

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

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MASSACHUSETTS COMMISSION)
AGAINST DISCRIMINATION)
)
and)
)
ANGELINA ROMERO-PEART, ET. AL.)
Complainants)
)
v.) DOCKET No. 95-SEM-0046
)
MASSACHUSETTS DEPARTMENT OF)
TRANSITIONAL ASSISTANCE)
Respondent)
_____)

Appearances:

Donald M. Frank, Esq., for Complainants
Thomas E. Noonan, Esq., and Daniel L. LaPage, Esq., for
the Massachusetts Department of Transitional Assistance

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On January 23, 1995, Complainant Ana Andino filed a class complaint charging the Massachusetts Department of Public Welfare k/n/a the Department of Transitional Assistance (hereafter: the Department) with discrimination based on her national origin in violation of Massachusetts General Laws, Chapter 151B, §4(1). Complainant alleged that the Department discriminated against Spanish-English bilingual workers of Latino or Latina heritage¹ in the terms, conditions and privileges of their employment. Com-

¹As used herein, the term "Latino" refers to both males and females.

plainant alleged, among other things, that the Department (1) assigned caseloads to class members that were larger than their monolingual co-workers; (2) burdened class members by requiring them to translate or interpret for their monolingual co-workers in addition to their regular job duties and responsibilities; (3) hired case workers who are bilingual in languages other than Spanish at a higher pay level to compensate them for their bilingual skills.

On March 16, 1999, Investigating Commissioner Dorca I. Gomez ruled that a class action was the most appropriate mechanism for resolving the issue of liability in this case. Commissioner Gomez granted Complainants' motion for class certification and found probable cause to credit the class complaint allegations of discrimination based on national origin. Commissioner Gomez simultaneously denied the Department's request for reconsideration of her probable cause finding, without prejudice, pending the parties' completion of post-determination discovery. Commissioner Gomez ordered the parties to complete discovery within six months, attend a pre-hearing conference on November 15, 1999, and submit a joint certification memorandum on or before November 1, 1999. (Joint Exhibit 14).

On November 19, 1999, Complainants' counsel sent out a notice to putative class members describing the complaint, names of the class representative and class counsel and the procedures and deadlines for joining or opting out of the class. (Joint Exhibit 15).

On September 20, 2000, Commissioner Gomez certified the class complaint for a bifurcated public hearing solely on

the issue of liability.² In her order, Commissioner Gomez set forth a number of facts stipulated to by the parties.³ Commissioner Gomez also scheduled a public hearing in this class complaint for November 27-December 1, 2000 at the Commission office in Springfield, Massachusetts.

I held a public hearing in this case on November 27-30, 2000 and May 29-31, June 26, July 30-31 and August 1-2, 2001. Complainants and the Department submitted their post-hearing memoranda, proposed findings of fact and conclusions of law on October 19 and December 7, 2001, respectively. On December 14, 2001, Complainants filed a supplementary memorandum of law. On December 21, 2001, the Department filed a reply to Complainants' supplementary memorandum of law.

I have carefully reviewed and considered the entire record before me, all proposed findings of fact, conclusions of law and supporting argument. To the extent the parties' proposed findings and conclusions are not in accord with my findings and conclusions, they are rejected. I have omitted certain proposed findings and conclusions as not relevant or as unnecessary to a proper determination of the material issues presented. I have modified other findings and conclusions to render them acceptable.

My findings of fact are based on the complaint filed in this case, the Department's Answer, the testimony presented at the public hearing held on November 27-30, 2000, May 29-31, June 26, July 30-31 and August 1-2, 2001, and the

²If I find that the Department is liable for unlawful discrimination, Commissioner Gomez's order directs me to conduct a public hearing on damages.

parties post-hearing submissions. Based on the credible evidence and reasonable inferences therefrom, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

A. Background

1. The certified class in this complaint consists of over 100 Spanish-English bilingual employees of Latino heritage who were employed by the Department as a Financial Assistance Social Worker (FASW) I or FASW II at anytime since 1991. (Stipulations a and b and Joint Exhibit No. 14).⁴

2. Angelina Romero-Peart, the class representative, is a bilingual FASW I who has worked for the Department since November 4, 1985. Ms. Romero-Peart is Mexican. On August 7, 1986, the Department certified Ms. Romero-Peart as fluent in Spanish and English. The Department appointed Ms. Romero-Peart to her FASW I position on October 11, 1988.⁵ (Joint Exhibit No. 15 and Respondent's Exhibit No. 1).

3. The Department is a state agency that provides and administers a comprehensive transitional assistance program

³The agreed on facts are set out below and are identified as "Stipulation," followed by the corresponding number.

⁴The FASW I and II positions are the entry- and second-level professional jobs in the financial assistance social worker job series. On November 1, 1995, the Department classified these jobs as Transitional Assistance Social Worker (TASW) I and II positions. (Complainant's Exhibits 4 and 5). There are no substantive changes in the FASW and TASW I and II job designations that are relevant to the instant complaint. These terms are used interchangeably in this decision.

⁵ Ms. Romero-Peart testified that she did not recall whether she was appointed to her position off a civil service list.

within the Commonwealth.⁶ The Department's financial assistance programs include, but are not limited to, Transitional Aid to Families With Dependent Children (TAFDC)⁷, formerly Aid to Families With Dependent Children (AFDC), Emergency Aid to the Elderly, Disabled and Children (EAEDC) and Emergency Assistance.⁸ At all times relevant to this complaint, the Department was an employer within the meaning of G.L. c. 151B, §1, paragraph 5.

4. At all times relevant to this complaint, Local 509 of the Service Employees International Union ("SIEU") Local 509 has represented Department employees in the FASW job series, including the FASW I, II and III levels. (Stipulation e). Local 509 is part of the Alliance that consists of the American Federation of State, County and Municipal Employees (AFSCME) and the SEIU, AFL-CIO, and its affiliates, Locals 254, 285 and 509. (Joint Exhibits 1A-1D).

5. In 1998, Ms. Romero-Peart became a Regional Vice President in Local 509. Ms. Romero-Peart is the highest-ranking Local 509 official in Western Massachusetts.

6. Fred Trusten is the Director of Field Services for Local 509. He has held this position since December 1989. Mr.

⁶The Department is the successor state agency to the Massachusetts Department of Public Welfare. See St. 1995, c. 5, §41. As used in this decision, the term "Department" means the Department of Transitional Assistance or the Department of Public Welfare.

⁷ The TAFDC program is a joint federal-state program whose general purpose is to "enable children to continue living at home through the provision of funds for their shelter, food, and other necessities, where one or more parents are unable fully to provide support or is absent." See Smith v. Commissioner of Transitional Assistance, 430 Mass. 638, 640 (2000) ; G.L. C. 118, 1 and 2.

⁸The EA program is also a cooperative federal-state program that is designed "to assist eligible families to prevent destitution or to provide for living arrangements in the home." The EA benefits include emergency payments of rent, mortgage and utility arrearages, home heating assistance

Trusten was the President and Executive Director for Local 509 from 1985 through 1989. He served as a field representative for Local 509 from 1978 through 1985. Prior to 1978, Mr. Trusten worked as a social worker and supervisor at the Department.

7. Robert Menicocci is the Department's Budget Director and has held his position since 1987. Mr. Menicocci served as the Department's assistant budget director from 1995-1997 and as a budget analyst from 1990 to 1995. Mr. Menicocci manages the Department's funds that come from a variety of sources including the federal and state treasuries.⁹

8. Jane Durland is the Director of the Department's Human Resources Division and has held her position since July 7, 1991. In her current position, Ms. Durland is responsible for personnel policies and guidelines, including employee classification and interpreting services. She is in charge of several units within the Department: Personnel, Payroll, Labor Relations, Employee Services, Training Unit and Human Resources Information Systems (HRIS). Ms. Durland reports directly to the Department's Assistant Commissioner for Administration and Finance.

9. From 1984 to 1991, Ms. Durland served as the Department's Director of Program Assessment. In this position, Ms. Durland managed the Local Office Quality Control (LOQC)

and temporary shelter. See Dowell v. Commissioner of Transitional Assistance, 424 Mass. 610, 612 (1997).

⁹The Department's Budget Office works with oversight agencies, the Massachusetts legislature and the executive department to ensure that the Department's funding needs are met and that its expenditures are made in accordance with the State Budget Act. The Budget Office also analyzes the Department's programs to insure that they are operated in a manner that is consistent with the legislature's intentions. The legislature appropriates money by establishing a line item in the state budget that designates an amount of funds and includes language instructing the agency on how it should expend the funds. (Trans. August 2, 2001 at 5-6).

Unit that consisted of 50-60 LOQC workers. From 1991 to 1994, Ms. Durland held a variety of administrative positions in the Central Office, including the Director of Special Projects and Assistant to the Deputy Commissioner.

10. Joyce Sampson is the Assistant Commissioner for Field Operations. She is in charge of all Department field offices and employees, including the TASW positions. Ms. Sampson has worked for the Department for approximately 32 years and has held the following positions: social worker, supervisor, office director, field manager, director of program assessment, director of child enforcement, operations manager and acting assistant commissioner.

11. As of May 29, 2001, the Department had 2400 employees, including 1,100 TASWs.

Department's Hiring Process

12. There are four "career ladder" levels in the TASW job series: I, II, III and IV (a supervisory position). The work generally performed by TASWs at grade levels I, II, and III is virtually interchangeable except for their rate of compensation. A TASW III occasionally supervises a TASW I or II on a temporary basis. The Department established these levels to create a career ladder so that Department social workers would not be permanently locked into certain pay levels.

13. The job descriptions for the TASW I and TASW II positions include different levels of responsibility and required experience.¹⁰ (Stipulation d).

14. Ms. Durland oversees the hiring process for the TASW positions. Since the TASW position is a job title covered by civil service, the Department is required to hire from an existing civil service list when it hires entry-level TASWs. To initiate the hiring process, the Human Resources Division of the Executive Office of Administration and Finance (HRD-AF) will create and administer a civil service examination for the entry-level title in the TASW job series, a TASW I. The HRD-AF advertises, administers and grades the examination. The HRD-AF then creates a list of individuals who took and passed the examination, in descending order. Once the Department determines the number of positions it intends to fill, it informs HRD-AF who notifies the individuals on the list to determine their interest in being considered for the available positions within a region. After a limited period, the HRD-AF establishes a pool of eligible candidates from which the Department can complete its selection process: interviews, background and reference checks.¹¹

15. The Department can also hire employees who have not taken and passed a civil service examination as provisional TASWs. An employee who has taken and passed a civil service examination for a TASW position has the right to "bump" a worker who holds the position on a provisional basis. A

¹⁰An applicant for a TASW I position can substitute a college degree for two years of work experience required. An applicant for a TASW III position can substitute a college degree for two years of work experience but must have two years of actual relevant experience.

¹¹ The Department is not required to hire the candidate who is on the top of the list. Depending on the number of candidates, the Department can choose to hire from a range of the individuals at the top of the list by using the following formula: $2N + 1$, where "N" equals the number of employees being hired. For example, if the Department is hiring six TASW Is, it can make six hires from the top 13 candidates on the list.

Department social worker cannot achieve permanent status without taking, passing and being appointed from a civil service examination list.

16. Department employees can be promoted to a TASW III position if they successfully pass the civil service promotional examination and are selected from the resulting civil service list for these titles. If there is no applicable civil service list, Department employees can seek a promotion through a job posting that satisfies the requirements of the CBA. (Stipulation c16).

17. When the Department hires individuals for a TASW position, its standard practice is to place them in a TASW I position. New employees who are certified as bilingual are also hired as a TASW I, regardless of the second language in which they are certified. (Complainant's Exhibit 8).

18. The Department uses the classification specifications for the TASW series to determine the appropriate level for placing a caseworker. Homeless Coordinators and Teen Specialists¹² are classified at the TASW III level based on the Department's determination that their job duties and the complexity of their cases required a higher level of knowledge, skills and abilities.

19. The Department maintains a quarterly bilingual staffing report for each Department office that shows the number of limited English proficiency (LEP) cases in each office (by language), the number of bilingual staff required measured against the Department's statewide average caseload, the

¹²In October 1995, the Federal Welfare Reform Act and St. 1995, Chapter 5, mandated that the Department immediately provide services to teenage parents. In October 1996, the Department created the Teen Specialist position to handle its teenage parent caseload. (Joint Exhibit 13).

number of certified bilingual staff and the number of bilingual speaking staff in each office (by language). (Complainant's Exhibit 8). Ms. Durland testified that Spanish is the largest language category used by LEP recipients.

20. Ms. Durland determines whether a local office needs additional bilingual staff based on whether the number of LEP cases exceeds a certain proportion to that number of office staff who speak the required languages. In this context, "LEPs" refers to all languages not just those recipients who speak Spanish only.

21. If the Department determines that that it needs to hire bilingual staff (TASW I), it sends a written justification to the HRD-AF. If the HRD-AF agrees with the justification, it will place a notification on the written notices to the individuals on the civil service list that they must be proficient in whatever language is needed. If the Department does not receive a sufficient number of responses from appropriate bilingual candidates on the civil service list, it notifies the HRD-AF and requests authority to post the TASW I positions and hire provisionally off the civil service list.

22. When the Department seeks to hire candidates who are bilingual in Spanish, it does not consider their ethnic background or require them to be Latino. The Department only requires that the candidates are able to speak Spanish proficiently. Ms. Durland testified that the Department has hired many employees who are bilingual in Spanish but are not Latino.¹³

¹³For example, Ms. Durland testified that Commissioner McIntire is bilingual in Spanish but does not have a Latino heritage.

23. From January 31, 1994 to January 31, 1999, the Department hired 193 TASW I employees. The Department's data shows that 92 (48%) of these hires were bilingual employees:

- a. 67 - Spanish;
- b. 12 - Vietnamese;
- c. 3 - Russian;
- d. 3 - Cambodian;
- e. 7 - Other languages. (Stipulation f).

24. Ms. Durland testified that the Department does not bypass the civil service list for entry-level appointments other than in instances of hiring of bilingual employees. The Department hired 5 of the 67 TASW I employees who were bilingual in Spanish from the civil service list.

Collective Bargaining Agreements

25. Between July 1, 1990 and June 30, 2001, the Department, through the Executive Office of Administration and Finance, negotiated a series of collective bargaining agreements with the Alliance and Local 509 that included detailed provisions concerning caseloads, workloads, performance standards and dispute resolution mechanisms to resolve disputes regarding these items. (Joint Exhibits 1A-1D and Respondent's Exhibit 25).

26. The collective bargaining agreements included provisions that prohibited the Department and Local 509 from discriminating against any covered employees based on, among other things, national origin. (Article 6 of Joint Exhibits

1A, 1B, 1C and 1D). The collective bargaining agreements also provided that an employee or Local 509 must submit a written grievance within 21 calendar days after the alleged act or omission occurred that gives rise to the grievance or after the date on which there was a reasonable basis for knowledge of the occurrence. (Article 23A of Joint Exhibits 1A, 1B, 1C and 1D).

27. In 1990, the collective bargaining agreement (CBA) required the Department to maintain a system of work standards to ensure that "the responsibilities of each social worker shall not be greater than reasonably can be expected in the time available. (Joint Exhibit 1A at 174-180).

28. During the contract period from July 1, 1990 to June 30, 1993, the Department could assign cases to intake workers based on the amount of "available time" they had each month and the amount of time the workers needed to perform certain case functions or tasks. (Joint Exhibit 1A at 177-78). The CBA also established a maximum number of applications that could be reasonably assigned to a social worker during the available time in a month, such as 1.75 AFDC applications per available day or 2 General Relief (GR) family applications per available day. (Joint Exhibit 1A at 178-79). For ongoing workers, the CBA established "reasonable work expectations," based on caseload size, for the amount of work that a social worker could be reasonably expected to perform.¹⁴ (Joint Exhibit 1A at 182-7).

¹⁴Under this system, the Department did not require a worker who had a higher caseload to perform more work on an individual case than that assigned to a worker with a lower caseload. (Joint Exhibit 1A at 185-89).

29. The underlying goal of the Department's caseload standards was to ensure an "equilibrium" or balance of workload and a worker's activities. The higher the caseload, the fewer "activities" the Department can expect or require the workers to perform. Conversely, the Department can require workers to perform more activities if they have lower caseloads.

30. The CBA defined the amount of "available time" as the number of workdays in a month minus all days that a social worker was unavailable. "Unavailable days" are those days on which a social worker is on approved leave, is attending Department sponsored training, is representing the Department in a court hearing, is assigned supervisory duties in the absence of a supervisor, is attending a Department sponsored training program or is working on a special project approved by the Tripartite Panel. (Joint Exhibit 1A at 177-178).

31. The CBA also described "unavailable days" as those days on which a social worker "is performing translation duties on cases other than their own." When bilingual caseworkers performed translation duties on cases assigned to other workers, they are entitled to receive a credit in two-hour increments that was subtracted from the amount of their "available time" in a given month. (Joint Exhibit 1A, pages 177-178).

32. In addition to workload limitations, the CBA also provided safeguards to ensure that the Department did not require a social worker to work in excess of the agreed upon workload standards. Social workers who believed that they were unable to timely complete assigned applications in

excess of the total number of days available in that month could seek an immediate, expedited review by the Department's Office of Administration. (Joint Exhibit 1A at 180). An expedited review was also available to social workers who believed that they were unable to meet the casework expectations "due to a lack of available time, e.g., abnormal amount of leave during review period or other additional assignment which limits the amount of available time." (Joint Exhibit 1A at 189-90, emphasis original).

33. The CBA also established a Tripartite Panel to resolve disputes about workload and productivity issues. The Tripartite Panel also reviewed existing Department workload standards and recommended new or revised ones based on changes in department policy and procedures. The Tripartite Panel consisted of a one representative designated by the Department, one representative designated by Local 509 and one neutral third-party agreed upon by the Union and the Department. At all times relevant to this complaint, Dennis Johnson, Manager, Human Resources Information Systems (HRIS) represented the Department and Kevin McKenna represented Local 509. (Joint Exhibit No. 1A, at 195196). Lawrence Bailis, Ph.D., Heller Graduate School, Brandeis University, was the designated neutral third-party representative. (Respondent's Exhibit 10).

34. The Department agreed not to implement new or revised work standards or requirements prior to the Tripartite Panel's review and recommendation. Each of the representatives on the Tripartite Panel could propose new or revised work standards. (Joint Exhibit 1A at 195-96).

35. After expiration of the CBA, the Department and Local 509 did not retain the contractual provisions relating to the Tripartite Panel. (Joints Exhibits 1B, 1C and 1D).

36. The Department and Local 509 also agreed to form a labor/management committee to "develop reasonable work expectations for bilingual social workers, based upon the department's existing policies . . . and discuss any other relevant issues." The labor/management committee had to make its final recommendations regarding reasonable work expectations for bilingual social workers to the Tripartite Panel to make "a final decision regarding its validity." (Joint Exhibit 1A at 192 and Respondent's Exhibit 25).

