STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

BOARD OF REGENTS OF THE
UNIVERSITY OF MICHIGAN,

Plaintiff,

v

Case No: 23-000422-NZ

THE GRADUATE EMPLOYEES ORGANIZATION
AMERICAN FEDERATION OF
TEACHERS LOCAL 3550,

Hon. Carol Kuhnke

Defendant.

_____/

BUTZEL LONG, a professional corporation
By: Craig S. Schwartz (P36137)
Sarah L. Nirenberg (P77560)
Attorneys for Plaintiff
201 W. Big Beaver Road, Suite 1200
Troy, MI 48084
248-258-2507
Fax: 248-258-1439
schwartz@butzel.com
nirenberg@butzel.com

_____/

THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN'S *EMERGENCY* MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

The Board of Regents of the University of Michigan moves this Court pursuant to MCR 3.310 and MCL 423.216(h) to issue a Temporary Restraining Order and a Preliminary Injunction enjoining Defendant Graduate Employees Organization from unlawfully striking and from encouraging, inducing, or persuading employees of the University to illegally strike.

WHEREFORE, the University requests that the Court issue a Temporary Restraining Order and Preliminary Injunction as prayed in the Verified Complaint, the accompanying brief, and the attached exhibits.

FILED IN Washtenaw County Trial Court; 3/30/2023 12:26 PM

Respectfully submitted,

BUTZEL LONG

By: *\/s/ Craig S. Schwartz*

Dated: March 30, 2023

Craig S. Schwartz (P36137)
Sarah L. Nirenberg (P77560)
Attorneys for Plaintiff
201 W. Big Beaver Road, Suite 1200
Troy, MI 48084
248-258-2507
Fax: 248-258-1439
schwartz@butzel.com
nirenberg@butzel.com

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

THE BOARD OF REGENTS OF THE
UNIVERSITY OF MICHIGAN,

Plaintiff,

v

Case No: 23-000422-NZ

THE GRADUATE EMPLOYEES ORGANIZATION
AMERICAN FEDERATION OF
TEACHERS LOCAL 3550,

Hon. Carol Kuhnke

Defendant.

_____/

BUTZEL LONG, a professional corporation
By: Craig S. Schwartz (P36137)
Sarah L. Nirenberg (P77560)
Attorneys for Plaintiff
201 W. Big Beaver Road, Suite 1200
Troy, MI 48084
248-258-2507
schwartz@butzel.com
nirenberg@butzel.com

_____/

BRIEF IN SUPPORT OF
THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN'S
***EMERGENCY* MOTION FOR TEMPORARY RESTRAINING ORDER**
AND PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiff, the Board of Regents of the University of Michigan, has brought this action seeking an immediate temporary restraining order and permanent injunctive relief to halt an illegal strike by the Graduate Student Instructors (GSIs) and Graduate Student Staff Assistants (GSSAs) through their union, the Graduate Employees Organization (GEO). The strike is in direct violation, and in repudiation, of a no-strike clause in the parties' current collective bargaining agreement, and has occurred in the middle of the University's Winter semester, thereby jeopardizing a

FILED IN Washtenaw County Trial Court; 3/30/2023 12:28 PM

student's ability to take final exams, complete necessary course work, graduate, or complete educational degrees necessary for graduate/professional school or post-graduate employment. Further, GEO's illegal strike constitutes an unfair labor practice, for which the University has filed an unfair labor practice charge with the Michigan Employment Relations Commission (MERC). GEO has not only struck prior to the exhaustion of the statutory dispute resolution procedures of mediation and fact-finding, but objects of the strike are bargaining proposals which are non-mandatory and/or illegal under the Michigan Public Employment Relations Act (PERA), MCL 423.201, *et seq*.

GEO attempts to use the judicial process as part of its unlawful campaign to exert unlawful economic pressure on the University. It recently issued a pamphlet to its members fully admitting that its strike is illegal, and in violation of the contractual no-strike clause, but claimed that the Court's busy docket would not permit an order of injunctive relief on its blatantly unlawful action for "a week or two." Compl, Ex. 2, p. 10.

The strike has completely disrupted the University's ability to deliver education to its students—the core mission of the University. For these reasons, detailed below, the University moves for a Temporary Restraining Order and a Preliminary Injunction to avert further irreparable harm to the University, its student body, students' families, and the general public.

FACTUAL BACKGROUND[1]

The University provides higher education to approximately 47,000 undergraduate students, and to do so, heavily relies on approximately 2,200 GSIs/GSSAs to teach thousands of class sections. Approximately 89.5% of University's undergraduates are enrolled in at least one course that is either taught or co-taught by a GSI or GSSA. *Id*. at ¶ 4.

[1] The following facts are supported by the Verified Complaint and the Affidavits attached to the Complaint as Exhibits 1-11.

GSIs and GSSAs are University employees and are represented for purposes of collective bargaining by GEO. The parties have a current collective bargaining agreement, which has a term of April 16, 2020 – May 1, 2023. Compl, Ex. 1. In the labor contract, GEO committed to strict prohibitions against any sort of strike, work stoppage, or interference with University operations during the term of the contract. These prohibitions are contained in Article III, "No Interference" which provides, in pertinent part:

> Article III: No Interference
>
> The Union, through its officials, will not cause, instigate, support or encourage, nor shall any Employee take part in, any concerted action against or any concerted interference with the operation of the University, such as the failure to report for duty, the absence from one's position, the stoppage of work, or the failure, in whole or part, to fully, faithfully, and properly perform the duties of employment. Nothing in this paragraph, however, shall be construed to limit participation of individuals in an activity that is unrelated to their employment relationship. In the event of any such action or interference and on notice from the University, the Union, through its officials, will immediately disavow such action or interference. Further, the Union will instruct in writing (email will suffice) and in a timely matter (e.g., prior to the action or interference when notice from the University is provided prior to the interference) any and all Employees to cease their misconduct and inform them that this misconduct is a violation of the Agreement, which subjects them to disciplinary action, including discharge.

Id. at p. 7.

Since November 2022, GEO and the University have engaged in collective bargaining negotiations for a new labor contract. Compl, Ex. 7, ¶ 5. Despite repeated objections by the University and specified demands for GEO to withdraw certain bargaining demands, since the inception of bargaining, GEO has bargained to impasse over several "non-mandatory" and/or illegal subjects of bargaining under PERA, which include the following:

(a) <u>GEO's "Unarmed Non-Police Response" Proposal</u> — demanding that the University "fund an unarmed and non-police urgent response program separate from the Division of

Public Safety." Such a demand does not pertain to the wages, hours, and terms and conditions of employment of GEO members. The proposal even states that the function of this program is intended to provide services not only to University employees outside the GEO bargaining unit, but also to non-students in the Ann Arbor Community:

> The function of this program is to facilitate an alternative for faculty, staff, students and community members … The services of this alternative program will be available to Employees represented by GEO and the wider Washtenaw County Community.

Compl, Ex. 3. Because it does not impact the wages, hours, and terms and conditions of employment of GEO members, but rather, seeks to negotiate police services for non-unit members and the public generally, the proposal is a non-mandatory subject of bargaining under PERA. Further, the proposal infringes on the University's management rights under PERA and constitutional rights under Section 5 of the Michigan Constitution.

(b) GEO's "Payment for Placement" Proposal — seeking to bargain a minimum $20 per hour stipend for all Masters of Social Work Students performing social work placements required by their degree programs and demanding that the University contribute $250,000 to the School of Social Work to cover program costs for Social Work students generally. Compl, Ex. 4. Such a demand does not pertain to the wages, hours, and terms and conditions of employment of members of the GEO bargaining unit. Most Social Work Students are not GSSAs/GSIs and, therefore, necessarily not bargaining unit members. Compl, Ex. 10, ¶ 6. While some Social Work Students may be GSSAs/GSIs in GEO, the field work they are performing for their graduate degree program is professional training related to their academic requirements. Because it demands the University provide funding for non-employees and/or non-members of the bargaining unit, the proposal is a non-mandatory subject of bargaining under PERA. Further, the proposal infringes on the University's management rights under PERA and constitutional rights under Section 5 of the

Michigan Constitution to determine the level of funding for academic programs and students participating in such programs.

(c) GEO's "Immigration Protection" Proposal — seeking to place stringent and unlawful restrictions on the University's cooperation with federal immigration agencies attempting to investigate and enforce federal immigration laws. Compl, Ex. 5. This proposal specifically demands that the University not comply with requests of federal immigration authorities to inspect I-9 forms and other supportive documentation establishing a right to work in the United States or to even enter University premises unless 72 hours' notice is provided to an employee. *Id*. This would permit any individual unlawfully working in the United States ample notice and opportunity to evade enforcement of federal immigration law. It also demands that the University pay for and provide legal representation to any employee in any federal immigration inquiry. *Id*. Such representation is not limited to inquiries about an individual's ability to work in the United States, but rather to all immigration inquiries including visa status generally. Because it prohibits the University's voluntary cooperation with federal immigration authorities enforcing federal law, places restrictions on legal compliance by the University in violating the federal law, and demands legal representation from immigration issues unrelated to GEO members' employment, such a proposal is a non-mandatory and/or illegal subject of bargaining in violation of public policy.

Despite GEO's unlawful bargaining posture, the University has bargained in good faith since November 2022 with the assistance of a mediator appointed by MERC. Compl, Ex. 10, ¶ 7. Mediation efforts have not, however, been exhausted, nor has GEO filed a petition with MERC for statutory fact-finding. *Id*. at ¶ 8.[2]

[2] In addition to the non-mandatory and/or illegal subjects discussed above, the parties have been unable to agree on wage and benefit demands GEO has made.

On March 29, 2023, GEO repudiated the no-strike obligations in Article III, "No Interference" of the collective bargaining agreement by organizing, initiating, and authorizing an unlawful strike and work stoppage among its members. As more fully discussed below, GEO's strike is blatantly unlawful on the following grounds:

- The strike is for the purpose, in part, to coerce a change in employment conditions, compensation or the rights and privileges of employment as defined by MCL 423.201(j) and as prohibited by MCL 423.202.
- The strike repudiates GEO's no-strike obligations in the current agreement and is an unfair labor practice under MCL 423.210(3)(d).
- The strike is in furtherance of bargaining demands that are non-mandatory and/or illegal subjects of bargaining under PERA and is an unfair labor practice in violation of MCL 23.210(3)(d).
- The strike has been initiated prior to the exhaustion of the statutory dispute resolution procedures of mediation and fact-finding and is an unfair labor practice in violation of MCL 423.210(3)(d).

The illegality of the strike is fully admitted in a pamphlet issued by GEO to its Union membership. Compl, Ex. 2. In response to the question **"I've heard that striking is illegal. Is that true?"** GEO informs its members **"Yes. UM is a public university and it is unlawful for public sector employees to strike in Michigan. In addition, our contract has a 'no strike clause' specifying that we cannot strike."** *Id*. at p. 4. The pamphlet further states under the heading **"What is the goal of a strike?" "A strike significantly interrupts undergraduate education . . .".** *Id*. at p. 2. Thus, GEO's unlawful strike is targeted not only at the University's bargaining posture, but directly at the University's student body. GEO repeats the same admissions of

unlawful conduct in a second electronic pamphlet issued to its members by GEO entitled "GEO Strike FAQ." Compl, Ex. 11, p. 3.

On March 29, 2023, the University filed an Unfair Labor Practice Charge with MERC. Compl, Ex. 6. GEO's illegal work stoppage and in-person picketing has caused and if it continues will continue to cause the following irreparable injury to the University, the student body, students' families, and the public in general, which the University supports and serves:

- Disruption and serious impairment of the vital function of the University; namely the education of approximately 47,000 students.
- Damage to the educational growth and plans of the University students, including inability to continue classes with no assurance that it will be possible to effectively make up time lost if the strike continues.
- Increased operating costs and related damages to the University if the Winter term must be extended or changed, with no legal recourse insufficient to compensate the University and its students for the harm suffered.
- Loss of confidence in the mission of the University on behalf of the students, families of students, and the general public.
- Loss of confidence in the quality of public education at the University on behalf of the students, their parents where applicable, and the general public.
- Loss of reputation in the quality of public education at the University on behalf of students, their parents where applicable, and the general public.
- Severe prejudice to students in applying for career jobs or graduate programs or relying on degrees for career advancement.

- Risk of loss of federal, state, and private financial aid and grants due to cancellation of courses.
- Potential delay in graduation and graduate school for undergraduate students.
- Repudiation of the collective bargaining agreement and destruction of the collective bargaining relationship.

Compl, Exs. 7-10.

The only remedy that will effectively restore the rights of the University, its student body students' families, and the general public, is an immediate order of this Court prohibiting and enjoining the illegal acts of GEO. The injunctive relief prayed for in the University's Motion and Verified Complaint will not deprive GEO or any of its members of any legal right and will in no way cause them any loss, injury, or damage.

ARGUMENT

I. The Court should enjoin GEO's illegal strike.

An injunction is an equitable remedy within the discretion of the courts to grant. In *School District for the City of Holland v Holland Education Association,* 380 Mich 314, 326 (1968), the Court stated:

> We recognize that great discretion is allowed the Trial Chancellor in the granting or withholding of injunctive relief. Courts sitting in equity have historically analyzed the respective positions of the parties and have weighed the injury which will be suffered by the plaintiff in considering whether an injunction should be granted or withheld.

In *Holland Schools,* the faculty union engaged in a work stoppage in violation of PERA, specifically MCL 423.202. The Circuit Court issued a Temporary Restraining Order enjoining the strike. On appeal, the Michigan Supreme Court held that circuit courts have authority to enforce, by injunction, the provisions of PERA prohibiting strikes by public employees, if the court finds: (1)

that the work stoppage is illegal and (2) that the work stoppage will result in irreparable injury. See also, *Warren Education Association v Adams,* 57 Mich App 496 (1975) (injunction properly issued to halt illegal teachers' strike). Here, the University satisfies *Holland Schools* standard.

A. GEO's strike is illegal.

Because the CBA contains broad and stringent no-strike language agreed to by GEO, the Union and its members' actions are unquestionably and admittedly unlawful. As detailed below, the University, its students, their families where applicable, and the general public will suffer irreparable injury if the illegal strike is not enjoined. The relief sought by the University in these circumstances is warranted, and this Court should enjoin the illegal strike.

In addition to the strike being a blatant and knowing violation of the no-strike clause, GEO's work stoppage/strike is also unlawful under PERA, which provides in pertinent part that "[a] public employee shall not strike... ." MCL 432.202. GSIs and GSSAs are public employees within the meaning of the Act. *Board of Control of Eastern Michigan University v Labor Mediation Board,* 18 Mich App 435 (1969) (employees of Eastern Michigan University were public employees covered by the Act); *Regents of the University of Michigan v Michigan Employment Relations Commission,* 389 Mich 96 (1973) (interns, residents, and post-doctoral fellows who were both employees and students of the University were covered by the Act). GEO's work stoppage also constitutes a strike, as defined by PERA as:

> The concerted failure to report for duty, the willful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment for the purpose of inducing, influencing, or coercing a change in employment conditions, compensation, or the rights, privileges, or obligations of employment.

MCL 423.201. To the extent that GEO's strike is in furtherance of wage and benefit demands that the University deems excessive and unreasonable, Defendant's action is clearly a "stoppage of work" for the purpose of "coercing a change in . . . compensation" and prohibited under PERA.

B. The University, the student body, students' families, and the general public have been and will continue to be irreparably harmed by GEO's illegal strike.

In the absence of an injunction preventing GEO and its members from illegally striking and encouraging others to do so in support, the University, the student body, students' parents, and the general public have been and will continue to be irreparably harmed. An injury is irreparable when it cannot adequately be compensated in damages. See, e.g., *National Bd of YMCA v Flint YMCA,* 764 F 2d 199, 201 (CA 6, 1985); *Thermatool Corp v Borzym*, 227 Mich App 366, 377 1998); *Ainsworth v Munoskong Hunting and Fishing Club,* 153 Mich 185, 191 (1908). The injuries here, supported by affidavits, are not trivial, inconsequential, or speculative—they prevent the University from accomplishing essential functions under the Michigan Constitution, state law, and the Regents' Bylaws, which govern the University. Significantly, these are injuries that will be long lasting and cannot be compensated in damages.

If GEO's illegal strike continues, there will be further serious disruption and impairment of the vital function of the education of approximately 47,000 students, causing damage to their educational and/or professional growth, including their ability to continue classes with assurance that they will be able to effectively make up for the lost instruction. A total of 2,200 GSSAs/GSIs teach or co-teach many courses throughout the University. For example, in the College of Literature, Science, and the Arts (LSA), the University's largest college, which includes thousands of students, GSIs lead course sections that make up approximately 25% of each student's class time and more than 150 GSIs provide 100% of instruction for many courses without any supervising

faculty member. Coml, Ex. 8, ¶¶ 3-4. In the School of Information, GSSAs/GSIs teach approximately 60% of all students. Compl, Ex. 9, ¶ 3.

In many cases, if GSSAs/GSIs choose to stop teaching a course as part of a work stoppage, there is no substitute to backfill the role. Compl, Ex. 7, ¶ 5. Without GSSAs/GSIs, the class may continue with students required to work through the syllabus on their own without any instruction. Compl, Ex. 7, ¶ 6. However, such self-instruction necessarily negatively impacts student learning, undermines student well-being, and has the potential to negatively impact grades, with consequences keenly felt in applications for professional and graduate programs. Compl, Ex. 7, ¶¶ 9-10. In many majors and degree programs, however, self-instruction is not possible. Because the strike/work stoppage comes at the end of the semester, with final exams scheduled for April 20-27, 2023, there is not sufficient time to make up necessary lectures or labs taught by GSSAs/GSIs, meaning that the course will be cancelled and students will lose the work they put into the course for nearly the entire semester. Compl, Ex. 8, ¶ 8.

Cancellation of courses has severe impact to students, including causing them to have to re-take a prerequisite course, which causes them to be set back a semester or an entire year, or preventing them from being able to cross-campus transfer to other schools/majors (e.g., Ross School of Business). Compl, Ex. 8, ¶ 14. This will create a backlog for other students, who will not be able to enroll in those courses or impede students' ability to continue on their preferred career path. Compl, Ex. 8, ¶ 14. Also, students who planned to graduate this spring may be unable to do so and, therefore, will be unable to start their jobs or graduate school programs in the summer or fall. Compl, Ex. 8, ¶¶ 16-17. Students with current jobs, such as the 750 students in the online Master of Applied Data Science degree in the School of Information, will be deprived of necessary instruction, and forced to retake the course, which means a delay in degree necessary for

advancement in their career. Compl, Ex. 9, ¶ 9. And even where courses can continue without instruction, students are not only deprived of instruction late in the semester, they are deprived of GSSA/GSI-led necessary review sessions for final exams. Without such preparation for final exams, there is a high potential to negatively impact students' final grades. Compl, Ex. 8, ¶ 12.

GEO is fully aware that its illegal strike irreparably harms the University and the student body, which is precisely why it is striking. GEO explicitly stated in its pamphlet to its members, encouraging them to strike: "A strike *significantly interrupts* undergraduate instruction" and **"(1) UM cannot fire all of us. Where would they find another 2,200 skilled teachers to teach? (2) UM would have to determine which workers were on strike. This is not easy to do in an institution as decentralized as UM."** Compl, Ex. 2, p. 7. GEO knows students will be left without instruction, causing the above-mentioned irreparable harm. *Id*.

GEO's illegal strike has and will continue to damage the academic reputation of the University, making it difficult to attract and retain prominent faculty and quality students at both the undergraduate and graduate level. Compl, Ex. 7, ¶ 19. Similarly, it will cause a loss of confidence in the University's educational mission, and the reputation of the quality of public education at the University will suffer. Compl, Ex. 7, ¶ 21. Finally, the illegal strike has repudiated specific provisions of the CBA and has destroyed the collective bargaining relationship.

Courts in other jurisdictions have found that the type of irreparable harm described above is sufficient to support an award of injunctive relief.

- *Temple Assoc of Univ Professionals v Temple University,* 582 A.2d 63 (Cmwlth Pa 1990): The court found that the following factors supported the granting of injunctive relief enjoining a strike by Temple University faculty: (1) a potential reduction in student financial aid; (2) lost course work caused by students unable to carry a full, or in some case, any course load; (3) delay

in graduation for eligible students; (4) loss of national stature in graduate education programs; (5) potential loss of substantial sums in tuition revenue; and (6) significant wage tax revenue loss.

- *Joint School District v Wisconsin Rapids Education Ass'n,* 234 NW2d 289, 299 (Wisc 1975): The trial court held that a school board demonstrated irreparable harm in seeking to enjoin a teacher strike in light of the following circumstances:

> (1) The illegal nature of the strike; (2) inability of the board to operate the school system and thereby meet its statutory duties and responsibilities to the taxpayers in the school district; (3) inability of the students to obtain the benefits of a tax-supported educational process; (4) possible loss of state aids; (5) inability of parents to comply with statutory responsibility to educate their children; and (6) cancellation of athletic events and other school activities.

- *Bristol Township Education Ass'n v School District,* 322 A2d 767 (Cmwlth Pa 1974): Denial of educational programs for students, the loss of instructional days and possible make-up days, and the loss of state subsidies to a school system because of a teacher strike were significant factors in the court's finding of "present danger or threat to the health, safety or welfare of the public."

- *Menard v Woonsocket Teachers' Guild-AFT 951,* 363 A2d 1349, 1354 (RI 1976): Disruption of the school calendar and "the disadvantage seniors might experience from an untimely entry into the job market caused by a late school closing" were factors in the court's finding of irreparable harm caused by a teacher strike.

- *Board of Education of the City School District of the City of Buffalo, NY v Pisa,* 55 AD 2d 128 (NY 1976): the court held that "by its very nature, a strike by public employees constitutes an 'irreparable injury' to the public order and welfare" sufficient to justify injunctive relief.

No less is required in the instant case where immediate injunctive relief is necessary and proper. Should the Court not enjoin GEO and its members from engaging in this illegal strike

during the term of the labor contract, the University, the student body, students' families, and the general public will be irreparably harmed.

II. The Court should temporarily enjoin GEO's illegal strike pending completion of the MERC unfair labor practice proceeding.

MCL 423.216(h) permits any charging party who has filed an unfair labor practice charge at MERC to seek appropriate temporary relief or a restraining order against a person or entity engaging in unfair labor practices, and authorizes this Court to grant temporary relief as it deems "just and proper." The standards for granting an injunction under Section 16(h) were summarized by the Michigan Court of Appeals in *AFSCME Local 207 v City of Detroit,* unpublished opinion of the Court of Appeals, issued Oct 18, 2007 (Docket No. 271321), 2007 WL 3036742, at p *1[3]:

> In determining whether to issue an injunction under §16(h), all usual equitable requirements apply. Thus, "a court must consider (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest, if the injunction is issued. This inquiry often includes the consideration of whether an adequate legal remedy is available to the applicant.

A. The University will prevail on the merits of its unfair labor practice charge against GEO.

GEO has committed a blatant violation of its duty to bargain in good faith under MCL 423.215, and the University will prove at MERC that GEO has committed unfair labor practices on at least three separate grounds. By way of summary:

[3] Unpublished Michigan court decisions and MERC cases are attached hereto as **Exhibit 1**.

i. GEO's strike and work stoppage constitutes a repudiation of the labor contract in violation of MCL § 423.10.

By initiating a strike and work stoppage during the term of the labor contract in furtherance of its demands, and by organizing, encouraging, and authorizing such strike and work stoppage among its members, GEO has repudiated Article II, "No Interference" of the contract in violation of Section 10(1)(e) of PERA, which constitutes an unfair labor practice. See, Wayne County, Public Employer-Respondent, and Michigan AFSCME Council 25, AFL-CIO, Labor Organization-Charging Party, 29 MPER Par. 1 (2015) (explaining that repudiation of a labor contract is unlawful); *City of Detroit*, 30 MPER 48 (2017).

ii. GEO violated its bargaining duty under PERA by bargaining to impasse and striking over non-mandatory and/or illegal subjects of bargaining.

PERA distinguishes between mandatory and non-mandatory subjects of collective bargaining. An employer is not required to bargain on non-mandatory subjects. See *West Ottawa Education Association v West Ottawa Public School Board of Education,* 126 Mich App 306, 314 (1983). Moreover, a union violates its bargaining duty and commits a violation of MCL 423.10(1)(e) where it bargains non-mandatory subjects to impasse over a public employer's objections and/or strikes over such non-mandatory demands. See *Oak Park Public Safety Officers Association,* 19 MPER Par. 50 (2006); *Operating Engineers Local Union No.* 12, 246 NLRB 510 (1979) (a strike over a non-mandatory subject of bargaining is an unfair labor practice). The same conclusion is warranted where a union seeks contract language that violates the law. *Michigan State AFL-CIO v MERC*, 212 Mich App 472, 486 (1995), aff'd 453 Mich 362 (1996); *Michigan Education Association v Vassar Public Schools*, unpublished opinion of the Court of Appeals, issued May 22, 2018, (Docket No. 337899), 2018 WL 2979814.

