animal Control Officers
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have performed approximately 56 Quarantines. The other approximately 173
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quarantines performed by the Animal Care and Control Department were
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processed, but the animal was either determined to not live in the City of Boston
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or was un-locatable.
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37. Prior to September 14, 2016, neither Mr. Mackan nor any other SENA member
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performed the same animal quarantine job duties that Ms. Jones and the other
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AFSCME Council 93, Local 1631 members perform.

1 The parties stipulated to these facts in the “Joint Pre-Hearing Memorandum” and the
“Agreed Upon Stipulations of Fact.”
12. The position of Director of Animal Care and Control is an exempt position that is not in any union.

13. Animal quarantine work can only be performed by Animal Inspectors under Massachusetts state law.

14. Animal Inspectors must be nominated by the Director of Animal Care and Control and sworn in by the City Clerk for the City of Boston to perform quarantines in the City.

15. AFSCME Animal Control Officers and Animal Inspectors have all been sworn in by the City Clerk of Boston after being nominated by the Director of Animal Care and Control to perform quarantines in the City.

16. Before December 1, 2000, the City of Boston had a contract with the Animal Rescue League of Boston to perform animal quarantine work.

17. After the contract for animal quarantine work with the City of Boston and Animal Rescue League of Boston ended, the City hired two AFSCME bargaining unit members to perform animal quarantine work.

18. Employees at the Animal Rescue League of Boston shelter in Boston and the Massachusetts Society for the Prevention of Cruelty to Animals shelter in Boston continue to perform animal quarantine work for animals only within their shelters.

19. The directly above referenced workers are not City employees and the shelters are on privately owned land within the City of Boston.

20. The AFSCME Animal Officers and Inspectors do not typically receive overtime to specifically perform animal quarantines.

FINDINGS OF FACT

In accordance with Massachusetts General Laws, each municipality must have an animal inspector to do quarantine work to prevent the spread of contagious disease.

M.G.L. c 129 § 15 states, in part:

The city manager in cities having a plan D or plan E charter, the mayor in all other cities, except Boston, the town manager in towns having a town manager form of government and the selectmen in all other towns shall annually, in March, nominate one or more inspectors of animals, and before April first shall send to the director the name, address and
occupation of each nominee. Such nominee shall not be appointed until
approved by the director.

Section 15 was later clarified by M.G.L. c 129, § 26, which added a provision
addressing inspectors of animals in the City by stating:

The provisions of this chapter relative to the duties of inspectors shall
apply to persons officially performing the functions of inspectors in Boston.

The Animal Care and Control Division (Division) is a unit of the Inspectional Services
Department (ISD) of the City. Within the Division, there are animal inspectors who
perform animal quarantines for the City, as statutorily required.

Prior to 2000, the City had a contract with the Animal Rescue League of Boston
to perform animal quarantines. After the contract ended, the Employer created two
AFSCME bargaining unit positions as Dog/Animal Control Officers (Dog Officers) to
perform animal quarantines within City limits. Although the Animal Rescue League of
Boston continued to perform animal quarantines within its privately owned shelter, it
ceased going out into the field to handle animal quarantines after 2000. Additionally, the
Massachusetts Society for the Prevention of Cruelty to Animals (MSPCA) also
performed animal quarantines, but solely within their privately owned shelter in Boston.

One of the AFSCME bargaining unit members hired in 2000 as a Dog Officer
was Patricia Jones (Jones). The job description under which Jones was hired states the
essential functions of the job as:

- Serve and deliver notices of quarantine;
- Perform quarantine inspection duties in places where animals are housed, sold
  or used for any purpose and inspect homes for quarantine suitability;
- Under general supervision removes any dog or other animal that is injured,
  maimed, or diseased;
• Makes and prepares complaints against owners of dogs not properly licensed or collared;
• Picks up stray and unlicensed dogs and other animals;
• Keeps records of the number of animals removed, their owners, number of complaints, and other information required by law; and
• Performs other related duties as required.

The Dog Officer job description was revised in 2017 to include the following additional duty:

• Enforces all Animal Control Laws as defined in Massachusetts General Laws and all City of Boston Ordinances related to Animal Control and their provisions providing for public safety and the well-being of animals.

