

MASSACHUSETTS LABOR CASES

CITE AS 18 MLC 1161

COMMONWEALTH OF MASSACHUSETTS AND SEIU, LOCAL 509, SUP-3356 AND SUP-3439
(10/16/91).

52.65 "meeting of the minds"
54.52 evaluation of employee performance
67.15 union waiver of bargaining rights
67.42 reneging on prior agreements
67.8 unilateral change by employer
91.51 scope of complaint

Commissioners participating:

Maria C. Walsh, Chairperson
Haidee A. Morris, Commissioner

Appearances:

Matthew Jones, Esq.	- Representing Service Employees International Union, Local 509
Anna McKeon, Esq.	- Representing the Commonwealth of Massachusetts

DECISION

Statement of the Case

Service Employees International Union, Local 509 (the Union), a member of the Alliance, filed charges of prohibited practice with the Labor Relations Commission (the Commission) on February 12, 1989 (docketed by the Commission as Case No. SUP-3356) and on September 12, 1989 (docketed by the Commission as Case No. SUP-3439), alleging that the Commonwealth of Massachusetts (the Commonwealth) had violated Sections 10(a)(1) and (5) of Massachusetts General Laws, Chapter 150E (the Law). Pursuant to Section 11 of the Law and Section 15.04 of the Commission's Rules, the Commission investigated the Union's charges and issued an Amended Complaint on November 20, 1989.

The Commission's Amended Complaint alleges that the Commonwealth violated Sections 10(a)(5) and (1) of the Law by refusing to implement an agreement it reached with the Union on Employee Performance Review System (EPRS) evaluation criteria for certain statewide bargaining unit 8 job titles within the Commonwealth's Department of Public Welfare (the Department). In its opening argument and its post-hearing brief, the Union also argued that the Commonwealth violated Sections 10(a)(5) and (1) of the Law by unilaterally changing the evaluation criteria for Welfare employees.

The hearing took place on December 8, 1989 and on March 27 and 28, 1990.¹

By letter dated May 4, 1990, the Commission informed the parties that it
(continued)



All parties had full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. On or before April 17, 1990, the Commonwealth filed proposed findings of fact, and the Union filed a brief that included proposed factual findings. The hearing officer issued Recommended Findings of Fact on May 4, 1990. The Union filed a Request for Review of Hearing Officer's Findings of Fact on June 6, 1990, in which it requested that the Commission make several additional findings, but did not object to the findings made by the hearing officer. The Commonwealth did not make any additional filings.

Neither party has objected to the factual findings made by the hearing officer, and we adopt them in toto. Furthermore, we find the Union's requested additional findings to be supported by the record and adopt them as set forth below. The hearing officer's Recommended Findings of Fact, along with the supplemental findings below, form the basis for our decision.²

Supplemental Findings of Fact

Jonathan Barnes, the Department's Director of Labor Relations, is an attorney with 11 years of experience in labor relations and has participated in more than 20 labor negotiations. The first time that Barnes stated in writing that he lacked authority to negotiate over EPRS criteria and referred the Union's representatives to the Office of Employee Relations (OER) was on or about July 24, 1989. The EPRS criteria describe the factors upon which Case Managers in the Department are to be evaluated and describe successful performance for purposes of evaluation. EPRS is the only formal evaluation system for Case Managers within the Department. In the meetings between the Union and representatives of the Department of Public Welfare regarding the Fiscal Year 1988 EPRS criteria, the Union's spokesperson, Robert Manso, contended at the table that the meetings regarding the 1988 EPRS criteria were negotiations.³

Opinion

The Union contends that the Commonwealth agreed to evaluate Department case managers and employees in related titles only on certain criteria, described on the

¹ (continued)
had redesignated the case "formal" pursuant to Section 13.02(1) of the Commission's Rules, 456 CMR 13.02(1).

²
The Hearing Officer's Recommended Findings of Fact are attached as Appendix A hereto.

³
Although the Union requested that the Commission find that Manso contended at the table that the Department's representatives had a legal duty to negotiate over the EPRS criteria, our examination of the record reveals that his contention was that the meetings were negotiations. At any rate, the distinction is not material to our decision in this case.



