



Association IUPA #16807 (BEMS-BPPA or Union) when the Commission changed health insurance costs for bargaining unit members by changing the plan design and increasing copayments without first giving the Union an opportunity to bargain to resolution or impasse over the decision and the impact of the decision on employee terms and conditions of employment. I conclude that the Commission violated Section 10(a)(5) of the Law in the manner alleged.

#### STATEMENT OF THE CASE

On July 26, 2012, the Union filed a Charge of Prohibited Practice (Charge) with the Department of Labor Relations (DLR), alleging that the Commission had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by engaging in bad faith bargaining when it unilaterally changed bargaining unit members' health insurance co-payments. A duly-designated DLR investigator investigated the Charge and issued a Complaint of Prohibited Practice (Complaint) on October 23, 2012. The Commission filed its Answer to the Complaint on November 2, 2012.

I conducted a hearing on November 7, 2013, at which both parties had an opportunity to be heard, to examine witnesses and to introduce evidence. On December 20, 2013, the Union and Employer both filed their post-hearing briefs. Based on the record, which includes witness testimony and documentary exhibits, and in consideration of the parties' arguments, I make the following findings of fact and render the following opinion.

#### STIPULATIONS OF FACT

Both parties stipulated to the following facts:

1. The Boston Public Health Commission (BPHC or Employer), is a public employer within the meaning of General Laws Chapter 150E, Section 1.

2. The Boston Emergency Medical Services, Boston Police Patrolmen's Association (BEMS-BPPA or Union), is an employer organization with the meaning of General Laws Chapter 150E, Section 1.
3. The Union is the exclusive bargaining representative for a bargaining unit that consists of all of the emergency medical technicians (EMTs) employed by the BPHC, including the titles of EMT, EMT intermediate, EMT-Paramedic, Senior EMT, Principal EMT, and Training Supervisor.
4. The Union and the BPHC are parties to a collective bargaining agreement [(Agreement)] effective July 1, 2006 to June 30, 2011.
5. The health insurance provision of [the Agreement] is set forth in Article 9.
6. The Union and the Employer (collectively, the parties) engaged in 14 negotiation sessions regarding a successor contract from May 25, 2011 through June, 2013.
7. The BPHC was created by statute (Boston Public Health Act of 1995, G.L. c. 111 App. §§ 2-1 through 2-15) in 1996. Since its creation, BPHC has provided health insurance to benefits-eligible employees, including BPPA members, through the City of Boston's [(City)] group health insurance plans purchased by the City.
8. In mid-April 2011, the City entered into an agreement (PEC Agreement) with the Boston Public Employees Commission (PEC), established pursuant to Chapter 32B, §19.
9. The PEC Agreement addressed health insurance premium and plan design changes effective July 1, 2011 through June 30, 2015 as negotiated by the City and the PEC.
10. Neither the BPHC nor the Union participated in the negotiation of the PEC Agreement.
11. By letter dated April 22, 2011, the BPHC's Chief Labor and Employment Counsel notified the Union's President of the execution of the PEC Agreement, and proposed that the BPHC continue to provide health insurance through the City, provided the Union agree to the premium contribution rates and plan design changes described in the PEC Agreement between the City and its unions. The April 22, 2011 letter included an attachment that summarized the co-payments of the City's new health insurance plans.

12. On or about April 24, 2012, the BPHC issued an open enrollment notice to all individuals eligible to receive health insurance, including the BEMS-BPPA's members.
13. The Union objected to the Employer's April 24, 2012 notice. At the Union's request, the BPHC issued a memorandum to all Union members regarding the health insurance dated April 25, 2012.
14. Effective July 1, 2012, the copayments for health insurance in the City's new health insurance plans increased. Effective July 1, 2012, copayments for health insurance paid by bargaining unit members increased.
15. The premium contributions payable by the Union's members are set forth in Article 29 of the Agreement and have not changed.
16. On July 26, 2012, the charge in this matter was filed.
17. The BPHC filed a petition for mediation with the DLR on June 18, 2013. A first mediation session was held with the DLR mediator on August 22, 2013.

### FINDINGS OF FACT

#### **The Boston Public Health Act**

The Legislature created the Commission by statute on July 1, 1996 pursuant to Chapter 147 of the Acts of 1995, which is also known as the Boston Public Health Act of 1995 (BPHA). The BPHA states in pertinent part:

Section 3. (a) ...The Commission shall not be subject to the supervision of any other department, commission, board, bureau, agency or officer of the City except and in the manner provided in this act.

