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

and

ALLIANCE, AFSCME-SEIU, LOCAL 509

Case No. SUP-4345

54.5841	*workload*
67.11	*contract bar*
67.15	*union waiver of bargaining rights*
67.42	*reneging on prior agreements*
67.8	*unilateral change by employer*
82.3	*status quo ante*
91.1	*dismissal*

June 29, 2001
Helen A. Moreschi, Chairwoman
Mark A. Preble, Commissioner

Susannah P. Scannell, Esq.	*Representing the Commonwealth of Massachusetts*
Marc L. Terry, Esq.	*Representing the Alliance, AFSCME-SEIU, Local 509*

DECISION[1]

Statement of the Case

On November 6, 1996, Local 509, AFSME-SEIU, Alliance (Union) filed a charge with the Labor Relations Commission (Commission) alleging that the Commonwealth of Massachusetts, Commissioner of Administration and Finance (Employer) had engaged in prohibited practices within the meaning of Sections 10(a)(5) and (1) of Massachusetts General Laws, Chapter 150E (the Law). On May 14, 1997, the Commission issued a Complaint of Prohibited Practice pursuant to Section 11 of the Law and Section 15.04 of the Commission's Rules, alleging that the Employer had failed to bargain in good faith with the Union in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by: 1) repudiating the terms of a March 19, 1996 settlement agreement; and 2) unilaterally changing the job duties and increasing the workload of bargaining unit members. On May 21, 1997, the Respondent filed an answer to the Commission's Complaint.

Hearing Officer Stephanie B. Carey, Esq. conducted a hearing on January 8, 1998, at which both parties had an opportunity to examine and cross-examine witnesses and introduce documentary evidence.[2] Both parties filed post-hearing briefs on or about April 24, 1998.

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. Hearing Officer Carey left the Commission after the hearing. On or about February 26, 1998, both parties waived their rights to have the hearing officer who conducted the hearing make any necessary credibility determinations.

Findings of Fact[3]

The Department of Social Services (DSS) is an agency of the Commonwealth, under the jurisdiction of the Secretary of Administration and Finance, which provides services, including substitute care (foster care and group residential placement), for children at risk of abuse and neglect. The Union is the exclusive collective bargaining representative for employees in Statewide Bargaining Unit 8, including social workers and foster care case reviewers employed at DSS. The case reviewers' primary duties were to prepare and conduct foster care review meetings for children in DSS substitute care.[4] At each meeting, the case reviewer served as the chair of a three member case review panel[5] that determined: 1) whether placement was necessary and appropriate; 2) whether and to what extent the parties to the family's service plan had completed assigned tasks; 3) the amount of progress made towards achieving service plan goals; and 4) projected dates for achieving the goals. Before each meeting, the case reviewer reviewed the individual case record of the child or children involved. He or she then conducted the case review meeting by asking questions of the participants[6] to make the four determinations listed above, and completed a report based on the review panel's findings. At all times material to the issues in the Complaint, DSS case reviewers conducted approximately twelve case reviews per week. Prior to June 1996, each case review took approximately three to three and one half hours to complete, including preparation, conducting the meeting, and writing the report.

Before approximately October 1992, case reviewers recorded the results of each case review on a form entitled "Foster Care Review Determinations" or "Summary of Review Findings Form," also entitled "Form 6." Section 11 of Form 6 related to providing medical services to the child.[7] The instructions for completing Section 11 of Form 6 directed the case reviewer to determine whether the medical passport was complete and up to date, as well as whether other current medical and dental information was available at the case review. According to these instructions, medical/dental information was deemed current if encounter forms in the case file documented that the child had seen doctors and dentists at intervals specified in the instructions. In approximately October of 1992, DSS revised Form 6; however, the foster care reviewer was still required to document the existence of current medical information via encounter forms in order to complete Section 11.

