COMMONWEALTH OF MASSACHUSETTS, SECRETARY OF ADMINISTRATION AND MCOFU, SUP-3461 (4/24/92).

52.33	rights under expired contract
54.611	health insurance
54.6111	health insurance trust fund
54.612	life insurance
54.8	mandatory subjects
67.8	unilateral change by employer
82.125	extension of certification year
82.3	status quo ante

Commissioners Participating:

Maria C. Walsh, Chairperson
Haidee A. Morris, Commissioner

Appearances:

Joseph M. Daly, Esq.	- Representing the Commonwealth of Massachusetts, Secretary of Administration and Finance
Matthew E. Dwyer, Esq.	- Representing the Massachusetts Correction Officers Federated Union

DECISION

Statement of the Case

The Massachusetts Correction Officers Federated Union (MCOFU) filed a charge of prohibited practice with the Labor Relations Commission (Commission) on November 14, 1989. MCOFU alleged that, on October 13, 1989, the Commonwealth of Massachusetts, acting through the Secretary of Administration and Finance (Commonwealth) had violated Sections 10(a)(1), (2) and (5) of General Law, Chapter 150E (the Law) by discontinuing required contributions to an independently administered Health and Welfare Trust Fund on behalf of employees in state-wide bargaining unit 4 (Unit 4). Following an investigation, the Commission issued a complaint of prohibited practice alleging that the Commonwealth had violated Sections 10(a)(5) and (1) of the Law by ceasing to make contributions to the Health and Welfare Fund covering Unit 4 employees and by ceasing to provide payments for vision and dental coverage for employees in Unit 4 without giving MCOFU prior notice and an opportunity to bargain. The Commission dismissed portions of MCOFU's charge that had alleged a violation of Section 10(a)(2) of the Law.

A hearing took place on February 22, April 2, and April 26, 1990 before hearing officer John Cochran. Both parties had a full opportunity to be heard, to

examine and cross-examine witnesses and to introduce documentary evidence. Both parties filed post-hearing briefs to the hearing officer on June 17, 1990; and on January 22, 1991, the hearing officer issued recommended findings of fact. Both parties were given the opportunity to challenge the recommended findings of fact pursuant to 456 CMR 13.02(2). On April 4, 1991, MCOFU filed objections to two of the hearing officer's findings. Our consideration of those two specific issues is noted where relevant below. We otherwise adopt the substance of the hearing officer's recommended findings of fact, as described below. Based upon these facts, we conclude that the Commonwealth has violated its obligation to bargain in good faith.

Facts[1]

The Commonwealth is a public employer within the meaning of Section 1 of the Law. On April 20, 1976, the Commission certified the American Federation of State, County, and Municipal Employees, Council 93, AFL-CIO (AFSCME) as the exclusive collective bargaining representative for the employees of the Commonwealth in Unit 4. Sometime after being certified as the bargaining representative for the employees in Unit 4, AFSCME affiliated with three locals of the Service Employees International Union (SEIU) and the affiliated unions, known as the Alliance, bargained with the Commonwealth on behalf of the employees in state-wide bargaining units 2, 4, 8, and 10. The collective bargaining agreements negotiated between the Alliance and the Commonwealth contained provisions applicable to all employees in bargaining units 2, 4, 8, and 10 and also contained supplemental provisions that applied only to employees in individual units.

During the negotiations for a successor to the 1983-1986 collective bargaining agreement between the Commonwealth and the Alliance, the Commonwealth and the Alliance agreed to establish a trust fund that would provide dental and vision care benefits to certain employees. On January 3, 1984, the Commonwealth and the Alliance executed an Agreement and Declaration of Trust (Trust Agreement)[2] establishing the Massachusetts Public Employees Health and Welfare Fund (Fund). The stated purpose of the Fund, according to the Trust Agreement, is to receive monies to be paid by the Commonwealth pursuant to collective bargaining agreements between the Union[3] and the Commonwealth; and to use those monies to provide covered

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[1] Neither party contests the jurisdiction of the Commission in this matter.

[2] The parties submitted into evidence the full Agreement and Declaration of Trust and the First Amendment to the Agreement and Declaration of Trust.

[3] The Trust Agreement references collective bargaining agreements with the "Union." "Union" is defined in the First Amendment to the Trust Agreement as:
(continued)

employees and their beneficiaries with life insurance, weekly sickness and accident benefits, medical, surgical, and hospitalization and similar coverage, including drug prescriptions, eyeglass benefits, dental care, and Medicare, as determined by the trustees of the Fund. The Trust Agreement also provides that the Trust shall terminate when:

> ...there is no longer in effect a collective bargaining agreement between the Union and the Employer for a period of 120 days and may also be terminated by a written execution by the Union and the Employer. Upon the termination of the Trust the Trustees shall continue after the termination date to carry out the provisions of the Trust and shall make the payments and provide for the benefits for the purposes set forth in Article II hereof, and provide for the administration of the Trust, until such time as all assets have been distributed. Notwithstanding the continuance of the Trust for 120 days, the Employer shall have no obligation to continue contributions where there is no longer a collective bargaining agreement between the Union and Employer.

The Commonwealth began making contributions to the Fund during the 1983-84 fiscal year and began providing dental and vision benefits during the 1984-85 fiscal year.

The Fund is jointly administered by a board of trustees chosen by the Commonwealth and the unions that comprise the Alliance, with the Alliance and the Commonwealth having equal voting strength on the board. The Director of Council 93, AFSCME and the Director of the Commonwealth's Office of Employee Relations OER) serve as co-chairpersons of the board. Joseph Daly, the General Counsel for the Commonwealth's Office of Employee Relations (OER) served as co-chairmen of the Fund for the 1990 fiscal year, which began on July 1, 1989. All policy decisions affecting benefits are decided at trustees' meetings, which are conducted according to parliamentary procedure. If there is a tie vote among the trustees on the board, the deadlock shall be resolved through arbitration.

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3 (continued)

(i) Alliance, AFSCME-SEIU, AFL-CIO, which is composed of American Federation of State, County and Municipal Employee's Union, Council 93, and Locals 254, 285 and 509 of the Service Employees International Union; (ii) any other local, national or international union which a) represents employees for purposes of collective bargaining with respect to whom contributions are required to be made to the Trust Fund; (b) is designated by the Trustees as eligible to become a signatory to the Trust Agreement; and c) does so pursuant to the vote of its governing body; and (iii) any successor to the foregoing, either singly or as a group, as the context may require.

The most recent collective bargaining agreement between the Alliance and the Commonwealth was effective from April 1, 1986 to March 31, 1989. The agreement also provided that it would remain in full force and effect until a successor agreement was executed or an impasse in negotiations reached. Article 13A of that agreement, in relevant part, includes the following provisions:

> Section 1. Creation of a Trust Agreement
>
> The parties have agreed to establish a Health and Welfare Fund under an Agreement and Declaration of Trust drafted by the Employer and executed by the Union and the Employer. Such Agreement and Declaration of Trust (hereinafter referred to as the "trust agreement") provides for a Board of Trustees composed of an equal number of representatives of the Employer and the Union. The Board of Trustees of the Health and Welfare Fund shall determine in their discretion and within the terms of this Agreement and the Agreement and Declaration of Trust such health and welfare benefits to be extended by the Health and Welfare Fund to employees and/or their dependents.
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> Section 2. Funding
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> For the period April 1, 1986 through June 30, 1987 the Employer agrees to contribute on behalf of each full-time employee equivalent a total of four (4) dollars per calendar week.
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> Effective July 1, 1987, the Employer agrees to contribute on behalf of each full-time employee equivalent the additional sum of one dollar per calendar week, for a total of five (5) dollars per calendar week.
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> Effective July 1, 1988, the Employer agrees to contribute an additional one dollar per calendar week per full-time equivalent, for a total of six (6) dollars per calendar week.
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> The contributions made by the Employer to the Health and Welfare Fund shall not be used for any purpose other than to provide health and welfare benefits and to pay the operating and administrative expense of the fund. The contributions shall be made by the Employer in an aggregate sum within forty-five (45) days following the end of the calendar month during which contributions were collected.
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> Section 4. Employer's Liability
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> It is expressly agreed and understood that the Employer does not accept, nor is the Employer to be charged with hereby with (sic) any responsibility in any manner connected with the determination of liability to any employee claiming under any of the benefits extended

> by the Health and Welfare Fund. The Employer's liability shall be limited to the contributions indicated under Section 2 above.

On July 1, 1988, the Commonwealth began contributing $6.00 per calendar week into the Fund on behalf of each full-time employee equivalent in state-wide bargaining units 2, 4, 8 and 10. For the 1990 fiscal year, which began on July 1, 1989, the Legislature passed and the Governor signed St. 1989, c.240, which appropriated 13.66 million dollars to fund the Commonwealth's contributions to various health and welfare funds established pursuant to collective bargaining agreements, including the Fund identified in Article 13A of the 1986-1989 collective bargaining agreement between the Commonwealth and the Alliance.[4] Pursuant to that legislation, the Commonwealth continued to contribute $6.00 per calendar week to the Fund on behalf of each full-time employee equivalent in state-wide bargaining units 2, 4, 8, and 10, including the approximately 3,000 employees in Unit 4.