Section 4. (d) ...Chapter [150E]... shall apply to the Commission, to the extent the provisions of the same are apt, and for purposes of said chapter...the Commission shall be considered an employer or public employer as defined therein.... The Commission shall have the authority to bargain collectively with labor organizations representing employees of the Commission and to enter into agreements with such organizations representing employees of the hours, working conditions, health benefits, pension and retirement allowances and the submission of grievances and disputes to arbitration.

#### **The PEC Agreement**

The Commission is a separate employer from the City. The City purchases health insurance on an annual basis and negotiates insurance contracts each year through the PEC on behalf of approximately 30,000 City employees, their families, retirees and surviving spouses. The City also permits Commission employees, their families, retirees and surviving spouses to purchase the same health insurance plans through the PEC Agreement.<sup>1</sup> As part of that arrangement, the Commission and its employees are bound to the terms agreed to by the City and the PEC. The Commission purchases health insurance from the City on a voluntary basis and may purchase health insurance elsewhere if it chooses. The Commission is not represented on the PEC and does not have control over the health insurance decisions reached between the City and the PEC.

In or about April of 2011, the City and the PEC reached a memorandum of agreement (MOA or PEC Agreement), which is effective from June 1, 2011 through June 30, 2015. By that MOA, the parties agreed to change the design of the City's group health insurance plans effective July 1, 2012, which included increases to pharmaceuticals, office visits and emergency room co-payments. The PEC Agreement states, in pertinent part:

WHEREAS, all individual bargaining units of the City of Boston... hereby agree to become a Public Employee Committee ("PEC") upon the acceptance of Chapter 32B, Section 19<sup>2</sup> by the Boston City Council and,

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<sup>1</sup> The Boston Water and Sewer Commission and the City of Chelsea also purchased health insurance with the City pursuant to G.L. c. 32B. The total number of City employees and non-City employees who subscribe to the health insurance plans is approximately 50,000 individuals, which yields a lower overall subscription rate.

<sup>2</sup> G.L. c. 32B, § 19 states, in pertinent part:

upon its creation the PEC will be the authorized exclusive bargaining representative for the coalition of the public employee bargaining units and retirees of the City of Boston with respect to health insurance coverage; and

WHEREAS the City and the PEC (collectively "the parties") have concluded negotiations regarding health insurance benefits for the City's subscribers for the time period from June 1, 2011 through June 30, 2015; and

WHEREAS, it is the express intent of the parties to create an enforceable, durable, binding agreement for the duration stated herein, subject to the conditions set forth herein, regardless of any potential or actual legislative changes to G.L. c. 32B, § 19, any provision of G.L. c. 150E, any other section of the General Laws, and/or special law, including, but not limited to the Acts of 2011; and

WHEREAS, the parties agree that all "bridge agreements" so called and any successor collective bargaining agreements negotiated with any

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(a) ....Except as otherwise provided in subsection (e), a contract with a health insurance carrier shall be in conformity with an agreement reached by an appropriate public authority and a public employee committee....The public employee committee shall include a representative of each collective bargaining unit with which the political subdivision negotiates under chapter 150E and a retiree representative....

An agreement approved under this section shall be binding on all active and retired employees for whom health insurance coverage is being purchased, shall supersede any conflicting provision of a collective bargaining agreement and shall not be superseded in a statutory impasse proceeding under chapter 150E, but the agreement may include procedures for resolving an impasse in negotiations for a successor agreement....

(b) Nothing in this section shall require, preclude or permit a change in any aspect of health insurance coverage for subscribers authorized by this section except where an agreement to provide for such change is reached by an appropriate public authority and a public employee committee in an agreement entered into or modified after the effective date of this subsection except as otherwise provided in subsection (e). In the absence of a successor agreement approved under this section, the prior agreement of the public employee committee and the appropriate public authority regarding the provision of health insurance shall remain in effect.

bargaining units shall continue in full force and effect, except as expressly modified by this MOA...as follows:

3. Section 19 Supersedes Collective Bargaining Agreements. Any and all provisions of any collective bargaining agreement relative to health insurance, including but not limited to health insurance plans, contribution rates, or policies between the City...and any of the bargaining units who are signatories to this MOA shall be superseded by the PEC Agreement, as it is the parties' understanding that all health insurance matters will hereafter be subject to the provisions and procedures of Section 19 and decisions made between the City and the PEC shall determine said matters, which are therefore not a proper subject of bargaining for individual bargaining units. Notwithstanding the aforementioned, dental and vision benefits, and any health insurance "opt-out" clause related to any individual union shall not be part of this MOA or the PEC Agreement and shall continue to be negotiated between the City and each of the collective bargaining units pursuant to M.G.L. c. 150E.

