

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

CITY OF WORCESTER

and

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES

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Case No. MUP-14-3596

Date Issued: October 17, 2016

Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

William R. Bagley Jr., Esq. - Representing the City of Worcester

John J. Mackin, Esq. - Representing the National Association
of Government Employees

HEARING OFFICER'S DECISION

1 SUMMARY

2 The issue is whether the City of Worcester (City or Employer) violated Section
3 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter
4 150E (the Law) by transferring bargaining unit work to a private vendor. For the
5 reasons explained below, I find that the City violated the Law as alleged.

6 STATEMENT OF THE CASE

7 On March 28, 2014, the National Association of Government Employees (Union)
8 filed a charge of prohibited practice with the Department of Labor Relations (DLR),
9 alleging that the City violated Sections 10(a)(5) and (1) of the Law. A DLR hearing

1 officer investigated the charge on August 28, 2014. On October 24, 2014, the
2 investigator issued a complaint alleging that the City violated Section 10(a)(5) and,
3 derivatively. Section 10(a)(1) of the Law by unilaterally transferring bargaining unit work
4 at the City's Public Library to non-bargaining unit members. The City filed its answer on
5 October 28, 2014.

6 I conducted a hearing on September 10, 2015. Both parties had an opportunity
7 to be heard, to call witnesses and to introduce evidence. The parties submitted their
8 post-hearing briefs on August 29, 2016.¹ Upon review of the entire record, including my
9 observation of the demeanor of the witnesses, I make the following findings of fact and
10 render the following opinion.

11 FINDINGS OF FACT²

12 Background

13 The Union is the exclusive bargaining representative for approximately 500
14 employees, who work in thirteen different divisions of the City and hold a total of 199 job
15 titles and classifications. From the 1960's forward, the Union's bargaining unit included
16 custodians who worked in the City's Library Department (Library), which consisted of a
17 main library and several branch libraries. Custodians were responsible for the upkeep
18 of the Library's buildings and grounds, which included cleaning the bathrooms and other
19 areas, vacuuming, dusting, washing windows, wet and dry mopping tiled areas, so-
20 called cleaning duties. They also maintained the grounds, mowed the grass, collected
21 and removed trash and changed light bulbs. Incumbents in the position operated snow

¹ The parties made assented-to requests for additional time to file their post-hearing briefs while they obtained a transcript of the audio recording of the hearing.

² The DLR's jurisdiction in this matter is uncontested.

1 blowers, shoveled snow and removed ice. They monitored HVAC and other building
2 systems, responded to security alarm calls, and reacted to situations that arose,
3 including wet and dirty floors, foul odors, electrical and plumbing problems, weather
4 related situations, and any emergency requiring immediate attention. Incumbents in the
5 position also received deliveries, distributed the mail and other materials, set up
6 meeting rooms, which included moving materials and equipment, and substituted for the
7 delivery driver.

8 Relevant Contractual Provisions

9 The Union and the City were parties to a collective bargaining agreement that, by
10 its terms was in effect from July 1, 2010 through June 30, 2013 (2010-2013 CBA). The
11 2010-2013 Agreement provides in relevant part as follows:

12 Article 4 Management Rights

13 In the interpretation of this Agreement, the City shall not be deemed to
14 have been limited in any way in the exercise of the regular and customary
15 function of municipal management or governmental authority and shall be
16 deemed to have retained and reserved unto itself all the powers, authority
17 and prerogatives of municipal management or governmental authority
18 including, but not limited to, the following examples: the operation and
19 direction of the affairs of the departments in all of their various aspects;
20 the determination of the level of services to be provided; the direction,
21 control, supervision and evaluation of the employees; the determination of
22 employee classifications; the determination and interpretation of job
23 descriptions, but not including substantive changes; the planning,
24 determination, direction and control of all the operations and services of
25 the departments (and their units and their programs); the increase,
26 diminishment, change or discontinuation of operations in whole or in part;
27 the institution of technological changes or the revising of processes,
28 systems or equipment; the alteration, addition or elimination of existing
29 methods, equipment, facilities or programs; the determination of the
30 methods, means, location, organization, number and training of personnel
31 of the departments or its units or programs; the assignment and transfer of
32 employees; the scheduling and enforcement of working hours; the
33 assignment of overtime; the determination of whether employees (if any)
34 in a classification are to be called in for work at times other than their

1 regularly scheduled hours and the determination of the classification to be
2 so called; the determination of whether goods should be made, leased,
3 contracted or purchased on either a temporary or permanent basis; the
4 hiring, appointment promotion, demotion, suspension, discipline,
5 discharge, or relief of employees due to lack of funds or of work, or the
6 incapacity to perform duties or for any other reason; the making,
7 implementation, amendment and enforcement of such rules, regulations,
8 operating and administrative procedures from time to time as the City
9 deems necessary; and the power to make appropriation of funds; except
10 to the extent abridged by a specific provision of this Agreement or law.

11
12 The rights of management under this article and not abridged shall not be
13 subject to the submission to the arbitration procedure in Article 11 herein.

14
15 Nothing in this article shall be interpreted or deemed to limit or deny any
16 rights of management provided the City bylaw.

17
18 Special Article 9-Recognition

19
20 With regard to the Department of Parks and Recreation, the Worcester
21 Free Public Library and the Vocational School Department, the Prefix to
22 this agreement shall be construed to apply to employees and not to work.
23 It shall not limit the City's right to contract out work or to transfer work to
24 other employees in the bargaining unit. The right to contract or
25 subcontract shall not be used for the purpose or intention of undermining
26 the Union, nor to discriminate against any of the City's employees. No
27 work presently performed by employees in the bargaining unit shall be
28 contracted out, but shall be subject to negotiation between the parties.

