In the Matter of TOWN OF EAST BRIDGEWATER and EAST BRIDGEWATER SCHOOL COMMITTEE

AND

EAST BRIDGEWATER EDUCATION ASSOCIATION

Case Nos. MUP-07D-5095 and MUP-07D-5115

54.611	***health insurance***
67.8	***unilateral change by employer***
82.3	***status quo ante***
91.11	***statute of limitations***

January 13, 2012
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

Daniel C. Brown, Esq.	*Town of East Bridgewater/ East Bridgewater School Committee*
Will Evans, Esq.	*East Bridgewater Education Association*

DECISION ON APPEAL OF HEARING OFFICER'S DECISION

Summary

This case provides the Board with an opportunity to clarify when the six-month period of limitations set forth in 456 CMR 15.03 begins to run in unilateral change cases, when an employer provides a union with advance notification of the change and the parties subsequently bargain. We affirm the Hearing Officer's ruling that the charge was timely and hold that in cases where a union is not presented with a *fait accompli*, the union makes a timely demand to bargain and the parties subsequently bargain, the period of limitations begins to run on the date the union has actual or constructive knowledge that the change will be implemented prior to the parties having bargained to resolution or impasse.

Statement of the Case

On November 19 and December 19, 2007, the East Bridgewater Education Association (Union) filed charges of prohibited practice with the Department of Labor Relations (Department)[1] against the Respondents Town of East Bridgewater (Town) and the School Committee (School Committee), alleging that they had engaged in prohibited practices within the meaning of Section 10(a)(5) and derivatively, Section 10(a)(1) of MGL c. 150E (the Law) by increasing health insurance co-payments without giving the Association an opportunity to bargain to resolution or impasse. The Department issued a complaint alleging that the Respondents violated the Law by unilaterally increasing co-payments and the

1. Pursuant to Chapter 3 of the Acts of 2011, the Division of Labor Relations is now called the Department of Labor Relations. References to the Department include the former Division.

matter went to hearing. On July 29, 2008, the Respondents filed a Motion to Dismiss the Complaint arguing that the Union's charges were time-barred pursuant to 456 CMR 15.03 of the Department's Rules and Regulations. On August 18, 2011, a Department Hearing Officer issued a decision denying the Respondents' motion to dismiss, finding that the limitations period began when the increase in co-payments was implemented, not when the Union first received notice of the Respondents' intention to implement the increase. Having found the matter timely, the Hearing Officer held that the Respondents violated the Section 10(a)(5) of the Law by unilaterally implementing health insurance co-payment increases for the Union's bargaining unit members without first bargaining to resolution or impasse.

The Respondents filed a timely appeal of the decision pursuant to MGL c.150E, Section 11 and 456 CMR 13.02(1)(j). Both parties filed supplementary statements and the Respondents filed a response to the Union's submission. Based on the record as a whole, and for the reasons set forth below, the Commonwealth Employment Relations Board (Board) affirms the Hearing Officer's conclusion that the charge was timely filed and that the Respondents violated the Law by implementing the changes before the parties bargained to resolution or impasse.

Finding of Fact

Neither party challenged the Hearing Officer's facts, but both parties proposed additional findings to supplement the record. We adopt the Hearing Officer's facts, as summarized and supplemented by the record evidence below.

On March 22, 2007, Town Administrator George Samia (Samia) sent a letter to Union president Sherley Phillips (Phillips) notifying her of certain changes to Town Health Insurance plans effective July 1, 2007.[2] The letter states in pertinent part:

> As you may know, for the last several years, the Town has been a member of the Southeastern Massachusetts Health Group. . . .
>
> As part of an ongoing effort by the Group to control costs while providing excellent benefits, the Health Group has voted to make the attached co-pay changes, effective July 1, 2007.
>
> * * *
>
> As the terms of our continued participation in the Group requires that we accept the change approved by the Group, the Town does plan to implement these changes effective July 1, 2007. If you would like to discuss this matter further, please feel free to contact me.[3]

On March 26, 2007, Phillips replied to this notice with a letter stating in pertinent part:

