STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

ROYAL OAK PUBLIC SCHOOLS,
Public Employer-Respondent,

Case No. C07 E-098

-and-

ROYAL OAK EDUCATION ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Keller Thoma, P.C., by Gary P. King and Daniel L. Villaire for the Public Employer

Law Offices of Lee & Correll, by Michael K. Lee and Tasha H. Washington for the Labor Organization

DECISION AND ORDER

On June 10, 2009, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that the charge filed by Charging Party, Royal Oak Education Association (Union), against Respondent, Royal Oak Public Schools (Employer), should be dismissed. The ALJ concluded that Respondent did not violate Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(e), when, on two occasions, it announced changes in school starting and ending times. The ALJ found that Respondent satisfied its duty to bargain over these changes by entering into successive collective bargaining agreements providing it with the right to determine hours of instruction and placing no restriction on its ability to change school starting and ending times. The ALJ agreed with Respondent that this subject was "covered by" the parties' agreements and found that the contract language constituted a clear and explicit waiver by the Union over the right to bargain this issue. The Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA. Charging Party filed its exceptions on July 7, 2009. After receiving an extension of time, Respondent filed a Brief in Support of the ALJ's Decision and Recommended Order on August 17, 2009.

In its exceptions, Charging Party asserts that the ALJ erred in concluding that the subject of starting and ending times at Respondent's schools was covered by the contracts and that

Respondent had satisfied its duty to bargain over the changes by entering into successive agreements with specific language on this issue. Charging Party asserts that prior to implementing changes to the hours of instruction, the Employer was required to bargain or at least request information concerning the needs of the teachers and the program. Charging Party also alleges that the ALJ erred in concluding that the contracts' language constituted an explicit waiver of the District's duty to bargain and that Respondent did not violate its duty to bargain in good faith when it announced such changes.

In its brief in support of the ALJ's Decision, Respondent counters that the ALJ was correct in concluding that school starting and ending times were covered by the collective bargaining agreements and that it had, in fact, satisfied its duty to bargain this issue. Respondent asserts that the Union's reading of the relevant contact provision is flawed and that the ALJ correctly found that the contract language constituted an explicit waiver of its duty to bargain.

We have reviewed Charging Party's exceptions and brief in support, as well as Respondent's brief in support of the ALJ's Decision, and conclude that the exceptions do not have merit.

Factual Summary

We adopt the ALJ's findings of fact and repeat them only as necessary here.

Article II(A)(5) of the 2003-2006 collective bargaining agreement between the parties reserved to Respondent the right:

> To determine class schedules after considering the needs of the teachers and the program, determine hours of instruction, and the duties, responsibilities and assignments of teachers subject to the express provisions of this Agreement.

The parties entered into a series of agreements extending the terms of the 2003-2006 contract, and it remained in effect through July 12, 2007.

On April 18, 2007, Respondent's school board passed a resolution that changed the starting and ending times of its middle and elementary schools for the 2007-2008 school year. At that time, the parties were engaged in bargaining a successor contract. When Charging Party demanded to bargain over the scheduling change, Respondent asserted that it was not required to bargain the change because Article II(A)(5) gave it the right to determine hours of instruction. On May 11, 2007, Charging Party filed the instant charge alleging that by unilaterally changing work hours, Respondent had breached its duty to bargain under PERA.

On August 22, 2007, the parties entered into a collective bargaining agreement covering the school years 2006-2007 through 2008-2009. The agreement, which took effect as of April 2008, preserved Article II(A)(5) of the previous contract without change.

Subsequently, on April 24, 2008, Respondent's school board passed a resolution changing the starting and ending times for one of its elementary schools. When Charging Party demanded to bargain over this change, Respondent again replied that the subject had been bargained by the parties and that their agreement was set forth in the current collective bargaining agreement. In July, 2008, Charging Party filed an amended charge in this case alleging that Respondent had violated its duty to bargain.

Discussion and Conclusions of Law:

Charging Party claims that the ALJ erred in holding that the subject of starting and ending times was covered by the parties' agreements, that Respondent satisfied its duty to bargain over this subject, that Charging Party waived its right to bargain over starting and ending times, and that Respondent did not violate its duty to bargain. The ALJ found that Charging Party waived its right to bargain school starting and ending times when the parties entered into a collective bargaining agreement covering the 2006-2007 through 2008-2009 school years and preserved Article II(A)(5) of the previous contract, quoted above, without change. We also find that the issue of Respondent's failure to bargain the change became moot. *36th District Court*, 17 MPER 36 (2004) (no exceptions).

