STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GARDEN CITY PUBLIC SCHOOLS,
Public Employer-Respondent,

Case No. C13 K-180
-and- Docket No. 13-015998-MERC

GARDEN CITY EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Miller, Canfield, Paddock and Stone, PLC, by Charles T. Oxender, for Respondent

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

DECISION AND ORDER ON RECONSIDERATION

On January 21, 2015, the Commission's Decision and Order was issued in this matter. On January 27, 2015, Charging Party expressed disagreement with language in that decision regarding the filing of Charging Party's response to exceptions and requested that the language be removed. Respondent has notified this Commission that it has no objection to the change requested by Charging Party. The language at issue has no effect on the outcome of the decision. Accordingly, based on our reconsideration of this matter, the January 21, 2015 decision is set aside and will not be published. The decision is hereby reissued as follows:

On April 25, 2014, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Summary Disposition in the above matter finding that Respondent Garden City Public Schools (Employer) violated § 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e), by unilaterally changing employee health insurance coverage during the term of its collective bargaining agreement with Charging Party Garden City Education Association, MEA/NEA (Union). The ALJ found that the parties' collective bargaining agreement contained unambiguous language with regard to specific health insurance coverage and that Respondent's actions were a repudiation of the contract. The ALJ recommended that we order Respondent to cease and desist from repudiating or unilaterally modifying the parties' collective bargaining agreement and to take certain affirmative action to make bargaining unit members whole. 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 to file exceptions, Respondent filed exceptions to the ALJ's Decision and Recommended Order on June 18, 2014. Charging Party requested and received an extension of time until July 31, 2014, to file its response to the exceptions.

In its exceptions, Respondent argues that Charging Party failed to state a claim upon which relief can be granted under PERA. Respondent contends that the ALJ erred in finding that Respondent repudiated its collective bargaining agreement. Respondent asserts that the dispute arose over the interpretation of contract language, and, therefore, it should be handled through the parties' grievance mechanism. Respondent further argues that the ALJ erred by finding that compliance with 2011 PA 152 is a permissive subject of bargaining, and contends that it is instead a prohibited subject of bargaining. Additionally, Respondent claims that the ALJ erred by not conducting an evidentiary hearing or offering the opportunity for oral argument in this matter, and by indicating in the Notice to Employees that the decision finding that Respondent committed an unfair labor practice was made after a public hearing in this matter.

We have reviewed Respondent's exceptions and find them to be without merit, except with regard to the Notice to Employees.

Factual Summary:

There are no material issues of fact in this case. We adopt the findings of fact as set forth in the ALJ's Decision and Recommended Order and will not repeat them here, except as necessary.

Public Act 152 of 2011, which became effective September 27, 2011, was enacted to limit public employers' expenditures for employee medical benefit plans. Section 3 of 2011 PA 152, MCL 15.563, sets specific dollar limits, referred to as "hard caps," on the amounts public employers can pay for employee medical benefit plans, commencing with medical benefit plan coverage years beginning on or after January 1, 2012. Upon majority vote of its governing body, a public employer may comply with the requirements of § 4 of PA 152 instead of § 3. Section 4, MCL 15.564, limits a public employer's share of healthcare costs to 80% of the total annual costs of all of the medical benefit plans it offers. Pursuant to § 5 of 2011 PA 152, MCL 15.565, §§ 3 and 4 do not apply where parties are covered by a collective bargaining agreement that was in effect prior to September 27, 2011, if that agreement is inconsistent with the terms of the Act. Section 5 also prohibits parties from entering into collective bargaining agreements after September 15, 2011, that contain terms inconsistent with the requirements of the Act. 2011 PA 152 provides sanctions for noncompliance. Public employers that fail to comply with the requirements of 2011 PA 152 are subject to a substantial financial penalty under § 9 of the Act.

Charging Party and Respondent are parties to a collective bargaining agreement that covered the period of September 1, 2011 through August 31, 2014[1]. Article IV(J) of the contract requires Respondent to provide group insurance coverage as specified in Schedule C, which states in relevant part:

> Hospitalization Insurance Coverage for Teachers, Dependent Spouses and/or Dependent Children
>
> Effective September 1, 2011, *all* members shall be enrolled in the Blue Cross/Blue Shield PPO 1 plan.
>
> Association members will contribute 20% toward health insurance premiums beginning January 1, 2012. The District and the Association agree that they will engage in future discussions to attempt to find ways to control health care costs.
>
> A $10/$40 prescription coverage co-pay for non-mail in prescriptions and a $10/$40 prescription coverage co-pay for mail-in prescriptions effective September 1, 2012 [sic].
> [Emphasis in original].

In December 2011, the majority of Respondent's board voted to adopt the 80% employer share option under § 4 of 2011 PA 152 for the 2012 calendar year. In December 2012, the board voted to continue the 80% employer share option for the 2013 calendar year, but to reconsider the options under 2011 PA 152 for 2014.

Charging Party and Respondent met in September 2013, to discuss possible methods to save on health insurance costs. Respondent requested proposals that would provide employees with the same benefits at a lower cost from Blue Cross\Blue Shield and, at Charging Party's request, from MESSA, the MEA's health insurance affiliate. Blue Cross/Blue Shield offered a proposal that gave employees a choice of three plans, each with different monthly premiums and different annual deductibles. Respondent concluded that adopting the Blue Cross proposal, which was less expensive than the MESSA proposal, would provide employees with health insurance coverage nearly identical to their current coverage while providing Respondent with considerable savings. In mid-November 2013, Respondent arranged to provide information to employees about the plans in the Blue Cross proposal. On November 21, 2013, Charging Party wrote to Respondent cautioning Respondent that changing to the Blue Cross proposal during the term of the parties' collective bargaining agreement would violate the contract and PERA. The next day, Charging Party notified Respondent that it was willing to discuss alternatives to the current health insurance plan, and if the parties were able to agree to a change in the benefits provided under their current contract, Charging Party would present a letter of agreement to its membership for ratification.

[1] According to Charging Party's Response to Show Cause Order and Reply to Respondent's Response to Show Cause Order, the collective bargaining agreement was ratified in 2012.