A bargaining proposal which is directed at individuals not in a union's bargaining unit is a non-mandatory subject. See *Mona Shores Board of Education*, 2 MPER 20081 (non-unit substitute teachers); *Woodhaven School District*, 3 MPER 21057 (job applicants not yet employed); *Village of Holly*, 17 MPER 48 (2004) (retirees who are no longer employees). Yet, this is precisely what GEO seeks to do in its Unarmed Police Response and Payment for Placement proposals, which are directed at non-members of the GEO bargaining unit. The Unarmed Police Response proposal additionally is not limited to classroom situations where GSIs or GSSAs are working and, therefore, does not pertain to bargaining unit working conditions or terms of employment.

In *Regents of the University of Michigan v Michigan Employment Relations Commission*, 389 Mich 96 (1973), the Michigan Supreme Court made it clear that the constitutional authority of the University in Section 5 of the Michigan Constitution limited the scope of the bargaining duty if a matter fell within the "educational sphere." *Id*. at 109-110. That clearly applies here, as to the mode of campus security the University chooses to adopt, the stipends or funding the University chooses to provide non-employee graduate students and programs in the School of Social Work, and the assistance it chooses to provide to immigration authorities who seek access to University campuses for the purpose of enforcing federal law. These are all non-mandatory subjects of bargaining that fall within the University's management rights under PERA and the Michigan Constitution. Moreover, GEO's demands inhibiting federal authorities from enforcing federal immigration law can only be viewed as unlawful, violative of public policy, and a violation of GEO's duty to bargain in good faith.

iii. Defendant GEO has violated its bargaining duty under PERA by striking without exhausting statutory impasse mechanisms.

Because public employees have <u>no right to strike</u> under Michigan law, PERA provides two impasse resolution mechanisms to assist public entities in resolving collective bargaining disputes:

(1) When it is notified of such by one of the parties to contract negotiations, MCL 423.207 requires MERC to appoint a State Mediator to mediate a contract dispute and (2) Statutory Fact-Finding. See MCL 423.25. Once a formal petition for fact-finding is filed by one of the parties to a collective bargaining dispute, MERC may appoint a neutral Fact-Finder from a panel of outside experts experienced in labor management relations. The Fact-Finder is empowered to hold public hearings on the contract provisions in dispute and hear evidence in support of each party's position on the disputed language. The neutral Fact-Finder must then issue a written report stating his conclusions on the contract issues in dispute, which is intended for public dissemination. While the Fact-Finder's report is non-binding and merely advisory, under PERA the parties must then bargain in good faith over the findings and continue mediation over the report to reach a contract settlement. See *Orion Township*, 18 MPER 72 (2005) ("We have consistently stated the importance of mediation and Fact-Finding, indicating that the failure of the parties to utilize these services to the maximum extent necessary may be viewed as indicating a lack of good faith, and contrary to the intent and policies of PERA.").

MCL 423.210(2)(d) makes it an unfair labor practice for a union to bargain in bad faith with a public employer over a mandatory subject of bargaining. MERC has repeatedly and consistently held that the failure of a union to fully use the statutory impasse resolution mechanisms of mediation and fact-finding before striking in furtherance of its collective bargaining demands is bad faith bargaining and an unfair labor practice. *Hart Public Schools*, 1989 MERC Lab Op 950; 1989 WL 1700175, *Lake Orion Education Association*, 1984 MERC Lab Op 770; *City of Ishpeming, DPW Employees Chapter of Local 1282* AFSCME, 1984 MERC Lab Op 871; *Wayne County MEA/NEA,* 1982 MERC Lab Op 1555; *East Jordan Public Schools*, 1982 MERC Lab Op 1101. As the commission noted in *Wayne County MEA/NEA*,

> We think the rule is well settled that refusal to utilize the full scope of statutory impasse resolution mechanisms prior to engaging in a strike is clear evidence of a lack of good faith in the bargaining process.

1982 MERC Lab Op at p. 1558. Also, in *Hart Public Schools, supra*, a teachers' strike was initiated on the first day of class to place pressure on the school district to capitulate to the union's demands. In finding that the union had bargained in bad faith by striking after only one mediation session and without filing a fact-finding petition, the Commission concluded:

> The Commission has further found that a strike occurring prior to the utilization of the full scope of statutory impasse resolution mechanisms does constitute bad faith bargaining. In the instant case, Union members withheld their services after only one mediation session, and without any attempt to utilize statutory fact-finding procedures. In line with the above cases, I find that a strike under these circumstances constituted bad faith bargaining.

1984 MERC Lab Op at 964.

Here, the parties have neither completed mediation, participated in fact-finding proceedings, nor met their duty to bargain over an eventual Fact-Finder's Report. Accordingly, it is patently clear that by striking prior to any meaningful exhaustion of statutory dispute resolution procedures, GEO has violated its duty to bargain in good faith in violation of PERA.

B. If injunctive relief is not granted, the University, the student body, the students' families, and the general public will suffer irreparable injury.

As stated above, the University, students, students' families, and the general public will be irreparably harmed if GEO's illegal strike is not immediately enjoined to allow students to finish the Winter semester. See *supra*, Argument IB. Moreover, the unlawful strike has resulted in irreparable harm to the collective bargaining process, thereby making the likelihood of a contract settlement an impossibility so long as the Union's unlawful strike continues.

C. The balance of the equities favors the University.

There is no harm to GEO if an injunction is granted. The University is only asking for the Union to cease its illegal strike in violation of PERA and to permit MERC to take administrative action to order GEO to cease its unfair labor practices. Conversely, if the illegal strike continues, the harm to the University, students, students' families, and the general public is incalculable. See *supra* Argument IB.

D. The public interest supports the issuance of injunctive relief.

The University, as public institution of higher education, is a tremendous asset to the citizens of the State of Michigan. It is, therefore, in the public interest for the University's operations to be maintained against an illegal strike caused by GEO's bad faith bargaining, and for the University to avoid irreparable injury to its academic reputation.

CONCLUSION

Based on the foregoing, the Board of Regents of the University of Michigan requests that this Court grant the relief requested in the Verified Complaint and enter a Temporary Restraining Order and Order to Show Cause, and then a Preliminary Injunction.

Respectfully submitted,

BUTZEL LONG, a professional corporation

By: */s/ Craig S. Schwartz*

Craig S. Schwartz (P36137)
Sarah L. Nirenberg (P77560)
Attorneys for Plaintiff
201 W. Big Beaver Road, Suite 1200
Troy, MI 48084
(248) 258-2507
schwartz@butzel.com
nirenberg@butzel.com

Dated: March 30, 2023

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Plaintiff,

v

Case No. 23-000422-NZ

THE GRADUATE EMPLOYEES ORGANIZATION AMERICAN FEDERATION OF TEACHERS LOCAL 3550,

Hon. Carol Kuhnke

Defendant.

_____/

BUTZEL LONG, *a professional corporation*
By: Craig S. Schwartz (P36137)
Sarah L. Nirenberg (P77560)
Attorneys for Plaintiff
201 W. Big Beaver, Suite 1200
Troy, MI 48084
248.258.2507
schwartz@butzel.com
nirenberg@butzel.com

_____/

EXHIBIT TO *EMERGENCY* BRIEF IN SUPPORT OF THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Exhibit 1 Unpublished Michigan court decisions and MERC cases

FILED IN Washtenaw County Trial Court; 3/30/2023 12:28 PM

EXHIBIT 1

2007 WL 3036742
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

AFSCME LOCAL 207, Plaintiff-Appellee,
v.
CITY OF DETROIT, Defendant-Appellant.

Docket No. 271321.
|
Oct. 18, 2007.

Wayne Circuit Court; LC No. 06-612425-CL.

Before: MURPHY, P.J., and SMOLENSKI and SCHUETTE, JJ.

Opinion

PER CURIAM.

*1 Defendant City of Detroit ("the City") appeals as of right from a preliminary injunction that prohibits the City from taking disciplinary action against Peavey Horton in his capacity as chief steward of plaintiff AFSCME Local 207 ("the union"), pending a hearing and decision by the Michigan Employment Relations Commission ("MERC"). We affirm.

I

A grant of injunctive relief is reviewed for an abuse of discretion. *Michigan Coalition of State Employee Unions v. Civil Service Comm,* 465 Mich. 212, 217; 634 NW2d 692 (2001). An abuse of discretion occurs only when the trial court's decision is outside the range of "reasonable and principled outcome[s]." *Maldonado v. Ford Motor Co,* 476 Mich. 372, 388; 719 NW2d 809 (2006).

Section 9 of the Public Employment Relations Act ("PERA"), MCL 423.209, provides:

> It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

Section 10 of the PERA, MCL 423.210(1), provides:

> It shall be unlawful for a public employer or an officer or agent of a public employer (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section 9; ... (c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization[;] ... [and] (d) to discriminate against a public employee because he has given testimony or instituted proceedings under this act....

Section 16(a) of the PERA, MCL 423.216(a), provides that when an unfair labor practice charge is filed, the MERC may issue a complaint and schedule a hearing. Section 16(h) adds:

> The commission or any charging party shall have power, upon issuance of a complaint as provided in subdivision (a) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any circuit court within any circuit where the unfair labor practice in question is alleged to have occurred or where such person resides or exercises or may exercise its governmental authority,

> for appropriate temporary relief or restraining order, in accordance with the general court rules, and the court shall have jurisdiction to grant to the commission or any charging party such temporary relief or restraining order as it deems just and proper.

In determining whether to issue an injunction under § 16(h), all usual equitable requirements apply. *Local 229, Michigan Council 25, AFSCME v. Detroit,* 124 Mich.App 791, 793-795; 335 NW2d 695 (1983). Thus, "a court must consider (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued." *Alliance for the Mentally Ill of Michigan v. Dep't of Community Health,* 231 Mich.App 647, 660-661; 588 NW2d 133 (1998); see also *Michigan State Employees Ass'n v. Dep't of Mental Health,* 421 Mich. 152, 157-158; 365 NW2d 93 (1984). "This inquiry often includes the consideration of whether an adequate legal remedy is available to the applicant." *Id.* at 158.

II

A. Irreparable Harm and Adequacy of Remedy at Law

***2** The City argues that the union failed to show that it would suffer irreparable harm if the injunction were not granted. Although Horton was subject to discharge upon his next suspension, the City argues that a discharge does not constitute irreparable harm because it can be compensated by money damages.

Our Supreme Court has declined to adopt a bright-line rule holding that termination from employment can never constitute irreparable harm. *Michigan State Employees Ass'n, supra* at 165-166. Rather, the Court has stated that, "[i]n all cases, the injury [alleged] must be evaluated in light of the totality of the circumstances affecting, and the alternatives available to the discharged employee." *Id.* at 167. Nonetheless, loss of income, by itself, is not ordinarily sufficient to show irreparable harm, because the loss can be compensated monetarily. *Id.* at 167-168.

In the present case, however, loss of income and benefits is not the harm identified by the union. Rather, the union alleged that by knowing that Horton was being disciplined, and was subject to discharge for his next suspension, for exercising his rights under the PERA, other employees and union officials would be hesitant to avail themselves of their rights, defeating the purpose of the act. This is akin to a chilling effect on the exercise of free speech, and is precisely the harm addressed by PERA's anti-retaliation and anti-discrimination provisions, contained in § 10. We believe that such harm is difficult, if not impossible, to quantify, and cannot be undone or compensated by money damages. Thus, we conclude that the union made a sufficient showing that it would suffer irreparable harm if the injunction were not issued.

The City argues that, because an evidentiary hearing was not held, the union failed to provide factual support for its claim that its members and officers would be intimidated by the City's disciplining of Horton.

The union's verified complaint alleges that, if the injunction were not issued, union members and officials would be intimidated by the City's disciplining of Horton for exercising rights protected by the PERA. The complaint was accompanied by Horton's affidavit attesting to the accuracy of the allegations in the complaint. The City did not file an answer under MCR 2.111(C), contesting these factual allegations. Instead, its "answer," the only pleading it filed below, contains only a legal argument about why an injunction should not issue. Therefore, under MCR 2.111(E), the factual allegations of the complaint may be accepted. We therefore reject the City's argument that factual support for the union's claim of irreparable harm is lacking.

The City also argues that, although this Court has found that MERC remedies are sometimes inadequate because they are not immediately available, this is not such a case.

In *Detroit v. Salaried Physicians Professional Ass'n, UAW,* 165 Mich.App 142, 150-153; 418 NW2d 679 (1987), and in *Van Buren Pub School Dist v. Wayne Circuit Judge,* 61 Mich.App 6, 16-17; 232 NW2d 278 (1975), the employers threatened to take actions that would have eliminated the

bargaining units, in alleged violation of their duty to bargain. This Court found that MERC remedies were inadequate because, absent an injunction, there would be nothing left for the parties to bargain about. *Salaried Physicians Professional Ass'n, supra* at 151-152; *Van Buren Public School Dist, supra* at 16-18. The City argues that the present case is distinguishable because it did not take action to eliminate the union.

*3 We believe that the City's argument is illusory. The City does not argue that an injunction may *only* be granted to prevent the complete elimination of a bargaining unit. As discussed previously, the danger in this case is the chilling of the employees' rights under the PERA. An injunction was necessary because, as previously discussed, that harm would be irreparable, and could not be adequately compensated by money damages.

B. Likelihood of Prevailing on the Merits

The City argues that the union cannot show that it would likely prevail on the merits of some uncertain, unspecified, speculative future discipline that might be imposed on Horton. Although the City did not make this argument below, we will address the likelihood that the union will prevail on the merits with regard to both prongs of the injunction.

The union alleged, and the City does not contest, that there is a high likelihood that the union will prevail on the merits of Horton's two challenged suspensions. If the union prevails, then the suspensions will be expunged from Horton's record, and the union will have obtained the relief embodied in the second part of the injunction, i.e., precluding the City from enhancing any subsequent penalty against Horton on the basis of the two challenged suspensions.

Regarding the first prong of the injunction, we note that the City was prohibited from disciplining Horton, in the future, "for any lawful actions taken in his capacity as" union steward. The City was not enjoined from imposing legitimate discipline unrelated to Horton's performance of his duties as union steward.

Under § 10, it is an unfair labor practice to discipline an employee for exercising his rights under the PERA. Therefore, if the City disciplines Horton in the future for performing his union duties, such discipline will be unlawful. Thus, there is a high likelihood that the union will prevail on the merits of a resulting challenge.

The City's reliance on *Alliance for the Mentally Ill, supra,* is misplaced. That case involved layoffs undertaken pursuant to a collective bargaining agreement that arguably reserved to management the right to lay off its employees. See *Alliance for the Mentally Ill, supra* at 661-664. Conversely, the present case involves disciplinary action that is clearly prohibited by the PERA.

C. Balancing of Resulting Harm and Harm to Public Interest

Relying on *Alliance for the Mentally Ill, supra* at 665-666, the City briefly argues that the public interest will be harmed if taxpayer dollars are spent to continue paying an employee, pending a challenge to discipline, if it is eventually determined that the discipline undertaken was lawful. As indicated previously, however, *Alliance for the Mentally Ill* involved layoffs that were arguably permitted by the collective bargaining agreement. Because Horton was not discharged, this was not a case where the City was ordered to continue employing him pending the resolution of other proceedings, potentially harming the City. [1] Additionally, the union has a high likelihood of prevailing on the merits of the pending proceedings, and of future proceedings brought to overturn any future discipline imposed in violation of the PERA. Thus, we conclude that the City was not harmed by the injunction.

*4 There is no public interest in allowing the City to discipline Horton in violation of the PERA. On the contrary, the public interest would seem to favor compliance with the PERA and the policies expressed therein. The City may be liable for damages for its failure to comply. Further, the City remains free to discipline Horton for legitimate reasons unrelated to his union activities. Thus, the public interest was not harmed by the injunction.

The union and its members, on the other hand, would suffer irreparable harm if an injunction were not issued.

We conclude that the factors relevant to issuing an injunction favored granting the union's request. While the trial court's findings were brief, the record is sufficient to enable appellate review. See MCR 2.517(A)(2); see also *Fletcher v. Fletcher,* 447 Mich. 871, 883; 526 NW2d 889 (1994). The

trial court did not abuse its discretion in granting the requested injunction.

Affirmed.

All Citations

Not Reported in N.W.2d, 2007 WL 3036742

Footnotes

1 For the same reason, *Michigan State Employees Ass'n, supra* at 164-165, involving a civil service challenge to an employee's discharge, is inapposite.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

29 MPER ¶ 1, 29 Michigan Pub. Employee Rep. ¶ 1, 2015 WL 3988557

Michigan Employment Relations Commission

Wayne County, Public Employer-Respondent, and Michigan
AFSCME Council 25, AFL-CIO, Labor Organization-Charging Party
No. C10 J-266
Docket 10-000060-MERC
CALLAGHAN, LABRANT
May 19, 2015

Related Index Numbers
1.1 Jurisdiction
3.342 Other State Legislation, Municipal, Ordinances
42.11 Mandatory Subjects, Case Law
43.137 Compensation, Benefits, Retirement
47.54 Grievance Arbitration, Deferral to Arbitration by State Agencies
71.81 Deferral to Arbitration, Standards for Prearbitral Deferral
72.612 Unilateral Change in Term or Condition of Employment, Established Practice
72.667 Unilateral Change in Term or Condition of Employment, Defenses to Unilateral Change, Other
74.31 Types of Orders, Cease and Desist

Appearances:
Clifford Hammond, for the Respondent, Wayne County Corporation Counsel, Bruce Campbell & Nemeth Law, P.C.
Keith Flynn, for the Charging Party, Miller Cohen, P.L.C.

Judge / Administrative Officer
CALLAGHAN
LABRANT

Ruling

MERC partly affirmed and partly reversed an ALJ' s recommended decision regarding an unfair practice charge, in which a union challenged the county employer' s amendment to a retirement ordinance. With respect to two bargaining units of law enforcement employees, MERC found that the matter was more appropriately resolved through the parties' contractual grievance procedure. MERC upheld the ALJ' s conclusion that the employer breached its bargaining duty by taking steps to enact the amendment to the retirement ordinance while the parties were in mandatory negotiations following fact-finding.

County breaches contract by amending retirement ordinance during fact-finding

Meaning

MERC noted that, once a subject has been determined to be a mandatory subject of bargaining, the parties must bargain concerning the subject and no party may take a unilateral action on that subject until the parties have reached impasse. Both MERC and Michigan courts have long held that pension and retirement benefits qualify as mandatory subjects of bargaining.

Case Summary

The union and the county employer engaged in unsuccessful negotiations for a bargaining agreement that would succeed an expired agreement. A factfinder issued his report in September 2010. Around the same time, the employer notified the union that it was proposing an amendment to its retirement ordinance. The amendment would alter the method for computing and

distributing funds for the employer' s Inflation Equity Reserve Fund (IEF) for retired employees. The amendment resulted in a significant reduction in the distribution of retirement funds called the " thirteenth check." The union brought an unfair practice charge alleging that the employer violated its good faith bargaining duty by amending the retirement ordinance. In a recommended decision, an ALJ decided that the employer violated its good faith bargaining duty, under PERA Section 10(1)(e), by unilaterally making retirement-related budget cuts. MERC considered the employer' s exceptions. It partly affirmed and partly reversed the ALJ' s decision. MERC initially determined that it maintained jurisdiction over the issue of the effect of 2010 amendments on the retirement ordinance. MERC noted that the issue of retirement benefits promised to active employees involved a mandatory subject of bargaining. With respect to two bargaining units of law enforcement employees, MERC found that the matter was more appropriately resolved through the parties' contractual grievance procedure because the parties' dispute stemmed from a difference in contract interpretation. MERC dismissed the charge to the extent it applied to the supervisory unit and to the unit of sergeants and lieutenants. However, MERC upheld the ALJ' s conclusion that the employer breached its bargaining duty, with respect to the nonsupervisory bargaining unit, by taking steps to enact the amendment to the retirement ordinance while the parties were in mandatory negotiations following fact-finding. MERC issued a cease and desist order.

Full Text

Decision and Order

On October 10, 2013, Administrative Law Judge (ALJ) Doyle O' Connor issued his Decision and Recommended Order in the above matter finding that Respondent, Wayne County (Employer or County), violated its duty to bargain in good faith when it amended a retirement ordinance that provided for a monetary benefit for certain retirees, known as the " thirteenth check." The ALJ found that Respondent violated § 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(e), and recommended that we order the Employer to cease and desist its unlawful actions and to take certain affirmative action. 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 to file its exceptions to the ALJ' s Decision and Recommended Order, Respondent filed exceptions, a brief in support of the exceptions, and a request for oral argument on December 3, 2013. Charging Party requested and was granted an extension of time to respond to Respondent' s exceptions. On January 13, 2014, Charging Party filed its response to the exceptions, a brief in support, and a request for oral argument.

In its exceptions, Respondent argues that the ALJ erred in finding that the thirteenth check was contractually guaranteed deferred compensation for active workers. Respondent further asserts that the ALJ erred in finding that the Inflation Equity Fund, from which the thirteenth check was paid, was an expressly negotiated contractual promise between the parties. Respondent further contends that the 2010 amendment to the Retirement Ordinance (Enrolled Ordinance 2010-514) did not alter employees' contractual eligibility for a thirteenth check. Charging Party argues that Respondent unilaterally changed a mandatory subject of bargaining and repudiated both the collective bargaining agreement and long established past practice. Charging Party further contends that Respondent breached its duty to bargain by amending the Retirement Ordinance while the parties were in negotiations following fact finding without giving Charging Party notice and an opportunity to bargain over the change.

Both parties seek oral argument in this matter. After reviewing Respondent' s exceptions and Charging Party' s response, we find that oral argument would not materially assist us in deciding this case. Therefore, the parties' requests for oral argument are denied.

On reviewing the record carefully and thoroughly, we find that Respondent' s exceptions have some merit.

Factual Summary:

© 2025 Thomson Reuters. No claim to original U.S. Government Works.

This matter is before us as the result of the Union' s charge asserting that Respondent made a unilateral change in terms and conditions of employment when the Wayne County Commission adopted and gave immediate effect to a Retirement Ordinance amendment on September 30, 2010.

Charging Party represents three bargaining units of employees employed by Respondent: the supervisory unit, the nonsupervisory unit, and the sergeants and lieutenants unit. At the time of the actions leading to the charge, the supervisory unit and the sergeants and lieutenants unit each had collective bargaining agreements with Respondent covering the years of 2008 through 2011. The most recent collective bargaining agreement between Respondent and the nonsupervisory unit covered the years 2004 through 2008. The parties' efforts to negotiate a successor agreement for that unit had been unsuccessful, and the matter was submitted to fact finding. The fact finder issued a report on September 17, 2010.

The Wayne County Employees' Retirement System (the Retirement System) is governed by Chapter 141 of the Wayne County Code of Ordinances (the Retirement Ordinance). The Retirement Ordinance is the plan document for purposes of the Internal Revenue Service. The Retirement Ordinance delineates the rules that govern multiple defined benefit plans, a defined contribution plan, a hybrid plan, and the Inflation Equity Reserve Fund (IEF). For the various plans to remain tax-free, the Internal Revenue Service must approve the terms of the plans as detailed in the plan document. The various retirement plans are administered by the Retirement Commission, which was formerly known as the Retirement System Board of Trustees. The Retirement Commission is composed of eight trustees including: four employees who are members of the retirement system; two retired members of the Retirement System; the chairperson of the County Commission; and a representative of the County Executive.

Prior to 1984, Respondent made occasional cost of living adjustments to retiree pension benefits but discontinued the practice in 1984. In 1984, the County' s chief financial officer informed the Retirement System Board of Trustees that the County was not in a position to give cost of living adjustments to retirees and suggested that the Trustees determine a self-sustaining mechanism by which they could pay an amount to retirees that would not require the County to provide additional funds. At that time, the Trustees were responsible for administering two funds for members of the defined benefit retirement plans, the active employee reserve and the retired reserve. It was around that time that the creation of an inflation equity reserve fund was first discussed. During the parties' contract negotiations, there was some discussion of creating a replacement for the cost of living adjustments.