29 The language in Article 4 and Special Article 9 have been present in the parties'
30 collective bargaining agreements since the 1960's. The City originally sought the
31 inclusion of the language in those articles in order to preserve its right to use temporary
32 workers to supplement bargaining unit members in certain departments, including the
33 Library, without first bargaining with the Union. The City sometimes obtained those
34 temporary workers from private vendors, while on other occasions the City used its
35 personnel pool payroll account to directly hire those temporary workers. When the City
36 hired temporary workers directly, those workers were not members of the bargaining
37 unit and usually did not receive benefits from the City. The amount, if any, of temporary

workers that the City used at the Library varied greatly from year to year depending on the Employer's needs. From the late 1960's to 2013, the City regularly hired temporary workers to supplement the Library's unit members in the performance of plumbing and electrical duties. Although in the early 1990's the City used temporary workers from a private vendor to supplement unit members in the performance of cleaning duties, the City did not use any temporary workers to perform cleaning duties at the Library from the early 1990's until 2013.³

May 2013

On May 7, 2013, the City's labor counsel D.M. Moschos (Moschos)⁴ sent two letters to Union president Sean Maher (Maher).⁵ One of the letters regarding "supplemental custodial support", stated in pertinent part:

The Public Library is proposing, effective July 1, 2013, to supplement the existing complement at the Library with additional cleaning support, particularly at night. The extent of the support will depend upon the vacation and workers' compensation leave levels, and the events at the Library. It is expected that this support will be done mostly in the evening

³ Relying on the recollections of certain unidentified unit members, who purportedly had worked at the Library for decades, Union president Sean Maher (Maher) testified that the City never used private vendors to perform cleaning duties at the Library. However, Denise Faucher (Faucher), who had worked for the City's Library for approximately forty-three years and had retired as its Director of Human Resources, credibly testified that the City used temporary workers from a private vendor to perform cleaning duties at the Library in the early 1990's but did not use temporary workers thereafter. I have credited Faucher's testimony on this point because it was based on her own first-hand observations that she described under oath and that were subject to cross-examination.

⁴ Moschos began to work for the City in the 1960's first as an assistant to the city manager, then as assistant city manager, and thereafter as labor counsel. Since that time, he has participated in each round of successor contract negotiations with the Union, including the negotiations in which the parties agreed upon the language in Article 4 and Special Article 9.

⁵ Maher began to work for the City's Department of Public Works in 2001 and has been Union president since January 2007.

1 hours in order to concentrate the existing complement generally during
2 the daytime hours.

3
4 If you have any questions about this proposal, please feel free to contact
5 me.

6 The other letter regarding "library custodial services", stated in pertinent part:
7

8 As you know, under the "Great Recession" the City of Worcester, as other
9 employers, has implemented various efficiencies in order to conserve
10 resources and avoid layoffs. The City is proposing, effective June 10,
11 2013, to revise the geographic area of assignments of the Library
12 Custodians and the Custodian at the Meade Street facility to include not
13 only their home departments but also City Hall, Union Station, and the
14 Senior Center where and when there is a need for custodial services at
15 those particular locations, as determined by the City of Worcester.
16

17 The Custodians would be paid for the travel time going to these locations
18 during the workday and would be eligible for mileage reimbursement as
19 applicable.
20

21 If you have any questions on this change in the geographic area of the
22 assignments of the Custodians, please contact me.

23 On May 13, 2013, the Union's national representative Bernard Loughnane, Jr.,
24 (Loughnane) sent a memorandum to then City Manager Michael O'Brien demanding to
25 bargain about:

26 The intent ... to carry out the changes suggested in ... [the] two letters of
27 May 7, 2013 namely library custodial services and supplemental support
28 constitutes changes in established conditions of employment that affects a
29 mandatory subject of bargaining.

30 On May 21, 2013, Moschos sent a letter to Loughnane referencing the reorganization of
31 custodial services and stating in pertinent part:

32 The City of Worcester previously advised you that they were proposing
33 that the custodians at the Library would from time to time, work in other
34 departments. The City wishes to supplement that notice by advising you
35 that in the 2014 budget, the City of Worcester is transferring all of the
36 Library and Meade Street custodians to a new maintenance division within
37 the Department of Administration and Finance. The custodians will

1 continue to have their original home base but will now be part of the new
2 division and report to the Director of the division.

3
4 As indicated in the prior letter, they will be assigned to other City agencies
5 when needed.

6
7 We have set up an impact negotiating session for Monday, June 3, 2013,
8 at 2:00 p.m. at Mirick O'Connell ⁶ At that time, we plan to include the
9 reorganization plan in our discussion.

10 The City contended that the transfer of the Library's custodians, to a single division, the
11 Energy and Asset Management Division,⁷ would provide more efficient and more
12 economical custodial services. The consolidated custodial services could respond to
13 certain municipal departments' ever changing needs and bypass the traditional
14 departmental budgetary restrictions on the sharing of services.⁸

15 Negotiations

16 On June 28, 2013, representatives from the City and the Union met for several
17 hours regarding the proposed custodial reorganization. Moschos, Odell, Dori Vecchio,
18 the Assistant Director of Human Resources, and Nina Galica, a paralegal in the Human
19 Resources Department⁹ were present for the City. Maher, Loughnane, Kevin Leary, the

⁶ On or about May 31, 2013, the parties agreed to reschedule the June 3, 2013 meeting to June 28, 2013.

⁷The Energy and Asset Management Division became operational on July 1, 2013.

⁸ In early to mid-May 2013, John Odell (Odell), the director designee of the Energy and Asset Management Division, met with the Library's Board of Directors to discuss the impacts of the proposed consolidation of custodial services on the Library. Because the record before me does not show that any Union representative was present at that meeting, I need not make any specific findings about Odell's comments to the Library's Board of Directors.

⁹ Although Maher testified that Faucher also attended the June 28, 2013 meeting, Faucher testified that she was not present. I credit Faucher's testimony on this point, because it is more likely that she would remember whether she attended the meeting.

