STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAVERLY COMMUNITY SCHOOLS,
Public Employer-Respondent in MERC Case No. C16 I-097,
Hearing Docket No. 16-028100,
Charging Party in MERC Case No. CU16 L-062/Hearing Docket No. 16-035891,

-and-

WAVERLY EDUCATON ASSOCIATION, MEA/NEA,
Labor Organization-Respondent in MERC Case No. CU16 L-062,
Hearing Docket No. 16-035891,
Charging Party in MERC Case No. C16 I-097/Hearing Docket No. 16-028100.
_____/

APPEARANCES:

Eric D. Delaporte, for the Public Employer

White, Schneider, PC, by Timothy J. Dlugos, for the Labor Organization

DECISION AND ORDER

On June 14, 2017, Administrative Law Judge Julia C. Stern (ALJ) issued her Decision and Recommended Order in the above matter finding that both the Waverly Community Schools (the Employer) and the Waverly Education Association, MEA/NEA, (the Union) violated § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ concluded that the Employer violated its duty to bargain in good faith by refusing to make contributions to employees' health savings accounts (HSAs) on January 1, 2017. The ALJ also concluded that the Union violated its duty to bargain in good faith on October 6, 2016, when it continued to propose that the parties' successor collective bargaining agreement include language on a prohibited subject of bargaining, teacher discipline. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

The Union filed exceptions to the ALJ's Decision and Recommended Order on July 5, 2017. The Employer filed a Motion for a Retroactive Extension to File a Response to Exceptions on July 24, 2017.

On August 17, 2017, the Commission received a Stipulation to Withdraw Charges signed by counsel for the Union and the Employer. The Stipulation requests leave to withdraw the charges filed by each party. The parties' request is hereby approved.

This Decision and Order and the Decision and Recommended Order of the Administrative Law Judge will be published in accordance with Commission policy.

ORDER

The unfair labor practice charges are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: November 17, 2017

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

WAVERLY COMMUNITY SCHOOLS,
Public Employer-Respondent in Case No. C16 I-097/Docket No. 16-028100,
Charging Party in Case No. CU16 L-062/Docket No. 16-035891-MERC,

-and-

WAVERLY EDUCATON ASSOCIATION, MEA/NEA,
Labor Organization-Respondent in Case No. CU16 L-062/Docket No.16-035891-MERC,
Charging Party in Case No. C16 I-097/Docket No. 16-028100-MERC.
_____/

APPEARANCES:

Eric D. Delaporte, for Waverly Community Schools

White, Schneider, PC, by Timothy J. Dlugos, for the Waverly Education Association, MEA/NEA

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 on February 2, 2017, 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 March 13, 2017, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges:

On September 26, 2016, the Waverly Education Association, MEA/NEA (the Union) filed the unfair labor practice charge in Case No. C16 I-097/ Docket No. 16-028100 against the Waverly Community Schools (the Employer). The Union represents a bargaining unit of professional teaching personnel and other educational professionals employed by the Employer. This unit includes both certified teachers covered by the Michigan Teacher Tenure Act, 1937 PA 4, MCL 38.71 to 38.191, and educational professionals whose employment is not covered by that statute. At the time this charge was filed, the parties had been bargaining since approximately January 2016 for a new collective bargaining agreement to replace an agreement that expired on

June 30, 2016. The parties had been unable to reach agreement on the terms of a new contract and had not agreed on a calendar for the 2016-2017 school year when classes began for that year. The charge, as originally filed, alleges that the Employer violated its duty to bargain in good faith by making three unilateral alterations to the school calendar at the beginning of the 2016-2017 school year. The alleged unilateral changes were: (1) scheduling professional development days for teachers on August 23 and August 24, 2016; (2) adding five minutes to the school day at the high school; and (3) inserting into the calendar fifteen "late start" days, i.e., school days on which students were to report two hours after their normal start time, with their teachers participating in professional development activities during these two hours.

On November 22, 2016, the Union amended its charge to allege that the Employer unlawfully altered employees' existing compensation by announcing that it would refuse to make lump sum contributions to the employees' health savings accounts (HSAs) on January 1, 2017.

On December 22, 2016, the Employer filed the charge in Case No. CU16 L-062/Docket No. 16-035891-MERC against the Union. This charge was amended on January 6, 2017. The Employer's charge alleges that the Union violated its duty to bargain in good faith on October 6, 2016, when it again submitted a contract proposal that included language on a prohibited subject of bargaining despite the fact that the Employer had unequivocally refused to agree to that language or bargain over its inclusion in the new contract. The Employer asserts that the language in dispute dealt with procedures the employer was required to follow before disciplining a teacher covered by the Teacher Tenure Act, a subject made a prohibited subject of bargaining by Section 15(3)(m) of PERA. On January 17, 2017, the Employer filed a motion for summary disposition of its charge. I concluded, however, that the Employer's and Union's charges should be consolidated and therefore held the Employer's motion in abeyance.

Findings of Fact:

The 2013-2016 Collective Bargaining Agreement

Articles 5.11 and 5.12

The parties' previous contract covered the term July 1, 2013, through June 30, 2016. Article 5, entitled "Association and Teacher Rights and Protection," included this language, at Article 5.11:

> No specialist shall be reprimanded and/or disciplined without just cause and due process.[1] The District shall apply its rules, orders and penalties in an impartial and equitable manner. Specialists shall be forewarned of possible and/or probable disciplinary action. All investigations regarding specialist conduct shall be conducted fairly and objectively, and with the specialist's knowledge to the extent permitted by law.

[1] The agreement defines a "specialist" as a bargaining unit member whose employment is not regulated by the Teacher Tenure Act.

The teacher or specialist shall, upon request, have the right to Association representation during any such investigation. Warnings and reprimands related to a teacher or specialist's performance or assigned duties shall be discussed privately between the teacher or specialist and principal except when either party requests the presence of an Association representative and/or bargaining unit representative of his/her choice. Neither party shall delay discussion more than two (2) school days from the date initially requested by administration except by mutual consent.

The following section, Article 5.12, read as follows:

A. The parties agree that most matters of concern can best be resolved informally through discussions between parents/guardians and teachers.

B. Any parent/guardian having a complaint against a teacher and who has not lodged his/her complaint with the teacher, when appropriate, shall be referred to the teacher by the principal.

C. Any parent/guardian who has not lodged his/her complaint with the teacher or principal shall be referred, when appropriate, to the principal by any other administrator who has been approached by that person with the complaint.