Charging Party's claims are also based on the premise that in exercising its Article II(A)(5) right to determine hours of instruction, Respondent must consider the needs of the teachers and the program. Charging Party argues that this condition must be satisfied by bargaining. We disagree with Charging Party's reading of the relevant portion of Article II(A)(5). It is clear that the language "after considering the needs of the teachers and the program" is meant to modify the phrase "to determine class schedules;" it does not modify the phrase "to determine hours of instruction," as Charging Party asserts. Furthermore, any claim that the Employer is misreading the contract language in this regard is a matter for grievance arbitration to determine, not for resolution by this Commission.

Even if we were to read this provision as Charging Party wishes, we would disagree with its assertion that the language requires further bargaining between the parties before there is a change in the hours of instruction. While bargaining, by definition, is an activity engaged in by two or more parties, the needs of the teachers and the program may be considered unilaterally, without bargaining. Article II(A)(5) establishes that the parties have already bargained the starting and ending times of the school day; hence, the subject is covered by their agreements. By agreeing that Respondent need only consider the needs of teachers and the program, the parties have waived any right or obligation to engage in additional bargaining. We conclude that the ALJ properly applied the rulings in *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309 (1996) and *MESPA v Gogebic Cmty Coll*, 246 Mich App 342 (2001) in reaching her conclusion.

We have considered all other arguments presented by the parties and conclude that they would not change the results in this case and issue our Order accordingly.

ORDER

The charge is hereby dismissed in its entirety.

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:

ROYAL OAK PUBLIC SCHOOLS,
Public Employer-Respondent,

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-and-

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APPEARANCES:

Keller Thoma, by Gary P. King, Esq., for Respondent

Law Offices of Lee & Correll, by Michael K. Lee, Esq., for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on October 1, 2008, before Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on November 5, 2008, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Royal Oak Education Association filed this charge against the Royal Oak Public Schools on May 11, 2007. The charge was amended on July 8, 2008. Charging Party represents a bargaining unit of all professional employees of Respondent, including certified teachers, therapists, librarians, and social workers. The charge originally alleged that on or about April 18, 2007, Respondent violated its duty to bargain in good faith by unilaterally changing the starting and ending times for student instruction at Respondent's elementary and middle schools for the 2007-2008 school year. This change altered the hours of work, although not the length of the workday, for Charging Party's members assigned to these schools. The amended charge alleges that on April 24, 2008, Respondent unlawfully unilaterally changed the starting and ending times at one of its elementary schools for the 2008-2009 school year.

Findings of Fact:

The 2003-2006 Collective Bargaining Agreement

The parties' 2003-2006 collective bargaining agreement had an expiration date of August 31, 2006. Article II (A) (5) of this agreement gave Respondent the right:

> To determine class schedules after considering the needs of the teachers and the program, to determine hours of instruction, and the duties, responsibilities and assignments of teachers subject to the express provisions of this Agreement.

Article VII (B) (5) of the 2003-2006 agreement read as follows:

> In order to meet the state required 1098 instructional hours, all elementary buildings must add fifteen (15) minutes per day of instructional time. All non bused elementary buildings will alter their schedules to start ten minutes earlier. All bused buildings will alter their schedules by starting five (5) minutes earlier, if possible, or ending five (5) minutes later.
>
> This schedule change shall be in conjunction with reducing their [sic] lunch hour as stated in Section E of this Article.

At the time the 2003-2006 contract went into effect, Respondent provided bus transportation only for special education students and students at some, but not all, of its elementary schools.

Other provisions in Article VII addressed teaching hours and the obligations of teachers both inside and outside of the regular work day. Article VII (A) (1) established the length of the teachers' work week as thirty-six and one-quarter (36¼) hours. Article VII also contained provisions covering the amount and scheduling of planning time for teachers for elementary, elementary special (art, music and physical education), and secondary teachers; the number of daily student contact hours and length of the workday for middle and senior high school teachers; the length of the lunch period; teachers' obligations to participate in parent/teacher conferences and school-sponsored activities outside of the normal workday; and the length and scheduling of mandatory staff meetings.

The parties entered into a series of agreements extending the terms of the 2003-2006 contract while they negotiated its successor. Per these agreements, the 2003-2006 contract remained in effect through July 12, 2007.

Changes in School Starting and Ending Times

On May 11, 2006, Respondent announced that it was changing the starting and ending times for student instruction at its senior high school. Per this announcement, both the students'

and teachers' school days were to begin and end a half-hour earlier effective with the start of the 2006-2007 school year. On June 5, 2006, Charging Party filed an unfair labor practice charge (Case No. C06 F-132) alleging that this unilateral action violated Respondent's duty to bargain in good faith.

