STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

SOUTHFIELD PUBLIC SCHOOLS,
Public Employer-Respondent,

-and-

MICHIGAN EDUCATIONAL SUPPORT
PERSONNEL ASSOCIATION (MESPA),
Labor Organization-Charging Party in Case No. C09 B-017,

-and-

EDUCATIONAL SECRETARIES OF SOUTHFIELD (ESOS),
Labor Organization-Charging Party in Case No. C09 B-019.
_____/

APPEARANCES:

Floyd Allen & Associates, by George D. Mesritz and Dandridge A. Floyd,
for Respondent

The Law Offices of Lee and Correll, by Michael K. Lee and Erika Pennil, for Charging Parties

DECISION AND ORDER

On July 22, 2010, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above cases finding that Southfield Public Schools (Employer), violated Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e). The ALJ held that Respondent violated its duty to bargain in good faith when it unilaterally eliminated its practice of paying employees for association release time. The ALJ found that these payments had become an established term and condition of employment for members of the bargaining units represented by Charging Parties (the Unions), the Michigan Educational Support Personnel Association (MESPA) and the Educational Secretaries of Southfield (ESOS). The ALJ found further that Respondent had a duty to bargain in good faith with Charging Parties before eliminating this practice and that it failed to give them

an opportunity to demand bargaining before unilaterally eliminating this term of employment. The ALJ further concluded that Charging Parties did not waive their right to bargain over this action by failing to demand bargaining. The ALJ recommended that the Commission order Respondent to cease and desist from unilaterally altering terms and conditions of employment, including paid association leave, without giving Charging Parties an opportunity to bargain over this change and to reinstate its practice pending satisfaction of its bargaining obligation. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. After requesting and receiving an extension of time, Respondent filed its exceptions and brief in support on September 3, 2010. Charging Parties also requested and received an extension of time and filed their brief in support of the ALJ's Decision and Recommended Order on October 18, 2010.

Among its numerous exceptions, Respondent alleges that the ALJ erred in determining: that it did not bargain in good faith; that the contract was ambiguous with respect to pay for release time; that Respondent eliminated its practice before providing Charging Parties with an opportunity to bargain; and that no waiver occurred. It further asserts error in several of the ALJ's other rulings.

After a careful and thorough review of the record, and specifically of Respondent's exceptions, we affirm the findings of fact and conclusions of law made by the ALJ. The ALJ found, and we agree for the reasons stated in her Decision and Recommended Order, that Respondent violated its duty to bargain in good faith when it unilaterally eliminated its practice of paying employees for association release time without first giving the Unions, MESPA and ESOS, notice and an opportunity to bargain. We find that Respondent's payments to employees for association release time had become an established term and condition of employment for members of both bargaining units. Respondent, therefore, had a duty to bargain in good faith with each of the two Unions before eliminating the practice of paid association release time. The evidence in the record establishes that Respondent failed to give the Unions an opportunity to demand bargaining before it unilaterally eliminated this term and condition of employment. Respondent presented the elimination of payment for association release time to MESPA and ESOS as a fait accompli, indicating that a demand to bargain would be futile.

An employer who notifies the union of its decision only after the decision becomes a *fait accompli* violates its obligation to bargain in good faith. *City of Westland*, 1987 MERC Lab Op 793, 797. We have previously held that "the obligation to request bargaining is waived if such a request would have been either futile or the bargaining subject change was a fact accomplished when notification was received." *Intermediate Ed Ass'n/Michigan Ed Ass'n (IEA/MEA)*, 1993 MERC Lab Op 101, 106. We, therefore, find no support in the record for Respondent's contention that Charging Parties waived their rights to bargain over this action.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward D. Callaghan, Commission Chair

_____
Nino E. Green, Commission Member

_____
Christine A. Derdarian, Commission Member

Dated: _____

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

In the Matter of:

SOUTHFIELD PUBLIC SCHOOLS,
Public Employer-Respondent,

-and-

MICHIGAN EDUCATIONAL SUPPORT
PERSONNEL ASSOCIATION (MESPA),
Labor Organization-Charging Party in Case No. C09 B-017,

-and-

EDUCATIONAL SECRETARIES OF SOUTHFIELD (ESOS),
Labor Organization-Charging Party in Case No. C09 B-019.
_____/

APPEARANCES:

Floyd Allen & Associates, by George D. Mesritz and Dandridge A. Floyd, for Respondent

