

In the Matter of CENTRAL BERKSHIRE REGIONAL  
SCHOOL COMMITTEE

and

CENTRAL BERKSHIRE EDUCATION ASSOCIATION

Case Nos. MUP-01-3231, MUP-01-3232, and MUP-01-3233

|         |  |
|---------|--|
| 54.6112 | <i>prescription drug co-payments</i>     |
| 67.15   | <i>union waiver of bargaining rights</i> |
| 67.8    | <i>unilateral change by employer</i>     |
| 82.3    | <i>status quo ante</i>                   |
| 91.11   | <i>statute of limitations</i>            |

June 8, 2005

*Helen A. Moreschi, Commissioner*

*Hugh L. Reilly, Commissioner*

*Philip H. Grandchamp, Esq. Representing the Central  
Stephen N. Pagotta, Esq. Berkshire Regional School  
Committee*

*Susan Lee Weissinger, Esq. Representing the Central  
Berkshire Education Association*

**DECISION<sup>1</sup>**

Statement of the Case

On November 30, 2001, the Central Berkshire Education Association (Association) filed prohibited labor practice charges with the Labor Relations Commission (Commission) alleging that the Central Berkshire Regional School Committee (School Committee) had violated Sections 10(a)(5) and (1) of M.G.L. c. 150E (the Law). Pursuant to Section 11 of the Law and Section 15.04 of the Commission's Rules, the Commission investigated the charges and, on May 9, 2002, issued its own complaints of prohibited practice alleging that the School Committee had failed to bargain in good faith by changing health insurance benefits for: 1) professional employees, including teachers, nurses and counselors (Case No. MUP-01-3231); 2) paraprofessionals (Case No. MUP-01-3232); and, 3) secretaries and bookkeepers (Case No. MUP-01-3233), without giving the Association prior notice and an opportunity to bargain to resolution or impasse, in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

The Commission dismissed certain allegations contained in all three charges. On May 9, 2002, the Commission consolidated the three cases for hearing. The School Committee filed answers to the complaints of prohibited practice with the Commission on May 23, 2002. On October 3, 2002, the School Committee filed unopposed motions to amend the answers. The Hearing Officer granted these motions on November 1, 2002. On December 6, 2002, the parties filed a joint request to record the hearing by means of a

stenographic transcription and to designate the written transcript of the hearing as the official record pursuant to 456 CMR 13.11(4). The Hearing Officer granted the parties' joint request on December 10, 2002.

Pursuant to notice, Ann T. Moriarty, Esq., a duly-designated Commission Hearing Officer (Hearing Officer), conducted an evidentiary hearing on December 11, 12, and 13, 2002. The Commission received the School Committee's brief on April 14, 2003, and the Association's brief on April 17, 2003. The Hearing Officer issued Recommended Findings of Fact on December 11, 2003. Neither the School Committee nor the Association filed challenges to these Recommended Findings of Fact.

Findings of Fact<sup>2</sup>

The parties stipulated to the following facts:

1. The School Committee is a public employer within the meaning of Section 1 of Chapter 150E.
2. The Association is an employee organization within the meaning of Section 1 of Chapter 150E.
3. The Association is the exclusive bargaining representative for the bargaining units described in MUP-01-3231 (teachers unit), in MUP-01-3232 (paraprofessional unit), and in MUP-01-3233 (secretaries and bookkeepers unit).
4. The School Committee offered health insurance for the teachers unit pursuant to G.L. c. 32B and under G.L. c. 150E and under Article 16 of the 2000-2003 collective bargaining agreement between the parties; for the paraprofessional unit under Article 3, Section B7 of the 2001-2004 collective bargaining agreement; and for the secretaries and bookkeepers unit under Article 12 of the 1999-2002 collective bargaining agreement.
5. The School Committee is a member of a joint purchase group organized under c. 32B, section 12, the Berkshire Health Group. The School Committee, through its representative on the Berkshire Health Group, participates in the negotiation and purchase of health insurance plans for its employees. The Berkshire Health Group self funds its group health plans and is insured for catastrophic loss. BlueCross BlueShield is the plan administrator for all plans.
6. The only health insurance plans offered by the School Committee to employees of the three units from July 1, 2000 are BlueCross BlueShield Master Medical (Indemnity Plan), Blue Care Elect Preferred (PPO Plan), Blue Choice New England (POS Plan) and Network Blue New England (HMO Plan).
7. For the insurance plans identified above, the relevant benefits and payment amounts in effect for the plan year commencing July 1, 2000 and for the subsequent plan year commencing July 1, 2001, are accurately described in the findings of fact below.

1. Pursuant to 456 CMR 13.02(1), the Commission has designated this case as one in which the Commission issues a decision in the first instance.

2. The Commission's jurisdiction is uncontested.

8. The plan administrator informed members of the Berkshire Health Group that if the co-pay amounts paid by employees for the prescription drugs did not increase to \$10, \$20 and \$35 as described in Appendix A for the plan year commencing on July 1, 2001, that the premiums for that year would increase by an additional 3.5%.

9. Dennis Lane (Lane) is a teacher employed by the School Committee and has been President of the Association from 1998 through at least December 6, 2001.

10. Lane was at all times relevant hereto an insurance participant in one of the health insurance plans offered by the School Committee.

11. Lane completed and signed a BlueCross BlueShield of Massachusetts "Enrollment and Change Form" on or before May 11, 2001, and delivered it (or had it delivered or mailed) to Susan Eastwood, Head Bookkeeper for the School Committee who signed it on or before May 17, 2001.

12. The charges of prohibited practice resulting in each of the three complaints, MUP-01-3231, MUP-01-3232 and MUP-01-3233, were filed with the Commission on November 30, 2001.

13. Jane H. Casey (Casey) was at all relevant times Executive Secretary of the Association.

14. All the members in the teachers unit are college graduates and can read the English language.

15. All the members of the paraprofessionals unit are either college graduates or otherwise well-educated and can read the English language.

16. All the members of the secretaries and bookkeepers unit have a college education or are otherwise well-educated and can read the English language.

The following facts are based on testimonial and documentary evidence:

#### *Association Structure*

The Association's membership includes teachers, paraprofessionals, secretaries and bookkeepers, all of whom are eligible to vote for the Association's officers.<sup>3</sup>

The Association's executive committee consists of its elected officers, the president, vice-president, secretary, treasurer, executive secretary, and the school building representatives from all the schools in the school district.<sup>4</sup> School building representatives attend all executive committee meetings and function primarily as liaisons between the Association's membership at each school and

the Association's leadership. The school district's schools include Wahconah Regional High School, Nessacus Middle School, Craneville Elementary School, Kittredge Elementary School, and the Berkshire Trail Elementary School.

#### *Bargaining History - Health Insurance*

As evidenced below, the changes in the health insurance provisions of the contracts for all three Association bargaining units were first negotiated by the School Committee and the Association during the bargaining for teachers' contracts. The parties then negotiated and agreed to include the same or substantively similar provisions in the subsequent paraprofessionals' contracts and secretaries' contracts. There is one exception to this general rule. The first time the parties reached an agreement about including a PPO insurance plan in any of the contracts was during the negotiations with the Association's paraprofessional bargaining unit covering the period July 1, 1992 through June 30, 1995.

#### *1987-1990 Teachers' Contract*

The School Committee and the Association are parties to a collective bargaining agreement covering the period September 1, 1987 through August 31, 1990 (1987-1990 teachers' contract). The parties signed the 1987-1990 teachers' contract on October 9, 1987. Article XVI, *Insurance*, of the 1987-1990 teachers' contract, in part, provides:

A. The Committee will pay 90% of the cost of the following types of insurance coverage:

2. Group hospitalization and surgical insurance with benefits substantially equivalent to those benefits provided by Massachusetts Blue Cross and Blue Shield to teachers on December 1, 1986.

