

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of

TOWN OF EAST
BRIDGEWATER and EAST
BRIDGEWATER SCHOOL
COMMITTEE

Case Nos. MUP-07D-5095 and
MUP-07D-5115

Date Issued: August 18, 2011

AND

EAST BRIDGEWATER
EDUCATION ASSOCIATION

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Daniel C. Brown, Esq. - Town of East Bridgewater/ East
Bridgewater School Committee

Will Evans, Esq. - East Bridgewater Education
Association

**HEARING OFFICER'S DECISION AND RULING ON MOTION TO DISMISS AND
MOTION TO FILE DEFAULT**

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Summary

3 The issue is whether the Town of East Bridgewater (Town) and the East
4 Bridgewater School Committee (School Committee) (collectively the Employers)
5 violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General
6 Laws Chapter 150E (the Law) by failing to bargain in good faith with the East
7 Bridgewater Education Association (Association) over changes to health insurance co-

1 payments. Based on the record and for the reasons explained below, I conclude that
2 the Employers violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law
3 as alleged in the Complaint and order relief as set forth below.

4 **Statement of the Case**

5 On November 19 and December 19, 2007, the Association filed Charges of
6 Prohibited Practice (Charges) with the Department of Labor Relations (Department)¹
7 alleging that the Employers had engaged in prohibited practices within the meaning of
8 Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. On December 19, 2007,
9 the Association filed a Motion to Consolidate the Charges. Following an investigation
10 on April 14, 2008, the investigator issued a Complaint of Prohibited Practice (Complaint)
11 on June 26, 2008, and alleged that the Employers violated the Law by unilaterally
12 increasing co-payments under the Blue Care Elect Preferred Plan and the HMO Blue
13 New England Plan.²

14 On July 9, 16 and 23, 2008, the Employers, with the Association's assent,
15 requested extensions of time to file its Answer. On July 29, 2008, the Employers filed a
16 Motion to Dismiss the Complaint, arguing that the Association's Charges were time-

¹ Pursuant to Chapter 3 of the Acts of 2011, the Division of Labor Relations (Division) is now the Department of Labor Relations. Pursuant to Chapter 145 of the Acts of 2007, the Division was given "all of the legal powers, authorities, responsibilities, duties, rights and obligations previously conferred on the labor relations commission."

² Although paragraph 12 of the Complaint omits the phrase "Section 10(a)(5)", the omission appears to be a scrivener's error, as it is clear from the four corners of the Complaint that this Section was the intended designation.

1 barred pursuant to 456 CMR 15.03 of the Department's Rules and Regulations. On
2 September 2, 2008, the Association filed their Opposition to the Motion to Dismiss. On
3 September 2, 2008, the Association filed a "Motion to File Default," alleging that the
4 Employers failed to file an Answer to the Complaint. On September 8, 2008, the
5 Employers filed their "Opposition to Motion for Default," arguing that it filed a "timely
6 responsive pleading" through its Motion to Dismiss and believed that "it would be ruled
7 upon prior to an Answer needing to be filed." Also, on September 8, 2008, the
8 Employers submitted their Answer, which was attached to their Opposition to Motion for
9 Default.

10 On November 6, 2008, I conducted a hearing at which all parties had a full
11 opportunity to be heard, to examine and cross-examine witnesses and to introduce
12 evidence. On December 31, 2008, both parties filed post-hearing briefs. For the
13 reasons set forth below, the Employers' Motion to Dismiss is denied and the
14 Association's Motion for Default is denied.³ On the entire record, I make the following:

15 **Stipulation of Facts**

16 The parties stipulated to the following facts:

- 17 1. The Town is a public employer within the meaning of Section 1 of the Law.
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³ I deny the Association's Motion for Default since the Commonwealth Employment Relations Board's policy is to refrain from deciding cases on purely technical grounds, absence evidence of prejudice. See Commonwealth of Massachusetts, 21 MLC 1515, 1517 (1994). On July 9, 16 and 23, 2008, the Association assented to the Employers requests for extensions to file their Answer. While the Employers filed an untimely Answer, it did file a timely responsive pleading. I find that the Association was not prejudiced by the Employers' untimely pleading; furthermore, the critical facts are undisputed.

