

In the Matter of COMMONWEALTH OF
MASSACHUSETTS, COMMISSIONER OF
ADMINISTRATION AND FINANCE

and

ALLIANCE, AFSCME-SEIU, LOCAL 509

Case No. SUP-4304

54.523 standards of productivity and performance
62. Discharge and Discipline—Just Cause
67.15 union waiver of bargaining rights
67.8 unilateral change by employer
82.3 status quo ante
82.4 bargaining orders

June 30, 2000

Robert C. Dumont, Chairman
Helen A. Moreschi, Commissioner
Mark A. Preble, Commissioner

Susannah P. Scannell, Esq. Representing the Commonwealth
of Massachusetts

Susan Jacobson, Esq. Representing the Alliance,
AFSCME-SEIU, Local 509

DECISION¹

Statement of the Case

On June 12, 1996, the Service Employees International Union, Local 509, a member of the Alliance, AFSCME/SEIU, AFL-CIO, (the Union) filed a charge with the Labor Relations Commission (the Commission) alleging that the Commonwealth of Massachusetts/Commissioner of Administration and Finance (the Commonwealth) had violated Sections 10(a)(5) and (1) of M.G.L.c.150E (the Law).² Following an investigation, the Commission dismissed the charge of prohibited practice on April 4, 1997. The Union then filed a request for reconsideration on April 17, 1997 pursuant to 456 CMR 15.03. On May 8, 1997, the Commission issued a complaint of prohibited practice alleging that

the Commonwealth had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally changing the criteria for imposing discipline on unit members.

A hearing was conducted on November 5, 1997, and the parties subsequently filed post-hearing briefs on January 30, 1998.³ Hearing Officer Margaret Sullivan issued Recommended Findings of Fact on October 4, 1999.⁴ Both parties filed objections to the Recommended Findings of Fact on November 26, 1999 and responses to the other party's objections on or about December 9, 1999. We have considered the parties' challenges to the findings, the arguments of the parties and the record in this matter. Based on that review, we make the following findings of fact and conclusions of law.

Stipulated Fact

In June 1994, the Union filed a prohibited labor practice charge in Case No. SUP-4075, challenging the February 1994 implementation of a Progress Supervisory Review policy.⁵ The Commission issued a complaint in that case on January 4, 1995 alleging that the Commonwealth had implemented the Progress Supervisory Review policy without bargaining to resolution or impasse.⁶ There has been no final resolution of that matter.⁷

Findings of Fact⁸

The Union is a member of the Alliance, AFSCME/SEIU, AFL-CIO. The Alliance is the exclusive collective bargaining representative for employees in statewide bargaining units 8 and 10, including certain employees of the Commonwealth of Massachusetts Department of Social Services (the DSS). The Union represents the following job titles at the DSS: Social Worker I's, Social Worker III's, Social Worker IV's, Social Work Technicians and Special Investigators. Social Worker IV's supervise Social Worker I's and III's and sometimes Social Work Technicians. Social Worker IV's, also referred to as supervisors, meet with social workers on a weekly basis and, as needed, in emergencies.

In February 1994, the DSS officially adopted a Progress Supervisory Review Policy⁹ on a statewide basis, along with a

1. Pursuant to 456 CMR 13.02(1), the Commission has designated this case as one in which the Commission shall issue a decision in the first instance.

2. We amend the name of the employee organization from the "Alliance, AFSCME-SEIU, Local 509" in response to the Union's challenge.

3. We amend the date of the hearing in response to the Commonwealth's challenge.

4. Administrative Law Judge Stephanie B. Carey (ALJ Carey) conducted the hearing but left the Commission's employ prior to issuing recommended findings of fact. The parties subsequently waived their rights to have ALJ Carey make credibility determinations and issue recommended findings of fact.

5. ALJ Carey took administrative notice of the opening statement and post-hearing brief of the attorney for the Commonwealth in Case No. SUP-4075.