37. Local 509 appointed a Bilingual Committee to work with the Department on reasonable work standards and expectations for bilingual workers. The Bilingual Committee included the following class members: Luis Vega, Luis Mejia, Brunilda Baez and Renato Vera. (Complainant's Exhibit No. 3).

Department's Interpreter Policy and Practice

38. On February 1, 1993, Assistant Commissioner Sampson sent a memorandum to all local office staff regarding the Department's provision of interpreters for non-English speaking applicants and recipients. Field Operations Memorandum No. 93-3 required the Department to provide interpretation services for non-English speaking applicants and recipients who called or came into a local office without an interpreter.¹⁵ (Joint Exhibit No. 8).

¹⁵ The Department's policy also applied to American Sign Language (ASL) users.

39. Under the Department's policy, applicants or recipients who called or came into a local office with their own interpreters were allowed to use them. If the applicants or recipients did not speak English and did not bring their own interpreters, the local office staff could not turn them away or direct them to return with an interpreter. The local office workers were required to give an appointment to the non-English speaking applicant or recipient for a time when the local office was able to provide interpretation¹⁶ services. (Joint Exhibit No. 8).

40. If appropriate local office staff was not available to interpret, the caseworkers were directed to ask the local office director (or designee) to request a volunteer from a local community agency that had agreed to provide interpretation services. If a local community agency did not have an interpreter available or could not provide the necessary interpretation services, the local office director (or designee) was directed to call the Department's Human Resources Division (HRD) to request interpretation services. (Joint Exhibit No. 8). The local office director was also required to maintain a list of interpreters and their telephone numbers to cover situations where an interpreter was needed on an emergency basis. (Joint Exhibit No. 8).

41. On June 9, 1993, Desdemonia Alexander and Paul Alford sent a memorandum to all Department staff that listed eight bilingual Department staff, including seven Spanish-speaking employees, and the languages (other than English) that they spoke. The memorandum also directed Department staff to contact Mr. Alford if an appropriate local office staff

¹⁶The Department uses the term, "interpretation" and "translation" interchangeably.

person was not available to interpret. (Joint Exhibit No. 8A).

42. On September 13, 1994, the Department reached an agreement with the Office of Civil Rights (OCR), U.S. Department of Health and Human Services (DHHS), regarding its provision of services to persons with limited English proficiency (LEP). The agreement resolved 14 administrative complaints that alleged that the Department's interpreter policies and practices discriminated against LEP persons based on their national origin in violation of Title VI of the Civil Rights Act of 1964, as amended.¹⁷ 42 U.S.C. §2000d et. seq. (Joint Exhibit No. 3 and Complainant's Exhibit No. 25).

43. The complaints alleged, in part, that the Department informed LEP persons that they were expected to bring interpreters with them when seeking benefits at the Department's local offices and at fair hearings (at their own expenses). The complaints also alleged that the Department staff burdened community agencies or organizations that provided health and social services to LEP persons by asking them to act as interpreters in the Department's office without having contracted or otherwise having arranged in advance for them to provide interpreter services. (Joint Exhibit No. 3).

44. Under the OCR agreement, the Department agreed to:
(a) develop policies and procedures that combined the use of bilingual staff, interpreter services and translated materials to enable effective communication with LEP per-

¹⁷ The Department was subject to Title VI because it received federal financial assistance through programs overseen by the DHHS. Title VI prohibits, *inter alia*, "methods of administration [which have] . . . the effect of discriminating against any individual on the grounds of . . . national origin."

sons in their primary languages; (b) amend its regulations to provide that an LEP person's right to an interpreter applied at all stages of the Department's operations; (c) post and maintain signs in local offices that invited applicants and clients to identify themselves as LEP persons needing interpreter services; (d) determine the primary language of each prospective client at the earliest oppor-

tunity by use of a "I speak" card that included all languages spoken by 100 or more client households; (e) use a notice to inform LEP persons, in their primary languages, of their right to interpreters; (f) whenever feasible, assign the case files of LEP persons to bilingual staff members fluent in the LEP person's primary language.

45. The Department agreed to ensure that all bilingual staff members fluently and accurately communicated in the language in which they profess proficiency and are able to interpret effectively to and from such languages. The Department also agreed not to burden community agencies or organizations that provided LEP persons with health and other services with requests for their personnel to provide on-call interpreters, e.g., face-to-face, telephone interpretation or translation of materials, for the Department's programs, unless by contract or other advance arrangement. (Joint Exhibit No. 3).

46. On November 9, 1994, the Department issued a memorandum to all staff that described key provisions of the OCR settlement agreement relating to its provision of interpreters for non-English speaking applicants and recipients. (Complainant's Exhibit No. 25).

47. On December 22, 1994, Assistant Commissioner Sampson and William Bell, Assistant Commissioner for Administration and Finance, sent a memorandum to local office directors that included an updated statewide list of contracted interpreters working in the Department's local offices. The contracted interpreters were available to all local offices to assist with interpreting needs that could be met over a

speaker telephone. Since the Department already contracted for such services, the memorandum encouraged local office directors to use the contracted interpreter services whenever possible. (Joint Exhibit No. 9).

48. If the local office directors were unable to secure a needed interpreter, the Sampson-Bell memorandum directed them to contact Linda Kennedy in the Human Resources Employee Services Unit who would request an interpreter from the Catholic Charities Interpreter Service. Given the cost of Catholic Charities interpreters, the local office directors were instructed not to request Catholic Charities interpreters unless they first exhausted all other interpreting options, e.g., office staff, community agencies and contracted interpreters. (Joint Exhibit No. 9).

49. Ms. Durland testified that, since 1995, the Department's Human Resources Division has used a hierarchy of interpreter services for recipients, as necessary: (1) a full-time contract interpreter in the local office who speaks the language and is available; (2) a full-time contract interpreter who is available in another local office; (3) a Catholic Charities interpreter; (4) an AT&T interpreter. (Joint Exhibits 10 and 11).

50. On January 16, 1997, Assistant Commissioners Sampson and Bell sent a memorandum to local office directors that described procedures on "how to access foreign language and sign language interpreting services." Local office directors were required to ensure that all staff knew about the Department's policy that prohibited them from asking applicants or recipients to provide their own interpreters. The local office directors were directed to the list of con-

tracted Department interpreters for assistance when they needed foreign language interpreting services. It also reiterated that Catholic Charities interpreters were available only after first attempting to use a contracted interpreter. (Joint Exhibit No. 10).

51. On October 9, 1999, Assistant Commissioner Sampson issued Field Operations Memorandum No. 99-31 that described an applicant's or client's right to an interpreter. It also described the Transitional Assistance workers' responsibility to give the "I Speak" card and the "Your Right to Interpreter Services" brochure in the appropriate language to all applicants or recipients whose primary language is not English. The memorandum also provided that local office workers had to meet with non-English-speaking applicants or recipients when they came into a local office if a Department bilingual worker was available who spoke the applicants' or recipients' language. If a bilingual worker was not available, the office director had to request an interpreter through a local community service, the Department's Human Resource office or the AT&T language line if there were no other options. (Joint Exhibit No. 11).

52. In October 1999, Commissioner Claire McIntire wrote a letter to all Department employees to restate the Department's policy regarding the provision of interpreter services to LEP persons. Commissioner McIntire wrote that, wherever feasible, the cases of LEP persons should be assigned to bilingual staff members who were fluent in the LEP's primary language. If an appropriate bilingual staff person was unavailable, the Department was required to provide an interpreter unless the LEP person expressed a

clear preference to bring his or her own interpreter.
(Joint Exhibit No. 12).

53. The Department compiles and distributes a list of contracted interpreters to all Department local offices. The list identifies the contract interpreter, their assigned offices, the number of weekly hours each interpreter is available and the name of their office contacts to arrange for telephonic services. (Joint Exhibits 9 and 11). The interpreters on the list are available to all offices, where appropriate. The contracted interpreters are located in the Worcester, Lowell, Lawrence, and Revere local field offices. (Stipulation g).

54. On December 22, 1994, the updated List of contracted interpreters showed four full-time and two part-time Spanish-speaking interpreters. (Joint Exhibit 9). By August 27, 1999, the list of Department local office interpreters showed two full-time and two part-time Spanish-speaking interpreters. (Joint Exhibit 11). By November 30, 2000, the Department had 17 local office contractors whose primary responsibility is to provide interpreter services: 3 Cambodian; 1 Haitian Creole; 3 Russian; 8 Spanish; 2 Vietnamese. (Respondent's Exhibit No. 8).

55. For the past seven or eight years, the Department has contracted with Catholic Charities to provide interpreter services for the Department's local offices, including Spanish-speaking services. To arrange for the service, a worker requests an interpreter through a local manager, usually the assistant director. The office manager then calls Ms. Durland's office to request an interpreter. A staff person in Ms. Durland's office calls Catholic

Charities and explains where the need is and the language requested. Catholic Charities then calls the local office directly. Recipients can inform the local office what language they need by pointing to their language on the "I Speak" card that includes many languages. Ms. Durland testified that this process does not entail lengthy delays.

56. In 1998, Catholic Charities provided interpreting services to the Department in 28 different languages. 68% of the total dollars spent by the Department on Catholic Charities interpreters were for Spanish-speaking interpreter services. (Stipulation h).

57. Since 1995, the Department has also contracted with the AT&T for a language line that is a telephonic interpreter services. The AT&T service is now available to all Department field offices¹⁸ and provides immediate access to "hundreds" of languages, including Spanish. If there is no other interpreter source available, a worker requests access from an assistant director who normally makes the call to the AT&T language line. The assistant director punches in a code and is immediately connected to an interpreter.

Interpreter Activities by Class Members

58. Amado Aburto is a certified bilingual Spanish-speaking FASW III who has worked in the Housing and Homeless Unit since September 11, 2000. From 1989 until September 11, 2000, Mr. Aburto worked as a FASW I in the Dorchester Office. Mr. Arbuto is Chilean.

¹⁸ By October 1996, the AT&T lines were established in less than 50% of the Department offices.

59. Mr. Arbuto testified that he sometimes translated client information for non-Spanish speaking supervisors who have to approve or sign off on a case. Mr. Arbuto also testified that he often translated documents such as a client's birth certificate for an English-speaking coworker. Mr. Arbuto testified that he translated many Department documents because there were only a few Spanish-translated ones.

60. Mr. Arbuto testified that his co-workers asked him to interpret at least two or three times a day. Mr. Arbuto also testified that he sometimes spent up to one hour interpreting if a coworker asked for assistance on an intake case. From 1991 to 1994, Mr. Arbuto estimated that he spent approximately one hour a week translating or interpreting for his co-workers. Mr. Arbuto also testified that Jerry Sullivan, his immediate supervisor, required him to translate for his co-workers in the Bowdoin Park Office.

61. Mr. Arbuto testified that the Housing and Homeless Unit does not have a Spanish interpreter assigned to it. In his current position, Mr. Arbuto testified that he interprets approximately three hours a week for his co-workers, including the receptionist.

62. While Mr. Arbuto knew about the Department's arrangement with AT&T for interpreter services, he did not use the AT&T line because he felt it was too time-consuming and disrupted his work with his clients. Mr. Arbuto also felt that there was no need for the AT&T interpreter services because he was available to interpret in his office.

63. In or about June 15, 2000, Mr. Sullivan noted on Mr. Arbuto's 1999 performance appraisal that his communication skills as a bilingual was a "plus" for many of his clients and the Housing and Homeless Unit. Mr. Sullivan also noted that Mr. Arbuto worked with his co-workers' non English-speaking clients without complaint.

64. Brunilda Baez is a certified bilingual Spanish-speaking FASW I who has worked in the Revere Office since March 1994. Ms. Baez became a FASW I on February 1, 1998 and was not appointed from a civil service list. Ms. Baez is Puerto Rican.

65. Ms. Baez testified that, during the past two years, she spent between three to five hours a week interpreting or translating for her monolingual, English-speaking co-workers. Ms. Baez also testified that she felt "bad for the people that need (sic) the translation" and that she always translated even if she was busy with other work.

66. Ms. Baez's EPRS for fiscal year 1994 stated, in part, that she always completed her work in a timely manner. Her EPRS for fiscal year 1997 stated that her projects were always on time. Ms. Baez's EPRS for fiscal year 2000 stated that she was accurate in her case management and it was always done in a timely manner.

67. Sara Barrientos is a certified bilingual Spanish-speaking FASW I who has worked in the Roxbury Crossing Office since 1993. From 1991 to 1993, Ms. Barrientos worked in the Lawrence Office. From 1981-1991, Ms. Barrientos also worked at the Roxbury Crossing office. Ms. Barrientos is Guatemalan.

68. Ms. Barrientos testified that the co-workers in her unit ask her to translate or interpret for their clients, including translating papers and interpreting during intake, about three times a day. She testified that it takes her one-half hour to translate an AFDC application. Ms. Barrientos has never seen her co-workers use the Department's other interpreter services.

69. For the past three years, Ms. Barrientos has had a FASW IV supervisor who is bilingual in Spanish. Prior to her current supervisor, Ms. Barrientos has always had a non-Spanish-speaking supervisor who "mostly always" requested that she interpret for them.

70. In the last two years, Ms. Barrientos testified that she has interpreted for co-workers in the Teen Unit and helped English-speaking workers fill out domestic violence forms. Ms. Barrientos testified that she spends "probably" two hours a week interpreting in her work unit and the Teen Unit. Ms. Barrientos testified that two years ago, she spent four or five hours a week interpreting for her co-workers.

71. Ms. Barrientos testified that she is stressed when she interprets because the clients sometimes get upset and the English-speaking worker does not know that the client has threatened him or her.

72. Carmen Benson is a certified bilingual social worker, FASW I, who has worked in the Somerville Office since 1995. The Department hired Ms. Benson in August 1985. Prior to her transfer to the Somerville Office, Ms. Benson worked at

the Hawkins Street, Cambridge and Chelsea offices. Ms. Benson is Puerto Rican.

73. Ms. Benson testified that her co-workers asked her to interpret forms and documents and to assist on applications. Ms. Benson also testified that Walter King, her supervisor, has sometimes asked her to interpret. Ms. Benson testified that she spends approximately two hours a week interpreting for her co-workers although she sometimes exceeds two hours.

74. Ms. Benson testified that interpreter services are available to her but that a contract interpreter was not stationed in the Somerville Office. Ms. Benson did not recall whether Catholic Charities provided the interpreter services but recalled that a caseworker had to request an interpreter at least 48 hours in advance. Ms. Benson also knew about the AT & T telephone interpreter service but she has never used it nor has she seen a co-worker use it.

75. Ms. Benson testified that she told her supervisor at least once that she was unable to perform her job duties because of the interpreting she was asked to perform. She testified that her supervisor responded by indicating that "it's all right - you know - if I didn't want to" interpret for the other person. Ms. Benson testified that sometimes she told her co-workers that she was busy and that they would have to wait.

76. Carmen Carrizales is a certified bilingual Spanish-speaking FASW I who has worked in the Fitchburg Office since she was hired on June 11, 1989. Ms. Carrizales is Puerto Rican.

77. Ms. Carrizales testified that she spends at least three hours performing interpreter or translation services on her Spanish duty day. Outside of her Spanish duty day, Ms. Carrizales testified that she spends about one hour a week translating for her co-workers.

78. On her performance evaluation, dated June 29, 2000, Charles Evahousky, Ms. Carrizales' supervisor, reported that, "Carmen C. does duty coverage for Spanish cases which require her to be away from the unit."

79. Rosa Cintron is a certified bilingual Spanish-speaking FASW II worker who has worked in the Roslindale Office since 1987. Ms. Cintron currently works as a food stamps worker. Ms. Cintron is from Puerto Rico.

80. Ms. Cintron testified that, throughout the years, her co-workers have asked her to translate for their clients in Spanish, including telephone calls. Ms. Cintron does not assist with translation at the front desk but sometimes her co-workers' clients ask her questions when she goes to the front desk to talk her own clients.

81. Ms. Cintron testified that she sometimes translates Department forms for her Spanish-speaking clients and translates letters in Spanish to give to her supervisor. Ms. Cintron testified that she still has to translate the Department's food stamp application because there is no Spanish form. Ms. Cintron translates information provided by Spanish-speaking clients for her supervisor such as letters and telephone messages.

82. Ms. Cintron testified that the Roslindale Office hired a part-time Spanish-speaking interpreter three or four months ago. Before the Roslindale Office hired an interpreter, Ms. Cintron spent four or five hours a week interpreting for co-workers. Since hiring the interpreter, Ms. Cintron has translated approximately once a week.

83. Ms. Cintron testified that she felt a lot of stress translating for other workers because she didn't have time to translate but she wanted to help clients who needed immediate service.

84. In 1998, Elizabeth Rattigan (non-Hispanic), TASW IV, was Ms. Cintron's immediate supervisor. As part of Ms. Cintron's performance review, Ms. Rattigan wrote that Ms. Cintron, "works closely with her Spanish-speaking caseload to overcome obstacles to employment and self-sufficiency." Ms. Rattigan also wrote that Ms. Cintron "is frequently asked to translate for her co-workers' clients."

85. In 1999, Marie Flanagan, TASW IV, another of Ms. Cintron's supervisors wrote in her performance review that Ms. Cintron is "bilingual, which is a great asset.

86. Luis Mejia is a bilingual Spanish-speaking FASW I who has worked in the Roslindale Office since 1993. Mr. Mejia is Guatemalan.

87. Mr. Mejia testified that he always interpreted for his co-workers and their clients from 1991 to the present. Mr. Mejia testified that he interpreted "any time that my co-workers are dealing with a Spanish-speaking client that does not understand or is not sure about understanding any part

of anything, about what they're talking about, they usually go in and grab me and, of course, I was, I was happy to help their clients and my co-workers." He also testified that this was an "informal thing" and there was no Department procedure to document his co-workers' requests.

88. Mr. Mejia testified that he spends, on average, an hour and a half to two hours each week interpreting for his co-workers. Mr. Mejia also testified that he interprets for his supervisor. Mr. Mejia testified that his supervisor has been present when his co-workers requested that he interpret for them.

89. While Mr. Mejia has never used the AT&T line, he testified that he knew that his co-workers have used it. Mr. Mejia understood that there was a "lag time" when using the AT&T interpreter line.

90. Mr. Mejia testified that he complained to his supervisor in August 2000 about his interpreting during a meeting shortly after the office contract interpreter was hired. Mr. Mejia told his supervisor that he "would like not to be called as an interpreter because my caseload was demanding, but if you think that I'm needed there, that's okay as a last resort. Let's try to accommodate the new interpreter." Mr. Mejia testified that his co-workers have asked him to interpret because the contract interpreter is "not here the whole day."