D. Any written or verbal complaint from a parent/guardian received by an administrator about a teacher or specialist or his/her job performance shall be called to the teacher or specialist's attention within two (2) school days and prior to any disciplinary action being taken on the complaint. The teacher or specialist shall receive a copy of any written complaint. The validity of the complaint shall be investigated by the administrator. The teacher or specialist shall be given an opportunity to respond to the complaint (including, where appropriate, a meeting with the parent/guardian) before any disciplinary or other corrective action is taken.

E. In the event the nature of the complaint may cause a specialist's principal to question the ability of the specialist, no conclusion that the specialist is deficient in his/her performance shall be drawn without first conducting an evaluation consistent with the procedure outlined in Article 12.3.

Article 7.1

Article 7.1 of the 2013-2016 contract, entitled "Teaching Hours," read as follows:

The daily class time shall be:

	Elementary K-4[2]	East	Middle	H.S.
Student/class Starting time	8:30	7:38	7:48	7:40
Student/class Dismissal time	3:30	2:30	2:43	2:40

> By mutual consent the above starting and ending class times at any level or building may be increased; however, as a result of that modification class times shall conclude no later than 3:30 p.m.

Per Section 7.2, teachers were required to be on duty five minutes before the starting time and ten minutes after the dismissal time for students at their schools.

Article 8.11(A)(1)

Health insurance benefits for full-time teachers was covered in Article 8.11(A)(1) of the 2013-2016 collective bargaining agreement. The parties agreed in the contract that in the middle of the 2013-2014 school year, or January 1, 2014, the health plan offered to teachers would change from MESSA Choices II to MESSA ABC Plan 1, a high-deductible plan. In the 2013-2016 agreement, Article 8.11(A)(1) was divided into three subsections, each of which covered one of the three school years encompassed by the contract. Article 8.11(A)(1)(a) of the contract covered health insurance for the 2013-2014 school year. Within that subsection were provisions describing the employees' health coverage, including the deductibles associated with the MESSA Choices II plan, through December 31, 2013; the Employer's required monthly insurance premium contributions from June 30 through December 31, 2013; and a statement that employees enrolling in health insurance would be obligated to pay any difference between the premiums for their coverage and the Employer's contribution during that period. Article 8.11(A)(1)(a) also described the employees' coverage, including deductibles under MESSA ABC Plan 1, beginning January 1, 2014; the Employer's monthly insurance premium contributions from January 1, 2014 through June 30, 2014; and a statement that during that period employees would be obligated to pay any additional premiums which exceeded the Employer's contribution. Finally, Article 8.11(A)(1)(a)(vii) read as follows:

> Additionally, on January 1, 2014 the District shall deposit an amount equal to $100 less than the annual in-network deductible amount for single subscribers and $200 less than the annual in-network deductible amount for two-persons and full-family subscribers into a Health Savings Account (HSA) for each bargaining unit member who enrolls in MESSA ABC Plan 1.
>
> Provided, that if a bargaining unit member has enrolled in MESSA ABC Plan 1 and is ineligible to receive the HSA contribution specified above due to

[2] At the beginning of the 2016-2017 school year, the Employer had two schools that housed grades 1 through 4, and one kindergarten-only building. Fifth and sixth graders attended East School.

limitations established by the Internal Revenue Service, that bargaining unit member may elect, in writing, to have the above amount that he/she would otherwise be eligible to receive as a HAS contribution remitted as compensation (less applicable deductions) or remitted as an employee elective 403b contribution.

Article 8.11(A)(1)(b) and Article 8.11(A)(1)(c), which covered health insurance for the 2014-2015 and 2015-2016 schools years respectively, each contained provisions similar to those in Article 8.11(A)(1)(a). Each of these subsections described the employees' coverage, which continued to be the ABC Plan 1 high-deductible plan in both years, and the amount of the Employer's monthly insurance premium contribution. The Employer's contribution was higher in 2015-2016 than it was in 2014-2015. Both Article 8.11(A)(1)(b) and Article 8.11(A)(1)(c) also included provisions stating that employees would be obligated to pay any additional premiums which exceed the Employer's contribution. Article 8.11(A)(1)(b)(iv) read as follows:

Additionally, on January 1, 2015 the District shall deposit an amount equal to $100 less than the annual in-network deductible amount for single subscribers and $200 less than the annual in-network deductible amount for two-persons and full-family subscribers into a Health Savings Account (HSA) for each bargaining unit member who enrolls in MESSA ABC Plan 1.

Provided, that if a bargaining unit member has enrolled in MESSA ABC Plan 1 and is ineligible to receive the HSA contribution specified above due to limitations established by the Internal Revenue Service, that bargaining unit member may elect, in writing, to have the above amount that he/she would otherwise be eligible to receive as a HSA contribution remitted as compensation (less applicable deductions) or remitted as an employee elective 403b contribution.

Article 8.11(A)(1)(c)(iv) read:

Additionally, on January 1, 2016 the District shall deposit an amount equal to $100 less than the annual deductible amount for single subscribers and $200 less than the annual deductible amount for two-persons and full-family subscribers into a Health Savings Account (HSA) for each bargaining unit member who enrolls in MESSA ABC Plan 1.

Provided, that if a bargaining unit member has enrolled in MESSA ABC Plan 1 and is ineligible to receive the HSA contribution specified above due to limitations established by the Internal Revenue Service, that bargaining unit member may elect, in writing, to have the above amount that he/she would otherwise be eligible to receive as a HSA contribution remitted as compensation (less applicable deductions) or remitted as an employee elective 403b contribution.

<u>Bargaining between January and June 2016</u>

On January 16, 2016, the parties met for the first time to negotiate a successor to the collective bargaining agreement expiring at the end of June 2016. The parties met again on January 27, 2016. On that date, the Employer presented its initial bargaining proposal, which it titled a package proposal. Attached to the proposal was a cover letter informing the Union that the Employer believed that the old agreement contained topics made prohibited subjects of bargaining by Section 15(3) of PERA and decisions interpreting the statute. The letter also said that nothing in the Employer's enclosed proposal should be regarded as an indication that the Employer intended to continue these provisions in the successor agreement, and that the Union should be on notice that the Employer "would not enter into or execute a successor collective bargaining agreement which contains provision embodying or pertaining to any prohibited subject of bargaining as defined in Section 15(3) of the Public Employment Relations Act or any illegal subject of bargaining (by way of example, Agency Shop or Dues Deduction." The cover letter did not specifically identify the provisions in the old agreement that the Employer believed dealt with prohibited subjects.

The cover letter also stated that the Employer recognized that some subsections of Section 15(3) applied only to teachers or certificated staff, and that if the Union wished to bargain for greater rights for non-certificated staff the Employer was willing to do so. The letter stated, however, that the Employer "does believe in parity."

