COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	
TOWN OF DOUGLAS and DOUGLAS SCHOOL COMMITTEE	*	Case Nos.: MUP-13-2835 and MUP-13-2836
and	*	Date Issued: February 24, 2015
DOUGLAS TEACHERS ASSOCIATION	*	

Hearing Officer:

Kendrah Davis, Esq.

Appearances:

Will Evans, Esq. and Laurie R. Houle, Esq.	-	Representing Douglas Teachers Association
Brian Maser, Esq.	-	Representing Town of Douglas and Douglas School Committee

HEARING OFFICER'S DECISION

SUMMARY

The issue is whether the Town of Douglas (Town) and the Douglas School Committee (Committee) (collectively Employers) failed to bargain in good faith with the Douglas Teachers Association (Association) when they adopted and implemented a Wavier of Health Insurance Opt-Out program (Opt-Out program) without giving the Association prior notice and an opportunity to bargain to resolution or impasse over the decision and its impacts in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law). Based on the

1 record, and for the reasons explained below, I find that the Employers violated the Law
2 when they adopted and implemented the Opt-Out program without giving the
3 Association prior notice and an opportunity to bargain to resolution or impasse over the
4 decision and its impacts.

5 STATEMENT OF THE CASE

6 On May 20, 2013, the Association filed two Charges[1] of Prohibited Practice
7 (Charges) with the Department of Labor Relations (DLR) alleging that the Employers
8 had engaged in prohibited practices within the meaning of the Law when the Town
9 unilaterally announced that it was "offering $3,000 in lieu of insurance only to those unit
10 members who currently receive insurance" (i.e., the Opt-Out program). On October 7,
11 2013, a DLR Investigator issued a Complaint of Prohibited Practice (Complaint),
12 alleging that the Employers had violated Section 10(a)(5) and, derivatively, Section
13 10(a)(1) of the Law by failing to bargain in good faith with the Association when it
14 implemented the Opt-Out program without first giving the Association notice and an
15 opportunity to bargain to resolution or impasse over the decision and its impacts. On
16 October 10, 2013, the Employers filed their Answer to the Complaint.

17 I conducted a hearing on July 14, 2014, at which all parties had the opportunity to
18 be heard, to examine and cross-examine witnesses and introduce evidence. On
19 October 1, 2014, the parties filed their post-hearing briefs. On the entire record, I make
20 the following findings and render the following decision.

21 STIPULATIONS OF FACT

22 1. The Town is a public employer within the meaning of Section 1 of the Law.

[1] The Association filed one charge against the Town and another against the Committee.

2. The Committee is the collective bargaining agent of the Town for the purpose of dealing with school employees.

3. The Union is an employee organization within the meaning of Section 1 of the Law.

4. The Union is the exclusive bargaining representative for certain teachers, certified professional employees below the rank of Assistant Principal and administrators employed by the Town.

5. Prior to May 1, 2013, the Town had not adopted and implemented the Opt-Out program.

6. On or about May 1, 2013, the Town adopted an Opt-Out program for employees, and implemented the Opt-Out program on or about July 1, 2013.

7. The Town and the Committee took the action described in paragraphs 5 and 6 without giving the Association an opportunity to bargain to resolution or impasse over the decision to adopt and implement an Opt-Out program and the impacts of that decision on employees' terms and conditions of employment.

FINDINGS OF FACT

The Committee and the Association were parties to a collective bargaining agreement that was effective from September 1, 2010 to August 31, 2013 (Agreement). Appendix B of the Agreement stated, in pertinent part:

> The Town agrees to meet with the Association to develop an "opt-out plan" for members who currently participate in health insurance to make recommendations on a plan to be implemented on or before September 1, 2011.

The parties ratified the Agreement on or about September 17, 2010. During that time, the parties agreed that the Town would pay a stipend to employees in exchange for opting out of health insurance coverage, which would result in cost-savings for the Town. However, after ratifying the Agreement, the parties never met again to discuss or

make recommendations about the actual stipend amount or of the Opt-Out program itself.

