STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CAPAC COMMUNITY SCHOOLS,
Public Employer-Respondent,

Case No. C08 J-205

-and-

CAPAC EDUCATION ASSOCIATION,
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. Based upon the entire record, including post-hearing briefs filed by the parties on or before October 26, 2009, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Capac Education Association filed this charge against the Capac Community Schools on October 4, 2008. The charge was amended on June 4, 2009. Charging Party represents a bargaining unit of professional employees of Respondent, including teachers, speech therapists, psychologists, social workers, vocational education teachers, and librarians. On June 30, 2008, the parties began negotiating a new collective bargaining agreement. Charging Party alleges that on or about August 25, 2008, Respondent announced that it was unilaterally implementing its proposals on the school calendar and health insurance benefits, despite the fact that the parties had not reached impasse.[1]

[1] The charge as originally filed 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 in this case. However, Charging Party did not explain in its charge or at the hearing why this letter constituted direct

The Capac School Services Association, MEA/NEA (CSSA), like Charging Party an affiliate of the Michigan Education Association, also filed a charge against the Respondent on October 1, 2008 (Case No. C08 J-204). The CSSA represents a unit of Respondent's support employees. In the summer of 2008, the CSSA and Respondent were also negotiating a new collective bargaining agreement. The charge in Case No. C08 J-204, like the instant charge, alleges that Respondent unlawfully announced that it was implementing its proposal on health insurance benefits on August 25, 2008. 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-204, *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 health insurance premium 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 a 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.

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dealing, and it did not address this allegation in its post-hearing brief. Because Charging Party did not explain the basis of its claim, I consider the claim to have been abandoned. The amended charge alleged that Respondent engaged in unlawful direct bargaining in a letter sent by Respondent's athletic director to teacher-coaches on March 14, 2009. At the hearing, Charging Party indicated that it was withdrawing this allegation and presented no evidence on this issue.

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, 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 a good faith 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.

[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.

Findings of Fact:

The parties' 2005-2008 collective bargaining agreement expired on August 20, 2008. Under Article XXII of this agreement, Respondent provided unit members with a health insurance plan called MESSA Choices II, dental insurance, a vision insurance plan, life insurance, and long-term disability insurance. Employees could elect a higher benefit health insurance plan, MESSA Super Care 1, after their first two years of employment. Those who chose MESSA Super Care 1 paid the difference between the premium for this plan and that for MESSA Choices II through payroll deduction. Employees who opted not to take health insurance received a subsidy which could be used to purchase additional benefits or an annuity.

MEA UniServ director Tracy Stablein-Brooks was the chief negotiator for Charging Party in negotiations for the 2005-2008 agreement. During those negotiations, the parties agreed to cut the number of teacher and student days in the school calendar as part of an agreement on salary. The 2005-2008 contract was ratified and put into effect sometime in January 2006. The parties agreed to meet in the winter or spring of each year of the contract and put together a calendar for the following year with the number of teacher and student days they had agreed to in contract negotiations. Neither Stablein-Brooks nor Respondent superintendent Jerry Jennex, Respondent's chief negotiator in these negotiations, could recall whether a calendar for the 2005-2006 school year was agreed to and/or distributed at the beginning of that school year while the parties were still negotiating.

On April 17, 2008, before negotiations for a successor to the 2005-2008 agreement began, Jennex sent Charging Party's president Colleen Burke and Charging Party's vice-president Deborah Weston a proposed calendar for the 2008-2009 school year. This calendar had the same number of teacher and student days - 182 and 178, respectively – as the 2007-2008 calendar. The calendar included dates of school breaks, parent teacher conferences and teacher in-service days mandated for all school districts within Respondent's county, but otherwise corresponded as closely as possible to the previous year's calendar. Jennex's cover memo asked Burke and Weston to review the calendar and let him know if they had any suggestions for changes. Burke asked Stablein-Brooks about the memo, and Stablein-Brooks told her that the calendar would be handled at the bargaining table. Accordingly, Burke and Weston did not respond to the memo. They also did not reply to a follow-up memo in early June asking them to approve the calendar because Respondent needed to program its payroll and "Zangle" for the upcoming school year.[3] On June 12, Respondent inputted the dates from its April 17 calendar into these programs, but noted in an email to staff that the calendar was tentative.