On July 24, 1986, Respondent' s legislative branch, the Wayne County Commission, established, via Ordinance 86-284, the Inflation Equity Reserve Fund (IEF) to provide retirees with some of the income protection previously provided by the cost of living adjustments that were discontinued in 1984. Ordinance 86-284 amended the Retirement Ordinance to authorize the Retirement System Board of Trustees to determine the threshold percentage rate of return, that is, the assumed percentage rate of return, on the investment of the retirement system funds. If the retirement system earned more than the threshold percentage rate of return, the earnings in excess of the threshold rate would then be divided between the IEF and the active employee reserve based on the percentage value of the retiree reserve versus the active employee reserve. The amount that went into the active employee reserve would reduce the amount the County would otherwise be required to pay into the active employee reserve that year. The ordinance provided: " The Board of Trustees may, not more frequently than once a year, distribute to retired members and survivor beneficiaries a percentage of the balance in the reserve for inflation equity." The percentage distributed to retirees could not be less than 20% or more than 50% of the balance of the fund. The distribution became commonly known as the thirteenth check to distinguish it from the monthly pension checks paid to retirees. After the establishment of the IEF, the Retirement System Board of Trustees annually determined the percentage of the IEF' s balance that was to be distributed to retirees and then made the distributions.

Unlike payments made under a defined benefit pension plan, the amount of the thirteenth check is not based on the amount of wages earned during employment. Ordinance 86-284 provided: " The formula for the distribution shall be as from time to time determined by the Board of Trustees and shall take into account the period of retirement and the period of credited service." Based on the retirement ordinance, the Board of Trustees determined that retirees would be assigned two credits for every year of service with the County, up to a maximum of 70, plus two credits for every year the retiree had been retired. The total number

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

of credits assigned to all eligible retirees was then divided into the dollar amount that the Board was going to distribute to get the unit credit value. Each retiree would then receive a check determined by the number of credits he or she had times the unit credit value. There is no evidence that Respondent and Charging Party ever negotiated the amount of a thirteenth check or the formula by which it is calculated. Moreover, retirees eligible for a thirteenth check include both former bargaining unit employees and former employees who were not members of an organized bargaining unit.

The Retirement Ordinance was amended in 1994 by the Wayne County Commission to replace the term " Board of Trustees" with " Retirement Commission." That amendment to the Ordinance was 94-747. It provided in relevant part, " A conflict between the provisions of the retirement ordinance and the provisions of a collective bargaining agreement shall be resolved, to the extent of the conflict, in accordance with the collective bargaining agreement." That language continues to be part of the Retirement Ordinance.

The Ordinance was again amended in 2000 by the Wayne County Commission, with the Union' s agreement. The initial paragraph of the amendment stated: " An ordinance to amend 141 (Retirement Ordinance) of the Wayne County Code to add additional language as result of new labor agreements and correction of errors." The amendment, Ordinance 2000-536, eliminated the requirement that the percentage distributed to retirees be an amount between a minimum of 20% and a maximum of 50% of the balance of the fund. This was done to give the members of the Retirement Commission the ability to somewhat stabilize the distributions, which the 20% minimum and 50% maximum rule would not allow. Charging Party' s witness Richard Johnson testified that the Union did not object to the amendment after hearing the explanation of the Retirement System Director. According to Charging Party' s witness, Hugh McDonald, the Union supported the removal of the 20% and 50% limitations on the distribution from the IEF because the distributions from the fund were moving up and down dramatically and investment yields during that period were rather significant. However, the amendment was never part of any tentative agreement between the parties. The ordinance also contains language making several other amendments to the Retirement Ordinance, including an amendment to limit the recovery of overpayments resulting from system errors.

Pursuant to the Retirement Ordinance as amended in 2000, the amount of the distribution of thirteenth check was discretionary with the Retirement Commission. The ordinance provided in relevant part:

(b) The Retirement Commission shall credit the reserve with the following amount at the end of each fiscal year: a portion of the excess, if any, of the rate of return on the actuarial value of Retirement System defined benefit assets over the rate established for this purpose by the Retirement Commission, multiplied by the actuarial present value of pensions being paid retired members and survivor allowance beneficiaries, both as reported in the annual actuarial valuation. The Retirement Commission shall establish the portion of the excess rate of return used in this calculation.

(c) The Retirement Commission may, not more frequently than once per year, distribute to retired members and survivor beneficiaries a percentage of the balance in the reserve for inflation equity. . . . The percentage of the balance to distribute shall be selected by the Retirement Commission.

Trifold brochures entitled " Wayne County Employees' Retirement System Fact and Information Guide," given to retirees by the Wayne County Retirement System state that in 1986, the Retirement System Board of Trustees finalized a formula for an annual distribution of excess earnings on investments, also referred to as the thirteenth check. The brochures go on to explain that each retiree or beneficiary with a retirement date prior to December 1 of a given year is eligible to receive a share of those earnings in November of the following year. The brochures describe the payment schedule and the means by which the amount of the payment is computed. The brochures also point out that the amount of the thirteenth check will vary each year depending on investment earnings. This language does not appear in any of the parties' collective bargaining agreements. Neither the brochures, Ordinance 86-284, nor any other amendment to the Retirement Ordinance guarantee that a thirteenth check will be paid.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

During the period 1986 through 2009, the IEF made yearly distributions to retirees of varying amounts, with total distributions ranging from a low of just over $4 million, in 1986, to a high of over $17 million in 2001, 2002, and 2003. The average amount of the thirteenth check each year ranged from a low of $677 in 1986 to a high of $2953 in 2003. When the distribution was around $5 million, in 1987 and 1988, the average check was around $800. With the exception of 1990, the IEF' s reserve rose from its initial reserve of around $12 million in 1986 to 128 million at the end of 2000. In most years during that period, the fund increased significantly due to investment returns well in excess of the threshold interest rate. In 2001, the investment return in excess of the threshold rate dropped significantly. After that, the investment returns only exceeded the threshold rate in two of the years between 2002 and 2009. Distributions continued to be paid each year although nothing was added to the IEF in 2002 through 2005 and 2008 through 2009. As a result, the fund balance fell from its high of $128 million in 2000 to $45 million in 2009.

The record reflects efforts to amend the Retirement Ordinance to change the way the IEF was calculated and distributed as early as June 30, 2010. The proposed amendments included efforts to transfer funds from the IEF to defined benefit plan assets. Notice of the initially unsuccessful efforts was provided to County Employees in an August 24, 2010 letter from the Director of the Employer' s Department of Personnel/Human Resources. Subsequently, additional efforts to amend the Retirement Ordinance were made. The proposed amendment that was eventually adopted was protested by the Wayne County Labor Coalition in a September 28, 2010 letter to the Chairman of the Wayne County Commission. The Wayne County Labor Coalition comprises the presidents and representatives of various union locals, including each of the locals representing members of the three AFSCME bargaining units involved in this matter. Copies of that letter were sent to each of the members of the Wayne County Labor Coalition, as well as, all of the County Commissioners and the Wayne County Employees Retirement System Board of Trustees.

On September 30, 2010, the Wayne County Commission adopted Ordinance No. 2010-514 and amended the Retirement Ordinance to limit the reserve of the IEF to $12 million and to prohibit yearly distributions in excess of $5 million. The amount in the IEF in excess of the newly imposed limit, approximately $32 million, was to be debited from the IEF and credited to defined benefit plan assets to cover accrued pension benefits guaranteed to both retirees and active employees. Section 141-32 of Ordinance No. 2010-514 provides:

(a) The retirement commission shall maintain a reserve for inflation equity provided that the fund shall be limited to no more than $12,000,000.

(b) (1) Subject to the limit of (a) above, the Retirement Commission may credit the reserve at the end of each fiscal year with a portion of the excess, if any, of the rate of return on the actuarial value of retirement system defined benefit assets over the rate established for this purpose by the Retirement Commission.

(2) The Retirement Commission shall establish the portion of the reserve fund available for distribution to retired members and survivor beneficiaries; provided that portion shall not exceed $5,000,000.

(3) The calculation of " defined benefit assets" shall exclude the County' s retirement contribution for that fiscal year as set forth in Sec. 141.36 provided the amount in the reserve fund in excess of the limit set forth in (a) above shall be debited from the reserve fund and credited to the Defined Benefit Plan assets and such credit shall offset and/or reduce the County' s defined benefit contribution requirement and thereafter be considered Defined Benefit Plan assets.

(c) The Retirement Commission may restrict the distribution and/or the minimum permanent pension to retired members and survivor beneficiaries having a pension effective date prior to dates selected from time to time by the Retirement Commission.

(d) The formula for the distribution shall be as from time to time determined by the Retirement Commission and shall take into account the period of retirement and period of credited service.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

(e) Nothing in this section shall preclude the County from reducing or eliminating its contribution for a fiscal year in which defined benefit assets exceed defined benefit liabilities.

(f) Within 9 months of first annual distribution from this fund, the CFO shall explore and report to the Wayne County Commission whether it is advantageous to issue bonds as a strategy to fully fund the retirement system and reimburse the Inflation Equity fund of $32 million dollars.

At the time of Respondent' s implementation of Ordinance No. 2010-514, the agreements governing the supervisory unit and the sergeants and lieutenants unit were in effect and fact-finding had just been completed in the effort to arrive at a successor agreement for the non-supervisory unit.

As a result of Respondent' s implementation of Ordinance No. 2010-514, Charging Party filed the unfair labor practice charge in this matter on October 1, 2010 alleging that Respondent violated § 10(1)(e) of PERA by " seeking to cancel the thirteenth check." The charge alleges that the thirteenth check is provided for in at least two provisions of the parties' collective bargaining agreement:

In Article 30.01 of the collective bargaining agreement the provisions of the " Wayne County Employees Retirement System shall control except where changed or amended below." The second place it is referred to in the collective bargaining agreement is at Article 30.05 B 8; " Employees in the Hybrid Retirement Plan shall be eligible for post retirement cost-of-living adjustments in the form of distributions from the Reserve for Inflation Equity."

The charge further contends that during collective bargaining, Respondent proposed that new hires would not be eligible for the thirteenth check, but active employees would continue to be eligible. Charging Party alleges that, at the same time, Respondent sought to have the County Commission amend the Retirement Ordinance to eliminate the thirteenth check and, by so doing, violated its duty to bargain in good faith. The charge does not allege that Charging Party sought to bargain over the distribution of the thirteenth check, its amount, its funding, or the amount of the balance in the IEF. The charge does not allege that the 2010 amendment to the Retirement Ordinance or its implementation occurred as a *fait accompli*.

During the hearing, Charging Party presented documentary evidence indicating that the presidents of each of the AFSCME locals representing the bargaining units involved in this matter had received notice from the Wayne County Labor Coalition of the proposed amendment to the Retirement Ordinance. [1] Charging Party offered no evidence that it was unaware of the proposed amendment or that it demanded bargaining over its enactment or its effects.

Article 30.01 of the 2008-2011 supervisory unit collective bargaining agreement, Article 30.01 of the 2004-2008 non-supervisory unit collective bargaining agreement, and Article 38.01 of the 2008-2011 sergeants and lieutenants' unit collective bargaining agreement each provide, in relevant part:

A. The detailed provisions of the Wayne County Employee' s Retirement System shall control except where changed or amended below.

Each of the three aforementioned collective bargaining agreements further provides:

Employees in the Hybrid Retirement Plan shall be eligible for post retirement cost-of-living adjustments in the form of distributions from the Reserve for Inflation Equity.

Article 38.01 I of the sergeants and lieutenants' unit collective bargaining agreement provides: " All employees hired on or after October 1, 2008 shall not be eligible for a 13th check upon retirement." The addendum to Article 30 of the 2008-2011 supervisory unit collective bargaining agreement provides: " All employees hired on or after the date of execution of the 2008-2011 collective bargaining agreement by the Wayne County Executive shall not be eligible for a 13th check upon retirement."

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

In December 2011, a successor agreement was reached for the non-supervisory unit that became effective on execution by the Wayne County Executive on December 19, 2011 and remained in effect until September 30, 2014. The agreement retained the language of Article 30.01 of the former agreement and added, at Article 30.01 L: " All employees hired on or after December 1, 2010 shall not be eligible for a 13th check upon retirement."

The 2008-2011 collective bargaining agreements for the sergeants and lieutenants' unit and the supervisory unit contain no other language addressing the thirteenth check or the Reserve for Inflation Equity. The same is true of the 2004 -2008 collective bargaining agreement and the successor agreement reached in 2011 for the nonsupervisory unit.

Employees in the defined benefit retirement plans hired before 2008 have been treated as eligible for the thirteenth check, but nothing in the current collective bargaining agreements expressly mentions their eligibility.

The Retirement System continued to make thirteenth check distributions in 2010, 2011 and 2012. Retirement fund earnings were well below the threshold rate in 2010 and 2011 and nothing was added to the IEF in 2010 or 2011.[2] In 2011, the County deducted $32 million from the IEF pursuant to the 2010 amendment of the Retirement Ordinance. After that point, distributions were made to retirees in 2011 and 2012, but they were smaller than they had been before. The remaining fund balance, after the 2012 distribution, was considerably less than the amount with which the fund was initiated in 1986. Lower retirement fund earnings mean that the earnings may not surpass the threshold rate and, therefore, there may not be a transfer into the IEF in the near future. This would result in a significant restriction in the Retirement Commission's ability to pay IEF distributions.

Discussion and Conclusions of Law:

On pages two through six of his Decision and Recommended Order, ALJ O' Connor recounted the details of other cases between these parties that were adjudicated between 2009 and 2010 and indicated that Respondent committed repeated unfair labor practices in the other cases. The parties' actions and the findings in those other matters are not relevant to this matter. Each case before this Commission must be decided on its own facts and the applicable law. This Commission cannot and will not issue an order finding a respondent liable for an unfair labor practice in one case merely because it committed a different unfair labor practice in an earlier separately adjudicated case. See Wayne Co, 26 MPER 22 (2012) rev' d on other grounds *Wayne Co v Michigan AFSCME Council 25*, unpublished opinion per curiam of the Court of Appeals, issued October 9, 2014 (Docket No. 312708); 2014 WL 5066057.

It is evident, however, that Respondent' s motivation for changing the funding of the thirteenth check is its current financial circumstances. While we understand that Respondent has a financial predicament, we must stress that a financial crisis does not excuse a public employer' s duty to bargain under PERA. Wayne Co, 24 MPER 25 (2011); *36th Dist Court,* 21 MPER 19 (2008).

To a considerable degree, Respondent relies on the findings of the Court of Appeals decisions in Wayne Co Retirement System v Wayne Co, 301 Mich App 1 (2013) and contends that the Court' s decision is precedent in this matter. Although, based on the record in this matter, we agree with some of the findings of fact made by the Court of Appeals, the legal issues before us differ from those that were before the Court. The Court of Appeals examined the rights of retirees, not the rights of active employees, and, more importantly, focused on the rights and responsibilities of the County and the Wayne County Retirement System under the Public Employee Retirement System Investment Act (PERSIA). The Court made no findings with respect to PERA or the parties' duty to bargain. As noted, that matter involved Respondent and the Wayne County Retirement System; Charging Party, AFSCME, was not a party to that action and cannot be bound by findings based on the record in that case.

Respondent contends that we have no jurisdiction because this matter involves retirement benefits. We have no jurisdiction over issues regarding retirees' claims with respect to the thirteenth check, since retirees are no longer public employees. See, Allied Chemical & Alkali Workers of America v Pittsburgh Plate Glass Co, 404 US 157 (1971); Butler v Wayne Co, 289 Mich App 664, 672 (2010); West Ottawa Ed Ass ' n v West Ottawa Pub Sch Bd of Ed, 126 Mich App 306, 327-330 (1983), aff' g 1982

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

MERC Lab Op 629; *St Clair Co*, 20 MPER 9 (2007). However, we do have jurisdiction over benefits that have been promised to active employees as a term or condition of employment; those benefits are mandatory subjects of bargaining. Our findings in this matter are limited to review of the effects of the 2010 amendment to the Retirement Ordinance on active employees.

Under § 15(1) of PERA, a public employer has a duty to bargain in good faith over mandatory subjects of bargaining such as wages, hours, and other terms and conditions of employment. See Detroit Police Officers Ass ' n v Detroit, 391 Mich 44, 54-55 (1974). A mandatory subject of bargaining is one that has a significant or material impact on wages, hours and other terms and conditions of employment or settles an aspect of the employer-employee relationship. Detroit v Michigan Council 25, AFSCME, 118 Mich App 211, 215-219 (1982). (Where the powers of the boards of trustees of retirement systems are substantial and have a significant effect upon conditions of employment, the composition of such boards is a mandatory subject of bargaining.) Once a subject has been determined to be a mandatory subject of bargaining, the parties must bargain concerning the subject and neither party may take unilateral action on that subject unless the parties arrive at an impasse in their negotiations. Central Michigan Univ Faculty Ass ' n v Central Michigan Univ, 404 Mich 268, 277 (1978). Michigan Courts and this Commission have long held that pension and retirement provisions are mandatory subjects of bargaining. Macomb Co v AFSCME Council 25, 494 Mich 65, 78 (2013); Detroit Police Officers Ass ' n v Detroit, 391 Mich 44, 63 (1974). See also Fraternal Order of Police v Riverview, 111 Mich App 158, (1981) (The manner by which retirement benefits are computed is also a mandatory subject of bargaining.)

In Detroit Police Officers Ass ' n v Detroit, 391 Mich 44, 63 (1974), the Michigan Supreme Court adopted the rationale of the National Labor Relations Board (NLRB) in Steelworkers (AFL-CIO) (Inland Steel Co),[3] finding that the NLRB case "has firmly established that pension and retirement provisions are mandatory subjects of bargaining under the NLRA." In Inland Steel, the NLRB held:

There is indeed an inseparable nexus between an employee' s current compensation and his future pension benefits. Regardless of the particular economic considerations that may motivate the establishment of a pension system, the fact remains that the employer' s financial contribution thereto, in whole or in part, on behalf of the employees provides a desirable form of insurance annuity which employees could otherwise obtain only by creating a reserve out of their current money wages or by purchasing similar protection on the open market. In substance, therefore, the respondent' s monetary contribution to the pension plan constitutes an economic enhancement of the employee' s money wages. Their actual total current compensation is reflected by both types of items.

Realistically viewed, this type of wage enhancement or increase, no less than any other, becomes an integral part of the entire wage structure, and the character of the employee representative' s interest in it, and the terms of its grant, is no different than in any other case where a change in the wage structure is effected.

More recently, the Michigan Supreme Court reaffirmed its holding that the calculation of retirement benefits is a mandatory subject of collective bargaining. Macomb Co v AFSCME Council 25, 494 Mich 65, 78 (2013).

The thirteenth check is a benefit received by retirees and is a benefit anticipated by active employees of the type that those "employees could otherwise obtain only by creating a reserve out of their current money wages or by purchasing similar protection on the open market."[4] Where retirement benefits have been promised to active employees, those benefits are mandatory subjects of bargaining.

The Allegations of Midterm Contract Repudiation

With the Supervisory Unit and the Sergeants and Lieutenants Unit

As a general rule, a public employer may not lawfully make a unilateral change to a mandatory subject of bargaining during the term of the collective bargaining agreement. St Clair Intermediate Sch Dist v Intermediate Ed Ass 'n, 458 Mich 540, 552-553 (1998); *36th Dist Court*, 21 MPER 19 (2008), aff' d *36th Dist Court v Michigan AFSCME Council*, unpublished opinion per

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

curiam of the Court of Appeals, issued September 29, 2009 (Docket No. 285123); 22 MPER 79. As the Michigan Supreme Court stated in Port Huron Ed Ass ' n v Port Huron Area Sch Dist, 452 Mich 309, 327 (1996): " 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*, 2000 MERC Lab Op 375, 377. See also *Wayne Co Cmty Coll*, 20 MPER 59 (2007). When the matter is covered by the agreement, further mandatory bargaining on that subject is foreclosed because the parties have fulfilled their statutory duty to bargain. Macomb Co v AFSCME Council 25, 494 Mich 65, 79 (2013); *City of Royal Oak*, 23 MPER 107 (2010); *Pontiac Sch Dist,* 2002 MERC Lab Op 20; 15 MPER 33025.

To be covered by the collective bargaining agreement, a topic need not be specifically mentioned. *See* Port Huron Ed Ass ' n v Port Huron Area Sch Dist, 452 Mich 309, 322 n 16 (1996); *citing Dep ' t of* Navy v Fed Labor Relations Authority, 962 F2d 48, 61 (CADC 1992). Where the matter involves an alleged refusal to bargain, and the parties have agreed to a grievance arbitration process, we must first determine whether the collective bargaining agreement covers the subject of the dispute. Macomb Co v AFSCME Council 25, 494 Mich 65, 81 (2013); *Port Huron Ed Ass ' n* at 321; (1996). When determining whether an issue is covered by the contract, the Commission must determine if the contract has provisions that can be reasonably relied on for the action in question. *Port Huron Ed Ass ' n,* at 321-322 citing *St Clair Co Rd Comm,* 1992 MERC Lab Op 533, 538.

While the Commission will not exercise jurisdiction over every contract dispute, we will find an unfair labor practice when the alleged breach of the collective bargaining agreement rises to the level of contract repudiation. City of Detroit, 22 MPER 11 (2009). Repudiation of a contract term that is a mandatory subject of bargaining is a violation of § 10(1)(e) of PERA. Repudiation exists only when both of the following occur: (1) the contract breach is substantial and has a significant impact on the bargaining unit; and (2) no bona fide dispute over interpretation of the contract is involved. City of Detroit, 26 MPER 21 (2012); Gibraltar Sch Dist, 18 MPER 20 (2005). Repudiation warranting Commission involvement can be found only when the actions of a party amount to a rewriting of the contract or a complete disregard for the contract as written. See Gibraltar Sch Dist, 16 MPER 36 (2003).

Repudiation is not found where the alleged deviation from the contract terms merely stems from a bona fide dispute over the interpretation of the contract. City of Detroit, 22 MPER 11 (2009). See also *Plymouth-Canton Cmty Sch*, 1984 MERC Lab Op 894, 897. This Commission has repeatedly held that there is no breach of the duty to bargain under § 10(1)(e) of PERA when the parties have a good faith dispute over contract interpretation. Wayne Co, 19 MPER 61 (2006); *Eastern Michigan Univ*, 17 MPER 72 (2004); City of Pontiac, 26 MPER 30 (2012). A good faith dispute over contract interpretation exists where the provisions of the collective bargaining agreement may reasonably be relied on for the actions taken by the parties. City of Pontiac, 26 MPER 30 (2012); *City of Royal Oak*, 23 MPER 107 (2010).

The Commission will not exercise jurisdiction over a good faith dispute over contract interpretation where the parties' contract provides a mandatory binding procedure for dispute resolution. Port Huron Ed Ass ' n v Port Huron Area Sch Dist, 452 Mich 309, 321; (1996); *Eastern Michigan Univ*, 17 MPER 72 (2004). See e.g. *City of Royal Oak*, 23 MPER 107 (2010). It is only where the parties have not agreed to a mandatory binding procedure for dispute resolution that the Commission would exercise jurisdiction over a bona fide dispute about contract interpretation. *Blue Water Area Transp Comm*, 26 MPER 25 (2012); *Plymouth-Canton Cmty Sch,* 1984 MERC Lab Op 894, 898.

In this case, both the supervisory unit and the sergeants and lieutenants' unit had effective collective bargaining agreements in place. The County' s change to the Retirement Ordinance occurred during the term of those contracts. If the change to the Retirement Ordinance constituted a repudiation of those collective bargaining agreements, that change would be a breach of the duty to bargain. *Wayne Co Cmty Coll*, 20 MPER 59 (2007).

Charging Party relies on two sentences in the collective bargaining agreements to support its claim of repudiation. Those sentences provide:

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

The detailed provisions of the Wayne County Employee' s Retirement System shall control except where changed or amended below.

* * *

Employees in the Hybrid Retirement Plan shall be eligible for post retirement cost-of-living adjustments in the form of distributions from the Reserve for Inflation Equity.

Charging Party contends that the language in the first of these two sentences incorporates by reference the version of the Retirement Ordinance in effect at the time the parties agreed to the collective bargaining agreement. Charging Party asserts that this language means that the Retirement Ordinance controls, except in two circumstances: (1) where the Ordinance is changed, or (2) where the Retirement System is amended by the collective bargaining agreement. Thus, Charging Party contends that the 2010 amendment does not apply until the expiration of the parties' collective bargaining agreement.

Respondent disagrees with Charging Party' s interpretation of the language covering the dispute. The Employer contends that neither the collective bargaining agreements nor past practice prohibit the County from amending the Ordinance as it applies to the thirteenth check. Respondent further asserts that the amendment of the Retirement Ordinance does not affect employee eligibility for the thirteenth check and does not conflict with any of the terms of the collective bargaining agreements. Respondent further contends that the amended Ordinance controls, because nothing in the collective bargaining agreements prohibits amendment of the Ordinance.

It is evident that the collective bargaining agreement covers the parties' dispute over the thirteenth check and Respondent' s ability to amend the Retirement Ordinance. Although there is no evidence that the parties bargained over the terms of the thirteenth check, its establishment, its funding, its amount, or its distribution, it is covered by the collective bargaining agreements. The only issue regarding the thirteenth check that is expressly addressed in the collective bargaining agreements is employee eligibility; the parties left the remaining terms to the Retirement Ordinance, which controls the interpretation of the provisions of the parties' collective bargaining agreements relating to retirement benefits. Inasmuch as the matter is covered by the agreement, the parties have satisfied their duty to bargain. Therefore, further mandatory bargaining on that subject is foreclosed and any possible relief is contractual.

