**STATE OF MICHIGAN**
**EMPLOYMENT RELATIONS COMMISSION**
**LABOR RELATIONS DIVISION**

In the Matter of:

SHELBY TOWNSHIP,
Public Employer-Respondent,

Case No. C12 D-067

-and-

COMMAND OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Kirk, Huth, Lange & Badalamenti, P.L.C., by Craig W. Lange and Kathryn E. Tignanelli, for Respondent

Douglas M. Gutscher, Assistant General Counsel, for Charging Party

## DECISION AND ORDER

On May 31, 2013, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent, Shelby Township, violated § 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e), by failing to bargain with Charging Party, Command Officers Association of Michigan, over the allocation of the employees' share of health insurance costs after receipt of Charging Party's January 6, 2012 bargaining demand. The ALJ reviewed Respondent's duty to bargain under PERA in the light of the Publicly Funded Health Insurance Contribution Act, 2011 PA 152 (Act 152), MCL 15.561-15.569. The ALJ held that Respondent had a duty to bargain with Charging Party over the allocation of the employees' share of medical benefit plan costs under § 4 of Act 152 after it received Charging Party's bargaining demand. The ALJ found that Act 152 explicitly excludes benefits provided to retirees from the definition of a medical benefit plan, and prohibits the inclusion of costs attributable to retiree health care benefits in the calculation of employee medical benefit plan costs. She further concluded that Respondent breached its duty to bargain by requiring Charging Party's members to pay a share of their medical benefit plan costs calculated on the basis of illustrative rates that included retiree medical costs. The ALJ also found that Respondent breached its duty to bargain when it determined that Charging Party's members would pay a twenty percent share of the costs of their insurance plan as a premium share in 2012, and then unilaterally implemented increases pursuant to 2011 PA 54[1] (Act 54), which raised

[1] 2011 PA 54 amended PERA at MCL 423.215b and became effective on June 8, 2011.

employees' premium share above twenty percent. The Decision and Recommended Order was served on the interested parties in accordance with § 16 of PERA.

After requesting and receiving an extension of time in which to file its exceptions, Respondent filed exceptions to the ALJ's Decision and Recommended Order, a brief in support of the exceptions, and a request for oral argument on July 24, 2013. Charging Party filed a brief in support of the ALJ's Decision and Recommended Order on August 2, 2013.

In its exceptions, Respondent contends that the ALJ erred in concluding that: (1) Charging Party's January 6, 2012 demand to bargain was not untimely; (2) a public employer's decision regarding the calculation and allocation of the employee share of health care costs pursuant to § 4 of Act 152 constitutes a mandatory subject of bargaining; (3) Respondent refused to bargain over the calculation and allocation of the employee share of health care costs after the January 6, 2012 bargaining demand; (4) Respondent's use of a Blue Cross illustrative rate, that included a retiree health care cost component to calculate the employees' share of health care costs is contrary to Act 152; (5) Respondent violated its bargaining obligations under PERA because it did not recalculate the employee share of health care costs pursuant to Act 152 after its implementation on January 1, 2012; and (6) Respondent violated PERA because it raised bargaining unit members' share of health care costs above twenty percent when it implemented increases in the employee share pursuant to Act 54.

Respondent seeks oral argument in this matter. After reviewing the exceptions and briefs filed by the parties, we find that oral argument would not materially assist us in deciding this case. Therefore, Respondent's request for oral argument is denied.

On September 19, 2013, Respondent filed its Motion for Leave to File a Supplemental Brief in Support of Exceptions to Decision and Recommended Order of Administrative Law Judge. Respondent filed its proposed Supplemental Brief on September 23, 2013. Charging Party filed its response on September 26, 2013. We have reviewed the parties' filings. Respondent's Motion and Brief asserts that we should consider "Frequently Asked Questions" issued by the Michigan Department of Treasury on or about August 28, 2013 regarding Act 152. Although we are not bound by the Department of Treasury's publications, since that department has responsibilities with respect to the enforcement of § 9 of Act 152, the information Treasury has provided to the general public may be of assistance in our consideration of the effect of Act 152 on Respondent's duty to bargain. We, therefore, grant Respondent's Motion for Leave to File a Supplemental Brief.

Upon review of the record, the exceptions, and the parties' briefs, we find merit in the Respondent's arguments that the ALJ erred by finding that Respondent refused to bargain over the calculation and allocation of the employee share of health care costs after receiving Charging Party's January 6, 2012 bargaining demand and that Respondent breached its duty to bargain when it implemented increases in bargaining unit members' share of health care costs pursuant to Act 54 that raised the employees' share above twenty percent We find no merit in Respondent's other exceptions.

Factual Summary:

Charging Party represents a bargaining unit of supervisory police officers employed by Respondent. The most recent collective bargaining agreement between Charging Party and Respondent provided the bargaining unit members with health insurance under a plan provided by Blue Cross Blue Shield of Michigan (Blue Cross). After the collective bargaining agreement expired on December 31, 2010, bargaining unit members' coverage continued under the same plan. Unit members with family or two-person coverage paid a premium of $400 per year. Employees with single coverage paid $200 per year. After beginning negotiations for a successor agreement in February or March 2011, Respondent proposed changes in co-pays and deductibles that would shift more of the cost of healthcare to bargaining unit members.

On September 27, 2011, Public Act 152 of 2011 became effective. Act 152 was enacted to limit public employers' expenditures for employee medical benefit plans. Section 3 of Act 152, MCL 15.563, sets specific dollar limits, referred to as "hard caps," on the amounts public employers may pay for employee medical benefit plans, commencing with medical benefit plan coverage years beginning on or after January 1, 2012. Upon the majority vote of its governing body, a public employer may choose to comply with the requirements of § 4 of Act 152 instead of § 3. Section 4, MCL 15.564, limits a public employer's share of health care costs to eighty percent of the total annual costs of all of the medical benefit plans it offers. Pursuant to § 5 of Act 152, MCL 15.565, parties are prohibited from entering into collective bargaining agreements after September 15, 2011, that contain terms inconsistent with the requirements of the Act. With a two-thirds vote of its governing body, a local unit of government, such as Respondent, may exempt itself from the requirements of Act 152 for the next succeeding medical benefit plan coverage year pursuant to § 8 of the Act, MCL 15.568. Public employers that fail to comply with the requirements of Act 152 are subject to a substantial financial penalty under § 9.

After Public Act 152 was passed in September 2011, the parties began discussing ways to minimize employees' premium share. However, during these discussions, Charging Party did not demand bargaining over which of the three options provided under Act 152 — the hard caps under § 3, the eighty percent employer share option under § 4, or the opt out under § 8 — would be used to determine the amount of the health insurance premium paid by Respondent and by bargaining unit employees. Moreover, the record does not indicate that the parties negotiated over the date on which the Act 152 premium share would take effect or when the "medical benefit plan coverage year" would begin. However, according to Charging Party's business agent, Kevin Loftis, during a November 19, 2011 meeting with Respondent's negotiators, he mentioned that "the benefit plan renewed in February 2012," and neither of Respondent's negotiators disputed that statement.

Respondent's payments for employee health insurance plans are based on illustrative rates determined both by the employer's cost experience and the level of benefits provided by the particular plan. In November 2011, Respondent received illustrative rates based on its combined costs for active employee and retiree health coverage. These combined rates are referred to as "bundled rates." A "bundled" rate contains an inherent subsidy of retirees by active employees because true health care costs for retirees are, on average, greater than active employees' health care costs. At the time, the "unbundled rates," that is, separate rates for active employees not including the amount attributable to retirees, were not provided to Respondent.

On November 21, Respondent's Human Resources Director Lisa Suida sent notice to members of Charging Party's bargaining unit of a health insurance open enrollment period from November 28 through December 9. The notice indicated that the changes made during open enrollment would take effect on January 1, 2012. The correspondence provided to Charging Party's members included a chart showing what their monthly premium share would be "effective January 1, 2012" for each coverage category if Respondent's Board adopted the eighty percent employer share option. The chart also indicated the amount that the monthly premium share for each coverage category would be if the Board adopted the hard cap option. Additionally, the chart shows the increase in the employees' premium share for each coverage category "as of February 1, 2012" for both the hard cap and the eighty percent employer share option. The chart also indicated that for every coverage category, on both January 1 and February 1, the employees' premium share was substantially less under the hard cap option than under the eighty percent employer share option. At hearing, Charging Party acknowledged receiving Suida's correspondence to the employees, or something similar to it, around the same time.

On December 6, 2011, Respondent's Township Board adopted a resolution electing to pay no more than eighty percent of the costs of medical benefit plans for employees and public officials for a medical benefit plan coverage year beginning on or after January 1, 2012. Respondent began deducting the twenty percent premium share in the amounts set forth in Suida's November 21, 2011 correspondence from the pay of Charging Party's bargaining unit members with their first paychecks after January 1, 2012.

On January 6, 2012, Loftis sent a letter to Suida demanding to bargain over the calculation method and total amount of the employee contributions before the implementation of the new health care contribution amounts. Loftis testified that he did not learn that Respondent had already begun deducting the Act 152 premium share from bargaining unit members' paychecks until after he sent the January 6 letter.

Loftis met with Respondent on January 13, 2012, and was informed at that time that Respondent believed its medical benefit plan coverage year began on January 1, 2012, because coverage and enrollment changes made during the open enrollment period became effective on that date. It was at that point that Loftis learned that Respondent had calculated the total annual cost of the plan based on a bundled rate, which included medical costs associated with retirees. At that meeting, Loftis was provided with the amounts that the employees' shares would be if those shares were based on the unbundled rate. The parties continued to bargain and met for mediation on January 19, 2012.

Discussion and Conclusions of Law:

Between the effective date of Act 152 and the beginning of its next medical benefit plan coverage year, which started on or after January 1, 2012, Respondent was required to determine whether it would comply with § 3 or § 4, or exempt itself from the requirements of Act 152 pursuant to § 8. While Respondent could have chosen to bargain with Charging Party over these options, it had no obligation to do so. As we explained in *Decatur Pub Sch*, 27 MPER 41 (2014):

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

We concluded that the ALJ in *Decatur* "erred by finding that the choice between the hard caps and eighty percent employer share is a mandatory subject of bargaining." *Id.* We went on to explain that in making this policy decision, "[p]ublic employers may bargain with the labor organizations representing their employees over the choice between the hard caps and the eighty percent employer share, but are not required to do so." *Id.*

The ALJ's Decision and Recommended Order in the instant case was issued prior to our decision in *Decatur*. She concluded that the choice of options under Act 152 is a mandatory subject of bargaining. The ALJ erred in reaching that conclusion, and her decision is reversed to the extent that it relies on her finding that a public employer has a duty to bargain over whether it will: apply the hard caps under § 3, apply the eighty percent employer share under § 4, or exempt itself under § 8. Since the choice of cost sharing options under Act 152 is a permissive subject of bargaining, Respondent did not breach its duty to bargain by failing to negotiate with Charging Party over its choice of options under Act 152.

