STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

ALLEN PARK PUBLIC SCHOOLS,
Public Employer-Respondent,

MERC Case No. 20-I-1406-CE

-and-

ALLEN PARK EDUCATION ASS'N, MEA/NEA
Labor Organization-Charging Party.
_____/

APPEARANCES:

Keller Thoma, by Gouri G. Sashital, for Respondent

McKnight, Canzano, Smith, Radtke & Brault, P.C., by John R. Canzano, Darcie R. Brault and Benjamin L. King, for Charging Party

DECISION AND ORDER

In January 2020, in order to accommodate several cognitively impaired students who were scheduled to enter high school in the fall, Allen Park Public Schools (Employer or Respondent) informed the Allen Park Education Association (Union or Charging Party) that it was eliminating the daily consult hour previously allowed to certain high school special education teachers. The Union believed that the elimination of the daily consult hour constituted a unilateral change in the teachers' terms of employment in violation of PERA and filed a charge in September 2020.

In response, the Employer argued that the charge was not timely filed, that the matter was covered by the parties' agreement and that the Union failed to demand bargaining.

In a Decision and Recommended Order, Administrative Law Judge (ALJ) Peltz determined that the charge was untimely filed under Section 16(a) of PERA and that, in the alternative, the subject matter of the dispute was covered by the parties' agreement.[1]

In its exceptions, the Union argues that the ALJ erred when he determined that the charge was untimely and when he found that the subject matter of the dispute was covered by the parties' agreement.

[1] MOAHR Hearing Docket No. 20-017714

For the reasons set forth below, we conclude that the charge was not timely filed and affirm the ALJ's recommended dismissal of the charge.

Procedural History:

The Union filed the instant unfair labor practice charge on September 8, 2020. The charge alleged that Respondent violated Section 10(1)(e) of PERA by unilaterally changing the schedules of seven special education teachers assigned to Allen Park High School.[2]

On October 15, 2020, the Employer filed a motion for summary disposition and the Union filed a response to the motion on November 10, 2020. On November 19, 2020, the ALJ denied the motion and a hearing was held on January 5, 2021.

On September 30, 2021, the ALJ issued a Decision and Recommended Order in which he recommended that the charge be dismissed.

On November 24, 2021, the Union filed exceptions to the ALJ's Decision and Recommended Order and on December 21, 2021, Respondent filed a Brief in Support of the ALJ's Decision and Recommended Order.

Facts:

I. Background

Charging Party Allen Park Education Association represents a bargaining unit consisting of approximately 208 certified and/or professional staff members employed by Respondent Allen Park Public Schools, including special education teachers. Respondent employs 39 staff members assigned to special education services, including six special education teachers at Allen Park High School. The Employer and Union are parties to a collective bargaining agreement (agreement) covering the period September 9, 2019 through August 31, 2024.

Special education teachers deliver direct instructional services to students who may be hearing impaired, learning disabled, on the autistic spectrum disorder (ASD) or otherwise cognitively impaired. With the exception of ASD teachers, special education teachers are each allocated a "caseload" of 22-23 students whose progress they are responsible for monitoring. Each special education teacher's caseload includes some students who are not assigned to that teacher's classroom.

Prior to January 2015 (the start of the second semester of the 2014-2015 school year), the daily teaching load for special education teachers consisted of five teaching periods and one

[2] The charge also alleged that Respondent violated PERA by failing or refusing to submit a tentative agreement for ratification. That assertion was withdrawn by the Union via an amended charge filed on December 7, 2020 (Tr. 5).

preparation period, as provided for by Article IV, Section B of the agreement. This was identical to the daily teaching load of regular education teachers.

At a workshop presented by the Wayne County RESA in the fall of 2014, the presenter, Lois Vaughn, recommended that Respondent modify the schedules of its high school special education teachers to allow them the opportunity to meet with all of their assigned students and to complete Individualized Education Programs (IEP). The administration and the special education staff then engaged in discussions about teacher schedules which resulted in the implementation of a "consult period model" during the second semester of the 2014-2015 school year. In accordance with the "consult period model," five of the six high school special education teachers were assigned four classroom instruction periods, one preparation period, and one consult hour each day. However, one special education teacher, Bill Robinson, was allocated two consult hours per day, and another high school special education teacher, Kathy Cialkowski, was not given a consult hour because she was assigned to the high school's Autism Spectrum Disorder Center.

Only high school special education teachers were assigned consult hours.

The consult period model was never memorialized in writing and, according to Mike Darga, Respondent's Superintendent and Director of Human Resources, the plan was subject to student needs.

On October 9, 2017, Director of Special Education Matthew Sokol sent an email to the high school special education staff regarding certain issues discussed during a meeting the prior week, including a concern raised regarding the elimination of one of the teacher's consult hours. In the email, Sokol wrote:

> I am sensitive to the demands of your role as [high school special education] caseload providers and the desire to provide quality services for our students. I'm also aware of our requirements to provide the number of sections needed for our students to graduate.
>
> I want to be very clear that there is no intention of eliminating the Consult Model at the high school level. There is no "slippery slope." Decisions regarding opening or closing sections is strictly based on student demand, and the need to provide what is needed for our students to graduate – nothing else.

The consult model was utilized from the second semester of the 2014-2015 school year until the events that resulted in the instant charge, as discussed below.

II. Reduction in Consult Hours

In 2019, Director Sokol became aware that several cognitively impaired students were scheduled to enter the high school in the fall of 2020 and determined that the school district would

need to add four additional sections to accommodate the incoming students. According to Sokol, the consult hour would be eliminated and replaced with "four essential element classes." During the fall of 2019, Sokol met several times with John Kelley, principal of Allen Park High School, and assistant principal Karen Moran, for the purpose of formulating a plan to modify the schedules of the special education teachers to implement the new curriculum.