The Employer's proposal was in the form of a complete contract that struck out some language in the old agreement and added some new language. Among the changes the Employer proposed were the changes to Article 5.11 and Article 5.12. As proposed by the Employer, Article 5.11 was to read as follows (the underlined language was new):

> 5. 11 No specialist shall be reprimanded and/or disciplined without [sic] ~~just cause and due process~~ or for reasons that are arbitrary or capricious. ~~The District shall apply its rules, orders and penalties in an impartial and equitable manner. Specialists shall be forewarned of possible and/or probably disciplinary action. All investigations regarding specialist conduct shall be conducted fairly and objectively and with the specialist's knowledge to the extent permitted by law.~~
>
> The ~~teacher or~~ specialist shall, upon request, have the right to Association representation during any such investigation. Warnings and reprimands related to a ~~teacher or~~ specialist's performance or assigned duties shall be discussed privately between the ~~teacher or~~ specialist and principal except when either party requests the presence of an Association representative and/or a bargaining unit representative of his/her choice. Neither party shall delay discussion more than two (2) school days from the date initially requested by administration except by mutual consent.

The Employer's proposal eliminated Article 5.12 in its entirety. During the January 27, 2016, meeting, the parties discussed the Employer's proposed revisions to Article 5.11 and 5.12. The Employer told the Union at that meeting that the purpose of its revisions to the second

paragraph of Article 5.11, and its elimination of Article 5.12, was to remove prohibited bargaining subjects from the contract.

The parties met again on February 17, February 20, February 29, March 9, March 14, March 16, March 23, and April 1. According to Union President Oppenheim, who was a member of the Union's bargaining committee, sometime during this period the Employer told the Union that the reason it had struck "the teacher" wherever it appeared in the second paragraph of Article 5.11 was that the Employer considered the matters covered in that paragraph to be discipline, a prohibited subject of bargaining for teachers. It also told the Union that it also considered paragraphs A-D (but not E) of Article 5.12 to be prohibited subjects of bargaining because they addressed teacher discipline.[3] Oppenheim testified that the Employer mentioned cases that it believed supported its position, including "*Shiawassee.*"[4] According to Oppenheim, the Union told the Employer that "it was too big a brush to paint the entirety of the language as a prohibited subject." However, there is no indication that the Union identified any portion of the language in question that it believed was either prohibited or not prohibited.

On April 11, 2016, the parties met with a mediator. At this meeting, the Union presented a package proposal in the form of a complete contract. Except for changing the word "the" at the beginning of the second paragraph of Article 5.11 to "a," the Union's proposal retained the language of Articles 5.11 and 5.12 from the 2013-2016 agreement. Oppenheim testified that the parties went over the Union's proposal paragraph by paragraph during that meeting, but when they reached Articles 5.11 and 5.12 they simply skipped over them without discussion

The parties met again with a mediator on April 27, May 13, May 20, June 3, and June 8, 2016. On May 23, 2016, the Union filed a petition for fact finding. The parties discussed Articles 5.11 and 5.12 at several of the meetings held in April, May and June. According to the Employer's witnesses, during each of these discussions, the Employer repeated its argument that Article 5.12, paragraphs A-D, as well as the second paragraph of Article 5.11, dealt with the prohibited subject of teacher discipline. Both Vincent Perkins, the Employer's human resources manager and a member of the Employer's bargaining team, and Evan Nuffer, another member of the Employer's bargaining team, testified that the Union's bargaining team's response on each occasion was that it needed to check with its legal counsel.

As discussed below, the parties met on July 7 and July 21, 2016, for the specific purpose of discussing the calendar for the 2016-2017 school year. In August, they held several sessions where both the calendar and economics were discussed. After the beginning of the school year, the parties did not meet again until October 6, 2016. On October 6, the parties exchanged proposals which they characterized as their final proposals prior to fact finding. The Employer's October 6, 2016, proposal on Articles 5.11 and 5.12 was the same as its January 27, 2016, proposal, and the Union's October 6 proposal on these articles was the same as its April 11,

[3] In its post-hearing brief, the Union argues that the Employer never identified the language in Articles 5.11 and 5.12 that it considered prohibited. Oppenheim's testimony, as I interpret it, was to the contrary.

[4] This appears to be a reference to *Shiawassee Intermediate Sch Dist Ed Assn*, 30 MPER 13 (2016), which at that time was pending on exception before the Commission.

2016, proposal. That is, the Employer continued to propose that that standard for discipline for specialists be changed from "just cause" to "arbitrary and capricious," that references to teachers be removed from the second paragraph of Article 5.11, and that Article 5.12 be deleted in its entirety. The Union continued to propose that, except for a grammar correction, Articles 5.11 and 5.12 be carried over from the prior contract without change. The parties did not discuss Article 5.11 and Article 5.12 during their October 6 meeting. However, according to Nuffer, the Employer assumed that the Union's continued inclusion of the prior contract language in the proposal it intended to present to the fact finder meant that the Union was now taking the position that nothing in Articles 5.11 or 5.12 was a prohibited subject of bargaining.

No evidence was presented at the hearing about any bargaining taking place after October 6, 2016.

Bargaining Over the 2016-2017 School Calendar

Several legislative changes impacted the Employer's 2016-2017 school calendar. First, effective with the 2016-2017 school year, the Legislature increased the minimum number of instructional days a school district was required to have in order to receive full state aid under the State School Aid Act to 180 days. See MCL 388.1701(3)(b). In part to accommodate the increase in the number of required instructional days, the Employer, along with other districts within the Ingham County Intermediate School District (ISD), applied for and received a waiver from the Michigan Department of Education (MDE) to begin classes for the 2016-2017 year before Labor Day. Accordingly, while the first day of school during the 2015-2016 school year was the day after Labor Day, the Employer decided that classes would begin for the 2016-2017 school year on Monday, August 29, 2016.

Second, as a condition of receiving state aid, the Employer is required to provide at least 1,098 hours of instruction within the school year. MCL 388.1701(3). It is also required to provide 30 hours of professional development for teachers. MCL 380.1527. Neither of these requirements changed between 2015-2016 and 2016-2017. However, in 2015-2016, and for many years before that, the Employer provided more than the minimum number of professional development hours. Until the parties' contract expired on June 30, 2016, the Employer had been allowed to include up to 38 hours of this professional development in its calculation of instructional hours. After the expiration of the collective bargaining agreement, however, the Employer was no longer allowed to count any professional development as instructional time for state aid purposes. See MCL 388.1701(10).