8. Health Insurance Coverage: The health insurance coverage for subscribers from July 1, 2011 through June 30, 2015 shall be in accordance with Appendix A of this MOA.

Appendix "A"

Health Insurance Plan Design

2. Co-Pays and Deductibles.

a) Effective July 2012, the co-pays below for Harvard Pilgrim Health Care HMO and POS, Neighborhood Health Plan, BMC Advantage...and Blue Choice shall be changed to the following:

<u>Office Visits...</u>	
Primary Care (including PT)	\$15
Specialty Care	\$25
 <u>Pharmacy...</u>	
Retail	\$10/\$25/\$45
Mail (90 days)	\$20/\$50/\$100
 <u>Emergency Room</u>	
	\$100

b) Effective July 2012, the co-pays below for Blue Care Elect Preferred shall be changed to the following:

Office Visits...

Primary and Specialty Care	\$20
<u>Pharmacy...</u>	
Retail	\$10/\$25/\$45
Mail (90 days)	\$20/\$50/\$100
<u>Emergency Room</u>	\$100

By letter dated April 22, 2011, Commission counsel E. David Susich (Susich) notified Union Representative James Orsino (Orsino) about the PEC Agreement and provided him with a copy of the changes. By that letter Susich, also reminded Orsino that bargaining unit members were subject to the same premium contribution rates and plan terms determined by the PEC Agreement.

### **The Collective Bargaining Agreement**

Article 5 of the Agreement pertains to Management Rights and states, in pertinent part:

Section 1. The Public Employer reserves and retains the sole and exclusive right to manage, operate and conduct all of its Departments' operations and activities, except as otherwise specifically and expressly provided in this Agreement or applicable law. The enumeration of management rights in this Article is not to be construed as a limitation of management's rights, but rather as an illustration of the nature of the rights inherent in management.

Section 2. Except as limited by the express provisions of this Agreement, the Public Employer reserves and retains the exclusive right to hire, promote, assign, transfer, suspend, discipline, discharge, lay off and recall personnel; to establish, create, revise and implement reasonable work rules and regulations; to establish positions and job descriptions and the classifications therefore; to make changes in related assigned duties and responsibilities; to schedule work as required; to create new shifts and schedules; to study and use, introduce, install new or improved methods, systems, facilities and/or equipment; to determine methods, processes and procedures by which work is to be performed; to subcontract work where the purpose is not to materially undermine the bargaining unit; and in all respects to carry out the ordinary and customary functions of municipal management. In the event the Public Employer wants to change or institute any of the above referenced matters, the

Union will be notified, and have an opportunity to negotiate the impact of any such change.

Article 29 of the parties' Agreement specified that the Commission would pay a certain percentage of the premium for health insurance offered to unit members. That provision stated, in part:<sup>3</sup>

Section 1. The Commission's contribution to all group hospitalization insurance premiums shall be as follows:

- a. Effective February 29, 2008 the Commission shall cease to offer Master Medical to bargaining unit members. The Commission shall offer the indemnity PPO known as Blue Care Elect Preferred. The Commission's rate of contribution for the indemnity PPO shall be 75%. The employee's rate of contribution shall be 25%.
- b. Effective January 1, 2008 the Commission's rate of contribution for all approved and authorized health maintenance organizations shall be 87.5%. The employee's rate of contribution for all approved and authorized health maintenance organizations shall be 12.5%.
- c. Effective January 1, 2009 the Commission's rate of contribution for all approved and authorized health maintenance organizations shall be 85%. The employee's rate of contribution for all approved and authorized health maintenance organizations shall be 15%.
- d. Effective January 1, 2008 the Commission's rate of contribution for all approved and authorized health maintenance organizations shall be 82.5%. The employee's rate of contribution for all approved and authorized health maintenance organizations shall be 17.5%.
- e. Effective January 1, 2009 the Commission's rate of contribution for all approved and authorized health maintenance organizations shall be 80%. The employee's rate of contribution for all approved and authorized health maintenance organizations shall be 20%.