The first negotiation session for the new collective bargaining agreement was held on June 30, 2008. Negotiations between the CSSA and Respondent also began on this date. Stablein-Brooks was Respondent's chief spokesperson at both sets of negotiations, while Respondent's chief spokesperson at both was David Hershey. At the June 30 meeting, Charging Party presented Respondent with a comprehensive written proposal which included proposals on teaching hours, class load, extra duty assignments, and union leave. Charging Party proposed salary increases for all three years of the contract and a longevity pay increase. Its proposal

[3] Zangle is a computer program that allows parents to view their children's homework assignments and grades as they are issued throughout the year.

included improved dental, vision and life insurance benefits. Charging Party proposed a change in the benefit received by employees opting not to take health insurance, but no other changes in health insurance benefits. Charging Party's proposal did not include a complete calendar. However, it proposed to reduce the number of teacher and student days to 172 and 168 per year, respectively, to count all professional development days as instructional time, and to add additional minutes to the student day to comply with the state-mandated 1098 hours of instructional time per year. Stablein-Brooks went through Charging Party's proposals to make sure that Respondent understood the changes proposed and its rationale for each. Respondent's team went into caucus, and when they returned they asked questions which Stablein-Brooks answered. Weston, a member of Charging Party's bargaining team, recalled that Respondent said during the discussion of health insurance that it was interested in cost containment over the long run more than in saving money in the short run. She also remembered that Respondent offered to help find cheaper coverage through a source other than MESSA.

The second bargaining session was held on July 15, 2008. At this meeting, Charging Party gave Respondent a proposed calendar that included the actual dates of holidays, breaks and teacher days for the 2008-2009 school year. In Charging Party's proposed calendar, the school year ended earlier than it had in previous years, reflecting Charging Party's proposal for fewer teacher and student days. On the second page of its calendar proposal, Charging Party explained how it proposed to change starting and ending times at the elementary and high schools to make up the lost hours. At the July 15 meeting, Respondent gave Charging Party a set of written proposals. These proposals did not include a proposal on the school calendar. They did include a cap on Respondent's health insurance premium contribution. Respondent's proposal for Article XXII of the contract was as follows:

> The Board shall make available to all full time teachers insurance protection on one of the following plans. The Board will provide MESSA Choices II; employees who enroll in Super Care 1 will pay the difference in the illustrated premium rates between Super Care 1 and Choices II in addition to any other employee contribution.
>
> The Board shall make a monthly contribution toward health insurance for full time employees of no more than $1,332.06. The difference between the Board's contribution and the actual premium of the plan selected by the employee shall be the responsibility of the employee. The employee's contribution shall be by payroll deduction.

New premium rates for MESSA plans go into effect on July 1 each year. The maximum amount in the proposal - $1,332.06 – was the monthly full-family premium for MESSA Choices II through June 2009. Under Respondent's proposal, therefore, employees electing Choices II would have no premium contribution until and unless the premium for the plan increased on July 1, 2009. Employees electing Super Care 1 would continue to pay the same amount they had been paying unless and until the premium for that plan increased on July 1.

In a negotiating session with the CSSA held on July 23, 2008, Respondent proposed to cap its health insurance premium contribution for that unit. It also proposed to cap its contribution for dental, vision and life insurance.