EPRS evaluation form, to which the parties had agreed. The Union argues that the Commonwealth repudiated its agreement with the Union by evaluating employees on the basis of individual numerical targets attached to the evaluation form. In order to establish that the Commonwealth's conduct constituted a repudiation of a collectively bargained agreement in violation of Section 10(a)(5) of the Law, the Union must show that the Commonwealth deliberately refused to abide by an agreement with the Union. See, e.g., City of Quincy, 17 MLC 1603, 1608 (1991); Massachusetts Board of Regents of Higher Education, 10 MLC 1196 (1983). If the evidence is insufficient to find an agreement underlying the matter in dispute, or if the parties hold differing good faith interpretations of the provision at issue the Commission will find no violation. City of Quincy, 17 MLC at 1608, citing Boston Water and Sewer Commission, 15 MLC 1319 (1989) and Town of Milford, 15 MLC 1247 (1988).

There is no dispute that the Commonwealth and the Union agreed that the following language would appear on the case managers' evaluation forms:

Duty 1: Case Management Targets Performance Criteria: (Performance is successful if:) The Case Manager assists in the achievement, maintenance and improvement of the supervisory unit performance relative to the unit's Child Support Common Health and Health Choices Targets and assists in the Referral, Placement and Enrollment Process to help achieve the Agency's E.T. Goals.

In transmitting the form with the above language to the Union, Barnes wrote that he was "enclosing the agreed-upon criteria for the job titles of Case Manager...." Such language, however, does not establish whether or not the Department also could use individual targets to evaluate a case manager's performance. The Union correctly notes that the language does not state that the case manager will be evaluated based on individual targets, but rather specifies that the case manager "assists" in the achievement of the supervisory unit's targets and the agency's goals. The Employer argues, however, that a determination of whether a case manager has "assisted" in achieving the supervisory unit targets may require an analysis of the unit's targets to determine whether the individual assisted to achieve his or her appropriate share.

When the language of a provision at issue is ambiguous, we look to the bargaining history to determine whether there was a clear agreement between the parties. See, e.g., Commonwealth of Massachusetts, 16 MLC 1143, 1159 (1989). In this case, the application of targets to case managers was the main topic of discussion at the Labor-Management Committee meetings for 1989, and the Union continued to voice opposition to the application of numerical goals or targets to the case managers at the last meeting held to discuss the evaluation criteria on January 4, 1989. The Union understood at the end of the meeting that the case managers were not going to be held accountable for specific goal or target achievement, and, in accordance with that understanding, the Department's representative



would rewrite the description of Duty #1.⁴ The Union subsequently accepted the Commonwealth's specific language for the evaluation form as set forth in n.4 above. In conveying the set of forms with the agreed upon language to the Union, the Department representative told the Union representative that the Department's Case Management Division might issue an "additional" form. The Union's representative immediately protested and declared that no form had been negotiated and the Union would file an unfair labor practice charge if one was implemented.

The evidence demonstrates that the Commonwealth and Union had agreed to use certain language on the evaluation form. The evidence is insufficient to establish that the Commonwealth ever agreed not to use any other form attachments to the evaluation which might contain individual targets. In the absence of an agreement to interpret the evaluation criterion "assists" in another manner, the Commonwealth did not "repudiate" an agreement when it implemented an evaluation system that unilaterally defined "assistance" to mean some individualized performance shares of an office performance target. Instead, the parties did not have a meeting of minds concerning this subject. Therefore the Commonwealth did not repudiate an agreement with the Union in violation of Section 10(a)(5) of the Law.

The Commonwealth, however, did violate Section 10(a)(5) of the Law by unilaterally changing the criteria for evaluation.⁵ The evidence in the record establishes that the Commonwealth unilaterally altered an existing condition of employment involving a mandatory subject of bargaining, without bargaining to impasse or resolution with the Union, and thus violated the Law. See, e.g.,

⁴
A few days later the Department's representative proposed the following language:

Duty 1: Case Management Targets Performance Criteria: (Performance is successful if:) The Case Manager assists in the achievement, maintenance and improvement of the supervisory unit performance relative to the unit's Child Support Common Health and Health Choices Targets and assists in the Referral, Placement and Enrollment Process to help achieve the Agency's E.T. Goals.

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The Complaint does not allege that the Commonwealth's conduct constituted a unilateral change, but the issue relates to the general subject matter of the Complaint. The Union argued in its opening statement that the Commonwealth's conduct constituted a unilateral change; and the Commonwealth responded by raising a waiver defense and arguing that no change had occurred. The Commonwealth does not contend that it lacked full or fair notice of this allegation or the opportunity to defend itself. We conclude that the issue was within the scope of the general subject matter of the Complaint and that the parties have had full and fair opportunity to litigate the matter. Accordingly, we have considered the allegation. See, e.g., Whitman-Hanson Regional School Committee, 10 MLC 1606 (1984).



