STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WEST IRON COUNTY PUBLIC SCHOOLS,
Public Employer-Respondent,

Case No. C12 F-115

-and-

WEST IRON COUNTY EDUCATIONAL
SUPPORT PERSONNEL ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Scholten Fant, by John S. Lepard, for the Respondent

White, Schneider, Young & Chiodini, P.C., by Jeffrey S. Donahue for the Charging Party

DECISION AND ORDER

On June 11, 2013, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Motion for Summary Disposition in the above matter recommending that we dismiss the charge in this matter. The ALJ found that Respondent, West Iron County Public Schools, did not violate § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, by announcing its intention to increase, on July 1, 2012, the health insurance premiums paid by employees in the bargaining unit represented by Charging Party, West Iron County Educational Support Personnel Association. The ALJ found that Respondent did not breach its duty to bargain by implementing the hard cap option under the Publicly Funded Health Insurance Contribution Act, 2011 PA 152 (Act 152), MCL 15.561 to MCL 15.569 while the parties were participating in fact finding. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with § 16 of PERA. After requesting and receiving an extension of time, Charging Party filed exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions on August 5, 2013. Respondent requested and was granted an extension of time to respond to the exceptions. On September 19, 2013, Respondent filed a brief in support of the ALJ's Decision and Recommended Order.

In its exceptions, Charging Party contends that the ALJ erred in concluding that Respondent did not violate its duty to bargain in good faith when it implemented the hard cap

option provided for by § 3 of Act 152, MCL 15.563 while the parties were engaged in fact finding. We have reviewed Charging Party's exceptions and find them to be without merit.

Factual Summary:

We adopt the facts as found by the ALJ and repeat them here only as necessary. We agree with the ALJ that there are no material facts at issue.

Respondent, a public school employer, and Charging Party, were parties to a collective-bargaining agreement that expired on June 30, 2010. After the contract expired, members of the bargaining unit represented by Charging Party continued to receive health insurance benefits under the terms of the expired contract. The parties engaged in negotiations for a successor agreement, but had been unable to reach agreement. Around September 22, 2011, Charging Party filed a petition for fact-finding.

On September 27, 2011, the Publicly Funded Health Insurance Contribution Act, 2011 PA 152 (Act 152), MCL 15.561 to MCL 15.569, became effective. Act 152 was enacted to limit public employers' expenditures for employee medical benefit plans. Section 3 of Act 152, MCL 15.563, sets specific dollar limits, referred to as "hard caps," on the amounts public employers may pay for employee medical benefit plans, commencing with medical benefit plan coverage years beginning on or after January 1, 2012. Upon the majority vote of its governing body, a public employer may choose to comply with the requirements of § 4 of Act 152 instead of § 3. Section 4, MCL 15.564, limits a public employer's share of health care costs to 80% of the total annual costs of all of the medical benefit plans it offers. Pursuant to § 5 of Act 152, MCL 15.565, parties are prohibited from entering into collective bargaining agreements after September 15, 2011, that contain terms inconsistent with the requirements of the Act. Public employers that fail to comply with the requirements of Act 152 are subject to a substantial financial penalty under § 9 of PA 152.

After the fact finding petition was filed, the parties met on several occasions with a Commission-appointed mediator but were unable to reach agreement on a new contract. A fact finder was appointed in February 2012.

On May 22, 2012, Charging Party's UniServ Director, Steven Smith, sent Respondent's Superintendent, Chris Thompson, a letter regarding Act 152 and the duty to bargain under PERA. In the letter, Smith asserted that neither the choice of the hard caps or 80% employer share under Act 152, nor the amount of employee contributions are prohibited subjects of bargaining. Smith further contended that the Employer was obligated to maintain the status quo during the bargaining process and while the parties were in fact finding. He stressed that implementation of the options under Act 152 prior to agreement or impasse would be an unfair labor practice and invited the Employer to notify him if the Employer was considering "early implementation" of options under Act 152.

By a letter dated June 7, 2012, Thompson replied and informed the UniServ Director that Respondent would not refrain from complying with Act 152 and that "Act 152 provides no basis and no authority for delaying the District's compliance with its mandates." Thompson pointed

out the "significant and substantial penalties" that would result from failure to comply with the Act's requirements and that selection of the hard cap or the 80% employer share option was "at best no more than a permissive subject over which the District has no duty to bargain."

In early July 2012, Respondent implemented premium share increases consistent with the hard cap option in § 3 of Act 152.

On January 23, 2013, after receiving the parties' final submissions and closing the record, the fact finder issued his report. The fact finder recognized that Respondent's decision to implement the hard caps was an issue before him but made no recommendation on the issue, noting that, "[u]nless subsequent litigation proves me wrong, the Employer has the right to impose the hard cap option." The parties continued to engage in bargaining after the fact finder's report and entered into a new contract sometime prior to April 3, 2013. The new contract incorporated the hard cap option that Respondent had implemented in July 2012, but did not do so retroactively.