Section 2. The Department shall staff and maintain an employee clinic to service its employees.

Section 3. Health Insurance Opt. Out. Effective July 1, 2008, eligible bargaining unit members who decline the Commission's health insurance

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<sup>3</sup> Article 29 of the parties' Agreement is silent about health insurance copayments.

benefits shall receive a health insurance opt out benefit pursuant to the Commission's Health Insurance Opt Out Program....

### **The 2011-2012 Successor Bargaining Negotiations**

Since 1996, the parties have regularly bargained over health insurance during contract negotiations. Beginning on May 25, 2011, the parties commenced successor contract negotiations for the Agreement. At that meeting, the Commission proposed ground rules and a bridge agreement to resolve the evergreen clause issue in the expired contract. The Commission also proposed certain health insurance changes that had been agreed to by the City and the PEC. At the parties next bargaining session on June 16, 2011, the Union demanded that the Commission's May 25, 2011 proposals be part of the parties' main table negotiations. At the fourth bargaining session on October 6, 2011, the Commission proposed that the Union waive its future rights to negotiate health insurance, including copayments, and defer to negotiations between the BPPA and the City, which the Union rejected.

The parties continued to engage in successor bargaining throughout the year and met again on April 24, 2012, when the Union objected to the changes announced by the Commission in its April 2012 Health Insurance Open Enrollment (Open Enrollment) form, which sought to increase unit members' health insurance copayments effective July 1, 2012. Specifically, the Open Enrollment form notified bargaining unit members that the deadline for health insurance open enrollment was June 15, 2012, and that the Commission would hold open-enrollment health fairs on April 26, May 8 and 9, 2012 for unit members to either enroll in a health plan for the first time, change their health plans or add/remove dependents. The Open Enrollment form also notified unit members of the following co-payment and rate increases effective July 1, 2012: (1)

\$15 for Primary Care, Physical Therapy and Mental Health Office Visits; (2) \$25 for Special Office Visits; (3) \$100 for Emergency Room Visits; (4) a three-tiered cost structure of \$10/\$25/\$45 for Pharmacy Retail Purchases; and (5) a three-tiered cost structure of \$20/\$50/\$100 for Pharmacy Mail Order Purchases. The Open Enrollment form did not notify unit members of a change in health insurance premiums.

By memorandum on April 25, 2012, the Commission notified the Union that “the new co-payments listed in the 2012-2013 open enrollment form [would] not apply to BEMS-BPPA bargaining unit members unless and until modified as a result of collective bargaining.” Without expressly indicating a specific bargaining deadline, the memorandum stated further:

The Commission and the Union are currently negotiating about the manner in which co-payments will be handled as of July 1, 2012, as employees may be required by their medical providers to pay the new co-payments when they seek care after that date. We will keep you advised.

Pursuant to the Open Enrollment form, and during the parties’ June 8, 2012 bargaining session, the Union proposed that the City’s health insurance carriers provide unit members with separate health insurance cards with lower co-payments than those negotiated in the PEC Agreement. The Commission submitted that proposal to the City and, at some point between June 8 and 26, 2012, the City’s Director of Health Benefits Kathleen Green (Green) rejected the proposal because it violated the PEC Agreement. At the parties’ June 26, 2012 bargaining session, the Commission also rejected the Union’s proposal, and stated that it was going to implement the health insurance changes on July 1, 2012. The parties scheduled another bargaining session for mid-July of 2012 but after Union counsel was unable to attend due to health-related reasons, they postponed further successor bargaining until January of 2013. As of the

hearing, the parties have not reached an agreement over the July 1, 2012 health insurance changes.

## OPINION

### **Unilateral Change**

A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) of the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first giving its employees' exclusive bargaining representative notice and an opportunity to bargain to resolution or impasse over the decision or its impacts. Commonwealth of Massachusetts v. Labor Relations Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983); Commonwealth of Massachusetts, 30 MLC 63, 64, SUP-4784 (Oct. 9, 2003). To establish a violation, the union must show that: (1) the employer changed an existing practice or instituted a new one; (2) the change had an impact on a mandatory subject of bargaining; and, (3) the change was implemented without prior notice to the union and an opportunity to bargain to resolution or impasse. Commonwealth of Massachusetts, 30 MLC at 64; Town of Shrewsbury, 28 MLC 44, 45, MUP-1704 (June 29, 2001); Commonwealth of Massachusetts, 27 MLC 11, 13, SUP-4378 (Aug. 24, 2000).