MCOFU is an employee organization within the meaning of Section 1 of the Law. On October 26, 1988, MCOFU filed a representation petition with the Commission seeking to represent the employees in Unit 4. On January 26, 1989, the Commission issued a Decision and Direction of Election directing that a secret ballot election be conducted among the employees in Unit 4 to determine whether a majority of those eligible to vote wished to be represented by AFSCME, Council 93, MCOFU, or by no employee organization.

Beginning in January 1989, Daly had discussions with John McKeon (McKeon), the Director of OER and Paul Waystack, OER's Deputy Director of Bargaining, about the Commonwealth's obligation to continue making contributions to the Fund if MCOFU prevailed in the election directed by the Commission. Daly reviewed the case law and the language of St. 1989, c.240, the state finance law governing expenditures, and the language of the 1986-1989 collective bargaining agreement between the Commonwealth and the Alliance. Based on that review, OER concluded that it would likely be unlawful for the Commonwealth to continue making contributions to the Fund if MCOFU prevailed in the election because St. 1989, c.240 authorized monies for health and welfare funds established pursuant to collective bargaining agreements and OER concluded that the Fund would not be contractually entitled to receive any contributions on behalf of employees no longer represented by the

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[4] Item 1108-3200 of that Legislation appropriated $13,660,000:

> For the purposes of the Commonwealth's contributions for the fiscal year nineteen hundred and ninety to health and welfare funds established pursuant to certain collective bargaining agreements; provided, that said contributions shall be calculated as provided in the applicable collective bargaining agreement, and shall be paid to such trust funds on a monthly basis, or on such other basis as the applicable collective bargaining agreement provides.

Alliance. Accordingly, sometime in the late winter or early spring of 1989, the Commonwealth decided that it would discontinue contributions to the Fund for Unit 4 employees if MCOFU prevailed in the upcoming representation election. In late May or early June 1989, Daly informed John Brouder (Brouder), the Fund Administrator, that the Commonwealth had determined that it would no longer have an obligation to continue contributions to the Fund if the Commission certified MCOFU as the exclusive bargaining representative for Unit 4 employees.

The Commission conducted the representation election pursuant to MCOFU's petition during the last week of May 1989. MCOFU prevailed in that election, but the certification of the exclusive bargaining representative could not issue until post-election objections filed by AFSCME had been investigated and decided.

In early June 1989, Daniel O'Neil, MCOFU's acting President, called Daly at Daly's office to inquire about what effect the election would have on the health and welfare benefits for Unit 4 employees.[5] Daly informed O'Neil that it was unlikely that the Fund would continue providing benefits to Unit 4 employees.[6]

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[5] Although O'Neil testified that he called Daly at OER and that Daly returned the call to O'Neil at home a few days later, the hearing officer has recommended that we find that O'Neil reached Daly in his office. We adopt this recommended finding based upon the existence of corroborating testimony as specifically described in the hearing officer's recommended findings.

[6] MCOFU challenged this finding of fact as recommended by the hearing officer on the ground that it was not supported by the record. The hearing officer discussed the conflicting testimony as follows: "O'Neil testified that Daly told him during that conversation that MCOFU could definitely continue to receive the same contribution the Commonwealth had been making to the Alliance Fund if MCOFU set up its own health and welfare fund. MCOFU argues that O'Neil's testimony is supported by the fact that he then contacted Blue Cross/Blue Shield and other insurance companies to explore alternative coverage. Although not contradicted by Daly's own testimony, both James Loughman and Manuel Lato (OER staff members), who overheard Daly's end of the conversation, testified that they did not hear Daly make any assurances of that kind to O'Neil. Further, O'Neil might have had subsequent discussions with various insurance carriers regardless of what Daly had said to him during their phone conversation." Therefore, the hearing officer did not credit O'Neil's recollection that Daly made any definitive assurances to him during their phone conversation. The Commission will not overturn a finding of fact in a hearing officer's decision that is based on credibility unless the clear preponderance of the relevant evidence demonstrates that the findings were incorrect. Commonwealth of Massachusetts, 6 MLC 1054, 1055 (1979). We believe that the same policy is equally applicable to the recommended findings of fact issued in decisions pursuant to 456 CMR 13.02(2). In this case we are unconvinced that a clear preponderance of the relevant evidence demonstrates that the recommended finding was incorrect. Therefore, we adopt the hearing officer's recommended finding.

Sometime after that phone conversation, O'Neil met with representatives of several insurance companies to explore available plans.

The Commission certified MCOFU as the exclusive collective bargaining representative for employees in Unit 4 on October 2, 1989. On October 5, 1989, Matthew Dwyer, MCOFU's attorney, sent Edward Lashman, the Commonwealth's Secretary of Administration and Finance, the following demand to bargain:

> On behalf of the Massachusetts Correction Officers Federated Union, this is to demand immediate negotiations for a successor bargaining agreement covering employes in State Unit 4.
>
> The Union will be represented in negotiations by the following individuals: Daniel J. O'Neil, Jerrel Poh, Richard J. Merrett, Brian Dawe, Raymond Perry, Jack Flanagan, Gary Murphy, and such others as the Union may designate from time to time. Kindly advise me who will serve as the authorized bargaining representative(s) for the Employer and their availability to meet for this purpose at your earlier [sic] convenience.
>
> I suggest that the parties establish an early date for a meeting to deal with such preliminary issues as release time, bargaining ground rules, and an agenda governing the time and place for negotiation sessions. I am available for this purpose of [sic] any of the following dates: October 13, 16, 17, 18, 20, 25, or 27.
>
> On behalf of M.C.O.F.U., I look forward to productive collective bargaining and a sound agreement for all concerned.

By letter dated October 13, 1990, McKeon wrote to Joseph Bonavita, the co-chairperson of the Fund, and advised him that:

> ...effective October 2, 1989, the Commonwealth will make no further contributions to the Alliance Health and Welfare Fund for any FTE's in bargaining unit 4. The Commonwealth will, of course, continue making contributions to the Fund based on the FTE's in bargaining units 2, 8, and 10.

McKeon also sent a copy of his letter to the other trustees of the Fund and to Brouder. McKeon had no discussions with any of the Fund's trustees about the continuation of benefits to Unit 4 employees under the Fund, and his decision to send his October 13 letter was not influenced by any agent of the Alliance of any trustee or other fiduciary of the Fund.[7] The Commonwealth did not provide MCOFU

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[7] To the extent that Daly gave McKeon advice about the commonwealth's (continued)

with notice or an opportunity to bargain before McKeon sent his October 13 letter. The Commonwealth stopped making contributions to the Fund for Unit 4 employees on October 13, 1989.

Dwyer wrote a letter to McKeon on October 18, 1989 that stated, in part:

> I have reason to believe that following the certification of the Federated Union, the Commonwealth caused to be sent to the Fund and/or the Alliance, a letter stating that effective October 2, 1989 all contributions made by the Commonwealth into the Fund on behalf of Unit 4 employees would cease, resulting in the discontinuation of health and welfare benefits to those employees.
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> My purpose in writing is obviously to have the Commonwealth either confirm or deny the truth of this assertion and, in so doing, to ascertain the Commonwealth's position on whether it intends to maintain the status quo in terms and conditions of employment. I wish to point out to you, in the strongest possible terms, how my client would view this action and what the Federated Union will be forced to do do in such a case if it turns out to be true.
>
> First, the Federated Union takes the position that it is the obligation of the Commonwealth to maintain the status quo in terms and conditions of employment pending either impasse or the execution of a successor collective bargaining agreement and that health and welfare coverage for bargaining unit employees constitutes a term or condition of employment. Thus, we would regard the cessation of benefits, on this mandatory subject of bargaining, as an unlawful, unilateral change, particularly since we have not yet commenced bargaining.
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> I stress that this obligation is one imposed by c.150E and, thus, does not depend for its validity upon the status of the Commonwealth's collective bargaining agreement with the former bargaining agent, including its so-called evergreen clause...
>
> Second, the Federated Union asserts that the Trust Agreement creating the Fund neither authorizes a unilateral discontinuation of contributions nor requires the cessation of benefits in these circumstances...
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> Third, the Federated Union takes the position that even if the Trust Agreement could be construed to require an automatic cessation of

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7 (continued)
obligation to continue making contributions to the Fund, Daly was acting in his role of General Counsel for OER.

contributions with a concomitant loss of eligibility...such an arrangement violates state labor laws in two related respects: by structuring an arrangement that conditions eligibility for health and welfare coverage on the continued incumbency of a particular bargaining agent, the employer lends unlawful support, domination, or assistance to an incumbent labor organization while restraining and coercing employees in the exercise of their protected rights.

In sum, the Federated Union is of the view that the Commonwealth is obliged to take all steps necessary to ensure that the status quo is maintained as to all terms and conditions of employment, including health and welfare benefits for Unit 4 employees, until we reach a successor agreement or impasse. I note from the 1985 amendments to the Trust and the continued participation of the state police after the latter's selection of a different bargaining agent, that the Trust agreement as administered and applied, envisions continued participation even if employees represented by the Alliance choose a new bargaining agent. In short, there is precedent for the course of action proposed.

If the Commonwealth, for whatever reason, is not willing to do this, we are prepared to avoid litigation by establishing a separate trust, administered by an equal number of employer and union designated trustees and qualify for tax-exempt status, to enable the Commonwealth to meet its obligation.

McKeon responded by letter of October 26, 1989. His letter provided, in part:

...While I agree with the concept, firmly embedded in case law, that a general obligation exists to maintain the status quo with respect to terms and conditions of employment (e.g., salaries, leave provisions, etc.) I cannot accept your assertion that eligibility for benefits under the Alliance Health and Welfare Fund is a "term or condition of employment" which this office is either required or empowered to maintain.