1 preparing the Town's budget. The Town is a member of the Southeastern
2 Massachusetts Health Group (SMHG), which is a health purchasing group consisting of
3 approximately eighteen Massachusetts municipalities.

4 On March 22, 2007, the Town sent notice to all Town employees and Association
5 officials regarding proposed co-payment changes to the health insurance benefits,
6 effective July 1, 2007. By letter dated March 26, 2007, Phillips responded to the Town's
7 notice and informed Samia of the Union's demand to bargain over the proposed
8 changes. On May 15, 2007, the parties met to discuss the proposed health insurance
9 changes and reached a tentative agreement where the Town agreed to draft a
10 proposed Memorandum of Agreement (proposed MOA) incorporating the settlement
11 terms. By e-mail on August 10, 2007, Town attorney, Kevin Feeley (Feeley) sent to the
12 Association a draft of its proposed MOA. The proposed MOA provided that:

13 from the period of July 1, 2007 through and including July 30, 2008...the
14 Town shall reimburse members of the Association who suffer a financial
15 loss during the reimbursement period. In order for a member of the
16 Association to establish that they have suffered a financial loss, the
17 member must document that she/he has paid co-payments during the
18 reimbursement period which are greater than \$271. over the co-payment
19 increase....

20
21 On September 17, 2007, the Association's executive board met and voted not to
22 ratify the proposed MOA. By e-mail on September 21, 2007, Buckley notified Feeley
23 that the Association's executive board failed to ratify the proposed MOA and requested
24 further bargaining. By e-mails on October 15 and 16, Buckley and Feeley confirmed a
25 second bargaining session on October 24, 2007. On October 24, 2007, the parties met

1 for the last time and the Association made additional proposals regarding the changes
2 to health insurance co-payments. The Employers did not accept the Association's
3 proposed changes and the issue remained unresolved.

4 **Ruling on Motion to Dismiss**

5 **Timeliness**

6 Section 15.03 of the Division's regulations states that: "Except for good cause
7 shown, no charge shall be entertained by the Department based upon any prohibited
8 practice occurring more than six (6) months prior to the filing of a charge with
9 the Department." 456 C.M.R. 1503. A charge of prohibited practice must be filed
10 with the Department within six months of the alleged violation or within six months from
11 the date the violation became known or should have become known to the charging
12 party, except for good cause shown. Felton v. Labor Relations Commission, 33 Mass.
13 App. Ct. 926 (1992). The six-month period of limitations for filing charges with the
14 Department begins to run when the party adversely affected receives actual or
15 constructive notice of the conduct alleged to be an unfair labor practice. Boston School
16 Committee, 35 MLC 277, 285-86 (2009); Town of Lenox, 29 MLC 51, 52 (2002) (citing
17 Wakefield School Committee, 27 MLC 9, 10 (2000)); Town of Middleborough, 18 MLC
18 1409 (1992). An allegation that a charge is untimely is an affirmative defense,
19 therefore, the Employer in this case has the burden of showing that the Association had
20 knowledge of the co-payment increases prior to the expiration of the statutory limitations
21 period. Diane McCormick v. Labor Relations Commission, 412 Mass. 164, 171, n. 13

1 (1992); Commonwealth of Massachusetts, 35 MLC 268, 269 (2008); Town of Dennis,
2 28 MLC 297, 301 (2002); Town of Dennis, 26 MLC 203 (2000).

3 The mission of the Commonwealth Employment Relations Board (Board) is to
4 provide a fair process to the parties before it to facilitate stable labor relations. See
5 Boston Teachers Union, Local 66, 26 MLC 137 (2000); Commonwealth of
6 Massachusetts, 26 MLC 43 (1999). Consequently, the Board is reluctant to decide
7 cases on purely technical grounds, absent evidence of prejudice or undue restraints on
8 Board resources. See Commonwealth of Massachusetts, 21 MLC 1515, 1517 (1994).
9 However, the Board does not condone a party's failure to comply with its rules and
10 regulations and enforces those rules when necessary and appropriate to ensure the
11 orderly administration of justice. See generally, Commonwealth of Massachusetts, 20
12 MLC 1179 (1993).

