

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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In the Matter of

CITY OF BOSTON

and

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

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Case No.: MUP-16-5525

Date Issued: May 9, 2018

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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  
2 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter  
3 150E (the Law) by transferring animal quarantining duties to non-bargaining unit  
4 personnel without providing the American Federation of State, County and Municipal  
5 Employees, AFL-CIO, Council 93 (AFSCME or Union) with prior notice and an  
6 opportunity to bargain to resolution or impasse over the decision and the impacts of that  
7 decision on employees' terms and conditions of employment. Based on the record and  
8 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.

STIPULATED FACTS<sup>1</sup>

1. The City of Boston is a public employer within the meaning of Section 1 of the Law.
2. The Union is an employee organization within the meaning of Section 1 of the Law.
3. The Union is the exclusive bargaining representative for all employees covered in the recognition article in the parties' contract.
4. Mike Mackan is a member of SENA.
5. Mike Mackan holds the position of Principal Administrative Assistant.
6. The Union is the exclusive bargaining representative for Animal Control Officers employed by the City.
7. Patricia Jones is a member of the bargaining unit and is one of the AFSCME members who performs animal quarantine duties within Local 1631.
8. On September 14, 2016, the City appointed a member of a different bargaining unit to perform the same animal quarantine job duties that Ms. Jones and the other AFSCME Council 93, Local 1631 members perform.
9. Mike Mackan of the bargaining unit SENA was the employee appointed by the City to perform the same animal quarantine job duties that Ms. Jones and the other AFSCME Council 93, Local 1631 members perform.
10. From September 14, 2016 to October 17, 2017, Mr. Mackan has performed approximately 209 quarantines while other AFSCME Animal Control Officers have performed approximately 56 Quarantines. The other approximately 173 quarantines performed by the Animal Care and Control Department were processed, but the animal was either determined to not live in the City of Boston or was un-locatable.
11. Prior to September 14, 2016, neither Mr. Mackan nor any other SENA member performed the same animal quarantine job duties that Ms. Jones and the other AFSCME Council 93, Local 1631 members perform.

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<sup>1</sup> The parties stipulated to these facts in the "Joint Pre-Hearing Memorandum" and the "Agreed Upon Stipulations of Fact."

- 1 12. The position of Director of Animal Care and Control is an exempt position that is  
2 not in any union.
- 3
- 4 13. Animal quarantine work can only be performed by Animal Inspectors under  
5 Massachusetts state law.
- 6
- 7 14. Animal Inspectors must be nominated by the Director of Animal Care and Control  
8 and sworn in by the City Clerk for the City of Boston to perform quarantines in the  
9 City.
- 10
- 11 15. AFSCME Animal Control Officers and Animal Inspectors have all been sworn in  
12 by the City Clerk of Boston after being nominated by the Director of Animal Care  
13 and Control to perform quarantines in the City.
- 14
- 15 16. Before December 1, 2000, the City of Boston had a contract with the Animal  
16 Rescue League of Boston to perform animal quarantine work.
- 17
- 18 17. After the contract for animal quarantine work with the City of Boston and Animal  
19 Rescue League of Boston ended, the City hired two AFSCME bargaining unit  
20 members to perform animal quarantine work.
- 21
- 22 18. Employees at the Animal Rescue League of Boston shelter in Boston and the  
23 Massachusetts Society for the Prevention of Cruelty to Animals shelter in Boston  
24 continue to perform animal quarantine work for animals only within their shelters.
- 25
- 26 19. The directly above referenced workers are not City employees and the shelters  
27 are on privately owned land within the City of Boston.
- 28
- 29 20. The AFSCME Animal Officers and Inspectors do not typically receive overtime to  
30 specifically perform animal quarantines.

### 31 FINDINGS OF FACT

32 In accordance with Massachusetts General Laws, each municipality must have  
33 an animal inspector to do quarantine work to prevent the spread of contagious disease.  
34 M.G.L. c 129 § 15 states, in part:

35 The city manager in cities having a plan D or plan E charter, the mayor in  
36 all other cities, except Boston, the town manager in towns having a town  
37 manager form of government and the selectmen in all other towns shall  
38 annually, in March, nominate one or more inspectors of animals, and  
39 before April first shall send to the director the name, address and

1 occupation of each nominee. Such nominee shall not be appointed until  
2 approved by the director.

