STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

KENT COUNTY AND KENT COUNTY SHERIFF,
Public Employers-Respondents,

MERC Case No. C16 F-062

-and-

KENT COUNTY DEPUTY SHERIFFS ASSOCIATION,
Labor Organization-Charging Party.
_____/

Appearances:

Robert J. Chovanec, for Respondents

Pinsky, Smith, Fayette & Kennedy, LLP, by Michael L. Fayette, for Charging Party

DECISION AND ORDER

On May 24, 2017, Administrative Law Judge Julia C. Stern (ALJ) issued her Decision and Recommended Order[1] in the above matter finding that the charge filed by Charging Party, Kent County Deputy Sheriffs Association (Union), against Respondents, Kent County and Kent County Sheriff (Employers) was not filed within the time set by § 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.216. Based on that conclusion, the ALJ found that the Commission lacks jurisdiction over the charge and recommended that the charge be dismissed. The charge alleges that the Respondents violated § 10(1)(a) and (e) of PERA by unlawfully implementing increases in employees' health insurance costs under 2011 PA 54 (Act 54), MCL 423.215b. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

Charging Party filed exceptions and a brief in support of the exceptions to the ALJ's Decision and Recommended Order on June 13, 2017. Respondent did not file a response to Charging Party's exceptions.

In its exceptions, Charging Party contends that the ALJ erred by finding that the unfair labor practice charge was untimely filed.

[1] MAHS Hearing Docket No. 16-017418

We have reviewed the exceptions filed by Charging Party, and find that they may have merit with respect to the timeliness issue. However, for the reasons discussed below, we agree with the ALJ that the charge should be dismissed.

Factual Summary:

The facts in this case are not in dispute and are set forth in the parties' stipulation of facts.

The Union represents a bargaining unit comprised of corrections deputies and sergeants. The bargaining unit employees are not eligible for compulsory binding arbitration of contract disputes under Act 312, 1969 PA 312, as amended, MCL 423.231-247.

The Union and the Employers had a collective bargaining agreement covering the term of January 1, 2012 through December 31, 2015. The parties began discussing the possible implementation of an increase in employee health insurance costs pursuant to Act 54 in October 2015. At an unknown point in those discussions, the Employers revealed that, in calculating the employees' share of health insurance costs under the expiring collective bargaining agreement, they had used an illustrative rate based on the bundled health care costs of both active employees and pre-65 retirees.

The Employers offer two health insurance plans and one prescription plan can be selected by employees and pre-65 retirees. The County has a self-funded PPO plan with Blue Cross Blue Shield as the third party administrator. It also has a fully insured HMO health plan through Grand Valley Health Plan. Its prescription plan is available to employees covered by either health insurance plan. The prescription plan is self-funded with Optum Rx as the third party administrator. The third party administrators for the self-funded PPO plan and the prescription plan do not provide illustrative rates. Those rates are calculated by an actuary who has provided the Employers with bundled rates based on active employee health care costs and pre-65 retiree health care costs. The actuary has informed the Employers that determining unbundled active employee-only illustrative rates would require an actuarial review. The illustrative rates for the Grand Valley HMO health plan are also based on a bundled rate. Although Grand Valley had historically provided the Employers with both bundled and unbundled rates, the County only used bundled rates. In 2015, Grand Valley provided only bundled rates for the 2016 plan year, and the County did not ask for unbundled rates. According to the Employers, they have been using the bundled employee and pre-65 retiree health care costs to compute the illustrative rates for at least 15 years. The Union has no evidence to dispute that. However, the Union contends that it did not know that the Employers were using bundled active employee and pre-65 retiree health care costs to compute its illustrative rates until the Act 54 calculation issue was discussed in October 2015. The Employers do not dispute that.

As of December 2015, the parties had not reached agreement on a new contract. In emails dated December 14, 2015 and December 15, 2015, the Union objected to an Act 54 calculation based on a bundled rate. The Union contended that the increase in employee health care costs should be based solely on the illustrative rate for active employees. At that time, the Union requested health care cost data for active employees only, without including the pre-65 retiree health care costs.

On December 22, 2015, the Employers' attorney sent an email to the Union's attorney disagreeing with the Union's contention that the retiree health care costs should not be included in the rates used to determine active employee health insurance costs under Act 54 and indicating that the Employers refused to implement the health care cost sharing allocation proposed by the Union.

