STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

TRAVERSE BAY INTERMEDIATE SCHOOL DISTRICT,
Public Employer-Respondent,

Case No. C12 G-129
-and- Docket No. 12-001190-MERC

TRAVERSE BAY INTERMEDIATE SCHOOL DISTRICT EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Thrun Law Firm, by Kevin S. Harty, for Respondent

White, Schneider, Young & Chiodini, by Jeffrey S. Donahue, for Charging Party

DECISION AND ORDER

On December 4, 2014, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Summary Disposition in the above matter finding that Respondent violated § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ found that Respondent violated PERA when, on July 1, 2012, it increased the share of health care costs that employees in the bargaining unit represented by Charging Party were required to pay. This matter required the ALJ to interpret the provisions of the Publicly Funded Health Insurance Contribution Act, 2011 PA 152 (Act 152), MCL 15.561 et seq, which limits the amount public employers may pay for employee health care costs. The ALJ concluded that Respondent was required by a provision in the contract to continue to pay 90% of the health care premium until August 31, 2012. For this reason, the ALJ found that it was a breach of Respondent's duty to bargain for it to insist that it was required to comply with Act 152 on July 1, 2012. The ALJ determined, however, that upon resolution of the statutory issues, the matter should go before an arbitrator to resolve the parties' dispute over contract interpretation. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with § 16 of PERA.

After requesting and receiving an extension of time, Respondent filed exceptions, a brief in support of exceptions to the ALJ's Decision and Recommended Order on Summary Disposition, and a request for oral argument on January 20, 2015. After being granted an extension of time, Charging Party filed cross exceptions, a brief in support of cross exceptions, a brief in support of the ALJ's Decision and Recommended Order on Summary Disposition, and a request for oral argument on February 23, 2015.

In its exceptions, Respondent contends that the ALJ erred by failing to dismiss the charges because there was a bona fide dispute over contract language. Respondent also contends that the ALJ erred in her finding that the terms of the collective bargaining agreement justified delaying compliance with Act 152 until August 31, 2012.

In its cross exceptions, Charging Party argues that the ALJ erred in her finding that Respondent was not required to bargain over its choice of health care cost sharing options in order to comply with Act 152. They also assert error in the ALJ's finding that a bona fide dispute over contract interpretation existed as to whether the parties' agreement obligated Respondent to continue to pay 90% of the health insurance premiums for bargaining unit employees until August 31, 2012.

Both parties seek oral argument in this matter. After reviewing the exceptions, cross exceptions, and briefs filed by the parties, we find that oral argument would not materially assist us in deciding this matter, and therefore, both parties' requests for oral argument are hereby denied.

After reviewing Respondent's exceptions and Charging Party's cross exceptions, we find that Respondent's exceptions have merit.

Factual Summary:

We adopt the findings of fact as set forth in the ALJ's Decision and Recommended Order on Summary Disposition, and repeat them here only as necessary.

Charging Party and Respondent's 2010-2012 collective bargaining agreement expired on June 30, 2012. Article XIII (E) of the parties'contract provided:

> The Board shall make ninety (90%) percent payment on insurance premiums for all employees who complete their contractual obligation to assure insurance coverage for the full twelve month period commencing September 1 and ending August 31, even though the teacher may not be returning for the next school year.

Act 152, which became effective September 27, 2011, was enacted to limit public employers' expenditures for employee medical benefit plans. Section 3 of Act 152, MCL 15.563, sets specific dollar limits, referred to as "hard caps," on the amounts public employers can pay for employee medical benefit plans, commencing with medical benefit plan coverage years beginning on or after January 1, 2012. Upon majority vote of its governing body, a public employer may comply with the requirements of § 4 of Act 152 instead of § 3. Section 4, MCL 15.564, limits a public employer's share of healthcare costs to 80% of the total annual costs of all of the medical benefit plans it offers. Pursuant to § 5 of Act 152, MCL 15.565, §§ 3 and 4 do not apply where parties are covered by a collective bargaining agreement that was in effect prior to September 27, 2011, if that agreement is inconsistent with the terms of the Act. Act 152 provides sanctions for noncompliance. Public employers that fail to comply with the requirements of PA 152 are subject to a substantial financial penalty under § 9 of PA 152. For

public school employers, this includes loss of their state aid payments. The Michigan Department of Treasury is responsible for assessing these penalties.

Sometime between November 2011 and January 2012, the parties began negotiations for a successor contract. When they had not yet reached agreement on June 11, 2012, Respondent notified bargaining unit employees that it would be increasing their share of health insurance premiums to comply with §3 of Act 152 on July 1, 2012.

