STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GOODRICH AREA SCHOOLS,
Public Employer - Respondent,

Case No. C05 D-090

-and-

GOODRICH EDUCATION ASSOCIATION,
LOCAL 10, MEA/NEA,
Labor Organization - Charging Party.
_____/

APPEARANCES:

Thrun Law Firm, P.C., by William G. Albertson, Esq., for the Respondent

Law Offices of Lee & Correll, by Michael K. Lee, Esq., and Erika Pennil, Esq., for the Charging Party

DECISION AND ORDER

On May 30, 2008, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order in the above matter finding that Respondent, Goodrich Area Schools, violated Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(e). The ALJ found that Respondent unilaterally reduced the length of the work year without notice to the Union and without bargaining, thereby constituting an improper repudiation of the parties' agreement and of Respondent's bargaining obligation with Charging Party, Goodrich Education Association, Local 10, MEA/NEA (Union). The ALJ also found that Respondent violated its duty to bargain in good faith by unilaterally altering the length of the school day in several schools. The ALJ recommended that Respondent cease and desist from such unilateral action and take affirmative action, including: restoring the length of the teachers' work year, restoring the length of the teachers' working day in the affected schools, and appropriately compensating those affected by the unilateral changes. The ALJ found, however, that Respondent did not violate Section 10(1)(a) of PERA when its representative made allegedly disparaging remarks toward the Union's spokesperson and recommended dismissal of that allegation.

The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. Respondent requested and was granted an extension of time to file exceptions and on July 18, 2008, filed its exceptions. After requesting and receiving an extension of time, Charging Party filed a response to Respondent's exceptions on August 27, 2008.

Respondent excepts to the ALJ's decision on the following grounds. First, Respondent asserts that the dispute over the number of teacher work days constitutes a dispute over the meaning and interpretation of the parties' collective bargaining agreement and is outside the Commission's jurisdiction. Next, Respondent takes exception to the ALJ's denial of its motion to reopen the record to receive the opinion and award of an arbitrator, and to the ALJ's refusal to give due deference to the arbitrator's factual findings pertaining to the parties' collective bargaining agreements. Respondent also asserts that the ALJ's factual finding that the parties mutually agreed to a 198 day teacher work year for the 2005-06 school year is not supported by a preponderance of the evidence and is contrary to the arbitrator's factual findings. Finally, Respondent challenges the ALJ's resolution of central credibility issues made without the benefit of observing the witnesses' demeanor.

Charging Party responds that the Commission indeed has jurisdiction over this dispute since the Union is pursuing a statutory right. The Union argues that the ALJ properly denied the motion to reopen the record consistent with MERC Rules and that the Commission is not bound by the arbitrator's decision, but may determine whether PERA was violated independently of the arbitrator. Lastly, Charging Party asserts that the record clearly supports the ALJ's credibility determinations that should be given due deference.

The Commission has reviewed Respondent's exceptions and finds them to be without merit.[1]

Factual Summary:

The facts in this case were set forth fully in the ALJ's Decision and Recommended Order and will be repeated only as necessary here. Under a continuous series of agreements, teachers in Charging Party's bargaining unit were paid a salary for a 184 day school year, with additional, *per diem* compensation for extra days extending the school year to as many as 210 days. The parties' 2001-02 and 2003-05 agreements were for a 198 day school year. The scheduling of days, referred to by the parties as the calendar, was a separate issue for negotiation once the length of the school year was determined.

During negotiations that began in 2004, the parties sought to extend their

[1] Respondent did not except to the ALJ's finding of a unilateral change concerning the length of the teachers' work day in some schools, and such exception, therefore, is waived R423.176(5). Nor did Charging Party except to the ALJ's recommendation dismissing the allegation that Respondent's representative made allegedly disparaging remarks to the Union's spokesperson. Per the above-cited Rule, that exception is waived.

collective bargaining agreement for the 2005-06 school year. Charging Party sought a 2% across the board base salary increase. It claims that an agreement was reached when it accepted an offer by Respondent's superintendent to continue the 198 day school year in exchange for Charging Party's acceptance of a 1% pay increase. Respondent denies that it agreed to continue the 198 day school year. Both parties ratified the contract extension, and Respondent gave Charging Party a June 18, 2004, memo with a chart of new salaries for both a 184 day and a 198 day school year. That document was in a form identical to charts that had been prepared previously describing the length of the school year. The chart was attached to a memo stating: "The Board ratified this agreement."

By February 2005, Respondent's superintendent had left and a new superintendent announced that Respondent intended to revert to 184 teacher days for the 2005-2006 school year. On April 13, 2005, Respondent advised Charging Party that it would not lay off any certified teachers during the 2005-06 school year if the Union agreed to a 184 day teacher school year.