Macomb Co v AFSCME Council 25, 494 Mich 65, 79 (2013); Detroit Police Officers Ass ' n v Detroit, 391 Mich 44, 55 (1974); *City of Royal Oak*, 23 MPER 107 (2010).

Whether we agree with Respondent' s interpretation or Charging Party' s interpretation, it is clear that the parties have a bona fide dispute over contract interpretation. Charging Party' s understanding of the language in the collective bargaining agreement on which it relies to support its claim differs from that of Respondent. It is evident that the parties have a dispute over how language in the collective bargaining agreements is to be interpreted. A dispute as to the meaning of a contract does not constitute repudiation of the contract. Wayne Co, 19 MPER 61 (2006). The Commission will not exercise jurisdiction over a bona fide dispute over contract interpretation where, as in the case of the supervisory unit and the sergeants and lieutenants unit, the parties' contracts provide mandatory binding procedures for dispute resolution. *City of Royal Oak*, 23 MPER 107 (2010).

We note Charging Party' s contention that the parties' past practice amends the contract and covers this matter. As the legislative body responsible for enacting the Retirement Ordinance and creating the Retirement Commission, the Wayne County Commission had the authority to amend the Retirement Ordinance as long as such amendments did not conflict with the County' s contractual obligations. See, United States v Winstar Corp, 518 US 839, 871-76 (1996). To establish that Respondent was prohibited from amending the Retirement Ordinance by past practice, Charging Party must show the parties had a meeting of the minds wherein they both agreed that Respondent would not amend the Retirement Ordinance or otherwise change the funding of the IEF. Macomb Co v AFSCME Council 25, 494 Mich 65, 81-82 (2013). See also, *Wayne Co v Michigan AFSCME Council 25*, unpublished opinion per curiam of the Court of Appeals, issued October 9, 2014 (Docket No. 312708); 2014 WL 5066057.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Charging Party may have had an expectation that the IEF would continue to be well-funded and that no funds would be removed from the IEF except disbursements to retirees. However, that expectation is unfounded. There is no evidence that Respondent made any express or implied promise that would intentionally create such an expectation with respect to the funding of the thirteenth check, which has always been a discretionary benefit.

Inasmuch as Charging Party has not established that the parties' dispute results from anything more than a difference in contract interpretation, we find that, with respect to the supervisory unit and the sergeants and lieutenants unit, this matter is more appropriately resolved through the grievance arbitration procedures established under the parties' collective bargaining agreement. Accordingly, for the foregoing reasons, we find the Charging Party has not established that Respondent repudiated the parties' collective bargaining agreements with respect to the supervisory unit or with respect to the sergeants and lieutenants unit and that the charge should be dismissed to the extent that it applies to those two units.

Allegations of Unilateral Change to the Expired Non-Supervisory Agreement

After the expiration of a labor contract, a public employer has a duty to continue to apply the terms of mandatory subjects of bargaining in the expired contract until the parties reach agreement or impasse. AFSCME Council 25 v Wayne Co, 152 Mich App 87, 93-94; 393 NW2d 889, 892 (1986). Grievance arbitration is an exception to that general rule. See Gibraltar Sch Dist v Gibraltar MESPA-Transp, 443 Mich 326, 337, (1993); *Lake Co & Lake Co Sheriff*, 22 MPER 59 (2009). There is no statutory duty to arbitrate after the expiration of the collective bargaining agreement. Gibraltar Sch Dist at 345-346. Thus, the right to grievance arbitration after the expiration of the collective bargaining agreement only survives with respect to contract rights that accrued or vested during the contract' s term. Ottawa Co v Jaklinski, 423 Mich 1, 23-25 (1985).

The relevant collective bargaining agreement between Respondent and the non-supervisory unit expired in 2008. The parties' agreed-upon grievance procedure is contained in Article 10 of that contract and specifically reserves the grievance and arbitration process to differences that arose between the parties during the term of the agreement. Moreover, the thirteenth check is a benefit that was crafted by Respondent to replace a discretionary cost-of-living increase that the County occasionally paid to retirees. It was created by the Wayne County Commission in its enactment of Retirement Ordinance 86-284 and its payment is entirely within the discretion of the Retirement Commission. Therefore, the active employees' " right" to a thirteenth check, if any, would not accrue until those employees have been retired for more than a year and the Retirement Commission has exercised its discretion to make a distribution from the IEF. Thus, active employees had no vested or accrued right to the thirteenth check during the term of the expired contract. Inasmuch as the parties' collective bargaining agreement expired, and active employees had no accrued or vested right to the thirteenth check during the term of the contract, the arbitration provisions of the expired contract are not binding with respect to this matter.

This Commission has the authority to interpret the terms of a collective bargaining agreement where necessary to determine whether a party has breached its statutory obligations. *City of Royal Oak*, 23 MPER 107 (2010); *Univ of Michigan,* 1971 MERC Lab Op 994, 996. Therefore, despite the fact that this matter revolves around a good faith dispute over contract interpretation, since the parties have no binding arbitration provisions, we must examine Respondent' s actions with respect to the nonsupervisory unit to determine whether Respondent breached its statutory duty to bargain. *Plymouth-Canton Cmty Sch,* 1984 MERC Lab Op 894, 898. See also City of Detroit, 26 MPER 21 (2012).

We have held that even in the event of a good faith impasse, a party may not unilaterally impose changes in mandatory subjects of bargaining after fact finding has been requested. Wayne Co, 24 MPER 25 (2011); *Wayne Co,* 1984 MERC Lab Op 1142 and 1985 MERC Lab Op 244, aff' d AFSCME Council 25 v Wayne Co, 152 Mich App 87 (1986). After fact finding, parties must make a serious effort to reconcile their differences. *Oakland Cmty Coll,* 2001 MERC Lab Op 273, 277; 15 MPER 33006 (2001). In Wayne Co, 1985 MERC Lab Op 244, 250-251, we established a rule that parties must bargain for a reasonable time over the substance of a fact finder' s report. We held that in most cases, a reasonable time is 60 days after the issuance of the report, provided the parties are bargaining in good faith.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Here, the parties were unable to negotiate a successor agreement before the contract expired and the matter was submitted to fact finding. The fact finder' s report was issued on September 17, 2010. The County amended the Retirement Ordinance less than two weeks after the fact finder' s report was issued. At that point, the parties' duty to bargain over mandatory subjects continued. If the amendment to the Retirement Ordinance was contrary to unambiguous language in the collective bargaining agreement such that it constituted a substantial change in terms and conditions of employment, Respondent would have had a duty to bargain over the change. In that event, implementation of a change in a mandatory subject of bargaining during the period shortly after the fact finder' s report was issued would be an unfair labor practice. See *Orion Twp (Dep ' t of Public Works),* 18 MPER 72 (2005).

During the parties' post-fact finding mandatory negotiations period, Respondent had a duty to give notice and an opportunity to bargain to the Union before taking action that would change a mandatory subject of bargaining. See *City of Detroit (Police Dep ' t)*, 18 MPER 53 (2005). The Commission has determined that notification must be given to the collective bargaining representative of potential changes in mandatory subjects of bargaining before the employer makes such changes. *City of Detroit, Board of Fire Commissioners*, 1970 MERC Lab Op 953, 957; City of Detroit, 1971 MERC Lab Op 211, 216. The Commission has also determined that the change in working conditions occurs when a governing body adopts the change. *City of Westland*, 1977 MERC Lab Op 230; *Ann Arbor Pub Sch*, 1980 MERC Lab Op 1039 (no exceptions).

Although amending the Retirement Ordinance is not necessarily a mandatory subject of bargaining, where the amendment to the Retirement Ordinance affects a mandatory subject of bargaining, such as the thirteenth check, the duty to bargain extends to the amendment to the Retirement Ordinance. Inasmuch as the thirteenth check is covered by the parties' collective bargaining agreement, Respondent had a duty to inform Charging Party of changes it planned to make to the Retirement Ordinance that would affect the calculation of the thirteenth check. See, Macomb Co v AFSCME Council 25, 494 Mich 65, 78 (2013). See also, Fraternal Order of Police v Riverview, 111 Mich App 158, (1981). The Employer' s failure to give notice to the Union of its intention to change the funding for the thirteenth check by amending the Retirement Ordinance during the post-fact finding mandatory negotiations period is a breach of the Employer' s duty to bargain.

The essential contract language in resolving this matter is contained in the following sentence:

The detailed provisions of the Wayne County Employee' s Retirement System shall control except where changed or amended below.

As indicated above, the parties dispute the meaning and effect of that sentence. Charging Party would have us read that sentence as nullifying the effect of any amendment to the Retirement Ordinance made during the term of the collective bargaining agreement until the agreement expires. With respect to the nonsupervisory bargaining unit, that argument has no merit since the collective bargaining agreement had already expired when the Retirement Ordinance was amended. Therefore, if the disputed sentence means that amendments to the Retirement Ordinance only take effect after the expiration of the collective bargaining agreement, the 2010 amendment effectively amended the Retirement Ordinance and is binding on the parties.

As the retirement plan document for Internal Revenue Service purposes, the Retirement Ordinance controls the interpretation of provisions of the collective bargaining agreements that apply to retirement benefits. Therefore, the language at issue could easily be read to mean that the detailed provisions of the Retirement Ordinance control unless the Ordinance is changed or amended in a way that is inconsistent with the collective bargaining agreement. That interpretation is supported by Section 141-2 of the Retirement Ordinance, which was added to the Ordinance in 1994 and provides:

A conflict between the provisions of the retirement chapter and the provisions of a collective bargaining agreement shall be resolved, to the extent of the conflict, in accordance with the collective bargaining agreement.

Nothing in the expired collective bargaining agreement expressly prohibits Respondent from altering the language of the Retirement Ordinance with respect to the thirteenth check or the IEF. The expired collective bargaining agreement contains no

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

language that promises employees or retirees will be paid a thirteenth check or that sets an amount or range of amounts for the thirteenth check. With the exception of providing that employees in the hybrid plan are eligible for the thirteenth check and that certain employees hired after 2008 are not eligible for the thirteenth check, the collective bargaining agreements do not mention the thirteenth check. Significantly, the collective bargaining agreements do not mention that employees in the defined benefit plans are eligible for the thirteenth check, although it appears from the record that the IEF and the thirteenth check were designed for the benefit of those employees. All other details regarding the thirteenth check are contained in the Retirement Ordinance. This supports Respondent' s assertion that it had the right to amend the Retirement Ordinance provided the amendment did not conflict with the express provisions of the collective bargaining agreement. Nevertheless, during the mandatory negotiations period, Respondent had a duty to give Charging Party notice and an opportunity to bargain over the amendment to the Retirement Ordinance and its effects.

Where an employer has a duty to bargain, the employer is not required to initiate bargaining. An employer' s duty to bargain under PERA is conditioned upon there being a demand for bargaining by the union. SEIU Local 586 v Village of Union City, 135 Mich App 553, 557 (1984). See also *Decatur Pub Sch*, 27 MPER 41 (2014); *City of Dearborn*, 20 MPER 110 (2007). We have previously held that " the obligation to request bargaining is waived if such a request would have been either futile or the bargaining subject change was a fact accomplished when notification was received." *Intermediate Ed Ass ' n/Michigan Ed Ass ' n*, 1993 MERC Lab Op 101, 106.

Since the 1986 enactment of the amendment to the Retirement Ordinance establishing the IEF and the procedures for funding and distribution of the thirteenth check, the Retirement Ordinance has been amended several times. Although there was some evidence that the Union agreed with at least one of the amendments, there is insufficient evidence to find that the amendment establishing the IEF or any of the subsequent amendments were ever negotiated by the parties. Indeed, it is apparent that until the 2010 amendment was enacted, the Union deferred to the Wayne County Commission' s right to change the Ordinance. Before it was enacted, the Union objected to the 2010 amendment to the Retirement Ordinance through its membership in the Wayne County Labor Coalition. Clearly, Charging Party was aware of the pending amendment and Respondent' s efforts to enact it. However, there is no evidence that the Union ever sought to negotiate with the County over the terms of the amendment or its effect either before or after its enactment. Although Charging Party has argued that the amendment to the Retirement Ordinance was presented as a *fait accompli*, the Union failed to offer evidence to support that argument.

There is no evidence that the parties ever bargained over the funding of the thirteenth check, its amount, or the terms of its distribution. The only issue for which there is evidence of bargaining is employee eligibility for the thirteenth check, an issue that was not altered by the 2010 amendment to the Retirement Ordinance. Although the concept of the thirteenth check is a mandatory subject of bargaining, it is evident that the parties chose not to bargain over its terms. Respondent never promised to pay the thirteenth check to retirees; it merely established a discretionary benefit in its Retirement Ordinance to help retirees on fixed incomes endure the effects of inflation.

When the parties reached agreement on a successor collective bargaining agreement several weeks after the Retirement Ordinance was amended, the successor agreement eliminated the thirteenth check for newly hired employees but made no changes regarding the funding or distribution of the thirteenth check. As with the predecessor agreement, the thirteenth check was covered by the successor agreement, but all details, with the exception of employee eligibility, were left to the Retirement Ordinance. Charging Party has offered no evidence indicating that it demanded bargaining over the funding or distribution of the thirteenth check or over the implementation or effect of the amendment. Although the Employer had a duty to give the Union notice of the amendment to the Retirement Ordinance before its enactment, the Employer' s failure did not entitle Charging Party to remain idle after it learned of the amendment. Inasmuch as Charging Party had notice of the proposed amendment before it passed and there were at least three months between the passage of the amendment and the removal of $32 million from the IEF in 2011, the evidence in the record does not support a contention that a request to bargain over the amendment or its effects would have been futile.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

We note Charging Party' s argument that the thirteenth check and the method for funding it are established by past practice. However, the fact that payments have been made every year since 1986 does not establish a past practice that amends the collective bargaining agreement in a way that gives employees a right to receive a thirteenth check after their retirement. Macomb Co v AFSCME Council 25, 494 Mich 65, 81-82 (2013); *Wayne Co v Michigan AFSCME Council 25*, unpublished opinion per curiam of the Court of Appeals, issued October 9, 2014 (Docket No. 312708), 2014 WL 5066057. See also *Southfield Pub Sch,* 2002 MERC Lab Op 53, (the employer' s sixteen year practice of routinely granting all requests for unpaid leaves of absence was not sufficient to amend the parties' contract to require the granting of all unpaid leave requests because the practice conflicted with contract language that gave the employer the discretion to grant or deny requests for such leaves). Payment of the thirteenth check is and, always has been, discretionary. The fact that these discretionary payments have been made for almost thirty years does not change their discretionary nature or cause those payments to become an entitlement.

The thirteenth check was designed to replace a discretionary and infrequent COLA payment to retirees. From its inception, the thirteenth check has always been discretionary with the Retirement Commission. The Retirement Commission sets the threshold rate that determines whether earnings are high enough to go into the IEF. The Retirement Commission has always had the discretion to decide whether a distribution should be made from the IEF in any given year. Between 2000 and 2010, the Retirement Commission also had the discretion to determine the amount of any distribution. The employees were never promised that they would receive a thirteenth check after retirement, or that any thirteenth check that the Retirement Commission elected to disperse to them would be of any certain amount or within a particular range of amounts. The removal of the $32 million from the IEF will undoubtedly reduce the amount of any distributions the Retirement Commission decides to make. However, a set amount was never promised and it has always been clear from the wording of the Retirement Ordinance that the amount of the funds in the IEF and the amount of the distributions are dependent on retirement fund earnings. Employees' expectations of receipt of a thirteenth check after retirement continue to be dependent on several factors: their eligibility under the collective bargaining agreement; the Retirement Commission' s determination of the threshold percentage rate, the presence of Retirement Fund earnings in excess of the threshold rate; and the Retirement Commission' s discretionary decisions as to whether a distribution should be made and the amount of any such distribution. These are the same factors on which employee expectations of receipt of a thirteenth check depended prior to the adoption of Ordinance No. 2010-514.

In sum, the 2010 amendment to the Retirement Ordinance did not alter or conflict with any of the terms of the expired collective bargaining agreement. The amendment does not change any of the terms in the collective bargaining agreement and, in particular, does not change the eligibility of any active employee to receive a thirteenth check in the event that the Retirement Commission determines that one should be issued after current employees retire. The amendment changed the amount that could be held in the IEF and thereby changed the funding for the thirteenth check. The Employer had a duty to inform the Union of its plans to make that change while the parties were in negotiations following the issuance of the fact finder' s report. If, the Union had demanded bargaining during that period, it is possible that they may have agreed on something that would have changed the effect of the amendment. However, despite knowing of the amendment before its enactment, the Union chose not to demand bargaining over the enactment of the amendment or its effect. Inasmuch as the parties reached a successor agreement that did not change the effect of the 2010 amendment to the Retirement Ordinance, and the Union was aware of the amendment before it was enacted, we question whether prior notice of the amendment by the Employer to the Union would have led to a different result. Although we find that Respondent breached its duty to bargain with respect to the nonsupervisory bargaining unit by amending the Retirement Ordinance during fact finding without giving prior notice to Charging Party, in light of the discretionary nature of the thirteenth check, and Charging Party' s failure to demand bargaining over the amendment to the Retirement Ordinance or its effects, we will not issue a bargaining order in this matter.

We have considered all other arguments submitted by the parties and conclude that they would not change the result in this case. After a careful and thorough review of the record, we find that the ALJ' s Decision and Recommended Order is reversed in part and affirmed in part. Charging Party failed to establish that Respondent repudiated the collective bargaining agreements with the supervisory unit and the sergeants and lieutenants unit in violation of § 10(1)(e) of PERA. The charge is dismissed to the extent it applies to the supervisory unit and the sergeants and lieutenants unit. The ALJ' s decision is affirmed to the extent that

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

it finds Respondent breached its duty to bargain by taking steps to enact the amendment to the Retirement Ordinance while the parties were in mandatory negotiations following fact finding. We, therefore, issue the following order:

Order

The charge in this case is hereby dismissed with respect to the supervisory unit and the sergeants and lieutenants unit. The Employer breached its duty to bargain in violation of § 10(1)(e) with respect to the nonsupervisory unit. Therefore, Wayne County, its officers, agents, and representatives are hereby ordered to:

1. Cease and desist from failing to give notice and an opportunity to bargain to Charging Party, the American Federation of State, County and Municipal Employees, before making unilateral changes to mandatory subjects of bargaining during fact-finding proceedings or during mandatory bargaining subsequent to those proceedings;

2. Post the attached notice to employees in a conspicuous place at each County worksite and post it prominently on any website maintained by the County for employee access for a period of thirty consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION [5]

Decision and Recommended Order of Administrative Law Judge

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201, et seq, this case was assigned to Doyle O' Connor, Administrative Law Judge with the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (MERC).

The Unfair Labor Practice Charge and Proceedings:

The original Charge in this long-running dispute was filed in January of 2010, by Michigan AFSCME Council 25 (the Union), alleging that Wayne County (the Employer) violated the Act by, in the midst of the bargaining process, unilaterally imposing a reduction in the length of the normal work week from five days per week to four days, with a corresponding reduction in pay, and by repudiating the pre-existing normal layoff and recall-by-seniority mechanisms. (Case No. C10 A-024). This change was referred to by the Employer as " Friday furloughs" , which were imposed on a significant portion of the AFSCME-represented employees. The unilateral " Friday furloughs" were described by the Employer as intended to accomplish the Employer' s earlier stated goal of securing a 10% reduction in its labor costs.

The facts underlying the original Charge, and much of the ensuing disputes, as well as the proffered Employer defenses, were all a nearly identical replay of a prior dispute between these very same parties, under indistinguishable circumstances, involving unilateral efforts by the Employer to reduce wages or benefits during an economic downturn, which was addressed, and resolved adverse to the Employer, in Wayne County, 1984 MERC Lab Op 1142; aff' d, 152 Mich App 87 (1986). Despite, or perhaps because of, the fact that the earlier Wayne County, supra, decision was both *res judicata* as to these parties and is regardless the controlling law on the questions presented herein, this litigation has been extraordinarily protracted, convoluted, and bitter. There were additional claims addressed in parallel cases both before me and before other ALJs, in which Wayne County was uniformly found to have repeatedly acted unlawfully and which will be addressed below.

The present Charge, as more fully discussed below, was originally filed as an amendment to the original Charge, but the allegations were severed and given a new case number. The present Charge arose from a pension ordinance amendment proposed by the County Executive and adopted by the County Commission, which is the County's legislative branch, in September of 2010. The Charge is brought on behalf of three separate AFSCME bargaining units which, as more fully discussed below, present partially differing claims: the supervisory unit; the sergeants and lieutenants unit; and the non-supervisory unit. The

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

new pension ordinance mandated a significant reduction in pension benefits, provided by the County Pension Board through the Inflation Equity Fund, for those already retired and for those who would retire in the future, and it shifted significant resources away from negotiated employee deferred compensation and to the Employer's coffers. The matter was tried over three days, with approximately 9,000 pages of exhibits introduced [6], and with the Employer resting without putting on any testimony following the close of the Union's case in chief. [7] Both parties filed timely post-hearing briefs and then both parties filed supplemental briefs on narrow questions related to the potential impact of several subsequently decided appellate cases.

In February 2010, I issued a decision in favor of the Union on the original Charge, Case No. C10 A-024, related to the " Friday furloughs" and recommended an order directing the Employer to restore the workweek, cease the unilateral imposition of changes in conditions of employment, and compensate the directly affected employees. In sum, in the earlier Decision, I found the Employer' s conduct, and its proffered defenses, legally and factually indistinguishable from the conduct of the same Employer in unilaterally imposing such Friday furloughs during bargaining, as to the same workforce, which had been held unlawful in 1984. See, Wayne County, 1984 MERC Lab Op 1142. I severed the remaining claims so that the County could immediately pursue exceptions with MERC, in the ultimately vain hope that clarity regarding the respective obligations of the parties would foster compliance. That recommended decision on summary disposition and the recommended relief were adopted by the Commission in March 2011. See, Wayne County, 24 MPER 25 (2011). The litigation continued unabated.

The Amended Charges

As events and acrimony between the parties progressed, the Charge was repeatedly amended. A Second Amended Charge added the allegation that the Employer had, in February 2010, made improper late-stage and retaliatory bargaining demands focused on the Employer' s effort to alter the length of the work week. The Third Amended Charge asserted that the Employer had, following the decision holding the Friday furloughs unlawful, announced in May 2010 that it would regardless recoup a similar cost savings by unilaterally imposing " Holiday furloughs" on many unit employees. These " Holiday furloughs" as announced would take away the pre-existing paid holidays for Memorial Day, the 4th of July, and Labor Day, and additionally convert those former short holiday weeks into essentially week-long unpaid layoffs for much of the bargaining unit. Like the earlier " Friday furloughs" , the new " Holiday furloughs" were imposed irrespective of the pre-existing contractual obligation to layoff and recall by seniority.

The announced " Holiday furloughs" were forestalled when the negotiators for the parties reached a tentative agreement on a successor collective bargaining agreement. That tentative agreement was not ratified, thereby returning the parties to the obligation to continue negotiations. The Fourth Amended Charge added claims related to the re-instituted " Holiday furloughs" which were, because of the passage of time, applied only to the July 4th and Labor Day holiday weeks. This time, the Employer added the more draconian threat to additionally deprive all employees subject to the holiday furloughs of health insurance coverage for themselves and their families for the entire months of July and September. The health insurance cut-off was premised on the fact that the Employer chose to schedule the " Holiday furloughs" to begin prior to the first day of the month, with the apparent sole purpose of the scheduling being to facilitate the Employer' s unprecedented claim that it need not provide health insurance to the families of any employee not on the payroll on the first day of the month. The " holiday furloughs" dispute was addressed, a violation found, and remedies recommended, in a decision issued in November 2012, in Case No. C10 A-024-A.

A Fifth Amended Charge was filed, addressing several disputes, including over the County's unilateral decision, in September of 2010 to severely curtail, if not entirely eliminate, the disbursal of so-called "13th checks" to current and future retired employees. That dispute was not resolved in the earlier Decision on the original Charge, and by concurrence of the parties, it was spun off as a separate case under Case No. C10 J-266 and, at the behest of the parties, was held in abeyance for a protracted period. [8]

On September 17, 2010, the MERC appointed fact-finder issued his report based on extensive proofs by both parties focused on the Employer' s financial status and ability to pay. He recommended that employees accept a 5% pay cut while largely

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

recommending the maintenance of other existing conditions of employment. The fact-finding process is a statutorily mandated system designed to attempt to narrow the differences between parties with the goal of facilitating voluntary resolution of labor disputes. Either side was free to accept or reject the fact-finder' s recommendation. Here, the Union accepted the recommended 5% pay cut; however, the Employer rejected that recommendation.