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Athol-Royalston Regional School Committee, 17 MLC 1670, 1674 (1991); City of Holyoke, 13 MLC 1336, 1343 (1986), citing School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983).

There is no dispute that case managers were not evaluated based on individual performance targets in fiscal year 1988. Although the Commonwealth argues that the attachment of the individual performance target form did not change the evaluation criteria, the record establishes that the Commonwealth did consider whether case managers achieved individualized performance goals or targets as part of their EPRS evaluation in fiscal years 1989 and 1990. Indeed, the evidence indicates that in at least one case the individualized numerical performance targets were determinative of the overall rating on the evaluation. The individualized performance targets constituted new standards of performance for the case managers. The new individualized performance targets were not simply new procedures for measuring existing standards of performance, for which bargaining might not have been required. See Commonwealth of Massachusetts, 13 MLC at 1720, and cases cited therein. Instead, the change implemented a new criterion by which employees were to be evaluated. A change in the criteria upon which employees are evaluated involves a mandatory subject of bargaining. Commonwealth of Massachusetts, 13 MLC 1717, 1719 (1987), citing Town of Wayland, 5 MLC 1738, 1741 (1979).

The Commonwealth does not argue, nor does the evidence support, that the Commonwealth and the Union agreed to use individual targets as one of the criteria for evaluation, or that the parties reached impasse in their negotiations regarding the evaluation criteria. Rather, the Commonwealth contends that it fully bargained with the Union regarding the EPRS criteria during the parties' negotiations for the 1986-1989 collective bargaining agreement, made no changes in the performance criteria,⁶ and thus had no further bargaining obligation.

Specifically, the Commonwealth argues that the Union agreed that the Department could develop the criteria for measuring job performance when it agreed to the following language in Section 2B.4 of Article 24 of the contract:

Prior to each evaluation period the supervisor shall meet with the employee and shall inform the employee of the general performance dimensions and procedures to be utilized in evaluating the employee's performance.

Such language is insufficient to find that the Union waived its right to bargain about the performance criteria, particularly in light of the additional contract

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The Commonwealth argues that the managers have been "responsible for achieving goals" since 1984 and that "bringing the numbers down to the worker level" gave case managers "a better understanding of...their job duties and responsibilities." Undated Memorandum of Commonwealth containing proposed findings of fact.



provision which establishes a labor/management committee within each agency to discuss problems or issues regarding implementation of the evaluation system. Proof of a Union's waiver of its statutory right to bargain must be clear and unmistakable, and the subject at issue must have been fully explored and consciously yielded. Athol-Royalston Regional School Committee, 17 MLC at 1674, citing Melrose School Committee, 3 MLC 1299, 1302 (1976). We do not find that the provisions in the parties' collective bargaining agreement regarding the evaluation procedure vest the employer with the authority to unilaterally determine the criteria by which employees will be evaluated. Accordingly, we find no waiver by the Union of its right to negotiate concerning this mandatory subject.

CONCLUSION

Therefore, on the basis of the foregoing reasons, we conclude that the Commonwealth violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it changed the performance criteria for case managers and employees in related titles, by evaluating case managers on the basis of individualized performance targets as part of their EPRS evaluation, without first bargaining to impasse or resolution with the Union.

Order

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

1. Cease and desist from:
 - a. Failing and refusing to bargain collectively in good faith with the Union over the decision to change the performance criteria for case managers and employees in related titles;
 - b. Evaluating case managers and employees in related titles based on whether they achieved their assigned individual performance targets, prior to the occurrence of the earliest of the following conditions:
 - 1) an agreement by the Union to evaluate case managers and employees in related titles based on whether they achieved their assigned individual performance targets;
 - 2) a bona fide impasse in bargaining;
 - 3) the failure of the Union to commence bargaining within five (5) days of notice of the Commonwealth's willingness to bargain and unconditional offer of the Commonwealth of rescind all performance evaluations, and actions taken as a result



of performance evaluations, for case managers and employees in related titles completed in fiscal years 1989 and 1990 which used individual performance targets as performance criteria;

- 4) the subsequent failure of the Union to bargain in good faith.
- c. In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights under the Law.
2. Take the following affirmative action which will effectuate the purposes of the Law:
 - a. Rescind all performance evaluations completed in fiscal year 1989 and 1990, and actions taken as a result of said performance evaluations, for case managers and employees in related titles which were based in any part upon individual performance targets;
 - b. Upon request of the Union, bargain collectively in good faith prior to changing any mandatory subject of bargaining, including criteria for evaluating employees' performance;
 - c. Sign and post immediately in conspicuous places where employees are likely to congregate, and leave posted for a period of thirty (30) consecutive days, the attached Notice to Employees; and
 - d. Notify the Commission, in writing, within thirty (30) days of the receipt of this Decision and Order of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