In the 2015-2016 school year, the Employer was certified as providing 1,103 instructional hours, plus a few minutes.[5] Over 30 of these hours, however, were actually devoted to professional development. Because the Employer could no longer count professional development hours as instructional time, it had to add actual instructional hours, i.e., hours of student contact time for its teachers, to its 2016-2017 schedule. As discussed below, the Employer also wanted to continue to provide the same number of hours of professional development for teachers in 2016-2017 that it had in 2015-2016. The Union's position, however,

[5] The Employer regularly builds more than the minimum number of instructional hours into its schedule in case it has to close school for reasons that are not accepted by the MDE.

was that since student contact hours had to increase, the Employer should reduce the number of professional development hours to the required minimum of 30 and/or adequately compensate teachers for the additional hours they had to work.

The Employer's January 27, 2016, proposal did not include calendars, but the Union's April 11, 2016, proposal included calendars for all three years of the contract. The 2016-2017 calendar in this proposal had classes beginning after Labor Day, on Tuesday, September 6, 2017, and full day professional development sessions scheduled for August 30, August 31 and September 1. The last day of school on the Union's proposed calendar was June 15, 2017.

On July 1, 2016, the Employer mailed a school calendar for the months of August and September to parents in the district. The calendar listed the opening day of classes as Monday, August 29, and had open houses for parents scheduled for the evenings of August 23 and August 24. It also listed Wednesday, September 7, and Wednesday, September 21, as "delayed start days."

The parties scheduled a meeting on July 7, 2016 for the purpose of discussing the 2016-2017 school year calendar. At the July 7 meeting, the Employer presented the Union with a written calendar proposal for the entire school year; it appears from the record that this was the Employer's first proposal on this issue. On the proposed calendar, classes began on August 29 and the last day of school for the year was June 9, 2017. The total number of instructional hours – a figure which now excluded professional development hours - was 1,105 plus a few minutes. The Employer's proposed calendar included a new feature; 15 delayed, or late start, days. In previous years, full day professional development sessions were held on several days before and also during the school year on days that students did not attend class. On late start days, however, students would start classes two hours later than usual, and professional development would take place in the morning. On the Employer's proposed calendar, late start days were scheduled roughly every other Wednesday; some months had only one late start Wednesday because of vacations or other events. The Employer proposed the late start days because it wanted teachers to spend more of their professional development hours meeting with other teachers in their grades or areas to discuss common problems and strategies for solving them. To facilitate this, the Employer wanted frequent, regular professional development sessions instead of long sessions scattered throughout the year. Thus the late start sessions were not merely a scheduling convenience, but had an educational purpose.

The parties' calendars had traditionally included several professional development days for teachers during the week prior to the beginning of classes in the fall. Open houses for parents were sometimes held in the evenings of those dates. In the 2015-2016 school year, full day professional development sessions were held on the Tuesday, Wednesday, and Thursday, of the week before classes began, with open houses in the evenings. As noted above, the Union's initial calendar proposal included three full day sessions of professional development before classes began. The first calendar that the Employer gave the Union on July 7 did not include any professional development days before the start of the school year even though, as noted above, the calendar that the Employer had published on July 1 had parent open houses scheduled on the evenings of August 23 and August 24. At the July 7 meeting, when the Union questioned whether teachers were expected to attend evening open houses on days that they were not

otherwise expected to work, the Employer told the Union that it had meant to include August 23 and August 24 as professional development days on the calendar and that leaving those dates off its proposal was simply an oversight. The Employer also explained that because it was implementing a new teacher evaluation system, it needed to have professional development on August 23 and August 24 in order to train teachers in the use of the new evaluation system before classes began. Shortly thereafter, the Employer provided the Union with a revised calendar proposal. On this calendar, August 23 and August 24, 2016, were listed as full day professional development days.

This proposed calendar, which the Employer eventually implemented, included 14 late start days, for a total of twenty-eight hours of professional development, plus another two days of professional development taking place before the school year began. The total number of instructional hours in this calendar was 1,105.

The parties met again to discuss the calendar on July 21. After listening to the Employer's explanation for its calendar proposal, the Union offered five different calendar proposals of its own. Instead of 15 late start days, the Union proposed 10 early release days, with three hours of professional development to take place in the afternoon on each early release day. The Union argued that early release days would be easier on parents because finding day care in the afternoon was easier than in the early morning; the Employer rejected this proposal because it felt that teachers would get more from professional development in the morning because they would be fresher. The essence of the parties' disagreement, however, was the total number of hours of professional development to be held over the course of the year and whether teachers should receive additional compensation for hours over the required minimum 30 hours. One of the Union's five proposals included only the 10 early release days, with no full days of professional development, for a total of only 30 hours. Another included the two days of professional development before the start of classes, plus the early release days, but proposed additional compensation for the two extra days. The Employer's response to the latter proposal was that the compensation package it had proposed already included additional compensation for the increase in worktime. The parties met again on several dates in August 2016 but were unable to reach agreement on a calendar.

Increase in the Length of the Teachers' Workday

As set out above, the 2013-2016 contract included a specific student start and dismissal time for each building. Both parties' initial contract proposals included language that gave the Employer more latitude to alter these times. Under the Employer's January 27, 2016, proposal, the contract would set the maximum length of the student day, which would be negotiated by the parties. The Employer would then have the right, before the beginning of each school year, to set the starting and dismissal times for students at each building.

The Union's April 11, 2016 proposal also allowed the Employer to set the daily class start and end times for each building, but required: (1) that the start time for each building be no earlier than 7:30 a.m., and the end time to later than 3:45 p.m., and (2) that the length of each building's school day be no longer than seven hours.

At their July 7, 2016 meeting the parties also discussed student start and dismissal times. The Employer provided the Union with a list of the student start and dismissal times it was proposing for each of its schools. At both the middle school and East school, the Employer proposed a student day longer than that set out in the 2013-2016 contract. However, the length of the student day at the middle school and at East School in the Employer's proposal remained less than seven hours. At the high school, however, the Employer also proposed to lengthen the student day, and the teachers' workday, by five minutes. The high school day, as proposed by the Employer, was now to be seven hours and five minutes. It was not clear from the record how the Employer explained this proposal to the Union on July 7. The Employer testified at the hearing that it needed the additional 15 hours of instructional time at the high school to satisfy the 1,080 hour instructional hour minimum.[6] Union Party Local President Oppenheim testified that he understood that this change was necessary to accommodate the late starts. The parties did not reach agreement on the length of the workday.

Implementation of the Calendar and Lengthened Workday

Teachers were informed in August that their first workday for the 2016-2017 school year would be August 23, 2016. Full day professional development sessions for teachers were held on August 23 and August 24. When school began on August 29, the student start and dismissal times were as proposed by the Employer on July 7, 2016, and the teachers' workday at the high school was seven hours and twenty minutes, five minutes longer than the previous year.