> It has come to the attention of the [Union] that the Town is preparing to make changes to the terms and provisions of the current health insurance plans and specifically is proposing to increase certain co-pays and/or add or change deductibles.
>
> Employer subsidized health insurance is a form of compensation. Thus, pursuant to the provisions of [the Law], any proposed changes to co-pays and/or deductibles must be bargained. . . .
>
> Thank you for your attention to this matter. Please contact me so that we may determine mutually agreeable dates and times to discuss and bargain over this matter.[4]

Also on March 22, 2007, the Town sent a memo to "All Town employees with healthcare benefits." The two sentence memo attached a rate sheet detailing changes to the Town's "health insurance premiums for FY 08 beginning July 1, 2007" and instructed employees to "Contact your Union president with any questions and/or concerns you may have."[5]

On May 15, 2007, the parties met to discuss the proposed health insurance changes and reached a tentative agreement. The Town agreed to draft a Memorandum of Agreement incorporating the settlement terms.[6]

On July 1, 2007, without finalizing or signing the tentative MOA, the Town implemented the co-payment increases described in its earlier correspondence to the Union and Town employees. Almost six weeks later, on August 10, 2007, Town attorney Kevin Feeley (Feeley) sent Union consultant Donna DeSimone Buckley (Buckley) an email stating:

> I understand from George [Samia] that your East Bridgewater "E-Board" has oked the parameters of the co-pay resolution. I have attached a pretty straightforward agreement for your review. Please feel free to call me . . . if you have any questions or suggested revisions.

The draft agreement provided that the Town would reimburse employees from July 1, 2007 to July 30, 2008 for any co-payments incurred in excess of $271.00 over the co-payment amount they would have paid before the July 1, 2007 increases went into effect.[7]

On September 21, 2007 Buckley sent Feeley an email notifying him that the Union's e-board had voted not to ratify the agreement. She proposed some bargaining dates in October 2011 to "see if we

---

2. The attached rate sheet reflected co-payment increases for office, emergency room and hospital stay visits for Blue Care Elect Preferred and HMO Blue NE plan members.

3. The Board has supplemented the Hearing Officer's findings to include the text of this letter, which was admitted into evidence as Joint Exhibit 1.

4. The Board has supplemented the Hearing Officer's findings to include the text of this letter, which was admitted into evidence as Joint Exhibit 2.

5. The Board has supplemented the Hearing Officer's findings to include the text of this letter, which was admitted into evidence as Joint Exhibit 3.

6. The Town seeks a supplemental finding that it never changed its position that the health insurance changes would go into effect on July 1, 2007. However, the Town fails to point to any portion of the record in which this was clearly communicated to the Union once the parties commenced bargaining. In its supplementary statement on appeal, the Town points only to Samia's testimony that the parties never discussed retracting the March 22nd notice and that the Town never changed its position. That does not have the same weight as evidence that the Union was informed that the changes would go into effect regardless of the status of negotiations at the time and we decline to supplement the Hearing Officer's findings as requested.

7. Based on an excerpt from Buckley's testimony that the Union quoted in its supplemental statement, it would appear that once bargaining commenced, the Union was focused on maintaining the economic status quo for employees once the changes went into effect. According to Buckley, if the parties reached such an agreement, "there wouldn't be anything to talk about at that point." There is no dispute that this did not occur as of the date the changes were implemented.

can come to resolution." The parties met on October 24, 2007. The Union made additional proposals regarding the changes to the health insurance co-payments. The Respondents did not accept the proposed changes and the issue remained unresolved.

Opinion

On appeal, the Respondents argue that the Union's charge was untimely because the six-month period of limitations began running when the Union first received notice of the planned co-payment changes and not when the changes were implemented. In response, the Union contends that because the parties bargained after the Administrator first announced the changes, the period of limitations began to run when the Union first learned that the Respondents had violated their bargaining obligation, which occurred either at implementation or several months later, when the Respondents declined to accept the Union's post-implementation proposals. We begin our analysis of this matter with a brief review of some basic Board law.