For many years, Jones was the only Dog Officer to perform animal quarantines. At some point, the number of Dog Officers increased to seven or eight; however, Jones continued to be the primary Dog Officer to perform animal quarantines. Jones was supposed to perform one to two animal quarantines per day. A backlog of quarantines developed over time and the former Director of the Division reached out to AFSCME President Christopher Stockridge (Stockridge) to discuss the matter. After a meeting, which took place sometime prior to 2015, it was agreed that animal quarantine duties would be spread more evenly amongst all the Dog Officers. As a result, Jones began to perform other duties within the Dog Officer job description, besides animal quarantines.

In or around July 2015, Amanda Kennedy (Kennedy) became the Director of the Division, a position outside any bargaining unit. In addition to her role as Director, Kennedy became an animal inspector and began performing approximately one animal
quarantine per week (i.e., approximately 52 per year). Still, the vast majority of animal quarantines were performed by AFSCME bargaining unit members. Although Jones and the other Dog Officers were aware that Kennedy was performing animal quarantines, neither Jones, the other Dog Officers or the Employer notified the Union. As such, the Union was not aware that Kennedy had performed animal quarantines.

Due to a large backlog of quarantines, on September 14, 2016, the City appointed Mike Mackan (Mackan), a Principal Administrative Assistant in ISD and a bargaining unit member of the Salaried Employees of North America (SENA), to perform the same animal quarantine job duties that Jones and the other Dog Officers perform. From September 14, 2016 to October 17, 2017, Mackan performed approximately 209 quarantines while the Dog Officers performed approximately 56 Quarantines.\(^3\) The other approximately 173 quarantines performed by the Division were processed, but the animal was either determined to not live in the City of Boston or was un-locatable. Prior to September 14, 2016, neither Mackan nor any other SENA member performed the same animal quarantine job duties that Jones and the other Dog Officers perform.

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\(^2\) I found Kennedy’s testimony on this disputed fact to be creditable. The Union offered no witness testimony or documentary evidence to refute Kennedy’s claim.

\(^3\) It is unclear from the record whether Kennedy continued to perform one quarantine per week after Mackan was appointed on September 14, 2016.
The issue before me is whether the City violated Sections 10(a)(5) and, derivatively, 10(a)(1) of the Law by transferring certain animal quarantining duties performed by the Union's bargaining unit members to a non-bargaining unit member. A public employer violates Section 10(a)(5) of the Law when it transfers work performed by bargaining unit members 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).

Exclusivity of Animal Quarantine Duties

To determine whether the City unlawfully transferred bargaining unit work, I must first determine whether as of September 14, 2016, the disputed animal quarantining duties were exclusive bargaining unit work or whether unit members shared the work with non-bargaining unit personnel. When bargaining unit members and non-unit
members share work, the Commonwealth Employment Relations Board (CERB) previously 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).

The City urges me to find that animal quarantine duties are shared work because, even before the City assigned animal quarantine duties to AFSCME bargaining unit members, the Animal Rescue League of Boston and the MSPCA had performed animal quarantines throughout Boston and, even after 2000, at their shelters within the City limits. Furthermore, the City notes that the Director of Animal Control has been performing animal quarantines since July 2015. Conversely, the Union argues that insufficient evidence was presented to challenge its claim that unit members exclusively performed animal quarantines on City owned property within City limits. Although both the Animal Rescue League of Boston and the MSPCA have performed animal quarantines at their own privately owned shelters, neither has performed animal quarantines on City owned property since 2000. Furthermore, notwithstanding Kennedy’s testimony that she has performed approximately one animal quarantine per week, no evidence was presented to support her claim. Finally, even if the work was shared, there was a calculated displacement of AFSCME bargaining unit work.

Upon review, the facts before me show that even though the Animal Rescue League of Boston and the MSPCA performed animal quarantines at their own privately owned shelters, neither performed animal quarantines on City owned property since the
work was given to AFSCME bargaining unit members in 2000. This eighteen plus-year
period is sufficient to establish a departure from the prior pattern of the shelters
performing animal quarantines on City owned property. See City of Boston, 38 MLC
201, 202, MUP-08-5253 (March 9, 2012) (rejecting the employer’s claim that two and
one-half years of assigning police captains to command a particular division was not
sufficient to establish a binding practice); City of Boston, 28 MLC 369, 372, MUP-2267
(May 31, 2002) (finding seven years sufficient to establish a practice of assigning patrol
officers exclusively to identify latent fingerprints at crime scenes). The fact that the
Animal Rescue League of Boston and the MSPCA currently perform animal quarantines
at their privately owned shelters has no bearing on this case. Thus, I do not find animal
quarantine duties to be shared work between AFSCME bargaining unit members and
either the Animal Rescue League of Boston or the MSPCA.