The Michigan Department of Treasury, which is tasked with enforcement of Act 152, provides Frequently Asked Questions (FAQs) and Answers regarding Act 152 on its website.[1] These FAQs include the following:[2]

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

Discussion and Conclusions of Law:

While addressing Act 152 in *Decatur Pub Schools*, 27 MPER 41 (2014) (which has since been affirmed by the Court of Appeals)[3], we found that public employers may bargain with the labor organizations representing their employees over the choice between the hard caps under § 3 and the 80% employer share under § 4 of Act 152, but are not required to do so. See also *Shelby Twp*, 28 MPER 21 (2014). We further held in *Decatur*, that the employer's decision on whether

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

[2] The Michigan Department of Treasury updates this information periodically. However, Q8-6 has remained the same since at least February 11, 2014.

[3] *Decatur Pub Sch v Van Buren Co Educ Ass'n*, __Mich App__; 28 MPER 67 (2015); 2015 WL 1477849.

to accept the risk that would result from delaying compliance with Act 152 was a policy choice within the respondent's managerial prerogative and it was up to the employer to determine the steps it was required to take to ensure compliance with Act 152. In *Shelby Twp*, we also explained that "[p]ublic employers must remain cognizant of their obligation to meet the timeliness requirements of Act 152" and "where the parties have not reached agreement on the allocation of health care costs by the implementation deadline set by Act 152, a public employer may implement the employees' share of those costs within the limits set by Act 152 without violating its duty to bargain under PERA."

The primary issue in this case is whether Respondent breached its duty to bargain by implementing changes in employee health care costs on July 1, 2012 per the terms of Act 152, or whether it was required to delay implementing those changes and instead, adhere to the terms of the parties' expired agreement. However, this issue has since been settled by our recent decision in *Bd of Ed of the Capac Community Schools*, 29 MPER 16 (2015). In *Capac*, we held that the employer did not violate PERA by increasing employees' share of the insurance premiums in order to comply with Act 152 following the expiration of the parties' collective bargaining agreement. As in this matter, the contract in *Capac*, included a health insurance provision that extended beyond the agreement's expiration date. In that case, we gave due consideration to the Department of Treasury's FAQs regarding Act 152, supra. *Id.* That publication, which is also relied upon by Respondent in the instant case, explains that the expired collective bargaining agreement's moratorium on health care costs did not constitute a collective bargaining agreement and, therefore, the employer would be required to comply with the requirements of Act 152 on its implementation date. *Id.* In light of the above Commission precedent, Respondent's actions in implementing the §3 "hard caps" option on July 1, 2012, in order to comply with Act 152 and protect itself from the § 9 penalties mentioned above, do not constitute an unfair labor practice.

Respondent asserts that the ALJ erred by failing to dismiss the instant charge, as they assert that the dispute is covered by the parties' collective bargaining agreement. We agree that arbitration is not the appropriate forum to settle issues of *statutory* interpretation regarding Act 152. However, as explained above, the issues regarding the *statutory* interpretation of Act 152 as it applies in this case have been settled by this Commission. Thus, all that remains is a good faith dispute over contract language, which is outside the purview of this Commission and should be decided by an arbitrator.

Respondent points to the Michigan Supreme Court's ruling in *Macomb County v AFSCME*, 494 Mich 65 (2013), which held that MERC is limited to determining whether an agreement covers the subject of the claim in the context of a refusal-to-bargain claim, with the details and enforceability being left to arbitration. *Id.* at 81. In so finding, the Court noted that it is necessary for courts and this Commission to recognize the difference between an unfair labor practice and an arbitrable disagreement over the terms of a collective bargaining agreement. *Id*.

We agree with the ALJ's finding that the Court in *Macomb Co* did not intend to preclude the Commission from finding an unfair labor practice based on a mid-term modification or repudiation of a term of a collective bargaining agreement. However, we find that the instant case does not involve a mid-term modification, as the implementation of the hard caps option occurred after the agreement had expired. Nor does this case involve a valid claim of

repudiation. It is well-established that repudiation exists only when: (1) the contract breach is substantial and has a significant impact on the bargaining unit; and (2) no bona fide dispute over contract interpretation is involved. *Wayne County Airport Authority*, 29 MPER 14 (2015); *Wayne County*, 29 MPER 1 (2015); *City of Detroit*, 26 MPER 21 (2012); *Gibraltar Sch Dist*, 18 MPER 20 (2005). We have repeatedly held that there is no breach of the duty to bargain under § 10(1)(e) where the provisions of the collective bargaining agreement may reasonably be relied on for the actions taken by the parties. *Wayne Co Airport Authority*. We conclude that Respondent reasonably relied upon the expiration of the collective bargaining agreement in electing to implement the requirements of Act 152 on July 1, 2012, especially in light of the Michigan Department of Treasury's FAQs. As the ALJ noted, there was a bona fide dispute over the contract language; and, therefore, no repudiation. Accordingly, the charge in this matter fails to state a claim upon which relief can be granted.

