

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the Matter of

BOSTON SCHOOL COMMITTEE

and

BOSTON TEACHERS UNION,
LOCAL 66, MFT/AFT, AFL-CIO

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Case No.: MUP-03-3886

Date Issued:

May 20, 2009

Board Members Participating:

Marjorie F. Wittner, Chair

Elizabeth Neumeier, Board Member

Appearances:

- Joseph W. Ambash, Esq. - Representing the Boston School Committee
- Christina C. Duddy, Esq. - Representing the Boston Teachers Union,
Local 66, MFT/AFT, AFL-CIO

DECISION¹

Statement of the Case

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On September 4, 2003, the Boston Teachers Union, Local 66, MFT/AFT, AFL-CIO (Union or BTU) filed a charge with the former Labor Relations Commission (Commission), alleging that the Boston School Committee (School Committee or Committee) had violated Sections 10(a)(5) and 10(a)(1) of M.G.L. c.150E (the Law). Following an investigation, the former Commission issued a complaint of prohibited practice on May 17, 2006, alleging that the School Committee had violated Sections 10(a)(5) and, derivatively, 10(a)(1) of the Law by unilaterally changing health insurance providers and co-payments without giving the Union notice and an opportunity to bargain to resolution or impasse. The School Committee filed its answer to the complaint on May 30, 2006.

On October 22, 2007, Victor Forberger, a duly-designated hearing officer

¹ Pursuant to 456 CMR 13.02(1) of the former Labor Relations Commission's (Commission) regulations in effect prior to November 15, 2007, this case was designated as one in which the Commission would issue a decision in the first instance. Pursuant to Chapter 145 of the Acts of 2007, the Division of Labor Relations (Division) "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the labor relations commission." The Commonwealth Employment Relations Board (Board) is the body within the Division charged with deciding adjudicatory matters. References to the Board include the Commission.

1 (Hearing Officer), conducted a hearing.² Both parties had an opportunity to be heard, to
2 examine witnesses, and to introduce evidence. On February 1, 2008, the Union filed its
3 post-hearing brief, and the School Committee filed its post-hearing brief on February 4,
4 2008.³

5 The Hearing Officer issued Recommended Findings of Fact on June 26, 2008.
6 Both parties filed challenges to the Recommended Findings on July 16, 2008. Both
7 parties filed responses to the other party's challenges on August 18, 2008. On August
8 25, 2008, the School Committee requested leave to file a brief in response to the
9 Union's August 18, 2008 reply to the School Committee's challenges. We deny this
10 motion and have not considered the School Committee's reply brief.

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² At a pre-hearing conference on September 27, 2007, the hearing officer asked the parties to brief the issue of how the Board might order a status quo ante remedy regarding the health insurance benefits available to bargaining unit members prior to July 1, 2003. On October 3, 2007, the Union indicated that it was not seeking to have health care insurers or their health care plans reinstated as part of a make-whole remedy. The Union explained that any remedy it was seeking was "financial in nature and primarily arises from the increased co-payments. . . . There may also be a small number of members who have experienced increased costs based on having to change doctors as a result of the need to change plans. However, that figure is unlikely to represent a significant portion of the financial costs associated with the [School Committee's] actions in 2003."

³ On February 19, 2008, the Union requested leave to file a reply brief that it submitted that same day. On March 6, 2008, the School Committee requested leave to file a responsive brief it submitted that same day. Both requests are granted.

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Stipulations⁴

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The parties agree to the following stipulations of fact.⁵

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1. The Union is an employee organization within the meaning of Section 1 of the Law. It currently serves as the certified collective bargaining representative for approximately five thousand teachers, paraprofessionals and other employees of the School Committee. The Union has collective bargaining agreements with the School Committee covering three bargaining units: teachers (which includes teachers, school nurses and other academic personnel), paraprofessionals and substitute teachers/nurses. Each of the three collective bargaining agreements relative to this dispute between the Union and the School Committee covering these units were effective by their own terms from September 2, 2000 to August 31, 2003. Those contracts were entered into by Memorandum of Agreement dated October 13, 2000.

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2. The City of Boston (City) is a public employer within the meaning of Section 1 of the Law. The School Committee is the City's designated representative for purposes of dealing with the City's employees in the Boston public schools.

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3. The Union and the School Committee have had collective bargaining agreements since 1966 and have negotiated at least sixteen contracts since the first, which took effect on September 1, 1966. Negotiations have traditionally commenced in the winter of the year preceding the contract's expiration on August 31st with the Union requesting negotiations and the parties establishing a series of bargaining dates.

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4. Each of the three collective bargaining agreements relative to this dispute between the Union and the School Committee contains a provision relating to health insurance. The contract covering the Teachers, Article VIII M, reads as follows:

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Health Insurance

⁴ The parties agreed to 48 paragraphs of stipulations, which the Hearing Officer recounted in his Recommended Findings. Although the parties do not challenge these stipulations, the Union noted typographical errors, which we have corrected. The Employer did not object to the Union's typographical error challenges. As noted by the Hearing Officer, besides stylistic changes and typographical corrections, the stipulations were amended to remove repetitious identification of individuals and to clarify references to various entities and individuals. Furthermore, the letterhead, addresses, and salutations from scanned documents were removed, and the contents of all but one of the scanned documents have been reset and included directly in the stipulations.

⁵ The Board's jurisdiction is uncontested.

1 The City's contribution to all group hospitalization insurance
2 premiums shall be as follows:

3 75% of the total monthly premiums for the policy selected by the
4 employer, including master medical or the equivalent benefits.

5 90% of the total monthly premiums for all approved and authorized
6 health maintenance organizations.

7 5. In the contracts covering the paraprofessionals and the substitute
8 teachers/nurses, the word "Committee's" is substituted for the word "City's" in
9 the first paragraph.

10 6. The health insurance provisions quoted above first entered the parties'
11 contracts in the 1994-1997 agreements. This same language, or virtually the
12 same language, became part of the City's contracts with its other unions
13 commencing with the 1994 contracts.

14 7. The health insurance provisions of the successors to the 2000-2003 collective
15 bargaining agreement were identical to the health insurance provisions of the
16 parties' 2000 to 2003 agreement, as quoted in paragraphs 4 and 5, above.

17 8. The parties' collective bargaining agreements have had the following
18 management rights language in effect since at least 1989:

19 **Management Rights**

20 Except as otherwise provided in this Agreement, the Committee
21 and the Superintendent retain all powers, rights, duties, and
22 authority that they had prior to entering into this Agreement or its
23 predecessors. Such rights of the Committee and the
24 Superintendent include but are not limited to the right:

- 25 - to establish educational policy;
- 26 - to establish the standards and qualifications for hiring and
27 promotion;
- 28 - to determine the size of the work force consistent with the
29 terms of this Agreement;
- 30 - to establish job duties for new or substantially changed
31 positions (except that changing the duties of existing
32 positions shall be subject to collective bargaining to the
33 extent required by law);
- 34 - to determine which textbooks shall be used in the schools;
- 35 - to prescribe curricula and rules governing student discipline;
- 36 and
- 37 - to establish educational programs and to determine the
38 number, age, and qualifications of pupils to be served by any
39 such programs.

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Handling of New Issues

Matters of collective bargaining import not covered by this Agreement may, during the life of the Agreement, be handled in the following manner:

By the Committee: Except as any change may be commanded by law, the Committee will continue its policies as outlined herein. With respect to matters not covered by this Agreement which are mandatory subjects for collective bargaining, the Committee agrees it will make no changes without prior consultation and negotiation with the Union.

By the Union: In any matter not covered in this Agreement which is a mandatory subject for collective bargaining, the Union may raise such issue with the Committee for consultation and negotiation; except that (other than as set forth later in this section E) the Union shall not renew or seek to renew any question introduced, debated, and settled, either negatively or affirmatively, during the bargaining prior to final settlement. This restriction shall not apply to the areas outlined in section C above as subjects for continuing consultation.

Being a mutual Agreement, this instrument may be amended at any time by mutual consent.