According to Stablein-Brooks, Respondent told Charging Party at the July 15 meeting, that it had two goals for its health insurance proposal: cost containment and "putting future increases on the bargaining table." It also said that if the Charging Party wanted to move to a lower cost plan it would help find one. Stablein-Brooks testified that she was not surprised by Respondent's proposal for an insurance cap since it resembled the initial proposals of other districts where she had recently bargained contracts. At the July 15 meeting, Stablein-Brooks talked about recent settlements in other school districts in the county and the health insurance plans of teacher groups in these districts. She said that there were two districts where teachers contributed to the cost of the premium, but that teachers in those districts made more money than Respondent's teachers. She noted that even these districts did not have a "hard cap," as she characterized Respondent's proposal. Stablein-Brooks said that it was Charging Party's goal to be competitive and comparable with these other districts. She told Respondent that she realized that Charging Party was one of the few teacher groups that still had 5/10 drug co-pays. According to Stablein-Brooks, she intended this comment as a signal to Respondent, in the early stages of negotiations, that she recognized that Charging Party would probably have to agree to some changes in insurance.

Jennex testified that Respondent said much the same things about its health insurance proposal in its July 15 meeting with Charging Party and its July 23 meeting with the CSSA at which Respondent presented its proposals to that unit. According to Jennex, Respondent said that it was interested in containing costs on health insurance both presently and in the future. It 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. Jennex testified that Respondent said that Respondent would help the employees find other insurance within that cap if this was what they wanted to do. According to Jennex, Respondent also said that it was the desire of the Board to make any future insurance premium increases subject to negotiations. Jennex confirmed Stablein-Brooks' testimony that the parties discussed the insurance provided in neighboring districts and that Stablein-Brooks emphasized that there was no "hard cap" in any of these districts.

Jennex testified:

> The Union was not interested in, we can call it a hard cap or a cap or a monetary cap, they were not interested in that. And again there was a reference to the county and that something to the effect that there was no desire to be the first in the county with a hard cap.[4]

Jennex was not sure if Respondent said that it might consider a cost-sharing proposal that was not a "hard cap," e.g., a proposal for the employees to pay a percentage of the premium. Both Jennex and Stablein-Brooks agree that neither party used the term "final offer" to refer to their proposals.

[4] Jennex's recollection was that Charging Party first made this comment at the parties' next meeting, on August 12.

On August 8, Respondent emailed a copy of the calendar it had given to Weston and Burke in April to all its employees. The email stated that this was a proposed calendar, and that Respondent was sending it in response to questions from employees about when school would begin. Respondent also published the calendar, labeled "proposed," in the August edition of its newsletter.

The third bargaining session between Respondent and Charging Party was held on August 12, 2008. At that session, Charging Party presented counter proposals on teaching hours, class load and the calculation of seniority. Respondent gave Charging Party a copy of the calendar it had emailed to employees a few days earlier. As noted above, this calendar had 182 teacher and 178 student days, the same as the previous year, and followed the previous year's calendar as closely as possible. Jennex testified that Charging Party expressed willingness to move on only two issues, the seniority language in the contract and the number of teacher meetings. The parties spent a long time during the August 12 meeting talking about the seniority language issue. However, they discussed other issues, including Respondent's insurance proposal. Jennex testified that Stablein-Brooks said, "We are not going to be the first in the county to have a hard cap." Stablein-Brooks did not deny making this statement, and I credit Jennex's testimony. The parties agree that neither party said that its package of proposals, or any individual proposal, was its final offer.

The parties scheduled another session for August 21. On August 18, Respondent notified Stablein-Brooks that it had arranged for a state mediator to attend the meeting. In an email, Hershey told Stablein-Brooks that it would be ideal to have the insurance matter settled before the upcoming open enrollment period so that employees could make an informed decision on their insurance coverage for the next benefit year. Hershey did not suggest in his email that the parties had reached impasse on this or any other issue. Stablein-Brooks, citing the need to meet with her team to explain the mediation process, cancelled the session and suggested other dates.

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.[5]

[5] There was no testimony on the record regarding any conversations between the parties outside of the formal bargaining sessions.

> In that 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].

Copies of Respondent's proposals to Charging Party and to the CEA were attached to this letter.

On August 25, 2008, Jennex 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 the letter was Respondent's proposed Article XXII and a copy of the 2008-2009 calendar given to Charging Party in April and again on August 12.

