STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

REDFORD UNION SCHOOL DISTRICT,
Public Employer-Respondent in Case No. C07 F-132,
Charging Party in Case No. CU07 F-030,

-and-

WAYNE COUNTY MEA/NEA,
Labor Organization-Charging Party in Case No. C07 F-132,
Respondent in Case No. CU07 F-030.
_____/

APPEARANCES:

Dickinson Wright, PLLC, by George P. Butler III, Esq., and Natalie L. Yaw, Esq., for the Public Employer

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

DECISION AND ORDER

On April 16, 2009, Administrative Law Judge (ALJ) David M. Peltz issued his Decision and Recommended Order in the above matter finding that in Case No. C07 F-132, the Redford Union School District (Employer) violated Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e), by unilaterally implementing changes to terms and conditions of employment in the absence of a valid impasse. In Case No. CU07 F-030, the ALJ found the Employer failed to establish that the Wayne County MEA/NEA (Union) breached its duty to bargain in good faith under Section 15 of PERA. The ALJ also found no merit in the Employer's reliance on Section 17 of PERA to support its unfair labor practice charge. The ALJ determined that by the terms of Section 17(2), the Commission lacks jurisdiction over any claims alleged under that section. Furthermore, the ALJ rejected the Employer's contention that proof of a Section 17 violation constituted evidence that an education association breached its duty to bargain generally. The ALJ concluded that if the legislature intended for the conduct proscribed in Section 17 to constitute a bargaining violation, it would have included that prohibition in Section 15 of the Act. The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA.

After receiving an extension of time to file exceptions, the Employer filed exceptions to the ALJ's Decision and Recommended Order and a brief in support on June 5, 2009. On that date, the Employer also filed a request for oral argument. After receiving an extension of time, the Union filed its response to the Employer's exceptions and a brief in support of the ALJ's Decision and Recommended Order on July 15, 2009. On July 16, 2009, the Employer filed a motion to strike the Union's response to its exceptions, and on July 27, 2009, the Union filed a response in opposition to the Employer's motion to strike. On September 29, 2009, the Employer filed a motion to reopen the record, seeking to add the September 9, 2009 report of the fact finder to the record. On October 12, 2009, the Union filed its response in opposition to the motion to reopen the record and its brief in support of the response. The Employer also filed a motion to reopen the record on February 16, 2010, seeking to have us consider a "newly imposed contract."[1] The Union filed its response in opposition to the motion on February 26, 2010.

After reviewing the exceptions, motions, and briefs filed by the parties, we find that oral argument would not materially assist us in deciding this case. Therefore, the Employer's request for oral argument is denied.

In its exceptions, the Employer asserts that throughout the Decision and Recommended Order, the ALJ erred in his credibility findings, mischaracterized the District's arguments, and developed factual findings and conclusions that were essentially unsubstantiated by legal precedent or by the record. In its brief in support of its exceptions, the Employer summarizes the issues involved by first asserting that the ALJ erred in finding that "the parties were not at impasse when the [District] declared impasse and imposed its purported last best offer on April 27, 2007" and, secondly, by contending that the ALJ erred in recommending dismissal of the Employer's charge alleging that the Union refused to bargain in good faith after impasse in violation of Section 17 of PERA.

In a fifty-one page document, the Employer filed fifty-seven numbered exceptions. It also filed a fifty-five page supporting brief. The Union filed a response to each Employer exception by addressing the merits of the issue raised or by asserting that the exception should be stricken for noncompliance with Commission Rule 176, 2002 AACS, R 423.176. The Union also filed a fifty page brief in support of the ALJ's decision. The Employer filed a motion to strike the Union's responses to the exceptions, contending that they are not permitted under Commission Rule 176(6). The Employer argues that those paragraphs in which the Union asserts that certain exceptions should be stricken are improper because they were not contained in a motion to strike. The Union filed a response in opposition to the Employer's motion to strike asserting that its filings are permissible under Commission Rules and that it was compelled to file two separate documents to adequately respond to the Employer's exceptions and brief. Rule 176(6) provides in relevant part:

> Within 10 days after service of exceptions, a party may file 1 original and 4 copies of cross exceptions and briefs in support thereof, or 1 original and 4 copies

[1] The term "newly imposed contract" is the Employer's. It is hornbook law that a contract is an agreement between two or more parties. By definition, therefore, a contract cannot be unilaterally imposed. What Respondent apparently seeks to offer is evidence of new, unilaterally imposed changes in working conditions.

of a brief or legal memorandum in support of the decision and recommended order.

Although the Employer's exceptions are quite extensive and some of the exceptions are not in compliance with Rule 176(3), we find merit to the Employer's motion to strike the Union's response to the exceptions. The Union could have filed a motion to strike with respect to those exceptions that did not comply with Commission Rules, but did not do so. Instead, in addition to its brief in support of the ALJ's decision, the Union filed a response to the exceptions, a document which is not authorized under the Rules. Therefore, we find it appropriate to strike the Union's response to the exceptions and to consider, only, its brief in support of the ALJ's decision.

On September 29, 2009, the Employer filed a motion to reopen the record, seeking to add a September 9, 2009 fact finder's report to the record. The Employer contends that the fact finder's report should be considered by the Commission as it undermines the ALJ's Decision and Recommended Order in several critical respects. On October 12, 2009, the Union filed its response in opposition to the motion to reopen the record and its brief in support of the response. The Union contends that the Employer's motion fails to the meet the requirements to justify reopening the record. The Union asserts that there is no authority to support the Employer's contention that the Commission may rely upon a fact finder's report in reviewing exceptions to an administrative law judge's decision and recommended order because the fact finder's report is not newly discovered evidence, but is merely an opinion "based on a different set of hearings." Upon review of the Employer's September 29, 2009 motion, the Union's response, and both parties' briefs, we deny the motion to reopen the record because the findings and conclusions of the fact finder are based upon a record that is not before us and was not made for the purpose of addressing the ultimate issues that we must decide.

The Employer also filed a motion to reopen the record on February 16, 2010, seeking to have us consider a "newly imposed contract." The Union filed its response in opposition to the motion on February 26, 2010. A motion for reopening is governed by Rule 166 of the Commission's General Rules, R 423.166. Under Rule 166, reopening of the record to admit additional evidence can only be granted upon a showing that the evidence the moving party seeks to offer is newly discovered material evidence which, if adduced and credited, would require a different result. The addition to the record of the "newly imposed contract" that the Employer offers would not provide assistance in addressing the question of whether the parties were at impasse when the Employer imposed its purported last best offer on April 27, 2007, nor does it relate to the issue of whether the Union unlawfully refused to bargain after the Employer imposed that offer. Accordingly, it would not change the result in either of the matters before us. Thus, the Employer's February 16, 2010 motion to reopen the record is denied.

As to the Employer's exceptions to the ALJ's Decision and Recommended Order, we have reviewed them and find them to be without merit.

Factual Summary:

Since 2001, the Employer had been operating at a deficit in violation of Section 102 of the State School Aid Act of 1979, MCL 388.1702. In 2005, it approved a plan to eliminate the deficit by 2010. The plan proposed a freeze on all wages, with the exception of step increases, the elimination of all overtime, and the negotiation of "future fringe benefit costs to be borne by employees."

At the same time that the Employer filed its deficit elimination plan, it was bargaining with the Union on a collective bargaining agreement to replace an agreement that had expired on August 31, 2005. The parties entered into tentative agreements on several issues from August of 2005 to December of 2006, by which time the only significant issues remaining unresolved were wages and health insurance.