Charging Party's January 6, 2012 Bargaining Demand

In this case, Charging Party did not demand to bargain over the cost sharing options.[2] However, Charging Party did demand to bargain over the calculation method and the total amount of the employee contributions. Respondent contends that the ALJ erred in finding that Charging Party's January 6, 2012 bargaining demand was timely. Respondent also contends that the ALJ erred in finding that Respondent failed or refused to bargain with Charging Party regarding its implementation of Act 152.

The timeliness of the bargaining demand depends on the date on which the medical benefit plan coverage year began. To be timely, Charging Party's bargaining demand had to be made before the beginning of the medical benefit plan coverage year. At the time this matter took place, Act 152 did not include a definition of "medical benefit plan coverage year."[3] Moreover, as the

[2] There are two reasons that Respondent had no duty to bargain over the choice of options under Act 152: first, because it is a permissive subject as indicated above, and second, because Charging Party did not demand to bargain over the cost sharing options.

[3] Act 152 was amended by 2013 PA 269, effective December 30, 2013, which added the definition of medical benefit plan coverage year at § 2(g) providing: "'Medical benefit plan coverage year' means the 12-month period after the effective date of the contractual or self-insured medical coverage plan that a public employer provides to its employees

ALJ noted, the Attorney General and the Department of Treasury had different definitions for "medical benefit plan coverage year." Respondent contends that the medical benefit plan coverage year began on January 1, 2012, the date that the newly elected or newly renewed coverage was to begin. Respondent's conclusion that the medical benefit coverage year began with the commencement of newly elected or newly renewed coverage is consistent with the definition provided by the Michigan Department of Treasury's "Frequently Asked Questions" at that time. Charging Party contends that the medical benefit plan coverage year began on February 1, 2012, the date on which the benefit plan renewed. Charging Party's interpretation of "medical benefit plan coverage year" appears to be consistent with an informal advice letter issued by the Attorney General's office on December 20, 2011. Thus, both parties had reasonable bases for their interpretation of "medical benefit plan coverage year."

As the ALJ found, there is no evidence in the record that the parties discussed the date on which the medical benefit plan coverage year would begin at the bargaining table. Moreover, the record lacks evidence that would establish that Respondent informed Charging Party's representatives of its conclusion that the medical benefit plan coverage year began on January 1, 2012. In light of Charging Party's reasonable belief that the medical benefit plan coverage year began on February 1, 2012, Charging Party's January 6, 2012 demand to bargain was timely.

We agree with Respondent that the evidence in the record does not support the ALJ's finding that Respondent refused to bargain with Charging Party after receipt of the January 6, 2012 bargaining demand. The parties met and discussed the amount of the employee contributions on January 13, 2012. The parties also met for mediation on January 19, 2012. For us to find that Respondent violated PERA by refusing to bargain, there must be a demand to bargain from Charging Party and a statement or action by Respondent clearly indicating a refusal to comply with the bargaining demand. See *Michigan State Univ*, 1993 MERC Lab Op 52, 63 citing *NLRB v Rural Elec Co*, 296 F2d 523, 524-25, (CA 10, 1961). Here the parties negotiated and participated in mediation after Charging Party's bargaining demand was made. Charging Party offered no evidence of any action or statement by any representative of Respondent indicating that Respondent refused to bargain over the calculation method and the total amount of the employee contributions after Charging Party's January 6, 2012 bargaining demand was received. See e.g. *City of Detroit*, 25 MPER 81 (2012) where we found that respondent satisfied its duty to bargain over a change in work assignments.

The Calculation and Allocation of the Employee Premium Share under § 4 of Act 152 is a Mandatory Subject of Bargaining

Respondent contends that the ALJ erred in concluding that a public employer's decision regarding the calculation and allocation of the employee premium share pursuant to § 4 of Act 152 constitutes a mandatory subject of bargaining. Respondent also contends that the ALJ specifically erred in making the following findings with respect to the calculation of the employee share of health insurance costs:

> I find that the plain language of § 4 gives an employer the right, absent other restrictions, to favor one group of employees over another in the allocation of the total health care cost burden, just as it has the right to favor one group over

---

or public officials."

> another by paying higher salaries to its more valued employees. I find that the decisions an employer is allowed by Act 152 to make about the percentage it will pay under § 4 and the allocation of the employees' share among groups of employees constitute mandatory subjects of bargaining under § 15(1) of PERA because they clearly affect employees' wages, hours and terms and conditions of employment.
>
> * * *
>
> I do not agree with Respondent that bargaining with its unions over the allocation of the employee share under § 4 would be impossible. I conclude that Respondent had a duty to bargain with Charging Party over the allocation of the employees' share under § 4 of Act 152 after it had elected the 80/20 option and after it had received Loftis' January 6, 2012 demand to bargain over the "calculation and total amount of the employees' contribution."

To the extent that they do not rely upon the ALJ's finding that the choice of cost sharing options under Act 152 is a mandatory subject of bargaining, we agree with the ALJ's statements in the above-quoted paragraphs. The Legislature's adoption of Act 152 did not alter the duty to bargain under PERA. Act 152 limits the amount that public employers may pay for employees' and elected officials' health benefits. The Act gives local government employers two options for setting the maximum amount that the employer will pay, as well as the option of exempting themselves from the requirements of Act 152. A public employer must choose one of the three options and take steps to implement its choice by the statutory deadline.

Where a public employer elects to pay the eighty percent employer share under § 4, Act 152 does not determine the amount to be allocated to particular employees or bargaining units. The employer and a labor organization representing bargaining unit employees may agree that the allocation of health care costs to members of that bargaining unit may be more than or less than twenty percent, as long as the total amount of health care costs to be paid by the employer is no more than eighty percent. At the time these events took place, § 4(2) of Act 152 provided as follows:[4]

> 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

[4] Section 4(2) of Act 152 was amended by 2013 PA 271, effective December 30, 2013. The amendment by 2013 PA 271, replaced the language "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," with the language "For purposes of this section, 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."

> 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.

Where an employer elects to pay the eighty percent share of total employee health care costs, the other twenty percent must be paid by employees and elected officials. However, that does not mean that each employee must pay precisely twenty percent of the cost of his or her own health care coverage. Section 4(2) of Act 152 specifically allows the public employer to "allocate the employees' share of total annual costs of the medical benefit plans among the employees of the public employer as it sees fit." That means that Act 152 does not regulate the allocation of the employees' share of the cost of medical benefit plans. This cost, just as before the adoption of Act 152, continues to be a mandatory subject of bargaining. As the ALJ pointed out, " . . . the plain language of § 4 gives an employer the right, absent other restrictions, to favor one group of employees over another in the allocation of the total health care cost burden, just as it has the right to favor one group over another by paying higher salaries to its more valued employees." This "right" remains subject to the duty to bargain, as health insurance benefits are mandatory subjects of bargaining. *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n*, 458 Mich 540, 551 (1998). Once a subject has been determined to be a mandatory subject of bargaining, the parties must bargain concerning the subject and neither party may take unilateral action on that subject unless the parties arrive at an impasse in their negotiations or there is a clear and unmistakable waiver.[5] *Wayne Co Gov't Bar Ass'n v Wayne Co,* 169 Mich App 480, 486; aff'g 1987 MERC Lab Op 230; *Central Michigan Univ Faculty Ass'n v Central Michigan Univ,* 404 Mich 268, 277 (1978). See also *Detroit Police Officers Ass'n v Detroit,* 391 Mich 44, 54-55; 214 NW2d 803 (1974).

Respondent argues that where one group of employees pays a lower premium share, this may require another group of employees to pay a greater premium share, as the total amount that must be paid by employees and elected officials must be at least twenty percent of the total annual costs of all of the medical benefit plans that the employer offers or contributes to for its employees and elected officials. As with other mandatory subjects of bargaining, the fact that one unit may benefit more than another unit with respect to a particular issue does not preclude good faith bargaining. If that were the case, there would be no duty to bargain over any benefit that had a financial impact on the employer, since public employers generally must bargain over the allocation of their limited resources. As we stated in *City of Detroit (Police Dep't),* 18 MPER 53 (2005): "when a mandatory subject of bargaining . . . impacts more than one bargaining unit, it must be bargained with all affected units." Accordingly, if an employer bargains a lower premium share with one bargaining unit, it likely will be required to bargain in good faith to reach agreements with other units ensuring that at least twenty percent of the total annual cost of the employees' medical benefit plans is paid by employees. However, the employer may not unilaterally require employees to pay more than twenty percent in the absence of agreement or impasse. In light of Charging Party's timely demand to bargain, Respondent had a duty to bargain with Charging Party over the calculation method and the total amount of the employee contributions.

---

[5] As discussed in *Decatur Pub Sch,* 27 MPER 41 (2014), the timeliness requirement of Act 152 provides a statutory deadline that acts as a further exception to the prohibition against unilateral action.

Respondent's Use of the Bundled Illustrative Rate, Which Included the Retiree Health Care Cost Component, to Calculate the Employees' Premium Share

Respondent contends that the ALJ erred in concluding that Respondent's use of the Blue Cross illustrative rate, which included a retiree health care cost component, to calculate employees' share of health care costs is contrary to Act 152. Respondent asserts that the ALJ erred in concluding that Respondent violated its bargaining obligations under PERA because it did not recalculate the employee premium share pursuant to Act 152 after its implementation on January 1, 2012. Respondent further contends that we lack authority to interpret Act 152 because the Department of Treasury is charged with its enforcement. We disagree. As ALJ Stern pointed out in her Decision and Recommended Order:

> . . . Act 152 did not eliminate a public employer's duty under PERA to maintain existing terms and conditions of employment, including health insurance, after the expiration of a collective bargaining agreement, but excused that duty only to the extent necessary to implement the changes required by Act 152. Obviously, the Commission must proceed cautiously in finding that an employer's implementation of an increase in an employee premium share violated PERA because the increase exceeded the amount authorized by Act 152. The Commission is not charged with administering Act 152, and, therefore, has only the authority to determine whether a public employer is excused by the terms of Act 152 from what would be, in the absence of that statute, its obligations to bargain under PERA.

In an action to enforce PERA where the employer's duty to bargain may be excused to the extent of its obligation to comply with Act 152, we must determine where to draw the line between the two statutes. As indicated above, public employers continue to have a duty to bargain over the allocation of health care costs within the parameters set by Act 152. The amount of the employee share of health care costs is a mandatory subject of bargaining subject to the limits imposed by Act 152. The parties may agree that the allocation of health care costs to particular groups of employees may be more than or less than twenty percent, as long as the total amount of health care costs to be paid by the employer is within the parameters set by § 4 of Act 152.

Public employers must remain cognizant of their obligation to meet the timeliness requirements of Act 152. Therefore, where the parties have not reached agreement on the allocation of health care costs by the implementation deadline set by Act 152, a public employer may implement the employees' share of those costs within the limits set by Act 152 without violating its duty to bargain under PERA. See *Decatur Pub Sch*, 27 MPER 41 (2014). Thus, while an employer may implement the eighty percent employer share if no agreement on health care cost sharing has been made by the parties prior to the statutorily set implementation deadline, the employer may not unilaterally require bargaining unit employees to pay more than the minimum amount required by Act 152, unless the parties have bargained to impasse. The employer may implement the premium share by allocating precisely twenty percent of the health care costs to employees without breaching its duty to bargain. This twenty percent share is both the minimum and the maximum amount a public employer may require bargaining unit employees to pay where the employer has elected the eighty percent employer share option under § 4 and its negotiations with its employees' labor organization have not reached impasse or agreement. For a public employer to require bargaining unit employees to pay more than the twenty percent minimum set by Act 152, in the absence of

impasse or agreement with the employees' labor organization, is a breach of the public employer's duty to bargain.