On May 1, 2013, Town Administrator Michael Guzinski (Guzinski) issued a memorandum regarding the Opt-Out program, which he addressed to "All Employees Currently Enrolled in the Town's Group Health Insurance Plan." That memorandum stated, in pertinent part:

> The Board of Selectmen, at their meeting of April 23rd, voted to adopt a "Voluntary Waiver of Health Insurance Opt-Out Program." I have attached a document outlining the parameters of this program. This program will go into effect on July 1st, 2013. If you wish to enroll in this program you must return an executed copy of the acknowledgment form along with all other required documentation as outlined in the policy to the Treasurer/Collector's Office by 4:00 p.m. on Thursday, May 23, 2013. If you have any questions in regards to this program you may contact the Treasurer/Collector's Office in person or by phone.... Thank you.

Attached to Guzinski's memorandum was a document explaining the Opt-Out program, stating in pertinent part:

> In return for the agreement to waive Town group health insurance coverage, the Town agrees to pay an eligible employee one of the following amounts:
>
> (1) $1,500 per fiscal year for waiving individual health insurance plan coverage
>
> or
>
> (2) $3,000 per fiscal year for waiving family health insurance plan coverage.
>
> The Town will process the above payment in semi-annual installments ($750 for an employee waiving individual health insurance or $1,500 for an employee waiving family health insurance) on or about the last pay period in December and June....
>
> To be eligible an employee must not have an outstanding court order or agreement requiring the employee to provide health insurance coverage for the employee's spouse, ex-spouse or dependent children, if any.

> To be eligible, an employee must have been enrolled in the Town's Group Health Insurance Plan for a period of at least 12 months immediately prior to applying for the Health Insurance Opt-Out Program. An employee must completely remove themselves as either a subscriber or dependent on the Town's health insurance plan at the time of enrollment in the Health Insurance Opt-Out Program. [Emphasis in original.] A Town employee is not eligible for the opt-out payment where the employee opts-out of their individual health plan and becomes a dependent on their spouse's plan, when their spouse is also a subscriber on the Town's plan.
>
> If an employee is eligible and elects to opt-out of the Town's Group Health Insurance Plan, the Town is not responsible for medical coverage effective on July 1, 2013 (except for medical coverage for injuries and illnesses covered by G.L. c. 41, Sec. 111F or G.L. c. 152) and for each fiscal year thereafter that the employee voluntarily agrees to waive health insurance coverage through the Town.
>
> An employee who wishes to enroll in the opt-out program must return the signed acknowledgement form as well as proof of other health insurance to the Treasurer/Collector's Office by 4:00 p.m. on Thursday, May 23rd, 2013....
>
> Each employee agreeing to opt-out of the Town's Group Health Insurance Plan must acknowledge that they have read and agree to comply with the terms and conditions of the Town's Opt-Out Program on the attached Acknowledgement Form, a copy of which along with any supporting documentation will be placed in the employee's personnel file.
>
> The Town reserves the right to alter or eliminate this program at the conclusion of any fiscal year.

By e-mail on May 1, 2013, Guzinski also notified certain administrators, including Superintendent Nancy T. Lane (Lane), that the Board of Selectman had recently approved the Opt-Out program and that he would discuss the matter "in more detail at the informational meetings scheduled for May 6th." By e-mail later that day, Superintendent Lane forwarded Guzinski's e-mail to "All Staff," including Association President Nancy Dupre (Dupre).

1 After receiving Superintendent Lane's e-mail, Dupre filed a Level II grievance on
2 May 5, 2013. By letter dated May 16, 2013, Lane denied the grievance. On June 5,
3 2013, Dupre filed a Level III grievance, which the Committee denied.