Sokol testified that he first mentioned the possibility of schedule changes to Union President Joel Burkey during a September 2019 meeting held in the office of John Tafelski, the school district's superintendent for curriculum instruction. One of the items on the agenda for the meeting was the addition of consult hours for the middle school special education teachers. After Sokol agreed to give some consult time to the middle school teachers, he raised the possibility of changing the schedule for the high school special education teachers to accommodate the incoming cognitively impaired students. According to Sokol, Burkey expressed support for the idea but indicated that he "would deny it if he was ever called on it." Similarly, Tafelski testified that Sokol brought up the idea of eliminating the daily consult hour for the high school special education teachers during the meeting.

Sokol, Kelley and Moran each testified that a draft plan to modify the schedules for the high school special education teachers was finalized during December 2019. The plan called for eliminating the daily consult hour, resulting in a teaching load of five instruction hours and one preparation period per day. In lieu of the daily consult hour, each special education teacher was to be allotted six hours of consult time per month. According to Sokol, a document describing the changes was created on December 6, 2019.

On January 15, 2020, Union President Joel Burkey met with Sokol, Moran and Kelley in the high school principal's office and Sokol presented the plan to reduce consult time for high school special education teachers. According to Burkey, Sokol stated that the current scheduling system was not a good allocation of staff resources and that the school district needed to be more efficient. Burkey told Sokol that he did not think the elimination of the daily consult hour was a good idea and that he believed that the proposal violated the collective bargaining agreement, although he was unable to cite a specific provision during the meeting. According to Burkey, Moran also expressed some disagreement with Sokol's proposal. Burkey testified that he believed the administration was just "testing the waters" and giving him an "initial sales pitch." According to Burkey, he did not think that the School District had made a final decision about the schedules and that "this was like the opening salvo, if you will, you know. This is something that we're going to be -- is going to be ongoing and we're going to discuss." Burkey further testified that he believed a reduction in consult hours "would be something that would violate the contract or our agreement."

Sokol testified that, during the meeting with Burkey, he went over the document which was created the prior month describing the details of the plan. According to Sokol, the plan was not presented to Burkey as merely a proposal, but rather it was a change which would be going into effect for the 2020-2021 school year. Sokol testified, "The general theme is we are moving

forward with this plan." Sokol recalled that Burkey responded by threatening to file a grievance if the administration moved forward with the plan to eliminate the daily consult hour. According to Sokol, Burkey's "response was that if you guys decide to move forward with this, we would likely need to file a grievance."

Sokol's account of the meeting was corroborated by Moran and Kelley. Moran testified that Sokol discussed the changes which were to be implemented in the fall and that Sokol told Burkey that the consult period would not be included in the new schedule. According to Moran, the plan was not presented as a proposal but rather as something that was "going to happen." Moran testified that Sokol addressed her concerns about the loss of consult hours by assuring her that some consult time would still be allocated to the special education teachers and promising that a substitute teacher would be called in the event a special education teacher needed some additional opportunity for consult time. Similarly, Kelley testified that Sokol gave no indication during the meeting that the plan was merely a proposal. According to both Moran and Kelley, Burkey mentioned the possibility of the Union filing a grievance over the schedule change. Burkey testified he did not recall making the statement that a grievance would be filed.

On January 20, 2020, Sokol, Kelley and Moran met with the high school special education teachers for the purpose of presenting Respondent's plan to reduce consult time. During the meeting, a multi-page document was disseminated to the teachers describing the specific details of the plan ("Handout Titled, APHS Special Education Service Delivery Adjustments for the 2020-21 School Year, Presented to staff 1/20/2020").

On February 14, 2020, Sokol and Moran held a professional development session for the high school special education teachers to provide an overview of the new essential elements curriculum which would be offered to the incoming students.

Burkey testified that, on or about May 9, 2020, he received complaints from special education teachers about the schedule changes.

The plan was implemented in the fall of 2020 in the form described by Sokol earlier in the year.

Discussion:

A. Legal Standards

Section 16(a) of PERA prohibits the Commission from acting on an unfair labor practice "occurring more than six months prior to the filing of the charge with the commission and the service of a copy thereof upon the person against whom the charge is made." The Commission has held that the statute of limitations in Section 16(a) is jurisdictional and cannot be waived. *Walkerville Rural Community Sch*, 1994 MERC Lab Op 582; *Shiawasee County Rd Comm*., 1978 MERC Lab Op 1182.

When the alleged unfair labor practice is a unilateral change in a term or condition of employment, the date of a unilateral change is the date of the announcement of the change, and not the date of implementation. *Interurban Transit Partnership,* 20 MPER 107 (2007); *Lapeer County*, 19 MPER 45 (2006); *Michigan State University*, 11 MPER 29012 (1997); *Detroit (Dep't of Water and Sewerage),*1990 MERC Lab Op 400; *Tuscola Intermediate Sch Dist*, 1985 MERC Lab Op 123; *Detroit Bd of Ed*, 1974 MERC Lab Op 813; *Grand Traverse County*, 30 MPER 68 (2017) (no exceptions).