Beginning on or about February 1, 1994, DSS informed case reviewers that they were no longer required to check the case files for the presence of the Medical Passports or encounter forms in preparing for the case review. Instead, the reviewers asked case review participants (*e.g.*, social workers, foster parents) whether children were receiving necessary medical and dental services. Case reviewers relied on these responses rather than on independent examination of the case files. Based on what they were told at the meeting, the case reviewers answered the question "Is child receiving all medical services needed?" by checking off one of seven possible answers on a checklist.[8]

Also on or about February 1, 1994, the employer laid off twelve of the fourteen nurses it had employed at DSS. The nurses had performed a variety of functions related to ensuring appropriate medical services to children in foster care, including consultation and technical assistance to DSS social workers and other DSS employees. Among other duties, the nurses assisted social workers in filling out medical passports. Nurses also monitored case records for the presence of Medical Passports and adequacy of information on the passports, in the context of assisting ongoing social workers, but did not assist foster care reviewers with this task in preparation for case reviews.[9] Nurses were not usually involved in foster care reviews. The nurses' layoff in 1994 was the subject of a prohibited practice charge by the Union.[10] On February 12, 1996, the parties executed a settlement agreement in that case which provided, in pertinent part :

> The Commonwealth of Massachusetts/DSS agrees that it will not assign work that was previously performed by licensed nurses, who were members of bargaining unit 7, to any members of bargaining unit 8.

In January of 1996, at a statewide staff meeting, the Employer gave case reviewers a draft of a Review of Medical Passport Encounter

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3. The Commission's jurisdiction is not contested.

4. Under federal law, DSS is required to review cases of children in substitute care every six months to assess the appropriateness of the services being provided, compliance with the service plan, and progress towards goals specified in the plan. The Foster Care Review Unit (FCRU), a specialized unit within DSS, is responsible for conducting case reviews. At all times material to the issues raised in the Commission's Complaint, the FCRU consisted of six teams, each with five case reviewers and a manager.

5. Each foster care review panel consists of a case reviewer, a DSS administrator, and a community volunteer.

6. Participants might include parents, foster parents, residential program staff, and the DSS social worker.

7. DSS kept track of medical and dental services to children in care by means of two forms: the "Medical Passport" and the "encounter form." The Medical Passport was a four page form that documented, in summary form, each child's medical history and needs. The Passport traveled with each child, and was kept by the foster parent or residential facility. A copy might be kept in DSS case file. It was compiled and updated by the child's ongoing social worker and the foster parent. The Encounter Form was a short form completed by the medical or dental provider after each appointment to document that the child had been seen, note the type of service provided, and indicate whether follow up care was needed. The foster parent was supposed to keep the original portion of the completed form with the Passport. The attached carbon copy was removed and sent to the social worker for the case file.

8. Beginning February 1, 1994, DSS replaced Form 6 with another form entitled "Service Plan Review & FCRU Determinations." This form was actually the last three pages of DSS Project Supervisory Review (PSR) form, and contained the list of questions to be answered during the review process. Witnesses for both parties testified that DSS had implemented the PSR system and accompanying form in February 1994, but it was not clear from the testimony what relationship there was, if any, between the PSR system and the case reviewers' duties regarding Medical Passports.

9. The Employer presented the testimony of Jacqueline Gervais (Gervais), who at all times material was the director of labor relations and personnel services for DSS. Gervais testified that the nurses did not monitor the status of the medical passports. The Union's witness, James "Dave" Chamberlain (Chamberlain), who was a social worker in a DSS area office and the Union chapter president, testified that the nurses did monitor the passports in the course of consulting with social workers. There was no evidence that nurses monitored the passports in preparing for case reviews, however. Therefore, we find that while nurses may have monitored medical passports while working in area offices with social workers, they did not perform this function in the case review context.