I base this statement on the following facts:

a. The Commonwealth, as employer, plays no role in the determination of eligibility for benefits under the "current fund" ... In fact, all determinations as to eligibility to receive benefits are made by the Board of Trustees of the Health and Welfare Fund, not by the Commonwealth as the Employer. Pursuant to the contract between the Employer and the Alliance, our obligation as the employer is solely to make monetary contributions to the fund, in an amount based upon the number of full time employee equivalents (F.T.E.'s) in the bargaining units represented by the Alliance.

b. Effective October 2, 1989, the date upon which M.C.O.F.U. was certified as the exclusive representative of employees in Unit 4, the number of F.T.E.'s represented by the Alliance decreased by the number of F.T.E.'s in bargaining unit 4; accordingly...I directed that contributions to the Alliance Health and Welfare Fund be decreased by the amount of money representing $6/wk x # F.T.E.'s in bargaining unit 4. I view this action as my obligation as an official of the Commonwealth since contractually, the Alliance union is only entitled to receive contributions for the number of F.T.E.'s in the bargaining unit it represents, not for FTE's in any other bargaining unit represented by M.C.O.F.U., or any other union. I do not view this action as lending "unlawful support ... to an incumbent union" ... Indeed, I view it as the only appropriate action, since I believe I would be derelict in my duties as a public official to allow gratuitous payments...to be made to an entity...not legally entitled to receive those funds ...even if I were to continue making contributions to the Alliance Fund, as you suggest at page 3 of your letter, the employer is still in no position to mandate that MCOFU-represented employee receive benefits.

Your alternative suggestion, i.e., that pending completion of bargaining for a collective bargaining agreement between MCOFU and the Commonwealth, a "separate trust" be established to provide Health & Welfare benefits to employees in Unit 4, is also impossible for me to perform. Such an arrangement would be in the nature of a collective bargaining agreement, and would require a pool of funds, neither of which exists...if you would point to the existing legislative appropriations for Health and Welfare funds as the source of funds for your alternative suggestions, I suggest the language of the appropriation enactments would prohibit payment to any entity not identified in the enactment itself.

McKeon's October 26 letter constituted the first notice from the Commonwealth to MCOFU that the Commonwealth had discontinued Fund payments on behalf of Unit 4 employees.

On November 20, 1990, MCOFU filed an action against the Commonwealth in Superior Court seeking injunctive and declaratory relief to prevent the Commonwealth from discontinuing contributions to the Fund. On November 29, 1989, the Superior Court denied MCOFU's request for a preliminary injunction, without opinion.

The Fund stopped providing dental and vision benefits to Unit 4 employees on November 30, 1989. McKeon played no personal role in the Fund's decision to

discontinue benefits to Unit 4 employees.[8] Since that time, Unit 4 employees have incurred expenses for vision and dental care previously covered by the Fund. Effective March 1, 1990, MCOFU established an emergency dental plan for dues paying members that pays fifty percent (50%) of emergency dental services. Because MCOFU has funded that plan with union dues, that dues money has been unavailable for collective bargaining related purposes.

Since November 30, 1989, some Unit 4 employees have received material in AFSCME envelopes referencing, inter alia, the loss of dental and vision benefits and including a form for revoking MCOFU dues check-off authorizations. Some Unit 4 employees have revoked their dues authorizations, citing the lack of dental and optical benefits.

OPINION

At the expiration of a collective bargaining agreement, an employer may not unilaterally change conditions of employment which affect mandatory subjects of bargaining. The employer first must notify the exclusive representative and provide an opportunity to bargain to resolution or good faith impasse. Commonwealth of Massachusetts, 9 MLC 1355, 1358 (1982). See National Labor Relations Board v. Katz, 369 U.W. 736, 50 LRRM 2177 (1962). "The terms of an expired agreement thus retain legal significance because they define the status quo." Derrico v. Sheehan Emergency Hospital, 844 F.2d 22, 26, 127 LRRM 3201, 3204 (2nd Cir. 1977).

Acknowledging the general principle that terms and conditions of employment must be maintained after contract expiration, the Commonwealth advances several arguments in defense of its actions in the present case. The Commonwealth contends that (1) neither its contributions to the Fund nor the dental and vision benefits provided by the Fund are a "term or condition of employment"; (2) the change in exclusive representative (from Alliance to MCOFU) extinguished its duty to continue the status quo ante obligation to contribute to the Fund because the status quo ante obligation was contractual and dependent upon a collective bargaining contract with the Alliance; and (3) in the absence of a legislative appropriation for the Fund contribution, the Commonwealth could not legally contribute to the Fund for

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[8] MCOFU objected to the hearing officer's recommended finding on this point on the grounds that "the record evidence including the reasonable inferences to be drawn from the undisputed facts, do not support the hearing officer's conclusion that the Fund's discontinuation of benefits was unaffected by McKeon's cutoff of contributions to the Fund." We agree that it is reasonable to infer that the Commonwealth's termination of contributions was related to the Fund's subsequent discontinuation of benefits. Our finding, however, is instead a determination that McKeon played no personal role to influence the decisions of the Trustees; and our finding is uncontradicted by the record evidence.

employees in Unit 4. We address each argument seriatim, turning first to the issue of whether payments to a health and welfare trust fund for the provision of dental and vision benefits are a mandatory subject of bargaining for employees of the Commonwealth.

The Mandatory Subject of Bargaining

As a general proposition, the Commission has held that life and health insurance are mandatory subjects of bargaining, Worcester Police Officials Association, 4 MLC 1366, 1370 (1977), and that insurance costs are encompassed by the term "wages, hours, standards of productivity and performance, and any other terms and conditions of employment" in Section 6 of the Law. Medford School Committee, 4 MLC 1450, 1453-1454 (1977), aff'd sub nom. School Committee of Medford v. Labor Relations Commission, 8 Mass.App.Ct. 139 (1979), aff'd 380 Mass. 932 (1980). See also Anderson v. Board of Selectmen of Wrentham, 406 Mass. 508 (1990); Town of Milford, 15 MLC 1247, 1252 (1988).

Although the Commission has not had the opportunity to consider the specific issue of whether health and welfare trust fund payments are a mandatory subject of bargaining, case law in the Commonwealth suggests that such payments should be analogized to wages regardless of whether the benefits are provided through a union-sponsored trust fund.[9]

Our federal counterpart, the National Labor Relations Board (NLRB) has

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[9] See, e.g., Kerrigan v. City of Boston, 361 Mass. 24 (1972), a declaratory judgment action in which the plaintiffs' sought a decree that the City was empowered to make payments to a teachers' union health and welfare fund pursuant to a collective bargaining agreement. The Court held that the trust fund payments were included in the G.L. c.149, Section 178 (the precursor to G.L. c.150E) definition of "wages" for collective bargaining purposes and stated that "(P)ayments to the Fund have no different impact on the City from direct payments to the teachers. But provisions for payment to third persons (a trust fund) may be very much in the teachers' interest):" at 28. See also, Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Town of Chatham, 404 Mass. 365 (1989) which involved a union-sponsored health and welfare plan providing indemnity-type group health insurance benefits. The Court held that under G.L. c.32B, the municipal employer was permitted to contribute to this play, which provided insurance coverage to police officers through collective bargaining, as well as to an insurance company plan under which other of the municipal employees received coverage. The Court did not distinguish between the insurance plans on the basis that one was a union-sponsored health and welfare plan. (This case arose prior to the c.32B amendment specifically authorizing municipal employers to make payments to a health and welfare trust fund, see, fn.12, below.)

consistently interpreted the National Labor Relations Act to include health and welfare trust fund payments as a mandatory subject of bargaining that survives a contract's expiration because of the employer's obligation to maintain the status quo ante pending further negotiations. Farmingdale Iron Works, 249 NLRB 98, 99 n.5 and 6 (1980); Harold W. Hinson, d/b/a Hen House Market No. 3, 175 NLRB 596 (1969), enf'd. 428 F.2d 133 (8th Cir. 1970). See, e.g., petroleum Maintenance Co., 290 NLRB 462, 463, 131 LRRM 1162, 1163 (1988); Cauthorne Trucking, 256 NLRB 721, 107 LRRM 1281, 1282 (1981), enf'd in rel. part, 691 F.2d 1023, 111 LRRM 2698, 2700 (D.C. Cir. 1982); Peerless Roofing Co. v. NLRB, 641 R.2d 734, 107 LRRM 2330, 2331 (9th Cir. 1981). Cf., Producers Dairy Delivery v. Pension Fund, 654 F.2d. 625, 108 LRRM 2510 (9th Cir. 1981) (pension fund contributions must be maintained post-contract expiration until negotiations reach impasse).

The fact that an employer contributes to a trust fund, which in turn provides or contracts for certain health and welfare benefits or insurance, rather than directly purchases health or other insurance coverage from an insurance carrier or provider system, or even establishes a self-insurance plan, is not determinative of whether the payments are a mandatory subject of bargaining. Rather, the test applied to health and welfare trust fund payments is the traditional mandatory/permissive analysis which "balances the interest of employees in bargaining over a particular subject with the interest of the public employer in maintaining its managerial prerogatives." Town of Danvers, 3 MLC 1559, 1577 (1977). See also, Kerrigan v. City of Boston, 361 Mass. 24, 28 (1972). Considered under this analysis are: "the degree to which the topic has direct impact on terms and conditions of employment; whether the issue involves a core government decision or whether it is far removed from terms and conditions of employment." Town of Danvers, 3 MLC at 1577.