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 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 the first employee pay date following January 1, 2012, to the extent required by Act 152. However, when Respondent chose to implement the premium share in January of 2012, Respondent could not lawfully require Charging Party's bargaining unit members to pay more than the amount required by Act 152, which was twenty percent of the medical benefit plan costs.

Pursuant to § 4(2) of Act 152, a public employer may pay no 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." "Medical benefit plan" is defined in § 2(e) and specifically excludes "benefits provided to individuals retired from a public employer." Thus, the "total annual costs of all of the medical benefit plans" that a public employer offers or contributes to for its employees and elected officials does not include the costs for medical benefit plans that the public employer offers or contributes to for retirees. The record shows that the illustrative rates were significantly lower when calculated without including costs attributable to retirees. Thus, by including retiree costs in the illustrative rate by which it determined the share of health care costs to be paid by Charging Party's bargaining unit members, Respondent required those employeees to pay an amount in excess of twenty percent of the "total annual costs of the medical benefit plans it offers or contributes to for its employees and elected public officials." Accordingly, we agree with the ALJ for the reasons stated in her decision that Respondent's actions in unilaterally requiring Charging Party's bargaining unit members to pay a premium share calculated on the basis of illustrative rates that included retiree costs is not permissible under Act 152 and is a violation of PERA.

At the time Respondent implemented health care cost sharing in January of 2012, Act 152 was a recent change to the law, and there may have been some ambiguity regarding public employers' responsibilities under the Act. Therefore, we understand that Respondent may have been unable to obtain the necessary information from Blue Cross to correctly calculate the amount of the employees' premium share at that time. Nevertheless, we agree with the ALJ that once Respondent was aware of the amount of the unbundled illustrative rate, Respondent had an obligation to recalculate the employees' share of health care costs. Respondent failed to do so. Accordingly, we agree with the ALJ that Respondent violated its duty to bargain under PERA by unilaterally requiring Charging Party's members to pay for health care costs calculated on the basis of the bundled illustrative rates that included retiree costs.

Implementation of the Premium Share Increase on February 1, 2012

Respondent contends that the ALJ erred in concluding that Respondent violated its duty to bargain under PERA because it raised bargaining unit members' premium share above twenty percent when it required employees to pay insurance premium increases based on an increase in the

illustrative rate after February 1, 2012. Respondent contends that the February 1, 2012 increase in employees' premium share was required by 2011 PA 54.

2011 PA 54, which was effective June 8, 2011, amended PERA at § 15b and provides in relevant part as follows:

> 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.
>
> * * *
>
> (3) For a collective bargaining agreement that expired before the effective date of this section, the requirements of this section apply to limit wages and benefits to the levels and amounts in effect on the effective date of this section.
>
> (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.
>
> (b) "Increased cost" in regard to insurance benefits means the difference in premiums or illustrated rates between the prior year and the current coverage year. The difference shall be calculated based on changes in cost by category of coverage and not on changes in individual employee marital or dependent status.

As explained above, health insurance benefits are mandatory subjects of bargaining. Section 15 of PERA requires public employers to bargain in good faith with the labor organizations representing their employees with respect to mandatory subjects of bargaining. Prior to the effective date of Act 54, it was well-settled 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; 352 NW2d 284 (1984), 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; 393 NW2d 889, 892 (1986). As indicated above, that also changed to some degree with the enactment of Act 152.

Before Act 54 was enacted, mandatory subjects of bargaining survived the contract by operation of law during the bargaining process unless there was a clear and unmistakable waiver.

*City of Portage*. With the enactment of Act 54 it is clear that the terms of certain mandatory subjects of bargaining do not survive contract expiration. Prior to the enactment of Act 54, if a collective bargaining agreement provided a set amount for employees' share of medical benefit costs, the amount would remain unchanged after the contract expired until the parties bargained to agreement or impasse. Under Act 54, if the costs of the medical benefits increase, the public employer must pass along the increase to employees.

As indicated above, the Employer unilaterally implemented a premium share increase in January of 2012. As of that point, Charging Party's bargaining unit members were paying more than the amount agreed upon in the expired contract. Pursuant to Act 152, Charging Party's bargaining unit members could lawfully have been required to pay twenty percent of the unbundled illustrative rate. However, by basing the employees' premium share on the bundled illustrative rate, Respondent was unlawfully requiring them to pay an amount that was in excess of twenty percent of the unbundled illustrative rate. As of January 1, 2012, the members of the bargaining unit represented by Charging Party should have been paying no more than twenty percent of the unbundled illustrative rate.

On January 6, 2012, Charging Party made a timely demand to bargain over the calculation method and the total amount of the employee contributions. At that point, Respondent had a duty to bargain with Charging Party over the amount of the employee share of health care costs. Although the parties bargained they did not reach impasse or agreement.

As of February 1, 2012, the illustrative rate increased. At that point, but for its use of the bundled illustrative rate in the computation of the employee premium share as of January 1, 2012, Respondent could have lawfully passed on to the employees the entire amount of the increase in the unbundled illustrative rate. However, as indicated above, Respondent should have recalculated the employee share of health care costs when it became aware of the amount of the unbundled illustrative rate and should have properly credited employees for the overpayment. Instead, Respondent continued to charge employees twenty percent of the bundled illustrative rate and increased the employee share of health care costs by the amount of the increase in the bundled illustrative rate. The employee share should have been reduced to twenty percent of the unbundled illustrative rate prior to the February 1, 2012 increase in that rate. Moreover, the increase authorized under Act 54 is the amount of the increase in the unbundled illustrative rate. Therefore, as of February 1, 2012, in the absence of agreement or impasse, Respondent could not lawfully require the employees to pay more than twenty percent of the unbundled illustrative rate that applied on January 1, 2012, as required by Act 152, plus the increase in the unbundled illustrative rate as of February 1, 2012, pursuant to Act 54. We, therefore, agree with the ALJ's finding that Respondent violated its duty to bargain by unilaterally implementing an employee share in excess of the amounts authorized by Act 152 and Act 54.

Summary and Conclusion:

In summary, the choice of cost sharing options under Act 152 is a permissive subject of bargaining. A public employer may, but is not required to bargain over whether it will apply the hard caps under § 3, the eighty percent employer share under § 4, or exempt itself under § 8. Where the employer chooses to implement the eighty percent employer share under § 4 of Act 152, the employer has a duty to bargain over the amount of the employees' share of health care costs subject

to the parameters of Act 152. The employer may implement its choice of options as of the beginning of the medical benefit plan coverage year. However, if the parties have not bargained to impasse or agreement, the employer may not set the employee share at more than twenty percent of the total annual costs of all of the medical benefit plans provided by the employer.

Respondent's unilateral implementation of the employees' share of health care costs on January 1, 2012 based on an illustrative rate that included retiree medical benefits costs was unlawful because the amount of the employee share exceeded the amount allowed by Act 152. Charging Party made a timely demand to bargain over the calculation method and the total amount of the employee contributions prior to the date it reasonably believed to be the beginning of the benefit plan coverage year. Therefore, Respondent had a duty to bargain over that issue. However, there is no evidence that Respondent refused to bargain after receiving Charging Party's demand. The record reflects that the parties continued to bargain after Charging Party's demand was made.

Pursuant to Act 54, Respondent was authorized to increase the employees' share of health care costs when the cost of the medical benefit plan increased on February 1, 2012. However, the appropriate increase was the increase in the unbundled illustrative rate that became effective on February 1, 2012. Therefore, Respondent breached its duty to bargain when it unilaterally implemented an increase in the employee share of health care costs on February 1, 2012 based on the increase in the bundled illustrative rate, which included costs attributable to retirees. Accordingly, Respondent must recalculate the employee share for the period of January 1, 2012 through January 31, 2012 based on the unbundled illustrative rate applicable at that time and must compensate employees in the amount of their overpayment. Moreover, Respondent must recalculate the employee share for the period beginning February 1, 2012 and thereafter until the point the parties reached agreement, or became subject to a binding arbitration award pursuant to Act 312 and compensate the employees for their overpayment.[6]

The ALJ's decision is affirmed in part and reversed in part.

We have considered all other arguments submitted by the parties and conclude that they would not change the result in this case. Accordingly, we issue the following order.

## ORDER

Respondent Shelby Township, its officers and agents, are hereby ordered to:

1. Cease and desist from unilaterally changing terms and conditions of employment by requiring members of the bargaining unit represented by Charging Party Command Officers Association of Michigan, on and after January 1, 2012, to pay a share of the costs of their medical benefit plan calculated on the basis of illustrative rates that include retiree medical costs.

2. Within forty-five days of the date of this order, recalculate the share of health care costs it required Charging Party's members to pay on and after January 1, 2012 for their existing medical benefit plan, using illustrative rates provided by Blue Cross that do not include retiree costs, and make Charging Party's members whole for any

[6] 1969 PA 312, as amended by 1976 PA 203, 1977 PA 303, and 2011 PA 116, MCL 423.231-247.

excess monies they paid as a result of Respondent's use of bundled rates that included retiree costs, including interest at the statutory rate of five percent per annum.

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: August 18, 2014

## NOTICE TO EMPLOYEES

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

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

**WE WILL NOT** unilaterally change terms and conditions of employment by requiring members of the bargaining unit represented by Charging Party Command Officers Association of Michigan to pay a share of the costs of their medical benefit plan calculated on the basis of illustrative rates that include retiree medical costs.

**WE WILL,** within forty-five days of the date of this order, recalculate the share of health care costs we required Charging Party's members to pay on and after January 1, 2012 for their existing medical benefit plan, using illustrative rates provided by Blue Cross that do not include retiree costs, and make Charging Party's members whole for any excess monies they paid as a result of our use of bundled rates that included retiree costs, including interest at the statutory rate of five percent per annum.

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

**SHELBY TOWNSHIP**

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. C12 D-067/ Docket No. 12-000635-MERC

**STATE OF MICHIGAN**
**MICHIGAN ADMINISTRATIVE HEARING SYSTEM**
**EMPLOYMENT RELATIONS COMMISSION**

In the Matter of:

SHELBY TOWNSHIP,
Public Employer-Respondent,

Case No. C12 D-067
Docket No. 12-000635-MERC

-and-

COMMAND OFFICERS OF MICHIGAN,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Kirk, Huth, Lange & Badalementi, P.C., by Craig W. Lange, for Respondent

Douglas M. Gutscher, Police Officers Association of Michigan, for Charging Party

## DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard in Detroit, Michigan, on July 17, 2012, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including post-hearing briefs filed by the parties on or before September 18, 2012, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The charge in this case was filed on April 3, 2012, by the Command Officers Association of Michigan against Shelby Township. Charging Party is the bargaining agent for a unit of supervisory law enforcement officers employed by Respondent. The parties' most recent collective bargaining agreement expired on December 31, 2010. Pursuant to the terms of this contract, members of the unit continued to be provided with health insurance coverage through Blue Cross Blue Shield of Michigan (Blue Cross) after the contract expired. Unit members paid a specific dollar amount annually as a premium share, with the amount varying by level of coverage (single, two-person or family) selected.