Kennedy testified that, shortly after becoming the Director in July 2015, she
became an animal inspector and began performing approximately one animal
quarantine per week. Notwithstanding the presence of Jones as a rebuttal witness at
the hearing, the Union presented no evidence to challenge Kennedy’s claim, and I
found her testimony to be creditable. Stockbridge testified creditably that he was not
aware that Kennedy had been doing animal quarantines and that no one from the
Division brought it to his attention. The City offered no witness testimony or
documentary evidence to contradict Stockbridge’s claim.

To determine whether a practice exists, the Board “analyzes the combination of
facts upon which the alleged practice is predicated, including whether the practice has
occurred with regularity over a sufficient period of time so that it is reasonable to expect
that the practice will continue." Commonwealth of Massachusetts, 23 MLC 171, 172,
SUP-3586 (January 30, 1997) (citing Town of Chatham, 21 MLC 1526, 1531, MUP-
9186 (January 5, 1995)). The CERB’s inquiry turns on whether the practice “is
unequivocal, has existed substantially unvaried for a reasonable period of time and is
known and accepted by both parties.” Town of Dedham School Committee, 5 MLC
1836, 1839, MUP-3002 (November 14, 1978) (emphasis added). In the present case,
although the Employer argued that Jones and the other Dog Officers were aware
Kennedy performed animal quarantine duties, it presented no evidence that the Union
had been made aware. The City presented no witnesses or documentary evidence
challenging Stockbridge’s claim that the Union only became aware of Kennedy’s
performance of animal quarantine duties as a result of the present charge. Under such
circumstances, I find that there is no known and accepted practice between the
Employer and Union regarding sharing animal quarantine duties between Dog Officers
and Kennedy. See Commonwealth of Massachusetts, 39 MLC 169, 171-172, SUP-08-
5447 (December 27, 2012) (finding no record evidence that the union knew or had
reason to believe that the asserted practice existed). Accordingly, I find animal
quarantine duties to be the exclusive work of Dog Officers.

Calculated Displacement

Even if I were to find animal quarantine duties to be shared work, there was a
calculated displacement of bargaining unit work as a result of the City’s transfer of
animal quarantine duties to Mackan. 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 Boston, 10 MLC 1539, 1541, MUP-4967 (April 24, 1984). To determine whether a calculated displacement of unit work has occurred, the DLR 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 unit work. Town of Bridgewater, 25 MLC 103, 104, MUP-8650 (December 30, 1998) (citing City of New Bedford, 15 MLC 1732, 1737, MUP-6488 (May 31, 1989) (other citations omitted)).

The stipulations and testimony are clear that, on September 14, 2016, the City appointed Mackan to perform the same animal quarantine job duties that Dog Officers and the Director performed. Prior to September 14, 2016, neither Mackan nor any other SENA member performed animal quarantine duties. Even without knowing the exact number of animal quarantines performed each year by Dog Officers prior to September 14, 2016, there was no dispute that Dog Officers performed vastly more animal quarantines than the Director. The Director testified that she performed approximately one animal quarantine per week (i.e., approximately 52 per year).

From September 14, 2016 to October 17, 2017, Mackan performed approximately 209 quarantines, while Dog Officers performed approximately 56 quarantines. Thus, Mackan performed nearly four times as many quarantines as
previously performed by Kennedy. Over this same time period, Dog Officers performed only 56 animal quarantines in total. In looking at the total number of quarantines performed between September 14, 2016 to October 17, 2017, Mackan performed approximately 79% of the animal quarantines and Dog Officers performed approximately 21%. Because Dog Officers went from performing the vast majority of animal quarantines to approximately only 21%, the City is not simply transferring work that was already outside of the bargaining unit. See City of Boston, 26 MLC 144, 147, MUP-1085 (March 10, 2000) (not restricting an employer from re-allocating a portion of work already being performed by non-unit personnel). Rather, the City transferred animal quarantine duties that were previously performed by Dog Officers.

In addition to arguing that quarantine work has not been transferred, the City argues that it had no obligation to bargain because the public policy implications of quarantines limit collective bargaining, and there has been no adverse impact on the bargaining unit since the work would have gone undone if not performed by Mackan.