Discussion and Conclusions of Law:

Charging Party contends that the ALJ erred in finding that Respondent did not violate its duty to bargain when it implemented the hard cap option under Act 152 while the parties were engaged in fact finding. As noted by Charging Party, it is well established that neither party may take unilateral action on a mandatory subject of bargaining before reaching an impasse in negotiations. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55 (1974). Further, this Commission has held that even in the event of a good faith impasse, a party may not unilaterally impose changes in mandatory subjects of bargaining after fact finding has been requested. *Wayne Co*, 24 MPER 25 (2011), *South Redford Sch Dist*, 1988 MERC Lab Op 447, 452; *Wayne Co*, 1984 MERC Lab Op 1142, 1144-1145, aff'd 152 Mich App 87 (1986). However, we must consider the effect of the mandates of Act 152 on the prohibitions against unilateral action.

The Relationship between Act 152 and PERA

Charging Party also points out in its brief in support of its exceptions, that the Michigan Supreme Court has consistently held PERA to be the dominant law regulating public employee labor relations. See *Rockwell v Crestwood Sch Dist Bd of Ed*, 393 Mich 616 (1975). On this basis, Charging Party contends that PERA must be held to dominate over any conflicting provisions of Act 152.

In *Decatur Pub Sch*, 27 MPER 41 (2014)[1], the Commission addressed the relationship between PERA and Act 152, explaining:

[1] The ALJ's Decision and Recommended Order was issued prior to our decision in *Decatur*, where we held that the choice of options under Act 152 is not a mandatory subject of bargaining. She concluded that the choice of options under Act 152 is a mandatory subject of bargaining. The ALJ erred in reaching that conclusion, and her decision is reversed to the extent that it relies on her finding that a public employer has a duty to bargain over whether it will apply the hard caps under § 3 of Act 152 or the 80% employer share under § 4.

> Although both statutes may have bearing on certain benefits provided by public employers to their employees as compensation, the commonality ends there. PERA sets forth the circumstances under which public employers must bargain with the representatives of their employees over compensation and other terms and conditions of employment. [Act] 152 specifically addresses public employers' costs for one type of compensation, health insurance, and sets limits on the amounts that public employers may pay. With the exception of granting an exemption to its requirements for public employers subject to collective bargaining agreements in effect when [Act] 152 was passed, [Act] 152 does not address collective bargaining. Its provisions are simply designed to limit the total amounts public employers may pay for health care costs. See House Fiscal Agency Legislative Analysis, Senate Bill 7 (as reported from Conference Committee) August 23, 2011 and Senate Fiscal Agency Analysis, Senate Bill 7 (Substitute H-6, Conference Report-1 as adopted by Conference Committee), August 24, 2011. PERA and PA 152 do not have a common purpose nor do they relate to the same subject or matter. *Id*.

Act 152 does not govern the bargaining relationships between public employers and their employees or the labor organizations representing their employees. Public employers continue to have a duty to bargain over health insurance cost sharing. Act 152 merely sets limits on what public employers may pay for specific budgetary items and gives public school employers, such as Respondent, the right to choose between the two kinds of limits to which they will be subjected, that is hard caps under § 3 or the 80% employer share under § 4.

In *Decatur*, and *Shelby Twp,* 28 MPER 21 (2014), we addressed the issue of whether a public employer may make unilateral changes prior to reaching impasse for the purpose of complying with Act 152. Each of those cases involved unilateral changes implemented by a public employer during negotiations for a successor collective bargaining agreement. In both of those cases, as in this one, the public employer implemented changes in health insurance cost sharing after the parties' collective bargaining agreement expired but before reaching impasse or agreement.

The language in § 3 of Act 152 provides:

> [A] public employer that offers or contributes to a medical benefit plan for its employees or elected public officials *shall pay no more* of the annual costs or illustrative rate and any payments for reimbursement of co-pays, deductibles, or payments into health savings accounts, flexible spending accounts, or similar accounts used for health care costs, than a total amount equal to $5,500.00 times the number of employees with single person coverage, $11,000.00 times the number of employees with individual and spouse coverage, plus $15,000.00 times the number of employees with family coverage, *for a medical benefit plan coverage year beginning on or after January 1, 2012*. (Emphasis added.)

The language in § 4 of Act 152 states in relevant part:

> (1) *By a majority vote of its governing body*, a public employer, excluding this state, may elect to comply with this section for a medical benefit plan coverage year instead of the requirements in section 3. The designated state official may elect to comply with this section instead of section 3 as to medical benefit plans for state employees and state officers.
>
> (2) For medical benefit plan coverage years beginning on or after January 1, 2012, *a public employer shall pay not more than 80% of the total annual costs of all of the medical benefit plans it offers or contributes to for its employees and elected public officials. . .* The public employer may allocate the employees' share of *total annual costs* of the medical benefit plans among the employees of the public employer as it sees fit. (Emphasis added.)