During the 2005-2006 school year, Respondent's elementary schools had different starting and ending times depending upon whether bus transportation was provided for students, other than special education students, at the school. However, one elementary school, Whittier, had different starting and ending times from the rest of Respondent's other elementary schools. Whittier's different schedule was connected to the fact that it was the only school that scheduled all of its professional development activities into a single afternoon once a month and sent students home early on that day. Each year, Whittier submitted its schedule for approval to the Joint Royal Oak Education-Board Committee, an advisory committee made up of Respondent and Charging Party representatives established by contract. However, sometime during the summer of 2006, Charging Party president Sidney Kardon and Charging Party executive director Laurie Moore raised the issue of Whittier's different schedule at the bargaining table in contract negotiations. On August 15, 2006, the parties entered into a written tentative agreement whose terms included withdrawal of the unfair labor practice charge in Case No. C06 F-132; the calendar for the 2006-2007 school year; certain changes to Article VII to be effective for the 2006-2007 school year only, and an agreement that Whittier Elementary would follow the same schedule as other elementary schools that did not bus their students. The last page of the agreement, entitled "Summary Page," contained the following paragraph:

> Elementary Times
>
> It is understood that the elementary hours require that all six early release days be extended to three hours and twelve minutes. Therefore, it was agreed that the following are the instructional hours on early release days. Elementary start and end times will remain the same as the 2005-2006 school year.
>
> Partial-Day Times
>
> Bused Schools 8:45-11:57
>
> Non-Bused Schools 8:35-11:47
>
> It was agreed that after several years of Whittier piloting an early release professional development plan, the district would adopt a similar plan for all elementary schools. Whittier will revert to the non-bused school hours.

During the 2006-2007 school year, Respondent went through the process of deciding which and how many elementary schools to close due to declining enrollments. Closing schools expanded the attendance area of the remaining schools and increased the distance elementary students had to travel to get to school. Many parents objected to the closings on this basis. As noted above, at this time Respondent provided bus transportation only to special education

students and to students at some of its elementary schools. It became apparent that closing elementary schools would require Respondent to provide bus transportation at more schools. To avoid the need to buy additional buses, Respondent decided that it would coordinate the starting and ending times of its elementary and middle schools so that the same buses used to transport special education students to the high school and middle school could be used to transport students to elementary schools.

At its meeting on April 18, 2007, Respondent's school board passed a resolution changing the starting and ending times of its middle and elementary schools for the 2007-2008 school year. To accommodate bus schedules, the starting and ending time for the middle school was moved back, and the starting and ending times for the elementary schools were moved forward. Charging Party learned of this change from an announcement on Respondent's website. At a subsequent contract negotiation session, it demanded to bargain over the change. Respondent replied that it did not have to bargain over the issue because Article II (A) (5) gave it the right to determine hours of instruction. On May 11, 2007, Charging Party filed the instant charge alleging that this constituted an unlawful unilateral change in terms and conditions of employment.

On August 22, 2007, the parties entered into a tentative agreement for a collective bargaining agreement covering the school years 2006-2007 through 2008-2009. The agreement was ratified by both parties and took effect in April 2008. Article II (A) (5) was carried over from the previous contract to the new agreement without change. The language in Article VII (B) (5) was replaced by this sentence "In order to meet state requirements, all students will receive 1098 hours of instruction." The 2006-2009 agreement contained no other reference to school start or end times.

In the spring of 2008, Respondent completed renovations on a partially closed elementary school and revised its elementary school attendance areas for the upcoming school year in response to the reopening of the building. Respondent decided that it could reduce the attendance area of one school, Adams Elementary, so that students there would no longer have to be bused. It also decided that, in response to parent requests, it would move the start time at Adams back one-half hour. On April 24, 2008, after the 2006-2009 agreement had gone into effect, Respondent's school board passed a resolution changing the starting and ending times for Adams Elementary School beginning with the 2008-2009 school year. Charging Party made a demand to bargain over the Adams change. In a letter dated June 6, 2008, Respondent replied that the subjects of teaching hours and teacher work day had already been bargained by the parties and were set forth in the parties' current collective bargaining agreement. In July 2008, Charging Party filed the amended charge in this case alleging that Respondent had violated its duty to bargain over this change.

Discussion and Conclusions of Law:

The duty to bargain over "hours," as set forth in Section 15 of the Act, encompasses both the number of hours worked and the particular hours and days of the week on which employees are required to work. Moreover, although the starting and ending times of the school day affect

the education of students, they do not "fall so clearly within the educational sphere" as to insulate them from the duty to bargain. *Detroit Bd of Ed,* 1986 MERC Lab Op 121, 123. Therefore, the starting and ending times of Respondent's schools are a mandatory subject of bargaining under PERA because they directly impact the hours of its employees.