At a bargaining session occurring on June 15, 2005, the Union presented what it referred to as an "off the table proposal," that included a calendar with 196 teacher work days. In August of 2005, Respondent unilaterally imposed a 184 day year for teachers.

Discussion and Conclusions of Law:

Respondent takes exception to the ALJ's failure to hold that a dispute as to the number of teacher workdays in the school year is a dispute regarding the meaning and interpretation of the parties' agreement. Respondent claims that, as such, the dispute is outside the jurisdiction of this Commission. We disagree. The issue before us is whether the parties agreed to a 198 day school year and, if so, whether Respondent repudiated that agreement. The meaning of 198 days is not in dispute and requires no interpretation.

Respondent also excepts to the ALJ's refusal to reopen the record to receive an arbitration award and to defer to the factual findings of the arbitrator. We are not privy to the record made in arbitration. However, in his decision, the arbitrator was unable to reconcile conflicting testimony and found it impossible to determine whether the parties had agreed to a 198 day school year. He made no findings of fact, stating instead that he was left in doubt. We do not share that doubt. On the record before us, we have determined that there was an agreement to continue the 198 day school year in the 2005-06 contract extension. We do not find that our decision is governed by collateral estoppel and, therefore, we adopt the ALJ's recommendation to deny Respondent's motion to reopen the record.

Respondent argues that in June 2004, its Board ratified three items in the 2005-06 extended agreement. The 198 day school year was not included. From this Respondent reasons that the 198 days was not ratified. However, we note that this was an extension of the previous contract; as such, ratification of specific provisions was sought only with regard to provisions that were changed from the previous agreement. The preservation of the 198 day school year represented no change; instead, it was included in the ratification of those provisions that were extended without change.

Respondent argues that the June 15, 2005 offer by Charging Party to accept a 196 day school year militates against a finding that there was an agreement that the school year would consist of 198 days. We view Charging Party's offer as an attempt to resolve the dispute and nothing more. Respondent also challenges Charging Party's claim that the parties agreed to a 198 day school year. However, we believe it significant that in April 2005, Respondent proposed to forgo layoffs if Charging Party agreed to a 184 day teacher school year. We agree with the ALJ that Respondent's offer to waive such a fundamental management right to reduce the workforce, in exchange for a reduction in the length of the school year is inconsistent with Respondent's claim that no agreement had been reached in negotiations on the length of the school year. We further find that the memorandum indicating that the Board had ratified the agreement and the chart that was identical to previously-prepared charts both constitute persuasive evidence that the parties had agreed to continue the 198 day school year into their 2005-06 agreement.

Respondent also argues that the parties never negotiated a calendar that did not include the exact number of teacher days during the school year. We note, however, that because the calendar is negotiated after the length of the school year has been determined, the calendar necessarily includes the exact number of teacher days to which the parties have agreed. Again, the issue is not whether the parties agreed to a calendar. The issue is whether they agreed to the number of teacher work days in the school year -- a matter that is determined before the calendar is negotiated.

We find that the parties did agree to continue the 198 day school year during the 2005-06 extension of their collective bargaining agreement. We also find that the Respondent unlawfully repudiated the agreement when it unilaterally implemented a 184 day school year in August of 2005.

Repudiation can be found where the actions of a party amount to a rewriting of the contract or a complete disregard for the contract as written. See *Gibraltar Sch Dist*, 16 MPER 36 (2003); *Central Michigan Univ*, 1997 MERC Lab Op 501, 507. The Commission will not find repudiation on the basis of an insubstantial or isolated breach. *Crawford Co Bd of Comm'rs*, 1998 MERC Lab Op 17, 21. In *City of Detroit*, 1984 MERC Lab Op 937, *aff'd* 150 Mich App 605 (1985), the employer was held to have repudiated the parties' collective bargaining agreement by refusing to pay negotiated wage increases because it lacked funds. As the Commission held in *Wayne Co Bd of Comm'rs*, 1985 MERC Lab Op 1037, even a bona fide financial crisis does not justify an employer's repudiation of its contractual obligations.

Here, Respondent unilaterally withdrew a substantial benefit that had been part of the parties' bargained relationship for a number of years. It was a benefit that Charging Party sought to preserve by making a concession regarding its proposed salary increase. Having accepted that concession, Respondent cannot unilaterally write the *quid pro quo* out of the parties' agreement.

Respondent challenges the ALJ's credibility determinations. The ALJ based his finding of an agreement for a 198 day school year in the 2005-06 extension, in part, upon

credibility determinations. He found certain testimony offered by Respondent to be unconvincing, contradictory, not compelling, and inaccurate. Respondent's witnesses tended to confuse negotiation of the length of the school year with negotiation of the calendar, treating them as if they were the same. Thus, the calendar was the subject of answers to certain questions posed with regard to the length of the school year. We reiterate that the length of the school year and the calendar were separate and distinct subjects of bargaining, and it is the length of the school year that is the crux of the parties' dispute in this proceeding.