On September 30, 2010, the County Commission adopted an ordinance which purported to change the existing scheme of benefits promised to current and former retirees, in particular those benefits which had previously been disbursed through what was known as the " Inflation Equity Fund" (the IEF). As more fully discussed below, the new ordinance, which was then unilaterally implemented by the County, functioned to immediately transfer significant assets from the pension plan, amounting to approximately $32 million, for the benefit of the Employer. It thereby effectively precluded the disbursal by the pension board of previously negotiated benefits which had been promised to current and future retirees. The ordinance set in place new rules which in essence gutted the negotiated deferred compensation plan.

Subsequent to the fact-finding process, the parties continued to meet, as is required by law. In December 2010, the Employer asserted the existence of an impasse in bargaining and announced further unilateral changes in conditions of employment. A Sixth Amended Charge asserted that the new unilateral changes were unlawful as the parties were not at a good faith impasse and that the changes imposed went beyond the proposals made by the Employer at the bargaining table. The Union challenged a 20% base pay cut and a claimed new right of the Employer to sub-contract unit work without limitation. Also, in December of 2010, the County asserted the right to unilaterally dispense with the prior commitment to a 40-hour work week, thereby, in essence retroactively excusing its previously litigated unilateral changes in the work week. The 20% pay cut dispute was likewise addressed, a violation found, and remedies recommended, in the decision issued in November 2012 in Case No. C10 A-024-A.

In summary, the Union' s multiple amended Charges alleged that the Employer had failed to bargain in good faith throughout, contrary to its obligations under Section 10(1)(e) of PERA; that the unilateral implementation of the myriad changes in conditions of employment were separate violations of the Section 10(1)(e) duty to bargain; and that certain imposed changes were retaliatory and thereby contrary to Section 10(1)(a) of the Act.

As more fully discussed in the November 2012 decision, the Employer asserted that the unilateral substantive changes in conditions of employment were somehow within its ordinary management rights. The County further asserted that its demands for economic concessions, and unilateral implementation of those demands, were warranted by economic exigencies. Additionally, the County asserted that the decisions by its Executive branch on how to implement the County Commission' s legislative determination to cut budgeted gross salary costs were unreviewable under PERA. Although that claim of immunity from review was earlier rejected, it was re-asserted as the main defense in the present case regarding the County Commission' s legislative decision to raid the IEF, albeit at the behest of the County Executive, to eliminate an existing negotiated deferred compensation benefit.

The Collateral Unfair Labor Practice Charges

During the pendency of this case, the parties litigated multiple other claims, arising from differing factual scenarios, both before me and before each of the other MAHS ALJs assigned to hear disputes under PERA. As will be more fully addressed below, it was established in each of the multiple cases that during the same round of bargaining, that Wayne County acted unlawfully including by: refusing to provide requested information; withholding health care benefits from disabled employees in 2009; withholding a scheduled pay increase in July 2009; withholding a separate scheduled pay increase in July 2010 [9]; and of course, unilaterally imposing the Friday and later holiday furloughs in 2010. The County was additionally found to have brought a meritless ULP Charge against the Union in an improper effort to block a collateral contract enforcement action in the Wayne County Circuit Court.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Findings of Fact:

The Background Facts [10]

Despite the protracted and acrimonious litigation over this multi-faceted dispute, the core facts were not legitimately in dispute. In truth, the dispute was factually straightforward. Like many, if not most, public employers these days, Wayne County is indisputably suffering from a decrease in tax revenues owing to both the economic downturn and tax policies. Unlike most public employers, Wayne County chose to repeatedly engage in self-help in the form of unilateral changes to well established conditions of employment as a way of attempting to address its own prior, and ongoing, budgetary and policy choices. While the Union challenged many of those unilateral Employer efforts at self-help as having been unlawful, it refrained from engaging in the corollary self-help of a work stoppage, presumably based at least in part on the fact that the PERA hearing process was designed to provide remedies in lieu of such disruptive self-help. The obligations and remedies under PERA were carefully calibrated for the very purpose of avoiding the tit-for-tat resort to self-help that would occur in an unregulated environment.

The parties' collective bargaining relationship goes back many decades. The most recent contracts expired and the disputes addressed in this, and in the many collateral decisions, arise from the Union' s challenges to certain unilateral actions taken by the Employer during the bargaining process to secure a successor agreement.

In June 2009, the Employer withheld contractually mandated 2% pay increases owed to certain employees, called annual service adjustments, which was held on summary disposition to be unlawful by ALJ Peltz in April 2010 and later affirmed by the Commission. See, Wayne County, 24 MPER 12 (2011).

In September 2009, formal fact-finding proceedings were initiated with MERC. Such proceedings are a creature of statute and are a part of the bargaining process. Fact-finding is a mechanism designed to assist parties in fulfilling their mutual obligations to bargain in good faith, and those proceedings are intended to deter disruptions of public services as a result of unresolved labor disputes. The parties were each well aware that it is unlawful for an employer to make unilateral changes in conditions of employment during the pendency of such fact-finding proceedings, as was first established in Wayne County (AFSCME), 1984 MERC Lab Op 1142; *aff' d*, 152 Mich App 87 (1986).

In October 2009, the County acted to withhold health care benefits from certain disabled County employees. That conduct resulted in another finding by ALJ Peltz in 2011 that the County had acted unlawfully in unilaterally changing employment conditions during bargaining, which was most recently affirmed by the Commission in Wayne County, 26 MPER 22 (2012). [11]

As bargaining continued, in January 2010, the County unilaterally imposed the unlawful " Friday furloughs" on much of the AFSCME unit. The ALJ' s Recommended Decision and Order on summary disposition regarding the Friday furloughs was issued in February 2010. Later in February 2010, the County interjected, late in the bargaining process, demands essentially designed to eliminate the contractual work week obligations which had previously been freely entered into and which had been the focus of the findings of unlawful conduct by the County regarding both the 1983 and the 2010 " Friday furloughs" .

In May 2010, the County announced its intent to unilaterally impose " Holiday furloughs" that were expressly designed to make up for the lost financial concessions the County had sought to unilaterally impose through the unlawful " Friday furloughs" . Also in May 2010, the negotiators for the parties reached a tentative agreement (TA) on a new collective bargaining agreement. After the TA was rejected, the County renewed its announced intent to impose " Holiday furloughs" with the additional announced intent to add to the layoffs a cut-off of health insurance for the entire month for any employee, and their family, who were directly impacted by the " Holiday furloughs" . The threatened health insurance cutoff was unprecedented, having not occurred in either the 1983 or 2010 unilateral " Friday furloughs" . The Employer human resources and labor relations staff witnesses each denied being the one who actually made the decision to implement the draconian health insurance cutoff.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

In June 2010, the County carried through with its announced intent and laid off a significant portion of the workforce, approximately 560 employees out of the unit of approximately 1500 workers, beginning the week before the 4th of July holiday week. The change in layoff date was designed to have the effected employees off the payroll on the first day of the month in order to bolster the County' s claimed entitlement to cut such employees off from health insurance for the entire month. The manipulation of the layoff dates to support the cutoff of health insurance was itself unprecedented. The purpose and function of the enhanced " Holiday furloughs" , with health insurance cutoff, was to punitively increase the cost to the AFSCME unit members of having rejected the concessions in the May tentative agreement.

As with the 1983 and 2010 " Friday furloughs" , the County ignored the long existent agreement, which it had repeatedly renewed even after losing the 1983 litigation, to use the common method of laying off the least senior employees in order of seniority. Instead the County unilaterally changed to a method it asserted was designed to " spread the pain" by laying off a large section of the workforce for several brief periods. Only the AFSCME non-supervisory unit among the County' s multiple bargaining units, faced the " Holiday layoffs" and the County witnesses, including its director of human resources Tim Taylor and its chief negotiator Mark Dukes, acknowledged that the laying off of the members of one bargaining unit, while no other County employees were laid off, through such " Friday furloughs" or " Holiday furloughs" , was an unprecedented move.

Also in June 2010, the County again unilaterally withheld a 2% pay increase owed certain employees, despite the fact that ALJ Peltz had held in April of 2010 that the indistinguishable 2009 unilateral refusal by the County to pay a scheduled pay increase was unlawful. [12] Even though the parties were then actively engaged in bargaining and in the fact-finding process, the County would later implausibly defend the June 2010 withholding of a scheduled pay increase based on its assertion that the parties *subsequently* reached an impasse in bargaining in December of 2010.

In August 2010, the County unilaterally imposed on a large portion of the workforce a " Holiday furlough" , with that layoff of approximately 520 employees timed to precede the Labor Day holiday to again bolster the County' s claimed right to withhold health insurance from the affected workers and their families for the month of September. In a particularly perverse and punitive twist, the County laid off workers whose jobs were fully funded by grants from other entities, even if that meant returning grant funds as unspent. The layoff of grant funded employees was evidence that the layoffs in general were punitive rather than driven by budget exigencies, as those layoffs brought no benefit whatsoever to the County' s general fund.

On September 17, 2010, the MERC appointed neutral fact-finder Paul E. Glendon issued his report on the bargaining issues facing the parties. [13] Glendon's report recommended a 5% employee pay cut, while for the most part leaving in place the remainder of the status quo of the parties' relationship. The Union accepted the fact-finder' s recommended financial package, including the 5% across the board pay cut, which the County rejected. Also in September, the County announced that it intended to retroactively cut off family health insurance coverage for many of the unit employees. A circuit court injunction sought by the Union blocked the threatened health insurance cutoff and the Union and the Employer later entered into a process by which most, if not all, employee health care claims were reimbursed. In the factfinding hearings, the formal proposal by the County was to exclude all new hires, and only new hires, from the provisions of the Inflation Equity Fund. Instead of utilizing the fact-finders report as an opportunity to re-examine its prior bargaining posture and to return to the table with the Union, the County treated the entire fact-finding process as a mere inconvenient hurdle to be gotten past en route to its intended unilateral implementation of changes to conditions of employment.

The Dispute Over the Inflation Equity Fund

On September 30, 2010, only two weeks after the issuance of the fact-finder' s Report, and during the minimum 60-day post-factfinding mandatory negotiation period, and before any substantive bargaining could have taken place in response to the fact-finder' s recommendations, the County Commission took up a pension ordinance amendment which had earlier been proposed by County Executive Robert Ficano in June of 2010 and introduced by a County Commissioner in August 2010. The ordinance, which was passed and immediately put into effect, had a fundamental impact on pre-existing conditions of employment. It is

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

undisputed that the unilateral implementation of the new ordinance began with the transfer of approximately $32 million to the Employer from funds intended for distribution as part of employee deferred compensation. The new ordinance specifically took away from the otherwise independent pension board authority to maintain more than $12 million dollars in the long existent " Inflation Equity Fund" (the IEF); prohibited disbursals of more than $5 million per year from the IEF; and allowed the Employer to take for its own benefit the approximately $32 million then in the IEF in excess of the newly imposed cap of $12 million. This huge transfer of value from employee compensation and for the Employer' s benefit had not been negotiated and occurred despite, as to the non-supervisory unit, the fact that the parties were still in negotiations; still in the fact-finding process; and despite the fact that even the Employer would not assert that the parties were at impasse in bargaining until months later. The ordinance change was also applied as to the supervisory unit and the sergeants and lieutenants unit even though they had valid collective bargaining agreements in place at the time.

The facts regarding the origin of the IEF were never genuinely placed in dispute. Under the pre-existing County Charter, and pursuant to the collective bargaining agreements, there existed an independent pension board, comprised of eight members. Six members represent beneficiary interests, four of whom were elected from amongst active employees, with two elected from retired employees. The County Executive and the chair of the County Commission also sit on the pension board. Over the past several decades, the pension board implemented and administered such benefits as were negotiated for Union members or were granted by the Employer to non-Union employees. The new ordinance took effective authority over the now-substantially depleted IEF away from the pension board.

The principle witness regarding the IEF, and the history of the so-called 13th checks disbursed from the fund, was Ron Yee, who was peculiarly situated to have broad knowledge of the origins of the IEF, its historic handling, and the impact of the change. Yee was initially in the 1980s an AFSCME officer, was then on the AFSCME negotiation team, and was on the pension board as an elected trustee; Yee then switched to management, rising to be the County' s Chief Labor Negotiator, later becoming Deputy Director and later still the Director of the Retirement System. Yee was intimately familiar with the handling of the issue, from all sides, over a more than 25 year period, ending with his retirement as director of the retirement system in 2010, just as the disputed ordinance change was being implemented. I fully credited Yee' s testimony as it was forthright, very direct, and while extensively knowledgeable. Yee freely acknowledged when he did not know something, or was not sure of specifics, or the like.

Significantly, the County rested its proofs without putting on any testimonial or documentary evidence challenging the Yee testimony. Further, Yee' s testimony was supported by the corollary and likewise credible testimony of Hugh MacDonald, a former AFSCME negotiator when the IEF was originally bargained, former director of accounting for the County responsible for monitoring the pension funds, and current retiree pension trustee; as well as by the testimony of Richard Johnson, who had negotiated on behalf of County employees in AFSCME throughout the relevant several decades.

Yee testified, without contradiction, that the IEF was an expressly negotiated contractual promise. Prior to 1984, the parties negotiated cost of living increases as a hedge against inflation for active and retired employees. The IEF was designed and agreed to in 1984 to replace the former, and more costly, system of issuing periodic cost-of-living (COLA) checks to retirees. The IEF was established to collect and hold assets and to annually disburse monies to eligible retirees in place of the former COLA checks, in a form which came to be known as the " 13th Check" . The specific contractual agreement was that the parties would mutually develop a set of language changes to the County pension to implement a new " immunization investment portfolio" to replace the COLA system. The contractual commitment was that the Employer would invest those funds " on behalf of employees" . It took the parties several years of effort to finally devise the IEF, as the implementation of the agreed upon " immunization investment portfolio" , and have an enabling ordinance amendment adopted. That resolution was particularly notable as it was a part of the settlement of the 1983-84 AFSCME-County disputes over the unilateral discontinuation of COLA pay for active employees, which was litigated to a conclusion adverse to the County.

The IEF was originally enabled via ordinance amendment in 1986 as a direct result of the 1984 collective bargaining agreement which committed the parties to devising an amendment to the pension ordinance to provide a different mechanism for inflation protection. The pension ordinance, and subsequent amendments, with the obvious exception of the disputed 2010 amendment,

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

was a creature of the collective bargaining process. This fact was expressly acknowledged by the Employer when the ordinance was amended in 2000, regarding the IEF itself. The County Commission motion adopting the 2000 ordinance amendment specified that the amendments were adopted to " *add additional language as a result of new labor agreements*" . In this litigation the Employer argued, without any discernible evidence, that the County Commission was in fact mistaken in 2000 when it formally amended the pension ordinance to " add additional language as a result of new labor agreements" . The Employer' s theory was that the then new labor agreements did not have language in the actual contract documents reflective of the ordinance amendment. The reason for that, as established by the proofs, was that the parties routinely memorialized their pension agreements by the expedient of having the County Commission adopt mutually agreed upon ordinance changes, with the collective bargaining agreements containing language requiring compliance with the new pension ordinance. Additionally, in the several collective bargaining agreements over the years, the parties contractually committed themselves to the maintenance of the retirement benefits described in the then-existing pension ordinance, which they expressly agreed " *shall control except where amended or changed* " within the collective barging agreement.

Throughout the ensuing decades, the Pension Board continued by mutual agreement to be numerically dominated by elected employee and retiree representatives. The IEF was funded by so-called " excess earnings" above the anticipated or target rate of return set by the Pension Board. Each year, the Board applied a long standing set formula to divide actual returns on investments between the Investment Equity Fund (IEF) and the Active Employee Reserve. Monies diverted to the Active Employee Reserve had the effect of reducing the Employer' s contributions the following year. Part of the monies placed in the IEF was used to fund that year' s 13th check, and a portion might be held in reserve to fund payments in future years. The total disbursed each year was in the $10 million range, but the amount of funds available went up and down depending on the market; the precise amounts disbursed each year were subject to the discretion of the trustees. The reserves held in the IEF above current year needs were later used to fund the 13th check in down-market years.

The 2010 unilateral ordinance change put a new hard cap on the amount that the pension trustees could place, or hold, in the IEF. The implementation of that new cap defined the fund as being $32 million over-funded. Rather than disburse the funds to employees or retirees for whom it had been held in reserve, the $32 million was immediately transferred to the County' s coffers pursuant to the new ordinance. As the County' s former chief labor negotiator and director of the pension system Yee put it, the County " *robbed Peter to pay Paul*" . The annual disbursal for the benefit of employees dropped to the range of $1 million for 2010 from the former average of $10 million. After the unilateral transfer, the IEF reserve fund had plummeted to approximately $3 million, which was a twenty-seven year low.

The availability of yearly IEF 13th Checks was expressly held out to active employees as a part of their contractually guaranteed deferred pay in exchange for their labor on behalf of the County, including at the bargaining table by Yee as the County' s chief negotiator. The pre-existing County pension plan had no built in inflation escalator. The practice of the pension board up to 1984 had been to provide periodic but uncertain COLA payments to retirees, in what was a corollary to the periodic COLA payments received by employees. That methodology was expensive and uncertain as it depended on specific budget allocations by the County Commission. The parties agreed to the IEF methodology as a way of providing a hedge against inflation as part of employee benefits, while taking control of it away from the political process at the County Commission. The parties subsequently agreed to exclude employees hired after certain dates from receiving IEF checks. Even though the precise amount of the IEF checks was never guaranteed, but depended on the markets, by express agreement the precise amount was ultimately controlled by the employee-dominated Board of Trustees exercise of their discretion and by the existence of the IEF reserve funds. That market relationship is now gone, the Trustees discretion is gone, and the IEF reserves are gone as the Employer has raided the cookie jar.

The change effected several different bargaining units represented by AFSCME: the non-supervisory unit, which had an expired contract but was in the factfinding process at the time of the unilateral change; the supervisory unit which had a collective bargaining agreement in effect at the time of the change which expressly required compliance with the then existing pension ordinance unless altered through negotiations; and the sergeants and lieutenants unit which similarly was governed by an extant

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

contract with the same mandate. Each contract explicitly referred to disbursals from the IEF and defined the class of individuals entitled to receive the annual benefit.

Following the pension ordinance change, and in December 2010, the Employer asserted that the parties were then at an impasse in bargaining. Even in the County' s supposed last best and final offer, the County only proposed eliminating the IEF payments as to new hires. The Employer then unilaterally imposed a 20% pay cut on the AFSCME non-supervisory unit, including on that large segment of the workforce which had already undergone the partial " Friday furloughs" and the extended " Holiday furloughs" , which together amounted to an approximate 12% cut in annual pay. County human resources director Tim Taylor acknowledged that no other bargaining unit was required to undergo both the layoff days and the full wage cut. The County, as part of its unilateral implementation of new employment terms, also purported to grant itself a new essentially unlimited right to subcontract that work performed by AFSCME members, even though it had agreed with other bargaining units to retain ordinary limited contractual restraints on the sub-contracting of existing unit work. Additionally, the County asserted that it was dispensing with the long extant contract language on the length of the workweek in an effort to *post hoc* ratify the earlier " Friday" and " Holiday" layoffs.

The parties did finally voluntarily settle on the terms of a new CBA for the non-supervisory unit in December of 2011. That contract maintained, without significant changes, the contract language sought by the Union regarding the length of work week and layoff obligations of which the County ran afoul in 1983 and again in the January 2010 events which begat this litigation. The new contract included a wage concession by the AFSCME unit, as sought by the Employer, but had the Employer issuing two lump sum payments of 2% each at six month intervals to compensate employees for the earlier withheld annual service adjustments. The new contract included the County' s proposed exclusion of new hires from the benefits paid out of the IEF. The County proposed that the Union, as part of those negotiations, waive the claims in the present unfair labor practice charge. The Union rejected the proposed waiver, and the parties nonetheless settled the contract. That new contract, which runs until 2014, did not resolve the IEF issues including the $32 million transfer, which the parties reserved for resolution at MERC, and which are addressed herein.

Discussion and Conclusions of Law:

The case law under PERA is well settled that salary, the length of the workday or workweek, and benefits such as health insurance and pension entitlements are all mandatory subjects of bargaining, and that neither side may take unilateral action to alter existing practices regarding such mandatory subjects unless a good faith impasse in bargaining has occurred. Detroit Police Officers Ass ' n v Detroit, 391 Mich 44, 54-55 (1974); Central Michigan Univ Faculty Ass ' n v Central Michigan Univ, 404 Mich 268 (1978); *International Association of Fire Fighters (IAFF)* v Portage, 134 Mich App 466 (1984).

There is a significant difference under the law in the analysis of the propriety of unilateral employer changes in conditions of employment before, and after, fulfilling the bargaining obligation. In essence, there is a presumption that any unilateral changes prior to the completion of the bargaining process have not been made in good faith. Once the bargaining process has been exhausted, and assuming good faith conduct throughout, the law recognizes both the right and the need for the employer to act decisively and, if necessary, unilaterally to define future conditions of employment. Determining whether a " good faith" impasse existed requires a review of the totality of the circumstances. *Warren Education Association*, 1977 MERC Lab Op 818. If a public employer takes unilateral action on a "mandatory subject" of bargaining before reaching a " good faith" impasse in negotiations, the employer has committed an unfair labor practice. *IAFF* v *Portage,* supra.

The Commission has further defined impasse as the point at which the parties' positions taken in good faith have so solidified that further bargaining would be futile. *Wayne County (Attorney Unit),* 1995 MERC Lab Op 199, 203; *City of Saginaw,* 1982 MERC Lab Op 727. Simply declaring impasse and asserting the right to implement changes in mandatory subjects of bargaining is not sufficient. The Employer bears the burden of establishing the existence of a " good faith" impasse and proving that neither party was willing to further compromise. *Oakland Comm College*, 2001 MERC Lab Op 273, citing NLRB v Powell Electric Mfg. Co, 906 F2d 1007 (CA 5 1990); Huck Mfg Co. vs. NLRB, 693 F2d 1176, 1186 (CA 5 1982). However, it is also well

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

established that a good faith impasse will generally not be found where a party has not bargained in good faith, including where unremedied unfair labor practices have been committed by the party asserting the existence of an impasse. See, *Detroit Public Schools*, 25 MPER 77 (2012); *City of Warren*, 1988 MERC Lab Op 761. Unsurprisingly, an impasse resulting from one party' s bad faith conduct does not relieve that party of the duty to bargain. *Warren*, supra at 767.

It is additionally well settled that an employer may not unilaterally impose changes in mandatory subjects of bargaining, such as salary and benefits, during the pendency of a fact-finding proceeding conducted by MERC pursuant to PERA. AFSCME v Wayne County, 152 Mich App 87 (1986), *aff' g Wayne County (AFSCME)*, 1984 MERC Lab Op 1142. The purpose of the bar on the imposition of unilateral changes prior to the conclusion of fact-finding is that the process is designed, and mandated by statute, as a mechanism for the good faith and voluntary resolution of labor disputes. Only upon the exhaustion of settlement efforts, including fact-finding, and in the event of a resulting impasse in negotiations after good faith bargaining following the issuance of the fact-finders report, may one party appropriately assert that it has in " good faith" reached an impasse and then unilaterally impose changes in pre-existing conditions of employment. See, AFSCME v Wayne County, supra.

As the Court of Appeals held in affirming the Commission' s Wayne County decision in 1986:

The general principles of law governing an employer' s right to implement changes in wages and other working conditions during the negotiation process are well established and have been set forth by this Court in Local 1467, International Ass' n of Firefighters, AFL— CIO v. Portage, 134 Mich App 466, 472-473 (1984):

* * *

Neither party may take unilateral action on a mandatory subject' of bargaining absent an impasse in negotiations. An employer taking unilateral action on a mandatory subject' of bargaining prior to impasse in negotiations has committed an unfair labor practice. MCL 423.210(1)(e); MSA 17.455(10)(1)(e). This prohibition against unilateral action prior to impasse serves to foster labor peace and must be liberally construed, particularly in light of the prohibition against striking by public employees set forth in MCL 423.202; MSA 17.455(2). (Citations and footnote omitted.) See also, Ottawa County v. Jaklinski, 423 Mich. 1, 12-13, 377 N.W.2d 668 (1985).

As the Commission held in *Wayne County Bd of Commissioners (WCBA)*, 1985 MERC Lab Op 1037, even a *bona fide* financial crisis does not justify an Employer' s unilateral repudiation of its contractual obligations, where a contract is in place, or permit a unilateral change in conditions of employment. Repudiation of contractual obligations is found by the Commission where there is an existing contract, as with the non-supervisory unit here; the contract breach is substantial; the contract breach has a significant impact on the bargaining unit as a whole; and there is no *bona fide* dispute over the interpretation or applicability of the contract language involved. *St. Clair County Road Comm*, 1992 MERC Lab Op 316. The repudiation question is here relevant only to two of the three AFSCME units, which had existing contracts.