4 OPINION

5 A public employer violates Section 10(a)(5) and, derivatively, 10(a)(1) of the Law
6 when it unilaterally changes an existing condition of employment or implements a new
7 condition of employment involving a mandatory subject of bargaining without first giving
8 its employees' exclusive bargaining representative notice and an opportunity to bargain
9 to resolution or impasse. Commonwealth of Massachusetts v. Labor Relations
10 Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor Relations
11 Commission, 388 Mass. 557 (1983); Commonwealth of Massachusetts, 30 MLC 63,
12 SUP-4784 (Oct. 9, 2003), aff'd Secretary of Administration and Finance v.
13 Commonwealth Employment Relations Board, 74 Mass. App. Ct. 91 (2009). To
14 establish a violation, the union must show that: (1) the employer changed an existing
15 practice or instituted a new one; (2) the change had an impact on a mandatory subject
16 of bargaining; and, (3) the change was implemented without prior notice to the union or
17 an opportunity to bargain to resolution or impasse. Commonwealth of Massachusetts,
18 30 MLC at 64; Town of Shrewsbury, 28 MLC 44, 45, MUP-1704 (June 29, 2001);
19 Commonwealth of Massachusetts, 27 MLC 11, 13, SUP-4378 (Aug. 24, 2000).

20 When dealing with school employees, a municipality and a school committee are
21 a single entity and share the responsibility for making and fulfilling contractual
22 commitments. City of Malden, 23 MLC 181, 183, MUP-9312 and MUP-9312 (Feb. 20,
23 1997) (citing Lawrence School Committee, 19 MLC 1167, 1170, n.4, MUP-7363 (Aug.

12, 1992)). Therefore, when a municipality proposes changes that affect the terms and conditions of employment of its school employees, it has an obligation to allow its representative to meet its obligation before the municipality implements its proposed change. City of Malden, 23 MLC at 183-84. A school committee's obligation as the representative of the municipality is to bargain with the employees' exclusive bargaining representative over the municipality's decision to change health insurance benefits and not merely the impact of the municipality's decision. Id. (citing Town of Ludlow, 17 MLC 1191, MUP-7040 (Aug. 3, 1990)).

The Commonwealth Employment Relations Board (Board) has long held that health insurance benefits are conditions of employment that constitute a mandatory subject of bargaining. See Town of Ludlow, 17 MLC at 1196; 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)); see also Mass Correction Officers Federated Union (MCOFU), 24 MLC 113, 114, SUP-3869 (June 10, 1998) (implementing cash payments in exchange for health care coverage is an economic benefit and, therefore, represents a mandatory subject of bargaining).

Here, it is undisputed that on or after May 1, 2013, the Town implemented the Opt-Out program effective July 1, 2013. It is also undisputed that a health insurance buy-out program is a mandatory subject of bargaining. Further, the parties stipulated that the Employers implemented the Opt-Out program without first giving the Association notice and an opportunity to bargain to resolution or impasse over the decision and the impacts of that decision on employees' terms and conditions of employment. Instead, the Employer raises the affirmative defense of waiver by inaction

1 to support the decision to implement the Opt-Out program.

2 **Waiver by Inaction**

3 A public employer that asserts the affirmative defense of waiver by inaction must
4 demonstrate by a preponderance of the evidence that an employee organization had:
5 (1) actual knowledge or notice of the proposed action; (2) a reasonable opportunity to
6 negotiate about the subject; and, (3) unreasonably or inexplicably failed to bargain or
7 request bargaining. School Committee of Newton v. Labor Relations Commission, 388
8 Mass. at 578; Town of Watertown, 32 MLC 54, 56, MUP-01-3275 (June 29, 2005)
9 (citing Commonwealth of Massachusetts, 28 MLC 239, 242, SUP-4485 (Jan. 23, 2002)).
10 The Board will not infer a union's waiver of its statutory right to bargain without a clear
11 and unmistakable showing that a waiver occurred. Ashburnham-Westminster Regional
12 School District, 29 MLC 191, 194, MUP-01-3144 (Apr. 9, 2003) (citing Holyoke School
13 Committee, 12 MLC 1443, 1452, MUP-5124 (Dec. 20, 1985)). Further, the Board will
14 not apply the doctrine of waiver by inaction where the union is presented with a *fait*
15 *accompli*, where "under all the attendant circumstances, it can be said that the
16 employer's conduct has progressed to a point that a demand to bargain would be
17 fruitless.'" Id. at 194 (citing Town of Hudson, 25 MLC 143, 148, MUP-1714 (Apr. 1,
18 1999)).

