STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

TRAVERSE BAY INTERMEDIATE SCHOOL DISTRICT,
Public Employer-Respondent,

Case No. C12 G-130

-and-

TRAVERSE BAY AREA INTERMEDIATE SCHOOL DISTRICT
EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION, MEA/NEA,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Thrun Law Firm, by Kevin S. Harty, for Respondent

White, Schneider, Young and Chiodini, by Jeffrey S. Donahue and William C. Camp, for Charging Party

DECISION AND ORDER

On October 15, 2013, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Motion to Dismiss as Moot in the above matter finding that the charge, which alleged that Respondent, Traverse Bay Area Intermediate School District, violated §10(1)(a) and (e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(a) and (e), was moot, and that further proceedings on the charge were not warranted. The Decision and Recommended Order of the ALJ was served on the interested parties in accordance with § 16 of PERA. On November 6, 2013, Charging Party filed exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions. On November 14, 2013, Respondent filed a brief in support of the ALJ's Decision and Recommended Order.

In its exceptions, Charging Party contends the ALJ erred in (1) concluding that there were no circumstances requiring further proceedings, where the parties in reaching a new collective bargaining agreement did not agree to dismiss the unfair labor practice charge, and (2) concluding that the instant case did not involve questions of public policy that are likely to reoccur but evade judicial review. We have reviewed Charging Party's exceptions and find them to be without merit.

Factual Summary:

We adopt the facts regarding the underlying merits of this case as set forth fully in the ALJ's Decision and Recommended Order and repeat them only as necessary.

Charging Party Traverse Bay Area Intermediate School District Educational Support Personnel Association, MEA/NEA, represents a bargaining unit of Respondent's employees consisting of teacher assistants and paraprofessionals. The collective bargaining agreement applicable to this unit expired on June 30, 2012. Under Article 28.2 of the expired agreement, employees paid a ten percent share of the premium for their health insurance coverage, and Respondent paid a ninety percent share.

On September 27, 2011, Public Act 152 of 2011 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 eighty percent 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 who fail to comply with the requirements of Act 152 are subject to a substantial financial penalty under § 9.

On June 11, 2012, several months after Public Act 152 was passed in September 2011, Respondent informed Charging Party and the employees it represented that Respondent was implementing the hard cap option under Section 3 of PA 152, effective July 1, 2012.

Charging Party responded by filing the instant unfair labor practice charge alleging that Respondent breached its duty to maintain the status quo regarding terms and conditions of employment after the expiration of the collective bargaining agreement by implementing the hard cap option without any meaningful bargaining or reaching a good faith impasse on the issue of health insurance. Charging Party further alleged that, notwithstanding this, Respondent violated its duty to bargain by implementing the premium share increases before September 1, 2012. According to Charging Party, Article 28.2 of the collective bargaining agreement, and the established past practice of the parties, gave employees a vested right to continue to pay only ten percent of the premium until September 1, 2012.

Subsequent to this, the parties entered into a new collective bargaining agreement effective July 1, 2012. Article 28.2 of the 2012 agreement provided that "effective July 1 through December 31, 2012," Respondent's total monthly contribution for health insurance and health savings account deductibles would be equal to Respondent's "hard cap" amounts under Act 152.

Discussion and Conclusions of Law:

Respondent asserts that the unfair labor practice charge filed against it alleging a failure to bargain in good faith should be dismissed because, subsequent to its filing, the parties entered into a new collective bargaining agreement that embodies the insurance premium allocation terms that are at issue in the charge. Respondent contends that the instant charge should, therefore, be dismissed as moot.

"Mootness precludes the adjudication of a claim where the actual controversy no longer exists, such as where 'the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome,'" *Michigan Chiropractic Council v Comm'r of Ins*, 475 Mich 363, 371 n 15 (2006) (opinion of Young, J.), quoting *Los Angeles Co v Davis*, 440 US 625, 631 (1979) (internal citations omitted), or where a subsequent event renders it impossible to fashion a remedy. *In re Contempt of Dudzinski*, 257 Mich App 96, 112 (2003). See also *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112-113 (2002), clarified in part in *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 470-472 (2006); *People v Cathey*, 261 Mich App 506, 510 (2004); *Mead v Batchlor*, 435 Mich 480, 486 (1990). Mootness is a question which may be raised at any time. *Michigan Chiropractic Council*, supra.