Furthermore, the ALJ's credibility determinations are supported by documentary evidence, including the 2005-06 salary chart for both a 184 day and a 198 day school year attached to Respondent's June 18, 2004, memo, stating that "The Board ratified this agreement." Those credibility determinations are supported by the April 13, 2005 offer by the Board to forgo layoffs in exchange for a 184 day school year. We also find the testimony of Respondent's witnesses that the 198 day school year received scant mention during negotiations to be unpersuasive. The 198 day school year was the *sine qua non* of the parties' effort to extend their contract. The claim that the issue was only mentioned at the start of negotiations and was not discussed during the meetings that followed is not credible.

For the reasons stated above, we adopt the order recommended by the ALJ.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

GOODRICH AREA SCHOOLS,
Respondent-Public Employer,

-and- Case No. C05 D-090

GOODRICH EDUCATION ASSOCIATION,
LOCAL 10, MEA/NEA,
Charging Party-Labor Organization.
_____/

APPEARANCES:

William G. Albertson, for the Respondent

Michael K. Lee, for the Charging Party

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, this case was heard at Detroit, Michigan on March 24, 2006, before Roy Roulhac, Administrative Law Judge (ALJ), and briefed before Doyle O'Connor, ALJ of the State Office of Administrative Hearings and Rules (SOAHR), acting on behalf of the Michigan Employment Relations Commission (MERC).[2] Based upon the entire record, including the pleadings, transcript and post-hearing and supplemental post-hearing briefs together with post-trial motions filed by the parties on or before October 19, 2006, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On April 22, 2005, Goodrich Education Association, Local 10, MEA/NEA (MEA or Union) filed the charge in this matter, which was later amended and which asserts that Goodrich Area Schools (Employer) violated the Act by failing to bargain in good faith and/or by repudiating an agreement regarding the length of the school year; by disparaging the Local Union spokesperson; and by unilaterally altering the length of the school day.

[2] Pursuant to Commission Rule 423.174 this matter was reassigned to ALJ O'Connor following the retirement of Judge Roulhac.

The Post-hearing Proceedings

Following the hearing in this matter, each party filed a motion to reopen the hearing to supplement the record. On June 5, 2006, the Union sought to supplement the record by substituting a corrected version of a portion of an exhibit that had been generated by the Employer, but had been proposed by the Union, and that had been admitted in the March 24, 2005 hearing in this matter. The Union's motion was unopposed. On October 4, 2006, the Employer sought to supplement the record with an arbitration decision arising from a related contractual dispute between the parties, which had been issued subsequent to the hearing. The Union opposed the Employer's motion.

Findings of Fact

The parties have a long standing collective bargaining relationship. The most recent relevant collective bargaining agreement ran from August 2003 to July 2005. During the early months of 2004, and at the initiation of the Employer, the parties negotiated a one year extension of the contract so that it would also cover the 2005-2006 school year. Those supplemental negotiations were brief, seemingly uneventful at the time, and left little in the way of a written record. The principle negotiators at that time were Dianne Bregenzer, a full-time employee of the Union, along with Goodrich teacher Linda Jackson for the Union, and Ray Green, who at the time was the school superintendent for the Employer. These negotiators had dealt with each other for well over a decade, through many rounds of contract negotiations.

Under prior contracts for the entire preceding decade, the teachers had been guaranteed an unusually long school year, with extra compensation. The base annual salary was premised on a 184 day school year, but with additional compensation on a set *per diem* basis for extra days up to 198 school days. This compensation scheme, and the 198 day school year for teachers (with 188 days scheduled for students), was expressly set forth in each contract. The genesis of this arrangement was in a special State funding grant in the early 1990s, and after some variation, the school year for teachers had been consistently 198 days since the 1996-1997 school year.

The issues addressed in the 2004 negotiations were narrow, as the parties were seeking to merely extend the existing contract for an additional year. The Union had in bargaining sought a 2% across the board increase to base salary. The Union witnesses testified that a compromise was reached when superintendent Green came to the Union's caucus, uncharacteristically without his other team members, and engaged in a frank discussion with the Union team about the potentially unsettled future. Green was slated to retire at the end of the year and was concerned with the stability of funding and the potential adverse impact on the schools and the teachers of a feared economic downturn. Green offered his belief that this might be the last contract year in which the Union preserved the 198 day school year and only if an agreement could be reached on the other economic issues. The Union was concerned with what a new superintendent might do regarding labor relations. According to the Union witnesses, Green offered to guarantee the continuation of the 198 day school year for regular teachers if the Union reduced its wage demand to 1 %, and that the Union accepted that offer. The Union witnesses

asserted that a confirming statement was read to the other members of the management team, although no written agreement was presented or signed.

