STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

KENTWOOD PUBLIC SCHOOLS,
Public Employer–Respondent,

Case No. C03 E-109

-and-

KENTWOOD EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION, KCEA/MEA/NEA ,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Peter A. Patterson, Esq., for Respondent

White, Schneider, Young & Chiodini, P.C., by William F. Young Esq., for Charging Party

DECISION AND ORDER

On August 12, 2004, Administrative Law Judge Roy L. Roulhac issued his Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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

_____
Nora Lynch, Commission Chairman

_____
Harry W. Bishop, Commission Member

_____
Nino E. Green, Commission Member

Dated: _____

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Peter A. Patterson, Esq., for Respondent

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DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, Administrative Law Judge Roy L. Roulhac heard this case for the Michigan Employment Relations Commission (MERC) in Lansing, Michigan on April 23, 2004. Based upon the record and post-hearing briefs filed by June 15, 2004, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge:

Charging Party Kentwood Educational Support Personnel Association, KCEA/MEA/NEA, filed an unfair labor practice charge against Respondent Kentwood Public Schools on May 16, 2003. As amended on September 19, 2003, the charge alleges that Respondent breached its duty to bargain in good faith by, *inter alia*, setting preconditions to bargaining, unilaterally implementing a school calendar, and engaging in surface bargaining and repudiating the mediation process.

Findings of Fact:

A. Preconditions to Bargaining

Charging Party is the exclusive bargaining representative for non-supervisory food service employees, bus drivers, paraprofessionals, Chapter I tutors and custodial, maintenance and mechanical personnel, including shuttle/warehouse personnel, employed by Respondent. Charging Party and

Respondent were parties to a collective bargaining agreement that expired on June 30, 2003. Respondent and the Kentwood Education Association (KEA), which represents teachers employed by Respondents, were parties to an agreement that also expired on June 30, 2003. During bargaining for successor contracts, a KEA representative attended Charging Party's negotiation sessions and a KESPA representative attended KEA's sessions.

On March 10, 2003, the parties began negotiations. The parties limited their discussion to ground rules, the calendar for the 2003-04 school year and goals for completing negotiations. The parties agreed to delay further bargaining until after an April 22 bond election.

In the meantime, Respondent's Superintendent Dr. Mary Leiker attended an April 19 union general membership member at the invitation of a bargaining unit member. In response to a question, Dr. Leiker stated that Respondent would not be able to afford step increases, a raise and fully paid insurance. Before leaving the meeting, Dr. Leiker asked Sue Burt, Charging Party's Uniserv Director and chief negotiator, whether there was anything that she said that had not been previously discussed with her. Burt responded, "No." In February or March 2003, Dr. Leiker had discussed Respondent's financial condition with Burt and Jane McDaniels, Charging Party's president. Dr. Leiker told them that if the State cut $533,00 from the District's 2003-4 budget, there would not be enough money for fully paid insurance and step and salary increases, that step and salary freezes would be needed and, even then, there might be teacher layoffs. According to Dr. Leiker, her statement at the union meeting and to Burt and McDaniels has remained Respondent's position throughout bargaining. McDaniels testified that the Charging Party's goals included securing step and salary increases.

B. Implementation of School Calendar

On May 20, 2003, Respondent submitted a proposed calendar for the 2003 – 2004 school year to the KEA and Charging Party. They submitted a counter-proposal on June 16. During the course of bargaining, the parties did not reach a tentative agreement. On August 21, Respondent adopted a resolution stating that since May 2003, it had engaged in good faith bargaining with the KEA and Charging Party regarding the school calendar on at least twelve different occasions and during at least one all-day mediation session; the parties had been unable to agree on the calendar for all or part of the school year and it believed that the parties were clearly at impasse. The resolution also stated that the Kentwood School District community (staff, parents and students) needed to know the school calendar for at least the next several months and noted that, historically, Respondent informs the school community of the full school year calendar in August. In the resolution, Respondent established the starting day and adopted a partial calendar that ended on December 31.

The calendar adopted by Respondent was not introduced as an exhibit. McDaniels testified on direct examination that "we ended up the one day – the October day that was going to be a records day ended up being an in-service day, and there was – our curriculum half days were different." On cross-examination, McDaniels testified that the calendar followed the expired 2000-2003 contract.

C. Abuse of Mediation Process and Surface Bargaining

During negotiations on August 19, 2003, Respondent met with the teachers' local in the morning and with Charging Party in the afternoon. Mediation was scheduled for the teachers' local on August 20 and for Charging Party on August 21.

According to McDaniels, on August 20, during mediation involving the KEA, Respondent's attorney stated, "I've saved you time. I filed for fact finding." McDaniels testified that she understood that Respondent had filed fact finding petitions for both the KEA's and Charging Party's units. According to McDaniels, she knew that it was a virtual certainty that the parties were going to fact finding on the three big issues – salary, step increase and insurance premiums. After Respondent announced that a fact finding petition had been filed, Respondent questioned the need to engage in mediation with Charging Party the next day as scheduled. According to McDaniels, Charging Party countered that "there should be mediation for KESPA because there is [sic] things that we could – that could be worked on." At the beginning of the mediation session, the parties agreed that step and salary increases and insurance premium contributions would not be discussed. Rather, they would focus on language and other issues where they believed progress could be made. Some progress was made.