91. In 2000, Minnie Tillinger, Mr. Mejia's supervisor, wrote in his performance appraisal, "transmits information in clear and concise manner. He uses his bilingual skills to translate for both clients and co-workers."

92. Marta Rivera is a certified bilingual Spanish-speaking FASW III who works in the Boston Housing Homeless Unit. From 1991 to 1994, Ms. Rivera worked in the Roxbury Crossing Office as FASW I.

93. While working in the Roxbury Crossing Office as a FASW I, Ms. Rivera shared an office with two non-Spanish speaking workers. Ms. Rivera testified that her co-workers asked her to translate whenever they received or made a telephone call. Ms. Rivera also testified that her supervisor asked her to translate for a Spanish-speaking client from time to time. Ms. Rivera estimated that she spent one and one-half to two hours a week translating or interpreting for co-workers.

94. Ms. Romero-Peart testified that the Springfield Office has employed a full-time interpreter for approximately two years. The interpreter worked at all the western offices: State Street, Holyoke, Westfield, Greenfield, North Adams, Northampton and Athol. Ms. Romero-Peart testified that "it was always true" that the Springfield Office has had a Hispanic receptionist.

95. In or about 1991, Ms. Romero-Peart transferred to a bilingual unit in the Springfield Office that consisted of five bilingual Spanish-speaking workers, including Anna Andino. Sometime after 1991, three of the bilingual workers left the unit and their Spanish-speaking only cases were assigned to English-speaking workers. Since there was no Spanish contract interpreter in the Springfield Office during this period, Ms. Romero-Peart and Ms. Andino had to interpret for the English-speaking workers who had Spanish-

speaking only clients. Ms. Romero-Peart also testified that she occasionally interpreted for her supervisors during this period.

96. Ms. Romero-Peart testified that she spent "about 25 to 30 percent" of her time each week (out of 37½ hours) during 1991-1997 interpreting for her co-workers and translating documents or letters. Ms. Romero-Peart also testified that she did not spend as much as 10 hours a week interpreting and that the amount of time was more like "7 to 8 percent." Ms. Romero-Peart finally testified that she spent "maybe four or five hours" a week interpreting for co-workers.

97. Ms. Romero-Peart testified that she interpreted for co-workers in three or four determinations each week, lasting approximately 15 or 20 minutes each. Ms. Romero-Peart also testified that her co-workers asked her and Anna Andino to call Puerto Rico once or twice a month to solicit case information. Ms. Romero-Peart testified that she translated documents like birth certificates and additions of a dependent or relative. Ms. Romero-Peart also testified that, during 1991-1998, she interpreted for non-Spanish speaking workers who were assigned duty day and requested her assistance to interpret for Spanish-speaking clients who came into the office.

98. Ms. Romero-Peart testified that she never used the AT&T interpreter telephone line and does not know the procedures for using it.

99. On August 2, 1994, Glenn Latinen, Ms. Romero-Peart's then supervisor, wrote that "she excels in communication with her clients, most of whom are Hispanic and can be

demanding." Ms. Romero-Peart testified that she was able to keep up with her caseload despite her interpreter or translation activities but "was always stressed out" because she had to take time away from her job duties to assist other workers with their duties.

100. Flavia Salcedo is a FASW III in the Boston Family Housing Unit. She has held this position since November 2000. Ms. Salcedo performs intake duties for the homeless unit.

101. From 1993 to 2000, Ms. Salcedo worked as a FASW I in the Dorchester Office. During this period, Ida Redford worked in the Screening Unit as a full-time Spanish-speaking interpreter. If Ms. Redford was unavailable because of lunch, illness or a client, Ms. Salcedo testified that co-workers, intake staff, food stamp workers and sometimes supervisors asked her and other bilingual workers to interpret for clients. Ms. Salcedo also testified that she interpreted approximately three hours a week for her co-workers.

102. There were also Russian and Vietnamese bilingual workers in Ms. Salecedo's unit. Ms. Salecedo testified that she asked the full-time Vietnamese interpreter in the office to interpret for her Vietnamese clients.

103. Nelson Vega, Jr., is a certified bilingual Spanish-speaking FASW II who has worked in the Revere Office since 1994. From 1991 to 1994, Mr. Vega worked as an intake worker in the Boylston Square office, 600 Washington Street, Boston, Massachusetts. Mr. Vega is Puerto Rican.

104. From 1991 to 1997, Mr. Vega testified that he spent one half hour to one hour each week interpreting for his co-workers, including his supervisor, the switchboard operator and the receptionist. Mr. Vega testified that his co-workers came up to him and said, "I need this or I need you to translate." Mr. Vega testified that, "they just took for granted that you had to do it because if you said no, then they'd go behind your back to management. Then management would come over to you, I heard you did this, you did this, you did that."

105. Since 1994, Mr. Vega testified that his co-workers asked him to translate or interpret maybe three or four times a week, including the receptionist, telephone calls from the switchboard operator, and his supervisors. Mr. Vega complained to his supervisors, including Ms. Cunio and Mark West at Boylston Square and at the Revere Office but the requests for translations continued. Mr. Vega testified that the switchboard operator gives the calls from Spanish-speaking clients to him or other workers who speak Spanish, even though the calls do not relate to his caseload. Mr. Vega also testified that clients would "tag him down" when he walked through the office lobby to translate because their workers didn't speak Spanish.

106. From 1991 to 1997, Mr. Vega testified that his supervisor asked him to interpret "five to ten times a month, maybe." Mr. Vega also testified that his co-workers' interpreting requests were stressful for him because he was still responsible for certain projects and deadlines.

107. Mr. Vega testified that his supervisor orally reprimanded him on one instance for not following his directions about interpreting but never gave him a written reprimand.

108. There has not been a Spanish-speaking interpreter in the Revere Office since June or July of 1999. The last Spanish-speaking interpreter worked in the Revere Office for about three months. Mr. Vega testified that the prior Spanish-speaking worker lasted about six months. When the Revere office contract interpreters were unavailable, Mr. Vega testified that he translates "if I'm in a good mood".

109. Mr. Vega testified that the other bilingual co-workers in his office are asked to translate because they "have no choice in the matter, they have to."

110. Mr. Vega testified that the AT&T interpreter line has been available in the Revere Office since 1998 but workers do not use it because it takes too long. Mr. Vega has never used the AT&T interpreter line but heard that a worker has to contact a manager who calls a 800 telephone number and gets back to the worker to set up an appointment time. Mr. Vega testified that his co-workers told him that the AT&T translation services are "such a pain and that's why they'd rather go up to someone who speaks the language to take care of it immediately."

111. Renato Vera is a certified bilingual Spanish-speaking FASW II who has worked in the Revere Office since 1994. Mr. Vera was not hired from a civil service list. He is Chilean.

112. Mr. Vera testified that there are five bilingual workers and one English-speaking worker in Mr. Vera's unit and 16 bilinguals in the entire office. Mr. Vera testified that his co-workers asked him to translate "very often." He also testified that his co-workers asked each bilingual worker to translate three or four times a day.

113. Prior to 1994, Mr. Vera worked in the Chelsea Office that used a Spanish-speaking clerk from the front desk to help with interpreting. While in the Chelsea Office, Mr. Vera spent "a couple of hours a week" interpreting for co-workers. Mr. Vera's supervisors never asked him to translate for co-workers although they know that he interprets for his co-workers.

114. From 1985 to 1994, Mr. Vera's supervisors were English-speaking except one who was also bilingual. During this period, Mr. Vera translated his case files into English for his supervisor's use.

115. After 1994, the Revere Office had an interpreter who worked from 9:00 a.m. to 1:00 p.m. Mr. Vera testified that he spent "between a half an hour to 45 minutes in time" interpreting each week in the Revere Office from 1994 to the present. When the Revere Office has an interpreter, the time Mr. Vera spends on interpreting for co-workers is reduced.

116. Ana Zayas is a certified bilingual Spanish-speaking FASW I who has worked in the Dorchester Office since 1992. The Department hired Ms. Zayas in May 1988 and assigned her to the Roslindale Office. After six months of training, Ms.

Zayas transferred to the Roxbury Crossing office where she remained until 1992. Ms. Zayas is Puerto Rican.

117. In or about September 8, 1993, the Department assigned Ms. Zayas to an Intake Unit that included six workers. Ms. Zayas was the only bilingual worker in the Intake Unit. Prior to leaving, Ms. Zayas testified that she met with Shirley Story, the Dorchester Office Director, who told her that her primary role in the Intake Unit was to take applications and that she was required to assist in interpreting for other Unit workers. After her meeting with Ms. Story, Ms. Zayas felt that she could not refuse to assist her co-workers when they asked for her assistance in interpreting.

118. Ms. Zayas felt that she was required to provide interpreter services based on Assistant Commissioner Sampson's field memorandum and that she was not free to ignore co-worker requests to interpret. Ms. Zayas testified that she was never told not that she did not have to interpret for her co-workers.

119. Ms. Zayas testified that her non-Spanish speaking co-workers asked her to interpret during their intake sessions and to screen clients during their initial walk-ins for assistance. She testified that the receptionist has asked her "many, many, many, many times" to interpret at the reception desk. Ms. Zayas also testified that her co-workers, including the domestic specialists, have asked her to interpret while they have a client on the telephone, while they are on duty for a Spanish-speaking supervisor or when they want an item written down in Spanish. She testified that her interpreter activities take approximately one hour

per week. Ms. Zayas also translates for her non-Spanish-speaking supervisors, as needed.

120. Ms. Zayas testified that she never knew about a contract interpreter being available in the Dorchester Office. Ms. Zayas also testified that she did not know about the AT&T interpreter line but knew that Catholic Charities was available if she needed interpreter services. Ms. Zayas also testified that she was never told to use the AT&T telephone lines for interpreter services.

121. In 1996, Ms. Zayas' supervisor wrote in her performance appraisal that, "Ana assists fellow workers to interpret for the Spanish-speaking clients, sometimes for the whole building." She also wrote that, "As a bilingual worker, Ana is able to listen, speak and write. That promotes understanding."

122. In June 1998, Ms. Zayas received a commendation that read, "Ana's casework is excellent, even when sometimes it takes a little more effort with Spanish-speaking clients."

123. During the period relevant to this complaint, the class members never requested that the Department reduce their caseload requirements under the CBA for the time they spent interpreting or translating for their co-workers. The class members also testified that there were no forms in the local offices on which they could record and track the time that they interpreted or translated for their co-workers. The Department did not give compensatory time or extra leave to its bilingual workers who interpreted or translated for their co-workers.

124. During the period relevant to this complaint, the class members satisfactorily performed their job duties despite their interpretation or translation activities for co-workers.

125. During the period relevant to this complaint, the Department did not discipline the class member or give them a negative performance appraisal for failing or refusing to interpret or translate for a coworker.

Co-workers' Testimony

126. Iris Hiraldo is a FASW III worker who has worked in the Lawrence Office for approximately one year. Ms. Hiraldo's immediate supervisor is Carol Lachance and the Lawrence Office Director is Marie Maio.

127. Ms. Hiraldo testified that the Lawrence Office has a full-time interpreter, Hendry Matos, who is available to the entire office. Ms. Hiraldo testified that, despite Ms. Matos' availability, Lawrence Office co-workers asked her to interpret "all the time," at least two or three times a week. Ms. Hiraldo testified that, on two occasions, she took one-half hour to interpret on a food stamp application.

128. Ms. Hiraldo testified that she never saw any of her co-workers, monolingual or bilingual, contact the AT&T interpreter line, Catholic Charities or another Department office for assistance regarding an interpreter.

129. Wendy Russo is a FASW III worker who has worked in the Revere Office for 23 years. Ms. Russo was promoted to her FASW III position in 1985.

130. Ms. Russo testified that the Revere Office has an interpreter who is in the office from 9:00 a.m. 12:00 noon. Ms. Russo also testified that the Revere Office has not had an interpreter for several months and, at one point, the interpreter was unavailable for one year.

131. When Ms. Russo needs an external interpreter, she submits a written request to an assistant director. Ms. Russo also testified that it may take up to two weeks to schedule an appointment with her Spanish-speaking client and the agency interpreter. To avoid delays, Ms. Russo asks her Spanish-speaking co-workers to interpret for her regarding her Spanish-speaking clients if she has a "short-term" task like translating a document such as a marriage license or birth certificate. If her request is for more "extensive" assistance requiring time up to one and one-half hours, e.g., an application, Ms. Russo asks her close friend, Martha Piloto, who is Spanish-speaking. She testified that her co-workers "happily" interpreted for her although the Spanish-speaking clients sometimes communicated directly with Martha because she previously interpreted for Ms. Russo.

132. Ms. Russo testified that her supervisors also ask the Spanish-speaking co-workers to interpret for them. She also testified that her supervisors knew that the English-speaking workers were routinely asking the Spanish-speaking workers to interpret for them. Ms. Russo testified that she willingly answers questions from her co-workers regarding Department policies, case procedures, and computer issues including help with the Beacon system.

133. Ms. Russo estimates that she uses a Spanish-speaking bilingual worker to interpret about once or twice a week. In Ms. Russo's experience, her English-only co-workers requested translation by their Spanish-speaking co-workers with the same frequency as she did. Prior to 1998, Ms. Russo testified that she used a Spanish-speaking bilingual worker to interpret several times a day or approximately 30 to 60 minutes a day.

134. Paul Foster is a FASW III worker who has worked in the EAEDC Unit in the Roslindale Office since 1991. Mr. Foster received a permanent civil service grade III in 1998. Mr. Foster is not of a Hispanic heritage and does not speak a "foreign" language.

135. Mr. Foster testified that his work unit has a very large Spanish-speaking caseload that includes French Creoles and Russian clients. There are no bilingual French Creole workers in the Roslindale Office. In Mr. Foster's opinion, the part-time, in-house Spanish-speaking and French Creole interpreter are "totally inadequate" because they are only available in the morning and not the entire day. In addition, these workers only interpret and do not take applications. Mr. Foster also testified that the office hired the in-office interpreters "just a few months ago."

136. Before the contract interpreters were hired, Mr. Foster testified that he asked the nearest bilingual Spanish-speaking worker from the family assistance or food stamps units who was not busy if he needed assistance with Spanish interpretation. He testified that the office workers were not supposed to turn away any clients who did not bring an interpreter.

137. Mr. Foster testified that he has asked co-workers to interpret "quite a number of times" each week, approximately six to twelve times. Mr. Foster estimated that he used bilingual Spanish workers for telephone calls (five times a week) and in-office clients "at least a couple of hours each week."

138. In the Revere Office, potential Spanish-speaking only clients must be screened by whoever is on duty, even if the duty person does not speak Spanish. If Mr. Foster has a French Creole client, he uses the French Creole interpreter or tries to schedule an appointment when the French Creole interpreter is available. If Mr. Foster has a client who speaks an unusual language like Russian, Somalian or French, he knows that he can use another interpreter service but feels that the Department's policy is to be as expeditious as possible by using "somebody else."

139. Mr. Foster has seen co-workers also using bilingual co-workers for interpreting as he described. Mr. Foster testified that his supervisor knew that office workers ask their bilingual co-workers for assistance regarding interpreting for clients and never told him not to use the bilingual co-workers for such purposes. Mr. Foster also testified that it was "up to them to say yes or no. If they're busy or can't do it, you're up a creek at that point."

140. Mr. Foster testified that the Department uses Catholic Charities interpreters for appeals hearings. He also testified that the process for securing a Catholic Charities interpreter was time-consuming. Mr. Foster does

not know how long it takes because he makes his request to his supervisor. Mr. Foster testified that he used an outside interpreter once and it took one approximately week to schedule the appointment.

141. Barbara Pax worked as a FASW II in Employment Services Program (ESP) Unit, New Bedford Office from 1994 until 1999. Andy Benoit was Ms. Pax's supervisor during this period. Ms. Pax is not of Hispanic heritage and is not a class member. Since 1999, Ms. Pax has worked on special projects and is in charge of child-care authorizations, monitoring welfare-to-work, structured job search and supported work.

142. Ms. Pax asked her bilingual co-workers to translate by explaining the procedures and paperwork to clients whom she referred for community service. The client typically belonged to another worker. Ms. Pax testified that she requested coworker interpretation assistance approximately four times a week for approximately one and one-half hours. Ms. Pax did not request bilingual assistance for telephone calls or walk-ins at the front desk.

143. Ms. Pax also testified that she usually used Allen Surplus, a coworker who sat one cubicle away, to interpret. Mr. Surplus is not Hispanic but speaks five languages. Ms. Pax also asked Evelyn (Caban) Fiore and Vickie Alma. She did not make appointments with her co-workers but usually just "calls out."

144. Ms. Pax testified that she observed other New Bedford Office workers ask their co-workers to interpret at least once a week. She did not know whether these workers were certified bilingual workers.

145. Ms. Pax testified that she saw her supervisor occasionally ask a coworker to translate if the client did not speak English.

146. Ms. Pax knew about the AT&T telephone interpreter line but did not ever use it. She did not recall when it was first available in the New Bedford Office.

147. Ms. Pax testified that the New Bedford Office has had an interpreter for a little less than a year who helps workers with translating. Ms. Pax testified that she saw co-workers using bilingual workers for interpreting after the office hired its contract interpreter.

Managers' and Supervisors' Testimony

148. Peter Bellew is a TAFDC supervisor IV who has worked in the Newmarket Square Office for the past five years. From 1985 to 1995, Mr. Bellew worked in the following positions: a Grade I entry-level worker in the Roxbury Crossing Office; an intake worker III in the Boylston Square Area Office; a supervisor III in the Refugee Resettlement Program (RRP) at Boylston Square.

149. While Mr. Bellew was an intake worker in the Boylston Office, he had Hispanic or non-English-speaking clients who needed an interpreter. Although Mr. Bellew speaks "very, very little Spanish," he rarely or occasionally had a need for interpreter services while working in the Boylston Square Area Office from 1990-1995. Mr. Bellew testified that he had a flair for languages and found it easy to

communicate in many ways, even non-verbally, with clients who did not speak English.

150. Mr. Bellew only sought out a bilingual, Spanish speaking worker if "something got extremely complicated." Mr. Bellew also testified that he used bilingual Spanish interpreters "maybe once a week, once every two weeks."

151. Mr. Bellew testified that there was an on-site full-time Russian-speaking interpreter at the Newmarket Square Office but not a Spanish-speaking interpreter. Mr. Bellew did not know whether they had an on-site full-time or even part-time interpreter at the Boylston Square Office. Mr. Bellew testified that there was no full-time Spanish-speaking interpreter at the Boylston Square Office while he was working there.

152. Mr. Bellew testified that he has used a contract interpreter in Newmarket Square. If workers wanted a contract interpreter, they requested one through their supervisor who contacted Kevin Brennan, the office's assistant director, to arrange the appointment dates they needed. Mr. Brennan made arrangements with Shirley Kennedy to provide the interpreter and then confirmed the appointment with the requesting worker. Mr. Bellew testified that it took two or three days to confirm an appointment. He also testified that it usually took 7-10 days from the initial request to get an appointment.