Law Offices of Lee and Correll, by Michael Lee and Erika Pennil, for Charging Parties MESPA and ESOS

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, the above cases were heard at Detroit, Michigan on August 6, 2009 (Case No. C09 B-017), and August 10, 2009, (Case No. C09 B-019) before Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules for the Michigan Employment Relations Commission. The cases were heard separately and separate records were developed. However, the charges proved to be based, for the most part, on the same events. For this reason, and because the issues to be addressed in the charges are similar, I am issuing a single decision covering both charges. Based upon the records in these cases, including post-hearing briefs filed by the parties on October 12, 2009, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges:

The Michigan Educational Support Personnel Association (MESPA) filed the unfair labor practice charge in Case No. C09 B-017 against the Southfield Public Schools on February 24, 2009. MESPA represents a bargaining unit of nonsupervisory support employees, excluding secretaries, employed by Respondent. The Educational Secretaries of Southfield (ESOS) filed the unfair labor practice charge in Case No. C09 B-019 against the Respondent on February 25, 2009. ESOS represents a bargaining unit of nonsupervisory secretaries employed by Respondent. Both charges allege that Respondent violated its duty to bargain in good faith under Section 10(1) (e) of PERA by: (1) unilaterally discontinuing its practice of providing Charging Parties' members and officers, other than their presidents, with paid release time for union business ("association release time"), and (2) refusing to bargain, upon demand, over the elimination of paid association release time. Both charges also allege that Respondent's elimination of paid association release time constituted an independent violation of Section 10(1) (a) because this action severely hampered Charging Parties' ability to investigate grievances, monitor the payment of dues, and otherwise properly administer their contracts.

Findings of Fact:

MESPA, ESOS, and the Southfield Education Association (SEA), the union representing Respondent's teachers and professional employees, together form the Southfield Coordinating Council. Patricia Haynie has been the full-time executive director of the Southfield Coordinating Council since 1998. Haynie serves as chief spokesperson for each of the three unions in contract negotiations and plays a substantial role in the administration of their contracts.

Association Release Time - MESPA Contract Provision and History

The most recent collective bargaining agreement between Respondent and MESPA covered the 2006-2007 and 2007-2008 school years and expired on August 11, 2008. The first paragraph of Article III (J) of this agreement covered association release time while the second paragraph covered release time for MESPA's president. The provision read as follows:

> The Association shall be granted one hundred (100) days per contract year to be used for Association business. Application for use of these days will be made through regular attendance channels and the Association President must authorize the application of [sic] the use of these days twenty-four hours in advance. Application will be sent and received by the department from which the Association members will be absent. There shall be no denial of the President's use of days. Association days will not be denied unless under extreme circumstances. The Association President shall provide to the Director of Labor Relations a monthly log of scheduled activities of Association days. Such log shall include who used the days and when the days were taken.
>
> Further, the Association President shall be released up to a maximum of one half of his/her regular work hours/work days each contract year of this agreement for the performance of Association business. *Such release shall be at the employee's*

> *normal rate of pay with all benefits provided under this agreement, at no cost to the President of the Association.* The President shall arrange such release time through regular attendance channels. [Emphasis added].

Joyce Nobel was an officer of MESPA from 1980, when it was formed, until 1985. She was a member of the bargaining teams for the 1980-1984 and 1984-1986 MESPA collective bargaining agreements. Although none of the MESPA agreements other than the 2006-2008 agreement were admitted into the record in this case, Nobel testified that prior to the 1984-1986 contract, the MESPA agreement provided eighty paid union release days per year, but did not include a separate release time provision for the MESPA president.[1] According to Nobel, when MESPA proposed to increase the number of paid release days to one hundred during negotiations for the 1984-1986 contract, Respondent countered with a proposal to make the MESPA president a half-time release position. Nobel testified that the parties ultimately agreed both to making the MESPA president a half-time release position and to providing eighty additional days of association release time per year which could be used by unit members as well as MESPA officers. Requests to use association release time had to be approved by the MESPA president and Respondent had to be provided sufficient advance notice to allow it to provide a substitute. Nobel testified that both the release time used by the president and association release time was paid by Respondent.