- 1 9. Massachusetts General Laws c.32B, §§ 7A and 16, have been accepted by
2 the City. The City purchases group health insurance pursuant to M.G.L.
3 c.32B.
- 4 10. The City has historically purchased its group health insurance for a single
5 combined group including current City employees and retirees, including
6 those of the School Department, and employees and retirees of the Boston
7 Public Health Commission, the City of Chelsea and the Boston Water &
8 Sewer Commission.
- 9 11. The City meets with an Insurance Advisory Committee (IAC) established in
10 accordance with M.G.L. c.32B, § 1 to discuss the purchase of group health
11 insurance. The IAC is composed of representatives of various City unions,
12 including the BTU, whose representative is Edward Welch (Welch).
13 Discussions with the IAC do not constitute contract negotiations.
- 14 12. Eugene Pastore (Pastore) is the Insurance Coordinator, Health Benefits and
15 Insurance Division, for the City. He reported to Dennis DiMarzio (DiMarzio),
16 the City's Chief Operating Officer, who served in that capacity at the time of
17 the events in question, through April 2007.
- 18 13. Pastore is responsible for coordinating and administering the purchase of
19 group health insurance under M.G. L. c.32B for employees and retirees of the
20 City, together with certain non-City employees, including those of the City of
21 Chelsea, the Boston Public Health Commission and the Boston Water &
22 Sewer Commission.
- 23 14. There are approximately 30,000 subscribers in the City's health plan,
24 amounting to more than 57,000 insured individuals (i.e., employees, retirees
25 and their covered family members).
- 26 15. Although M.G.L. c.32B permits the purchase of health insurance contracts for
27 up to five years, pursuant to certain rulings of the Massachusetts
28 Commissioner of Insurance, municipalities only purchase health insurance on
29 an annual basis. Thus, the City's health insurance contracts are negotiated
30 each year.
- 31 16. Group Benefits Strategies, Inc. is the City's advisor with regard to the
32 selection and negotiation of its group health insurance plans, as well as
33 providing underwriting analysis, plan consolidation, claims auditing, stop-loss
34 tracking and similar services. DiMarzio was responsible for hiring Group
35 Benefits Strategies. Kevin Walsh (Walsh), Vice President, was one of the
36 principal individuals of Group Benefit Strategies assisting the City during
37 negotiations with insurers for its FY04 health insurance contracts.
- 38 17. The City follows a regular process with regard to the negotiation and renewal
39 of its annual group health insurance policies. The City asks carriers each fall
40 to submit "status quo" renewal quotes on their current product, including any

1 benefit changes or network changes in their product, for rates to become
 2 effective the next July. Group Benefits Strategies does an underwriting
 3 analysis of the renewal packages and an analysis of the financial impact on
 4 the City.

5 18. In FY 2003, the City offered its group health insurance participants two
 6 indemnity plans, Master Medical and Blue Choice, a Harvard Pilgrim Point of
 7 Service Plan, the Harvard Pilgrim HMO, HMO Blue, Tufts Health Plan HMO
 8 (Tufts HMO), the Neighborhood Health Plan, and the Boston Medical Center
 9 Advantage Plan. The only issue in this litigation regarding elimination of
 10 health plans is the discontinuation of HMO Blue and Tufts HMO.

11 19. In the fall of 2002, consistent with its regular health insurance purchasing
 12 process, the City asked Walsh to obtain status quo rate quotes from the City's
 13 health care insurers based on existing subscribership and the then-existing
 14 menu of benefits.⁶

15 20. The City met with the IAC on October 30, 2002 and informed its members
 16 that Group Benefits Strategies had sent letters to the health plans requesting
 17 status quo rates for FY04, together with information about any benefit
 18 modifications and each plan's risk pool information.

19 21. The initial status quo rate renewal proposals from Tufts Health Plan
 20 (11/25/02), Harvard Pilgrim Healthcare (12/3/02) and Blue Cross (12/16/02)
 21 were reviewed by Group Benefits Strategies, which prepared an analysis on
 22 December 30, 2002. The initial proposed increase by Blue Cross was 19.7%
 23 over its rate for FY 03; the initial proposed increase by Harvard Pilgrim was
 24 16.7% over its rate for FY 03; and the initial increase for Tufts was 20.8%
 25 over its rate for FY 03. The total increase in premiums for all plans for the
 26 City's insured population would have been \$39,875,453.

27 22. Based on an updated "Benefit Alternative Analysis" conducted by Group
 28 Benefits Strategies on information provided by the carriers, DiMarzio told the
 29 IAC on January 22, 2003 that the City was looking at possibly putting into
 30 place four benefit modifications regarding co-pays and prescriptions in order
 31 to save on health insurance costs. Based on Walsh's analysis, the City
 32 projected an estimated savings of \$7 million at that time, based on those
 33 potential changes: increase office visit co-payments to \$15 per visit; increase
 34 emergency room co-payments to \$75 per visit; increase 3-tier prescription

⁶ The parties use the terms health care insurer, provider, carrier, and health plan interchangeably. The parties also use interchangeable names for the three HMO health care insurers at issue here: HMO Blue and Blue Cross; Tufts, Tufts Health Plan, and Tufts HMO; and Harvard Pilgrim, Harvard Pilgrim Healthcare, and Harvard Pilgrim HMO.

- 1 coverage to \$10/\$20/\$30; and implement an in-patient deductible of \$250 per
2 admission.
- 3 23. Having informed the IAC of the City's intentions as of that date, DiMarzio
4 directed David Connelly (Connelly), Deputy Director of the Office of Labor
5 Relations, to write to all of the City's unions outlining the proposed co-pay
6 changes and asking them to bargain. These letters were sent on or about
7 January 27, 2003. Virginia Tisei (Tisei), the School Committee's Director of
8 Labor Relations, was asked to do the same for the School Committee's
9 unions. As a result, she sent the letter contained in Paragraph 35, below.⁷
- 10 24. The City met with the IAC on April 3, 2003 and reviewed the status of the
11 negotiations with the various providers. The City submitted a financial
12 summary to IAC members. DiMarzio informed IAC members that the City's
13 recommendation was to eliminate both HMO Blue and Tufts HMO and
14 consolidate all HMOs into Harvard Pilgrim. DiMarzio also informed the IAC's
15 members that the City had discarded three of the four initially-proposed
16 benefits modifications and lowered the office visit co-pay from a proposed \$15
17 to \$10, stating that "We heard the unions and responded in this manner."
- 18 25. DiMarzio also informed the IAC members that he did not then know when
19 open enrollment would occur, because the City needed to give the unions
20 time to respond. DiMarzio also explained that the decision on the carriers
21 was not final, and that the City had gone back to Tufts and Blue Cross and
22 "expressed regret, but the door is not completely closed."
- 23 26. DiMarzio explained to the IAC that he understood that the IAC process was
24 not collective bargaining.
- 25 27. The City's open enrollment period was postponed in the Spring of 2003 from
26 April to May.
- 27 28. Because no final decision had been made about the elimination of Tufts HMO
28 and HMO Blue and because the City was still in the process of negotiating
29 with the carriers at the time of the May 2003 open enrollment period, a letter
30 from the Mayor to the City's employees dated April 11, 2003 was specifically
31 worded to advise employees that it was possible that the City would eliminate
32 Tufts HMO and HMO Blue.
- 33 29. The City continued negotiations with Blue Cross into May 2003.
- 34 30. The City notified both Tufts and Blue Cross on May 30, 2003 that their HMO
35 plans were being terminated due to inability to reach agreement on an
36 acceptable rate increase.

⁷ The stipulations originally referenced Paragraph 38.

1 31. Following negotiations with the SEIU non-School Department units, the City
2 agreed to reduce the proposed co-pay increases by \$5 and it eliminated the
3 other proposed changes outlined in paragraph 22, above.

4 32. The array of HMO's available to the participants in the City of Boston's group
5 health insurance program prior to July 1, 2003 included the following:

- 6 1. Harvard Pilgrim
- 7 2. HMO Blue
- 8 3. Tufts
- 9 4. Neighborhood Health Plan

10 33. The co-payments and deductibles charged to enrollees in the above HMO's
11 prior to July 1, 2003 were as follows:

	Harvard-Pilgrim	HMO Blue	Tufts	Neighborhood
Office Co-Payments	\$5	\$5	\$5	0
Emergency Room Co-Payments	\$30	\$25	\$25	0
Prescription Drug Co-Payments	\$5/\$10/\$25	\$5/\$10/\$25	\$5/\$10/\$25	\$5/\$10/\$25
In-patient Deductible (Per Admission)	0	0	0	0

12 34. In January 2003 the Union's then president, Edward J. Doherty (Doherty),
13 requested that the School Committee meet with the Union to negotiate a
14 successor to each of the above collective bargaining agreements. The first
15 negotiating session was scheduled for February 13, 2003 at 26 Court Street,
16 Boston, Massachusetts.

