

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	
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COMMONWEALTH OF MASSACHUSETTS	*	Case No. SUP-09-5485
DEPARTMENT OF CHILDREN & FAMILIES	*	
	*	
and	*	Date Issued:
	*	
ALLIANCE, AFSCME/SEIU, LOCAL 509	*	August 2, 2011
	*	

Hearing Officer:

Susan L. Atwater, Esq.

Appearances:

Martha Lipchitz O'Connor, Esq. - Representing the Commonwealth of
Massachusetts/DCF

Tod A. Cochran, Esq. - Representing the Alliance, AFSCME/SEIU
Local 509

HEARING OFFICER'S DECISION AND ORDER

SUMMARY

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2 The issue in this case is whether the Commonwealth of Massachusetts, acting
3 through the Department of Children and Families (Employer or DCF), violated Section
4 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter
5 150E (the Law) by failing to bargain in good faith over the impacts of its decision to
6 implement a new service delivery model called the "Integrated Casework Practice
7 Model" (ICPM). I find that the Employer violated the Law as alleged.

STATEMENT OF THE CASE

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On April 15, 2009, the Alliance, AFSCME/SEIU Local 509 (Union) filed a charge of prohibited practice with the former Division of Labor Relations (DLR)¹ alleging that the Employer had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by implementing a new service delivery model without giving the Union prior notice and an opportunity to bargain over its impacts on employee terms and conditions of employment. The Union filed an amended charge on May 28, 2009. Following an investigation, the DLR issued a complaint of prohibited practice on December 9, 2009. The Employer filed an answer to the complaint on December 16, 2009.

I conducted a hearing on June 3, 2010 and June 7, 2010 at which both parties had the opportunity to be heard, to examine witnesses and to introduce evidence. The Employer and the Union filed timely post-hearing briefs. Based on the record, which includes witness testimony, my observation of the witnesses' demeanor, stipulations of fact, and documentary exhibits; and in consideration of the parties' arguments, I make the following findings of fact and render the following opinion.

STIPULATIONS OF FACT

1. The Commonwealth of Massachusetts is a public employer within the meaning of Section 1 of Chapter 150E of the Massachusetts General Laws ("the Law").
2. SEIU, Local 509 is an employee organization within the meaning of Section 1 of the Law.
3. SEIU, Local 509 and the Commonwealth are parties to a Collective Bargaining Agreement ("the Agreement") which is currently in effect for the period December 31, 2009 – December 31, 2011.

¹ Pursuant to Chapter 3 of the Acts of 2011, the Division of Labor Relations is now the Department of Labor Relations.

- 1 4. On February 26, 2009, the Department of Children and Families [DCF] issued
2 the first of a series of guidelines for its Integrated Casework Practice Model
3 ("ICPM") setting forth changes in the manner and method of DCF's delivery of
4 service.
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- 6 5. The Union filed demands to bargain over this ICPM on March 3 and 6, 2009.
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- 8 6. DCF Commissioner Angelo McClain sent a response to these demands to
9 bargain on March 20, 2009.
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- 11 7. The parties have engaged in approximately two meetings a month over this
12 ICPM since April 2009. DCF has characterized these meetings as bargaining
13 sessions.
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- 15 8. In August 2009, the parties entered into a Memorandum of Agreement
16 regarding aspects of the ICPM.
17
- 18 9. During the course of these twice monthly sessions with the Union, DCF has
19 continued to make changes to the ICPM Model with input from the Union.
20 DCF has not fully implemented the ICPM as of May 14, 2010.
21
- 22 10. The Union filed the instant charge on April 15, 2009 and amended charge on
23 May 28, 2009.
24
- 25 11. The organizational structure of the Department of Children and Families is as
26 follows:
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 - 28 a. a. Central Office is located at 24 Farnsworth Street, Boston, MA.
29 Centralized administrative and support functions make up the Central
30 Office staff (i.e. the Commissioner's staff, field operations, policy and
31 practice support, fiscal operations, training services, program services,
32 legal services, human resources, etc.)
33
 - 34 b. The "Field" is broken into six Regions. Within each Region are Area
35 Offices. There are twenty-nine (29) Area Offices.
36
 - 37 c. Each Region is managed by a Regional Director who oversees regional
38 operations and Area Offices. The Regional Directors report to the Deputy
39 Commissioner of Field Operations.
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 - 41 d. Each Area Office is managed by an Area Director who oversees local or
42 area operations. The Area Directors report to a Regional Director.
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 - 44 e. The Regions and Area Offices that are assigned within a Region are as
45 follows:
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- i. **Region 1/Western Region** – The Western Regional Office is located in Springfield. The following Area Offices are within Region 1:
 - 1. Pittsfield Area Office
 - 2. Greenfield Area Office
 - 3. Holyoke Area Office
 - 4. Robert Van Wart Area Office (located in Springfield)
 - 5. Springfield Area Office

- ii. **Region 2/Central Region** – The Central Regional Office is located in Worcester. The following Area Offices are within Region 2:
 - 1. North Central Area Office (located in Leominster)
 - 2. South Central Area Office (located in Whitinsville)
 - 3. Worcester East Area Office
 - 4. Worcester West Area Office

- iii. **Region 3/Northeast Region** – The Northeast Regional Office is located in Lawrence. The following Area Offices are within Region 3:
 - 1. Lowell Area Office
 - 2. Lawrence Area Office
 - 3. Haverhill Area Office
 - 4. Cape Ann Area Office (located in Salem)
 - 5. Lynn Area Office

- iv. **Region 4/Metro Region** – The Metro Regional Office is located in Arlington. The following Area Offices are within Region 4:
 - 1. Malden Area Office
 - 2. Framingham Area Office
 - 3. Cambridge/Somerville Area Office (located in Cambridge)
 - 4. Arlington Area Office
 - 5. Coastal Area Office (located in South Weymouth)