10. Commission Case No. SUP-4074.

Form. The Employer told the case reviewers that it might require them to complete this form, but that there was no scheduled implementation date. Joseph Hilyard (Hilyard) was a case reviewer in the FCRU and also was an Executive Board Member of the Union's DSS chapter. Hilyard received a copy of the draft form at the meeting and gave it to DSS Chapter Regional Vice President Phil Leduc (Leduc).[11]

On or about March 14, 1996, Hilyard learned that the Employer planned to implement the new Review of Medical Passport Encounter Form on April 1, 1996. Hilyard immediately relayed this information to Chamberlain. At all relevant times, Chamberlain was one of the Union's representatives at the Statewide Labor Management Committee, which had been established pursuant to Supplemental Agreement Q to the parties' collective bargaining agreement. (Supp. Q). Among other things, Supp. Q provided, at Paragraph XII:

> It is mutually agreed by the Parties that the Statewide Labor Management Committee will address factors which arise during the life of the Agreement which affect worker's abilities to meet their case responsibilities. The Department further agrees to continue the Labor Management Casework/Paperwork Reduction Committee to discuss the reduction or elimination of social workers responsibility for tasks such as (but not limited to): ...Medical passport and related documentation. If changes in casework related tasks or additional tasks are anticipated, these changes will be made only after discussions have taken place between the parties.[12]

In addition to using the Labor Management Committee, the Union had also made demands in the past to impact bargain over certain other issues affecting workload. The Union usually made those bargaining demands in written form on Union letterhead.

On or about March 18, 1996, Chamberlain sent the Union's agenda items for the regular April 1996 Labor-Management Committee meeting to Gervais. In pertinent part the agenda stated:

> We have been approached by a number of Case Reviewers relative to an additional form they are told will be required as of April 1...While the form itself is an issue, it is the time involved in gathering the required information that is the basis for concern. Please advise us as to the status of the form and delay its use until there is an opportunity to discuss it. The Union will file a Formal Demand to Bargain if the form is to be introduced and if the plan is implemented we will file a Prohibited Practice at the SLRC. The information being sought...would seem to be a task formerly assigned by [sic] the nurses...[T]here is an agreement that tasks of this nature are not to be assigned to Bargaining Unit members. The form...is titled, *Review of Medical Passport/Encounter Form.*

On or about March 21, 1996, case reviewer Eilish Broderick-Murphy (Broderick-Murphy) sent a memorandum to FCRU Director Katherine May (May), stating in part:

> [M]ost reviewers have expressed concerns on the impact [the Medical Passport Encounter Form] will have on workload and time needed to conduct reviews. Another concern is that participants in this project may be performing the work duties formerly assigned to laid off DSS nurses...Would it be possible to postpone implementation of this Project until after April 1, 1996? This would provide more time for discussion between management and reviewers...

At some time between mid-March and April 1, 1996, DSS postponed implementing the new form, but not as a result of Broderick-Murphy's or the Union's request.

At the April 4, 1996 Labor Management Committee meeting, Chamberlain reiterated the Union's concerns as stated in the March 16 advance agenda. The Union also stated that, if the Employer did not bargain over the form, the Union would make a formal demand to bargain. Gervais first learned at the April 4 meeting that DSS had postponed the original April implementation date. Gervais told the Union that DSS did not have a firm date for implementing the form, and that it would notify the Union when it did. Chamberlain understood Gervais to mean that DSS was not certain whether the change would actually take place.[13]

The Employer further stated that it did not believe that the form would require the case reviewers to perform duties formerly performed by nurses, or that completing the form would impose new duties on the case reviewers because they always had been required to review medical care being provided to children in foster care in preparation for case reviews. Finally, Gervais stated that the Employer would bargain with the Union if it was legally required to do so.

On or about May 3, 1996 the Union sent DSS an advance agenda for the May 1996 Labor Management Meeting. In pertinent part, the agenda stated:

> FCRU and Medical Passports:As stated last month the Union would view implementation of this policy as a repudiation of the agreement concerning work previously done by nurses. If the Department intends to proceed with the implementation we expect to be given notice in this forum.

On May 6, 1996, DSS Commissioner Linda K. Carlisle (Carlisle) issued a memorandum to DSS management staff entitled "RE: Medical/Dental Care Initiative." The memorandum provided, in pertinent part:

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11. Hilyard wanted Leduc to present the draft form to the Labor/Management Paperwork Reduction Committee. However, no Committee meetings were held. between January and June 1996.