3  
4 Section 15 was later clarified by M.G.L. c 129, § 26, which added a provision  
5 addressing inspectors of animals in the City by stating:

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

8  
9 The Animal Care and Control Division (Division) is a unit of the Inspectional Services  
10 Department (ISD) of the City. Within the Division, there are animal inspectors who  
11 perform animal quarantines for the City, as statutorily required.

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

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

- 23 • Serve and deliver notices of quarantine;  
24 • Perform quarantine inspection duties in places where animals are housed, sold  
25 or used for any purpose and inspect homes for quarantine suitability;  
26 • Under general supervision removes any dog or other animal that is injured,  
27 maimed, or diseased;

- 1 • Makes and prepares complaints against owners of dogs not properly licensed or
- 2 collared;
- 3 • Picks up stray and unlicensed dogs and other animals;
- 4 • Keeps records of the number of animals removed, their owners, number of
- 5 complaints, and other information required by law; and
- 6 • Performs other related duties as required.

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

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

12  
13 For many years, Jones was the only Dog Officer to perform animal quarantines. At  
14 some point, the number of Dog Officers increased to seven or eight; however, Jones  
15 continued to be the primary Dog Officer to perform animal quarantines. Jones was  
16 supposed to perform one to two animal quarantines per day. A backlog of quarantines  
17 developed over time and the former Director of the Division reached out to AFSCME  
18 President Christopher Stockridge (Stockridge) to discuss the matter. After a meeting,  
19 which took place sometime prior to 2015, it was agreed that animal quarantine duties  
20 would be spread more evenly amongst all the Dog Officers. As a result, Jones began to  
21 perform other duties within the Dog Officer job description, besides animal quarantines.

22 In or around July 2015, Amanda Kennedy (Kennedy) became the Director of the  
23 Division, a position outside any bargaining unit. In addition to her role as Director,  
24 Kennedy became an animal inspector and began performing approximately one animal

1 quarantine per week (i.e., approximately 52 per year).<sup>2</sup> Still, the vast majority of animal  
2 quarantines were performed by AFSCME bargaining unit members. Although Jones  
3 and the other Dog Officers were aware that Kennedy was performing animal  
4 quarantines, neither Jones, the other Dog Officers or the Employer notified the Union.  
5 As such, the Union was not aware that Kennedy had performed animal quarantines.

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

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<sup>2</sup> 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.

<sup>3</sup> It is unclear from the record whether Kennedy continued to perform one quarantine per week after Mackan was appointed on September 14, 2016.

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1 members share work, the Commonwealth Employment Relations Board (CERB)  
2 previously has determined that the work will not be recognized as belonging exclusively  
3 to the bargaining unit. Higher Education Coordinating Council, 23 MLC 90, 92, SUP-  
4 4090 (September 17, 1996); City of Boston, 6 MLC 1117, 1125, MUP-2683 (June 4,  
5 1979).

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

20       Upon review, the facts before me show that even though the Animal Rescue  
21 League of Boston and the MSPCA performed animal quarantines at their own privately  
22 owned shelters, neither performed animal quarantines on City owned property since the

1 work was given to AFSCME bargaining unit members in 2000. This eighteen plus-year  
2 period is sufficient to establish a departure from the prior pattern of the shelters  
3 performing animal quarantines on City owned property. See City of Boston, 38 MLC  
4 201, 202, MUP-08-5253 (March 9, 2012) (rejecting the employer's claim that two and  
5 one-half years of assigning police captains to command a particular division was not  
6 sufficient to establish a binding practice); City of Boston, 28 MLC 369, 372, MUP-2267  
7 (May 31, 2002) (finding seven years sufficient to establish a practice of assigning patrol  
8 officers exclusively to identify latent fingerprints at crime scenes). The fact that the  
9 Animal Rescue League of Boston and the MSPCA currently perform animal quarantines  
10 at their privately owned shelters has no bearing on this case. Thus, I do not find animal  
11 quarantine duties to be shared work between AFSCME bargaining unit members and  
12 either the Animal Rescue League of Boston or the MSPCA.