On January 11, 2007, the Union made a written proposal to "settle all remaining issues." The Employer rejected the Union's proposal. It submitted a written offer to the Union on February 27, 2007, proposing that all bargaining unit members switch from a traditional Blue Cross/Blue Shield hospital and medical plan to a Community Blue PPO health plan. It offered to pay a portion of the cost of the new plan for eligible tenured teachers and their dependents and to pay a portion of the cost for single health coverage for eligible non-tenured teachers. The Employer also proposed that wages not be subject to negotiation during the term of the agreement. The parties continued to meet. They discussed possible Union concessions and the Employer continued to seek cost-sharing with respect to health insurance in conformance with the objectives stated in its deficit elimination plan.

On or about April 23, 2007, members of the Union's bargaining team suggested that a mediator be called in to assist the parties. A few days later, in an e-mail to the Union dated April 27, 2007, the Employer's chief negotiator wrote, "At the meeting earlier this week you confirmed your view that the parties have been at impasse since our last offer. We agree." A document labeled "Last Best Offer," the terms of which were to be unilaterally imposed upon the bargaining unit, was attached. In its response, the Union denied that anyone had mentioned impasse and reiterated its desire to have a mediator's assistance.

At the hearing in this matter, the Employer offered testimony that the e-mail to the Union was the result of a Union assertion that "We are done; we can do no more." The Employer's chief negotiator testified that it was his belief at that time that the parties had "no chance of coming to an agreement" and that the Employer needed to implement its last best offer "because of the timelines, for financial considerations and because of the state's pressure." However, on June 19, 2007, during a circuit court hearing in a collateral matter, he testified that the Employer was willing and able to accept terms and conditions of employment that were less favorable than those unilaterally imposed on April 27, 2007. He testified further that the decision to impose was intended to pressure the Union to move from its current position and "was encouragement to get something done."

A consultant to the Employer claims that in March of 2007, he told the Union's Univserv Director that the parties were at impasse. The ALJ did not find this testimony credible. The

Union offered testimony that the parties had not alluded to or used the word "impasse" prior to April 27, 2007. The ALJ found this testimony to be credible. Inasmuch as the ALJ has an opportunity to observe and to evaluate witness demeanor, we give great weight to ALJ credibility determinations and will not overturn such determinations unless they are clearly contrary to the record. See *City of Lansing (Bd of Water & Light)* 20 MPER 33 (2007); *Saginaw Valley State Univ*, 19 MPER 36 (2006); *Bellaire Pub Sch*, 19 MPER 17 (2006). We accept the ALJ's credibility findings on this issue.

Following implementation of the Employer's last offer, the Union left a voicemail message for the Employer concerning future negotiations. In it, the Union stated that its position was that it did not bargain imposed "contracts." At hearing, the Union offered testimony that by this it meant that it did not accept the terms imposed by the Employer and wished to bargain an agreement about which both parties were satisfied. According to the Employer, the Union refused to negotiate after the alleged impasse and bargaining did not resume until August of 2007. However, the Employer did not request that negotiations resume when the Union made two additional contract proposals shortly after the Employer imposed its last offer.

After the hearing in this matter was closed, the Employer filed a post-hearing brief to which it attached copies of two additional documents which had not been admitted into the record or offered as exhibits during the hearing. These documents, labeled Exhibits F and N, are unsigned, unsworn, and undated "affidavits" of two witnesses who had testified at the hearing. The Union filed a motion to strike Exhibits F and N. In response, the Employer argued that they were part of the "underlying record in this case," having been attached to a motion that it had filed in the collateral proceeding in the circuit court. It asserted that it did not introduce Exhibits F and N at the hearing in this matter because the affiants had testified "consistently" with those documents. It also asserted that the Union failed to timely object to the submission of the documents.

Discussion and Conclusions of Law:

In its exceptions, the Employer contends that the ALJ erred by granting the Union's motion to strike Exhibits F and N. The Employer asserts that it did not introduce Exhibits F and N during the hearing because it believed that the circuit court record had been "incorporated" in the record here. However, the only portion of the circuit court record admitted in this proceeding was the transcript of a June 19, 2007 circuit court proceeding. The transcript was offered by the Employer; it did not include Exhibits F and N. We find nothing in the record to indicate that the entire circuit court record had been "incorporated" in the record here. The ALJ ruled correctly that documents not admitted during the hearing may not be considered as part of the record. We find the exception taken to the granting of the Union's motion to strike Exhibits F and N to be without merit.

In Case No. C07 F-132, the Union charges that the Employer committed an unfair labor practice in violation of Section 10(1)(e) of PERA. An employer violates Section 10(1)(e) when it takes unilateral action on a mandatory subject of bargaining before the parties reach impasse. *Detroit Police Officers Ass'n v Detroit*, 61 Mich App 487, 490 (1975), *lv den* 395 Mich 756 (1975); *International Ass'n of Firefighters Local 1467, AFL-CIO v Portage*, 134 Mich App 466,

473 (1984). Impasse has been defined as the point at which the parties' positions have so solidified that further bargaining would be futile. *Oakland Cmty Coll*, 2001 MERC Lab Op 273, 277; 15 MPER 33006 (2001); *Wayne Co (Attorney Unit)*, 1995 MERC Lab Op 199, 203; *City of Saginaw*, 1982 MERC Lab Op 727. Once the parties have reached impasse, an employer is usually free under Section 10(1)(e) to take unilateral action on an issue as long as its action is consistent with its offer to the union. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 56 (1974). However, simply declaring impasse and asserting the right to implement changes in mandatory subjects of bargaining is not sufficient. The parties are only at impasse when neither party is willing to compromise. *NLRB v Powell Elec Mfg Co*, 906 F2d 1007 (CA 5, 1990); *Huck Mfg Co v NLRB*, 693 F2d 1176, 1186 (CA 5, 1982).

The determination of whether an impasse exists is made on a case-by-case basis, taking into account the totality of the circumstances and the entire conduct of the parties. *Flint Twp*, 1974 MERC Lab Op 152, 156. In determining whether impasse exists, the Commission looks at a number of different factors. These include whether there has been a reasonable term of bargaining, whether the positions of the parties have become fixed, and whether both parties are aware of where the positions have solidified. *Oakland Cmty Coll*, at 277.

The ALJ found that that the parties were not at impasse on April 27, 2007, when the Employer declared impasse and imposed its purported last best offer. We agree with the ALJ that to declare impasse before engaging in mediation is evidence that an employer is acting in violation of Section 10(1)(e), particularly where, as here, the union has proposed calling in a mediator. *Crestwood Sch Dist*, 1975 MERC Lab Op 609, 625; see also *Cass Co Rd Comm*, 1984 MERC Lab Op 306; *Orion Twp*, 18 MPER 72 (2005). Four days after the Union proposed mediation, the Employer imposed its last offer without attempting mediation even though it acknowledged, during a subsequent circuit court hearing, that, at the time it imposed its purported last best offer, it could have accepted terms and conditions less favorable to it than those that it had imposed. Because mediation had been proposed and there was room for movement at the time of imposition, we conclude that the Employer violated its bargaining duty by imposing its purported last best offer.

In Case No. CU07 F-030, the Employer asserts that the Union breached its duty to bargain in good faith by refusing to negotiate after the Employer declared impasse and that it violated Section 17 of PERA by refusing to present an agreement reached in mediation for ratification by its bargaining unit. The Employer's chief negotiator testified that he thought an agreement had been reached during the mediation that occurred after the Employer's last best offer was imposed. The Employer's claim that the parties reached an agreement is inconsistent with its claim that the Union refused to bargain.