1 Union's treasurer, and Mary Cocorochio, the Union's executive secretary, were present
2 for the Union.¹⁰ Moschos and Maher were the spokespersons for their respective
3 groups. The Union referenced rumors¹¹ that the City intended to abolish in-house
4 custodial services and contract out those services and inquired whether those rumors
5 were correct. The City responded that it was not abolishing and contracting out
6 custodial services at the Library but instead was going to consolidate those services
7 under the Energy and Asset Management Division. The Union also inquired whether
8 the City was going to continue to supplement custodial services,¹² and the City replied
9 affirmatively. Neither the City nor the Union discussed what the term "supplement"
10 meant. Maher believed the term meant that the City would hire additional bargaining
11 unit custodians, while Moschos believed that the term referred to the City's right to hire
12 temporary, non-bargaining unit employees either through the personnel pool account or
13 from outside vendors.

¹⁰ In support of their respective positions, the City and the Union both referenced portions of handwritten notes that Loughnane allegedly took at the June 28, 2013 meeting, which were introduced as City Exhibit #7. Upon review, the notes do not transcribe all statements that were made at the meeting but instead consist of Loughnane's impressions and conclusions. Loughnane did not attend the hearing and thus, could not explain the meaning of his notes. Therefore, I decline to make findings of fact based upon those notes.

¹¹The Union had heard rumors about Odell's early to mid-May 2013 meeting with the Library Department's Board of Directors.

¹² Odell testified that the Union asked how the custodial duties at the Library would be performed if the custodians were performing work at other facilities and that he replied "supplemental resources". However, Maher testified that he asked Odell but Moschos answered the question. Moschos also testified that he answered the question. However, I need not reconcile the differences in their testimony because it is not material to the outcome of the case.

1 The parties also discussed how the proposed reorganization of custodial services
2 would give the custodians greater opportunities to perform so-called craftsmen's duties,
3 including minor plumbing and electrical work, instead of focusing solely on the custodial
4 duties that were described earlier in this decision.¹³ The City also identified the sites to
5 which the custodians would travel and provide services as the Senior Center, the
6 Library, the Inspectional and Health Department Building on Meade Street (Meade
7 Street), and City Hall, for craftsmen work only, as well as the possibility of providing
8 services to Union Station. Although the parties did not reach agreement on the issue at
9 the June 28, 2013 meeting, the Union indicated that it was interested in the City's
10 proposal and that it wanted to work the matter out.

11 On July 3, 2013, Moschos sent a letter to Kathleen Johnson (Johnson), Assistant
12 City Manager, regarding the negotiations that stated in pertinent part:

13 The Union then stated that the Library Board had been advised that the
14 City was contracting out custodial services and asked if that is true. We
15 replied, "no," and stated that if we were doing that, we would not be setting
16 up this Division and consolidating the Custodians. The City's existing
17 practice of supplementing custodial services in Departments, for example,
18 Library or City Hall, would continue. The Union said the Library Board
19 was told that Union employees would become maintenance men. We
20 replied, "no" and we stated that they will continue to be custodians, but
21 performing minor maintenance and repair work.

22 On or about that time, Johnson assumed responsibility on behalf of the City for
23 negotiating with the Union over the reorganization.¹⁴ Johnson and Maher discussed the
24 issue in person and via telephone and email. At times, the City's chief financial officer

¹³ The parties did not reference either Article 4 or Special Article 9 of the 2010-2013 Agreement at the June 28, 2013 meeting.

¹⁴ Moschos continued to provide Johnson with legal advice about the reorganization.

1 Thomas Zidelis (Zidelis) also participated in the discussions.¹⁵ On July 15, 2013,

2 Johnson sent an email message to Maher stating:

3 Sean: just a reminder to get me the list of the three issues you wanted the
4 City to review/respond in relation to the facilities reorganizational plan per
5 our discussion last week.

6 In a July 18, 2013 email message to Johnson, Maher replied in pertinent part:

7 The items which we need to address with this new work and Division are:

- 8
- 9 1) Job title's for these employees as this division goes forward.
 - 10
 - 11 2) Pay-grades for these employees as this division goes forward.
 - 12
 - 13 3) All employees who work must be in the unit (the man at City
14 Hall who works, regardless of their job title) we cannot accept
15 shared work at any level. (Mike)¹⁶
 - 16
 - 17 4) We will withdraw the demand for civil service standing for the
18 employees of this division.
 - 19

20 I am so sorry I did not get it to you yesterday.

21

22 As I talked about last Friday, we need something in place for those at the
23 bottom and we are willing to find something that will address your
24 concerns but must address a fair wage (pay grade) for the work which the
25 city and the union *both* want to see come from this new department. ...
26 [Emphasis in the original].

27

28 Perhaps you can call me tomorrow and tell me when we can talk about
29 these issues and ideas you have that can help us move forward.

30

¹⁵ The record does not reveal that Maher had any discussions with Johnson and Zidelis about the topic of supplementing custodial services at the Library. Also, Moschos noted that Johnson did bring any questions to him about the Library using supplemental services at the time of her discussions with Maher.

¹⁶ Mike Powell (Powell) was the plant engineer at City Hall and for the prior twenty years, had not been a member of the Union's bargaining unit. Because Powell would be working with bargaining unit custodians pursuant to the City's proposal to reorganize the custodians, the Union insisted on the inclusion of Powell's position in the bargaining unit.

1 Johnson and Maher subsequently had further conversations about the issue over the
2 next few days. On July 24, 2016 at 5:41 PM, Johnson sent Maher an email message
3 that stated in pertinent part:

4 Per our conversation yesterday, I am sending the information below as
5 confirmation of our discussion:
6

7 When finalizing the FY14 budget during the tax recap (in November), the
8 City will include 5 positions of Building Maintenance Man and remove 5
9 Custodian positions, giving the 5 Custodians an opportunity to be
10 promoted to those positions based on their skills. That process will be
11 completed by 12/31/13.
12

13 In FY15, the City will include one higher level position and job duties (such
14 as a Building Maintenance Craftsman) in place of an existing position to
15 give the Facilities Division employees an additional opportunity to seek
16 promotion to the position.
17

18 We agreed the Plant Engineer (City Hall) position in the facilities Division
19 will be in the bargaining unit.
20

21 We are in agreement that positions in the Facilities Division will not be
22 subject to civil service.
23

24 I will forward an agreement for your review and signature within the next
25 few days. Please let me know if you have any questions.