B. Application to the Present Case

The ALJ found that the Union had clear notice of the Employer's intention to eliminate the daily consult hour for high school special education teachers more than six months before it filed the unfair labor practice charge on September 8, 2020. According to the ALJ, the record established that, throughout the fall of 2019, Sokol, Kelley and Moran worked on a plan to accommodate several cognitively impaired students who were scheduled to attend high school the following year. Both Sokol and Moran testified that a draft plan was finalized sometime in December of 2019. The ALJ noted it was undisputed that the plan was the subject of a meeting held on January 15, 2020, attended by Union President Burkey. According to Burkey's account of the meeting, Sokol discussed eliminating the consult hour to create four sections of classes for the new students. Although Burkey testified that he believed Sokol was merely "testing the waters" and that he did not definitively learn that the school district intended to implement the plan until May of 2020, the ALJ found Burkey's claim was contradicted by Sokol, Kelley and Moran, each of whom disputed any suggestion that the plan presented to Burkey on January 15 was merely a proposal. The ALJ credited Sokol's testimony that he went over a document with Burkey detailing the schedule change, and specifically informed the Union president that the elimination of the daily consult hour would go into effect for the 2020-2021 school year. Additionally, the ALJ found that both Kelley and Moran testified credibly that Sokol told Burkey the daily consult hour would be eliminated, and that the plan was not presented as a proposal.

The ALJ further pointed out that Respondent's contention that the plan to eliminate the daily consult hour was in place well before April 2020 was supported by evidence introduced at the hearing pertaining to the January 20, 2020, meeting between the administration and the high school special education teachers. In that regard, it was undisputed that the teachers were definitively told during that meeting that the schedule change would be implemented at the start of the 2020-2021 school year. In addition to Sokol's account of the meeting, Respondent entered into evidence a document that the school district provided to the teachers on that date. The document includes a section entitled "Changes **to be made** for the '20-'21 school year" and explicitly indicates that consult time "will be allocated to the 1st and 3rd Thursdays of each month, half a day each…" (Emphasis added). According to the ALJ, the fact that the schedule embedded within the handout is identified as a "hypothetical" schedule did not, as Charging Party asserted, prove that the plan itself was still tentative as of that date. To the contrary, the ALJ found that both Sokol and Moran testified credibly that the schedule was included simply to show the teachers an

example of what impact the change would have on their daily teaching load beginning in the fall of 2020.

Although the ALJ recognized that Burkey was not present for the January 20, 2020, meeting, he noted that the fact the meeting occurred just five days after members of the administration met with Burkey to discuss the elimination of the daily consult hour strongly contradicted the Union's claim that the plan was not finalized until later in the spring. For that reason, and based upon the credible testimony of Sokol, Kelley and Moran, the ALJ concluded that Charging Party knew or should have known of the schedule change as of January 2020. Consequently, the ALJ found that the record established the Union had clear notice of the school district's intention to eliminate the daily consult hour for high school special education teachers more than six months before it filed the unfair labor practice charge on September 8, 2020.

Although Charging Party takes exception to the ALJ's assessment of witness credibility, in *City of Detroit*, 24 MPER 7 (2011), the Commission noted that it will not overturn the ALJ's determinations of witness credibility unless presented with clear evidence to the contrary:

> The ALJ is in the best position to observe and evaluate witness demeanor and to judge the credibility of specific witnesses. This Commission will not overturn the ALJ's determinations of witness credibility unless presented with clear evidence to the contrary. See *Redford Union Sch. Dist*., 23 MPER 32 (2010*)*; *City of Lansing (Bd. of Water & Light),* 20 MPER 33 (2007); *Bellaire Pub. Sch*., 19 MPER 17 (2006).

Similarly, in *Michigan Employment Relations Comm v Detroit Symphony Orchestra, Inc*., 393 Mich 116; 223 NW2d 283 (1974), the Michigan Supreme Court overturned one of our decisions as unsupported by substantial evidence where we had rejected the trial examiner's findings regarding anti-union animus. Noting "the unique opportunity of the trial examiner to weigh the testimony of witnesses," the Court refused "to ignore the determination as to credibility of the only decision-maker to hear testimony firsthand and, in effect, credit the contrary determination of the" Commission. Id. at 127; 223 NW2d at 289. In *City of Detroit v Detroit Fire Fighters Ass ' n, Local 344, IAFF*, 204 Mich App 541, 554; 517 NW2d 240, 247 (1994), the Court of Appeals similarly overturned one of our decisions for failing to "give due deference to the review conducted by the referee, in particular with respect to the findings of credibility." See also *Grand Rapids Employees Independent Union,* 34 MPER 26 (2021).

In this case, the ALJ was in the best position to observe and evaluate witness demeanor and to judge the credibility of specific witnesses. The Union has not presented the Commission with clear evidence contradicting the credibility determinations made by the ALJ, and we find no basis for overturning his findings.

The Union also contends, in its exceptions, that even if it was aware of the Employer's plan to change the schedule for the high school special education teachers in January of 2020, the unfair

labor practice charge was nonetheless timely filed because the limitations period was tolled pursuant to Michigan Supreme Court Order 2020-3 and by Executive Order 2020-58, both of which were issued in response to the COVID-19 public health crisis.

As noted by the ALJ, however, the Supreme Court's order, which was issued on March 23, 2020, provided that any day falling within the state of emergency declared by the Governor would not be counted for the purpose of computing deadlines pertaining to case initiation or the filing of initial responsive pleadings in "all civil and probate case-types." Consistent with the Court's order, Executive Order 2020-58, which was issued by the Governor on April 22, 2020, likewise suspended "all deadlines applicable to the commencement of all civil and probate actions and proceedings" until the end of the declared state of emergency. Contrary to Charging Party's position, however, the instant case is not a civil or probate case. Rather, it is a contested case proceeding governed by PERA and the provisions of the Administrative Procedures Act (APA), MCL 24.201 et seq. The express language of the order only refers to civil and probate case initiation. Absent is any reference to criminal or administrative proceedings, the latter of which are usually referred to separately in the legal context as opposed to being co-mingled with general civil matters.