An agreement is not reached until it is accepted by both parties. The Employer's belief that an agreement had been reached in mediation proved to be premature. At the bargaining table, what was thought to be an agreement was described by the Union to the Employer's chief negotiator as a "mediation proposal" or "mediation framework." On the record before us, we are unable to find that there was an agreement.

Nevertheless, even if there had been an agreement and even if a union's refusal to seek ratification of that agreement is cognizable under Section 17 of PERA, this Commission does not have authority to provide a remedy because Section 17 contains its own enforcement mechanism. Section 17(2) provides:

> If an education association, a bargaining representative, or a bargaining unit violates this section, the board of a public school employer or any other person adversely affected by the violation of this section may bring an action to enjoin the violation of this section in circuit court for the county in which the plaintiff resides or the circuit court for the county in which the affected public school employer is located. Failure to comply with an order of the court may be punished as contempt. In addition, the court shall award court costs and reasonable attorney fees to a plaintiff who prevails in an action brought under this section.

We agree with the ALJ that this Commission lacks jurisdiction over an alleged Section 17 violation.

Lastly, the Employer takes exception to the make-whole remedy recommended by the ALJ. It claims that the remedy is "overbroad" because its last offer was not fully imposed and was subsequently modified. However, these are matters to be taken into account when determining how to make unit employees whole. The remedy proposed by the ALJ is appropriate and we adopt it as our Order.

We have considered all other arguments submitted by the parties and conclude they would not change the result in this case.

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

_____
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:

REDFORD UNION SCHOOL DISTRICT,
Charging Party-Public Employer in Case No. CU07 F-030,
Respondent in Case No. C07 F-132,

-and-

WAYNE COUNTY MEA/NEA,
Respondent-Labor Organization in Case No. CU07 F-030,
Charging Party in Case No. C07 F-132.
_____/

APPEARANCES:

Dickinson Wright, PLLC, by George P. Butler III and Natalie L. Yaw, for the Public Employer

Law Office of Lee and Correll, by Michael K. Lee and Erika Pennil, for the Labor Organization

DECISION AND RECOMMENDED ORDER ON 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 November 11, 2007, November 30, 2007 and January 30, 2008, before David M. Peltz, Administrative Law Judge of the State Office of Administrative Hearings and Rules, on behalf of the Michigan Employment Relations Commission. Based upon the entire record, including the transcripts of hearing, exhibits and briefs filed by the parties on or before March 17, 2008, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charges:

Wayne County, MEA/NEA (hereafter "the Union") is a multi-association labor organization comprised of bargaining units from various school districts located within Wayne County. The Union was certified as the collective bargaining representative of teachers employed by the Redford Union School District (hereafter the "school district" or

"the Employer") by Commission orders dated June 11, 1979 (Case No. R79 C-150) and January 30, 1989 (Case No. R88 L-330).

On June 11, 2007, Wayne County, MEA/NEA filed the unfair labor practice charge in Case No. C07 F-132. The charge asserts that on April 27, 2007, the school district prematurely declared that the parties were at an impasse in negotiations and unilaterally implemented changes in terms and conditions of employment in violation of PERA.

The Employer filed its charge in Case No. CU07 F-030 on June 25, 2007. In that charge, the school district contends that Wayne County, MEA/NEA breached its duty to bargain in good faith and violated Section 17 of PERA by refusing to bargain in good faith after the district implemented its last best offer. After describing generally the events leading to the alleged impasse, the charge states:

> 7. Two of the health care provisions that were included in the District's imposed contract were (1) a cap on prescription drug benefits and (2) the requirement that non-tenured employees purchase full family coverage if they wished to have full family, as opposed to single, coverage.
>
> 8. The Union subsequently requested that MERC appoint a mediator for the purpose of helping the Parties bargain. The Parties subsequently engaged in post-impasse mediation that was led by a MERC appointed mediator, Jim Amar. The District made it clear to Mr. Amar that it had imposed its agreement and it was willing to engage in post-imposition bargaining. The parties came to an agreement regarding the two health care provisions at issue, part of which involved the District agreeing to remove the two health care provisions at issue.
>
> 9. Despite that agreement, the Union thereafter refused to submit the agreement to its membership, taking the position that the county and state labor organizations of which it was a part were taking the position that it could not engage in post-imposition negotiations.
>
> 10. Furthermore, at the direction of the Michigan Education Association, the Union refused to engage in any further negotiations over the District's imposed contract or the health care reforms being sought by the District.
>
> 11. The District re-offered three times the agreement that had been made in the mediation, but the Union continued to refuse to bargain, stating that they could not honor the agreement on the basis that the local and state educational associations would not permit them to present the agreement to their members, because of the ban these educational organizations had placed on post-imposition bargaining.
>
> 12. The Union's refusal to bargain violates its statutory obligation to engage in good faith negotiations with the District.

Findings of Fact:

Redford Union has been operating at a deficit since 2001 in violation of Section 102 of the state school aid act of 1979, Act No. 94 of the Public Acts of 1979, MCL 388.1702, which prohibits a school district from adopting a budget in which expenditures exceed revenues. A district which has an existing deficit or which incurs a deficit is required to file a deficit elimination plan with the Michigan Department of Education outlining how the district will correct the condition within a specified period, typically not exceeding two years. Although the Department of Education reviews the deficit elimination plan to ensure that it is plausible, it does not make suggestions or recommendations with respect to any specific budget cuts. In 2005, the Redford Union school board formulated and approved a deficit elimination plan to eliminate the district's $3.4 million deficit by 2010. The plan proposed a freeze on all wages, with the exception of step increases, the elimination of all overtime and the negotiation of "future fringe benefit costs to be borne by employees." The district filed its deficit elimination plan with the Department of Education in November of 2005.

At the same time that Redford Union filed its deficit elimination plan, it was in the process of bargaining with Wayne County MEA/NEA on a collective bargaining agreement to replace the parties' prior contract which had expired by its own terms on August 31, 2005. Negotiations on a new contract began in August or September of 2005. The bargaining teams met at least once or twice per month through December of 2005, and at least twice a month throughout the following year. The parties agreed to limit bargaining to issues unrelated to the district's finances until the student count for the 2005-2006 school year was determined. At first, the parties engaged in interest-based or "collaborative" bargaining, a process which typically focuses on problem solving rather than the traditional exchange of formal proposals.[2] Negotiations proceeded smoothly and the parties entered into tentative agreements on at least ten issues from August of 2005 to December of 2006. By that time, the only significant issues which remained unresolved were wages and health insurance.

In December of 2006, the school district withdrew from the collaborative bargaining process and tendered to the Union its first formal proposal, the terms of which were not set forth in the record. The Union's bargaining team, clearly irritated by the abrupt change to a traditional bargaining format, submitted to the school district its own "table position" on January 11, 2007. The Union's written proposal to "settle all remaining issues" called for a two percent across-the board wage increase for each year of the contract, retroactive to 2004. In addition, Wayne County, MEA/NEA proposed offering a credit to those members of the bargaining unit who elected to be covered by health insurance from their spouses or other outside sources. The district rejected the Union's table position, with Redford Union Superintendent Donna Rhodes characterizing it as "nonsense."

[2] Beyond the agreement to delay bargaining over economic issues, the record does not indicate the particular ground rules utilized by the parties in connection with their negotiations.