In *Decatur*, we examined the language of Act 152 in the light of public employers' duty to bargain under PERA and explained:

> By basing the public employer's share of health care costs on the total amount to be paid for health care costs for all employees and public officials, [Act] 152 makes it clear that the public employer's costs are not determined by the amount the public employer pays for particular bargaining units or other groups of employees, but for all employees and public officials as a single group. Therefore, it is evident that the public employer must choose with respect to all of its employees and public officials whether it will use the hard caps under § 3 or the 80% employer share under § 4. Moreover, the fact that § 4 requires a majority vote of the public employer's governing body indicates that the choice between the hard caps and the 80% employer share is a policy choice to be made by the employer. Thus, while not expressly making this issue a prohibited subject of bargaining, it is clear the Legislature intended that the choice between the hard caps and the 80% employer share be left to the public employer.

We concluded, "[p]ublic employers may bargain with the labor organizations representing their employees over the choice between the hard caps and the 80% employer share, but are not required to do so." *Id.* In *Shelby Twp*, we expressly held that the choice of cost sharing options under Act 152 is a permissive subject of bargaining.

Between the effective date of Act 152 and the beginning of its next medical benefit plan coverage year on or after January 1, 2012, Respondent was required to determine whether it would comply with § 3 or § 4 of Act 152. In this case, the next benefit plan coverage year began July 1, 2012. Therefore, Respondent had to determine which section of Act 152 it would comply with before July 1, 2012. While Respondent could have chosen to bargain with Charging Party over these options, it had no obligation to do so. Therefore, for the reasons stated in *Decatur* and *Shelby Twp*, we agree that Respondent's decision to implement the hard caps under§ 3 of Act 152 rather than the 80% employer share under § 4 is a permissive subject of bargaining. Respondent had no duty to bargain over its choice between the hard caps and the 80% employer share.

Implementation of the Choice of Act 152 Options While Engaged in Fact Finding

On exceptions, Charging Party argues that the ALJ erred in her interpretation of PA 152 in the light of the Commission's decisions in *Wayne Co*, 1984 MERC Lab Op 1142 and 1985 MERC Lab Op 244 and the Court of Appeals' affirmance of those decisions in *AFSCME Council 25 v Wayne Co*, 152 Mich App 87 (1986). We disagree. In *AFSCME*, the Court of Appeals affirmed the Commission's conclusion that the employer violated its duty to bargain in good faith by implementing its last best offer after fact finding had been initiated. We agree with the ALJ that the parties' participation in fact finding did not require Respondent to delay compliance with Act 152. Our affirmance of the ALJ's decision on this issue is by no means a reversal of our prior holdings that a unilateral change in mandatory subjects of bargaining while the parties are in fact finding may constitute a breach of the duty to bargain. Since the Employer's choice of options under Act 152 is a permissive subject of bargaining, the parties' participation in fact finding does not preclude the Employer from making that choice. See *Grand Rapids Cmty Coll*, 1998 MERC Lab Op 534, 11 MPER 29091.

Moreover, § 3 of Act 152 indicates that public employers must ensure their compliance with the limits on public employers' payments for employee medical benefit plans by the beginning of the medical benefit plan coverage year beginning on or after January 1, 2012. Section 9 of Act 152 states in relevant part:

> If a public employer fails to comply with this act, the public employer shall permit the state treasurer to reduce by 10% each economic vitality incentive program payment received under 2011 PA 63 and the department of education shall assess the public employer a penalty equal to 10% of each payment of any funds for which the public employer qualifies under the state school aid act of 1979, 1979 PA 94, MCL 388.1601 to 388.1772, *during the period that the public employer fails to comply with this act*. (Emphasis added.)

In *Decatur*, we refused to consider the employer's actions to comply with Act 152 as an unfair labor practice, stating:

> [W]e note § 9 indicates that a public employer that fails to comply with [Act] 152 will be subject to penalties during the period of noncompliance. Based on that wording, we cannot conclude that a delay in the implementation of the hard caps for a period of time after the contract's expiration would not be viewed by the State Treasurer as a basis for imposition of the penalty even if the Employer subsequently complied.

Similarly, in the matter before us we cannot conclude that delay in the implementation of the hard caps for the duration of the fact finding proceeding would not be viewed by the State Treasurer as a basis for imposition of the penalty under § 9, even if Respondent subsequently complied with Act 152. Accordingly, while we continue to adhere to the holdings of *Wayne Co*, 24 MPER 25 (2011); *South Redford Sch Dist*, 1988 MERC Lab Op 447, 452; and *Wayne Co*, 1984 MERC Lab Op 1142 and 1985 MERC Lab Op 244, aff'd *AFSCME Council 25 v Wayne Co*, 152 Mich App 87 (1986), regarding the duty to refrain from unilateral action during fact

finding, the timeliness requirement of Act 152 provides a statutory deadline that requires an exception to that rule.

