STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CAPAC COMMUNITY SCHOOLS,
Public Employer-Respondent,

Case No. C08 J-204

-and-

CAPAC SCHOOL SERVICE ASSOCIATION, MEA/NEA,
Labor Organization-Charging Party.
_____/

APPEARANCES:

David W. Hershey, Michigan Association of School Boards, for Respondent

White, Schneider, Young and Chiodini, P.C., by Michael M. Shoudy, Esq., for Charging Party

DECISION AND ORDER

On March 26, 2010, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

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

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

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DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard in Detroit, Michigan on June 24, 2009, before Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules for the Michigan Employment Relations Commission. After the hearing, on August 28, 2009, Respondent filed a motion to dismiss the charge. On or before October 29, 2009, both parties filed post-hearing briefs. Based on the entire record, as discussed below, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Capac School Service Association, MEA/NEA filed this charge against the Capac Community Schools on October 1, 2008. Charging Party represents a bargaining unit of secretaries, cooks, aides, paraprofessionals, media technicians, and custodial maintenance employees of Respondent. On June 30, 2008, the parties began negotiating a new collective bargaining agreement. Charging Party alleges that on or about August 25, 2008, Respondent violated Section 10(1) (e) of PERA when it announced that it was unilaterally implementing its proposal on health insurance, despite the fact that the parties had not reached impasse.[1]

[1] Charging Party also alleged that Respondent engaged in unlawful direct dealing with members of Charging Party's unit in a letter sent to them on August 25, 2008. The letter itself was admitted into the record. However, Charging Party did not explain in its charge, at the hearing, or in its post-hearing brief why this letter constituted unlawful

The Capac Education Association, MEA/NEA (CEA), like Charging Party an affiliate of the MEA, also filed a charge against the Respondent on October 1, 2008 (Case No. C08 J-205). The CEA represents a unit of Respondent's professional employees. In the summer of 2008, the CEA and Respondent were also negotiating a new collective bargaining agreement, although Respondent held separate negotiation sessions with the CEA and Charging Party. Although the two cases were not consolidated, the parties stipulated that evidence presented in either hearing would be considered part of the record in both. My decision and recommended order in Case No. C08 J-205, *Capac Cmty Schs*, 23 MPER ____ (2009) has been issued this same date.

Respondent's Post-Hearing Motion to Dismiss:

On August 28, 2009, Respondent filed a motion to dismiss the charge as moot. At the hearing in June 2009, Respondent asserted that the parties had reached impasse on August 25, 2008, when Respondent announced that it was implementing its proposal to impose a cap on Respondent's insurance premiums contribution. In its August 28, 2009 motion, Respondent asserts that on February 9, 2009, it "reasserted that an impasse existed" and "reconfirmed" Respondent's implementation of its proposal to cap premium contributions. In its motion, Respondent reproduced a letter from Respondent's labor relations representative, David Hershey, to Charging Party UniServ Director Tracy Stablein-Brooks dated February 9, 2009. This letter states that, based on Charging Party's recent actions, Respondent is "reassert[ing] that an impasse in negotiations exists and reconfirm[ing] the Employer's position of implementing its last offer on insurances." Respondent did not produce this letter at the June 24, 2009 hearing.

On September 8, 2009, Charging Party filed a motion to strike Respondent's motion. Charging Party argues that Respondent's motion should be stricken because it is based on a document in Respondent's possession on the date of the hearing but not introduced as an exhibit or referenced in that hearing.

Rule 167 the Commission's General Rules, 2002 AACS, R 423.167, states that a party to a proceeding may move for reopening of the record following the close of a hearing. It also states that a motion to reopen the record will be granted only upon a showing of all of the following:

> 1. The additional evidence could not with reasonable diligence have been discovered and produced at the original hearing.
>
> 2. The additional evidence itself, and not merely its materiality, is newly discovered.
>
> 3. The additional evidence, if adduced and credited, would require a different result.