- v. **Region 5/Southeast Region** – The Southeast Regional Office is located in Brockton. The following Area Offices are within Region 5:
 - 1. Taunton/Attleboro Area Office (located in Taunton)
 - 2. Brockton Area Office
 - 3. Fall River Area Office
 - 4. New Bedford Area Office
 - 5. Cape Cod Area Office (located in Hyannis)

6. Plymouth Area Office

vi. **Region 6/Boston Region** – The Boston Regional Office is located in Dorchester. The following Area Offices are within Region 6:

1. Hyde Park Area Office
2. Dimock Street Area Office (located in Roxbury)
3. Park Street Area Office (located in Dorchester)
4. Harbor Area Office (located in Chelsea)

12. SEIU Local 509 members are assigned to each of the work locations noted in paragraph e above. The following SEIU Local 509 titles are utilized at the DCF:

- a. Social Worker A/B
- b. Social Worker C
- c. Social Worker D
- d. Case Reviewer A/B
- e. Community Resource Developer A/B
- f. Community Resource Developer C
- g. Social Worker Technician A/B
- h. Special Investigator, DSS A/B

13. The titles of Social Worker A/B and Social Worker C are used in numerous functions throughout the agency and are generally used interchangeably for similar functions. Individuals in these titles generally perform the following functions:

- a. Screening/Intake
- b. Investigator
- c. Assessments
- d. Ongoing Case Management

14. The title of Social Worker D is generally used for the function of supervisor of lower level social workers (i.e. Social Workers A/B, Social Workers C and Social Worker Technicians.)

15. Social Worker D's are generally supervised by managers called "Area Program Managers" or "APM's"; APM's are supervised by Area Directors; Area Directors are supervised by Regional Directors.

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FINDINGS OF FACT2 Pre-ICPM

3 DCF is the Massachusetts state agency charged with promoting the safety of
4 children and the well-being of families.² DCF becomes involved with families after
5 there is an allegation of child abuse or neglect or after a family voluntarily requests
6 assistance. Commissioner Angelo McClain (McClain), appointed in June 2007, heads
7 DCF. DCF employs bargaining unit members holding a variety of social worker and
8 supervisor positions.

9 In 2002, DCF began moving toward a "strength-based" approach to working with
10 families and undertook a variety of planning efforts toward that end.³ The first phase of
11 DCF's strengths-based efforts, entitled "Working with Families Right From the Start"
12 (WWFRS), began in September of 2004. WWFRS explored how to engage families
13 from the start of their involvement with DCF and included a design team comprised of
14 bargaining unit members to recommend improvements in case work practice. The
15 design team issued a report in September of 2005 which included recommendations
16 regarding screening, signs of safety, and differential response.⁴

² DCF was formerly known as the Department of Social Services (DSS). It became known as DCF in July 2008.

³ A strength-based approach emphasizes a family's strengths and supports over its deficits.

⁴ "Differential response" is a decision-making process that targets the most appropriate response to an allegation of abuse/neglect and enables screened-in cases to be assigned for assessment rather than investigation. Providing an alternative to an investigation allows DCF to engage families more quickly when the reported concern does not warrant an investigation.

1 Phase Two of DCF's strengths-based approach, entitled "Family Engagement
2 Model," extended the planning developed in WWFRS. The Phase Two report issued in
3 December of 2006 and included additional recommendations for a differential response
4 model, tools for assessing danger and risk, and family entry into DCF.

5 In 2006, in response to specific tragic cases of child maltreatment, the
6 Legislature held hearings and eventually recommended changes to DCF's casework
7 practices.⁵ When Governor Deval Patrick appointed McClain in the summer of 2007,
8 the Governor issued a mandate to transform DCF. Once appointed, McClain began
9 visiting area offices and reviewing DCF practices and policies, including WWFRS and
10 the Family Engagement Model. At approximately the same time, the Federal
11 Administration for Children and Families conducted an audit of DCF. The audit showed
12 that DCF was substantially in compliance with six out of seven systematic measures,
13 but needed improvement in six out of seven outcome measures. The January 2008
14 final audit report recommended, among other things, that DCF create a defined
15 casework model and standardize safety and risk assessment.

16 Faced with the Governor's mandate, three high profile child fatalities, state and
17 federal recommendations for a defined casework practice model, and feedback from
18 DCF area offices, it became clear to McClain that DCF needed operational change.
19 Accordingly, in May of 2008, McClain decided to move toward reforming casework
20 practice. DCF then convened five planning teams and established a Steering
21 Committee to oversee the planning process, hear the planning teams'

⁵ In 2008, the Legislature passed Chapter 176 of the Acts of 2008, known as the Child Welfare Act of 2008.

1 recommendations, and make final recommendations about casework practice changes.
2 The Steering Committee held a “kick-off” meeting on June 18, 2009. It held subsequent
3 meetings in June and September of 2008 and January or February of 2009.

4 **ICPM Implementation**

5 Between June and November of 2008, DCF decided to implement a new
6 strengths-based casework practice approach. In November of 2008, DCF presented
7 the new casework practice approach to families, service providers, and DCP staff
8 members, supervisors, and managers at various regional forums. At these regional
9 forums, DCF explained the direction and general areas that DCF believed it needed to
10 move toward and solicited community feedback. DCF displayed a PowerPoint
11 presentation describing various aspects of the new approach, such as: the “DCF
12 Strategic Planning Process,” “Team Recommendations,” “Steering Committee Identified
13 Major Themes,” “Major Opportunities for Improvement,” and “Year 1 Action Steps.”
14 Copies of the PowerPoint presentation were available on the DCF intranet following the
15 forums, and managers were directed to share the PowerPoint presentation to staff who
16 did not attend the forums.