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

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: October 20, 2015

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

TRAVERSE BAY INTERMEDIATE SCHOOL DISTRICT,
Public Employer-Respondent,

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-and-

TRAVERSE BAY INTERMEDIATE SCHOOL DISTRICT
EDUCATION ASSOCIATION, MEA/NEA,
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APPEARANCES:

Thrun Law Firm, by Kevin S. Harty, for Respondent

White, Schneider, Young & Chiodini, by Jeffrey S. Donahue, for Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

On July 3, 2012, the Traverse Bay Intermediate School District Education Association filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against the Traverse Bay Intermediate School District pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Pursuant to Section 16 of PERA, the charge was assigned to Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS).

An evidentiary hearing was scheduled in this case but, before the hearing was held, Administrative Law Judge Doyle O'Connor issued a Decision and Recommended Order in a case involving related issues. Over Charging Party's objection, I held this charge in abeyance pending the Commission's consideration of exceptions to his Decision and Recommended Order. On January 21, 2014, the Commission issued its decision in that case, *Decatur Pub Schs*, 27 MPER 41 (2014). On February 28, 2014, Respondent filed a motion for summary dismissal of this charge. Charging Party filed a brief in opposition to the motion on March 25, 2014. On June 4, 2014, I held oral argument on the motion.

I find that there are no material issues of fact requiring an evidentiary hearing in this case. Based on facts set out in the charge and pleadings and not in dispute, and on the arguments of the

parties in their briefs and at oral argument, 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 full-time and regularly employed part-time certificated professional personnel employed by Respondent, including teachers, school psychologists, teacher consultants, occupational therapists, physical therapists, speech therapists, orientation and mobility instructors, and school social workers. Most, if not all, unit members do not work during July and August because their programs do not operate during those months.

The parties' 2010-2012 agreement expired on June 30, 2012. Sometime between November 2011 and January 2012, the parties began negotiations for a successor contract. They had not reached agreement on a new contract when, on June 11, 2012, Respondent notified Charging Party's members that, effective July 1, 2012, their contributions to their health care premiums would be increased so that the amount Respondent paid for their health care did not exceed the "hard cap" amounts in §3 of the Publicly Funded Health Care Expenditures Act, (Act 152), MCL 15.561 et seq. Unit members who had elected to receive paychecks during July and August had the additional premium contribution deducted from their July and August paychecks. Unit members who had elected not to receive paychecks during those months were instructed to send checks to Respondent in the amount of their additional contribution.

Charging Party asserts that Respondent violated §10(1)(e) of PERA by implementing a hard cap on its health insurance contribution without engaging in any meaningful bargaining over Respondent's choice of options for complying with Act 152, and in the absence of a successor collective bargaining agreement or a good faith impasse on the issue of health insurance. It also asserts that Respondent was obligated, by Article XIII(E) of the expired contract, to continue paying ninety percent of bargaining unit members' insurance premiums for the months of July and August 2012. Charging Party alleges that Respondent unlawfully repudiated the contract, and its collective bargaining obligation, when it forced unit members to begin contributing more than ten percent of their premium prior to September 1, 2012.

Facts:

The parties' 2010-2012 agreement became effective on July 1, 2010. Article XIII (E) of this agreement obligated Respondent to pay ninety percent of the premium for up to full family coverage for the MESSA (Michigan Education Special Services Association) Choices II health insurance plan. Unit members paid the first ten percent of their premium through payroll deduction. Article XIII(E) included this language:

> The Board shall make ninety (90%) percent payment on insurance premiums for all employees who complete their contractual obligation to assure insurance coverage for the full twelve month period commencing September 1 and ending August 31, even though the teacher may not be returning for the next school year.

Act 152 was adopted by the Legislature and became effective on September 27, 2011. Act 152 puts limits on the amounts that public employers can spend on health care benefits for their employees. The statute provides that a "local unit of government" can exempt itself from the requirements of the statute for the succeeding year by a two-thirds vote of its governing body. However, school districts are not considered local units of government under the statute and cannot exempt themselves from complying with the Act. Act 152 provides two alternate methods for complying with the statute. Section 3 establishes annual hard caps for different insurance coverage levels, i.e., single, two-person, and family coverage, and prohibits a public employer from paying more than the hard cap amounts set out in the statute for these coverage levels. In 2012, §3 stated that public employers could "pay no more of the annual costs or illustrative rate and any payments for reimbursement of co-pays, deductibles, or payments into health savings accounts, flexible spending accounts, or similar accounts used for health care costs" than these hard caps times the number of its employees who had elected these levels of coverage for a "medical benefit plan coverage year" beginning on or after January 1, 2012. Public employers, including school districts, can, by a majority vote of their governing bodies, elect to comply with §4 rather than §3 of Act 152. Section 4 limits the public employer to paying no more than eighty percent of the total annual costs of all of the medical benefit plans it offers or contributes to for its employees and elected public officials during a medical benefit plan coverage year.