Other members of the original Employer bargaining team denied being aware of any such exchange between superintendent Green and the Union and denied the reading by the Union of a confirming statement as claimed by the Union witnesses. Green acknowledged the occurrence of the private exchange, but did not acknowledge that he had assured the Union of no change in the length of the school year. Green also testified that all the changes that were agreed to by the parties were incorporated in the ratified extension agreement, Charging Party Exhibit 5, which was prepared by Green's office on June 18, 2004. As discussed more fully below, Green's testimony on the 2004 negotiations was not compelling and his testimony regarding prior rounds of negotiations was inaccurate in asserting that the parties had never previously agreed to the length of the school year without simultaneously agreeing to the placement of the days on the calendar. I credit the other testimony, and the documentary evidence, with establishing that the parties routinely negotiated the length of the school year as part of the negotiating of collective bargaining agreements, while reserving for often much later the discussions over the precise placement of work days on the calendar.

The parties did reach agreement on a 1% increase for regular teachers. No written tentative agreements were signed or initialed. A new written contract was not prepared. At hearing, both sides conceded that the handling of the bargaining over the extension was uncharacteristically sloppy. Both parties ratified the agreement. At the same meeting where the school board ratified the contract extension for the regular teachers with its 1% pay increase, the board approved a 2% increase for substitute teachers.

Following ratification by both sides, the Employer forwarded to the union a memo dated June 18, 2004, introduced as Charging Party Exhibit 5, which offered two attached pages to be appended to the existing contract to memorialize the supplemental agreement and the extension of the contract for another year. Those two pages reflected special upgrades for several positions, which are not in dispute, and provided a new wage scale for regular teachers. That scale, like the scale in the 2003-2005 contract, provided a chart showing a base salary for regular teachers, at various steps, premised on a 184 day school year, with a separate chart, prepared by the Employer, showing the appropriate salaries at each step for the 2005-2006 school year premised on a 198 day school year. The Union agreed to the chart as proposed by the Employer. As to both the original contract and the supplemental extension agreement, the sole practical relevance of the 184 day base salary schedule was that it was used as the baseline by the parties for calculating the across the board percentage salary increases.

By February, 2005, the new superintendent, Kim Hart, was in place and announced that the school intended to revert to 184 teacher days for the 2005-2006 school year. On April 13, 2005, the Employer notified the Union that it would agree to not lay off any certified teachers during the 2005-2006 school year if the Union agreed to a 184 day teacher school year. I find the April 2005 offer by the Employer to be consistent with Green's earlier expressed concern with an economic downturn, where the April 2005 offer has management proposing to waive its otherwise existent right to lay off teachers, in exchange for which it seeks the Union's agreement to reduce the length of

the year from the established 198 days to 184 days. I likewise find the offer to waive a fundamental management right, in exchange for a reduction in the length of the school year, to be inconsistent with the claim that no agreement had been reached on the length of the 2005-2006 school year during those supplemental negotiations of 2004.

The parties met repeatedly from April through June of 2005 and unsuccessfully attempted to resolve the dispute over the proper length of the 2005-2006 school year. In August of 2005, the Board unilaterally imposed a final school calendar consisting of a 184 day year for teachers.

During the spring and summer of 2005 Michael Thorp, president of the school board, sharply and personally criticized Union representative Bregenzer, including by referring to her repeatedly as "that person from Lansing" who didn't care about the people in Goodrich or the teachers. Thorp also seemingly deliberately snubbed Bregenzer when she properly sought to speak at a school board public meeting.

After the Employer shortened the number of school days, the Union pointed out that, at least as to the elementary school, the result would be too few hours of instruction time to meet the State mandated minimum. The Employer responded by lengthening the school day in some of the schools, including by making the student reporting time earlier, which necessarily required that the teachers also begin work earlier. Likewise, moving the reporting time to earlier in the morning caused some extra-curricular activities, which are supervised by the teachers, to be shifted to after school, further lengthening the teachers' work day.

Discussion and Conclusions of Law:

The Union's June 5, 2006 Motion to Reopen the Record

The Union's motion to reopen the record was supported by an affidavit that set forth that Charging Party Exhibit 5 from the hearing in this matter had attached to it an erroneous salary schedule. The affidavit additionally established that both parties recognized the erroneous salary schedule as a mistake when issued, and that the Respondent Employer had corrected the mistake by posting a corrected and accurate salary schedule on the several teachers' bulletin boards in the school buildings. The Union proposed substituting the corrected salary schedule for the one admitted at hearing. The Employer did not oppose the Union's motion.[3]

The Union's motion to reopen the record is granted and Charging Party Exhibit 5 is supplemented by the attachment of the corrected salary schedule.

