STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

SOUTHGATE COMMUNITY SCHOOL DISTRICT,
Respondent-Public Employer in Case No. C99 E-90,

-and-

UNITED TEACHERS OF SOUTHGATE, MEA-NEA,
Respondent-Labor Organization in Case No. CU99 E-18,

-and-

RENEE CASILLAS, ET AL.,
Charging Parties.
_____/

APPEARANCES:

Logan, Huchla & Wycoff, P.C., by Charles E. Wycoff, Esq., for the Public Employer

Amberg, McNenly, Firestone & Lee, P.C., by Michael K. Lee, Esq., for the Labor Organization

Mark H. Cousens, Esq., for the Individual Charging Parties

DECISION AND ORDER

On January 22, 2001, Administrative Law Judge James P. Kurtz issued his Decision and Recommended Order in the above matter finding that Respondents did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Dated: _____

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Amberg, McNenly, Firestone & Lee, P.C., by Michael K. Lee, Atty, for the Labor Organization

Mark H. Cousens, Atty, for the 18 Individual Charging Parties

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON MOTIONS TO DISMISS

These charges were filed on May 20, 1999, naming as Respondents the above School District and the bargaining representative for its teaching employees. The cases were assigned to James P. Kurtz, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission, and a consolidated complaint and notice of hearing, dated May 25, 1999, was issued under Section 16 of the Public Employment Relations Act (PERA), 1965 PA 379 and 1973 PA 25, as amended, MCLA 423.216, MSA 17.455(16), setting a hearing date of June 14, 1999. Thereafter, as outlined below, the parties filed various pleadings, motions to dismiss, and briefs relative to the timeliness of the filing of the charges under Section 16(a) of PERA. In the absence of any factual dispute, the parties agreed that this timeliness issue may be submitted for decision without a hearing. Accordingly, the undersigned notified the parties that the record on the motions was closed as of September 1, 2000. Based upon the pleadings and other written material submitted in this matter, the undersigned makes the following findings of fact, conclusions of law, and recommended order under Section 16(b) of PERA:

The Charges and Facts:

There is no dispute in the facts set forth in the two sets of charges filed herein, which contain identical allegations summarized as follows: The 18 Charging Parties are all individual teaching employees of the Respondent Employer, who are in the bargaining unit of teaching and other professional employees represented by the Respondent Labor Organization, United Teachers of Southgate (UTS).[1] The Charging Parties were until the beginning of the 1998-1999 school year employed by the Wayne County Intermediate School District, also referred to as the Wayne County Regional Educational Service Agency (WCRESA). As employees of WCRESA, they were assigned to what is known as the Beacon Center Day Treatment Program. Commencing with the beginning of the 1998-1999 school year, this program, along with its employees, was transferred from WCRESA to the control of the Respondent Employer, Southgate Board of Education, where the employees were included in the UTS bargaining unit. The Employer and the UTS had entered into a new three-year collective bargaining agreement on July 30, 1998 to replace the prior contract expiring at the end to the 1997-1998 school year. The new contract became effective on September 1, 1998, at about the same time as the Beacon Center program and its employees were beginning operation under the jurisdiction of the Southgate District.

The transfer of the program was done under a provision of the current revised school code of the State, MCL 380.1766, MSA 15.41766, which protects the employment of intermediate school district employees whose special education program is discontinued and assumed by a constituent district. In pertinent part, subsection (2) of the statute provides that, "Special education personnel . . . shall be entitled to all rights and benefits to which they would otherwise be entitled had they been employed by the constituent district originally." This subsection also provides that under these same circumstances the teacher tenure act, MCL 38.71-38.191, MSA 15.1971-15.2056, applies to the employees involved, except that the controlling board can impose another one-year probationary period. Subsection (3) provides that the statute does not apply when the affected employee is covered under "an agreement which provides substantially the same benefits." See *Dearborn Fed of Teachers, Local 681 v Dearborn Bd of Ed*, 172 Mich App 270, 274 (1988), which construed a similar provision under the former school code of 1976.

