

In the Matter of TOWN OF WATERTOWN
and
WATERTOWN MUNICIPAL EMPLOYEES
ASSOCIATION

Case No. MUP-01-3275

54.611 health insurance
67.15 union waiver of bargaining rights
67.8 unilateral change by employer
82.3 status quo ante

June 29, 2005

Allan W. Drachman, Chairman
Helen A. Moreschi, Commissioner

Lisa C. Adams, Esq. Representing the Town of
David C. Jenkins, Esq. Watertown
Watertown Municipal Pro Se¹
Employees Association

DECISION²

Statement of the Case

On December 18, 2001, the Watertown Municipal Employees Association (Association) filed a charge with the Labor Relations Commission (Commission), alleging that the Town of Watertown (Town) had engaged in prohibited practices within the meaning of Sections 10(a)(5) and (1) of M.G.L. c.150E (the Law). Following an investigation, the Commission issued a complaint of prohibited practice on November 29, 2002, alleging that the Town had violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it unilaterally changed employees' health insurance benefits by: 1) increasing employees' co-payments for prescription drugs under certain Blue Cross/Blue Shield (BC/BS) health insurance plans; 2) reducing the amount that employees would be reimbursed for durable medical equipment under the Tufts HMO (Tufts) health insurance plan; and 3) ceasing to pay for most non-emergency tooth extractions for employees enrolled in the Tufts plan.³ The Town filed an answer on December 9, 2002.

On April 3, 2003, Margaret M. Sullivan, Esq., a duly-designated Commission hearing officer (Hearing Officer), conducted a hearing at which all parties had an opportunity to be heard, to examine witnesses and to introduce evidence. The Association and the

Town submitted post-hearing briefs on May 15, 2003. On July 30, 2003, the Hearing Officer issued her Recommended Findings of Fact. Neither party filed challenges to the Recommended Findings of Fact. Based on the evidence contained in the record, and in consideration of the parties' arguments, we make the following findings of fact and render the following opinion.

Findings of Fact⁴

Neither party challenged the Hearing Officer's Recommended Findings of Fact. Therefore, we adopt them in their entirety and summarize the relevant portions below.

The Association is the exclusive collective bargaining representative for certain full-time and regular part-time employees employed by the Town in its Department of Public Works. As of January 2001, the Town offered members of the Association's bargaining unit the option of enrolling in Tufts, Harvard Pilgrim HMO (Harvard Pilgrim) and certain BC/BS health insurance plans.⁵ The Town pays ninety percent of the cost of the premiums for those health insurance plans, while unit members pay ten percent of the cost of premiums. A private company, EBS Foran, represents the Town in its dealings with the health insurers and reviews information from those insurers, including the financial data that the vendors use to calculate their premiums as well as any changes in benefits.

In mid to late February 2001, the Town received a letter from EBS Foran dated February 12, 2001. In that letter, EBS Foran notified the Town of the new premium rates for Harvard Pilgrim, Tufts and the BC/BS health insurance plans and of certain changes to those health insurance plans that would take effect on July 1, 2001. Those changes included an increase in the co-payments that unit members paid for prescription drugs under the BC/BS health insurance plans. Previously, unit members enrolled in those plans paid co-payments of \$5 or \$10 for prescription drugs. Now, according to EBS Foran, the co-payments would increase to \$10 for preferred generic drugs, \$20 for preferred brand drugs and \$35 for non-preferred brand drugs.

During March and April 2001, the Town's Insurance Advisory Committee (the IAC) met on two occasions. Pursuant to M.G.L. c.32B, §3, the IAC, which is comprised of a representative from each employee organization representing the Town's employees and a representative from the Town's retirees, makes recommendations to the Town about life and health insurance benefits.⁶ During the March and April 2001 IAC meetings, the members discussed the possibility of reducing the Town's health insurance

1. The Commission allowed a motion from Jack J. Canzoneri, Esq. to withdraw as counsel for the Watertown Municipal Employees Association.

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

3. The Commission dismissed those portions of the Association's charge alleging that the Town had violated Section 10(a)(5) of the Law by unilaterally increasing employees' co-payments for prescription drugs under the Tufts plan, and the Association did not seek reconsideration pursuant to 456 CMR 15.03.

4. The Commission's jurisdiction is uncontested.

5. The BC/BS plans included Master Health Plus, HMO Blue and Blue Care Elect.

6. Pursuant to M.G.L. c.32B, §3, the Town can decline to adopt the IAC's recommendations.

providers from three to two vendors. The Association's president Anthony Mazzeo (Mazzeo)⁷ attended one of the two meetings.