17 35. On January 30, 2003 Tisei sent a letter and single page attachment to
18 Doherty stating the following:

19 The City of Boston has been meeting regularly with the Insurance
20 Advisory Committee regarding potential health insurance changes
21 in FY 04. The IAC has considered and discussed in some detail
22 changes in the HMO plans offered to City employees. Changes
23 contemplated include increases in co-payment amounts for certain
24 HMO transactions and the requirement of a deductible payment for
25 in-patient hospital admissions. The transactions include
26 prescriptions and office visits. (See Attachment A).

27 The City's health insurance costs continue to increase at an
28 alarming rate. The City expects that the HMOs shall raise our
29 premium rates significantly this year. The City of Boston intends to
30 do all that it can to limit the amount of those premium increases.
31 Implementing the proposed changes represents one important step

1 in that direction. These changes will benefit both the City and the
 2 majority of its employee HMO members by reducing the overall
 3 anticipated cost of the insurance premiums.

4 Per this letter of January 29, 2003, I am notifying you that the City
 5 intends to implement the changes discussed (co-payment
 6 increases and in-patient deductible) for all FY 04 HMO plans. The
 7 specific changes that the City proposes are detailed on the
 8 enclosed chart. We offer you an opportunity to bargain over the
 9 proposed changes. Please contact me as soon as possible but no
 10 later than February 13, 2003 should you wish to bargain over the
 11 impact of these changes.

12 * * *

13 [Attachment A]

JANUARY 2003

PROPOSED HMO BENEFIT ALTERNATIVES

<u>Proposed HMO Benefit</u>	<u>Current HMO Benefit</u>			
	Har- vard	HMO Blue	Neighborhood	Tufts
1. Increase office visit co-payment to \$15 per visit	\$5	\$5	\$0	\$5
2. Increase emergency room Co-payment to \$75 per visit	\$30	\$25	\$0*	\$25
3. Increase 3 tier prescription Coverage to \$10/\$20/\$30	\$5/\$10/\$25	\$5/\$10/\$25	\$5/\$10/\$25	\$5/\$10/\$25
4. Implement an in-patient Deductible of \$250 per Admission	\$0	\$0	\$0	\$0

NOTE: Effective July 1, 2003, the Neighborhood Plan will institute a mandatory \$25 emergency co-payment

- 1 36. On or about February 12, 2003, Tisei forwarded initial bargaining proposals to
2 the BTU which included, in relevant part, a proposal to decrease the City's
3 health insurance premium contributions to HMO plans from 90% to 85%.
4 Tisei believed that the issue of premium contribution percentages needed to
5 be bargained as part of successor negotiations because it required a change
6 to the parties' collective bargaining agreement. For its part, the BTU proposed
7 in negotiations that Article VIII M of the teachers' contract be modified by
8 changing the words "the equivalent" to "equal" in the sentence that calls for
9 the city to pay 75% of monthly insurance premiums for indemnity plans.
- 10 37. On February 12, 2003, Doherty sent a letter to Tisei stating:
- 11 I am in receipt of your letter of January 30, 2003 on the subject of
12 proposed plan design changes in the city's group insurance plan for
13 HMO subscribers. The parties are currently scheduled to meet on
14 February 13th for negotiation on a contract to replace the current
15 BTU collective bargaining agreement expiring August 31, 2003. In
16 light of the fact that our collective bargaining agreement contains
17 language dealing with the costs of group health insurance, BTU
18 requests that you reduce to written form your proposal on this vital
19 subject and place it on the bargaining table in the context of those
20 negotiations.
- 21 I look forward to bargaining over this issue with you in negotiations
22 for a successor contract.
- 23 38. On February 12, 2003, Tisei replied as follows to Doherty:
- 24 In response to your letter of February 12, 2003, this matter is not a
25 subject for main table successor bargaining.
- 26 We are offering the date of Monday, February 24, 2003, at 12:30
27 P.M. to discuss the impact of the proposed changes the City desire
28 to make.
- 29 If this date is unavailable, please call Mary Ellen Burns at x1576 to
30 suggest an alternative date. If this date is available, please call
31 Mary Ellen Burns to confirm.
- 32 39. On February 20, 2003, Matthew E. Dwyer (Dwyer), counsel to the BTU, wrote
33 a letter to Tisei stating the following:
- 34 I am writing to respond to your recent letter to President Edward J.
35 Doherty of the Boston Teachers Union. If the School Department is
36 aware of any legal authority for the proposition that it can insist on
37 divorcing health insurance from the current, ongoing negotiations
38 for a successor contract, I would appreciate your directing my
39 attention to it and I will discuss it with the union.

1 In any case, Edward Welch, whose participation on this issue is
2 important to BTU, is not available at this point. I will be returning to
3 Massachusetts on March 3rd and will contact you as soon as I
4 return to discuss this further. In the interim, whether we negotiate
5 this separately or as part of contract negotiations, I am requesting
6 that you forward your proposal(s) on this subject so that we may
7 study it and respond.

8 40. On March 11, 2003, Dwyer wrote another letter to Tisei in which he stated:

9 I am writing on behalf of the Boston Teachers Union to follow up on
10 my letter of February 20, 2003 and the subject of bargaining over
11 group health insurance for members of the union's bargaining unit.
12 In that letter I had asked that you share with me any legal
13 precedents that you were relying upon to support your insistence
14 that the city divorce negotiations on this subject from the parties'
15 now ongoing negotiations for a successor collective bargaining
16 agreement to the 2001-2003 agreement between the BTU and the
17 School Committee.

18 I did receive your document entitled "Proposed HMO Benefit
19 Alternatives". Having consulted with the BTU, I write to request,
20 once again, that the subject of these increases to employee co-
21 pays for office and emergency room visits, prescription coverage
22 and the institution of new in-patient deductibles be placed on the
23 table for responsible discussion and negotiation in successor
24 contract talks. As you know, those successor contract negotiations
25 have traditionally gotten underway in January and this year has
26 proven no exception. The subject of HMO costs is committed to
27 the terms of the 2001-2003 agreement and the changes to the co-
28 payments and deductibles you propose are an integral part of the
29 parties' bargain over cost allocations as between the employer and
30 the employee. The School Committee's current proposal to change
31 employee co-payments for HMO premiums is already on the table
32 in successor negotiations. Any attempt to alter these allocations
33 unilaterally or outside the context of successor negotiations is
34 unlawful.

35 I also note from your original letter to Edward J. Doherty dated
36 January 30, 2003 that the School Committee's insistence on
37 negotiations in this area, separately from successor contract
38 negotiations was restricted to bargaining "over the impact of these
39 changes." I am requesting that you clarify for BTU's benefit
40 whether the School Committee is ready, willing and able to decision
41 bargain. The Boston Teachers Union takes the position that the
42 scope of the bargaining may not be restricted by the employer to
43 impact bargaining.

1 It is my understanding that the parties' ground rules afford both
2 sides the right to amend their proposals of February 13th within sixty
3 (60) days in the ongoing successor contract negotiations and BTU
4 is currently formulating its position of this and other mandatory
5 subjects. The BTU expects the School Committee to honor the
6 status quo while those efforts are underway. Since the subject is
7 clearly one of mutual interest I see no reason why we cannot
8 approach the negotiations in a constructive fashion.

9 Please let me know of your position on this demand for decision
10 bargaining on the subject of successor contract negotiations at your
11 earliest convenience.

12 41. On March 13, 2003, Tisei wrote a letter to Dwyer stating:

13 Once again, the Boston Public Schools is requesting that you
14 discuss the issues regarding the City's proposed utilization fees for
15 Health Insurance. At this meeting, we will discuss and share the
16 background, rationale and statistics on the proposed utilization
17 fees.

18 This matter is not a subject for main table bargaining nor do we
19 agree with your characterization that this should be decisional
20 bargaining.

21 While reserving all our rights in this regard, the Boston Public
22 Schools welcome [sic] and invites your input, suggestions and
23 participation.

24 Please contact Mary Ellen Burns, Staff Assistant, Office of Labor
25 Relations to set up a date as soon as possible.

26 42. Tisei wrote a letter dated April 4, 2003, to Doherty stating:

27 As you know, the City has engaged its best efforts to secure the
28 most affordable HMO health insurance options for our employees
29 for the next fiscal year. The providers initially presented us with
30 quotes reflecting a premium increase rate of approximately 20% on
31 average. The total health insurance increase projected for the City
32 for next year was 30 million dollars, of which 19 million dollars was
33 associated with HMOs.