26 Approximately thirty minutes later in an email message at 6:14 PM, Maher responded
27 that:

28 I just wanted to clarify that the immediate change for those at that title will
29 be to a pay grade 26.
30

31 Next years (FY 15) change will address a pay grade we will work together
32 for the higher title?

33 Johnson then replied via email approximately fifty minutes later at 7:07 PM and
34 commented:

35 Sean: the 5 Building Maintenance Man positions will be pay grade 26.
36

On the second question, it will be based on the review and decision of the facilities division management team in collaboration with HR to ensure it matches up to similar job classifications and duties in other depts. I can confirm that it is everyone's intention for it to be equal or higher than a Building Maintenance-Craftsman (pay grade 30 or higher).

Nearly eighty minutes later at 7:07 PM, Maher sent an email message to Johnson, with a copy to Zidelis, which stated:

Hi Kathy and Tom,

I want to thank you both and express my gratitude that we were able to work this out

I will share this all with my team.

Thank you [Emphasis in original]

The Memorandum of Agreement

On July 30, 2013, Johnson sent a proposed settlement agreement to Maher via email,¹⁷ and Maher subsequently reviewed it. In an August 2, 2016, email message, Maher replied in relevant part that:

I have reviewed the MOA, and I am sorry to say I do have some concerns.

The first sentence ... "Without prejudice to the City's management rights,"

What is this about? This sounds more like Attorney Moschos has entered the room again. The reference was not in our discussions and it has no place and serves no purpose in the MOA we agreed to.

The CBA is what it is and the only purpose this can serve is if your side has plans other than what we all agreed to.

I hope you will keep our agreement as it was discussed between us, and add a [provision] to reflect the increase to pay grade 26.

I did not add anything new in our discussions as I promised.

On August 5, 2013, Johnson sent an email message to Maher commenting that:

¹⁷ Moschos had drafted the proposed settlement agreement for the City.

1 The without prejudice language is typical in agreements. It just makes
2 clear that we are not setting a precedent that we have to negotiate with
3 the union regarding the items the City can do under its mgt rights clause
4 (add new positions, do promotions). Under this agreement, we are only
5 agreeing to waive our rights for these terms at this time.
6

7 Regarding the increase to pay grade 26, I've added it to the item that
8 addresses the issue
9

10 Please let me know if you have any other questions or concerns.
11

12 In an August 19, 2013 email message to Johnson, Maher noted that:

13 We have made some minor adjustments to the agreement.
14

15 We will sign it as it is here.
16

17 Please call me and let's finish this up.
18

19 Thank you.

20 On August 22, 2013, Johnson responded to Maher by stating:

21 I've reviewed your edits to the agreement and was surprised that they
22 included adjustments to the terms that reached three weeks ago.
23 Specifically, in Section 5, the agreement for the pay grade on the higher
24 titled position was pay grade 30 or higher (Maintenance/Craftsman is pay
25 grade 30; you list it as 32). Please see our email exchange on that issued
26 dated 07/24/13. In addition, you, Tom and I discussed and agreed to
27 including 1 higher position in this division-not multiple as you've included
28 in your changes. We'd be willing to put wording such as "The City may
29 upon determining need, establish the promotional position at a higher pay
30 grade or add additional promotional positions" into the agreement, which
31 I've suggested
32

33 I too would like to finish this up-but under the terms to which we agreed.

34 The City and the Union subsequently executed a memorandum of agreement (2013

35 MOA) that stated:¹⁸

36 WHEREAS, fiscal constraints make it necessary for the City of Worcester
37 ("City") to implement various efficiencies in order to conserve resources;
38

¹⁸ The 2013 MOA bore a heading regarding the reorganization of custodian services.

1 WHEREAS, the City notified Local 495, NAGE/SEIU, AFL-CIO ("the
2 Union") that the City proposed to consolidate the City's custodial services,
3 except for the Police Department, into a new Division ("City Energy and
4 Asset Management") which will be a unit under the City's Administration
5 and Finance Department;
6

7 WHEREAS, the City and the Union have engaged in and completed
8 impact bargaining regarding the reorganization of custodian services;
9

10 The Union acknowledges that the City established a new Division which is
11 entitled the City Energy and Asset Management Division which will
12 provide centralized custodial and maintenance services to certain
13 Departments, effective July 1, 2013.
14

15 The City recognizes Local 495 as the representative of all custodial
16 employees in the Division for purposes of collective bargaining over
17 wages, hours and other terms and conditions of employment, effective
18 July 1, 2013.
19

20 The Union acknowledges that the custodial employees in the Division are
21 not under Civil Service, except any grandfathered unit members.
22

23 Without prejudice to the City's management rights, the City agrees that by
24 December 31, 2013, the City will create 5 positions of Building
25 Maintenance Man (pay grade 26) and it will promote the 5 current
26 Custodians to those positions.
27

28 Without prejudice to the City's management rights, the City agrees during
29 fiscal year 2015 to establish a promotional position (such as Building
30 Maintenance/Craftsman) in place of an existing position and will promote a
31 custodial employee who meets the skills, experience and qualifications to
32 the position. The City may upon determining need, establish the
33 promotional position to a higher grade or add additional promotional
34 positions.
35

36 The City agrees, without prejudice to the City's management rights, that
37 the City Fleet Engineer position will be in the Local 495 bargaining unit.
38

39 This Agreement has been duly executed by the authorized representatives
40 of the City of Worcester and Local 495, NAGE/SEIU, AFL-CIO.

41 Maher and Loughnane executed the 2013 MOA on behalf of the Union on September
42 24, 2013, while Johnson and Moschos executed on behalf of the City on October 1,
43 2013 and October 3, 2013 respectively.