17 The PowerPoint presentation also contained an integration map chart for the
18 strategic plan implementation and detailed the “Year 1 Action Steps.” These action
19 steps included implementation of extended screening and a differential response, and
20 noted that non-emergency screening decisions would be made within three business
21 days. However, the PowerPoint presentation did not indicate how the new approach or

1 the extended time frames would specifically affect bargaining unit employees' workload
2 or safety and did not detail new or changed job duties.⁶

3 DCF made the decision on the ICPM model in December of 2008 and January of
4 2009. At that time, ICPM was not a written policy, but a label for various practice
5 components which, in January and February of 2009, became known as the ICPM. The
6 Department planned to implement the ICPM in five stages: Planning and Design
7 (December 2008 - March 2009); Pre-Implementation (March - June 2009);
8 Consolidation of Learning (June 2009); Initial Implementation (July - September 2009);
9 and full implementation (October - November 2009).

10 DCF issued the first pre-implementation ICPM practice guidance memo on
11 February 26, 2009 (February Memo). The February Memo was the first DCF
12 communication that specifically identified changes and additions to employee job duties.
13 The February Memo described the ICPM and included diagrams, an implementation
14 structure and schedule, and guidance tips for DCF employees. It also described new
15 duties for bargaining unit members. Specifically, it indicated that the extended
16 screening component of the ICPM would include additional contacts with the family and
17 "collaterals."⁷ Thereafter, DCF began to issue a series of Interim Practice Guidance
18 memos that described various casework practice changes.

⁶ Jan Nisenbaum (Nisenbaum) testified that she described the new casework practice model at the regional forums, and she spoke to staff about what the differential response would mean and what each action step described in the PowerPoint presentation would look like. However, she did not testify that she described the workload, job duty or safety impacts to staff members or union officials.

⁷ Collateral contacts include teachers, schools, counselors, therapists, doctors, nurses and neighbors.

1 ICPM Impacts⁸

2 The ICPM impacted employee workloads by requiring employees to perform
3 certain new duties.⁹ The new duties vary depending on whether the employee is
4 screening reports of abuse or neglect, conducting an initial assessment of a screened-in
5 report of concern, providing ongoing services, or working in a supervisory capacity.

6 The new extended screening component increases the time frame for responding
7 to non-emergency reports in order to gather additional information. New screening
8 tasks include: contacting collaterals to gather information regarding the safety or risk to
9 the children or other relevant conditions in the home; and a telephone, office or home
10 visit¹⁰ to determine the need for DCF services.¹¹ Bargaining unit members who

⁸ The parties jointly compiled and introduced a chart depicting some of the casework changes that the ICPM instituted. Various witnesses testified that they participated in drafting the chart. As a result, I have resolved discrepancies between witness testimony and the stipulated chart in favor of the facts contained in the chart.

⁹ The record evidence is insufficient to establish that the ICPM impacted "weighted" workloads.

¹⁰ Home visits only take place in rare circumstances.

¹¹ The ICPM requires screeners to draft a summary of a reported family's prior involvement with DCF and to complete CORI checks. Witnesses provided conflicting testimony over whether screeners had previously been required to document a family's history of involvement with DCF or whether summarizing family histories was a new duty. Documentary evidence shows that, prior to ICPM, employees who screened reports of abuse/neglect were required to check DCF records for a family's history and to document their findings in FamilyNet, DCF's computerized case management system. The evidence does not show that ICPM family history summaries differ from the family histories previously recorded in FamilyNet, and consequently, I find that drafting family histories was not a new duty. Additionally, the evidence shows that although screeners are now required to complete CORI checks, it is an insignificant amount of new work.

1 supervise screeners are now required to read additional reports, check the accuracy of
2 reports and ensure that collaterals are contacted.

3 The initial assessment is part of the differential response - a new and different
4 response to a screened-in report of abuse or neglect. Prior to the ICPM, all screened-in
5 reports were assigned for investigation. Post ICPM, screened-in reports involving
6 "lower levels" of child neglect are assigned for an initial assessment instead.¹² Social
7 workers providing ongoing family services perform this new duty in addition to their
8 regular case loads. Initial assessments require employees to contact the family within
9 two working days of assignment, and visit the home and view the children within four
10 working days. Employees must conduct at least two face-to-face interviews with the
11 parent/parent substitutes and the reported/referred child(ren) - at least one of which
12 must occur in the home; at least one face-to-face interview each with other household
13 members, including all children who reside in the home; and at least one face-to-face
14 interview with any parent/parent substitute who does not reside with the
15 reported/referred child. Employees can complete a "Danger and Safety Assessment
16 Tool" and a "Risk Assessment Tool"¹³ based on the information obtained and must

¹² DCF assigns a screened-in report case for an initial assessment where there is a reasonable cause to believe that the child(ren) are impacted by caretaker neglect, but there is no immediate danger to life, health or physical safety. DCF does not identify a perpetrator in an initial assessment. DCF becomes involved to assess the safety and family needs and facilitate early family engagement.

¹³ The parties dispute whether these tools are mandatory or voluntary, and this issue is the subject of a separate unfair labor practice charge: SUP-10-5561, Commonwealth of Massachusetts. The parties stipulated that the tools are "recommended best practice," and that "practice guidance provided guidance on completion of tools." Because this issue will be decided in another case, I reach no conclusions on this issue, except to note that FamilyNet references the use of these tools.

1 "safety map" with the family to identify danger(s) to the child, family strengths, and the
2 conditions necessary to ensure child safety and end DCF involvement. If necessary,
3 the employee develops an Interim or Emergency Service Plan with the family that
4 identifies goals, objectives, and necessary tasks. Initial assessment activities must be
5 documented in Family Net.