As noted in the November 2012 Decision, these parties were hardly without a history or guidance on the very question of what to do when an economic downturn hit. The early 1980s saw a significant economic downturn. These same parties, AFSCME & Wayne County, became embroiled then in an indistinguishable squabble over how to handle the resulting shortfall in revenue. The County unilaterally devised a scheme of changes to existing conditions of employment which it believed would allow the budget shortfall to be spread more evenly across all employees, with arguably little disruption of service. The County did it without the Union' s concurrence and without exhausting its bargaining obligations. The Commission held that the earlier reviewed conduct was unlawful; ordered it reversed; was affirmed in a published Court of Appeals decision; and the resulting rule became the black letter law by which not just these parties, but all public sector parties, understood their obligations in ensuing years.

Twenty-five years later, this same Employer, for unexplained, and seemingly inexplicable, reasons went back to the same playbook and unilaterally imposed cuts in an effort to " spread the pain" as it saw fit, rather than maintain the existing wage

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

and benefit package mandated by the collective bargaining agreements the County had continued to negotiate and sign in the interim. As was inevitable, in 2011 the Commission held the replay of the County' s unilateral budget balancing actions to have been as unlawful as were the 1980s original. Wayne County, 25 MPER 24 (2011).

As held regarding the " Friday & Holiday furloughs" , the County had the absolute right to reduce its spending to meet its budget limitations; indeed, it had the duty to do so and it had readily available and contractually agreed upon mechanisms for doing so. What it did not have the right to do was unilaterally change the rules in the midst of the latest, unpredictable but nonetheless inevitable, downturn. The County was likewise not entitled to unilaterally impose wage and benefit cuts to avoid reducing services and to instead force employees to bear the brunt of the County' s profligate spending.

The function of PERA is not to set the terms of the employment deal struck between employees and their employers. PERA functions to regulate the means to reach such deals and to enforce good faith compliance with voluntarily agreed upon arrangements. One purpose of such enforcement is to facilitate the reaching of future agreements. A necessary predicate for successful future negotiations is that the parties are cognizant that they are each legally entitled to expect, and compel, compliance by the other with the terms mutually agreed upon. See, *Kalamazoo County & Sheriff*, 24 MPER 17 (2011).

Here, as in the 1980s, the County agreed to a perfectly ordinary set of contractual obligations which left it with the unfettered right to match the workforce, and the services to be provided, to the quantity of funds available or allocated. The County contractually bound itself to the creation of a reserve fund to make payments as part of deferred compensation; contractually bound itself to a particular mechanism by which the funds would be disbursed; and contractually bound itself to maintain those funds for the benefit of employees. The County failed at its obligation to manage its affairs. Instead, perhaps understandably, the County' s leadership wanted to have it all— a full size workforce with all the programs for the public intact, with a less than full-sized budget. The resort by the County to self-help in seizing the funds, which it had explicitly agreed to set aside for the benefit of employees, was unlawful.

It has now become a convenient public relations gambit to assert that such 13th checks, and the establishment of dedicated funding streams to provide such deferred compensation benefits, amounted to a gift, a gratuity, or a bonus. They are not. [14] The 13th check system is utilized by many employers, in addition to Wayne County, as a method of giving some rough protection against inflation in deferred compensation systems. In the 1970s, it was not unusual to have formal inflation hedges in such systems tied directly to the cost of living indicators (COLA). That system became perceived as both unpredictable and prohibitively expensive by the late 1970s-early 1980s. In Wayne County in particular, the Employer's effort to get out from under the admittedly burdensome COLA increases lead directly to unilateral action by the County and to the 1984 and 1985 adverse Commission decisions. For Wayne County, as established by testimony in the present case, the COLA system was replaced by the 13th check system which created a dedicated funding stream to provide an annual bump which, while guaranteed to be paid, was not guaranteed to actually match the rate of inflation. It might be higher than a traditional COLA payment; it would likely be lower; but the annual receipt was assured.

The focus on the elimination or curtailment of promised deferred compensation payments has its genesis in the present difficult fiscal circumstances, and also in a specifically Machiavellian pressure. Those who have already retired or who are about to retire have the least bargaining power of the several constituencies whose needs compete for limited resources. Office holders rightly seek to satisfy the demand of constituents for maintained services, even with reduced tax revenues. Employers see value in placating those on whose labor they must depend in the coming months or years to provide those services to the public. It is that very recognition of the value of labor peace that underpins the obligations set by PERA. There is, however, little immediate perceived value in maintaining peace with those whose labor is no longer of significance.

Additionally at play is a strong dose of willful forgetfulness. Public officials, and the public they serve, see little value in cutting a pay check to someone who did not perform labor last week or last month and whose services are not needed next month. The simple fact, however, is that the retirees, and those to retire in the future, worked in exchange for a specific wage and benefit

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

package which included pensions and the 13th check inflation protection. The monies were earned and they are owed; yet, snatching the payments away currently plays well to the public as ' sound fiscal management' or a ' fair sharing of the pain' .

One only need posit the potential corollary to recognize the unfairness and unreasonableness of the claw-back of payment for labor already provided. The County' s actions in repatriating this wealth are, in practical reality, no different than if they showed up at the homes of former employees to announce " *We have decided that 2 years ago (or 10 years ago, or 20) we paid you at an agreed upon hourly rate that we now think was too high. Therefore, we have repossessed your car & we took your kids bikes out of the garage and we are selling them to get our money back.* " The populace would be rightfully up in arms at such an affront.

No public official, or fiscal analyst, proposing such schemes of retroactive withdrawals of promised deferred compensation have themselves taken, or offered to take, retroactive pay cuts for their services in prior years (which in many cases arguably are what led to the present fiscal crisis). No one expects current elected officials to give back some percentage of their prior years' pay, but it nonetheless seems reasonable to demand it of retired or soon to retire employees.

Of course the above analysis is unnecessary when good faith bargaining occurs and addresses a fiscal downturn responsibly. Here, after all the drama and all the litigation losses, the County and the Union were finally able to negotiate a new collective bargaining agreement. It restored most of the conditions of employment that had been unlawfully changed. The Union agreed to a wage cut for future work performed. Significantly, the Union agreed that the 13th Check promise would be withheld from new hires. And that is a proper handling of the question. Employees are entitled to know under what package of remuneration they are being asked to give their labor. For an employer to say to employees ' *After today, we can no longer pay as much as we did in the past*" may be an unwelcome occurrence; however, it properly allows employees to choose freely to work for the lower wages or to seek employment elsewhere. Just as employees cannot rightly demand more than has been promised, an employer cannot, after the labor has been performed, pay less than was promised.

As to both the supervisory unit and the sergeant and lieutenants units, unexpired collective bargaining agreements were in place at the point in September 2010 when the County unilaterally altered the IEF and snatched $32 million dollars that had been set aside for employee deferred compensation. That resort to self-help was an unarguable repudiation of the Employer' s contractual commitments to those two bargaining units. No viable defense has been proffered, much less proved. In the absence of a an even colorable claim to having a good faith dispute as to the meaning of the contractual commitments, such a refusal to comply is a repudiation of the agreements and an unfair labor practice, as it violates the duty to bargain in good faith under section 10(1)(e) of PERA. See, *St. Clair Rd Comm*, supra.

A different analysis applies to the non-supervisory AFSCME bargaining unit, where the prior collective bargaining agreement had expired. While an employer is certainly able, under appropriate circumstances, to unilaterally change conditions of employment after expiration of a collective bargaining agreement and upon exhausting its bargaining obligations, that has not occurred here. At the time the disputed changes were imposed, the parties were in the late stages of a formal fact-finding process under PERA. The purpose of fact-finding is to aid parties in reaching a voluntary and good faith resolution of a pending contractual dispute. For either side to take unilateral action on a fundamental aspect of their relationship is inherently destructive to the bargaining relationship and of the fact-finding process, which is an extension of the statutory bargaining process. Such unilateral action during fact-finding has long been held to be unlawful. Indeed, the seminal case on the question involved this same employer and this very same tactic of unilaterally imposing pay and benefit cuts during the pendency of a fact-finding proceeding. AFSCME v Wayne County, 152 Mich App 87 (1986), *aff'g Wayne County*, 1984 MERC Lab Op 1142. The County' s action in imposing the benefit cuts followed shortly on the heels of the fact-finders September 2010 report and without any pretense at engaging in a renewed effort to bargain based on the recommendations made by the fact-finder.

In *Orion Twp*, 18 MPER 72 (2005) the Commission most recently reiterated the obligations faced by parties after the issuance of a fact-finders report, holding:

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

We have consistently stated the importance of mediation and fact finding, indicating that the failure of the parties to utilize these services to the maximum extent necessary may be viewed as indicating a lack of good faith, and contrary to the intent and policies of PERA. *Crestwood Sch Dist*, 1975 MERC Lab Op 609; *Cass Co Road Comm*, 1984 MERC Lab Op 306. In the Wayne Co case, [Wayne Co, 1984 MERC Lab Op 1142, and 1985 MERC Lab Op 244, 250, aff' d 152 Mich App 87, 125 LRRM 2588 (1986), lv den 426 Mich 875 (1986)] we established a rule that parties must bargain for a reasonable time over the substance of a fact finder' s report. We stated that in most cases, a reasonable time is 60 days after the issuance of the report, providing the parties are bargaining in good faith. We have found that after fact finding, a party must make a serious effort to reconcile its differences with the other side; simply meeting and discussing the fact finder' s report may not be sufficient to satisfy the bargaining obligation. *Oakland Cmty College*, 2001 MERC Lab Op 273; *City of Dearborn,* 1972 MERC Lab Op 749, 759.

As to the non-supervisory units, the County had not exhausted its bargaining obligations prior to enacting the pension ordinance change and materially altering previously promised portions of the wage and benefit package. The County' s actions amounted of a forthright raid on an investment fund which the County had contractually agreed it would maintain for the benefit of employees. The Commission has rightly recognized the entirely corrosive, if not fatal, effect such self-help maneuvers have on the statutorily mandated bargaining process. See, *Kalamazoo County & Sheriff*, 24 MPER 17 (2011). If in the middle of bargaining, either side is allowed to unilaterally grab what it can grab, the prospects dim for the mutual give and take necessary to reach a voluntary resolution. That unilateral change in conditions of employment as to the non-supervisory unit, in particular the seizure of the $32 million dollar fund, during the bargaining process and in the late stages of the factfinding process, was an unfair labor practice under section 10(1)(e) of PERA.

Further, and again only as to the non-supervisory unit that had an expired contract, even assuming *arguendo* that good faith bargaining had occurred over a successor agreement and that an impasse had, contrary to the prior Decision, existed in either October or December 2010 between the County and the Union as to the non-supervisory unit, the changes would still be unlawful. Under PERA, when parties have exhausted the bargaining process, including fact-finding, and are at a good faith impasse, the Employer is privileged to unilaterally implement changes in conditions of employment consistent with the Employer' s final offer. Ottawa Co v Jaklinski, 423 Mich 1 (1985); Detroit Police Officers Ass ' n v. Detroit, 391 Mich 44, 54-55 (1974).

Here, the Employer' s formal final offer in the factfinding proceeding as to the non-supervisory unit was that the IEF payments would be made only to existing employees or then-retired employees and would be denied to all new hires. What the Employer implemented was far more draconian than its final offer. Instead of merely closing the door to future accruals of the benefit, the Employer engineered an ordinance change which it utilized to drain the investment fund from which payments to both current employees and future hires would have been drawn. That change was of course not consistent with what had been proposed at the table by the Employer and, consequently, the Employer' s over-reaching conduct would have been unlawful even if the parties had been at a good faith impasse.

I have above found that the County' s actions were a straightforward repudiation of existing agreements as to the supervisory and sergeants and lieutenants units, as well as an unlawful unilateral change in the midst of bargaining, and the fact-finding process, as to the non-supervisory unit. The County proffered no traditionally accepted or viable defense to its otherwise straightforwardly unlawful conduct. The Employer did advance multiple esoteric defenses which are addressed below, with the remainder of the discussion divided into narrow sub-sections specific to the County' s several claims.

1. Financial Exigencies Do Not Excuse a Statutory Violation

As in the prior litigation, the County asserts that its unilateral action is somehow excused by the existence of a claimed financial crisis. As the Commission held in *Wayne County Bd of Commissioners (WCBA),* 1985 MERC Lab Op 1037, even a *bona fide* financial crisis does not justify an Employer's repudiation of its contractual obligations or permit a unilateral change in conditions of employment during a fact-finding proceeding. Notably, the County persists in this argument despite the fact that in that same decision of nearly 30 years ago, the Commission held that the County's asserted defense of an inability to pay due

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

to a financial crisis was then so untenable that it was, as a matter of law, a " *patently frivolous*"defense such that an award of costs and attorney fees to the Charging Party was appropriate. *Wayne County Bd of Commissioners (WCBA),* 1985 MERC Lab Op 1037, 1040-41, relying in part on the prior rejection of the "economic necessity" defense in *City of Detroit (DOT),* 1984 MERC Lab Op 937, *aff' d* 150 Mich App 605 (1985). See also, rejecting the economic necessity defense, *Jonesville Bd of Ed,* 1980 MERC Lab Op 891, 900-901; *Taylor Bd of Ed,* 1983 MERC Lab Op 77. [15]

The whole point of the prohibition on various forms of unilateral action is that for one party to exercise sole authority over basic terms of the relationship is destructive of the entire fabric of labor relations and the very premise of good faith bargaining — that is, that making compromises results in a binding agreement that gives each side stability. If such conditions can be unilaterally altered, both stability and the possibility of productive future discussions are destroyed. To find otherwise, would dismantle the balance of compromises reached by parties through good faith bargaining and would be destructive of the goal of voluntary resolution of labor disputes, which is the underpinning of government regulation of labor disputes. *Oakland Univ,* 23 MPER 86 (2010); *Kalamazoo County & Sheriff,* 22 MPER 94 (2009). See also, MCL 423.1, wherein the labor policy of the State is declared: " *[T]he best interests of the people of this state are served by the prevention or prompt settlement of labor disputes. . . and that the voluntary mediation of such disputes under the guidance and supervision of a governmental agency*" will best promote those interests.

Moreover, and to put it bluntly, it is especially important that parties play by the rules during hard times. Many public entities are facing extreme financial distress. As seen in instance after instance by this agency, most employers and most unions representing the employees are, albeit grudgingly and frequently with some drama, acting responsibly and making new deals which take into account the present economic realities. After several decades in which unions in the public sector generally were able to regularly deliver improvements in working conditions, it is understandably difficult for union leadership to go to the membership, often repeatedly, to seek approval of objectively unattractive new terms of employment. The resolute and responsible actions now asked of such union leaders cannot reasonably be expected to occur if employers do not themselves play by the rules. A union cannot likely sell a new concessionary deal to its members where, as here, the Employer is, with an openly stated belief in its own impunity, flouting the rules by unilaterally and adversely changing conditions of employment. Further, to ignore the corrosive effect such unilateral conduct would have on future negotiations would be to fail to exercise what the appellate courts have properly recognized as " MERC' s expertise and judgment in the area of labor relations." Port Huron Education Ass ' n v Port Huron Area School District, 452 Mich 309, 323 n18 (1996).

2. Deferral to Arbitration Is Not Appropriate

Just as in the recent prior cases, the County makes the equally unavailing argument that MERC should defer to arguably available contractual remedies on the County's theory that there is a *bona fide* dispute over the interpretation of the parties'collective bargaining agreement. First, as to the non-supervisory unit, arbitration was presumably not available as its collective bargaining agreement with the County had expired and with it the duty to arbitrate. [16] Further, and to the contrary, there was never a *bona fide* good-faith dispute over the question of the contractually mandated benefits, or over the right of either party to unilaterally abandon or modify its own obligations. As in the prior cases there is no question amenable to arbitration here, as the County has repudiated its obligations rather than asserted a good faith dispute over some detail of its duties. The Commission will not find repudiation on the basis of an isolated breach, *Crawford County Bd of Comm ' rs,* 1998 MERC Lab Op 17, 21; however, here the deferred compensation benefit cut applied across the board to the entirety of the several AFSCME units. The cut was indisputably unilateral and occurred during a period when respectively, collective bargaining agreements were in place or the bargaining obligation still attached. The County proposal to the Commission to remand the matter to arbitration is merely a tactic intended to avoid substantive and effective review or remedy. The Commission has the authority to interpret the terms of a collective bargaining agreement where necessary to determine whether a party has breached its collective bargaining obligations. *University of Michigan,* 1971 MERC Lab Op 994, 996, citing NLRB v C & C Plywood Corp, 385 US 421 (1967). If the term or condition in dispute is "covered by" a provision in the collective bargaining agreement, and the parties have agreed to a grievance resolution procedure ending in binding arbitration, the details and enforceability of the provision are generally

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

left to arbitration where there is any good faith dispute as to the nature of the contractual obligation. Port Huron Ed Ass ' n v Port Huron Area Sch Dist, 452 Mich. 309, 317-321 (1996). Here there is no good faith dispute over the parameters of the Employer's obligations; rather, the County seeks to instead unlawfully reject its existing obligations contrary to its duty to bargain. Where such repudiation has occurred, the Commission is prohibited, by prior decision of our Supreme Court, from deferring to contractual arbitration and must instead enforce the statutory obligations on behalf of the people of the State. See, Detroit Fire Fighters Ass ' n v. City of Detroit, 408 Mich. 663, 676 (Mich 1980). Moreover, the County's asserted defenses are statutory and Constitutional rather than contractual and, therefore, are not within the purview of a private arbitrator.

3. The Parties Were Not at Impasse in October 2010

As also discussed above, the Commission has defined impasse as the point at which the parties' positions have so solidified that further bargaining would be futile. *Wayne County (Attorney Unit),* 1995 MERC Lab Op 199, 203; *City of Saginaw,* 1982 MERC Lab Op 727. Simply declaring impasse and asserting the right to implement changes in mandatory subjects of bargaining is not sufficient. As resort to such self-help is disfavored, the Employer bears the substantial burden of establishing the existence of a " good faith" impasse and that neither party was willing to further compromise. As held in the November 2012 Decision, and as to the non-supervisory AFSCME unit, the parties were not at a good faith impasse in bargaining in December 2010, as then asserted by the Employer, and therefore could not possibly have been at an impasse earlier in October of 2010 when the disputed pension changes were enacted.

4. The County Had Not Bargained In Good Faith Prior to Declaring Impasse

Even assuming *arguendo* that an impasse had, contrary to the prior Decision, existed in either October or December 2010 between the County and the Union as to the non-supervisory unit such that disfavored unilateral action was permissible, there must still be a review of the totality of the circumstances to determine if that alleged impasse was reached in " good faith" . *Capac Comm Schls*, 23 MPER 46 (2010); *Flint Twp*, 1974 MERC Lab Op 152, 157; *Warren Education Association*, 1977 MERC Lab Op 818; *Mecosta Co. Park Comm.*, 2001 MERC Lab Op 28, 32 (no exceptions). It must be determined whether the party asserting the existence of an impasse " *has actively engaged in the bargaining process with an open mind and a sincere desire to reach an agreement*" See, *Union-Sebewaing Area Schools*, 1988 MERC Lab Op 86, relying in turn on DPOA v Detroit, 391 Mich 44 (1975).

In this series of cases, there can be no question but that the County engaged in bad faith bargaining, where the County made demands which sabotaged any possibility of securing an agreement and where there were pervasive unremedied violations of the Act, including multiple unilateral changes in conditions of employment during the bargaining effort; unlawful unilateral changes in conditions of employment during the fact-finding process; retaliatory holiday furloughs; a draconian health insurance cut off; and then deferred compensation benefit cuts. Adjudicated findings of other contemporaneous unfair labor practices by an employer are relevant circumstantial evidence of unlawful motive by that employer in the context of a discrimination or bad faith bargaining charge. See, *Oaktree Capitol Mgt*, 353 NLRB No. 27 (2009); Shattuck Mining Corp v NLRB, 362 F2d 466, 470 (CA 9, 1966). Each separate finding of an unfair labor practice must stand on its own merits; however, unlawful conduct occurring between the same parties during the same round of negotiations is certainly relevant. Indeed, such contemporaneous acts are unavoidably part and parcel of analyzing a party' s conduct and the " totality of the circumstances" . It is of particular significance that the County is a large and sophisticated employer with many decades of experience in labor negotiations and a track record in litigation arising from the 1980s disputes. The County knows how to comport itself within the ordinary bounds of the law and chose to do otherwise.

As noted by ALJ Peltz in Wayne County, C09 J-211(Sept 2011), this same public Employer has been found to have violated its duty to bargain in good faith under PERA with this same Union multiple times during this same round of contract negotiations. In Wayne County, 26 MPER 2 (2012), the Commission adopted Peltz' recommended finding that the Employer violated its duty to bargain by, during this same round of bargaining, repudiating its contractual obligation to provide health insurance benefits to

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

certain disabled County workers. In Wayne County, 24 MPER 12 (2011), the Commission held that the County violated the duty to bargain by repudiating its contractual obligations by failing to make annual service adjustment increases of 2% of salaries in 2009 to members of the AFSCME bargaining units, again while the parties were at the table in this round of bargaining. As noted above, an indistinguishable claim was pending, but later withdrawn, in Wayne County, C10 F-158, arising from the unilateral withholding of the 2010 annual 2% service adjustment, which notably occurred after the 2009 unilateral withholding had already been found to have been unlawful. In Wayne County, 24 MPER 25 (2011), the Commission concluded that the County violated its statutory bargaining obligation by unilaterally reducing the length of the workweek for these same unit members, likewise as a part of this bargaining round. In that case, there were no material facts in dispute and the Employer' s position was indistinguishable from arguments previously rejected by the Commission in the 1980s case involving the same parties. After no exceptions were filed in Wayne County, 22 MPER 80 (2009), enf' d (Unpub CA No 294459) (March 1, 2010), the Commission affirmed the finding of the ALJ that the County breached its duty to bargain in good faith by ignoring this same Union' s request for presumptively relevant information. The County was additionally found to have brought a meritless ULP Charge against the Union in an improper effort to block a collateral contract enforcement action in the Wayne County Circuit Court. *AFSCME Council 25*, 22 MPER 102 (2009), aff' d 24 MPER 19 (CA Unpub # 295536, 3/22/11) [24 MPER 19].

5. The Separation of Powers and Legislative Body Constitutional Authority Defenses

The County asserted a defense that the Charges should be dismissed in deference to the legislative authority of the County Commission. It was argued that the County Commission's decision to amend the pension ordinance is unreviewable under PERA, for to do so would purportedly infringe on the separate legislative authority of the County Commission. Such claims for exemption from the strictures of PERA by various units of government have been routinely rejected, whether based on a charter or even Constitutional authority. See, Wayne County Civ Serv v Wayne County, 384 Mich 363 (1971); Pontiac Police v Pontiac, 397 Mich 674 (1976); CMU Faculty v CMU, 404 Mich 268 (1978). [17]

The underlying theory has likewise been resoundingly rejected. It is a truism that the County Commission has exclusive authority to decide for itself what ordinances to adopt and to later amend, repeal, or replace such ordinances; however, the mere adopting of an ordinance does not lawfully effectuate changes in conditions of employment where a bargaining obligation otherwise exists. That claim of an ability to sidestep bargaining obligations imposed by State statute by the expedient of enacting conflicting local laws was flatly rejected, as to retirement benefits, in the seminal Detroit Police Officers Association v Detroit, 391 Mich 44 (1974). See also, AFSCME et al v Detroit, 218 Mich App 263 (1996); *City of Detroit (Fire Fighters),* 1982 MERC Lab Op 150. Simply, the County Commission can indeed pass any local ordinance or even Charter amendment that it sees fit to enact; however, neither the County Commission nor the County Executive can implement such changes without first fulfilling the duty to bargain under State law.

The County further asserted that the " Employer" could not be held liable for an unfair labor practice based on actions of its purportedly separate legislature. The argument is based on a nonsensical syllogism, which begins with the unremarkable fact that the Union negotiates collective bargaining agreements with the County Executive, with the major premise then offered that such negotiations necessarily require the conclusion that the County Executive is the " Employer" ; the secondary premise is the equally obvious fact that the County Commission is a legislative body separate from the County Executive; the offered conclusion is that therefore the County Commission is *not* the Employer, and therefore could not have violated PERA through unilateral changes to conditions of employment which only an *employer* is prohibited from making. While such constructs may find utility in an undergraduate logic class, they are ill-suited to legal argument or to the regulating of the affairs of major institutions.