Section 5 of Act 152 prohibits employers, on and after September 15, 2011, from executing new contracts with terms inconsistent with §§3 and 4. However, §5 states that if "a collective bargaining agreement or other contract inconsistent with §§3 and 4 is in effect for a group of employees on the effective date of the statute, the requirements of §§3 and 4 do not apply until the contract expires." The requirements of §§3 and 4 do apply to "any extension or renewal of the contract."

Act 152 provides penalties for a public employer's failure to comply with its provisions. These include, for public school employers, loss of their state aid payments. The Michigan Department of Treasury (MDT) is responsible for assessing these penalties.

The parties began bargaining for a successor to their 2010-2012 collective bargaining agreement sometime between November 2011 and January 2012. Respondent attached to its motion an affidavit executed by Stephanie Murray, its director of human resources and a member of Respondent's bargaining team. Murray asserts that Respondent's bargaining team raised the issue of compliance with Act 152 at a bargaining session held on January 31, 2012. According to Murray, Charging Party's representatives maintained at that meeting that the spending limits of Act 152 would not take effect until the parties reached agreement on the successor contract. Murray's affidavit also states that Charging Party did not make a proposal on health insurance until June 7, 2012. According to Murray, Charging Party proposed at that time that Respondent elect the §3 hard cap option. However, it proposed that Respondent also pay sums above the hard cap to fund individual health care flexible spending accounts, a proposal that was not acceptable to Respondent. With its response to the motion, Charging Party submitted an affidavit executed by Marvin Nordeen, Charging Party's president and a member of Charging Party's bargaining team. Nordeen's affidavit asserts that Respondent rejected nearly all of the Charging Party's

proposals on mandatory topics, including health insurance, and that it offered no counterproposals on these topics.

New rates for MESSA insurance take effect each year on July 1. There is no dispute that the "medical benefit plan coverage" year for MESSA insurance begins each year on July 1.There is also no dispute that on June 11, 2012, the parties had not reached agreement on either a successor agreement or on the health insurance provisions for that agreement. On that date, Murray sent a memo to Charging Party's members entitled "Information regarding July and August premium share adjustment." The memo stated that Act 152 would be effective for the unit as of July 1, 2012 and that employees would therefore be required to pay make an additional premium contribution for the months of July and August 2012. The memo described in detail how Respondent calculated each employee's additional contribution; Charging Party does not dispute Respondent's method of calculating the additional premium share. The memo stated that for employees paid over the summer months, the amount of the additional premium share would be deducted over the five pay periods in July and August 2012. Employees who were not paid in the summer were instructed to send payment of the total amount to Respondent.

On June 29, 2012, Charging Party filed a grievance asserting that Article XIII(E) required Respondent to provide all employees with twelve months of health care coverage from September 1 until August 31. The grievance maintained that Respondent breached this provision by requiring employees to pay a premium share for July and August 2012. Charging Party did not pursue arbitration of the grievance.

The MDT maintains on its website a document entitled Frequently Asked Questions (FAQ) about Act 152. On February 11, 2014, the FAQ included this question and this answer[4]:

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

[4] The Frequently Asked Questions memo has since been updated several times. However, the above question and answer remain in the memo.

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

Discussion and Conclusions of Law:

In *Decatur Pub Schs,* 27 MPER 41 (2014), now pending on appeal before the Court of Appeals, the Commission held that a public employer's choice between the hard cap option of §3 of Act 152 and the eighty percent employer share of §4 is not a mandatory subject of bargaining under PERA. It concluded that while public employers continue to have a duty to bargain over health care benefits and the costs of such benefits, to the extent that these costs are within the parameters established by Act 152, a public employer's choice of the options for complying with that statute is a policy decision to be made by the public employer over which it may, but is not required to, bargain with the labor organizations representing its employees. The Commission also held that a public employer's decision to delay compliance with Act 152 in order to engage in additional bargaining over health insurance – and thus risk being subject to penalties for noncompliance with that statute – is a managerial prerogative and not a decision over which it must bargain.