The February 9, 2009 letter from Hershey to Stablein-Brooks is not part of the record in this case and Respondent did not explicitly move to reopen the record to admit it. Even if it had,

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direct dealing. Because Charging Party did not explain the basis of its claim, I consider the claim to have been abandoned.

it is clear that the February 9, 2009 letter is not evidence that was discovered after, or could not have been produced at, the June 24, 2009 hearing. Accordingly, it would be inappropriate for me to reopen the record to include this document. Of course, I am also precluded from granting Respondent's motion to dismiss based on evidence not in the record.

In its motion, Respondent asserts that the "February 9, 2009 letter . . . constituted a second declaration of impasse and implementation as well as a second benchmark for determination if and when an impasse existed." As discussed below, although Respondent announced on August 25, 2008 that it was implementing its proposal to impose premium caps, the change did not impact unit members until premiums rose in July 2009. The motion to dismiss asserts that even if the parties were not at impasse on August 25, 2008, they were at impasse by February 2009. According to Respondent, the instant unfair labor practice charge is moot because Respondent lawfully implemented, or reimplemented, its proposal before the change affected employees.[2]

The charge in this case was filed in October 2008. However, the hearing was not held until June 2009. Respondent could have raised its mootness defense before the hearing. If it had done so, the issue of whether the parties had reached impasse by February 9, 2009 could have been litigated at the hearing. Instead, it appears from statements made in Respondent's motion to dismiss that it decided to wait until six months after the February 9, 2009 letter to assert that the charge was moot, on the theory that if Charging Party did not file a separate charge within this period it would be barred by the statute of limitations from challenging Respondent's "reimplementation" of its proposal.

I find that Respondent's mootness claim could and should have been raised as a defense to the charge on or before the date of the hearing. I conclude, therefore, that reopening the hearing to allow Respondent to present evidence that the charge is now moot would not be appropriate. Respondent's motion to dismiss is denied.

Findings of Fact:

The parties' 2005-2008 collective bargaining agreement expired on September 1, 2008. Under Article IX of the agreement, Respondent provided a health insurance plan called MESSA Choices to all unit employees except non-instructional aides and part-time aides. For custodians, secretaries, cooks and media technicians, Respondent paid the full premium for single subscriber, two-person or full family coverage. For full-time paraprofessionals and instructional aides, Respondent only paid for single subscriber coverage. If an employee in those classifications chose broader coverage, the employee paid the amount of the additional premium through payroll deduction. Non-instructional and part-time aides received no health insurance coverage, but received a $100 annual allowance under Respondent's cafeteria benefit plan. All

[2] It is well established that no valid bargaining impasse can exist in the presence of bad faith bargaining by either party. *Taft Broadcasting Co,* 163 NLRB 475, 478 (1967); *NLRB v. Pacific Grinding Wheel Co.*, 220 NLRB 1389 (1975), enfd 572 F2d 1343, 1349 (CA 9, 1978); *United Contractors*, 244 NLRB 72, 73 (1979), enfd. mem. 631 F2d 735 (CA 7, 1980). As I find below, Respondent bargained in bad faith by implementing its health insurance proposal in August 2008 before the parties had reached impasse. Consequently, the parties could not have reached good faith impasse in February 2009 unless Respondent somehow "cured" its unlawful conduct before that date.

employees received vision, life, and dental insurance, although the amount of the dental benefit varied by classification. All employees qualifying for health insurance benefits had the option of receiving cash in lieu of benefits.

The parties' first bargaining session for a new contract was held on June 30, 2008. Respondent and the CEA also held their first bargaining session on that date. The unions' chief spokesperson in both negotiations was UniServ director Tracy Stablein-Brooks. Respondent's chief negotiator in both negotiations was David Hershey. At its June 30 meeting with Respondent, Charging Party gave Respondent a written contract proposal that included changes in the dental and vision coverage and an increase in the cash allowance in lieu of benefits. The proposal also included proposed wage increases for all three years of the proposed contract and certain contract language changes. Charging Party did not propose a change in the health insurance benefit. Its proposal also did not include a calendar for the 2008-2009 school year because it was the parties' practice to let the calendar be negotiated by the CEA. After Respondent received the proposal, its bargaining team caucused. When it returned, the parties set a date for their next meeting. The entire meeting lasted about an hour. Respondent did not present proposals at this meeting. Stablein-Brooks testified that she believed that the parties discussed some issues relating to food service employees in this bargaining session. She also testified that she typically begins negotiations by going through the union's initial proposal, pointing out the changes, and describing the union's rationale. However, according to Lori Ensley, a member of Charging Party's bargaining team, there was no discussion of individual proposals at this meeting, and Stablein-Brooks did not contradict this testimony.