Non-delegable Authority

Relying primarily on Chief Justice for Administration and Management of the Trial Court v. Commonwealth Employment Relations Board, 79 Mass. App. Ct. 374, 946 N.E.2d 704 (Mass. App. 2011) (CJAM), the City has argued, in part, that there was no obligation to bargain with the Union over the decision to transfer animal quarantine work to Mackan or the impact of that decision. In CJAM, the Court stated that a clear legislative directive will exclude a subject from collective bargaining. Id. at 382, citing Somerville v. Somerville Municipal Employees Association, 451 Mass. 493, 497-500,
887 N.E.2d 1033 (2008) ("clear and specific statutory conferral of appointment authority upon mayors excluded it from collective bargaining"). The Court referenced M.G.L. c. 211B, §9A which explicitly authorized the court administrator, in part, to appoint and transfer court officers as deemed necessary for public safety. CJAM, 79 Mass. App. Ct. at 382. The Court further noted that the Justices of the Supreme Judicial Court had called upon that authority in 1992, declaring that insufficient security staffing had created a statewide emergency in the Courts of the Commonwealth and ordered the court administrator to assume exclusive control over the "hiring, deployment and management" of court officers. Id. at 383. The Court reasoned that this exclusive legislative grant of authority overrode the general duty to bargain under M.G.L. c. 150E. See Somerville v. Commonwealth Employment Relations Board, 470 Mass. 563, 24 N.E.3d 552 (2015) (a legislative authority "conferred on a municipality to decide whether and how much to contribute to the monthly health insurance premiums of retired employees...would be wholly undermined by an obligation to collectively bargain the matter") (citing National Association of Government Employees v. Commonwealth, 419 Mass. 448, 453, 646 N.E.2d 106, cert. denied, 515 U.S. 1161, 115 S. Ct. 2615, 132 L. Ed. 2d 858 (1995) (legislature reserved the ability to change the contribution percentage to state employees' health insurance premiums, and this could not be overridden by collective bargaining)).

In the present case, the City argues that any collective bargaining obligations should be limited due to M.G.L. c. 129, § 18, which mandates that "[e]ach inspector shall comply with and enforce all orders and regulations directed to him by the director."
These legally required duties include quarantine obligations under 330 CMR 10.00. The City contends that the legislative directive mandating that quarantines be performed in a "specific manner and completed along specific timelines" is analogous to CJAM. The City also argues that, if it must bargain every effort to ensure this work is done, it would put public safety at risk and leave many quarantines undone.

The City's argument misses the mark. The statute referenced in CJAM contains a precise grant of authority which allowed the court administrator "to appoint, dismiss, define the duties of, assign, transfer and discipline said court officers within the trial court departments as he deems necessary for the administration of justice and for public safety." 79 Mass. App. Ct. at 382 (citing M.G.L. c. 211B, § 9A); see also Massachusetts Bay Transportation Authority v. Local 589, Amalgamated Transit Union, 406 Mass. 36, 40 (1989) (MBTA's explicit authority to appoint and assign personnel under M.G.L. c. 161A, § 19(i) is not susceptible to collective bargaining). In contrast, the statute that the City cites does not grant any such explicit authority regarding the appointment or assignment of inspectors. Rather, it directs the actions of those who have already been appointed as inspectors, and threatens economic consequences should they fail to act. Those duties are not in contention and the Union has not demanded any bargaining take place over those statutorily mandated duties. Additionally, although Mackan has been sworn in as an inspector and is permitted to conduct animal quarantines, nothing in the record suggests that the Employer cannot lawfully remove animal quarantines from his job duties.
It is also not clear how the legislative directive to perform quarantines and prevent the spread of rabies would be undermined by collective bargaining. *City of Lynn v. Labor Relations Commission*, 43 Mass. App. Ct. 172, 180 (1997). The requirement that only bargaining unit members perform the work until the Employer first notifies and bargains with the Union to resolution or impasse regarding a change does not interfere with the City’s ability to manage animal inspectors or to deal with the backlog of animal quarantines. *See Essex County Sheriff's Department v. Essex County Correctional Officers Association*, Mass. App. Ct. 2010-P-255, Rule 1:28 Decision (January 24, 2011) (requiring only bargaining unit members to perform work does not interfere with managerial authority regarding how shifts will be assigned, deployment of staff, or overtime levels). To the contrary, the Employer could have explored alternative options with the Union in fulfillment of its legislative directive. *See Commonwealth v. Labor Relations Commission*, 60 Mass. App. Ct. 831, 834 (2004) (failure to explore the possibility of different positions with the union prior to transferring work contributed towards a violation of the Law).