6 The new requirements of the initial assessment could impact the safety of
7 employees who have not received DCF training, depending on the safety of the setting
8 in which they are conducting assessment activities. Workers performing initial
9 assessments who have not received investigation training may be unaware of how to
10 protect themselves in certain dangerous situations.¹⁴

11 The ICPM did not change investigators' fundamental job duties. Prior to, and
12 after the ICPM, investigators are required to interview all children, parents, parent
13 substitutes, and collateral contacts. However, the ICPM expanded the time frame for
14 bargaining unit members to complete non-emergency investigations from 10 to 15 days.
15 For emergency investigations, the ICPM increased the completion time frame from
16 twenty-four hours to five business days. As a result, employees must contact more
17 people as part of the investigation. Additionally, employees may now complete the
18 Danger and Safety Assessment Tool and Risk Assessment Tool based on the
19 information they obtain, and this duty is recommended as "best practice."

¹⁴ DCF began to offer initial assessment training in August of 2009. However, the record doesn't indicate whether the training includes the same safety training that DCF provides for investigators. Training is voluntary, and not all employees have elected to participate.

1 Union officials participated on some of the planning teams that preceded
2 implementation of the ICPM. Union Chapter President Zevorah Ortega-Bagni (Bagni)
3 participated on the WWRFS and the Family Engagement Model design teams. Bagni
4 was also a member of the ICPM Steering Committee and, in that capacity, attended two
5 of the meetings that were held between June and September of 2008. As a result of
6 participating on the Steering Committee, Bagni knew that DCF sought to develop a new
7 case practice model, but she did not know about the specific changes to employee
8 duties, safety, and workload that the ICPM generated. Bagni attended a regional forum
9 in November of 2008.

10 DCF did not offer to bargain with the Union over any aspect of the ICPM before
11 deciding to implement it. Rather, McClain invited Bagni to participate on the Steering
12 Committee to represent the Union as DCF developed the new casework practice model.
13 Prior to April of 2009, there was no other vehicle for Union input into the ICPM other
14 than Bagni's participation on the Steering Committee.

15 On or about February 5, 2009, DCF notified the Union of its intent to begin
16 implementing the ICPM. Prior to February 2009, DCF did not notify the Union of the
17 impacts of the ICPM on employee workload, job duties, or safety. DCF gave Bagni a
18 copy of the February Memo delineating certain specific changes to employee duties in
19 February of 2009, at the same time that DCF distributed the memo to other staff
20 members. DCF subsequently gave the Union practice guidance memos, but never a
21 comprehensive ICPM policy or guidance memo.

1 **The Union's Bargaining Demands**

2 On March 3, 2009, Union President Michael Grunko forwarded a letter to Office
3 of Employee Relations Attorney Mark D'Angelo demanding to bargain over the workload
4 impact of DCF's plan to implement additional fields in the Family Net system. On March
5 6, 2009, Grunko forwarded a second letter to D'Angelo that states in pertinent part as
6 follows:

7 On or about February 5, 2009, the Department notified Local 509 of its
8 intent to begin implementing its "Integrated Casework Practice Model" also
9 known as "Differential Response."

10
11 Local 509 demands to bargain over this change and its impact on our
12 bargaining unit members. The Union further demands that the
13 Department of Children and Families cease and desist from implementing
14 its "Integrated Casework Practice Model/Differential Response" until this
15 bargaining is completed. The Union further demands that the Department
16 of Children and Families cease and desist from changing or restructuring
17 any existing units and/or job functions until this bargaining is completed.

18 ...
19
20 By letter dated March 20, 2009, McClain responded to the Union's demand to
21 bargain. McClain's letter, which he addressed to Bagni, stated in pertinent part as
22 follows:

23 This letter serves as the Department's response to your request to delay
24 (move forward) the implementation date for the integrated casework
25 practice and differential response model...As you know, our
26 implementation includes five stages....

27
28 I appreciate the spirit in which your request is made, please know that I
29 am also committed to a process that achieves good faith bargaining. To
30 that end, I have asked Doug Shatkin to schedule bargaining meetings
31 over the next four months to provide a consistent forum wherein
32 challenges and opportunities can be openly discussed. As you know, we
33 have already made adjustments to the model based on suggestions that
34 you made (during steering committee meetings, individual meetings with
35 me, or during implementation meetings).
36

1 For now, I have decided to proceed with the pre-implementation; based on
2 how it goes, we will make a "go/no-go" decision regarding the initial
3 implementation and full implementation. Thank you for your request; your
4 input, and the input of 509 members, is valued.
5

6 Beginning in April of 2009, DCF and the Union met approximately two times per
7 month to discuss the impact of the ICPM implementation. In an April 19, 2009 meeting,
8 the Union demanded that DCF cease ICPM pre-implementation until there were
9 "proper" negotiations, and it reserved its rights and responsibilities under the Law and
10 its collective bargaining agreement. The Employer declined to cease implementation.
11 The Union stated that it would go forward in good faith to address concerns and
12 workload issues, and it raised the issue of holding employees harmless for casework
13 errors during the pre-implementation and implementation stages.