153. Mr. Bellew did not know whether this procedure applied to Catholic Charities. Mr. Bellew testified that he never used this procedure to obtain a contract Spanish-speaking interpreter because the office had a large number of

bilingual Spanish-speaking staff, including workers and clerks. Mr. Bellew testified that he now has a bilingual Spanish-speaking worker in his unit.

154. In Newmarket Square, Mr. Bellew observed other non-bilingual workers use their Spanish-speaking bilingual co-workers as interpreters. Mr. Bellew testified that he used bilingual Spanish-speaking co-workers about five or six minutes a week.

155. Marie Lonczak has been a Team Supervisor in the State Street Springfield Office since March 1999. From 1985 until March 1999, Ms. Lonczak worked as a supervisor, FASW IV, in the Springfield Office and generally supervised four or five workers.

156. Ms. Lonczak testified that she has asked her Spanish-speaking subordinates to translate completed Spanish forms into English so that she could read case files during her monthly review and supervision. Ms. Lonczak also testified that she used bilingual Spanish-speaking workers to interpret on her cases at least once a week before she became a Team Leader. Ms. Lonczak knew that other bilingual co-workers regularly asked their Spanish-speaking co-workers to interpret and/or translate for their non-English speaking clients.

157. Ms. Lonczak testified that she has never used the AT&T interpreter telephone lines although the Department's central office encouraged her to use the line in her office. Ms. Lonczak did not use the AT&T line because she used her bilingual co-workers for interpreting. Ms. Lonczak testified that she now instructs her English-speaking

workers to use the AT&T line because she does not supervise a Spanish-speaking worker. Ms. Lonczak testified that, if she had a Spanish-speaking worker, she would use him or her to interpret for a quick question rather than using the AT&T line because it takes two to four hours to use. Ms. Lonczak also testified that she would recommend that a worker use the AT&T line to complete an application.

158. Russell Michaud is a TASW III who has worked in the Department's Taunton Office since 1994. Between 1991 and 1994, Mr. Michaud worked in the Department's Brockton Office. Mr. Michaud is not bilingual and does not speak Spanish.

159. While Mr. Michaud worked in the Brockton Office, he had clients who spoke Spanish only. Mr. Michaud communicated with his Spanish-speaking only clients if they brought an interpreter or he "approached" a bilingual Hispanic co-worker. Mr. Michaud testified that he contacted a bilingual Hispanic worker for interpreter services "maybe once a month."

160. While employed in the Taunton Office, Mr. Michaud used bilingual co-workers to interpret for his Spanish-speaking clients. Mr. Michaud does not have a Hispanic caseload but still ends up occasionally with a Spanish-speaking-only client. If a Spanish-speaking client comes into the office to apply for benefits and the Spanish-speaking worker is unavailable, Mr. Michaud will take the intake application if the client has an interpreter. If the client does not have an interpreter, Mr. Michaud will go to a Spanish-speaking worker to ask for assistance. Once the case is opened, it is transferred to the Spanish-speaking worker.

161. Mr. Michaud estimated that it takes 30 minutes to 3 hours when a Spanish-speaking worker interprets for him while he is completing an application. He estimated that it takes twice as long for him to complete a Spanish-speaking-only application. Mr. Michaud uses a coworker to interpret and does not use other Department resources because he is looking to complete the application as quickly as possible since it may involve an emergency, a client with children or a mandated time deadline like over-the-counter food stamps.

162. Mr. Michaud has never used a telephone service or interpreting service.

163. Kathryn Townley is a FASW IV supervisor in the Department's New Bedford Office. Ms. Townley has held her supervisor position for 14 years. Ms. Townley is not of Hispanic heritage, is not a class member and is not a manager.

164. Ms. Townley testified that she has used bilingual Spanish-speaking interpreters in the course of her job duties, including as part of supervisory duties, because she does not speak or read Spanish or Portuguese. When Ms. Townley is reviewing a Spanish-speaking client's file, she needs a Spanish-bilingual worker to translate the file into English for her. Ms. Townley testified that it takes an average of 15 minutes for a Spanish bilingual co-worker to interpret a Spanish file into English. As part of her supervisory duties, Ms. Townley reviews 10-15 files each week.

165. The New Bedford Office hired a contract interpreter in June 1999. Between 1991 and June 1999, if Spanish-speaking

only LEPs came into the New Bedford Office, they may be assigned to a non-Spanish-speaking worker. In this case, the assigned worker would have to ask a bilingual-Spanish worker to assist on the case. Ms. Townley testified that this practice happened daily.

166. Ms. Townley testified that there is one worker in her unit who speaks Spanish, Evelyn Caban-Fiore, who is a class member. If a Spanish-speaking LEP called to complain about something, Ms. Townley asks Evelyn to take the phone call and interpret for her. Ms. Townley testified, "I just go over to her and ask if she would just come and assist me, and she always does." Ms. Townley also testified that she asks Evelyn to interpret "maybe once a month."

167. Ms. Townley testified that her office workers did not use contract interpreters from other Department offices because it was inconvenient for clients in that they want to be seen right away and don't want to make appointments. Ms. Townley also testified that Department's policy was to serve clients on the day that they come into the local offices.

168. Ms. Townley believed that the Department's policy was that she should use office bilingual staff for interpreting as the first resort. Ms. Townley testified that she would use contract interpreters if her use of office bilingual workers interfered with the Department's mission or the performance of her work unit.

169. Shirley Story is the Director of the Dorchester Office. She has held her position since July 1995. Ms. Story has held several positions at the Department: social worker (1974-1984), training unit supervisor (1984-April

1987) and roll call office assistant director for program (1987-1995).

170. The Dorchester Office has had a full-time Vietnamese interpreter since 1999 and a full-time Spanish-speaking interpreter from 1995 until March 2001 when she retired. Ms. Story testified that she again hired a full-time Spanish-speaking interpreter in June 2001. Both full-time interpreters are located in the Dorchester Office and are available to all Department staff by telephone or in-person.

171. If there is no full-time interpreter available, Ms. Story testified that the Dorchester Office will use interpreters assigned to other Department offices. Dorchester Office staff has contacted the Central Office to obtain interpreter services through Catholic Charities. Ms. Story also testified that her assistant directors have used the AT&T interpreter line and she did not know of any delay in accessing the AT&T line. Ms. Story testified that her workers also make arrangements for potential clients to fill out applications in off-site resources or locations like the Kit Clark Senior Center that have available interpreter services. Ms. Story testified that her office makes this arrangement when requested by a community service agency.

172. The bilingual caseworkers in the Dorchester Office, including those that speak Spanish, are asked to translate for their co-workers. Ms. Story testified that the bilingual workers are not required to interpret for co-workers and may refuse. She testified that two bilingual caseworkers have refused to interpret for a coworker and she did not discipline them. Ms. Story testified that she has also asked her two assistant directors to translate for her.

173. Anne Gerde is the Assistant Director at the Fitchburg Office and has held her position since January 1992. Since 1975, Ms. Gerde has held several positions in the Department: social worker (1975-1986), supervisor in the Athol Office (1986), assistant director in the Gardner office (1987-1990), director in the Gardner office (1990-1991) and assistant director in the Lawrence office (1991-1992).

174. If the Gardner Office does not have an employee who speaks a potential client's language, Ms. Gerde testified that the procedure is to first review the list of Department offices that have translators. If an office has an interpreter who speaks the required language, Gardner Office staff will call the office to make arrangements for the worker to translate.

175. If an appropriate translator is not on the office list, the Gardner office staff can make arrangements with Catholic Charities to provide an interpreter. Ms. Gerde testified that her office has used the following procedure since 1992 to obtain a Catholic Charities' interpreter: the caseworker makes a request to Ms. Gerde who contacts the Central Office; the Central Office contacts Catholic Charities who gives it an appointment date and time; the Central Office then gives the information to Ms. Gerde who gives it the assigned caseworker; the caseworker then contacts the client. Ms. Gerde testified that they try to meet at the same time and make the telephone call together to work out an appointment time and date. In Ms. Gerde's experience, there is no long delay in obtaining the Catholic Charities translation services and it has never taken one week.

176. Ms. Gerde testified that she has used Catholic Charities once for assistance on a food stamp case. Ms. Gerde testified that her assistant directors have used Catholic Charities for translation services but she did not know how often.

177. Ms. Gerde testified that her office has used the AT&T interpreter line once but she did not know whether there was a long delay in accessing the AT&T line.

178. Ms. Gerde testified that bilingual Spanish, Vietnamese and Cambodian caseworkers in the Gardner Office are sometimes asked to translate or interpret for their coworkers. Ms. Gerde also testified that she has asked a Spanish-speaking worker to translate a few times each year. She testified that her requests generally take a few minutes to complete.

179. Ms. Gerde testified that there are Department forms that a caseworker can use with a Spanish-only speaking client. In Ms. Gerde's experience, a Spanish-speaking caseworker is not required to translate the form into English for an English-only speaking caseworker because the worker can figure out the responses by comparing the document to an English-only form. (Respondent's Exhibits 21A and B, 22A and B).

180. Marie Maio is the Lawrence Office Director and has held her position since May 1994. Ms. Maio has worked at the Department since December 1976. She began her employment at the Department as a FASW I. After two years, Ms. Maio was promoted to a FASW II. Ms. Maio worked as a

financial assistance social work supervisor from 1978 to 1984. From 1984 to 1990, Ms. Maio was a manager and assistant director in the Chelsea Office. From 1990 to 1992, Ms. Maio worked as an assistant manager and an assistant director for programs in the Malden Office. Ms. Maio was the director of the Gloucester Office from 1992 to 1994.

181. The Lawrence Office has had a full-time Spanish interpreter since 1994. The interpreter works 8:30 a.m. to 4:30 p.m. but is "flexible, depending on the needs." Ms. Maio testified that the interpreter will come into the office earlier, if necessary, and will work on Saturday mornings when the local office is open. The current interpreter has worked for the past two years and is the third Spanish-speaking interpreter since 1994. Ms. Maio testified that the interpreter's schedule is "fairly full with cash appointments and also the two ESP workers' schedules.

182. In addition to the contract interpreter, there are two employment services program (ESP) workers in the Lawrence Office who have scheduled appointments since October 2002 when they are available to interpret. The office scheduler and the AIS (photo) operator are Hispanic bilingual who are available, as needed, to interpret during a brief conversation. The scheduler and AIS operator have been at the Lawrence Office since 1994.

183. If monolingual workers in the Lawrence Office are having an extended interview with a Spanish-speaking client, they use an interpreter that is arranged, the full-time interpreter or the ESP staff. If the interview is not

planned and requires a more lengthy conversation, Ms. Maio testified that her workers will use interpreters from other Department offices, contact the Central Office to use Catholic Charities, or call the AT&T line for a quick conversation. Ms. Maio testified it takes two or three days notice to arrange a Catholic Charities interpreter. She also testified that they did not need any time to access the AT&T line as workers only need to "dial the number." Ms. Maio testified that her workers do not use bilingual coworkers to interpret during long interviews in the office.

184. Ms. Maio agreed that it is quicker to use a bilingual coworker for a quick translation than to contact the AT& T line or Catholic Charities. Under the office procedures, an assistant director calls the Central Office that makes the arrangement with Catholic Charities. In Ms. Maio's experience, the office always received the interpreter and the time it requested. Ms. Maio does not know the precise cost of using Catholic Charities but she understood that it was more expensive to use a Catholic charities interpreter than a full-time office interpreter.

185. Ms. Maio testified that her staff has contacted the contract interpreter in the Newmarket Square, North Shore, Lowell, Worcester and Springfield Offices for interpreting services. Ms. Maio has never directed her staff to use the services of a local office interpreter before they use the services of a bilingual worker in the Lawrence Office.

186. Ms. Maio testified that she has personally used the Catholic Charities interpreter services twice within the last couple of months and "half a dozen" times since 1994. The majority of these occasions involved languages other

than Spanish and maybe one or two in Spanish. The requests for Spanish interpretation did not involve hearings or appeals because Ms. Maio generally did not sit in on appeals. Ms. Maio has not personally used the AT&T interpreter lines.

187. Ms. Maio testified she has asked a bilingual worker for interpreting assistance. When Ms. Maio cannot find a resource at the front desk, she and other workers use DET staff that is outstationed in her office because they are the closest and are willing to interpret. Ms. Maio testified that a bilingual worker has never refused to interpret or translate for her.

188. Ms. Maio testified that not all of the Spanish-speaking workers in the Lawrence Office are Hispanic. There are also a few bilingual workers in the office who speak languages other than Spanish: French, Italian, Polish and limited Portuguese.

189. Ms. Maio testified that the Spanish-speaking workers in the office are not asked to translate for their coworkers unless they have a personal relationship with the coworker and they are doing it to help each other. Ms. Maio also testified that the office's non-Latino Spanish-speaking workers are asked to translate by coworkers in the same frequency as other bilingual workers.

190. Ms. Maio testified that she does not require that workers translate for their coworkers. She would not discipline a worker if he or she refused to translate for a coworker.

191. Ms. Maio testified that she has acknowledged and thanked the ESP workers for volunteering to assist other workers with interpreting. Ms. Maio also testified that she thanked her bilingual workers to recognize the fact that they are willing to interpret and that it was effective and created a positive result for clients.

192. Ms. Maio has not asked the Department for a second contract interpreter because she uses the two ESP workers. Ms. Maio estimates that the two ESP workers provide approximately 16 hours of interpreting a week.

193. Ms. Maio testified that workers in her office tend to encourage cooperation among each other. Ms. Maio seeks to maintain the spirit of cooperation among workers that she found when she got to the Lawrence Office. Ms. Maio testified that workers have offered to interpret for her in situations where it was obvious that she was having difficulty.

194. Ms. Maio does not discourage bilingual workers to assist other workers with translations. She also testified that monolingual employees are comfortable with asking some bilingual employees with whom they have a personal relationship to interpret.

195. Clarence Moten is the Area Director in the Roslindale Office and has held his position since 1989. From 1988 to 1989, Mr. Moten was an Acting Regional Director and supervised 11 area directors throughout the Commonwealth. From 1985 to 1988, Mr. Moten was the chief clinical supervisor in the Department of Social Services, Quincy, Massachusetts.

196. The Roslindale Office currently has three contract interpreters: one Russian, Creole and Spanish. The Spanish interpreter has worked in the office for approximately seven months. She works from 9:00 a.m. to 1:00 p.m. Prior to the Spanish interpreter, the bilingual workers in each unit covered her interpreter work.

197. The Roslindale Office has two full-time contract interpreters who sit at the front desk and help the receptionist and assist other co-workers with interpretation: one is Spanish and the other is Haitian-Creole. The contract interpreters are also available to interpret for employees in other Department offices. Mr. Moten testified that there are no long delays in obtaining interpreters' services. Ms. Moten also testified that the Central office has authorized funding an interpreter position based on need.

198. Mr. Moten testified that a Latino bilingual worker is not required to interpret for a coworker, although they have always cooperated with co-workers or him. Mr. Moten estimates that his bilingual workers spend no more than one hour a week translating for monolingual co-workers. Mr. Moten also testified that he would not discipline a bilingual worker for his refusal to interpret for a co-worker.

199. If the potential recipient speaks a language for which the Roslindale Office does not have an appropriate bilingual worker, Susan Bender, the assistant director, will contact another Department office to arrange for an interpreter to process the case with the Roslindale Office worker. If a Department local office interpreter is not available, the Roslindale Office will contact the Central Office to arrange for an interpreter through Catholic Charities.

200. In Mr. Moten's experience, there were no substantial delays in accessing Catholic Charities' interpreter services and the use of such services does not affect the ability of the office to meet its timeliness standards for the provision of services. Mr. Moten testified that his office has also used Catholic Charities interpreters at a Department appeal hearing.

201. Mr. Moten testified that his staff used the AT&T interpreter line once but he felt that the process was cumbersome and not user friendly. Mr. Moten also testified that his office has had sufficient interpreter resources that it was not required to use the AT&T line.

202. Gary Smalley is a Food Stamp Supervisor who has worked in the Roslindale Office since January 1992. Mr. Smalley supervises five workers. From December 1990 until January 1992, Mr. Smalley worked at the Framingham Office as a consolidated worker who handled cases involving AFDC, EAEDC, emergency assistance and food stamps.

203. Six to eight months ago, the Roslindale Office hired two in-house interpreters: one speaks French Creole and the other speaks Spanish. Their work hours are 9:00 a.m. to 1:00 p.m., Monday-Friday. Prior to hiring the Spanish interpreter, Mr. Smalley asked bilingual Spanish-speaking co-workers Is and IIs to help him communicate with his Spanish-speaking population and interpret documents including handwritten Spanish letters. These workers included Luis Mejia, Gloria Stewart, Alma Lassiter, Manny Rodil and Rosa Cintron.

204. Mr. Smalley testified that he asked his bilingual Spanish-speaking workers for assistance as an interpreter five to ten times a week totaling approximately one-half hour to one hour. Mr. Smalley also observed other workers ask their Spanish-speaking co-workers for interpreter assistance.

205. Mr. Smalley testified that he never used the telephone interpreter lines or contract interpreters because there was a constant influx of clients in the Food Stamp Unit. Mr. Smalley also testified that the office's tradition or protocol discouraged him from using these types of interpreter services. Mr. Smalley felt that the assistance of his co-workers by interpreting was looked upon as teamwork, "we're all in this together; let's get the job done kind of attitude."

206. Florence Webb is the Area Director in the Springfield Office. Ms. Webb established a bilingual-Spanish speaking unit because of the volume Spanish-speaking clients who may come into the office when their Spanish-speaking worker was unavailable. Ms. Webb established the bilingual unit after the RRP program was disbanded but it no longer exists.

207. Ms. Webb testified that Hispanic workers interpreted for Anglo workers but "not to any great degree." If the Anglo worker requires interpreting that will take a brief amount of time, the worker can use the receptionist. If the worker requires a "long-term thing or involved procedure," he or she can use an interpreter through the AT&T interpreter line although this process takes longer, e.g., a one hour application can take up to one and one-half hours.

208. Ms. Durland testified that the Department does not have a policy that requires bilingual workers to translate for co-workers. Ms. Durland also testified that the Department has never disciplined a bilingual social worker for refusing to interpret. I credit Ms. Durland's testimony.

C. Department's Time Study in 1992-1993

209. As part of the CBA, the Department agreed to conduct a work-measurement study of the full range of activities and functions normally performed by Employment and Training (ET) social workers. The purpose of the study was to develop reasonable work expectations to ensure the equitable distribution of ET cases and to make recommendations, as appropriate, to the Tripartite Panel. The time study was based on timed actual observations of the work performed by ET workers. (Joint Exhibit No. 1A, page 192).