I find that under the Commission's decision in *Decatur,* Respondent was not required to engage in bargaining over its choice of options for complying with Act 152, and it was not required to delay implementing the premium contribution increase for Charging Party's members until the parties had reached a good faith impasse or agreement on health insurance. It is, therefore, unnecessary for me to determine whether the parties engaged in meaningful bargaining over whether Respondent would elect the §3 option for complying with Act 152 before Respondent imposed the premium contribution increase on July 1, 2012. It is also unnecessary for me to determine whether the parties had reached a good faith bargaining impasse on health insurance prior to that date. I conclude, therefore, that any dispute of fact that may exist between the parties regarding what took place during bargaining is not material to my decision in this case.

However, Charging Party also argues that Respondent's implementation of the premium contribution increases prior to September 1, 2012 constituted unlawful repudiation of the parties' contract and Respondent's collective bargaining obligation. It asserts that Respondent had a contractual obligation, under Article XIII(E) of the 2010-2012 agreement, to continue to pay ninety percent of the health insurance premium through August 31, 2012.

Respondent asserts that the Commission has no jurisdiction to find an unfair labor practice in this case because the Charging Party's claim is a contractual one and the matter in dispute is "covered by" the terms of the collective bargaining agreement. Respondent cites the Supreme Court's discussion in *Macomb Co v AFSCME,* 494 Mich 65 (2013) of the proper role of role of the Commission when a party alleges, in an unfair labor practice charge, that there has been a failure to bargain over a mandatory subject of bargain. Quoting a previous decision, *Port Huron Ed Assn v Port Huron Sch Dist,* 452 Mich 309, 318 (1996), the *Macomb* Court first noted that a public employer can fulfill its statutory duty to bargain by negotiating over a subject and memorializing the agreement on that subject within a collective bargaining agreement. It stated

that when the parties negotiate for a provision in the collective bargaining agreement that fixes the parties' rights, they foreclose further mandatory bargaining because the matter is "covered by" the agreement. As the Court noted, the resulting bargain creates a set of enforceable rules upon which a contracting party has a right to rely as the statement of its obligations on any topic "covered by" the agreement. In both *Port Huron,* at 321, and *Macomb,* at 80, the Court said that the Commission's role is initially to determine whether the parties' agreement "covers" the dispute; if it does, "the details and enforceability of the provision are left to arbitration." The Court in *Macomb* added, at 81, that it was "incumbent on the court and [the Commission] not to conflate an unfair labor practice with an arbitrable disagreement over the terms of the collective bargaining agreement."

Respondent argues that, under *Macomb,* the Commission has no authority to find an unfair labor practice based on a unilateral mid-term modification or a "repudiation" of a contract term. I have addressed this same argument in two previous decisions. In *Oakland Co,* 27 MPER 54 (2014), a decision and recommended order adopted by the Commission when no exceptions were filed, I recommended that the charge be dismissed because I found that there was a bona fide dispute between the parties over the interpretation of the agreement; in that case, an arbitrator had already issued a decision rejecting the union's interpretation of the agreement. I concluded that the union was asking the Commission to substitute its judgment on the meaning of the contract for that of an arbitrator, and that this would clearly constitute improper interference with the principle that when the parties have agreed to binding arbitration, bona fide disputes over the interpretation of the contract are to be decided by an arbitrator and not the Commission. However, I rejected the employer's argument that *Macomb Co* precluded the Commission from ever finding an unfair labor practice based on a mid-term modification or repudiation of a collective bargaining agreement.

The second decision, *Garden City Pub Schs,* Case No. C13 K-180/No. 13-015998-MERC, was issued by me on April 25, 2014 and is currently pending on exceptions before the Commission. In *Garden City,* the union filed a charge alleging that the employer had repudiated the parties' existing collective bargaining agreement, and thus violated its duty to bargain, by changing the health care plan options available to employees during the term of the agreement. The contract contained a provision explicitly requiring the employer to pay eighty percent of the cost of a specific health care plan for the life of the contract. For the first two years of the contract, the employer's board voted to comply with Act 152 through §4, or eighty percent employer share, option. During the final year of the contract, however, the employer's board voted instead to adopt the hard cap option. The employer also notified unit members that it would no longer pay eighty percent of the cost of the plan in the contract, as to do so would force the employer to pay more than the statutory hard caps. Instead, employees were given a choice among plans, not including the plan in the contract, which the employer deemed to provide comparable or nearly comparable benefits at a lower cost.

The union filed both a grievance and an unfair labor practice charge alleging that the employer violated its duty to bargain by repudiating the collective bargaining agreement. The employer filed a motion for summary disposition arguing that the charge failed to state a claim upon which relief could be granted because the dispute was clearly "covered by" the existing

contract which contained a binding arbitration clause. I concluded that the employer had repudiated the contract, and therefore violated its duty to bargain, in that case.