19 Without presenting any evidence, the Employers assert that the Association
20 waived its right to bargain by inaction because the Association had actual knowledge of
21 the proposed change pursuant to the language of Appendix B of the Agreement but did
22 not demand to bargain over the opt-out program. They argues that Appendix B "makes
23 clear that the time for the Association to bargain with, and make opt-out plan

1 recommendations to the Town regarding the Opt-Out program was for a period of one
2 (1) calendar year from the commencement of the agreement, i.e. September 2010 –
3 September 2011." However, Appendix B expressly states that "the Town agrees to
4 meet with the Association to develop an opt-out plan...[and] to make recommendations
5 on a plan to be implemented on or before September 1, 2011." Here, neither the Town
6 nor the Committee met with the Association to develop the Opt-Out program, neither
7 made any recommendations to the Association about a possible opt-out plan to be
8 implemented in September of 2011, and neither implemented any such a plan on or
9 before September 1, 2011. Instead, the record shows that Employers adopted the Opt-
10 Out program on May 1, 2013 and implemented it on July 1, 2013 without first notifying
11 the Association and providing it with an opportunity to bargain to resolution or impasse
12 over the program. Thus, I find that the Association had no actual knowledge of a
13 program that the Employers implemented in 2013 because the language of Appendix B
14 applies only to plans implemented before September 1, 2011. Town of Watertown, 32
15 MLC at 56.

16 The Employers next contend that the Association had a reasonable opportunity
17 to negotiate and "meet with the Town to discuss the terms of the opt-out plan" but failed
18 to do so because the Association never sought to meet with the Town or the Committee
19 "or otherwise make opt-out plan recommendations to the Town prior to September of
20 2011." I find that the Association did not have a reasonable opportunity to meet with the
21 Town and bargain over the Opt-Out program because the Employers failed to notify the
22 Association that it intended to implement any opt-out plan, in the first place.

23 I find also that the Town presented the Opt-Out program as a *fait accompli*

because after the Board of Selectmen had approved the program on April 23, 2013, eight days later Guzinski and Lane invited "All Employees Currently Enrolled in the Town's Group Health Insurance Plan" to participate in the Opt-Out program, and began enrolling employees in that program on July 1, 2013, without first notifying and bargaining with the Association over the change. Therefore, a demand to bargain would have been futile at this point because the Employers had already implemented the Opt-Out program. Accordingly, I find that the Association did not waive by inaction its right to bargain over the Town's decision to implement that program on July 1, 2013, because the Town unlawfully presented the program as *a fait accompli*. Ashburnham-Westminster Regional School District, 29 MLC at 194 (citing Town of Hudson, 25 MLC at 148).

REMEDY

Section 11 of the Law grants the Board broad authority to fashion appropriate orders to remedy unlawful conduct. Labor Relations Commission v. Everett, 7 Mass. App. Ct. 826 (1979); City of Gardner and Gardener School Committee, 26 MLC 72, 78, MUP-1995 (Jan. 5, 2000). When fashioning appropriate remedies, the Board attempts to place employees in the position they would have been in but for the unlawful conduct. City of Gardner, 26 MLC at 78 (citing Amesbury School Committee, 11 MLC 1049, 1058, MUP-5254 (July 11, 1984)).

Make whole remedy

The Union requests that any make whole remedy refrain from reverting to the status quo ante to protect unit members who elected to opt-out of their health insurance coverage when the Employers implemented the Opt-Out program. Instead, the Union

1 seeks a remedy that requires the Employers to retroactively pay any increases in the
2 Opt-Out program that are negotiated between the parties. Relying on MCOFU, 24 MLC
3 at 115, the Association asserts that the Board's broad remedial authority permits it to
4 issue such a remedy.

5 In MCOFU, the Board found that the employer unlawfully offered and
6 implemented a health insurance buy-out program without first notifying or bargaining
7 with the union to resolution or impasse. The Board also found that the employer had
8 failed to bargain over the amount of money to be paid to eligible employees who elected
9 to participate in the buy-out. Thus, along with a bargaining order, the Board also
10 ordered that if the employer reoffered and re-implemented the buy-out program, it must
11 "pay to those employees who participated in the [initial] program an amount of money
12 equal to the difference, if any, between what they received under the [initial] formula
13 and...the amount of money they would have received under the program next offered."
14 Id. at 115.