210. From September 1992 to June 1993, the Department conducted the work measurement study at issue in this complaint (hereafter: the 1993 time study). The Department designed the 1993 time study to: (1) update its existing work measurement data base; (2) revise existing reasonable work expectations, as necessary; (3) develop reasonable work expectations for the EAEDC Program; (4) develop separate reasonable work expectations for bilingual caseworkers, as necessary. The study also focused on functions related to AFDC entry and ongoing payments, EAEDC entry and ongoing payments and non-consolidated and consolidated service delivery. (Joint Exhibit 2). As part of the study, the Department also agreed to review the work performed by monolingual and bilingual social workers, including their provision of translation or interpreter services.

211. Dennis C. Johnson designed and developed the protocols and directed all aspects of the 1993 time study. Mr. Johnson has served as the Department's HRIS Manager since 1998. As part of Mr. Johnson's primary duties, he maintains the Department's human resources demographic and employee information.

212. Between 1980-1998, Mr. Johnson held several positions within the Department: Work Management Specialist, Director of the Work Measurement Unit, Director of Standards Development and Director of Performance Management. During this period, Mr. Johnson participated in several work-measurement studies, staffing and cost-benefit analyses and helped to develop computer applications for the Department's management and field staff. Prior to 1980, Mr. Johnson worked as a TASW I in the Department for approximately four months.

213. Since 1982, Mr. Johnson has participated in collective bargaining negotiations as a co-chair of the Department's negotiating team and serves as the keeper of the Department's data for negotiations.

214. Mr. Johnson worked as the Director of the Work Measurement and Standards Development from 1992-1998. As the Work-Measurement Director, Mr. Johnson conducted and directed work-measurement studies to comply with the Department's responsibilities under the Department's CBAs. For federal cost reimbursement purposes, Mr. Johnson developed methodologies to determine the percentage of time that Department case-workers spent on administrative duties and non-reimbursable items such as activities related to the Commonwealth's EAEDC or GR program.

215. Mr. Johnson also conducted analyses to determine how much staff was needed in the Department's local offices and its Central Office. From 1992-1998, he maintained an extensive database, including information obtained through work-measurement studies. Mr. Johnson also applied time standards to worker activities to develop staffing recommendations. Mr. Johnson's federal cost-allocation analyses were critical to the Department because they established baselines for the federal government to reimburse the Department for administrative costs related to various assistance programs.

216. The Department's work-measurement database includes information that it collects and maintains as part of its obligations under its collective bargaining agreements. The database includes the actual observations of the amount of time it takes for workers to perform fieldwork. The database enables the Department to determine, on average, how long it takes for its workers to perform discrete activities that are required to complete a work function, e.g., a grouping of activities to complete an application.

217. The Department began using work-measurement studies in 1978 to determine the productivity measurement of Department workers who were responsible for cash granting compared to social services functions. The Department initially contracted with Coopers & Lybrand to conduct a work-measurement study of its cash-grant and social services functions.¹⁹ The Department has used the Coopers & Lybrand methodology as

¹⁹An arbitrator's decision upheld the validity of Cooper & Lybrand's methodology. Mr. Johnson testified that the arbitrator also required the Department to establish a work measurement unit to maintain current work standards and adjust them to reflect policy and procedural changes man-

the foundation for its work-measurement protocols since 1978, although subsequent work-measurement studies are more detailed.

218. The Department's work-measurement methodology is essentially a journal study approach. The ultimate objective of a time study is to produce a list of all day-to-day, major activities that workers perform in their jobs. Mr. Johnson used the following approach as part of the Department's general methodology in the 1993 time study: (1) the observer establishes or develops a master list of functions or a grouping of activities that result in a worker performing a specific task or activity such as an approval or denial of an application or a redetermination; (2) the observer "shadows" a worker, records each activity performed in a journal log and assigns a specific time allocation for each activity; (3) the observer aggregates the activities previously described in the master list and determines the average time required to perform each activity. Using the collected data, the Department then develops a detailed activity list with associated time frames and establishes an overall time standard for the function, e.g., redetermination, after adding an additional 10% factor to account for personal fatigue and delay.

219. Since 1982, Mr. Johnson has conducted studies that are tied into the Department's database to ensure that it accurately reflected changes in the Department policies or procedures. As a work-measurement specialist, Mr. Johnson conducted two time studies but did not develop their protocols. As Director of the Work Measurement Unit, Mr.

dated by state or federal laws or directives. During the public hearing, Mr. Johnson was unable to locate the Coopers & Lybrand work-measurement study.

Johnson conducted and developed the protocols for five time studies in addition to the 1993 time study. These time studies examined emergency assistance functions, AFDC and EAEDC intake and ongoing payments work, food stamps program, Medicaid intake and ongoing functions and the Supplemental Security Income (SSI) program.

220. Mr. Johnson conducted a time study of the Department's food stamp program in July-September 1990 pursuant to a contractual agreement—Supplemental R of the Alliance contract. Using a journal approach, Mr. Johnson reviewed the activities of the non-public assistance food stamp workers who were separate from the TAFDC, EAEDC and Medical Assistance workers. Mr. Johnson concluded that the caseload size for the non-public assistance food stamp workers was much lower than the existing standard and that there was a "significant amount of worker-related downtime." Based on the study, the Tripartite Committee unanimously recommended that the Department increase the Non-Public Assistance Food Stamp caseload limitation standard from 200 cases to 330 cases per worker. (Complainant's Exhibit No. 9).

221. Mr. Johnson has a bachelor's degree of arts and received a master's degree in anthropology in 1979. Mr. Johnson did not take any courses relating to the development of work-measurement studies during his undergraduate and graduate studies. Mr. Johnson has not taken any courses or received formal training related to work-measurement studies since 1983.

Time Study Planning and Standards

222. After Mr. Johnson developed the standards and protocols for the 1993 time study, he submitted them to the Tripartite Panel for its review and approval. Mr. Johnson did not recall meeting with the Bilingual Committee or discussing the standards or protocols directly with it. Mr. Johnson believed Mr. McKenna, the union representative on the Tripartite Committee, submitted his time study proposal and protocols to the Bilingual Committee for its review and comment.

223. The Bilingual Committee disagreed with the use of a work measurement study to examine bilingual functions and informed Mr. Johnson of its preference for a survey.²⁰ The Bilingual Committee also felt that the Department could easily recognize that bilingual workers had additional work skills-their linguistic abilities-that the Department should "adequately compensate in good faith." Nonetheless, the Bilingual Committee made 10 recommendations to the Department it felt were necessary to make the 1993 time study "fair" for bilingual employees.²¹ (Complainant's Exhibit No. 2).

224. As part of its 10 recommendations, the Bilingual Committee wanted the Department to observe a "normal day" for a worker "with no changes." It also asked the Department to observe certain activities and functions as part of the bilingual time study. The Bilingual Committee's list included, but was not limited to, explaining policy, procedures and process to non-English speaking clients; interpreting and translating documents for other co-workers

²⁰Mr. Mejia acknowledged that a survey sent to Department workers would not be more scientific than a time study conducted by observations.

(in writing); assisting switchboard and co-workers by answering telephone calls of non-English speaking callers; oral interpretation of clients' messages for other co-workers. Mr. Johnson incorporated the Bilingual Committee's list into the Department's 10 bilingual allowance activities identified in the 1993 time study. (Joint Exhibit No. 2, page 152).

225. Mr. Johnson designated a special code, "Q," for the 1993 time study observers to capture the 10 bilingual allowance activities identified by the Bilingual Committee. (Joint Exhibit 2, page 39). Mr. Johnson testified that he directed the 1993 time study observers to annotate their observation logs with a "Q" designation whenever they observed bilingual workers speaking in a language other than English in cases assigned to their co-workers. Mr. Johnson testified that the "Q" designation did not apply to bilingual activities performed by the bilingual workers in their own cases because he directed the observers to record such information in other parts of their observation logs.

226. Mr. Mejia testified that the Bilingual Committee intended the 10 items on its list to include instances in which bilingual workers were used as a translator or interpreter for co-workers and their own clients. Mr. Mejia believed that the 1993 time study would include the time the bilingual workers spent translating for the entire office, "our own clients and other co-workers." I credit Mr. Johnson's characterization of the applicability of the "Q" designation to translation or interpretation performed by

²¹The Bilingual Committee's 10 recommendations are dated May 1992. (Complainant's Exhibit No. 2). Mr. Johnson testified that he did not receive the recommendations until July 9, 1992.

bilingual workers in their co-workers' cases and not in their own cases.

227. Mr. Johnson testified that he designed the 1993 time study to measure, in part, "activities" conducted by bilingual workers and the amount of time bilingual workers conducted such activities in a language other than English. It also measured the amount of time bilingual workers spent translating for non-bilingual workers. (Joint Exhibit 2, page 152). Mr. Johnson testified that the bilingual component of the Department's 1993 time study was not limited to measuring the activities of Spanish-speaking bilingual employees but extended to all workers in the study who spoke a language other than English in the course of their job duties, including translating or interpreting for co-workers.

228. Mr. Mejia testified that, after additional discussion between the Department and Local 509, the Department stated that the 1993 time study would not result in "any kind of employment implementation." After negotiations, the Tripartite Committee approved the 1993 time study methodology as modified by the addition of the Bilingual Committee's list of allowance activities.

Time Study Protocols and Data Gathering

229. Mr. Johnson determined the sample size for the 1993 time study based on the number of days allotted to complete the study, the number of Department staff available to serve as observers and the fact that the observers would "shadow" an AP worker for a single workday. Mr. Johnson also testified that the study protocol required the Department to give

at least 24 hours advance notice to the caseworkers who were selected for observation. Mr. Johnson contacted local office directors and asked them to randomly select the caseworkers for the study. (Joint Exhibit No. 2).

230. As part of the 1993 time study, the Department observed the activities of 215 of 953 (22.6%) AP workers in 40 local offices throughout the Commonwealth. In the study, 84 of 215 (39%) subjects were bilingual caseworkers.

231. Mr. Johnson selected 26 Local Office Quality Control (LOQC) workers to conduct direct time observations of AP caseworkers performing their daily work activities.²² Mr. Johnson selected the LOQC workers to serve as observers because they were knowledgeable about Department procedures, forms and policies as part of their quality control duties. Mr. Johnson also used bilingual LOQC observers to observe bilingual AP workers. Prior to the 1993 time study, Mr. Johnson had never used LOQC workers as observers in a work-measurement study. The LOQC workers are also members of Local 509 of Bargaining Unit 8.

232. Mr. Johnson gave the LOQC workers a one-half day, classroom training session that covered, among other things: the purpose and scope of the study, an overview of work measurement standards, observational techniques, study protocols and logistics. Mr. Johnson also held a one-half

²²The LOQC Unit reviews a statistically valid sample size of a local office's cases to determine whether the payments to welfare recipients met certain federal requirements. To make their assessments, the LOQC workers review the records and paperwork of caseworkers in the Department field office to determine if there was a worker or client-caused case error. While the LOQC review is generally a paper process, the LOQC worker sometimes interviews caseworkers, if necessary, who are required to cooperate with the LOQC workers under the threat of discipline. The LOQC Unit provided error rate information to the regional directors who were responsible for the local offices under review. (Durland testimony).

day practice observation at a local office that was followed by a review and critique of the observers' techniques, individually and in small groups. (Joint Exhibit No. 2, Training Outline, pages 41-45).

233. Josephine Gonzalez is a certified bilingual LOQC Specialist in the Department's Finance Department. Ms. Gonzalez has held her position since 1987. As part of her job duties, Ms. Gonzalez audits medical providers, taxi companies, personal medical goods and the Department's

234. offices for program accuracy. One of her duties is to ensure that local offices are operating correctly and accurately in accordance with Department regulations. From 1985 to 1987, Ms. Gonzalez was a FASW I in the Westfield office.

235. Prior to 1991, Ms. Gonzalez had never conducted a time study. Ms. Gonzalez did not remember how many days of training she received prior to her observation but it "was definitely less than a week." Ms. Gonzalez also recalled that she "practiced observations" maybe one or three days. She did not speak with Mr. Johnson about her observation duties.

236. Mr. Johnson testified that he did not direct anyone within the Department to tell employees in the local offices not to interrupt the workers who were being observed. Mr. Johnson testified that this type of direction would be contrary to time study protocol that was designed to observe a "day in the work life" of an AP worker. Mr. Johnson testified that he directed the LOQC workers to tell the caseworkers that they should continue their normal daily work routine and that the LOQC workers would "evaluate their individual [work] performance." (Joint Exhibit No. 2, Training Outline, page 43). I credit Mr. Johnson's testimony.

237. The LOQC workers completed a daily observation log prepared by Mr. Johnson to document each caseworker activity. They recorded the starting and stopping times for each activity and provided written comments. (Joint Exhibit No. 2, pages 37-38). The LOQC workers used work classification function codes prepared by Mr. Johnson to classify each

activity they observed as it related to a primary work function area, such as an application, redetermination or case maintenance activities related to AFDC or EAEDC functions. (Joint Exhibit No. 2, pages 39-40).

238. Mr. Johnson testified that he instructed the LOQC workers to show the daily observation logs to the caseworkers at the beginning of their observation. He also instructed the LOQC workers to review the completed observation logs with the caseworkers at the conclusion of the observation to respond to their questions, if any.

239. Mr. Johnson instructed the LOQC workers to hand-carry or mail the originals of their completed observation logs to him on the day after each observation and keep a photocopy for their records. Upon receipt, Mr. Johnson reviewed each observation log to determine if the activities were correctly coded, e.g., sequential start and stop times, total elapsed observational time and worker observations. If Mr. Johnson had questions about a LOQC worker's entries, he contacted the LOQC worker to discuss and clarify the entry. Mr. Johnson then made any necessary corrections or clarifications, in ink, on the original observation log. (Respondent's Exhibit No. 26 includes the original observation logs of the 84 bilingual employees who were observed as part of the 1993 time study).

240. Once Mr. Johnson completed his review, he and his staff manually entered the data from each observation log into a customized computer program that he designed. The computer program allowed the Department to sort the data by functions and activities to generate an average or standard for determining the amount of time needed to complete a work function

or activity. The Department established measurements for the primary work functions by aggregating the measurements of their component activities. (Joint Exhibit No. 2, pages 18-36). The Department then used the data to determine the frequency of certain activities within a work function such as a determination. The end result was a detailed listing with related times for completion of all activities necessary to perform a work "function."

241. Ms. Baez testified that the LOQC worker conducting her observation made her nervous because "he kept watching everything I did. He listened to all the phone calls. When I had to go to the ladies rooms, he had to follow me there to the doorway." Ms. Baez also testified that the observer's status as a LOQC worker made "a difference" to her because "they're the ones who check up on our errors."

242. Ms. Baez knew that LOQC workers reviewed cases and reported errors to the local office director or assistant director. Ms. Baez also testified that she was uncomfortable when her supervisor interviewed her about errors.

243. Ms. Baez testified that the LOQC person did not give her co-workers any instructions about how they were to interact with her during the observation. Ms. Baez testified that her observation day was unusual because she "wasn't interrupted at all" by her co-workers. Ms. Baez also testified that she was usually "interrupted all the time, every day, all day long."

244. Ms. Rivera testified that she felt "strange" when the LOQC worker observed her time, took notes of what she did, whether it was a telephone call, paperwork or an inter-

ruption by another worker or supervisor. Ms. Rivera testified that she was uncomfortable because she was being watched. Ms. Rivera also testified that it made a difference to her that a LOQC worker observed her because LOQC workers were "always looking over us to do it right." Ms. Rivera testified that her observation day was "quiet."

245. Ms. Cintron testified that her observation was "scary" because the LOQC worker followed her and checked on everything she did. Ms. Cintron testified that the day of her time study was "unusual" because none of her co-workers socialized with her and they normally spent 10-15 minutes or more socializing each day. Ms. Cintron also testified that she did not have coworker interruptions during her observation and that "it was like people were scared coming to me, probably."

246. Ms. Romero-Peart testified that the LOQC worker's presence did not bother her but it affected how she worked. She testified, "I only had to deal with my cases, you know, I didn't have to be interrupted to go and translate for another worker or --- so, I guess that it did affect it in that way maybe."

247. Ms. Romero-Peart testified that she "couldn't have anybody bothering us when we were doing the time study." She also testified that the workers were not allowed to interrupt "because the supervisor, Glenn Latinen, told the workers not to bother us while the time study was being done." She also testified that the Department's purported instructions related to interruptions for personal activities and not instances where a co-worker sought assistance on cases.

248. Mr. Vera was not observed as part of the 1993 time study. Mr. Vera testified that Sylvia Lezcano, an assistant director, told workers in his office not to approach their co-workers in the office who were scheduled for observation and that they should tell their clients not to call on the day that the worker was scheduled to be observed.

249. Mr. Vera testified that he did not observe anyone have contact with Ms. Baez on her observation day and that it was unusual for no one to approach her during the workday. Mr. Vera also testified that the subject workers' caseload ranged from 145 to 180 cases in 1992-1993 and that it would be impossible to call each client within the one week advance notice period.

250. The observation logs for Ms. Baez, Ms. Rivera and Ms. Cintron showed that their co-workers interrupted them several times during their observations, including requests for interpretation or translations for co-workers. (Respondent's Exhibit Nos. 12, 13 and 14). Ms. Romero-Peart's observation log shows that her co-workers interrupted her twice during her observation. (Complainant's Exhibit No. 2).

251. Ms. Domingo did not testify regarding her experience as a time study participant.²³ Ms. Domingo's observation log showed that co-workers interrupted her eight times, including three instances in which a co-worker requested a translation. (Respondent's Exhibit No. 11).

²³In their memorandum of law, Complainants inadvertently attributed certain testimony that was offered by Ms. Baez about the LOQC observer to Ms. Domingo. (Transcript, dated November 30, page 193).

252. Ms. Gonzalez testified that the amount of coworker interruptions "was very minimal" for Ms. Romero-Peart and the other workers she observed during the 1993 time study. Ms. Gonzalez testified that "there was no interrupting, no other workers asking for feedback on a case or anything. The maintenance was low and usually the flow of clients, you have no control over that. There wasn't much. And the phone calls were very limited. I thought, also, but that was my personal observations." She also testified, "I thought it was [unusual], but I wasn't there, I didn't comment on it. At the time my job was just to observe and write down what I had to write without making any comments." She did not report the minimal amount of coworker interruptions to Mr. Johnson.

253. Ms. Gonzalez was not told at any time that the local office workers were allegedly told not to interrupt the caseworkers who were to be observed.