The second bargaining session was held on July 23, 2008. At this meeting, Respondent presented Charging Party with a written proposal. Respondent's proposal included a number of language changes. Respondent proposed a wage freeze for the first year of the contract, with wage reopeners for the remaining two years. Respondent also proposed to cap its premium contribution for health, dental, vision and life insurance. For Article XIX, it proposed the following new language:

> The Board shall make a monthly contribution toward insurances pursuant to the following table:
>
> | | |
> |---|---|
> | Health insurance: | $541.34 (ss)
$1215.15 (2p)
$1351.11 (ff) |
> | Dental: | $91.22 (80/80)
$62.26 (50/50) |
> | Vision | $14.29 (ff)
$ 5.20 (ss) |
> | Life | $7.20 |

> The Employer's contribution for insurance shall be no greater than the sum of rates from the table above for the insurance options allowed and selected by the employee.
>
> 1. MESSA Choices health insurance effective March 1, 2003 and/or equivalent coverage
>
> 2. Full-time paraprofessionals and aides (six or more hours) will received an amount equal to the single subscriber rate of MESSA Choices to apply towards purchased health insurance benefits with the district.
>
> 3. Part-time aides will receive SET/SEG Vision Plan II
>
> The Board subsidy shall terminate the first of the month following severance of employment.
>
> In instances where the cost of coverage exceeds the amount of the Board subsidy, the excess shall be payroll deducted.

The capped rates in the proposal represented what Respondent was committed to paying through July 2009. Under this proposal, employees who had not previously contributed to their premiums would have to start doing so in July 2009 if premiums rose at that time. In addition, paraprofessionals and aides who had been paying the premium for two-person or full family health insurance coverage would have to pay the full amount of the premium increase for these categories. Employees would also be responsible for any additional premium increases during the life of the collective bargaining agreement.

Respondent also proposed a cap on health insurance premium contributions, but not contributions for dental, vision, or life insurance, in its negotiations with the CEA.

Stablein-Brooks did not testify specifically about the July 23 meeting. According to Ensley, after Charging Party's team received Respondent's proposal it went into caucus. When the bargaining team came out of caucus, the meeting ended. According to Ensley, the July 23, 2008 bargaining session, like the first one, lasted approximately one hour. Ensley did not recall any discussion of proposals taking place at the meeting.

Respondent superintendent Jerry Jennex, a member of Respondent's bargaining team in both negotiations, testified that Respondent said much the same things about its insurance proposals at its meeting with Charging Party on July 23 and its meeting with the CEA on July 15. He testified that Respondent told Charging Party that it was interested in containing costs on insurance both presently and in the future. He said that it was willing to pay the premium rate for the 2008-2009 school year, but that was all that it was willing to pay, and that Respondent desired to make any future insurance premium increases subject to negotiations. According to Jennex, Respondent said that it would help the employees find other insurance within the cap if this was what they wanted to do. I credit Jennex's testimony that the parties discussed Respondent's health insurance proposal with Charging Party at this meeting and that Respondent

explained its position as stated above. As discussed in my decision in Case No. C08 J-205, Stablein-Brooks told Respondent at a CEA bargaining session that "We are not going to be the first in the county to have a hard cap," as she referred to Respondent's proposal. There was no testimony from any witness that Respondent said in any meeting that its insurance proposal or any other proposal was a final offer.

At some point, the parties agreed not to schedule any more bargaining sessions for the CSSA unit until the CEA and Respondent reached agreement on health insurance. Charging Party's witnesses recalled this as a decision made by Stablein-Brooks after August 25, whereas Jennex recalled there being an agreement to this effect at a CEA negotiation session on August 12. In any case, on August 18, Respondent notified Charging Party's chief negotiator that it had arranged for a state mediator to attend its meeting with the CEA scheduled for August 21. Stablein-Brooks, citing the need to meet with her team to explain the mediation process, cancelled the session. Respondent and the CEA agreed to meet with the mediator on their next mutually agreeable date, September 15.