12. The Statewide Labor Management Committee met monthly to address issues arising during the life of the Agreement. The Union customarily sent an advance list of agenda items to the Employer prior to each meeting. There were regular discussions at the Committee meetings of policies that DSS was in the process of developing. The Union did not consider the discussions at the meetings to be impact bargaining.

13. The record is unclear as to whether DSS stated that it definitely planned to implement the change, and that the only question was the date. Gervais testified that most of the discussion at the April meeting centered on the substance of the new form and on the fact that she did not know the implementation date. Gervais's testimony was vague as to whether she had stated at the meeting that DSS' plan to introduce the new form was going forward at some point. Chamberlain left the meeting with the impression that DSS did not know whether or when form would be introduced.

> Beginning June 1, the Foster Care Review Panel will once again be reviewing the medical passport and encounter forms during the review meeting; in addition, the Panel will also identify unmet medical needs of children that will require follow-up...

The next Labor Management Committee meeting took place on May 10, 1996. As of the meeting date, the Union was not aware of the May 6 memorandum from Carlisle.[14] At the May 10 meeting, the Union reiterated its concerns that implementing the Review of Medical Passport Encounter Form would both increase case reviewers' workloads and require them to perform the duties formerly performed by nurses. Gervais responded, on behalf of the Employer, that the proposed form was in development, that DSS did not know the implementation date, and that DSS would notify the Union when it knew the implementation date. Chamberlain again believed that DSS did not know if it definitely planned to implement the form.

On or about May 15, 1996, Chamberlain learned about the May 6 memorandum from Carlisle. On or about May 20, 1996, Chamberlain discussed the new form with DSS Deputy Commissioner John Farley (Farley). Chamberlain stated the Union's concerns about increased workload and assuming the nurses' former duties and requested that the Employer delay implementing the new form to allow for bargaining. On May 24, 1996, Farley informed Chamberlain that the Employer would not delay implementation. On or about May 24, 1996, Gervais sent Chamberlain a memorandum with attachments[15] that provided as follows:

> As I indicated at the last Labor Management meeting, I would inform you when I found out that the Department was planning to move forward on a specific date with the initiative on medical care, involving Foster Care Reviews. Enclosed is the material on the several initiatives related to children's medical care. While the Department has made clear we do not see any workload impact, however, we will be happy to set up a time to meet to discuss the initiative once you have reviewed the material enclosed.

On or about June 1, 1996, DSS implemented the Review of Medical Passport Encounter Form.

On June 12, 1996, the June Labor Management Committee meeting was held. The advance agenda for the meeting, written by Chamberlain, had reiterated the Union's concerns about the form and requested bargaining.[16] At the meeting itself, Chamberlain reiterated the Union's concerns and requested bargaining. On June 13, 1996, Chamberlain met with Farley and DSS Assistant Commissioner for Human Resources David Young (Young). Chamberlain requested DSS to postpone implementation and raised concerns regarding a need for bargaining.

On or about July 2, 1996, a meeting was held at the Union's request with representatives of the Union and the Employer[17] to discuss the Medical Passport Encounter Form. The Union stated concerns about the length of time required to complete the Form, and proposed a reduction in the number of cases assigned weekly. The Employer did not agree to the proposed reduction.

The new form was one page long and contained eight identical checklists (to accommodate up to eight children from one family), each consisting of the following six items:

- Passport not up to date
- Passport up to date
- No encounter forms for medical
- No encounter forms for dental
- Medical documentation in record
- Dental documentation in record

Two pages entitled, respectively, "Guidelines for Medical Passport Review" (Guidelines) and "Medical Passport Form Instructions" (Instructions) accompanied the form. The Guidelines listed which portions of the Medical Passport needed to be completed for the Passport to be up to date.[18] The Guidelines also stated that Encounter Forms or other medical/dental documentation had to reflect routine medical/dental care based on guidelines in the DSS medical policy, and listed the required frequency of routine medical and dental visits for children of various ages.