In an email dated December 28, 2015, the Union demanded that the Employers provide it with information as to what the total premium cost for active employees alone was for 2015 and what the total premium cost for active employees alone would be for 2016. On December 30, 2015, the Employers responded that they did not have the requested information and could only get the unbundled rates by obtaining an actuarial study. The Employers believed they were not required to obtain an actuarial study.

On January 1, 2016, the Employers implemented an increase in employee health insurance costs pursuant to Act 54. In calculating the January 1, 2016 increase, the Employers used illustrative rates based on bundled health care costs for both active employees and pre-65 retirees.

When the parties subsequently agreed on a successor collective bargaining agreement, the Act 54 amount that had been imposed on the bargaining unit members as of January 1, 2016, was stopped effective June 9, 2016.

The Union filed its charge in this matter on June 17, 2016.[2] The charge asserted that the health insurance cost increases imposed by the Employers were unlawful because the increase in the employees' share of health insurance costs was based on bundled active employee health insurance costs and pre-65 retiree health insurance costs. The Union contends that the increase in employee health insurance costs under Act 54 should have been based solely on the increase in active employee health insurance costs.

Discussion and Conclusions of Law:

Timeliness of the Charge

Pursuant to § 16(a) of PERA, no complaint shall issue based upon any alleged unfair labor practice occurring more than six months prior to the filing of the charge with the Commission. The limitations period under § 16(a) commences when the charging party "knows of the act which caused his injury, and has good reason to believe that the act was improper or done in an improper manner." *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983), aff'g 1981 MERC Lab Op 836. See also *AFSCME Local 1583*, 18 MPER 42 (2005). This Commission has long held that the statute of limitations contained in § 16(a) is jurisdictional and cannot be waived. *Washtenaw Cmty Mental Health*, 17 MPER 45 (2004); *Walkerville Rural Communities Sch*, 1994 MERC Lab Op 582. When a charge alleges a unilateral change in terms and conditions of employment, the statute of limitations runs from the date on which the

[2] On the last page of her Decision and Recommended Order, the ALJ found that the charge was filed June 27, 2016. That finding was clearly a typographical error, because earlier in the decision she correctly noted that the charge was filed June 17, 2016. Based on the finding that the charge was filed June 27, 2016, which is more than 6 months after December 22, 2015, the ALJ concluded that the charge was not timely.

employer announces the decision to implement the change. *Interurban Transit Partnership*, 20 MPER 107 (2007); *Lapeer Co & Lapeer Co Treasurer*, 19 MPER 45 (2006); *City of Detroit (Dep't of Water & Sewerage)*, 1990 MERC Lab Op 400, 404-405; *Tuscola Intermediate Sch Dist*, 1985 MERC Lab Op 123, 125.

In this case, the parties anticipated that the Employers would increase employees' health insurance costs after the collective bargaining agreement expired on December 31, 2015. The date that the statute of limitations began to run is the date on which the Union knew or should have known that the Employers' method of calculating the increase in employees' health insurance costs was contrary to what the Union believed was legally permissible. That date, would be the date on which the Employers informed the Union that the Employers planned to calculate the increase in employees' health insurance costs based on bundled active employee health care costs and pre-65 retiree health care costs. See e.g. *City of Detroit (Dep't of Water & Sewerage)*, 1990 MERC Lab Op 400, 404-405; *Tuscola Intermediate Sch Dist*, 1985 MERC Lab Op 123, 125.

The ALJ concluded that the statutory period for filing the charge in this matter began "on or before" the Union received the December 22, 2015 email from the Employers' attorney. The Union contends that the ALJ erred by determining that the statute of limitations began to run when the Employers announced on December 22, 2015, that they would apply the bundled rate in determining the increase in the employees' share of health care costs. If that was the first time that the Employers announced their intention to use the bundled rate in calculating the increase under Act 54, the statute of limitations would have begun to run on December 22, 2015, and the charge filed on June 17, 2016 would be timely. See, *Interurban Transit Partnership*, 20 MPER 107 (2007) (the Commission explained that when the charge alleges a unilateral change, the statute begins to run when the employer announces the decision). See also, *Lapeer Co & Lapeer Co Treasurer*, 19 MPER 45 (2006).

The Union also takes issue with the ALJ's finding that the statute of limitations began to run on *or before* December 22, 2015. The Union argues that there are no facts to support the ALJ's conclusion that the statute of limitations began to run any earlier than December 22, 2015. The parties' joint stipulation states that they discussed "the possible implementation of P.A. 54 in October 2015 and those discussions continued into December 2015." Therefore, it is apparent that at some point between October 2015 and December 23, 2015, the Union learned that the Employers used bundled rates to determine the employees' share of health insurance costs during the term of the collective bargaining agreement.