The Employer also implemented the late start Wednesday schedule. Human Resource Director Perkins described how the late start Wednesdays affected teacher planning periods at each of the school buildings. At the Employer's two first through fourth grade buildings, the second and third grade teachers had regular length planning periods on one late start day, and none on the next late start day; schedule was reversed for the first and fourth grade teachers. At the high school and middle school, all the class periods were shortened on the late start days, and each teacher got a proportionately shortened planning period. At East School and at Colt, which has only kindergarteners, all planning periods were normally scheduled in the afternoon. Teachers at those schools had their regular planning periods on late start days.

The Employer's Refusal to Make HSA Contributions

Unit members who were enrolled in the MESSA ABC 1 health plan before the parties' 2013-2016 collective bargaining agreement expired continued to receive their same benefits after the contract expired on June 30, 2016, and the Employer continued making the same monthly contributions it had made during the 2015-2016 school year.

On November 22, 2016, the Employer's superintendent wrote a letter to members of Charging Party's bargaining unit stating that Section 15b of PERA (otherwise known as Act 54)

[6] Nuffer explained that keeping the total number of instructional hours at 1,103, which was the figure for the previous school year, would have meant adding 4 minutes and 24 seconds to each school day. Since this was not feasible, the Employer rounded up to five minutes.

prohibited the Employer from making contributions to their HSA accounts on January 1, 2017. The letter explained the Employer's rationale as follows:

> On June 8, 2011, the Michigan Legislature enacted Public Act 54 of 2011 (as amended), with immediate effect. Public Act 54 of 2011 mandates, in part, that "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 and levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement."
>
> On March 21, 2013, the Waverly Education Association (the "WEA") and the Waverly Community Schools' Board of Education ("the Board") executed a collective bargaining agreement (the "CBA'), which expired on June 30, 2016. The plain language of the CBA required the Board to make Health Savings Account lump sum payments to eligible employees on January 1, 2014, January 1, 2015, and January 1, 2016. The expired CBA does not require Board-funded HSA payments after January 1, 2016.
>
> Because of the specific health insurance language chosen by the Parties for the 2013-2016 CBA, on June 30, 2016, the Board did not have any contractual obligation to make future HSA payments beyond January 1, 2016. Public Act 54 now *prevents* the District from making a January 1, 2017, HSA payment, as doing so would provide a benefit greater than that which obligated the District on June 30, 2016. [Emphasis in original]

The Employer did not make any lump sum contributions to the HSAs of bargaining unit employees on January 1, 2017.

Discussion and Conclusions of Law:

Charge against the Employer

Implementation of the 2016-2017 Calendar

At the expiration of a labor contract, a public employer is required to bargain in good faith over the terms of a successor agreement. Wages, hours, and other terms and conditions of employment constituting mandatory subjects of bargaining that were established by the contract survive the contract by operation of law during the bargaining process. *Local 1467, International Ass'n of Firefighters, AFL-CIO v Portage*, 134 Mich App 466, 472, (1984), lv den 422 Mich 924 (1985). Unilateral action over mandatory subjects of bargaining may not be taken by either party absent an impasse in negotiations, *Ottawa Co v Jaklinski*, 423 Mich 1, 13 (1985), or a clear and unmistakable waiver by a party of its right to bargain. *Lansing Fire Fighters Union, Local 421, Int'l Ass'n of Fire Fighters, AFL-CIO v Lansing*, 133 Mich App 56, (1984). An employer who takes unilateral action on a mandatory subject of bargaining prior to impasse in negotiations commits an unfair labor practice. *Portage*, at 473. Moreover, even in the event of a good faith impasse, a party may not unilaterally impose changes to mandatory subjects of bargaining during

the pendency of fact finding. *Wayne Co,* 1984 MERC Lab Op 1142, 1144-1145, aff'd 152 Mich App 87 (1986); *Wayne Co*, 24 MPER 25 (2011).

Except for the starting date of school, which under Section 15(3)(b) of PERA is a prohibited subject of bargaining, most aspects of a school calendar are mandatory subjects of bargaining between public school employers and the unions representing their teachers. These include holiday and vacation dates, *Reese Pub Schs*, 1967 MEC Lab Op 489; the ending dates (and until the addition of Section 15(3)(b) to PERA, the starting dates) of the school term, *Westwood Cmty Schs*, 1972 MERC Lab Op 313; the number of class periods in a day, *Cedar Springs Pub Schs*, 1985 MERC Lab Op 1101, aff'd 157 Mich App 59 (1987); the total length of the teachers' workday, *Reading Cmty Schs*, 1989 MERC Lab Op 1069; the amount of pupil contact time within a day, *Oak Park Schs*, 1995 MERC Lab Op 442, and the amount of teacher preparation time, *Woodhaven Sch Dist*, 1982 MERC Lab Op 256.

In Section 15(3)(b), the Legislature explicitly made "the amount of pupil contact time required to received full state aid," and the starting date of school, prohibited subject of bargaining. However, the Legislature has also *de facto* limited the ability of school districts to bargain over teacher work hours by requiring school districts, as a condition of receiving full state funding, to provide a minimum number of instructional days and hours, and a minimum number of hours of teacher professional development.

Here, the Employer does not dispute that it had a duty to bargain over the 2016-2017 school year calendar. There is also no dispute that the parties held a series of meetings in July and August 2016 at which they bargained over the calendar but could not reach agreement. As discussed above, even if the parties have reached an impasse in bargaining, an employer has a duty to maintain the status quo as to mandatory subjects of bargaining while a fact finding petition is pending. Accordingly, at the start of a 2016-2017 school year, the Employer's obligation to maintain the status quo with respect to mandatory subjects of bargaining required it to implement a partial-year calendar that followed, as closely as possible, the previous year's calendar. The Employer, of course, had an obligation to continue to bargain with the Union over the full year calendar as the school year progressed. In this case, however, it is clear that the Employer could not implement a 2016-2017 calendar that simply mirrored the previous year's calendar. That is, because it could no longer include professional development hours in its required minimum instructional hours, the Employer had to increase actual student contact hours by some amount.