Significantly, we also note that the Governor issued other Executive Orders that addressed specific issues involving administrative agencies, such as EO 2020-79, which addressed filing requirements under the Youth Employment Standards Act, and other EOs related to the Michigan Employment Security Act, e.g., EO 2020-76. Had EO 2020-58 been intended to toll deadlines in the administrative context, we believe it likely that the Governor would have expressly stated so. Because EO 2020-58 is silent concerning any applicability to administrative proceedings, we find that it does not toll or extend the deadline for individuals to file a charge alleging a violation of PERA.

Additionally, as noted above, Section 16(a) of PERA is jurisdictional and cannot be waived. The only statutory tolling of the six-month period is military service. *Detroit Bd of Ed*, 1990 MERC Lab Op 781 (no exceptions); *Fire Fighters, Local 352*, 1989 MERC Lab Op 522, 525. Accordingly, the orders relied upon by the Union to excuse its failure to bring a timely charge before the Commission are inapplicable to this proceeding.

The ALJ thus properly concluded that the charge was not timely filed and recommended its dismissal[3]. We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case.

[3] Because we have determined that the charge was untimely, we find it unnecessary to address the ALJ's alternative rulings and other bases for recommending dismissal of the charge.

ORDER

IT IS HEREBY ORDERED that the unfair labor practice charge is dismissed in its entirety and that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Tinamarie Pappas, Commission Chair

William F. Young, Commission Member

Issued: January 14, 2022

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

ALLEN PARK PUBLIC SCHOOLS,
Respondent-Public Employer,

Case No. 20-I-1406-CE
Docket No. 20-017714-MERC

-and-

ALLEN PARK EDUCATION ASS'N, MEA/NEA
Charging Party-Labor Organization.

_____/

APPEARANCES:

Keller Thoma, by Gouri G. Sashital, for Respondent

McKnight, Canzano, Smith, Radtke & Brault, P.C., by John R. Canzano, Darcie R. Brault and Benjamin L. King for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case arises from an unfair labor practice charge filed by the Allen Park Education Association, Michigan Education Association/National Education Association (MEA/NEA) against the Allen Park Public Schools. Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the case was heard by David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Office of Administrative Hearings and Rules (MOAHR), acting on behalf of the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including the transcript of the hearing, exhibits and post-hearing briefs, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge:

Charging Party (APEA) represents a bargaining unit consisting of approximately 208 certified and/or professional staff members employed by Allen Park Public Schools, including special education teachers, also referred to by the parties as "resource room" teachers. The unfair labor practice charge, which was filed on September 8, 2020, asserts that Respondent violated Section 10(1)(c) of PERA by unilaterally changing the schedules

of seven special education teachers assigned to Allen Park High School.[1] On October 15, 2020, Respondent filed a motion for summary disposition. The Union filed a response to the motion on November 10, 2020. In an order issued on November 19, 2020, I denied the motion on the ground that there were questions of material fact which warranted an evidentiary hearing. A hearing was held before the undersigned on January 5, 2021. Post-hearing briefs were filed by the parties on or before March 9, 2021.

Findings of Fact:

I. Background

Article IV of the 2017-2018 collective bargaining agreement between the APEA and Respondent governed teaching hours and class load. Section B of Article IV provided, in pertinent part, that the "normal, daily teaching load in the high school and middle school will be five (5) teaching periods and one (1) unassigned preparation period, running consecutively." Article II, Section G of that contract required the superintendent to consult with the Union on any "major revisions of educational policy" whether proposed or under consideration.

During bargaining on a successor contract, there was no discussion between the parties about changing the language of Article IV or otherwise modifying the schedules of special education teachers. On September 9, 2019, APEA and Respondent reached agreement on a successor collective bargaining agreement covering the period 2019-2020. The contract language quoted above relating to teaching load and major policy revisions was included verbatim in the new agreement. The successor contract contains a grievance procedure, Article XXIV, culminating in final and binding arbitration.

Article XVII of the 2019-2020 collective bargaining agreement, which is entitled "Maintenance of Standards", provides:

> A. All conditions of employment, including teaching hours, extra compensation for duties outside regular teaching hours, relief period, leaves, and general teaching conditions shall be maintained at not less than the highest minimum standards in effect in the district at the time this Agreement is signed, provided that such conditions shall be improved for the benefit of teachers as required by the express provisions of this Agreement. This Agreement shall not be interpreted or applied to deprive teachers of professional advantages heretofore enjoyed unless expressly stated herein.
>
> B. The duties of any teacher or the responsibilities of any position in the bargaining unit will not be substantially altered or increased without prior negotiation with the Union.

[1] The charge also contained an allegation that Respondent violated PERA by failing or refusing to submit a tentative agreement for ratification. That assertion was withdrawn by the Union via an amended charge filed on December 7, 2020.

II. Consult Hours

Respondent employs 39 staff members assigned to special education services, including six special education teachers at Allen Park High School. Special education teachers deliver direct instructional services to students who may be hearing impaired, learning disabled, on the autistic spectrum disorder or otherwise cognitively impaired. Special education teachers are each allocated a "caseload" of 22-23 students whose progress they are responsible for monitoring. Each special education teacher's caseload includes some students who are not assigned to that teacher's classroom.

Historically, the daily teaching load for special education teachers was comprised of five teaching periods and one preparation period, consistent with the language of Article IV, Section B of the collective bargaining agreement. In the fall of 2014, representatives of the school district attended a workshop presented by Wayne County RESA, the intermediate school district (ISD) of which Allen Park Public Schools is a member, for the purpose of discussing legal requirements and best practices for special education. During that meeting, the presenter recommended that the schedules for Respondent's high school special education teachers be modified to allow them an opportunity to meet with all of the students assigned to their respective caseloads and time to complete Individualized Education Programs (IEP). Following the workshop, the administration contacted members of the special education staff and expressed a desire to implement consult time for the high school special education teachers as soon as possible.