6. The Union objects to the hearing officer's failure to make certain findings which are allegedly based upon representations that the Commonwealth's attorney made in her opening statement and post-hearing brief in Case No. SUP-4075. Representations made by a party's counsel are not evidence and cannot be used to

establish findings of fact. We reject the Union's argument that it is relying upon the opening statement and post-hearing brief of the Commonwealth's counsel in Case No. SUP-4075 to demonstrate the employer's legal position in Case No. SUP-4075 rather than to demonstrate the alleged truth of the underlying representations. Instead, the Union attempts to use the Commonwealth's opening statement and post-hearing brief in Case No. SUP-4075 to establish that a past practice existed prior to December 1995 whereby the Commonwealth did not discipline unit members for failing to complete the PSR forms. Accordingly, we decline to use the opening statement and post-hearing brief in Case No. SUP-4075 to make additional findings of fact.

7. On June 4, 1999, the Commission issued a decision in Case No. SUP-4075 finding that the Commonwealth had violated Sections 10(a)(5) and (1) by failing to bargain to resolution or impasse over the impact of the Progress Supervisory Review policy on unit members' workload and job conditions. The Commonwealth has appealed that decision pursuant to M.G.L.c.150E, §11.

8. The Commission's jurisdiction in this matter is uncontested.

9. We amend the name of the policy in response to the parties' challenges.

revised Service Planning Policy and a revised Policy and Procedures for the Ongoing Periodic Review of Cases.¹⁰ The Performance Supervisory Review Policy is a part of, and incorporated within, the DSS policy known as the Policy and Procedures for the Ongoing Periodic Review of Cases.¹¹ The objective of the Progress Supervisory Review Policy is to structure existing supervisory review sessions between social workers and supervisors to ensure that each case is reviewed every three months.¹² The Progress Supervisory Review policy was implemented to structure the supervisory process to ensure that open cases are reviewed on a periodic basis to identify significant family developments, assess progress made in achieving service plan goals, identify barriers to achieving these goals, and identify changes needed to achieve these goals.¹³ The cornerstone of the Progress Supervisory Review Policy is a report, known as the Progress Supervisory Review (the PSR) form.¹⁴ The PSR form requires the supervisor to note relevant information concerning case progress including the number of visits that the social worker made to the home and family members, case goals and necessary changes to the family's service plan.¹⁵

The Progress Supervisory Review policy requires a supervisor to complete a PSR form for all cases belonging to the social workers whom the supervisor directs. The DSS compiles statistics concerning the number of PSR forms that a supervisor completes, the number of PSR forms that supervisors in the same office complete, and the number of PSR forms that supervisors throughout the state complete. One of the management indicators that the DSS uses to measure whether supervisors have fulfilled

their supervisory responsibilities is the number of PSR forms the supervisors have completed in a quarter.¹⁶

Prior to the DSS implementing the Progress Supervisory Review Policy, the DSS required supervisors to review the cases of social workers but did not require them to utilize any specific review form.¹⁷ Supervisors¹⁸ were free to utilize their own formats.¹⁹ The Progress Supervisory Review policy did not supplant the weekly supervision requirements of the Ongoing Casework Policy; rather the Progress Supervisory Review Policy co-existed with the weekly supervision requirements of the Ongoing Casework Policy.²⁰ Whereas the Ongoing Casework Policy requires regular weekly supervision, the Ongoing Periodic Review Policy describes the Progress Supervisory Review process and the time frames upon which a PSR form is due on a particular case: quarterly (every three months) by workers in the Ongoing Unit if a case involves children who are not in foster care placement, and semi-annually by the Ongoing Unit if a case involves children who are in foster placement. The Foster Care Review Unit also performs two Progress Supervisory Reviews a year in those instances.²¹ Progress Supervisory Reviews are expected to be done in the course of regular weekly supervision, but only on those cases in which the PSR form is due.²² The factors that the supervisor and supervisee review during the Progress Supervisory Review Process are the same factors that are discussed during regular weekly supervision—progress of a family in achieving goals of the service plan, developments in the case, court orders, new members coming into the family, etc.²³ The DSS did not inform the Union that it planned to use the failure of a supervisor to complete PSR forms or

10. The Service Planning Policy is DSS Policy #86-001 and the Ongoing Periodic Review of Cases is DSS Policy #86-008.

11. The Union argues that this fact should have been included in the findings. We find this fact to be supported by the record and have amended the findings accordingly.