The Employer's October 4, 2006 Motion to Reopen the Record

The employer sought to add to the record an award by arbitrator Peter D. Jason dated July 13, 2006, which arose from a contractual grievance dispute between the parties

[3] ALJ Julia C. Stern gave the Employer until July 3, 2006 to respond to the Union's motion of June 5, 2006, indicating that if no response was received the motion would be granted.

to this unfair labor practice proceeding and which addressed the meaning and interpretation of their collective bargaining agreement. The employer asserted that the award constituted newly discovered evidence that was material to the repudiation claim by the Union, and which, the Employer asserted, was dispositive of that portion of the charge. The Employer further asserted that its motion was timely, as no decision and recommended order of the Administrative Law Judge had yet been issued.

The Employer argued that the award by Jason was controlling on the parties and on the Commission on the question relevant to these proceedings of whether or not the parties had reached agreement on the length of the 2005-2006 teacher work year. The Employer asserted that the arbitrator's adverse findings were binding under the doctrine of collateral estoppel.

The Union opposed the admission of the arbitration award, asserting that the Employer had been dilatory in waiting from July, when the award was issued, until the end of September to seek admission of the award. Additionally, the Union opposed the motion on the basis that the Employer had not sought a ruling in advance on the admissibility of the anticipated award, where the parties were aware at the time of the March 2006 hearing before ALJ Roulhac that the grievance dispute had been scheduled for hearing and would result in such an award. The Union suggests that the Employer, if acting in good faith, should have taken the position prior to the issuance of the arbitration award that it would assert that the factual findings contained in it would constitute collateral estoppel. I find that the Employer's motion was filed within a reasonable period of time from the issuance of the award.

Moreover, the Union argues that admitting the award would be improper as the arbitrator's findings would not be controlling on the Commission in reviewing the merits of the pending charge. The Union is correct that, as found in *Bay City School District v Bay City Education Association,* 425 Mich 426 (1986), under appropriate circumstances, parties to a dispute before MERC could separately pursue contractual remedies in another forum. The issues heard by MERC are different than those heard by a contractual arbitrator and, therefore, MERC is not generally bound by the findings of an arbitrator.[4] In a comparable circumstance involving a dispute over the lengthening of the school day, the Commission found that an employer had violated its duty to bargain with the Union even though an arbitrator had previously found that the disputed action by the employer had not violated the parties' contract. *Cedar Springs Public Schools*, 1985 MERC Lab Op 1101, aff'd 157 Mich App 59 (1987)

I find several things of note in the award itself; most significantly, at page eight of the award, the arbitrator finds based on the record before him that "it is impossible for me to determine what the parties' true intents were" on the question of the length of the school work year. I also find notable that the award does not indicate what documentary evidence was supplied to the arbitrator, and in particular the arbitration award makes no

[4] It is of course possible that under appropriate circumstances collateral estoppel principles should, and would, apply to preclude a party from re-litigating before MERC a factual issue on which it had secured an otherwise binding ruling in another forum, just as findings in a MERC proceeding may give rise to collateral estoppel preclusion. See *Partlo v Clarkston Com Schools*, 20 MPER 5 (E.D. Mich, 2007)

reference to the documents comprising Charging Party exhibit 5 in this case, which, as indicated below, I find to be the best contemporaneous reflection of the intent of the parties. Additionally, the arbitration award, in particular at page seven, reviews testimonial evidence that was not elicited in the unfair labor practice proceeding. In sum, the arbitrator made no factual findings relevant to this proceeding; rather, the arbitrator specifically found that, based on the record made before him, he was unable to reach a conclusion as to the facts of what happened between these parties during the bargaining which led to the contractual extension for the 2005-2006 year. I find that there is nothing in the Jason award on which a relevant claim of collateral estoppel could be properly premised.

Commission Rule R 423.166 limits the post-hearing acceptance of proffered evidence to circumstances where the evidence could not earlier have been discovered, where the evidence and not merely its materiality is newly discovered, and where if admitted the newly offered evidence would require a different result. I find that the award is not admissible where it would have no collateral estoppel impact and is therefore neither controlling, nor even relevant, to the Commission's decision making task.

The Unilateral Change in the Length of the School Year

The parties agree that they extended the collective bargaining agreement by one year to cover the 2005-2006 school year. They also agree that the only written memorialization of their agreement is the June 18, 2004 memo from superintendent Green which was sent with the two page addition to the contract that encompasses the new salary schedule which presumes a 198 working day school year. The parties agree that the Employer later unilaterally reduced the 2005-2006 school year to 184 working days, rather than maintaining it at the 198 days which it had been for the preceding decade. The Employer insists that it was entitled to unilaterally set the length of the work year as the parties had never reached agreement and the school calendar had to be set.