Among the Union's proposals for the 2016-2017 calendar was that the Employer decrease the number of professional development hours it had required the previous year to the minimum required to receive full state aid. This would, of course, have partially offset the effect on teachers of the increase in student contact hours, and is a proposal that the parties might have agreed to in bargaining. However, I find that the Employer's obligation to maintain the status quo pending agreement did not require it to reduce the number of professional development hours it required of teachers at the beginning of the 2016-2017 school year. I also find that since the Employer had required teachers to participate in full-day sessions of professional development before the start of the 2015-2016 school year it did not unilaterally alter the status

quo with respect to hours of work by requiring its teachers to participate in professional development on August 23 and August 24, 2016, before classes began for students.

The previous year's calendar did not include late start days. In 2015-2016, teacher professional development hours took place during full day sessions scheduled before and during the school year. In 2016-2017, as the Union was aware, the Employer wanted to change its method of scheduling professional development to facilitate increased teacher collaboration. Late start days, apparently, were counted as instructional days. Scheduling professional development on instructional days obviously decreased the number of hours on those days that could be counted as instructional. However, the shift to late start scheduling in 2016-2017 did not increase the total number of hours of professional development in which teachers were required to participate during the school year, or lengthen the total number of hours teachers were required to work. I conclude, therefore, that the implementation of the late start schedule in September 2016 did not constitute a unilateral change in hours of work over the previous school year.

At the beginning of the 2016-2017 school year the Employer increased the length of the workday for teachers at its high school by five minutes per day. According to the Employer, however, taking this action was necessary to ensure that the calendar it implemented included enough instructional hours to qualify for full state aid. As discussed above, the loss of the ability to count professional development hours as instructional hours meant that the Employer had to increase student contact hours in 2016-2017. The parties might, during negotiations, have found some other mutually agreeable way to schedule those hours. However, when the 2016-2017 school year began they had not reached agreement on a way to do so. The Employer continued to have an obligation, after the 2016-2017 school year began, to continue to bargain over the length of the high school workday as well as other calendar issues. I conclude, however, that the Employer did not unilaterally alter the status quo by increasing the length of the workday at the high school at the beginning of the 2016-2017 school year to ensure that, if the parties did not reach agreement, it would have enough instructional hours to meet the requirements for receiving state aid.

Refusal to Make HSA Contributions

An employer's duty to bargain under PERA includes the duty to bargain over health care benefits and costs. *Decatur Pub Schs,* 27 MPER 41 (2014); *St Clair Intermediate Sch Dist v Intermediate Ed Ass' n*, 458 Mich 540, 551 (1998). As discussed above, at the expiration of the contract, wages, hours, and other terms and conditions of employment established by the contract survive the contract by operation of law during the bargaining process. The parties may agree in their contract that the employer will have no statutory obligation to maintain a particular term or condition in effect after that contract expires. That is, the union may agree in the contract to waive its statutory right to maintenance of the status quo as to that particular term, but that waiver must be clear and unmistakable. See *Allied Signal Aerospace*, 330 NLRB 1216 (2000).

Section 15b of PERA, which was added to PERA by 2011 PA 54, requires an employer, except as otherwise provided in that section, to "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." Section 15b also states:

> Employees who receive health, dental, vision, prescription, or other insurance benefits under a collective bargaining agreement shall bear any increased costs of maintaining those benefits that occur after the expiration date.
>
> "Increased costs" 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 costs by category of coverage and not on changes in individual employee marital or dependent status.

In the instant case, the parties' collective bargaining agreement required the Employer to make a monthly insurance contribution in a set amount for the employees' health care coverage; all premium costs above that amount were to be paid by the employees. The Employer concedes that it was required to continue to make this monthly contribution after the contract expired. However, the Employer argues that the collective bargaining agreement merely required it to make HSA contributions on three specific dates – January 1, 2014, January 1, 2015, and January 1, 2016. According to the Employer, the HSA contributions were not a term or condition of employment that survived the contract because, under the language of the agreement, it had no obligation to make any HSA contribution after January 1, 2016. It also argues that it was prohibited by Section 15b from making HSA contributions after the expiration of the collective bargaining agreement because it would have been providing benefits at levels or amounts greater than the benefits in effect on the expiration date of the collective bargaining agreement.

A high-deductible health plan, like the plan covering the Union's bargaining unit members, has higher than typical annual deductible but its premiums are typically lower than those of a plan without high deductibles for the same coverage. Individuals who have high-deductible plans and no other health coverage, and only those individuals, are allowed to establish HSAs, and these individuals can use the funds in their accounts to pay qualified medical expenses which, because of the high deductible, they are required to pay out of pocket. The tax benefits of HSAs to employees include the ability to claim a tax deduction for HSA contributions even if the employees do not itemize, and the exclusion of any contribution made by their employers to the HSA from the employees' gross income. Because employer contributions to HSAs are excluded from employees' gross income, employers need not pay FICA or withholding on these sums. See Internal Revenue Service Publication 969 (2016) https://www.irs.gov/uac/about-publication-969. Therefore, providing employees with part of their compensation in the form of a contribution to an HSA provides tax advantages to both the employees and the employer.

The Employer's argument that the HSAs did not become a term or condition of employment, because the parties intended the contributions to terminate with the contract, rests on the fact that the 2013-2016 collective bargaining agreement required the Employer to make HSA contributions on three specific dates. According to the Employer, had the parties intended that HSA payments be made after January 1, 2016, they would have provided that HSA payments be made "every January 1" or "every year thereafter." This argument, however, ignores the structure of Article 8.11(A)(1). As noted in the findings of fact, the parties agreed in their contract to switch employees from their existing health plan to a new high-deductible plan on January 1, 2014, which was in the middle of the first year of their three year contract. For this

or some other reason, Article 8.11(A)(1) was divided into three subsections, each of which covered one of the three school years encompassed by the contract. Many provisions appeared in each subsection without change; for example, each subsection included the provision requiring employees to pay the amount of the premium that exceeded the Employer's contribution. Each subsection also included a provision that required the Employer to contribute to employees' HSA accounts once during each school year, at the beginning of the tax year, and included the full date - month, day and year – that the payment for that school year was to be made. The parties, of course, could have inserted the phrase, "and on January 1 every year thereafter" in Article 8.11(A)(1)(c)(iv). However, the absence of this phrase does not indicate an explicit agreement to eliminate the HSA contribution associated with the high-deductible plan at the expiration of the contract.

In this case, the parties' collective bargaining agreement required the Employer to make a contribution to employees' HSA accounts once a year, on January 1. These contributions, I conclude, were an inextricable part of the parties' agreement to switch to a high-deductible health plan, and constituted part of the employees' annual compensation at the time the contract expired. As such, the HSA contributions were an existing term or condition of employment for members of the Union's bargaining unit when the contract expired. Moreover, I conclude that the Union did not waive its statutory right to maintenance of the HSA contributions as a term or condition of employment after the expiration of the contract.