MARIA C. WALSH, CHAIRPERSON

HAIDEE A. MORRIS, COMMISSIONER



Commonwealth of Massachusetts and SEIU, Local 509, 18 MLC 1161

NOTICE TO EMPLOYEES
POSTED BY ORDER OF
THE MASSACHUSETTS LABOR RELATIONS COMMISSION
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

After a hearing, the Massachusetts Labor Relations Commission has determined that the Commonwealth of Massachusetts refused to bargain in good faith with Service Employees International Union, Local 509 (the Union) in violation of Sections 10(a)(5) and (1) of G.L. c.150E (the Law), when it unilaterally changed the performance criteria for case managers and employees in related titles at the Department of Public Welfare, by considering whether employees had achieved assigned individual performance targets or goals, without first bargaining to impasse or resolution with the Union.

We hereby assure our employees that:

WE WILL NOT refuse to bargain in good faith with the Union over a decision to change performance evaluation criteria.

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

WE WILL rescind all performance evaluations completed in fiscal years 1989 and 1990, and actions taken as a result of said performance evaluations, for case managers and employees in related titles which were based in any part upon individual performance targets.

For the Commonwealth

APPENDIX A

Case Nos. SUP-3356, SUP-3439

Date Issued: May 4, 1990

Hearing Officer:

Gene M. Switzer, Esq.

Appearances:

Anna McKeon, Esq.

- Representing the Commonwealth of
Massachusetts, Commissioner of
Administration and Finance

Matthew E. Jones, Esq.

- Representing the Service Employees
International Union, Local 509

HEARING OFFICER'S RECOMMENDED
FINDINGS OF FACT

Statement of the Case

The Service Employees International Union, Local 509 (Local 509), a member of the Alliance, filed charges of prohibited practice with the Labor Relations Commission (Commission) on February 12, 1989 (docketed by the Commission as Case No. SUP-3356) and on and on September 12, 1989 (docketed by the Commission as Case No. SUP-3439), alleging that the Commonwealth of Massachusetts, Commissioner of Administration and Finance (Commonwealth) had engaged in prohibited practices within the meaning of Massachusetts General Laws Chapter 150E (the Law). Pursuant to Section 11 of the Law and Section 15.04 of the Commission's Rules, the Commission investigated Local 509's charges and, on November 20, 1989, issued an Amended Complaint of Prohibited Practice. That Complaint alleged that the Commonwealth had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by refusing to implement an agreement it reached with Local 509 on the Employee Performance Review System (EPRS) evaluation criteria for certain statewide bargaining unit 8 job titles within the Commonwealth's Department of Public Welfare (DPW). Expedited hearings were conducted before the undersigned hearing officer on December 8, 1989 and on March 27 and 28, 1990. Full opportunity to be heard, to examine and cross-examine witnesses and to introduce documentary evidence was afforded to both parties. Both parties filed briefs¹ on or before April 17, 1990 which have been carefully considered.

¹ (see page 1170)



By letter dated May 4, 1990, accompanying these Recommended Findings of Fact, the Commission informed the parties that it had redesigned the case "formal" pursuant to Section 13.02(1) of the Commission's rules, 456 CMR 13.02(1). The Commission further informed the parties that it would defer issuing its decision in this case until the hearing officer issued Recommended Findings of Fact and that the parties had an opportunity to object to those findings.

The following Recommended Findings of Fact are based upon all the evidence in the record.

Facts

Local 509, a member of the Alliance, is the exclusive collective bargaining representative of certain employees of DPW including Case Managers and Case Management Supervisors (Supervisors).² Case Managers are primarily responsible for delivering DPW's services to the public. In this regard, Case Managers have intake and/or case maintenance responsibilities.³ Their actual job duties vary, however, according to the programs to which they are assigned. The programs DPW administers to which Case Managers and Supervisors are assigned include Aide to Families with Dependent Children (AFDC), General Relief (GR), Employment and Training (ET), Long Term Medical Care (Medicaid), Common Health, Health Choices and Food Stamps.⁴ Generally, however, job duties include assisting the needy clients to obtain such things as job training, employment, child support, housing, and health care.

DPW operates 63 field offices across the Commonwealth, five of which are dedicated exclusively to Medicaid. Each field office is staffed by a Director,

1 (From page 1169)

In an off-the-record discussion, the hearing officer asked the parties to provide detailed proposed findings of fact when they submitted their briefs.