On August 25, 2008, Jennex sent Stablein-Brooks the following letter:

> The district was disheartened that an effort to settle several matters prior to the start of school was unsuccessful due to the association's cancellation of a negotiation session with a state mediator. Under the current situation, the Capac Public Schools, the students, the employees and the community in general are left without clear direction in several areas.
>
> The following was not an easy decision for the district, however, one that had to be made for various reasons including those stated. It would have been more desirous if the parties had met with the mediator on Thursday instead of the association cancelling leaving the district with few options. Based on prior conversations both in and out of formal negotiations, we believe the parties' positions to be diametrically opposite from each other with no reasonable, nor foreseeable, solution.
>
> In the regard, first be advised the Capac Public Schools is exercising its option under the Public Employment Relations Act (PERA) and implementing the school calendar. The calendar that is being implemented is that which the employer last submitted in negotiations on August 12, 2008 (copy attached). We are taking this action so that the district, the employees, the students and community have guidance regarding critical scheduling of various key events throughout the school year.
>
> Secondly, be advised the district is also exercising its option under PERA to implement its last proposal regarding insurance (copy attached.) We are doing this for what we believe to be sound business reasons. Employees are facing the annual reopening period for insurance under the district's Section 125 cafeteria plan. We believe as the employees make those choices they should do so from the

informed position that they may have to make some contributions toward insurance premiums the next fiscal year.

We recognize and fully intend to continue to negotiate on both of these issues and those others that are still unresolved pursuant to the employer's duty to bargain under the PERA. [Emphasis added].

On August 25, 2008, Jennex also sent the following letter to members of Charging Party's bargaining unit:

The Capac Public Schools and your association are engaged in negotiating a new contract. One is not in place, leaving several questions: (1) What is the new calendar and (2) What is the new health care plan? Under the Public Employment Relations Act (PERA) when there is no foreseeable reason to believe settlement of an issue is possible, the employer has the right to implement its last proposal. We notified your association on August 25, 2008 that we have elected the option.

The district has implemented the enclosed calendar and insurance language. The calendar we believe to be self-explanatory. The insurance plan on the other hand requires a brief explanation. Basically, as you face decisions regarding insurance during the upcoming enrollment period, you should keep in mind that as insurance rates rise next July, you, as an employee subscriber, may have to contribute toward those increased premiums. We inform you of this for your benefit in making future decision regarding the plan you select.

If you have any question, please feel free to consult the central office at 395-3710.

Attached to this letter were Respondent's proposed Article XIX and a copy of the calendar it had presented to the CEA in negotiations. Jennex testified that Respondent implemented its health insurance premium cap proposal because, as stated in the letter, it believed employees needed this to make an informed choice of insurance plans during the open enrollment period.

In early June, 2009, Respondent notified unit members that health insurance premiums would increase on July 1 and explained how the increases would impact them. There was no information in the record regarding any increases in the premiums for dental, vision or life insurance coverage.

Discussion and Conclusions of Law:

Under Section 15 of PERA, neither party may take unilateral action on a mandatory subject of bargaining, i.e., unilaterally alter an existing term or and condition of employment, absent a good faith impasse in negotiations. *Central Michigan Univ Faculty Ass'n v Central Michigan University*, 404 Mich 268, 277, (1978); *Local 1467, Intern Ass'n of Firefighters, AFL-CIO v City of Portage*, 134 Mich App 466, 472 (1984); *Plymouth Fire Fighters Ass'n, Local 1811, IAFF, AFL-CIO v City of Plymouth*, 156 Mich App 220, 222-223 (1986).The Commission

defines a bargaining impasse as the point at which the parties' positions have solidified and further bargaining would be useless. *Oakland Cmty College*, 2001 MERC Lab Op 272, 277; *Wayne Co (Attorney Unit)*, 1995 MERC Lab Op 199, 203; *City of Ishpeming*, 1985 MERC Lab Op 687; *City of Saginaw*, 1982 MERC Lab Op 727.