14 On August 13, 2009, the Union and the Employer executed a Memo of
15 Understanding (MOU) that provides as follows:

16 Whereas the Commonwealth and the Alliance AFSCME/SEIU, Local 509,
17 SEIU are parties to a Collective Bargaining Agreement; and
18

19 Whereas the Department of Children and Families ("the Department")
20 plans to implement changes to policy and practice generally known as an
21 Integrated Casework practice Model ("Model"); and
22

23 Whereas the Department has begun this Model through a pre-
24 implementation phase effective on March 1, 2009 and plans to continue
25 the pre-implementation phase through on or after June 30, 2009; and
26

27 Whereas, the Union has filed demands to bargain (two dated March 3,
28 2009 and two dated March 6, 2009) over the impact of the changes; and
29

30 Whereas, the Department plans to begin initial implementation of this
31 Model beginning on or after July 1, 2009 through on or after September
32 30, 2009; and
33

34 Whereas the Department plans to realize full implementation on or after
35 October 1, 2009 through on or after December 31, 2009; and
36

1 Whereas, changes instituted by the Department with the new Model may
2 impact the performance and abilities of social workers to complete
3 casework activities because of unfamiliarity with new methodology,
4 training needs and tools; and
5

6 Whereas, these factors may result in a social worker's inability to complete
7 all casework activities in a timely manner, the parties agree to the
8 following:
9

10 1. The Department will provide adequate training and guidance to all
11 employees whose positions are affected by the implementation of the
12 Model. All trainings will be shared with the Union prior to training
13 implementation to provide the Union with an opportunity to comment.
14

15 2. The Department will not discipline any Bargaining Unit 8 members for
16 reasonable procedural or judgment errors made during the pre-
17 implementation and implementation periods, if that employee makes a
18 good faith effort to learn and understand the new Model by utilizing
19 available training and guidance tools. During the pre-implementation and
20 implementation periods, employees who are having difficulty adapting to
21 the Model despite good faith efforts will have available a range of
22 individual supports including supervision, Area Implementation Teams,
23 Regional Facilitators, guidance documents and further training. Further,
24 the Department agrees that an employee's recognition of his/her difficulty
25 adapting to the new Model will not be construed as an overall inability to
26 complete their duties.
27

28 3. The parties acknowledge that casework practice and policy changes
29 may impact caseload and weighted workload standards within
30 Supplemental Agreement Q of the Collective Bargaining Agreement. The
31 parties agree to evaluate the impact of changes from the Model on a
32 worker's time and workload every ninety work days and, if needed, will
33 discuss the impact and possible remedy at the State-wide
34 Labor/Management meeting.
35

36 4. The parties will continue to meet to discuss the impact of the Model's
37 implementation according to the previously agreed negotiation schedule
38 and as otherwise mutually agreed upon.
39

40 5. Nothing in this Memorandum of Understanding shall waive the
41 provisions of Supplemental Agreement Q of the Collective Bargaining
42 Agreement. The terms of this Agreement are not intended to modify or
43 amend any provision of the Collective Bargaining Agreement including
44 Supplemental Q.
45

1 6. On an ongoing basis, the Department will provide the Union with all
 2 data utilized to assess the potential impact of the Model on workers'
 3 workloads and ability to complete all related casework activities.
 4

5 7. The parties agree that any changes in practice or policy as the result of
 6 this Model will not have adverse impact upon any reasonable
 7 accommodation provided to any employee by the Department's
 8 Reasonable Accommodations Committee. The parties agree that
 9 employees who are currently assigned to the screening for intake function
 10 upon the execution of this agreement will not be involuntarily reassigned
 11 from the function unless it is due to operational necessity or just cause.
 12 Any involuntary reassignments for reasons other than just cause will be
 13 conducted in accordance with Article 14 of the parties' collective
 14 bargaining agreement.
 15

16 8. The parties understand that upon final implementation of the Model, the
 17 Department's assessment of requests for reasonable accommodations will
 18 continue to be in accordance with the American's with Disabilities Act,
 19 M.G.L. c.151B and the essential functions of the employee's job
 20 responsibilities at that time.
 21

22 9. The parties agree that this Memorandum of Understanding will remain
 23 in effect for a period of six months following full implementation of the
 24 Model in all of the area offices or June 30, 2010, whichever date is later.
 25 By entering into this agreement neither party waives any right or claim of
 26 defense concerning any other matter, except as provided for in this
 27 Memorandum of Understanding.
 28

29 OPINION

30 The Law requires a public employer to provide the exclusive collective bargaining
 31 representative with an opportunity to negotiate before changing wages, hours, working
 32 conditions or standards of productivity and performance. Lowell School Committee, 23
 33 MLC 216, 217 (1997). However, the Law does not require the public employer to
 34 bargain about decisions that fall within its exclusive managerial prerogative. Town of
 35 Dedham, 21 MLC 1014, 1022 (1994). Yet, even when a public employer is excused
 36 from bargaining over a decision that is a management prerogative, that employer still

1 has the obligation to bargain with the union over the impacts its decision will have on
2 mandatory subjects of bargaining, before it implements that decision. Id. at 1023.

3 The Complaint of Prohibited Practice in this case does not allege that DCF
4 unlawfully failed to bargain over the decision to implement the ICPM. Rather, the
5 Complaint alleges that the Employer failed to bargain over the impacts of the decision to
6 implement the ICPM. Thus, the issue I consider is whether DCF violated Section 10
7 (a)(5), and derivatively, Section 10(a)(1) of the Law by failing to bargain in good faith
8 over the ICPM's impacts on bargaining unit members' terms and conditions of
9 employment, including workload, job duties, and safety.

10 The Employer does not argue that it satisfied its bargaining obligation by
11 bargaining to impasse or resolution prior to implementing the ICPM.¹⁵ Instead, DCF
12 defends its conduct by arguing that the Union: 1) filed an untimely charge; 2) waived by
13 inaction its right to bargain over the impact of the ICPM; and 3) agreed in the August
14 2009 MOU to permit ICPM implementation. I am not persuaded by these arguments.