13 The Employers contend that the Association's Charges are untimely because the
14 Association had actual notice of the changes to health insurance co-payments on March
15 22, 2007, when Samia sent letters to the mailboxes of all Town employees and
16 Association officials via the "intra-Town" mail system. In the alternative, the Employers
17 contend that the Association was placed on notice on March 26, 2007, when Phillips
18 responded to Samia's March 22, 2007 letter with a written demand to bargain. Relying
19 on Town of Lenox, the Employers argue that the limitations period began to run when
20 the Association was first notified of the plan changes.

1 The Association contends that the statute of limitations period in this case does
2 not begin with the Employers' notification of changes in health insurance. Rather,
3 because the parties entered into good faith negotiations, the Association argues that
4 statute of limitations began to run when the Association became aware that the
5 Employers would not continue bargaining in good faith. The Association points to two
6 alternative dates. First, the Association argues that the Employers' triggering violation
7 occurred on July 1, 2007, when the Employers implemented the changes. In the
8 alternative, the Association argues that the triggering violation occurred on October 24,
9 2007, when the Employers refused to engage in further bargaining after the Association
10 refused to ratify the proposed MOA. The Association relies on Dracut School
11 Committee, 22 MLC 1013, 1025-26 (ALJ 1995). In that case, the school committee
12 implemented a sexual harassment policy (policy) in March of 1993. The union became
13 aware that the policy had been implemented in June of 1993 when a bargaining unit
14 member was investigated pursuant to the policy. The parties bargained over the policy
15 until late December of 1993 when the union learned that the school committee
16 commenced disciplinary action against the unit member. Id., 22 MLC at 1025-26. The
17 Administrative Law Judge (ALJ) found that the union's charge was timely because the
18 union did not have actual notice of the unfair labor practice until after the school
19 committee informed the unit member that he was being disciplined under the policy. Id.

20 In some cases that raise issues of timeliness (e.g., when a union is presented
21 with a fait accompli or when an employer insists on bargaining separately from main

1 table negotiations), the date that the union receives notice of the proposed change is
2 also the date when the period of limitations begins to run. Town of Lenox, 29 MLC at 52
3 (period of limitations began running when employer announced changes to health care
4 co-payment without first giving union opportunity to bargain); Boston School Committee,
5 35 MLC 277, 286 (2009). Here, the Employers' March 22, 2007 notice to the
6 Association was not a fait accompli because pursuant to this notice the Association
7 demanded to bargain on March 27, 2007. The parties commenced bargaining on May
8 15, 2007, and even though the Employers implemented the changes on July 1, 2007,
9 the parties continued to engage in good faith bargaining until October 24, 2007.
10 Accordingly, I find that the alleged violation did not occur until the Employers
11 implemented the health insurance co-payment changes on July 1, 2007, which occurred
12 prior to the parties reaching impasse. See Boston School Committee, 35 MLC at 286
13 (even where an employer has given a union notice and an opportunity to bargain, the
14 employer may not implement its proposed change until the parties reach an agreement
15 or impasse). Thus, I find that the Charges were timely filed.

16 **Impasse**

17 The Employers argue that the parties reached impasse on October 24, 2007,
18 when the Association presented additional proposals and the Town refused to accept
19 the terms of the Association's additional proposals. The Employers argue that they
20 believed the parties had reached impasse because Buckley "stated at the in-person
21 investigation that after the October 24, 2007 meeting, the Association had no further

1 contact with the Town prior to filing the [C]harge.”⁴ Relying on City of Worcester, 33
2 MLC 154 (2007), the Employers conclude that the parties had reached impasse
3 because “despite the union’s documented desire to negotiate further, the parties’ had
4 bargained in good faith, were deadlocked, and further negotiations would have been
5 fruitless.”