Pursuant to the 2013 MOA, the City subsequently promoted five custodians who were reassigned to the Energy and Asset Management Division¹⁹ to the position of building maintenance man. Those five unit members received a salary increase and responsibility for performing craftsmen duties as well as their prior duties as custodians. The Energy and Asset Management Division's consolidated custodial services has seven employees, all of whom are unit members. Those seven employees include: the four or five individuals who previously worked as Library custodians, Powell, the plant engineer, and one or two individuals who previously worked as custodians in other municipal departments.²⁰ The record before me does not show that the City subsequently hired any additional employees to work in the Energy and Asset Management Division's consolidated custodial services.

Bids for Cleaning Services in the Energy and Asset Management Division

On September 4, 2013, the City posted an invitation to bid, sealed Bid No. CR-6070-W3, for cleaning services at the Main Library, the Senior Center and Meade Street. The invitation to bid indicated that potential bidders needed to submit their sealed bids by September 25, 2013 at 10 AM. The general specifications of the bid stated in pertinent part:

The City of Worcester is seeking to hire a company to provide cleaning services for three facilities: the Public Library, Senior Center and Health Inspectional Services. The successful bidder will be responsible for supplying all labor, materials and equipment necessary to satisfy the requirements of the bid, **excepting paper goods at the Library, which shall be supplied by the City.** [Emphasis in original]. The contract will

¹⁹ The City did not lay off any custodians as a result of the reorganization.

²⁰ The record does not identify the municipal departments where those non-Library employees previously worked.

1 be for a period of one (1) year, with options to extend for a second and
2 third year at the sole discretion of the City.

3
4 Pages 13 and 14 of the invitation to bid bore the heading Cleaning
5 Services: Worcester Public Library and stated that:

6
7 **Public areas, including restrooms, must be cleaned and vacuumed**
8 **between 6:00 A.M. and 9:00 A.M., Monday through Friday. All other**
9 **cleaning can be done during regular library working hours per an**
10 **agreed upon schedule.**

11
12 **Cleaning schedules cannot be changed without the written**
13 **permission of the Energy & Asset Management Department.**

14
15 **The Worcester Public Library is located at 3 Salem Square and is**
16 **149,950 square feet on five floors, with 8 public restrooms and 6 staff**
17 **restrooms. The vendor will have access to a small supply room to**
18 **store their supplies and equipment.**

19
20 **DAILY DUTIES [Emphasis in original]**

21
22 Wet Mop floors

23 Nov.-Apr.-All Public areas including entranceways, the 3 public staircases
24 and two public elevators

25 Café area

26
27 Vacuum Upholstered Furniture and Cushions

28 Public areas-including loveseats in Children's room

29 Spot clean carpets and upholstered furniture –as needed

30
31 Vacuum all rugs

32
33 First Floor will be vacuumed daily including under tables and chairs.

34 Balance of the library will divided into 5 sections (2nd floor, 3rd floor, 4th
35 floor staff area, and basement) with a section completed each day, Tues-
36 Fri.

37
38 Empty all wastebaskets and recycling containers, and change liners

39
40 Clean all tabletops, counters and work surfaces (some dusted, others
41 liquid cleaner)

42 Café tabletops to be cleaned-daily

43 Public areas-MWF

44
45 Elevators-Vacuum and clean stainless steel inside and out on elevators 1
46 and 2.

Clean & Disinfect Restrooms (all sinks, toilets, urinals, countertops, mirrors, stalls & floors)

Public areas-

Stock toilet paper & towels daily, soap as needed.

Wash walls next to urinals in public men's restroom-twice per week

Staff areas-twice per week

Stock toilet paper & towels, soap as needed

WEEKLY DUTIES:

Wet mop floors

All Staff areas

May-Oct.-All Public areas including entranceways, the 3 public staircases, and two public elevators

Staff areas-Vacuum Upholstered Furniture and Cushions (8 chairs on the fourth floor)

Public areas and Display units-wash glass in entry ways, doors, ½ walls, and staircases within reach

Wash all Drinking Fountains

Dust Public and Staff areas

tops of low bookcases, fireplace mantels, and display cases, woodwork in entrances, hallways, stairwells, and desk fronts, wooden chairs, window sills

Clean staff kitchen/vending area-Tuesday and Friday

Work includes sweeping floor, disinfecting stainless steel sinks and microwave(s)

Wet mop floor weekly

MONTHLY DUTIES:

Staff areas-wash glass in entry ways, doors and ½ walls

Board Room and Oak Room-wash tables and wood work

YEARLY DUTIES

Windows: All windows are to be washed on the inside and outside, once in May

Carpets: All carpets are to be professionally cleaned once a year to the satisfaction of the owner, preferably in the spring after the snow season

1 and in conjunction with a holiday or "long weekend" the library is closed.
2 The Vendor will contact the Facilities Manager to arrange a convenient
3 time to perform the work. This work **cannot** be performed during normal
4 business hours.

5
6 **Please note: only EAM custodial staff can access Administration,**
7 **Human Resources, and Business Offices for cleaning on 4th floor.**

8 The invitation to bid also contained sections that described the cleaning services that
9 the City was seeking to have the successful bidder perform at the Senior Center and at
10 Meade Street.

11 In October 2013, John Orrell, the City's Purchasing Director, sent a notice to the
12 Energy and Asset Management Division that the City had awarded Brand-Nu Janitorial
13 Services (Brand-Nu) the contract for Bid No. CR-6070-W3. Pursuant to the terms of
14 the winning bid, Brand-Nu would provide cleaning services to: the Main Library for a fee
15 of \$3,333.91 per month, the Senior Center for a fee of \$2,440.00 per month, and Meade
16 Street for a fee of \$1417.41 per month. Brand-Nu also would perform window
17 cleaning²¹ at the Main Library for \$2,700 per year and at Meade Street for \$1,440.00 per
18 year.²²

19 Thereafter, at least one and sometimes two Brand-Nu employees worked at the
20 Main Library²³ Monday through Friday from approximately 6:00 AM until they completed

²¹ The record is silent as to whether unit members previously performed window cleaning at the three sites.