The record does not indicate whether any of the MESPA contracts prior to the 2006-2008 agreement explicitly stated that either the president's release time or association release time was paid time. However, Charging Parties witnesses testified, without contradiction, that at all times between 1986 and October 2008 both the president's release time and association release time for the MESPA unit was paid time. In addition to Noble, these witnesses consisted of Haynie; Jonathan Pogatz, a MESPA member from 1985 to 2009 and a union officer for seven or eight of these years; Karl Bell, MESPA president from 1990 until 2000; and Michael Graves, Bell's immediate successor and MESPA president at the time of the hearing in this case

Between 1986 and 2008, MESPA members and officers used paid association release time for a wide variety of purposes, including training. They attended training programs and workshops on the handling of grievances, and training programs and workshops on general issues, such as leadership and conflict resolution. They also attended union-sponsored training geared toward their job functions. For example, paraprofessionals attended a union-sponsored conference on helping their school district meet federal student achievement goals and handling difficult students. Custodians and others in the unit attended union-sponsored training on preventing "sick building" syndrome.

MESPA also used paid association release time to hold and attend union meetings. Because MESPA members were distributed between the day and afternoon shifts, MESPA's executive board used paid association release time to hold its meetings. The MESPA grievance committee, which decided which grievances would go forward, also met on association release

[1] While on the witness stand, Nobel stated that she had a copy of the 1984-1986 contract with her. Respondent's counsel then requested to be allowed to examine this contract, but MESPA's counsel protested. I ruled that since Nobel had not used the contract to testify, Charging Party could not be compelled to show Respondent the document.

time. During Bell's presidency, association release time was even used to allow members to attend union membership meetings. Time spent by members of MESPA's bargaining committees attending negotiation sessions was paid separately (as so-called "joint" time). However, the committees used release time to meet for the purpose of formulating bargaining proposals. MESPA members and officers also used association release time to attend meetings of MESPA's affiliated organizations, the Michigan Education Association and the National Education Association.[2]

MESPA officers were often permitted to investigate grievances on Respondent's time without applying for and using time from the association release time bank, but they sometimes used release time for this purpose. Time spent meeting with Respondent to discuss grievances was considered "joint" time and paid as such. However, association release time was used by MESPA members and officers to prepare for and testify at arbitrations and other hearings. Association release time was also used to distribute copies of the collective bargaining agreement to members. In addition, MESPA officers other than the president, including the vice-president/membership chair and the treasurer, used association release time to carry out the responsibilities of their union offices.

In addition, the record indicated that during Bell's tenure, MESPA members used paid association release time to plan training for unit members for professional development days. For example, in the mid 1990s, MESPA members planned and presented an "in-service" training on diversity and ethnicity. During this period, MESPA members also used paid association release time to assist with millage election campaigns.

Association Release Time – ESOS Contract Provision and History

The most recent collective bargaining agreement between Respondent and ESOS covered the 2006-2007 and 2007-2008 school years and expired on July 31, 2008. Like the MESPA contract, the ESOS agreement provided for both association release time and release time for the ESOS president. Article III(C) of the ESOS agreement read:

> The Association shall be granted seventy (70) days to be used for official Association business. Application for use of these days shall be processed through regular conference attendance channels and shall be signed by the Association President signifying approval. Additional days may also be granted upon the approval of the Director of Personnel/Employee Relations. Use of these days will be determined solely by the Association President. The Association President shall provide to the Director of Personnel/Employee Relations a monthly log of

[2] In the late 1990s, MESPA president Bell was active in MEA and NEA affairs and used association days as well as his half-time release. Because Respondent had to provide a substitute for Bell's custodian position to cover his long absences, the parties entered into letter of understanding on June 20, 1999 making Bell full-time release for the remainder of his tenure. This agreement had several conditions. Bell was required to take on responsibility for developing and implementing in-service training for the unit and work performed by Bell for the state-wide MEA was be billed to and paid by the MEA. The agreement also stated that Bell's arrangement would apply only to Bell and last only for the remainder of his term as MESPA president.

scheduled activities of Association days. Such log shall include who used the days and when the days were taken.

Further, the Association President shall be released, one (1) day per week or the equivalent, to fulfill Association responsibilities. *The President shall continue to be compensated at his/her regular rate of pay for 100% of his/her regular work hours for the full contract year with all benefits (including any required contributions to the MPSERS paid by the employer.)* [Emphasis added]

Haynie testified that both association release time and the president's release time were treated as paid time in the ESOS unit when she became executive director of the Southfield Coordinating Counsel in 1998 and continued to be treated as such until October 2008. Haynie's testimony was the only evidence in the record concerning the history of the ESOS provision.