The parties' stipulation further states that in emails dated December 14, 2015, and December 15, 2015, the Union notified the Employers that it objected to an Act 54 calculation based on a bundled rate that included pre-65 retiree health costs and that the Union requested health care cost data for employees only, without including the pre-65 retiree health costs. Those emails are not in the record. It is not clear from the record whether the Union objected to the use of a bundled rate in the Act 54 calculation because: (1) it had recently learned that a bundled rate had been used to calculate the employees' health care costs under the collective bargaining agreement, (2) the Employers had indicated that there was a *possibility* that they might use the same method to calculate the Act 54 rate that they had used to calculate the rate applied under the collective bargaining agreement, or (3) the Employers definitively stated that they would use

the bundled rate to calculate the Act 54 increase. If, at the time of the Union's December 14 and 15 emails, the Employers had only indicated that they were tentatively considering using the bundled rate in the Act 54 calculation, that may not have been enough to put the Union on notice that it had a basis for filing a charge at that point. See, *Southfield Police Officers Ass'n v Southfield* 162 Mich App 729, 734-735 (1987), *rev'd on other grounds* 433 Mich 168 (1989). Nothing in the parties' stipulation expressly states that the Employers informed the Union of a definite intention to calculate the Act 54 increase based on a bundled rate prior to December 22, 2015.

Since it is not clear from the parties' stipulation that the Employers specifically informed the Union that the Employers intended to use illustrative rates based on bundled health care costs to calculate the Act 54 increase prior to the Employers' attorneys' December 22, 2015 email, the matter could be remanded to the ALJ for a hearing to obtain the additional evidence that would allow the ALJ to determine the specific date on which the Employers first informed the Union that the Employers intended to apply the bundled rate in calculating the Act 54 increase. However, as more fully discussed below, in the interest of judicial economy we will not remand this matter on statute of limitations grounds. Upon consideration of the substance of the charge, for the reasons stated below, and whether the charge is timely or not, we find that the charge fails to state a claim upon which relief can be granted under PERA.

Act 54, § 15b of PERA, MCL 423.215b

In its charge, the Union asserts that the increases in the employees' share of health insurance costs that the Employers imposed after the termination of the parties' collective bargaining agreement were unlawful. The Union contends that it was unlawful to base an increase in active employee health insurance costs on an illustrative rate based on bundled active employee health care costs and retiree health care costs. The Union argues that the increase in employee health insurance costs under Act 54 should have been based solely on the increase in active employee health care costs.

Public Act 152 of 2011 (Act 152), MCL 15.561 to 15.569, was enacted to limit public employers' expenditures for employee medical benefit plans. Pursuant to § 2(e) of Act 152, medical benefit plans do not include health care benefits provided by public employers to their retirees. Based on that restriction, we found the employer in *Shelby Twp*, 28 MPER 21 (2014)[3] had violated PERA when it determined the amount of the employees' share of health care costs based on bundled active employee and retiree health care costs, imposed that on the employees without reaching impasse or agreement with the union, and subsequently passed on increases in those bundled costs to employees in the absence of impasse or agreement. As discussed more fully below, Act 152 is not an issue in this matter. Here the issue is Act 54, which is § 15b of PERA.

Act 54 is the original language of § 15b of PERA. Section 15b was amended October 15, 2014, and now provides in relevant part:

[3] Affirmed in *Shelby Township v Command Officers Association of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued December 15, 2015 (Docket No. 323491); aff'd __Mich__ issued November 1, 2017 (Docket No. 153074); 2017 WL 5030885.

(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. . . . 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. The public employer may make payroll deductions necessary to pay the increased costs of maintaining those benefits.

* * *

(4) All of the following apply to a public employee eligible to submit labor disputes to compulsory arbitration under 1969 PA 312, MCL 423.231 to 423.247:

* * *

(b) The increase in employee costs for maintaining health, dental, vision, prescription, or other insurance benefits after the collective bargaining contract expiration date that the employee is required to bear under subsection (1) shall not cause the total employee costs for those benefits to exceed the amount of the employee's share under the publicly funded health insurance contribution act, 2011 PA 152, MCL 15.561 to 15.269. If the public employer is exempt from the limitations of that act, the total employee costs for those benefits shall not exceed the higher of the minimum required employee share under section 3 or 4 of the publicly funded health insurance contribution act, 2011 PA 152, MCL 15.563 and 15.264, calculated as if the public employer were subject to that act.