In *City of Saginaw*, 1984 MERC Lab Op 104, the Commission noted that it has not hesitated to dismiss an unfair labor practice charge when "there is no longer a live controversy and the purposes of the Public Employment Relations Act have been effectuated in that a collective bargaining agreement has been reached between the parties." See also *Waterford Sch Dist*, 23 MPER 91 (2010) (no exceptions); *City of Bay City*, 22 MPER 60 (2009); and *Saginaw Ed Ass'n*, 1982 MERC Lab Op 100, at 105 (no exceptions). An otherwise moot issue may be reviewed, however, if it is deemed to be of public significance and is expected to recur while simultaneously likely to evade judicial review. *Wayne Co Int Sch Dist*, 1993 MERC Lab Op 317, 324; *Jackson Cmty Coll*, 1989 MERC Lab Op 913.

In the present case, Charging Party alleged that Respondent violated its duty to bargain in good faith when it implemented the hard cap option under Section 3 of PA 152 on July 1, 2012. Subsequent to this, however, the parties negotiated a collective bargaining agreement that specifically allocated insurance premium contributions in the manner Respondent unilaterally implemented previously and made this agreed upon allocation retroactive to July 1, 2012.

Charging Party argues that the instant case involves questions of public policy that are likely to recur but evade judicial review. The Commission, nonetheless, agrees with the ALJ that the scope of a public employer's duty to bargain over the implementation of health insurance premium increases in light of Act 152 was the issue in other cases pending before the Commission that have been resolved. As we explained in *Decatur Pub Sch*, 27 MPER 41 (2014):

> 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, PA 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.

See also *Shelby Township*, 28 MPER 21 (2014), and *City of Southfield*, 28 MPER ___ (Case Nos. C11 L-220, *et al*, issued November 18, 2014). Consequently, the instant case appears to involve settled law and does not involve a question of public policy that is likely to reoccur but evade judicial review.

In its exceptions, Charging Party also maintains that the parties have "a consistent practice of collecting the premium share from the Association's members during the school year and providing health insurance benefits to the Association's members through August 31st of each year." On this basis, Charging Party asserts that the instant agreement, unlike that involved in *Decatur*, extends beyond its designated expiration date. In *Macomb Co v AFSCME Council 25*, 494 Mich 65 (2013), however, the Michigan Supreme Court recently explained that a party seeking to overcome unambiguous contract language has an exceedingly high burden to meet. The Court held that the party that seeks to use evidence of practice to overcome an unambiguous collective bargaining agreement must present evidence establishing the parties' affirmative intent to revise the collective bargaining agreement and establish new terms or conditions of employment. *Macomb Co*, 494 Mich at 79. Moreover, the Court held that an arbitrator, not MERC, is ordinarily best equipped to decide whether a past practice has matured into a new term or condition of employment. *Macomb Co*, 494 Mich at 80. Any doubt about whether a subject matter is covered by the collective bargaining agreement should be resolved in favor of having the parties arbitrate the dispute.

In the present case, Charging Party has not met its burden under *Macomb Co*. Initially, the agreement unambiguously expired on June 30, 2012 and Charging Party has not presented evidence establishing the parties' affirmative intent to revise the collective bargaining agreement and establish new terms or conditions of employment. Furthermore, even if the past practice somehow supported Charging Party's position, the subject matter of this dispute is covered by the parties' agreement and an arbitrator, not the Commission, should decide whether any past practice has matured into a term or condition of employment that prohibits Respondent's actions as alleged by Charging Party.