The 2008 Contract Negotiations and Respondent's September 23 Memo

Between 2006 and 2008, Respondent contracted with third parties to provide transportation, custodial and food services. Many members of the MESPA unit were laid off, and the MESPA unit was greatly decreased in size. As noted above, the most recent collective bargaining agreement between Respondent and MESPA expired on August 11, 2008. The parties began negotiating a successor to the MESPA agreement in July 2008. Haynie was the chief spokesperson for MESPA while Respondent's chief spokesperson was its labor counsel, Floyd Allen. Bargaining sessions were held in July and August. In August, MESPA gave Respondent a set of initial proposals that proposed no change to the union release time language. Respondent did not provide MESPA with written proposals during the July and August meetings. There was no discussion of release time during these meetings.

The most recent collective bargaining agreement between Respondent and ESOS expired on July 31, 2008. MESPA and ESOS held separate contract negotiations, but the first bargaining session between Respondent and ESOS also occurred in July 2008. Haynie and Allen were the chief spokespersons in the ESOS negotiations as well as in the MESPA negotiations. The first ESOS negotiation session was spent discussing ground rules, but in August the parties exchanged initial contract offers. Neither offer proposed a change to the language of Article III(C). The issue of release time was not discussed in these bargaining sessions.

On September 23, 2008, Floyd Allen, Respondent's attorney and chief negotiator, sent Haynie the following memo:

Subject: Notice of Discontinuance of Pay for Certain Release Time for Association Business by the S-MESPA and ESOS Bargaining Units

The Board understands that certain Association members need to be released from their work duties from time to time. As a courtesy, the Board has previously paid some of these members during this release time, although there is no requirement in law or in the collective bargaining agreements to do so.

> In these economic times, it is important now more than ever for the Board to ensure that its resources are effectively managed so that the Board can continue to meet its educational mission. As such, the Board intends, effective October 1, 2008, to discontinue its practice of paying for release time for certain union members for Association business by the S-MESPA and ESOS bargaining units.
>
> At this time, the Board will continue to release and pay the Associations' presidents for release time as provided by Article III in the respective collective bargaining agreements. Should you have any questions or wish to discuss this matter before implementation, please contact me directly at ….

Haynie received this memo on September 26. Haynie testified that she interpreted this memo as announcing that Respondent planned to eliminate even unpaid release time for anyone other than the union presidents. On September 26, or shortly thereafter, she called Allen and angrily asked him why Respondent was doing this. She accused Respondent of trying to destroy the unions. Allen told her that Respondent was simply complying with the contract. Haynie replied that the MESPA agreement required release time for association members and that it could only be denied in extreme circumstances. Allen said that this was based on when MESPA had over 600 members, and with 200 members it did not need all that time.

Haynie and Allen did not discuss the elimination of paid association release time again before October 1. However, Haynie talked to Respondent's administrators and also contacted members of the school board directly in an attempt to persuade Respondent to reverse its position. She was not successful. After October 1, 2008, both the ESOS president and the MESPA president stopped requesting association release time for their members.

ESOS and Respondent had a bargaining session on or about October 3, but there was no discussion of release time at this meeting. The first MESPA bargaining session after October 1 was held on October 28, 2008. At this session, both parties exchanged comprehensive written proposals for the new contract. MESPA's proposal on release time was to continue the current language of Article III (J). Respondent proposed to replace it with language eliminating any reference to payment for either association release time or the president's release time.

At the October 28 meeting, Haynie told Allen that if her bargaining committee members were not going to receive paid association release time to discuss Respondent's proposals, she would have them do it in caucus during the bargaining session. Allen then agreed to pay MESPA's bargaining committee for time spent holding meetings to review and respond to Respondent's October 28 proposal.

On November 11, 2008, Haynie sent Allen the following letter, which was also signed by ESOS president Katherine Michalsen:

> On September 23, 2008, on behalf of the Southfield School Board, you notified us that the District would no longer honor the use of Association days for Union activity. We believe the unilateral act to eliminate the use of these days is a violation of the Employee Relations Act. In addition, we believe this topic is a

mandatory subject of bargaining. Therefore, please consider this letter as a formal demand to bargain over this matter.

Allen replied by letter dated December 4, 2008. The letter stated that Respondent had not unilaterally ceased to "honor the use of Association days for Union activity," but had simply discontinued its practice of paying for union release time for certain union members. The letter reiterated that the practice had been discontinued on October 1. Allen's letter also stated that since Haynie had failed to contact him to discuss the discontinuance of the practice before implementation, Respondent's position was that the unions had waived their right to bargain over the matter. However, he stated that Respondent was willing to discuss written proposals on this issue during negotiations.