**Public Health Considerations**

The City also cites to *CJAM* to argue that public health and safety concerns compelled it to address the quarantines, and those considerations overrode the City’s collective bargaining obligations. While the City is not “free to bargain away certain elements of its non-delegable authority and responsibility to act for the public health, safety, and welfare,” the right of public employees to bargain collectively “constitutes a ‘strong public policy’ for the achievement of fair working arrangements and the orderly

The weight of the public interest in CJAM makes the case easily distinguishable from the circumstances in the present case. In CJAM, the SJC had declared that a statewide security emergency existed in the Courts of the Commonwealth, and explicitly authorized the court administrator to take control of the management of security personnel. CJAM, 79 Mass. App. Ct. at 383. In its decision, the Court highlighted that this emergency not just authorized the court administrator to act urgently and without any delay by bargaining, but in fact created a responsibility which compelled him “to act swiftly and flexibly to assure courtroom safety.” Id. at 386. Although the Court found that the public interest in courtroom safety outweighed the public interest in collective bargaining, that decision was made only in the “circumstances of this case.” Id. at 388.

There is no doubt that the animal quarantines serve an important role in maintaining public safety, health and welfare. However, no evidence was presented in the present case of any exigent circumstances that would warrant the suspension of the City’s obligations to collectively bargain over the decision to transfer animal quarantine duties to Mackan. The laws referenced by the City describe general quarantine duties, rather than dictating heightened responses to a specific circumstance. Furthermore,
H.O. Decision (cont'd)

despite the legislative command to perform animal quarantines and the backlog of animal quarantines, the City has actually assigned Dog Officers to perform fewer animal quarantines than it had in the past. The evidence presented here does not show such a critical and dominant safety and welfare interest as to outweigh the public interest in collective bargaining.

6 Adverse Impact

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 1732, 1737, MUP-6488 (May 31, 1989). Additionally, the DLR has long held that an adverse impact can be shown, absent a reduction in bargaining unit positions, when the transfer “could result in the eventual elimination of the bargaining unit through gradual erosion of bargaining unit duties.” Commonwealth v. Labor Relations Commission, 60 Mass. App. Ct. 831, 834 (2004); see generally Lowell School Committee, 28 MLC 29, 32, MUP-2074 (June 22, 2001) (citing City of New Bedford, 15 MLC at 1739); 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). As the City correctly asserts, the union bears the burden of demonstrating the impact. See Town of Seekonk, 14 MLC 1725, 1730-31, MUP-6131 (May 10, 1988).

The City argues that, analogous to CJAM, the Union has not shown evidence of any real impact. The City claims that no layoffs have occurred or are planned, there has been no loss of overtime or the opportunity to perform animal quarantine duties, and
members of the bargaining unit have not experienced any loss of hours or reduction in 
overall duties. The City also claims that the Union has not shown any risk of erosion to 
the bargaining unit. The City, however, ignores the stark differences between the 
hypothetical damages in CJAM and the actual detriments faced by the bargaining unit 
here.

The Union claims that the adverse impact lies in the loss of the ability to perform 
the animal quarantines that Mackan has done and the loss of possible overtime 
opportunities. The Union argues that, instead of appointing Mackan, the City could and 
should have offered the Union the opportunity to address the backlog with such options 
as expanding the bargaining unit beyond the current eight Dog Officers or allowing for 
overtime. Notwithstanding the Union’s claims, no evidence was presented that any 
bargaining unit member actually lost overtime opportunities that he or she previously 
had. To the contrary, the parties stipulated that the bargaining unit members do not 
typically receive overtime.

However, the Court in CJAM did not overrule the DLR standard that an adverse 
impact might occur through the gradual erosion of bargaining unit duties, even absent a 
direct loss of bargaining unit positions resulting from the transfer. Instead, the Court in 
CJAM simply found that there was insufficient evidence that “the use of three retirees 
began a process of erosion and eventual elimination of the court officers union by loss 
of work and member displacement.” Id. at 387 (internal quotations omitted). The Court 
highlighted that the court administrator had explicitly hired retired guards on a part-time
basis to supplement the shortage of regular, full-time workers. \textit{Id.} at 387.\textsuperscript{4} In contrast, Mackan is not a supplemental, part-time employee. Rather, he was transferred permanently to ISD and serves as the Principal Administrative Assistant. Mackan was duly sworn in as an animal inspector and conducted 79% of the animal quarantines from September 14, 2016 to October 17, 2017. No evidence or testimony was presented that Mackan's position was temporary or would be reduced to part-time. To the contrary, the evidence presented at hearing suggested that Mackan would continue performing animal quarantine duties indefinitely. These facts indicate that, by transferring quarantine duties to Mackan, the City has begun a process of eroding bargaining unit members' animal quarantine duties, which is an essential function of the Dog Officer's job description. This is not comparable to the situation that existed in \textbf{CJAM}, where the Court explicitly found that there was no evidence that the retirees were displacing the bargaining unit members from their primary job function, and instead were performing duties that were "supplemental, not substitutional." \textsuperscript{79} Mass. App. Ct. at 386 n.12. The assignment of quarantine duties to Mackan is more substantial and permanent, and thus in line with the CERB's longstanding standard regarding the erosion of bargaining unit duties. Compare \textbf{Boston School Committee, 16 MLC 1012, 1016-17, MUP-7210} (June 5, 1989) (no adverse impact when employer temporarily contracted with a private company to perform bargaining unit work for three