As the Union points out in its brief, in *Harrison Twp,* 27 MPER 50 (2014) (no exceptions), a case decided by me to which no exceptions were filed, I implicitly rejected the argument that Section 15b prohibits an employer from making lump sum payments to employees after the expiration of the contract. In that case, the parties' expired contract required the employer to make longevity payments to employees starting with their fifth anniversary date, and in amounts that increased with seniority. The employer, I concluded, did not violate its duty to bargain or Section 15b by continuing to make payments to employees on their anniversary dates after the contract expired, but "freezing" the amount of payments so that no employee received more than he or she had received the previous year.

As indicated above, I find that Employer contributions to employees' HSA accounts on January 1 of each year constituted a term and condition of their employment established by the 2013-2016 collective bargaining agreement that survived the expiration of that contract by operation of the bargaining process. I conclude that the Employer's obligation to maintain the status quo pending bargaining and completion of the fact finding process required it to make contributions to these accounts on January 1, 2017, in the same amounts and levels as set forth in the parties' expired collective bargaining agreement, and that the Employer violated its duty to bargain in good faith by refusing to make these contributions.

Charge against the Union

Statute of Limitations

Section 16(a) of PERA prohibits the Commission from issuing a complaint based upon any alleged unfair labor practice occurring more than six months prior to the filing of the charge

with the Commission and the service of the charge upon each of the named respondents. *City of Detroit (Dept of Transportation)*, 30 MPER 61 (2017). The limitations period commences when the charging party knows or should have known of the acts constituting the unfair labor practice and has good reason to believe the acts were improper or done in an improper manner. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983). The Commission has rejected the argument that a charge filed outside the statutory limitation period should be considered timely, as a continuing violation, when the inception of the violation occurred outside of the statutory limitations period but the violation remains uncorrected at the time the charge is filed. *City of Adrian*, 1970 MERC Lab Op 579, 581, adopting the holding of the U.S. Supreme Court in *Local Lodge 142 v NLRB (Bryan Mfg Co*), 362 US 411 (1960); *City of Detroit, Dept of Trans*, 30 MPER 61 (2017).

When the allegation is that an employer has unilaterally altered a term or condition of employment in violation of PERA, the statute of limitations runs from the date of the announcement of the change, and subsequent discussion of the issue does not toll the statute. *City of Detroit (Recreation Dep't)*, 1990 MERC Lab Op 388; *Co of Kent and Sheriff*, 1993 MERC Op 333; *Interurban Transit Authority*, 20 MPER 107(2007); *City of Detroit*, 25 MPER 68 (2012). However, when an employer refuses a union's demand to bargain over a mandatory subject, the lawfulness or unlawfulness of the employer's action does not, as in the unilateral change situation, depend upon an action taken outside the statutory period. See *Local Lodge 142*, 416-418. Thus, the Commission has held that each refusal constitutes a separate violation, and the statute of limitations runs from the union's last demand or the employer's refusal of that demand. *Reese Pub Schs*, 1989 MERC Lab Op 476, 481; *Van Buren Twp*, 1982 MERC 398, 404 (employer's refusal of union's most recent demand to include positions within the bargaining unit was a new unfair labor practice and charge was not barred because employer had refused union's previous demands for recognition); *Spring Lake Pub Schs*, 1988 MERC Lab Op 362 (employer had a continuing duty to bargain with union over contents of a teacher evaluation instrument, and each refusal to enter into an agreement on this topic constituted a separate violation). See also *Jackson Fire Fighters Ass'n*, 1996 MERC Lab Op 125, where a Commission administrative law judge, *citing Spring Lake*, held that a union's renewal of its demand that the employer include nonmandatory subject in their collective bargaining agreement, and its submission of the issue to an Act 312 arbitrator, constituted a "continuing," i.e. separate, violation of PERA.

The Union argues that the Employer's charge should be dismissed as untimely because it was not filed until December 22, 2016. According to the Union, the alleged unfair labor practice occurred on April 11, 2016, when the Union gave the Employer a bargaining proposal that included the disputed language, or, alternatively, on May 23, 2016, when the Union filed its fact finding petition. According to the Union, its October 6, 2016 proposal was nothing more than a continuation of the conduct – proposing that contract language which the Employer claims is a prohibited subject be included in the successor agreement - which the Employer alleges to be unlawful.

The Employer argues that its charge was timely because it was filed within six month of the Union's October 6, 2016, proposal. According to the Employer, because the Union refused to take an explicit position on whether the disputed language was prohibited, the Employer did not have reasonable grounds to believe that the Union would insist on including it in the new

agreement until it again proposed, in its last proposal before fact finding, that the language remain in the agreement. In the alternative, the Employer argues that the Union committed a new unfair labor practice on October 6, 2016, by presenting yet another proposal that included language covering a prohibited topic.

In *Calhoun Intermediate Ed Assn,* 28 MPER 26 (2014), aff'd 314 Mich App 41(2016), and *Ionia Pub Schs,* 28 MPER 58 (2014), aff'd in an unpublished decision per curium of the Court of Appeals issued May 12, 2016 (Docket No.325413) the Commission held that where a public school employer has clearly and unambiguously indicated its unwillingness to bargain over prohibited subjects of bargaining, it is a breach of the union's duty to bargain for the union to then demand bargaining over these subjects. As the Commission held in *Ionia*, a union violates its duty to bargain in good faith by demanding to bargain over a prohibited subject even if the union has not made the inclusion of the prohibited subject a condition of reaching agreement. The Commission held in these cases that by continuing to insist that an employer agree to include prohibited topics in the contract, a union obstructs and impedes the bargaining process.

The parties have not cited any Commission cases, and I have not discovered any, discussing the application of the statute of limitations to an allegation that a union demanded to bargain over a prohibited subject. I note, however, that both the employer's charge in *Calhoun* and the employer's charge in *Ionia* were filed more than six months after the union in that case first notified the employer that the union would not agree to remove from the successor agreement language that the employer had identified as prohibited.

As is the case when an employer refuses a union's demand to bargain, the lawfulness or unlawfulness of a union's proposal to include an allegedly prohibited topic in the parties' collective bargaining agreement does not depend on any earlier action. I agree with the Employer, therefore, that after an employer has identified certain topics as prohibited subjects of bargaining and indicated its unwillingness to bargain over them, each subsequent refusal by a union to take these subjects off the table constitutes a separate unfair labor practice. I conclude, therefore, that the Employer's charge was timely because it was filed within six months of October 6, 2016, when the Union presented the Employer with another proposal that allegedly dealt with a prohibited topic.