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case. Accordingly, we agree with the ALJ that the charge in the instant case is moot and that further proceedings on the charge are not warranted. The ALJ's Decision and Recommended Order is affirmed.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: December 18, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

TRAVERSE BAY INTERMEDIATE SCHOOL DISTRICT,
Public Employer-Respondent,

Case No. C12 G-130
Docket No. 12-001191-MERC

-and-

TRAVERSE BAY AREA INTERMEDIATE SCHOOL DISTRICT
EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION, MEA/NEA,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Thrun Law Firm, by Kevin S. Harty, for Respondent

White, Schneider, Young and Chiodini, by Jeffrey S. Donahue, for Charging Party

DECISION AND RECOMMENDED ORDER ON MOTION TO DISMISS AS MOOT

On July 3, 2012, the Traverse Bay Area Intermediate School District Educational Support Personnel Association, MEA/NEA, filed the above charge with the Michigan Employment Relations Commission (the Commission) against the Traverse Bay Intermediate School District alleging that the Respondent violated §§10(1)(a) and (e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(10), by unilaterally implementing increases in the amounts of the insurance premium members of its bargaining unit were required to pay for their health insurance effective July 1, 2012. Pursuant to Section 16 of PERA, the charge was assigned for hearing to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System.

On this same date, the Traverse Bay Area Intermediate School District Education Association, MEA/NEA, filed a similar charge (Case No. C12 G-129/12-001190-MERC) against the Respondent. The two charges were consolidated for hearing.

During a telephone conference held on January 22, 2013, Respondent made an oral request that both charges be held in abeyance pending Commission review of a Decision and Recommended Order issued by Administrative Law Judge Doyle O'Connor in *Decatur Pub Schs*, Case Nos. C12 F-123/12-001178 and C12 F-124/12-001180. On February 20, 2013, Charging Party objected in writing to the request. Charging Party also withdrew allegations in both charges that Respondent had engaged in courses of conduct during contract negotiations

with both Charging Parties that evidenced a failure to bargain in good faith. On February 21, 2013, Respondent put its request that the charges be held in abeyance in writing. It also requested that the charge in Case No. C12 G-130 be dismissed as moot. On April 11, 2013, Charging Party filed written objections to the dismissal of this charge.

Based on facts set forth in the charge and pleadings and not in dispute, I make the following conclusion of law with respect to the charge in Case No. C12 G-130 and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge and Pertinent Facts:

Charging Party represents a bargaining unit of teacher assistants and paraprofessionals employed by Respondent. Respondent and Charging Party were parties to a collective bargaining agreement covering this unit with an expiration date of June 30, 2012. Under that agreement, Charging Party's members paid a ten percent share of the premium for their health insurance coverage, and Respondent paid a ninety percent share. During the 2011-2012 school year, unit employees received insurance provided through MESSA. MESSA's plan year runs from July 1 to July 1, and its rates renew annually on that date.

On June 11, 2012, Respondent announced that, effective July 1, 2012, members of the unit would be required to pay a higher share of the premium for their health insurance coverage because of the limitations imposed by the Publicly Funded Health Insurance Contribution Act, 2011 PA 152 (Act 152), MCL 15.561 et seq, on the amounts that Respondent could pay for its employees' health care. On July 1, 2012, Respondent implemented premium share contributions that were consistent with the so-called "hard cap" option contained in §3 of Act 152.

Some members of Charging Party's bargaining unit work during July and August and some do not. For employees working and receiving a paycheck in July and August, the additional premium contribution was deducted from their paycheck. Employees not receiving a paycheck in July and August were directed to send payment of the additional premium share to Respondent.

The unfair labor practice charge alleged that Respondent had a duty to maintain the status quo as to terms and conditions of employment, including employee premium contributions, after the expiration of the collective bargaining agreement until the parties reached a successor agreement or a good faith impasse. It alleged that Respondent violated its duty to bargain in good faith under PERA by implementing the "hard cap" without any meaningful bargaining or reaching a good faith impasse on the issue of health insurance. Alternatively, in paragraph G of its charge, it alleged that Respondent violated its duty to bargain in good faith by implementing the premium share increases before September 1, 2012. It asserted that Article 28.2 of the collective bargaining agreement, and the parties' established past practice, gave Charging Party's members a vested right to continue to pay only ten percent of the premium for the remainder of the summer of 2012, i.e., July and August 2012. Article 28.2 read:

> The Employer will provide up to full family health insurance on a 10% co-pay basis commencing July 1, 1999 for each teacher assistant and paraprofessional on

a twelve month basis whether they work during the summer or not and who is not otherwise covered by a better plan by another employer. [Sic]