Judged by these standards, we find that the Commonwealth's payment of $6.00 per week is an economic benefit enjoyed by Unit 4 employees, and therefor is a mandatory subject of bargaining. The $6.00 per week payment secured vision and dental care coverage for Unit 4 employees through the Fund's administration. The Commonwealth's payment did not involve a "core" governmental decision "fundamental to the basic direction of" the enterprise, Town of Danvers, 3 MLC at 1571, quoting Fibreboard Paper Products Corp. v. National Labor Relations Board, 379 U.S. 203, 221-223 (1964). The Commonwealth's argument that an employee has "no interest" in the $6.00 per week contribution is inconsistent with a generally accepted understanding of employee fringe benefits and their appropriate classification as "wages." See Kerrigan v. City of Boston, 361 Mass. at 28 (and cases cited therein).

The Commonwealth urges us to conclude, however, that in Massachusetts a union representing state employees may not demand to bargain about individual health care benefits such as dental or vision coverage, but may only demand to bargain about the percentage of an employer's contribution toward the costs of

group health insurance.[10] Although the Commonwealth's argument on this point is somewhat conclusory, we have considered the statutory framework surrounding the provision of group health and life insurance for employees of the Commonwealth, which is administered by the Group Insurance Commission under G.L. c.32A, and conclude that the legislature has not demonstrated an intent to limit or preclude bargaining over dental and vision benefits regardless of the administrative mechanism employed to pay for them.[11]

G.L. c.32A, §1, which describes the purpose of the contributory group insurance system, states:

> The purpose of this chapter is to provide a program of group life insurance, group accidental death and dismemberment insurance for certain persons in the service of the Commonwealth, and group general or blanket hospital, surgical, medical, dental and other health insurance for such persons and their dependents.

In 1987, G.L. c.32A was amended to include, in Section 17, a provision for reimbursement by the Commonwealth through the Group Insurance Commission of dental and vision benefits, subject to appropriation, to a maximum of $200 per year per eligible employee, for managers, confidential employees, members of the general court and retirees. St. 1987, c.697, §113. The statute is silent, however, on the provision of dental and vision benefits for employees represented by an employee organization, and the Commonwealth has not pointed to any dental and/or vision benefits provided to organized employees through the auspices of the Group

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[10] It is unclear whether the Commonwealth is arguing first that dental or vision coverage is either a permissive or illegal subject of bargaining; and/or second that the provision of dental and vision coverage by a trust fund should be considered nonmandatory. We assume that since the Commonwealth has been negotiating with the Alliance over health and welfare trust payments to provide dental and vision benefits, that the Commonwealth's argument is that such payments were permissive and were extinguished at contract expiration. Because we find that the payments at issue are a mandatory subject of bargaining, we need not consider the effect of a contract's expiration on permissive subjects. For a detailed discussion of this subject, see Weeks, Continuing Liability under Expired Collective Bargaining Agreements, 15 Oklahoma City Univ. Law Review, 1-209; 359-602 (1990).

[11] In Commonwealth of Massachusetts, 4 MLC 1869, 1877, n.9 (1978), the Commission declined to reach the issue of the negotiability of decisions regarding group insurance coverage for state employees, but stated, "[u]nder the balancing test adopted in Town of Danvers, 3 MLC 1553 (1977), the nature and structure of the GIC (Group Insurance Commission) would be given consideration in determining the negotiability of these areas."

Insurance Commission.[12] Because G.L. c.32A is a statute not listed in Section 7(d) of c.150E, any terms of a collective bargaining agreement which specifically conflict with the terms of that statute would be superseded by the statute. Town of Ludlow, 17 MLC 1191, 1196-1197 (1990); School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 566 (1983). As we have noted, however, the conflict resolution mechanism of Section 7(d) of the Law does not foreclose collective bargaining over insurance issues.[13] Ludlow, 17 MLC at 1197 ("[a] collectively bargained agreement specifying the terms of insurance coverage need not conflict with [G.L. c.32B]").[14] Accord, School Committee of Medford v. Labor Relations Commission, 380 Mass. 932 (1980) (rescript).

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12 St. 1988, c.82 amended G.L. c.32B, §15 to expressly permit municipal employers to make payments to a health and welfare trust fund agreement under certain conditions. Although there is no Section 32A counterpart to this specific provision, the Legislature annually has appropriated monies for the Fund and other health and welfare trust funds, thereby authorizing such payments.

13 The Group Insurance Commission, established by G.L. c.32A, section 3, has adopted a regulation which states in part that "[n]othing in M.G.L. c.32A shall be construed as being within the jurisdiction of any of th provisions of M.G.L. c.150E...." and "[a]ny reference to group insurance in a collective bargaining agreement shall be informational only and shall not be binding or have any force or effect upon the Group Insurance Commission." The Commonwealth does not argue that this regulation has any bearing on the present case, and we note that the regulation which purports to limit the scope of G.L. c.150E, does not comport with the Commission's interpretation of the Law.

14 The issue of potential conflict between the bargaining obligation and the provisions of the group insurance laws is a theme that runs through several early court cases. Watertown Firefighters, Local 1347, I.A.F.F., AFL-CIO v. Town of Watertown, 376 Mass. 706, 711 (1978), for example, cautions against "encouraging a competitive scramble" and preventing "serious impairment of the basic advantages of the group insurance program which derive from wide distribution of risks and uniform administration," but specifically notes as to municipal employees, that "the statutory regulation of group insurance...does not exclude all collective bargaining by a union on the subject..." at 715, n.19. The terms and conditions of employment about which bargaining has not been required have been limited to the "specific requirements" of statutes not listed in Section 7(d). See Commonwealth v. Labor Relations Commission, 404 Mass. 124, 126-127 (1989) (no inconsistency between St. 1983, c.717's provision that salaries of data processing professionals be determined by Commissioner of Administration and the imposition of a prior bargaining obligation on the Commonwealth). Also see, Dedham v. Labor Relations Commission, 365 Mass. 392, 402 (1974) (court should construe potentially overlapping or conflicting statutes "so as to constitute a harmonious whole...").

G.L. c.32A does not prohibit the Commonwealth from bargaining collectively about dental or vision coverage or establishment of a health and welfare trust fund to provide such coverage. Since at least 1986, the Legislature has been aware that the Commonwealth has entered into collective bargaining agreements with the Alliance, as well as with other unions representing bargaining units of state employees, that require contributions to health and welfare trust funds to provide dental and vision coverage and has annually appropriated money to fund such contributions. See 1986 Mass. Stat. ch.440. We discern no grounds, therefore, to find that either the Fund payments or the general subject of dental and vision benefits for state employees have been excluded from the ambit of "wages, hours... and other terms and conditions of employment" described in Section 6 of c.150E.

The Effect of the Change in Bargaining Representative

The Commonwealth next argues that any right to the Fund payments was a right accruing only to the Alliance, and that the employees' vote to change the unit's bargaining representative extinguished the Commonwealth's obligations to continue the contributions.[15]

When employees select a new bargaining representative, the employer's obligation to maintain the status quo is unaffected. To find otherwise would unduly restrain employees from selecting the bargaining representative of their choice. There are, therefore, only a limited number of contractual provisions generally exempted from the status quo requirement.[16] See, e.g., Southwestern

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[15] At other points in its post-hearing memorandum, the Commonwealth appears to contend that the right to the trust fund payments is a benefit belonging to the Alliance as an organization, rather than to the employees in the bargaining unit. Assuming, arguendo, that the Commonwealth could make payments to a labor organization without any putative benefit to employees, we do not find that the Commonwealth has engaged in such a practice i this case. Rather, the payments to the fund are for the purpose of securing certain benefits for employees. The fact that the Commonwealth has not retained exclusive control of the Fund, and does not exclusively determine the benefits to be paid from the Fund does not alter the conclusion that the payments constitute a form of compensation to employees and thus are a mandatory subject of bargaining. Just as the Fund's additional legally enforceable fiduciary concerns are separate from, although related to, the interests of the bargaining unit employees so too are any union interest in collecting and transmitting Fund payments. The instant case concerns neither the Fund's interests nor the union's interests but instead concerns the interests of bargaining unit employees to retain their terms and conditions of employment, despite a change in the identity of their bargaining representative.

[16] The NLRB has excepted an employer from the obligation to maintain payments (continued)

Steel & Supply, Inc. v. NLRB, 806 F.2d 1111, 1114, 123 LRRM 3290, 3292 (D.C. Cir. 1986) (union security clause and dues checkoff provisions require an existing collective bargaining agreement through the operation of Section 8(a)(3) of the NLRA and Section 302(c)(4) of the LMRA; a private sector union's right to strike is not deemed waived post-contract expiration by a waiver during contract term). But see, Wood's Hole, Martha's Vineyard and Nantucket Steamship Authority, 12 MLC 1531, 1554 (1986) (dues checkoff survives contract expiration under G.L. c.150A because Massachusetts statutes do not require existing collective bargaining agreement).