Neither party presented any proposals in the MESPA negotiations on the subject of release time between October 28 and January 5, 2009. On that date, Respondent gave MESPA this proposal:

> The Association shall be granted seventy (70) days to be used for official Association business. Application for use of these days shall be processed through regular conference attendance channels and shall be assigned to by the Association President signifying approval. Additional days may also be granted upon the approval of the Director of Personnel/Employee Relations. Use of these days will be determined solely by the Association President. The Association President shall submit to the Director of Personnel/Employee Relations a monthly log of scheduled activities of Association days. Such log shall include when association days were used and by whom.
>
> Further, the Association president shall be released one (1) day per week or the equivalent *to fulfill Association responsibilities without loss of pay.* The President shall arrange such release time through the work supervisor. [Emphasis added]

At a negotiating session on January 13, 2009, MESPA made its first counterproposal on Article III (J). The counterproposal modified the language in the expired agreement by lowering the number of days in the bank from one hundred to ninety and adding the following language to paragraph one:

> No deduction for the individual's leave day accumulation shall be made for days so granted. It is understood that the only expense to the Board is the regular compensation of the employee and the employment of a substitute.

On January 29, Respondent submitted a new proposal to MESPA. This proposal was the same as its January 5 proposal, except that it included language clarifying that Respondent would not pay for the union release days under paragraph one. Sometime around this time, Allen remarked privately to Haynie that "if other things fall into place, this [the issue of paid association release] might get resolved."

In May or June 2008, MESPA submitted another proposal which lowered the number of association days to eighty. Between June 2008 and the date of the hearing in August 2009, neither party had submitted any additional proposals on this issue. As of the close of the record, MESPA and Respondent had not reached agreement on the terms of a new contract.

As of the close of the record, ESOS and Respondent had also not reached agreement on the terms of a new contract. As of the date of the hearing, neither party in the ESOS negotiations had presented any proposal that altered the release time language in their expired agreement. At some point during these negotiations, Haynie asked Allen if the parties could tentatively agree to continue the current contract language on Article III, since Respondent had not presented any proposal to change that language. It is not clear from the record how Allen responded.

Impact of Elimination of Paid Association Release Time on MESPA

In support of its claim that Respondent's elimination of paid association release time for the MESPA unit interfered with employees' exercise of their Section 9 rights, Charging Parties presented evidence regarding the impact of this change on MESPA and its members. The biggest impact was on the process whereby MESPA's collected its dues and fees. Per the parties' expired contract and past practice, Respondent gives MESPA each summer a list of all unit members, their positions, their regularly scheduled working hours, and their hourly wage rates. From that information, MESPA calculates the amount of union dues or agency fees each employee should pay by applying a percentage formula. MESPA then informs Respondent, by August 15, how much money should be deducted from each employee's paycheck for dues or fees for the upcoming year. Respondent is also supposed to provide MESPA with this same information about all new hires into the unit within two weeks of their employment. After receiving the information about a new hire, MESPA fills out a form indicating the amount of dues to be deducted and returns it to Respondent. Dues deduction does not commence until Respondent receives this form and the employee has signed a dues checkoff form.

Prior to the 2008-2009 school year, MESPA's vice-president, who is also its membership chair, used paid association release time to visit work sites on a regular basis and question employees about their employment status as it pertained to their dues obligations and about the accuracy of the wage information Respondent provided MESPA. If MESPA received information that an individual who was not paying dues was working as a regular unit employee, the membership chair went to the work site and questioned the employee. This situation arises frequently in the MESPA unit because non-unit substitutes are often hired to fill unit vacancies. If appropriate, the membership chair had the individual sign a form for dues or fee deduction on the spot. During the 2008-2009 school year, MESPA's membership chairman did not visit the work sites. Eventually MESPA discovered that there were approximately 68 individuals holding regular MESPA positions who should have been paying dues or service fees, but had not paid them for all or part of the school year.

The elimination of paid association release time also had an effect on MESPA's ability to process grievances. During the 2008-2009 school year, MESPA representatives discontinued their previous practice of visiting worksites to check the accuracy of the seniority information Respondent provided MESPA. When there were layoffs in the unit during that school year,

disputes arose over the accuracy of the seniority list. Finally, the MESPA grievance committee did not meet during the 2008-2009 school year because its members could not use paid association release time to meet. As a result, Haynie and MESPA president Graves together took over the responsibility of deciding whether grievances would go forward to the next step.