The defects in the syllogism are myriad. First, the County Executive is not the " Employer" and neither is the County Commission. The " Employer" is Wayne County which is the only legally recognized body politic which can hold property, authorize contracts, sue, and be sued in its own name (in for example the present regulatory action). Second, while the Union meets with the County Executive (or his designees) to negotiate a collective bargaining agreement, any such agreement is subject to ratification, or rejection, by the County Commission, underscoring that the " Employer" is of two equal, joined,

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

and necessary parts when it comes to labor relations. Regardless, the PERA, when it prohibits action by a " public employer" likewise and expressly prohibits the same action by " any officer or agent" of that " employer" , such that, any action by the County Commission, the County Executive, or a mere department head or supervisor of the County, would be attributable to the County for purposes under PERA.

In effect, what the County asks through this theory is that the Commission, as an administrative agency, ignore, set aside, or reverse the seminal interpretation of PERA by the Michigan Supreme Court in a 40-year old decision, perhaps predictably, involving Wayne County itself. When PERA was enacted in 1965, it created entirely new, and often equally uncertain and unwelcome, obligations on public employers. There was then legitimate good faith uncertainty about such fundamental questions as which entity was the employer and who spoke for it. The Wayne County Civil Service Commission brought an action for declaratory judgment respecting who was the employer of employees of Wayne County for purposes of collective bargaining under PERA. In that action, the Civil Service Commission asserted that based on long standing State statutory authority, which had created the Wayne County Civil Service System, it had exclusive authority over such things as setting wages and benefits for County employees and that it, not the County Commission (then called a Board of Supervisors), was the statutory " employer" for purposes under PERA. See, Civil Service Commission for the County of Wayne v Wayne County Board of Supervisors, 384 Mich 363 (1971).

The Court recognized the legitimate difficulties faced by efforts at compliance with the then-new PERA and its then unfamiliar obligations. There was then uncertainty about which branch of local government or which particular entity was, in effect, in charge when it came to labor relations when employees chose to unionize under PERA. Nonetheless, the Court sought, with until now near uniform success, to put to rest such arguments. Where differing branches of government sought to assert control over bargaining based on prior rights or powers, in the face of new statutory obligations under PERA, the Court found that the newer statutory obligations under PERA operate " *to the extent of repugnancy*" as a repeal of prior statutory obligations or rights. Citing, Breitung v Lindauer, 37 Mich 217 (1877).

The Court found that " *In short shrift this means that the purposed thrust of the act of 1965* [of regulating bargaining] *must be implemented as provided therein*" and that conflicting claims of " *authority and duty* " made by a particular governmental entity were " *diminished pro tanto by the act of 1965 to the extent of free administration of the latter according to its tenor*" . To paraphrase and follow the command of Civil Service v Wayne County, the Wayne County Commission remains a separate branch of the County government, co-equal with the County Executive in most matters and with greater powers regarding the ultimate allocation of resources; however, any claims of unreviewable action by the County Commission in the field of labor relations, including regarding employee wages and benefits, " was diminished *pro tanto*" by the passage of PERA.

6. The Retired Status of Prior Recipients of the 13th Checks Does Not Insulate the County From Liability

The County asserts that MERC lacks jurisdiction to resolve this dispute, which the County defines as involving a mid-term modification to benefits of already retired former employees, in reliance on its interpretation of the decision in Butler v Wayne County, 289 Mich App 662 (2010). [18] The County is correct that a violation of PERA will not be found as to a refusal to bargain regarding already retired individuals, for they are not "employees" under the Act, and therefore, not subject to mandatory bargaining obligations. However, the County' s analysis of the issue is defective. Under PERA, enforceable agreements can be reached promising current employees deferred compensation benefits that will be collected only in retirement. Neither party is obliged to re-negotiate such promises as to individuals who have already retired, as they are no longer " employees" under the Act, and the Union is no longer their exclusive bargaining agent. The parties may nonetheless choose to negotiate over benefits to be received by already retired individuals; however, such bargaining topics are deemed " permissive" in that either party may refuse to negotiate over the questions.

Simply, future pension rights for existing employees are mandatory subjects of bargaining. Regarding already retired individuals, promised benefits are locked in and changes in those benefits are at best a permissive subject of bargaining. Collective bargaining agreements predictably, and almost necessarily, frequently contain agreements as to both mandatory and permissive subjects.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Those agreed upon benefits become intertwined such that a repudiation of one benefit is a repudiation of the entire package and therefore a violation of PERA. See, *Kalamazoo County & Sheriff*, supra.

Additionally, as to the not yet retired employees, the unlawful repudiation is in denying them the contractual right to collect promised benefits in the future, such as here, the 13th checks in such amounts as the market forces may make available under the formula used by the pension board to allocate ' excess earnings' . Further, as to current employees of Wayne County, the repudiated promise of most immediate significance is the Employer' s promise to maintain the IEF reserve funds " for the benefit of employees" and to not spend it for its own purposes. Here, current employees are entitled to insist that the County restore the funds, and funding mechanism, so that when the current employees retire in the future, the funds necessary to provide them with their promised and anticipated 13th checks will still be there.

Moreover, and as the County is well aware, a violation may be found where an Employer contractually promises to provide certain benefits upon retirement and then, without bargaining, repudiates that promise. In Wayne County (AFSCME), 26 MPER 22 (2012), one of the series of cases arising from this same 2009-2010 bargaining debacle, the Commission found a violation and ordered relief where the County unilaterally announced that it would no longer provide health care benefits to certain classes of employees who left work on a disability pension. That change altered existing promised benefits, was unilateral, and was therefore unlawful.

7. The Studier Decision Is Irrelevant to Any Analysis Under PERA

The County relies on a tortured application of the decision in Studier v MPSERS, 472 Mich 642 (2005), to excuse its unilateral changes, which would otherwise be unlawful under PERA. The *Studier* case involved a claim by public school retirees challenging an increase in their insurance premium copays as a claimed violation of Article 9, section 24 of the Michigan Constitution. That clause of the Constitution expressly protects " accrued financial benefits" under public pension plans from any later impairment. The Court held that the Constitutional protection extended only to traditional pension benefits under a pension plan, that is the usual monthly pension check, and that the Constitutional protection did not extend to non-pension benefits, such as retiree health insurance, or to other collateral benefits offered under State statutes. *Studier* did not address any issues under PERA.

It perhaps states the obvious, but this unfair labor practice case is not about the Constitutionality of a County ordinance change. The rights protected under PERA may well not rise to the level of independently Constitutionally-protected, nor does that standard need to be met to prevail in an unfair labor practice case. None of the multiple bargaining violations already found arising from Wayne County' s conduct during the 2009-2010 bargaining cycle likely rise to the level of Constitutional violations. The statutory right of employees to not have their wages unilaterally cut, the length of their workweek shortened, their continued receipt of health insurance coverage denied, or as here, the continued functioning of the negotiated IEF gutted, do not need to rise to the level of Constitutionally-protected rights to be nonetheless protected under PERA.

8. The Wayne County Retirement System v Wayne County Decision Is Irrelevant to Any Analysis Under PERA

The County relied heavily on a September 2011 decision by Wayne County Circuit Court Judge Sapala, in Wayne County Retirement System v Wayne County, in which the trail court opined that the unilateral changes to the IEF benefits were not unlawful under 1963 Const art 9, section 24. The Circuit Court made certain findings regarding the nature of the collective bargaining agreements between the County and the Union, in *dicta*, and significantly, in a case in which the Union was not a party. The County seeks to grant special significance to the Circuit Court' s finding that the IEF benefits were not " accrued financial benefits" . Of course they were not, and therefore they were not Constitutionally protected against impairment. If the involved employees were not represented by Unions and subject to collective bargaining agreements, the County would have had a free hand in changing conditions of employment, as is routinely true regarding non-union employees. That recognition alters nothing regarding the lawfulness of the conduct under PERA. Regardless, the Sapala decision was reversed in Wayne

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

County Retirement System v Wayne County, 301 Mich App 1 (2013). The appellate court found that the ordinance challenged in this case also violated the Public Employee Retirement System Investment Act (PERSIA), MCL 38.1132 et seq, and ordered restoration of the improperly diverted $32 million dollars. The appellate court did not address the PERA questions that are before this tribunal. Except to the extent that the relief ordered herein may be duplicative in part of the relief already ordered by the Court of Appeals, both of the decisions are irrelevant to these proceedings.

9. The Macomb County Decision Supports the Finding of A Violation in this Instance

Both parties rely on the Michigan Supreme Court decision in Macomb County v AFSCME Council 25, Mich (No. 144303, June 12, 2013). In that case, the Court reversed MERC in its earlier finding of a violation where Macomb County acting through its retirement board altered a long standing reliance on a particular actuarial table used to calculate benefits, to the disadvantage of some retirees. The decision functioned primarily to return the Commission to a closer hewing to the standard provided under Port Huron Education Ass ' n v Port Huron Sch Dist, 452 Mich 309 (1996).

In Macomb County, at the MERC ALJ level, no violation of the statute was found. The Commission decision reversing ALJ Stern was in turn ultimately reversed by the Supreme Court. The grounds prove not relevant to the present matter. The Supreme Court found the underlying collective bargaining agreement in Macomb to be unambiguous and that it expressly provided discretion to the retirement board to make the challenged change in mortality tables. The Court held that MERC had erred by relying on a past practice, *albeit* of several decades duration, of using the same actuarial table as a basis for finding an unlawful unilateral change, rather than respecting the unambiguous language of the contract which, even if long unused, expressly allowed the retirement board to make the change in mortality tables.

The Court in Macomb reaffirmed the right of parties to rely on their agreements, as held in the earlier Port Huron case, the holding of which remains controlling law. In the instant case, the unambiguous language of the contracts supports a finding of a violation. [19] The parties here expressly provided for a particular benefit to be funded and disbursed in a particular manner. Their agreements were memorialized both in contract and in ordinance. The County sought, unsuccessfully as to the non-supervisory unit, to negotiate a prospective change in entitlement to benefits. Failing at that, the County acted unilaterally in passing and then enforcing an ordinance to unilaterally almost entirely take away a negotiated benefit. The Macomb decision affirms rather than detracts from the enforcement of rights as to an unambiguous agreement.

A portion of the Macomb decision re-affirms earlier case law requiring MERC to refer back to arbitration disputes " covered by" a collective bargaining agreement which had in it an arbitration clause where there was any colorable claim that the complained of conduct was allowed under the contract. The Court held that such disputes are for arbitrators, not the Commission, to decide. Here, the " covered by" analysis fails for two separate reasons. First, as to the non-supervisory unit, which contains the bulk of the effected employees, there was no contract in place at the time of the unilateral change in conditions and no arbitration clause to which the matter could be deferred. Second, as more fully discussed above, the County simply had and advanced no even arguable basis under the prior ordinance or several collective bargaining agreements which could excuse its conduct. Simply, no plausible contractual defense was proffered. Rather, the Employer here advanced statutory and Constitutionally based defenses which are not amenable to resolution by a private arbitrator.

Moreover the County seeks to turn the Macomb decision on its head. In Macomb, the Court found that the contract language expressly granted the retirement board the discretion to make certain decisions, and the retirement board made such a decision well within its established discretion. Here, the unilaterally imposed new Wayne County ordinance took away from the pension board the discretion which the parties had expressly agreed the pension board alone would wield.

10. The Fact that the Prior Agreements of the Parties Were in Part Memorialized In Ordinance Amendments Does Not Excuse Unilateral Changes

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

The County advances the additional novel and implausible theory that because the pension obligations immediately in dispute were primarily recorded in an ordinance rather than in the collective bargaining agreements, the unilateral change was not a violation of the duty to bargain. The County relies on the unremarkable assertion that because the County Commission as a legislative body has the right to adopt ordinances, it has the corollary right to repeal or amend ordinances. First, under *Detroit Police Officers Ass ' n (*DPOA) v. Detroit, 391 Mich 44, 54-55 (1974), it is perfectly appropriate for parties to memorialize their negotiated agreements in various forms. The Supreme Court in DPOA expressly noted that under the plain language of PERA, it is proper for parties to negotiate and to then record their deal in a collective bargaining agreement, in a memorandum of understanding, or by passing an appropriate ordinance or resolution, as in the DPOA case itself which involved a municipal pension ordinance. In relevant part, the statute provides that once a deal has been struck, it may be memorialized by " *the execution of a written agreement, ordinance, or resolution* " incorporating the agreed upon terms. See, 423.215 (1). It is not in the least uncommon for parties to memorialize a municipal pension deal by passing an amended ordinance, as here, and especially as to pension issues where typically, a union representing some employees negotiated beneficial changes which are then applied across the board to all employees, even those not in a bargaining unit.

Moreover, in addition to the original 1986 and the revised 2000 ordinance, the parties did, in fact, memorialize their deferred compensation agreements in the several collective bargaining agreements. In those agreements, the parties contractually committed themselves to the maintenance of the retirement benefits described in the then-existing pension ordinance, which they expressly agreed " *shall control except where amended or changed* " within the collective bargaining agreement itself. Thus, the pre-existing ordinance was incorporated by reference in the parties' written agreements.

Conclusion

The County has offered no substantive or valid reason why it should, in this latest instance, be excused from the obligations uniformly imposed on all other employers that are subject to PERA. This holding, as was true of the historical Wayne County cases, does not require that the County continue to provide services in excess of its budgetary capacity; instead, it requires the County to exercise budgetary discipline in the manner to which it has voluntarily committed itself, both before and after this dispute. The County cannot now unilaterally change existing conditions of employment without violating PERA any more than it could during the earlier economic downturn of 1982-83. The retirement related benefit cuts were an unlawful unilateral change in basic conditions of employment implemented in violation of the County' s well-established obligations under Section 10(1)(e) of PERA to bargain in good faith, to refrain from repudiating prior agreements, and to maintain pre-existing conditions of employment during the bargaining process.

I have carefully considered any additional arguments asserted by the parties in this matter and have determined 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

Wayne County, its officers, agents, and representatives shall:

1. Cease and desist from

a. Failing to bargain in good faith with the representative of its employees, including by failing to participate in good faith in the fact-finding process;

b. Unilaterally altering any established conditions of employment during the bargaining process and prior to the conclusion of good faith bargaining and fact-finding proceedings;

WESTLAW © 2023 Thomson Reuters. No claim to original U.S. Government Works.

c. Asserting that there exists an impasse in bargaining where there are related and unremedied unfair labor practices committed by the Employer;

d. Unilaterally altering benefits during the pendency of good faith bargaining and fact-finding proceedings;

e. Seizing assets held for the benefit of employees, during the bargaining process and prior to the conclusion of fact-finding proceedings and good faith bargaining;

f. Where an unexpired collective bargaining agreement is in place, repudiating the terms of such agreements and refusing to comply with the unambiguous obligations under such agreements;

g. Interfering in the holding and distribution of assets by the retirement board from the IEF when it is acting pursuant to authority expressly granted to it by the parties, whether through agreement memorialized in the pension ordinance or in separate written collective bargaining agreements.

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

a. Bargain in good faith with AFSCME regarding successor collective bargaining agreements as to each of the several units as the respective contracts expire;

b. Affirmatively renounce reliance on the September 30, 2010 pension ordinance amendment;

c. Restore to the Inflation Equity Fund the entirety of the approximately $32 million in assets diverted from the IEF following the adoption of the September 30, 2010 ordinance amendment, to the extent that the assets have not already been restored pursuant to an order of the Court in the collateral proceedings;

d. Affirmatively renounce and cease any effort at enforcement of the $12 million cap on assets held in the IEF, unilaterally imposed through the adoption of the September 30, 2010, ordinance amendment;

e. Affirmatively renounce and cease any effort at enforcement of the $5 million cap on annual distributions from assets held in the IEF, unilaterally imposed through the adoption of the September 30, 2010, ordinance amendment;

f. Provide statutory interest to, or otherwise make whole, the IEF for the deprivation of the approximately $32 million in assets and the intervening lost earnings on those assets;

g. Refrain from any interference in the distribution of the so-called " 13th checks" by the retirement board, including in the distribution of any make-up or backpay checks as may be issued in the discretion of the retirement board;

h. Otherwise make whole all AFSCME bargaining unit members adversely effected by the unilateral changes in conditions of employment found unlawful in this Decision;

i. Provide the Union with the full calculation of amounts reimbursable to the IEF, or unit members, and interest on same;

j. Maintain all existing conditions of employment throughout the bargaining and fact-finding process.

3. Post the attached notice to employees in a conspicuous place at each County worksite and post it prominently on any website maintained by the County for employee access for a period of thirty (30) consecutive days, and additionally deliver a copy of the notice by mail or email to each employee in the AFSCME bargaining units.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Cases Cited
26 MPER 30

Footnotes

1 We note Charging Party's assertion in its post hearing brief that it was not provided with notice or an opportunity to bargain over the amendment to the retirement ordinance regarding the thirteenth check. However, Exhibit 52, which was offered by Charging Party, indicates that the president of each of the locals representing the three bargaining units involved in this matter were members of the Wayne County Labor Coalition and were notified by the Coalition of the Employer's efforts to amend the Retirement Ordinance in September 2010.

2 The record does not contain data for fund earnings or the investment threshold rate after 2011.

3 77 NLRB No 1 (NLRB), 77 NLRB 1, 21 LRRM (BNA) 1310, (1948) enforced *sub nom,* Inland Steel Co v NLRB, 170 F2d 247 (CA 7, 1948); *cert den* 336 US 960, 69 S Ct 887, 93 L Ed 1112 (1949). See also, Allied Chemical & Alkali Workers of America v Pittsburgh Plate Glass Co, 404 US 157, 180 (1971).

4 Steelworkers (AFL-CIO) (Inland Steel Co.), 77 NLRB No 1 (NLRB), 77 NLRB 1, 21 LRRM (BNA) 1310, (1948).

5 Commissioner Natalie P. Yaw has recused herself and did not participate in the decision in this matter.

6 Counsel, in particular for the Employer, acknowledged on the record that nearly the entirety of the 9,000 pages of exhibits was irrelevant. Indeed, in their post hearing briefs, the parties referenced a mere handful of the voluminous exhibits.

7 The Employer rested without putting on a single witness despite repeatedly, and vaguely, insisting that there existed genuine disputes of material fact warranting an extensive evidentiary hearing on what objectively appeared to be, and ultimately was, a *factually* undisputed disagreement regarding the legal obligations of the parties.

8 Also addressed in the Fifth Amended Charge was the County's attempted implementation of the cut-off of family insurance coverage, including a retroactive cut-off of coverage for the month of September 2010. In a collateral action in Wayne County Circuit Court, an injunction was issued largely blocking the insurance cut-off, although a claim for related relief remained, which was addressed and a remedy ordered in the November 2012 decision in Case NO C10 A-024-A.

9 That matter was not litigated to conclusion, as more fully described below.

10 The background facts are derived from the record in this matter and from prior formal decisions by MERC and by the several ALJs who have heard various portions of this dispute.

11 Notably, in his Decision on the health insurance case, ALJ Peltz recommended an award of attorneys fees against the County premised on an established and egregious pattern of repeated willful violations of their bargaining obligations and of the Act. The Commission affirmed the finding of unlawful conduct, but rejected the proposed award of fees.

12 As a part of the December 2011 contract settlement, the County withdrew its challenge in the Michigan Court of Appeals to the Commission Decision reported at Wayne County, 24 MPER 12 (2011), adopting Peltz'finding that the 2009 withholding of a pay increase was unlawful. The parties had already briefed before me on summary disposition the question of the legality of the 2010 unilaterally withheld pay increase, with the County conceding that the 2009 and 2010 cases were indistinguishable. As part of the 2011 settlement, the Union withdrew the ULP then awaiting decision on

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

the 2010 withheld 2% pay increase, the outcome of which was otherwise seemingly inevitable given the Commission's already published Decision affirming Peltz with regard to the 2009 pay increase.

13 As addressed more fully in the Discussion section below, once a MERC fact-finder's report is issued the parties are expected, indeed required, to re-double their bargaining efforts for at minimum another 60 days during which period unilateral action on a mandatory subject of bargaining by either side is *per se* unlawful.

14 The reference to retirement obligations for public employees as "gratuities" is not without historical precedent in Michigan, *albeit* not supportive of the assertion. In Bowler v Nagel, 228 Mich 434 (1924), the Court specifically rejected the City of Detroit's assertion that amounts paid from retirement funds were "gratuities" . However, in Brown v Highland Park, 320 Mich 108 (1948), the Court faced a financially beleaguered city and held that, despite Bowler, such pension obligations were not individually enforceable "contractual" obligations in nature, such that the City of Highland Park could eliminate the pensions of the widows of police and firemen, by the expedient of a Charter amendment, without offending State law or the Federal Constitutional impairment of contracts clause. Outrage over the impact of that decision helped lead to the 1963 Constitution, which in article 9, section 24, put the theory to rest and defined such public pension benefits as Constitutionally protected entitlements. The same Constitutional Convention adopted article 4, section 48, which authorized the creation of PERA, the unionization of public employees, and the negotiation of enforceable collective bargaining agreements.

15 Notably, a different outcome may well arise where an overspending governmental entity legitimately and formally seeks bankruptcy protection.

16 The Respondent has previously taken the position, as to these same parties, that there is no duty to arbitrate disputes which arose after expiration of an agreement, such as here with the non-supervisory unit. See, AFSCME Council 25 v Wayne County, 290 Mich App 348 (2010).

17 Regardless, the novel theory of unreviewable legislative action would likely run afoul of federal and state constitutional protections against Legislative impairment of contracts, the taking of private property rights by the government without compensation, and the constitutional guarantee of substantive due process. See, AFT Michigan v State of Michigan, 297 Mich App 597 (2012).

18 In Wayne County, 26 MPER 22 (2012) MERC upheld a finding of a violation by the County, in unilaterally withholding health care benefits from disability retirees, specifically finding Wayne County's reliance on the Butler decision to be "*misplaced*". The Butler decision was an unremarkable one, finding that the complained of action by the employer had been specifically authorized by the contract in question.

19 The Union did here additionally make a "past practice" argument in support of its opposition to the unilateral changes made by the Employer, but I find the argument to be mere surplusage where the express contract language precluded the action taken by the Employer.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

30 MPER ¶ 48, 30 Michigan Pub. Employee Rep. ¶ 48, 2017 WL 603786

Michigan Employment Relations Commission

City of Detroit, Public Employer-Respondent, and Detroit Fire Fighters Association, Local 344, International Association of Fire Fighters, Labor Organization-Charging Party
No. C09 L-265
Hearing Docket No. 09-000013
CALLAGHAN, LABRANT, YAW
January 11, 2017

Related Index Numbers
15.43 Uniformed Services, Fire Fighters
41.7 Duty to Supply Information
43.137 Compensation, Benefits, Retirement
43.168 Compensation, Leaves of Absence, Sick Leave
72.77 Other Unfair Practices, Refusal to Supply Information
72.611 Unilateral Change in Term or Condition of Employment, What Constitutes Change
74.31 Types of Orders, Cease and Desist
74.321 Types of Orders, Restoration of Status Quo Ante, Specific Affirmative Action
74.341 Types of Orders, Restitution, Liability for Back Pay
74.3211 Types of Orders, Specific Affirmative Action, Supply Requested Information

Appearances:
Valerie A. Colbert-Osamuede, for Respondent
Letitia C. Jones, for Respondent
Alison L. Paton, for Charging Party

Judge / Administrative Officer
CALLAGHAN
LABRANT
YAW

Ruling

MERC adopted an ALJ' s recommended decision regarding an unfair practice charge, where no exceptions were filed. The ALJ decided that the municipal employer breached its bargaining duty under PERA Section 10(1)(e) by failing or refusing to supply certain information to the union. The ALJ further found that the employer repudiated its contractual obligations by failing to properly credit unit members for the accrued sick leave time that they earned. However, the ALJ determined that the employer did not repudiate other contract provisions. The ALJ issued several unfair practice remedies.

City commits ULP by failing to provide requested info and by breaching CBA

Meaning

The ALJ explained that, in order to satisfy its bargaining obligation under PERA Section 10(1)(e), an employer must timely supply requested information to permit the union to engage in bargaining and to police the administration of the contract.

Case Summary

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

In 2009, the firefighters' union filed an unfair practice charge asserting that the municipal employer violated PERA provisions by failing to fulfill the union' s request for information relating to calculations of lump sum pay for retiring bargaining unit members. The union also contended that the employer breached its good faith bargaining duty and repudiated its obligations under the parties' bargaining agreement. An ALJ issued a recommended decision regarding the charge. The ALJ found that the employer breached its bargaining duty under Section 10(1)(e) of PERA by failing or refusing to supply relevant information to the union regarding: (1) the calculation of lump sum payments for retiring members; (2) the medical condition of a bargaining unit member; and (3) the possible transfer of the administration of employee retirement benefit plans to the Municipal Employees' Retirement System. The ALJ further found that the employer repudiated its contractual obligations by failing to properly credit unit members for the accrued sick leave time that they earned. However, the ALJ determined that the employer did not repudiate other contract provisions regarding sick time, the payment of step increases for certain unit members, the retroactive implementation of an Act 312 award, and Medicare and Social Security deductions. The ALJ issued a cease and desist order. The ALJ directed the employer to provide certain requested information, to comply with certain contract requirements, to grant certain sick leave credits to unit members, and to make bargaining unit members whole. MERC adopted the ALJ' s decision, where no exceptions were filed.