The Instructions further specified the criteria for completing the checklist(s) on the form; *i.e.*, the reviewer was to check off "passport not up to date" on the form if the passport was neither in the record nor available at the review meeting, or if the passport "does not document the medical/dental needs of the child. For example: child has asthma and this is not documented in the passport..." Similarly, the Instructions detailed when the case reviewer should check off "no encounter forms" on the form, *i.e.*, when Encounter Forms documenting medical and dental visits were neither in the case file nor produced at the meeting.

To complete the Review of Medical Passport Encounter Form for each child whose case was to be reviewed, case reviewers first needed to review the medical documentation in the child's case file before the meeting, to determine whether the Medical Passport was complete within the meaning of the Guidelines and Instructions: *i.e.*, whether the Passport reflected the medical and dental care provided. If Encounter Forms from medical or dental visits were not in the case file, the foster care reviewer had to look for alternate documentation such as doctors' letters or notations of medical visits contained in the social worker's narrative for the previous six months. If the needed information was not in the case file, the case reviewer would ask for it at the review itself.[19]

Additionally, case reviewers were required to determine, based on their review of the file and information provided by participants at

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14. No representative of the Employer mentioned Carlisle's memorandum at the May 10 Labor Management Committee meeting.

15. The attachments were not introduced at the hearing.

16. The advance agenda for the June meeting was not introduced at hearing.

17. Chamberlain and Murphy represented the Union. The Employer was represented by Deputy Commissioner Michael Weekes (Weekes), Young, and May.

18. The instructions were somewhat different for passports issued before and after June 1, 1996.

19. The medical documentation in the case file was often incomplete or missing.

the case review meeting, whether the child[ren] were receiving needed medical and dental services. The case reviewers were not required to determine the clinical appropriateness of the services provided. Rather, they determined whether: 1) routine care had been delivered according to a schedule established by DSS; and 2) follow up services recommended by a health care provider had been delivered.

Case reviewers spent more time reviewing medical information in case files after DSS implemented the Medical Passport Encounter Form than they had spent between February 1994 and June 1, 1996 because they had to conduct a more thorough pre-meeting review of the case file.[20] Although the Union previously had made written demands to bargain, it did not do so here.

Opinion

A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) if it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first affording the employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse. *Commonwealth of Massachusetts* v. *Labor Relations Commission*, 404 Mass. 124, 127 (1989); *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. 557, 572 (1983); *City of Boston*, 16 MLC 1429, 1434 (1989); *City of Holyoke*, 13 MLC 1336, 1343 (1986). A public employer's duty to bargain includes working conditions established through custom and practice as well as those governed by the terms of a collective bargaining agreement. *City of Boston*, 16 MLC at 1434; *Town of Wilmington*, 9 MLC 1694, 1699 (1983); *City of Boston*, 3 MLC 1450, 1459 (1977). To establish a violation, the charging party must demonstrate 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. *City of Boston*, 26 MLC 177, 181 (2000). Job duties and workload are mandatory subjects of bargaining. *See*, *City of Worcester*, 25 MLC 169 (1999); *City of Newton*, 16 MLC 1036, 1042 (1989); *Commonwealth of Massachusetts*, 25 MLC at 205.

The Employer does not contend here that it bargained to resolution or impasse with the Union. Rather, the Employer's position is that: 1) there was no change in past practice; and 2) even if there was a change, the Union waived its bargaining rights by inaction and by contract.