According to Jennex, Respondent implemented the full-year calendar on August 25 in part because it had already inputted these dates into its system. He testified that because Respondent had eliminated clerical positions, it did not want to have to go back and change these dates again during the year. Jennex also testified that Respondent gets many calls from parents who want to know the dates of breaks and the last day of school, and that it likes to publish the entire calendar at the beginning of the year so that parents know what the rest of the year looks like. Jennex testified that Respondent implemented its health insurance premium cap proposal because, as stated in the letter, it believed employees needed it do this to make an informed choice of insurance plans during the open enrollment period.

The parties continued to meet and bargain after August 25. The parties met with a mediator on September 15, 2008. The next session after that was held on October 29, 2008. At that meeting, Charging Party presented counterproposals, including a proposal that Respondent switch to a health insurance plan with higher drug co-pays and reimburse employees for the difference. Respondent told Charging Party that this might cost Respondent more than the current plan. At this session, Respondent gave Charging Party a chart comparing the benefits of four insurance plans – MESSA Choices, MESSA Choices II, MESSA Super Care 1, and Blue Cross Community Blue 1. Respondent told Charging Party that the cap it had imposed would remain in place, but that if Charging Party chose an insurance plan below the cap the difference could be applied to salary.

The parties had not yet reached agreement on a new contract when Respondent was informed that premiums for the MESSA Choices II and MESSA Super Care 1 plans would go up on July 1, 2009. In early June, 2009, Respondent notified unit members of these premium increases and how much they would have to pay for their existing coverage after July 1.

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. In *Royal Motor Sales*, 329 NLRB 760, 762 (1999), and *Hi-Way Billboards*, 206 NLRB 22, 23 (1973), enforcement denied 500 F2d 181 (CA 5, 1974), the National Labor Relations Board (NLRB) explained impasse as follows:

> A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to

> achieve agreement with respect to such, neither party is willing to move from its respective position.

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. These include how long the parties have bargained, *City of Warren,* 1988 MERC Lab Op 761 (one meeting); *Edwardsburg Pub Schs,* 1968 MERC Lab Op 727 (four meetings); *City of Benton Harbor,* 1996 MERC Lab Op 399 (two years). 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).

In *Taft Broadcasting Co,* 163 NLRB 475, 478 (1967), enfd sub nom *Television Artists AFTRA v NLRB,* 395 F2d 622 (CA DC, 1968), the NLRB stated:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

The party asserting impasse bears the burden of establishing that impasse was reached; it must show that both parties, and not just one, were unwilling to compromise. *Oakland Cmty College*, at 277.

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, 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. *Wayne Co (Attorney Unit), supra; Univ of Mich,* 1988 MERC Lab Op 204 (no exceptions); *Wolverine Cmty Schs,* 1983 MERC Lab Op 655 (no exceptions).

Respondent does not dispute that both the school calendar and health insurance are mandatory subjects of bargaining. It is unclear whether Respondent is arguing that by August 25, 2008, the parties had reached impasse in their negotiations for a new contract. I conclude that they had not. Prior to that date, the parties had only three bargaining sessions on the CEA contract. Each party had presented an initial offer. Charging Party had gone through and explained the rationale for each of its proposals, and Charging Party had presented counterproposals on some issues. The parties had not yet met with a mediator. It is not entirely clear whether the parties had actually discussed every proposal contained in the two offers. In any case, neither party had used the word "final offer" to refer to its proposals, nor had either suggested that that the parties might have reached impasse. I conclude that as of the date of their

last meeting, August 12, the parties' positions had not solidified and neither believed that further bargaining would be useless. To the contrary, the parties contemplated, and had scheduled, meetings in the immediate future.

It is true that on August 12, the parties were far apart on an important economic issue, whether there would be a cap on the Respondent's health insurance premium contribution. As the quote from *Taft Broadcasting* indicates, impasse on a single issue can bring about an impasse in contract negotiations if the parties' inability to agree on that issue, despite their good faith efforts, prevents their reaching a contract. I find, however, that the parties had not yet reached this point on August 25. Over the course of three meetings, Respondent repeatedly insisted on the cap, and Charging Party unequivocally rejected it. However, neither party communicated to the other that its position on the cap would be a "deal breaker" or foreclose further negotiations. For a good faith impasse to exist, the parties' positions must have solidified *and* both parties must be aware that they have solidified, that the other party is not posturing, and that the other party has no further room to compromise. I conclude that on August 25, 2008 this had not yet occurred.