The school district submitted another written offer to the Union on February 27, 2007. Under the prior collective bargaining agreement, teachers and their dependents had been eligible for a traditional Blue Cross/Blue Shield hospital and medical service plan, with the subscriber's cost fully paid by the district, and a $5 deductible for prescription drugs. In its offer of February 27, the district proposed switching all bargaining unit members to a Community Blue PPO health plan. For eligible tenured teachers and their dependents, the district offered to pay a portion, not to exceed 81 percent, of each subscriber's cost of the health plan. For eligible non-tenured teachers, the Employer agreed to pay a portion of each subscriber's cost for single health and prescription coverage. Deductibles for prescription drug coverage under the district's proposal were $20/$40/$40 for generic medications, single source preferred brand name drugs, and "designer convenience-dosed" drugs, respectively. The district's offer further provided that wages "shall not be subject to negotiations" during the term of the agreement.

In late February or early March of 2007, representatives of the parties began meeting primarily in sidebar sessions, with only a few members of each of the bargaining teams in attendance at any given session. During these meetings, the parties' representatives discussed a number of possible Union concessions to help remedy the district's budget problems, including a freeze to the salary steps, an early retirement plan, changes to the existing prescription drug plan and the transfer of all bargaining unit members from the Blue Cross/Blue Shield traditional hospital and medical service plan to a PPO health plan. However, none of these ideas were acceptable to the school district's bargaining team, which continued to seek cost-sharing with respect to health insurance in conformance with the objectives stated in the district's November 2005 deficit elimination plan.

At the hearing in this matter, Superintendent Rhodes testified that the terms discussed in sidebar would, in her opinion, have represented at best a short-term fix to the school district's budget problems and that a more systemic solution was needed to eliminate the deficit by 2010. Rhodes testified:

> [T]he deficit elimination plan is made up of a lot of things. Of the portion that the teachers would impact . . . [the sidebar proposals] would come close to those figures for the first year. But the buy-out isn't something you can do every year. And once people are all on that PPO, that is just a done deal then. And freezing the steps. It doesn't — isn't an ongoing [solution], because we would — we're going to be continually laying off, so whether you could count on that 200,000 every year is a questionable amount.

Although Rhodes asserted that Redford Union was open to considering any alternative which would have provided the necessary systemic changes, she testified that no viable alternatives to health insurance cost-sharing were ever proposed by the Union or discussed by the parties' bargaining teams.

During a sidebar session on or about April 23, 2007, members of the Union's bargaining team opined that the parties needed "a new set of eyes" and suggested to the school district's spokesperson and chief negotiator, Shawn McGowan, that a mediator be

called in to assist the parties in finalizing an agreement. McGowan responded, "The district is going to do what the district has to do." A few days later, in an e-mail to the Union's bargaining team dated April 27, 2007, McGowan wrote, "At the meeting earlier this week you confirmed your view that the parties have been at impasse since our last offer. We agree." Attached to the message was a document labeled "Last Best Offer", the terms of which, according to McGowan, would be unilaterally imposed upon the bargaining unit.

Steven Losey is employed by the school district as a special education teacher and is a member of the Union's bargaining team. Losey is also president of the Redford Union Education Association (hereafter "RUEA"), which is comprised of the district's certified teachers. Losey responded to McGowan's April 27, 2007 e-mail almost immediately. In his response to McGowan, Losey denied that anyone had mentioned an impasse and referenced the Union's desire to have a mediator assist the parties. Losey indicated that the Union's bargaining team believed that the parties were moving forward "in all areas of negotiations" and he expressed surprise and disappointment at the school district's decision to declare impasse. Losey characterized the district's action as "nothing more than an Unfair Labor Practice."

That same day, Dave Harrell, an MEA Uniserv Director assigned to the Redford Union School District, also responded to McGowan. Harrell, a member of the Union's bargaining team, wrote, in pertinent part:

> Shawn, you know perfectly well that at no time during our meeting this week did I state or confirm that the parties are at impasse. In fact we both have expressed willingness for some compromises that are not in our last table offers. What I said at our last meeting was that I the teacher's team [sic] had filed for mediation, believing that we needed the help of a mediator to find a settlement. That is quite different from impasse.
>
> * * *
>
> I ask that you immediately retract your statement that you will impose your last best offer. Should you fail to do so, we will initiate an unfair labor practice charge against the Board.

At the hearing in this matter, McGowan testified that his e-mail to the Union was the result of a comment Dave Harrell had made at the April 23 sidebar meeting. According to McGowan, Harrell stated at that meeting, "We are done; we can do no more." McGowan testified that it was his belief at that time that the parties had "no chance of coming to an agreement" and that the district needed to implement its last best offer "because of the timelines, for financial considerations and because of the state's pressure." However, McGowan gave a very different rationale for the Employer's decision to declare impasse when he testified under oath in an earlier proceeding in connection with a complaint filed by Wayne County, MEA/NEA for injunctive relief, the transcript of which was admitted into the record as an Employer exhibit.

Appearing before Wayne Circuit Judge William J. Giovan on June 19, 2007, McGowan testified under oath that the Employer was willing and able to accept terms and conditions of employment which were less favorable to the school district than those unilaterally imposed by the district on April 27, 2007.[3] Describing a post-imposition proposal from the school district, McGowan testified:

> A (by McGowan): [T]he [later] offer that basically came out of mediation was that the District employees would pay fifteen hundred dollars toward their healthcare benefits. That they would go to a ten twenty forty drug card. And from what I understand from - on the recommendation or on the advice of our chief financial officer, that would be enough for the District to start making its way out of deficit.
>
> Q (by Michael Lee): And that was less than what was imposed on April twenty seventh as far as cuts were concerned, true?
>
> A: Yes.
>
> * * *
>
> Q: Okay. So is there any reason why the District couldn't have done that on April twenty seventh?
>
> A: I would have to say no, other than the fact that in terms of the bargaining process we were under - at least let me say I was under the assumption that we needed to go to a certain point in order to work back towards the middle of what we could live with.
>
> In other words, if we would have imposed what we could live with, then we were afraid that it would get chipped away to something that we couldn't live with.
>
> Q: Okay. How would it get chipped away if you imposed it?
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> A: If we imposed it, it would mean what we would expect, as Mr. Butler said that when you imposed a contract, that you keep negotiating, that we would be able to come up with something that we both could live with.
>
> Q: Okay. So, this would -

[3] Judge Giovan denied the complaint after summary proceedings, finding for the purpose of reviewing the application for injunctive relief, that the Union had no likelihood of success on the merits of its claim that the school district had acted unlawfully in declaring impasse. The Commission is charged with a review of the actual merits of the Union's claim following a full and complete hearing. Moreover, the appellate courts have acknowledged the Commission's particular "expertise and judgment in the area of labor relations." *Oakland Cty v Oakland Cty Deputy Sheriffs Ass'n*, 282 Mich App 266 (2009), citing *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323 n 18 (1996).

> A: Then when you come up with something that you both can live with, if you start at A and the other side is at C, you're looking to get to B, so you have to go a little bit beyond that point, which is why - which is what I understand why we went to the extremes of the imposition of that contract. And I'd also like to say at this time, we never thought we would have to get to that point.

When asked on cross-examination at the hearing in the instant case about his prior testimony in circuit court, McGowan confirmed that the Employer's decision to impose was intended to pressure the Union to move from its current position. McGowan acknowledged that the decision to implement "was encouragement to get something done."