* * *

(5) As used in this section:

* * *

(b) "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 brief submitted to the ALJ, the Union argues that the employees who receive the insurance benefits are active employees, that they receive active employee benefits, and they do not receive benefits for retirees. Therefore, according to the Union, the active employees should not be responsible for bearing the increased cost of maintaining the benefits for retirees. Thus, the Union contends that any increases in the cost of active employees' benefits can be passed on to active employees under Act 54, but increases in the cost of retirees' benefits cannot be passed on to active employees. However, nothing in Act 54 or any other PERA provision prohibits employers from using bundled retiree and active employee costs to determine the employees'

share of health insurance premium costs or to determine the increase in the employees' share of health insurance premium cost increases after the expiration of the collective bargaining agreement.

The Union also contends that by stating "Employees who receive," in § 15b(1) the Legislature intended the language to apply only to active employees and their benefits. The Union asserts that if the Legislature had intended that the costs for retiree benefits would be included in calculating the increase under Act 54, the Legislature would have specifically stated that. However, in this case, active employees and pre-65 retirees participate in the same medical benefit plans. Although the actual cost for retirees' health care may be higher than the actual cost for active employees' health care, retirees and active employees are each entitled to the same health care benefits. Thus, the active employees' benefits cannot be distinguished from the pre-65 retirees' benefits in this case.

Subsection 4(b) of § 15b of PERA became effective October 15, 2014. Subsection 4(b) provides that the provisions of § 15b are to be applied differently to employees who are eligible for compulsory binding arbitration under Act 312. Subsection 4(b) indicates that the increase that Act 312 eligible employees would be required to pay under Act 54 cannot be greater than the amount those employees would have to pay under Act 152. However, no such limitation applies to employees who are not eligible for Act 312 arbitration, such as the employees in this matter. Subsection 4(b) clearly ties Act 152 costs to Act 54 cost increases for employees who are Act 312 eligible. There is nothing in PERA to indicate that the Legislature intended to tie increases under Act 54 to the requirements of Act 152 for employees who are not eligible for Act 312 arbitration. Therefore, nothing in the Union's argument establishes that the Employers violated Act 54 or any other provision of PERA, by using bundled retiree and active employee costs to determine the amount of the increase in employee health insurance costs under Act 54. Accordingly, we cannot infer that the Legislature intended us to prohibit public employers from bundling active employee health insurance benefit costs with those of retirees for purposes of § 15b(1) where the employees in question are not eligible for Act 312 arbitration.

Shelby Twp, Act 54, and Act 152

In the briefs that the parties submitted to the ALJ, the parties compared this case to our decision in *Shelby Twp*, 28 MPER 21 (2014). However, there are significant differences between the two cases. In *Shelby Twp*, the parties' collective bargaining agreement expired on December 31, 2010, and the parties' respective shares of health care costs continued as set by the expired collective bargaining agreement while they were negotiating a successor agreement. The parties in *Shelby Twp* had not reached agreement or impasse by September 27, 2011, when Act 152 became effective. At that point, the employer in *Shelby Twp* had to determine the employees' share of health care costs to meet its obligations under Act 152.

Health care costs are mandatory subjects of bargaining. *Van Buren Co Ed Ass'n v Decatur Pub Sch*, 309 Mich App 630, 641 (2015), aff'g *Decatur Pub Sch*, 27 MPER 41 (2014). Thus, prior to the enactment of Act 54 and Act 152, it was an unfair labor practice for a public employer to impose an increase in the employees' share of health care costs after the parties' collective bargaining agreement expired, but before the employer and union reached impasse or agreement.

The employer in *Shelby Twp* had to reach agreement or impasse with the union on the employees' share of health care costs or decide to impose an appropriate share of health care costs on employees in order to comply with Act 152. Upon determining that it had to act timely to comply with Act 152, the employer in *Shelby Twp* had three choices: (1) applying the hard caps; (2) implementing the 80% employer share option, with the majority vote of its board; or (3) exempting itself from the requirements of Act 152 for the next medical benefit plan coverage year, with a two-thirds vote of its governing body.