15 As a threshold issue, I consider whether the charge was untimely filed. DLR
16 Rule 15.03, 456 CMR 15.03, states:

17 Except for good cause shown, no charge shall be entertained by the [DLR]
18 based upon any prohibited practice occurring more than six months prior
19 to the filing of a charge with the [DLR].
20

21 The six month period of limitations begins to run when the adversely affected party
22 receives actual or constructive notice of the conduct alleged to be an unfair labor
23 practice. Town of Lenox, 29 MLC 51, 52 (2001).

¹⁵In his March 20, 2009 letter, McClain expressly declines to delay ICPM implementation in response to the Union's bargaining demand.

1 The Employer contends that the period of limitations began to run at the June
2 18, 2008 Steering Committee “kick-off” meeting when DCF signaled its intent to
3 transform the way it delivers services to children. The flaw in this argument is that the
4 Employer’s announcement of its intent to change service delivery is not a violation of
5 Law because it had no obligation to bargain over that decision. See Commonwealth of
6 Massachusetts, 25 MLC 201, 206 (1999) (DSS decision to provide more frequent case
7 reviews, social worker visits, and better track family progress of families is a level of
8 services decision and not a mandatory subject of bargaining). The conduct alleged to
9 violate the Law is the implementation of the ICPM without giving the Union prior notice
10 and an opportunity to bargain to impasse or resolution over the impacts of the ICPM on
11 employee terms and conditions of employment. According to McClain, DCF made the
12 decision on the ICPM in December of 2008 and January of 2009. The new service
13 delivery model became known as the ICPM in January and February of 2009, and DCF
14 issued the first practice guidance memo on February 26, 2009. Because the Union filed
15 both its original and amended charge within six months of those time frames, the
16 charges were timely.

17 I next consider whether the Union waived by inaction its right to bargain over the
18 workload, job duty and safety impacts of the ICPM. Employee safety, job duties, and
19 workload are mandatory subjects of bargaining. Commonwealth of Massachusetts, 28
20 MLC 36, 40 (2001) (job duties and workload); City of Boston, 30 MLC 38, 40 (2003)
21 (safety). DCF’s decision to implement the ICPM impacted all of these issues, and
22 consequently, DCF was obligated to bargain with the Union over these impacts prior to
23 implementing the ICPM.

1 A union waives its right to bargain by inaction if the union: 1) had actual
2 knowledge or notice of the proposed action; 2) had a reasonable opportunity to
3 negotiate about the subject; and 3) unreasonably or inexplicably failed to bargain or
4 request bargaining. Town of Hudson, 25 MLC 143, 148 (1999). Notice will be imputed
5 to a union when a union officer with authority to bargain is first made aware of the
6 employer's proposed plan, and the information conveyed to the employee organization
7 must be sufficiently clear for the employee organization to make a judgment as to an
8 appropriate response. Id. at 148.

9 The job duty and workload impacts of the ICPM for employees performing certain
10 functions are largely undisputed. The evidence demonstrates that the extended
11 screening and initial assessment components impose new job duties for screeners and
12 ongoing case workers.¹⁶ Post-ICPM screening tasks include contacting collaterals, and
13 conducting a telephone interview, office or home visit to determine the need for DCF
14 services. Bargaining unit members who supervise screeners are now required to
15 review additional reports and ensure that collaterals are contacted. New duties
16 stemming from the initial assessment include: contacting the reported family, visiting the
17 home, viewing the children; interviewing the parent/parent substitutes, reported
18 child(ren), and other household members; safety mapping with the family; developing
19 interim or emergency service plans; and documenting activities in FamilyNet.

¹⁶ The ICPM did not impact investigators' job duties or workload. The ICPM extended the time frames for completing investigations to expand the number of individuals to be contacted, but the investigators' job duties did not change. The Union acknowledges that the number of investigations has not increased.

1 Although initial assessments are completed for low level cases of neglect, they
2 pose a level of risk to employees who conduct the assessments without having received
3 safety training. Although DCF began to provide assessment training in August of 2009,
4 it is not clear that the training covered the issue of employee safety or that DCF negated
5 the safety risk in any other way. Consequently, I find that conducting initial
6 assessments impacts employee safety. See generally, City of Boston, supra (possibility
7 of robbery affected safety of employee assigned to transport money to a bank.)

8 The Employer contends that DCF gave the Union actual notice in June of 2008
9 that it was going to transform the way it delivered services to children when, at the kick-
10 off meeting, it tasked the Steering Committee with guiding the strategic planning
11 process, reviewing recommendations from planning teams, and prioritizing their
12 recommendations to form the basis of DCF's plan of action. Bagni's attendance at this
13 meeting, the Employer argues, gave the Union the requisite notice, and thus the Union
14 waived its bargaining rights by waiting to demand bargaining until March of 2009.

15 The error here is that the Employer assumes that the Union was obligated to
16 demand bargaining when it first learned that the Employer intended to change its
17 method of delivering services. Although the Union could have demanded to bargain at
18 that time over any impacts that may have subsequently flowed from a change in service
19 delivery, the Union was not obligated to demand bargaining until it received notice or
20 acquired actual knowledge of the changes in employee working conditions that the
21 Employer proposed to implement. Commonwealth of Massachusetts, 28 MLC 239
22 (2002) (notice that employer intended to improve systems for inmate accountability did
23 not trigger obligation to demand bargaining where employer did not notify union that it

1 intended to change employee job duties); Middlesex County Commissioners, 9 MLC
2 1579 (1983) (obligation to bargain arose when employer warned employees that layoffs
3 would ensure, not when advisory board issued a recommendation to cut staff); Canton
4 School Committee, 7 MLC 1143 (H.O. 1980) (union's obligation to demand bargaining
5 arose after it became apparent that the second part of a remedial reading program
6 impacted employee workload). The Employer does not contend that in June of 2008
7 the Steering Committee publicized the specific changes that it proposed to implement in
8 employee working conditions, and it acknowledges that it convened the Steering
9 Committee to guide the planning process and produce recommendations. At that time,
10 the Steering Committee could not and did not communicate the changes in working
11 conditions that the ICPM would later produce, and the Union was not obligated to
12 demand bargaining over the impacts of the ICPM until it knew what the impacts would
13 be.

