STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

BRIGHTON AREA SCHOOLS,
Public Employer-Respondent,

Case No. C06 K-274

-and-

BRIGHTON EDUCATION ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Thrun Law Firm, P.C., by Donald J. Bonato, Esq., for Respondent

Lee & Clark, by Suzanne Krumholz Clark, Esq., for Charging Party

DECISION AND ORDER

On July 10, 2009, Administrative Law Judge Doyle O'Connor issued his Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

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

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APPEARANCES:

Suzanne Krumholz Clark, for the Charging Party

Donald J. Bonato, for the Respondent

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to the Public Employment Relations Act (PERA, or the Act), 1965 PA 379, as amended, MCL 423.201 *et seq*, this case was assigned to Doyle O'Connor, of the State Office of Administrative Hearings and Rules (SOAHR), acting on behalf of the Michigan Employment Relations Commission (MERC). Based upon the entire record, including the pleadings, transcript and post-hearing briefs filed by the parties, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On November 15, 2006, a Charge was filed in this matter by the Brighton Education Association (the Union or MEA) alleging that the Brighton Area Schools (the Employer or District) had violated the Act by failing to fulfill its duty to bargain in good faith. It was alleged that the then-assistant superintendent James Craig, who had served on the Employer's bargaining team, had acted improperly in making certain statements to the media which were intended to, or had the effect of, encouraging the school board to reject a tentative agreement with the teachers. The Employer did not deny the occurrence of the conduct attributed to Craig, but denied that his conduct violated the Act.

Findings of Fact:

The parties had a collective bargaining agreement covering teachers for the 2004-2005 school year and met at length with their full bargaining teams to attempt to

negotiate a successor agreement. Finally, in May 2006, the parties agreed to meet with truncated teams of two individuals for each side to try to bring bargaining to a conclusion. The Employer's team was comprised of then-interim superintendent, John Hansen, and then-assistant superintendent for finance, James Craig, while the Union's team was comprised of MEA UniServe director, Lane Hotchkiss, and chief negotiator, Brad Gibson.

During the course of the weekend of May 19-21, 2006, the two-member bargaining teams met and each of the participants in bargaining signed off on a tentative settlement they reached in two parts. The first part was for a collective bargaining agreement retroactively applying to the 2005-06 school year and providing terms for the 2006-07 school year. Terms for the 2007-08 school year were provided for in a separate tentative agreement. The parties agreed that the two packages covering 2005-06/2006-07 and 2007-08 would be voted on separately and that acceptance of the 2005-06/2006-07 agreement would not preclude either side from rejecting the 2007-08 package. The tentative agreement provided: "Either party may approve or not approve the optional third year and it shall not be considered bad faith if either or both sides turn it down." Craig testified that it was his understanding that the Employer's negotiators would support ratification of the two-year tentative agreement, but would only "present" the third year tentative agreement to the board.

The parties held a mutually agreed upon joint press conference to announce the resolution of the long-running dispute. Superintendent Hansen expressed the school administration's support for the tentative settlement. Craig also spoke at the press conference, responding to a media question whether the district could afford the deal, and indicated that "it will be tough, but we can make it work." The matter was set for a ratification vote by the school board in early June.

Craig made additional comments to the media regarding the tentative settlement, which he acknowledged in his testimony were accurately reported. On May 31, 2006, the *Livingston Daily Press and Argus* reported that Craig had asserted that if the entire three year pact were accepted, by the third year the district would have exhausted its entire reserve balance. Craig also said that during the third year the district would have to cut programs being offered to students. Craig suggested in the article that athletics or other additional activities would have to be cut. Craig was quoted as saying, "The day of reckoning is really here, now, with this next year." Craig noted that up until then, the discussion of the district's financial circumstances had been kept in-house, but that the discussion now "needs to involve the broader community." Consistent with the tentative agreement and the mutual agreement to hold the initial press conference jointly, the Union declined to respond to the *Livingston Daily Press and Argus'* requests for comment for that article.

The *Livingston Daily Press and Argus* again quoted Craig in an article of June 4, 2006, following another interview. That article noted that the Union president had not responded to "numerous calls for comment" on the tentative deal. While indicating that the then-interim superintendent was calling on the school board to the ratify the entire

three-year deal, the article quoted Craig as again asserting that the terms would entirely deplete the district's reserves and "could force the district into heavier cuts to programs and services to students." The *Livingston Daily Press and Argus* news article of June 4, 2006 was accompanied by an editorial the same day advising that the "district should seek a better deal."

When the school board met to consider the tentative agreements, then-superintendent Hansen spoke in support of ratification of the full package. Craig did not directly address the school board on the ratification issue at the meeting. He testified that it was traditional that the superintendent address the board on such questions and that Hansen was speaking on behalf of the entire team. The board voted to ratify the two-year 2005-06/2006-07 package, but voted to reject the third-year 2007-08 package. At that meeting, the school board also voted to appoint Craig to the position of superintendent.

Despite the position he took in the several later press interviews, Craig in his testimony acknowledged that he had not, during bargaining, asserted that the district could not afford the terms of the tentative agreement, that he signed the tentative agreement, and that he would not have signed the tentative agreement if he had not thought the terms to be in the best interest of the district. Craig had been finance director since 1991, and there was no claim that his knowledge of the district's finances had changed between the May 21, 2006 tentative agreement and the interviews which led to the May 31 and June 4 articles. Craig testified that he did not refer the newspaper reporter to the superintendent for comment on the tentative agreement because communicating with the media was a regular part of Craig's duties. Craig testified that it was his understanding at the conclusion of bargaining that the Employer's team was obliged to recommend school board ratification of the two-year tentative agreement, but that the Employer's team would merely "present" the third-year as an option for the school board.