The insurance coverage provided for in Article XVI, A. 2., above, is commonly referred to as an indemnity plan that the School District is required to offer its employees pursuant to certain section(s) of M.G.L. c. 32B.<sup>5</sup>

#### *1988-1991 Secretaries' and Bookkeepers' Contract*

The School Committee and the Association are parties to a collective bargaining agreement covering the period July 1, 1988 through June 30, 1991 (1988-1991 secretaries' and bookkeepers' contract). The parties signed the 1988-1991 secretaries' and bookkeepers' contract on April 13, 1989. Article 12, *Insurance*, in part, provides:

A. The Committee will pay 90% of the cost of the following types of insurance coverage:

2. Group hospitalization and surgical insurance with benefits substantially equivalent to those benefits provided by Massachu-

3. In December 2002, there were about 116 teachers and nurses included in the Association's teacher bargaining unit, about sixty paraprofessionals included in the Association's paraprofessional bargaining unit, and about eighteen secretaries and bookkeepers included in the Association's bargaining unit of secretaries and bookkeepers.

4. An election is held in each school for the Association position of school building representative only if there is more than one candidate for that position. If there is only one person interested in serving as the school's building representative, the Association does not conduct an election.

5. The School District has adopted M.G.L. c. 32B.

settles Blue Cross and Blue Shield to unit members on January 3, 1978.

*1989-1992 Paraprofessionals' Contract*

The School Committee and the Association are parties to a collective bargaining agreement covering the period July 1, 1989 through June 30, 1992 (1989-1992 paraprofessionals' contract). The parties signed the 1989-1992 paraprofessionals' contract on January 3, 1990. Article 3, Section 7 of the 1989-1992 paraprofessionals' contract, in part, provides:

7. Health Insurance - The Committee will pay for paraprofessionals whose duties regularly require no less than 20 hours per week 90% of the cost of the following types of insurance coverage.

Group hospitalization and surgical insurance provided for teachers employed by the district.

*1990-1993 Teachers' Contract*

The School Committee and the Association are parties to a collective bargaining agreement covering the period September 1, 1990 through August 31, 1993 (1990-1993 teachers' contract). The parties signed the 1990-1993 teachers' contract on June 18, 1990. Article XVI, *Insurance*, of the 1990-1993 teachers' contract, in part, provides:

A. The Committee will pay 90% of the cost of the following types of insurance coverage:

2. *One of the following at teacher's election: group hospitalization and surgical insurance with benefits substantially equivalent to those benefits provided by Massachusetts Blue Cross and Blue Shield to teachers on December 1, 1986, or HMO coverage with such benefits and through such organization as the Committee shall from time to time select.*<sup>6</sup>

John Cicchetti (Cicchetti)<sup>7</sup> served as the Association's chief negotiator during the negotiations for the 1990-1993 teachers' contract, and Philip H. Grandchamp, Esq. (Grandchamp)<sup>8</sup> served as the School Committee's chief negotiator. During these negotiations, the School Committee proposed including a health maintenance organization (HMO) insurance plan in the insurance provision of their agreement. Grandchamp proposed amending the language in

Article XVI, *Insurance*, to include "one of the following at teacher's election" and "or HMO coverage with such benefits and through such organization as the Committee shall from time to time select." At the bargaining table, Grandchamp stated that, under his proposed language, the teachers had the indemnity plan in place as an anchor, but the School Committee was offering the teachers the opportunity to elect HMO coverage, with such benefits and through such organization as the Committee would from time to time select. Grandchamp told the Association's bargaining team that if the School Committee's HMO plan was inadequate, the teachers would stay with the indemnity plan, and, therefore, it was an incentive for the School Committee to offer a good HMO plan that the teachers would elect rather than staying with the more costly indemnity plan.

The parties discussed whether the School Committee could change HMO organizations or coverage or benefits during the term of the contract. Grandchamp stated that his drafted language meant that the School Committee could provide whatever HMO coverage it wanted to, but the language should not be objectionable to the Association because the teachers always had the indemnity plan, which the School Committee could not change without further bargaining.

The Association agreed in principal to include a HMO insurance plan in the contract, but it objected to the proposed School Committee language that the HMO coverage would be provided "with such benefits and through such organization as the Committee shall from time to time select." Rather, the Association sought language tracking, or similar to, the existing contractual language surrounding the existing indemnity plan.<sup>9</sup>

In response, Grandchamp stated that "this is a benefit we are giving you as an option" or words to that effect. Grandchamp also stated at the bargaining table that the HMO plan is new in the marketplace and "we don't know where this is going," and that the School Committee wanted to have the flexibility to change the HMO coverage at any time and in any manner it wanted to.<sup>10</sup> The School Committee maintained this position throughout these negotiations.

6. The italicized language reflects the negotiated amendments to the insurance provision of the parties' contract.

7. John Cicchetti worked for the School Committee from 1964 to 2000 as an English teacher and as the chairman of the English department at the Wahnah Regional High School. In or about 1968, Cicchetti served as the Association's president and was a member of the Association's bargaining team for the first collective bargaining agreement between the School Committee and the Association for the teachers' bargaining unit. Subsequently, Cicchetti served continuously as the Association's chief negotiator from about 1975 until 2000. As the Association's chief negotiator, Cicchetti was the chief spokesperson at the negotiating tables for the contracts covering all three of the Association's bargaining units from at least 1988 to 2000. The last contract he negotiated for the Association was the 2000-2003 teachers' contract.

8. Grandchamp has served as legal counsel for the School Committee since about 1968. In that capacity, Grandchamp has negotiated with the Association for every contract for the Association's teachers' bargaining unit from 1968 up to and including the collective bargaining agreement effective August 31, 1994 through August 31, 1997. Further, in that capacity Grandchamp has periodically participated in the negotiations for the contracts for the Association's paraprofessionals' bargaining unit and the Association's bargaining unit of secretaries and bookkeepers.

9. Although Cicchetti testified that he did not recall the Association making this counterproposal during the negotiations, the Hearing Officer credited Grandchamp's testimony that the Association did counter with this language. The School Committee placed the HMO offer on the table as a cost saving alternative to the current indemnity plan, with the financial benefit inuring in very substantial part to the School Committee if the teachers changed to the HMO plan from the more costly indemnity plan. Therefore, the Hearing Officer found that it was far more likely that Grandchamp recalled those negotiations in more precise detail than Cicchetti.

10. The Hearing Officer found that Grandchamp testified without hesitation that in discussions of that kind [health insurance] he was very blunt at the bargaining table and just said: "Look, this is a benefit we are going to offer. It is a benefit to the school district because costs will be reduced, but it will also be a benefit for the employees because it will reduce costs, but more important, it gives a different type of coverage that is on the plan. We don't know what is going to be coming up down the road, we don't know how it is going to change, and therefore, we are willing to offer it to the benefit of both, but only if we still remain in control to choose whatever the benefits are going to be, whatever the policy is going to be. Your anchor is the indemnity plan, because if you don't like what we have got, you can always go back to the indemnity." The Hearing Officer credited this testimony without challenge from either party.

The parties' negotiations about the addition of the HMO plan and the School Committee's language occurred at more than one bargaining session. During these negotiations, the parties did not discuss the identity of the HMO plan administrator, the level of hospitalization, surgical, or emergency care benefits, or prescription drug coverage. Further, the parties did not discuss prescription drug co-payments or deductibles attending any medical services under the HMO plan. At the conclusion of their negotiations, the Association accepted the School Committee's proposed language.

By a letter of agreement signed on July 8, 1992, the parties extended the 1990-1993 teachers' contract for one year.

#### *1991-1994 Secretaries' and Bookkeepers' Contract*

The School Committee and the Association are parties to a collective bargaining agreement covering the period July 1, 1991 through June 30, 1994 (1991-1994 secretaries' and bookkeepers' contract). The parties signed the 1991-1994 secretaries' and bookkeepers' contract on February 28, 1992. Article 12, *Insurance*, in part, provides:

A. The Committee will pay 90% of the cost of the following types of insurance coverage:

*2. One of the following at employee's election: group hospitalization and surgical benefit plan substantially equivalent those benefits provided by Massachusetts Blue Cross and Blue Shield to employees on December 1, 1986, or HMO coverage with such benefits and through such organization as the Committee shall from time to time select.*<sup>11</sup>

#### *1992-1995 Paraprofessionals' Contract*

The School Committee and the Association are parties to a collective bargaining agreement covering the period July 1, 1992 through June 30, 1995 (1992-1995 paraprofessionals' contract). The parties signed the 1992-1995 paraprofessionals' contract on October 13, 1994. Article 3, Section 7 of the 1992-1995 paraprofessionals' contract, in part, provides:

7. Health Insurance - The Committee will pay for paraprofessionals whose duties regularly require no less than 20 hours per week 90% of the cost of the following types of insurance coverage.