Union's Articles 5.11 and 5.12 and Prohibited Subjects of Bargaining

Section 15(3)(m) of PERA makes the following prohibited subjects of bargaining:

> For public employees whose employment is regulated by 1937 PA 4, MCL 38.71 to 38.191, decisions about the development, content, standards, procedures, adoption, and implementation of a policy regarding discharge or discipline of an employee, decisions concerning the discharge or discipline of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit.

In the summer of 2016, the Commission decided two cases, *Shiawassee Intermediate Sch Dist Ed Assn,* 30 MPER 13 (2016) and *Ionia Intermediate Sch Dist* Ed *Assn,* 30 MPER 18

(2016), dealing with the scope of Section 15(3)(m). The Commission held in these cases that the topics made prohibited subjects by Section 15(3)(m) included not only individual decisions about whether an employee should be disciplined or discharged, but the procedures used by a public school employer to make these decisions. It held that while Section 15(3)(m) did not deprive teachers of rights guaranteed them by PERA, and did not, of course, deprive them of their constitutional rights to due process with respect to disciplinary decisions, it did remove these issues from the sphere of collective bargaining. It held, therefore, that under Section 15(3)(m), a public school employer's promise not to violate an employee's due process or statutory rights in connection with his or her discipline was not enforceable under PERA when made as part of a collective bargaining agreement.

The second paragraph of Article 5.11 of the parties' expired contract clearly requires the Employer to adhere to certain procedures in disciplining either teachers or specialists. Under this paragraph, the Employer must allow employees to have union representation during investigations of potential misconduct. An employee's principal must also discuss any warning or reprimand the Employer plans to issue with the employee, this discussion must be private except for the presence of a union representative if requested, and the discussion cannot be delayed except by mutual agreement.

Paragraph D of Article 5.12 also clearly contains a promise by the Employer to adhere to certain procedures before disciplining a teacher or specialist for misconduct brought to the Employer's attention by a parent complaint. Under this paragraph, in order to discipline an employee the employer must make the teacher or specialist aware of the complaint within two days of its receipt and before taking any disciplinary action. The Employer, when appropriate, must also give the teacher or specialist an opportunity to respond to the complaint and to meet with the parent. Neither paragraphs B nor paragraph C explicitly refers to discipline. Paragraph B of Article 5.12 requires a principal who receives a complaint about a teacher from a parent to refer the parent to the teacher when the parent has not already made the complaint to the teacher. Paragraph C requires any other administrator who is approached by a parent with a complaint about a teacher to refer the parent to the principal. However, the placement of these paragraphs directly above paragraph D might be interpreted as prohibiting the Employer from disciplining a teacher as a result of a parent complaint if it failed to handle the complaint in the fashion set out in these two paragraphs. I conclude, therefore, that the second paragraph of Article 5.11 and paragraphs B, C, and D of Article 5.12 address a prohibited subject of bargaining, the procedures the Employer is required to follow before disciplining a teacher.

In *Calhoun* and in *Ionia Pub Schs*, the Commission held that a union violates its duty to bargain in good faith by continuing to make proposals dealing with prohibited subjects after the union is on notice that the Employer considers the proposals to cover a prohibited subjects and the Employer unequivocally refuses to bargain over these proposals. In this case, the Employer during bargaining identified the language in Articles 5.11 and 5.12 that it considered to be prohibited. I agree with the Union that the parties could have had more discussion about the extent to which the language in Articles 5.11 and 5.12 impacted teacher discipline. However, once the Employer had identified the language it deemed prohibited and explained why, the onus was on the Union to either remove the language from its proposals or initiate further discussion on whether the language was prohibited or how it might be modified. I find that the Union could

not lawfully simply continue to propose that the disputed language remain in the contract as it did in this case. I conclude, therefore, that the Union violated its duty to bargain in good faith under Section 10(2)(d) of PERA on October 6, 2016, when it again proposed that the parties' successor collective bargaining agreement include language on a prohibited subject of bargaining.

In accord with the findings of fact and conclusions of law set out above, I find that the Employer violated its duty to bargain in good faith by refusing to make contributions to employees' HSA accounts on January 1, 2017, and that the Union violated its duty to bargain in good faith on October 6, 2016, when it proposed again that the parties' successor collective bargaining agreement include language on the prohibited subject of bargaining teacher discipline. I conclude that the Employer did not violate its duty to bargain when it implemented a partial year calendar at the beginning of the 2016-2017 school year. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

Case No. C16 I-097/Docket No. 16-028100-MERC

Respondent Waverly Community Schools, its officers and agents, are hereby ordered to:

1. Cease and desist from unilaterally altering existing terms and conditions of employment after the expiration of its 2013-2016 collective bargaining agreement with the Waverly Education Association by refusing to make contributions to employees' health savings accounts on January 1, 2107, in the amounts and levels set forth in the expired agreement.

2. Within 30 days of the date of this order, make contributions to employees' health savings accounts in the amounts and levels set forth in the expired agreement, plus interest on these sums at the statutory rate of 5% per annum, compounded quarterly. For any employee enrolled in MESSA ABC Plan 1 on January 1, 2017, who is ineligible to receive this sum or any part of it as an HSA contribution due to limitations imposed by the Internal Revenue Service, pay to that employee a lump sum equal to his or her contribution, plus interest but less applicable deductions, or, at the employee's election, deposit this sum to the employee's 403b account as an employee elective contribution.

3. Post copies of the attached notice to employees on the Employer's premises in all places where notices to employees in the bargaining unit represented by the Waverly Education Association are customarily posted for a period of thirty (30) consecutive days.

Case No. CU16 L-062/Docket No.16-035891-MERC

Respondent Waverley Education Association, MEA/NEA, its officers and agents, is hereby ordered to:

1. Cease and desist from bargaining in bad faith, and obstructing and impeding the bargaining process, by continuing to propose that the parties' successor collective bargaining agreement include provisions dealing with prohibited subjects of bargaining after the Employer Waverly Community Schools unequivocally refused to bargain over these provisions.

2. Communicate to the Waverly Community Schools, in writing, its willingness to enter into a collective bargaining agreement that does not include any prohibited subject of bargaining, including but not limited to the language in the second paragraph of Article 5.11 and paragraphs B, C, and D of Article 5.12 of the parties' 2013-2016 collective bargaining agreement in the form that it appears in that agreement.

3. Bargain in good faith with the Waverly Community Schools over wages, hours and terms and conditions of employment for a successor to our 2013-2016 collective bargaining agreement.

4. Transmit to members of its bargaining unit a copy of the attached notice to members by mail, posting, or other appropriate method of communication, within 30 days of the date of this order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: June 14, 2017