The elimination of paid association release time did not have as much impact on the smaller ESOS unit. In that unit, grievances are investigated and processed by Haynie, the ESOS president, and the ESOS vice-president. After October 1, 2008, the vice-president continued to investigate grievances, but she did so on her own time or during her lunch hours.

Discussion and Conclusions of Law:

Alleged Violations of the Duty to Bargain

One of the fundamental principles of collective bargaining under PERA is that once a specific subject has been classified as a mandatory subject of bargaining, neither party may take unilateral action on that subject absent an impasse in negotiations. *Central Michigan Univ Faculty Ass'n v Central Michigan Univ* 404 Mich 268, 277(1978); *Wayne Co Government Bar Ass'n, Wayne Co Government Bar Ass'n v Wayne Co,* 169 Mich App 480, 485. It is also well established that a public employer has the obligation during the bargaining process to continue to apply those wages, hours, and other terms and conditions of employment established by the contract until such time as impasse is reached. *Local 1467, Intern Ass'n of Firefighters, AFL-CIO v City of Portage,* 134 Mich App 466, 472 (1984). Paid time to engage in union activities during working hours is a mandatory subject of bargaining. *United Auto Workers, Local 6888* v *Central Michigan University,* 217 Mich App 136 (1996).

There is no dispute that prior to October 2008, it was Respondent's practice to pay Charging Parties' members and officers for the union release time, including association release time, provided for in their union contracts. A past practice which does not derive from the parties' collective bargaining agreement may become a term and condition of employment which cannot be unilaterally altered by either party. The nature of the practice, its duration, and the reasonable expectations of the parties are factors considered in determining whether the past practice has became a term of employment which the parties tacitly agreed would continue. *Amalgamated Transit Union, Local 1564* v *Southeastern Michigan Transportation Authority,* 437 Mich 441, 454 (1991). In this case, the Respondent had consistently paid association release time over a long period of time – at least twenty years for the MESPA unit, and at least ten years for the ESOS unit. Especially in the MESPA unit, paid association release time was a frequently used benefit.

However, a past practice which is contrary to clear contract language does not create a term or condition of employment unless the past practice is so widely acknowledged and mutually accepted that it amends the contract. A party seeking to supplant the contract language must show the parties had a meeting of the minds with respect to the new terms or conditions and that there was effectively an agreement to modify the contract; *Port Huron Educ Ass'n v Port Huron Area Sch Dist,* 452 Mich 309, 321(1996); *Detroit Police Officers Association et al v City of Detroit,* 452 Mich 339 (1996). Accordingly, the Commission held in *Southfield Pub Schs,*

2002 MERC Lab Op 53, that the employer's sixteen year practice of routinely granting all requests for unpaid leaves of absence and failing to enforce the restrictions on unpaid leave contained in the contract did not become a term or condition of employment because the practice conflicted with contract language that unambiguously gave the employer the discretion to grant or deny requests for unpaid leaves.

Respondent asserts that paid association release time did not become an established term or condition of employment because the parties' collective bargaining agreements unambiguously provided that only Charging Parties' presidents would be paid for release time. Respondent also maintains that even if it did have a duty to bargain over the elimination of paid association release time, Charging Parties waived their rights by failing to make a timely demand to bargain over the issue.

I disagree with Respondent that its practice of paying association release time was contrary to the clear language of either Article III (J) of the expired MESPA agreement or Article III (C) of the ESOS agreement. Unlike the contract language in the *Southfield* case discussed above, these provisions do not give Respondent the discretion to determine whether or not to pay association release time. Rather, both contracts are merely silent as to whether association release time will be paid or unpaid. Both contracts do state explicitly that release time for the union president will be paid. As Respondent notes, application of the well-established maxim of contractual construction espressio unius est exclusio alterius, or "to express one thing is to exclude another," suggests that the parties intended association release time to be unpaid. However, there are countervailing considerations. The provisions providing for association release time and the provisions providing release time for the union president are in separate paragraphs in both contracts. Moreover, the testimony regarding the history of these provisions in the MESPA contracts suggests that the paragraph providing release time to the president may have been a later addition to that contract. Finally, the evidence indicates that prior to October 2008, Respondent never provided unpaid association release time. In sum, I conclude that both Article III (J) of the expired MESPA contract and Article II(C) of the expired ESOS agreement are ambiguous with respect to whether association release time must be paid, and that Respondent's practice of paying for this time was not contrary to the clear language of the contract.