*a. One of the following at employee's election: a) Group hospitalization and surgical benefit plan substantially equivalent to the District's self-funded hospitalization and surgical plan, b) HMO plan with such benefits and through such organization as the Committee shall from time to time select, c) PPO plan with such benefits and through such organization as the Committee shall determine.*<sup>12</sup>

Cicchetti served as the Association's chief negotiator during the negotiations for the 1992-1995 paraprofessionals' contract, and Assistant Superintendent Carolyn Rosen (Rosen) served as the

School Committee's chief negotiator. During these negotiations, the School Committee and the Association agreed to amend Article 3, Section 7 to include an HMO insurance plan and a PPO insurance plan in the health insurance provision of the contract. The parties' discussions at the bargaining table did not include any statements by the School Committee's negotiators to the effect that, by agreeing to the language adding the HMO and PPO insurance plans, the Association was giving the School Committee the total flexibility, discretion, and right to change the HMO or PPO insurance plans without bargaining with the Association.

#### *1994-1997 Teachers' Contract*

The School Committee and the Association are parties to a collective bargaining agreement covering the period August 31, 1994 through August 30, 1997 (1994-1997 teachers' contract). The parties signed the 1994-1997 teachers' contract on September 27, 1995. Article 16, *Insurance*, of the 1994-1997 teachers' contract, in part, provides:

16.1 The District will pay 90% of the cost of the following benefits:

16.1.2 One of the following at teacher's election: (i) Group hospitalization and surgical benefit plan substantially equivalent to the District's self-funded hospitalization and surgical plan, (ii) HMO plan with such benefits and through such organization as the School Committee shall from time to time select, and (iii) PPO plan with such benefits and through such organization as the School Committee shall from time to time select.<sup>13</sup>

During the negotiations for the 1994-1997 teachers' contract, the School Committee proposed including a PPO insurance plan in their contract. Cicchetti served as the Association's chief negotiator during the negotiations for the 1990-1993 teachers' contract, and Grandchamp served as the School Committee's chief negotiator. At the time of these negotiations, the HMO plan had been included and offered to employees for at least four, if not five years. Cicchetti was not aware of any changes in the terms of the HMO benefit structure since its offering four or five years prior to 1995.

During the bargaining sessions, Grandchamp made statements about including the PPO plan in the contract that were similar to the statements he had made during the negotiations about including the HMO plan in the contract.<sup>14</sup> Grandchamp explained at the table that if a PPO plan was included in the agreement, the School Committee wanted the same rights that it had with the HMO benefit, the rights to select the PPO coverage with the benefits and the plan administrator that the School Committee selected. Because there were new members on the teachers' negotiating team, Grandchamp explained that if the PPO plan proved unacceptable to the teachers, they could choose one of the two other insurance options. The School Committee maintained its position throughout the negotiations that flexibility in the HMO and PPO plans was

11. The italicized language reflects the negotiated amendments to the insurance provision of the parties' contract.

12. The italicized language reflects the negotiated amendments to the insurance provision of the parties' contract.

13. The italicized language reflects the negotiated amendments to the insurance provision of the parties' contract.

14. The Hearing Officer credited Grandchamp's testimony about those negotiations for the same reasons that she credited his testimony about the health insurance negotiations that led to including the HMO language in the teachers' 1990-1993 contract.

necessary, and that the School Committee wanted flexibility to choose and change the plans whenever they wanted to do so.

During these negotiations, the parties did not discuss the identity of the PPO plan administrator, the level of hospitalization, surgical, or emergency care benefits, or prescription drug coverage. Further, the parties did not discuss prescription drug co-payments or deductibles attending any medical services under the PPO plan. At the conclusion of their negotiations, the Association accepted the School Committee's proposed language.

During these negotiations, the parties also agreed to include the following provision in their contract:

16.7 The Association and District agree to establish a Joint Labor Management Committee composed of equal representation from both parties which may include representatives from other employee groups, if the parties agree as to composition of such Joint Labor Management Committee, for the purpose of looking at all cost saving strategies for group hospitalization and health coverage and dental coverage options including, but not limited to, plans, deductibles and reimbursement rates which would be adopted by the parties. The parties agree to commence bargaining collectively during the term of the agreement within 30 days after the receipt of a report from such Committee.

The parties agreed to include the above provision in their contract for the expressed purpose of working together in a collaborative manner to reduce health insurance costs in the school district. During the parties' negotiations over this provision, neither Grandchamp nor any other member of the School Committee's negotiating team stated at the table that, notwithstanding their willingness to discuss these issues with the Association, the School Committee had the absolute right or discretion to modify or alter the HMO plan and the PPO plan.

#### *1994-1996 Secretaries' and Bookkeepers' Contract*

The School Committee and the Association are parties to a collective bargaining agreement covering the period July 1, 1994 through June 30, 1996 (1994-1996 secretaries' and bookkeepers' contract). The parties signed the 1994-1996 secretaries' and bookkeepers' contract on September 13, 1995. Article 12A.2, *Insurance*, in part, provides:

A. The District will pay for secretaries, clerks and bookkeepers whose duties regularly require no less than 20 hours per week 90% of the cost of the following types of insurance coverage:

2. One of the following at employee's election: group hospitalization and surgical benefit plan substantially equivalent to the District's self-funded hospitalization and surgical plan; HMO plan with such benefits and through such organization as the Committee shall from time to time determine; *PPO plan with such benefits and through such organization as the District shall determine.*<sup>15</sup>

#### *1995-1998 Paraprofessionals' Contract*

The School Committee and the Association are parties to a collective bargaining agreement covering the period July 1, 1995 through June 30, 1998 (1995-1998 paraprofessionals' contract). The parties signed the 1995-1998 paraprofessionals' contract on November 5, 1996. Article 3, Section 7a, *Health Insurance*, remained unchanged from the 1992-1995 paraprofessionals' contract.

#### *1996-1999 Secretaries' and Bookkeepers' Contract*

The School Committee and the Association are parties to a collective bargaining agreement covering the period July 1, 1996 through June 30, 1999 (1996-1999 secretaries' and bookkeepers' contract). The parties signed the 1996-1999 secretaries' and bookkeepers' contract on March 19, 1997. Article 12A.2, *Insurance*, remained unchanged from the 1994-1996 secretaries' contract.

#### *1997-2000 Teachers' Contract*

The Association and the School Committee are parties to a collective bargaining agreement covering the period August 31, 1997 through August 30, 2000 (1997-2000 teachers' contract). Articles 16.1.2 and 16.7, *Insurance*, of the teachers' contract remained unchanged from the 1994-1997 teachers' contract.

#### *1998-2001 Paraprofessionals' Contract*

The School Committee and the Association are parties to a collective bargaining agreement covering the period July 1, 1998 through June 30, 2001 (1998-2001 paraprofessionals' contract). The parties signed the 1998-2001 paraprofessionals' contract on December 12, 1998. Article 3, Section 7a, *Health Insurance*, remained unchanged from the 1992-1995 paraprofessionals' contract.

#### *1999-2002 Secretaries' and Bookkeepers' Contract*

The School Committee and the Association are parties to a collective bargaining agreement covering the period July 1, 1999 through June 30, 2002 (1999-2002 secretaries' and bookkeepers' contract). The parties signed the 1999-2002 secretaries' and bookkeepers' contract on January 6, 2000. Article 12A.2, *Insurance*, remained unchanged from the 1994-1996 secretaries' contract.

#### *2000-2003 Teachers' Contract*

The School Committee and the Association are parties to a collective bargaining agreement covering the period August 31, 2000 through August 31, 2003 (2000-2003 teachers' contract). The parties signed the 2000-2003 teachers' contract on July 14, 2000. Article 16, *Insurance*, of the 2000-2003 teachers' contract, in part, provides:

16.2 Commencing January 1, 2001, the District will pay 85% of the cost of the following benefits:

16.2.1 One of the following at teacher's election: (i) Group hospitalization and surgical benefit plan substantially equivalent to the Dis-

15. The italicized language reflects the negotiated amendments to the insurance provision of the parties' contract.

trict's self-funded hospitalization and surgical plan, (ii) HMO plan with such benefits and through such organization as the School Committee shall from time to time select, and (iii) PPO plan with such benefits and through such organization as the School Committee shall from time to time select, (iv) *POS plan with such benefits and through such organization as the School Committee shall from time to time select, and such other medical plan(s) as the District may, but it need not, elect to provide, having such benefits and through such organization(s) as the School Committee shall from time to time select.*<sup>16</sup>

16.7 [Parties deleted the language as it appeared in the 1994-1997 and 1997-2000 teachers' contracts.]