The Effect of the Terms of the Trust Agreement

The policies of c.150E require application of the status quo rule to health and welfare trust fund payments. The fact that the Trust Fund has exclusive authority to determine eligibility and benefit levels does not alter the Commonwealth's obligation to maintain the status quo ante. If the Trust Fund independently had taken some action which would have precluded Unit 4 employees from receiving benefits after MCOFU was certified as their bargaining representative, or had announced an intent to deny Unit 4 claimants benefits, the Commonwealth legitimately could have responded to such action by notifying the exclusive bargaining representative of the Trust Fund's action and negotiating about the issue. For example, the NLRB has found that an employer's cessation of payments to a trust fund that, post-contract expiration, increased its premiums and would not accept premium contributions at the old (i.e., status quo) rate, was not an unlawful unilateral change. Clear Pine Mouldings, 238 NLRB 69, 80, 99 LRRM 1221 (1978). The employer in Clear Pine Mouldings, however, was found to have violated the NLRA by purchasing a substitute insurance plan without first consulting with the union. The NLRB has opined that an employer could demonstrate its commitment to bargain in good faith by depositing the contributions into an escrow account pending negotiations if the trust fund refuses to accept them. Clear Pine Mouldings, 238 NLRB at 80. The success of the employer's defense in such cases requires an "independent

16 (continued)
to negotiated health and welfare or pension fund plans post-contract expiration in the following limited circumstances: (1) when the employer can demonstrate that at the time it ceased making the payments no union represented the employees, Cauthorne Trucking, 107 LRRM at 1282, and (2) where the collective bargaining agreement expressly provides for termination of the employer's obligation to contribute to the trust. See, e.g., M.J. Santilli Mail Services, Inc., 281 NLRB 1288 (1986). Neither exception applies here. Specifically, the collective bargaining agreement between the Alliance and the Commonwealth contains no provision that the Commonwealth's obligation to contribute to the Fund expires with the expiration of the collective bargaining agreement. Thus, the condition of employment, i.e., the contribution of $6.00/week/FTE to secure health and welfare benefits for Unit 4 employees, was not contractually limited to the term of the contract.

showing that postexpiration...contributions would have been rejected and/or coverage denied by the trustees." Crest Beverage Co., Inc., 1231 NLRB 116, 119 (1977).[17]

In the present case, we cannot reach the issue of whether the Commonwealth was privileged to cease payments to the Fund because of action taken by the Fund. The undisputed facts demonstrate that the Commonwealth unilaterally and prior to any action by the Fund to terminate coverage of Unit 4 employees, notified the Fund that it would cease making contributions for Unit 4 employees.

We also find no support for the Commonwealth's claim that the Trust Agreement establishing the Fund mandated the cessation of contributions for Unit 4 members. The Trust Agreement is silent as to the specific effect of the certification of a different union as representative of any of the bargaining units covered by the agreement.[18] Moreover, the Trust Agreement appears to permit the enrollment of any "common-law employee" of the Commonwealth subject to the Trustees' approval of the arrangement.[19] Additionally, the Trust Agreement anticipates that another union representing Commonwealth employees may become a signatory to the Agreement. See note 3, supra. Moreover, even assuming, arguendo, that the provisions of the Trust terminated the participation of bargaining unit employees upon certification of a different union, the Commonwealth had a continuing obligation to bargain in good faith with MCOFU by maintaining or attempting to maintain the status quo in some form until after having given MCOFU notice and an

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17 In other cases, the NLRB has utilized its broad remedial authority to require health and welfare or pension trusts to accept contributions to remedy unfair labor practices. See United Brotherhood of Carpenters, Local #1913, 213 NLRB 363, n.1, 87 LRRM 1700, 1701 (1974), mod'f., 531 F.2d 424, 91 LRRM 2542 (9th Cir. 1976); Jacobs Transfer, Inc., 227 NLRB 1231, 1233, 95 LRRM 1589, 1591 (1977).

18 At least one federal appellate court has voided an attempt by an employer and union to terminate a pension trust after a different union was chosen by the employees to be their bargaining representative on the grounds that only the new union could bargain with the employer. Brick & Clay Workers v. District 50, 439 F.2d 311, 76 LRRM 2813, 2814 (8th Cir. 1971).

19 The Trust Agreement, as amended, specifies that the purpose of the Trust is to provide health and welfare coverage for employees. The Trust Agreement, as amended, defines "employee" as "any person who is a common-law employee of the Employer included in a collective bargaining unit represented by a Union and with respect to whom contributions are payable to the Trust Fund either: (a) [p]ursuant to a written agreement executed by the Employer and the Union, and approved and accepted by the Trustees; or (b) [p]ursuant to a written agreement executed by the Trustees." First Amendment to Agreement and Declaration of Trust of the Massachusetts Public Employees Health and Welfare Fund, Section 1.

opportunity to bargain to agreement or impasse.[20] See Clear Pine Mouldings, 238 NLRB at 80.

The Impact of State Finance Law

The Commonwealth also argues that the continuation of its premium contributions after MCOFU's certification would have violated "the state finance law."[21] Therefore, the Commonwealth contends that its cessation of the payments to the Fund is excused on the grounds of impossibility of performance. However, consideration of statutory requirements, case law and the legislative history of the appropriation for payments to health and welfare trust funds leads us to conclude that state finance law does not preclude such payments.

We agree with the Commonwealth that when the Legislature appropriates funds, the appropriation specifies the purpose for which the money may be spent. The Supreme Judicial Court has described the authority of the executive branch to expend funds "in such manner that the executive officers of the government are authorized to use that money, and no more, for that object and for no other." Slama v. Attorney General 384 Mass. 620, 625 (1981) (citations omitted). We do not agree, however, that the specific appropriations that were made for health and welfare trust fund payments in fiscal year 1990 prohibited the Commonwealth from continuing to contribute to health and welfare benefits for Unit 4 employees after MCOFU's certification.

Ch.240 of the Acts of 1989, §2, line item 1108-3200, appropriated over $13 million for the Commonwealth's fiscal year 1990 contribution to "health and welfare funds established pursuant to certain collective bargaining agreements...calculated as provided in the applicable collective bargaining agreement..." At the time it terminated premium contributions to the Fund, the Commonwealth had no collective

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20 We discuss below in the Remedy section the options available to the Commonwealth.

21 No specific citation was provided to identify the Commonwealth's reference to "the state finance law." We presume the the Commonwealth is referring to Sections 18, 26 and 27 of G.L. c.29. Section 18 provides in relevant part that "no money shall be paid by the Commonwealth without a warrant from the Governor drawn in accordance with an appropriate then in effect...." Section 26 provides in relevant part that "[e]xpenses of offices and departments for compensation of officers, members and employees and for other purposes shall not exceed the appropriations made therefore by the general court...." Section 27 provides in relevant part that "...no department...shall incur an expense...unless an appropriation by the general court and an allotment by the Governor, sufficient to cover the expense thereof, shall have been made..."

bargaining agreement with MCOFU. As a result, the Commonwealth claims that it could not expend any of the appropriate money for the continuation of health and welfare benefit payments for Unit 4 employees.[22] The appropriation language, however, does not seem to limit the health and welfare benefit payments to identified collective bargaining agreements, but rather appears to authorize payments to any fund established pursuant to a collective bargaining agreement. Similarly, the appropriation language does not limit the Commonwealth's contribution to an amount specified in an identified collective bargaining agreement; but rather, authorizes contributions that are calculated according to the terms of "applicable" collective bargaining agreements. If the Commonwealth and MCOFU agreed to continue the participation of Unit 4 employees in the Fund, any contribution made by the Commonwealth still would have been to a "health and welfare [fund] established pursuant to [a] ... collective bargaining agreement..." since the Trust was established pursuant to the collective bargaining agreement between the Alliance and the Commonwealth. Further, the amount of the Commonwealth's contribution initially would have been calculated as provided by the terms of the expired collective bargaining agreement between the Commonwealth and the Alliance,[23] and thus would appear to have satisfied the requirements of the appropriation language. Alternatively, if the Commonwealth and MCOFU had executed a written agreement, accepted by the Fund Trustees, to continue to contribute to the Fund, there is no reason to conclude that such an agreement could not have constituted an "applicable" collective bargaining agreement within the meaning of the appropriations language.

The Commonwealth also argues that the language of the line item 1108-3200 appropriation forbade Fund contributions based on a FTE calculation which included non-Alliance members. However, this interpretation is inconsistent with the general purpose expressed at the original creation of the line item. In 1986,

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22 The Commonwealth has conceded that, even in the absence of the specific line item appropriation for contributions to health and welfare trust funds, the Commonwealth's contributions in this case could be paid from the general appropriation for the Department of Corrections. Specifically, the record in this case contains, as exhibit 10, the Commonwealth's answer and memorandum opposing injunctive relief to the complaint filed by MCOFU in Suffolk superior Court Civil Action 89-6528-C, seeking to enjoin the Commonwealth's discontinuation of Fund contributions. The Commonwealth's memorandum identifies a potential alternate source of money to continue health and welfare contributions and states that in the absence of legislative funding (through the specific line item appropriation) for Fund contributions, the funds "would have to come out of the Department of Corrections."

23 The Commonwealth's obligation to continue the same level of contributions following expiration of the collective bargaining agreement with the Alliance was a consequence of its obligation to bargain in good faith with MCOFU by maintaining the status quo ante, as discussed above.

then-Governor Michael S. Dukakis, in a message to the Senate and House of Representatives, recommended the creation of a separate appropriation account for health and welfare trust fund payments, with the following explanation:

> I am also recommending that an appropriation account (1105-2000)[24] be established under OER [Office of Employee Relations] to meet the basic ongoing cost of the Commonwealth's contributions to the several Health and Welfare trust funds which provide for supplemental medical, dental, and optical benefits for over 41,000 Executive agency employees. While the FY 1987 budget contains funding for similar obligations in the Judiciary, Higher Education, and two of our other bargaining units, it does not include an appropriation to cover such costs for the remaining Executive agency bargaining units. The 8.75 million appropriation recommended herewith reflects the estimated amount needed to meet our legal obligation of contributory funding for these important employee benefit programs. A separate Appropriation of $110,000 (in item 0604-0096) is recommended in order to address this obligation with respect to the agreement covering employees of the State Lottery Commission."

This recommendation was enacted as c.440 of the Acts of 1986,[25] which, in Section 1, identified the Alliance agreement as the source of the "employee economic benefits" specifically funded by line item 1105-2000. Appropriations to this account in subsequent fiscal years merely refer to "certain collective bargaining agreements" without specifically identifying the employee organization which was party to each of the various agreements covering executive branch employees. Moreover, the subsequent appropriation language does not limit the Commonwealth's authority to contribute to health and welfare trust funds created after the effective date of the legislation.

We believe that the appropriations language, when read in conjunction with the purposes of Chapter 150E, authorizes continued expenditures for health and welfare benefits despite a change in bargaining representative. There is no evidence that the Legislature would so interfere with employee free choice as to condition the function of health and welfare benefits on the selection of a particular bargaining representative. When the Legislature appropriates funds for wage increases negotiated between the Commonwealth and the various unions

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[24] The line item number has been changed at least once, but there is no indication that the change has any significance for purposes of this case.

[25] The record reflects that the Commonwealth began making contributions to the Fund during fiscal year 1984. Nothing in the record indicates the statutory authority for the appropriation that funded the Commonwealth's contributions to the Fund prior to fiscal year 1987.

representing state employees, for example, it also identifies the specific collective bargaining agreement authorizing the "salary adjustments."[26] The Commonwealth does not argue that the appropriation language prohibits continued payment of the adjusted salaries after the expiration of the contract if employees choose a different bargaining representative. In the absence of evidence to more convincingly distinguish between the appropriations for health and welfare trust fund payments and appropriations for salaries we conclude that the Legislature has not evinced any intent to terminate the Commonwealth's authority to expend the appropriated health and welfare funds merely because employees selected a new collective bargaining representative. Moreover, even if there was a technical impediment to the use of funds from that specific line item, nothing in this record demonstrates that other appropriations were unavailable to continue the Fund payments pending good faith bargaining between the Commonwealth and MCOFU.

Thus, we conclude that the Commonwealth's contributions to the Fund are a "term and condition of employment" and a mandatory subject of bargaining under G.L. c.150E; that neither the collective bargaining agreement with the Alliance nor the Trust Agreement extinguished the Commonwealth's obligation to maintain the Fund contributions upon the expiration of the Alliance contract and the certification of MCOFU; and that the Commonwealth was not excused from its obligation to maintain the status quo ante by the language of the Legislative appropriation for health and welfare trust fund contributions. The Commonwealth could seek to alter the status quo only by giving MCOFU prior notice and an opportunity to bargain, and was required to continue the Fund contributions pending a good faith impasse or agreement with MCOFU.

Even under the Commonwealth's theory that the appropriations language made it impossible to continue health and welfare trust fund contribution payments from line item 1108-3200, 1989 Stat. ch.240, Section 2 (and assuming that payment from the general appropriation for the Department of Corrections or from any other account was also impossible), the Commonwealth was not relieved of its obligation to give prior notice of its intent to cease Fund contributions to MCOFU so that MCOFU would have had a prompt opportunity to bargain about the issues raised by the Commonwealth's proposed action.[27] Good faith negotiations may have resulted in a creative solution.[28] Instead, the Commonwealth decided to discontinue Fund

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[27] We note that Daly's statement, in June 1989, to O'Neil that it was unlikely that the Fund would continue to provide benefits to Unit 4 employees after MCOFU's certification did not constitute notice from the Commonwealth to the certified bargaining representative of the Commonwealth's intent to terminate contributions.

[28] We note that in other cases we have concluded that an employer's obligation to bargain in good faith may also include the duty to take affirmative steps before the legislative body to insure that it can fulfill its collective bargaining (continued)

contributions for Unit 4 employees if MCOFU prevailed in the representation election, and unilaterally stopped making those contributions shortly after MCOFU's certification. By waiting until October 26, 1989 to notify MCOFU of its action the Commonwealth foreclosed MCOFU from exercising its rights pursuant to G.L. c.150E to have the opportunity to negotiate about wages and other terms and conditions of employment prior to the Commonwealth's unilateral action.

Nothing required the Commonwealth to reach agreement with MCOFU concerning new benefits for Unit 4 employees. But the Law forbids the Commonwealth from unilaterally eliminating a benefit of employment without prior notice to the exclusive bargaining representative, unless provision of that benefit, or a substantially equivalent benefit is impossible. The record in this case does not establish that it would have been impossible for the Commonwealth to continue to contribute $6.00/week/FTE for health and welfare benefits on behalf of Unit 4 employees.

CONCLUSION

Therefore, the Commonwealth has breached its obligation to bargain in good faith in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by its unilateral discontinuance of the payment of $6.00 per week per full-time equivalent employee for the provision of health and welfare benefits.

REMEDY

The object of a remedial order pursuant to the Commission's authority under Section 11 of the Law is to make the affected employees whole and to restore the status quo. Town of Ludlow, 17 MLC 1191, 1203 (1990); Newton School Committee, 5 MLC 1016, 1027 (1978), enf'd sub nom. School Committee of Newton v. Labor Relations Commission, 388 Mass. 557 (1983). Labor Relations Commission v. City of Everett, 7 Mass.App.Ct. 826, 831 (1979). When an employer fails to continue post-contract expiration contributions to a health and welfare or pension trust, the appropriate relief usually includes an order that the employer make all of the contributions as required by the expired collective bargaining agreement, and continue such contributions until it negotiates with the union to resolution or a good faith impasse. Included in such a remedy is an order to reimburse employees for any out-of-pocket costs they have incurred because of the loss of benefits. See Crest Beverage Co.,

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28 (continued)
obligations. See, e.g., City of Medford, 4 MLC 1450, 1455 (1977); Turners Falls Fire District, 4 MLC 1658, 1662 (1977); Labor Relations Commission v. Board of Selectmen of Dracut, 374 Mass. 619 (1978); Mendes v. Taunton, 366 Mass. 109 (1974). There would have been nothing to prevent the Commonwealth and MCOFU from reaching an agreement which was contingent upon specific Legislative action, if that had been required to authorize the expenditure of funds to continue health and welfare coverage for Unit 4 employees.

Inc., 231 NLRB 116, 120 (1977). The NLRB has described the appropriate remedy in similar cases as the restoration of the status quo ante "to the extent feasible where there is no evidence that to do so would impose an undue or unfair burden on the respondent." Turnbull Enterprises, 259 NLRB 934, 109 LRRM 1069, 1071 (1982).[29]

In the federal sector, the remedy is tailored to the specific circumstances. For example, where the union and employer have subsequently negotiated a new insurance plan, the employer is not required to make double payments, and the union is given the option of reinstating the prior health and welfare plan. Id. at 935. Where an employer has substituted its own plan, the order includes a requirement that employees be made whole by paying all contributions under the former plan "to the extent that such contributions have not been made or that the employees have not otherwise been made whole." Wayne's Dairy, 223 NLRB 260, 266, 92 LRRM 1229 (1976) (emphasis supplied). Even where the evidence demonstrated that a health and welfare trust refused to accept contributions at the previous (i.e. status quo) rate, and the employer was therefore privileged to cease contributions to that specific health and welfare trust,[30] an employer who unilaterally purchased a new insurance plan was required to make whole, with interest, any employee who lost money as a result of the employer's action. Clear Pine Mouldings, 238 NLRB 69, 81, 99 LRRM 1221 (1978).

An appropriate order also generally requires the employer to notify all persons employed in the bargaining unit after the date insurance benefits were discontinued of their entitlement to the make-whole remedy, Turnbull Enterprises, 259 NLRB at 935-936, and may also require that the health and welfare trust fund be reimbursed for administrative costs and loss of interest.[31] Id at 935. Where circumstances warrant, the union may be given the option of requesting the rein-

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29 The Commonwealth has conceded in its argument in Suffolk Civil Action 89-6528-C that the Commission possesses the authority to "order retroactive contribution and/or reimbursement for out of pocket expenses of employees for dental and vision services which would have been covered by the Alliance Trust fund package." [Exhibit 10].

30 In that instance, the employer could have deposited the contributions into an escrow account pending the outcome of collective bargaining to avoid liability. Clear Pine Mouldings, 238 NLRB 69, 80, 99 LRRM 1221 (1978) (pension contributions deposited into bank account).

31 The amount of interest on investments lost by a trust fund because of an employer's unlawful discontinuation of contributions is left by the NLRB to the compliance stage because the provisions of trust agreements are usually variable and complex and the fixed rate of interest applicable to back pay orders in other cases may not result in a just "make whole" remedy. Merryweather Optical, 240 NLRB 1213, 1216, n.7, 100 LRRM 1412 (1979).

statement of a prior health and welfare trust fund, or may continue a subsequently negotiated insurance plan. Ibid. The theme running through all of these cases is that individual employees must be made whole for their out-of-pocket expenditures to the extent that those costs would have been paid by the health and welfare trust fund and, to the extent feasible, the trust fund must be reimbursed up to the amount it would otherwise have received absent the employer's unlawful action.

The Commonwealth urges that any remedy be limited to reimbursement of Unit 4 employees for out-of-pocket disbursements on the theory that only individual employees in need of dental or optical services were harmed. The Commonwealth argues that MCOFU would be unjustly enriched were we to order that it receive the contributions that would have been made to the Fund absent the unfair labor practice[32] and that because the Commonwealth could not require Fund Trustees to now grant eligibility for benefits to Unit 4 employees, that an order to reimburse the Fund is "unworkable."

While we agree that employees must be reimbursed, with interest, for the legitimate expenses they incurred to secure substitute benefits, the limited remedy the Commonwealth suggests is inconsistent with the policy of restoring the status quo. The negotiated employee benefit that the Commonwealth unilaterally discontinued was a $6.00 per week per full-time equivalent employee payment into a trust fund which in turn provided dental and vision benefits. Reimbursement only to employees who incurred out-of-pocket expenses for services which otherwise would have been reimbursed by the Fund fails to restore the pool of funds which is the hallmark of an insurance program. Under the provisions of the Fund, Unit 4 employees were not necessarily restricted, in a given time period, to reimbursement equivalent to the Commonwealth's $6.00/wk FTE payment. In any given month, for example, Unit 4 employees as a group may have been reimbursed more than the Commonwealth contributed to the Fund, the additional monies coming out of the larger pool administered by the Fund or from the profits from investments, which in turn could subsidize greater benefits. The benefit of a pool of funds, used to spread the risk and generate income is a loss that Unit 4 employees have suffered for which direct reimbursement of out-of-pocket expenses fails to compensate. Moreover, a remedy which requires reimbursement to a benefits fund does not result in a windfall to the fund. To the extent that the MCOFU dental benefit fund or individual employees are reimbursed by the Commonwealth pursuant to the terms of our remedial order, those expenses are to be deducted from the $6.00/week/FTE contribution owed by the Commonwealth. The fund thus receives only the monies, if any,

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[32] The record demonstrates that MCOFU established a substitute dental benefits fund for dues-paying members. Those expenses would be reimbursable to MCOFU on the theory that MCOFU has already reimbursed some employees and should recover in their stead. The reasonable and necessary ancillary costs of administering the substitute program are also appropriately within the scope of the Commonwealth's obligation to restore the status quo ante by reimbursing MCOFU for costs incurred to provide benefits formerly funded by the Commonwealth.

remaining after benefits are paid, plus the interest it could have earned on the unlawfully withheld contributions.

Full restoration of the status quo ante in this case is complicated, however, by several factors: the Fund Trustees control the benefits, and the Unit 4 employees' new bargaining representative, MCOFU, is not represented on the Board of Trustees, which is composed of representatives of the Commonwealth and the Alliance; and there is no guarantee that the harm done to the interests of the Unit 4 employees will be redressed by an order that the Commonwealth reimburse the Fund. Neither party to this case argues that we should issue an order directed to the Trustees.[33] MCOFU suggests that if the Commission orders the Commonwealth to resume contributions to the Fund and the Trustees refuse to accept them, MCOFU will address the matter in a pending court action alleging a breach of fiduciary duty. Therefore it also urges an alternative order placing the contributions in escrow.

We think that the interests of the bargaining unit employees are best protected, and thus the policies of the Law best effectuated, by an order leaving to their representative, MCOFU, the selection of one of three options to handle the "excess" contribution amount.[34] (1) MCOFU could seek the "designation of the Fund Trustees to become a signatory to the rust Agreement pursuant to the provisions of Section ii(b) of the First Amendment of that agreement (see n.3, supra), or otherwise insure that Unit 4 employees would continue to be beneficiaries of the Fund pending bargaining. In this event the Commonwealth could thereafter reimburse the Fund with interest for the amount it should be continued to contribute on behalf of Unit 4 employees (minus the sums paid to the MCOFU dental fund and to employees to reimburse for expenses incurred), and continue to contribute at the rate of $6.00 per week per full-time equivalent Unit 4 employee pending the outcome of good faith bargaining to resolution or impasse with MCOFU over the issue of health and welfare trust fund contributions.[35] (2) MCOFU and the Commonwealth may negotiate some

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33 See, e.g., Jacobs Transfer, Inc., 227 NLRB 1231, 95 LRRM 1589 (1977) (trustees named as defendants in compliance action and, as agents of employer and union, ordered to accept health and pension trust contributions).

34 By "excess" contribution amount we refer to the amount of the $6.00/week/FTE contribution remaining after reimbursement, with interest, of individual employees for the legitimate cost of dental and vision benefits to the extent they would have been paid by the Fund, and the reimbursement, with interest, of the MCOFU dental fund for the legitimate expenses paid for benefits for Unit 4 employees which would have been paid by the Fund, including the reasonable and necessary administrative expenses of the MCOFU dental fund.

35 We recognize that the Fund would have to agree to accept such a contribution and might have to modify the benefits or the benefit eligibility period to reflect the fact that the payments are both delayed and reduced by the amount of direct reimbursement to employees and the MCOFU fund.

alternative dental and vision coverage, which could be funded initially with the amount the Commonwealth should have contributed to the Fund on behalf of Unit 4 employees. (3) MCOFU could require that the Commonwealth establish an escrow account into which the Commonwealth's unlawfully withheld benefit contributions would be deposited. Employees would be reimbursed, with interest, from the escrow account for eligible expenses incurred since November 30, 1989, to the same extent that the Fund would have paid the expense for benefits and continuing until the Commonwealth and MCOFU have bargaining to resolution or impasse over the issue of health and welfare trust fund payments. The Commonwealth has a prospective obligation to continue to contribute $6.00 per week per full-time equivalent Unit 4 employee into the escrow account pending the outcome of good faith bargaining to resolution or impasse with MCOFU over the issue of health and welfare trust fund payments.[36]

Under any option, the Commonwealth's obligation to make the employees whole is not limited by the actual dollar amount the Commonwealth would have contributed to the Fund from October 13, 1989 until it complies with this Order. If the employees' out-of-pocket expenses, plus interest at the statutorily prescribed rate, exceed that dollar amount, then as the wrongdoer, the Commonwealth bears the obligation to make the employees whole. See, Kraft Plumbing and Heating, Inc., 252 NLRB 891, 903 (1980) (order requires employer to transmit unlawfully withheld trust fund payments and to reimburse employees for any contributions they may have made, for any premiums they paid to third parties, and for any bills they paid directly to health care providers). See also, School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 557-578 (1983). If, as may be more likely, employees postponed or avoided dental or vision treatment after their insurance benefits lapsed, and therefore their total out-of-pocket expenses are less than the actual dollar amount the Commonwealth would have contributed to the Fund from October 13, 1989 until it complies with this Order, then we will require that the difference be paid to the Fund, to an agreed-upon alternative, or held in escrow, at MCOFU's option as described above. WE will leave to the compliance stage, if any, the calculation of the amount of interest due to the Fund. See, Merryweather Optical, 240 NLRB 1213, 1216 n.7, 100 LRRM 1412 (1979). Specifically included as out-of-pocket expenses are reimbursements to MCOFU for the benefits it caused to be paid out through the substitute dental fund for dues-paying members to the extent that those benefits would have been paid by the Fund, plus interest at the statutory rate, plus the reasonable and necessary administrative costs, if any, of the substitute dental benefits fund.

We will also order the Commonwealth to notify all present members of Unit 4 and former Unit 4 employees whose employment ceased after October 13, 1989, of

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[36] We note that line item 1108-3200 of c.138 of the Acts of 1991 appropriates $14,700,000 for fiscal year 1992 contributions to health and welfare trust funds.

their potential eligibility for reimbursement under the terms of this Order.[37]

The Certification Year

Finally, we must consider whether the Commonwealth's violation of Section 10(a)(5) of the Law in this case warrants an extension of the certification year.[38] The one-year certification bar period serves a variety of interests. The principal purpose of the certification year bar is to insulate the newly certified union from the disruptive pressure of outside organizing or decertification drives while it establishes a new bargaining relationship with the employer. The one year period is deemed sufficient to provide the newly certified union time to establish a productive bargaining relationship with the employer including, perhaps, agreement on a first contract. See City of Gardner, 1 MLC 1115, 1115 (1974). See Brooks v. National Labor Relations Board, 348 U.S. 96, 35 LRRM 2158, 2159 (1954). When an employer violates the Law, however, and refuses to bargain in good faith with the newly certified union, the union is denied a fair opportunity to secure a contract. As a result, full remediation of the employer's conduct, including restoration of the status quo ante, requires recreation of the insulated conditions under which the newly certified union should have been able to bargain with the employer. Recreation of the insulated conditions may require an extension of the certification year to bar any rival challenge to the union's status as exclusive representative. Mar-Jac Poultry Co., 136 NLRB 785, 786-87, 49 LRRM 1854 (1962). Although many cases in which the NLRB routinely extends the certification year are those in which the employer has refused to negotiate with the union at all, see, e.g., NLRB v. Best Products Co., 765 F.2d 903, 119 LRRM 3265, 3273 (9th Cir. 1985); Knapp-Sherril Co. v. NLRB, 488 F.2d 655, 85 LRRM 2289, 2291 (5th Cir. 1974), extension of the certification year is also appropriate where the employer has committed other violations of its duty to bargain in good faith. See, e.g., Stamping Specialty Co., Inc., 294 NLRB 703, 715, 131 LRRM 1740 (1989).[39]

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[37] The Commonwealth suggests that a Notice to Employees, generally a standard part of any Commission order, is not required in this case because it presented a novel issue in the Commonwealth. The intent of a posted Notice is to inform employees of their rights and the Commission's action in a particular case, and therefore it is an appropriate provision of any remedial order.