34 After months of consultation with the Insurance Advisory
35 Committee, negotiation with the various providers and bargaining
36 with the unions, the City believes that it has achieved the lowest
37 possible rate while continuing to provide the best coverage
38 available. Accordingly, the City is prepared to move forward with
39 the following health insurance changes. The City shall continue to

1 provide the Harvard/Pilgrim, Neighborhood and BMC HMOs. The
2 City intends to eliminate service from Tufts HMO and HMO Blue.
3 Employees previously affiliated with Tufts or HMO Blue will likely
4 see little or no change in either cost or service.

5 Also, following bargaining with various unions, the City has made
6 significant changes to our original proposal related to utilization
7 charges. The City has withdrawn the proposals to increase
8 emergency room co-pays, prescription drug coverage co-pays and
9 the in-patient hospitalization deductible. Further, the City has
10 modified its proposal regarding the office visit co-payment. Instead
11 of increasing that co-pay from five dollars (\$5.00) to fifteen dollars
12 (\$15.00), the City now intends only to increase it to ten dollars
13 (\$10.00) per visit.

14 These changes will save the City approximately 8 million dollars
15 next year. At a time when the City is forced to consider reductions
16 in force, this savings may have a substantial impact on minimizing
17 any necessary layoffs.

18 As you may suspect, time is of the essence in implementing these
19 changes. I offer you the opportunity to bargain over the impact of
20 the proposed changes. Please contact me at your earliest
21 convenience. If I do not hear from you by Thursday, April 10, 2003,
22 I shall assume that you do not wish to negotiate.

23 Thank you for your time and anticipated cooperation.

- 24 43. On April 11, 2003, Mayor Thomas M. Menino (Mayor Menino) sent a letter to
25 all City employees eligible to participate in the City's group health insurance
26 plan, including employees represented by the BTU, stating:

27 Dear City Employee:

28 The City of Boston faces an unprecedented financial challenge, in
29 large part because of sharply declining state aid, our second-
30 largest source of revenue. Health care costs are rising dramatically,
31 and our health insurance providers are passing those costs on in
32 the form of premium increases, some as high as 20% for the
33 coming year. As part of our effort to control costs, I directed staff to
34 negotiate with health care providers to secure excellent health care
35 for employees while minimizing increases to both employees and
36 city government.

37 This is the status of negotiations:

- 38 • All Retiree Plans - **No Change**

- 1 • Blue Cross Master Medical and Blue Choice (The City's
2 Indemnity Plans) - **No Change**
- 3 • Harvard Pilgrim, Harvard Added Choice, Neighborhood
4 Health, and Boston Medical Center Advantage (HMOs) - **No**
5 **Change**
- 6 • Tufts HMO and HMO Blue have proposed rate increases
7 that are costly to both employees and the City; therefore we
8 may no longer offer these plans to employees.

9 Our research shows that the doctors available through Harvard
10 Pilgrim are virtually identical to those available through Tufts HMO
11 and HMO Blue. Additionally, Harvard Pilgrim is accepted at every
12 hospital in Eastern Massachusetts.

13 During the open enrollment period, you will have the opportunity to
14 explore each of the available options.

15 Some employees confuse Harvard Pilgrim with Harvard Vanguard;
16 Harvard Pilgrim is an HMO providing insurance coverage; Harvard
17 Vanguard operates a set of medical centers located in the Boston
18 Area and is not an HMO or insurance provider.

19 In these difficult times, I remain committed to providing retirees,
20 employees, and their families with the best health care coverage
21 possible. The consolidation of choices would reduce our HMO rate
22 increases for FY04 by approximately \$8.5 million dollars. This
23 savings translates into a 150- to 200-person reduction in layoffs.

24 These are difficult economic times, and resources are shrinking. In
25 advance, I thank you for your cooperation as we continue to work
26 on behalf of the citizens of Boston.

27 44. On May 15, 2003, Tisei wrote a letter to Doherty stating:

28 In April, I wrote to you and all City unions with information regarding
29 proposed changes in health insurance for FY 04. Specifically, I
30 indicated that it was possible that the City intended to discontinue
31 its relationship with both Tufts HMO and HMO Blue during the
32 coming fiscal year. In their place, Harvard/Pilgrim HMO would take
33 on the business previously offered by those HMOs and would be
34 available to cover City employees who were participants in those
35 plans. This change enables both the City and its employees to
36 avoid a significant cost increase in the FY 04 HMO premium rate.
37 All other health insurance plans, including the two indemnity plans
38 and the BMC HMO would remain as plans. You'll recall that I
39 offered to negotiate these matters with your union.

1 The consolidation of HMOs will not have a significant effect, if any,
2 on employees who were previously carried by Tufts or HMO Blue.
3 That is, in almost every circumstance, employees will not have to
4 change physicians or hospitals. If an employee's physician is not
5 currently affiliated with Harvard/Pilgrim, we have been assured that
6 Harvard will work to establish such a relationship. Additionally, the
7 plans previously offered by Harvard/Pilgrim, Tufts, and HMO Blue
8 were all substantially similar and there are no substantive changes
9 in the level of care or the services offered from Harvard/Pilgrim's
10 FY 03 plan and its FY 04 plan.

11 I also indicated that we had either withdrawn or modified several
12 proposals regarding utilization changes, opting only to proceed with
13 an increase in the office visit co-payment from \$5 to \$10. I also
14 offered to negotiate this change.

15 The City is now proceeding forward with the annual open
16 enrollment process in order to give employees the opportunity to
17 select a health insurance carrier for the next fiscal year. The
18 changes indicated above will be reflected in the materials provided
19 to employees.

20 While time is of the essence in implementing these health
21 insurance changes for FY 04, which begins on July 1, 2003, we
22 continue to offer you the opportunity to negotiate these changes
23 should you so desire. We shall continue to be available to bargain
24 over the health insurance issue as necessary.

25 Please contact me as soon as possible should you wish to discuss
26 these matters further. See attached information on the insurance
27 plans and open enrollment meetings.

1 45. On or about May 15, 2003, the City issued the following Open Enrollment
 2 Notice to individuals eligible to participate in the City's group insurance
 3 program:



City of Boston / Office of Human Resources / Health Benefits and Insurance
 Boston City Hall, Room 807, (617) 635-4570
 EMPLOYEE NEWSLETTER - SPRING 2003

OPEN ENROLLMENT MAY 15 - JUNE 3, 2003

IMPORTANT NOTICE ON REVERSE SIDE FOR HMO BLUE AND TUFTS MEMBERS

BEFORE-TAX PREMIUM PAYMENT PLAN

Open Enrollment is also the time to complete a waiver of participation form if you do not want to participate in the City's Before-Tax Premium Payment Plan. By completing a waiver, your health and life insurance premiums will be deducted from your pay on an after-tax basis. If you have not filed a waiver, your health and life insurance premiums are being deducted on a before-tax basis, which means that you do not pay taxes on these premiums which in turn increases your take-home pay. Waiver of Participation forms are available at the Health Benefits and Insurance office in Room 807 of City Hall.

HEALTH PLAN WEBSITES

For a detailed description of the benefits available under each health provider and lists of physicians and health centers, visit the websites listed below:

- www.bluecrossma.com
- www.nhp.org
- www.harvardpilgrint.org

OPEN ENROLLMENT HEALTH FAIRS

Learn more about the health and life insurance plans by attending a Health Fair at the location most convenient to you. Plan representatives will be present to answer your questions and to help you complete enrollment applications.

- May 15, 16, 19, 20 City Hall Mezzanine 10 am - 2 pm
- May 20 Boston Teachers Union 4 pm - 6 pm
180 Mount Vernon Street, Dorchester
- May 28 1010 Mass. Ave. 10 am - 12 pm
Cafeteria
- May 29 Florian Hall 4 pm - 6 pm
55 Ballet Street, Dorchester
- June 2 & 3 City Hall Mezzanine 10 am - 2 pm

Brochures and applications are also available throughout Open Enrollment at the Health Benefits and Insurance office in Room 807 of City Hall.