Cicchetti served as the Association's chief negotiator during the negotiations for the 2000-2003 teachers' contract. The School Committee's primary goal during these negotiations was to reduce their contribution to the costs of health insurance premiums. After lengthy negotiations, the Association agreed to reduce the employer's contribution rate for these costs by 5%, from 90% to 85%, with the employee's share increasing by 5%, from 10% to 15%. With minimal attendant discussion, the Association also agreed to the School Committee's proposal to add a POS insurance plan and the language "and such other medical plan(s) as the District may, but it need not, elect to provide, having such benefits and through such organization(s) as the School Committee shall from time to time select." During the parties' very short discussions about including a POS plan in their agreement, no School Committee negotiator stated at the table that its proposed language meant that the School Committee retained the right and discretion to change the POS benefits without bargaining with the Association.

During these negotiations, the parties did not discuss the identity of the POS plan administrator, the level of hospitalization, surgical, or emergency care benefits, prescription drug coverage, prescription drug co-payments or deductibles attending any medical services. At the conclusion of their negotiations, the Association accepted the School Committee's proposed POS language. The parties also agreed to delete the language about the Joint Labor Management Committee (JLMC) that had appeared at 16.7 of the 1994-1997 and 1997-2000 teachers' contracts. The JLMC had met, but it was not an active committee. Further, the teachers had not expressed any concerns about the various health plan offerings to the Association. During these negotiations, the parties did not discuss prescription drug co-payments or any increases in the prescription drug co-payments under any or all of the offered health plans, nor did the parties discuss or propose changing any of the plans' benefits or deductibles to reduce the premium costs of the various health insurance plans.

#### 2001-2004 Paraprofessionals' Contract

The School Committee and the Association are parties to a collective bargaining agreement covering the period July 1, 2001 through June 30, 2004 (2001-2004 paraprofessionals' contract).

The parties signed the 2001-2004 paraprofessionals' contract on July 16, 2001. Article 3, Section 7 of the 2001-2004 paraprofessionals' contract, in part, provides:

7. Health Insurance - *The Committee will pay for paraprofessionals whose duties regularly require no less than 20 hours per week 85% of the cost of the following types of insurance coverage.*<sup>17</sup>

a. One of the following at employee's election: a) Group hospitalization and surgical benefit plan substantially equivalent to the District's self-funded hospitalization and surgical plan, b) HMO plan with such benefits and through such organization as the Committee shall from time to time select, c) PPO plan with such benefits and through such organization as the Committee shall select, d) *POS plan with such benefits and through such organization as the Committee shall from time to time select, and such other medical plan(s) as the District may, but it need not, elect to provide, having such benefits and through organization(s) as the Committee shall from time to time select.*<sup>18</sup>

During the negotiations for the 2001-2004 paraprofessionals' contract, the parties negotiated over the decrease in the School Committee's percentage contribution of the cost of the offered types of insurance coverage from 90% to 85%. The negotiated decrease in the School Committee's percentage contribution increased the employee's percentage contribution from 10% to 15%. During those negotiations, the School Committee and the Association did not discuss increases in the employee's co-payments for prescription drugs under the offered plans, nor did the School Committee inform the Association during those negotiations that the employee's co-payments for prescription drugs would increase effective July 1, 2001.

#### 2002-2005 Secretaries' and Bookkeepers' Contract

The School Committee and the Association are parties to a collective bargaining agreement covering the period July 1, 2002 through June 30, 2005 (2002-2005 secretaries' and bookkeepers' contract). The parties signed the 2002-2005 secretaries' and bookkeepers' contract on June 19, 2002. Article 12, *Insurance*, in part, provides:

A. *The District will pay for secretaries and bookkeepers whose duties regularly require no less than 20 hours per week 85% of the cost of the following types of insurance coverage:*

2. One of the following at employee's election: group hospitalization and surgical benefit plan substantially equivalent to the District's self-funded hospitalization and surgical plan; HMO plan with such benefits and through such organization as the Committee shall from time to time determine; PPO plan with such benefits and through such organization as the District shall determine, *POS plan with such benefits and through such organization as the Committee shall from time to time determine; and such other medical plan(s) as the District may, but it need not, elect to provide, having such benefits and through such organization(s) as the School Committee shall from time to time determine.*<sup>19</sup>

16. The italicized language reflects the negotiated amendments to the insurance provision of the parties' contract.

17. The italicized language reflects the negotiated amendments to the insurance provision of the parties' contract.

18. The italicized language reflects the negotiated amendments to the insurance provision of the parties' contract.

19. The italicized language reflects the negotiated amendments to the insurance provision of the parties' contract.

*Increases in Co-Payments for Prescription Drugs, Effective July 1, 2001*

The School Committee is a member of the Berkshire Health Group (BHG), a consortium of about eleven public entities formed under M.G.L. c. 32B to purchase health insurance. David Balardini (Balardini), the School Committee's business manager since 1994,<sup>20</sup> is the School Committee's designated representative to the BHG and, in that capacity, sits on the BHG board.

As early as January 2001, the BHG members, including Balardini, began discussing increasing prescription drug co-payments to reduce the costs of health insurance premiums. Specifically, the BHG discussed increasing the co-payments from \$5 for generic drugs and \$10 for brand name drugs to \$10 for generic drugs, \$20 for preferred brand name drugs, and \$35 for non-preferred drugs to reduce health insurance premiums. The plan administrator informed BHG members that, if the co-pay amounts paid by employees for the prescription drugs did not increase to \$10, \$20 and \$35 for the plan year commencing on July 1, 2001, that the premiums for that year would increase by an additional 3.5%. The School Committee incorporated its share of the projected savings in health insurance premium costs into its next budget for the fiscal year beginning July 1, 2001. The School Committee prepared that budget in mid-March 2001 for submission to each member municipality for approval during their respective town meeting held in early May 2001. Balardini did not notify the Association president or Association executive secretary that the BHG was considering increasing the prescription drug co-payments that School Committee employees, including members of the Association's bargaining units, pay for prescription drugs under the offered health insurance plans.

Prior to on or about May 2, 2001, BHG members, including Balardini, voted to increase the co-payments for prescription drugs effective July 1, 2001. The School Committee implemented the prescription drug co-payment increases on July 1, 2001. All prescription drug co-payments increased both the retail (30-day supply) and the mail order (90 supply) for the HMO, PPO, and POS plans. Under the offered indemnity plan, the mail order co-payments increased in the same amount as the HMO, PPO, and POS plan, but the retail co-insurance percentage or co-payment under the indemnity plan did not increase on July 1, 2001.<sup>21</sup> As of July 1, 2001, the School Committee paid 85% of the health insurance premiums for members of the Association's teachers' bargaining unit and paraprofessionals' bargaining unit, and 90% of the health insurance premiums for members of the Association's secretaries' and bookkeepers' bargaining unit, with the enrolled employee paying either 15% or 10% of the health insurance premium. By increasing the co-payments for prescription drugs, the premium costs for the health insurance plans paid by both the employee and

the School Committee did not increase by an additional 3.5%. The full amount of the increases in the prescription drug co-payments fell directly to the School Committee employees, including members of the Association's bargaining units, who were enrolled in the offered health insurance plans. The School Committee did not pay any portion or percentage of the increases in the co-payments for prescription drugs.

Generally, the superintendent either writes or telephones the Association's executive secretary and/or president if the School Committee wishes to discuss matters of mutual concern about the Association's bargaining units' members' terms and conditions of employment. Prior to July 1, 2001, neither the superintendent, nor any other School Committee representative, communicated directly with Casey, in her capacity as the Association's executive secretary,<sup>22</sup> for the express purpose of notifying the Association about the increases in the prescription drug co-payments, and offering to meet and negotiate with the Association about those increases in co-payments. The School Committee and the Association did not bargain about the increases in prescription drug co-payments that the School Committee implemented on July 1, 2001.