Thereafter, on April 11, 2001, Tracy⁸ directed a benefits clerk⁹ to send a packet of information to members of the IAC via interoffice mail¹⁰ pursuant to their request for a summary of the health benefits that would be available to employees in Fiscal Year 2002. In a cover letter to the information packet, Tracy stated:

Attached is a notice being sent to employees and non-medicare retirees, regarding the upcoming open enrollment. I have also attached other pertinent information regarding the Town's health insurance vendors.

Please contact me if you have any questions or concerns regarding this information.

The content of various pages in the packet are described in more detail below.

Turning to the third page of the packet, that page specifically referenced a BC/BS plan, HMO Blue, and stated that there would be a mandatory benefit change in prescription drug co-payments to \$5 for generic drugs, \$10 for preferred brand drugs and \$25 for non-preferred brand drugs. Additionally, the fifth page of the packet referenced the Tufts health insurance plan and noted that certain benefit changes would take place as of July 1, 2001, including that Tufts would cease to provide coverage for most non-emergency tooth extractions, and that Tufts would cover 80% of the cost of durable medical equipment up to a \$5000 calendar year maximum.¹¹ Finally, the seventh and eighth pages of the packet consisted of copies of an April 12, 2001 letter with an attachment that Tracy intended to send to all current Town employees and retirees who were under age sixty-five and ineligible for Medicare benefits. The April 12, 2001 letter stated in relevant part:

This letter is to notify all eligible Town employees and non-medicare retirees of the annual open enrollment for the primary health insurance coverage. The Benefits Fair will be held Thursday, April 26, 2001, between the hours of 1:00 PM and 4:00 PM. The open enrollment period will be from April 26th to May 10th. All primary health enrollments/changes will be effective July 1, 2001 and must be received in the Town Auditor's office no later than Thursday, May 10, 2001....

The Benefits Fair will provide you with the opportunity to evaluate the various primary plans currently offered by the Town of Watertown. Insurance providers will be present to assist you with any questions or changes....

The anticipated rates as of July 1, 2001 (effective date of enrollment/change) to June 30, 2002 are on the attached rate sheet.¹²

Although Hyde routinely reviewed all documents that the Town sent to the Association, he never saw a copy of the information packet.

On April 26, 2001, Hyde attended the Town's Benefits Fair. The Benefits Fair gave both represented and unrepresented Town employees the opportunity to receive written materials from representatives from BC/BS, Tufts and Harvard Pilgrim and to speak directly to them. Because Hyde had heard rumors about changes to the Town's health insurance plans, he asked representatives from BC/BS and Tufts who were present at the Benefits Fair whether there would be any changes in those health insurance plans effective July 1, 2001. The representatives from both companies assured Hyde that the only changes in those plans would be in the cost of the premiums.

On June 18, 2001, the IAC held a third meeting at which members voted to recommend that the Town reduce its number of health insurance vendors in order to secure health insurance coverage for retirees who had moved outside of the state. No representative from the Association attended that meeting.¹³

Also, in mid-June 2001, Hyde¹⁴ received a pamphlet from Tufts that described changes in the plan's benefits, but Hyde did not look at the pamphlet.¹⁵ Several days before the end of June 2001, Hyde's wife needed a piece of durable medical equipment. At that time, a Tufts representative telephoned Hyde and encouraged him to submit the bills for his wife's durable medical equipment to the insurer before June 30, 2001. The representative informed Hyde that as of July 1, 2001, Tufts would only reimburse employees for 80% of the cost of durable medical equipment. Previously, Tufts had fully reimbursed employees for the cost of durable medical equipment. After Hyde received that telephone call, he read the pamphlet that he had received earlier from Tufts. The pamphlet noted that Tufts would only pay 80% of the costs of durable medical equipment up to a maximum of \$5,000.

On July 1, 2001, Tufts began to reimburse employees for only 80% of the cost of durable medical equipment up to a maximum of \$5,000 and ceased to pay for non-emergency tooth extractions. On that same date, BC/BS instituted a three-tier co-payment structure for prescription drugs of \$5, \$10 or \$25. In late July 2001, Joseph Cavallaro (Cavallaro), a bargaining unit member who worked in

7. Although Mazzeo held the title of president, Charles Hyde (Hyde), the vice-president, actually performed the duties of president, vice-president and secretary during this period of time.

8. Tracy's duties as auditor include oversight of the municipal payroll and all life and health insurance benefits that are offered to the Town's employees.

9. Mary Aguiliano left the position of benefits clerk on or about that time, and Diane Ryan (Ryan) subsequently succeeded her in that position.

10. Tracy did not provide the benefits clerk with a list of the names of the IAC members. Because Tracy had previously received letters from the IAC that displayed the names of its members in the letterhead, Tracy presumed that the benefits clerk would obtain the appropriate names from those letters.