The Commonwealth Employment Relations Board (Board) holds that health insurance coverage and the terms and costs of health insurance benefits, including co-payments and plan designs, are conditions of employment that constitute mandatory subjects of bargaining. Town of Brookline, 20 MLC 1570, 1592, MUP-8426, MUP-8478

and MUP-8479 (May 20, 1994); Town of Ludlow, 17 MLC 1191, 1196, MUP-7040 (Aug. 3, 1990)); Board of Regents of Higher Education, 19 MLC 1248, 1265, SUP-3267 through SUP-3272 (Aug. 24, 1992) (citing Anderson v. Board of Selectmen of Wrentham, 406 Mass. 508 (1990)). Commonwealth of Massachusetts, 30 MLC at 64. The Board has also held that employer-subsidized health insurance is a form of compensation. Board of Regents of Higher Education, 19 MLC at 1265. Changes in the amount of a co-payment that employees are required to pay for prescription drugs or office visits under an employer's health insurance plans are changes to both the terms and costs of health insurance affecting employees' overall compensation. Therefore, an employer must generally bargain with a union to resolution or impasse prior to changing the amount of co-payments that employees are required to make under the employer's group health insurance plan. Town of Dennis, 28 MLC 297, MUP-2634 (April 3, 2002).

### **Third Party Control**

Where a third party over which the employer has no control, exercises its authority to change employees' terms and conditions of employment, the public employer may not be required to bargain over the decision to make that change. Massachusetts Correctional Officers Federated Union v. Labor Relations Commission (MCOFU), 417 Mass. 7 (1994); see also Higher Education Coordinating Council, 22 MLC 1662, SUP-4078 (Apr. 11, 1996) (citing City of Malden, 20 MLC 1400, 1405, MUP-7998 (Feb. 23, 1994)). However, even if a public employer is excused from the obligation to bargain over a decision, that employer still has the obligation to bargain with the union regarding any impacts its decision will have on mandatory subjects of

bargaining, before it implements that decision. Higher Education Coordinating Council, 22 MLC at 1668-69 (citing Town of Dedham, 21 MLC 1014, 1023, MUP-8091 (June 15, 1994); MCOFU, 417 Mass. at 9; Board of Regents of Higher Education, 19 MLC at 1265).

It is undisputed that effective July 1, 2012, the Commission changed the health insurance plan design and increased copayments. It is also undisputed that those health insurance changes impacted a mandatory subject of bargaining. The Commission admits that it is obligated to bargain with the Union over the impacts of those changes. Therefore, the only issue is whether the Employer implemented the changes without first giving the Union prior notice and an opportunity to bargain over the decision. The Union argues that the Commission is obligated to bargain over the decision because it controls plan design changes and copayment increases based on its ability to purchase health insurance from another carrier other than the City and the PEC. Specifically, the Union contends that while the Commission cannot force the City to purchase particular plan designs, the unavailability of a particular plan design does not terminate the Employer's obligation to bargain under Chapter 150E.

Relying on MCOFU, the Employer argues that it was not obligated to bargain over the decision to change those copayments because that decision was made by the City and the PEC under G.L. c. 32B; and, therefore was beyond the Commission's control. In MCOFU, the Court held that the employer had no control over the Group Insurance Commission's (GIC) decision to reduce health insurance benefits because the GIC is an independent third party agency; thereby relieving the employer of its duty to bargain over the health insurance changes that were mandated by the GIC.

Contrary to the Commission's reliance on MCOFU, the PEC is not an independent agency analogous to the GIC for purposes of purchasing health insurance for municipal employees. See Town of Dennis, 28 MLC at 301. Section 3(a) of the BPHA clearly states that the Commission is an employer independent from "any other department, commission, board, bureau or officer of the city," and there is no evidence that the PEC constitutes an independent, third party over which the Commission has no control. Rather, the record shows that the Commission voluntarily makes purchases from the City and can voluntarily stop those transactions by choosing to do business with another health insurance carrier. The City does not control the Commission for purposes of purchasing health insurance. And, even though the Commission did not participate in the PEC decision-making process, there is nothing that mandates the Commission to purchase health insurance from the City. Compare Town of Dennis, 28 MLC at 301 (Board held that while G.L. c. 32B permits the town to join together with other governmental authorities to purchase health insurance policies for its employees, G.L. c. 32B did not require the town to do so, nor did it relieve the town of its respective obligations to bargain over changes to the health insurance policies of its employees).