Change in Past Practice

The Employer argues here that case reviewers' duties always had included detailed reviews of case records, including Medical Passports, and written documentation of the results of this review. The record evidence shows, however, that although case reviewers always were required to make some sort of determination that children were receiving needed medical services, the Employer added specific new duties to this function that significantly increased case reviewers' workloads. For approximately two and one half years prior to June 1996, case reviewers did not normally examine the case file for the Medical Passport, encounter forms or other documentation, relying, instead, on case review participants' answers to a list of questions asked at the meetings to determine whether children in foster care had received necessary medical services. After implementing the Review of Medical Passport Encounter Form, case reviewers had to conduct a thorough search of the record of each case to be reviewed to find and, to some extent, examine medical documentation. Thus, the record evidence does not support the Employer's contention that case reviewers' job duties and workload did not change after it implemented the form.The Employer next asserts that the effects of the new form were not substantial enough to impose a bargaining obligation on the Employer. However, Hilyard testified that he spent about half an hour more per case, or six additional hours per week, more than he had before the Employer implemented the new form. Because completing the new form significantly increased case reviewers' job duties and workload, mandatory subjects of bargaining, we conclude that the Employer was obligated to negotiate with the Union over the decision to implement the form. *See*, *Commonwealth of Massachusetts*, 27 MLC 70 (2000).

Waiver by Inaction

The Commission has consistently held that a union waives its right to bargain by inaction if the union: 1) had actual knowledge or notice of the proposed action; 2) had a reasonable opportunity to negotiate about the subject; and 3) had unreasonably or inexplicably failed to bargain or request bargaining. *Town of Dennis*, 26 MLC 203, 204 (2000); *Town of Hudson*, 25 MLC 143, 148 (1999). The employer must prove these elements by a preponderance of the evidence, as the Commission does not infer a union's waiver of its statutory right to bargain without a "clear and unmistakable" showing that a waiver occurred. *Holyoke School Committee*, 12 MLC 1443, 1452 (1985), *citing City of Everett*, 2 MLC 1471, 1476 (1976), *aff'd. Labor Relations Commission* v. *City of Everett*, 7 Mass. App. Ct. 826 (1979).

Notice of a proposed employer action will be imputed to a union when a union officer with authority to bargain is first made aware of the employer's proposed plan. *City of Holyoke*, 13 MLC 1336, 1343 (1986), *citing Boston School Committee*, 4 MLC 1912, 1914-15 (1978). The information that the employer conveys to the union must be sufficiently clear for the union to respond appropriately and must be received far enough in advance to allow effective bargaining to occur. *Town of Hudson*, 25 MLC at 148; *Boston School Committee*, 4 MLC at 1915. The Commission has found notice to be sufficient to evoke a union response in several cases in which the employer stated it was considering certain actions, without specifying a date or deadline. *Id.*, *citing Scituate School Committee*, 9 MLC 1010, 1012 (1982). The Commission will not apply the doctrine of waiver by inaction where the union is presented with a

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20. May testified that case reviewers did not have to spend any additional time to complete the form because they always had been required to review medical documentation in case files when preparing for case reviews. On the other hand, Hilyard testified that reviewing medical documentation and completing the new form added approximately thirty minutes of preparation time to each case to be reviewed. Because Hilyard handled approximately twelve case reviews per week, his weekly workload increased by about six hours after DSS implemented the new form.

fait accompli, where, "under all the attendant circumstances, it can be said that the employer's conduct has progressed to a point that a demand to bargain would be fruitless." *Town of Hudson*, 25 MLC at 148; *Holliston School Committee*, 23 MLC 211, 212-13 (1997), *quoting Scituate School Committee*, 9 MLC 1010, 1012 (1982); *City of Everett*, 2 MLC at 1471.

Here, the Employer argues that the Union had adequate notice of the proposed change but failed to demand bargaining. Although the Union did not make a formal written demand to bargain, the record demonstrates that the Union informed DSS several times that it wished to bargain if DSS planned to implement the form. For example, the Union's March 18, 1996 advance agenda for the April 4, 1996 Labor Management Committee meeting stated in pertinent part: "Please advise us as to the status of the form and delay its use until there is an opportunity to discuss it. The Union will file a Formal Demand to Bargain if the form is to be introduced[.]" Similarly, the Union's May 3, 1996 advance agenda for the May 10, 1996 Labor Management Committee meeting requested that DSS give the Union notice if it implemented the form. The Union also indicated at the April 4, 1996 Labor Management Committee meeting that it intended to request bargaining over the form if DSS implemented it. Nevertheless, the Union learned on or about May 15, 1996 that DSS planned to implement the form on June 1, 1996 – only sixteen days later. On or about May 20, 1996, Chamberlain talked to Farley and requested that DSS delay implementing the new form to permit time to bargain. However, DSS implemented the new form as scheduled on June 1, 1996. Because the Union had continuously expressed a desire to bargain over proposed changes to case reviewers' job duties and workload, we find that the Union did not waive its right to bargain by inaction and conclude that the Union's demand to bargain was sufficient. *Town of Hudson*, 25 MLC at 148.