Time Study Results

254. The Department compiled a distribution summary of the time spent by bilingual workers who participated in the 1993 time study. The summary showed information by work function code, primary work function area, the total time spent by all bilingual workers on a function (e.g., AFDC application), the total time spent by bilingual workers speaking or conducting activities in a language other than English and the appropriate percentages. (Joint Exhibit No. 2, page 154). The Department also compiled a distribution summary of the time spent by monolingual workers who participated in the 1993 time study capturing the same data items. (Joint Exhibit No. 2, page 155).

255. The 1993 time study data showed that bilingual workers spent 15% of their overall observation time conducting casework in a language other than English. (Joint Exhibit No. 2, Attachment 25)

256. The Department's comparison for bilingual workers also tabulated the total time they spent on activities that were classified under the "Q" code. The data showed that the 84 bilingual workers who participated in the study spent an average of 4.4 minutes a day or 1.5 hours a month performing the bilingual allowance activities listed under the "Q" code—interpreting or translating for other workers in their cases. (Joint Exhibit No. 2, page 154).

257. The Department also prepared a comparison of completion times by monolingual and bilingual workers for certain activities. While the data showed differences on several activities, Mr. Johnson concluded that the overall data showed no appreciable difference in the time bilingual and monolingual workers spent performing identical casework activities. (Joint Exhibit No. 2, pages 156-157).

258. Based on the 1993 time study, Mr. Johnson recommended an increase in the AFDC entry payments standards to the Tripartite Panel. Mr. Johnson testified that Tripartite Panel approved an increase in the standard from 1.75 to 3 AFDC applications per available day.

259. On August 4, 1994, Local 509 issued a notice for posting that objected to the 1993 time study and asked its members to call Commissioner Gallant to oppose the work and time measurement study. (Respondent's Exhibit No. 6).

260. Mr. Johnson testified that the Department's work-measurement staff observed Department workers engaging in bilingual activities as part of the five earlier studies that were conducted during his tenure as the Work Measurement Director. Mr. Johnson testified that he did not find anything significant in these studies about the amount of time bilingual workers spent on their bilingual activities nor did he conclude that they were "doing more work" than their non-bilingual co-workers.

D. Refugee Resettlement Program

261. In 1980, the United States Congress established the Refugee Resettlement Program (RRP) because ". . . it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands. . ." Act, March 1980, P.L. 96-212, Title I, §94, Stat. 102. Congress mandated that the states provide a range of social services, medical and cash assistance to designated refugees through a program separate from the state programs already available to citizens and immigrants.²⁴ Congress agreed to provide full federal funding for RRP benefits and the costs of administering a separate state program. 8 U.S.C. §1521, et seq.

262. In the 1980s and early 1990s, the Department administered a refugee resettlement program within the

²⁴In consultation with Congress, the President defines who is a "refugee" and establishes the numerical limits on refugees permitted in the United States. 8 U.S.C. §§1157(a)(2) and (3). For purposes of the RRP, the Department describes "refugees" as those persons who must leave their homeland for exigent reasons related to some form of persecution or threat of persecution. Conversely "immigrants" generally arrive in the United States through an orderly and regulatory process. Department's Post-Hearing Memorandum at page 50.

Commonwealth that was established by the Refugee Act of 1980, 8 U.S.C. §1521 et seq. (Stipulation c1).

263. Executive Order (EO) 257, dated October 4, 1985, designated the Massachusetts Office of Refugee Resettlement (MORR) as the state agency with responsibility for refugee affairs in the Commonwealth. Under EO 257, the MORR's administrator prepared and submitted a state plan to the federal government that described the Commonwealth's refugee resettlement program. (Stipulation c2).

264. On August 22, 1986, Governor Dukakis issued EO 265 that amended EO 257. Under EO 265, the MORR was placed in the Office of the Secretary of the Executive Office of Health and Human Services (EOHS). The MORR was authorized to coordinate and supervise the provision of cash, medical and other services to eligible refugees. If another state agency provided these services, EO 265 required that the MORR maintain its coordination and oversight role in an interagency agreement. (Stipulation c3).

265. On March 3, 1987, the Department, the EOHS and the MORR entered into an interagency agreement (the "Agreement") detailing their responsibilities regarding the administration of the Commonwealth's Refugee Cash and Medical Assistance (RCMA) program. The EOHS had the right to terminate the Agreement if it ceased to receive federal funding and it was unable to obtain other funding for refugee benefits. The Department agreed that it would amend or terminate the Agreement if federal or state statutes or regulations were enacted that affected delivery of the refugee services funded under the Agreement. The Department also agreed that its policies and procedures would not alter

or infringe upon the federal RRP's goals or objectives for the delivery of services funded under the Agreement. (Stipulation c4).

266. Under the Agreement, the EOHS was responsible for requesting funds from the federal administrative agency for RCMA benefits and administrative costs which it then allocated to the Department. The EOHS agreed that it would establish its account (4000-0802) as a "state account, 100% federally funded." It further agreed that it would request the establishment of an allocation account (4406-6000) from its account for compensation to the Department. (Complainant's Exhibit No. 35). The Department agreed that it would arrange for AFDC and Medicaid reimbursement to be deposited directly into Account No. 4406-6000. If the federal government disallowed reimbursement for expenditures made by the Department, the EOHS was responsible for appealing the disallowance. If an appeal was unsuccessful, the EOHS agreed to request a supplemental appropriation from the Massachusetts legislature to cover the disallowance. (Stipulation c5). The EOHS had additional responsibilities under the Agreement, including monitoring the Department's performance and coordinating activities with agencies providing education and training services to refugees. (Stipulation c5).

267. Under the Agreement, the Department had full responsibility to administer refugee benefits under the RCMA. The Department's Division of Eligibility Operations was responsible for providing refugee benefits through teams of social workers who had caseloads consisting solely of refugees who were eligible for benefits fully funded by the federal government. The Agreement further specified that

the Department would provide services "to the fullest extent possible, by social workers who are bilingual in refugee languages appropriate to the major ethnicities represented among the region's refugee population, as identified by [EOHS and the Department]." The Department retained "responsibility for its . . . payroll and personnel functions," and had sole responsibility for directing and supervising" RCMA social workers. (Stipulation c6). The MORR monitored the Department's performance through its review of the Department's reports and case files. (Stipulation c7).

268. The parties amended the original Agreement twice. Among the changes made by the first amendment was a change in the name of the MORR to the "Massachusetts Office for Refugees and Immigrants" (MORI). The second amendment extended the expiration date of the Agreement to September 30, 1988, among other changes. (Stipulation c8). The parties also executed a subsequent interagency agreement that covered the period from January 1, 1990 through June 30, 1992. (Stipulation c9).

269. On or about September 19, 1986, the Department requested authorization from the Massachusetts Department of Personnel Administration (DPA) to establish 22 FASW III positions as "federal temporary positions" for the RRP from appropriation account 4406-6000. This account was separate from the Department's other appropriation accounts for administrative expenditures. (Stipulation c10).

270. Mr. Menicocci testified that the Department's designation of the RRP positions as "temporary federal positions" merely identified their "funding" stream for accounting

purposes. Mr. Menicocci also testified that the Department used the following factors to determine whether the incumbents in the RRP positions were "state employees:" whether they applied for employment using a Department employment application form; whether a Department manager hired, supervised and evaluated them; whether they were enrolled in a state retirement system; whether the collective bargaining agent representing Bargaining Unit No. 8 deducted union dues.

271. Mr. Trusten testified that Walter Holmes, then the Department's Deputy Commissioner, told him that the RRP workers would not have civil service status but would be treated as temporary or provisional employees who were hired for the duration of the federal funding.

272. Mr. Menicocci testified that the phrase "federal temporary positions" does not mean that the RPP workers were "short-term" employees who were only employed for the duration of a specific program. He also testified that Department workers who were originally paid from the RRP account could be shifted to the Department's general administrative account and then returned to the RRP account, if necessary. Mr. Menicocci testified that the Department generally reassigned its workers to other positions when the federal funding for their positions ended.

273. The Department requested that the DPA classify the RRP positions at the FASW III grade level rather than the customary FASW I entry grade level. The Department's request was based on its determination that a RRP worker's job duties required a level of skill, knowledge and abilities comparable to that of workers in its other specialized

units, homeless coordinators and teen specialists, who were at the FASW III grade level. The Department's determination was not based on the fact the RRP workers were bilingual.

274. The RRP workers' primary job duties required them to: (1) provide "soft" services such as assisting their clients with housing problems or dealing with utility companies; (2) identify agencies that provided services specifically designed to assist refugees with their assimilation into American culture; (3) determine the refugees' initial and continuing eligibility for any of the Department's programs, including its cash assistance programs.

275. The DPA approved FASW III as the appropriate job classification for the RRP positions. (Stipulation c10). The RRP caseworkers were included in Local 509 because the Department classified them as FASWs.

276. Job postings for the RRP positions required an applicant to be "certified, or certifiable," in one of the languages needed for the RRP, such as Southeast Asian, Russian or Polish. (Stipulation c11). The Department did not post any openings for RRP positions for applicants who were certified or certifiable in Spanish. (Joint Exhibit No. 6). Spanish-speaking candidates were not eligible for a RRP position unless they spoke one of the designated languages.

277. In early November 1996, the Department selected the successful applicants for the FASW III positions with a starting date of November 30, 1996. Some of the candidates selected for the positions were current Department employees who were reassigned and promoted while the Department hired

other candidates as new Department employees. In addition, some of the selectees were not certified as bilingual. (Stipulation c12).

278. Between November 30, 1986 and April 17, 1990, the Department hired additional RRP workers. These workers applied for their positions on the Department's employment application forms and were hired by the Department managers who were paid from account 4406-6005. They were also supervised and evaluated by Department employees who were also paid from account 4406-6005. The selected employees enrolled in the state employee retirement system and authorized the deduction of union dues to Local 509.

279. The RRP hires were provisional appointments because the Department did not hire them from a civil service list. (Stipulation c13).

280. The Department initially placed the RRP workers into a discrete unit within the Department's local office structure. The Department divided the RRP workers into regional teams that were located in seven local offices throughout the Commonwealth. As part of their routine workload, the RRP workers traveled from one office to another, as needed, to serve the refugee population in a particular area. (Stipulation c14). A program director in the Central Office provided management oversight of the RRP including technical support to the refugee workers and served as a liaison for the Department with the MORI and other state and community agencies. (Joint Exhibit No. 5).

281. Sometime in late 1990 or early 1991, the Department reconsidered the RRP's service delivery model based on

changes in the federal law that reduced the length of time refugees were eligible for fully federally funded benefits. These changes resulted in a significant decrease in the RRP's caseload. (Stipulation c14).

282. Based on the federal changes, the Department decided to decentralize the RRP program and eliminate it as a separate unit. On or about June 13, 1991, the Department involuntarily reassigned 18 RRP workers to local offices, effective July 1, 1991, where they became a part of the local office field staff. (Stipulation c15 and Joint Exhibit 7). The Department did not demote the RRP social workers and they retained their positions and titles upon their reassignment into the Department's local offices. (Respondent's Exhibit No. 9).

283. Once deployed into the local offices, the RRP workers performed the same work as other Department social workers. The RRP workers continued to have a refugee caseload but were also assigned non-refugee cases. (Stipulation c15).

284. Ms. Durland testified that a homeless coordinator or teen specialist TASW I or II who is provisionally appointed to a TASW III level would return to their original grade level if they voluntarily left their specialist positions. Under these circumstances, the specialists do not retain their TASW III grade level because they are no longer performing the unique job functions that justify a TASW III grade level. Ms. Durland also testified that if the Department had demoted the RRP workers from their TASW III positions, the vacated grade III positions would still not be available to other workers, including the class members.

285. General Laws, Chapter 41, §14 provides that "a provisional appointment shall be terminated if there is a change in the nature of the appointment or in the salary of the person who has been provisionally appointed."

286. Florence Webb is the Department's Springfield Office Area Director in the Springfield Office. Ms. Webb testified that the RRP workers had a 17-week training program compared to the 15-week training program for other Department workers. Ms. Webb also testified that the RRP employees worked harder than other Department caseworkers because their job duties were much more varied and diverse.

287. In 1982, Juliette Nguyen began to work at the Department as a FASW I. In 1987, the Department promoted Ms. Nguyen to a FASW III position. After Ms. Nguyen's promotion, the Department transferred her to the RRP as a supervisor. Ms. Nguyen is now the MORI Executive Director.

288. Before her assignment as an RRP worker, Ms. Nguyen worked as a caseworker who had a "regular" caseload that included Spanish-speaking, Vietnamese and English-speaking clients. When Ms. Nguyen assumed her duties as an RRP supervisor, she and two workers were responsible for all refugee cases in western Massachusetts. Ms. Nguyen believed her RRP cases were more difficult than her prior Department caseload because of the high number of assigned cases and the fact that she had to perform consolidated activities, e.g., intake, ongoing case management and redeterminations.

289. On June 13, 1991, the Department informed Ms. Nguyen that it had involuntarily reassigned her to the Worcester local office. It also informed Ms. Nguyen that she would

retain her status as a FASW III. (Joint Exhibit No. 7). Ms. Nguyen assumed a regular caseload of ongoing cases with English and Spanish-speaking only clients but she does not recall how many Spanish-speaking cases she had in her caseload. Ms. Nguyen held this position from 1991 to 1994.

290. Department employees who disagree with their placement into a position can file an "individual reallocation request" or appeal of their classification within the Department, and then directly to the HRD-AF. If they are unhappy with HRD-AF's decision, they can appeal to the Civil Service Commission. G.L. c. 30, §§ 45 and 53.

291. Since 1991, Department employees have filed 400 classification appeals, with 198 approvals.

292. Complainants did not request a reclassification of their positions to the TASW III grade at any time after July 1, 1991.

293. On May 28, 1991, Mr. Vega filed a grievance on behalf of the Bilingual Committee alleging that the Department discriminated against bilingual workers when it failed to classify them as FASW III workers. The grievance stated that the Department "failed to ensure equal opportunity in the area of hiring, upgrading and rate of compensation for FASWs I holding bilingual positions when hiring staff for R.R.P. at a third level (FASW III) and for other programs such as AFDC, MA, FS and GR at the first level (FASW I)." Mr. Vega claimed that the Department should have hired him as a FASW III like the RRP workers instead of as a FASW I. The Bilingual Committee alleged violations of the Articles 2, 16 and 23A of the CBA. (Respondent's Exhibit No. 5).

294. On or about March 2, 1994, Mr. Trusten denied the Bilingual Committee's grievance on behalf of Local 509. Mr. Trusten testified that Local 509 declined to appeal the grievance denial because it also represented the RRP social workers.

295. On June 28, 1994, the Appeals Committee of Local 509 informed the Bilingual Committee that it would not allow the RRP grievance to proceed to arbitration. The Appeals Committee ruled that the Bilingual Committee's grievance had no merit and that there was no contract violation regarding the Department's classification of the RRP workers as FASW IIIs. (Respondent's Exhibit No. 4).

296. Peter Klein is the Department's Director of Labor Relations and has held his position since December 1996. Prior to his current position, Mr. Klein worked as the Department's assistant general counsel and deputy general counsel in the area of policy and contract procurement. From 1991 to 1993, Mr. Klein was the associate general counsel at the Commonwealth's Office of Employee Relations in the Executive Office of Administration and Finance.

297. As Director of Labor Relations, Mr. Klein is responsible for all labor relations functions within the DTA. He handles the contract administration for several collective bargaining agreements between the Commonwealth and bargaining units 1, 6 and 8. Mr. Klein also serves as the Department's designee for Step 2 grievances. He periodically conducts labor management meetings with representatives of Local 509. He also works with Local 509

on a day-to-day basis in problem solving and avoiding grievances.

298. Mr. Klein testified that the Commonwealth and Local 509 entered into a tentative agreement on June 30, 2001. As part of the agreement, the Commonwealth agreed to a bilingual pay differential of \$40 a pay period, effective July 2002. The bilingual pay differential applies to all Department employees, regardless of languages spoken, who are designated to perform bilingual responsibilities as an essential function of their jobs. It is designed to be a recruiting and retention tool for agencies that have had difficulty hiring or retaining bilingual employees. Mr. Klein testified that this was the first time that Local 509 had proposed a bilingual pay differential.

III. CONCLUSIONS OF LAW

A. Disparate Impact: Department's Interpreter Policy

General Laws Chapter 151B prohibits employment policies or practices that are fair in form but discriminatory in operation.²⁵ The disparate impact theory of discrimination prohibits employment policies or practices "that are facially neutral in their treatment of different groups, but that in fact fall more harshly on one group than another and cannot be justified by business necessity."²⁶ International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335, n.15 (1977); Griggs v. Duke Power, 401 U.S. 424 (1971); Smith College v. Massachusetts Commission Against Discrimination, 376 Mass. 221, 227 (1978).

Since a disparate impact claim focuses on the consequences or results of alleged discriminatory practices, proof of a discriminatory motive or intent is not required. Cox v. New England Telephone & Telegraph Co., 414 Mass. 374, 385 (1993); School Committee of Braintree v. Massachusetts Commission Against Discrimination, 374 Mass. 424, 429 (1979). Accordingly, Chapter 151B makes unlawful a facially neutral employment policy or practice if it adversely affects members of a protected class to a greater degree than non-members even absent a showing of unlawful discriminatory intent, unless the policy or practice is justified by business necessity. See generally Harris & Tatum v. City of

²⁵In addition to a denial of employment opportunities, a disparate impact claim may be based on a challenge to an employment policy or practice that has a significant adverse impact on the terms, conditions or privileges of a protected group. Garcia et. al v. Spun Steak Co., 998 F.2d 1480, 1487 (9th Cir. 1993), affirmed, 13 F.3d 296 (1994).

²⁶See generally Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988)("the necessary premise of the disparate impact approach is that some employment practices, adopted without a discriminatory motive, may in operation be functionally equivalent to intentional discrimination").

Worcester Police Department, 24 MDLR 122 (2002); Bresnahan v. Route 114 Liquors, 17 MDLR 1129, 1333 (1995); Wible v. McDonough, 10 MDLR 1497, 1510-1511 (1988).

The Commission and Massachusetts courts have followed the three-part burden shifting framework for disparate impact cases set forth by the United States Supreme Court in Griggs v. Duke Power Co., supra. See e.g., Harris & Tatum, supra; Bresnahan, supra; EEOC v. Steamships Clerks Local 1066, 48 F.3d 594, 606 (1st Cir. 1995), cert. denied, 516 U.S. 814 (1995). To establish a prima facie case of disparate impact discrimination, Complainants must prove that the Department maintained a facially neutral policy or practice that had a substantial and disproportionate adverse impact on them as members of a class protected under General Laws, Chapter 151B. Griggs v. Duke Power Co., 401 U.S. at 430. See also Ramos v. Baxter Healthcare Corp., 256 F.Supp 2d 217 (2003)(the alleged discrimination arose from the employer's policy not to extend benefits to its employees located in Puerto Rico and was not based on a otherwise neutral policy that, as applied, had a disparate impact on Hispanic employees).