2

Case Managers and Supervisors come within the civil service Financial Assistance Social Worker (FASW) job series.

3

Intake workers are primarily responsible for processing new welfare applicants while ongoing or maintenance workers are involved in maintaining open cases of welfare recipients.

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In this regard, Supervisors and Case Managers are given such functional titles as General Relief Case Management Supervisor, General Relief Case Manager, Medical Assistance Long Term Care Unit Supervisor, Medical Assistance Long Term Care Unit Social Worker, Employment and Training Case Management Supervisor, Employment and Training Case Management Specialist, Commonwealth Supervisor, Commonwealth Representative, Health Choices Program Management Supervisor, Health Choices Program Management Resource Specialist, Non-Public Assistance Food Stamp Supervisors, and Non-Public Assistance Food Stamp Case Manager.



Assistant Director, Supervisors and Case Managers. Generally, within each field office, Case Managers and Supervisors work in teams, known as supervisory units, which consist of a group of Case Managers and a Supervisor. Supervisory units are generally organized around one or more programs (i.e. AFDC, GR, ET, etc.) and perform specific functions in the areas of intake or case maintenance.

Each year, since at least Fiscal Year (FY) 1984, DPW has established numerical case management and departmental goals or targets. These numerical goals or targets, sometimes referred to as the "Big Ten" (because they cover ten general areas), which DPW strives to achieve each year, are designed as a means for accomplishing the agency's mission of getting people out of poverty. Some of these goals or targets relate to the duties of Case Managers such as the number of referrals and placements in various programs (ET, Child Support, health care, homeless, etc.) or control of a numerical error rate.

From the agency's overall goals, each field office is assigned numerical goals or targets. The number assigned to these goals or targets at the field office level is dependent on field office case load. The goals that are assigned to each office are also reduced to each supervisory unit within the office so that each unit is also assigned a numerical goal or target relating specifically to its functions.

All employees are informed of the agency's overall goals as well as the goals that pertain to their field office and supervisory unit. In addition to providing each employee with a copy of the agency's overall departmental and case management goals, the Commissioner of DPW and his executive staff meet with all staff people through PIPs (partners in professionalism) meetings to communicate what the agency's overall goals and expectations are. At the local office level, directors are responsible for communicating office and unit goals to Supervisors who in turn communicate those unit expectations to the Case Managers. The record does not evince that Supervisors formally assigned Case Managers individual goals or targets based on their unit's goals and targets. Because Case Managers have direct client contact and are responsible for assisting clients in obtaining jobs, child support, housing, health care and the like, however, a supervisory unit's ability to achieve its numerical goals or targets is largely dependent upon Case Manager performance.

With the addition of Section 6A in 1981, the Civil Service provisions of M.G.L. c.31 (Chapter 31) were amended to require the implementation of an employee performance evaluation system (EPRS) for the Commonwealth's civil service employees. Although the statute sets certain uniform requirements, it allows the parties to a collective bargaining agreement to develop and determine the actual form, method and general criteria of their EPRS. The most recent collective bargaining agreement between the Alliance and the Respondent established an EPRS for all covered employees, including those employed in the FASW job series at DPW. Specifically, Article 24 of that agreement provides, in relevant part:



Section 2. Performance Evaluation

A. In accordance with the provisions of Chapter 776 of the Acts of 1981, there shall be established a Performance Evaluation System for all employees covered by this Agreement.

B. Said system shall permit variations in format within and between various departments and agencies. However, any format must meet the following criteria (subject to formal promulgation under G.L. c.31, §4 and 6A):

1. All employee evaluations shall be in writing and shall be included in the employee's official personnel file.
2. Evaluations shall be completed by the employee's immediate supervisor and be approved by a supervisor of a higher grade designated by the Appointing Authority (except in cases of potential conflict of interest or other legitimate reasoning).
3. Formal evaluations shall be completed at least once per year for each employee but not more than twice per year.
4. Prior to each evaluation period the supervisor shall meet with the employee and shall inform the employee of the general performance dimensions and procedures to be utilized in evaluating the employee's performance.
5. The performance dimensions shall be a objective and job-related as practicable.
6. At least once during the evaluation period, at or near its mid-point, the employee's supervisor shall meet with the employee to review the employee's progress.
7. At or near the end of the evaluation period, the supervisor shall meet with the employee and inform the employee of the results of the evaluation. The employee shall sign the evaluation and indicate whether s/he agrees or disagrees with the content thereof.
8. Following the employee's review and signature, the form shall be submitted to the higher level supervisor for final determination of ratings. The employee shall be given a copy of the completed form and shall have the right to file a written rebuttal which shall be affixed to the form.