Much of the Employer's defense involved conflating the placement of the work days on the calendar with determining the length of the work year. These parties in prior years had variously negotiated placement of the work days on the calendar simultaneous to setting the length of the work year or, in some contract periods, settled on the length of the year first and only much later, as the affected year approached, negotiated over the precise placement of the work days on the calendar. The relevant question is not whether the parties had reached agreement on the precise calendaring of the work year; rather, had the parties reached agreement on the length of the work year. There is no dispute over the fact that the length of the work year, which directly determines the teachers' salaries, is a basic condition of employment over which there is a duty to bargain. See, *Cedar Springs*, supra.

The testimony of Jackson and Bregenzer, the two principle Union negotiators, was unequivocal. They insist that Green approached the Union and offered continuation of the 198 day work year in express exchange for a more moderate salary increase than that sought by the Union. In contrast, Green's testimony was at best equivocal, and at times evasive. When asked on direct examination if the parties ever agreed on the length of the teachers' work year during the 2004 negotiations, Green replied, "*We did not agree to a calendar at the bargaining table, no*." That testimony exhibits two levels of evasion.

First, the testimony of the Union witnesses was of course that the agreement had been crafted in caucus, rather than at the bargaining table. Second, the insistence on answering as to whether or not a 'calendar' had been agreed to was entirely unresponsive as to whether or not the length of the work year had been agreed to.

Green then unequivocally denied having "advised any person" during the 2004 negotiations that an agreement had been reached. That is consistent with the testimony of other members of the management bargaining team that Green had private discussions with the Union but did not advise the rest of his team that a deal had been struck. However, when asked whether or not the Union had advised Green, during the 2004 negotiations, that the Union bargainers thought a deal had been reached with him as to the length of the year, Green asserted that he could not "*recall*".

Regardless of the inconsistencies and equivocations in Green's testimony, the best test of the original subjective intent of parties is not their dueling after-the-fact testimony; rather, it is a review of objectively verifiable contemporaneous conduct, which may be consistent with, or inconsistent with, a party's later recalled subjective intent. Here, it was Green who authored the one document which the parties agree reflects their ratified agreement for the 2005-20006 extension of the contract. There appears no ambiguity, and therefore no room for good faith dispute, over the terms of the document prepared by Green, particularly in light of a decade long history of the normal work year being 198 days, and with that document expressly calculating salaries at each step premised on a 198 day work year.

I find that during the 2004 negotiations, the Employer, through superintendent Green, offered to continue the desirable 198 day work year for at least through the 2005-2006 year, if the Union reduced its salary increase demand from 2% to 1%. I further find that the Union accepted Green's proposal and that the agreement reached, and ratified, by the parties is accurately reflected in Charging Party exhibit 5, prepared by the Employer, which provides a salary schedule premised on the continuation of the 198 day work schedule for the 2005-2006 school year. I find no ambiguity or good faith dispute as to the terms agreed upon by the parties.

By unilaterally choosing to reduce the work year, the Employer avoided its bargaining obligation, and consequently deprived the Union of the opportunity to work with the Employer to attempt to reach agreement on other alternatives by weighing the harm and benefit of various approaches to the economic shortfall, including layoffs by seniority. Instead, the Employer, notwithstanding its bargaining obligation and its existing contract with the Union, chose to, in essence, lay off the entire teaching workforce for fourteen days. This was not a proper unilateral alternative. See, *36th District Court*, ___MPER____ (April 9, 2008).

A decision by a public employer to reduce the size of its workforce is within the scope of managerial prerogative; however, the Employer here chose instead to reduce the number of days worked by each of its employees. The dispute in this case is not substantively distinguishable from *Ionia Co Rd Comm*, 1984 MERC Lab Op 625, aff'd, unpublished opinion (Court of Appeals, September 24, 1985), where the Commission held that although the decision to cutback shifts or hours may have a fiscal impact on the

employer similar to a layoff, such a cutback is different from a layoff for the employees who remain employed. As the Commission explained, such a decision significantly changes employees' hours, take home pay, and actual working conditions. *Ionia*, *supra,* at 627-628. Inasmuch as the composition of the work year is covered by unambiguous contract language in this matter, such a significant change as that imposed by the Employer is a substantial repudiation of the contract and of the underlying bargaining obligation. See, *36th District Court, supra; Ionia Co Rd Comm, supra.*

PERA prohibits a mid-term modification of a mandatory subject of bargaining without consent of both parties. See, *St Clair Intermediate Sch Dist v Mich Educ Assoc*, 458 Mich 540, 552-567 (1998); followed, *36th Dist Ct, supra*. Since the parties were operating under an existing contract, the Union here had no duty to re-negotiate the length of the school year for the 2005-2006 school year, as the parties had already agreed that it would consist of 198 work days. Members of the unit covered by the contract had a right to rely upon the terms and conditions of that agreement and to expect that they would continue unchanged. The Employer was obliged to secure the Union's consent before altering that important term and condition of employment. Unlike an impasse that is reached after a contract's expiration, an impasse reached over a proposed mid-term modification does not allow a party to impose the new terms that it desires, thus the number of days in the work year were not subject to change without mutual consent. See, *St Clair Intermediate Sch Dist*, at 458 Mich, 565-567; *36th Dist Ct, supra*.