The Commission's decision in *Decatur Pub Sch*, 27 MPER 41 (2014), examined the relationship between public employers' obligations under PERA and under Act 152. In *Decatur*, the Commission held that it was up to the employer to determine whether it should promptly comply with Act 152 or whether it could delay doing so in order to continue to bargain in an attempt to reach agreement or impasse on the health care cost issues. In *Decatur*, the Commission held that the employer's decision, on whether to accept the risk that would result from delaying compliance with Act 152, is a policy choice within the employer's managerial prerogative. Therefore, the Commission concluded that the employer's choice to not delay implementation of health care cost sharing for the purpose of compliance with Act 152 is not a breach of the duty to bargain. See *Decatur Pub Sch*, 27 MPER 41 (2014); aff'd sub nom *Van Buren Co Ed Ass'n v Decatur Pub Sch*, 309 Mich App 630 (2015).

In *Shelby Twp*, the employer determined that the beginning of the medical benefit plan year was January 1, 2012 and, without reaching impasse or agreement with the union, the employer set the amount of the employees' share of medical benefit plan costs at 20% of a bundled rate that included retiree health care costs and active employee health care costs. That bundled rate was contrary to § 2(e) of Act 152, MCL 15.562(e), which states:

> "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 or a public employer's contributions to a fund used for the sole purpose of funding health care benefits that are available to a public employee or an elected public official only upon retirement or separation from service* (emphasis added).

In *Decatur*, the Commission allowed the employer to impose the amount of the employee share of medical benefit plan costs without reaching agreement or impasse because imposition was necessary for compliance with Act 152. Shelby Township's imposition of health care costs based on the bundled rate was <u>not</u> necessary for compliance with Act 152. If the *Shelby Twp* employer had set the amount of the employees' share of medical benefit plan costs at 20% of active employee health care costs, the employer's imposition of the rate would not have been an unfair labor practice, because in that case, the employer would have set the employees' share of health care costs at the level necessary to meet its obligations under Act 152. However, by implementing a rate that charged employees more than the minimum allowable rate under Act 152, the employer went beyond what was required for compliance with Act 152. Therefore, the

Commission concluded that the employer in *Shelby Twp* violated PERA by imposing that rate. The violation of PERA was the imposition of a change in a mandatory subject of bargaining without reaching agreement or impasse. Because the employer went beyond the minimum necessary for compliance with Act 152, the Commission could not excuse the unlawful imposition of the increase in employee health care costs.

In finding that Shelby Township violated PERA when it increased the employees' insurance costs, the Commission indicated that the parties could have agreed to any amount for the employees' share of health insurance costs within the parameters set by Act 152. However, that employer's acts were unlawful because it unilaterally imposed the initial health care plan costs in an amount in excess of the amount necessary to comply with Act 152. When addressing the increase made pursuant to Act 54, the same rule applied. That is, in the absence of agreement or impasse, the employer could not lawfully impose an increase in excess of the amount necessary to comply with Act 152 and Act 54. As we stated in *Shelby Twp*:

> 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.

When premium costs increased on February 1, 2012, the employer in *Shelby Twp* increased the employees' share of premium costs based on increases in the previous unlawful bundled rate. Again, the *Shelby Twp* employer imposed the higher rate prior to reaching agreement or impasse with the union. Therefore, by imposing costs on employees that were not necessary for compliance with Act 152 or Act 54, the *Shelby Twp* employer acted unlawfully. Accordingly, the Commission found that the employer in *Shelby Twp* breached its duty to bargain in both instances because it unlawfully imposed rates higher than those required by Act 152 without first reaching agreement or impasse.

The big difference between this case and *Shelby Twp* is in the legality of the employees' share of health insurance costs that applied before the Act 54 increase was imposed. In *Shelby Twp*, the employees' share of health insurance costs that applied before the Act 54 increase was unlawfully imposed by the employer. However, in this matter, the employees' share of health insurance costs that applied before the Act 54 increase was negotiated and agreed to by the parties. We recognize that the Union might argue that by applying the bundled rate to calculate the employees' share of health insurance costs under the collective bargaining agreement the Employers may have violated § 2(e) of Act 152. However, while a violation of Act 152 can result in a violation of PERA under certain circumstances, a violation of Act 152 is not necessarily a violation of PERA. Act 152 is not part of PERA, Act 152 is not administered by this Commission, and we have no subject matter jurisdiction over the question of the Employers' compliance with Act 152 when the issue is not related to an alleged PERA violation. Since the parties negotiated and agreed to the rate under the collective bargaining agreement, there is no violation of PERA. Similarly, after the expiration of the collective bargaining agreement, an increase in employees' insurance costs based on an increase in the cost of the health insurance benefits provided under the collective bargaining agreement is required by Act 54 and is not a violation of PERA.