In June of 1998, the UTS and the Employer entered into a memorandum of understanding (MOU) to facilitate the transfer of the Beacon Center program, and the integration of its employees into the UTS bargaining unit. This MOU was attached as an appendix to the new collective bargaining agreement. This MOU confirmed that the program employees would be added to the UTS bargaining unit, granted them seniority based on their date of hire by WCRESA, and granted them placement on the contract salary schedule based on that same date. In the MOU, the parties agreed there would be no transfers or reassignments of teachers, absent written agreement, during the 1998-1999 school year. With regard to 1999-2000 and thereafter, the MOU provided that, "Recognizing

[1]The name of an additional employee was originally included on the charges, but was later withdrawn as a Charging Party.

the distinct nature of instruction and working conditions as between regular and special education assignments," any transfer was subject to an additional qualification which, according to the Charging Parties, effectively negated the statutory grant of seniority to program employees; namely,

> The affected employee, within the preceding 10 years, must have successfully taught or otherwise successfully provided professional services for at least one semester in the Southgate Community School District in the same type of assignment. . . .

The MOU also provides that this qualification may be waived ". . . to facilitate the assignment of current or laid off teachers and to meet particular instructional requirements. . . ."

Charging Parties contend that the above qualification was adopted to prevent program employees from using their accumulated seniority to claim vacant positions sought by other Southgate employees, and to circumvent and nullify the statutory seniority rights of program employees. Both the Union and the Employer, according to Charging Parties, have violated PERA by making an agreement that circumvents the above statute, which in effect constitutes a prohibited subject of bargaining. Further, the Union has allegedly violated its duty of fair representation by making such an agreement that unfairly targets certain unit members and deprives them of the benefits of the law. Charging Parties allege that several general education positions, which at least some of them were qualified to teach, become vacant in the spring of 1999, but the MOU made application for such vacancies futile. The Commission is asked to determine that the MOU is an unlawful agreement, and that the provision requiring a teacher to have prior experience within the past 10 years in the Southgate District before transfer from special to general education be declared void and unenforceable. There is no contention in this matter that any Charging Party applied for and was refused a transfer based on the MOU provision in question.

Answers of Respondents and Other Pleadings:

The Union and the Employer filed answers to the charge on June 1 and 8, 1999, respectively. The answers admitted the essential factual allegations, but denied any unfair labor practice. Both answers raised the affirmative defenses of a failure to state a claim, and that the matter was barred by the six months statute of limitations in Section 16(a) of PERA. The Employer noted affirmatively that subsection three of the cited provision of the revised school code makes the statute inapplicable to persons covered by agreements which provide substantially the same benefits, such as the collective bargaining agreement and MOU in this case. The Union also raised the affirmative defense of lack of ripeness because there had been no denial of a transfer to any of the Charging Parties, and that the Charging Parties had failed to exhaust their administrative, contractual, or other remedies.

On September 8, 1999, the Union filed a motion for summary disposition of the charge, with a brief in support. This motion was based on the alleged untimely filing of the charge on May 20, 1999, almost nine months after the contract became effective, citing *Leider v Fitzgerald Ed Ass'n*, 167 Mich App 210, 215 (1988). The motion also noted that none of the Charging Parties had been denied a transfer, and that they were essentially asking for the equivalent of a "declaratory ruling" without reference to any specific harm, except the existence of the MOU. Charging Parties were asked to

respond by the undersigned's letter dated September 29, 1999.

The response of the Charging Parties was filed on November 9, 1999, contending that the violation of PERA was continuing in nature, and that the Charging Parties had suffered harm within the six-month period prior to the filing of the charge. Essentially, the Charging Parties argued that the clause nullifying their seniority violated the school code and was unlawful and unenforceable. Such an unenforceable clause, according to Charging Parties, constitutes a continuing violation of PERA, since the period of limitations never expires on an unlawful contract provision. Cited in support of the proposition that the clause in this matter is a continuing violation was the NLRB case of *Teamsters Local 293 (Lipton Dist Co)*, 311 NLRB 538, 143 LRRM 1237 (1993). In the *Teamsters* case, a majority of the Board held that because the maintenance and enforcement of a contract provision requiring payment of a higher wage to union shop stewards is "invalid on its face," the Board was not precluded from finding the provision unlawful more than six months after the execution of the contract. Therefore, the charge herein is allegedly timely because the offending clause is similar and impacted the Charging Parties in the spring of 1999 when transfer positions were posted, even though the Charging Parties did not apply on the ground that it would have been futile.