HEALTH AND BASIC LIFE INSURANCE MONTHLY RATES
 For coverage effective July 1, 2003 - June 30, 2004

	BCBS Member Medical	Blue Choice	Harvard Pilgrim POS	Blue Cross Advantage	Harvard Pilgrim HMO	HMO Blue	Neighborhood Health Plan	Tufts Health Plan	Basic Life
IND	\$182.80	\$122.28	\$51.64	\$32.28	\$32.28	*	\$28.32	*	\$4.12
FAM	\$447.28	\$315.44	\$136.84	\$86.80	\$86.80	*	\$75.32	*	N/A

SEE REVERSE SIDE

Thomas M. Menino
 Mayor

turn for more

**ATTENTION CURRENT MEMBERS OF THE HMO BLUE AND
TUFTS HMO PLANS**

HMO Blue and Tufts HMO plans have proposed rate increases that are costly to both employees, retirees, and the City. If these two HMOs do not agree to the same rate increase accepted by the other City HMO plans, then the HMO Blue and Tufts HMO contracts will not be renewed and will expire on June 30, 2003. As a result, current HMO Blue and Tufts HMO members will need to enroll in one of the other health providers offered by the City (see front of this newsletter for options).

In order to minimize the disruption of current HMO Blue and Tufts HMO members, the entire membership of these two HMOs will be transferred to the Harvard Pilgrim HMO plan with an effective date of July 1, 2003. You do not have to fill out and submit a Harvard Pilgrim HMO application; the transfer is automatic. All of your enrollment information along with your spouse's and/or dependents' information, including the name of each members' primary care physician, will be transferred to the Harvard Pilgrim HMO. You do nothing. You will receive Harvard Pilgrim HMO identification cards for you and your dependents during the month of June, with coverage effective July 1, 2003.

Our research shows that the doctors available through Harvard Pilgrim are virtually identical to those available through HMO Blue and Tufts HMO. You are able to verify that your doctor accepts Harvard Pilgrim insurance by visiting the harvardpilgrim.org website or by calling your physician's office. If you find that your doctor does not accept Harvard Pilgrim insurance, the Member Services Department at Harvard Pilgrim will assist you in locating a doctor near your home or work and offer other support services necessary to transition your care to a Harvard Pilgrim doctor. Additionally, Harvard Pilgrim is accepted at every hospital in Eastern Massachusetts.

Harvard Pilgrim is a HMO providing insurance and is not Harvard Vanguard. Harvard Vanguard operates a set of medical centers located in the Boston area and is not an HMO or insurance provider.

NOTE: If you do not wish to be a member of the Harvard Pilgrim HMO on July 1st, then you must complete an application during the Open Enrollment period for one of the other health plans offered by the City. You and your dependents will receive identification cards during the month of June for the plan that you select and your coverage will be effective July 1, 2003.

Health Plan representatives will be present at the Open Enrollment Health Fairs to answer your questions.

OPEN ENROLLMENT GUIDELINES

Open Enrollment is the once-a-year period when you can sign up for health and life insurance coverage if you did not enroll when you were first hired, change your health plan, or add dependents who were not added to your health plan membership when they were first eligible. Documentation will be required.*

***VERIFICATION OF DEPENDENT ELIGIBILITY IS REQUIRED FOR ALL APPLICANTS. REQUIRED DOCUMENTATION INCLUDES CERTIFIED MARRIAGE CERTIFICATES AND BIRTH CERTIFICATES.**

BENEFIT CHANGES EFFECTIVE JULY 1, 2003

NEIGHBORHOOD HEALTH PLAN – Effective July 1, 2003, there will be a \$25.00 co-payment for Emergency Room visits.

BMC Advantage, Harvard Pilgrim HMO, Harvard Pilgrim POS, and Neighborhood – Effective July 1, 2003, the office visit co-payment will be \$10.00 per visit.

To view and print out a health plan benefits comparison document for a brief overview of the benefits offered by the City's group health plans, visit the City of Boston Website and type in COB1.

1 have changed from the current fiscal year, the City wants to have this information set
2 before open enrollment in health care plans begins. When negotiations with health care
3 providers are not resolved expeditiously, the City is confronted with the problem of
4 explaining to participants enrolling in health care coverage for the next fiscal year that a
5 health care plan or certain payment expectations may or may not exist.⁹ The City's
6 history of negotiations with Blue Cross illustrates this problem. In 1997, the City did not
7 offer HMO Blue during open enrollment, because the City and Blue Cross could not
8 agree on rates. Blue Cross emphatically stated that its proposed rates were "final," and
9 that it would not agree to the rates the City wanted. Blue Cross subsequently made a
10 direct written appeal to employees regarding its health care plan, bypassing the City
11 and its unions. In response, DiMarzio met with the then Chief Executive Officer of Blue
12 Cross and threatened to end the City's relationship with Blue Cross if that type of
13 behavior continued. The Chief Executive Officer apologized to DiMarzio for sending the
14 direct written appeal, and negotiations between the City and Blue Cross commenced

⁸ To expedite the hearing and because witnesses were testifying about events that occurred several years prior to the hearing, the parties agreed to the following process of having witnesses offer prepared testimony. Prior to the hearing, the parties provided copies of witnesses' prepared testimony to each other with sufficient time to review that prepared testimony. At the hearing, the sworn witness reviewed his or her prepared testimony and indicated whether it was what he or she would have said under direct examination. If the witness agreed that the prepared testimony was what he or she would have said under direct examination, the prepared testimony was entered into the record as a joint exhibit. Cross-examination of the witness then commenced.

⁹ Negotiations with health care providers do not have to be resolved prior to the start of the next fiscal year. Because municipalities negotiate health care coverage with several employee organizations at one time, health care providers will, at their discretion, extend their already-existing plans into a new fiscal year to allow for negotiations with a municipality and its employee organizations to continue. In this situation, however, the health care plan could institute whatever rates it deemed appropriate.

1 again. On May 29, 1997, just after the open enrollment period had ended, the City and
2 Blue Cross reached agreement on rates, and Mayor Menino subsequently informed City
3 employees about the availability of Blue Cross-sponsored health care plans. In 2000,
4 the City and Blue Cross did not agree to acceptable rates until just prior to the start of
5 the open enrollment period.¹⁰

6 Since approximately 1987, the City qua School Committee has changed its
7 health care plans without objection from the Union. These changes include: the merger
8 of the Harvard Community Health Plan and the Pilgrim Health plan; the elimination of
9 Medical East when it became part of HMO Blue; the elimination of the Healthway plan;
10 the elimination of the Lahey Clinic Health plan; the elimination of the Multi-Group Health
11 Plan; the addition of Boston Medical Center Advantage, and Neighborhood Health
12 plans; and changes in prescription-tier co-pays and drug classifications.¹¹

13 Other changes, however, have led to objections from the Union. In 1995,
14 Arbitrator Timothy Buckalew (Buckalew) found that the School Committee violated the
15 provision of the parties' collective bargaining agreements regarding health care
16 coverage when the City eliminated the Blue Cross/Blue Shield Master Health Plus plan.
17 Buckalew explained that: (a) the choice of a health care plan was a mandatory subject

¹⁰ The record is silent regarding whether the open enrollment period was delayed in 2000.

¹¹ Despite testimony in the record, the Hearing Officer did not include Blue Choice as one of the health care plans added without objection from the Union. The arbitration decision described below indicates that the Union did object to the addition of this plan.

1 of bargaining that was not covered under the collective bargaining agreements;¹² and
2 (b) the management rights provision specified that the School Committee could not
3 change mandatory subjects of bargaining not covered in the collective bargaining
4 agreements without first negotiating with the Union. In 1997, Arbitrator Tim Bornstein
5 (Bornstein) denied the Union's grievance over the City's decision to add a new
6 indemnity health insurance plan, Blue Choice. Bornstein held that the health insurance
7 provision in the parties' collective bargaining agreements gave the School Committee
8 "unilateral authority to select group health insurance plans other than HMOs."

9 These changes to the City's health care coverage occur, because health care
10 costs are a growing part of the City's budget. The City has to manage its health care
11 costs relative to its other obligations to its employees and in serving its residents. In the
12 Spring of 2002, the City faced a budgetary shortfall, because of a decline in state aid.
13 In April of 2002, the City convened a meeting of the IAC to discuss possible changes in
14 health care coverage. However, at that time the City decided not to seek any changes
15 for the upcoming 2003 Fiscal Year, and the City eventually spent approximately 8% of
16 its \$1.8 billion budget on health care coverage. Instead, the City placed a hiring freeze
17 on vacancies, laid off several hundred employees, offered an early retirement incentive,

¹² The health insurance provision examined by Buckalew differed from the provision set forth in Stipulations #4 and #5.