Conclusion

Act 152 does not apply to the issues in this case. The Union and the Employers agreed that employees would receive certain health care benefits for which they would pay a designated amount of the health care costs. The fact that the agreed upon amount was based on a bundled rate does not violate PERA. During the period between the expiration of the collective bargaining agreement and the effective date of a successor agreement, Act 54 requires the Employers to pass on to employees the increased costs in maintaining the agreed upon insurance benefits. This is the case even if the cost of the benefits was based on bundled active employee and pre-65 retiree health care costs. Therefore, the fact that the Employers passed on the increase in the cost of maintaining the agreed upon insurance benefits is not an unfair labor practice. The charge does not allege a violation of PERA. Accordingly, the ALJ's decision is modified; the charge must be dismissed because it fails to state a claim upon which relief can be granted.

ORDER

The unfair labor practice charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: December 18, 2017

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

KENT COUNTY AND KENT COUNTY SHERIFF,
Public Employers-Respondents,

Case No. C16 F-062
-and- Docket No. 16-017418-MERC

KENT COUNTY DEPUTY SHERIFFS ASSOCIATION,
Labor Organization-Charging Party.
_____/

Appearances:

Robert Chovanec, Labor Counsel, Kent County, for Respondents

Alison L. Paton, for Charging Party

DECISION AND RECOMMENDED ORDER

OF

ADMINISTRATIVE LAW JUDGE

On June 17, 2016, the Kent County Deputy Sheriffs Association filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against Kent County and the Kent County Sheriff, pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MCL 423.216. Pursuant to Section 16 of PERA, the charge was assigned to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System.

On December 1, 2016, the parties submitted a joint stipulation of facts, as permitted by Commission Rule 171(3), R 423.171(3), in lieu of a hearing. Both parties filed briefs on or before January 31, 2017. Based on the facts contained in the stipulation and as set out below, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

Charging Party represents a bargaining unit of corrections deputies and sergeants employed jointly by Respondents Kent County and the Kent County Sheriff. Employees in this unit are not eligible to submit labor disputes to compulsory arbitration under 1969 PA 312 (Act 312), MCL 423.231 to 423.247. On December 31, 2015, a collective bargaining agreement covering this unit expired.

Section 15b of PERA requires a public employer to pass along to its employees any increases in the costs of providing their health care benefits that occur after the expiration date of their collective bargaining agreement.[4] The Respondent County offers the same health care plans it offers to members of Charging Party's unit to other active County employees and to County retirees who are less than 65 years old. In the fall of 2015, the Respondent County calculated its costs of providing these health plans for the coverage year beginning January 1, 2016. The County's calculations indicated that its costs had increased over the previous year. Effective January 1, 2016, Respondents increased the contributions paid by members of Charging Party's unit toward their health benefits by percentages corresponding to the percentage increases in the costs of their plans, as calculated by the County. Charging Party, however, alleges that the contribution increases were larger than those authorized by Act 54 because the rates used by the Respondent County to calculate the increases were so-called "bundled rates," i.e. rates that included the costs of providing the benefits to both active employees and retirees. Charging Party alleges that the January 1, 2016, contribution increases, therefore, constituted an unlawful unilateral change in terms and conditions of employment.

Facts:

Implementation of the Act 54 Increases

As noted above, the parties' collective bargaining agreement expired on December 31, 2015. In October 2015, when bargaining had failed to produce a new contract to replace the agreement expiring on December 31, the parties began discussions regarding the possible implementation of Act 54 increases for members of the unit at the beginning of the new plan coverage year on January 1. These discussions continued into December 2015. Sometime during these discussions, but prior to December 14 or 15, Charging Party learned that the Respondent County had used bundled rates to calculate the amounts of the Act 54 increases.

In emails dated December 14, 2015, and December 15, 2015, Charging Party notified Respondents that it objected to a calculation based on bundled rates that included pre-65 retiree health costs. It asserted that the Act 54-mandated increases in contributions should be based on increases in employee health care costs only, and requested that Respondents provide it with health care cost data for employees only.