Accordingly, for the aforementioned reasons, we conclude that Respondent did not violate its duty to bargain in good faith under PERA when it implemented the hard cap option for members of Charging Party's bargaining unit at the beginning of its medical benefit plan coverage year in July 2012, even though the parties were engaged in Commission-ordered fact finding at the time.

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case. Accordingly, the Commission adopts the Order recommended by the ALJ for the reasons stated herein.

ORDER

The charge in this case is hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: November 21, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

WEST IRON COUNTY PUBLIC SCHOOLS,
Public Employer-Respondent,

Case No. C12 F-115
Docket No. 12-001084-MERC

-and-

WEST IRON COUNTY EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Scholten Fant, by John S. Lepard, for Respondent

White, Schneider, Young & Chiodini, P.C., by Jeffrey S. Donahue

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON MOTION FOR SUMMARY DISPOSITION

On June 21, 2012, the West Iron County Educational Support Personnel Association filed the above charge with the Michigan Employment Relations Commission (the Commission) against the West Iron County Public Schools. The charge alleges that the Respondent violated §10 of the Public Employment Relations Act, (PERA), MCL 423.210, by announcing, on June 7, 2012, its intention to increase, on July 1, 2012, the premiums employees in the Charging Party's bargaining unit paid for their health insurance coverage. The charge was assigned to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System.

On February 13, 2013, Respondent filed a motion for summary disposition asserting that the charge failed to state a claim under PERA and also that there were no genuine issues of fact and Respondent was entitled to judgment as a matter of law. Respondent attached to its motion a copy of a fact finding petition filed by Charging Party on or about September 22, 2011 and an affidavit from Chris Thomson, Respondent's superintendent. Charging Party filed a response in opposition to the motion on March 12, 2013, which included an affidavit from Michigan Education Association UniServ Director Steven Smith and a copy of the fact finder's report issued January 23, 2013. In addition, copies of a letter from Smith to Thomson dated May 22, 2012 and from Thomson to Smith dated June 7, 2013 were attached to the charge.

I held oral argument on the motion on April 3, 2013. At the close of argument on that date, I granted Respondent's motion to dismiss. Based on facts as set forth in the charge and

pleadings and not in dispute, and on the arguments made in the pleadings and at oral argument, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

Charging Party represents a bargaining unit of all full-time and regular part-time employees of Respondent, excluding administrative personnel, teachers, supervisors, confidential employees and substitutes. The parties' most recent collective bargaining agreement had expired when, on June 7, 2012, Respondent announced its intention to increase the premiums members of the bargaining unit paid for their health insurance effective July 1, 2012 to comply with the Publicly Funded Health Insurance Contribution Act, 2011 PA 152 (Act 152), MCL 15.561 et seq. Charging Party alleges that Respondent's action constituted an unlawful unilateral change in terms and conditions of employment because Respondent had a duty to maintain the status quo with respect to mandatory subjects of bargaining during the pendency of a fact finding proceeding.

Facts:

Act 152

Effective September 2011, the Legislature passed the Publicly Funded Health Insurance Contribution Act, 2011 PA 152 (Act 152), MCL 15.561 et seq. This law places limitations on the amounts a public employer can pay for health care for its employees and elected officials for medical benefit plan coverage years beginning on and after January 1, 2012. Act 152 provides school district employers with two options for compliance: "hard cap" (§3 of the statute), and "80/20" (§4 of the statute). The hard cap provision, which Respondent elected, reads as follows:

> Section 3. Except as otherwise provided in this act, *a public employer that offers or contributes to a medical benefit plan for its employees or elected public officials shall pay no more* of the annual costs or illustrative rate and any payments for reimbursement of co-pays, deductibles, or payments into health savings accounts, flexible spending accounts, or similar accounts used for health care costs, than a total amount equal to $5,500.00 times the number of employees with single person coverage, $11,000.00 times the number of employees with individual and spouse coverage, plus $15,000.00 times the number of employees with family coverage, *for a medical benefit plan coverage year beginning on or after January 1, 2012.* A public employer may allocate its payments for medical benefit plan costs among its employees and elected public officials as it sees fit. By October 1 of each year after 2011, the state treasurer shall adjust the maximum payment permitted under this section for each coverage category for medical benefit plan coverage years beginning the succeeding calendar year, based on the change in the medical care component of the United States consumer price index for the most recent 12-month period for which data are available from the United States department of labor, bureau of labor statistics. [Emphasis added.]

Section 4 of Act 152 provides an alternate method of complying with the statute, referred to as the 80/20 option. Section 4 requires a majority vote of the public employer's governing body to elect this option. Section 8 of Act 152 allows certain public employers to "opt out" of complying with the statute on a year-to-year basis, but requires a two-thirds vote of the employer's governing body each year. This option is not available to school districts like Respondent.

Section 5 of Act 152 states that if a collective bargaining agreement that is inconsistent with §3 or §4 is in effect for a group of employees of a public employer on the effective date of the Act, the requirements of §3 or §4 do not apply to that group of employees until the collective bargaining agreement expires.