On November 27, 2013, Respondent notified employees that it was changing to the plans offered in the Blue Cross proposal that it had informed the employees about earlier that month. On December 2, 2013, Charging Party wrote to Respondent and cautioned the Employer that if its board changed its means of compliance with 2011 PA 152 from the 80% employer share option to the hard cap option, Charging Party would consider that to be a breach of collective bargaining agreement for which the Union would grieve and seek expedited arbitration. In that correspondence, Charging Party also warned Respondent that if the board proceeded to implement the hard caps, Charging Party would file an unfair labor practice charge. At a special meeting of Respondent's board on December 2, 2013, the board voted to implement the hard cap option for health insurance cost sharing in 2014. Within the next few days, Charging Party filed the unfair labor practice charge in this matter, and filed a grievance alleging a violation of the collective bargaining agreement. Charging Party subsequently demanded arbitration of the grievance.

On December 12, 2013, the ALJ issued an order requiring Respondent "to show cause, in writing, . . . why it should not be found to have violated its duty to bargain in good faith under § 10(1)(e) of PERA by repudiating and/or unilaterally modifying the parties' collective bargaining agreement during its term."

Respondent filed its response to the ALJ's order on January 21, 2014. In that response, Respondent set forth its arguments in defense of the charge and requested that the charge be dismissed with prejudice. Further, Respondent requested that an evidentiary hearing be provided if the charge was not dismissed. Respondent did not request oral argument. Attached to Respondent's response to the show cause order was an affidavit by its associate superintendent asserting that the change to the health care plans "will provide bargaining unit members with nearly identical benefit coverage, and a net savings to bargaining unit members, and will save this School District hundreds of thousands of dollars."

On February 11, 2014, Charging Party filed its Response to Show Cause Order and Reply to Respondent's Response to Show Cause Order. In that document, Charging Party asserted that the change in the health insurance plan increased employee costs and caused "a significant financial burden on the Association's members." Charging Party also attached an affidavit by the president of the Union asserting certain increased costs to bargaining unit members resulting from the change in insurance plans.

Finding no material issues of fact, the ALJ issued her Decision and Recommended Order on Summary Disposition on April 25, 2014.

Discussion and Conclusions of Law:

Repudiation Occurs in the Absence of a
Good Faith Dispute over Contract Interpretation

In its exceptions, Respondent argues that Charging Party failed to state a claim upon which relief can be granted under PERA. Respondent asserts that since the dispute arose over the interpretation of contract language, it should be handled through the parties' grievance

mechanism and not by MERC. Further, Respondent contends that the ALJ erred in finding that Respondent repudiated its collective bargaining agreement and asserts that there can be no repudiation where the parties have a bona fide dispute over contract interpretation. As Respondent indicates, repudiation exists only when both of the following occur: (1) the contract breach is substantial and has a significant impact on the bargaining unit;[2] and (2) no bona fide dispute over interpretation of the contract is involved. *City of Detroit*, 26 MPER 21 (2012); *Goodrich Area Sch*, 22 MPER 103 (2009). See e.g. *Gibraltar Sch Dist*, 18 MPER 20 (2005). Respondent is also correct that the Commission will not exercise jurisdiction over a *good faith* dispute over contract interpretation where, as here, the parties' contract provides a mandatory binding procedure for dispute resolution. *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 321-322; 550 NW2d 228, 236 (1996); *Eastern Michigan Univ*, 17 MPER 72 (2004). See e.g. *City of Royal Oak*, 23 MPER 107 (2010).

Contending that there is a bona fide dispute over contract interpretation in this case, Respondent points to *Thirty-First Circuit Court*, 19 MPER 40 (2006) (no exceptions) for support. However, in *Thirty-First Circuit Court*, the ALJ found that the contract language at issue was ambiguous and held, therefore, that there was a bona fide dispute over the interpretation of the contract language. In this case, unlike *Thirty-First Circuit Court*, Respondent has not shown that language in the parties' contract regarding health care coverage and health care cost sharing is unclear or ambiguous. A good faith dispute over contract interpretation exists where the provisions of the collective bargaining agreement cover the matter in dispute and where those provisions may reasonably be relied on for the actions taken by the parties. See, *City of Pontiac*, 26 MPER 30 (2012); *City of Royal Oak*, 23 MPER 107 (2010). In this case, however, Respondent has failed to identify any language in the parties' collective bargaining agreement on which it relies as the basis for its actions in making midterm modifications of the health care plan and the apportionment of health care costs specified in the contract.

Respondent contends that it "is providing the same health care benefit plan required in the [collective bargaining] agreement." However, Responded fails to point to anything in the collective bargaining agreement that would allow it to replace the Blue Cross/Blue Shield PPO 1 plan and other terms specified in Schedule C of the contract with the three plans identified in Respondent's November 27, 2013 letter to its employees.

We agree with the ALJ's finding that the language of Article IV(J) of the parties' collective bargaining agreement and Schedule C regarding Hospitalization Insurance Coverage for Teachers, Dependent Spouses and/or Dependent Children is unambiguous. Those provisions clearly require Respondent to provide Charging Party's members with a specific health insurance plan and specified prescription co-pays. The collective bargaining agreement also clearly sets employee costs at 20% of the premium for the life of the contract.

[2] The only factual dispute that is apparent from the record is the parties' disagreement over the affect that the change in health insurance plans and health care cost sharing has had on bargaining unit members. This factual dispute is not material because Respondent has not argued that the alleged contract breach is insubstantial or that it does not have a significant impact on the bargaining unit. Respondent's argument that the charge failed to state a claim upon which relief can be granted under PERA focuses solely on its contention that there is a bona fide dispute over the interpretation of contract language.

Respondent has failed to argue that the language of Article IV(J) or Schedule C is ambiguous or unclear.

Respondent further asserts that "by filing the grievance and demanding arbitration, the Union has conceded that there is a 'bona fide' dispute over the interpretation of the collective bargaining agreement." However, Respondent offers no legal authority to support this assertion. On the contrary, this is a case in which statutory and contractual issues overlap. Repudiation of a collective bargaining agreement may be a breach of contract remediable in arbitration and, at the same time, that repudiation may be a violation of the duty to bargain under PERA. See *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 321 (1996); *Detroit Fire Fighters Ass'n v Detroit*, 408 Mich 663, 293 NW2d 278 (1980).