²² The terms of the City's contract with Brand-Nu Janitorial Service also provided for a cash discount if payment was made within certain time frames.

²³ The Main Library is open four days per week from 9:00 to 5:30 PM, three days per week from 9:00 AM to 9:00 PM, and Sundays from 1:30 to 5:30.

1 their duties typically in the late morning.²⁴ Brand-Nu personnel also performed cleaning
2 duties at Meade Street on Monday, Wednesday and Friday and at the Senior Center on
3 Tuesday, Thursday and Friday, although Brand-Nu personnel started work at 7 AM at
4 those two sites. On or about late October 2013, the Union became aware that the
5 Brand-Nu employees were performing cleaning duties at the Main Library, cleaning
6 duties that unit members previously had performed. Also, despite the City's contract
7 with Brand-Nu, unit members continued to perform some cleaning duties at the Main
8 Library as well as to perform cleaning duties at other municipal sites for which the Asset
9 and Energy Management Division provided some or all of the upkeep. Although unit
10 members continued to perform some cleaning duties at the Main Library, they do not
11 perform all of the cleaning duties at the Main Library, which they had prior to the City's
12 hiring of Brand-Nu.

13 Opinion

14 The issue before me is whether the City violated Sections 10(a)(5) and (1) of the
15 Law by transferring certain custodial duties at the Main Library to a private vendor. A
16 public employer violates Section 10(a)(5) of the law when it transfers work performed by
17 bargaining unit members to non-bargaining unit personnel without first giving the
18 exclusive representative of its bargaining unit members prior notice and an opportunity
19 to bargain to resolution or impasse. City of Cambridge, 23 MLC 28, 36, MUP-9171
20 (June 28, 1996), aff'd sub nom., Cambridge Police Superior Officers Association v.

²⁴ Maher testified that the Brand-Nu personnel worked eight hours per day at the Main Library. However, Faucher testified that the Brand-Nu personnel worked mornings there. I credit Faucher's testimony on this point because she worked at the Main Library and had a greater opportunity to observe the Brand-Nu personnel on a daily basis than Maher did. Also, Odell's testimony about the daily hours of the Brand-Nu personnel who worked at the Main Library was similar to Faucher's testimony.

1 Labor Relations Commission, 47 Mass. App. Ct. 1108 (1999). To establish that a public
2 employer has violated the Law, an employee organization must demonstrate that: 1) the
3 employer transferred bargaining unit work to non-unit personnel; 2) the transfer of unit
4 work had an adverse impact on individual employees or the bargaining unit itself; and 3)
5 the employer failed to give the employee organization prior notice and an opportunity to
6 bargain to resolution or impasse over the decision to transfer the work. Lowell School
7 Committee, 28 MLC 29, 31, MUP-2074 (June 22, 2001); City of Gardner, 10 MLC 1216,
8 1219, MUP-4917 (September 14, 1983).

9 Alleged Transfer of Unit Work

10 To determine whether the City transferred bargaining unit work, I must first
11 determine whether as of October 2013, the disputed custodial duties were exclusive
12 bargaining unit work or whether unit members shared the work with non-bargaining unit
13 personnel, specifically pool personnel or private vendors. When bargaining unit
14 members and non-unit members share work, the CERB previously has determined that
15 the work will not be recognized as belonging exclusively to the bargaining unit. Higher
16 Education Coordinating Council, 23 MLC 90, 92, SUP-4090 (September 17, 1996); City
17 of Boston, 6 MLC 1117, 1125, MUP-2683 (June 4, 1979). The City urges me to find
18 that the custodial duties were shared work because the City has used pool personnel
19 and private vendors to perform work at the Main Library since the 1960's and
20 continuing. Conversely, the Union insists that for many years, unit members exclusively
21 provided custodial services at the Main Library.

22 Upon review, the facts before me show that even though the City has used
23 temporary workers to perform plumbing and electrical duties at the Main Library for the

1 past fifty years, the City has not used temporary workers to clean the Main Library since
2 the early 1990's. Thus, only bargaining unit members have provided cleaning services
3 to the Main Library for twenty plus years. The twenty plus-year period is sufficient to
4 establish a departure from the prior pattern of unit members and non-unit personnel
5 providing custodial services at the Main Library and to establish a new practice of unit
6 members exclusively performing custodial services. See City of Boston, 38 MLC 201,
7 202, MUP-08-5253 (March 9, 2012) (rejecting the employer's claim that two and one-
8 half years of assigning police captains to command a particular division was not
9 sufficient to establish a binding practice); City of Boston, 28 MLC 369, 372, MUP-2267
10 (May 31, 2002) (finding seven years sufficient to establish a practice of assigning patrol
11 officers exclusively to identify latent prints at crime scenes). When the City hired Brand-
12 Nu to perform custodial services at the Main Library, the City transferred exclusive
13 bargaining unit work to non-bargaining unit personnel.

14 Alleged Adverse Impacts

15 The City contends that individual unit members and the bargaining unit as a
16 whole were not adversely affected by the City's hiring of Brand-Nu because no unit
17 members were laid off and the bargaining unit was not reduced in size. The CERB has
18 long held that depriving a bargaining unit of an opportunity to perform work that it
19 previously performed constitutes an adverse impact on the unit, even if the loss of
20 bargaining unit work may not directly result in a reduction in the number of bargaining
21 unit personnel. See Lowell School Committee, 28 MLC at 29 (citing City of New
22 Bedford, 15 MLC 1732, 1739, MUP-6488 (May 31, 1989)); City of Cambridge, 23 MLC
23 at 28; Cf., Chief Justice for the Administration and Management of the Trial Court v.