Section 6 of Act 152 permits a public employer to deduct a covered employee's portion of the cost of a medical benefit plan from the employee's compensation.

Section 7 of Act 152 reads as follows:

> The requirements of this act apply to medical benefit plans of all public employees and elected public officials to the greatest extent consistent with constitutionally allocated powers, whether or not a public employee is a member of a collective bargaining unit.

Finally, §9 of Act 152 requires the Department of Education to withhold ten percent of its state school aid from a school district that fails to comply with the act.

Contract Negotiations and Fact Finding Petition

The parties' most recent collective bargaining agreement expired on June 30, 2010. Bargaining unit members received health insurance benefits through MESSA pursuant to the terms of the expired agreement. Health insurance was a topic of discussion throughout the parties' negotiations for a successor agreement. On or about September 22, 2011, Charging Party filed a petition with the Commission seeking the appointment of a fact finder to make recommendations on the issues remaining in dispute. One of the issues listed on the fact finding petition as unresolved was health insurance. A fact finder was appointed in February 2012. The parties agreed to present the case to the fact finder in the form of exhibits and briefs and to forego a hearing. They also agreed to a schedule of submissions which began with the submission of initial exhibits to the fact finder on or about July 20, 2012. The fact finder received the parties' final submissions and closed the record on January 17, 2013.

According to Respondent, Charging Party's proposal on health insurance, as submitted to the fact finder, was "Beginning July 1, 2012, members will contribute a portion toward their health insurance pursuant to Act 152, and the District will ensure that said premium contribution will be the lesser of the two alternatives." It is not clear from the pleadings when Charging Party first presented this proposal.

The parties had several sessions with a Commission-appointed mediator after the fact finding petition was filed. These sessions did not result in an agreement on a new contract. However, sometime between the effective date of Act 152 and July 1, 2012, the parties agreed to a change in the health insurance benefits available to Charging Party's members to reduce the amount these employees would have to pay under Act 152.

Implementation of the Act 152 Premium Share

In May 2012, Respondent was in negotiations with both Charging Party's unit and the bargaining unit that included its teachers. The collective bargaining agreement covering the teachers' unit was to expire on June 30, 2012. Both unions were represented at the bargaining table by Steven Smith, UniServ Director for the Michigan Education Association. On May 22, 2012, Smith sent Respondent superintendent Thomson a letter to ensure that "we are both on the same page" with respect to Act 152. The letter read, in pertinent part:

> While PA 152 is basically effective for MESSA groups with expired contracts on July 1, the state Legislature did not make the selection of a hard cap or 80% employee contribution a prohibited subject of bargaining. Further, they did not make employee contributions a prohibited subject of bargaining.
>
> Hence, the district must maintain status quo throughout the bargaining process and may not implement one or the other PA 152 options until either ratification of a new agreement or an imposition resulting from impasse. Any implementation earlier than those two scenarios would be an unfair labor practice in altering the status quo, an example of bad faith bargaining.
>
> Furthermore, since the West Iron County Education Support Personnel Association is currently in fact finding, that status quo must be maintained as a matter of law.
>
> Please let me know if you have any questions or if you are entertaining early implementation.

Thomson replied on June 7, 2012. Thomson's letter stated, first, that Act 152 provided no basis and no authority for delaying Respondent's compliance with its mandates, and that Respondent could not risk the substantial penalties that would come from noncompliance. Second, Thomson stated that it was Respondent's position that selection of the hard cap or 80/20 option was at best no more than a permissive subject over which Respondent had no duty to bargain. The letter also included the following paragraph:

> From our perspective, therefore, neither the absence of a new CBA, or the absence of implementation following impasse, nor the pendency of fact-finding proceedings relieve the District of its duty to comply with the mandates of Act 152, effective July 1, 2012, for all District employees – including those represented by either the West Iron County Education Association or the West Iron County Support Personnel Association.

The instant charge was filed on June 21, 2012. Respondent did not implement premium share increases on July 1, 2012 because it was temporarily enjoined from doing so at the time. However, the temporary restraining order issued by the Iron County Circuit Court was dissolved in early July 2012. Respondent then implemented premium share increases for both units consistent with the hard cap option in §3 of Act 152.[2] After implementation, the premiums paid by all or nearly all of Charging Party's members for their health insurance were lower than they would have been had Respondent elected the 80/20 option, but higher than they would have been had Respondent not implemented either of these options.

Fact Finder's Report and New Contract

On January 23, 2013, the fact finder, Barry Goldman, issued his report and recommendations. He noted that Respondent had opted to take the hard cap option under Act 152, and stated, "Unless subsequent litigation proves me wrong, the Employer has the right to impose the hard cap option." Goldman recommended against other changes in health care and other insurance benefits proposed by Respondent. After issuance of the report, the parties returned to the bargaining table to bargain over the fact finder's recommendations. Sometime between the filing of the motion for summary disposition in February 2013 and oral argument on the motion on April 3, 2013, the parties entered into a new contract. The new contract incorporated the hard cap option as it was implemented by Respondent in July 2012. However, the new contract was not given retroactive effect, and the parties did not agree, as part of their contract settlement, that the unfair labor practice charge would be withdrawn.