14 Further, in June of 2008, DCF had not yet decided to implement the ICPM. At
15 that time, it only knew that it intended to implement a new casework practice approach.
16 DCF made the ICPM decision later, in December of 2008 or January of 2009. It is
17 illogical to suggest that the Union knew or should have known of something in the
18 spring of 2008 that the Employer did not decide until the fall.¹⁷ Although the Union may
19 have known in June that service delivery changes were on the horizon, a union is not
20 required to respond to rumors of proposed changes, speculation or proposals that are
21 so indefinite that no response could be formulated. City of Gardner, 10 MLC 1218,

¹⁷ For this reason, I do not consider any suggestion that the Union should have known of the ICPM impacts through Union participation in WWRFSS or the Family Engagement model.

1 1222 (1983). Any details that DCF communicated at the Steering Committee kick-off
2 regarding its service delivery plans were too vague to trigger an obligation to demand
3 bargaining at that time. Consequently, the Union did not waive its bargaining rights by
4 failing to demand bargaining then and waiting until March of 2009.

5 Alternatively, the Employer argues that Bagni's attendance at a regional forum in
6 November of 2008 gave the Union sufficient notice of the ICPM to trigger its obligation
7 to demand bargaining. Specifically, the Employer contends that the Steering
8 Committee finalized and agreed to the changes at issue in October of 2008, and DCF
9 publicized the components and timeframes of the ICPM at the regional forums. By
10 failing to demand bargaining until March 2009, the Employer argues, the Union waived
11 its bargaining rights.

12 I am not persuaded by this argument either. McClain's testimony that DCF made
13 the ICPM decision in December of 2008 or January of 2009 belies the assertion that the
14 Steering Committee decided to implement it in October of 2008. Although Nisenbaum
15 described the new approach at the November regional forums and identified themes,
16 recommendations, and action steps, there is no evidence that she advised the
17 attendees of the specific employee workload, job duty, and safety changes that were
18 coming. Instead, the Union - through Bagni - learned of the ICPM job duty and
19 workload impacts at the same time the rest of the staff did by reading the interim
20 practice guidance memo distributed on February 26, 2009. The Union promptly filed
21 bargaining demands on March 3 and 6, 2009. Thus, there was no waiver.

22 Finally, the Employer argues that the Union waived its right to impact bargain by
23 entering into the August 2009 MOU. It asserts that the MOU expresses the parties'

1 agreement that DCF would continue to implement the ICPM and even provided
2 timelines for implementation. I find no such agreement in the MOU.

3 As the Employer correctly notes, where an employer raises the affirmative
4 defense of waiver by contract, it bears the burden of demonstrating that the parties
5 consciously considered the situation that has arisen, and the union knowingly and
6 unmistakably waived its bargaining rights. Massachusetts Board of Regents, 15 MLC
7 1265, 1269 (1988). If the language clearly, unequivocally and specifically permits the
8 employer to make the change, no further inquiry is necessary. Peabody School
9 Committee, 28 MLC 19, 21 (2001). If the language is ambiguous, the Commonwealth
10 Employment Relations Board (CERB) will review bargaining history to ascertain the
11 parties' intent. Id.

12 The Employer contends that the parties started bargaining over the Union's initial
13 "hold harmless" proposal and over time, negotiated a broad agreement encompassing
14 other issues. According to the Employer, the parties agreed that DCF would not
15 discipline employees for reasonable judgment errors made while complying with the
16 ICPM, the ICPM would not adversely impact an employee's reasonable
17 accommodation, and employees assigned to the screening function would not be
18 involuntarily reassigned absent an operational necessity. In exchange, the Employer
19 asserts, the Union agreed that DCF would continue to roll out the ICPM according to an
20 agreed-upon schedule, the parties would continue bi-monthly impact bargaining, and
21 the MOU would stay in place six months beyond full implementation. The Employer
22 further argues that the Union's assent to the "hold harmless" provision shows its
23 agreement to permit continued ICPM implementation.

1 I am not persuaded by the Employer's arguments because the evidence does not
2 show that the Union knowingly agreed to waive its right to bargain over the impact of the
3 ICPM prior to the ICPM implementation, and because the language of the MOU does
4 not support the Employer's assertions. The first eight paragraphs of the MOU recite
5 factual statements, i.e. "[w]hereas the Commonwealth and the Alliance AFSCME/SEIU,
6 Local 509, SEIU are parties to a Collective Bargaining Agreement...." The eighth
7 paragraph ends with the words: "the parties agree to the following...." A series of
8 numbered paragraphs follows. This format clearly distinguishes factual assertions from
9 agreements. The language indicating that DCF "plans" to implement the ICPM is
10 lodged in the prefatory factual paragraphs, indicating that the parties acknowledged
11 DCF's plans. This language does not show that the Union agreed to DCF's
12 implementation plans.

13 Second, the language in numbered paragraph four - the parties will continue to
14 meet to discuss the impact of the ICPM implementation - does not clearly, unequivocally
15 and specifically permit the Employer to continue to implement the ICPM prior to the
16 completion of impact bargaining. Rather, this language is consistent with the Union's
17 initial willingness to discuss its concerns and workload issues despite the Employer's
18 refusal to accede to the Union's request to cease implementation.