In my decision and recommended order, I noted that the language from the *Macomb* decision upon which the employer relied was also in *Port Huron,* at 321,

> In cases in which statutory and contractual issues overlap, the MERC, like the NLRB, must often review the contract to determine whether there is a statutory violation. The MERC does not involve itself with contract interpretation when the agreement provides a grievance process that culminates in arbitration. *Sanilac Co Bd. of Comm'rs v. Sanilac Co Employees,* 1993 MERC Lab Op 750, 755; *Police Officers Ass'n of Michigan v. Romulus,* 1992 MERC Lab Op 170. When the unfair labor charge is the failure to bargain, however, it is often necessary for the MERC, like the NLRB, to review the terms of an agreement to ascertain whether a party has breached its statutory duty to bargain. See *Detroit Fire Fighters Ass'n v Detroit,* 408 Mich 663, 293 NW2d 278 (1980); Edwards, *Deferral to arbitration and waiver of the duty to bargain: A possible way out of everlasting confusion at the NLRB,* 46 Ohio St LJ 23, 24 (1985) (describing a similar requirement for the NLRB). In reviewing an agreement for any PERA violation, the MERC's initial charge is to determine whether the agreement "covers" the dispute. If the term or condition in dispute is "covered" by the agreement, the details and enforceability of the provision are left to arbitration.

I noted, however, that subsequent to the *Port Huron* decision, the Supreme Court held, in *St Clair Intermediate School Dist v Intermediate Ed Association/Michigan Ed Ass'n,* 458 Mich 540 (1998), that a mid-term modification of a collective bargaining agreement by either party without negotiation and agreement by the other party constitutes a violation of a party's duty to bargain in good faith and an unfair labor practice under PERA. In *St. Clair,* the Court cited *Port Huron* for the principal that when a matter is covered by the contract, the parties have created a set of unenforceable rules for themselves upon which they have the right to rely. It held that during the term of the contract, neither party can modify the contract without the consent of the other, and affirmed the finding of the Commission and Court of Appeals that the union committed an unfair labor practice by unilaterally modifying the contract during its terms.

I also noted that the Commission had held that a mid-term modification of the collective bargaining agreement without the agreement of the other party is an unfair labor practice even though the collective bargaining agreement contains a grievance procedure which provides an alternate remedy and the charging party has filed a grievance. See *36th District Court,* 21 MPER 19 (2008). The Commission has also repeatedly and consistently held that a party's repudiation of a collective bargaining agreement is an unfair labor practice even though the agreement contains a grievance procedure and the party filing the unfair labor practice charge has also filed a grievance. See *Detroit Regional Convention Center,* 25 MPER 8 (2011). However, it has also consistently held that ordinary contract breaches do not constitute unfair labor practices. As the Commission has frequently stated, to constitute "repudiation," a contract breach must be an attempt to rewrite the parties' contract, a refusal to acknowledge its existence, or a complete disregard for the contract as written. *36th District Court; Central Michigan Univ,* 1997 MERC

Lab Op 501; *Redford Twp Bd of Ed,* 1992 MERC Lab Op 894. For the Commission to find an unlawful repudiation, the contract breach must be substantial and have a significant impact on the bargaining unit, and there must be no bona fide dispute over the contract language. *Plymouth-Canton Cmty Schs,* 1984 MERC Lab Op 894, 897.

The *Macomb Co* case did not involve an allegation that the respondent had repudiated the collective bargaining agreement or unilaterally modified one of its terms. Nothing in *Macomb* suggests that a party can, consistent with its obligation to bargain in good faith, simply ignore a clear and unambiguous contract provision even if the contract contains a grievance procedure ending in binding arbitration. I concluded in *Garden City*, and again conclude here, that the Court in *Macomb* did not intend to preclude the Commission from finding an unfair labor practice, under the appropriate circumstances, based on a mid-term modification or repudiation of a term of a collective bargaining agreement.

Respondent also argues that there is no basis for finding an unlawful repudiation of the contract because a bona fide dispute exists over the interpretation of Article XIII(E). It maintains that Article XIII(E) does not, as Charging Party claims, require Respondent to pay ninety percent of the premium through August 2012. Rather, according to Respondent, Article XIII(E) merely requires Respondent to continue to provide insurance coverage for all unit members who complete the school year, including those who indicate their intent not to return in the fall, for the entire summer. It argues that it complied with its obligations under that article by continuing to pay premiums, up to the hard cap level, for all members of the bargaining unit who had completed the 2011-2012 school year.