*Health Insurance Annual Open Enrollment Period Notices to Employees - May 2001*

Each year, the School Committee notifies all employees, including members of the Association's bargaining units, in writing of their opportunity to enroll and to change their health insurance plan. This time period, commonly referred to as the open enrollment period, usually occurs during the month of May. For at least ten years prior to May 2001, the School Committee has notified the teachers of the open enrollment period by placing a written notice in each teacher's mailbox located in the school where they are regularly assigned to teach each school day. These mailboxes are open slots and are used by the School Committee to deliver to each teacher his/her bi-weekly paycheck, personal mail delivered by the U.S. mail service, and various notices distributed internally by the school district. The Association has the right to communicate with members of its teachers' bargaining unit by using the school district's mail delivery system.

The School Committee's written notice of the May 2001 health insurance open enrollment period (Open Enrollment Notice) consisted of three pages stapled together: 1) the open enrollment memorandum dated May 1, 2001 (the Memorandum); 2) the Health Benefits Update (the Update); and, 3) the health insurance rate sheet (the Rate Sheet). Balardini prepared the one-sided Memorandum directed to all eligible employees and retirees dated May 1, 2001 by changing the text of a prior open enrollment period memorandum, which he had stored on his computer on a letter-

20. As the business manager, Balardini has participated in negotiations with the Association for the successor collective bargaining agreements for both the teachers' bargaining unit and the secretaries' bargaining unit since 1994. Balardini has functioned as a resource person for the School Committee's bargaining team during successor contract negotiations with the Association for the paraprofessionals' bargaining unit since 1994.

21. Under the indemnity retail plan, the enrolled employee pays 20% of the cost of the prescription drug, and the insurer pays 80% of the cost of the prescription drug.

22. Casey has worked for the School Committee since 1980 and has held various elected and appointed Association positions. Casey served as Association president from 1995 until June 2000. In June 2000, Casey was elected Association executive secretary, and she continued to serve continuously in that position from June 2000 to at least December 13, 2002. As the Association's executive secretary, Casey serves as the grievance chair and chief negotiator for all three bargaining units. Casey has been a member of the Association's negotiating teams for successor contracts for all three Association bargaining units since 1986.



head template. Although the notice is dated May 1, 2001, Balardini prepared the Memorandum on either Friday, April 27, 2001 or Monday, April 30, 2001. The Memorandum, with the emphasis in the original replicated, is as follows:

**TO: All Eligible Employees and Retirees**

**FROM: David M. Balardini, Business Manager**

**SUBJECT: OPEN ENROLLMENT-HEALTH AND DENTAL INSURANCE**

**DATE: May 1, 2001**

The District will be sponsoring the annual enrollment period during which employees and retirees eligible for health and dental insurance coverage may elect to remain with their current coverage or change to an alternate plan. Any change in coverage will become effective July 1, 2001. A listing of the various plans offered by the District and the premium information for each for 2001-02 is attached to this memo. In addition, please read the enclosed "Health Benefits Update". The type of plan which best meets your needs is, of course, an individual decision. I strongly urge you however, to take the time to compare both the costs and benefits of each plan as you consider possible changes in coverage. You may be surprised to learn the level of coverage available to you in a plan whose costs are significantly less than what you are now paying. If you are considering a change, or would like to know more about your options, a representative of Blue Cross will be available to answer your questions on May 16<sup>th</sup> from 1:00 to 4:30 pm in the Faculty Lounge at Nessacus Regional Middle School. No appointment is necessary. If you would like to speak to a representative prior to that date please call Mr. Mark Meunier at 1-800-517-2227, ext 62926. And, please do not hesitate to contact the Business Office if you are in need of assistance. Enrollment forms and details of the benefits of all plans can be obtained from the Business Office.

Again, I remind you that if you do not wish to change your coverage no action on your part is required.

If you wish to enroll or change options (plans) within our present offerings, please notify Susan Eastwood, Head Bookkeeper, at 684-1792 at the Central Office by *May 25, 2001*. It is imperative that she hears from you by that time so that the necessary paperwork required to make these changes can be finished before July 1, 2001.

If a change is not made during this time frame, then you must wait another year to make changes in the health insurance, unless your status changes.

**PLEASE REMEMBER THE DATE: BY MAY 25, 2001 TO MAKE CHANGES OR TO ENROLL WITH AN EFFECTIVE DATE OF JULY 1, 2001.**

**THE STANDARD DENTAL PLAN IS DELTA DENTAL.** Dental Insurance is *not* available to retirees.

The second page of the Open Enrollment Notice is a two-sided document entitled "Health Benefits Update", which was prepared and distributed to BHG members by Group Benefits Strategies (GBS), a consulting firm retained by BHG to assist it in procuring health insurance plans for its members. Balardini received this update from GBS on May 2, 2001 as an attachment to an electronic mail message. Balardini did not change the text of the update before printing it, but he did modify the column placement of the text on the back side. The front side of the Update consists of two columns, one with the heading "Rising Costs of Health Care" in bold print, the other with the heading "Benefit Changes for July 1<sup>st</sup>" in

bold print. At the end of the text of both front side columns appears the text in italics "Continued on p.2." The back side of the Update also consists of two columns, one with the heading "Rising Costs (continued from p. 1)," the other with the heading "Benefit Changes (continued from p. 1)." The text below, with the emphasis as it appears in the Update, is found on the back side of the Update in the column with the heading "Benefit Changes (continued from p. 1)."

#### **Other Changes - Rx Co-pays**

Blue Cross & Blue Shield (BCBS) has changed its standard prescription drug (Rx) co-pays to a 3-tiered arrangement. The three tiers are (1) generic drugs, (2) formulary or preferred brand name drugs, and (3) non-formulary or non-preferred brand name drugs. This change does not apply to Medex.

Non-formulary brand drugs are those brands that the BCBS pharmaceutical committee has determined are either lifestyle drugs or are not cost effective compared to lower cost alternatives with comparable therapeutic effect.

**Effective July 1, 2001 the new Rx co-pays for the Berkshire Health Group will be the standard BCBS co-pays as follows:**

**\$10 for generic drugs;**

**\$20 for formulary brand name drugs;**

**\$35 for non-formulary brand name drugs.**

**The co-pays above apply to a 30-day supply of medication at the retail pharmacy AND to a 90-day supply of medication through the Mail Order service.**

The health plans that have Rx co-pays for both retail and mail order drugs are Master Health Plus, Blue Care Elect Preferred, Blue Choice, and Network Blue (HMO Blue). The Master Medical plan has coinsurance for drugs filled at the retail pharmacy and the co-pays above for Mail Order Rx.

You can find out what tier your medications are on by going to the Blue Cross web-site, [www.bcbsma.com](http://www.bcbsma.com). BCBS also distributes literature with the drugs listed by tier.

**Please read the article on this page about Mail Order Rx through BCBS's pharmacy partner, *Express Scripts*, to learn how you can save money when you use the Mail Order Rx service for your maintenance medications. You can go to the *Express Scripts* web-site through the link on the BCBS web-site.**

Prescription drugs are the fastest growing expense item for health plans now and are playing a significant role in the Berkshire Health Group's health plan rate increases this year.

The third page of the Open Enrollment Notice is the Rate Sheet, a two-sided chart of the monthly health insurance premium costs, listing both the employer's share and the employee's share for each of the school district's offered plans, effective July 1, 2001. Susan Eastwood (Eastwood), head bookkeeper in the School Committee's Business Office, prepared this chart by retrieving the prior year's chart on her computer and then making the necessary changes in the premium costs from the marked-up chart that Balardini had given to her for input. The front side of the chart contained the figures for those employees, like the secretaries and bookkeepers who are included in the Association's bargaining unit, who continued to pay 10% of the premium, with the employer paying 90% of the premium, as of July 1, 2001. The back side of



the chart contained the figures for those employees, like the members of the Association's teachers' bargaining unit and the paraprofessionals' bargaining unit who paid 15% of the premium, with the employer paying 85% of the premium.

Balardini reviewed all three pages of the Open Enrollment Notice before he asked Eastwood to distribute the notice following the same procedure she had used in the previous seven years in her capacity as head bookkeeper in the Business Office. Eastwood has worked for the School Committee for twenty-five years. As the head bookkeeper in the Business Office since 1995, Eastwood has been responsible for the final preparation of the School Committee's annual health insurance open enrollment period notice, photocopying that notice, and packaging and placing those notices in each school's mail box. On, or within a few days of May 2, 2001, Eastwood had all three pages of the Open Enrollment Notice in her possession. Using the photocopier's stapling function, Eastwood photocopied and stapled together all three pages of the Open Enrollment Notice, twenty copies at a time. Eastwood then packaged the Open Enrollment Notices in an inter-school envelope with the respective school secretary's name on the envelope, and placed those envelopes in each school's mailbox in the Business Office for pick-up and delivery.<sup>23</sup> If the mail is placed in the school's mailbox before mid-morning, the mail is delivered to the school that date. If not, the delivery date is usually the next school day.