Respondent asserts, however, that it has satisfied its obligation to bargain in this case by negotiating language specifically giving it the right to "determine hours of instruction" and by entering into detailed contract provisions covering the teacher workday and teaching hours that did not restrict Respondent's right under the management rights clause to change the starting and ending times of the school day. A public employer satisfies its obligation to bargain under PERA by negotiating for a provision in the collective bargaining agreement that fixes the parties' rights on a particular subject and forecloses further mandatory bargaining. In that case, the matter is "covered by" the agreement. *Port Huron Educ Ass'n, MEA/NEA v Port Huron Area School Dist,* 452 Mich 309, 318, (1996). Respondent argues that the facts here are analogous to those in *MESPA v Gogebic Cmty College*, 246 Mich App 342 (2001). In *Gogebic*, the parties entered into a contract provision that stated that the employer would pay the premium for dental coverage, and specified the employee's deductible and co-pay, but said nothing about the dental insurance carrier. The Court of Appeals found that the parties had bargained over dental coverage and memorialized the terms on which they agreed, and that the union had the opportunity to negotiate a provision preventing the employer from changing carriers or becoming self-funded but failed to do so. It noted that in *Port Huron*, at 319, the Supreme Court said, "When the parties bargain about a subject and memorialize the result of their negotiations in a collective bargaining agreement, they create a set of enforceable rules … a new code of conduct for themselves – on that subject." The Court held that the subject of dental coverage was "covered by" the contract and the employer had no further duty to bargain over its decision to begin self-funding this coverage.

I agree with Respondent that the subject of school starting and ending times was "covered by" both the parties' 2003-2006 contract and its 2006-2009 successor. The 2003-2006 collective bargaining agreement contained detailed provisions dealing with teacher hours, but made no reference to school starting and ending times except to give Respondent the right to "determine hours of instruction." In April 2007, Charging Party learned that Respondent's position was that Article II (A) (5) gave it the right to unilaterally determine starting and ending times. The parties were then in negotiations for a successor agreement. However, in April 2008, the parties entered into an agreement for the term 2006-2009 that did not include any new language on the subject of starting and ending times. I find that Respondent satisfied its duty to bargain over the changes in this case by entering into successive agreements that gave it the right to "determine hours of instruction" and placed no restriction on its ability to change school starting and ending times.

I would also find Article II (A) (5) to constitute an explicit waiver by Charging Party of its right to bargain over school starting and ending times. In order for contract language to effect a waiver of bargaining rights, it must be clear and unmistakable; the language must be specific enough to indicate that the union consciously yielded its right to negotiate over the matter at issue. *Amalgamated Transit Union, Local 1564, AFL-CIO* v *Southeastern Michigan Transp Authority,* 437 Mich 441, 460-462 (1991). Article II (A) (5) gave Respondent the right to

"determine hours of instruction." The minimum *number* of hours of instruction Respondent must provide annually is set by statute, as Article VII (B) (5) of the parties' 2003-2006 contract reflects. The parties' 2006-2009 contract includes both Article II (A) (5) and a new Article VII (B) (5) stating that students are to receive 1098 hours of instruction per year. I find that the phrase "hours of instruction" in Article II (A) (5) of both agreements clearly and ambiguously referred to the hours of the day during which instruction is to be provided, i.e. the starting and ending times of the school day, and constituted a clear and explicit waiver by Charging Party of its right to bargain over changes in these times.[1]

In August 2007, the parties reached an agreement which resolved a pending unfair labor practice and the calendar for the upcoming school year, as well as the problem of Whittier having different starting and ending times from the rest of Respondent's schools. However, the fact that starting and ending times were part of the parties' bargain on this occasion does not mean that they agreed that starting and ending times were no longer to be a management right.

Based on the findings of fact and conclusions of law set forth above, I conclude that Respondent did not violate its duty to bargain in good faith when it announced changes in school starting and ending times on April 18, 2007 and April 24, 2008. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

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

Dated: _____

[1] *Wayne State Univ*, 1987 MERC Lab Op 899 (no exceptions), cited by Charging Party in its brief, is inapposite. In that case, the administrative law judge simply applied the well established rule that a waiver of bargaining rights based solely on contract language does not extend beyond the life of the contract. See *Capac Cmty Schs*, 1984 MERC Lab Op 1195. In this case, however a contract containing the waiver language was in effect both on April 18, 2007 and April 24, 2008 when Respondent announced the changes in school starting and ending times.