The parties' dispute in this case, however, is not merely, or even primarily, a dispute over contract interpretation. Respondent argues, backed up by the MDT's FAQ quoted above, that Act 152 required/entitled it to implement the premium contribution increase on July 1, 2012 because the parties' 2010-2012 collective bargaining agreement expired on June 30, 2012. According to Charging Party, since Respondent had a contractual obligation to continue to pay ninety percent of the premium through August 2012, under §5 of Act 152 Respondent was neither required nor permitted to require unit members to pay an additional premium contribution for the months of July and August 2012.

This is, of course, in part a dispute over the interpretation of §5 of Act 152. However, like *Decatur,* it is also a dispute over how PERA and Act 152 work together. An arbitrator neither can nor should decide either of these issues. I conclude, therefore, that it would be disingenuous to dismiss this charge on the basis that the dispute should have been submitted to arbitration.

The term "collective bargaining agreement" is not defined in either PERA or Act 152. However, it generally refers to a contract reached as a result of negotiations between an employer and a group of its employees, or their representatives, covering, but not strictly limited to, wages, hours, and other terms of employment. Unions and employer typically negotiate a comprehensive collective bargaining agreements covering terms and conditions of employment and with a single expiration date. The Commission has never held, however, that there cannot be more than one enforceable agreement between parties to a collective bargaining relationship at one time. In fact, parties regularly enter into enforceable stand-alone agreements on one or more

issues. These include, for example, grievance settlements and letters of understanding executed during the term of or after the expiration of a comprehensive collective bargaining agreement. The Commission has recognized that stand-alone agreements, such as grievance settlements and letters of understanding executed during the term of the comprehensive agreements, are enforceable agreements, the repudiation of which may violate a party's duty to bargain in good faith. See *Wayne Co,* 24 MPER 12 (2011); *Oakland University,* 23 MPER 86 (2010); *City of Roseville,* 23 MPER 5 (2010).

It is also a common practice for unions and employers to enter into comprehensive collective bargaining agreements which contain different expiration dates for different terms of the agreement. For example, so-called "reopener clauses" typically provide that, upon notice by either party, negotiations may be reopened during the term of the contract for those topics covered by the reopener clause. Such clauses are lawful, and do not affect the underlying enforceability of the agreement. See, e.g., *Speedrack, Inc,* 293 NLRB 1054 (1989). In *Ann Arbor Fire Fighters Local 1733,* 1990 MERC Lab Op 528, the Commission found that the parties waived their right to bargain over pension benefits after their comprehensive collective bargaining agreement expired by entering into a clause which provided that there would be no changes made in pension benefits for a period extending beyond the expiration of that agreement. As the Charging Party points out in its brief in opposition to the motion, there are also numerous court decisions affirming that parties may agree in a collective bargaining agreement that certain rights arising from that agreement, e.g., the right to receive severance pay, will survive termination of the collective bargaining contract. See, e.g., *John Wiley & Sons v Livingston,* 376 U.S. 543, 555 (1964); *Nolde Bros, Inc v Bakery Workers,* 430 US 243 (1977).

In sum, it is well established under both PERA and federal law that parties to a collective bargaining agreement may agree that certain terms of the agreement will have effect beyond the expiration date of that agreement. Such agreements are enforceable contracts, whatever term is used to describe them.

As noted above, Respondent points to the MDT's FAQ as support for its position that it was required to comply with Act 152's mandates upon the expiration of the parties' comprehensive collective bargaining agreement. The question addressed by the MDT in this FAQ was whether a "separate" moratorium agreement on health care costs and premiums "in" the expired collective bargaining agreement excused the employer from complying with Act 152 until the moratorium agreement expired. In concluding that the employer was required to comply after the collective bargaining agreement expired, the MDT did not address the question of whether the moratorium itself constituted either a "collective bargaining agreement" or "contract" within the meaning of §5 of Act 152. Of course, there is no certainty that the MDT would reach the same conclusion it reached in that FAQ if presented with the facts in this case. However, the FAQ seems to suggest that, as the MDT interprets §5, the expiration of a collective comprehensive collective bargaining agreement entered into before the effective date of Act 152 automatically extinguishes an agreement covering the employer's contribution to employee health care costs, even if the parties explicitly agreed, prior to the effective date of the statute, that the employer would provide specific benefits after the expiration of the comprehensive agreement.

As the Commission noted in *Decatur,* Act 152 is not a collective bargaining statute. Rather, it specifically addresses public employers' costs for one type of compensation – health insurance – and sets limits on the amounts that a public employer may pay. The MDT, and not the Commission, is charged with enforcing and interpreting Act 152. However, as the Commission also noted in *Decatur,* §5 of Act 152 explicitly deals with collective bargaining agreements, an area within the Commission's specific expertise.