Mail, like the annual health insurance open enrollment period notice, that is prepared by or distributed from the School Committee's Business Office, including the bi-weekly pay checks for all employees, is packaged, labeled for each school, and then placed in a cabinet in the Business Office that has a box or slot for each of the schools and offices in the school district.<sup>24</sup> These mailboxes are located in Eastwood's office. A custodian from each school or a custodian who makes more than one school delivery picks up the mail from those boxes each day and delivers it to the designated schools. For example, one custodian picks up the mail from the Business Office and delivers it to the Wahconah High School, the Nessacus Middle School, and the Craneville Elementary School. Another custodian picks up that mail and delivers it to the Kittredge School. If the custodian is absent on a particular day, another School Committee employee performs those mail pick-up and delivery duties.

23. The Hearing Officer's findings regarding the final preparation, the photocopying, the stapling, the packaging, and the placement of the envelope with the Open Enrollment Notices into each school's mail box were based on Eastwood's description of the procedure that she regularly and routinely followed over the prior seven years, including her recollection that she was confident that she had followed the same procedure in May 2001. The Hearing Officer credited her testimony on these issues.

24. The bi-weekly pay checks are placed individually in an envelope with the employee's name on it and are then packaged by school and placed in the school's mail slot for pick-up by either the custodian or the respective school's principal. Eastwood has been responsible for packaging and distributing employees' bi-weekly paychecks for the past seven years and has followed the same procedure for distributing the paychecks over the course of her employment as head bookkeeper. Eastwood was not aware of any problems that have come up over the past seven years regarding the packaging and distribution system for employees' paychecks.

25. The findings about the delivery and receipt of the Open Enrollment Notice are limited to the two schools, the Kittredge Elementary School and the Nessacus Mid-

*Delivery of the Open Enrollment Notice - May 2001<sup>25</sup>*  
*Kittredge Elementary School*

Pamela Walsh (Walsh) has worked for the School Committee as a secretary at the Kittredge Elementary School since February 1994. The Kittredge Elementary School has a separate mailbox for each teacher, including Lane and Terry Goodrich (Goodrich), and a separate mailbox for each specialist and paraprofessional working at that school. As part of her duties, Walsh receives all in-coming mail, including inter-office mail like the annual health insurance open enrollment period notices and employees' paychecks, sorts the mail and places it in the appropriate mailbox. On or about May 4, 2001, Walsh received the package prepared by Eastwood that contained the three-page stapled Open Enrollment Notice. Walsh placed a copy of the Open Enrollment Notice in all the mailboxes at the Kittredge Elementary School.<sup>26</sup>

Lane is a teacher at the Kittredge Elementary School and is a member of the teachers' bargaining unit. Lane has worked for the School Committee since 1970 and has held various elected and appointed Association positions, starting in or about 1973 when he became the school building representative to the Association's executive committee. Lane has served as Association president on three occasions and has served on the Association's negotiating team for a number of years. Lane was the Association's president in May 2001.

Lane has obtained health insurance coverage through the school district since 1970, and he remained with the indemnity plan from 1970 until he changed to the PPO plan during the health insurance open enrollment period in May 2001. A number of factors played into Lane's decision to change health plans, including, in substantial part, the negotiated increase in the employee's share of the premium costs of health insurance from 10% to 15% effective January 1, 2001. As president of the Association, Lane knew of this scheduled increase as early as July 14, 2000, when the parties signed the 2000-2003 teachers' contract. At some point after mid-July 2000, Lane reviewed comparative data of the various health plans' benefits offered by the school district, particularly the prescription drug co-payments, that had been prepared and distributed by Blue Cross representative Mark Meunier at some point in 2000. That data did not reflect the July 1, 2001 increases in the prescription drug co-payments for each plan.

the School, whose secretaries testified about the receipt and the distribution of the Open Enrollment Notices. The secretaries at the Wahconah Regional High School, the Craneville Elementary School, and the Berkshire Trail Elementary School did not testify. Further, the record does not clearly demonstrate that Peter Bachli, a teacher at the Craneville Elementary School, and Brian Poopor and Antonio Pagliarulo, teachers at the Wahconah Regional High School, who testified in this case, held an elected or appointed Association position in May 2001.

26. The Hearing Officer credited Walsh's forthright testimony that she received the notices, that the notices she received consisted of a three-page stapled document, and that she distributed the notices into the mailboxes. As an employee enrolled in a health insurance plan, Walsh read the information when she received it, and she retained a copy of the Open Enrollment Notice in her personal files. Walsh reviewed the Open Enrollment Notice during the negotiations for the secretaries' contract to determine the increased premium costs she would incur personally after the secretaries' contribution rate for health insurance costs increased from 10% to 15%. The record does not indicate whether Walsh held an elected or appointed position with the Association in May 2001.

After reviewing the plan benefit comparative data in calendar year 2000, Lane decided to change from the indemnity plan to the PPO plan during the next open enrollment period following the January 1, 2001 increase in the employee's share of the premium costs of health insurance. Based on his over thirty years of tenure with the school district, Lane knew that the next open enrollment period would very likely be in May 2001. Therefore, Lane was prepared to act and file the change form immediately after he received notice of the open enrollment period.

On or about May 4, 2001, Walsh placed a copy of the Open Enrollment Notice in Lane's mailbox. Lane received the Open Enrollment Notice, read the Memorandum, noted that he needed to contact Eastwood to obtain the requisite form to change insurance plans, and then acted to change his health plan as he had decided previously.<sup>27</sup> As instructed in the text of this memorandum, Lane obtained the requisite change form from Eastwood. He completed and signed the BlueCross BlueShield of Massachusetts "Enrollment and Change Form" on or before May 11, 2001, and delivered it or had it delivered or mailed to Eastwood, who signed it on or before May 17, 2001.<sup>28</sup> At the time Lane filed his request to change health plans, he was not aware of the increases in the prescription drug co-payments effective July 1, 2001. Lane first became aware of the increased costs of prescription drug co-payments after July 1, 2001.

Goodrich has served as the Association's building representative for the Kittredge Elementary School since at least September 2000 to December 13, 2002. On or about May 4, 2001, Walsh placed a copy of the Open Enrollment Notice into Goodrich's mailbox. On or about May 4, 2001, Goodrich received the Open Enrollment Notice, which was delivered to his mailbox in accordance with the school's regular and routine practice of mail delivery.<sup>29</sup> Goodrich first became aware of the increases in prescription co-payments in September 2001.

#### *Nessacus Middle School*

Bonnie Smith (Smith) has worked for the School Committee since 1968. Since 1994, Smith has worked as a secretary at the Nessacus

Middle School. The Nessacus Middle School has a separate mailbox for each teacher, including Casey and Carole Striebel (Striebel), and a separate mailbox for some paraprofessionals who work at that school. As part of her duties, Smith receives the inter-office mail, like the annual health insurance enrollment period notices and employees' paychecks, and puts the mail into each teacher's mailbox. On or about May 4, 2001, Smith received the package prepared by Eastwood that contained the three-page stapled Open Enrollment Notice. Smith placed a copy of the Open Enrollment Notice in all the mailboxes, and she also placed one of the notices next to the employee mandatory sign-in sheet and posted one on the bulletin boards.<sup>30</sup> No employee at the Nessacus Middle School complained to Smith that they had not received Open Enrollment Notice.

Striebel worked for the School Committee as a teacher at the Nessacus Middle School until she retired in June 2002. For about the last four years of her employment, including May 2001, Striebel served as the Association's building representative for the Nessacus Middle School. On or about May 4, 2001, Smith placed a copy of the Open Enrollment Notice in Striebel's mailbox. On or about May 4, 2001, Striebel received the Open Enrollment Notice, which was delivered to her mailbox in accordance with the school's regular and routine practice of mail delivery.<sup>31</sup> Striebel first became aware of the increases in the prescription drug co-payments in late July 2001.