Superintendent Rhodes testified that she believed the parties were at impasse in April of 2007 because Wayne County, MEA/NEA had taken a firm stance against agreeing to a collective bargaining agreement pursuant to which its members would be required to contribute to the cost of health insurance. According to Rhodes, cost-sharing was an important element of the district's 2005 deficit elimination plan and the school board felt "very strongly about sticking to [that] plan." In fact, Rhodes believed the parties were actually at impasse much earlier and testified that she expressed that opinion to the school board in a closed meeting on March 5, 2007. Rhodes testified that the school district choose not to declare impasse at that time because additional bargaining sessions were planned and "we were still hopeful that we might be able to move forward." Rhodes admitted that there was "[l]ots of discussion" between the parties after March 5th.

Edward Callaghan is a consultant to the Redford Union School District. Callaghan testified that he personally told Univserv Director Dave Harrell that the parties were at impasse in March of 2007. However, I did not find Callahan's testimony credible. Callaghan was the only witness who claimed that the school district gave prior notice to the Union of its intent to declare impasse. Although Superintendent Rhodes alleged that she discussed declaring impasse with the school board in March, there is no evidence to suggest that she notified the Union of that fact. McGowan, the district' chief spokesperson, testified explicitly that no one used the word impasse during bargaining and that he did not believe the parties were at impasse until Harrell commented during the sidebar session in April that the Union "could do no more." The Union's chief spokesperson, Kyle Muston, also testified credibly that the parties had not alluded to or used the word "impasse" prior to April 27, 2007.

The terms and conditions of employment which were imposed upon members of the Wayne County MEA/NEA bargaining unit included a change in prescription drug co-pays from $5 for all prescriptions as part of the expired contract to $20 for generic drugs and $40 for non-generic drugs and "designer" medications, with a $2,400 yearly cap per insured. With respect to health insurance, members who had been enrolled in the Blue Cross/Blue Shield traditional health and hospitalization plan were switched to Blue Cross Community Blue PPO Plan #1. Under the imposed terms, non-tenured teachers are eligible for single coverage only, with the option to extend coverage to dependents through payroll deductions. Finally, bargaining unit members are now required to contribute to the cost of medical

coverage through payroll deductions of $150 per month from September to June of each year, for a total of $1,500 per year. No changes were made to wages or step increments. The Employer described to the bargaining unit members the details of these unilateral changes in a memo dated June 22, 2007.

Following implementation by the school district, RUEA president Losey left a voicemail message for Rhodes concerning future negotiations. The June 4, 2007, message, which was transcribed by the Employer and admitted into evidence at hearing, states, in part:

> Uh, wanted to, uh give you the heads up if you weren't uh, bombarded by Shawn, uh, in the morning or the late afternoon. Uhm, I met with, uh Wayne County today, uh the MEA, uh, went down there to try and get this stuff, uh, all settled and squared away. Uhm, apparently the, uh, folks from the MEA have met last Friday from across the state, uhm, with, uh, some new guidelines, I guess, uh, you could call them uhm, with response to, uh, pending impositions across the state. Uhm, the MEA's position now is that we do not bargain imposed contracts. Uh, we only bargain settlement agreements and that's where they're going from that. Uhm, with that, they drafted up, uh, a counter proposal if you will, to your last table position from the district. Uhm, and I delivered that to Shawn.

At hearing, Losey explained that when he made the statement that the Union would "not bargain an imposed contract," he meant that the Union did not accept the terms imposed by the district and that the Union wanted to bargain a "full collective bargaining agreement" about which both parties were satisfied. Losey testified, "We wanted to have, sit down and have something we can collaboratively come up to an agreement upon and settle that way." Losey denied that he ever attended a meeting in Lansing and alleged that his voicemail message referred to information he had received from MEA Uniserv Director Cheryl Ann Robinson.

Robinson had taken over for Harrell as Uniserv Director for the bargaining unit in May or June of 2007. Around that same time, she attended an MEA meeting in Lansing which had been called by a statewide consultant for the purpose of discussing various bargaining issues, including privatization and possible impositions. Robinson described the event, which she attended with other Uniserv Directors from throughout the state, as a "collaborative meeting to brainstorm, share ideas, concerns." Robinson testified that there were no directives issued to the attendees at that meeting and that the "MEA is not in a position to tell locals what they can and cannot bargain."

After receiving Losey's voicemail message, Rhodes sent an e-mail to Robinson requesting confirmation that "the state MEA organization does not want teachers to pay a portion of their benefits as a part of their contract settlements." In response, Robinson wrote that the position of the state MEA and Wayne County MEA/NEA is "no caps" and that both organizations "consider a cap on insurance premiums a serious rollback."[4] Robinson

[4] The parties use the term "caps" as shorthand for describing employee contributions to health care.

concluded the letter by stating, "I am the authorized Wayne County MEA/NEA signatory at the bargaining table. Perhaps this is what Steve [Losey] is referring to." At hearing, Robinson testified that she had the authority to sign off on a tentative agreement on behalf of the bargaining unit, but that she would not do so before first discussing the matter with the RUEA.

According to Superintendent Rhodes, the Union refused to negotiate after the school district declared impasse. In fact, Rhodes testified that bargaining did not resume until August of 2007, when the parties reached a settlement in a related MERC proceeding. However, Rhodes admitted that she did not personally request that negotiations resume, nor did she direct anyone to do so. Moreover, the record establishes that the Union actually made two additional contract proposals shortly after the district imposed. On June 4, 2007, the same day that Losey left his voicemail message for Rhodes, the Union forwarded a written offer to the school district. The Union proposed that all eligible teachers and their dependents would be switched to the Community Blue PPO health plan, with the costs of the plan fully paid by the Employer. The Union submitted a second post-implementation proposal on June 8, 2007. The Union again offered to switch its members to the Community Blue PPO. In addition, the Union proposed that effective July 1, 2007, the prescription drug co-pays would be $3/$10/$40, and that salaries on all step increments would be frozen through the 2007-2008 school year.

Losey testified that the Union was always open to considering employee contributions to health insurance, but that it needed additional information from the school district establishing, to the Union's satisfaction, that such concessions were necessary. According to Losey, such information was never made available. In fact, Losey testified credibly that both before and after the school district declared impasse, the district repeatedly increased its claimed need for concessions from the bargaining unit. For example, the district asserted in late 2005 or early 2006 that it needed $300,000 in concessions from the unit to obviate the need for employee contributions to health care. When the Union found savings in that amount, the district asserted that additional concessions were necessary. There is no evidence of any change in circumstance which would have justified the employer's increasing demands. In fact, the record indicates that prior to implementation, the district received a one-time payment of $900,000 from the state and that there was also an unanticipated reduction in the Employer's MPSERS rate which resulted in a yearly savings of about $700-800 per teacher.