Sometime after the charge was filed, the parties entered into a new collective bargaining agreement with an effective date of July 1, 2012. Article 28.2 of the new collective bargaining agreement explicitly provided that "effective July 1 through December 31, 2012," Respondent's total monthly contribution for health insurance and health savings account deductibles would be the amounts set forth in the agreement for each coverage category, which were Respondent's "hard cap" amounts under Act 152. The new collective bargaining agreement provided tha,t effective January 1, 2013, unit employees would be given the option to select one of three plans provided through Blue Cross/Blue Shield. Article 28.6 of the new agreement reaffirmed that Respondent would make premium and health savings account contributions as specified in the article for each eligible teacher assistant and paraprofessional on a twelve month basis whether they worked during the summer months or not, if they were not otherwise covered by a better plan by another employer. Article 28.6 concludes with this sentence "All amounts for which employees are responsible under this Article [in] excess of the Employer's contribution shall be payroll deducted from the compensation of the enrolled employee."

Discussion and Conclusions of Law:

Respondent asserts that the charge should be dismissed as moot because the new collective bargaining agreement removes any live controversy regarding either Respondent's right to unilaterally implement premium share increases consistent with the "hard cap" option under Act 152 or the appropriate date of this implementation, i.e. July 1, 2012. Charging Party disagrees that the charge is moot.

Both parties cite substantially the same case law, including *Waterford Sch Dist*, 23 MPER 91 (2010) (no exceptions); *Saginaw Ed Ass'n*, 1982 MERC Lab Op 100, 105 (no exceptions); and *City of Bay City*, 22 MPER 60 (2009). The doctrine of mootness, as applied to refusal to bargain charges under PERA, was nicely analyzed by ALJ David Peltz in *Waterford.* As he noted in that case, the doctrine of mootness precludes the adjudication of a claim where the actual controversy no longer exists, such as the where the issues presented are no longer live, the parties lack a legally cognitive interest in the outcome, or where a subsequent event renders it impossible to fashion a remedy. However, an otherwise moot issue may be reviewed if it is deemed to be of public significance and is likely to reoccur but evade judicial review.

The signing of a collective bargaining agreement after a charge is filed does not necessarily render the charge moot. However, if the signing of the agreement has substantially removed any effective remedy beyond a cease and desist order and notice posting, the circumstances should be assessed to determine whether public policy reasons warrant the issuance of a cease and desist order or whether the purposes of the Act have been effectuated by the signing of the agreement. Compare *Saginaw Ed Ass'n* and *Cass County Road Comm*, 1984 MERC Lab Op 306, 308.

Since the parties agreed in their successor collective bargaining agreement to the implementation of a hard cap contribution effective July 1, 2012, an order requiring Respondent

to make employees whole for the increased premium share they paid after July 1, 2012 would clearly not be appropriate. Moreover, I find nothing in the circumstances of this case to warrant further proceedings on this charge. In July 2012, both public employers and the unions representing their employees were struggling to interpret the scope of their obligations to bargain over health insurance in light of the recent, and unprecedented, limitations imposed by the legislature in Act 152. Adjudication of Charging Party's claims after the parties resolved the underlying issues in their contract might do more to rekindle tensions between the parties than to relieve them. See *City of Bay City*, 22 MPER 60 (2009). I also conclude that the issues in this case are not the type of moot issues which should be decided because they present questions of public policy that are likely to reoccur but evade judicial review. The scope of a public employer's duty to bargain over the implementation of health insurance premium increases in light of Act 152 is the issue in *Decatur Pub Schs* and other cases now pending before the Commission and presumably will be decided in those cases. The narrower issue raised by the charge – whether an employer's contractual promise to pay health insurance benefits at a level inconsistent with its obligations under Act 152 beyond the stated expiration date of the contract meant that the parties had an "existing contract" beyond that date within the meaning of §5 of Act 152 – is one not likely to reoccur since Act 152 precludes employers from entering into new agreements to pay benefits inconsistent with these obligations. I find that the charge in the instant case is moot, and that further proceedings on the charge are not warranted. Therefore, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: October 15, 2013