19 Further, the reservation of rights language in numbered paragraph nine shows
20 that the Union preserved – rather than waived – its impact bargaining rights, and did not
21 agree to permit the Employer to continue implementation absent compliance with its
22 bargaining obligation. Numbered paragraph nine states that: "neither party waives any
23 right or claim of defense concerning any other matter, except as provided for in this

1 Memorandum of Understanding.” This charge of prohibited practice was outstanding
2 when the parties executed the MOU, and the MOU references the Union’s prior
3 bargaining demands. The fact that the MOU did not expressly dispose of this charge
4 demonstrates that the Union did not waive the attendant allegations regarding its right to
5 impact bargain pre-implementation, and it belies the Employer’s assertion that the hold
6 harmless language was exchanged for an agreement to permit implementation.

7 Finally, even if I found the language of the MOU to be ambiguous, the Employer
8 cites no evidence of conversations at the bargaining table to support its quid pro quo
9 argument. Rather, the bargaining history shows that in April of 2009, the Union asked
10 DCF to cease implementation pending the completion of impact bargaining, and DCF
11 declined to do so. The Union then expressly reserved its contractual and statutory
12 rights, but agreed to discuss its issues and concerns. The Union should not be faulted
13 for trying to salvage the situation by agreeing to discuss impact issues in the face of
14 DCF’s unlawful conduct, and it cannot have waived its statutory rights by doing so. In
15 short, the Employer has not met its burden to show that the Union knowingly waived its
16 bargaining rights by executing the August 2009 MOU.

17 CONCLUSION

18 Based on the record and for the reasons explained above, I conclude that the
19 Commonwealth of Massachusetts/DCF violated the Law by failing to bargain over the
20 impact of the ICPM on bargaining unit members’ workload, job duties, and safety.

1 a new supervisory review policy that informed communications between social workers
2 and supervisors and certain aspects of casework practice. Conversely here, the ICPM
3 is a comprehensive service delivery and casework practice model that was designed, in
4 large part, to remedy identified problem areas in the provision of services to vulnerable
5 children and families.

6 Because I find no way to restore the status quo ante to employee job duties and
7 workload without rescinding extended screening and the differential response, I do not
8 order rescission of the workload or job duties impacted by the ICPM. See generally,
9 Taunton School Committee, 28 MLC 378, 391 (2002) (school committee not required to
10 rescind block scheduling model that had already been implemented, but required to
11 refrain from implementing block scheduling the next school year until it satisfied its
12 bargaining obligation). However, DCF must not implement any new aspect of the ICPM
13 until it satisfies its impact bargaining obligations. In addition, DCF must restore the
14 status quo ante for employee safety during the period of impact bargaining by ensuring
15 that all employees performing initial assessments have the opportunity to receive the
16 employee safety training that investigators receive.

17 Order

18 WHEREFORE, based upon the foregoing, it is hereby ordered that the Commonwealth
19 of Massachusetts/DCF shall:

20 1. Cease and desist from:

- 21
22 a) Failing to bargain in good faith by failing to bargain with the Union
23 over the impacts of the ICPM on employee terms and conditions of
24 employment;
25

1 b) In any like or related manner, interfering with, restraining or
2 coercing employees in the exercise of their rights guaranteed under
3 the Law.
4

5 2. Take the following affirmative action that will effectuate the purposes of the Law:
6

7 a) Upon request of the Union, bargain in good faith to agreement or
8 impasse about the impact of the ICPM on employee safety, job
9 duties, and workload;
10

11 b) Refrain from implementing any new aspect of the ICPM until the
12 following occurs:
13

14 1. The Employer and the Union reach agreement regarding
15 the impact of the ICPM on employee safety, job duties and
16 workload;
17

18 2. The Employer and the Union reach impasse after
19 bargaining in good faith;
20

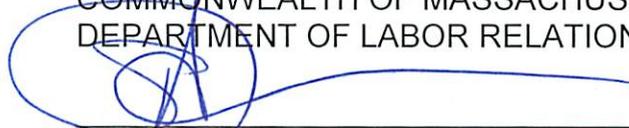
21 3. The Union fails to commence negotiations within five (5)
22 days of receipt of the Employer's notice of its willingness to
23 bargain with the Union;
24

25 c) Restore the status quo ante by ensuring that all employees performing
26 initial assessments receive access to employee safety training;
27

28 d) Post immediately in all conspicuous places where members of the Union's
29 bargaining unit usually congregate and where notices to these employees
30 are usually posted, including electronically, if the Employer customarily
31 communicates to its employees via intranet or email, and maintain for a
32 period of thirty (30) consecutive days thereafter, signed copies of the
33 attached Notice to Employees.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



SUSAN L. ATWATER, ESQ.
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 456 CMR 13.02(1)(j), and 456 CMR 13.15, 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.



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

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 Commonwealth of Massachusetts/Department of Children and Families has violated Section 10(a)(5) and, derivatively Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by failing to bargain over the impact of the ICPM on bargaining unit members' workloads, job duties and safety. The Commonwealth of Massachusetts/Department of Children and Families posts this Notice to Employees in compliance with the hearing officer's order.

Section 2 of M.G.L. Chapter 150E gives public employees the following rights:

- to engage in self-organization; to form, join or assist any union;
- to bargain collectively through representatives of their own choosing;
- to act together for the purpose of collective bargaining or other mutual aid or protection; and
- to refrain from all of the above.

WE WILL NOT fail to bargain in good faith by failing to bargain to agreement or impasse about the impact of the ICPM on employee safety, job duties, and workload.

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

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

- o Upon request of the Union, bargain in good faith to agreement or impasse about the impact of the ICPM on employee safety, job duties and workload;
- o Restore the status quo ante by ensuring that all employees performing initial assessments receive access to employee safety training.
- o Refrain from implementing any new aspect of the ICPM during the period of impact bargaining.

Commissioner Angelo McClain

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, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).