Discussion and Conclusions of Law:

Motion to Strike

Post-hearing briefs were filed by the parties on March 17, 2008. In an unexplained departure from normal procedure, the school district attached to its brief copies of all of the hearing transcripts, as well as a large number of the hearing exhibits — despite the fact that those documents were, of course, already part of the record. Intermingled amongst those materials, the Employer, without any explanation, inappropriately included two additional documents which had never been admitted into the record or even offered as exhibits during

the three-day hearing. These documents, labeled as Exhibits F and N, are unsigned, unsworn and undated "affidavits" of two witnesses who testified at the hearing in this matter, John Tsvetanoff and Shawn McGowan, respectively. In its post-hearing brief, the Employer relies frequently and substantively on statements contained within the Tsvetanoff and McGowan "affidavits." In fact, on page 10 of its brief, the school district refers to an assertion in the McGowan "affidavit" as "the best evidence of the Union's refusal to bargain." Yet, the Employer's counsel did not seek leave from the undersigned to reopen the record for inclusion of these documents, nor did the Employer's counsel bring to my attention, or that of the opposing party, the fact that it had submitted, and sought to secure my reliance upon, documents which were not part of the record.[5]

On May 28, 2008, the Union filed a motion to strike Exhibits F and N. The school district filed a response to the motion to strike on June 18, 2008. In its response, the Employer argued that the documents were properly submitted because they were part of the "underlying record in this case," allegedly having been attached to a motion which the school district filed in the collateral proceedings in Wayne Circuit Court in opposition to the Union's motion for injunctive relief. In addition, the school district asserted that it did not introduce the "affidavits" at the hearing in this matter because the two witnesses, Tsvetanoff and McGowan, had testified "consistently" with those documents. Finally, the school district claimed that the Union had failed to timely object to the submission of these documents. Incredibly, the Employer made this argument despite the fact that its post-hearing attempt to supplement the record was carried out surreptitiously. On June 20, 2008, the Union filed a reply to the school district's response to the motion to strike.

The arguments set forth by the school district regarding its self-help effort to supplement the record are without any merit. The fact that an exhibit may have been admitted into evidence as part of a proceeding in another forum does not, of course, mean that the document is thereafter part of the record in any subsequent legal proceeding between the same parties. The school district was clearly aware that the circuit court proceeding was not, as it now contends, part and parcel of the instant case, given that it specifically sought to introduce a transcript from that proceeding as an Employer exhibit here. The district's assertion that it did not seek to introduce the "affidavits" as exhibits because Tsvetanoff and McGowan testified consistently with those documents is belied by the fact that the Employer repeatedly relies in its post-hearing brief on factual assertions set forth within the "affidavits" which were not testified to by the witnesses in this proceeding, including assertions relied upon by the district as the sole proof of what the district describes as "the best evidence of the Union's refusal to bargain." Finally, the fact that the Union did not bring its motion to strike until two months after the district filed its post-hearing brief is of no legal significance. Regardless of when or if the opposing party objected to the Employer's submission of the "affidavits," it is axiomatic that documents not admitted as exhibits during the hearing may not be considered as part of the record absent an order from the ALJ reopening the record. Thus, I would have disregarded the unsworn, unsigned, undated "affidavits" *sua sponte* had the motion to strike not been filed.

[5] The Employer specifically identifies the documents attached to its brief as "exhibits . . . from the hearings in this matter." Such a statement suggests a willful and affirmative attempt to mislead this tribunal.

Even if I were to treat the school district's response to the Union's motion to strike as, in essence, a motion to reopen the record, there exists no rationale which would justify consideration of the "affidavits" as evidence in this matter. Rule 166 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.166 provides:

> A motion for reopening the record will be granted only upon a showing of all of the following:
>
> (a) The additional evidence could not with reasonable diligence have been discovered and produced at the original hearing.
>
> (b) The additional evidence itself, and not merely its materiality, is newly discovered.
>
> (c) The additional evidence, if adduced and credited, would require a different result.

The hearing on the Union's motion for injunctive relief was held in Wayne Circuit Court on June 19, 2007. Given that both "affidavits" were purportedly submitted to the circuit court in opposition to that motion, there can be no serious argument made that the documents themselves or the facts asserted therein were somehow newly discovered, or that the "affidavits" could not have been produced at the hearing in this matter, which ended on January 30, 2008.

In conclusion, I find that the Employer's attempt to rely on evidence which is not part of the record was improper. The Union's motion to strike Exhibits F and N as attached to the Employer's post-hearing brief is hereby granted.

Case No. C07 F-132

In its charge, the Union asserts that the school district violated its duty to bargain under PERA by unilaterally implementing changes to terms and conditions of employment in the absence of a valid impasse. Under Section 15 of the Act, public employers and labor organizations have a duty to bargain in good faith over "wages, hours and other terms and conditions of employment." Such issues are mandatory subjects of bargaining. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55 (1974). It is well established that the benefits, coverage, and administration of a health insurance plan are mandatory subjects of bargaining under Section 15 of PERA. See e.g. *Taylor Sch Dist*, 1976 MERC Lab Op 693; *Houghton Lake Ed Ass'n v Houghton Lake Bd of Ed*, 109 Mich App 1, 7 (1981). In fact, Section 15(3)(a) of the Act explicitly recognizes the obligation of both public school employers and labor organizations to bargain with respect to "types and levels of benefits and coverages for employee group insurance." MCL 423.215(3)(a). See also *St. Clair County ISD*, 2000 MERC Lab Op 55, 61-62. An employer violates Section 10(1)(e) of PERA if it unilaterally modifies a term or condition of employment absent a good faith impasse in the negotiations. *Port Huron Education Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 317 (1996).

Although not specifically defined under PERA, the Commission has generally described impasse as the point at which the positions of the parties have so solidified that further discussion would be futile. *Memphis Cmty Schools*, 1999 MERC Lab Op 377, 386; *City of Ishpeming*, 1985 MERC Lab Op 687; *City of Saginaw*, 1982 MERC Lab Op 727; *Flint Twp*, 1974 MERC Lab Op 152. The determination of whether impasse exists is made on a case-by-case basis, taking into account the totality of the circumstances and the entire conduct of the parties. *Flint, supra*. The Commission has considered a number of factors in making this determination, including whether there has been a reasonable term of bargaining, whether the parties have participated in mediation, whether the positions of the parties have become fixed, and whether both parties are aware that their positions have solidified. *Oakland Cmty College*, 2001 MERC Lab Op 272, 277; *Saginaw, supra*. A finding of impasse depends on the facts of each case and not on the declaration of either party. *St. Ignace Area Schools*, 1983 MERC Lab Op 1042; *Munson Medical Center*, 1971 MERC Lab Op 1092. Once a bona fide impasse has been reached, an employer may lawfully make unilateral changes in working conditions, provided that such changes are not substantially different or greater than the last offer which the employer proposed during negotiations. *Waldron Area Schools*, 1996 MERC Lab Op 441, 447; *Atlas Tack Corp*, 226 NLRB 222, 227 (1976), enf'd 559 F2d 1201 (CA1, 1977).

Based upon a careful review of the record, including the transcripts and exhibits, I find that that the parties were not at impasse when the school district declared impasse and imposed its purported last best offer on April 27, 2007. Although the parties engaged in lengthy bargaining in connection with this matter, time spent negotiating, while a factor in determining whether impasse exists, is not determinative. See e.g. *Clinton Cmty Schools*, 1999 MERC Lab Op 1. From the beginning of negotiations in August or September of 2005 through December of 2006, the parties reached tentative agreements on at least ten issues, with only the major economic issues, wages and health insurance, unresolved. Moreover, the parties were engaged in non-traditional collaborative bargaining during that period. Accordingly, no formal bargaining proposals were tendered by either party for a vast majority of the approximately 20 months the parties spent bargaining prior to April 27, 2007.