Accordingly, we find no basis to conclude that the parties have a good faith dispute over contract interpretation that would preclude finding that Respondent violated its duty to bargain under PERA by repudiating the parties' collective bargaining agreement. Moreover, it is evident that Respondent has disregarded the terms of the parties' collective bargaining agreement by making unilateral changes to employee health insurance coverage and cost sharing during the term of the contract. Members of the bargaining unit represented by Charging Party had the right to rely upon the terms and conditions set forth in the parties' contract until it expired. *Detroit Bd of Ed*, 2000 MERC Lab Op 375, 377. Although Respondent sought to bargain over a mid-term modification of the contract, it could only lawfully modify the contract if the Union agreed to the changes. Respondent was obligated to obtain Charging Party's consent before making changes in the employees' insurance plan and in the employees' share of health care costs. See *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n*, 458 Mich 540, 552-553 (1998); *36th Dist Court*, 21 MPER 19 (2008), aff'd 3*6th Dist Court v Michigan AFSCME Council*, unpublished opinion per curiam of the Court of Appeals, issued September 29, 2009 (Docket No. 285123).

The collective bargaining agreement specified certain mandatory subjects of bargaining including: the amount of the premium employees would pay, the amount of their prescription co-pay, and the particular insurance plan. Respondent's unilateral change to these mandatory subjects of bargaining is a breach of its duty to bargain and an unfair labor practice in violation of § 10(1)(e) of PERA.

The Choice of Health Care Cost Sharing Options under 2011 PA 152 Is a Permissive Subject of Bargaining

Respondent further argues that the ALJ erred by finding that compliance with 2011 PA 152 is a permissive subject of bargaining, contending that it is instead a prohibited subject of bargaining. The ALJ correctly interpreted our decision in *Decatur Pub Sch*, 27 MPER 41 (2014) as indicating that a public employer's choice of options under 2011 PA 152 is a permissive subject of bargaining. There we explained:

> [W]hile 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.

> . . . Public 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. Public employers continue to have the duty to bargain over health care benefits and the costs of such benefits to the extent that the costs of those benefits are within the parameters of the public employer's choice of the options provided by PA 152.

Several months later, we issued our decision in *Shelby Twp*, 28 MPER 21 (2014). There we expressly held that the choice of cost sharing options under 2011 PA 152 is a permissive subject of bargaining.

Since the employer's choice of health care cost sharing options under 2011 PA 152 is a permissive subject of bargaining, Respondent did not have to bargain over whether health insurance cost sharing would be based on the 80% employer share option under § 4 or the hard caps under § 3 when it negotiated with Charging Party for the collective bargaining agreement that expired August 31, 2014. Although Respondent did not have to bargain over health care cost sharing options, it agreed to apply the 80% employer share option for the duration of the collective bargaining agreement. During the term of that agreement, Respondent decided that it would no longer comply with the 80% employer share option for health care cost sharing and repudiated that part of its agreement with Charging Party. Where parties have agreed on a permissive subject of bargaining, repudiation of that agreement by one of the parties is an unfair labor practice.

In *Kalamazoo Co & Kalamazoo Co Sheriff*, 22 MPER 94 (2009), we explained that parties are not required to bargain permissive subjects and may take unilateral action on permissive subjects in the absence of an agreement on the matter. However, when a permissive subject is embodied in an agreement, neither party may take unilateral action regarding the permissive subject. Further, we reasoned that when a permissive subject and a mandatory subject are intertwined, repudiation of the permissive subject is repudiation of the entire package. We went on to apply this same reasoning in *City of Roseville*, 23 MPER 55 (2010) and in *Oakland Univ*, 23 MPER 86 (2010). In *Oakland Univ*, we concluded that the employer engaged in an unfair labor practice when it repudiated a grievance settlement agreement in which it agreed to waive certain defenses to any future grievances asserting a violation of an article of the collective bargaining agreement covering a permissive subject of bargaining. On appeal, the Court of Appeals affirmed our finding that repudiation of an agreement regarding a permissive subject of bargaining is an unfair labor practice. *Oakland University Chapter, American Association of University Professors v Oakland University*, unpublished opinion per curiam of the Court of Appeals, issued February 9, 2012 (Docket No. 300680). The Court noted: "compromises that result in agreement provide stability to the parties' relationship and a degree of reliability to future interactions . . . . If settlements can be unilaterally revoked, both stability and the possibility of productive future discussions are undermined."

Here the choice of cost sharing options was included in the collective bargaining agreement. The parties to the contract and the employees covered by the contract have a right

to rely on the contract's terms. *Detroit Bd of Ed*, 2000 MERC Lab Op 375, 377. See also *Wayne Co Cmty Coll*, 20 MPER 59 (2007). The Respondent's unilateral change in the cost sharing options is a repudiation of the parties' agreement and a violation of Respondent's duty to bargain.

Public Employers Must Comply with Both 2011 PA 152 and PERA

Both *Decatur* and *Shelby Twp* involved parties whose contract had expired and were negotiating new agreements. In both cases, we stressed that the duty to bargain with respect to mandatory subjects of bargaining, such as health insurance cost sharing, does not conflict with the dictates of 2011 PA 152. In this case, the parties are bound by an existing contract that did not expire until August 31, 2014. When the parties ratified this agreement in 2012, 2011 PA 152 had already taken effect. Thus, the parties were prohibited by § 5 of that Act from entering into a collective bargaining agreement that contained terms inconsistent with the Act's requirements. The vote of Respondent's board to adopt the 80% employer share option under § 4 for the 2012 calendar year and its subsequent vote to adopt the 80% employer share option for the 2013 calendar year further indicates an intent to comply with 2011 PA 152. It is also evident that the language in the parties' agreement providing that employees would pay 20% of the health care premium costs was in contemplation of compliance with § 4.

Despite the language of the collective bargaining agreement, Respondent contends that its board could lawfully vote to change the cost sharing options from the 80% employer share under § 4 to the hard caps under § 3 for the 2014 calendar year. Any changes to the cost sharing options during the term of the contract requires compliance with both PERA and 2011 PA 152. As we indicated in *Decatur*:

> 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. PA 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 PA 152 was passed, PA 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. .

Respondent contends that 2011 PA 152 sets the hard caps under § 3 as the default option and requires that the majority of a public employer's board annually approve implementation of the 80% employer share under § 4 before the employer can implement the 80 % employer share. 2011 PA 152 does require an annual vote by the employer's board in favor of approval of the 80% employer share. This annual board vote reflects a decision by

the employer and, in this case, is within Respondent's control. Respondent met that requirement in each of the first two years of the collective bargaining agreement. However, prior to the 2014 calendar year, Respondent's board chose not to continue the 80% employer share option for 2014. By entering into a three year contract that required the health care costs to be shared based on an 80/20 division, Respondent agreed that its board would annually approve implementation of the 80% employer share option throughout the period covered by the contract. We agree with the ALJ that by not voting to approve the 80% employer share option for 2014, Respondent's board chose to repudiate its obligations under the parties' collective bargaining agreement and breached its duty to bargain in good faith.