Although the Commission was not a party to the PEC Agreement, it had the power to delay the July 1, 2012 implementation deadline and exercised that power on April 25, 2012 when it notified the Union that "the new co-payments listed in the 2012-2013 open enrollment form will not apply to the BEMS-BPPA bargaining unit members unless and until modified as a result of collective bargaining." Thus, even though the Commission could not control the City's decision to implement those changes on July 1, 2012, it retained the obligation to bargain with the Union over that decision. Town of

Dennis, 28 MLC at 301; see also City of Malden, 23 MLC 181, 194, MUP-9312, MUP-9313 (Feb. 20, 1997) (committee remained obligated to give notice and opportunity to bargain over city's decision to change health benefits and not merely the impact of the municipality's decision, even where committee did not make the original decision).

### **Timeliness**

Section 15.03 of the DLR's regulations states that: "Except for good cause shown, no charge shall be entertained by the Department based upon any prohibited practice occurring more than six (6) months prior to the filing of a charge with the Department." 456 C.M.R. 1503. A charge of prohibited practice must be filed with the Department within six months of the alleged violation or within six months from the date the violation became known or should have become known to the charging party, except for good cause shown. Felton v. Labor Relations Commission, 33 Mass. App. Ct. 926 (1992). The six-month period of limitations for filing charges with the Department begins to run when the party adversely affected receives actual or constructive notice of the conduct alleged to be an unfair labor practice. Boston School Committee, 35 MLC 277, 285-86, MUP-03-3886 (May 20, 2009); Wakefield School Committee, 27 MLC 9, 10, MUP-2441 (Aug. 16, 2000). The Employer has the burden of showing that the Union had knowledge of the co-payment increases and plan design changes but failed to file its Charge prior to the expiration of the statutory limitations period. Diane McCormick v. Labor Relations Commission, 412 Mass. 164, 171, n. 13 (1992); Commonwealth of Massachusetts, 35 MLC 268, 269, SUP-07D-5371 (Dec. 31, 2008); Town of Dennis, 28 MLC at 301; Town of Dennis, 26 MLC 203, MUP-1868 (Apr. 21, 2000).

The mission of the Commonwealth Employment Relations Board (Board) is to provide a fair process to the parties before it to facilitate stable labor relations. See Boston Teachers Union, Local 66, 26 MLC 137, MUPL-4215 (Mar. 7, 2000); Commonwealth of Massachusetts, 26 MLC 43 (1999). Consequently, the Board is reluctant to decide cases on purely technical grounds, absent evidence of prejudice or undue restraints on Board resources. See Commonwealth of Massachusetts, 21 MLC 1515, 1517, SUP-4029 (Dec. 30, 1994). However, the Board does not condone a party's failure to comply with its rules and regulations and enforces those rules when necessary and appropriate to ensure the orderly administration of justice. See generally, Commonwealth of Massachusetts, 20 MLC 1179, SUP-3894 (Sept. 10, 1993).

The Commission argues that it provided the Union with notice on April 22, 2011 about implementing new health insurance changes per the PEC Agreement, effective July 1, 2012. It contends that instead of filing a timely charge six months after the April 22, 2011 notice, the Union waited until July 26, 2012 to file its charge, which is beyond the statutory six-month limitations period. However, unlike Town of Lenox, 29 MLC 51, 52 (2002), where the Board dismissed the union's claim after finding that it had failed to demand bargaining with the town, the Union, in this case, demanded to bargain with the Commission and commenced bargaining in May of 2011, which continued through June 26, 2012 when the Commission announced that it would implement the health insurance changes (and did implement them) on July 1, 2012. See Town of East Bridgewater and East Bridgewater School Committee, 38 MLC 164, MUP-07D-5095 and MUP-07D-5115 (Jan. 13, 2012). During that bargaining period, the Union relied on the Commission's April 25, 2012 memorandum, which promised to indefinitely postpone

the July 1, 2012 implementation deadline. When the Employer reneged on that promise and implemented the health insurance changes on July 1, 2012 without further bargaining, the Union promptly filed its Charge on July 26, 2012, which was within the six-month statute of limitations. Based on this evidence, I find that the relevant violation here occurred on July 1, 2012—when the Employer implemented the health insurance changes—not on April 22, 2011—when the Employer announced the future implementation of those changes. Town of East Bridgewater, 38 MLC at 166-67. Accordingly, I find that the Union's Charge was filed in a timely manner pursuant to 456 CMR 15.03.