Complainants allege that the Department's interpreter policy or practice requires class members to interpret or translate for monolingual co-workers, upon request, and that such requirement places additional duties on class members that are not imposed on their monolingual co-workers. Accordingly, Complainants must show that the Department's interpreter policy or practice had a substantial adverse impact on a legally protected class of which they are members--Latino bilingual Spanish-speaking workers--and cannot be justified by a business necessity. Steamship

Clerks Union, Local 1066, 48 F.3d at 6013; Griggs, 410 U.S. at 430; Harris & Tatum, *supra*. Com-plainants may rely on statistical data to prove a prima facie case and they do not have to prove the precise impact of the policy to a mathematical certainty. See Bresnahan, 17 MDLR at 1333-1334, *citing* Griggs, 410 U.S. at 703; Stuart v. Roache, 951 F.2d 446, 451 (1st Cir. 1991), Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988).

Once Complainants have established a prima facie case of disparate impact discrimination, the burden shifts to the Department to rebut their proof by showing that there is no mandatory interpreter policy or practice for class members, that the Department's implementation produced no disparate impact or that there is no causal relationship between the Department's policy and the alleged disparate impact. See Equal Employment Opportunity Commission v. Steamship Clerks Union, Local 106, 48 F.3d 594. In addition, the Department can demonstrate that, even though the challenged interpreter practice or policy may have a disparate impact, it is job-related and is reasonably necessary to achieve a legitimate business objective. See Dothard v. Rawlinson, 433 U.S. 331-332, n.14 (1977)(the touchstone of the "business necessity" exception is whether the discriminatory employment practice is vital to safe and efficient job performance); School Committee of Brockton v. Massachusetts Commission Against Discrimination, 377 Mass. 392, 401 (1979); Bresnahan, *supra*. If the Department successfully articulates a business necessity for its interpreter practice or policy, Complainants must then prove that a less restrictive alternative exists that would not have the same discriminatory impact on the Department's Latino bilingual Spanish-speaking workers. Bresnahan, 17

MDLR at 1334, citing Albermarle v. Moody, 422 U.S. 405, 425-426 (1975). The ultimate burden of proving disparate impact rests with Complainants. Donnelly v. R.I. Board of Governors, 929 F. Supp 583 (1996), affirmed 110 F.3d 2 (1st Cir. 1997); School Committee of Brockton v. Massachusetts Commission Against Discrimination, 377 Mass. at 423.

Prima Facie Case

The crux of Complainant's disparate impact claim is that the Department's interpreter policy or practice has "burdened bilingual Hispanic FASWs with extensive requests for translations, in addition to their regular duties, that [do] not apply to their monolingual co-workers." Complainants' Memorandum of Law at 4.²⁷ As discussed below, I conclude that Complainants have failed to establish that the Department's interpreter policy or practice satisfied two key elements of their prima facie case: adverseness and disparateness. Donnelly v. R.I. Board of Governors, 110 F.3d at 5.

I conclude that Complainants have failed to identify a Department interpreter policy or practice that requires bilingual caseworkers, including the class members, to "accede to" their co-workers' requests for "extensive translations" during the time period relevant to this complaint. Contrary to Complainants' characterization, I

²⁷ Complainants contend that interpreting is not a job related function for TASW I and IIs because it is not included in the classification specifications for the TASW job series. (Complainant's Exhibit 4). I will not address this contention because Complainants raised it for the first time in their post-hearing memorandum of law. I note, however, that Complainant's Exhibit 4 includes the relevant classification standards and not the job description for TASW I and II positions. I also find that Complainants' contention is not relevant in this complaint because they did not prove that the Department disciplined class members for failing to interpret upon their co-workers' requests. The key question in this case is whether the Department's interpreter policy or practice has a disproportionate and substantial impact on class members and not whether the Department has the authority to ask class members to interpret.

find that the Department's interpreter policy statements and memoranda do not establish a mandatory translation requirement for the class members and that the other evidence in the hearing record does not support their contention. (Joint Exhibits 8-12 and Complainant's Exhibit 25).

Nowhere in the Department's policy statements cited by Complainants is there an explicit requirement that bilingual workers must interpret or translate for their co-workers. The policy statements merely describe the Department's obligation, under the OCR agreement, to provide interpreter services to its LEP applicants and clients. They also identify the Department's panoply of interpreter resources that are available to ensure that LEP persons have equal access and opportunity to the Department's assistance programs in the local offices. These resources include: (1) appropriate local office bilingual staff; (2) bilingual volunteers from local agencies; (3) contracted Department interpreters in various languages; (4) the Catholic Charities' interpreter service contract; and (5) the AT&T line interpreter services.

While the Department's policy statements and memoranda clarify the right of applicants and clients to appropriate interpreter services, they cannot be fairly characterized as directives to local office staff that the Department's bilingual caseworkers, including class members, are required to translate for their co-workers, upon request. For example, the Department's policy clearly provides that, wherever feasible, local office staff should assign the cases of LEP persons to bilingual workers who are fluent in

the LEP person's primary language.²⁸ If an appropriate bilingual worker is not available, the local office must furnish an interpreter unless the LEP person expresses a clear preference to bring his or her own interpreter. (Joint Exhibit No. 12). The Department's policy directives do not require or mandate, however, that a bilingual worker, including a class member, interpret in this circumstance. They merely authorize local office managers and supervisors to use bilingual workers who are "available" and "appropriate" as part of its overall comprehensive scheme to provide interpreter services. Complainants' contention that the Department's policy statements "require that office staff request that class members interpret for them and that class members comply with the request" clearly overreaches and misstates the Department's interpreter policies.

The Department's varied strategies to effectively implement its OCR agreement also belie the class members' assertion that the Department expected and demanded that they accede to their co-workers' requests for extensive translations. For example, the Department hired 67 Spanish-bilingual TASW I workers (48% of all of new hires) from January 31, 1994 to January 31, 1999 to respond to its need for Spanish-speaking bilingual workers. The Department also increased the number of bilingual Spanish-speaking contract interpreters whose sole responsibility is to interpret. The contract interpreters are available to provide translation services to any local office throughout the Commonwealth. In addition, the Department also executed contracts with Catholic Charities²⁹ and the AT&T

²⁸The DHHS imposed this requirement on the Department as part of the OCR agreement. (Joint Exhibit 3, Section III, Paragraph 6.

²⁹In 1998, 68% of the total dollars spent by the Department under the Catholic Charities contract were for Spanish-speaking interpreter services. (Stipulation h).

Interpreter Line to provide additional interpreter resources. Finally, some of the Department's local offices initiated their own strategies in response to their unique workload and staffing needs such as securing interpreter services through agreements with local community agencies and using other bilingual state employees who were deployed in local offices.³⁰

There is no doubt that the above-described strategies enabled the Department to meet its obligation to provide equal access and opportunity to its LEP applicants and clients who require interpreter services. I also find that the Department's interpreter strategies and actions have a concomitant benefit in that they are also reasonably likely to minimize the Department's reliance on and use of bilingual workers, including class members, to interpret for their monolingual co-workers who were assigned Spanish-speaking clients. For example, an increase in the number of bilingual Spanish-speaking workers should enable local offices to assign more LEP Spanish-speaking persons to appropriate bilingual workers and reduce the Department's need to use alternative interpreter services, including the class members.

It is also undisputed in the record that the class members, like their non-Spanish-speaking bilingual colleagues, interpreted for their co-workers and supervisors. However, Complainants presented no credible testimony that a Department manager or supervisor directed or required a class member to translate or that class members felt com-

³⁰The Department implemented its interpreter strategies during a period when its overall caseload declined. In 1996, the Department's AFDC and EAEDC caseloads were 83,000 and 17,000. In 2001, its AFDC and EAEDC caseloads were 42,000 and 17,000, respectively.

pelled by a supervisor or manager to interpret. In addition, Complainants did not offer any evidence to rebut the Department's testimony that no class member has been disciplined for a failure to interpret when requested by a supervisor or monolingual co-worker. (Durland testimony). Finally, the Department does not dispute that its managers and supervisors "encouraged" class members to interpret when requested and positively acknowledged their interpreter actions through favorable performance appraisals. (Testimony of Arbuto, Baez, Carrizales, Cintron, Mejia, Romero-Peart and Zayas). Complainants have failed, however, to prove by objective evidence that the class members treated such "encouragement," as coercive.

The class members' testimony also shows that they voluntarily interpreted for their co-workers based on considerations related to teamwork, service delivery and workload, and not in response to any Department policy directives.³¹ Ms. Baez testified that she interpreted because she "felt bad" for the clients who needed help. Ms. Cintron testified that she translated because she wanted to help clients who needed immediate assistance. Mr. Mejia testified that he "was happy to help their clients and my co-workers." When a new contract interpreter was hired in his office, Mr. Mejia also told his supervisor that he would not like to be called to interpret because of his caseload except as a last resort. Ms. Benson testified that her supervisor told her that it was "okay" if she did not want to interpret for a co-worker and that sometimes she told her co-workers that she was busy and that they would have to wait. Mr. Vega testified that he now translates "if I'm in a good mood."

³¹Mr. Arbuto testified that his supervisor required him to translate for his co-workers.

I also credit the testimony of the Department's witnesses that they did not force or require class members to interpret for their co-workers (see testimony of Durland, Foster, Story, Maio and Moten). Mr. Foster testified that the bilingual workers had discretion on whether to interpret: "it was up to them to say yes or no. If they are busy or can't do it, you're up a creek at that point." Ms. Story testified that bilingual workers are not required to interpret for their co-workers and that they may refuse. She cited two instances in which bilingual workers refused to interpret for a co-worker and were not disciplined. Ms. Maio testified that monolingual workers in the Lawrence Office were comfortable with asking Spanish-speaking bilingual workers to interpret with whom they have a personal relationship and will help out in a "spirit of cooperation."

Based on the totality of evidence in the hearing record, I conclude that Complainants have not met the first element of their prima facie case because they have not proven that the Department had an interpreter policy or practice that required class members to accede to their co-workers' requests for extensive translations.

In addition to identifying a mandatory interpreter policy or practice, Complainants must show that they sustained an injury arising from the interpreter policy and practice (adverse impact) that was disproportionately borne by Latino bilingual Spanish-speaking workers compared to non-protected employees (disparate impact). They must also show that there is a causal relationship between the Department's interpreter policy or practice and the disparate

impact, if any. Donnelly v. R.I. Board of Governors, 110 F.3d 2, 5 n.2 (1st Cir. 1997)(complainants failed to show that the University of Rhode Island's three-tier faculty salary plan had a disparate impact on the pay received by female faculty because it resulted in lower minimum salaries for women compared to men. See also Bresnahan, 17 MDLR at 1133; McAuliffe v. Pechelis, 13 MDLR 1039, 1052 (1991).

It is not sufficient for Complainants to merely assert that the Department's interpreter policy or practice has harmed Latino bilingual Spanish-speaking workers. They must prove the adverse affects of such policy or practice on the terms, conditions or privileges of their employment, that the adverse impact is significant and that other employees not of their protected group were not affected by the policy or practice to the same degree. See Garcia v. Spun Steak Co., 998 F.2d 1480, 1486 (9th Cir. 1993), rehearing denied, 13 F.3d 296 (1993), cert. denied, 512 U.S. 1228 (1994)(there is no dispute that, if the English-only policy causes any adverse effects, they will be suffered disproportionately by those of Hispanic origin. The vast majority of those workers at Spun Steak who speak a language other than English—and virtually all those employees for whom English is not a first language—are Hispanic); Wible v. McDonagh, 10 MDLR 1497 (the percentage of single female heads of household who received Section 8 certificates in 1985 was 23 times greater than the percentage of all other heads of household. Therefore, the group disadvantaged by the policy of not renting to recipients of Section 8 was overwhelmingly members of a protected class-females).

For the following reasons, I conclude that Complainants have failed to show that the Department's

interpreter policy or practice had a disparate impact on class members because of their national origin:

(1) As discussed above, I find that the class members were free to decline or refrain from interpreting for their co-workers and supervisors without fear of disciplinary action by the Department. There is no disparate impact regarding a condition or privilege of employment "if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference." Garcia et. al v. Spun Steak Co., 998 F.2d at 1487.

(2) Although the majority of bilingual caseworkers hired by the Department from January 31, 1994 to January 31, 1999 were bilingual in Spanish, it also hired individuals who were bilingual in other languages, including Creole French, Vietnamese, Russian and Cambodian. (Respondent's Exhibit No. 8 and Stipulation f). Since ethnicity was not a consideration in the hiring process for TASW I bilinguals, many of the Department's Spanish-bilingual workers were not Latino. (Durland testimony).

Based on the evidence in the record, I reasonably infer that all bilingual workers—not just the class members—translated for their co-workers, upon request. For example, Ms. Salcedo testified that she asked the contract Vietnamese bilingual interpreter in her office to translate for her Vietnamese clients. Ms. Pax testified that when she needed translation, she usually asked a worker who was not Latino. Ms. Gerde testified that bilingual Vietnamese and Cambodian caseworkers were sometimes asked by their co-workers to interpret. Finally, Mr. Maio testified that non-Latino bilingual caseworkers were asked to translate by

their co-workers at the same rate as other bilingual workers.

Despite the Department's recent hiring record regarding bilingual caseworkers, Complainants did not introduce any evidence to show the percentage of TASW I and II caseworkers who are bilingual in Spanish but not Latino. Complainants also failed to introduce any evidence that class members were disproportionately affected when compared to the other bilingual TASW I and IIs-irrespective of their national origin—who were asked to interpret or translate by their monolingual co-workers.

(3) Assuming, arguendo, that the Department's policy or practice required class members to interpret for their monolingual co-workers, Complainants have not proven that their harm was substantial because they were "burdened by extensive requests for translations" from their co-workers. Complainants provided no objective evidence or documentary information to corroborate the time spent by class members interpreting for their co-workers. The testimony of the 13 class members called by Complainants consisted solely of their limited recollections and anecdotes covering a 10-year period. Even if I fully credit their testimony, it shows that 8 of 13 class members spent only 2 hours or less a week (5% of the work week) interpreting for co-workers and 3 class members spent only 3 hours a week (8% of the work week) performing such activities. The remaining two class members testified that they only spent 3-5 hours a week (13% of the work week) interpreting for their co-workers.

I also conclude that other testimony by class members is contrary to their contention that they suffered a signifi-

cant harm because of interpreter activities for their co-workers. At least three class members testified that they were able to satisfactorily perform their job duties despite their translation activities for their co-workers.

(Testimony of Baez, Romero-Peart and Zayas). None of the class members testified that they were unable to adequately perform their duties or that they needed additional time to perform them because of their translation for co-workers. In addition, there is no evidence that any class member ever requested relief under the CBA such as a reduction in their monthly "available time" for case assignments or an administrative review by the Department's Office of Administration of his or her caseload because of "extensive requests for translations." (Joint Exhibit 1A at 177-179, 182 and 189-190). It is certainly reasonable to infer that the class members would have used the available CBA remedies to relieve themselves of what they believed were otherwise burdensome interpreter requests by co-workers. Based on the totality of the class members' testimony, I conclude that the impact of Complainants interpreting for their monolingual co-workers is minimal and is clearly insufficient to establish the requisite substantial and disproportionate harm for a disparate impact claim. See Bresnahan, supra.; Donnelly, supra.

I also find that the testimony of Complainants' co-workers and the Department's managers and supervisors does not support Complainants' contention that they sustained a substantial injury arising from their translations for monolingual caseworkers. These witnesses testified that class members spent minimal amounts of time each week interpreting for their co-workers: 5-6 minutes (Bellow, Lon Zack); one-half hour to one hour (Smalley); one hour

(Moton); one and one-half hours (Pax); two hours (Foster); 3.75 hours (Townley); once a month (Michaud).

The supervisors' testimony is also consistent with the Department's data and three key findings from its 1993 time study relating to the amount of time spent by bilingual workers, including class members, performing activities in a language other than English. First, the time study showed that the 84 bilingual workers who participated in the study only spent an average of 4.4 minutes a day or 1.5 hours a month interpreting or translating for other workers in their cases. (Joint Exhibit 2, page 154). Second, the observers found that bilingual caseworkers only spent 15% of the overall observation time conducting casework in a language other than English. (Joint Exhibit No. 2, Attachment 25). Third, the study compared activities performed by bilingual workers with the same activities performed by monolingual workers and concluded that there was "no appreciable difference" in the time that they spent performing identical casework activities. (Joint Exhibit No. 2, pages 156-157). The 1993 time study's extensive data and overall findings clearly support my conclusion based on the class members' testimony that Complainants did not prove a substantial and disproportionate injury based on their interpreter activities for monolingual workers during 1991-2001.

I reject Complainants' contention that the 1993 time study is "invalid" regarding the measurement of bilingual activities and is otherwise unreliable.³² Complainants contend that the 1993 time study is flawed because: (1) it did

³²My finding that Complainants have not proven a substantial and disproportionate impact is based on the testimony of the class members relating to the time they spent interpreting for their co-workers. While the testimony of the Department's supervisors and managers and the 1993 time study data findings corroborate my findings, they are not necessary to my determination.

not measure bilingual translation for workers; (2) the "Q" code designation did not include time spent by the bilingual workers on translating for their own cases; (3) the use of LOQC workers as observers and the manner in which they made observations prevented an accurate measurement of co-worker translations; (4) it is too stale since the underlying observations were conducted in September and October 1992.³³ Complainants' Memorandum, pages 17-24.

Based on Mr. Johnson's testimony, documents showing the underlying work-measurement methodology and the observation logs for the class members, I find that the 1993 time study measured separately the bilingual activities completed by class members in their own cases and those of their monolingual co-workers. As such, the data collected and methodology used in the 1993 time study reflected its three primary objectives relating to the Complainants' overall claim that they performed more work than their monolingual co-workers: (1) measure the overall amount of time bilingual workers spent conducting their case activities in other than English; (2) measure whether bilingual workers spent more time performing identical casework activities than their monolingual co-workers; (3) measure the amount of time class members spent on interpreting or translating for their monolingual co-workers.

³³During the public hearing, I denied Complainants' motion to exclude the 1993 time study on the grounds that it failed to meet the evidentiary standards governing the admissibility of scientific evidence adopted by the Supreme Judicial Court in Commonwealth v. Lanigan, 419 Mass. 15 (1994)(the scientific reliability and validity of evidence may be established using factors derive from a variety of scientific principles in addition to, or in lieu of, general acceptance in the relevant scientific community). See also Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993); Theresa Canavan's Case, 432 Mass. 304 (2000). In their memorandum of law, Complainants do not challenge Mr. Johnson's testimony about the 1993 time study or its admissibility based on the Lanigan-Daubert standards. Accordingly, this decision does not address any issues about the

I also reject Complainants' contention that the Department's use of LOQC staff to conduct the worker observations somehow negatively affected the quality and amount of data collected during the worker observations. The evidence in the record, including the observation logs, does not support Complainants' contention that office workers were intimidated by the presence of the LOQC workers and did not interrupt the observed class member to request a translation, where necessary. While the class members may have felt "nervous," "scared," or "uncomfortable" during their observations, Complainants offered no evidence to establish that the class members would have had different "experiences" had non-LOQC workers conducted the time study observations. In addition, Complainants failed to show how the "act of being observed" by the LOQC workers produced, in fact, flawed data or otherwise harmed Complainants' interests.