Effective June 8, 2011, the Legislature adopted 2011 PA 54 (Act 54) which added §15(b) to PERA. This section provides that after a collective bargaining agreement expires and until a successor agreement is reached, employees who receive insurance benefits under a collective bargaining agreement are required to bear any increased cost of maintaining those benefits that occur after the expiration date of the contract. Effective September 2011, the Legislature passed the Publicly Funded Health Insurance Contribution Act, 2011 PA 152 (Act 152), MCL 15.561 et seq. This law places limitations on the amounts a public employer can pay for health care for its employees and elected officials for "medical benefit plan coverage years" beginning on and after January 1, 2012. Act 152 provides local municipalities like Respondent with three options for compliance (discussed more fully below): "hard cap" (§3 of the statute), "80/20" (§4 of the statute), and "opt-out" (§8 of the statute). The statute also permits the public employer to deduct additional sums from employees' compensation, if necessary, to cover the remaining costs.

In early December 2011, Respondent's Township Board voted to select the 80/20 option. On January 1, 2012, Respondent increased the premium share it deducted from the paychecks of Charging Party's members to 20% of the total amount of the Blue Cross illustrative rate for their coverage. On February 1, 2012, when the new rates for the employees' health insurance plan took effect, Respondent again increased the amount it deducted in premiums from unit members' paychecks by increasing each member's premium share by the percentage increase in the illustrative rate for their plan and coverage category.

Charging Party alleges that Respondent violated its duty to bargain by unilaterally implementing increases in its members' premium share pursuant to Act 152 without giving Charging Party an opportunity to bargain over the calculation and total amount of the premium share. According to Charging Party, this included, but was not limited to, how the employees' 20% share under the 80/20 option would be allocated between members of Charging Party's unit and non-union employees. Charging Party asserts that the imposition by Respondent of this premium share increase constituted an unlawful unilateral change in terms and conditions of employment in violation of §§10(1)(a) and (e) of PERA, both because it was imposed unilaterally and because the amount of the increase exceeded the amount authorized by Act 152 and Act 54. Charging Party asserts that the premium share imposed by Respondent on its members exceeded the amount authorized by these statutes because: (1) Respondent implemented the Act 152 increase before the beginning of the "medical plan coverage year;" (2) Respondent failed to impose the same premium share on non-union employees that it imposed on Charging Party's members; (3) in calculating the 20% premium share that it imposed on Charging Party's members, Respondent used an illustrative rate which improperly included the cost of medical benefits provided to retirees; and (4) Respondent's implementation of a 20% employee premium share pursuant to Act 152, in conjunction with passing on to Charging Party's members the full amount of the increase in the cost of the premium for their plan which took effect on February 1, 2012, constituted an impermissible "stacking" of premium sharing on Charging Party's members which resulted in Charging Party's members paying substantially more than 20% of the cost of their benefits after February 1, 2012.

Finally, Charging Party alleges that Respondent's decision to implement Act 152 premium sharing for its members, while failing to implement it for non-union employees, constituted unlawful discrimination to discourage union membership in violation of §10(1)(c) of

PERA.

Findings of Fact:

Act 54 and Act 152

Act 54, or §15(b) of PERA, MCL 423.215(b), reads, in pertinent part, as follows:

(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.* [Emphasis added].

* * *

(4) As used in this section:

* * *

(b) "Increased cost" in regard to insurance benefits means the difference in premiums or illustrated rates between the prior year and the current coverage year. The difference shall be calculated based on changes in cost by category of coverage and not on changes in individual employee marital or dependent status.

The provisions of Act 152 pertinent to this dispute are as follows:

Section 2. As used in this act:

* * *

e) "Medical benefit plan" means a plan established and maintained by a carrier, a voluntary employees' beneficiary association described in section 501(c)(9) of the internal revenue code of 1986, 26 USC 501, or by 1 or more public employers, that provides for the payment of medical benefits, including, but not limited to, hospital and physician services, prescription drugs, and related benefits, for public employees or elected public officials.

*Medical benefit plan does not include benefits provided to individuals retired from a public employer.* [Emphasis added]

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

Section 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 plans* 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.* [Emphasis added]

Section 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. [Emphasis added]

* * *

Section 6. A public employer may deduct the covered employee's or elected public official's portion of the cost of a medical benefit plan from compensation due to the covered employee or elected public official. The employer may condition eligibility for the medical benefit plan on the employee's or elected public official's authorizing the public employer to make the deduction.

Sec.7. (1*) 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.* [Emphasis added]

Sec.8. (1) By a 2/3 vote of its governing body each year, a local unit of government may exempt itself from the requirements of this act for the next succeeding year.

Interpretations of Act 152 "Medical Benefit Plan Coverage Year"

After Act 152 went into effect, the Michigan Department of Treasury issued a document entitled "Frequently Asked Questions" about that statute.[1] Question 1 of this document addressed the meaning of the term "medical benefit plan coverage year" as used in §§3 and 4 of Act 152. The document stated:

Q1. When does the benefit plan year begin?

A1. The Publicly Funded Health Insurance Contribution Act provides for certain limitations on the amount that public employers may contribute toward the annual cost of medical benefit plans that cover their employees. The act applies to "coverage years" beginning on or after January 1, 2012. The Act does not use the term "plan year."

Although "coverage year" is not defined in the Act, Treasury has interpreted this term to mean the one-year period beginning on the date that newly elected or newly renewed coverage begins for a group of persons under a medical benefit

[1] The Department of Treasury is not specifically charged with administering Act 152, but Section 9 of that Act gives the State Treasurer the authority to reduce the "economic vitality incentive payments" of municipalities that fail to comply with Act 152.

plan. Usually, this date is shortly after the annual benefit enrollment period during which employees choose coverage. Therefore, the first "coverage year" under the Act would be the one-year period beginning on the date on or after January 1, 2012 that new medical insurance begins.

On December 20, 2011, the Attorney General's office issued an informal advice letter discussing the meaning of "medical benefit plan coverage year."[2] The letter concluded, in pertinent part:

> Because the term "medical benefit plan coverage year" is used in the Act to indicate when the employer's contribution caps become effective, it appears that the Legislature intended "medical benefit plan coverage year" to coincide with the Employer's obligation to make premium payments for its employee medical benefit plans. The premiums payable for a medical benefit plan are generally determined at the time that the plan is issued or renewed, at which time the "coverage year" also becomes effective.
>
> * * *
>
> In your example, if a "medical benefit plan coverage year" began on January 1 when covered benefits adjust, but the premiums payable for the plan were subject to increase in an undetermined amount when the plan renews six months later on July 1, public employers would have extreme difficulty determining the plan's total annual costs and structuring their contributions in a manner that complies with the Act's contribution caps. The problem is avoided when the "medical benefit plan coverage year" begins on the same date that the plan renews and any premium adjustments for the plan's new term become effective.
>
> In summary, under the Publicly Funded Health Insurance contribution Act, 2011 PA 152, a "medical benefit plan coverage year" begins on the date that a public employer renews an existing medical benefit plan (and premiums likely adjust), or, for a new plan, on the date that the plan issues. At that time, the renewed or newly-issued plan becomes subject to the total dollar or total percentage cap elected by the public employer.

Insofar as the record reflects, there have been no court decisions interpreting the term "medical benefit plan coverage year" as used in Act 152.

---

[2] Whether governmental agencies are bound even by formal opinions of the Attorney General was called "questionable" in *Danse Corp. v City of Madison Heights,* 466 Mich 175, 182, n. 6, (2002), in which the Court cited *East Grand Rapids Sch Dis. v Kent Co,* 415 Mich. 381, 394, (1982) (a state agency is not bound by an Attorney General opinion that a statute is unconstitutional), and *Traverse City Sch Dist v. Attorney General,* 384 Mich 390, 410, n. 2, (1971) (an opinion of the Attorney General commands the allegiance of state agencies). Attorney General opinions are not binding on the courts.

Respondent's Imposition of Premium Share Increases in 2012

In addition to Charging Party's unit of supervisory police officers, Respondent has six other bargaining units: a nonsupervisory police officers unit; a unit of dispatchers; a general employees unit represented by the UAW; a supervisory employees unit represented by the UAW; a court employees unit; and a fire fighters unit. The only Respondent employees that are not represented by a union, other than its elected township supervisor, clerk and treasurer, are a group of department heads. When Act 152 took effect in September 2011, Charging Party's unit and the unit of dispatchers were the only bargaining units without collective bargaining agreements.[3] The collective bargaining agreements for the other units all expired on dates after December 31, 2012.

As noted above, the parties' most recent collective bargaining agreement expired on December 31, 2010. Under this contract, Charging Party's members had only one health insurance option, a "Flex Blue" health insurance plan provided by Blue Cross. Although employees in some of Respondent's other bargaining units had more than one plan to choose from, Charging Party's members were the only employees with this particular plan. Per the terms of the expired collective bargaining agreement, Charging Party members electing family or two-person coverage paid a premium share of $400 per year, while employees electing single coverage paid $200 per year.

The parties did not begin negotiations for a successor agreement until February or March 2011. Charging Party business agent Kevin Loftis headed Charging Party's bargaining team, and Human Resources Director Lisa Suida and attorney Craig Lange negotiated on behalf of Respondent. When negotiations began, Respondent proposed changes in co-pays and deductibles to shift more of the cost of their health care to unit members. After the passage of Act 152 in September 2011, the parties also began discussing ways to minimize the employees' premium share. The details of these discussions were not made part of the record in this case. However, the record reflects that the parties were unable to reach agreement on either a new contract or a new health plan.

During these post-Act 152 discussions, Charging Party did not make a demand to bargain over which of the three Act 152 options Respondent would select. Loftis testified that Charging Party interpreted Act 152 as giving Respondent the right to unilaterally select an option, although not the right to select different options for different groups or bargaining units of employees. Although Loftis' testimony was not completely clear, it appears that he anticipated that after Respondent made its selection, and assuming that Respondent did not "opt-out," the parties would bargain over any issues relating to the implementation of the premium share, with Charging Party's objective being the minimization of the actual premium paid by its members. There is no indication in the record that during these discussions the parties talked about when the "medical benefit plan coverage year" would begin for Charging Party's plan or the specific date that the Act 152 premium share would take effect.

[3] The record contains no reference to the dispatch unit other than the fact that this unit did not have a contract when Act 152 went into effect. That is, there is nothing in the record that indicates whether or not Respondent implemented an Act 152 premium increase for the dispatch unit in 2012, or, if so, how this premium increase was calculated.