1 cut departmental spending, and reduced capital spending. In FY2004, the City's budget
2 remained at approximately \$1.8 billion.¹³

3 In response to the very high initial "status quo" proposals described in stipulation
4 #21, DiMarzio conceived of having the three HMO health care insurers — Harvard
5 Pilgrim HMO, Tufts HMO, and HMO Blue — bid on each other's risk pool in the hope of
6 lowering the renewal quote. As a result, besides informing the IAC of possible co-pay
7 increases, as described in Stipulation #22, the City also informed the IAC that it
8 intended to ask the HMO health care insurers to submit bids for one or both of the other
9 HMO health care plans. The three HMO health care plans responded by the end of
10 February of 2003 with bids for all current HMO health care plan subscribers in the other

¹³ The Hearing Officer declined to make findings concerning whether the City faced a financial crisis in its Fiscal Year 2004 budget, explaining that this question was a mixed question of law and fact for the Board to determine. We find that it was within the Hearing Officer's province to determine whether the Employer faced a financial crisis, though the legal question of whether this crisis reached the level of an exigency under prior Board precedent is a legal question. We determine factually that there was not a financial crisis and further that there was insufficient evidence to conclude that "chaos" would result from a delay in choosing which health care plans to offer during the open enrollment period. As the Hearing Officer noted, the only evidence presented at the hearing concerning this were witnesses' subjective judgments about whether a financial "crisis" existed or whether open enrollment "chaos" would result. We do adopt the Hearing Officer's decision not to find that Tisei told Dwyer that the School Committee would not negotiate changes in health care coverage as part of the negotiations for a successor collective bargaining agreement, because those negotiations were unlikely to be finished before the end of the current fiscal year. Tisei could not recall any circumstances regarding when or in what context this conversation with Dwyer took place, except to note that: (a) Dwyer was not on the Union's negotiating team; and (b) this information was not part of her written communications with the Union. Because the Hearing Officer could not determine when Tisei made this statement or the attendant circumstances of how the Union received it, he did not find that this testimony provides substantial evidence to support a finding.

1 two plans.¹⁴ The bid from Tufts HMO amounted to a 16.03% rate increase over its
2 current premium rate. The bid from HMO Blue amounted to a 17.3% increase over its
3 current premium rate. And, the bid from Harvard Pilgrim HMO amounted to a 13.7%
4 increase over its current premium rate. Furthermore, Harvard Pilgrim also proposed a
5 \$5.00 co-pay increase for doctor's visits, which, if accepted, led to the premium increase
6 amounting to 10.9% instead of 13.7%.¹⁵

7 The City continued negotiations with HMO health care insurers in March and
8 April of 2003. Neighborhood Health agreed to the City's requested 10.9% rate increase
9 in a letter dated April 4, 2003, though Neighborhood Health unilaterally increased its
10 emergency room co-pay from zero to \$25. Tufts HMO presented its final offer to the
11 City on March 18, 2003. Neither Tufts HMO nor HMO Blue agreed to the City's
12 requested 10.9% increase for HMO health care plans. By the end of March 2003,
13 DiMarizio had concluded that the City would best be served by folding the employees
14 currently enrolled in the Tufts HMO and HMO Blue plans into the Harvard Pilgrim HMO

¹⁴ The bids did not include those enrolled with Neighborhood Health. Because this HMO health care insurer covered less than 10% of the City's employees and their dependents, it was the City's practice to exclude Neighborhood Health Plan from rate negotiations and simply require Neighborhood Health Plan to agree to whatever final rate was negotiated with the other HMO health care providers.

¹⁵ While HMO health care insurers were responding to the City's requests to bid on each other's risk pool, the City also began negotiations with several employee organizations representing City employees who had responded to the letters Connelly sent out, as described in Stipulation #23. See also Stipulation #31. We have modified this finding to reflect that there were negotiations and decline to characterize these negotiations as the Hearing Officer did.

1 plan.¹⁶ On April 4, 2003, Group Benefits Strategy wrote a letter to Blue Cross on behalf
2 of the City. In this letter, Group Benefits Strategy explained that the City did not
3 presently intend to renew the HMO Blue contract, because Blue Cross would not agree
4 to the same rate and co-pay increase that Harvard Pilgrim HMO had proposed.

5 The City had yet to decide formally that it was not going to renew the HMO Blue
6 plan, however, and negotiations between the City and Blue Cross about limiting the
7 premium increase to 10.9% continued into May of 2003.¹⁷ Because of these continuing
8 negotiations, the City took the action described in Stipulation #27 of postponing the
9 open enrollment period from April to May of 2003.

10 The City's decision to eliminate HMO Blue and Tufts HMO led unit members to
11 switch their health care coverage. Prior to July 1, 2003, there were 452 BTU members
12 with individual health insurance coverage and 465 BTU members with family health
13 insurance coverage under the HMO Blue plan, and there were 690 BTU members with
14 individual health insurance coverage and 789 BTU members with family health
15 insurance coverage under the Tufts HMO plan. As a result of the changes implemented
16 effective July 1, 2003, 2,396 BTU members as well as an unknown number of
17 dependents changed plans because HMO Blue and Tufts HMO were no longer

¹⁶ As a result of this decision, DiMarzio instructed Connelly and Tisei to write to the City's unions and the School Committee's unions, respectively, to offer to bargain about this proposal. The letter Tisei wrote is set forth in Stipulation #42.

¹⁷ The contracts between the City and its health care providers specify that the City must provide notice one month prior to the contract's expiration date of the City's decision not to renew a contract with a health care provider.

1 available.¹⁸ There was a 98% overlap of physicians between Harvard Pilgrim HMO and
 2 HMO Blue, and a 97% overlap of physicians between Harvard Pilgrim HMO and Tufts
 3 HMO. Furthermore, Harvard Pilgrim HMO committed itself to solicit physicians not
 4 currently included in its services once the City identified that physician. Still, twenty-
 5 nine unit members or dependents of unit members changed doctors after the
 6 elimination of the HMO Blue and Tufts HMO health care plans.¹⁹

7 In regards to how co-pays changed in Fiscal Year 2004, utilization data for
 8 enrollees in Harvard Pilgrim HMO reveals the following:²⁰

9	<u>Year</u>	<u>Office Visits</u>	<u>Co-Payments (at \$10/visit)</u>
10	2004	62,742	\$627,420
11	2005	65,456	\$654,560
12	2006	68,610	\$686,100
13	Totals	196,808	\$1,968,080

¹⁸ The record is silent regarding which health care plans these individuals selected in lieu of Tufts HMO and HMO Blue.

¹⁹ The record is silent regarding any specific circumstances or any costs associated with the change in physicians. We sustain the Union's challenge to the Hearing Officer's conclusion that the record is silent regarding what resolution, if any, the parties reached when they agreed to a successor collective bargaining agreement in April of 2004 (see Stipulation #48) regarding the changes in health care plans and co-pays at issue here, since the parties' collective bargaining agreement, Jt. Ex. 1, shows that these issues were not resolved.

²⁰ The record is silent regarding whether these enrollees represent all City employees or just BTU bargaining unit members. Additionally, the record is silent regarding the financial impact the change in co-pays had for those BTU unit members, if any, who enrolled in the Neighborhood Health plan.

Opinion

1 There are two separate Section 10(a)(5) and (1) allegations at issue here
2 concerning the School Committee's actions arising from the Fiscal Year 2004 changes
3 that the City made in health insurance offered to bargaining unit employees.²¹ The first
4 issue is whether the School Committee violated the Law when it increased the co-
5 payments for the Harvard Pilgrim HMO and the Neighborhood Health Plan. The second
6 issue is whether the School Committee violated the Law when it eliminated the HMO
7 Blue and the Tufts HMO health insurance plans. We conclude that the allegation
8 concerning the co-payments is time-barred, because starting in January and February
9 2003, the School Committee notified the Union of an increase in co-payments and of its
10 bargaining position, but the Union waited until September 4, 2003 to file this charge.
11 We find, however, that the unilateral elimination of HMO Blue and Tufts HMO insurance
12 plans without bargaining in good faith to resolution or impasse with the Union violated
13 Sections 10(a)(5) and (1) of the Law, since the School Committee insisted its only
14 obligation was to bargain over the impact of this decision. Furthermore, the School
15 Committee consistently refused to bargain with the Union about these changes during
16 bargaining for a successor contract.