Section 6 of the Law requires public employers to give the exclusive collective bargaining representative prior notice and an opportunity to bargain to resolution or impasse before changing wages, hours and other terms and conditions of employment. *Lowell School Committee*, 23 MLC 216, *aff'd sub nom. School Committee of Lowell* v. *Labor Relations Commission*, 46 Mass. App. Ct. 921 (1999). An employer violates Section 10(a)(5) when it "refuse[s] to bargain collectively in good faith with the exclusive representative as required in section six." MGL c. 150E, §10(a)(5).

Section 15.03 of the Department's rules, 456 CMR 15.03, states:

> Except for good cause shown, no charge shall be entertained by the Department based upon any prohibited practice occurring more than six months prior to the filing of a charge with the Department.

It is well-established pursuant to Department Rule 15.03, a charge of prohibited practice must be filed with the Department within six months of the alleged violation or within six months of the date the violation became known or should have become known to the charging party, except for good cause shown. *Felton* v. *Labor Relations Commission*, 33 Mass. App. Ct.. 926 (1992); *Town of Lenox*, 29 MLC 52 (2002) (citing *Town of Dennis*, 26 MLC 203 (2000). Thus, in unilateral change cases, the timeliness of a charge turns on when the union knew or should have known that the employer would implement a change affecting a mandatory subject of bargaining without satisfying its Section 6 bargaining obligation.

In cases where an employer has not given the union prior notice of a change, the period of limitations begins to run when the union has actual or constructive knowledge of the change itself, which usually, but does not always, coincide, with the date the change was actually implemented. *See, e.g., Town of Dennis*, 28 MLC 297 (2002) (where Town did not give notice of co-payment increases, limitations period started to run when union first learned from bargaining unit members that those changes had taken effect); *Town of Middleboro*, 19 MLC 1200 (1992) (period of limitations began running on date union learned that police chief issued order immediately changing the time police officers report to court).

In cases such as this one, where an employer has given the union prior notice of a future change, a charge's timeliness turns on when the union knew or should have known that the employer intends to implement the change without first satisfying its statutory bargaining obligation. Thus, if the employer presents the change as a *fait accompli*, that is, if, under all the attendant circumstances, it can be said that the employer's conduct has progressed to a point that bargaining would be fruitless, the clock starts running on the date when the change is first announced. *See, e.g., Town of Dennis*, 26 MLC at 205 (Commissioner Preble concurring) (period of limitations began running on date when police chief issued a personnel order announcing sergeant's new duties, effective six weeks later). This stands to reason - if a union is notified of an impending change to a mandatory subject of bargaining, but circumstances are such that it would be futile to even request bargaining, it is clear that this is the point union knows that employer is going to implement the change without satisfying its statutory bargaining obligation. In those situations, although the Law may excuse a union from demanding to bargain, *see, e.g., Town of Hudson*, 25 MLC 143, 148 (1998), it does not excuse it from filing a charge within six months of the realization that bargaining would be futile. *Town of Dennis*, 26 MLC at 205.

Conversely, if a change is not presented as a *fait accompli*, i.e., if advance notice is provided and it appears that the union's demand to bargain could still bring about results, the time for filing a charge does not start running until the point at which the union has actual or constructive knowledge that the employer has violated the Law by failing to bargain to resolution or impasse before making the change. In some cases, this is the date the change is actually made. *Town of South Hadley*, 27 MLC 161, 164 (2001). In others, it is the date before implementation when the employer ceases to bargain in good faith. *Boston School Committee*, 35 MLC 277, 285-286 (2009) (period of limitations started running when employer refused to bargain over proposed copayment changes at the main table, not when proposed co-payment changes first announced).

In this case, the Hearing Officer found that the Town did not present the Union with a *fait accompli*, and, therefore, the limitations period started to run on the date the employer implemented the changes, which was before the parties reached impasse. The Town argues that this conclusion is erroneous as a matter of Law because, as in *Town of Lenox*, it clearly informed the Union that co-payment changes would take place on July 1 and never veered from this position. However, in *Town of Lenox*, the employer notified all individual insurance participants on May 8, 2001 that prescription drug co-payments were going to increase on July 1. 29 MLC at 51. The Board's decision, made on a pre-hearing motion to dismiss, reflects no direct communications between the union and the town before or after the changes were implemented. *Id.* at 51-52.