The administration and the special education staff engaged in discussions about teacher schedules which resulted in the implementation of a "consult period model" during the second semester of the 2014-2015 school year. Five of the six high school special education teachers were assigned four classroom instruction periods, one preparation period and one daily consult hour. One of the special education teachers, Bill Robinson, was allocated two consult hours per day based upon the agreement of the staff. Another high school special education teacher, Kathy Cialkowski, was not given a consult hour because she was assigned to the high school's Autism Spectrum Disorder (ASD) Center and had only three or four students for whom she was responsible. The consult period model was never memorialized in writing and, according to Mike Darga, the district's Superintendent and Director of Human Resources, the plan was subject to student needs.

Matthew Sokol is the director of special education for Allen Park Public Schools. On October 9, 2017, Sokol sent an email to the high school special education staff regarding issues discussed during a meeting the prior week, including a concern raised regarding the elimination of one of the teacher's consult hours. In the email, Sokol wrote:

> I am sensitive to the demands of your role as [high school special education] caseload providers and the desire to provide quality services for our students. I'm also aware of our requirements to provide the number of sections needed for our students to graduate.

> I want to be very clear that there is no intention of eliminating the Consult Model at the high school level. There is no "slippery slope." Decisions regarding opening or closing sections is strictly based on student demand, and the need to provide what is needed for our students to graduate – nothing else.

The consult model was utilized from the second semester of the 2014-2015 school year until the events giving rise to the instant charge, as set forth more fully below.

III. Reduction in Consult Hours

Sometime in 2019, Sokol became aware that several cognitively impaired students were scheduled to matriculate from the middle school to the high school in the fall of 2020. The incoming students are not on a typical diploma track; rather, they are part of an alternative curriculum called "essential elements" which consists of language arts, math, social studies and science. Sokol determined that the school district would need to add four additional sections in order to accommodate the incoming students. During the fall of 2019, Sokol met several times with John Kelley, principal of Allen Park High School, and assistant principal Karen Moran, for the purpose of formulating a plan to modify the schedules of the special education teachers in order to implement the new curriculum.

Sokol testified that he first mentioned the possibility of schedule changes to Union president Joel Burkey during a September 2019 meeting held in the office of John Tafelski, the school district's superintendent for curriculum instruction. One of the items on the agenda for the meeting was the addition of consult hours for the middle school special education teachers. After Sokol agreed to give some consult time to the middle school teachers, he raised the possibility of changing the schedule for the high school special education teachers in order to accommodate the incoming cognitively impaired students. According to Sokol, Burkey expressed support for the idea but indicated that he "would deny it if he was ever called on it." Similarly, Tafelski testified that Sokol brought up the idea of eliminating the daily consult hour for the high school special education teachers during the meeting.

Sokol, Kelley and Moran each testified that a draft plan to modify the schedules for the high school special education teachers was finalized sometime in December of 2019. The plan called for eliminating the daily consult hour, resulting in a teaching load of five instruction hours and one preparation period per day. In lieu of the daily consult hour, each special education teacher was to be allotted six hours of consult time per month. According to Sokol, a document describing the changes was created on December 6, 2019.

Burkey testified that he first learned that Respondent was considering making changes to the schedules for high school special education teachers on January 13, 2020, when he received an email regarding an upcoming meeting with Sokol and Moran. After reading the email, Burkey sent a message to Superintendent Darga which stated, in pertinent part:

> I was . . . contacted by Karen about a meeting on Wednesday about proposed changes to schedules due to the influx of students from the

> [middle school] to the [high school]. I am not sure what I am stepping into here. Given that it includes Dr. Sokol I assume this is in regard to special education? But again, I'm not sure.

Darga responded by email later that day, telling Burkey that he had heard "rumblings" regarding an issue with special education numbers and wishing the Union president good luck in the meeting.

On January 15, 2020, Burkey attended a meeting with Sokol, Moran and Kelley in the high school principal's office during which Sokol presented the plan to reduce consult time for the special education teachers. According to Burkey, Sokol stated that the current scheduling system was not a good allocation of staff resources and that the school district needed to be more efficient. Burkey told Sokol that he did not think the elimination of the daily consult hour was a good idea and that he believed that the proposal violated the collective bargaining agreement, though he was unable to cite a specific provision during the meeting. According to Burkey, Moran also expressed some disagreement with Sokol's proposal. Burkey testified that he believed the administration was just "testing the waters" and giving him an "initial sales pitch." Burley's assumption that a final decision had not yet been made was based, in part, on the fact that Sokol had never previously engaged in collective bargaining with the Union.

Sokol testified that during the meeting with Burkey, he went over the document which was created the prior month describing the details of the plan. According to Sokol, the plan was not presented to Burkey as merely a proposal, but rather it was a change which would be going into effect for the 2020-2021 school year. Sokol testified, "The general theme is we are moving forward with this plan." Sokol recalled that Burkey responded by threatening to file a grievance if the administration moved forward with the plan to eliminate the daily consult hour.

Sokol's account of the meeting was corroborated by Moran and Kelley. Moran testified that Sokol discussed the changes which were to be implemented in the fall and that he told Burkey that the consult period would not be included in the new schedule. According to Moran, the plan was not presented as a proposal but rather as something that was "going to happen." Moran testified that Sokol addressed her concerns about the loss of consult hours by assuring her that some consult time would still be allocated to the special education teachers and promising that a substitute teacher would be called in the event that a special education teacher needed an additional opportunity for consult time. Similarly, Kelley testified that Sokol gave no indication during the meeting that the plan was merely a proposal. According to both Moran and Kelley, Burkey mentioned the possibility of the Union filing a grievance over the schedule change.