Respondent is self-insured for all its health insurance plans with Blue Cross. Therefore, Respondent does not pay a premium. Instead, its payments to Blue Cross are based on illustrative rates determined both by the employer's cost experience and the level of benefits provided by the particular plan. In November 2011, Respondent's insurance consultant, John Vance, obtained illustrative rates from Blue Cross for the plan Respondent provided to Charging Party's members and the different, somewhat cheaper, plan Respondent provided to its elected officials for the purpose of calculating employee and elected official premium shares under Act 152. In Blue Cross parlance, separate rates for active employees and retirees are referred to as "unbundled" rates. The illustrative rates provided to Vance by Blue Cross were so-called "bundled rates," i.e. rates that were the same for active employees and retirees. As documents provided to Charging Party by Vance confirm, a "bundled" rate contains an inherent subsidy of retirees by active employees because true health care costs for retirees are, on average, greater than active employees' health care costs. In other words, as these documents reflect, if both active employees and retirees pay the same per capita premium for their benefits, active employees are paying more than they would if their premiums were calculated solely on costs incurred by active employees. Vance testified that at the time he asked Blue Cross for the rate information, Blue Cross did not, would not, and could not provide him with "unbundled" illustrative rates. Vance, therefore, used the "bundled" illustrative rates provided by Blue Cross to calculate the monthly premium shares for Charging Party's unit and the elected officials' group under both the hard cap and 80/20 option. In calculating premium shares under the 80/20 option, Vance assumed that both Charging Party's members and the elected officials would pay 20% of the monthly cost of their groups' plan.

In mid-November 2011, Loftis heard from a member of his bargaining unit that Respondent intended to adopt the 80/20 option only for Charging Party's bargaining unit and the dispatch unit, and the hard cap option for department heads and elected officials. Loftis reported this rumor to Charging Party chief counsel Frank Guido. Shortly after their conversation, on November 19, Loftis met with Lange and Suida at a restaurant to discuss the possibility of Charging Party allowing the Township to hire a chief of police outside of the collective bargaining agreement in return for Respondent "waiving the health care premiums for one or two years for Charging Party's members." This proposal was ultimately rejected by Charging Party's membership. During their discussions on November 19, Lange and Suida told Loftis that Respondent's Township Board had not made an official decision as to which Act 152 option Respondent would adopt. According to Loftis, he mentioned during this meeting that "the benefit plan renewed in February 2012," and neither Lange nor Suida contradicted him.

On November 22, Guido sent a letter to Suida based on his earlier conversation with Loftis. The letter stated, "assuming, for purposes of argument only, that the Township is entitled to impose the provisions of PA 152 on the Command Officers Association bargaining unit without first engaging in bargaining, the Township is not at liberty to utilize the 'hard-cap' formula for one group of employees and the '80%' formula for another." The letter also included this paragraph:

> By this correspondence, please be advised that the COAM reserves the right to challenge the Township's action as violative of the provisions of PA 152. In

addition, the Township is on notice that reliance and application of PA 152, without bargaining to impasse, constitutes a violation of collective bargaining rights pursuant to the Public Employment Relations Act.

The previous day, November 21, Suida had sent a letter to all employees, including members of Charging Party's bargaining unit, announcing an open enrollment period for Respondent's health plans from November 28 through December 9, with changes to take effect on January 1, 2012. In addition to providing information to employees about how to change or maintain their current coverage, Suida's letter stated that Respondent's Board of Trustees would vote in December whether to opt-out, utilize hard caps, or adopt the 80/20 option in 2012. Suida's letter to Charging Party's members included a chart showing the monthly premium share for their bargaining unit "effective January 1, 2012" for each coverage category if the Board adopted the 80/20 option and the monthly premium share for each coverage category if it adopted the hard cap option. The chart also included the premium share for each coverage category "as of February 1, 2012" for both options. The letter explained that under Public Act 54, any increases in the cost of health care were the responsibility of the employee until a successor contract was in effect, and that increases to the cost of the Township's insurance plan on February 1, 2012 accounted for the cost share changes on that date. For every coverage category, and on both January 1 and February 1, the employees' premium share was substantially less under the hard cap option. For example, according to Suida's letter, while a member of Charging Party's unit with full family coverage would have a premium share of $360 per month after February 1 under the 80/20 option, this same member's premium share would be only $165.74 under the hard cap option.

Suida did not testify that she sent or gave a copy of this letter to Loftis. The letter itself does not indicate that a copy was sent to Charging Party, and there was no evidence presented at the hearing as to whether this letter found its way to Charging Party representatives. When Respondent sought its admission, Charging Party's counsel commented that Charging Party had received this document or something similar around the date of the letter. However, Loftis, Charging Party's only witness, did not testify that he saw Suida's letter. In fact, according to Loftis, he assumed that the "medical benefit plan coverage year" would begin on or about February 1, 2012, which he knew was the date that the new Blue Cross rate increases for the year would take effect. That is, Loftis expected Respondent to implement the Act 152 premium increase and the Act 54 premium increase at the same time, and not until February.

On December 1, Lange sent Guido a reply to his November 22 letter stating that Respondent had made no decision yet as to what premium sharing arrangement would be implemented pursuant to Act 152, and that Respondent had not stated that it would impose different arrangements on different employee groups. The letter included this paragraph:

> I have, however, informed Mr. Loftis of the Township's intention to act upon PA 152's provisions, whether by means of opting out or applying the caps set forth in either Section 3 or Section 4, prior to the end of the calendar year. As you know, premium sharing is to begin, absent a Community's decision to opt out, *after January 1, 2012.* [Emphasis added].

On December 6, 2011, Respondent's Township Board adopted the following resolution:

> [T]o elect to comply with Section four of Public Act 152 and 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 a medical benefit plan coverage year beginning on or after January 1, 2012.* [Emphasis added]

Loftis watched a televised portion of the Board's meeting that included this resolution. According to Loftis, he did not interpret either Lange's letter or the Board's resolution as a declaration that Respondent would increase the premium share on January 1. Rather, he continued to assume that the Act 152 premium share increase and Act 54 premium share increase would be implemented at the same time in February.

On December 13, 2011, the parties met with a mediator to attempt to resolve their contract. There was no indication in the record that the parties discussed the Act 152 premium share at this meeting.

With the first paycheck after January 1, 2012, Respondent began deducting from the checks of Charging Party's members the 20% premium share amounts set forth in Suida's November 21, 2011 letter. It also began deducting 20% of the cost of their health care plan from the paychecks of its elected officials. Respondent did not increase the premium share paid by its department heads, even though the department heads were not covered by a collective bargaining agreement. According to Respondent, it concluded that the premium share requirements of §4 did not apply to department heads because Respondent had a contract, although not a collective bargaining agreement, with these individuals under §5 of Act 152. This contract, according to Respondent, took the form of a resolution adopted by Respondent's Board on November 21, 2006, as follows:

> WHEREAS, the Charter Township of Shelby wishes to memorialize its agreement with its other department heads, to wit:
>
> It is hereby resolved, that the above identified employees, excluding the fire chief and police chief, shall be compensated in accordance with the supervisory contract between the Charter Township of Shelby and the supervisory unit – UAW Local 1777, except as to the provisions of said collective bargaining agreement that pertain to union security, union rights, grievance procedure and deduction of dues; and with the longevity to be set at $60,000. With all of the above to be effective at 12:00 am on January 1, 2005.

According to Respondent, this resolution constituted a contract with the department heads that expired when Respondent's collective bargaining agreement with the UAW covering the supervisory unit expired.

On January 6, 2012, Loftis sent Suida this letter:

> The Union has received notice of the Employer's implementation of health care premium rate increases effective February, 2012. The Union demands to bargain over the calculation method and total amount of the employee contributions. The Union demands to bargain this issue prior to the implementation of the new health care contribution amounts.

Loftis testified that when he sent this letter, he was unaware that Respondent had already implemented the Act 152 premium share effective January 1. However, shortly thereafter, Loftis was informed of this fact by his members..

On January 13, Loftis met with Respondent representatives, including insurance consultant Vance, who confirmed that Respondent had already implemented the Act 152 premium share. Respondent explained to Loftis that it believed that its "medical plan coverage year" began on January 1, 2012, because this was the date that coverage and enrollment changes made during the open enrollment period became effective. During discussion of this change, Loftis learned from Vance that the illustrative rate used to calculate the total annual cost of the plan included medical insurance costs associated with retirees. i.e., was a "bundled" rate. He was also told that Blue Cross could not provide Respondent with an unbundled rate at the time Vance was calculating the premium share. However, by January 13, 2012, Blue Cross had begun providing self-insured employers with unbundled rates on a preliminary basis. At the January 13 meeting, Vance gave Loftis charts comparing the benefits of and premium shares for Charging Party's current health care plan with the benefits of and premium shares for five alternative plans, some from Blue Cross and some from other providers. Vance provided Loftis with charts using both bundled and unbundled rates. The charts showed that Charging Party's members' 20% premium share for their existing plan was less for all coverage categories when calculated on the basis of an unbundled rate. At the January 13 meeting, the parties also discussed Respondent's decision not to impose an Act 152 premium share on the department heads. Loftis testified that when he asked whether elected officials and non-union employees were subject to a premium increase, he was told that "this was an issue that only dealt with collective bargaining agreements." According to Loftis, Suida told him that she had been advised that it was within Respondent's discretion whether to charge the department heads. Loftis did not recall being told that Respondent had a contract with the department heads since it had passed a resolution linking them to the UAW contract. Suida denied telling Loftis that Respondent had the discretion to decide whether or not to charge the department heads. However, she did not explain what she or Respondent's other representatives told Loftis was the reason for Respondent's failure to impose an Act 152 premium share on the department heads.

Either at this meeting or sometime thereafter, Respondent also told Loftis that it planned to pass along the full amount of the rate increase for the unit's plan to Charging Party's members on February 1. On or about February 1, 2012, Respondent began charging Charging Party's members the premium share which Suida's November 21, 2011 letter had stated it would impose on that date if Respondent selected the 80/20 option. Loftis objected to Respondent's calculation of the amount of the second premium increase, pointing out that after this second increase, unit employees were actually paying more than 25% of the monthly illustrative rate. For example, a bargaining unit member electing full-family coverage, who prior to January 1, 2012 had paid a premium share of $400 per year, was required after February 1, 2012 to pay $360 per month,

$260.77 of which represented his 20% share of the cost of the plan on January 1 and $99.43 of which represented the increase in the monthly cost of the plan effective February 1. This $360 constituted 25.67% of the monthly cost of his insurance after February 1, 2012. Although the record was not entirely clear on this point, Loftis seems to have taken the position that the employees' total premium share, including the Act 54 increase, should be "capped" at 20% of the amount of the monthly illustrative rate for their coverage.

The parties continued to bargain toward a contract, and met again for negotiations on January 19, 2012. According to a summary of the parties' positions, both parties were open to discuss changes to the existing health care plan to bring the cost, and the premium share, down. However, they did not reach agreement on a new plan.

Discussion and Conclusions of Law:

In Act 152, the Legislature sought to at least partially dictate what public employers can pay their employees in the form of health insurance benefits. For public employers whose employees are represented by unions and for whom health insurance has been a mandatory subject of bargaining for more than 40 years, this was a sea change. This charge and the issues it raises reflect the uncertainty experienced by public employers and the unions representing their employees after Act 152 took effect over how to comply with their obligations under PERA and the obligations of the new statute.