11. Previously, Tufts had reimbursed employees for 100% of the cost of durable medical equipment and had imposed no cap on the reimbursement amount.

12. The rate sheet indicated the weekly, bi-weekly and monthly costs for health insurance premiums for employees and the Town.

13. Approximately six weeks later, the IAC wrote to Town Manager Michael J. Driscoll informing him of the outcome of the vote. In that letter, the IAC noted that, although it had made the recommendation to reduce the number of health insurance vendors, "it is understood and agreed upon by Mary Flanders Aicardi [Flanders Aicardi], Personnel Director, that this change in benefit must be bargained with each unit independently."

14. Hyde and his wife were enrolled in the Tufts health insurance plan.

15. Typically, before a health insurer sent employees any materials about changes in their health plans, the insurer provided the Town with copies of the materials several weeks before.

the City's Parks Department, informed Hyde that BC/BS had instituted a three-tier rate for prescription drug co-payments and that Cavallaro's out-of-pocket costs had increased. Prior to this conversation, Hyde was unaware that BC/BS had instituted a three-tier co-payment cost structure for prescription drugs.

In early August 2001, Hyde telephoned Flanders Aicardi and asked her why Tufts had changed some of the benefits that it offered to employees and why BC/BS had instituted a three-tier co-payment plan for prescription drugs. Flanders Aicardi referred Hyde to Tracy. On the same day, Hyde stopped by the Town Auditor's Office and asked Ryan why Tufts had reduced the amount that it would pay for durable medical equipment. Ryan told Hyde that he needed to speak with Tracy. Shortly thereafter, Hyde telephoned Tracy and inquired why Tufts had reduced the amount that it would reimburse employees for durable medical equipment. Tracy responded that the change had been made in order to improve the Town retirees' health insurance benefits. Hyde also asked Tracy why the Town had not notified the Association about the changes in the health insurance plans and why the Town had not bargained with the Association over the changes. Tracy did not respond to Hyde's inquiries.

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 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. *Ashburnham-Westminster Regional School District*, 29 MLC 191 (2003).

In this case, the Town acknowledges its responsibility to bargain over changes in the terms and costs of health insurance coverage, including co-payments, and does not dispute that it made changes to the BC/BS and Tufts health insurance plans. However, the Town argues that it did not violate Section 10(a)(5) of the Law, because the Association waived by inaction its right to bargain over the health insurance changes that took effect on July 1, 2001. We turn to analyze the Town's defense.

A public employer that asserts the affirmative defense of waiver by inaction must demonstrate by a preponderance of the evidence that an employee organization had: 1) actual knowledge or notice of the proposed action; 2) a reasonable opportunity to negotiate

about the subject; and 3) unreasonably or inexplicably failed to bargain or request bargaining. *Commonwealth of Massachusetts*, 28 MLC 239, 242 (2002); *Town of Milford*, 15 MLC 1247, 1252 (1988); *Amesbury School Committee*, 11 MLC 1049 (1984); *Scituate School Committee*, 9 MLC 1010 (1982). Here, the Town argues that the Association had notice and actual knowledge of the impending changes to the BC/BS and Tufts health insurance plans when the Town notified the IAC of the proposed changes in mid-April. We disagree.

In *Town of Ludlow*, 17 MLC at 1191, the employer notified the town's IAC of proposed changes to a health insurance plan that was available to bargaining unit employees. Noting that a member of the bargaining unit represented by the union was a member of the IAC, the employer in *Ludlow* argued that notice to the IAC of the proposed changes constituted sufficient notice to the union. The Commission rejected the employer's argument, because the bargaining unit member did not represent the union at the IAC, and his position in the union did not warrant imputation of his knowledge to the union. *Ludlow*, 17 MLC at 1200.

Similarly here, general notice to the IAC of the proposed health insurance changes was insufficient notice to the Association. Notice will be imputed to a union when a union executive officer with authority to bargain is made aware of the employer's proposed plan. *Town of Hudson*, 25 MLC 143, 148 (1999). Although Tracy directed a clerk to distribute the April 11, 2001 memo containing the information about the impending health plan changes to members of the IAC, he did not supply the clerk with a list of names of intended recipients. Hyde never saw the memo, and there is no evidence conclusively demonstrating that any other Association officer received it. Consequently, the Town failed to establish that the Association received notice or had actual knowledge in April of 2001 of the impending health insurance plan changes.¹⁶