Laurie Cady (Cady) is currently working for the School Committee as a secretary assigned to the Nessacus Middle School and is a member of the Association's secretarial bargaining unit. Cady has served as the elected treasurer of the Association for about four years, including the month of May 2001. Cady received and read the Memorandum, the first page of the Open Enrollment Notice, in early May 2001.<sup>32</sup> Cady first became aware of the increases in the prescription drug co-payments in late July 2001.

Casey is a reading teacher at the Nessacus Middle School. On or about May 4, 2001, Smith placed a copy of the Open Enrollment Notice in Casey's mailbox. On or about May 4, 2001, Casey received the Open Enrollment Notice, which was delivered to her

27. The Hearing Officer found that, although Lane's memory of exactly what information he had received from the School Committee about the May 2001 open enrollment period was somewhat imprecise, he clearly recalled receiving and reading the Memorandum and then acting upon the information contained in the Memorandum. The Memorandum is the first page of the stapled, three-page Open Enrollment Notice that Walsh placed into Lane's mailbox on or about May 4, 2001. Absent credible, relevant information that places in doubt Lane's receipt of the mail delivered to his mailbox, not present here, the Hearing Officer found that the record supports a finding that Lane received the Open Enrollment Notice on or about May 4, 2001.

28. At least three other teachers from the Kittredge Elementary School changed their health insurance coverage during the May 2001 open enrollment period.

29. Goodrich has no clear recollection if he received or did not receive the Open Enrollment Notice in early May 2001. However, this ambivalent testimony about his receipt of the Open Enrollment Notice did not cause the Hearing Officer to question the efficiency of the school district's mail delivery system or the delivery of the Open Enrollment Notice. The fact that Walsh delivered the Open Enrollment Notice to Goodrich's mailbox on or about May 4, 2001 supports the Hearing Officer's finding, absent credible, competing evidence, that Goodrich received the Open Enrollment Notice on or about May 4, 2001.

30. The Hearing Officer credited Smith's forthright testimony that she received the Open Enrollment Notices from Eastwood, that the notices consisted of a three-page stapled document, and that she distributed those notices into the mailboxes.

31. Striebel has no clear recollection if she did or did not receive the Open Enrollment Notice in early May 2001. However, this ambivalent testimony about her receipt of the Open Enrollment Notice did not cause the Hearing Officer to question the efficiency of the school district's mail delivery system or the delivery of the Open Enrollment Notice. The fact that Smith delivered the Open Enrollment Notice to Striebel's mailbox on or about May 4, 2001 supports the Hearing Officer's finding, absent credible, competing evidence, that Striebel received the Open Enrollment Notice on or about May 4, 2001.

32. Cady testified that she does not remember whether any other pages were attached to the Memorandum she received and read. The record does not demonstrate that the Nessacus Middle School secretaries had mailboxes, nor does the record demonstrate the method the School Committee used to distribute the Open Enrollment Notice to its employees, like Cady, who did not have mailboxes. Therefore, the Hearing Officer's findings about Cady's receipt of the Open Enrollment Notice did not include any inferential facts.

mailbox in accordance with the school's regular and routine practice of mail delivery.<sup>33</sup> Casey first became aware of the prescription drug co-payment increases in or about the first week of August 2001, after she received telephone calls from members of the Association's bargaining units about the prescription drug co-payment increases and experienced these increases herself.

On August 29, 2001, Casey filed a grievance challenging the implemented prescription drug co-payment increases.<sup>34</sup> The grievance proceeded to a level three grievance hearing before the School Committee on November 8, 2001. During the discussion about the co-pay grievance, the School Committee directed Casey's attention to its Open Enrollment Notice.<sup>35</sup> Casey is not aware of any grievance filed by any member of the Association's bargaining units alleging that they were not able to switch health insurance plans during the open enrollment period in May 2001, because they did not receive notice of the open enrollment period in time to do so.

#### Opinion

A public employer violates Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it unilaterally changes an existing condition of employment or implements a new condition of employment involving a mandatory subject of bargaining without first giving its employees' exclusive bargaining representative prior notice and an opportunity to bargain to resolution or impasse. *Commonwealth of Massachusetts v. Labor Relations Commission*, 404 Mass. 124 (1989); *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983); *Town of Ludlow*, 17 MLC 1191 (1990). The terms and costs of health insurance benefits, including co-payments, are conditions of employment that constitute mandatory subjects of bargaining. *Town of Dennis*, 28 MLC 297 (2002).

In the present case, the record reflects that on July 1, 2001, the School Committee implemented changes that had been voted on and approved by the BHG in May 2001 to increase the co-payments that employees had to pay for prescription drugs, both at a retail pharmacy and under a mail-order program, under the Blue Care Elect Preferred PPO Plan, Network Blue New England, and Blue Choice New England. It is undisputed that the School Committee and the Association did not bargain about these co-payment increases prior to July 1, 2001.

The School Committee raises two affirmative defenses to the charges. It asserts that the charges are untimely, and that the Association waived by contract its right to bargain over the changes. We consider both arguments below.

#### Timeliness

Section 15.03 of the Commission's regulations, 456 CMR 15.03, provides: "Except for good cause shown, no charge shall be entertained by the Commission based upon any prohibited practice occurring more than six months prior to the filing of a charge with the Commission." To meet this requirement, a charge of prohibited practice must be filed with the Commission within six months of the alleged violation or within six months from the date the violation became known or should have become known to the charging party, unless good cause is shown. *Felton v. Labor Relations Commission*, 33 Mass. App. Ct. 926 (1992).

Relying on *Town of Lenox*, 29 MLC 51 (2002), the School Committee argues that the period of limitations in this case began to run in early May 2001, when it distributed the Open Enrollment Notice to school district employees. Because the Association filed these charges more than six months after that date, on November 30, 2001, the School Committee contends that they are untimely and should be dismissed. We disagree and find that *Town of Lenox* is distinguishable from the instant matter for the reasons articulated below.

In *Town of Lenox*, the Commission found that the date on which the town had sent a notice and newsletter describing changes to prescription drug co-payments to all town insurance participants, including the union president, was the date on which the union knew or should have known of the alleged violation. Because the union had filed the charge more than six months after that date, the Commission granted the town's pre-hearing motion to dismiss the charge as untimely. *Id.* at 52. Notably, in *Town of Lenox*, the notice that the town manager sent to insurance participants expressly stated that Blue Cross/Blue Shield was instituting a change in prescription drug payments. *Id.* at 51.

In the present case, by contrast, the Memorandum, which served as the cover page to the Open Enrollment Notice, did not indicate either in its subject line or the body of the letter that employees' health insurance benefits or co-payments were going to change. Another difference between the case before us and the cited case is that the parties here had an established practice regarding providing notice about negotiable issues. Specifically, the record shows that whenever the School Committee wished to communicate matters of mutual concern regarding bargaining unit members' terms and conditions of employment, the superintendent wrote or telephoned the Association's executive secretary and/or president. Despite the existence of that practice, neither the superintendent nor any other School Committee representative communicated with those individuals for the express purpose of notifying the Association about the increases in the prescription drug co-payments. Although the Memorandum directed employees to read the en-

33. Casey testified that she did not recall if she did or did not receive the Open Enrollment Notice in early May 2001, and that the first time she recalled seeing the Open Enrollment Notice was on November 8, 2001 during a Level Three hearing on the Association's prescription drug co-payment grievance. However, Casey's testimony did not cause the Hearing Officer to question the efficiency of the school district's mail delivery system or the delivery of the Open Enrollment Notice. This fact caused the Hearing Officer to draw the reasoned, logical inference that Casey

received the Open Enrollment Notice on or about May 4, 2001, and that Smith delivered the Open Enrollment Notice to Casey's mailbox on or about May 4, 2001.

34. The record does not include a copy of the Association's grievance, nor does the record reflect the bargaining unit or discriminatees subject to it.

35. This is the first time Casey recalls seeing the Open Enrollment Notice.

closed Health Benefits Update, it also stated that employees needed to take no action unless they wanted to change their health insurance plans. There was no evidence of similar language in *Town of Lenox*.