Charging Party's Demand to Bargain

Respondent's first argument is that it had no duty to bargain over its implementation of the premium sharing required by Act 152 because Charging Party failed to make a timely demand to bargain over any aspect of this implementation. There is no dispute that an employer's duty to bargain is conditioned on its receipt of an appropriate request. *Local 586, Service Employees International Union v Union City,* 135 Mich App 553, lv den 421 Mich 857 (1995). Since Respondent argues Charging Party waived any bargaining rights it may have had by failing to make a timely demand, I will address that argument first. To begin, I agree with Respondent that Charging Party did not demand to bargain over which option Respondent would select to comply with Act 152. There was no indication that Loftis sought to bargain over this issue when the parties discussed changes to their health insurance plan after Act 152 went into effect in September 2011. It was also clear from Loftis' testimony that he believed Respondent did not have a duty to bargain over the selection of its Act 152 option. Guido's November 21 letter maintained that "reliance and application of PA 152, without bargaining to impasse," would violate PERA, but he did not specifically demand to bargain in that letter over the selection of the compliance option. I conclude that since Charging Party did not demand to bargain over Respondent's selection of a compliance option, Respondent had no duty to bargain over this issue.

On January 6, 2012, however, Loftis sent Respondent a letter demanding to bargain over "the calculation method and total amount of the employee contributions." By this time, Respondent had already implemented the Act 152 premium share. Respondent asserts that

Loftis' letter did not constitute a timely demand to bargain since Charging Party knew or should have known, at least as far back as November 2011, that Respondent intended to implement the Act 152 premium share effective January 1, 2012. I conclude, however, that the record did not establish that Loftis, or any Charging Party representative, had notice that Respondent considered January 1, 2012 to be the beginning of its "medical benefit plan coverage year" and, therefore, the date that the Act 152 premium share would be implemented.

Act 152 does not define the term "medical benefit plan coverage year." As reflected in the Treasury Department's FAQ and the informal opinion letter from the Attorney General's office, in the fall of 2011 there were questions about what this term meant as applied to some plans. There is no indication in the record, however, that the parties in this case discussed this issue at the bargaining table at any time in 2011. By November 21, 2011, when Suida sent a letter to Charging Party's members, Respondent had concluded that its "medical benefit plan coverage year" began when new coverage changes took effect or old coverage renewed after the open enrollment period even though premiums did not adjust on that date, which is apparently the interpretation adopted by the Treasury Department. Suida's letter informed Charging Party's members that their premium share would increase on January 1, 2012 if Respondent chose either the hard cap or 80/20 option, and that it would increase again on February 1, 2012 because of Act 54. This is the type of letter which one might expect employees would share with their bargaining representatives. However, there was no evidence in the record that Charging Party representatives saw this letter. Charging Party representatives did receive Lange's December 1 letter, and were aware of the Township Board's December 6 resolution. However, Lange's letter merely stated that Act 152 premium sharing would begin "after January 1, 2012," while the Township Board's December 6 resolution referred to a "medical plan coverage year" beginning "on or after January 1, 2012." Given the evidence, and Loftis' testimony, I conclude that Charging Party could have reasonably assumed that Respondent did not plan to implement the premium share increases required by Act 152 until February 1, 2012. Under these circumstances, I find that Loftis' demand to bargain on January 6, 2012 "over the calculation and total amount of employee contributions" was not untimely.[4]

Respondent's Duty to Bargain
Over the Amount and Calculation of the Premium Share

As discussed above, after its Township Board voted to adopt the 80/20 option, Respondent required both Charging Party's members and its elected officials to pay 20% of the costs of their plans, the minimum percentage allowed under that option. Respondent maintains that it had no duty to bargain with Charging Party over how the 20% share to be paid by employees and elected officials would be allocated among groups of employees, or over how Charging Party's members' 20% share was calculated. According to Respondent, its duty to bargain was limited to bargaining with Charging Party over the impact on employees of the

[4] In support of its claim that Charging Party representatives knew that Respondent intended to implement the Act 152 premium share on January 1, 2012, Respondent cites paragraph 4 of the charge, which states, "On or about November 11, 2011, Charging Party learned that Respondent was intending to unilaterally implement its interpretation of the provisions of PA 152 of 2011, effective January 1, 2012." The testimony, however, indicated that this paragraph was a reference to the rumor Loftis heard that Respondent intended to select different Act 152 options for unionized and non-unionized employees.

implementation of the Act 152 premium share. Since Respondent was willing to, and the parties did, bargain over changes to the existing plan that would reduce the employees' premium share, Respondent asserts that it satisfied any obligation it had to bargain under PERA.

On December 20, 2012, Administrative Law Judge Doyle O'Connor issued a Decision and Recommended Order in which he addressed the interaction between the duty to bargain under PERA and the mandates of Act 152, *Decatur Pub Schs,* (Case Nos. C12 F-123/12-001178 and C12 F-124/12-001180) currently pending on exceptions before the Commission. ALJ O'Connor found that the Legislature clearly intended Act 152 to apply to unionized employees, but that the Legislature also recognized in that statute that public employers continued to have an obligation to bargain over health insurance. He concluded that since the obligations imposed by the two statutes, PERA and Act 152, could be reconciled, they should be. Undertaking that task, he summarized his conclusions as follows:

> 1. A public employer has no duty to propose or demand bargaining over how it will comply with Act 152, i.e. the burden to demand bargaining is on the union.
>
> 2. Assuming that the union demands bargaining in a timely fashion, there is a duty to bargain over the employer's choice among the options provided by the statute for complying with Act 152. However, a public employer has no obligation to secure the union's agreement before taking steps to comply with Act 152 by imposing the statutorily mandated "hard caps."[He held that] the parties in the case before him were, upon the expiration of their collective bargaining agreements, at what amounted to a statutorily imposed impasse over health insurance cost sharing as they did not have an agreement. He characterized the hard cap option in §3 as the "fall back" option, and concluded that the public school employer in that case, upon reaching the deadline for complying with the statute, had no other alternative but to implement this option.
>
> 3. There continues to be a duty under PERA to maintain conditions of employment as to health insurance issues after expiration of the collective bargaining agreement, and that duty is excused only to the extent necessary to implement those changes required by Act 152.
>
> 4. There continues to be a duty to bargain in general over the nature of health insurance options.
>
> 5. There is a duty by an employer to bargain in good faith, if a timely demand is made, regarding the mechanism by which Act 152's mandate will be accomplished.
>
> 6. As with any other unilateral change in conditions of employment which an employer lawfully makes after reaching impasse, after implementing the premium share required by Act 152 the employer continues to have a duty to bargain over health insurance issues. He stated, however, in what he characterized as dicta,

that after an employer lawfully imposes changes to the premium share required by Act 152, these changes become the new status quo for purposes of subsequent bargaining.

Here, I have concluded that Charging Party conceded to Respondent the right to select the 80/20 option. As a result, it is unnecessary for me to reach the question of whether Respondent's unilateral imposition of an 80/20 premium share would have violated its duty to bargain. However, ALJ O'Connor's analysis of the concurrent obligations imposed by PERA and Act 152 are nevertheless relevant to the allegations in the instant charge. In *Decatur,* ALJ O'Connor concluded that the Legislature in Act 152 did not intend to preclude bargaining over all issues pertaining to compliance with that statute. Rather, he concluded that public employers continued to have a duty to bargain "over the mechanism by which Act 152's mandate will be accomplished." In finding that public employers have a duty to bargain over the option they select to comply with Act 152, he noted that §4 of Act 152 provides that the employer "may at its discretion" adopt the 80/20 option. However, as he discussed at some length in *Decatur*, many legislatively-granted rights of discretionary authority to an employer have been found to be subject to the duty to bargain under PERA. He concluded that because the public employer in his case had the discretion under Act 152 to choose either the hard cap or 80/20 option, it had an obligation to bargain with the union over its choice. To that analysis, I add that although the Legislature repeatedly amended §15 of PERA in 2011 to add new prohibited subjects of bargaining, the Legislature did not make issues pertaining to compliance with Act 152 a prohibited subject. I agree with ALJ O'Connor's analysis, and I conclude that a public employer has a duty to bargain with the unions representing its employees over issues of compliance with Act 152 which that statute otherwise leaves to the employer's discretion.

ALJ O'Connor concluded, however, and I agree, that the Legislature did not intend to give public employers engaged in bargaining new contracts with unionized employees the discretion to ignore the deadlines for complying with Act 152 set out in the statute. That is, in §5 the Legislature excused groups of employees covered by contracts, including collective bargaining agreements, containing provisions inconsistent with Act 152's requirements from the cost sharing requirements imposed by §§3 and 4. However, it did not exempt unionized employees not covered by an existing collective bargaining agreement. I conclude, as ALJ O'Connor did, that the Legislature intended to require a public employer engaged in bargaining a new collective bargaining agreement to comply with Act 152 at the beginning of its "medical benefit plan coverage year beginning on or after January 1, 2012" even if it and the union have not reached agreement or what would be traditionally considered impasse on a new agreement at the beginning of the "medical benefit plan coverage year" following the expiration of their previous agreement. Of course, the instant case differs from *Decatur* in that Respondent, as a local unit of government, could have elected to opt out under §8 of Act 152 as the school employer in *Decatur* could not. However, I find that an employer is not required to "opt out" merely because it is engaged in bargaining a new collective bargaining agreement with one of its units and the parties have not reached what would normally be considered impasse on the terms of the new agreement.

In sum, in accord with the reasoning of ALJ O'Connor in *Decatur,* I conclude that a public employer, upon receiving an appropriate demand, has a duty to bargain under PERA over

any aspect of its implementation of the Act 152 premium share that Act 152 leaves to its discretion. I also conclude, however, that the public employer, unless it elects to opt out, must comply with the deadlines for compliance imposed by §§ 3 or 4 of Act 152 regardless of the status of negotiations over these issues. I reject, therefore, Charging Party's argument that in 2012, Respondent was entitled to pass along to Charging Party's members only the premium share increases required by Act 54, and not those provided for in Act 152, because the parties had not reached agreement or impasse on a new collective bargaining agreement.

In addition to giving a non-school public employer the options for compliance set out in §§3, 4, and 8 of Act 152, §4 allows a public employer selecting the 80/20 option to "allocate the employees' share of total annual costs of the medical benefit plans among the employees of the public employer as it sees fit." Respondent argues that the phrase "as it sees fit" in §4 exempted it from a duty to bargain over how the employees' share would be allocated among groups of employees. However, as discussed by ALJ O'Connor in *Decatur,* statutes granting discretionary authority over some aspect of the employment relationship to a particular individual, including statutes granting judges and elected officials the sole authority to appoint or reappoint employees under them, have not been interpreted as eliminating the duty to bargain over this issue under PERA. Instead, the courts have sought to reconcile the obligations of the two statutes by requiring that the judge or elected official be given the opportunity to participate in collective bargaining.