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

21 To determine whether a practice exists, the Board "analyzes the combination of  
22 facts upon which the alleged practice is predicated, including whether the practice has

1 occurred with regularity over a sufficient period of time so that it is reasonable to expect  
2 that the practice will continue.” Commonwealth of Massachusetts, 23 MLC 171, 172,  
3 SUP-3586 (January 30, 1997) (citing Town of Chatham, 21 MLC 1526, 1531, MUP-  
4 9186 (January 5, 1995)). The CERB’s inquiry turns on whether the practice “is  
5 unequivocal, has existed substantially unvaried for a reasonable period of time and is  
6 **known and accepted** by both parties.” Town of Dedham School Committee, 5 MLC  
7 1836, 1839, MUP-3002 (November 14, 1978) (emphasis added). In the present case,  
8 although the Employer argued that Jones and the other Dog Officers were aware  
9 Kennedy performed animal quarantine duties, it presented no evidence that the Union  
10 had been made aware. The City presented no witnesses or documentary evidence  
11 challenging Stockbridge’s claim that the Union only became aware of Kennedy’s  
12 performance of animal quarantine duties as a result of the present charge. Under such  
13 circumstances, I find that there is no known and accepted practice between the  
14 Employer and Union regarding sharing animal quarantine duties between Dog Officers  
15 and Kennedy. See Commonwealth of Massachusetts, 39 MLC 169, 171-172, SUP-08-  
16 5447 (December 27, 2012) (finding no record evidence that the union knew or had  
17 reason to believe that the asserted practice existed). Accordingly, I find animal  
18 quarantine duties to be the exclusive work of Dog Officers.

### 19 **Calculated Displacement**

20 Even if I were to find animal quarantine duties to be shared work, there was a  
21 calculated displacement of bargaining unit work as a result of the City’s transfer of  
22 animal quarantine duties to Mackan. In shared work situations, there is no obligation to

1 bargain over every incidental variation in job assignments between unit and non-unit  
2 personnel. Rather, bargaining must occur only in situations where there is a calculated  
3 displacement of bargaining unit work. City of Boston, 10 MLC 1539, 1541, MUP-4967  
4 (April 24, 1984). To determine whether a calculated displacement of unit work has  
5 occurred, the DLR examines how the work has been shared in the past. If unit  
6 employees traditionally have performed an ascertainable percentage of the work, a  
7 significant reduction in the portion of work performed by unit employees with a  
8 corresponding increase in the work performed by non-unit employees may demonstrate  
9 a calculated displacement of unit work. Town of Bridgewater, 25 MLC 103, 104, MUP-  
10 8650 (December 30, 1998) (citing City of New Bedford, 15 MLC 1732, 1737, MUP-6488  
11 (May 31, 1989) (other citations omitted)).

12 The stipulations and testimony are clear that, on September 14, 2016, the City  
13 appointed Mackan to perform the same animal quarantine job duties that Dog Officers  
14 and the Director performed. Prior to September 14, 2016, neither Mackan nor any other  
15 SENA member performed animal quarantine duties. Even without knowing the exact  
16 number of animal quarantines performed each year by Dog Officers prior to September  
17 14, 2016, there was no dispute that Dog Officers performed vastly more animal  
18 quarantines than the Director. The Director testified that she performed approximately  
19 one animal quarantine per week (i.e., approximately 52 per year).