It was not until December of 2006, just four months prior to the declaration of impasse, that a written proposal was actually made. At that time, the Employer withdrew from the collaborative bargaining process and tendered to the Union its first formal proposal. Thereafter, the Union submitted its "table position" to the school district, and the district countered with another proposal on February 27, 2007. Although none of the three proposals exchanged during this period suggest that the parties were on the verge of finalizing an agreement on wages and health insurance, the record equally establishes that members of the respective bargaining teams continued to engage in substantive discussions concerning those issues. During sidebar sessions, the parties considered a freeze to step increments, an early retirement plan, changes to the existing prescription drug plan and the transfer of all bargaining unit members to a PPO health plan. However, none of these ideas were acceptable to the Employer.

At hearing, Superintendent Rhodes testified that the school district was always open to considering alternatives to employee contributions to health care, but that no viable plan was ever proposed by the Union or discussed by the parties during negotiations. Rhodes asserted that the concepts discussed in sidebar would have resulted in savings for only one year and, therefore, would not have provided the systemic changes needed by the school district to permanently remedy its budget problems. However, the explanation offered by Rhodes defies logic, as each of the proposals described above would have the potential at least of providing a substantial level of long-term savings to the district. For example, an early retirement plan would not only result in a permanent decrease in the number of teachers on staff, it would also have the obvious effect of decreasing the number of teachers who are working at the highest levels of the existing salary steps. Similarly, an agreement to increase prescription drug co-pays would certainly save the district money during each year of the contract as compared to the district's expenses under the prior agreement.

The Employer bears the burden of establishing that impasse was reached to justify implementing its last best offer. Simply declaring impasse and asserting the right to implement changes in mandatory subjects of bargaining is not sufficient. The Employer must prove that neither party, not just one, was willing to compromise. *Oakland Cmty College*, *supra*. See also *NLRB v Powell Electric Mfg Co*, 906 F2d 1007 (CA 5, 1990); *Huck Mfg Co v NLRB*, 693 F2d 1176, 1186 (CA 5, 1982). In the instant case, there is no credible evidence indicating that the Employer gave the Union any advance notice of its intent to declare impasse, a fact which by itself strongly suggests a lack of good faith on the part of the school district. Moreover, it is evident that the Union did not agree with the district's determination that the parties were at impasse, as evidenced by the e-mails which Losey and Harrell sent to McGowan immediately after learning of the Employer's decision to impose its purported last offer. In those emails, the Union expressed its intent to continue negotiations and referenced its desire for the parties to utilize the services of a mediator.

The fact that the school district declared impasse before the parties ever engaged in mediation or fact finding and almost immediately after the Union proposed calling in a mediator is also evidence that the Employer was acting in violation of Section 10(1)(e) of the Act. Notwithstanding the Employer's contention in its post-hearing brief that there is "simply no authority" obligating the parties to engage in mediation, the Commission, as early as 1975, noted:

> We intend to look very carefully in the future to the activities of all the parties in carrying out the polices and intent of PERA. Delay in negotiations, or a tendency to negotiate in a manner calculated to inflame the passions of the parties will be viewed critically by this Commission. *Likewise, the failure of the parties to utilize to the maximum extent necessary the services of mediation, fact finding and arbitration will be viewed as indicating a lack of good faith to carry out the intent and policies of PERA* (Emphasis supplied).

Crestwood School District, 1975 MERC Lab Op 609, 625. See also *Orion Twp*, 18 MPER 72 (2005), in which the Commission emphasized the importance of mediation and fact

finding and reaffirmed its holding in *Crestwood* that the failure to utilize these services may be proof of bad faith.

The Employer contends that the positions of the parties had solidified by April 27, 2007 to the extent that additional negotiations, even with the services of a mediator, would have been futile. However, the testimony of McGowan, the school district's spokesperson and chief negotiator, contradicts this assertion. Testifying in circuit court on June 19, 2007, McGowan stated that the terms and conditions of employment which the school district imposed went beyond what was necessary for the Employer to address its budget problems. McGowan testified, "[I]f we would have imposed what we could live with, then we were afraid that it would [later] get chipped away to something that we couldn't live with." It is evident from McGowan's testimony that the district's decision to impose was nothing more than a bargaining tactic designed to force the Union to accede to its demands. McGowan acknowledged as much when, in responding to questions from the Union's attorney concerning his testimony in circuit court, he conceded that the decision to implement "was encouragement to get something done." The unilateral imposition of changes in terms and conditions of employment may not be used as a bargaining tactic.

Notwithstanding McGowan's testimony, the Employer contends that it needed to declare impasse and implement its last best offer on April 27, 2007 because the "current benefit period" was due to expire on June 30, 2007 and "the cut-off date for implementing any new health insurance provisions was July 1, 2007." The Commission has long held that an employer may implement its last offer where the parties have reached impasse on a particular subject and immediate action is required. See e.g. *Wolverine Cmty Schools*, 1983 MERC Lab Op 655; *Fowlerville Bd of Ed*, 1977 MERC Lab Op 392; *Centerline Pub Schools*, 1976 MERC Lab Op 729. In the instant case, however, the only proof cited by the Employer in support of its contention that there was a definitive cut-off date for implementing changes to health insurance is the Tsvetanoff "affidavit" which, as noted, is not properly before the Commission.[6] Other than the vague and conclusory hearing testimony of McGowan, who asserted that the school district imposed "because of the dates of what needed to get done for the financial good of the district," there is simply no credible evidence in the record suggesting that the Employer's decision to impose on April 27, 2007 was driven by any legitimate business necessity.

I find that the record does not support the Employer's assertion that the parties had reached impasse on April 27, 2007. Taking into account the totality of the circumstances and the entire conduct of the parties, including the fact that there were only three formal proposals tendered prior to imposition, the fact that the parties had not yet attempted to utilize the services of a mediator, the fact that the district considered the declaration of impasse to be a mere bargaining tactic, the fact that the parties continued to engage in substantive discussions regarding health care and other matters just prior to the declaration

[6] The Tsvetanoff "affidavit" does not even stand for the factual proposition asserted by the Employer in its brief. The document does not state that there was any cut-off date for making changes with respect to health insurance. Rather, the "affidavit" asserts only that the school district "was required to finalize its budget for 2007-2008 by July 1, 2007."

of impasse and the lack of any legitimate business necessity, I conclude that the school district violated its bargaining duty by refusing to continue negotiations and by implementing its purported last best offer.

Case No. CU07 F-030

In its charge, the Employer asserts that Wayne County, MEA/NEA breached its duty to bargain in good faith by refusing to negotiate after the school district declared impasse, and that it violated Section 17 of PERA because its refusal to negotiate was at the direction of the Union's "hierarchical superiors." Specifically, the charge alleges that the Union, at the direction of the MEA, refused to submit a tentative agreement reached in mediation to the membership and thereafter refused to engage in any additional negotiations. However, the Employer did not elicit any testimony at the hearing to support this contention. In fact, the only alleged proof cited by the district in its post-hearing brief to establish that there was a post-impasse agreement which the Union refused to present to its members for ratification is the McGowan "affidavit" which, as noted, is not properly before the Commission. The school district spent much of the hearing, and a good deal of its post-hearing brief, instead attempting to prove that the Union's bargaining team negotiated in bad faith by demonstrating that members of that team were "confused and misinformed." Notably, such allegations were not part of the original charge and the district never moved to amend its charge to include this or any other new allegation.[7] Under these circumstances I conclude that the Employer has effectively abandoned its charge. Nevertheless, I will address several of the arguments set forth by the school district in its post-hearing brief.