In *Decatur* and *Shelby Twp*, we discussed the timeliness requirement of 2011 PA 152 and how, in certain circumstances, it may act as an exception to particular aspects of the duty to bargain under PERA. In those two cases, to comply with 2011 PA 152, the employer was required to implement health care cost sharing measures by a certain deadline. When the parties were unable to reach agreement by that deadline, the employer was permitted to implement health care cost sharing within the parameters of the cost sharing option under 2011 PA 152 that it chose. That exception to the employer's duty to bargain was made because the employer would most likely have been in violation of 2011 PA 152 had strict adherence to bargaining requirements been maintained. No such exception is necessary in this case since Respondent complied with 2011 PA 152 when it chose the 80% employer share option for calendar years 2012 and 2013. Respondent has failed to indicate any reason why it would be unable to comply with 2011 PA 152 by voting to apply the 80% employer share option for the 2014 calendar year.

Summary Disposition Is Appropriate Where There Is No Dispute over Material Facts

Additionally, Respondent contends that the ALJ erred by not conducting an evidentiary hearing or offering the opportunity for oral argument in this matter, and by indicating in the Notice to Employees that the decision finding that Respondent committed an unfair labor practice was made after a public hearing.

We find merit to Respondent's contention that the ALJ erred by indicating in the Notice to Employees that her decision was made after a public hearing. Since there was no hearing in this matter, the ALJ erred by so indicating in the Notice to Employees. Accordingly, the Notice to Employees that is attached to this decision does not indicate that our decision was made after a public hearing.

We find no merit in Respondent's assertion that it was erroneously denied an evidentiary hearing. Rule 165 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.165 authorizes the ALJ to summarily dispose of the case in appropriate circumstances and states:

> The commission or *administrative law judge* designated by the commission may, on its own motion or on a motion by any party, order dismissal of a

> charge or issue a ruling in favor of the charging party. The motion may be made any time before or during the hearing. (Emphasis added.)

We also look to *Smith v Lansing Sch Dist*, 428 Mich 248, 250-251, 255-259 (1987) for guidance on the issue of whether the Administrative Procedures Act, MCL 24.201 – 24.328, requires an evidentiary hearing to be held. In *Smith,* at 257, the Supreme Court said:

> We agree with appellants that § 72(3) [of the APA] does not require a full evidentiary hearing when, for purposes of the proceeding in question, all alleged facts are taken as true. That is, we construe that portion of § 72(3) to require affording the opportunity to present evidence on issues of fact only when such issues exist.

In its brief in support of its exceptions, Respondent states: "the District asserts that in this case where the facts are contested, an evidentiary hearing is required to provide the District with its due process rights." A mere claim that there are disputed facts is insufficient to justify an evidentiary hearing. If facts are disputed, it is up to Respondent to assert the facts that it claims support its defense to the charge. The ALJ's show cause order clearly indicated that a decision recommending that the Commission grant summary disposition would be issued without a hearing if there is no genuine issue of material fact and a party is entitled to summary disposition as a matter of law. To avoid summary disposition, Respondent had to assert disputed material facts that supported its defense to the charge. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237, 507 NW2d 741, 743 (1993). However, neither Respondent's brief on exceptions nor Respondent's response to the ALJ's Show Cause Order identifies any material facts that are disputed by the parties. As indicated above in the factual summary section of this decision, there are no material issues of fact in this case. Thus, the decision in this matter depends purely on the resolution of issues of law. Therefore, an evidentiary hearing is neither necessary nor appropriate. Inasmuch as there are no material facts in dispute, summary disposition is proper. *Quinto v Cross and Peters Co*, 451 Mich 358, 362-363 (1996).

Respondent contends that the ALJ erred by deciding the case "without offering at least the opportunity for oral argument." Section 72(3) of the Administrative Procedures Act (APA), MCL 24.272(3), states: "The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact." MERC's application of that language was interpreted in *Smith*, at 259. There, the Supreme Court held that parties must be given an opportunity to present oral argument in opposing summary disposition. MERC has promulgated procedural rules to ensure compliance with that directive. Rule 161(4) of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.161(4) provides:

> Unless otherwise ordered by the commission or administrative law judge, all motions made before or after hearing shall be ruled upon without notice or oral argument. A request for oral argument may be made by the moving party by separate statement at the end of the motion as filed, or by an opposing party by a separate pleading filed within 10 days after service of the motion, or within

any other period as designated by the commission or administrative law judge designated by the commission.

Respondent had the opportunity to present oral argument. To take advantage of the opportunity for oral argument, Respondent was required to submit a request for oral argument along with its written argument in response to the ALJ's order to show cause. By failing to request oral argument at that time, Respondent agreed to have the ALJ decide the issues that were before her based on the documents contained in the record. *Wayne Co*, 24 MPER 25 (2011) aff'd *Wayne Co v AFSCME Council 25*, unpublished opinion per curiam of the Court of Appeals, issued February 13, 2014 (Docket No. 303672); *Teamsters State, County & Municipal Workers, Local 214*, 16 MPER 8 (2003). Since Respondent chose not to request oral argument, Respondent waived its right to oral argument.

We have also considered all other arguments that were timely submitted by the parties and conclude that they would not change the result in this case. In accordance with the conclusions of law set forth above, we affirm the ALJ's Decision and Recommended Order and issue the following order:

ORDER

IT IS HEREBY ORDERED the Commission Decision issued in this matter on January 21, 2015, is set aside and will not be published. It is further 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: February 11, 2015

NOTICE TO EMPLOYEES

THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **GARDEN CITY 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 repudiate or unilaterally modify our collective bargaining agreement with Charging Party Garden City Education Association, MEA/NEA, by ceasing to offer Blue Cross PPO 1 health insurance plan coverage to members of the Charging Party's bargaining unit and pay 80% of the premium for this coverage.

WE WILL restore Blue Cross PPO 1 coverage as an option for unit members, and pay 80% of the premium for those unit members who elect this plan, for the remainder of the term of the collective bargaining agreement expiring August 31, 2014 or until an agreement is reached with Charging Party to modify the collective bargaining agreement.

WE WILL make members of the unit whole for monetary losses incurred as a result of Respondent's unilateral modification/repudiation of Article IV (J) of the contract, plus interest on these sums at the statutory rate of five per cent per annum, computed quarterly.

As a public employer under the PERA, we are obligated to bargain in good faith with representatives selected by the majority of our employees with respect to rates of pay, hours of employment or other terms and conditions of employment. This obligation includes the duty to refrain from altering the terms of an existing collective bargaining agreement covering wages, hours or working conditions without the consent of the union.

GARDEN CITY 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. C13 K-180/13-015998-MERC

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

GARDEN CITY PUBLIC SCHOOLS,
Public Employer-Respondent,

Case No. C13 K-180
Docket No. 13-015998-MERC

-and-

GARDEN CITY EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Miller Canfield, by Charles T. Oxender, for Respondent

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

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

On December 4, 2013, the Garden City Education Association, MEA/NEA, filed the above charge with the Michigan Employment Relations Commission (the Commission) against the Garden City Public Schools. The charge alleges that Respondent violated §§10(1)(a), (c) and (e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1) by repudiating its collective bargaining agreement with Charging Party and retaliating against Charging Party's members because Charging Party threatened to file a grievance over the repudiation. Pursuant to Section 16 of PERA, the charge was assigned to Administrative Law Judge Julia C. Stern from the Michigan Administrative Hearing System. Based on facts set forth in the charge and in the pleadings and not in dispute, 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 certificated and/or professional personnel employed by Respondent. A collective bargaining agreement is currently in effect for this unit. Charging Party asserts that this agreement, as discussed below, explicitly requires Respondent to provide all unit members with a specific health care plan, Blue Cross/Blue Shield PPO 1, and to pay 80% of the cost of the premium for that plan for the life of the contract. It alleges that Respondent repudiated the parties' collective bargaining agreement by changing the health care plan options available to employees effective January 1, 2014 and eliminating Blue Cross/Blue

Shield PPO 1 as an option for members of its unit. It also asserts that Respondent repudiated this agreement when, on or about December 2, 2013, its school board voted to adopted the "hard cap," or §3 option, for complying with the Publicly Funded Health Insurance Contribution Act, 2011 PA 152 (Act 152), MCL 15.561 et seq, for its 2014 medical benefit plan coverage year instead of the "80% employer share" or §4 option. Finally, Charging Party alleges that Respondent violated §10(1)(c) of PERA by changing the default selection – the plan in which employees would be enrolled if they did not complete a new enrollment form by a certain date – to a plan with lesser benefits after Charging Party announced its intention to file a grievance over the change.

On December 12, 2013, I issued an order to Respondent to show cause why it should not be found to have violated its duty to bargain in good faith by repudiating and/or unilaterally modifying the parties' collective bargaining agreement during its term.[3] On January 21, 2014, Respondent filed a response to the order to show cause. Respondent points out that the issue of health insurance is covered by the contract and that the parties' collective bargaining agreement contains a grievance procedure providing for binding arbitration. It asserts that the charge should be dismissed on the grounds that the Commission is not the appropriate forum for the resolution of the parties' dispute under these circumstances. Respondent also asserts that it did not repudiate the collective bargaining agreement and that the parties have a bona fide dispute over contract interpretation.

On the same date that Respondent filed its response to the order to show cause, January 21, 2014, the Commission issued its decision in *Decatur Pub Schs*, 27 MPER 41 (2014). In *Decatur*, the Commission held, contrary to the finding of Administrative Law Judge Doyle O'Connor, that an employer has no duty to bargain under PERA over its discretionary choice between the hard cap option of §3 and the 80% employer share option of §4 of Act 152. By email dated February 4, 2014, I asked the parties whether they wished to address the impact of *Decatur* on the instant charge. Respondent indicated that it did not wish to do so. However, on February 11, 2014, Charging Party filed a pleading which addressed both the impact of *Decatur* and the arguments raised by Respondent in its response to my order to show cause.

Facts:

The current collective bargaining agreement was effective September 1, 2011 and expires on August 31, 2014. This agreement provides, in Article IV (J), that Respondent is to provide "such group insurance coverage as indicated in Schedule C." Schedule C of the agreement states, in pertinent part:

[3] The order to show cause did not address Charging Party's allegation that Respondent unlawfully retaliated against unit employees for Charging Party's threat to file a grievance by changing the default plan into which they would be placed if they did not select a new plan. According to the charge, on December 3, 2013, Respondent sent employees a reminder that they needed to sign up for a new plan which stated that the default selection was the Simply Blue high deductible plan. However, none of the documents attached to the pleadings establish whether the default selection had previously been another plan or, if so, when the change occurred. Because the relief sought by Charging Party for the alleged violations of §§10(1)(c) and 10(1)(e) are essentially the same, I have severed the allegations. The §10(1)(c) allegation has been given new case numbers, C13 K-181A/14-005141-MERC. If not withdrawn by Charging Party, this charge will be set for hearing. The Decision and Recommended Order addresses only the §10(1)(e) allegation.

Hospitalization Insurance Coverage for Teachers, Dependent Spouses and/or Dependent Children

Effective September 1, 2011, *all* members shall be enrolled in the Blue Cross/Blue Shield PPO 1 plan.

Association members will contribute 20% toward health insurance premiums beginning January 1, 2012. The District and the Association agree that they will engage in future discussions to attempt to find ways to control health care costs.

A $10/$40 prescription coverage co-pay for non-mail in prescriptions and a $10/40 prescription coverage co-pay for mail-in prescriptions effective September 1, 2012 [sic]. [Emphasis in original].

The 2011-2014 collective bargaining agreement includes a grievance procedure culminating in binding arbitration.

Act 152 was adopted by the Legislature and given immediate effect on September 27, 2011. On December 16, 2011, a majority of Respondent's school board voted to adopt the 80% employer cost sharing option for complying with Act 152 through December 31, 2012, and to implement the hard cap option beginning January 1, 2013. However, on December 10, 2012, the Board voted not to implement the hard cap option for 2013, but to reconsider it again for 2014 based on Respondent's financial status.

In both December 2011 and December 2012, §§3 and 4 of Act 152 read as follows:

Sec. 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.

> Sec. 4. (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. For purposes of this subsection, total annual costs includes the premium or illustrative rate of the medical benefit plan and all employer payments for reimbursement of co-pays, deductibles, and payments into health savings accounts, flexible spending accounts, or similar accounts used for health care but does not include beneficiary-paid copayments, coinsurance, deductibles, other out-of-pocket expenses, other service-related fees that are assessed to the coverage beneficiary, or beneficiary payments into health savings accounts, flexible spending accounts, or similar accounts used for health care. Each elected public official who participates in a medical benefit plan offered by a public employer shall be required to pay 20% or more of the total annual costs of that plan. 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.

In 2013 PA 271, effective December 30, 2013, the Legislature amended both §3 and §4 of PERA. The first sentence of §4 now reads, "By a majority vote of its governing body each year, prior to the beginning of the medical benefit plan coverage year, 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."

After the student count date at the beginning of the 2013-2014 school year, Respondent discovered that it had lost more students, and had approximately $500,000 less in revenue, than it had budgeted for. In September 2013, Respondent met with Charging Party to discuss possible ways to save money through a different health plan structure. Respondent asked its health insurance carrier, Blue Cross\Blue Shield, for proposals which would provide employees with the same benefits at a lower cost to both the employees and Respondent. At Charging Party's request, Respondent also agreed to accept a proposal from MESSA, the MEA's health insurance affiliate. Blue Cross/Blue Shield presented Respondent with a proposal under which employees would have a choice of three plans, each with different monthly premiums and different annual deductibles. The third plan, a high deductible plan, included Respondent contributions to employee health savings accounts. The cost of MESSA's proposal was 10% higher than the Blue Cross proposal. Respondent concluded that adopting the Blue Cross proposal would provide unit members with benefit coverage nearly identical to their current coverage while saving Respondent hundreds of thousands of dollars per year.

Sometime around the middle of November 2013, Respondent arranged for its health care consultant to meet with unit employees to explain the plans in the Blue Cross proposal. On

November 21, 2013, Charging Party's Uniserv director wrote an email to Respondent's associate superintendent stating that he had heard that Respondent was considering unilaterally changing the health care plan for Charging Party's members, effective January 1, 2014, and also changing from the 80% employer share option to the hard cap option. The email stated that taking these actions without Charging Party's agreement would violate both the collective bargaining agreement and PERA. The following day, Charging Party's local union president sent an email to the associate superintendent stating that Charging Party was willing to sit down and discuss options to the current health care plan, and, if the parties could agree to modify the current negotiated benefits, to present a letter of agreement to its membership for ratification.

On November 27, 2013, Respondent sent the following memo to its employees, including the members of Charging Party's unit.

> The District has elected to move to the fully insured Blue Cross Blue Shield plan presented last week by Gallagher Benefits. The BCBA plan will offer three options to those employees currently eligible for health care through the district. The first plan is essentially identical to the plan you currently have. Under a hard-cap, however, the monthly premium for this plan would be significantly more expensive than the current rate. A second plan will offer the same coverage with a lower monthly premium but higher deductibles. A third offering is a high deductible plan called Simply Blue, and this plan was discussed at the high school.
>
> The Simply Blue plan has a $0 monthly premium for employees, provides a 10/60/60 prescription drug co-pay and provides savings the district will be able to pass on to employees the first year, allowing us to "seed" employee Health Savings Accounts (HSA) to offset the cost of the deductibles. As such, throughout the first year under the plan, the district will make deposits to those individual accounts for persons who qualify for and open an HSA. In January and July deposits will be made into eligible HAS's for a total of:
>
> Single: $77
>
> 2 Person: $1,064
>
> Full Family: $1,156
>
> Representatives will meet soon in the buildings with all health care benefit employees to personally sign you up for an appropriate plan. We are confident you will be pleased with the coverage and appreciate your patience with these adjustments. [Emphasis added.]

On December 2, counsel for Charging Party sent a letter to Respondent's counsel that included the following:

> Despite the clear, unambiguous language of the collective bargaining agreement, we have been advised the Board is contemplating a unilateral change to the "hard cap," modifying the contribution of Association members, as well as a unilateral change in the health insurance plan. Further, the Board, through its administration, has advised members of the Association of the imminent change in plans and has advised them of their obligation to sign up for the new medical plan during the week of December 1.
>
> It is the position of the Association that if the Board carries out its intended action tonight, the imposition of this unilateral change in health insurance coverage is a flagrant violation of clear contract language. In light of this blatant disregard of the collective bargaining agreement, it is our intention to immediately file a grievance and seek expedited arbitration pursuant to the Rules of the American Arbitration Association.

The letter also warned Respondent that if its Board carried out this action, Charging Party intended to file an unfair labor practice charge as well.

A special meeting of Respondent's Board was held on December 2, 2013. At this meeting, Respondent's superintendent presented the Board with a resolution to "elect to comply with the requirements of the Publicly Funded Health Insurance Contribution Act and vote to implement the hard cap model of Public Act 152 beginning January 1, 2014." In a supporting memo to the Board, the superintendent recommended that the Board elect to move to the hard cap based on the current financial status of the district. She also noted that administrators had explored "a variety of healthcare options that mitigate membership healthcare expenses." The Board adopted the resolution at its December 2 meeting.

On December 4, 2013, Charging Party filed this unfair labor practice charge. On December 7, 2013, Charging Party filed a grievance alleging a violation of Article IV (J) of the collective bargaining agreement. On December 20, 2013, it made a demand for arbitration of the grievance.

Respondent's January 21, 2014 response to my order to show cause included an affidavit from its associate superintendent stating that Respondent's structural change to the health care plans provided bargaining unit members with "nearly identical benefit coverage, and a net savings to bargaining unit members." In its reply to this response, Charging Party included an affidavit from its president stating that many unit members had reported to her that the cost of their regular prescriptions and/or regular required medical treatments had increased substantially after the implementation of the new health care plans on January 1, 2014. The affidavit gave ten specific examples of employees who had experienced cost increases and what these cost increases were. It did not indicate which of the three new plans these employees had selected or what premiums they paid after January 1.

Discussion and Conclusions of Law:

Respondent asserts that the charge fails to state a claim under PERA because the parties' dispute is "covered by" a provision in a collective bargaining agreement which includes a grievance procedure ending in binding arbitration. Respondent cites *Macomb Co v AFSCME Council 25,* 494 Mich 65, 70, (2013), for the proposition that, under these circumstances, "the details and enforceability of the provision are to be left to arbitration." Respondent maintains that when Charging Party filed a grievance asserting that Respondent violated Article IV (J) of the contract, Charging Party conceded that the parties' dispute was covered by the contract and that an arbitrator, and not the Commission, had jurisdiction.

The above statement by the *Macomb Co* Court was a direct quote from an earlier Supreme Court decision, *Port Huron EA v Port Huron Area Sch Dist,* 452 Mich 309 at 321. (1996). In *Port Huron,* the Court said:

> In cases in which statutory and contractual issues overlap, the MERC, like the NLRB, must often review the contract to determine whether there is a statutory violation. The MERC does not involve itself with contract interpretation when the agreement provides a grievance process that culminates in arbitration. *Sanilac Co Bd. of Comm'rs v. Sanilac Co Employees*, 1993 MERC Lab Op 750, 755; *Police Officers Ass'n of Michigan v. Romulus*, 1992 MERC Lab Op 170. When the unfair labor charge is the failure to bargain, however, it is often necessary for the MERC, like the NLRB, to review the terms of an agreement to ascertain whether a party has breached its statutory duty to bargain. See *Detroit Fire Fighters Ass'n v Detroit*, 408 Mich 663, 293 NW2d 278 (1980); Edwards, *Deferral to arbitration and waiver of the duty to bargain: A possible way out of everlasting confusion at the NLRB,* 46 Ohio St LJ 23, 24 (1985) (describing a similar requirement for the NLRB). In reviewing an agreement for any PERA violation, the MERC's initial charge is to determine whether the agreement "covers" the dispute. If the term or condition in dispute is "covered" by the agreement, the details and enforceability of the provision are left to arbitration.

Subsequent to the *Port Huron* decision, the Supreme Court held, in *St Clair Intermediate School Dist v Intermediate Educ Association/Michigan Educ Ass'n,* 458 Mich 540 (1998), that a mid-term modification of a collective bargaining agreement by either party without negotiation and agreement by the other party constitutes a violation of a party's duty to bargain in good faith and an unfair labor practice under PERA. In reaching this conclusion, the *St Clair* Court, at 567, cited *Port Huron* for the principle that when a matter is covered by a collective bargaining agreement, the parties have created a set of enforceable rules for themselves. The Court stated, in fn 32:

> If the mandatory term is contained in the contract, neither party is free to modify it unless the party desiring the modification continues the existing agreement in full force and effect until its expiration date, and neither party is required to discuss or agree to any modification of the terms and conditions in a contract for a fixed period if the modification sought is to be made effective under the existing

contract. During the life of the contract, neither party may alter the contractual terms without consent.

Health insurance benefits, including the carrier and plan, have long been held to constitute mandatory subjects of bargaining under PERA. See *Houghton Lake Ed Assn,* 109 Mich App 1, 7 (1981). In *Decatur,* as indicated by the excerpt quoted below, the Commission reaffirmed that health care benefits and the costs of such benefits to employees continue to be mandatory bargaining subjects, to the extent that the costs of these benefits are within the parameters of the public employer's choice of the options provided by Act 152.

The Commission has held that a mid-term modification of the collective bargaining agreement without the agreement of the other party is an unfair labor practice even though the collective bargaining agreement contains a grievance procedure which provides an alternate remedy and the charging party has filed a grievance. See *36th District Court,* 21 MPER 19 (2008). The Commission has also held that a party's repudiation of a collective bargaining agreement is an unfair labor practice even though the agreement contains a grievance procedure and the party filing the unfair labor practice charge has also filed a grievance. See *Detroit Regional Convention Center,* 25 MPER 8 (2011).

The Commission has consistently held, however, that ordinary contract breaches do not constitute unfair labor practices. As it has frequently stated, to constitute "repudiation," a contract breach must be an attempt to rewrite the parties' contract, a refusal to acknowledge its existence, or a complete disregard for the contract as written. *36th District Court; Central Michigan Univ,* 1997 MERC Lab Op 501; *Redford Twp Bd of Ed,* 1992 MERC Lab Op 894. For the Commission to find an unlawful repudiation, the contract breach must be substantial and have a significant impact on the bargaining unit, and there must be no bona fide dispute over the contract language. *Plymouth-Canton Cmty Schs,* 1984 MERC Lab Op 894, 897.

In *Macomb,* the Commission held that an employer's unilateral change in the mortality table used by its retirement system to calculate optional joint and survivor pension benefits constituted an unfair labor practice because of the parties' tacit agreement to use a different table over a succession of collective bargaining agreements, despite the existence of a dispute between the parties over whether use of this mortality table conflicted with language in the retirement ordinance incorporated into the collective bargaining agreements. The Supreme Court concluded that the language in the ordinance unambiguously conflicted with the past practice. Accordingly, it held that the Commission's finding that the parties' tacit agreement to use the mortality table had amended the language of the ordinance/contract was not consistent with the Court's holding in *Port Huron,* at 312, that when there is an unambiguous provision in a collective bargaining agreement, a charging party must show that the parties had a meeting of the minds on an agreement to modify the contract language.

The charging parties in *Macomb* did not allege that the change in the mortality table constituted an unlawful mid-term modification to or repudiation of their contracts. The Macomb Court did not discuss either *St Clair Intermediate Sch Dist* or the long line of Commission cases in which repudiation of a collective bargaining agreement has been held to constitute an unfair labor practice. Despite the phrase from that decision quoted by Respondent, I conclude that

Macomb did not overrule these cases or preclude the Commission from finding an unfair labor practice based on a mid-term modification or repudiation of a term of a collective bargaining agreement. That is, nothing in *Macomb* suggests that a party can, consistent with its obligation to bargain in good faith, simply ignore a clear and unambiguous contract provision even if the contract contains a grievance procedure ending in binding arbitration.

Respondent denies that it repudiated or modified the terms of its collective bargaining agreement with Charging Party. It asserts that the parties have a legitimate dispute over the meaning of the collective bargaining agreement. In explanation, it asserts that it is "providing the same level of health care benefits required by the agreement, while exercising the requirement of state law to reduce employee's [sic] contributions to health care costs." However, the contract in this case does not, as some collective bargaining agreements do, allow Respondent to provide either a specific health care plan or equivalent coverage. I find that Article IV (J) unambiguously requires Respondent to provide Charging Party's members with a specific health insurance plan, Blue Cross PPO 1, with specified prescription co-pays, for the life of the contract. I also find that Respondent has not shown that there is a bona fide dispute over whether the collective bargaining agreement requires this.

I find the contract language requiring Respondent to pay 80% of the premium for the Blue Cross PPO 1 plan to be equally unambiguous. However, *Decatur* raises the question of whether this contract language is enforceable. I note, first, that the decision of Respondent's Board to elect the hard cap option, rather than the 80% employer share, is not strictly at issue here. That is, the collective bargaining agreement requires Respondent to pay 80% of a determinable amount – the cost of Blue Cross PPO 1 coverage for members of Charging Party's unit – for the term of the agreement. As long as Respondent complies with the language of the collective bargaining agreement, its method of complying with Act 152 has no impact on its duty to bargain. However, the documents attached to the parties' pleadings, including the November 27, 2013 memo Respondent sent to employees about the new plans, indicate that when Respondent's Board elected the hard cap option, it did so with the knowledge that it could not continue to pay 80% of the cost of Blue Cross PPO 1 coverage, with the prescription rider as provided in the contract. Rather, both the adoption of the hard cap option and the implementation of the three new health care plan options were integral to Respondent's plan to reduce its health insurance costs. The December 2, 2013 vote of the Board, therefore, was an explicit rejection of Article IV (J) of the collective bargaining agreement.