### **Waiver by Inaction**

Where an employer has given a union notice and an opportunity to bargain, the employer may not implement its proposed change until the parties reach an agreement or impasse, unless a union has waived its right to bargain. Town of Natick, 19 MLC 1753, 1754, MUP-7503 (Apr. 6, 1993). Once an exclusive bargaining representative is on notice that an employer contemplates a unilateral change in a mandatory subject of bargaining, the bargaining representative must make a prompt and effective demand for bargaining or risk waiving its right to negotiate over the proposed change. Boston School Committee, 4 MLC 1912, 1914, MUP-2611 (Apr. 27, 1978). Only a finding of fait accompli will relieve the bargaining representative of its obligation to request bargaining. Boston Water & Sewer Commission, 12 MLC 1250, 1255, MUP-5860 and MUP-5861 (Sept. 20, 1985). Faced with a fait accompli, a bargaining representative need only protest the unilateral change. Id. at 1255. The Board has defined a fait accompli as occurring when "under all attendant circumstances, it can be said that the employer's

conduct has progressed to a point that a demand to bargain would be fruitless." Scituate School Committee, 9 MLC 1010, 1012, MUP-4563 (May 27, 1982).

Here, the Commission argues that the Union waived its right to bargain by inaction because it had actual knowledge and notice that the City/PEC was going to change the health insurance co-payments beginning by memoranda on April 22, 2011 and on April 24, 2012. It also contends that since 1996, the Union has always known that July 1st is the annual deadline for the Employer to implement any health insurance changes. The Commission contends further that there was no a fait accompli because it did not have control over the changes, and because the Union canceled the July 2012 bargaining session.

The bargaining history shows that in April of 2011, the Commission first notified the Union about the health insurance changes and, in May of 2011, the Union first demanded to bargain over changes. The parties commenced bargaining over the issue and met several times throughout 2011 into mid-2012. On April 24, 2012, the Commission confirmed its intent to implement those changes on July 1, 2012 via the Open Enrollment notice but changed its position by memorandum on April 25, 2012, informing the Union that it would not implement the changes until after the parties had concluded bargaining. On June 26, 2012, the Commission reversed its position when it announced at a negotiation session that it was going to implement the health insurance changes on July 1, 2012. The Commission implemented those changes on July 1, 2012. The Union immediately protested and the parties scheduled another bargaining session for mid-July of 2012.

Although the Union was forced to cancel the parties' July negotiation session, I find the cancelation to be irrelevant because the Union promptly demanded bargaining in April of 2011 and, thereafter, the parties engaged in continuous negotiations beginning in 2011, through 2012 and into 2013. Because the parties were still engaged in ongoing successor bargaining over the health insurance changes, I cannot find wavier by inaction. Boston School Committee, 4 MLC at 1914.

### **Statutory Jurisdiction under the BPHA and G.L. c. 32B**

Next, the Commission argues that under the BPHA and G.L. c. 32B, Section 19, the entire subject of bargaining over health insurance is reserved to the exclusive jurisdiction of the City and the PEC. It also asserts that any attempt to change the health insurance plan design and copayments for Commission employees would violate Section 19 and the PEC Agreement based on Green's rejection of the Union's proposal to offer separate rates from Commission employees sometime between June 8 and 26, 2012. However, the mere fact that the purchase of health care coverage is regulated by Chapter 32B does not alone preclude collective bargaining over the issue. See generally Town of Milton and Milton School Committee, 16 MLC 1725, 1737, MUP-MUP-7061, MUP-7062, MUP-7103, MUP-7129 and MUP-7140 (H.O. 1990).