17 Employer's Increase in Co-payments.

18 Section 15.03 of the Division's regulations, 456 CMR 15.03, states: "Except for
19 good cause shown, no charge shall be entertained by the Division based upon any

²¹ Although alleged as one count, the factual allegations are included in separate paragraphs of the Complaint.

1 prohibited practice occurring more than six months prior to the filing of a charge with the
2 Division.” A charge of prohibited practice must be filed with the Division within six
3 months of the alleged violation or within six months from the date that the violation
4 became known or should have become known to the charging party, unless good cause
5 is shown. Town of Lenox, 29 MLC 51 (2002) (citing Town of Dennis, 26 MLC 203
6 (2000)). It is well-established that the six month limitations period begins to run when
7 the party adversely affected receives actual or constructive notice of the conduct
8 alleged to be an unfair labor practice. Town of Lenox, 29 MLC at 52 (citing Wakefield
9 School Committee, 27 MLC 9, 10 (2000)). Further, a wrong “is not inherently
10 unknowable if the injured party, in the exercise of reasonable diligence, should have
11 known of the factual basis for the wrong.” Felton v. Labor Relations Commission, 33
12 Mass. App. Ct. 926, 927-928 (1992).²²

13 Here, it is undisputed that in its January 29, 2003 letter to the Union, the School
14 Committee specifically informed the Union of contemplated changes in the HMO plans
15 offered to City employees, including a detailed diagram of co-pay increases. In this
16 letter, Tisei notified the Union that “the City intends to implement the changes discussed
17 (co-payment increases and in-patient deductible) for all FY 04 HMO plans.” Tisei
18 further noted that the School Committee was offering the Union an opportunity to
19 bargain over the proposed changes and to contact her “as soon as possible but no later
20 than February 13, 2003 should you wish to bargain over the **impact** of these changes.”
21 (Emphasis added).

²² In paragraph 8 of its Answer to the Complaint, the School Committee raised timeliness as an affirmative defense.

1 The Union immediately understood the Employer's position as is evident from its
2 responses to the School Committee. In Doherty's February 12, 2003 letter, the Union
3 made its position concerning the HMO changes very clear and stated that since the
4 parties were scheduled to negotiate a successor contract that included language
5 dealing with the costs of group health insurance, it requested that the School Committee
6 put its proposal in writing and "place it on the bargaining table in the context of those
7 negotiations."

8 The School Committee quickly notified the Union that it would not do so. In a
9 letter from Tisei dated the same day as the Union's February 12, 2003 letter, the School
10 Committee notified the Union know that "this is not a subject for main table successor
11 bargaining." Furthermore, the School Committee offered a date to meet to discuss the
12 "impact of the proposed changes the City desires to make." The Union again
13 understood the School Committee's position and immediately objected. Its counsel
14 wrote to the School Committee on February 20, 2003, demanding to know "any legal
15 authority for the proposition that it can insist on divorcing health insurance from the
16 current, ongoing negotiations for a successor contract."

17 After these letters were exchanged, although there was some communication
18 between the parties about health insurance, the parties' respective positions concerning
19 their bargaining obligations and the School Committee's position that there would be
20 increases in employee co-payments did not change. The Union continued to maintain
21 that the School Committee had to bargain at the main table and the School Committee
22 maintained that it did not have to do so. Within six months of the date the Union filed
23 this charge, the School Committee changed the **amount** of the increase in co-payments

1 it would require for employees. It did not, however, change its position that its only
2 obligation was to bargain about the impact of the co-payment changes with the Union
3 and that these negotiations had to be conducted separate from ongoing successor
4 negotiations, nor did its position change with respect to the fact that co-payment
5 increases would have to be implemented. Indeed, the Union's own letters reveal that it
6 knew in January and certainly in February 2003, of the School Committee's position as
7 to its bargaining obligation. Thus, we find that the Union's charge, which was filed on
8 September 4, 2003, was untimely with respect to the increased co-payments and
9 dismiss that allegation.

10 The Union advances three arguments defending the timeliness of this aspect of
11 its charge. First, the Union contends that the limitations period should be measured
12 from July 1, 2003, when the School Committee implemented the change in co-pay and
13 eliminated the HMO Blue and Tufts HMO insurance plans. This argument fails, since
14 the alleged unfair labor practice occurred not when the insurance changes were
15 implemented, but when the School Committee refused to bargain about the decision to
16 make the changes at the main table. Town of Lenox, 29 MLC 51, 52 (2002) (six-month
17 period of limitations for filing a charge alleging an unlawful increase in prescription drug
18 co-payments began to run on the date the union received actual notice of the
19 employer's announcement of the upcoming changes, not the subsequent effective date
20 of the increase).

21 The Union argues in the alternative that the earliest limitations start date is April
22 4, 2003, when Tisei informed the Union about its plan to eliminate HMO Blue and Tufts
23 HMO and certain changes to its proposal to increase office co-payments. The Union

1 further claims that it was not until May 15, 2003, when the City sent out its Open
2 Enrollment notice, that the Union knew exactly what changes would be implemented. In
3 arguing (but not conceding) that the earliest date on which the statute of limitations
4 began to run was April 4, 2003, the Union asserts that the School Committee's January
5 and February 2003 letters only reflected possible modifications and not the final
6 insurance proposals. Therefore, the Union argues that the period of limitations did not
7 begin to run on those dates. The Union also finds it significant that the January 29,
8 2003 letter was sent before the start of successor bargaining, claiming that since there
9 was one insurance proposal on the table at main bargaining (insurance premiums), it
10 reasonably could have concluded that it would be able to induce the School Committee
11 to put all insurance proposals on the table. Yet, as discussed above, and as the Union
12 admits, the Employer's stance that it was willing only to engage in impact bargaining
13 away from the main table over the increase in co-payments never changed. Certainly,
14 the Union could have waited up to six months before filing its charge to see if the
15 Employer's position would change, but there is no explanation (or good cause) as to
16 why the Union waited longer than six months. The mere possibility that the Employer
17 would change its mind about the bargaining scope or venue, does not, without more,
18 change the date on which the Union knew, or should have known of the conduct that
19 forms the basis of this count of its prohibited practice charge: the increase in co-
20 payments. The Union's argument fails because we find that the Union knew about the
21 Employer's plan to increase co-payments without engaging in decisional or main table
22 bargaining at the latest by February 2003, more than six months from the date the
23 charge was filed.

1 Finally, the Union claims that, at the very least, the School Committee's conduct
2 is a continuing violation, since the School Committee refused to bargain over its
3 decision to implement changes to co-payments and refused to place its proposals on
4 the main table for successor negotiations throughout the parties' successor
5 negotiations. Therefore, the Union claims, the violations continued up to the date of the
6 charge and beyond. We disagree. Rather, on February 12, 2003, the School
7 Committee, by announcing that it intended to increase office visit co-payments, took
8 discrete action connected to an ongoing obligation it had under the Law. Because the
9 School Committee never changed its position that it would not bargain over its decision
10 to implement the change during successor negotiation, the impact and effect of the
11 School Committee's action here was specific and finite – the Union was permanently
12 deprived of the opportunity to address a mandatory subject of bargaining as part of
13 successor negotiations. Therefore, the Union has not demonstrated that the School
14 Committee's actions here constitute a continuing violation and we dismiss this aspect of
15 the Union's charge as untimely. City of Boston, 32 MLC 173, 176 (2006) (City's
16 notification of increase in prescription drug co-payments did not constitute a continuing
17 violation).

18 **Employer's Elimination of Tufts HMO and HMO Blue**

19 A public employer violates Section 10(a)(5) and derivatively, Section 10(a)(1) of
20 the Law when it unilaterally changes an existing condition of employment or implements
21 a new condition of employment involving a mandatory subject of bargaining without first
22 giving its employees' exclusive bargaining representative prior notice and an opportunity
23 to bargain to resolution or impasse. Commonwealth of Massachusetts v. Labor

1 Relations Commission, 404 Mass. 124 (1989); School Committee of Newton v. Labor
2 Relations Commission, 388 Mass. 557 (1983). The terms and costs of health insurance
3 benefits are conditions of employment that constitute mandatory subjects of bargaining.
4 Town of Dennis, 28 MLC 297 (2002).