20 From September 14, 2016 to October 17, 2017, Mackan performed  
21 approximately 209 quarantines, while Dog Officers performed approximately 56  
22 quarantines. Thus, Mackan performed nearly four times as many quarantines as

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

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

### 15 **Non-delegable Authority**

16 Relying primarily on Chief Justice for Administration and Management of the Trial  
17 Court v. Commonwealth Employment Relations Board, 79 Mass. App. Ct. 374, 946  
18 N.E.2d 704 (Mass. App. 2011) (CJAM), the City has argued, in part, that there was no  
19 obligation to bargain with the Union over the decision to transfer animal quarantine work  
20 to Mackan or the impact of that decision. In CJAM, the Court stated that a clear  
21 legislative directive will exclude a subject from collective bargaining. Id. at 382, citing  
22 Somerville v. Somerville Municipal Employees Association, 451 Mass. 493, 497-500,

1 887 N.E.2d 1033 (2008) ("clear and specific statutory conferral of appointment authority  
2 upon mayors excluded it from collective bargaining"). The Court referenced M.G.L. c.  
3 211B, §9A which explicitly authorized the court administrator, in part, to appoint and  
4 transfer court officers as deemed necessary for public safety. CJAM, 79 Mass. App. Ct.  
5 at 382. The Court further noted that the Justices of the Supreme Judicial Court had  
6 called upon that authority in 1992, declaring that insufficient security staffing had  
7 created a statewide emergency in the Courts of the Commonwealth and ordered the  
8 court administrator to assume exclusive control over the "hiring, deployment and  
9 management" of court officers. Id. at 383. The Court reasoned that this exclusive  
10 legislative grant of authority overrode the general duty to bargain under M.G.L. c. 150E.  
11 See Somerville v. Commonwealth Employment Relations Board, 470 Mass. 563, 24  
12 N.E.3d 552 (2015) (a legislative authority "conferred on a municipality to decide whether  
13 and how much to contribute to the monthly health insurance premiums of retired  
14 employees...would be wholly undermined by an obligation to collectively bargain the  
15 matter") (citing National Association of Government Employees v. Commonwealth, 419  
16 Mass. 448, 453, 646 N.E.2d 106, cert. denied, 515 U.S. 1161, 115 S. Ct. 2615, 132 L.  
17 Ed. 2d 858 (1995) (legislature reserved the ability to change the contribution percentage  
18 to state employees' health insurance premiums, and this could not be overridden by  
19 collective bargaining)).

20 In the present case, the City argues that any collective bargaining obligations  
21 should be limited due to M.G.L. c. 129, § 18, which mandates that "[e]ach inspector  
22 shall comply with and enforce all orders and regulations directed to him by the director."

1 These legally required duties include quarantine obligations under 330 CMR 10.00. The  
2 City contends that the legislative directive mandating that quarantines be performed in a  
3 "specific manner and completed along specific timelines" is analogous to CJAM. The  
4 City also argues that, if it must bargain every effort to ensure this work is done, it would  
5 put public safety at risk and leave many quarantines undone.

6 The City's argument misses the mark. The statute referenced in CJAM contains  
7 a precise grant of authority which allowed the court administrator "to appoint, dismiss,  
8 define the duties of, assign, transfer and discipline said court officers within the trial  
9 court departments as he deems necessary for the administration of justice and for  
10 public safety." 79 Mass. App. Ct. at 382 (citing M.G.L. c. 211B, § 9A); see also  
11 Massachusetts Bay Transportation Authority v. Local 589, Amalgamated Transit Union,  
12 406 Mass. 36, 40 (1989) (MBTA's explicit authority to appoint and assign personnel  
13 under M.G.L. c. 161A, § 19(i) is not susceptible to collective bargaining). In contrast, the  
14 statute that the City cites does not grant any such explicit authority regarding the  
15 appointment or assignment of inspectors. Rather, it directs the actions of those who  
16 have already been appointed as inspectors, and threatens economic consequences  
17 should they fail to act. Those duties are not in contention and the Union has not  
18 demanded any bargaining take place over those statutorily mandated duties.  
19 Additionally, although Mackan has been sworn in as an inspector and is permitted to  
20 conduct animal quarantines, nothing in the record suggests that the Employer cannot  
21 lawfully remove animal quarantines from his job duties.