12. The Union requests a finding that the Progress Supervisory Review process has the same purpose as regular weekly supervision; with the difference that the Progress Supervisory Review process includes a particular form upon which the progress can be recorded. We find the record insufficient to support the Union's contention and decline to add this finding.

13. The Commonwealth contends that this fact should have been included in the findings. We find this fact to be supported by the record and have amended the findings accordingly.

14. The Commonwealth challenges the hearing officer's failure to find that the general requirements of the Progress Supervisory Review policy were already encompassed by the DSS's case practice expectations as reflected in its pre-existing Ongoing Casework Policy. We find the record insufficient to support the Commonwealth's contention and decline to add this requested finding.

15. The service plan details the family's understanding of their problems, the family's goals and the steps that the family must complete to achieve their goals.

The Union objects to the hearing officer's failure to specifically find that the stated purpose of the periodic review is to identify significant family developments which have occurred since the service plan was first written, to assess progress in achieving the goal(s) of the service plan, to identify existing barriers which interfere with achieving the goals of the service plan and to identify changes which need to be made to the service plan. However, the additional findings requested by the Union are not relevant to our analysis here and, therefore, we need not disturb the hearing officer's findings.

16. The DSS also uses other factors as management indicators.

17. The Ongoing Casework Policy, which the DSS revised in the late 1980's, defines supervision as "a dynamic process which supports ongoing casework through discussion of family dynamics, treatment planning, service delivery, agency mandate and caseload priorities." The Ongoing Casework Policy provides that supervision would include a regularly scheduled discussion of each case and consultation regarding each case on an as needed basis. We have amended this footnote to address the Union's concern that the language should clearly convey that the Ongoing Casework Policy continues to be in effect until the present time.

18. ALJ Carey agreed in the instant case to take administrative notice of the stipulations of fact that the parties had made during the hearing in Case No. SUP-4075. This finding was made from those stipulations.

19. The Union objects to the hearing officer's failure to specifically find that the DSS does not require any particular format for documentation of weekly supervision. The Union requests a finding that generally, supervisors may take notes or otherwise informally document the supervision, but there is no established procedure pursuant to the Ongoing Casework Policy. However, the additional findings requested by the Union are not relevant to our analysis here and, therefore, we need not amend the hearing officer's findings.

20. The Union argues that this fact should have been included in the findings. We find this fact to be supported by the record and have amended the findings accordingly.

21. The Union contends that this fact should have been included in the findings. We find this fact to be supported by the record and have amended the findings accordingly.

22. The Union challenges the hearing officer's failure to include this fact in the findings. After reviewing the record, we agree with the Union and alter the findings to reflect this change.

23. The Union requests additional findings concerning the factors that the supervisor and the supervisee discuss during the Progress Supervisory Review process. Where the record supports further findings, they are included in the factual findings.

to complete PSR forms in a timely manner as a basis for discipline.²⁴ Prior to December 1995, the DSS had not disciplined a supervisor for failing to complete PSR forms or to complete PSR forms in a timely manner.²⁵