Respondent also asserts that even if the collective bargaining agreements are deemed to be ambiguous, it had a right to discontinue its past practice of paying for association release time upon the expiration of the parties' collective bargaining agreements after providing notice to Charging Parties. In support of this proposition, it relies on *Capital Area Transportation Authority (CATA)*, 1994 MERC Lab Op 922. In that case, the Commission found that the employer did not violate its duty to bargain when it terminated past practices with respect to the scheduling of lunch and the payment of overtime after the contract expired. These practices were not grounded on specific contract language. However, the employer's previous attempt to terminate the lunch scheduling practice had been found by an arbitrator to violate the contract because, the arbitrator concluded, the 18-year-old practice could not be eliminated without giving the union clear notice and an opportunity to negotiate an alternative during contract negotiations. Accordingly, on December 1, the day after the contract expired, the employer sent the union a memo describing the practices and stating that "unless we reach a specific

understanding to the contrary," the practices would cease with the termination of the labor agreement. The parties continued to bargain and the union did not make a proposal on either subject. The parties reached a tentative contract agreement on December 3. This tentative agreement included a "zipper" clause stating that the agreement was to take the place of all prior contracts, both written and oral. On December 9, the employer gave the union a draft contract to present to its membership for ratification, with a forwarding memo that stated, "The changes in practices will be made ten days after the agreement is ratified." On January 5, after both the union membership and the employer's governing body had ratified the contract, the employer eliminated both practices. The Commission agreed with the administrative law judge that the mutuality of agreement necessary to sustain a past practice had been destroyed. It noted that the employer had served both oral and written notice of its intention to terminate the practices during negotiations for the current labor agreement. It found that the union had the opportunity to negotiate over these issues but had elected not to make "alternative" demands. Finally, it concluded that the union had waived its right to bargain over the elimination of the practices by entering into a contract containing a zipper clause.

I do not interpret *CATA* as standing for the proposition that an employer may unilaterally terminate a past practice that has become a condition of employment after the expiration of the contract simply by giving the union notice. This would be contrary to the established principle that an employer cannot unilaterally alter terms and conditions of employment during contract negotiations without bargaining to impasse. The employer in *CATA* not only notified the union that it was terminating the past practices, it gave the union an opportunity to bargain before it terminated them. The employer notified the union during contract negotiations that the practices were terminated *unless* the parties specifically agreed otherwise. After the parties reached a tentative contract agreement that did not contain new language covering these practices and also contained a zipper clause, the employer again warned the union that the practices would be terminated upon ratification of this agreement. The union did not make any proposals, and ratified the new contract. Only after the contract had been ratified did the employer actually eliminate the practices. By entering into the new agreement, the union in *CATA* clearly waived any further right to bargain over the elimination of the practices, and the employer satisfied its obligation to avoid unilateral action.

In the instant case, however, Respondent eliminated its practice of paying for association leave before giving Charging Party an opportunity to negotiate over the issue. On September 23, 2008, the parties were negotiating new collective bargaining agreements. Respondent, without having previously raised the issue at the bargaining table or anywhere else, notified Charging Parties that it would cease its "courtesy" twenty year practice of paying for association release time on October 1. Allen's September 23 letter said nothing about giving Charging Parties an opportunity to bargain over the issue, but simply told Haynie to call if she wished to discuss the matter. Haynie did call, and objected strenuously to the change. Allen replied that Respondent was only following the contract. Neither the letter, nor Allen's comments to Haynie, suggested that Respondent's decision to eliminate paid association leave was conditioned on the parties failing to reach agreement on new contract language. After her conversation with Allen, Haynie spoke to various Respondent administrators and board members in an attempt to change Respondent's decision, However, she did not make a demand to bargain before October 1, the date Allen had announced that the practice would be eliminated.

An employer's duty to bargain is normally contingent upon the union making a demand to bargain. *Local 586, SEIU v Village of Union City*, 135 Mich App 553, 558 (1984). When an employer proposes to alter terms and conditions of employment not covered by a collective bargaining agreement, it is not sufficient for the union merely to complain about the proposal; unless the union also makes a demand to meet and bargain, it waives its right to object to the change. See, e.g., *City of Oak Park*, 1998 MERC Lab Op 519 (no exceptions). However, a union has no obligation to demand bargaining if such a request would have been futile because the change was a *fait accompli* when it first received notice. *Intermediate Ed Ass'n/Michigan Ed Ass'n*, 1993 MERC Lab Op 101, 106. I find that based on Allen's letter and their subsequent discussion, Haynie reasonably concluded that there was no point in demanding to bargain over the elimination of paid association release time between September 26, when she received notice of Respondent's decision, and October 1. When Charging Parties did make a written bargaining demand, on November 11, 2008, Respondent told them that their demand was untimely.[3] I conclude that Charging Parties did not waive their right to bargain over the elimination of paid association release time.