While the parties were engaged in mediation, a group of secretaries were observed stuffing envelopes in the courtyard. The next day, according to Mary Iciek, a member of Charging Party's bargaining team, she received a letter, dated August 21, from Respondent. Pertinent parts read:

> The District has now completed 15 bargaining sessions and two mediation sessions in the hopes of reaching a successor agreement with the KEA/KESPA/KCEA. Unfortunately, while we had hoped to continue our tradition of starting the school year with a new contract in place, no agreement has yet been reached.
>
> We are disappointed in the lack of resolution, as we believe you are. However, we simply cannot provide salary, step (annual seniority increases), and insurance increases when there is no new money from the State this year. We continue to receive grim news about the State's, and thus our own, financial picture. On August 19, we learned that the decline in State revenues **"was about twice as much as had been expected."**[1] In this environment, we believe our position on the unresolved issues is fair and reasonable. We have unwavering confidence in our Superintendent, administration, and bargaining team.
>
> Therefore, we have filed a Petition for Fact finding with the Michigan Employment Relations Commission.

Conclusions of Law:

A. Preconditions to Bargaining

Charging Party, relying on *Hart Educational Support Personnel Ass'n*, 1994 MERC Lab Op 734, claims that Respondent violated PERA by setting preconditions to bargaining. According to Charging

[1] Emphasis in original.

Party, at the union's general membership meeting on April 19, Superintendent Leiker "threw down the gauntlet" and set forth Respondent's position on economics that it maintained throughout bargaining. Assuming this assertion is true, it does not demonstrate that Respondent set a precondition to bargaining. A precondition to bargaining implies that one party must do something before the other party will bargain. Charging Party has failed to identify any condition in the Superintendent's remarks that had to be fulfilled before Respondent would bargain. In *Hart*, an unfair labor practice was found where two different bargaining units conditioned settlement in one bargaining unit upon receiving an acceptable settlement offer in second bargaining unit. Here, the Superintendent merely provided information on Respondent's ability to provide salary and step increases and fully-paid insurance premiums in view of declining revenue.

B. Implementation of School Calendar

Charging Party contends that the parties were not at impasse on the calendar and to the extent that the calendar imposed by Respondent was not consistent with its prior proposal, it committed an unfair labor practice. This assertion also lacks merit. Charging Party and the KEA rejected a calendar proposed by Respondent in May 2003, and submitted counter proposals on June 16. On August 21, after the parties failed to reach agreement, Respondent implemented a calendar that, as acknowledged by Charging Party's president, followed the calendar in the expired contract although it was different from Respondent's May 2003, proposal. These facts are similar to those presented in *Mason Co Eastern Schs*, 1993 MERC Lab Op 5, 15. There, the Commission found that the union's rejection of two different tentative agreements left the employer with no alternative but to return to the status quo. See also *Waldron Area Schs*, 1996 MERC Lab Op 115, where the Commission found that the employer was not obligated to implement its most recent bargaining proposal when it decided that it needed to set the Christmas vacation schedule. Rather, the Commission held that the employer was entitled to follow the parties' past practice. The same conclusion is warranted in this case.

C. Abuse of Mediation Process and Surface Bargaining

Finally, Charging Party claims that Respondent abused the mediation process and engaged in surface bargaining. According to Charging Party, Respondent had no intention of engaging in mediation in good faith because it filed a fact finding petition on August 20, the day before mediation. Moreover, Charging Party argues, while the parties were engaged in mediation, Respondent was preparing a letter indicating that fact finding was being sought because of a "lack of resolution." These assertions are not supported by the record and require little comment.

The record demonstrates that Respondent announced during mediation with the KEA on August 20, that it was filing a fact finding petition for Charging Party and KEA. Charging Party knew with virtual certainty that the parties were going to fact finding on step and salary increases and insurance premium contributions. Respondent prepared the letter on August 21 after announcing that it had filed a fact finding petition for both the KEA and Charging Party. Further, on August 21, prior to the beginning of mediation, the parties agreed that insurance premium contributions and step and salary increases would not be discussed. These facts simply do not support Charging Party's claim that Respondent had no indication of engaging in mediation in good faith and did not enter the mediation process with an "open mind" and "sincere desire" to reach agreement. The parties engaged in mediation and made some progress.

Moreover, Charging Party presented no evidence that Respondent engaged in surface bargaining or that Respondent was unwilling to bargain. Nor is there evidence on the record that Charging Party presented an alternative proposal or changed its goal of gaining step and salary increases. Section 15 of PERA does not compel either party to agree to a proposal or to make a concession. I conclude that Respondent did not abuse the mediation process or engage in surface bargaining.

Based on the above findings of fact and conclusion of law, I recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

The unfair labor practice charge is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Roy L. Roulhac
Administrative Law Judge

Dated: _____