The School Committee nevertheless argues that, because Lane actually changed his coverage in 2001, he should therefore be presumed to have received and read the Update. However, the record shows that the parties signed the 2000-2003 teachers' contract on July 14, 2000. It was on that date that Lane, as Association president, knew that the employees' share of the premium costs were going to increase from 10% to 15%, effective January 1, 2001. As a result, at some unspecified time thereafter, but prior to receiving the Open Enrollment Notice, Lane reviewed comparative data of the various health plan benefits that had been prepared and distributed by Blue Cross representative Mark Meunier, including, in particular, information about the prescription drug co-payments. That data did not reflect the July 1, 2001 prescription drug co-payment increases. After reading that material, Lane decided to change his plan during the next open period, which he knew from previous experience would occur in or around May 2001. The record clearly reflects that when Lane filed his request to change health plans, he was not aware of the increases in the prescription drug co-payment that were scheduled to take place on July 1, 2001. Further, we do not find that he should have been aware of those changes, because the School Committee failed to notify either him or any other Association official of those changes, as had been their previous practice.

Based on the record before us, the School Committee has not established that any official of the Association knew or should have known of the changes in the co-payments for prescription drugs prior to the July 1, 2001 implementation date. Therefore, we find that the Association's charge is timely filed. *See, Town of Ludlow*, 17 MLC at 1200-1201 (Commission found that town's notification to IAC representative of proposed changes to health insurance coverage was inadequate notice to union of those changes, because there was no evidence that town or IAC representative had advised any union officials of those changes).

#### *Contract Waiver*

The Commission has long held that an employer asserting contractual waiver as an affirmative defense must show that the parties consciously considered the situation that has arisen and that the union knowingly waived its bargaining rights. *Commonwealth of Massachusetts*, 26 MLC 228, 231 (2000), citing, *Town of Marblehead*, 12 MLC 1667, 1670 (1986). The waiver needs to be conscious and unmistakable. *Id.* If the language to the contract is ambiguous, the Commission will review the parties' bargaining history to determine their intent. *Massachusetts Board of Regents*, 15 MLC 1265, 1269 (1988). In particular, the Commission must analyze whether the contract language expressly, or by necessary implication, confers upon the employer the right to make a change in a mandatory subject of bargaining without first giving the union notice and an opportunity to bargain. *Id.*

Here, the School Committee argues that the present complaints must be dismissed, because the various contracts contain language

stating that the School Committee will pay 85% of the cost of those health insurance plans "with such benefits and through such organization as the School Committee shall from time to time select." The School Committee argues that this language is a broad grant of authority that allows it to go out in the marketplace and purchase the plan with whatever benefits it chooses, to change the plan provider at any time, and to change the plan's benefits, including co-pay amounts, at any time after a plan is implemented. However, we find that the disputed contractual language, on its face, does not pertain to changes in prescription drug co-payments and is too broad to constitute a valid contractual waiver. *Compare, Town of Oxford*, 31 MLC 40, 44 (2004) (by negotiating language in work rule providing that employees could not wear buttons, insignia, attachments or coverings of any type of their uniforms, union waived right to bargain over that rule). Even if we were to conclude that the disputed contractual language is ambiguous, the parties' bargaining history, detailed below, does not support the School Committee's position.

The Hearing Officer credited Grandchamp's testimony that the School Committee retained the flexibility in the course of the negotiations for the 1990-1993 teachers' contract to change the HMO plan. However, the Hearing Officer also found that the parties did not discuss prescription drug co-payments or deductibles for any medical services under that plan. Nor did the parties discuss prescription drug co-payments or deductibles in any of the subsequent negotiations at issue regarding the PPO or POS plans. Finally, there is no evidence that, during any of the parties' negotiations, the School Committee retained the right and discretion to change any aspect of the three health insurance plans without bargaining with the Association. Indeed, the parties bargained at length regarding their respective health insurance premium contribution rates during their negotiations for the 2000-2003 teachers' contract before those rates were changed.

On these facts, the Association did not clearly and unmistakably waive by contract its right to bargain over the changes in the co-payments for prescription drugs. *See, e.g., Town of Brookline*, 20 MLC 1570 (1994) (contract provision stating that school committee would pay maximum percentage permitted by selectmen and town meeting for health insurance held not to constitute a waiver of union's right to bargain over employer's contribution to HMO plans where clause was silent as to HMOs, and there was no bargaining history demonstrating that the parties had consciously agreed to waive bargaining over such changes). We therefore conclude that the School Committee violated Sections 10(a)(5), and, derivatively, Section 10(a)(1) of the Law when it implemented increases to prescription drug co-payments without first giving the Association prior notice and an opportunity to bargain.

The fact that the School Committee is a member of the BHG does not alter our conclusion. In *Town of Dennis*, 28 MLC at 302, the Commission held that municipalities participating in joint purchasing groups like the BHG under M.G.L. c. 32B are not relieved of their obligation to bargain over changes to health insurance plans, particularly where, as here, the individual who drafted the open enrollment notice announcing the co-payment increases, Baldarini, sits on the board of that group.

## Conclusion

Accordingly, we conclude that the School Committee violated Section 10(a)(5) and, derivatively, Section 10(a)(1) by unilaterally implementing increases to prescription drug co-payments without first giving the Association notice and an opportunity to bargain over that change.

## Order

WHEREFORE, based on the foregoing, it is hereby ordered that the School Committee shall:

## 1. Cease and desist from:

- a. Unilaterally changing prescription drug co-payments for bargaining unit members represented by the Association; and
- b. In any like or related manner, interfering with, restraining or coercing any employees in the exercise of their rights guaranteed under the Law.

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

- a. Restore to bargaining unit members represented by the Association the cost and structure of prescription drug co-payments for all health insurance plans offered by the School Committee that were in place prior to July 1, 2001;
- b. Provide the Association with prior notice of any proposed change in the prescription drug co-payments affecting its bargaining unit members and, upon request, bargain in good faith to resolution or impasse before implementing any changes in prescription drug co-payments;
- c. Make whole bargaining unit members for any economic losses they may have suffered as a result of the School Committee's unlawful change in prescription drug co-payments, plus interest on any sums owing at the floating interest rate specified in M.G. L. c. 321, § 6I compounded quarterly;<sup>36</sup>
- d. Sign and post immediately in conspicuous places where employees usually congregate or where notices to employees are usually posted and maintain for a period of thirty (30) days thereafter copies of a Notice to Employees; and
- e. Notify the Commission in writing within ten (10) days of receipt of this decision and order of the steps taken to comply herewith.

SO ORDERED.

## NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE MASSACHUSETTS LABOR  
RELATIONS COMMISSION AN AGENCY OF THE  
COMMONWEALTH OF MASSACHUSETTS

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

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any

other material. Any questions concerning this notice or compliance with its provisions may be directed to the Labor Relations Commission, 399 Washington St., 4<sup>th</sup> Floor, Boston, MA 02108-5213 (Telephone: (617) 727-3505).

The Massachusetts Labor Relations Commission (Commission) has decided that the Central Berkshire Regional School Committee (School Committee) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (Chapter 150E), the Public Employee Collective Bargaining Law, by failing to bargain in good faith by unilaterally changing prescription drug co-payments.

WE WILL NOT fail and refuse to bargain in good faith with the Central Berkshire Education Association (Association) by unilaterally changing prescription drug co-payments for bargaining unit members represented by the Association (Association).

WE WILL NOT in any like manner, interfere with, restrain, or coerce employees in the exercise of their rights under Chapter 150E.

WE WILL restore to bargaining unit members represented by the Association the cost and structure of prescription drug co-payments for all health insurance plans offered by the School Committee that were in place prior to July 2001.

WE WILL provide the Association with prior notice of any proposed change in prescription drug co-payments affecting its bargaining unit members and, upon request, bargain in good faith to resolution or impasse before implementing any changes in prescription drug co-payments.

WE WILL make whole bargaining unit members for any economic losses they may have suffered as a result of the School Committee's unlawful change in prescription drug co-payments, plus interest on any sums owing at the rate specified in M.G. L. c. 321, §6I, compounded quarterly.

[signed]

For the Central Berkshire Regional School Committee

\* \* \* \* \*

36. The Union asks the Commission to impose interest at the 12% rate set forth in M.G.L. c. 321, §6B. We decline to do so because the Commission has adopted the floating interest rate specified in M.G.L. c. 321, §6I as the rate of interest applicable

to all monetary remedies awarded by the Commission. *Ashburnham-Westminster Regional School District*, 29 MLC 191, 196 (2003).