Discussion and Conclusions of Law:

Whether the Charge Was Filed Prematurely

Respondent argues that the charge fails to state a claim upon which relief can be granted because, when the charge was filed on June 21, 2012, Respondent had not taken any unilateral action to implement the mandates of Act 152. I find this argument to be without merit. Section 16(a) of PERA states, "No complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the commission and the service of a copy thereof upon the person against whom the charge is made." In *Detroit Bd of Ed,* 1974 MERC Lab Op 813, 818, the Commission held that the statute of limitations began to run on a charge alleging that the employer unlawfully unilaterally implemented a residency rule on the date that the employer's governing body passed a resolution effecting the change, not on the date that the new rule went into effect. See also *Tuscola Intermediate Sch Dist,* 1985 MERC Lab Op 123, and cases cited therein at 125. Further, in *City of Detroit (Recreation Dept),* 1990 MERC Lab Op 388, 389 and 395 and 1990 MERC Lab Op 578, the Commission held that the date of the alleged unfair labor practice, and, therefore, the date the statute of limitations began to run, was the date the employer announced the unilateral change and not the date the change was implemented. See also *City of Detroit,* 25 MPER 68 (2012). I find that the alleged unfair labor

[2] An unfair labor practice charge (Case No. C12 F-118/12-001110-MERC) was also filed over Respondent's unilateral increase in the premium share paid by Respondent's teachers. This charge was withdrawn on March 13, 2013.

practice here occurred on June 7, 2012, when Respondent unequivocally announced its intention to implement increases in the health insurance premiums paid by Charging Party's members effective July 1, 2012. I conclude, therefore, that the charge filed on June 21, 2012 was not premature.

Respondent's Duty to Bargain Over
Its Election Between Hard Cap and 80/20

Respondent asserts that the charge should be dismissed because its selection between the hard cap and 80/20 methods of complying with Act 152 was not a mandatory subject of bargaining. Respondent points to several aspects of Act 152 which, according to Respondent, make bargaining over an employer's selection of an option for complying with Act 152 highly impractical and/or indicate that the Legislature did not intend to require public employers to bargain over this issue. Respondent first points out that a public employer cannot elect the 80/20 option under §4 of Act 152 unless the majority of its governing body votes to adopt that option. That is, even if the parties agree at the bargaining table to a tentative collective bargaining agreement incorporating the 80/20 option, the agreement would not be allowed unless the majority of the employer's governing body also agreed. Second, it notes that both §3 and §4 of Act 152 give a public employer the discretion to allocate medical benefit plan costs among its employees as it sees fit; according to Respondent, this makes bargaining with any one union over the options for compliance problematical. Third, it points out that in order to opt out under §8, two-thirds of the public employer's governing body must vote each year to adopt this option. Thus, a public employer that entered into a collective bargaining agreement that required it to opt out of Act 152's requirements for longer than a single calendar year might be forced either to repudiate that agreement or endure the severe financial penalties for noncompliance with Act 152 if, during any year, it was unable to muster enough votes from its governing body to continue the opt out.

Charging Party maintains that Respondent had a duty to bargain over its election between the options available to it under Act 152. It relies primarily on the reasoning of ALJ Doyle O'Connor in his Decision and Recommended Order in *Decatur Pub Schs,* (Case Nos. C12 F-123/12-001178 and C12 F-124/12-001180) issued on December 12, 2012 and currently pending on exceptions before the Commission.

Although Act 152 went into effect in September 2011, ALJ O'Connor's December 2012 Decision and Recommended Order in *Decatur* was the first unfair labor practice decision to address the issue of a public employer's obligation to bargain under PERA in light of Act 152. [3] In *Decatur,* ALJ O'Connor concluded that Act 152 was clearly intended to apply to unionized employees. However, he concluded that the Legislature did not intend to eliminate the duty of public employers under PERA to bargain over health insurance issues, as indicated by the fact that in §5 it delayed implementation of Act 152's obligations as to employees covered by existing collective bargaining agreements until after these collective bargaining agreements

[3] Two other ALJ decisions on this issue have since been issued. On February 27, 2013, ALJ David Peltz issued a Decision and Recommended Order which was adopted by the Commission when no exceptions were filed. *Genesee Co et al,* 26 MPER 48 (2013). On May 31, 2013, I issued a Decision and Recommended Order in *Shelby Twp,* (Case C12 D-067/12-000635).

expired. He also concluded that the obligations of PERA and Act 152 could and should be reconciled, and undertook to do so. He concluded that a public employer continues to have a duty under PERA to bargain over health insurance and also to maintain existing conditions of employment after contract expiration. He held that this duty is excused only to the extent necessary to implement the changes required by Act 152. He concluded that, if a timely demand is made, an employer has a duty to bargain regarding the mechanism by which "Act 152's mandate will be accomplished," including the employer's choice among the options provided by the statute for complying with Act 152.