Ruling on Motion to Dismiss and Subsequent Submissions:

By letter dated December 7, 1999, the undersigned ruled that the Section 16(a) limitations period under PERA had run relative to the challenge to the legality of the MOU provision, since the contract was effective on September 1, 1998, and the charges were not filed until May 20, 1999. In pertinent part, the ruling stated:

> . . . The Commission has held in such cases that the six-month limitation period under Section 16(a) of PERA dates from the effective date of the contract, and that there is not a continuing violation in such cases. *City of Adrian*, 1970 MERC Lab Op 579,581, 584-585, adopting the U.S. Supreme Court ruling in *Local Lodge 1424, Machinists v NLRB (Bryan Mfg Co)*, 362 US 411, 45 LRRM 3212 (1960); see also *City of Flint*, 1996 MERC Lab Op 1, 9-11; *Wayne State Univ*, 1975 MERC Lab Op 189, 194 and cases cited thereat.

While the undersigned held no further action was possible on the charges, Charging Parties were given the option of a hearing on the motion.

Instead of seeking a hearing the Charging Parties chose to respond in writing, which was received on April 24, 2000. All of the parties thereafter agreed that this case could be resolved on briefs, and waived a hearing. The Union filed a brief on July 19, 2000, and a reply was filed by the Charging Parties on August 4, 2000. No further pleading was filed by the Employer and the record in this matter was closed as of September 1, 2000.

Discussion and Conclusions:

Where no evidentiary hearing has been held, the facts must be construed most favorably to the

Charging Party. *Central Mich Univ*, 1995 MERC Lab Op 112, 116. Charging Parties case for the timeliness of its charge must rest on its contention that the MOU provision at issue is illegal on its face. The agreed facts establish that nothing has happened during the six-month period preceding the filing of the charges, except for the maintenance of the provision in the contract and the refusal of the Charging Parties to bid on a transfer because such bid might be futile, despite the waiver clause attached to the alleged offensive provision. Thus, for Charging Parties to prove a violation of PERA in this case, it would be necessary to go back and rely entirely on the negotiation of the provision in the summer of 1998, and on the transfer of the Charging Parties into the Union's bargaining unit at the beginning of the 1998-1999 school year. This is exactly what the Supreme Court in *Bryan, supra*, would not allow. The recognition and bargaining with a minority labor organization did not change with the passage of the six-month period in *Bryan*, but the ability to declare the contract null and void did pass. The mere maintenance of the contract did not give rise to a new violation of the statute, and the same rationale applies to the contract provision in this case. See also *Univ of Mich*, 2000 MERC Lab Op __ (6-13-00); *Hawkins Steel Cartage*, 1990 MERC Lab Op 683, 688-689, and cited cases; *cf. Spring Lake P S*, 1988 MERC Lab Op 362, 366-367, where the Commission found that each refusal to bargain a mandatory subject of bargaining constitutes a separate violation of PERA.

I agree with the contention of the Union that the contract clause at issue is at least neutral, if not valid, on its face. One must rely on facts extrinsic to the contract to render the clause arguably unlawful, so I find the precedent cited by Charging Parties of contract provisions illegal on their face inapplicable in this case. To take the *Teamsters* case, *supra*, as an example, the clause found illegal in that case provided for higher wages for union stewards, something that would be openly and continuously paid to the stewards during the life of the contract. Compare *City of Holland*, 1992 MERC Lab Op 461, 464, where the granting of greater dental benefits to unorganized employees of the employer was held not to be a continuing violation, and was not discriminatory or a refusal to bargain. As noted above, no action by the Employer or Union has taken place in this case within the statutory limitations period that would give rise to a new unfair labor practice. What would have happened if a Charging Party had applied for a transfer to a regular education position in the spring of 1999 is purely speculative and cannot be the basis for an unfair labor practice.

Accordingly, I conclude that there is no basis in this case for further proceedings and that the motions to dismiss the charges must be granted. This conclusion, I find, is in accord with the holdings of the Commission in *Muskegon Heights School Dist.*, 1994 MERC Lab Op 852, 854; and 1993 MERC Lab Op 869 and 654, since no "issues of fact" have been advanced herein under Section 72(3) of the Michigan Administrative Procedures Act, MCLA 24.272(3), MSA 3.560(172)(3), which would require giving Charging Party a further "opportunity to present evidence and argument." *Smith v Lansing School Dist.*, 428 Mich 248, 257-260, 126 LRRM 3169, 3172-3173 (1987). Therefore, I recommend that the Commission issue the following order:

ORDER DISMISSING CHARGES

Based upon the findings of fact and conclusions of law set forth above, the unfair labor practice charges filed in this matter are hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

James P. Kurtz
Administrative Law Judge

DATED: