STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

BOARD OF EDUCATION OF THE
CAPAC COMMUNITY SCHOOLS,
Public Employer-Respondent,

Case No. C13 C-038
-and- Docket No. 13-000275-MERC

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

APPEARANCES:

Fletcher, Fealko, Shoudy & Francis, P.C., by Gary A. Fletcher, for Respondent

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

DECISION AND ORDER

On December 4, 2014, Administrative Law Judge (ALJ) Travis Calderwood issued his Decision and Recommended Order in the above matter finding that Respondent, the Board of Education of Capac Community Schools (Employer), violated § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 by increasing employee health care costs in its effort to comply with the requirements of the Publicly Funded Health Insurance Contribution Act, 2011 PA 152 (Act 152), MCL 15.561-15.569. The ALJ concluded that Respondent and Charging Party, Capac Education Association, MEA/NEA (Union), were bound by a provision in their collective bargaining agreement that set the increase in the employees' share of health care costs at ten dollars per pay after the contract expired and until a successor agreement was reached. The ALJ determined that Respondent was not subject to the requirements of the health care cost sharing options under Act 152 until the entire contract expired and that by prematurely implementing the requirements of Act 152, Respondent repudiated the aforementioned provision in its contract with Charging Party and violated § 10(1)(e) of PERA. The Decision and Recommended Order of the ALJ was served on the interested parties in accordance with § 16 of PERA.

After requesting and receiving an extension of time, Respondent filed its exceptions and brief in support of exceptions of the ALJ's Decision and Recommended Order on

January 22, 2015. After being granted an extension of time, Charging Party filed its brief in support of the ALJ's Decision and Recommended Order on March 3, 2015.

In its exceptions, Respondent argues that the ALJ erred by concluding that it violated PERA by implementing the 80% employer health care cost sharing option under § 4 of Act 152 before the parties reached agreement on a new collective bargaining agreement. Respondent contends that the insurance protection provision of the party's collective bargaining agreement did not create a separate contractual obligation because the provision can apply only in the absence of a successor agreement. Respondent also asserts that the ALJ's failure to rely on the Michigan Department of Treasury's Memorandum regarding Act 152 was inconsistent with past Commission decisions, which recognize the role of the Department of Treasury in enforcing the penalty provisions of Act 152.

Charging Party contends that language of the parties' collective bargaining agreement barred the implementation of Act 152. In its brief in support of the ALJ's Decision and Recommended Order, Charging Party argues that the ALJ's findings were based on applicable law and should be affirmed.

We have reviewed Respondent's exceptions and find they have merit

Factual Summary:

We adopt the findings of fact as set forth in the ALJ's Decision and Recommended Order based on the parties' stipulation, and will not repeat them here, except as necessary. Charging Party and Respondent entered into a collective bargaining agreement effective May 3, 2010. The contract expired August 20, 2012. Article XXII of that contract, entitled Insurance Protection, set forth provisions governing the parties' agreement on health insurance and various other insurance benefits for employees. It provides in relevant part:

> During the 2011-12 school year, employees will have a deductible fo [sic] $200 for single subscriber, and $400 for full family. Additionally, employees will make a premium contribution for their first 21 pays of:
>
> - $25 per pay, if MESSA rates increase up to 11% from the previous year
> - $30 per pay, if MESSA rates increase from 11.01% to 17% from previous year.
> - $35 per pay, if MESSA rates increase from 17.01 to 22% from previous year.
> - $40 per pay, if MESSA rates increase over 22.01% from previous year.
>
> Absent a successor agreement, CEA members will pay an additional premium contribution of $10 per pay.

The parties began negotiations for a successor agreement on February 12, 2012. On June 20, 2012, Charging Party's UniServ Director provided Respondent with a letter stating that the employer may not unilaterally impose a 20% employee health care contribution at contract expiration and cautioned that such action would be an unfair labor practice. According to the parties' stipulation: "The letter pointed to contract language from the collective bargaining agreement not yet expired at the time, which she [the UniServ Director] asserted established the status quo for insurance contributions after contract expiration." The letter is the only communication from Charging Party to Respondent on this issue. Charging Party contends the letter constitutes a demand to bargain. Respondent contends that the letter cannot reasonably be construed as a demand to bargain.

On June 28, 2012, Respondent passed a resolution providing that the Employer would not pay more than 80% of the annual costs of all medical benefit plans pursuant to Act 152. Upon expiration of the collective bargaining agreement, Respondent imposed the 80% limit on the Employer's share of health care costs beginning September 1, 2012. Subsequently, according to the parties' stipulation: "Upon the expiration of the collective bargaining agreement between the parties, the District imposed the 80% limitation set forth in Exhibit 2, commencing on September 1, 2012." This resulted in an increase of healthcare premium costs for employees to 20% of costs. As a result, Charging Party filed the unfair labor practice charge in this matter.

Discussion and Conclusions of Law:

The Publicly Funded Health Insurance Contribution Act, 2011 PA 152, which became effective September 27, 2011, 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 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 Act 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 27, 2011, that contain terms inconsistent with the requirements of the Act. Act 152 provides sanctions for noncompliance. Public employers that fail to comply with the requirements of Act 152 are subject to a substantial financial penalty under § 9 of the Act.

We first examined the relationship between PERA and Act 152 in *Decatur Pub Sch*[1], where we found no conflict between the two acts. We stated:

1 27 MPER 41; 2014 WL 637037.

> Although both statutes [PERA and Act 152] may have a bearing on certain benefits provided by public employers to their employees as compensation, the commonality ends there. PERA sets forth the circumstances under which public employers must bargain with the representatives of their employees over compensation and other terms and conditions of employment. 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.

In reviewing our decision in *Decatur Pub Sch,*[2] the Court of Appeals explained[3]:

> [B]oth PA 152 and PERA concern, at least to some degree, the subject of health insurance benefits for public employees. This Court should attempt to construe the statutes so as to avoid a conflict. . . . As noted, in the past, our Supreme Court has held that when PERA conflicts with another statute, PERA, as the predominant law in the field of public employee relations, prevails. (Citations omitted.)

While recognizing PERA's predominance in cases of conflict with other statutes, in its affirmance of our decision in *Decatur*, the Court went on to agree that Act 152 and PERA do not conflict with respect to collective bargaining rights, stating:[4]

> PA 152 and PERA do not contain conflicting provisions as to collective bargaining rights. Rather, the statutes and their respective mandates can be read to coincide with one another. As noted, PA 152 simply sets limits an employer may not exceed when paying for health care contributions. . . . Therefore, PA 152 and PERA can be read so as not to conflict, and can be reconciled with one another.

Further, the *Decatur* Court noted: "PA 152 expressly recognizes the right of collective bargaining, as it mandates that the limits not take effect until *after* the expiration of a CBA in the event that the existing CBA contained terms that were inconsistent with the limits prescribed in the statute. See MCL 15.565(1)."

Section 5 of Act 152, as adopted, provided[5]:

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2 27 MPER 41; 2014 WL 637037,

3 *Decatur Pub Sch v Van Buren Co Educ Ass'n,* ___Mich App___; 28 MPER 67 (2015); 2015 WL 1477849

4 *Id.*

5 Act 152 was amended December 30, 2013. The amendment to § 5 clarified that September 27, 2011, is the date on and after which a new contract must comply with the Act. Other changes to § 5 made by that amendment have no effect on this matter.

(1) If a collective bargaining agreement or other contract that is inconsistent with sections 3 and 4 is in effect for a group of employees of a public employer on the effective date of this act, the requirements of section 3 or 4 do not apply to that group of employees until the contract expires. A public employer's expenditures for medical benefit plans under a collective bargaining agreement or other contract described in this subsection shall be excluded from calculation of the public employer's maximum payment under section 4. The requirements of sections 3 and 4 apply to any extension or renewal of the contract.
(2) A collective bargaining agreement or other contract that is executed on or after September 15, 2011 shall not include terms that are inconsistent with the requirements of sections 3 and 4.

The collective bargaining agreement between the parties went into effect May 3, 2010, well over a year before the enactment of Act 152. Therefore, pursuant to § 5, the requirements of §§ 3 and 4 of Act 152 do not apply to the Employer's health care expenditures until the expiration of the parties' contract. The parties' collective bargaining agreement expired August 20, 2012. It was Respondent's obligation to implement such changes as were necessary to ensure its compliance with Act 152 at the point the contract expired. We note that, in affirming our decision in *Decatur Pub Sch*,[6] the Court of Appeals[7] held:

> Moreover, PA 152 is clear that, upon expiration of the existing CBA, a public employer is to comply with the statute. Indeed, the limits imposed by either the hard caps or the 80/20 plan came into play at the expiration of the previous CBA. See MCL 15.565(1) (explaining that, in the event the public employer and its employees were parties to a CBA, the limits imposed on employer health care contributions "do not apply . . . *until* the contract expires). The word "until" means "up to the time that or when[.]" *Random House Webster's College Dictionary* (2005). Thus, a public employer's ability to delay implementation of the limits imposed by PA 152 lasted "up to the time that or when" the CBA expired, but no longer. See MCL 15.565(5).

In its exceptions, Respondent argues in support of the State Treasurer's role in enforcing Act 152 and states: "In *Decatur Public Schools*, the Commission confirmed the importance of the State Treasurer's role in PFHICA by holding "inasmuch as it is up to the state treasurer to enforce PA 152, we will not presume to determine how [MCL 15.569] should be interpreted." Based on that language, Respondent contends that the ALJ erred in

6 27 MPER 41; 2014 WL 637037.
7 *Decatur Pub Sch v Van Buren Co Educ Ass'n*, ___Mich App___; 28 MPER 67 (2015); 2015 WL 1477849.

failing to consider the portions of the Department of Treasury's Frequently Asked Questions on the Treasury Department's website at Q8-6 and A8-6. [8]:

Section 9 of Act 152, MCL 15.569, sets forth the penalties that may be applied by the State Treasurer if a public employer fails to comply with Act 152. In *Decatur*, we were hesitant to interpret Act 152's penalty language, which is solely within the jurisdiction of the State Treasurer, with respect to an issue where both parties' positions could be considered reasonable. In *Decatur*, the reasonableness of the respondent's actions dictated whether the respondent breached its duty to bargain in good faith. See also *Shelby Twp*, 28 MPER 21 (2014). In this matter, § 9 of Act 152 has no bearing on our responsibility to determine whether the public employer repudiated the parties' contract. The question before us is whether the parties' collective bargaining agreement was repudiated.

Although we are not bound by the Department of Treasury's publications, the information Treasury has provided to the general public may be of assistance when we consider the effect of Act 152 on a respondent's duty to bargain. *Id*. We do not always agree that the Department of Treasury's views of the requirements of Act 152 are consistent with the requirements of PERA.[9] However, in this case, we agree with Respondent that the ALJ erred by failing to give due consideration to the following portions of the Department of Treasury's Frequently Asked Questions:

> Q8-6. A collective bargaining agreement (CBA) expired in December 2012. In the CBA, there was a separate moratorium agreement on health care costs and premiums until December 31, 2013. Does the public employer need to comply with the requirements of the Act, as of January 1, 2013, for the group of employees covered by the moratorium under the expired CBA?
>
> A8-6. Yes. The public employer would need to comply with the Act for a medical benefit plan coverage year beginning after the CBA expired in December 2012. Section 5 of the Act (MCL 15.565) directs that if a CBA or other contract that is inconsistent with the Act is in effect for 1 or more employees of a public employer on September 27, 2011, the requirements of the Act do not apply to an employee covered by that contract until the contract expires. Thus, the public employer did not

8 State of Michigan Department of Treasury, 2011 Public Act 152: Publicly Funded Health Insurance Contribution Act (MCL 15.561 – 15.569), as amended by 2013 Public Acts numbered 269 through 273, Frequently Asked Questions, updated, April 3, 2015.

9 See, for example, the Department of Treasury's Frequently Asked Questions Q8-4 and A8-4, which indicate that where an employer and union have a three year contract providing that health care cost sharing will be on an 80/20 basis under § 4 of Act 152, the employer must apply the hard caps for years of that contract in which the majority of the employer's board does not vote to continue to apply the 80% employer share option under § 4. Our decision in *Garden City Pub Sch*, 28 MPER 63 (2015), held, to the contrary, that the employer breached its duty to bargain when it did not continue to apply the 80% employer share option under § 4. We concluded that by agreeing to a three-year contract providing that health care cost sharing would be on an 80/20 basis, the employer obligated its board majority to adopt the 80% employer share option for each year of the collective bargaining agreement.

> need to comply with the Act until after the CBA expired in December 2012. The expired CBA's provision that there is a moratorium or postponement of action on health care costs and premiums until December 31, 2013, does not constitute a CBA.

The collective bargaining agreement in this matter expired August 20, 2012. It was Respondent's obligation to implement such changes as were necessary to ensure its compliance with Act 152 at the point the contract expired. Respondent did not have a duty to bargain over its choice of options under Act 152 and was entitled to choose whether it would implement the hard caps under § 3 of Act 152 or the 80% employer share option under § 4. By requiring employees to pay 20% of the health care costs, Respondent was merely acting in compliance with Act 152. Respondent's actions in requiring employees to pay 20% of healthcare costs beginning September 1, 2012, did not breach the Employer's duty to bargain.

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case. Therefore, for the foregoing reasons we reverse the ALJ's decision and enter the following order.

ORDER

The charge in this case is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: July 28, 2015

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

BOARD OF EDUCATION OF THE
CAPAC COMMUNITY SCHOOLS,
Respondent-Public Employer, Case No. C13 C-038
-and- Docket No. 13-000275-MERC

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

APPEARANCES:

Fletcher Fealko Shoudy & Francis, P.C., by Gary A. Fletcher, for the Public Employer

White, Schneider, Young & Chiodini, P.C., by Jeffrey S. Donahue and William C. Camp, for the Labor Organization

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On February 28, 2013, the Capac Education Association, MEA/NEA (the Union or Charging Party) filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against the Board of Education of the Capac Community Schools (the Board or Respondent) under §10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. Pursuant to Section 16 of PERA, MCL 423.216, this case was assigned to Administrative Law Judge (ALJ) Travis Calderwood, of the Michigan Administrative Hearing System (MAHS), and acting on behalf of the Commission.

Based on the pleadings, stipulated facts of the parties and the record as a whole as set forth below, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge and Procedural History:

Charging Party filed this unfair labor practice charge on February 28, 2013, alleging that Respondent violated Section 10(1)(e) of PERA, MCL 423.210(1)(e), by engaging in bad faith bargaining during contract negotiations and by implementing a 20% employee health care contribution on September 1, 2012. Charging Party alleges that the September 1, 2012, implementation of the cost sharing violated the agreed upon status quo between the parties

established in the 2010-2012 collective bargaining agreement that expired on August 20, 2012. To support its claim, Charging Party relies upon language contained within the collective bargaining agreement which states, "absent a successor agreement, [Association] members will pay an additional premium contribution of $10 per pay."

Initially this matter was assigned to ALJ Doyle O'Conner, who on March 7, 2013, issued a Complaint and Notice of Hearing together with a copy of his recent Decision and Recommended Order in *Decatur Schools,* Case Nos. C12 F-123 and C12 F-124, which had been issued on December 20, 2012. In the accompanying correspondence, ALJ O'Connor recognized that "[b]ased on the alleged contractual limitation on post-expiration increases, the analysis in that Decision may not be relevant to this dispute."

On March 29, 2013, Respondent filed an answer denying that it had engaged in bad faith bargaining or that the September 1, 2012, implementation of the 20% employee health care contribution violated the status quo.

On May 31, 2013, following discussions between the parties and ALJ O'Connor, Charging Party agreed to withdraw its claim that Respondent had engaged in bad faith bargaining during contract negotiations for a successor agreement. Additionally, both parties, in the interest of judicial economy, agreed to forego an evidentiary hearing, stipulate to facts, submit briefs, and allow the ALJ to render a decision on the record as developed.

On August 14, 2013, the parties submitted Stipulated Facts and agreed to a briefing schedule requiring initial briefs to be filed by September 9, 2013, and response briefs to be filed by September 23, 2013.

On September 9, 2013, ALJ O'Connor provided notice to the parties that he was retiring and that this matter would be reassigned to one of the other two remaining ALJ's; ultimately ALJ David M. Peltz. ALJ Peltz put this matter on hold in light of the then pending Commission review of ALJ O'Connor's Decision and Recommended Order in *Decatur Public Schools.* On January 21, 2014, the Commission issued its Decision and Order in *Decatur Public Schools,* 27 MPER 41 (2014). ALJ Peltz provided notice to the parties of the Commission's decision in *Decatur* and directed Charging Party to determine whether that decision was dispositive with regard to some or all of its claims. Charging Party responded on March 12, 2014; Respondent on April 2, 2014. On April 4, 2014, the parties were provided notice that this matter was reassigned to ALJ Calderwood.

Public Act 152 of 2011:

At the center of this dispute is the Publicly Funded Health Care Expenditure Act, Public Act 152 of 2011, MCL 15.561 *et seq,* as amended (PA 152). PA 152 limits the total health care expenditure made by any public employer on behalf of all of its employees. The Act does so by providing two "cap" options for the employer to choose from. Section 3 of 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 choose to comply with the requirements of Section 4 of PA 152 instead of Section 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. A violation of PA 152 can result in a significant financial penalty. In the case of a public school employer, Section 9, MCL 15.569, provides that the "department of education shall assess the public employer a penalty equal to 10% of each payment of any funds for which the public employer qualifies under the state school aid act... during the period that the public employer fails to comply with this act."

Section 5 of PA 152, provides a grandfather clause for collective bargaining agreements or other contracts in effect prior to the Act's effective date. MCL 15.565. That section, as originally enacted in Public Act 152 of 2011, provided in its entirety:

> Sec. 5. (1) If a collective bargaining agreement or other contract that is inconsistent with sections 3 and 4 is in effect for a group of employees of a public employer on the effective date of this act, the requirements of section 3 or 4 do not apply to that group of employees until the contract expires. A public employer's expenditures for medical benefit plans under a collective bargaining agreement or other contract described in this subsection shall be excluded from calculation of the public employer's maximum payment under section 4. The requirements of sections 3 and 4 apply to any extension or renewal of the contract.

Section 5 of PA 152 was amended by Public Act 272 of 2013, in order to clarify the Act's effective date. That Section now provides in its entirety:

> Sec. 5. (1) If a collective bargaining agreement or other contract that is inconsistent with sections 3 and 4 is in effect for 1 or more employees of a public employer on September 27, 2011, the requirements of section 3 or 4 do not apply to an employee covered by that contract until the contract expires. A public employer's expenditures for medical benefit plans under a collective bargaining agreement or other contract described in this subsection shall be excluded from calculation of the public employer's maximum payment under section 4. The requirements of sections 3 and 4 apply to any extension or renewal of the contract.
>
> (2) A collective bargaining agreement or other contract that is executed on or after September 27, 2011 shall not include terms that are inconsistent with the requirements of sections 3 and 4. MCL 15.565

The Legislature, when it enacted Public Act 272, included the statement that, "[t]his amendatory act clarifies the original intent of the legislature that September 27, 2011 is the date on and after which a new contract must comply with this act. This amendatory act is curative and applies retroactively."

Findings of Fact:

The parties stipulated as follows:

On May 3, 2010, Charging Party and Respondent entered into a collective bargaining agreement ("CBA") which according to the parties, expired on August 20, 2012. That contract, as provided by Article I, covered:

> All professional, non-supervisory personnel employed by [the] Board, including speech therapists, psychologists, social workers, vocational education teachers, department heads, and librarians, but excluding superintendents, principals, assistant principals, all other supervisors and other employees.

Article XXII of the 2010-2012 CBA, entitled Insurance Protection, set forth the insurance options available to Charging Party's members together with the amount of cost sharing required. The relevant portion of that article read as follows:

> During the 2011-12 school year, employees will have a deductible fo [sic] $200 for single subscriber, and $400 for full family. Additionally, employees will make a premium contribution for their first 21 pays of:
>
> - $25 per pay, if MESSA rates increase up to 11% from the previous year
> - $30 per pay, if MESSA rates increase from 11.01% to 17% from previous year.
> - $35 per pay, if MESSA rates increase from 17.01 to 22% from previous year.
> - $40 per pay, if MESSA rates increase over 22.01% from previous year.
>
> Absent a successor agreement, CEA members will pay an additional premium contribution of $10 per pay.

The phrase "absent a successor agreement, CEA members will pay an additional premium contribution of $10 per pay" was not a part of the CBA prior to the 2010-2012 agreement.

On February 15, 2012, the parties began negotiating for a successor agreement to the 2010-2012 CBA. On June 20, 2012, MEA UniServ Director, Michele Israel, presented the Respondent with a letter in which she stated that Respondent may not unilaterally impose the 20% employee health care contribution provided for by PA 152 upon the 2010-2012 CBA's expiration. The letter made reference to the principle that an "employer must maintain the status quo after contract expiration until there is a new agreement or a legitimate impasse in bargaining." Ms. Israel's letter went on to cite the language of Article XXII of the 2010-2012 CBA, which stated "absent a successor agreement, CEA members will pay an additional premium contribution of $10 per pay."

On June 28, 2012, Respondent's Board of Education passed a resolution electing to comply with the 80/20 cap as provided in Section 4 of PA 152. On September 1, 2012, the collective bargaining agreement between the parties expired and Respondent imposed the 80% contribution limitation.

In addition to the above stipulation of facts by the parties, Respondent provided an undated Michigan Department of Treasury ("Treasury") Guidance Memo that addressed "Frequently Asked Questions" on PA 152. Question 8-1 of that Memo states:

> Q8-1. A) Can a public employer choose to have one collective bargaining unit fall under Section 3 of the Act (MCL 15.563) and another collective bargaining unit fall under Section 4 of the Act (MCL 15.564)?
>
> B) Can subdivisions of collective bargaining units fall under different sections?
>
> A8-1. A) No. Section 4(2) of the Act (MCL 15.564(2)) provides that when a public employer has elected to have Section 4 of the Act (MCL 15.564) apply (if a public employer elects the 80/20 percentage requirement, then it must pass a resolution each year), it shall pay not more than 80% of the total annual costs of "all of the medical benefit plans" it offers or contributes to. The implication of this language is that an election to comply with Section 4 of the Act (MCL 15.564) (rather than Section 3 of the Act (MCL 15.563)) affects all of the public employer's medical benefit plans (if it has more than one). Section 4(2) of the Act (MCL 15.564(2)) also provides that where the public employer elects to comply with Section 4 of the Act (MCL 15.564), any elected public official who participates in "a medical benefit plan" offered by the public employer must pay at least 20% of the total annual plan costs. Again, this language implicates that an election to comply with Section 4 of the Act (MCL 15.564) affects all of the public employer's medical benefit plans.
>
> B) No. Subdivisions of collective bargaining units cannot fall under different sections.

Additionally, I must take judicial notice of the subsequent revisions of the Treasury Memo. The Treasury Memo was updated on June 10, 2014, to include the following question and answer:[10]

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10 The Treasury Memo was updated again on August 21, 2014. Both Q8-1 and Q8-6, and their respective answers remained unchanged from previous versions.

Q8-6. A collective bargaining agreement (CBA) expired in December 2012. In the CBA, there was a separate moratorium agreement on health care costs and premiums until December 31, 2013. Does the public employer need to comply with the requirements of the Act, as of January 1, 2013, for the group of employees covered by the moratorium under the expired CBA?

A8-6. Yes. The public employer would need to comply with the Act for a medical benefit plan coverage year beginning after the CBA expired in December 2012.

Section 5 of the Act (MCL 15.565) directs that if a CBA or other contract that is inconsistent with the Act is in effect for 1 or more employees of a public employer on September 27, 2011, the requirements of the Act do not apply to an employee covered by that contract until the contract expires. Thus, the public employer did not need to comply with the Act until after the CBA expired in December 2012.

The expired CBA's provision that there is a moratorium or postponement of action on health care costs and premiums until December 31, 2013, does not constitute a CBA.

Prior Commission Decisions on PA 152:

Due to the relatively recent enactment of PA 152, and that Act's staggered date of applicability to collective bargaining agreements, i.e., the Act becomes effective upon the expiration of a collective bargaining agreement or other contract in conflict with it, the Commission has had limited opportunity to interpret or address the Act's impact on the bargaining rights and obligations provided under PERA. Despite that limited opportunity for review, what follows is a brief analysis of those cases relevant to the present controversy.

Decatur Public Schools, 27 MPER 41 (2014):

As stated previously, the Commission issued its Decision and Order in *Decatur Public Schools*, 27 MPER 41 (2014), on January 21, 2014, and sometime in February of 2014, ALJ Peltz provided the parties with a copy of the decision. ALJ Peltz directed Charging Party to consider whether *Decatur* impacted its charge or was dispositive of some or all the issues contained therein.

The issue in *Decatur* was whether an employer violated its duty to bargain in good faith under PERA when it imposed the hard cap upon contract expiration, despite its inability to reach agreement with the union regarding that choice. The ALJ first determined that the choice between the cap options was a mandatory subject of bargaining. The ALJ further reasoned that the parties were, upon expiration of their prior collective bargaining agreements, at a statutorily imposed impasse over health insurance cost sharing. The ALJ

concluded that because the parties were at impasse over the choice between the two caps upon contract expiration, the employer did not commit an unfair labor practice by implementing the hard caps. The ALJ recommended that the Commission dismiss the unfair labor practice charges in their entirety.

The Commission adopted the Order recommended by the ALJ, but not for the same reasons relied upon by the ALJ. The Commission disagreed with the ALJ that bargaining over the cap choices was a mandatory subject of bargaining. According to the Commission, public employers may bargain with labor organizations regarding the choice between the two cap options under PA 152, but are not required to do so. The Commission explained that a public employer's choice of options under PA 152 constituted a policy decision to be made by the public employer.

On March 12, 2014, Charging Party responded to ALJ Peltz, with the position that the present charge is unaffected by *Decatur* and that the issues presently before the Commission remain distinct than those in *Decatur*, i.e., *Decatur* did not include an allegation that a contract term barred the implementation of PA 152.

Respondent filed a response on April 2, 2014, wherein it repeated much of the same arguments and positions contained within its prior filings. Respondent did provide further support for its position stating that the acceptance of Charging Party's argument would negate several other statutory restrictions enacted by the Legislature, including the prohibition against step increases proscribed by Section 15b of PERA. MCL 423.215b. Respondent referenced *Houghton Lake Tourism & Convention Bureau v Wood*, 255 Mich App 127 (2003), for the principle that statutes must be interpreted in a manner that does not lead to illogical results, and *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491 (2001), for the proposition that courts routinely refuse to enforce illegal contractual provisions.

Shelby Township, 28 MPER 21 (2014):

In *Shelby Township*, at issue was the parties' interpretation of the term "medical benefit plan coverage year."11 Respondent had argued that the medical benefit plan coverage year began on the date that the newly elected or newly renewed coverage was to begin, January 1, 2012. Charging Party argued that the correct date was actually the date on which the benefit plan renewed, February 1, 2012. The Commission was tasked with determining whether a January 6, 2012, demand to bargain made by Charging Party was timely and whether Respondent's implementation of PA 152 compliant health care cost sharing on January 1, 2012, breached its duty to bargain under PERA. The Commission stated that the parties' respective interpretations, although different, were reasonably based. It was because of the parties' reasonably based interpretations that the Commission determined that Charging's Party January 6, 2012, demand to bargain was timely and, further,

11 At the time of that dispute, PA 152 did not include a definition of "medical benefit plan coverage year." In 2013, Public Act 269 of 2013, effective December 30, 2013, amended PA 152 to add Section 2(g) which provided a definition for "medical benefit plan coverage year."

that Respondent did not breach its duty to bargain when it implemented the cost sharing on January 1, 2012. The Commission stated:

> Here, the parties' collective bargaining agreement had expired and they were negotiating a successor agreement. After the contract's expiration, Respondent was obligated to maintain existing terms and conditions of employment with respect to mandatory subjects of bargaining until the parties reached agreement or impasse. Despite their efforts, the parties had not reached agreement or impasse by January 1, 2012, the date that Respondent had determined to be the beginning of the benefit plan coverage year. Inasmuch as Respondent had a reasonable basis for believing that January 2, 2012 was the beginning of the benefit plan coverage year, Respondent did not breach its duty to bargain by implementing the health care benefit cost sharing on the first employee pay day following January, 2, 2012, to the extent required by Act 152.

City of Southfield, Case Nos: C11 L-220; C11 L-223; C11 L-224; C11 L-225 (2014):

In *City of Southfield,* issued just recently on November 18, 2014, the Commission was presented with an issue similar to that of *Shelby Township*. Here, as in *Shelby Township*, the parties disagreed upon the date that the "medical benefit plan coverage year" should begin. Charging Party argued that the provisions of PA 152 did not become applicable until October 1, 2012, the date upon which the City's contracts with its insurance carriers for medical benefit coverage were set to renew. Charging Party asserted that those healthcare plans constituted a "contract" for purposes of Section 5 of PA 152, which requires a delay in the implementation of changes to health insurance premium sharing where there is a "collective bargaining agreement or other contract that is inconsistent with sections 3 and 4" of the Act in effect. Respondent countered that the correct date was January 1, 2012, under the rationale that benefit coverage for purposes of PA 152 was provided on a calendar basis, i.e., January 1st, through December 31st, of each year. The Commission stated:

> In the present case, as in *Shelby Township*, the parties' collective bargaining agreements had expired and they were negotiating successor agreements. After the contracts expired, Respondent was obligated to maintain existing terms and conditions of employment with respect to mandatory subjects of bargaining until the parties reached agreement or impasse. Despite their efforts to negotiate new agreements, the parties had not reached agreement or impasse by January 1, 2012, the date that Respondent had determined to be the beginning of the medical benefit plan coverage year. Inasmuch as Respondent had a reasonable basis for believing that January 1, 2012 was the beginning of the benefit plan coverage year, Respondent did not breach its duty to bargain by implementing the health care benefit cost sharing on January 1, 2012, to the extent required by Act 152.

Discussion and Conclusions of Law:

Charging Party claims that Article XXII of the parties' 2010-2012 CBA established a "status quo" which the Respondent violated when it implemented the hard cap upon the agreement's expiration. Charging Party, throughout its pleadings, cites multiple examples under federal law, including *John Wiley & Sons v Livingston*, 376 US 543 (1964), and *UAW v Yard-Man, Inc*, 716 F2d 1476 (CA 6 1983), to show that parties to a contract can agree to terms that survive past a contract's expiration date. Charging Party also argues that whether it made a demand to bargain is not dispositive to the issue because Article XXII explicitly dictated the obligations of the parties following contract expiration.

Respondent relies purely on principles of statutory interpretation and construction and claims that the enactment of PA 152 relieves it of any obligation to maintain the "status quo" or to honor the post contract expiration language contained in Article XXII. According to Respondent, PA 152 mandates that it must implement either the hard cap or 80/20 upon the contract's expiration.[12] Respondent argues that the plain language of PA 152 mandates that the cap on a public employer's contribution to the cost of its employees' health care benefits applies upon expiration of existing agreements and also to "any extension or renewal of the contract." Respondent states that the "fact the contribution mandate applies immediately on expiration of existing agreements is confirmed by the express intent of PFHICA." Respondent points to MCL 15.567(1), the full text of which states:

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

Respondent asserts that accepting Charging Party's position would place it in direct violation of PA 152, thereby subjecting it to "significant financial penalties.

It is quite commonplace for public employers and bargaining representatives to enter into enforceable stand-alone agreements, separate and apart from collective bargaining agreements, on one or more issues. Often times these agreements include, for example, grievance settlements and letters of understanding executed during the term of or after the expiration of a comprehensive collective bargaining agreement. Equally as often, parties negotiate terms within a comprehensive collective bargaining agreement that explicitly expire before or continue on past the term of said agreement, i.e., "reopener clauses" and "moratorium" or "sunset" clauses. See *Ann Arbor Fire Fighters Local 1733*, 1990 MERC Lab Op 528, in which the Commission found enforceable a "pension moratorium" clause in a collective bargaining agreement with a longer duration than that of the remainder of the agreement. Such agreements, while not comprehensive collective bargaining agreements by

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12 Respondent further argued that it was not required to bargain over which contribution cap to implement because Act 152 expressly vests the decision making authority concerning which method to choose with public employers; a position later confirmed by the Commission in *Decatur*.

themselves are considered enforceable agreements under PERA. The Commission has repeatedly held that repudiation of an agreement which is not a "full collective bargaining agreement" may nevertheless violate a party's duty to bargain. *Wayne Co*, 24 MPER 12 (2011); *Oakland University*, 23 MPER 86 (2010); *City of Roseville*, 23 MPER 5 (2010).

Prior to the enactment of PA 152, the analysis of the facts that gave rise to this unfair labor practice charge would be straightforward. Simply put, as was their right under PERA, the parties negotiated a collective bargaining agreement that covered health care, a mandatory subject of bargaining. Not only did that contract govern the cost sharing of health care during the term of the whole agreement, but it also addressed cost sharing for the period of time following contract expiration and until such time that a successor agreement could be reached. Accordingly, any decision by Respondent to disregard that post contract expiration agreement would have violated its duty to bargain in good faith as required by PERA. Applying the above rationale, I must reject Charging Party's argument that Article XXII created a "status quo" that the Respondent was obligated to maintain upon contract expiration. Rather, I conclude that the language contained in Article XXII which states "absent a successor agreement, CEA members will pay an additional premium contribution of $10 per pay" created a separate contractual obligation. That separate contractual obligation was agreed upon between the parties and was effective on May 3, 2010.

The question that remains before this ALJ is whether PA 152 releases the Respondent from the obligation to comply with Article XXII following the contract's expiration, and, for the reasons set forth below, I conclude it does not.

Our Supreme Court has consistently held that PERA is the dominant law regulating public employee labor relations. See *Rockwell v Crestwood Sch Dist Bd of Ed*, 393 Mich 616, 629 (1975). In *Rockwell*, the Court held that "[t]he supremacy of the provisions of the PERA is predicated on the constitution (Const 1963, art 4, s 48) and the apparent legislative intent that the PERA be the governing law for public employee labor relations." *Rockwell* at 630. In *Detroit Bd of Ed v Parks*, 98 Mich App 22, 36 (1980), the Court of Appeals concluded that because PERA is the dominant law regulating public employee labor relations it "therefore must supersede any other law in conflict with it." See also, *Local 1383 Int'l Ass'n of Fire Fighters v City of Warren*, 411 Mich 642, 648 (1981).

The foremost goal of statutory construction is to effectuate the Legislature's intent. *Casco Twp v Sec'y of State*, 472 Mich 566, 571, (2005). However, a fundamental principle of statutory construction presumes that the Legislature is aware of statutory interpretations by the courts and by the administrative bodies charged with statutory enforcement. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505-506 (1991); *Melia v Appeal Bd of Michigan Employment Sec Comm*, 346 Mich 544, 565-566 (1956); *Parker Bd of Ed of Byron Center Pub Sch*, 229 Mich App 565 (1998). Every word of a statute should be given meaning and no word should be made nugatory. *Apsey v Mem'l Hosp*, 477 Mich 120, 127 (2007); *People v Warren*, 462 Mich 415, 429 n. 24; (2000); *Baker v Gen Motors Corp*, 409 Mich 639, 665 (1980). Accordingly, the rules of statutory construction requires that once a statute is enacted, it is meant to be read as a whole. *Metropolitan Council 23, AFSCME v Oakland Co Prosecutor*, 409 Mich 299, 317-318 (1980). As such, any provision that is in dispute must be

read in the light of the general purpose of the act. *Romeo Homes, Inc v Comm'r of Revenue*, 361 Mich 128, 135 (1960).

Section 5 of the PA 152, as presently enacted provides as follows:

> (1) If a collective bargaining agreement or other contract that is inconsistent with sections 3 and 4 is in effect for 1 or more employees of a public employer on September 27, 2011, the requirements of section 3 or 4 do not apply to an employee covered by that contract until the contract expires. A public employer's expenditures for medical benefit plans under a collective bargaining agreement or other contract described in this subsection shall be excluded from calculation of the public employer's maximum payment under section 4. The requirements of sections 3 and 4 apply to any extension or renewal of the contract.
>
> (2) A collective bargaining agreement or other contract that is executed on or after September 27, 2011 shall not include terms that are inconsistent with the requirements of sections 3 and 4.

The use of the term "other contract" by the Legislature is significant because, as our Supreme Court held in *Gordon Sel-Way, Inc,* the Legislature is aware of statutory interpretations by the courts and by the administrative bodies charged with statutory enforcement. It must be presumed that the Legislature, in enacting PA 152, understood that public employers and representatives of public employees often times create or enter into agreements or "contracts" that fall outside the confines of a traditional collective bargaining agreement and that the Commission has consistently found these agreements to be enforceable. Here, Charging Party and Respondent entered into a collective bargaining agreement which contained a contractual clause, Article XXII, in which both parties intended to continue in full force and effect past the expiration of the other terms of that agreement up until a successor agreement could be reached. It is only when the parties agree to a successor agreement that the contractual obligation of Article XXII expires.

Respondent originally relied upon the Treasury's Memo to support its position that it was not obligated to bargain over the choice between the two caps. Following the Commission's decision in *Decatur,* such reliance became unnecessary. The later revisions to the Treasury's Memo, of which I took judicial notice, came months after the parties submitted their final briefs and as such, Respondent never got the opportunity to argue that Q8-6 and A8-6 supported its position; nonetheless it is necessary to address that Memo's revision. Q8-6 and A8-6 explicitly address a "separate moratorium agreement" which in the example expired a year after the comprehensive collective bargaining agreement. The Treasury concluded that because a moratorium agreement does not constitute a collective bargaining agreement, PA 152 applies upon the expiration of the collective bargaining agreement and is not stayed by the moratorium agreement. This conclusion however is inconsistent with the basic tenet of statutory construction that "every word of a statute should be given meaning and no word should be made nugatory" because the Treasury, despite properly stating the text of the PA 152, ignored the term "or other contract" in its analysis.

As discussed above, the Commission, the administrative body with plenary authority to interpret and administer PERA, determined in *Ann Arbor Fire Fighters Local 1733*, that a moratorium agreement regarding pensions was a valid and enforceable agreement under PERA. As such, the moratorium agreement used within the example, presumably is a valid and enforceable under PERA and therefore, while not a complete collective bargaining agreement, would constitute an "other contract" under PA 152.

It is because of PERA's supremacy over other laws that may conflict with it and the inclusion of the words "or other contract" that I conclude the Respondent may not rely upon PA 152, or some other agency's interpretation of it, to relieve itself of a contractual obligation that arises under PERA. Accordingly, I conclude that Respondent may not rely upon PA 152 or the Treasury Memo to excuse it from the obligation created by Article XXII. I also conclude that under *Wayne Co*, supra, Respondent, by imposing the 20% contribution rate, repudiated the contract that Article XXII created and as such has violated its duty to bargain. Had Article XXII not explicitly created that contractual obligation Respondent would have been free to implement whichever cap method it so chose under the Commission's decision in *Decatur*.

The situation and facts herein are easily distinguishable from *Decatur*, *Shelby Township*, and *City of Southfield*. In each of those cases, there was no contract or contractual agreement agreed upon between the parties which prohibited the implementation of PA 152. While Charging Party riled upon a contract in *City of Southfield*, that contract was between the City and its employees' health insurance providers. Furthermore, while the Commission relied upon the employers' reasonable interpretations of PA 152, with regard to a term that was at the time undefined, as an effective defense against a PERA violation, such a reasonable interpretation does not exist here. The definition of what constitutes a "contract" for purposes of collective bargaining under PERA is not murky nor is it unclear. Bargained for and negotiated agreements that fall outside of a collective bargaining agreement's term, as discussed above, have been found enforceable by the Commission. Here, the parties created just such a contractual agreement when they agreed to the language contained in Article XXII. Accordingly, any interpretation of PA 152 which ignores key words, in this case "or other contract," is not reasonable and therefore does not preclude a finding of a violation of PERA.

Although not directly raised by the parties, I must next address whether Section 15b of PERA impacts my above findings and conclusions. Public Act 54 of 2011, which took effect on July 8, 2011, amended PERA and added Section 15b. MCL 423.215b. Section 15b provided in the relevant part:

> (1) Except as otherwise provided in this section, after the expiration date of a collective bargaining agreement and until a successor collective bargaining agreement is in place, a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement. The prohibition in this subsection includes increases that would result from wage step increases. Employees who receive health, dental, vision,

> prescription, or other insurance benefits under a collective bargaining agreement shall bear any increased cost of maintaining those benefits that occurs after the expiration date. The public employer is authorized to make payroll deductions necessary to pay the increased costs of maintaining those benefits.
> ***
>
> (4) As used in this section:
>
> (a) "Expiration date" means the expiration date set forth in a collective bargaining agreement without regard to any agreement of the parties to extend or honor the collective bargaining agreement during pending negotiations for a successor collective bargaining agreement.

Prior to the effective date of Section 15b, it was well-settled Commission law that after contract expiration, a public employer had a duty to continue to apply the terms of mandatory subjects of bargaining in the expired contract until the parties reached agreement or impasse. *Local 1467, IAFF v City of Portage,* 134 Mich App 466, 472; *lv den* 422 Mich 924 (1985). See also *Wayne Co Gov' t Bar Ass' n,* at 485-486; *AFSCME Council 25 v Wayne Co*, 152 Mich App 87, 93-94; (1986). Accordingly, before Section 15b was added to PERA, mandatory subjects of bargaining survived the contract by operation of law during the bargaining process unless there was a clear and unmistakable waiver. See *Local 1467, IAFF v City of Portage,* supra. Included among the numerous mandatory subjects of bargaining determined to survive contract expiration were health benefits. *Port Huron Ed Ass'n v. Port Huron Area School Dist*, 452 Mich 309, 317, n 12 (1996).

The language of Section 15b makes it clear that certain mandatory subjects of bargaining no longer survive contract expiration. The Commission, in *Bedford Public Schools*, 26 MPER 35 (2012), considered whether the Legislature intended to prohibit lane changes, the advancement to another pay scale by reason of completing additional education, as well as step increases following a contract's expiration and ultimately concluded that Section 15b "prohibits the payment of step increases whether based on increased years of service or educational advancement." The Commission, in reaching its decision, determined that Section 15b was unambiguous and that because it had previously considered lane changes as a type of step increase, the Legislature must be presumed to have been aware of those prior rulings. The Court of Appeals, in *Bedford Public Schools v Bedford Educ Ass'n MEA/NEA*, 305 Mich App 558 (2014), concluded that because the plain language of Section 15b was unambiguous in that it clearly prohibits a public employer from paying any wage increases in the absence of an effective CBA "no further judicial construction is required or permitted." *Id* at 569. The Court therefore affirmed the Commission's decision without adopting its reasoning.

The plain language of Section 15b provides that its prohibition applies after the expiration date of a collective bargaining agreement. The Legislature even defined the term "expiration date" providing in very plain and simple terms that such a date was "without regard to any agreement of the parties to extend or honor the collective bargaining agreement

during pending negotiations for a successor collective bargaining agreement." Therefore, consistent with a plain reading of the statute, as required by the Court's decision in *Bedford Public Schools*, Section 15b became effective for purposes of the present matter on August 21, 2012, regardless of Article XXII. Accordingly, any make whole order must be offset by the requirement of Section 15b that "[e]mployees who receive health, dental, vision, prescription, or other insurance benefits under a collective bargaining agreement shall bear any increased cost of maintaining those benefits that occurs after the expiration date."

I have carefully considered all other arguments asserted by the parties in this matter and have determined that they do not warrant a change in the result. For the reasons set forth above, I conclude that Respondent has violated Section 10(1)(e) of PERA by repudiating its contractual obligation established under Article XXII and by its implementation of the 20% contribution rate in violation thereof. Simply put, the amount that members of the bargaining unit should have been required to contribute following the expiration of the 2010-2012 CBA was the 2011-2012 rate, as adjusted by Section 15b in accordance with the statutory definition of "medical benefit plan coverage year," plus an additional ten dollars ($10.00). Accordingly, based upon the findings of fact and the conclusions of law discussed above, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

Based upon the above findings of fact and conclusions of law, Respondent, the Board of Education of the Capac Community Schools and its officers, agents, and representatives are hereby ordered to:

1. Cease and desist from any continued violation of its obligation under Section 10(1)(e) of PERA with regard to Article XXII if Article XXII has not been superseded by a successor agreement to the 2010-2012 Collective Bargaining Agreement.

2. Refund, with the statutory rate of interest, to each bargaining member who made a health insurance premium contribution payment after September 1, 2012, through such time as successor agreement may have been reached or is reached, the difference between the amount of the contribution actually made and an amount equal to the 2011-2012 premium contribution rate adjusted to comply with the statutory requirements of MCL 423.215b, plus ten dollars ($10.00).

3. Given the nature of the dispute and absence of evidence that Respondent is or has been engaged in a continuing violation of PERA, a posting of a Notice to Employees is not ordered.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: December 4, 2014