Contract Waiver

Parties to collective bargaining agreements may waive the right to bargain over otherwise mandatory subjects by virtue of the terms of their collective bargaining agreement. *School Committee of Newton* v. *Labor Relations Commission*, 388 Mass. at 569; *Mass. Board of Regents/University of Massachusetts Medical Center*, 13 MLC 1046, 1048 (1986). To prevail on a contractual waiver defense, the employer must demonstrate that the parties consciously considered the issue, and that the Union knowingly waived its right to bargain about it. *Commonwealth of Massachusetts*, 21 MLC 1029, 1040 (1994) (citations omitted). If contract language is ambiguous, or too vague to demonstrate a clear and conscious waiver, bargaining history may be examined to determine the parties' intentions. *Id.*

Here, the Employer argues that, in Supp. Q, the Union waived its right to bargain over new practices affecting workload, like the new form. Specifically, the Employer argues that the Union waived its bargaining rights in favor of *discussions* of proposed changes in casework tasks in the Labor Management Committee. However, Supp. Q. does not state that the parties intended the Labor Management Committee to be the exclusive forum for addressing workload issues during the life of the contract, or that they intended to supplant the Union's right to bargain over changes in case reviewers' job duties and workload. The record contains no evidence of bargaining history. Therefore, the Employer cannot prevail on its contractual waiver defense.

Repudiation Claim

An employer's obligation to bargain in good faith includes the duty to refrain from repudiating an agreement reached as a result of collective bargaining, including a settlement agreement. *Higher Education Coordinating Council*, 21 MLC 1184 (1994); *City of Boston*, 16 MLC 1653, 1658 (1990). An employer's deliberate refusal to abide by an agreement with a union, including a settlement agreement, constitutes an unlawful repudiation of the agreement in violation of Sections 10(a)(5) and (1) of the Law.

Here, the record does not establish that the Employer repudiated the March 1996 settlement agreement providing that DSS would not assign work previously performed by nurses to Bargaining Unit 8 employees, including case reviewers. The evidence shows that, although nurses assisted caseworkers in filling out medical passports, they did so as consultants to social workers providing ongoing services to children and not in the context of semi-annual foster care reviews. There is no record evidence that nurses had ever conducted the data gathering and file review required to complete the Review of Medical Passport Encounter Form for case reviews in particular. Therefore, the Union has not established that the Employer repudiated the settlement agreement.

Conclusion

For the reasons stated above, we conclude that the Employer: 1) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally changing case reviewers' job duties and workload without first giving the Union notice and an opportunity to bargain to resolution or impasse; and 2) did not repudiate the March 1996 settlement agreement referred to above, and dismiss that portion of the complaint.

ORDER

WHEREFORE, on the basis of the foregoing, it is hereby ordered that the Commonwealth of Massachusetts, Secretary of Administration and Finance shall:

1. Cease and desist from:

   a. Failing and refusing to bargain collectively in good faith with the Union by unilaterally changing case reviewers' workload and job duties.

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

2. Take the following affirmative action which will effectuate the policies of the Law:

   a. Immediately restore the case reviewers' workload and job duties as they existed prior to implementing the Review of Medical Passport Encounter Form.

   b. Upon request, bargain collectively in good faith with the Union over case reviewers' workload and job duties.

   c. Post in conspicuous places where 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 [not published] Notice to Employees.

d. Notify the Commission within ten (10) days of receipt of this decision and order of the steps taken to comply with this Order.

SO ORDERED.