As noted above, the Commission has held that impasse on single issue may justify the employer's imposing its last offer on this issue if immediate action is required. In *Wayne Co (Attorney Unit)*, the Commission held that an employer lawfully implemented its proposal for a wage freeze for the first year of the new contract, including the elimination of step increases. Under the collective bargaining agreement, the employer was required to pay annual step increases on employees' anniversary dates. The Commission concluded that the parties had reached impasse on this issue, even though they had met only four times, where (1) the employer had consistently insisted that a wage freeze was a condition of agreement and the union insisted that it could not agree to one; (2), the employer had provided the union with information about its financial condition; (3) the employer imposed a similar wage freeze for all its other represented and nonrepresented employees; and (4) the employer informed the union at their last bargaining session that the parties were at impasse and that the employer intended to implement its offer before it had to begin paying annual step increases, the first of which was due four days after the meeting. Similarly, in *Univ of Michigan, supra,* a Commission administrative law judge held that the employer could lawfully implement its bargaining proposal to have employees pay half of the cost of any health insurance premium increase where the parties had reached impasse on this issue and the employer had received notice that its premiums were to increase in a month. In *Wolverine Cmty Schs,* 1983 MERC Lab Op 655 (no exceptions) an administrative law judge concluded that the employer could lawfully implement a proposed change in layoff notice provisions during contract negotiations when the parties had reached impasse on this issue and layoffs were imminent.

In this case, Respondent asserts that the parties were at impasse on the premium cap issue on August 25, 2008. It argues that Respondent needed to implement its proposal before the upcoming open enrollment period so that employees could make an informed decision regarding which insurance plan and/or coverage to select. According to Respondent, its decision to implement its health insurance proposal was lawful because, like the employers in the cases above, Respondent had a sound business reason for implementing its proposal.

I do not agree that business necessity dictated that Respondent implement its health insurance proposal when it did. Unlike the employers in *Univ of Michigan* and *Wayne Co*, 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 on them between July 1, 2009 and the date of the next open enrollment.

In sum, I find that Respondent and Charging Party had not reached impasse on the terms of a new contract when Respondent announced on August 25, 2008 that it was implementing its health 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 health insurance proposal before the parties had reached a good faith impasse.

The charge also alleges that Respondent unlawfully announced the implementation of its proposed school calendar for the 2008-2009 school year on August 25. This calendar was, except for certain changes mandated by the county, the same as the 2007-2008 calendar. I agree with Respondent that it had the right to announce and distribute a calendar before the school year began. Indeed, in early August 2008, Respondent distributed a calendar to staff and the public, without objection from Charging Party. The only difference between this calendar and the one it distributed on August 25, 2008 was that the calendar distributed in early August was labeled "proposed." I agree with Respondent that it did not unilaterally alter existing terms and conditions of employment by implementing a calendar for the 2008-2009 school year which was the same as the calendar for the previous school year.[6] I recommend, therefore, that this allegation be dismissed. However, in accord with my finding that Respondent unlawfully announced that it was implementing its health insurance proposal on August 25, 2008, I recommend that the Commission issue the following order.

[6] I note that the charge does not specifically allege that Respondent refused to discuss the 2008-2009 calendar as part of contract negotiations after August 25, 2008, that its August 25, 2008 letter suggests that this was not its intent, and that Charging Party presented no evidence that Respondent refused to bargain over the calendar after implementing it.

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 health insurance benefits, for employees represented by the Capac Education Association (CEA) 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 Education Association over health insurance benefits, including premium caps;

b. Rescind the health insurance premium caps unlawfully implemented on August 25, 2008 and make members of the CEA's unit whole for additional monies paid by them in health 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: _____