Counsel for both parties advised the undersigned post-hearing that the employment of Craig with the district had been terminated and that the parties had negotiated a successor multi-year collective bargaining agreement, which continues in effect at the time of the issuance of this decision.

Discussion and Conclusions of Law:

The bargaining obligation includes the duty to approach the entire process with "an open mind and a sincere desire to reach an agreement." *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54 (1974); *City of Springfield*, 1999 MERC Lab Op 399. When a tentative agreement is subject, as here, to approval by the principal parties, a party does not demonstrate bad faith merely by rejecting the tentative agreement. *Eau Claire Public Schools*, 1973 MERC Lab Op 184; *Port. Austin Public Schools*, 1977 MERC Lab Op 974. However, the bargaining obligation includes a duty on the part of the negotiators for each party to affirmatively support a tentative agreement when it is brought for ratification and the failure to do so may, in and of itself, constitute an unfair labor practice. See, *City of Springfield*, *supra; Branch County*, 2002 MERC Lab Op 110.

Craig was the long serving finance director for the district and was not a novice to issues related to bargaining. While he asserted in his testimony that he merely responded to media questions as part of his ordinary job duties in his several pre-ratification vote interviews, that claim is not believable. Craig was one of two individuals representing the district in negotiating a tentative contract with the teachers union. As part of the bargaining process, the negotiators agreed to hold a joint press conference, which was obviously intended to put a positive spin on the tentative deal. At the press conference, Craig's comments were supportive of the joint position, and of the statements in support of the tentative agreement made by the interim superintendent.

Craig asserts that in the several weeks following the joint press conference, the media sought him out and that he therefore gave several interviews. Unlike Craig, the Union repeatedly rebuffed the same reporter's requests for an interview, as was consistent with the parties' mutual commitment. The comments Craig gave to the media predicted a "day of reckoning" if the third year of the tentative agreement was ratified. Craig asserted that the districts finances would be entirely drained and that cuts to programs such as athletics could be forced upon the district. His media comments contradicted the supportive message given by the interim superintendent.

Craig asserted in his testimony that it was his understanding from the bargaining process that the Employer's negotiators would support ratification of the two-year tentative agreement, but would only "present" the third year tentative agreement to the board. I do not credit that claim by Craig. His claimed understanding is inconsistent with the fact that he and all of the other bargainers signed-off on the two tentative agreements. His claimed understanding is also belied by the fact that the interim superintendent, and the Union negotiators, all acted consistently with the mutual obligation to support ratification of the tentative deal, and all four bargainers took part in an agreed upon joint press conference to express support for the pact.[1]

The Employer correctly notes that Craig did not specifically call on board members to reject the tentative agreement. However, the rational conclusion to be drawn from Craig's repeated media interviews, with the prediction of dire financial consequences, including cuts to the athletic program if the third year of the pact was ratified, is that his comments would make it politically unpalatable, if not impossible, for school board members to vote in favor of ratification. Craig was neither inexperienced nor naïve, having been finance director for some fifteen years and involved in the entire bargaining process, and must therefore be presumed to have intended the likely consequences of his actions. I must therefore, and do, conclude that Craig sought to scuttle, at least in part, the tentative agreement which he had helped negotiate with the Union. His conduct is attributable to the Employer, which selected him as a principal

[1] Craig's claimed understanding also conflicts with the contrary admission made in the Employer's opening statement that "It was the Board team's understanding that they were going to recommend ratification of all three years. . ."

bargainer, and establishes a failure to bargain in good faith, in violation of §10(1)(e) of PERA.[2]

The Employer asserted both that Craig was merely exercising his right of free speech and that his statements to the media merely reflected what he believed to be truthful statements. Neither argument is persuasive. Craig was not speaking on his own behalf; rather, as he expressly asserted in testimony, he was speaking to the media as part of his regular duties as finance director. The truthfulness of any subjective misgivings he may have had does not excuse his violation of the duty to support the ratification of a tentative agreement which he had helped negotiate and had signed. Moreover, the truthfulness defense is otherwise undercut by the fact that Craig testified that he had supported entering into the tentative agreement and would not have done so at the time if he had not believed it to be in the best interest of the district.

While Craig's conduct violated the Act, there remains the question of whether any remedy is available or appropriate where Craig has departed employment with the district and a successor agreement has been negotiated and ratified. The specific relief sought in the charge was an order directing the board to again consider ratification of the tentative agreement for the 2007-08 school year. Obviously, that remedy is irrelevant where the parties are presently operating under a new successor agreement. The Union additionally sought the finding of a violation and the posting of an appropriate notice. The posting of such a notice can have a beneficial effect, particularly where the individual whose conduct is at issue remains in a position of authority; however, under these circumstances, where Craig was removed by the district, a posting is just as likely to pointlessly reignite discord. A finding that an unfair labor practice dispute is moot is warranted where, as here, the improper conduct was later corrected; where there exists no practical remedy; and where the passage of time has diminished the significance of the posting of a notice. Here, the passage of time has diminished the significance of an order to cease and desist, and the posting of a notice might do more to rekindle tensions than to relieve them. Mootness, under these circumstances, warrants dismissal of the unfair labor practice charge. *City of Bay City*, 22 MPER___, (2009) (C06 F-151, June 25, 1979); cf, *Wayne State Univ*, 1991 MERC Lab Op 496.

[2] I do not discount the possibility, suggested by the union, that Craig's conduct was additionally influenced by a motive for self-aggrandizement, given that he was imminently up for appointment as superintendent; however, the Employer is responsible for his conduct and its effects, regardless of his possible subjective motivation.

RECOMMENDED ORDER

It is hereby recommended that the unfair labor practice charge be dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O'Connor
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: July 10, 2009