One of the fundamental principles of statutory construction is a presumption that the legislature is presumed to act with knowledge of statutory interpretations by the courts and by the administrative bodies charged with statutory enforcement. *Gordon Sel-Way, Inc v Spence Bros, Inc,* 438 Mich 488, 505-506 1991); *Melia v Appeal Bd of Michigan Employment Sec Comm,* 346 Mich 544, 565-566 (1956). In this case, I find that it should be presumed that the Legislature, in drafting Act 152, understood that agreements between the parties to a collective bargaining relationship that contain terms that expire on different dates, or which obligate the employer to take some action after the agreement itself has expired, are binding and enforceable contracts. I also find that it should be presumed that the Legislature intended to give such enforceable agreements the same deference it gave in Act 152 to other contracts entered into before the effective date of that statute.

In *Decatur,* as discussed above, the Commission held that whether to delay compliance with Act 152, and thereby accept the risk of being assessed a penalty for failing to comply, is a policy choice within a public employer's managerial prerogative and not a mandatory subject of bargaining. I recognize that waiting until September 1, 2012 to impose the new premium contribution might have exposed Respondent to significant penalties based upon the MDT's apparent interpretation of §5 of Act 152. However, I find that Respondent could not, without violating its obligation to bargain under PERA, rely on Act 152 or the MDT's interpretation thereof to avoid a contractual commitment made to its employees before September 27, 2011. I conclude, therefore, that Respondent violated its duty to bargain in good faith by insisting, after Charging Party filed a grievance on June 29, 2012, that Respondent was required to comply with Act 152 effective July 1, 2012.

Here, Article XIII(E) of the parties' 2010-2012 collective bargaining agreement clearly obligated Respondent, during the term of the agreement, to pay ninety percent of a full year's health insurance premium for every unit member who completed the school year, whether or not the he or she was returning to work for Respondent the following school year. When the parties negotiated that agreement, Act 152 had not yet been adopted. The Legislature also had not yet amended PERA to mandate, in §15b, that employees bear the increased cost of maintaining their health insurance after the expiration of the contract. Under the law as it existed when the parties entered into the 2010-2012 contract, Respondent's duty to bargain in good faith would have required it, after the expiration of the contract on June 30, 2012, to continue to pay ninety percent of the premium until the parties reached agreement on a new contract or a good faith bargaining impasse. I agree with Respondent that a bona fide issue of contract interpretation exists over whether Article XXIII(E) obliged Respondent, after the contract expired, to continue to pay ninety percent of unit employees' full health insurance premiums. As the Commission and Courts have repeatedly held, and as the Court in *Macomb* emphasized, issues of contract

interpretation are properly decided by an arbitrator and not by the Commission. I will, therefore, recommend to the Commission that Respondent be ordered, as part of the remedy for its unfair labor practice, to agree to arbitrate the June 29, 2012 grievance. I recommend that the Commission issue the following order in this case.

RECOMMENDED ORDER

Respondent Traverse Bay Intermediate School District, its officers and agents, are hereby ordered to:

1. Cease and desist from insisting, after Charging Party filed a grievance on June 29, 2012 challenging Respondent's contractual right to increase employee health care premiums effective July 1, 2012, that Respondent was required to increase employees' premiums on that date to comply with the Publicly Funded Health Insurance Contribution Act.

2. Take the following affirmative action to effectuate the purposes of the Act:

   a. Upon receipt of a demand by Charging Party, agree to arbitrate the June 29, 2012, grievance and comply with the order, if any, issued by the arbitrator.

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: December 4, 2014

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **TRAVERSE BAY INTERMEDIATE SCHOOL DISTRICT** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT insist that we were required to increase employees' health insurance premiums on July 1, 2012 to comply with the Publicly Funded Health Insurance Contribution Act.

WE WILL, upon receipt of a demand by the Traverse City Intermediate School District Education Association, MEA/NEA, agree to arbitrate a grievance filed by the union on June 29, 2012, challenging our contractual right to increase employee health care premiums on that date and will comply with the order, if any, issued by the arbitrator.

As a public employer under the PERA, we are obligated to bargain in good faith with representatives selected by the majority of our employees with respect to rates of pay, hours of employment or other terms and conditions of employment. This obligation includes the duty to refrain from altering the terms of an existing collective bargaining agreement covering wages, hours or working conditions without the consent of the union.

TRAVERSE BAY INTERMEDIATE SCHOOL DISTRICT

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.
Case No. C12G-129/12-0111190-MERC