6 The Association argues that the parties did not reach impasse because it
7 believed that the October 24, 2007 meeting would be a continuation of the bargaining.
8 The Association contends that at no point during the period between March 22, 2007
9 and October 24, 2007 did it believe that the Town would not comply with its legal
10 bargaining obligations to negotiate in good faith. Buckley testified that on October 24,
11 2007 she first became aware that the Town refused to consider the Association’s
12 additional proposal to make whole the employees who were affected by the Town’s
13 health insurance changes that were implemented on July 1, 2007. The Association also
14 contends that it was at the October 24, 2007 meeting that it first became aware that the
15 Employers had violated the Law by unilaterally implementing the changes and failing to
16 bargain in good faith. Relying on Town of Natick, 19 MLC 1753 (1993), the Association
17 argues that the parties did not reach impasse, the Association never waived its right to

⁴ The Employers argue that Buckley’s April 14, 2008 in-person investigation statements contradicted her testimony at the hearing. Specifically, the Employers argue that Buckley offered contradictory evidence about whether Phillips actually received the Town’s March 22, 2007 letter. I find that Buckley’s investigation statements were not made under oath; and, therefore, I only consider statements that were offered and accepted through testimonial or documentary evidence at the hearing.

1 contest the health insurance changes and the Employers violated the Law by
2 implementing the changes during the parties' on-going negotiations. Id., 19 MLC at
3 1754.

4 After good faith negotiations have exhausted the prospects of concluding an
5 agreement, an employer may implement changes in terms and conditions of
6 employment that are reasonably comprehended within its pre-impasse proposals. City
7 of Leominster, 23 MLC 62, 66 (1996) (citing Hanson School Committee, 5 MLC 1671
8 (1979)). Factors considered in determining whether impasse has been reached
9 include: bargaining history, the good faith of the parties, the length of negotiations, the
10 importance of the issues to which there is disagreement and the contemporaneous
11 understanding of the parties concerning the state of the negotiations. Ashburnham-
12 Westminster Regional School District, 29 MLC 191, 195 (2003) (citing Town of
13 Westborough, 25 MLC 81, 88 (1997); Town of Weymouth, 23 MLC 70, 71 (YEAR); City
14 of Leominster, 23 MLC at 66). Impasse exists only where both parties have bargained
15 in good faith on negotiable issues to the point where it is clear that further negotiations
16 would be fruitless because the parties are deadlocked. Ashburnham-Westminster
17 Regional School District, 29 MLC at 195 (citing Commonwealth of Massachusetts, 25
18 MLC 201, 205 (1999); Town of Brookline, 20 MLC 1570, 1592 (1994)). An analysis of
19 whether the parties are at impasse requires an assessment of the likelihood of further
20 movement by either side, and whether they have exhausted all possibility of
21 compromise. Ashburnham-Westminster Regional School District, 29 MLC at 195 (citing

1 Commission, 388 Mass. 557 (1983); Commonwealth of Massachusetts, 30 MLC 64
2 (2003). To establish a violation, the union must show that: (1) the employer changed an
3 existing practice or instituted a new one; (2) the change had an impact on a mandatory
4 subject of bargaining; and, (3) the change was implemented without prior notice to the
5 union or an opportunity to bargain to resolution or impasse. Commonwealth of
6 Massachusetts, 30 MLC at 64; Town of Shrewsbury, 28 MLC 44, 45 (2001);
7 Commonwealth of Massachusetts, 27 MLC 11, 13 (2000). The Board holds that health
8 insurance coverage and the terms and costs of health insurance benefits, including co-
9 payments, are conditions of employment that constitute mandatory subjects
10 of bargaining. Town of Northbridge and Northbridge School Committee, 37 MLC 34, 76
11 (2010); Boston School Committee, 35 MLC at 286; Town of Dennis, 28 MLC 297, 301
12 (2002).

13 Here, it is undisputed that after July 1, 2007, the health insurance co-payments
14 increased, as stipulated by the parties. It is also undisputed that health insurance is a
15 mandatory subject of bargaining. Thus, the issue is whether the Employers bargained
16 in good faith with the Association before implementing changes to health insurance co-
17 payments on July 1, 2007. The Employers raised the affirmative defenses of timeliness
18 and impasse, which I addressed in my Ruling, above. Therefore, I find that the
19 Employers failed to bargain in good faith with the Association by implementing changes
20 to health insurance co-payments on July 1, 2007 in violation of Section 10(a)(5) and,
21 derivatively, Section 10(a)(1) of the Law.