Richard Fay

Richard Fay (Fay) was a supervisor in the Ongoing Unit at the Solomon Carter Fuller area office.²⁶ On December 15, 1995, the DSS sent Fay a letter informing him that the DSS had scheduled a pre-disciplinary hearing (a just cause hearing) for Fay on December 15, 1995 because of alleged deficiencies in Fay's performance, which could warrant his termination. The December 15, 1995 letter alleged that Fay had failed to: (a) provide regular ongoing supervision to workers in his unit; (b) provide effective clinical and casework supervision of children and family cases assigned to staff in Fay's unit; (c) complete the PSR forms in accordance with departmental policy; and (d) effectively monitor the casework activity of the social workers under his direction. At the just cause hearing, the DSS presented information concerning the actual number of PSR forms that Fay had completed. Joan McGregor (McGregor), who was the hearing officer for Fay's just cause hearing, claimed that Fay's failure to complete PSR forms was not the primary concern of the DSS.²⁷ She stated that the DSS's primary concern was that Fay failed to perform regular, weekly supervision as demonstrated by his failing to complete PSR forms.²⁸ Fay was terminated based upon his overall deficiency in fulfilling his supervisory responsibilities.²⁹ On January 5, 1996, the DSS issued Fay a termination letter that stated in part:

Most significantly in your case, the Department's review of the twenty (20) cases (of Susan Ohrstrom, a social worker under Fay's supervision) showed that there had been only three (3) PSR's completed by you with Ms. Ohrstrom during the period January 1995 to December 1995. In order to ascertain whether Ms. Ohrstrom presented an atypical case among the social workers you were assigned to supervise, the Department also reviewed the case records of each of the five (5) social workers that you supervise. Those records, which included 83 case files, revealed that you completed

only six (6) PSR's total for all of the individuals you were assigned to supervise during the period from January 1995 to December 1995. Had you been completing timely PSR's for the social workers assigned to you, you would have completed well over 300 PSR's. This constitutes an unacceptable deficiency in your supervisory responsibilities. ...

In short, the PSR is the central means by which supervisors and managers within the Department can assure that case management, including home visits, provision of services and service goals are being met for children receiving protective and preventive services from this agency. ...

Based on all of the available evidence, I conclude that you have failed to perform your essential responsibilities as a Supervisor/Social Worker IV. Your failure to perform your supervisory duties increased the risk of abuse and neglect to children, leaving you consistently unaware of the status of cases being managed by the caseworkers assigned to you for supervision, most particularly Ms. Ohrstrom, and cannot be tolerated by this agency, whose mission is to protect the safety of children reported as being abused or neglected. Therefore, there exists just cause for your termination.

Fay grieved his termination. At the Step Three grievance hearing, the DSS presented statistics comparing the number of PSR forms that Fay had completed with the number of PSR forms that other supervisors in the Solomon Carter Fuller Office area office had completed.³⁰

Sadiki Kambon

Sadiki Kambon (Kambon) was a supervisor in the Ongoing Unit at the Solomon Carter Fuller area office. On February 7, 1996, the DSS notified Kambon of a just cause hearing, which was scheduled for February 16, 1996. In the February 7, 1996 letter, the DSS alleged that Kambon had: (a) designated five cases to social workers in the computer but failed to inform the social workers of the assignments; (b) failed to assign two ongoing cases for a significant period of time; (c) failed to transfer three ongoing cases that social workers had submitted to him; and (d) consistently failed to complete timely PSR forms for any of the social workers that he

24. The Commonwealth argues that this fact is misleading because the evidence adduced at the hearing allegedly substantiated the DSS's position that noncompliance with the Progress Supervisory Review policy alone would not form the basis of disciplinary action, but instead that a unit member's failure to provide appropriate supervision, as reflected *inter alia* in the completed PSR forms, would continue to warrant disciplinary action. We decline to modify the findings because Jacqueline Gervais (Gervais), who was the Director of Labor Relations for the DSS from 1990 through 1995, had testified at the July 1995 hearing in Case No. SUP-4075 that the tracking of the Progress Supervisory Review policy "should not be disciplinary, that the intent was to get this to be good casework practice, that we are doing good work on behalf of clients and discipline should not be a part..." ALJ Carey had taken administrative notice in the present case of the transcript of a portion of Gervais's testimony at the hearing in Case No. SUP-4075.