In this case by contrast, although the Town provided a similar co-payment increase notice to individual employees, it simultaneously sent a separate letter to the Union notifying it of these changes and, notably, offering to discuss the change. Furthermore, the Union, consistent with its statutory bargaining obligation, im-

mediately replied to the March 22 notice with a demand to bargain and the parties bargained, resulting in the tentative MOA. Accordingly, even if the March 22 notice to individual insurance participants undercut the Town's offer to discuss the changes with the Union and/or rendered it ambiguous, the fact that the Town subsequently bargained with the Union and reached a tentative MOA clarifies that, at least initially, the Town complied with its Section 6 obligation to provide the Union with notice and an opportunity to bargain before implementing the change. The Board has previously held that similar notifications directly to unions do not constitute a *fait accompli*. *See Commonwealth of Massachusetts*, 28 MLC 351, 363 (2002) (citing *Holliston School Committee*, 23 MLC 211 (1997)) (Commonwealth's January 28 letter notifying union of change to take place between April 1 and June 1 and offering to meet and discuss the plan provided the union with both actual notice of impending change and reasonable opportunity for Union to negotiate); *but see Town of Hudson*, 25 MLC at 148 (absent justification for deadline, nine (9) days between the date of actual notice and date of change is insufficient time to afford a union a meaningful opportunity to bargain).

However, on July 1, before even reducing the proposed MOA to writing, the Town implemented the change. This took place before the parties reached resolution or impasse, as evidenced by the Town's *post*-implementation draft MOA, and, therefore, it is at this point that Union knew or should have known that the Law had been violated. *Town of South Hadley*, 27 MLC at 164.

The Town argues that it never veered from its position that the changes would be implemented on July 1 and that this demonstrates that the Union should have known on March 22 that the changes were going to be implemented. However, as noted in note 6, above, the record is not entirely clear on this point. Even assuming the Union did know about the intended implementation, there is no evidence that the Union knew that this would occur before the parties had bargained to resolution or impasse. That is, because the parties were actively engaged in bargaining and had reached a tentative MOA in mid-May, the Union had no way of knowing that the Town would implement before bargaining to resolution or impasse until this actually occurred on July 1, 2007. In this regard, this matter is distinguishable from *Boston School Committee*, where the school committee told the union that it would not bargain over health insurance changes at the main table as the Union had requested and as the Law required. 35 MLC at 281. The Board held that the period of limitations began running on the date the City refused to bargain at the main table over the changes, because that was when the Union knew that the School Committee would implement the changes without satisfying its bargaining obligation. *Id.* at 286. Here, by contrast, the Town did not present the Union with a *fait accompli* and did not refuse to bargain with the Union when the Union requested it do so. Therefore, regardless of whether the Town affirmatively agreed to delay implementing the change, the Union had no reason to know before July 1, 2007 that the Town would implement those changes before bargaining was completed.

The Town's reliance on *Town of Wakefield*, 27 MLC 9 (2000), does not persuade us otherwise. In that case, the union alleged that the town had unlawfully disciplined a union official in violation of Section 10(a)(3) of the Law. *Id.* at 9. However, the union waited to file its charge until the school committee denied its grievance over the discipline, which was more than six months after the discipline took place. *Id.*. The Board held that the charge was untimely, finding that the limitations period began to run on the date the union learned of the discipline that formed the basis of its charge, and not the date on which its efforts to challenge that discipline through the parallel grievance process failed. *Id.* at 10. The lesson to be drawn from *Wakefield* is that once a change has been implemented, parties' *post*-implementation efforts to litigate in another forum or reach a settlement on the acts that form the basis of an unfair labor practice do not change the date on which a charging party knew or should have known of the conduct that forms the basis of its charge. *See also Suffolk County Sheriff's Department*, 29 MLC 21 (2002) (limitations period starts to run on date computer program affecting overtime calculations implemented, notwithstanding employer's efforts to correct program); *Town of Middleboro*, 19 MLC at 1202 (limitations period started when change implemented, not subsequently, when board of selectmen rescinded an earlier directive to undo initial change).