I find, for reasons discussed above, that paid association release time had become an established term and condition of employment for members of the MESPA and ESOS unit on October 1, 2008. I find that Respondent had a duty to bargain in good faith with Charging Parties before eliminating its practice of paying for association release time, and that it failed to give Charging Party an opportunity to demand bargaining before it unilaterally eliminated this term of employment. I also find that Charging Parties did not waive their right to bargain over this action by failing to make a demand to bargain between September 26, 2008, when they were notified of Respondent's intention to eliminate its practice, and October 1, 2008, the date it was eliminated.

Charging Parties also argue that Respondent's elimination of paid association release time violated Section 10(1) (a) of PERA because it interfered with MESPA's ability to collect dues and its ability to represent its members. Although the investigation of grievances is activity protected by Section 9 of PERA, the Commission, through its administrative law judges, has consistently held that paid time off to engage in union business is a privilege to be negotiated and not a right guarantee by Section 9. See *City of Detroit (General Hospital),* 1968 MERC Lab Op 378 (no exceptions); *City of Grand Rapids*, 1980 MERC Lab Op 18 (no exceptions); *City of Birmingham,* 1974 MERC Lab Op 642 (no exceptions); *Belding Area Schs,* 20 MPER 105 (2007) (no exceptions). The record makes it clear that paid association release time is important to MESPA. As I have concluded above, Respondent did not have the right to unilaterally eliminate this benefit without giving Charging Parties the opportunity to bargain. However, since paid release time is not a right guaranteed by PERA, I conclude that Respondent's elimination of this benefit did not constitute a separate and independent violation of Section 10(1) (a). In accord

[3] Respondent asserts in its brief that it did not refuse Charging Parties' demand to bargain over association release time. Respondent did not refuse to consider proposals on association release time for the new contract. However, Charging Parties' November 11, 2008 letter demanded to bargain over the elimination of paid association release time, which occurred on October 1, 2008. Allen's December 4 response clearly states Respondent's position that Charging Parties waived their right to bargain over this matter by failing to make a demand before prior to the implementation date.

with the findings of fact and conclusions of law set forth above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER IN CASE NO. C09 B-017

Respondent Southfield Public 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 paid association leave, for employees represented by the Michigan Educational Support Association without giving this union an opportunity to bargain over this change.

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

   a. Reinstate its practice of providing members of this bargaining unit with one hundred days of paid association leave per year pending satisfaction of its obligation to bargain with the Michigan Educational Support Association over elimination of the practice.

   b. Upon demand, bargain in good faith with the Michigan Educational Support Association over the issue of paid association leave.

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

RECOMMENDED ORDER IN CASE NO. C09 B-019

Respondent Southfield Public 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 paid association leave, for employees represented by the Educational Secretaries of Southfield without giving this union an opportunity to bargain over this change.

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

   a. Reinstate its practice of providing members of this bargaining unit with seventy days of paid association leave per year pending satisfaction of its obligation to bargain with the Educational Secretaries of Southfield over elimination of the practice.

   b. Upon demand, bargain in good faith with the Educational Secretaries of Southfield over the issue of paid association leave.

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **SOUTHFIELD PUBLIC SCHOOLS** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally impose changes in existing terms and conditions of employment, including paid association leave, for employees represented by the Michigan Educational Support Personnel Association without giving this union an opportunity to bargain over the change.

WE WILL reinstate our practice of providing members of this bargaining unit with one hundred days of paid association leave per year pending satisfaction of its obligation to bargain with the Michigan Educational Support Personnel Association over elimination of the practice.

WE WILL, upon demand, bargain in good faith with the Michigan Educational Support Personnel Association over the issue of paid association leave.

We acknowledge that as a public employer under PERA, we are obligated to bargain in good faith with representatives selected by the majority of our employees with respect to rates of pay, wages, hours of employment or other conditions of employment.

SOUTHFIELD PUBLIC SCHOOLS

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.
Case No. C09 B-017.