The Town also contends that Hyde had notice and knowledge of the impending health insurance changes, because his wife and a representative from Tufts health plan told him about changes to the Tufts plan. We find no merit in this argument. The information conveyed to the employee organization must be sufficiently clear and definite for the employee organization to make a judgment as to an appropriate response. *Commonwealth of Massachusetts*, 28 MLC at 242; *Boston School Committee*, 4 MLC 1912, 1915 (1978). The information that Hyde received from his wife and from the Tufts health plan representative concerned only the changes to the durable medical equipment coverage in the Tufts health plan. It did not alert him to changes in coverage for non-emergency tooth extractions in the Tufts plan or to changes in prescription drug costs in the BC/BS plan. Moreover, Hyde received conflicting information from Tufts. In April 2001, a Tufts representative at the Town Benefits Fair assured Hyde that the premium costs would be the only changes to the health plan. The fol-

16. The Town also attempts to distinguish this case from *Ashburnham-Westminster Regional School District*, 29 MLC at 191, arguing that the April 11, 2001 memo did not constitute a *fait accompli*. We need not reach this issue because we find that the Town did not give the Association notice of the impending changes to the BC/BS and Tufts health plans. However, the April 11 memo describes the changes in coverage for durable medical equipment and tooth extractions under the Tufts health

plan as "mandatory". The reference in the memo to changes in BC/BS prescription drug co-payments is noted as a "[m]andatory benefit change". (Emphasis in original.) This language demonstrates that a demand to bargain would have been fruitless and that the notice, if received by the Association, would have been a *fait accompli*.

lowing June, a Tufts representative advised him of changes in the cost of obtaining durable medical equipment. We do not consider the information Hyde received to be sufficiently clear and definite as to trigger the Association's obligation to demand bargaining. Consequently, the Association did not waive by inaction its right to bargain over the proposed health insurance changes.

Conclusion

We find that the Town violated Sections 10(a)(5) and, derivatively, (a)(1) of the Law by unilaterally changing the co-payment structure for prescription drugs under the BC/BS health plans and the coverage amounts for durable medical equipment and non-emergency tooth extractions under the Tufts health plan for bargaining unit members represented by the Association.

Order

WHEREFORE, based on the foregoing, it is hereby ordered that the Town of Watertown shall:

1. Cease and desist from:

- a. Unilaterally changing the co-payment structure for prescription drugs under the BC/BS health plans and the coverage amounts for durable medical equipment and non-emergency tooth extractions under the Tufts health plan for bargaining unit members represented by the Association.
- 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 co-payment structure for prescription drugs under the BC/BS plans and the coverage amounts for durable medical equipment and non-emergency tooth extractions under the Tufts plan that were in place prior to July 1, 2001.
- b. Provide the Association with prior notice of any proposed changes in the prescription drug co-payments under the BC/BS plans and of any proposed changes in coverage amounts for durable medical equipment and non-emergency tooth extractions under Tufts health plan affecting bargaining unit members.
- c. Upon request, bargain in good faith to resolution or impasse before implementing any of the proposed changes referred to in paragraph 2(b).
- d. Make whole bargaining unit members for any economic losses they may have suffered as a result of the Town's unlawful unilateral changes, plus interest, on any sums owing at the floating interest rate specified in M.G.L. c. 231 s.6I, compounded quarterly.
- e. Sign and post immediately in conspicuous places where employees usually congregate or where notices to employees are usually posted and maintain for a period of thirty (30) days thereafter, copies of the attached Notice to Employees.
- f. Notify the Commission within thirty (30) days after the date of service of this decision and order of the steps taken to comply with its terms.

SO ORDERED.

NOTICE TO EMPLOYEES

The Massachusetts Labor Relations Commission has determined that the Town of Watertown (Town) has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by failing to bargain in good faith by unilaterally changing prescription drug co-payments and coverage for non-emergency tooth extractions and durable medical equipment under certain health insurance plans available to bargaining unit members represented by the Watertown Municipal Employees Association (Association).

WE WILL NOT unilaterally change prescription drug co-payments under the Blue Cross/Blue Shield health plans (BC/BS), and coverage for non-emergency tooth extractions and durable medical equipment under the Tufts HMO health plan (Tufts), for bargaining unit members represented by the Association.

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

WE WILL restore to bargaining unit members represented by the Association the cost and structure of prescription drug co-payments for all BC/BS plans, and the coverage for non-emergency tooth extractions and durable medical equipment for the Tufts plan, that were in place prior to July 1, 2001.

WE WILL provide the Association with prior notice of any proposed change in prescription drug co-payments and coverage for non-emergency tooth extractions and durable medical equipment that affect its bargaining unit members and, upon request, bargain in good faith to resolution or impasse before implementing any such changes in prescription drug co-payments and coverage for non-emergency tooth extractions and durable medical equipment.

WE WILL make whole bargaining unit members for any economic losses they may have suffered as a result of the Town's unlawful changes, plus interest on any sums owing at the rate specified in M.G.L. c. 231, §6I compounded quarterly.

[signed]
Town of Watertown

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