1        It is also not clear how the legislative directive to perform quarantines and  
2 prevent the spread of rabies would be undermined by collective bargaining. City of Lynn  
3 v. Labor Relations Commission, 43 Mass. App. Ct. 172, 180 (1997). The requirement  
4 that only bargaining unit members perform the work until the Employer first notifies and  
5 bargains with the Union to resolution or impasse regarding a change does not interfere  
6 with the City's ability to manage animal inspectors or to deal with the backlog of animal  
7 quarantines. See Essex County Sheriff's Department v. Essex County Correctional  
8 Officers Association, Mass. App. Ct. 2010-P-255, Rule 1:28 Decision (January 24,  
9 2011) (requiring only bargaining unit members to perform work does not interfere with  
10 managerial authority regarding how shifts will be assigned, deployment of staff, or  
11 overtime levels). To the contrary, the Employer could have explored alternative options  
12 with the Union in fulfillment of its legislative directive. See Commonwealth v. Labor  
13 Relations Commission, 60 Mass. App. Ct. 831, 834 (2004) (failure to explore the  
14 possibility of different positions with the union prior to transferring work contributed  
15 towards a violation of the Law).

#### 16 **Public Health Considerations**

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



1 provision of societal services." CJAM, 79 Mass. App. Ct. at 380-381 (citing School  
2 Committee of Pittsfield v. United Educators of Pittsfield, 438 Mass. 753, 761-762, 784  
3 N.E.2d 11 (2003)). Those elements must be so "comparatively heavy that collective  
4 bargaining... on the subject is, as a matter of law, to be denied effect." Id. (citing School  
5 Committee of Boston v. Boston Teachers Union, Local 66, 378 Mass. 65, 70-71, 389  
6 N.E.2d 970 (1979)).

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

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

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

### 6 **Adverse Impact**

7 An employer must bargain about a transfer of unit work, if the transfer results in  
8 adverse impacts on individual employees or the bargaining unit as a whole. See City of  
9 New Bedford, 15 MLC 1732, 1737, MUP-6488 (May 31, 1989). Additionally, the DLR  
10 has long held that an adverse impact can be shown, absent a reduction in bargaining  
11 unit positions, when the transfer "could result in the eventual elimination of the  
12 bargaining unit through gradual erosion of bargaining unit duties." Commonwealth v.  
13 Labor Relations Commission, 60 Mass. App. Ct. 831, 834 (2004); see generally Lowell  
14 School Committee, 28 MLC 29, 32, MUP-2074 (June 22, 2001) (citing City of New  
15 Bedford, 15 MLC at 1739); City of Cambridge, 23 MLC 28, 36, MUP-9171 (June 28,  
16 1996) aff'd sub nom. Cambridge Police Superior Officers Association v. Labor Relations  
17 Commission, 47 Mass. App. Ct. 1108 (1999). As the City correctly asserts, the union  
18 bears the burden of demonstrating the impact. See Town of Seekonk, 14 MLC 1725,  
19 1730-31, MUP-6131 (May 10, 1988).

20 The City argues that, analogous to CJAM, the Union has not shown evidence of  
21 any real impact. The City claims that no layoffs have occurred or are planned, there has  
22 been no loss of overtime or the opportunity to perform animal quarantine duties, and

1 members of the bargaining unit have not experienced any loss of hours or reduction in  
2 overall duties. The City also claims that the Union has not shown any risk of erosion to  
3 the bargaining unit. The City, however, ignores the stark differences between the  
4 hypothetical damages in CJAM and the actual detriments faced by the bargaining unit  
5 here.

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

15 However, the Court in CJAM did not overrule the DLR standard that an adverse  
16 impact might occur through the gradual erosion of bargaining unit duties, even absent a  
17 direct loss of bargaining unit positions resulting from the transfer. Instead, the Court in  
18 CJAM simply found that there was insufficient evidence that "the use of three retirees  
19 began a process of erosion and eventual elimination of the court officers union by loss  
20 of work and member displacement." Id. at 387 (internal quotations omitted). The Court  
21 highlighted that the court administrator had explicitly hired retired guards on a part-time