1 Commonwealth Employment Relations Board, 79 Mass. App. Ct. 374 (2011) (no
2 adverse impact where record establishes that work would have gone undone if per
3 diems were not hired). Here, one and sometimes two Brand-Nu employees cleaned the
4 Main Library five days per week, five to six hours per day, and there is no evidence that
5 the work would have gone undone had the City not transferred it.

6 I also am not persuaded by the City's argument that individual bargaining unit
7 members and the bargaining unit as a whole cannot show any adverse impacts from the
8 transfer of unit work because on or about the same time, the City promoted five unit
9 members and increased their salaries as well as included the plant engineer position in
10 the bargaining unit. The City's argument incorrectly presumes that the promotions and
11 pay increases, which were made pursuant to the terms of the 2013 MOA, somehow
12 nullified any adverse impacts from the transfer of unit work. However, the City
13 promoted the unit members and increased their salaries and included the plan engineer
14 in the bargaining unit as a result of negotiations concerning the custodial reorganization.
15 As will be discussed further below, the 2013 MOA did not address the transfer of unit
16 work. Accordingly, I find that the City's transfer of custodial duties at the Main Library to
17 Brand-NU constituted a sufficient detriment to the bargaining unit to trigger the City's
18 statutory obligation to bargain to resolution or impasse with the Union.

19 Alleged Failure to Bargain

20 I turn next to consider certain defenses that the City raises concerning its alleged
21 failure to satisfy its statutory bargaining obligation.

22 Waiver by Contract

1 When an employer raises the affirmative defense of waiver by contract, it bears
2 the burden of demonstrating that the parties consciously considered the situation that
3 has arisen and that the union knowingly waived its bargaining rights. Massachusetts
4 Board of Regents, 15 MLC 1265, 1269, SUP-2959 (November 18, 1988); Town of
5 Marblehead, 12 MLC 1667, 1670, MUP-5370 (March 28, 1986). The initial inquiry
6 focuses on the language of the contract. Town of Mansfield, 25 MLC 14, 15, MUP-1567
7 (August 4, 1998). If the language clearly, unequivocally and specifically permits the
8 public employer to make the change, no further inquiry is necessary. City of Worcester,
9 16 MLC 1327, 1333, MUP-6810 (October 19, 1989). If the language is ambiguous, the
10 CERB will review the parties' bargaining history to determine their intent. Peabody
11 School Committee, 28 MLC 19, 21, MUP-2073 (June 21, 2001); Town of Marblehead,
12 12 MLC at 1670. The City contends that Article 4, Management Rights, read in
13 conjunction with Special Article 9, Recognition, constitutes a waiver of the Union's right
14 to bargain. Article 4, provides, inter alia:

15 ... the City shall not be deemed to have been limited in any way in the
16 exercise of the regular and customary function of municipal management
17 or governmental authority and shall be deemed to have retained and
18 reserved unto itself all the powers, authority and prerogatives of municipal
19 management or governmental authority including, but not limited to...the
20 operation and direction of the affairs of the departments in all their various
21 aspects; ... the determination of the methods, means, location,
22 organization, number and training of personnel of the departments or its
23 units or programs; the assignment and transfer of employees

24 Additionally, Article 9 states:

25 With regard to the ... Worcester Free Public Library, the Prefix to this
26 agreement shall be construed to apply to employees and not to work. It
27 shall not limit the City's right to contract out work or to transfer work to
28 other employees in the bargaining unit. .. No work presently performed by
29 employees in the bargaining unit shall be contracted out, but shall be
30 subject to negotiation between the parties.

1 Moschos testified that the City negotiated those two provisions in the 1960's in order to
2 preserve its right to supplement the work force at certain municipal departments,
3 including the Library. Moreover, the cited language in Article 4 and Special Article 9
4 clearly shows that the City retained certain general and specific rights respectively,
5 including the right to contract out work without first bargaining with the Union over the
6 decision. However, the final sentence of Special Article 9 also contains a limitation on
7 the City's right to contract out work where the Union currently performs that work.
8 Here, only bargaining unit members cleaned the Main Library for the twenty plus years
9 prior to the City's hiring of Brand-Nu. Reading the final sentence in Special Article 9,
10 giving the words their plain and normal meaning, I conclude that the Union did not
11 contractually waive its right to seek bargaining over the City's decision to transfer the
12 cleaning duties at the Main Library.

13 Parties' Bargained to Resolution

14 Alternatively, the City asserts that even if it had a bargaining obligation, the
15 parties negotiated to resolution as evinced by the 2013 MOA. In determining whether
16 an employer and a union reached an agreement, the CERB considers whether there
17 has been a meeting of the minds on the actual terms of the agreement. Town of
18 Ipswich, 11 MLC 1403, 1410, MUP-5248 (February 7, 1985). To achieve a meeting of
19 the minds, the parties must manifest an assent to the terms of the agreement. Suffolk
20 County Sheriff's Department, 30 MLC 1, 6, MUP-2630, 2747 (August 19, 2003). Upon
21 review, the facts before me do not show that the parties agreed that the City would use
22 a private vendor to clean the Main Library. The parties attended a meeting on June 28,
23 2013 at which they discussed the City's proposed reorganization of the custodians.

1 During that meeting, the City, in response to inquiries from the Union, confirmed that it
2 was not going to abolish in-house custodial services and contract out those services,
3 but that it instead intended to supplement custodial services. However, neither the City
4 nor the Union discussed what the term "supplement" meant. Also, the parties'
5 spokespersons, Moschos and Maher, had differing beliefs as to the meaning of the
6 term.