Five days later, on January 20, 2020, Sokol, Kelley and Moran held a meeting with the high school special education teachers for the purpose of presenting Respondent's plan to reduce consult time. No Union representatives attended the meeting, during which a multi-page document was disseminated to the teachers describing the specific details of the plan. The document, which was entered into the record in this matter as Exhibit 12, explains the reasons for the change and includes a section entitled "Changes to be made for the '20-'21 school year." That section provides, in pertinent part:

- "Consult time" will be allocated to the 1st and 3rd Thursdays of each month, half a day each i.e. Group 1 (Kathi, Karen, Bill will have consultation time for hours 1-3 on the 1st Thursday, and hours 4-6 on the 3rd Thursday); Group 2 (Gary, Hannah, Kate will have consultation time for hours 4-6 on the 1st Thursday, and hours 1-3 on the 3rd Thursday).

- If additional case management is needed, resource room teachers. May request for time through the Special Education Office.

The third page of the document handed out to the teachers at the January 20th meeting includes a "hypothetical" schedule for the 2020-2021 school year showing five instructional periods and no daily consult hour for each of the high school special education teachers. According to Sokol, the hypothetical schedule was not intended to show the actual classes that each teacher would be assigned but rather was simply meant to demonstrate to each teacher what his or her schedule might look like upon implementation of the plan. Similarly, Moran testified that the document constituted a "model" schedule showing the impact of replacing the daily consult hour with the essential elements classes.

During the January 20th meeting, one of the high school special education teachers asked whether the plan to eliminate the daily consult hour had been vetted by Wayne County RESA. Sokol testified that as of that date, he had not yet consulted with the ISD. The only evidence in the record pertaining to the authority of Wayne County RESA with respect to special education came during the following exchange between counsel for Charing Party and Moran:

> Q: What is the Wayne RESA role in terms of best practices for special ed?
>
> A: Well, I am not their director of special education. I could tell you my — what my thoughts on what they do is to serve as a resource and to provide examples of best practices, provide training and provide support when needed and when asked. And also, they've got kind of a legal obligation that they are responsible for and that we abide by some of — we abide by that.

On February 14, 2020, Sokol and Moran held a professional development session for the high school special education teachers. According to Moran, the purpose of the professional development session was to provide an overview of the new essential elements curriculum which would be offered to the incoming students. Burkey testified that he was aware that the meeting had been scheduled and that he knew that the plan to eliminate the daily consult hour would be discussed. Burkey explained that he was not concerned because he believed that Respondent would have to consult with the Union before implementing any changes.

Burkey testified that the next time he heard about the plan to eliminate the daily consult hour was on or about May 9, 2020, when he received complaints from special education teachers about the schedule changes. In response to those complaints, Burkey called Darga and asked whether the the school district was going to move forward with the plan to modify the special education schedule. Burkey testified that Darga responded that he

was "pretty comfortable with where we're at with everything." Darga recalled the meeting similarly, adding that he told Burkey that he believed the school district had the legal authority to make such a change.

The plan was implemented in the fall of 2020 in the form described by Sokol earlier in the year. At no point did Burkey follow up with Darga or file a grievance over the change to the special education schedules. When asked at hearing to explain why he took no further action to challenge Respondent's implementation of the plan, Burkey testified, "There was a lot going on. I mean, we were still dealing with how we were going to handle the coming school year. We were dealing with the daily brush fires that were created by COVID. I did not have enough hours in the day to dedicate to everything I needed to do as Union president at the time."

Discussion and Conclusions of Law:

Charging Party contends that the school district violated PERA by unilaterally eliminating the daily consult hour for high school special education teachers. Respondent asserts that the charge must be dismissed on the ground that it was not timely filed and because the Union failed to demand bargaining over the change. In addition, the school district argues that the Commission lacks jurisdiction over this matter because the collective bargaining agreement contains a provision governing teaching loads. According to Respondent, any dispute over the scope or meaning of that provision must be resolved by way of the grievance procedure set forth in the contract.

Section 16(a) of PERA prohibits the Commission from acting on an unfair labor practice "occurring more than six months prior to the filing of the charge with the commission and the service of a copy thereof upon the person against whom the charge is made." The Commission has held that the statute of limitations in Section 16(a) is jurisdictional and cannot be waived. *Walkerville Rural Community Sch*, 1994 MERC Lab Op 582; *Shiawasee County Rd Comm.*, 1978 MERC Lab Op 1182. With regard to unfair labor practice charges alleging unilateral change, the six-month limitation period runs from the time the operative event constituting the basis for the charge occurs and the charging party is notified, rather than when the change was actually implemented. *Tuscola Int School District*, 1985 MERC Lab Op 123.

In the instant case, the record establishes that throughout the fall of 2019, Sokol, Kelley and Moran worked on a plan to accommodate several cognitively impaired students who were scheduled to matriculate from the middle school to the high school the following year. Both Sokol and Moran testified that a draft plan was finalized sometime in December of 2019. It is undisputed that the plan was the subject of a meeting held on January 15, 2020, attended by Burkey, the Union president. By Burkey's own account of the meeting, Sokol discussed eliminating the consult hour in order to create four sections of classes for the new students. Burkey testified that he believed Sokol was merely "testing the waters" and that he did not definitively learn that the school district intended to implement the plan until May of 2020, when the special education teachers contacted the Union with complaints. Such a claim is contradicted by Sokol, Kelley and Moran, each of whom disputed any suggestion that the plan presented to Burkey on December 15th was merely a proposal. Sokol testified that he went over a document with Burkey detailing the schedule change and that he

specifically informed the Union president that the elimination of the daily consult hour would go into effect for the 2020-2021 school year. Likewise, both Kelley and Moran testified credibly that Sokol told Burkey that the daily consult hour would be eliminated and that the plan was not presented as a proposal.