5 Where conditions of employment are established by contract, an employer may
6 request to reopen bargaining concerning such contract provisions during the term of a
7 contract, and engage in "mid-term" bargaining, but may not insist upon doing so. Town
8 of Randolph, 8 MLC 2044, 2051 (1982); City of Salem, 5 MLC 1433, 1437 (1978). Even
9 where an employer has given a union notice and an opportunity to bargain, the
10 employer may not implement its proposed change until the parties reach an agreement
11 or impasse, unless a union has waived its right to bargain. Town of Natick, 19 MLC
12 1753, 1754 (1993). The Board will not find an impasse where a party insists upon
13 bargaining separately about health insurance premiums, rather than at on-going
14 successor negotiations. Town of Brookline, 20 MLC 1570, 1594 (1994).

15 In this case, although the parties were actively involved in successor
16 negotiations, the School Committee failed to notify and bargain with the Union at the
17 bargaining table concerning its plan to eliminate the Tufts HMO and HMO Blue plans.
18 Rather, the School Committee's insurance proposal at the table was limited to its
19 proposal to decrease its HMO contribution percentage rate. The School Committee's
20 first notification to the Union of its intent to eliminate the Tufts HMO and HMO Blue
21 plans was in the form of a letter from Tisei dated April 4, 2003, in which Tisei stated that
22 time was of the essence in implementing these changes and Tisei offered the Union the

1 opportunity to bargain over the impact of the proposed changes, including elimination of
2 the plans.

3 The School Committee's bargaining position concerning elimination of the two
4 plans was consistent with its earlier co-pay bargaining position -- that its obligation was
5 to **impact** bargain and that it would only do so away from the successor bargaining.
6 This was unlawful. Case law is clear that the School Committee is not entitled to insist
7 that the Union bargain separately about health insurance. City of Boston, 31 MLC 25,
8 32 (2004); City of Leominster, 23 MLC 62 (1996).

9 We further conclude the School Committee's conduct was unlawful with respect
10 to the elimination of the HMO Blue and Tufts HMO plans because it insisted that its only
11 obligation was to bargain over the impacts of this decision. This was wrong, since the
12 decision to eliminate these plans was, as, the School Committee concedes, a
13 mandatory subject of bargaining. See Massachusetts Correction Officers Federated
14 Union v. Labor Relations Commission, 417 Mass. 7, 8, n.3 (1994).²³

15 As mentioned above, the School Committee does not deny that its proposed
16 elimination of the HMO Blue and Tufts HMO plans was a mandatory subject of
17 bargaining. Instead, it offers various defenses for its conduct here. First, the School
18 Committee maintains that it faced dire economic repercussions and chaos if it failed to
19 act by the purported June 30, 2003 deadline to purchase group health insurance. This
20 argument is similar to the employer's argument in Town of Brookline, 20 MLC 1570,

²³ Accordingly, the School Committee's defenses discussed below concerning waiver and mid-term negotiations fail in any case, since the School Committee could not limit the bargaining to impact bargaining.

1 which the former Commission rejected. As was the case in Town of Brookline, the
2 School Committee failed to bargain at successor negotiations prior to its deadline,
3 notwithstanding its stated need for quick action. Under Section 6 of the Law, the School
4 Committee's bargaining obligation was one of bargaining and not agreement, yet the
5 School Committee's own refusal to enter into negotiations at the main table in February
6 2003 and beyond caused a significant delay when there was still time to act. Thus, its
7 defense on this ground fails.

8 The School Committee next argues that the Union made a choice to participate
9 in insurance that covered all of the City's employees, and, therefore could not
10 unilaterally delay the making of an insurance purchase decision that affected thousands
11 of individuals beyond the Union's membership. The School Committee further argues
12 that its own conduct was laudatory, since it notified the Union promptly of its strategy
13 decisions related to the purchase of insurance. This argument is without merit. The
14 School Committee is not relieved of its bargaining obligations merely because it
15 purchases group health insurance pursuant to M.G.L. c.32B. Town of Ludlow, 17 MLC
16 1191, 1198 (1990). Moreover, by insisting that the Union bargain only on the School
17 Committee's terms, the School Committee's own conduct formed the basis for the
18 delay.

19 Finally, the School Committee argues that this dispute must be resolved by the
20 parties' collective bargaining agreement and that it was following the contract when it
21 insisted that the Union engage in mid-term contract bargaining. According to the School
22 Committee, it is the Union that waived its right to bargain by its refusal to bargain away
23 from the main table in violation of the parties' contract. This argument misses a critical

1 point. Even assuming the parties' contract allowed the School Committee to insist on
2 side table bargaining, it had no right to insist on bargaining only over the impact of its
3 insurance decisions. Furthermore, the contract language providing that the parties will
4 bargain mid-term over matters not covered by the contract does not mean that the
5 School Committee was free to dictate where the bargaining would take place. Rather,
6 for reasons discussed above, the bargaining should have taken place at the main table,
7 since the parties were in the midst of successor bargaining. The contract does not
8 provide otherwise.

9 Conclusion

10 For the reasons stated above, we find that the School Committee violated
11 Sections 10(a)(5) and derivatively, Section 10(a)(1) of the Law by unilaterally changing
12 the health insurance benefits offered to members of the bargaining unit represented by
13 the Union by eliminating two of the insurance plans previously available without
14 bargaining with the Union to resolution or impasse. We dismiss the allegation
15 concerning the City's increase of co-payments as untimely.

16 Remedy

17 At the pre-hearing conference, the Union indicated that it was not seeking to
18 have health care insurers or their health care plans reinstated as part of a make-whole
19 remedy. However, according to the Union, there may be a small number of members
20 who have experienced increased costs based on having to change doctors as a result
21 of the need to change plans. Therefore, our remedy concerning the School
22 Committee's elimination of Tufts HMO and HMO Blue is limited to the financial costs
23 incurred by those members impacted by the elimination of the plans.

Order

WHEREFORE, based on the foregoing, it is hereby ordered that the Boston School

Committee shall:

1) Cease and desist from:

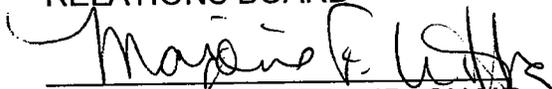
- a) Unilaterally changing the health insurance benefit plans that it offered to members of the bargaining unit represented by the Boston Teachers Union, Local 66, MFT/AFT, AFL-CIO by eliminating two insurance plans without bargaining with the Union to resolution or impasse.
- b) In any similar manner interfering with, restraining, or coercing employees in the exercise of their rights under the Law.

2) Take the following affirmative action which will effectuate the purposes of the Law:

- a) Upon request, bargain with the Union in good faith to resolution or impasse before eliminating health insurance plans.
- b) Make whole any employees for any losses suffered as a result of the School Committee's unlawful implementation of a change in health insurance benefits, plus interest on any sums owing at the rate specified in M.G.L. c.321 §6I, compounded quarterly.
- c) Sign and post immediately in conspicuous places where employees usually congregate or where notices are usually posted and maintain for a period of thirty (30) days thereafter, copies of the attached Notice to Employees.
- d) Notify the Board within thirty (30) days of receiving this decision of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT
RELATIONS BOARD


MARJORIE F. WITTNER, CHAIR


ELIZABETH NEUMEIER, BOARD MEMBER

THE COMMONWEALTH OF MASSACHUSETTS
DIVISION OF LABOR RELATIONS

NOTICE TO EMPLOYEES

**POSTED BY ORDER OF
THE MASSACHUSETTS DIVISION OF LABOR RELATIONS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS**

The Commonwealth Employment Relations Board (Board) has determined that the Boston School Committee (School Committee) violated Sections 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E, by unilaterally changing the health insurance benefit plans it offered to employees in the bargaining unit represented by the Boston Teachers Union, Local 66, MFT/AFT, AFL-CIO (Union), without giving the Union an opportunity to bargain to resolution or impasse.

The School Committee posts this Notice to Employees in compliance with the Board's order.

WE WILL NOT unilaterally change health insurance benefits without giving the Union prior notice or an opportunity to bargain to resolution or impasse.

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

WE WILL take the following affirmative action that will effectuate the purposes of the Law:

- 1) Upon request, meet and bargain in good faith with the Union to resolution or impasse over the decision to change the health insurance benefit plans offered to employees.
- 2) Make whole employees for any losses suffered as result of the elimination of the HMO Blue and Tufts HMO plans, plus interest at the rate specified in M.G.L. c. 231, §6I, compounded quarterly.

Boston School Committee

Date