However, ALJ O'Connor also found that Act 152 clearly imposed a firm deadline for complying with that statute, and that employers have no obligation to secure the union's agreement before taking steps to comply with Act 152's deadline. He concluded that by imposing this deadline, the Legislature created what amounted to a statutorily imposed impasse over health insurance cost sharing. Although ALJ O'Connor did not explicitly conclude that the absence of a bargaining impasse on the contract as a whole did not affect an employer's right to implement increases to comply with Act 152, this conclusion is implicit in his finding that the Legislature in Act 152 imposed a firm deadline for complying with the statute. Finally, ALJ O'Connor concluded that in the event the parties had not reached agreement on an Act 152 option by the deadline set by the Legislature for compliance with that statute, an employer could lawfully implement the "hard cap" option, which he concluded was the "fall back" option under Act 152.[4]

ALJ O'Connor's decision in *Decatur* is pending on exception before the Commission. I assume that the Commission or the courts will eventually decide to what extent the Legislature intended in Act 152 to eliminate, restrict or change the duty of a public employer under PERA to bargain over health insurance cost sharing. I can only say that I find no reason to disagree with ALJ O'Connor's conclusion that the Legislature did not intend to entirely eliminate the duty of a public employer under PERA to bargain over the issue of health insurance cost sharing, which I find would be the effect of making the election of options for Act 152 compliance a nonmandatory subject. Had the Legislature intended this result, it could have amended §15 of PERA to make this issue a prohibited subject of bargaining, as it did with many other issues in 2011. Addressing the specific points raised by Respondent in this case, I note that while an employer cannot adopt the 80/20 option without a majority vote of its governing body, any collective bargaining agreement with health insurance cost sharing based on that option would normally have to be approved by that same majority. As for Respondent's argument that a public employer could not agree to a multi-year collective bargaining agreement with health insurance cost sharing based entirely on "opt-out," Act 152 does appear to make this type of agreement impractical. However, I conclude that the impracticality of this type of agreement is not a sufficient basis for eliminating a public employer's duty to bargain over health insurance cost sharing.

[4] Since in *Decatur*, as here, the employer adopted the hard cap option, ALJ O'Connor did not address the circumstances under which an employer could lawfully adopt the 80/20 option.

Effect of the Fact Finding Petition

Charging Party disagrees with ALJ O'Connor's conclusion that the employer in *Decatur* had the right to implement the hard cap option even though the parties in that case had not reached either agreement or impasse on the terms of a new contract. However, it argues that *Decatur* is nevertheless distinguishable on the basis that fact finding proceedings were not pending when the employer in *Decatur* implemented the insurance premium increases.

In *Wayne Co*, 1984 MERC Lab Op 1142 and 1985 MERC Lab Op 244, aff'd *AFSCME Council 25 v Wayne Co*, 152 Mich App 87 (1986), lv den 425 Mich 875 (1986), the Commission held that employers violate their duty to bargain in good faith by implementing unilateral changes in terms and conditions of employment after fact finding is initiated and before it has been completed and the parties have had a reasonable opportunity to bargain over the fact finder's recommendation. The Commission noted that fact finding was an integral part of the dispute resolution process provided by the Legislature for public employees and employers. It held that implementation by an employer of its final contract offer during fact finding circumvented this process since it obviously tended to forestall the possibility of reaching an agreement through fact finding. In *South Redford Sch Dist*, 1988 MERC Lab Op 447, 452, the Commission clarified *Wayne Co* by holding that an employer is required to refrain from implementing its last offer after a fact finding petition is filed, even if the parties had reached a good faith bargaining impasse before the petition was filed. Cf *Saginaw Co*, 16 MPER 45 (2003) (no exceptions) (employer was entitled to implement its last offer after previously informing the union of its intention to do so, even though the union filed a fact finding petition between these two events). The Commission recently reaffirmed these holdings in *Wayne Co*, 24 MPER 25 (2011).

Respondent argues that the Commission has the flexibility to adjust the adjudicative "rule" it announced in *Wayne Co.* It points out that the Court of Appeals in *Wayne Co* noted, at 152 Mich App 99, that the Commission might wish to work out in future proceedings the precise contours of the rules it had announced in that case. Respondent points out that since the employer's implementation of its bargaining offer during fact finding in *Wayne Co* was prompted by economic concerns, the employer's action in that case was discretionary. According to Respondent, in the instant case it was compelled, under threat of loss of state aid, to implement the changes it did at the time it did so. Respondent maintains that since the pending fact finding proceeding had absolutely no effect on the timing of its compliance with Act 152, it should not affect Respondent's ability to implement the premium increases mandated by that statute. Thus, it argues, an exception to the rule in *Wayne Co* must be allowed to permit an employer to comply with Act 152 even though a fact finding petition is pending.