In this case, however, the Union did file its charge within six months of the date the changes were implemented. Moreover, because the change was not presented as a *fait accompli*, the bargaining that took place prior to implementation was not in the nature of settlement of an unfair labor practice charge, but rather the very type of pre-implementation bargaining that Section 6 of the Law requires. For these reasons, we affirm the Hearing Officer's conclusion that the period of limitations began to run on July 1, 2007 and not on the date the Town first notified the Union of the planned change. Because we have determined that the Respondents violated the Law on July 1, 2007, we need not address their argument contesting the Hearing Officer's conclusion that the parties were not at impasse on October 24, 2007.

Conclusion

For the foregoing reasons, we affirm the Hearing Officer's conclusion that the Respondents violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by unilaterally implementing increases to health insurance co-payments.

Remedy

The Board fashions remedies for violations of the Law by attempting to place charging parties in the positions they would have been in but for the unfair labor practice. *Natick School Committee*, 11 MLC 1387, 1400 (1985). The Hearing Officer originally ordered the Respondents to, among other things, restore the cost and structure of the co-payments for all health insurance plans in place prior to July 1, 2007 and to make whole bargaining unit members for any economic losses they may have suffered as a result of the Town's unlawful change to health insurance co-payments. In this case, given the Union's consistent position that it would accept the co-payment changes as long as the economic status quo was restored, we decline to order the Respondents to restore the cost and structure of the pre-July 1 2007 co-payments. The rest of the order, including the make-whole remedy, remains intact.

ORDER

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

1. Cease and desist from:

a. Failing and refusing to bargain collectively in good faith by unilaterally changing health insurance co-payments for bargaining unit members represented by the Union without giving the Union an opportunity to bargain to resolution or impasse.

b. In any like manner, interfere with, restrain and coerce any employees in the exercise of their rights guaranteed under the Law.

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

a. Upon request, bargain with the Union, in good faith to resolution or impasse before implementing any changes in health insurance co-payments.

b. Make whole bargaining unit members for any economic losses they may have suffered as a result of the Respondents' unlawful change to health insurance co-payments, plus interest on any sums owing at the rate specified in MGL c. 321, sec. 6I compounded quarterly.

c. 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.

d. Notify the Board 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.

APPEAL RIGHTS

Pursuant to MGL c.150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

COMMONWEALTH EMPLOYMENT RELATIONS BOARD

NOTICE TO EMPLOYEES

POSTED BY ORDER OF COMMONWEALTH EMPLOYMENT RELATIONS BOARD

AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth Employment Relations Board (Board) has held that the Town of East Bridgewater and the East Bridgewater School Committee (Respondents) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by failing to bargain in good faith with the East Bridgewater Education Association (Association) by changing health insurance co-payments and failing to give the Association prior notice and an opportunity to bargain to resolution or impasse before implementing these changes. Chapter 150E gives public employees the right to form, join or assist a union; to participate in proceedings at the Department of Labor Relations; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and to choose not to engage in any of these protected activities.

The Respondents post this Notice in compliance with the Hearing Officer's Order.

WE WILL NOT fail or refuse to bargain collectively in good faith with the Association by implementing changes to health insurance co-payments for employees represented by the Association without first affording the Association notice and an opportunity to bargain to resolution or impasse.

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

WE WILL, upon request, bargain with the Association to resolution or impasse before increasing health insurance co-payments for employees represented by the Association.

WE WILL make whole employees represented by the Association for any economic losses suffered as a result of the Respondents' unlawful change in health insurance co-payments on July 1, 2007.

[signed]
For the Town of East Bridgewater

Dated

[signed]
For the East Bridgewater School Committee

Dated

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

This notice must remain posted for 30 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Department of Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).

* * * * * *