7 Subsequently, the City and the Union had a number of discussions about the
8 proposed reorganization, but the record does not show that the issue of supplementing
9 the custodial services at the Main Library arose during those remaining discussions.
10 Further, the parties did not refer to the issue of supplementing custodial services at the
11 Main Library in the draft settlement agreements (drafts) that they exchanged or in the
12 email messages in which they commented on those drafts. Also, in a July 18, 2013
13 email message that Maher sent to Johnson regarding the need for inclusion of the plant
14 engineer in the bargaining unit, Maher noted, "[w]e cannot accept shared work at any
15 level." Maher's statement makes it highly unlikely that the parties had a meeting of the
16 minds whereby the Union would agree to the use of a private vendor to clean the Main
17 Library. Compare Suffolk County Sheriff's Department, 30 MLC at 6 (promoting unit
18 members on a temporary basis consistent with the parties' oral agreement) and City of
19 Everett, 26 MLC 25, 28, MUP-1542 (July 22, 1999) (fire chief's delivery of a verbal
20 warning consistent with oral agreement). Finally, a review of the 2013 MOA does not
21 reveal any reference to the City's use of a private vendor to perform custodial services
22 at the Main Library. Compare City of Boston/Boston Public Library, 26 MLC 215, 217,

1 MUP-2081 (May 31, 2000) (concluding that bargaining notes do not show that the
2 parties had agreed upon a possible location for a smoking lounge).

3 Consequently, the City has transferred bargaining unit work without bargaining
4 to resolution or impasse with the Union over the decision and the impacts of that
5 decision in violation of Section 10(a)(5) of the Law.

6 Remedy

7 The CERB fashions remedies for violations of the Law by attempting to place a
8 charging party in the position that it would have been in but for the unfair labor practice.
9 Natick School Committee, 11 MLC 1397, 1400, MUP-5157 (February 1, 1985). The
10 traditional remedy where a public employer has unlawfully refused to bargain over a
11 decision to transfer unit work is an order to restore the status quo ante until the
12 employer has fulfilled its bargaining obligation and to make all affected employees
13 whole for any economic losses they may have suffered. Commonwealth of
14 Massachusetts, 35 MLC 105, 110, SUP-04-5054 (December 10, 2008). However, in
15 this case where the City has engaged an outside contractor since 2013 to perform the
16 work formerly performed by bargaining unit employees and presumably remains
17 financially obligated to the private contractor for some remaining period of time, it would
18 not further the policies of Chapter 150E to require the City to restore the duties in
19 dispute to the bargaining unit. See City of Gardner, 10 MLC at 1222. As in City of
20 Gardner, the more appropriate remedy is to order the City to do what it should have
21 done in the first place, namely to bargain to resolution or impasse with the Union over
22 the decision to transfer cleaning duties at the Main Library. The City should refrain from
23 renewing its contract with Brand-Nu or refrain from entering into a similar contract with

1 an outside vendor to provide cleaning services at the Main Library until such time as the
2 City has bargained to resolution or impasse with the Union over the decision to transfer
3 the bargaining unit work and the impacts of that decision. Further, although the Union
4 requests that certain unit members, who currently work in the consolidated custodial
5 services in the Energy and Asset Management Division, be made whole for the loss of
6 their work by the payment of overtime for the transferred duties, I decline to do so as
7 there is no evidence that those unit members lost overtime opportunities.²⁵

8 Conclusion

9 Based on the record and for the reasons explained above, I conclude that the
10 City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by
11 transferring certain bargaining unit duties at the Main Library to non-unit personnel
12 without bargaining to resolution or impasse.

13 ORDER

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

15 1. Cease and desist from:

- 16
17 a. Unilaterally transferring bargaining unit work at the Main Library to non-
18 bargaining unit personnel without first giving the Union notice and an
19 opportunity to bargain to resolution or impasse about the decision and the
20 impacts of that decision.
21
22 b. In any like or related manner, interfering with, restraining and coercing its
23 employees in any rights guaranteed under the Law.

24
25 2. Take the following action that will effectuate the purposes of the Law:
26

²⁵ Although Maher made the general statement at hearing that unit members lost overtime opportunities, the record before me contains no specific information about those overtime opportunities, including how those overtime opportunities would interplay with unit members' regular work schedules and the language in Article 4 concerning the assignment of overtime.

- 1 a. Refrain from renewing the portion of its contract with Brand-Nu to clean
2 the Main Library and from entering into any similar contract until the City
3 has bargained in good faith to resolution or impasse over the decision to
4 transfer bargaining unit work and the impacts of that decision on unit
5 members' terms and conditions of employment.
6
7 b. Bargain in good faith with the Union to resolution or impasse over the
8 decision to transfer cleaning duties at the Main Library and the impacts of
9 that decision on unit members' terms and conditions of employment.
10
11 c. Post immediately in all conspicuous places where members of the Union's
12 bargaining unit usually congregate, or where notices are usually posted,
13 including electronically, if the City customarily communicated with these
14 unit members via intranet or email and display for a period of thirty (30)
15 days thereafter, signed copies of the attached Notice to Employees.
16
17 d. Notify the DLR in writing of steps taken to comply with this decision within
18 ten (10) days of receipt of this decision.

SO ORDERED

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



MARGARET M. SULLIVAN
HEARING OFFICER

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 Notice of Appeal with the Executive Secretary of the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within the ten days, this decision shall become final and binding on the parties.



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

A Hearing Officer of the Massachusetts Department of Labor Relations (DLR) has held that the City of Worcester (City) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (Law) when it transferred certain cleaning duties at the Main Library from the National Association of Government Employees (NAGE) bargaining unit to a private company Brand-Nu without bargaining to resolution or impasse.

Section 2 of Chapter 150E gives public employees the right to form, join or assist a union; to participate in proceedings at the DLR; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities.

The City assures its employees that:

WE WILL NOT fail and refuse to bargain in good faith by:

- Unilaterally transferring bargaining unit work at the Main Library to non-bargaining unit personnel without first giving the Union notice and an opportunity to bargain to resolution or impasse about the decision and the impacts of that decision.

WE WILL NOT in any like or similar manner interfere with, restrain or coerce employees in the exercise of their rights guaranteed under the Law.

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

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

For the City of Worcester

Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, 19 Staniford Street, 1st Floor, Boston, MA 02114 (Telephone: (617) 626-7132).