Charging Party also quotes from the Court of Appeals decision in *Wayne Co*, noting that the Court found that case to involve a "significant principle of public sector labor law," at 90; that the inclusion of a fact finding procedure in PERA was intended to balance the fact that under PERA employees do not have the right to strike, at 96; and that the Legislature in drafting PERA was sensitive to the special role that public opinion plays in labor disputes in the public sector, at 96: and that the "commission's decision is consistent with the fundamental purpose of PERA, which is to create a balance between the public employer and the public employee in the matter

of labor-management relations in order to foster an equitable adjustment of interests and to ensure fundamental fairness to all concerned," at 98. Charging Party asserts that the prohibition against implementation during the pendency of s fact finding petition is a significant principle of collective bargaining law under PERA that should not be set aside. It also notes that the Legislature, when it adopts new legislation, is presumed to know the state of the existing law. Since the Legislature did not amend PERA when it adopted Act 152, Charging Party argues, it should be presumed to have understood that the Commission's rule in *Wayne Co* would preclude the implementation of Act 152 while a fact finding petition was pending. Finally, Charging Party argues that if the Department of Education had, in fact, imposed penalties against Respondent because of its failure to implement Act 152 in July 2012, the imposition of these penalties would have been subject to appeal as inconsistent with PERA.

Article IV, Section 48 of the Constitution of 1963 gives the Legislature the right to enact laws providing for the resolution of disputes concerning public employees. PERA was enacted by the Legislature under the authority of this article as the dominant law governing public employee labor relations. *Rockwell v Board of Ed of School Dist of Crestwood*, 393 Mich 616, 629-630 (1975). To the extent that provisions in other state statutes directly conflict with PERA, PERA has been held to take precedence. *Civil Service Commission for Wayne County v. Wayne County Bd. of Sup'rs*, 384 Mich 363, 373 (1971) (conflict between county civil service act, enacted before PERA, and obligation to bargain under PERA); *Local 1383 Intern Ass'n of Fire Fighters v. City of Warren*, 411 Mich 642, 663, (1981) (conflict between police and fire civil service act and duty to bargain under PERA). However, as Justice Williams stated in his concurring opinion in *Rockwell,* at 650-651:

> If the courts can by any fair, strict, or liberal construction find for the two provisions a reasonable field of operation, without destroying their evident intent and meaning, preserving the force of both, and construing them together in harmony with the whole course of legislation upon the subject it is their duty to do so. *Rathbun v State of Michigan*, 284 Mich 521, 544-545, (1938), quoting with approval from *State ex rel Ellis v .Givens*, 48 Fla 165, 174 (1904).

As ALJ O'Connor put it in *Decatur,* because PERA and Act 152 have overlapping purposes, they must be read in *pari materia* so that both statutes are given effect to the fullest extent possible.

The overriding goal of statutory interpretation is to ascertain and give effect to the Legislature's intent. *People v Lowe*, 484 Mich 718, 721, (2009); *People v Flick*, 487 Mich 1, 10-11, (2010). The touchstone of legislative intent is the statute's language. *People v Gardner,* 482 Mich 41, 50, (2008). As both parties appear to recognize, the issue here is to what extent the Legislature, when it adopted Act 152, intended to alter a public employer's duty to bargain under PERA as the Commission has interpreted it. Unlike the statutes in the cases discussed above in which PERA was held to take precedence, and similar cases cited in Charging Party's brief, in Act 152 the Legislature explicitly expressed its intent that this statute apply to employees who are members of collective bargaining units. Section 5 of Act 152 exempts groups of employees covered by collective bargaining agreements or other contracts in effect on the effective date of that act. However, there is no exemption in Act 152 for employees whose collective bargaining

representatives and employers are engaged in negotiating a new collective bargaining agreement on the effective date of the act. Section 3 of Act 152 unambiguously requires a public employer to comply with that section, "except as otherwise provided in this act," and both §§3 and 4 plainly set the beginning of the first "medical benefit plan coverage year" on or after January 1, 2012 as the deadline for the employer's compliance. I conclude that the Legislature's intent, as plainly expressed in Act 152, was to require a public employer to elect and implement one of the options provided in the statute by that deadline for all its nonexempt employees even if it was currently engaged in negotiating a new collective bargaining agreement with their bargaining representative and regardless of the status of these negotiations. Although the Legislature did not specifically amend PERA to accomplish this, I find that PERA should be construed to give effect to the Legislature's clearly expressed intent. Moreover, since Respondent was required to comply with Act 152 by the deadline, its implementation of premium share increases to comply with the statute was not "unilateral" action as that term is usually used.

I conclude that Respondent did not violate its duty to bargain in good faith under PERA by implementing the hard cap option for members of Charging Party's bargaining unit in July 2012, even though the parties were engaged in Commission-ordered fact finding at that time. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____