A public employer has no duty to bargain over prohibited or illegal subjects of bargaining and contract provisions covering these are not enforceable. As the Commission confirmed in *Decatur*, both health care benefits and the cost of these benefits to employees, within the parameters imposed by Act 152, remain mandatory subjects of bargaining. However, if an employer's selection of its option for complying with Act 152 is a prohibited or illegal subject of bargaining, it would seem to follow that an employer that can no longer comply with a contractual obligation because it has exercised its right to select a different Act 152 option is not guilty of violating its duty to bargain in good faith.

As noted above, the Commission held in *Decatur* that the decision of a public employer's governing body to choose the option by which it will comply with Act 152 is not a

mandatory subject of bargaining. In concluding in *Decatur* that the selection of the option for complying with Act 152 is not a mandatory subject of bargaining, the Commission reasoned as follows:

> 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.
>
> Accordingly, we agree with Respondent's argument that the ALJ erred by finding that the choice between the hard caps and 80% employer share is a mandatory subject of bargaining. Public 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. Public employers continue to have the duty to bargain over health care benefits and the costs of such benefits to the extent that the costs of those benefits are within the parameters of the public employer's choice of the options provided by PA 152. However, the public employer's choice of the options under PA 152 is a policy decision to be made by the public employer. [Emphasis added.]

The employers in *Decatur*, unlike Respondent, had not agreed to a contract provision impacting the employers' choice of their Act 152 option. Since it did not matter, for purposes of the decision, whether this choice is a permissive or an illegal/prohibited subject, the Commission did not make a specific finding on this issue.

The distinction is important here, however, since the Commission has found employers guilty of violating their duty to bargain in good faith under PERA by unilaterally repudiating terms of bargained for agreement covering permissive topics. In *Kalamazoo Co*, 22 MPER 94 (2009), and *City of Roseville*, 23 MPER 55 (2010), the Commission, distinguishing *Allied Chemical & Alkali Workers of America v Pittsburgh Plate Glass Co*, 404 US 157 (1971), the Commission held that where permissive and mandatory subjects are intertwined, to refuse to find a violation of the duty to bargain would leave little distinction between a permissive subject of bargaining and an illegal or prohibited subject. It concluded that to permit an employer to unilaterally renege on an agreement containing both mandatory and permissive topics would seriously undermine the stability and reliability of agreements that is a goal of good faith bargaining. Here, Respondent agreed in its contract to pay 80% of the premium for a specific Blue Cross plan, an agreement that in this case required it to adopt the 80% employer share

option. If Respondent's choice of an Act 152 option was a permissive rather than prohibited subject of bargaining, its repudiation of its contractual obligation was, I conclude, a violation of its duty to bargain in good faith under these cases.

In *Decatur,* the Commission concluded that a public employer's choice of options for complying with Act 152 is fundamentally a policy decision to be made by the employer. However, it also stated that public employers "may bargain" over the option for complying with Act 152. The fact that the Commission used the term "bargain," rather than "discuss," suggests that the Commission recognized an employer's selection of an Act 152 option to be a permissive subject on which the parties can reach a binding agreement. A contractual agreement that requires a public employer to elect the 80% share option does, of course, present practical difficulties for the employer. For example, under Act 152 a majority of the public employer's governing body must vote each year of the contract to adopt that option, and it must adopt that option for all of its employees and not just those covered by the union contract. These difficulties, are, however, for the parties to resolve within the confines of their bargaining obligations under PERA. I conclude that if a public employer agrees to a contract provision that requires it to elect the 80% employer share option, its repudiation of that commitment is inconsistent with its duty to bargain in good faith. In accord with this conclusion, I find that Respondent unlawfully repudiated its collective bargaining agreement with Charging Party and/or unlawfully modified the term of the existing agreement both by ceasing to offer Blue Cross PPO 1 coverage to Charging Party's members effective January 1, 2014 and by failing to paying 80% of the premium for this coverage. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Garden City Public Schools, its officers and agents, are hereby ordered to:

1. Cease and desist from repudiating or unilaterally modifying during its term its collective bargaining agreement with Charging Party Garden City Education Association, MEA/NEA, by ceasing to offer Blue Cross PPO 1 health insurance plan coverage to members of the Charging Party's bargaining unit and pay 80% of the premium for this coverage.

2. Restore the above plan as an option for unit members, and pay 80% of the premium for those unit members who elect this plan, for the remainder of the term of the collective bargaining agreement expiring August 31, 2014 or until an agreement is reached with Charging Party to modify the collective bargaining agreement.

3. Make members of the unit whole for monetary losses incurred as a result of Respondent's unilateral modification/repudiation of Article IV (J) of the contract, plus interest on these sums at the statutory rate of five per cent per annum, computed quarterly.

4. Post the attached notice on Respondent's premises in places where notices to employees are customarily posted for a period of thirty consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: April 25, 2014

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **GARDEN CITY 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 repudiate or unilaterally modify our collective bargaining agreement with Charging Party Garden City Education Association, MEA/NEA, by ceasing to offer Blue Cross PPO 1 health insurance plan coverage to members of the Charging Party's bargaining unit and pay 80% of the premium for this coverage.

WE WILL restore Blue Cross PPO 1 coverage as an option for unit members, and pay 80% of the premium for those unit members who elect this plan, for the remainder of the term of the collective bargaining agreement expiring August 31, 2014 or until an agreement is reached with Charging Party to modify the collective bargaining agreement.

WE WILL make members of the unit whole for monetary losses incurred as a result of Respondent's unilateral modification/repudiation of Article IV (J) of the contract, plus interest on these sums at the statutory rate of five per cent per annum, computed quarterly.

As a public employer under the PERA, we are obligated to bargain in good faith with representatives selected by the majority of our employees with respect to rates of pay, hours of employment or other terms and conditions of employment. This obligation includes the duty to refrain from altering the terms of an existing collective bargaining agreement covering wages, hours or working conditions without the consent of the union.

GARDEN CITY 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. C13 K-180/13-015998-MERC