Section 4(d) of the BPHA clearly states that G.L. c. 150E shall apply to the Commission and that it shall be considered a public employer with the authority to bargain collectively with labor organizations representing employees of the Commission. Further, the Law states that when contemplating health insurance purchases under M.G.L. c. 32B, a public employer has an obligation to refrain from implementing any changes in health insurance benefits until it provides the exclusive

bargaining representative with notice and an opportunity to bargain to resolution or impasse. City of Malden, 23, MLC at 184. Therefore, I find that neither the BPHA nor G.L. c. 32B conflicts with the Commission's legal obligation to bargain in good faith with the Union over the changes to the health insurance plan design and copayments.

### CONCLUSION

I find that the Commission failed to bargain in good faith with the Union when it changed the health insurance plan design and increased copayments on July 1, 2012, without first giving the Union an opportunity to bargain to resolution or impasse over the decision in violation of Section 10(a)(5) of the Law.

### ORDER

WHEREFORE, based on the foregoing, it is hereby ordered that the Boston Public Health Commission shall:

1. Cease and desist from:

- a. Unilaterally changing the health insurance plan design and increasing copayments for bargaining unit members represented by Boston Emergency Medical Services – Boston Police Patrolmen's Association (BEMS-BPPA).
- b. Failing or refusing to bargain collectively in good faith with the BEMS-BPPA about any changes to the health insurance plan design and copayments.
- 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 BEMS-BPPA the cost and structure of the health insurance plan design and copayments offered by the Commission that were in place prior to July 1, 2012.

- b. Upon request, bargain with the BEMS-BPPA, in good faith to resolution or impasse before implementing any changes to the health insurance plan design and co-payments.
- c. Make whole bargaining unit members for any economic losses they may have suffered as a result of the Commission's unlawful change in the health insurance plan design and co-payments, plus interest on any sums owing at the rate specified in M.G.L. c. 231, s.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 DLR 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.

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF LABOR RELATIONS

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KENDRAH DAVIS, ESQ. HEARING OFFICER

#### APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. Chapter 150E, Section 11 and 456 CMR 13.02(1)(j), to request a review of this decision by the Commonwealth Employment Relations Board by filing a Request for Review with the Executive Secretary of the Department of Labor Relations within ten days after receiving notice of this decision. If a Request for Review is not filed within ten days, this decision shall become final and binding on the parties.



**THE COMMONWEALTH OF MASSACHUSETTS  
NOTICE TO EMPLOYEES  
POSTED BY ORDER OF A HEARING OFFICER OF THE  
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 Boston Public Health Commission (Commission) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of G.L. Chapter 150E (the Law) when it failed to bargain in good faith with the Boston Emergency Medical Services – Boston Police Patrolmen’s Association (BEMS-BPPA) by changing the health insurance plan design and copayments without first giving the BEMS-BPPA prior notice and an opportunity to bargain to resolution or impasse.

Section 2 of the Law gives all employees: (1) the right to engage in concerted protected activity, including the right to form, join and assist unions, to improve wages, hours, working conditions, and other terms of employment, without fear of interference, restraint, coercion or discrimination; and, (2) the right to refrain from either engaging in concerted protected activity, or forming or joining or assisting unions.

WE WILL NOT unilaterally change the health insurance plan design and increase copayments for or bargaining unit members represented by Boston Emergency Medical Services – Boston Police Patrolmen’s Association (BEMS-BPPA).

WE WILL NOT fail or refuse to bargain collectively in good faith with the BEMS-BPPA about any changes to the health insurance plan design and copayments

WE WILL NOT, in any like manner, interfere with, restrain and coerce any employees in the exercise of her rights guaranteed under the Law;

WE WILL restore to bargaining unit members represented the BEMS-BPPA the cost and structure of the health insurance plan design and copayments offered by the Commission that were in place prior to July 1, 2012;

WE WILL upon request, bargain with the BEMS-BPPA, in good faith to resolution or impasse before implementing any changes to the health insurance plan design and copayments;

WE WILL make whole bargaining unit members for any economic losses they may have suffered as a result of the Commission's unlawful change in the health insurance plan design and co-payments, plus interest on any sums owing at the rate specified in M.G.L. c. 231, s.6I compounded quarterly.

\_\_\_\_\_  
Boston Public Health Commission

\_\_\_\_\_  
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 Labor Relations, Charles F. Hurley Building, 1<sup>st</sup> Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).