In the instant case, Respondent allocated the employees' share by charging Charging Party's members twenty percent of the total annual costs of the plan they personally participated in, the same method it used to determine its elected officials' share. As Charging Party points out, however, §4 requires only that an employer "pay no more than 80%" of its employees' and elected officials' total annual medical costs." Under the plain language of the statute, an employer could choose to pay less than 80% - or none – of these costs. Moreover, even if the employer voluntarily commits to paying 80% of its total costs, §4 plainly permits methods of allocating the 20% other than the one Respondent chose. For example, an employer could, consistent with the language of the statute, require all employees to pay the same share of the employer's total annual costs even if some employees were covered by plans with higher per-employee costs. It could also fix the percentage of total costs to be paid by non-union employees at less than 20% and require other groups to pay a higher percentage. I find that the plain language of §4 gives an employer the right, absent other restrictions, to favor one group of employees over another in the allocation of the total health care cost burden, just as it has the right to favor one group over another by paying higher salaries to its more valued employees. I find that the decisions an employer is allowed by Act 152 to make about the percentage it will pay under §4 and the allocation of the employees' share among groups of employees constitute mandatory subjects of bargaining under §15(1) of PERA because they clearly affect employees' wages, hours and terms and conditions of employment.

Respondent argues that it will be left in an impossible bargaining position if it must bargain over how the premium costs under §4 are allocated among its various employee groups and bargaining units. While Respondent has seven bargaining units, it argues that it would be impossible to fulfill its obligation to bargain in good faith over this issue even if it had only two units. As an example, it asserts that if it first bargained with unit A, and the parties agreed that

unit A's members would pay only 10% of the employer's total annual costs of its medical benefit plans, then unit B's members would, in effect, be forced to pay 30% in order to comply with the 80/20 premium share requirement. If the two labor contracts expired in sequential years, and the unit whose contract expired first demanded that it pay 10% of the total allocated premium, the public employer would be required to set the percentage allocation for the other unit at 30% even though the contract for that unit had not expired.

Admittedly, bargaining under such circumstances would be complicated. However, the Commission has held that where an action involving a mandatory bargaining subject impacts more than one bargaining unit, an employer has a duty to bargain over that action with all affected units. *City of Port Huron,* 1985 MERC Lab Op 872; *City of Detroit (Police Dept) –and- Detroit Police Lieutenants and Sergeants Ass'n (DPLSA),* 18 MPER 532 (2005). In *City of Detroit (Police Dept) –and- Detroit Police Officers Ass'n (DPOA),* 17 MPER 18 (2004) (no exceptions), the Commission held that the Employer violated its duty to bargain with the representative of its patrol officers by unilaterally changing the criteria and procedures for promotion to the rank of sergeant by members of the DPOA when it promoted all inspectors – a position represented by the DPLSA – to sergeant even though an award issued in an Act 312 proceeding involving the Employer and the DPLSA required these promotions. The ALJ held in that case that the employer was not absolved by the Act 312 award from its duty to bargain with the DPOA over changes in promotional standards and criteria. After the ALJ issued his decision, the Employer rescinded the promotions. The DPLSA then filed a charge against the Employer alleging that it had violated its duty to bargain with the DPLSA by unilaterally rescinding the promotions. The Commission concluded that the Act 312 panel had no authority to issue an award that affected the terms and conditions of employment of another bargaining unit. However, it concluded that the employer had violated its duty to bargain with the DPLSA by rescinding the promotions without first giving the DPLSA notice that it had changed its position and giving the DPLSA, as well as the DPOA, the opportunity to demand bargaining over the criteria and procedures for promotion to sergeant. The Commission held that it was the employer's responsibility to address the competing interests and to ensure that both unions were informed of potential changes in promotional criteria and given the opportunity to bargain over those changes. The Court of Appeals affirmed the Commission in an unpublished decision. *City of Detroit v Detroit Lieutenants and Sergeants Ass'n, (*Unpublished opinion of the Court of Appeals, Docket No. 265325, issued February 6, 2007).

In order to fulfill its duty to bargain under PERA over the allocation of premium costs under the 80/20 option, an employer might have to provide notice to all its unions of proposals made by any of them regarding the allocation of costs, and to give all its unions the opportunity to participate in negotiations before reaching agreement with any of them. However, it is important to note that the fact that an employer is required to bargain over the allocation of the employees' share under the 80/20 option does not mean that it is obligated to agree to union demands, including demands that make it impossible for the employer to both comply with Act 152 and honor its collective bargaining contracts with other unions. For simplicity's sake, Respondent and its unions might agree to the method of allocating costs Respondent adopted in this case, which was to require each group to pay 20% of the costs of its own plan. Leaving aside Respondent's decision to exempt department heads from the premium share, Respondent's method of allocating costs did not favor either Charging Party's unit or the elected officials.

However, as discussed above, this method is not the only method permitted by §4. The fact that the method Respondent unilaterally chose may have appeared to be the fairest under the circumstances is not an argument for excusing it from bargaining over its choice. I do not agree with Respondent that bargaining with its unions over the allocation of the employee share under §4 would be impossible. I conclude that Respondent had a duty to bargain with Charging Party over the allocation of the employees' share under §4 of Act 152 after it had elected the 80/20 option and after it had received Loftis' January 6, 2012 demand to bargain over the "calculation and total amount of the employees' contribution." I also conclude that it failed to do so in this case.

Whether the Premium Share Exceeded the Amount Authorized by Act 152

Charging Party alleges that Respondent's unilateral implementation of the Act 152 and Act 54 premium shares violated PERA because the amount of the increase exceeded that authorized by those statutes. Specifically, it alleges that Respondent: (1) implemented the Act 152 increase before the beginning of the "medical benefit plan coverage year;" (2) failed to impose the same premium share on non-union employees that it imposed on Charging Party's members; (3) contrary to Act 152, calculated the 20% premium share it imposed on Charging Party's members by using an illustrative rate which included the cost of medical benefits provided to retirees, and (4) impermissibly "stacked" premium increases by imposing a 20% Act 152 premium share and then separately passing along to Charging Party's members the full amount of the increase in the illustrative rate for their plan, resulting in their paying more than 20% of the cost of their plan as a premium share.

In response to Charging Party's claim that the premium share implemented by Respondent exceeded the amount authorized by Act 152, Respondent argues that it properly implemented the Act 152 premium share at the beginning of its "medical benefit plan coverage year" on January 1, 2012. According to Respondent, it reasonably relied on the Department of Treasury's definition of that term, since the State Treasurer is responsible under Act 152 for enforcing the financial penalties imposed on local municipalities for failure to comply with that Act. Respondent also maintains that it properly calculated the 80/20 premium share based on the illustrative rate provided by Blue Cross. It denies that Act 152 prohibits the use of retiree data to calculate the illustrative rate under §4, and also asserts that the Commission lacks jurisdiction to determine whether Respondent's use of a "bundled" illustrative rate violated Act 152. Respondent asserts that it did not impose a premium share on its nonunion department heads because it had a contract with these department heads that precluded it from doing so. In addition, Respondent maintains that it properly passed along to Charging Party's members the additional increase in their health insurance premiums on February 1, 2012, as Act 54 required.

As noted above, ALJ O'Connor concluded in *Decatur* that Act 152 did not eliminate a public employer's duty under PERA to maintain existing terms and conditions of employment, including health insurance, after the expiration of a collective bargaining agreement, but excused that duty only to the extent necessary to implement the changes required by Act 152. Obviously, the Commission must proceed cautiously in finding that an employer's implementation of an increase in an employee premium share violated PERA because the increase exceeded the amount authorized by Act 152. The Commission is not charged with administering Act 152, and,

therefore, has only the authority to determine whether a public employer is excused by the terms of Act 152 from what would be, in the absence of that statute, its obligations to bargain under PERA. However, allowing an employer, under the aegis of complying with Act 152, to implement a premium increase which is clearly contrary to the plain language of that statute would be equivalent to ignoring the employer's continuing duty to bargain under PERA over employees' health benefits and the share the employer will assume of the costs of these benefits.

Act 152 does not define "medical benefit plan coverage year" as used in the statute, and that language of the statute provides little guidance as to its meaning. As the record reflects, the Michigan Department of Treasury reached one conclusion as to the meaning of the term, while the Attorney General's office reached a somewhat different conclusion as to its meaning. Neither of these interpretations, needless to say, was clearly contrary to the language of Act 152, and the issue has not been resolved by a court ruling. I conclude that under these circumstances, the Commission should not attempt its own interpretation of the term. I note that the Commission sometimes refrains from asserting jurisdiction over disputes over which it has statutory jurisdiction. For example, the Commission has long held that it has jurisdiction to interpret a collective bargaining agreement where necessary to determine whether an unfair labor practice has been committed. *Univ of Mich*, 1971 MERC Lab Op 994; *City of Ann Arbor*, 1990 MERC Lab Op 528, 538; *City of Detroit (Dept. of Public Works)*, 2001 MERC Lab Op 234 236. However, the Commission does not exercise jurisdiction over every contract dispute. Rather, it does not find an unfair labor practice based on an alleged breach of contract unless the employer has "repudiated" the contract. See *Gibraltar Sch Dist,* 16 MPER 36 (2003). Repudiation does not exist unless (1) the contract breach is substantial and has a significant impact on the bargaining unit; and (2) no bona fide dispute over interpretation of the contract is involved. *Plymouth-Canton Cmty Schs,* 1984 MERC Lab Op 894, 897. I conclude that since Respondent adopted a reasonable interpretation of the term "medical benefit plan coverage year," the Commission should not conclude that its decision to impose the Act 152 premium share on the date that newly elected or newly renewed coverage began for Charging Party's members after their annual enrollment period violated Respondent's duty to bargain under PERA.

I also find that Respondent did not violate its duty to bargain with Charging Party by failing to require department heads to pay an Act 152 premium share in 2012. I note that if the health care costs of the department heads had been considered to be part of Respondent's "total annual medical costs for all the medical benefit plans" of its employees and elected officials, Charging Party could have demanded that the department heads pay a percentage greater than 20%, and Charging Party's members a lesser percentage, of these costs. Therefore, Respondent's decision not to require the department heads to pay an Act 152 premium share did have an impact on Charging Party's members. However, Section 6 of Act 152 states that the requirements of §§3 and 4 do not apply to employees covered by a collective bargaining agreement "or other contract" and that the "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 statute does not otherwise define "other contract." I find that Respondent's conclusion that the November 2006 Township Board resolution constituted a contract between Respondent and the department heads under that section was not unreasonable or clearly contrary to the language of

Act 152. I conclude, therefore, that Respondent did not violate its duty to bargain with Charging Party by excluding department heads from the calculation of the 2012 premium share.

I agree with Charging Party, however, that Respondent's use of "bundled" illustrative rates to calculate the total cost of the health care plans it provided to its employees and elected officials under §4 of Act 152 was contrary to the plain language of Act 152. Section 2(e) of Act 152 explicitly excludes benefits provided to retirees from the definition of "medical benefit plan." Respondent is correct that Act 152 does not explicitly require that illustrative rates be calculated on the experience of active employees only. However, since "total annual costs" under §4 are calculated using the "illustrative rate of the [employer's] medical benefit plan(s)," I conclude that the plain meaning of §2(e) is that retiree costs are not to be included in the illustrative rates used to calculate the employer's total costs, and, therefore, the employee's premium share. I note that the decision of the Legislature to exclude retiree costs makes sense, since some public employer health plans covering active employees also cover retirees, while others, such as plans for public school employees, do not. Since retiree costs tend to be higher than the costs of active employees, if retiree costs were included in the calculation of the employer's total cost, employees in plans that include retirees would in effect be forced to subsidize retiree benefits while other employees would not. In this case, Blue Cross could not provide Respondent with "unbundled" illustrative rates for Respondent's health plans when Respondent calculated its Act 152 premium shares in November 2011. However, by January 13, 2012, Respondent was able to give Charging Party the unbundled rates for several Blue Cross plans, including its members' existing plan. As might be expected, the documents showed that the unit members' 20% premium share was lower when calculated using the unbundled rates for their plan than when calculated using the bundled rates Respondent had used in November. Respondent has not asserted that there was any reason that it could not have adjusted the amount it was deducting from employees' checks after Blue Cross provided it with rates for their plan that did not include retiree costs. I conclude that Respondent violated its duty to bargain under PERA in this case by unilaterally requiring Charging Party's members to pay a premium share that was calculated on the basis of illustrative rates that included retiree costs.

Respondent's Implementation of the Act 54 Premium Increase

As discussed above, Charging Party argues that Respondent impermissibly "stacked" premium increases by imposing a 20% Act 152 premium share and then separately passing along to Charging Party's members the full amount of the increase in the illustrative rate for their plan when the rates increased, resulting in their paying more than 20% of the cost of their plan as a premium share for the 2012 calendar year. Respondent maintains that it was obligated by Act 54 to pass along the full amount of the increases on the date the increases took effect.

As discussed above, Act 152 left Respondent with the discretion to determine how large a share, above the minimum threshold of 20%, employees and elected officials would pay of the total costs in 2012 of the medical benefit plans Respondent provided them and how this share would be allocated among employee groups and elected officials. I have concluded, as discussed above, that because of this discretion, Respondent had a duty to bargain with Charging Party over the calculation and total amount of the premium contribution paid by members of Charging Party's bargaining unit in 2012. Although Respondent was required by Act 54 to pass along to

Charging Party's members the increases in the illustrated rates for their insurance plan which took effect on February 1, 2012, the total amount of their 2012 premium contribution obviously included these increases. I conclude that the percentage that Charging Party's members were actually required to pay as a premium share, which included the increases implemented pursuant to Act 54, was an issue subject to bargaining and over which Respondent should have bargained after it received Charging Party's bargaining demand. I also find that since Respondent failed to bargain with Charging Party over this issue after Loftis' January 2012 demand, it could not thereafter lawfully increase the premium share of Charging Party's members above the 20% it unilaterally determined, on or before January 2012, would be their share. That is, I conclude that in the absence of agreement or bargaining, Respondent was required to recalculate the premium shares paid by Charging Party's members after the Act 54 increases took effect so that the these employees were not paying more than 20% of the total amount of the monthly illustrative rate for their plan for 2012.

In sum, I conclude that the total amount of the 2012 premium share paid by Charging Party's members was a mandatory subject of bargaining, and that Respondent was obligated to bargain after Charging Party demanded to bargain over that issue on January 6, 2012. However, I conclude that Respondent acted unlawfully by unilaterally requiring Charging Party's members to pay a premium share calculated on the basis of illustrative rates that included retiree costs. I also conclude that Respondent could not unilaterally determine that Charging Party's members would pay a 20% share of the costs of their insurance plan as a premium share in 2012, refuse Charging Party's demand to bargain over the total amount of the premium share, and then unilaterally implement increases pursuant to Act 54 which raised employees' premium share above 20%. However, I conclude that Respondent did not violate PERA by implementing the Act 152 premium share for Charging Party's members on January 1, 2012 or by requiring Charging Party's members to pay an Act 152 premium share when it did not require its nonunion department heads to do so.

Alleged Discrimination

I find no evidence to support Charging Party's allegation that Respondent's decision to exempt department heads from the premium sharing requirements of PA 152 constituted discrimination against Charging Party's members to discourage membership in a labor union in violation of §10(1)(c) of PERA. In order to establish a violation of §10(1)(c), Charging Party must present substantial evidence establishing that Respondent had an illegal motive for the action constituting the unlawful discrimination. See, e. g., *Lake Erie Transportation Commission,* 16 MPER 21 (2003); *Rochester Sch Dist,* 2000 MERC Lab Op 38, 42. Here, the facts showed only that Respondent decided to exempt non-union department heads from the Act 152 premium share while imposing the premium share on unionized employees not covered by collective bargaining agreements. Respondent justified its decision on the basis that a 2006 resolution of the Township Board constituted a contract between Respondent and the department heads which, under §5 of Act 152, exempted the department heads from the requirements of the §4 80/20 premium share. While the non-union department heads benefited from Respondent's conclusion that the Board resolution constituted a contract, Charging Party presented no evidence that Respondent's conclusion was based on hostility toward or a desire to retaliate

against unionized employees in general or Charging Party's members in particular. I conclude, therefore, that the §10(1)(c) allegation should be dismissed.

## Remedy

As discussed above, I have concluded that Respondent violated its duty to bargain under §15 of PERA by unilaterally requiring Charging Party's members to pay a share of their medical benefit plan costs calculated on the basis of illustrative rates that included retiree medical costs, since Act 152 explicitly excludes benefits provided to retirees from the definition of a medical benefit plan under that statute and, therefore, did not authorize Respondent to deduct these costs from the paychecks of Charging Party's members. In addition to a cease and desist order, I find the appropriate remedy for this violation to be an order requiring Respondent, within 45 days of the date of the order, to recalculate the premium share it imposed on Charging Party's members on and after January 1, 2012 using unbundled illustrative rates for their existing medical benefit plan as provided by Blue Cross, and to make Charging Party's members whole for any excess premium share they paid as a result of Respondent's use of bundled rates.

I have also concluded that Respondent unlawfully refused to bargain with Charging Party over the calculation and total amount of the premium share it imposed on Charging Party's members in 2012 after Charging Party demanded to bargain over these issues on January 6, 2012. This did not include a duty to bargain over the selection of its method of complying with Act 152, as Charging Party conceded Respondent's right to select the method. It was also limited to issues over which Respondent had discretion under Act 152 and Act 54. These issues included the allocation among Charging Party's members, its elected officials and members of any other bargaining unit without a collective bargaining agreement of the 20% Respondent designated as the employees' and elected officials' share of total annual medical costs under §4 of Act 152. I have concluded, in addition, that after unilaterally determining that Charging Party's members would pay a 20% premium share under Act 152, Respondent could not then lawfully implement further premium increases pursuant to Act 54 which raised the members' premium share above 20%.

The appropriate remedy for these violations, I find, includes: (1) a cease and desist order; (2) an order requiring Respondent to bargain with Charging Party over the calculation and total amount of Charging Party's premium share after January 1, 2012 to the extent that it can lawfully do so; (3) and an order requiring Respondent to recalculate the employees' premium shares for this period based on any agreement reached between the parties, or in the absence of an agreement to the contrary, to make Charging Party's members whole, plus interest, for sums deducted from their paychecks for premium shares to the extent that these sums exceeded 20% of the illustrative rates for their insurance coverage for this period.

I conclude that the remedy Charging Party's seeks, which is an order to Respondent to restore the status quo ante of medical insurance coverage and premium sharing in effect prior to January 1, 2012 and make Charging Party's members whole for losses suffered, is neither appropriate nor permissible in this case. This remedy is not appropriate because Respondent's imposition of the Act 152 premium share on January 1, 2012 took place before Charging Party demanded to bargain, and, therefore, did not constitute an unlawful unilateral change. It is not

permissible because requiring Respondent to restore the status quo and/or reimburse Charging Party's members for the additional premium share they paid after January 1, 2012 pending satisfaction of its obligation to bargain would likely force Respondent out of compliance with Act 152. I recommend, therefore, that the Commission issue the following order.

## RECOMMENDED ORDER

Respondent Shelby Township, its officers and agents, are hereby ordered to:

1. Cease and desist from unilaterally changing terms and conditions of employment by requiring members of the bargaining unit represented by Charging Party Command Officers of Michigan, on and after about January 1, 2012, to pay a share of the costs of their medical benefit plan calculated on the basis of illustrative rates that included retiree medical costs.

2. Within 45 days of the date of this order, recalculate the premium share it required Charging Party's members to pay on and after January 1, 2012 using illustrative rates for their existing medical benefit plan that do not include retiree costs, as provided by Blue Cross, and make Charging Party's members whole for any excess monies they paid as a result of Respondent's use of bundled rates that included retiree costs, including interest at the statutory rate of 5% per annum.

3. Cease and desist from refusing to bargain over issues related to the calculation and total amount of the premium share it required Charging Party's members to pay after January 2012, to the extent that Respondent had discretion over these issues under Act 152 and Act 54.

4. Upon demand, bargain with Charging Party over issues related to the calculation and total amount of the premium share it required Charging Party's members to pay after January 2012, including the allocation of the twenty-percent share of total medical costs Respondent designated as the share of its employees and elected officials in 2012 among Charging Party's members, Respondent's elected officials, and any other group of employees not covered by a collective bargaining agreement or other contract.

5. If agreement is reached, recalculate the premium share Charging Party's members were required to pay after January 2012 based on this agreement, and make Charging Party's members whole for any excess monies they paid in excess of the agreed-upon premium share.

6. If no agreement is reached, make Charging Party's members whole for sums deducted from their paychecks on and after February 1, 2012 as a premium share to the extent that these sums exceeded 20% of the illustrative rates for their health insurance coverage, including interest at the statutory rate of 5% per annum.

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____

## NOTICE TO EMPLOYEES

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

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

**WE WILL NOT** unilaterally change terms and conditions of employment by requiring members of the bargaining unit represented by Charging Party Command Officers of Michigan to pay a share of the costs of their medical benefit plan calculated on the basis of illustrative rates that include retiree medical costs.

**WE WILL,** within 45 days of the date of this order, recalculate the premium share we required Charging Party's members to pay on and after January 1, 2012 using illustrative rates for their existing medical benefit plan that do not include retiree costs, as provided by Blue Cross, and make Charging Party's members whole for any excess monies they paid as a result of our use of bundled rates that included retiree costs, including interest at the statutory rate of 5% per annum.

**WE WILL NOT** refuse to bargain over issues related to the calculation and total amount of the premium share we required Charging Party's members to pay after January 2012, to the extent that we have discretion over these issues under 2011 PA 54 (Act 54), MCL 423.215(b), and 2011 PA 152 (Act 152), MCL 15.561 et seq.

**WE WILL**, on demand, bargain with the Charging Party Command Officers of Michigan over issues related to the calculation and total amount of the premium share we required its members to pay after January 2012, including the allocation among Charging Party's members, our elected officials, and any other group of employees not covered by a collective bargaining agreement or other contract, of the twenty-percent share of total medical costs we designated as the employees' and elected officials' share in 2012.

**WE WILL,** if agreement is reached, recalculate the premium share Charging Party's members were required to pay after January 2012 based on this agreement, and make Charging Party's members whole for any excess monies they paid in excess of the agreed-upon premium share.

**WE WILL,** if no agreement is reached, make Charging Party's members whole for sums deducted from their paychecks on and after February 1, 2012 as a premium share to the extent that these sums exceeded 20% of the illustrative rates for their health insurance coverage, including interest at the statutory rate of 5% per annum.

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

**SHELBY TOWNSHIP**

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. C12 D-067/ Docket No. 12-000635-MERC