In reviewing the credibility of the agents of Goodrich in their professed compliance with their bargaining obligations as to the length of the school year, it would be inappropriate to entirely ignore their contemporaneous handling of the change in the length of the school day at some of the schools. On that issue, as more fully set forth below, the Employer improperly acted unilaterally, and in defense of this case, simply ignored that part of the charge which addressed the change in the length of the school day. The cavalier approach to the bargaining obligation regarding the length of the day, as well as the its non-response to that part of the charge, supports the conclusion that the Employer did not take seriously its bargaining obligations regarding the length of the school year or length of the school day.

These factual findings and conclusions of law do not presume that the Employer was not in fact facing severe economic difficulty. Many public employers are presently facing such budget shortfalls, and in such times hard choices must be made. A fundamental conflict always exists when choosing between unattractive options. As was initially proposed here in the Employer's April, 2005, letter, the choice is often seen as between laying off less senior employees, and consequently reducing services or further burdening the remaining workforce, or accepting or imposing economic concessions upon all employees in the affected group. Such a fundamental and difficult balancing of interests may not however, in a bargaining situation, ordinarily be done unilaterally by either party without violating PERA.

The Employer's unilateral imposition of a 184 work day school year constitutes an unlawful change in basic conditions of employment and a repudiation of the fundamental economic terms of the 2005-2006 extension of the contract. A unilateral reduction in the contractually established number of work weeks or days is unlawful and

requires a remedy. See, *Plymouth-Canton Community Schools*, 1984 MERC Lab Op 894. In that instance, the Commission determined that it was unlawful for a school employer to shorten the work year without the Union's consent, where its length was expressly provided for as here, and ordered that the affected employees be made whole for the lost opportunity to work and the resulting reduction in annual earnings.

The Unilateral Change in the Length of the School Day

A portion of the charge asserted that the Employer had improperly and unilaterally changed conditions of employment, without bargaining and without notice to the Union, and had thereby repudiated the agreement of the parties and, therefore, also repudiated its bargaining obligations, by lengthening the work day in at least several of the schools.[5] The proofs were uncontested that in at least some of the elementary schools, the employer changed, and made earlier, the starting time for students while leaving the ending times unchanged, which had the practical impact of requiring that the teachers report to work earlier and work longer.[6]

The unrebutted testimony by Kelly Alford-Graves established that, at the Oaktree elementary school, the employer extended the workday for the teachers by unilaterally extending the time spent by students at school each day. This required an earlier starting time for teachers, and as a practical matter, it required that extracurricular activities for which teachers were responsible be conducted at the end of the school day, further extending the working hours for teachers. It is factually uncontested that this change was not negotiated with the Union, and was unilaterally announced by the employer directly to the affected employees.[7]

The length of the teaching day is without dispute a mandatory subject of bargaining. It is well settled law that an employer may not unilaterally alter the length of the workday, even by a matter of minutes, without negotiating with the Union. *Reading Community Schools*, 1989 MERC Lab Op 1069. It is undisputed here that the employer unilaterally lengthened the school day at certain schools without notice to the Union, or affording it an opportunity to bargain over the issue. The conduct by Goodrich in lengthening the school day in this case constitutes an improper repudiation of the agreement between the parties and of the bargaining obligation.

The Disparaging of the Union's Spokesperson

Simple expressions of opinion by management representatives, even if rude towards or critical of unions or union officers, do not violate Section 10(1)(a) unless there is a threat of retaliatory action. *City of Southfield*, 1987 MERC Lab Op 126, 141; *City of Detroit Water & Sewerage*, 1985 MERC Lab Op 777, 781; *Redford Twp*, 1982 MERC

[5] The charge did not specify how many of the schools were affected by the alleged change in the length of the workday. The uncontested proofs establish that at least some of the schools were so affected.

[6] Notably, Article XII of the collective bargaining agreement limits the proper workday to seven and ¼ hours and also requires that teachers be in their classrooms 15 minutes prior to the beginning of the student day, and remain there for at least 15 minutes following the close of the students' day.

[7] The Employer left unaddressed in its post-hearing brief the dispute over the lengthening of the school day and, therefore, the Union's arguments on that issue are uncontested.

Lab Op 1289, 1300. An employer cannot lawfully threaten, either expressly or impliedly, to penalize employees because of the filing of grievances. *New Haven Cmty Schs*, 1990 MERC Lab Op 167, 179. To determine whether an employer's remarks constitute a threat, both the content and the context in which they occurred must be examined. *City of Ferndale*, 1998 MERC Lab Op 274, 277. However, mere anti-union statements do not violate Section 10(1)(a) unless they include an explicit or implied threat. *Edwardsburg Public Schools*, 1994 MERC Lab Op 870.