25. The Union objects to the hearing officer's failure to find that the DSS did not give the Union notice or an opportunity to bargain, to resolution or impasse, regarding its decision to discipline bargaining unit members for violating the Progress Supervisory Review policy. We find the record insufficient to support the Union's contention and decline to amend the facts.

26. The Ongoing Unit monitors open cases once the DSS determines that a family needs services.

27. McGregor noted that the DSS undertook an examination of selected case files of social workers that Fay had supervised in response to the deaths of two children whose case had been assigned to a social worker under Fay's direction.

The Commonwealth challenges the hearing officer's additional finding in the footnote that the deceased children's case file initially was devoid of documentation showing that the social worker had ongoing contact with the family. The employer argues that the DSS's review of Fay's supervisee revealed a consistent lack of documentation indicating that required contact with client families had occurred and a lack of dictation reflecting that required protective services had been provided. Upon review of the Commonwealth's objection and the record as a whole, we agree with the employer and hereby modify the finding.

28. The Union objects to the hearing officer's failure to find that although the DSS claimed that Fay's failure to complete PSR forms was not the basis for his discipline that the DSS did in fact discipline Fay for failure to complete the PSR forms. We find the reprint of portions of Fay's termination letter to be sufficient and decline to amend the findings.

29. The Commonwealth argues that this fact should have been included in the findings. We find this fact to be supported by the record and have amended the findings accordingly.

30. At the Step Three hearing, the Union introduced a letter from four social workers that Fay had supervised stating in part that: "... Fay has proven to be an exemplary supervisor. He has given his time, experience and education. He has held weekly supervision ... He has been involved in the decision making process in all of our cases, guiding us and enhancing that process."

supervised. The DSS characterized the PSR forms as the primary means by which supervisors can ascertain whether the social workers assigned to them for supervision have conducted timely home visits, arranged for the provision of required services and have up-to-date service plans.³¹

At Kambron's just cause hearing, the DSS referenced Kambron's alleged failure to complete the PSR forms but also indicated that Kambron was facing potential discipline because he failed to assign cases.³² The DSS introduced statistics comparing the number of PSR forms that Kambron had completed with the number of PSR forms that other supervisors at the Solomon Carter Fuller area office had completed.³³ Darrel Cole, the Union's field representative, inquired at the just cause hearing whether the DSS was changing its alleged policy of not disciplining a supervisor for failing to complete PSR forms. McGregor, who was the hearing officer at Kambron's just cause hearing, determined that Kambron's failure to complete the PSR forms was a factor in his discipline but not a major factor.³⁴ The employer's major concern was that Kambron's failure to complete PSR forms showed a lack of supervisory responsibility.³⁵

The DSS issued Kambron a termination letter on March 14, 1996, which stated in part:

In 17 of the 26 cases (that were assigned to you), you failed to assign social workers to handle the cases for dangerously long periods of time. As a result, children were left without protection or services for as long as 120 days. ...

This fundamental lack of concern for your responsibilities as a (S)upervisor is also reflected in your consistent failure to complete progress supervisory reviews with the workers in your unit. The progress supervisory reviews must occur every three months, so that you can know the number of times that each child has been seen, to identify if there are barriers to achieving the goals of service plans, to review whether children can remain safely at home with their families, to review all children in placement, and to help your social workers to close cases when that can safely be done. The progress supervisory reviews are the central means by which supervisors and managers with the DSS can be assured that children are being protected and that their families are being given the best opportunity to parent their children successfully. It is the only means the

Department has of ensuring that children have been visited and are safe. ...

With regard to the even more serious matter of failure to assign cases, your sole explanation was that your workers' caseloads were too high. ...

Therefore, based on all of the evidence, I conclude that you have failed to perform your essential responsibilities as a Supervisor/Social Worker IV. Your failure to perform your supervisory duties increased the risk of abuse and neglect to children...

Kambron grieved his termination. At the Step Three hearing on Kambron's grievance, the DSS introduced statistics concerning the number of PSR forms that Kambron had completed, the number of PSR forms that other supervisors in the Solomon Carter Fuller area office had completed, the number of PSR forms that other supervisors in the Boston area had completed, and the number of PSR forms that supervisors throughout the state had completed.³⁶

Opinion

A public employer violates Section 10(a)(5) of the Law when it implements a change in a mandatory subject of bargaining without first providing its employees' exclusive collective bargaining representative with prior notice and an opportunity to bargain to resolution or impasse. *School Committee of Newton v. Labor Relations Commission*, 338 Mass. 557 (1983). The duty to bargain extends to both conditions of employment that are established through past practice as well as those conditions of employment established through a collective bargaining agreement. *City of Boston*, 16 MLC 1429, 1434 (1989); *Town of Wilmington*, 9 MLC 1694, 1697 (1983). To establish a violation, the Union must show that: 1) the employer altered an existing practice or instituted a new one; 2) the change affected a mandatory subject of bargaining; and 3) the change was established without prior notice or an opportunity to bargain. *Commonwealth of Massachusetts*, 20 MLC 1545, 1552 (1994); *City of Boston*, 20 MLC 1603, 1607 (1994).

Prior to December 15, 1995, the Commonwealth had not relied on the number of PSR forms that a supervisor had completed to support an allegation that the employee's work performance was

31. The DSS made this characterization in a January 16, 1996 just cause letter, which the employer sent to Kambron. The DSS then broadened its investigation of Kambron's activities as supervisor and issued the February 7, 1996 just cause letter.

32. According to Gervais, the DSS had not disciplined Fay or Kambron solely for failing to complete the PSR forms. Gervais reasoned that, if a supervisor was failing to complete the PSR forms in a timely manner, that it was likely that the supervisor was failing to perform other types of supervisory duties as well, like reviewing a social worker's dictation in a file.

33. The Commonwealth objects to the hearing officer's failure to find that at Kambron's just cause hearing that the DSS introduced evidence that in 17 of 26 new cases for which Kambron was responsible as a supervisor during the preceding six months he had failed to assign social workers to handle the cases for dangerously long periods of time and had instead hidden the case files in his office. A review of the record indicates that the hearing officer accurately summarized the evidence which the parties presented concerning Kambron's just cause hearing. Therefore, we decline to add this finding.

34. The Union contends that the hearing officer should have found that although the DSS claimed that Kambron's failure to complete the PSR forms was not the basis for his discipline, the DSS did in fact discipline Kambron for failing to complete the PSR forms. We find the reprint of portions of Kambron's termination letter to be sufficient and decline to amend the findings.

35. The Union submitted two letters in support of Kambron at his just cause hearing. Howard Lawrence, a social worker, wrote in part that: "Experience has shown me that Mr. Kambron possesses superior supervisory skills which has assisted me in performing my job effectively." Five of the social workers that Kambron supervised wrote in part that: "Mr. Kambron has also been very supportive of all his workers. He has assisted us in numerous removals and in doing so has born the brunt of our clients' anger. He has also made himself available to either accompany or stand in for his workers for court, home visits, foster-care reviews, placements and other various meetings."

36. The Commonwealth requests an additional finding that at Kambron's Step Three hearing he did not contest his failure to assign cases and presented no other evidence that he had otherwise adequately supervised his social workers. We decline to supplement the hearing officer's findings on this point because this issue is not material to our decision.

unsatisfactory. The Commonwealth unilaterally altered this practice in its January 15, 1996 letter by relying on the number of PSR forms that Fay had completed to support its conclusion that Fay had not fulfilled his supervisory responsibilities. Further, in a March 14, 1996 letter, the Commonwealth referred to the small number of PSR forms that Kambon had finished to buttress its determination that Kambon had failed to satisfactorily perform his supervisory duties.

Section 6 of the Law provides that an employer has an obligation to negotiate over standards of productivity and performance. It is well established that the decision to implement a new standard for assessing supervisory performance falls within the scope of Section 6 of the Law and is a mandatory subject of bargaining. *See e.g., Commonwealth of Massachusetts*, 13 MLC 1717, 1719 (1987); *Burlington School Committee*, 7 MLC 1273, 1275 (1980); *Town of Wayland*, 5 MLC 1738, 1741 (1979). Here, the Commonwealth argues that it referred to the number of PSR forms that Fay and Kambon had done to provide examples of their supervisory deficiencies rather than as a standard to evaluate their performances. However, the Commonwealth referred to the small number of PSR forms that Fay and Kambon had completed as one of the reasons why it concluded that those employees had not fulfilled their supervisory responsibilities. Therefore, the Commonwealth used the PSR forms in a manner that established a new criterion for assessing supervisory performance, without giving the Union notice or an opportunity to bargain.

The Commonwealth attempts to defend its action on the grounds that the Union waived its right to bargain over the standards of employee performance. The Commission has long held that an employer asserting contractual waiver as an affirmative defense must show that the parties “consciously considered the situation that has arisen, and that the Union knowingly waived its bargaining rights.” *Town of Marblehead*, 12 MLC 1667, 1670 (1986). However, the record here is devoid of any evidence that the parties either fully discussed or consciously explored the issue of the implementation of new criteria for employee performance and that the Union consciously yielded its interest on this matter during contract negotiations. Therefore, we do not find that the Union waived its right to bargain about the role of the PSR forms in evaluating employee performance.

Remedy

Section 11 of the Law grants the Commission broad authority to fashion appropriate orders to remedy unlawful conduct. *Labor Relations Commission v. City of Everett*, 7 Mass.App.Ct. 826 (1979); *Millis School Committee*, 23 MLC 99 (1996). The traditional remedy where a public employer unlawfully implements a unilateral change is an order to restore the *status quo* until the employer has fulfilled its bargaining obligation and to make all affected employees whole for any economic losses that they may have suffered. *School Committee of Newton*, 388 Mass. at 557. Therefore, we order the Commonwealth to: 1) restore the *status quo*; 2) bargain with the Union over the unilateral change in the criteria for performance and the impacts of that decision; and 3) make whole any bargaining unit member who has suffered a monetary loss as a result of the Commonwealth’s actions. *See Id.*

Any dispute about what would constitute restoring the *status quo* here or about which employees suffered economic harm because the Commonwealth used PSR forms as a criterion for performance can be resolved either by the parties themselves or, if necessary, through a compliance proceeding. *See City of Gardner*, 10 MLC 1218, 1222-1223 (1983).

Conclusion

Based on the record and for the reasons stated above, we conclude that the Commonwealth violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally changing the criteria that it used to determine whether a unit member had satisfactorily performed his or her supervisory duties without providing the Union with an opportunity to bargain to resolution or impasse.

Order

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

1. Cease and desist from:

- a. Failing and/or refusing to bargain in good faith to resolution or impasse with the Union over the decision to use the number of PSR forms that a unit member has completed as a standard to assess supervisory performance;
- b. In any like or related manner, interfering with, restraining or coercing any employee in the exercise of his/her rights guaranteed under the Law.

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

- a. Refrain from using the number of PSR forms that a unit member has completed as a standard to assess supervisory performance;
- b. Upon demand, negotiate in good faith with the Union over the decision to use the number of PSR forms that a supervisor has completed as a standard to assess supervisory performance and the impacts of that decision on wages, hours and conditions of employment;
- c. Make whole any employee who suffered economic losses as a direct result of the Commonwealth’s use of the unit member’s number of completed PSR forms as a standard to assess supervisory performance;
- d. Pay interest on all sums owed at the rate specified in M.G.L.c.231 §6B up to the date the City complies with this Order;
- e. Post in all conspicuous places where its employees represented by the Union usually congregate, or where notices are usually posted, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees;
- f. Notify the Commission in writing of the steps taken to comply with this decision within ten (10) days after receipt of this decision.

SO ORDERED.

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