ORDER

WHEREFORE, based on the foregoing, it is hereby ordered that the Town of East Bridgewater and the East Bridgewater School Committee shall:

1. Cease and desist from:

- a. Unilaterally changing co-payments for bargaining unit members represented by the Association without giving the Association an opportunity to bargain to resolution or impasse.
- b. Failing or refusing to bargain collectively in good faith with the Association about proposed changes in health insurance co-payments for office visits, emergency room visits and hospital stays.
- c. In any like manner, interfere with, restrain and coerce any employees in the exercise of their rights guaranteed under the Law.

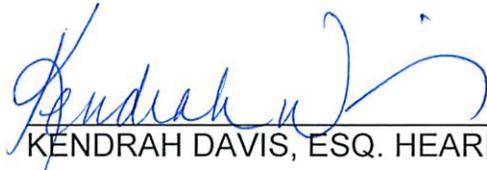
2. Take the following affirmative action that will effectuate the purposes of the Law:

- a. Restore to bargaining unit members represented by the Association the cost and structure of co-payments for all health insurance plans that were in place prior to July 1, 2007.
- b. Upon request, bargain with the Association, in good faith to resolution or impasse before implementing any changes in health insurance co-payments.
- c. Make whole bargaining unit members for any economic losses they may have suffered as a result of the Town's unlawful change to health insurance co-payments, plus interest on any sums owing at the rate specified in M.G.L. c. 321, sec. 6I compounded quarterly.
- d. Sign and post immediately in conspicuous places where employees usually congregate or where notices to employees are usually posted and maintain for a period of thirty (30) days thereafter copies of the attached Notice to Employees.
- e. Notify the Board within thirty (30) days after the date of service of this decision and order of the steps taken to comply with its terms.

SO ORDERED.

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COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



KENDRAH DAVIS, ESQ. HEARING OFFICER

APPEAL RIGHTS

10 The parties are advised of their right, pursuant to M.G.L. c. 150E, Section 11, 456 CMR
11 13.02(1)(j), and 456 CMR 13.15, to request a review of this decision by the
12 Commonwealth Employment Relations Board by filing a Notice of Appeal with the
13 Executive Secretary of the Department of Labor Relations not later than ten days after
14 receiving notice of this decision. If a Notice of Appeal is not filed within the ten days,
15 this decision shall become final and binding on the parties.



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
NOTICE TO EMPLOYEES
POSTED BY ORDER OF A HEARING OFFICER OF THE
MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

A Hearing Officer of the Massachusetts Department of Labor Relations has held that the Town of East Bridgewater and the East Bridgewater School Committee (Employers) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by failing to bargain in good faith with the East Bridgewater Education Association (Association) by changing health insurance co-payments and failing to give the Association prior notice and an opportunity to bargain to resolution or impasse over these changes. Chapter 150E gives public employees the right to form, join or assist a union; to participate in proceedings at the Department of Labor Relations; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and to choose not to engage in any of these protected activities.

The Employers post this Notice in compliance with the Hearing Officer's Order.

WE WILL NOT implement changes to health insurance co-payments for employees represented by the Association without first affording the Association notice and an opportunity to bargain to resolution or impasse.

WE WILL NOT fail or refuse to bargain collectively in good faith with the Association about proposed changes to health insurance co-payments.

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

WE WILL restore to employees represented by the Association the costs and structure of health insurance co-payments that were in place prior to July 1, 2007.

WE WILL, upon request, bargain with the Association to resolution or impasse before increasing health insurance co-payments for employees represented by the Association.

WE WILL make whole employees represented by the Association any economic losses suffered as a result of the Employers' unlawful change in health insurance co-payments on July 1, 2007.

For the Town of East Bridgewater

Date

For the East Bridgewater School Committee

Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).