15 Here, requiring a make whole order that reverts to the status quo ante would
16 adversely affect those bargaining unit members who have already accepted payments
17 in exchange for opting-out of their health insurance coverage, beginning on July 1,
18 2013. I agree with the Association that if the Employers offer the Opt-Out program
19 again, the make whole remedy should instead require the Employers to pay the
20 difference between the original opt-out amounts and any increase to future opt-out
21 payments that the Association may negotiate to those unit members who elected to take
22 the payment under the July 1, 2013 Opt-Out program. This remedy would make unit
23 members whole because if the parties subsequently negotiate a new opt-out program,

then those employees who have already opted-out will be eligible to receive the same benefits as any new employee who chooses to opt-out in the future.

CONCLUSION

Accordingly, based on the record, I find that the Employers' violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when they implemented a Voluntary Waiver Health Insurance Opt-Out program without giving the Association prior notice and an opportunity to bargain to resolution or impasse over the decision and it impacts.

ORDER

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

1. Cease and desist from:

   a. Offering and implementing a Voluntary Waiver Opt-Out program without, first giving the Association an opportunity to bargain to resolution or impasse over that program and the stipend amount to be paid to employees who elect to participate in the program.

   b. Failing or refusing to bargain collectively in good faith with the Association to resolution or impact over the Voluntary Waiver Opt-Out program and the stipend amount to be paid to employees who elect to participate in the program.

   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. Upon request, bargain with the Association, in good faith to resolution or impasse over the Voluntary Waiver Opt-Out program and the stipend amount to be paid to employees who elect to participate in the program.

   b. If the Town and School Committee offer and implement a Voluntary Waiver Opt-Out program, pay all employees who participated in the July 1, 2013 Opt-Out program the difference, if any, between the stipend received

in the July 1, 2013 program and any future stipend that the Employers and the Association may subsequently negotiate, plus interest on any sums owing at the rate specified in G.L. c. 321, sec. 6I compounded quarterly, unless the parties reach an agreement on an alternative remedy for these bargaining unit members.

c. Sign and post immediately in conspicuous places where employees usually congregate or where notices to employees are usually posted, including electronically, if the Town and School Committee customarily communicate to its employees via intranet or e-mail, and maintain for a period of thirty (30) consecutive days thereafter signed copies of the attached Notice to Employees; and

d. Within thirty (30) days, notify the DLR in writing of the steps taken to comply with this Decision and Order.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

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 13.15, 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.

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 Douglas (Town) and the Douglas School Committee (Committee) (collectively, Employers) have violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of G.L. Chapter 150E (the Law) when they implemented a Voluntary Waiver Health Insurance Opt-Out program (Opt-Out program) without giving the Douglas Teachers Association (Association) prior notice and an opportunity to bargain to resolution or impasse over the decision and it impacts.

Section 2 of the Law gives all employees: 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, the right to refrain from either engaging in concerted protected activity, or forming or joining or assisting unions. The Employers assure its employees that:

WE WILL NOT offer and implement an Opt-Out program without first giving the Association an opportunity to bargain to resolution or impasse over that program and the stipend amount to be paid to employees who elect to participate in the program.

WE WILL NOT fail or refuse to bargain collectively in good faith with the Association to resolution or impact over the Opt-Out program and the stipend amount to be paid to employees who elect to participate in the program.

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

WE WILL, upon request, bargain with the Association, in good faith to resolution or impasse over the Opt-Out program and the stipend amount to be paid to employees who elect to participate in the program.

WE WILL, if the Employers offer and implement an Opt-Out program, pay all employees who participated in the July 1, 2013 Opt-Out program the difference, if any, between the stipend received in the July 1, 2013 program and any future stipend that the Employers and the Association may subsequently negotiate, plus interest on any sums owing at the rate specified in G.L. c. 321, sec. 6l compounded quarterly, unless the parties reach an agreement on an alternative remedy for these bargaining unit members.

Town of Douglas	Date
Douglas 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 Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).