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, 157; *Mecosta Co Park Comm*, 2001 MERC Lab Op 28, 32 (no exceptions). In determining whether the parties have reached a good faith impasse, the Commission looks at a number of factors. The primary factors are whether there has been a reasonable period of bargaining, whether the parties' positions have become fixed, and whether both parties are aware of where the positions have solidified. *City of Saginaw*¸ *supra; Memphis Cmty Schs*, 1998 MERC Lab Op 377 (no exceptions).

Charging Party and Respondent held two bargaining sessions before Respondent announced, on August 25, 2008, that it was implementing its proposal for health insurance premium caps. Charging Party presented its initial proposals at the first negotiating session, on June 30, 2008, and Respondent presented its initial proposals at the second session, on July 23. The testimony about these negotiations was sketchy, and it appears that the parties may not even have discussed all their proposals. As discussed in my decision and recommended order involving the CEA unit, Case No. C08 J-205, most of the discussion of the proposed health insurance premium cap appears to have occurred during the CEA negotiation sessions held on July 14 and August 12, 2008. However, Respondent clearly indicated in its discussions with Charging Party that it was committed to capping its insurance premiums at their current level and making any future insurance premium increases subject to negotiations. Stablein-Brooks rejected the concept of a "hard" premium cap in the CEA negotiations, and Charging Party had indicated its intention to follow the CEA's lead on this issue. Despite the parties' clear disagreement on this issue, however, neither party had indicated that its most recent offer was its final offer and neither had used the word impasse. For a good faith impasse to exist the parties' positions must have solidified *and* both parties must be aware that they have solidified. I find that on August 25, 2008 these things had not yet occurred.

When the parties are negotiating an entire contract, an employer cannot normally isolate a single issue and declare impasse on that issue. *Flint Twp*, at 157. However, as I discussed more fully in my decision and recommended order involving the CEA unit, Case No. C08 J-205, the Commission has recognized that it may be appropriate for an employer engaged in contract negotiations to implement its offer on a single issue when the parties have reached impasse on that issue and immediate action is required. For example, as discussed in the CEA decision, in *Wayne Co (Attorney Unit)*, *supra*, the Commission held that the employer lawfully implemented a proposed wage freeze during contract negotiations when the parties had reached impasse on that issue and, unless the employer implemented its proposal, it would have to begin paying step increases in about four days time.

In this case, Respondent implemented its insurance premium cap proposal because, on August 25, 2008, it believed employees needed it to do this to make an informed choice of insurance plans during the upcoming insurance open enrollment period. According to

Respondent, its decision to implement its insurance proposal was lawful because it had a sound business reason for implementing its proposal. As discussed in my decision and recommended order in Case No. C08 J-205, I do not agree that business necessity dictated that Respondent implement its health insurance proposal when it did. Respondent was not faced with the choice between implementing its proposal immediately and paying out money that it would not owe if the proposal was implemented. Respondent's concern that employees have sufficient information to allow them to make an informed choice during open enrollment was legitimate. However, Respondent could have addressed this concern simply by communicating its proposal on premium caps to employees and explaining its potential effect of its proposal on the amount they might have to pay in the future to continue their current coverage.

I find that Respondent and Charging Party had not reached impasse when Respondent announced on August 25, 2008 that it was implementing its insurance proposal. I also find that Respondent was not required by business necessity to implement this proposal on this date. I conclude, therefore, that Respondent violated its duty to bargain in good faith by unilaterally implementing its insurance proposal before the parties had reached a good faith impasse. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Capac Community Schools, its officers and agents, are hereby ordered to:

1. Cease and desist from unilaterally imposing changes in existing terms and conditions of employment, including insurance benefits, for employees represented by the Capac School Service Association (CSSA) prior to reaching good faith impasse with that labor organization.

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

a. Upon demand, bargain in good faith with the Capac School Service Association over insurance benefits, including premium caps.

b. Rescind the insurance premium caps unlawfully implemented on August 25, 2008 and make members of the CSSA's unit whole for additional monies paid by them in insurance premiums as a result of this unlawfully imposed change, including interest at the statutory rate of 6% per annum, computed quarterly.

c. Post the attached notice to employees in conspicuous places on the Respondent's premises, including all places where notices to employees are customarily posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: _____