Finally, I find that Complainant's claim that "time alone makes the 1993 time study obsolete" is without merit. First, the instant discrimination charge was filed in January 1995, or within 18 months after the 1993 time study was completed. Complainants introduced no evidence that changes in the Department's interpreter policy or practice since 1995 lessened the value of the 1993 time study's findings and analysis. Second, some of the class members' testified about variations in the amount of time they purportedly interpreted for co-workers from 1991-2001. Accordingly, I find that the evidence in the record does not support Complainants' objections to the 1993 time study. I also find that their objections are insufficient,

underlying validity of the 1993 time study or the admissibility of Mr. Johnson's testimony based on the Lanigan standard.

individually or taken together, to undermine the underlying validity and integrity of the methodology used in the 1993 time study.

For the reasons discussed above, I find that Complainants have failed to identify a Department policy or practice that required class members to accede to their co-workers' "extensive requests" to translate or interpret for co-workers. I also find that Complainants have failed to prove that the Department's interpreter policy or practice had a substantial and disproportionate adverse impact on the class members because of their national origin. I therefore conclude that Complainants did not establish a prima facie case of unlawful disparate impact discrimination.³⁴

Business Necessity Defense

Assuming arguendo, that Complainants have established their prima facie case, I conclude that the Department's interpreter policy or practice is job-related and is a lawful business necessity. First, the Department's interpreter policy is reasonably designed to ensure, in part, that the Department is able to meet its statutory mandate to provide financial and other assistance to needy LEP persons and their families within the Commonwealth. See General Laws, Chapters 18, 117A, 118 and 118A. A fundamental purpose of the Department's interpreter policy is to enable bilingual LEP persons to effectively communicate with

³⁴Based on these findings, I find that Complainants have also failed to establish a prima facie of disparate treatment discrimination. Complainants' failed to prove that they were harmed by the Department's interpreter policy or practice or that they were treated differently than other bilingual co-workers. In addition, Complainants failed to offer any reasonable explanation for their failure to use the CBA's administrative remedies to relieve them, where necessary, of their interpreter activities: reduction in "available time" and/or in their caseloads.

Department workers so that they can receive appropriate financial and other services.

Second, the OCR agreement required the Department to remove language barriers that could potentially deprive LEP persons of an equal access to or an equal opportunity to participate in the Department's assistance programs. The OCR agreement also required the Department to implement a number of actions to enable its workers to effectively communicate with bilingual LEP persons in their native languages. The Department's actions mandated under the OCR agreement included its implementation of interpreter policies and procedures and its use of bilingual Department staff, contracted interpreter services and translated materials. (Joint Exhibit 3). The Department meets its need for interpreter services through (1) hiring more bilingual caseworkers, (2) hiring contractors whose sole responsibility is to interpret for Department workers and (3) obtaining translation services from the Catholic Charities and the AT&T Interpreter Line. To the extent that the Department's interpreter policy included the use of available bilingual caseworkers, where appropriate, to occasionally provide translations for their co-workers, it was part of a comprehensive scheme that was also intended to satisfy the Department's non-discrimination obligations under Title VI.

Once the Department has articulated a business necessity for its interpreter policy, Complainants must prove that a less restrictive alternative exists that would have not had the same adverse impact on class members.³⁵

³⁵As discussed before, Complainants could have ameliorated the impact of the Department's interpreter policy by seeking individual relief under the CBA through adjustments in their "available time" or caseload assignments.

See Bresnahan, supra.; Harris and Tatum, supra. Complainants did not introduce evidence on this issue nor address it in their posthearing written submission. Accordingly, I conclude that Complainants have not proven that less restrictive alternatives existed to the Department's interpreter policy, including the use of available bilingual TASW I and IIs, where appropriate, to translate for their co-workers. I therefore conclude that Complainants have failed to establish that the Department's interpreter policy, including the use of bilingual workers to interpret for their co-workers, violated Massachusetts General Laws, Chapter 151B, §4(1).

B. Disparate Treatment: Refugee Resettlement Program³⁶

On January 23, 1995, Complainant Andino filed the instant class complaint with the Commission. The complaint alleged, inter alia, that the Department discriminated against the class members in July 1991 when it failed to reclassify them as TASW IIIs after it redeployed the RRP workers into the Department's local offices.³⁷ The Department contends that the Complainants' discrimination allegation concerning its failure to reclassify them as TASW

³⁶During the public hearing, Complainants raise three additional disparate impact claims: the Department assigned "more difficult Latino" cases and higher caseloads to Latino workers and had a practice of not allowing Latino workers to transfer. (Transcript, November 30 at 107-8). I have not reached these issues in this decision because Complainants did not address them in their Memorandum. I find, however, that Complainant did not produce any objective evidence to prove that they had higher caseloads than their monolingual co-workers, that they had "more difficult" cases based on the fact that their caseloads include Spanish-speaking only clients or that they were denied opportunities to transfer as a matter of Department policy or practice.

³⁷Complainants do not contend that the RRP workers were improperly classified as TASW IIIs at the inception of the refugee program nor do they contend that the RRP workers' continued classification at the TASW III grade after their involuntary reassignment was improper. Complainants allege that the Department should have reclassified them at the TASW IIII grade because they performed substantially similar duties as the RRP workers after the Department reassigned them to the local offices.

IIIs is untimely because they did not file it within the applicable six-month limitations period.

During the period relevant to the instant complaint, Massachusetts General Laws, Chapter 151B, §5, required a complainant to file a charge of discrimination with the Commission within six months after the alleged discriminatory act(s).³⁸ School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7 (1996); Hollis Rounds v. Commonwealth of Massachusetts, Department of Correction, 19 MDLR 90 (1997)(sexual harassment allegations were time barred under G.L. c. 151B, §5). The Commission's Rules of Procedure authorized the filing of a discrimination complaint within six months after the alleged unlawful conduct. See 804 C.M.R. §1.10(2); Libby v. Commonwealth of Massachusetts, Department of Food and Agriculture, 22 MDLR 58 (2000)(sex discrimination complaint was untimely because it was filed approximately one year after the alleged discriminatory layoff). The purpose of the six-month filing requirement is twofold: (1) provide the Commission with an opportunity to investigate and conciliate a discrimination claim; (2) give notice to an employer of potential liability. Cuddyer v. The Stop & Shop Supermarket Co., 434 Mass. 521, 531 (2001). Accordingly, Complainants were required to file their RRP claim on or before January 1, 1992 absent a showing that they had reasons sufficient to justify a tolling or extension of the six-month limitations period.

³⁸On August 7, 2002, Acting Governor Jane Swift signed Chapter 233 of the Acts of 2002 that amended G.L. c. 151B, §5, to increase the limitation period for filing a discrimination complaint at the Commission from six months to 300 days. The amendment applies to discrimination claims arising after its effective date on November 5, 2002. For all claims arising on or before November 5, 2002, the six-month limitation period still applies.

The six-month filing period is not jurisdictional. It is akin to a statute of limitations that is subject to waiver, estoppel and equitable tolling. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982); Sanderson v. Town of Wellfleet Fire Department, 16 MDLR 1341 (1994). The Commission can toll or extend the six-month limitations period when there are equitable considerations. Rock v. Westinghouse, 1 MDLR 1262 (1979).

The Commission's regulations set forth two exceptions to the six-month statutory filing requirement. See 804 C.M.R. §1.10(2). The first exception applies when, "pursuant to an employment contract, an aggrieved person enters into grievance proceedings concerning the alleged discriminatory act(s) within six months of the conduct complained of and subsequently files a complaint within six months of the outcome of such proceeding(s)." The second exception arises where a complainant alleges facts "which indicate that the unlawful conduct complained of is of a continuing nature." Rock v. Massachusetts Commission Against Discrimination, 384 Mass. 198, 205-08 (1981) (upholding "continuing violation" regulation as permitting the Commission to remedy ongoing discriminatory practices). 804 C.M.R. §1.10(2). For the reasons discussed below, I conclude that Complainants have failed to establish that they met either standard for waiving the six-month filing period for their complaint regarding the Department's failure to reclassify them after its involuntary reassignment of the RRP workers without a loss in grade.

1. Grievance Exception:

Complainants did not introduce any evidence to establish the date on which the Bilingual Committee first learned about the Department's decision to "disband" the RRP unit and involuntarily reassign the RRP workers to local offices while maintaining their TASW III grade. I conclude, however, that Complainants met the first element of the grievance exception because the Bilingual Committee timely filed a grievance on May 28, 1991, a few weeks before the Department's redeployment of the RRP workers into local offices on July 1, 1991.³⁹ (Respondent's Exhibit No. 5). The record shows that the Bilingual Committee's grievance ended on June 28, 1994 when the Appeals Committee of Local 509 informed the Bilingual Committee that it would not allow the RRP grievance to proceed to arbitration. (Respondent's Exhibit No. 4). I also conclude that Complainants failed to satisfy the second part of the grievance exception because they did not file their complaint, including the RRP allegations, until January 23, 1995, or approximately seven months after they learned of Local 509's decision to deny their grievance.⁴⁰

2. Continuing Violation Exception

When there is a continuing violation, a complaint is timely filed even though the alleged discriminatory act(s) commenced more than six months prior to the filing of the complaint. See Lynn Teacher's Union, Local 1037, AFL-CIO v. Massachusetts Commission Against Discrimination, 406 Mass. 515, 522 (1990) (continuing violation doctrine applied to

³⁹Article 23 of the CBA requires an employee or Local 509 to file a grievance within 21 days after the actions occurred that gave rise to the grievance or after the date on which there was a reasonable basis for knowledge of such occurrence. (Joint Exhibit 1A at pages 98-99).

⁴⁰Complainants offered no objective evidence to establish that their failure to timely file their complaint after they learned about Local 509's denial of their opportunity to proceed to arbitration was due to the Department's actions or for other reasons beyond their control.

longstanding seniority system that gave continuing effect to an earlier discriminatory maternity policy). The continuing violation exception recognizes that some discrimination claims involve a series of related acts that must be viewed in their totality to adequately assess their discriminatory nature and impact. Cuddyer v. The Stop & Shop Supermarket Co., supra. at 531.

The purpose of the continuing violation doctrine is to enable the Commission to remedy ongoing discriminatory policies or practices. See e.g., Klaus v. Amherst Fire Department and Town of Amherst, 22 MDLR 164 (2000). The Commission has recognized two different types of continuing violations: systemic and serial claims. In a systemic continuing violation, the complaint generally alleges that the employer has maintained a discriminatory employment policy or practice that adversely affects a protected class of employees. See Mack v. Great Atlantic & Pacific Tea Co., 871 F. 2d 179, 183 (1st Cir. 1989). A discrimination charge involving a systemic violation is timely if it is filed while the employer's alleged discriminatory policy or practice remains in effect, or within six months after the employer's discriminatory policy and practice has ended. Lynn Teacher's Union, Local 1037 v. Massachusetts Commission Against Discrimination, supra.; Davis v. Town of Wilbraham Public Schools, et, al., 22 MDLR 1 (2000); Beldo v. University of Massachusetts, 20 MDLR 105, 111 (1998).

A serial continuing violation occurs when the employer subjects an employee to a series or pattern of discrete, related discriminatory acts. See Mack v. The Great Atlantic & Pacific Tea Co., Inc., supra. These violations are "composed of a number of discriminatory acts emanating from

the same discriminatory animus [with] each act constituting a separate wrong actionable" under Chapter 151B. Provencher v. CVS Pharmacy Division of Melville Corporation, et. al., 145 F.3d 5, 14 (1st Cir. 1998). The serial continuing violation also requires a complainant to show that at least one discriminatory act has occurred within the six-month limitations period. The timely discriminatory act serves as the violation that anchors the earlier untimely discriminatory acts, e.g., those discriminatory acts that took place prior to the six-month limitations period. See DeNovellis v. Shalala, 124 F.3d 298, 307 (1st Cir. 1997).

I am analyzing the RRP claim as a "systemic claim" continuing violation because Complainant contend that the Department's failure to compensate class members at the FASW III grade level arises from an alleged discriminatory policy or practice. See Lynn Teachers Union, Local 1037, AFT, AFL-CIO v. Massachusetts Commission Against Discrimination, 406 Mass. 515 (1990); Sabree v. United Brotherhood of Carpenters and Joiners, Local 1037 v. Massachusetts Commission Against Discrimination, 406 Mass. 515 (1990); Rock v. Massachusetts Commission Against Discrimination, supra.; Pilgrim v. Trustees of Tufts College, 118 F.3d 864, 869 (1st Cir. 1997).

Complainants allege that the Department's initial act of discrimination began in July 1991 when it failed to reclassify the class members to a TASW III grade when it deployed the RRP workers to the local offices. The crux of Complainants' contention is that the Department's alleged discrimination continued until the date that they filed the instant complaint and is actionable each time they received paychecks from July 1, 1991 until January 23, 1995 that compensated them at less than a TASW III grade level. See Bazemore et. al. v. Friday et. al., 478 U.S. 385, 395 (1986)

(per curiam)(in a pattern or practice case, each paycheck that delivered less to a black employee than a similarly situated white employee was actionable under Title VII even though the salary disparity began prior to the applicable limitations period); Anderson et. al v. Zubieta, 180 F.3d 329 (U.S. App. D.C. 1999)(a continuing violation was established each time the Panama Commission paid its black American citizens of Panamanian or Hispanic national origin less salary and benefits than it paid white non-Panamanian citizens performing the same jobs).

I am not persuaded by Complainants' argument and I find that their reliance on the Bazemore decision and its progeny is misplaced in this case. In Bazemore and Anderson alleged that their employers originally adopted a discriminatory salary policy prior to the applicable limitations period that treated similarly situated employees differently based on their race and national origin and then continued it during the limitations period; specifically, the employers perpetuated the discriminatory pay policy when they continued to unlawfully discriminate each time they applied it to the plaintiffs during the applicable limitations period. See Bazemore et. al., 478 U.S. at 395-396; Anderson et. al., 180 F.3d at 335, 336. I find that the Bazemore line of cases is distinguishable from the facts in this case.

First, Complainants did not identify a particular discriminatory Department policy or practice after July 1991 that was aimed at them because of their national origin. See Provencher v. CVS Pharmacy, 145 F.3d 5 (1st Cir. 1998); Lawton v. State Mutual Life Assurance Company of America, 101 F.3d 218 (1st Cir. 1996).

Second, Complainants introduced no evidence that the Department maintained and applied a discriminatory policy from July 1991 to the date they filed the instant discrimination complaint. I find that the Department's decision to re-deploy the RRP workers to the local offices at their TASW III grades was a one-time, discrete personnel action that the class members learned about in or about July 1991. Similarly, the Department's failure to simultaneously increase the pay of Latino bilingual employees was also a discrete employment action that was not based on a purported Department "policy" or "practice."⁴¹ See International Brotherhood of Teamsters v. United States, 431 U.S. at 336 (a policy must be "standard operating procedure—the regular rather than the unusual practice).

This is also not a case where the Department has "perpetuated" alleged discrimination by continuing to apply a discriminatory policy. I find that Complainants' cause of action accrued and the applicable limitations period began when they learned in July 1991 about the Department's decision to involuntarily reassign the RRP workers and hold them "harmless" regarding their TASW III grade level. Wheatley v. AT&T, 418 Mass. 394 (1994); Libby v. Commonwealth of Massachusetts, Department of Food and Agriculture, 22 MDLR 58 (2000). This analysis is consistent with the Supreme Court's decision and reasoning in National Railroad Passenger Corporation v. Morgan, 536 U.S. 101 (2002). In Morgan, the Supreme Court distinguished its holding in Bazemore and held that discrete discriminatory acts are not actionable if time barred even when they

⁴¹Aside from the Bilingual Committee's grievance, Complainants did not introduce any evidence to prove that they filed a timely request for reclassification as TASW IIIs.

"relate to" acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for the running of the applicable statute of limitation; accordingly, a plaintiff must file a charge within the limitation period after the discrete discriminatory act occurred. 536 U.S. at 113. The Court defined "discrete discriminatory acts" to include acts that constitute a separate actionable unlawful employment practice, e.g., termination, failure to promote, denial of a transfer or a refusal to hire.⁴² 536 U.S. at 114.

The Morgan reasoning is equally applicable in this case to the Department's "discrete" decision to reassign the RRP workers at their TASW III pay grades and to not increase Complainants' pay grades to the same level. I reject Complainants' continuing violation claim because they improperly focused on the "effect" of the Department's July 1991 decision rather than its "timing." See e.g., Lorance et. al. v. AT&T Technologies, Inc. et. al., 490 U.S. 900 (1989); United Air Lines v. Evans, 431 U.S. 553 (1977). Adopting Complainants' reasoning in this case would effectively eviscerate the utility of a limitations period because it fails to distinguish between harm caused by a continuing discriminatory policy from that caused by an unlawful discrete employment action that has ongoing consequences or harm but is not recurring. See Delaware State College v. Ricks, 449 U.S. 250 (1980).

Third, there is no evidence that the Department treated class members differently than all other Department employees, monolingual or bilingual, who were classified at

⁴²The Supreme Court held that plaintiffs are still able to use untimely prior acts as background evidence to support a timely discrimination claim. 536 U.S. at 113.

the TASW I and II grade levels. To the extent Complainants can identify a discriminatory policy or practice, it would certainly apply to all Department employees, monolingual or bilingual, who were classified at the TASW I and II grade levels when the RRP workers were assigned to the local offices.

Contrary to Complainants' assertion, the Department did not exclude class members from TASW III positions "because their language is Spanish, not Vietnamese or Russian." Complainants introduced no evidence to rebut the Department's evidence that it compensated the RRP workers as TASW IIIs because they needed a higher level of skills to provide a comprehensive range of services to a more difficult client population.

For the above reasons, I conclude that Complainants' complaint regarding the assignment of the RRP workers is untimely and does not allege a "continuing violation."⁴³

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, I hereby order that the complaint in this matter be dismissed.

This constitutes the final order of the Hearing Officer. Any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten (10) days of receipt of this order and a Petition of Review

⁴³Since I have ruled that Complainants' RRP claim is untimely, I have not addressed the substantive merits of their RRP claim.

with the Full Commission within thirty (30) days of receipt of this Order.

SO ORDERED this 17th day of October, 2003.

KENNETH B. GROOMS
Hearing Officer