Respondent's contention that the plan to eliminate the daily consult hour was in place well before April of 2020 is supported by evidence introduced at hearing pertaining to the January 20, 2020, meeting between the administration and the high school special education teachers. It is undisputed that the teachers were definitively told during that meeting that the schedule change would be implemented at the start of the 2020-2021 school year. In addition to Sokol's account of the meeting, Respondent entered into evidence as Exhibit 12 a document which the school district provided to the teachers on that date. The document includes a section entitled "Changes **to be made** for the '20-'21 school year" and which explicitly indicates that consult time "will be allocated to the 1st and 3rd Thursdays of each month, half a day each. . . ." (Emphasis supplied.) The fact that the schedule embedded within the handout is identified as a "hypothetical" schedule does not, as Charging Party asserts, prove that the plan itself was still tentative as of that date. Sokol and Moran testified credibly that the schedule was included simply to show the teachers what impact the change would have on their daily teaching load beginning in the fall of 2020.

It is true that Burkey was not present for the January 20, 2020, meeting and that none of the high school special education teachers in attendance on that date were Union representatives. For that reason, the meeting could not have constituted formal notice to Charging Party of the impending schedule change and I do not rely upon evidence concerning the substance of the January 20th meeting for that purpose. See e.g. *Interurban Transit Partnership*, 21 MPER 47 (2008); *University of Michigan*, 18 MPER 5 (2005). However, the fact that the meeting occurred just five days after members of the administration met with Burkey to discuss the elimination of the daily consult hour strongly contradicts the Union's claim that the plan was not finalized until later in the spring. For that reason, and based upon the credible testimony of Sokol, Kelley and Moran, I conclude that Charging Party knew or should have known of the schedule change as of January 2020. Even assuming arguendo that there were some minor tweaks to the plan after Sokol's January 15th meeting with Burkey and that the plan had not yet been reviewed by Wayne RESA, the record establishes that the Union had clear notice of the school district's intention to eliminate the daily consult hour for high school special education teachers more than six months before it filed the unfair labor practice charge on September 8, 2020.[2]

The Union contends that even if it was aware of the school district's plan to change the schedule for the high school special education teachers in January of 2020, the unfair labor practice charge was nonetheless timely filed because the limitations period was tolled pursuant to Michigan Supreme Court Order 2020-3 and by Executive Order 2020-58, both

[2] Moran's testimony does not establish that Wayne RESA had the authority to overrule Respondent's decision to eliminate the daily consult hour. In fact, the record indicates that consult hours were first implemented in 2014 at the "recommendation" of Wayne RESA. Moreover, Charging Party has not cited to any statute requiring a school district in Michigan to implement a daily consult hour for high school special education teachers. In any event, Burkey never claimed that the reason for the delay in bringing the unfair labor practice charge was due to any pending review by Wayne RESA.

of which were issued in response to the COVID-19 public health crisis. The Supreme Court's order, which was issued on March 23, 2020, provided that any day falling within the state of emergency declared by the Governor would not be counted for purpose of computing deadlines pertaining to case initiation or the filing of initial responsive pleadings in "all civil and probate case-types." Consistent with the Court's order, Executive Order 2020-28, which was issued by the Governor on April 22, 2020, likewise suspended "all deadlines applicable to the commencement of all civil and probate actions and proceedings" until the end of the declared state of emergency. The problem with Charging Party's argument is that the instant matter is not a civil or probate case; rather, it is a contested case proceeding governed by PERA and the provisions of the Administrative Procedures Act (APA), MCL 24.201 et seq. As noted, Section 16(a) of PERA is jurisdictional and cannot be waived. The only statutory tolling of the six-month period is military service. *Detroit Bd of Ed*, 1990 MERC Lab Op 781 (no exceptions); *Fire Fighters, Local 352,* 1989 MERC Lab Op 522, 525. Accordingly, the orders relied upon by the Union to excuse its failure to bring a timely charge before the Commission have no application to this proceeding.

Even if the charge had been filed within six months of the date the Union learned of the elimination of the daily consult hour, I would nonetheless recommend dismissal of this matter. Under Section 15 of the Act, public employers and labor organizations have a duty to bargain in good faith over "wages, hours and other terms and conditions of employment." Such issues are mandatory subjects of bargaining. MCL 423.215(1); *Detroit Police Officers Ass' n v Detroit*, 391 Mich 44, 54-55 (1974). A party violates PERA if, before bargaining, it unilaterally alters or modifies a term or condition of employment, unless that party has fulfilled its statutory obligation or has been freed from it. *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 317 (1996); *Detroit Bd of Ed*, 2000 MERC Lab Op 375, 377. Except for the starting date of school, which is a prohibited subject of bargaining under Section 15(3)(b) of PERA, most aspects of a school calendar are mandatory subjects of bargaining, including the amount of pupil time within a day, *Oak Park Sch Dist*, 1995 MERC Lab Op 442, and the amount of teacher preparation time, *Woodhaven Sch Dist*, 1982 MERC Lab Op 256. See also *Waverly Community Sch*, 31 MPER 30 (2017) (exceptions withdrawn).

A party can fulfill its obligation under Section 15 of PERA by bargaining about a subject and memorializing the resolution of that subject in the collective bargaining agreement. Under such circumstances, the matter is "covered by" the agreement. *Port Huron* at 318; *St Clair Co ISD*, 2005 MERC Lab Op 55, 61-62. As the Michigan Supreme Court stated in *Port Huron* at 327, "Once the employer has fulfilled its duty to bargain, it has a right to rely on the agreement as the statement of its obligations on any topic 'covered by' the agreement." At the same time, bargaining unit members have a right to rely upon the terms and conditions in the contract and to expect that they will continue unchanged. *Detroit Bd of Ed*. See also *Wayne Co Community Coll*, 20 MPER 59 (2007). Where there is a contract covering the subject matter of a dispute, which has provisions reasonably relied on for the action in question, and the contract also has a grievance procedure with final and binding arbitration, the contract controls and no PERA issue is presented. *St Clair Co Rd Comm*, 1992 MERC Labor Op 533, 538.