The school district asserts that the Union failed to engage in any bargaining between April 27, 2007, when the Employer declared impasse, and August of 2007, when the parties reached a settlement in a related MERC proceeding. Although the existence of a bona fide impasse does not permanently terminate the collective bargaining obligation, the duty to bargain is suspended until circumstances change which break the impasse. *Escanaba Public Schools*, 1990 MERC Lab Op 887, 891; *City of Ishpeming*, 1985 MERC Lab Op 517. In any event, the very contention that the Union refused to engage in post-impasse bargaining is contradicted by the Employer's own charge, which specifically asserts that both parties in fact engaged in post-impasse mediation. Moreover, the record in this case demonstrates that the Union tendered two contract proposals to the school district during the period immediately following imposition. The first offer was made on June 4, 2007, just one week after the district declared impasse, while the second offer was tendered to the district four days later, on June 8, 2007.

In support of its contention that the Union refused to bargain following the declaration of impasse, the Employer cites the voicemail message to Rhodes in which Losey asserted that the Union would not bargain an imposed contract. However, a careful reading of that message, along with an examination of Losey's consistent hearing testimony, reveals that the statement was not intended, and could not reasonably be construed, as an outright refusal to negotiate. In fact, in his message to Rhodes, Losey explicitly referred to a forthcoming Union proposal, an offer which was indeed forwarded to the school district that same day. It is evident that the message which Losey intended to convey was that the Union wanted to continue bargaining, but that it would not accept the imposed terms as the starting

[7] The evidence does in fact suggest that the performance of some members of the Union's bargaining team was far from optimal. Nevertheless, that fact, even if properly pled, would not suffice to establish a PERA violation on the part of the Union.

point for additional negotiations. This posture is consistent with the parties' bargaining obligations under PERA. The Commission has held that even lawful changes implemented after impasse do not have the status of a collective bargaining agreement and do not act to foreclose bargaining over these issues for a set period, as is the case when the parties voluntarily enter into a collective bargaining agreement with a fixed term. *Escanaba*, *supra*; *Wayne County*, 1988 MERC Lab Op 7, 15 at fn 2. Accordingly, I find no violation of the duty to bargain on the part of the Union.

The Employer's reliance on Section 17 of PERA, MCL 423(17), to support its unfair labor practice charge is also baseless.[8] Section 17(1) provides that education associations "shall not veto," "shall not require the bargaining unit to obtain . . . ratification," and "shall not in any other way" prohibit or prevent the bargaining unit from entering into, ratifying, or executing a collective bargaining agreement.[9] Regarding enforcement of this provision, Section 17(2) provides:

> If an education association, a bargaining representative, or a bargaining unit violates this section, the board of a public school employer or any other person adversely affected by the violation of this section may bring an action to enjoin the violation of this section in circuit court for the county in which the plaintiff resides or the circuit court for the county in which the affected public school employer is located. Failure to comply with an order of the court may be punished as contempt. In addition, the court shall award court costs and reasonable attorney fees to a plaintiff who prevails in an action brought under this section.

Although the Employer references Section 17(1) of PERA repeatedly throughout its post-hearing brief and even quotes that entire subsection verbatim, the school district largely ignores Section 17(2). In fact, the only time the school district refers to Section 17(2) in its brief, it falsely asserts that the provision gives the Commission "the authority to remedy a violation of Section 17 under MCL 423(17)(2)."[10] Based on the clear and explicit language of the statute, the only possible conclusion is that the circuit court has the sole authority to remedy a Section 17(1) violation.

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[8] Unfair labor practices by labor organizations are identified in Section 10(3) of the Act, and the procedure for enforcement of that provision is set forth in Section 16 of PERA.

[9] The Michigan Supreme Court upheld the constitutionality of Section 17 in *Michigan State AFL-CIO v MERC*, 453 Mich 362 (1996). In order to conform to First Amendment requirements, the Court held that "the language of subsection 17(1) that restricts an education association from 'in any other way' prohibiting a local bargaining unit from ratifying a collective bargaining agreement only restricts the association from holding a legal 'power' over the local unit." *Id*. at 378. Thus, the Court interpreted Section 17 as allowing education associations to advise and assist local bargaining units.

[10] The totality of the conduct of the Employer's counsel, including the inappropriate and surreptitious attempt to supplement the record, the misrepresentation of the content of an "affidavit" and the failure to acknowledge the existence of a statutory provision contrary to the interests of his client, is deeply troubling. Such behavior far exceeds the bounds of zealous advocacy.

The school district further argues that proof of a Section 17 violation may constitute evidence that an education association breached its duty to bargain generally. I disagree. At the time the legislature amended PERA to include Section 17, it also added language to Section 15 of the Act which effectively constrained bargaining regarding public school employees. Had the legislature intended for the conduct proscribed in Section 17 to constitute a bargaining violation, it surely would have included that prohibition in Section 15, which specifically addresses the bargaining obligations of employers and unions. Because Section 17 contains its own enforcement mechanism separate and apart from the other provisions of PERA, I find that the Commission lacks jurisdiction over any allegations related to that section as set forth by the Employer in this case.

I have carefully considered the remaining arguments of the parties and conclude that they do not warrant a change in the result. For the reasons stated above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charge in Case No. CU07 F-030 is hereby dismissed in its entirety.

It is hereby ordered in Case No. C07 F-132 that Redford Union School District, its officers, agents and assigns, shall:

(1) Cease and desist from refusing to bargain collectively and in good faith concerning wages, hours and working conditions with Wayne County, MEA/NEA by unilaterally imposing and changing terms and conditions of employment in the absence of a lawful impasse.

(2) Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively and in good faith concerning wages, hours and working conditions with the above named Union.

(b) Restore to the unit employees the terms and conditions of employment that were applicable prior to April 27, 2007, and continue them in effect until the parties reach either an agreement or a good-faith impasse in bargaining. Nothing herein shall require the rescission of benefits granted.

(c) Make whole the unit employees for any losses they may have suffered because of the unlawful imposition of any unilateral changes in terms and conditions of employment on and after April 27, 2007, including interest at the statutory rate.

(d) Simultaneously disclose to the Union the methods used to

calculate reimbursement for losses incurred by each affected employee because of the unlawful imposition of any unilateral changes in terms and conditions of employment on and after April 27, 2007 and, upon request, meet and confer with the Union regarding compliance with the make whole portion of this order.

(e) Post copies of the attached notice to employees in conspicuous places on the Employer's premises, including all locations where notices to employees are customarily posted and on any website routinely utilized by Redford Union for employee access. Copies of this notice shall remain posted for 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
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, REDFORD UNION SCHOOL DISTRICT, 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 refuse to bargain collectively and in good faith concerning wages, hours and working conditions with Wayne County, MEA/NEA by unilaterally imposing and changing terms and conditions of employment in the absence of a lawful impasse.

WE WILL upon request, bargain collectively and in good faith concerning wages, hours and working conditions with the above named Union.

WE WILL restore to the unit employees the terms and conditions of employment that were applicable prior to April 27, 2007, and continue them in effect until the parties reach either an agreement or a good-faith impasse in bargaining. Nothing herein shall require the rescission of benefits granted.

WE WILL make whole the unit employees for any losses they may have suffered because of the unlawful imposition of any unilateral changes in terms and conditions of employment on and after April 27, 2007, including interest at the statutory rate.

WE WILL simultaneously disclose to the Union the methods used to calculate reimbursement for losses incurred by each affected employee because of the unlawful imposition of any unilateral changes in terms and conditions of employment on and after April 27, 2007 and, upon request, meet and confer with the Union regarding compliance with the make whole portion of this order.

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.

REDFORD UNION SCHOOL DISTRICT

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 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, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510.