On December 22, 2015, the County's attorney sent an email to Charging Party's attorney stating that Respondents did not agree with Charging Party that Act 54 required the removal of retiree health costs from the calculation of the contributions required under that statute. The

[4] Section 15b, added to PERA by 2011 PA 54, is alternatively referred to as Act 54, even though it was subsequently amended.

email said that Respondents "do not agree with that interpretation and will not implement it." On this same date, mediation having failed to produce a contract, Charging Party filed a petition for fact finding with the Commission.

On December 28, 2015, Charging Party's attorney sent an email to the County's attorney requesting the following information:

> (1) For 2015 what was the total "premium" cost for active employees only (excluding pre-65 retirees)? In other words, if in 2015 the County had calculated the 17.5% employee premium share (before wellness credits) based on active employee health care costs only (excluding pre-65 retirees), what would those numbers have been?
>
> (2) For 2016 what will be the total "premium" costs for active employees only (excluding pre-65 retirees)? In other words, if in 2016 the County were to calculate the 17.5% employee premium share (before wellness credits) based on active employee health costs only (excluding pre-65 retirees), what would those numbers be?
>
> It is my assumption that by the County using the composite (active and pre-65 retiree) rate, that this makes the premium amount paid by employees higher than it would be if it were based on active employees alone, but also makes the premium amount paid by pre-65 retirees lower. *Please let me know if you would agree with that.* [Emphasis in original]

The County's attorney, in an email dated December 30, 2015, told Charging Party's attorney that the County did not have the information Charging Party was requesting because it established rates based on overall data. He said that he had been informed by the County's actuary that providing the separate rates that Charging Party was requesting would require an actuarial study, and that he did not believe that the County was required to have such a study done.

Effective January 1, 2016, Respondents increased employee health care contributions for employees in Charging Party's unit to reflect what it calculated was the increase in the cost of their plans for 2016. The parties eventually reached a new collective bargaining agreement, and, on June 9, 2016, the contributions of unit employees were adjusted in accord with the terms of the new agreement.

The unfair labor practice charge was filed on June 17, 2016. After the charge was filed, the County informed Charging Party that if it was determined that its interpretation of Act 54 was incorrect and that its implementation of the Act 54 increases had been unlawful, the County would obtain unbundled active-employee-only rates.

Respondents' Calculation of the Costs of Its Health Plans

As noted above, the County offers the same health plans it offers to members of Charging Party's unit to other active County employees and to County retirees who are less than 65 years old. Employees and retirees may participate in either a Preferred Provider Organization (PPO) plan self-funded by the County or a fully-insured Health Maintenance Organization (HMO) plan provided by Grand Valley Health Plans. Blue Cross/Blue Shield is the third party administrator for the self-funded PPO plan. Neither the PPO nor the HMO plan covers prescriptions. The County has a separate self-funded prescription plan offered to participants in both the PPO and HMO plans. The third-party administrator for the prescription plan is Optum RX.

Grand Valley Health Plans determines the premium rates it will charge the County for its HMO plan. Prior to the 2015 coverage year, Grand Valley provided the County with both "bundled" premium rates, i.e., rates that included both active employees and pre-65 retirees, and separate "unbundled" rates for active employees and retirees. However, the County consistently chose the bundled rates. Since 2015, Grand Valley has provided only bundled rates and the County has not asked for separate rates.

The illustrative rates for the County's two self-funded plans, the PPO plan and the prescription plan, are calculated not by Blue Cross/Blue Shield but by an actuary employed by a contractor, AON Risk Services Central. According to the County, for at least the past 15 years AON has provided bundled illustrative rates only; Charging Party has no evidence to dispute the County's assertion. According to Charging Party, it was not aware that Respondents had been using bundled rates until October 2015, when discussions began over the Act 54 increases; Respondents have no evidence to dispute Charging Party's claim that it did not know of the practice. As the County's attorney informed Charging Party on December 30, 2015, AON told the County that it would have to conduct an actuarial study in order to provide the County with separate unbundled rates for active employees and retirees.

Section 15(b) of PERA and *Shelby Township*:

Act 54 took effect on June 8, 2011. Section 15(b), which as noted above was added to PERA by this act, 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. . . . *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.* The public employer may make payroll deductions necessary to pay the increased costs of maintaining those benefits. [Emphasis added]
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> ** *
>
> (5) As used in this section:

** *

> (a) *"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. [Emphasis added]

On August 18, 2014, the Commission issued a decision in *Shelby Township*, 28 MPER 21 (2014).[5] The primary issues in that case involved the obligations of the employer under PERA in light of a new statute, the Publicly Funded Health Insurance Contribution Act, 2011 PA 152 (Act 152), MCL 15.561– MCL 15.569. Among the arguments raised by the charging party union in *Shelby* was that the employer violated its duty to bargain by using bundled rates that incorporated retiree health care costs to calculate the share of their health care premiums that the employer could unilaterally impose on unit employees under Act 152. However, the union also alleged that the employer improperly calculated the amount of the Act 54 increase which the employer also implemented a month later.