[38] 456 CMR 14.06(2) provides that "except for good cause shown, no election shall be directed...in any bargaining unit...within which a valid election has been held in the preceding twelve months....(T)he Commission will not process a petition for an election in any bargaining unit...when the Commission has issued a certification of representatives within the preceding twelve months."

[39] Even where the NLRB has not specifically extended the certification year, some courts have construed the employer's obligation to comply with a remedial (continued)

One of the factors that determines whether the certification year should be extended is the degree to which the unfair labor practices undermined the bargaining relationship. Stamping Specialty Co., Inc., 294 NLRB at 703, n.3. Cf. Guerdon Industries, Inc., 218 NLRB 658, 661, 89 LRRM 1389, 1393 (1975) (where employer has withdrawn recognition from a union based upon a doubt of the union's continued majority status, the withdrawal of recognition may be unlawful if the employer has committed unfair labor practices "of such a character as to either affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself.")

In the present case, the Commonwealth unilaterally ceased payments to the Fund at the outset of MCOFU's certification year, an action affecting the whole bargaining unit, and an action which we have found caused some MCOFU members to revoke their dues authorizations. When we determined that probable cause existed to believe that the Commonwealth had engaged in such a prohibited practice, we concluded that the conduct alleged was sufficiently injurious to the collective bargaining rights of Unit 4 employees to warrant "blocking" a representation petition filed by AFSCME on October 3, 1990, the date when MCOFU's original certification year ended. Commonwealth of Massachusetts, 17 MLC 1650, 1656 (1991). We are now compelled to conclude that an extension of MCOFU's certification year is warranted to permit MCOFU a fair opportunity to negotiate with the Commonwealth about, inter alia, the health and welfare benefits contributions, free from the pressure of outside organizing or decertification drives and bolstered by restoration of the terms and conditions of employment that should have been maintained by the Commonwealth.

There remains the issue of the appropriate length of the certification year extension. The general rule in the federal sector is that the time period should compensate for the failure to bargain during any period of the certification year, Mid-City Foundry Co., 167 NLRB 795, 799, 66 LRRM 1154 (1967). Typically the amount of time that extends from the date of the employer's unlawful acts until the end of the certification year is considered an appropriate extension period. Haymarket Bookbinders, Inc., 183 NLRB 121, 74 LRRM 1370, 1374 (1970). Thus, when the parties engaged in good faith bargaining prior to the employer's prohibited practice, the time spent in good faith bargaining generally will be subtracted from the on-year certification extension. Similarly, when the parties engage in good faith bargaining after an approved settlement agreement designed to remedy the employer's refusal to bargain, the certification year will be shortened by the time spent in good faith bargaining pursuant to the settlement agreement. See, e.g., Mid-City Foundry Co., 167 NLRB at 799. The rule is flexible, however, and the NLRB has modified the formulaic time period in an effort to "provide the parties with a

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39 (continued)
bargaining order to insulate a union from a challenge to its presumed majority status for a "reasonable time." See NLRB v. Lee Office Equipment, 572 F.2d 704, 98 LRRM 2235, 2237-38 (9th Cir. 1978).

reasonable interval in which to resume negotiations and, possibly, reach an agreement, without unduly saddling employees with a bargaining representative they may no longer support." Dominquez Valley Hospital, 287 NLRB 149, 151, 127 LRRM 1065 (1987) enf'd sub nom NLRB v. National Medical Hospital, 407 F.2d 905, 134 LRRM 2787 (9th Cir. 1990) (certification year extended for six months instead of the two months which the general formula would indicate).

We think that the NLRB's approach also makes sense for cases arising under c.150E, in which we need to strike a balance between the right of a certified bargaining representative to a reasonable period of good faith negotiations with the employer and the rights of employees to freely choose their representative. In this case, the Commonwealth's unlawful action took place as soon as MCOFU was certified. Ordinarily, the Commonwealth's conduct would be presumed to have tainted subsequent relations between the parties and would compel a full one-year extension of the certification year. In this case, however, the Commonwealth and MCOFU have been able to establish a bargaining relationship in spite of the prohibited practice. Our ruling on MCOFU's blocking charge request, issued on April 9, 1991, permitted MCOFU and the Commonwealth to bargain as of the date of that decision. Commonwealth of Massachusetts, 17 MLC at 1658. Although the record before us does not reveal the extent to which such negotiations have been successful, we believe that MCOFU has received many of the advantages of a certification year extension as a result of our ruling in case SCR-2201, 17 MLC 1650 (1991). As a consequence we do not perceive the necessity for a full one year extension of the certification year. Instead, we believe that a six month extension of the certification year will permit MCOFU adequate opportunity to negotiate with the Commonwealth. While we recognize that we are denying MCOFU the typical one year extension of its certification year, we conclude that the period since issuance of our "blocking" charge ruling in SCR-2201 has provided MCOFU with many of the benefits of a certification year. Although not free of the Commonwealth's prohibited practice, MCOFU has had some time during which to negotiate. Therefore, we have balanced the interest of employees in preserving an insulated certification year, free of prohibited practices, against the interest of ensuring that the collective bargaining process does not serve to forever insulate an incumbent from the pressure of outside organizing or decertification drives. As part of the remedy in this case we will therefore extend MCOFU's certification for six months from the date of this decision and order.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the Commonwealth of Massachusetts shall:

1. Cease and desist from:

   a. Unilaterally changing terms and conditions of employment of employees in State Bargaining Unit 4 by failing to maintain the

status quo pending negotiations for a successor collective bargaining agreement;

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

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

a. Reimburse all members of state bargaining Unit 4 for the costs they have incurred since October 2, 1989, for dental or vision treatment or benefits which would have been paid by the Massachusetts Public Employees Health and Welfare Fund, plus interest at the rate specified in G.L. c.231, Section 6B, to the extent that those costs have not been paid by the dental benefits fund established by MCOFU;

b. Reimburse the Massachusetts Correction Officers Federated Union for expenses it incurred in establishing a substitute dental benefits fund for dues-paying members, including the benefits it paid, to the extent that the dental benefits would have been paid by the Massachusetts Public Employees Health and Welfare Fund under the benefit terms existing on October 2, 1989, and all necessary and reasonable costs of administering the substitute program, plus interest at the rate specified in G.L. c.231, Section 6B.

c. Upon written notification by the Massachusetts Correction Officers Federated Union that it has secured dental and vision benefits for Unit 4 employees from the Massachusetts Public Employees Health and Welfare Fund, or such other alternative that may be negotiated between MCOFU and the Commonwealth, such notice to be provided within thirty (30) days from the date of this decision, unless the Commission grants a request by the Massachusetts Correction Officers Federated Union to extend the time period: reimburse the Massachusetts Public Employees Health and Welfare Fund or the agreed alternative for the contributions the Commonwealth should have continued for the Unit 4 employees, minus any amount paid pursuant to the provisions of subsection(a), above, at the rate of $6.00 per week per full-time equivalent Unit 4 employee, from October 2, 1989 or such later date as the Fund specified (see n.35, above) and continuing until good faith collective bargaining with MCOFU results in either resolution or impasse on the issue of health and welfare trust fund contributions, plus lost interest on investments applicable to the contributions from October 2, 1989 until the date of the Commonwealth's payment;

d. Upon written notification by the Massachusetts Correction Officers Federated Union that it desires to have the funds due under this Order deposited into an interest-bearing escrow account, or upon the failure of MCOFU to designate an option for the disposition of the funds within thirty (30) days from the date of this decision, unless the Commission grants a request by MCOFU to extend the time period: deposit into an interest-bearing bank or other investment account, the contributions which should have been made for the Unit 4 employees, minus any amount paid pursuant to the provisions of subsection (a), above, at the rate of $6.00 per week per full-time equivalent Unit 4 employee, from October 2, 1989, and continuing until good faith collective bargaining with MCOFU results in either resolution or impasse on the issue of health and welfare trust fund contributions, plus lost interest on investment applicable to the contributions at the rate specified in G.L. c.231, §68;

e. Notify all current Unit 4 employees and former employees in Unit 4 who have left the bargaining unit since October 2, 1989, of their potential eligibility for reimbursement under the terms of this Order.

f. Upon request of MCOFU, bargain collectively in good faith over the issue of health and welfare trust fund contributions until a resolution or good faith impasse is reached.

g. Post in conspicuous places where employees represented by MCOFU usually congregate, or where notices are usually posted, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

h. Notify the Commission in writing within thirty (30) days of the service of this Decision and Order of the steps taken in compliance therewith, including the date that good faith bargaining has resumed under the terms of this Order.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

MARIA C. WALSH, CHAIRPERSON

HAIDEE A. MORRIS, COMMISSIONER

[NOTICE TO EMPLOYEES OMITTED]