1 basis to supplement the shortage of regular, full-time workers. Id. at 387.<sup>4</sup> In contrast,  
2 Mackan is not a supplemental, part-time employee. Rather, he was transferred  
3 permanently to ISD and serves as the Principal Administrative Assistant. Mackan was  
4 duly sworn in as an animal inspector and conducted 79% of the animal quarantines  
5 from September 14, 2016 to October 17, 2017. No evidence or testimony was  
6 presented that Mackan's position was temporary or would be reduced to part-time. To  
7 the contrary, the evidence presented at hearing suggested that Mackan would continue  
8 performing animal quarantine duties indefinitely. These facts indicate that, by  
9 transferring quarantine duties to Mackan, the City has begun a process of eroding  
10 bargaining unit members' animal quarantine duties, which is an essential function of the  
11 Dog Officer's job description. This is not comparable to the situation that existed in  
12 CJAM, where the Court explicitly found that there was no evidence that the retirees  
13 were displacing the bargaining unit members from their primary job function, and  
14 instead were performing duties that were "supplemental, not substitutional." 79 Mass.  
15 App. Ct. at 386 n.12. The assignment of quarantine duties to Mackan is more  
16 substantial and permanent, and thus in line with the CERB's longstanding standard  
17 regarding the erosion of bargaining unit duties. Compare Boston School Committee, 16  
18 MLC 1012, 1016-17, MUP-7210 (June 5, 1989) (no adverse impact when employer  
19 temporarily contracted with a private company to perform bargaining unit work for three

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<sup>4</sup> 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.

1 months) with Boston School Committee, MUP-13-2551 (June 6, 2014) (transfer of  
2 bargaining unit work eventually led to permanent loss for the bargaining unit to do the  
3 work).

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

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

1 established that the work would go undone but for the hiring of the per diem guards. Id.  
2 at 387.

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

### 13 **Notice and Opportunity to Bargain**

14 Finally, notice and opportunity to bargain is required prior to the transfer of  
15 bargaining unit work. Lowell School Committee, 28 MLC 29, 31, MUP-2074 (June 22,  
16 2001). As mentioned earlier, no evidence was presented that the City provided to the  
17 Union prior notice and an opportunity to bargain to resolution or impasse over the  
18 decision to transfer animal quarantine duties to non-bargaining unit personnel and the  
19 impacts of that decision on employees' terms and conditions of employment.

### 20 CONCLUSION

21 Based on the record and for the reasons explained above, I find that the City  
22 violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by transferring

1 animal quarantining duties to non-bargaining unit personnel without providing the Union  
2 with prior notice and an opportunity to bargain to resolution or impasse over the  
3 decision and the impacts of that decision on employees' terms and conditions of  
4 employment.

5 ORDER

6 WHEREFORE, based on the foregoing, it is hereby ordered that the City of  
7 Boston shall:

8 1) Cease and desist from:

- 9 a) Transferring bargaining unit work to non-bargaining unit employees without first  
10 bargaining to resolution or impasse with the Union over the decision to transfer  
11 animal quarantine duties and the impact of that decision on bargaining unit  
12 members' terms and conditions of employment; and  
13  
14 b) In any like manner, interfering with, restraining and coercing its employees in any  
15 right guaranteed under the Law.  
16

17 2) Take the following affirmative action that will effectuate the purpose of the Law:  
18

- 19 a) Restore the status quo ante by returning the animal quarantine duties performed  
20 by Mackan to the Union's bargaining unit members until the City satisfies its  
21 obligation to bargain over the decision to transfer animal quarantine duties and  
22 the impacts of that decision on employee's terms and conditions of employment;  
23  
24 b) Upon request, bargain in good faith with the Union to resolution or impasse over  
25 the decision to transfer animal quarantine duties to non-bargaining unit personnel  
26 and the impacts of that decision on employees' terms and conditions of  
27 employment;  
28  
29 c) Sign and post immediately in conspicuous places where employees usually  
30 congregate or where notices to employees are usually posted, including  
31 electronically, if the Employer customarily communicates to its employees via  
32 intranet or e-mail, and maintain for a period of thirty (30) consecutive days  
33 thereafter signed copies of the attached Notice to Employees; and  
34

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

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

A handwritten signature in cursive script, appearing to read "Will Evans", is written over a horizontal line.

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.





**THE COMMONWEALTH OF MASSACHUSETTS  
NOTICE TO EMPLOYEES 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 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, 1<sup>st</sup> Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).