The Commission held that the employer in *Shelby Township* had the right under the circumstances of the case to unilaterally increase unit employees' health care contributions to 20% of the costs of their plan at the beginning of what the employer reasonably concluded was its medical benefit plan coverage year. However, it held that the employer calculated the amount of the contribution increases improperly because its calculations were based on bundled rates. The Commission also held that the employer violated its duty to bargain in implementing Act 54 increases that were based on bundled rates. It stated:

> 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*

[5] *Shelby Township* was affirmed by the Court of Appeals in an unpublished opinion issued on December 15, 2015. *Shelby Township v Command Officers Association of Michigan*, 29 MPER 38 (2015). On February 3, 2017, the Michigan Supreme Court granted leave to appeal. ___ Mich ____ (Docket No. 153074). One of the issues on which leave was granted was "whether Public Act 152, alone or in conjunction with PERA, precludes a public employer's use of illustrative insurance rates that include retiree health insurance costs." The Supreme Court has not yet issued its decision in *Shelby.*

> *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.* [Emphasis added].

In October 2014, while *Shelby* was pending on appeal before the Court of Appeals, Section 15b was amended, by 2014 PA 322, to add several provisions that applied only to employees eligible for arbitration under Act 312. One of the new provisions, Section 15b(4)(b), reads as follows:

> The increase in employee costs for maintaining health, dental, vision, prescription, or other insurance benefits after the collective bargaining contract expiration date that the employee is required to bear under subsection (1) shall not cause the total employee costs for those benefits to exceed the amount of the employee's share under the publicly funded health insurance contribution act, 2011 PA 152, MCL 15.561 to 15.269. If the public employer is exempt from the limitations of that act, the total employee costs for those benefits shall not exceed the higher of the minimum required employee share under section 3 or 4 of the of the publicly funded health insurance contribution act, 2011 PA 152.

Discussion and Conclusions of Law:

As noted above, the parties submitted a joint stipulation of facts in this case in lieu of a hearing. The last paragraph of this stipulation reads as follows:

> The parties agree that the Unfair Labor Practice Charge was timely filed and that the Michigan Employment Relations Commission has jurisdiction in this manner.

As the Commission has often affirmed, the six month statute of limitations contained in Section 16(a) of PERA is jurisdictional. As the Commission recently stated in *of Detroit (Dept of Transportation),* 30 MPER 61 (2017:

> Under Section 16(a) of PERA, no complaint shall issue 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. The Commission has long held that PERA's statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Cmty Sch*, 1994 MERC Lab Op 582, 583. 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).

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, rather than the date of implementation. 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).

In the instant case, the parties' stipulation of facts did not indicate when Respondents first informed Charging Party that the rates it had used to calculate the Act 54 contributions for its members were bundled rates that including pre-65 retiree costs.

However, this clearly occurred sometime prior to December 14 or December 15, 2015, when Charging Party sent Respondents an email objecting to the use of bundled rates. In any case, Charging Party clearly knew, upon receiving the December 22, 2015, email from the County's counsel, that Respondents had calculated the Act 54 contribution increases based on bundled rates and that Respondents planned to implement increases which Charging Party believed had been calculated improperly. I find that the statute of limitations under Section 16(a) in this case began to run on or before December 22, 2015. Since the charge was not filed until June 27, 2016, more than six months later, the charge was untimely.

In their joint stipulation of facts, the parties attempted to stipulate both that the charge was not untimely and that the Commission had jurisdiction. However, whether a charge has been timely filed is not a fact, but a conclusion of law. I also find that because the Commission's jurisdiction over a dispute is determined by the language of PERA, the parties cannot agree to confer jurisdiction on the Commission where PERA does not. Under Section 16(a), as the Commission has interpreted it, the Commission does not have jurisdiction to find an unfair labor practice based on an untimely charge. Here, the stipulated facts demonstrate that under Section 16(a) the charge was not timely filed. I conclude, therefore, that the charge must be dismissed on the basis that the Commission lacks jurisdiction over the dispute. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: May 24, 2017