The Union relies principally on the Commission's holding in *New Haven Community Schools*, which plainly held that antagonistic statements by an employer representative did not violate the Act if not coercive when viewed in context. It is significant that here, the Employer's criticisms, and arguably dismissive conduct, was directed at a Union official who was a full-time employee of the Union, not of the School District, and who was therefore not subject to supervision, or to direct coercion, by the Employer. I find no violation of the Act in the comments and conduct directed at Uniserv Director Bregenzer, as both sides are entitled to form and express opinions about the other, and an employer is not restricted by PERA from criticizing the union's grievances, its motives, or the ability of its officers, even rudely, although it cannot lawfully threaten, either expressly or impliedly, to penalize employees for filing grievances or for the exercise of other protected activity. *City of Lincoln Park*, 1983 MERC Lab Op 362. It was not established that the antagonism expressed towards Bregenzer carried with it a threat of retaliation against employees of the District.

Conclusion

In accord with the above findings of fact and conclusions of law, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

Goodrich Area Schools, its officers, agents, and representatives shall:

1. Cease and desist from

    a. Unilaterally changing the length of the work day of its teaching staff, including by changing the length of student days, without prior notice to and bargaining with the Goodrich Education Association, Local 10 MEA/NEA.
    b. Unilaterally changing the length of the work year by reducing the number of working days below the established 198 day work year, without prior notice to and bargaining with the Goodrich Education Association, Local 10 MEA/NEA.

2. Take the following affirmative action necessary to effectuate the purposes of the Act

    a. Immediately restore the length of the teachers' working day in affected schools to the length which existed in the 2004-2005 school

year prior to the unilateral change first imposed in the fall of 2005, including if necessary, by restoring the students' starting and ending times.

b. Compensate, at the appropriate hourly rate, each teacher for whom the working day was extended by the unilateral change first imposed in the fall of 2005, with the Employer to promptly provide to the Union its calculation of backpay owed and with the Employer to, upon demand by the Union, negotiate over the proper method of calculation of such backpay and identification of individual teachers entitled to compensation.

c. Restore the length of the teachers' working year to 198 days, with the commensurate increase in compensation, effective with the calendar for the 2008-2009 school year.

d. Compensate, at the appropriate contractual per diem rate, each teacher for whom the working year was shortened by the unilateral change first imposed in the fall of 2005, with the Employer to promptly provide to the Union its calculation of backpay owed and with the Employer to, upon demand by the Union, negotiate over the proper method of calculation of such backpay and identification of individual teachers entitled to compensation.

e. Negotiate with the Goodrich Education Association, Local 10 MEA/NEA over the placement of the 198 day school year on the calendar for the 2008-2009 school year.

f. Maintain the status quo which existed prior to the fall of 2005 as to the length of school year and of the school day, absent fulfillment of the bargaining obligation by reaching agreement with the Union on any change or by reaching a good faith impasse in bargaining after exhausting the bargaining obligation, including by good faith participation in fact finding if requested by either party.

3. Post the attached notice to employees in a conspicuous place for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Doyle O'Connor
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: _____

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, GOODRICH AREA SCHOOLS, a public employer under the PUBLIC EMPLOYMENT RELATIONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT

a. Unilaterally change the length of the work day of our teaching staff, including by changing the length of student days, without prior notice to and good faith bargaining with the Goodrich Education Association, Local 10 MEA/NEA.

b. Unilaterally change the length of the work year by reducing the number of working days below the established 198 day work year, without prior notice to and good faith bargaining with the Goodrich Education Association, Local 10 MEA/NEA.

WE WILL

a. Restore the length of the teachers' working day in affected schools to the length which existed in the 2004-2005 school year prior to the unilateral change, including if necessary, by restoring the students' starting and ending times.

b. Compensate individual teachers who worked longer days as a result of the unilateral change first imposed in the fall of 2005.

c. Compensate individual teachers who worked fewer days as a result of the unilateral change in the length of the school year first imposed in the fall of 2005.

d. Restore the length of the teachers' working year to 198 days effective with the calendar for the 2008-2009 school year.

e. Negotiate with the Goodrich Education Association, Local 10 MEA/NEA over the placement of the 198 day school year on the calendar for the 2008-2009 school year.

f. Maintain the status quo which existed prior to the fall of 2005 as to the length of school year and of the school day, absent fulfillment of the bargaining obligation by reaching agreement with the Union on any change or by reaching a good faith impasse in bargaining after exhausting the bargaining obligation, including by good faith participation in fact finding if requested by either party.

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

GOODRICH AREA SCHOOLS

By:_____

Title:_____ Date:_____

This notice must be posted for thirty (30) consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, Detroit, MI 48202-2988. Telephone: (313) 456-3510.