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C. On or before July 1, 1986, each department/agency which elects not to utilize one of the preapproved forms shall develop and submit to the Agency Labor Management Committee established in Section 3 herein its proposed format and plan for evaluation for discussion and review. No later than August 15, 1986, each agency shall submit its revised proposal to the Chairman of the Alliance, the Personnel Administrator and the Director of the Office of Employee Relations pursuant to the contractual, regulatory and statutory criteria established for such systems.

Those persons or their designees shall meet and shall approve, disapprove or revise and approve the proposal. Said decision shall be final and binding.

D. There shall be established within each agency a labor/management committee consisting of not more than four representatives of each party which shall meet at reasonable times to discuss any problems or issues surrounding the implementation of the Performance Evaluation System.

The agreement makes no mention of the specific job dimensions or criteria by which DPW Case Managers and Supervisors are to be evaluated.

DPW did not actually begin to implement the EPRS until FY 1988. DPW employee evaluations under EPRS are conducted in three stages: Stage A, Performance Planning; Stage B, Progress Review; and Stage C, Annual Review. This evaluation cycle is intended to coincide with the FY, with Stage A occurring at the beginning of the FY, Stage B at the mid-year point and Stage C at the end of the FY. At Stage A the employee and the supervisor are supposed to meet to review the employee's primary job responsibilities and the performance criteria to be used in evaluating the employee's performance. The employee's performance during the first half of the evaluation cycle is evaluated at Stage B and an annual review is conducted at Stage C. Employees are evaluated on a "meets", "exceeds" or "below" job requirements basis and they receive ratings for each job duty as well as an overall performance rating.

Pursuant to Article 24, Section 2D of the collective bargaining agreement, representatives of DPW and Local 509 met several times in the context of Labor-Management Committee meetings prior to the implementation of the EPRS for FY 1988.⁵ Representatives for Local 509 at these meetings included Robert Manso, the chief spokesperson, Arthur Casey, presently Local 509's state-wide vice-president

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Labor-Management Committee meetings also occur between Local 509 and DPW state-wide on a monthly basis and on an ad hoc basis as issues arise. The EPRS Labor-Management Committee meetings were separate and distinct from the monthly state-wide meetings.



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for the welfare chapter, Al Pierce, Sussy Sullivan and Terri Chandler Masiello. DPW's representatives included Jonathan Barnes, the agency's Labor Relations Director and Dennis Johnson, the EPRS coordinator.

The main topic of discussion during those meetings concerned the job duties and evaluation criteria that DPW would use in evaluating the various Case Managers and Supervisors. At the first meeting DPW presented Local 509 with a draft EPRS form containing the job duties and performance criteria DPW proposed to use in evaluating Case Managers and Supervisors. Johnson was responsible for composing the draft EPRS forms. In so doing, Johnson reviewed the civil service job descriptions of the FASW job series (the so-called Form 30) and transferred that information onto the EPRS form for each functional title. Over the course of these meetings, the parties worked with Johnson's draft, altering and clarifying language, until they reached an agreement on the performance criteria. Local 509 perceived this process as negotiations⁶ despite the fact that Barnes had indicated to Manso as early as the first meeting that, although he was willing to meet and discuss the EPRS criteria with the Union, he had no authority to negotiate with them.⁷ With respect to the application of DPW goals or targets on the EPRS forms, the parties agreed to refer to the supervisory unit goals or targets in the Supervisors' EPRS forms but not in those of the Case Managers. More specifically, the Supervisors' EPRS forms indicated that Supervisors would be responsible for assisting the field office in the achievement of the agency's goals or targets through the use of supervisory unit goals or targets.⁸ The effect of the

⁶ In this regard Masiello testified that there was "give and take" by both parties as to how the duties should be put into written form. Both parties made written notations on working drafts of the EPRS form and would agree on those notations. She further indicated that DPW would update the drafts to reflect the agreed to language.

⁷ Although Masiello and Casey testified that the DPW representatives never indicated that the meetings were something other than negotiations, I credit the testimony of Barnes, which was corroborated by Johnson, that at the first meeting he specifically told Manso that he did not have authority to negotiate with Local 509 over the EPRS. Barnes offered un rebutted testimony, which was corroborated by Johnson, that at most Labor-Management Committee meetings he attends it is his practice to inform Local 509 that he does not have authority to bargain with them.

⁸ Specifically, duty #1 of the Supervisor's EPRS concerns unit performance and improvement and states that performance is successful if "The unit supervisor insures that the supervisory unit assists the local office in achieving the mission of helping clients out of poverty by performing in an effective manner, and developing techniques for the improvement of the unit's performance in areas where improvement is necessary. Similarly duty #3, concerning Unit ET placement/refusal goals, states performance is successful if "The supervisory unit assists in the achievement, maintenance and improvement of local office performance relative to

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supervisory unit goals or targets on the Supervisors' EPRS was described in a June 24, 1987 memo to the Local 509 EPRS Committee members from Jolie Bain Pillsbury and Walter Holmes, Jr., Associate DPW Commissioners which reads as follows:

The purpose of this memo is to respond to the concerns that were raised during the EPRS Committee meetings regarding the Department Choices performance expectations that were developed for supervisory staff.

As you know these performance expectations reflect FY88 Agency goals and are based upon the Department's commitment to provide our client population with a route out of poverty through participation in the Department's Choices programs.

The key to the achievement of Agency goals is the supervisory unit. During the first year of the implementation of the EPRS, as they have in the past, supervisory units will be responsible to assist in the achievement of these goals at the local office level.

During meetings with their local office directors, supervisors will discuss the local office goals for the coming year and will be assigned targets for each supervisory unit. The purpose of these targets is to enable the supervisory unit to assist in the achievement and improvement of local office performance in these vital areas.

These targets as measured by various Department Reports, provide a bench mark toward which the supervisory unit will work during the course of the performance evaluation cycle. All of the factors which may affect the supervisor's performance will be considered during the evaluation process.

Although no numbers were placed on the Supervisor's EPRS form itself, during the evaluation process, some reviewing officials in various offices began to write them in. When Casey learned of the addition he contacted Johnson who indicated that he would explore the matter. Casey's concern was not so much that numerical goals or targets were being applied to the Supervisors, but that those numbers were being written on the forms themselves. Casey later agreed to resolve the problem by allowing the reviewing officials to place the supervisory unit goal or target figure on a separate piece of paper that would subsequently be attached to the Supervisor's EPRS.

At some point toward the end of FY 1988, Casey asked Barnes what DPW

8 (continued)

ET placement and referral goals. The Supervisors' EPRS forms contain similar language relative to Unit Health Choices Placement/Referral and Child Support referral goals.



intended to do regarding the implementation of EPRS for FY 1989. Barnes informed Casey that he was not sure whether or not there would be any changes to the evaluation criteria. Barnes further indicated he would inform Casey of any changes DPW planned to make.

At some time during October or November 1988, DPW provided Casey with the EPRS criteria DPW intended to implement for FY 1989. Subsequently, representatives of Local 508 and DPW met in the context of Labor-Management Committee meetings to discuss the EPRS evaluation criteria for FY 1989. Representatives of Local 509 included Casey, as chief spokesperson, Sullivan, Masiello and Pierce. Representatives of DPW included Johnson, who acted as chief spokesperson and Barnes. The main topic of discussion in these meetings concerned the application of DPW's goals or targets to Case Managers. It was DPW's intent to formally hold Case Managers responsible for achieving the agency's goals or targets by applying supervisory unit referral and placement goals to them. That is, DPW wanted to hold Case Managers responsible for achieving individual numerical goals or targets which would be derived from their supervisory unit's goals or targets. Local 509 was opposed to this for several reasons. Specifically, there was a concern that Case Managers would be required to meet goals or targets in areas where they could not control, such as ET placements. Case Managers cannot single handedly control the achievement of an ET placement. There was also a concern that workers in the various supervisory units would have differing opportunities to meet their goals or targets because of the varied type of caseload and/or clientele they worked with. Local 509 believed this would cause dissension among the Case Managers. In addition, because the targets or goals assigned to the Case Manager would be dependent on the supervisory unit's workload, Local 509 believed that the assignment of goals or targets to Case Managers would be unfair because some workers would be assigned higher goals than others. In an attempt to alleviate Local 509's concerns, Barnes and Johnson explained that it was not DPW's intent to treat the goals or targets as standards or absolutes, but rather they were merely guides. Local 509 was assured that the achievement of numerical goals or targets alone would not be determinative of any one EPRS rating. Barnes and Johnson further explained that in addition to goal or target achievement, evaluators would look at what Case Managers did to reach their assigned goals or targets.

The parties met several times during the months of November and December 1988. By January 4, 1989, essentially two issues remained unresolved. The first issue concerned the dispute over the application of numerical goals or targets to Case Managers, including holding Case Managers responsible for ET placements (which was incorporated into job duty #1 on the EPRS form). The second issue concerned the use of sick leave as an evaluation tool.

The parties met again on January 4, 1989. At that meeting, Local 509 continued to voice its opposition to the application of numerical goals and targets to the Case Managers and to using sick leave as an evaluation criterion. At that meeting the parties agreed not to include sick leave usage into the EPRS form. Local 509 also understood that Case Managers were not going to be held accountable for specific goal or target achievement. In accordance with that



understanding, the parties further agreed that Johnson would rewrite duty #1 and submit it to Casey for his review. A few days later, while traveling in a car to a DPW office, Johnson Casey proposed language for Case Manager EPRS job duty #1, which Casey and Local 509 were later able to agree to. The agreed upon language of job duty #1 reads as follows:

Duty 1: Case Management Targets Performance Criteria: (Performance is successful if:) The Case Manager assists in the achievement, maintenance and improvement of the supervisory unit performance relative to the unit's Child Support, Common Health and Health Choices Targets and assists in the Referral, Placement and Enrollment Process to help achieve the Agency's E.T. Goals.

As was the case regarding the FY 1988 EPRS Labor-Management Committee meetings, Local 509 believed the FY 1989 EPRS meetings were negotiations. No one from DPW represented otherwise.⁹

On January 20, 1989, Casey and Pierce met with Barnes to pick up a copy of the FY 1989 EPRS form the parties had agreed to implement for the various Case Manager and Supervisor job titles. In a cover letter attached to those documents, addressed to Casey and dated January 20, Barnes wrote, in relevant part:

Dear Arthur:

Enclosed please find a copy of the FY89 criteria material which incorporated the modifications we discussed Wednesday and which we have agreed is acceptable, both to the union and to management. Specifically, I am enclosing the agreed-upon criteria for the job titles of Case Manager, Case Management Supervisor....

...

I appreciate the time and effort which you and the EPRS committee committed to reach this agreement on the criteria.

Very truly yours,

/s/Jonathan Barnes
Director of Labor Relations

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Contrary to the EPRS meetings for the FY 1988 evaluation year, it is not clear from the record that Barnes, Johnson or any other DPW representative indicated to Local 509 that they lacked the authority to negotiate the FY 1989 EPRS evaluation criteria. Although Barnes and Johnson testified that Barnes had had conversations with Casey and other Local 509 representatives at various times regarding the lack of authority to negotiate over the EPRS evaluation criteria,

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At that meeting Barnes told Casey that the EPRS forms should incorporate all of the changes Casey and Johnson worked out and agreed to. Barnes also told Casey that DPW's Case Management Division may issue an additional form. At that, Casey became upset and stated "we didn't negotiate a form; I'm going to file an unfair labor practice charge if that form comes to pass."

Shortly thereafter, sometime in late January or early February 1989, an additional document was added to the FY 1989 Case Manager EPRS forms. The new form, which was referred to as an EPRS "Case Management Target Worksheet," was intended and used to communicate to the Case Managers the numerical goals or targets they would be held accountable for and evaluated on. The goals or targets were broken down in the areas of ET, child support, commonwealth, health choices, and/or error rate. The worksheet had spaces where the evaluator could write in the target figures that the individual Case Managers were to be assigned and evaluated on.

In FY 1989, DPW did consider whether Case Managers achieved their assigned goals or targets as part of their EPRS evaluation. Although the record establishes that in some cases DPW's intent, as articulated by Barnes and Johnson (that the achievement of individual goals or targets alone would not be determinative of any rating), was followed, the record also indicates that in some cases that intent was ignored. For example, in FY 1989, Masiello, a part-time GR Case Manager, was initially evaluated on the basis of her achievement of numerical goals or targets that were the same as those used for full-time Case Managers. As a result, she initially received an overall rating of "meets" on her annual review. When Masiello brought that fact to the attention of her evaluator, the goal or target figures that appeared on her EPRS were amended to reflect her part-time status and her overall rating was changed to an "exceeds." Her achievement of an overall rating of "exceeds," therefore, was based solely on the achievement of her assigned numerical goals or targets.

In FY 1990, DPW implemented EPRS based on the identical criteria that was developed and used in FY 1989. The parties did not participate in Labor-Management Committee meetings to discuss the FY 1990 EPRS evaluation criteria.

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neither specifically testified that those conversations took place during any of the EPRS meetings for the FY 1989 evaluation year. As such, I credit the testimony of Casey and Masiello that no such representations were made during the FY 1989 EPRS meetings.