In the instant case, there can be no serious dispute that the collective bargaining agreement covers the issue of daily instructional loads for high school teachers. Article IV, Section B of the collective bargaining agreement explicitly provides that the "normal, daily

teaching load in the high school and middle school will be five (5) teaching periods and one (1) unassigned preparation period, running consecutively." As Respondent points out, there is no language in Article IV distinguishing special education teachers from regular teachers, nor is there any suggestion in the agreement that high school special education teachers are somehow exempt from the normal teaching load. Nevertheless, Charging Party contends that Article IV, Section B only applies to regular teachers and that it has no relevance to special education teachers whose work, the Union asserts, is significantly different than other instructional employees of the school district.

Even assuming arguendo that there is merit to the Union's assertion, the contract plainly and unequivocally covers the allegations set forth in the charge. As noted, where there is a contract covering the subject matter of a dispute which has provisions reasonably relied on for the action in question, and the contract also has a grievance procedure with final and binding arbitration, the contract controls and no PERA issue is presented. *Wayne Co*, 19 MPER 61 (2006). Because arbitration has come to be the favored procedure for resolving grievances in federal and Michigan labor relations, doubt about whether a subject matter is covered should be resolved in favor of having the parties arbitrate the dispute. *Macomb Co v AFSCME Council 25, Locals 411 and 893*, 494 Mich 65, 235 (2013). Accordingly, I conclude that Respondent reasonably relied on the language of the collective bargaining agreement in making decisions concerning the schedule for high school special education teachers and that the record fails to establish a violation of Section 10(1)(e) of PERA.[3]

Charging Party asserts that even if the contract covers the subject matter of this dispute, there was an established past practice in existence pursuant to which high school special education teachers were allocated at least one hour of consult time per day. A past practice which does not derive from the parties' collective bargaining agreement may become a term or condition of employment which is binding on the parties. *Amalgamated Transit Union v SEMTA*, 437 Mich 441, 454-455 (1991). In order to create a term or condition of employment through past practice, the practice must be mutually accepted by both parties. Where the collective bargaining agreement is ambiguous or silent on the subject for which the past practice has developed, there need only be "tacit agreement that the practice would continue." *Id*. However, where, as here, the contract unambiguously covers a term of employment that conflicts with a party's behavior, a higher standard of proof is required. In such situations, the unambiguous language controls unless the past practice is so widely acknowledged and mutually accepted that it creates an amendment to the contract. *Port Huron Ed Ass'n, supra*.

I find Charging Party's past practice argument in the instant case unpersuasive. In *Macomb Co, supra*, the Michigan Supreme Court explained that a party seeking to overcome unambiguous contract language has an exceedingly high burden to meet. The Court held that the party that seeks to use evidence of practice to overcome an unambiguous collective bargaining agreement must present evidence establishing the parties' affirmative intent to

[3] This same analysis governs Charging Party's contention that the school district violated Article II, Section G of the contract. Whether the elimination of the daily consult hour constituted a "major policy revision" which required the superintendent to consult with the Union prior to making the change is a question for an arbitrator to decide.

revise the collective bargaining agreement and establish new terms or conditions of employment. *Macomb Co*, 494 Mich at 79. Moreover, the Court held that an arbitrator, not MERC, is ordinarily best equipped to decide whether a past practice has matured into a new term or condition of employment. *Macomb Co*, 494 Mich at 80. Any doubt about whether a subject matter is covered by the collective bargaining agreement should be resolved in favor of having the parties arbitrate the dispute.

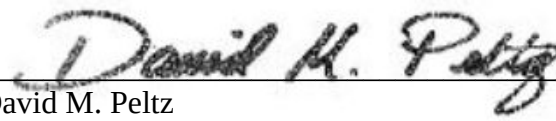
Here, the record establishes that consult time for high school special education teachers was an idea first proposed by the school district and that a daily consult hour was implemented for the second semester of the 2014-2015 school year following discussions between administration and the special education staff. However, contrary to Charging Party's assertion, the allocation of a daily consult hour has not been consistently applied. One of the six high school special education teachers, Kathy Cialkowski, has never had a consult hour because there have only been a small number of students in the ASD program and, for that reason, Cialkowski did not need extra time in her day. Although the Union describes this as a "minor exception to this consistent practice," it substantiates Superintendent Darga's testimony that the consult hour concept was subject to student needs. That notion is further supported by the email sent by Sokol to the high school special education staff on October 9, 2017. In that message, Sokol indicates that although Respondent has no intention of eliminating the consult model, decisions regarding how many sections to offer would be based on "student demand" and "the need to provide what is needed for our students to graduate." While the record establishes that the school district had a past practice of allocating some consult time to the high school teachers, I find that the subject matter of this dispute is covered by the parties' agreement and that an arbitrator, not the Commission, should decide whether that practice has matured into a term or condition of employment. See e.g. *Traverse Bay ISD*, 28 MPER 59 (2014).

I have carefully considered the remaining arguments set forth by the parties in this matter and conclude that they do not warrant a change in the result. For the reasons set forth above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charge filed by the Allen Park Education Association, MEA/NEA against the Allen Park Public Schools in Case No. 20-I-1406-CE; Docket No. 20-017714-MERC is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



David M. Peltz
Administrative Law Judge
Michigan Office of Administrative Hearings & Rules

Dated: September 30, 2021