\textsuperscript{4} The Court also noted that it would be difficult to show an erosion of bargaining unit strength when the bargaining unit itself directly participated in arranging for non-bargaining unit members to come in as replacements in the past. 79 Mass. App. Ct. at 387 n. 13. There is no analogous situation here.
months) with Boston School Committee, MUP-13-2551 (June 6, 2014) (transfer of bargaining unit work eventually led to permanent loss for the bargaining unit to do the work).

The City also argues that there was no duty to bargain because the "work would have gone undone if not done by non-bargaining unit members." In CJAM, the Court held that there was no duty to bargain over the assignment of the security duties to the per diem employees because the record established that if they "had not performed the work, it would have gone undone." 79 Mass. App. Ct. at 387. The record in the present case, however, does not indicate that, but for the assignment of quarantine duties to Mackan, the quarantines would have gone undone. Rather, the record indicates only that Mackan was assigned quarantine duties in an effort to address the quarantine backlog.

In CJAM, prior to hiring the retired court security officers on a part-time, per diem basis, the court administrator had explored several other options to address the staffing shortage. 79 Mass. App. Ct. at 376. These efforts included working with the union in April of 2002 to shift bargaining unit members from other courthouses to Suffolk County Superior Court and attempting to hire additional court officers. The record in CJAM indicated that, only after these efforts failed, did the court administrator begin employing the retirees to work in the courthouses covered by the bargaining unit. Id. at 377. The existence of a shortage of security personnel, standing alone, did not relieve the CJAM of its impact bargaining obligations. It was through those efforts that the record
established that the work would go undone but for the hiring of the per diem guards. Id. at 387.

In the present case, the City argues that the existence of the backlog evidences that quarantines would have gone undone without transferring duties to Mackan. The City presented no evidence, however, to establish that it contemplated any other approach to resolving the quarantine backlog to support its assertion that the work would have gone undone. Based on the evidence presented at hearing, the City's argument that the work would have gone undone is completely speculative and inconsistent with its statutory mandate and public policy concerns. Accordingly, I find that the City's transfer of animal quarantine duties at Mackan constituted a sufficient detriment to the bargaining unit to trigger the City's statutory obligation to bargain to resolution or impasse with the Union over the decision and the impacts.

Notice and Opportunity to Bargain

Finally, notice and opportunity to bargain is required prior to the transfer of bargaining unit work. Lowell School Committee, 28 MLC 29, 31, MUP-2074 (June 22, 2001). As mentioned earlier, no evidence was presented that the City provided to the Union prior notice and an opportunity to bargain to resolution or impasse over the decision to transfer animal quarantine duties to non-bargaining unit personnel and the impacts of that decision on employees' terms and conditions of employment.

CONCLUSION

Based on the record and for the reasons explained above, I find that the City violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by transferring
animal quarantining duties 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 City of
Boston 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
animal quarantine 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 animal quarantine duties performed
by Mackan to the Union's bargaining unit members until the City satisfies its
obligation to bargain over the decision to transfer animal quarantine 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 animal quarantine 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

[Signature]
WILL EVANS, ESQ.
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.
A Hearing Officer of the Massachusetts Department of Labor Relations has held that the City of Boston (City) 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 American Federation of State, County and Municipal Employees, AFL-CIO, Council 93 (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 animal quarantine 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 City 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 animal quarantine 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 animal quarantine duties performed by the Union's bargaining unit members until the City satisfies its obligation to bargain over the decision to transfer animal quarantine 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.

City of Boston                                          Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED
This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).