Full Text

Decision and Order

On November 1, 2016, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by either of the parties to this proceeding.

Order

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

Decision and Recommended Order of Administrative Law Judge

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission. Based upon the entire record, including the transcript of hearing, exhibits and post-hearing briefs, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge and Procedural History:

This case has a long and tortured procedural history which is described in detail below. The Detroit Fire Fighters Association, Local 344, International Association of Fire Fighters (DFFA or Union) represents a bargaining unit comprised of all non-civilian positions within the City of Detroit Fire Department, including fire chief, fire marshal, fire captain and fire fighter. The unit also includes several civilian positions such as fire dispatcher, supervisor of fire apparatus and auto repair foremen. The most recent

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

collective bargaining agreement between the parties covered the period July 1, 1998 to June 30, 2001, but remained in effect at the time of the hearing in this matter. The contract contains a grievance procedure culminating in final and binding arbitration.

On December 30, 2009, the DFFA filed an unfair labor practice charge asserting that the City of Detroit violated Section 10(1)(e) of the Act by failing to provide information requested by the Union relating to calculations of lump sum pay for retiring bargaining unit members and by providing " incomplete information" in response to a request for the medical records of unit member Jason Johnson. The charge further alleged that the City breached its duty to bargain in good faith by unilaterally implementing Bulletin 86/09, which pertained to the submission of medical mileage reimbursement requests. Finally, the charge asserted that the City repudiated its obligations under the collective bargaining agreement by: (1) failing to pay banked leave time (other than sick time) within the 30-day contractual time limit; (2) failing to implement a two percent wage increase for battalion chiefs and equivalent ranks; (3) failing to properly and accurately credit employees for sick leave accrual; (4) failing to implement step increases for members above the rank of fire fighter; (5) failing to implement increased merit performance award pay for the ranks of battalion chief and above; (6) failing to pay retroactive pay to DFFA members who are in positions which are parity allied with positions represented by the Detroit Police Lieutenants and Sergeants Association (DPLSA); (7) failing to pay the proper amount owed to members under the contract' s uniform and cleaning allowances; (8) making improper deductions for Medicare; (9) failing to pay compensatory time; and (10) failing to correct underpayments for all of the above within the 60-day time period set forth in the contract.

The charge was initially assigned to ALJ Doyle O' Connor and an evidentiary hearing was scheduled for May 5, 2010. On January 15, 2010, Judge O' Connor issued an order requiring the City of Detroit to file a fact specific answer or position statement addressing the allegations set forth in the charge. With respect to the information request allegation, the order required the City to show cause why summary disposition should not be granted in the Union' s favor. On or about February 18, 2010, the City filed a response to the order to show cause asserting that it had previously responded to all of the information requests submitted by the Union.

No answer or position statement was filed addressing the remaining allegations in the charge as required by Judge O' Connor' s order of January 15, 2010. After the Union complained about the Employer' s failure to fully comply with the ALJ' s order, Joseph Martinico, then Director of Labor Relations for the City of Detroit, sent a letter to the Union dated March 16, 2010, in which he asserted that most of the Union' s complaints have been addressed, but that the City would provide the DFFA with any " missing or incomplete" information. The Union' s attorney, Alison Paton, responded to Martinico by letter dated April 1, 2010. In that letter, Paton took issue with Martinico' s assertion that the case was essentially resolved and she provided clarification regarding the specific claims being asserted by the Union.

On or about April 8, 2010, the evidentiary hearing in this matter was adjourned at the request of the parties to accommodate proceedings which were ongoing pursuant to the Compulsory Arbitration of Labor Disputes in Police and Fire Departments Act, 1969 PA 312, MCL 423.231 et seq. (Act 312). Following the conclusion of the Act 312 hearings, Judge O' Connor rescheduled this matter for hearing on November 16, 2010.

On August 5, 2010, the DFFA filed a first amended charge in which it withdrew the allegation that the City had repudiated its contractual obligation to implement a two percent wage increase for battalion chiefs and equivalent ranks. The amended charge raised several new allegations, including a claim that Respondent failed to comply with the Union' s May 13, 2010, request for information relating to the City' s " possible transfer" of the Detroit Police & Fire Retirement System (DPFRS) to the Municipal Employees' Retirement System (MERS). In addition, the amended charge asserted that the City had repudiated the terms of the parties' collective bargaining agreement by failing to pay unused sick time in accordance with the formula specified in the contract. Finally, the amended charge alleged that Respondent was unlawfully deducting social security from the paychecks of bargaining members.

The Union filed a second amended charge on September 22, 2010, incorporating two additional allegations which the DFFA asserted had been " inadvertently omitted" from the prior pleading. The second amended charge asserted that following the

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

issuance of an Act 312 award involving the City and the Detroit Police Command Officers Association (DPCOA), Respondent repudiated the terms of its contract with the DFFA by failing or refusing to implement changes in terms and conditions of employment for unit members who were supposed to have parity with police command positions. In addition, the second amended charge alleged that the City violated PERA by failing to implement the provisions of the " Dorio Thornton" settlement agreement entered into on December 29, 2009.

The parties met for the evidentiary hearing in this matter on November 16, 2010. Rather than going on the record, the City and the Union instead engaged in settlement discussions which resulted in an agreement on a framework for voluntary resolution of all of the Union' s allegations. The agreement was codified in a letter from DFFA President Daniel McNamara to Martinico dated November 23, 2010. In case the settlement fell through, the parties also resolved to participate in another prehearing conference with Judge O' Connor. On May 4, 2011, Paton notified O' Connor in writing that the parties had been unable to fully resolve this dispute. Specifically, Paton asserted that the City had failed to keep almost all of the promises it had made at the November 16, 2010, prehearing conference.

The parties met once more in an attempt to resolve this dispute on May 18, 2011. Those discussions failed to produce a settlement and an evidentiary hearing commenced before Judge O' Connor on June 15, 2011. The hearing was not completed on that date and a second day of trial was scheduled for September 20, 2011.

On July 20, 2011, the DFFA filed a third amended charge in which it withdrew allegations relating to implementation of increased merit performance award pay for the ranks of battalion chief, payment of the uniform and cleaning allowance for bargaining unit members, failure to pay compensatory time and implementation of the " Dorio Thornton" settlement agreement. The amended charge included a new allegation that the City violated PERA by failing to provide information regarding merit pay for battalion chiefs.

The September 20, 2011, date for continuation of the evidentiary hearing was canceled at the City' s request due to a scheduling conflict. The hearing was rescheduled for December 15, 2011. The day before the hearing was set to resume, Charging Party notified ALJ O' Connor that the DFFA was withdrawing its allegation that Respondent violated PERA by failing to implement the provisions of the DPOCA arbitration award and its claim that the City had unlawfully failed or refused to provide requested information concerning merit pay for battalion chiefs.

On December 15, 2011, the parties informed Judge O' Connor that no additional hearing dates were necessary and that the record in this matter could be closed. Thereafter, the ALJ provided the parties with a schedule for the filing of post-hearing briefs. The DFFA filed its post-hearing brief on February 29, 2012. As part of the brief, the Union withdrew its allegation that the City had breached its duty to bargain in good faith by unilaterally implementing Bulletin 86/09 which pertained to the submission of medical mileage reimbursement requests. The City filed its post-hearing brief on September 14, 2012.

Pursuant to Rule 174, R423.174, this case was transferred to ALJ Julia Stern on October 11, 2013, following Judge O' Connor' s retirement. In July of 2013, Respondent filed a petition for bankruptcy in federal court. As a result, all cases then pending before the Commission involving the City of Detroit, including the instant case, were held in abeyance until the bankruptcy petition was resolved. On February 21, 2014, the DFFA filed a proof of claim in the bankruptcy court preserving the Union' s right to debt owned in connection with various cases, including the instant dispute.

The City of Detroit emerged from bankruptcy on December 10, 2014. On August 26, 2015, Judge Stern sent the parties a letter stating that since the bankruptcy proceeding had concluded, she planned on moving forward with this case, but that if any party believed that placing this matter back on the active docket would be in contravention of an order issued by the Bankruptcy Court or any other lawfully issued order, the party was to notify her within twenty-eight days of the letter. Judge Stern did not receive any response to the letter and the case was placed back on her active docket. However, because of the age of the case, and the likelihood that some issues had been rendered moot or settled while the matter was stayed, Judge Stern directed

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

the parties to appear for a status conference on December 1, 2015. The conference was rescheduled for January 29, 2016, at Charging Party' s request.

Around the time that the instant case was reactivated, Judge Stern was in the process of presiding over a complicated unit clarification proceeding for which an expedited decision was required. Accordingly, I was invited to assist her at the status conference with the understanding that this matter would likely be transferred to my docket if any issues remained outstanding. At the January 29, 2016, conference, the Union withdrew its allegation that the City violated PERA by failing to pay banked leave time (other than sick time) within the 30-day contractual time limit. Thereafter, the case was formally transferred to my docket.

The following issues remain in dispute: (1) failure to provide information relating to calculations of lump sum pay for retiring bargaining unit members; (2) failure to provide Jason Johnson' s entire medical file; (3) refusal to comply with the Union' s request for information relating to the possible transfer of the DPFRS to MERS; (4) failure to pay unused sick time; (5) failure to properly and accurately credit employees for sick leave accrual; (6) failure to implement parity step increases for members above the rank of fire fighter; (7) failure to pay retroactive pay to DFFA members who have parity with DPLSA positions; (8) improper deductions for Medicare for employees hired before March 31, 1986; and (9) improper deductions for social security.

I. Information Requests

Findings of Fact:

Calculation of Lump Sum Pay For Retiring Bargaining Unit Members

Under the collective bargaining agreement which was in effect at the time of the hearing in this matter, members of the DFFA unit were entitled, upon retirement, to a lump sum payment of accrued sick time and banked time, the latter of which included compensatory time and furlough days. The payments were processed by the City' s payroll department using separate forms, one for sick time and another for all other types of banked time.

At some point, bargaining unit members began noticing that they were not receiving the proper lump sum payment amounts. On July 2, 2009, DFFA Secretary Jeffrey Pegg wrote to Seth Doyle, III, Deputy Fire Commissioner, requesting a " complete and accurate copy of the Detroit Fire Department' s Calculation of Lump Sum Pay for all members that have retired effective July 1, 2008 through present." Doyle responded by letter dated July 8, 2009, asserting that the request had been forwarded to human resources and/or payroll " for a proper response." Despite that assurance, the Union received no further communications from the City regarding this matter and the requested information was not provided.

On September 23, 2009, the Union filed the instant charge which included an allegation that the City had violated its duty to bargain under PERA by failing to respond to the July 2, 2009, request for information concerning the calculation of lump sum payments. Two days after the charge was filed, Pegg sent another written request to Doyle for the lump sum payment information for bargaining unit members who had retired effective July 1, 2008, through the present. At the time, the request covered approximately 40 unit members. Once again, the City provided no response to the Union' s information request.

On March 16, 2010, Martinico wrote to DFFA attorney Paton concerning the charge. Regarding the issue of the lump sum payment information request, Martinico expressed uncertainty as to which of the two forms the Union was seeking. Despite that confusion, Martinico promised that the City would provide " greater detail and explanation as to how these lump sum payments are calculated." Martinico further indicated that he would provide Paton with " several sample calculations of sick leave payments, in order to more fully clarify the methodology or formula used to make these calculations."

Paton responded to Martinico by letter dated April 1, 2010. In the letter, Paton took issue with the City' s contention that it did not understand which forms the Union was seeking. Paton asserted that Martinico' s letter was " the first time anyone has indicated

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

that there was a need for further clarity as to what is being requested; it is unfortunate that this was never indicated previously during the approximately 8 months that this request has been pending." Paton proceeded to explain that the Union was seeking information for both sick time lump sum payments and all other lump sum payments for every member who had retired since July 1, 2008. She also clarified that the DFFA was " not seeking sample calculations, but rather calculation sheets" for each affected unit member. To avoid any further confusion, Paton enclosed examples of the specific forms the Union was seeking.

On November 16, 2010, Judge O' Connor held a settlement conference during which the parties worked out a schedule for resolution of the various claims set forth in the charge. The schedule, as formalized in a letter from DFFA President McNamara to Martinico dated November 23, 2010, called for the DFFA to provide to the City a list of the specific individuals for whom lump sum payment information was being sought. Pursuant to the agreement, the City was then obligated to provide the Union by December 24, 2010, with copies of the two lump sum payment forms for 25 of the bargaining unit members identified by the Union, with forms for the remainder of unit members provided to the DFFA by February 1, 2011.

Pursuant to the agreement, the Union provided the City with a list containing the names of 151 fire department employees for whom it was seeking information concerning the calculation of lump sum payments. Several names on the list, which was provided to Respondent on November 19, 2010, were in bargaining units other than the DFFA at the time; however, those individuals were formerly in Charging Party' s unit and held seniority in positions represented by the DFFA. Other individuals on the list had not yet retired from the fire department but had opted to take an early payout prior to separation from employment with the City.

Although the City ultimately provided Charging Party with the requested separation payment forms for 25 of the bargaining unit members identified by the Union, it did not do so by the December 24, 2010, deadline previously agreed to by the parties. Forms for 20 additional unit members were later provided to the Union at a meeting on May 18, 2011. However, the Union indicated to the City at that time that the forms were incomplete. According to the Union, Respondent provided only the sick time forms and did not include the lump sum payment forms for any of these members.

Respondent did not provide any further information to the DFFA through the date of the hearing in this matter. With respect to the approximately forty bargaining unit members who had retired from July 1, 2008, through the time of the filing of the charge, there were still six to ten members for whom the Union had received no information whatsoever relating to the calculation of lump sum payments.

Medical Documentation Concerning Jason Johnson

The Union filed a grievance on behalf of bargaining unit member Jason Johnson after Respondent placed him on " injured on duty inquiry" status. The grievance asserted that Johnson should have been eligible for duty disability benefits. On August 26, 2009, the Union submitted a form entitled, " Authorization to Release Medical Information/Records" to the fire department' s medical division. The form, which Johnson signed, requested that Respondent produce " any and all information you may have regarding my condition when under observation or treatment by you, including history obtained, findings and diagnosis." The form did not specifically mention the pending grievance. Pegg testified that whenever the Union had previously submitted such a form to the fire department, it had always received the employee' s entire medical file in return.

The City responded to the information request on or about September 2, 2009, by providing the Union with a 46-page packet of medical records pertaining to Johnson which included a Workers Compensation Claim summary, an accident report, and various documents from medical care providers.

Sometime in late 2009 or early 2010, Pegg had a conversation with Yolanda Daley, a medical case worker employed by the City. Daley is in charge of maintaining medical records for fire department employees and compiling those files in response to Union requests for information. Daley told Pegg that she had not given the DFFA a copy of Johnson' s complete medical file, but rather only those documents that she had deemed relevant to the pending grievance. Following that conversation, Pegg wrote

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

to 2nd Deputy Fire Commissioner Chery Campbell, complaining that the City was not providing complete medical files for its members in response to Union information requests. In addition, Pegg asserted that the fire department' s medical division was giving copies of medical documents to the Respondent' s labor relations department and/or City attorneys which had never been provided to the Union.

Campbell responded by letter dated January 15, 2010, in which she asserted that the Union would " receive a more comprehensive response after these allegations have been investigated." Charging Party never received a reply from Campbell regarding Pegg' s assertion that the fire department was withholding information. However, the Union subsequently received a new packet of documents from Respondent which included additional medical records pertaining to Johnson. The new packed included a progress report from Gary Chodoroff, M.D. In the report, Dr. Chodoroff asserted the City had misrepresented his earlier diagnosis of Johnson:

Mr. Johnson provided me with a document entitled, " Public Safety Case Review" dated 08/06/2008. In this review, it is stated that, " Based on Dr. Chodoroff note, nothing duty related. Problems appear chronic. Can continue treatment with his physician and should be placed off sick." This is not what I had stated to the doctor. I explained to her that my opinion was that there was . . . a clear cut work injury."

After the instant charge was filed, Martinico wrote to Paton regarding the issue of Johnson' s medical records. In the letter, dated March 16, 2010, Martinico explained that Respondent had interpreted the Union' s August 26, 2009, request as pertaining to records relevant to the grievance and that the City had not understood that the DFFA was actually seeking all records in the fire department' s possession concerning Johnson' s medical history. Martinico indicated that " [u]pon receipt by the Department of a medical records release covering all medical records applicable to all conditions for which Mr. Johnson has been treated during his employment with the Department, all of these records will be provided."

Information Regarding Transfer of Retirement System

Retirement plans for employees of the City of Detroit police and fire departments are administered by the DPFRS. In 2010, Charging Party became concerned that the City might be considering transferring the administration of employee retirement benefit plans to MERS, a retirement services company which oversees retirement plans for municipalities throughout Michigan. At hearing, Union President Dan McNamara testified that such a move would have the potential to impact members of the DFFA bargaining unit. For example, McNamara testified that under the current system, the DPFRS board is responsible for determining whether a police or fire department employee is entitled to a disability pension. According to McNamara, the responsibility would likely be transferred to another entity if MERS were to take over management of the retiree benefits.

By letter dated May 13, 2010, McNamara wrote to Executive Fire Commissioner James W. Mack, Jr., requesting " all communications written and verbal to include but not be held to only these forms: e-mail, letter, missive, snail mail, text, twitter, tweet, phone call, video, facebook, myspace page or any other electronic means between the City of Detroit and its agents, MERS and its agents and any other interested group or persons directly related to moving the Detroit Police and Fire Retirement System to MERS."

Mack responded to McNamara on or about May 21, 2010, asserting that " the Detroit Fire Department does not have communication, written or verbal" pertaining to the subject matter of the request. A few days later, Martinico wrote to McNamara regarding the Union' s information request. In the letter, which was dated May 27, 2010, Martinico neither confirmed nor denied that transfer of the retirement system to MERS was under consideration. Instead, he asserted that the Union was not entitled to any information regarding the issue because " there is currently no City or Union proposal made in collective negotiations or bargaining regarding moving the Detroit Police and Fire Department System to MERS." Martinico requested that McNamara " indicate the basis for the Association' s information request" so that Respondent could be able to appropriately consider whether any document should be disclosed.

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

On or about June 10, 2010, McNamara wrote a letter to Martinico disputing his legal conclusion that the City had no duty under PERA to disclose the requested information. In the letter, McNamara noted that " PERA allows such a request so that a union can ' administer, enforce or negotiate the collective bargaining agreement.' " The letter continued:

The Detroit Fire Fighters Association (DFFA) is under the belief that there have been meetings held by our employer with MERS and other interested parties that involve a mandatory subject of bargaining that is clearly recognized in our CBA. In fact, one group has stated in print that they have met and discussed the movement to MERS with Mayor Bing and representatives of MERS.

It is problematic that groups are meeting over such an issue, especially while those bargaining groups that are legislatively and legally empowered to do such negotiating are left out.

For these, and other obvious reasons, I again assert the PERA request that I have submitted to you.

Attached to the letter was a copy of a news item published by the Retired Detroit Police and Fire Fighters Association (RDPFFA). The publication referred to a meeting at which RDPFFA representatives, then City of Detroit Mayor Dave Bing and officials from MERS purportedly discussed proposed legislation which would place the Detroit pension systems under the management of the statewide retirement system.

Martinico responded to McNamara by letter dated June 23, 2010. Martinico once again asserted that the City was not obligated to provide any information regarding the possible transfer of the retirement system because the Union had not explained how its request was relevant to the " administration, enforcement or negotiation of the agreement." Martinico also denied having any knowledge of a meeting between the City, MERS or other interested parties, including the RDPFFA. Martinico concluded the letter by asserting that he was " still unable to make a full and knowledgeable evaluation" of the Union' s information request. After receiving this letter from Martinico, the Union filed the instant charge.

On November 16, 2010, the parties met for a pretrial conference with Judge O' Connor, the substance of which was later codified in a letter from McNamara to Martinico dated November 23, 2010. With respect to the MERS information request, the City agreed that on or before January 10, 2011, it would provide a letter to the DFFA " indicating what if any documents it will provide, and for any documents that exist but which the City does not intend to provide, a brief explanation of the document and the reason the City will not provide it." McNamara testified the Union never received any such letter from the City, nor did the DFFA ever receive any documents in response to its request for information concerning the possible transfer of the retirement system.

Discussion and Conclusions:

Charging Party contends that the City violated PERA by failing to properly and fully respond to its requests for information. In order to satisfy its bargaining obligation under Section 10(1)(e) of PERA, an employer must timely supply requested information to permit the union to engage in collective bargaining and to police the administration of the contract. *Wayne County*, 1997 MERC Lab Op 679; *Ecorse Pub Sch*, 1995 MERC Lab Op 384, 387. The standard applied is a liberal discovery-type standard. The employer has a duty to disclose the requested information as long as there exists a reasonable probability that the information will be of use to the union in carrying out its statutory duties. *Wayne County, SMART*, 1993 MERC Lab Op 355, 357. See also Pfizer, Inc, 268 NLRB 916 (1984), enf' d, 763 F2d 887 (CA 7 1985). Information relating to terms and conditions of employment, such as wages, job descriptions, and other information pertaining to bargaining unit employees is presumptively relevant and the employer must provide it unless it rebuts the presumption. *Plymouth Canton Community Sch*, 1998 MERC Lab Op 545; *City of Detroit, Dep ' t of Transp*, 1998 MERC Lab Op 205. A refusal or unreasonable delay in supplying relevant information is a violation of the duty to bargain in good faith. *Oakland University*, 1994 MERC Lab Op 540; *Wayne County ISD*, 1993 MERC Lab Op 317.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Charging Party made its initial request for information concerning the calculation of lump sum payments on July 2, 2009. No information was provided by Respondent at that time, nor did the City disclose any information after the Union repeated the request on September 25, 2009, more than two months later. The information request was clearly relevant to the Union' s statutory duty to police the administration of its contract. Members of the bargaining unit had been complaining to DFFA representatives that they were not being paid the full lump sum payment amounts that they were owed by Respondent upon retirement. The information sought by the Union was necessary to assess whether those complaints were valid. In fact, the City has not disputed the relevancy of the requested information.

The record overwhelmingly establishes that the City did not respond in good faith to the request for information. Although Respondent promptly acknowledged receipt of the Union' s initial request, it did not immediately provide Charging Party with the information or offer any reason why it could not do so. The only explanation given by Respondent to justify its failure or refusal to provide the requested documents was Martinico' s assertion that the meaning of the request was unclear. However, that claim was not made until March 16, 2010, more than eight months after the Union first submitted its information request and almost six months after the charge was filed. To the extent that the City found Charging Party' s request vague or misleading, it should have requested clarification upon receipt of the initial request. *Wayne County Comm College*, 20 MPER 98 (2007), citing Azabu USA, 298 NLRB 702 (1990). See also National Electrical Contractors Assn., Birmingham Chapter, 313 NLRB 770, 771 (1994); Keauhou Beach Hotel, 298 NLRB 702 (1990).

At hearing, the City' s attorney asserted that the Union' s allegations concerning the production of lump sum payment information should be dismissed because most of the documentation requested was ultimately provided to the DFFA. I find no merit to this assertion. The fact that requested information may have been provided to the Union after the charge was filed does not obviate an otherwise valid claim for breach of the duty to bargain in good faith. *Macomb County (Juvenile Justice Center)*, 27 MPER 7 (2013); *Detroit Public Schools*, 25 MPER 58 (2011). An employer' s unreasonable delay in furnishing relevant information is as much a violation of its duty to bargain as a refusal to provide the information at all. Valley Inventory Service, 295 NLRB 1163, 1166 (1989). See also City of Detroit, 25 MPER 23 (2011) (no exceptions). In any event, it should be noted that even after the charge was filed, the City acted in a dilatory manner by failing to comply with the timeline it had agreed to during the November 16, 2010, settlement conference. In fact, it was not until May 18, 2011, almost two years after the charge was filed, and more than a year after Paton first clarified the scope of the request, that much of the information was finally provided. Under such circumstances, I find that Respondent did not respond to the request for information in good faith, and has thereby violated Section 10(1)(e) of the Act.

Similarly, I find that the City violated PERA by withholding information in response to the Union' s request for copies of Johnson' s medical records. There can be no reasonable dispute that the information sought by the Union was presumptively relevant. Johnson was a member of the DFFA bargaining unit and the Union had filed a grievance on his behalf pertaining to Johnson' s eligibility for duty disability benefits. Although Respondent initially provided certain documents to the Union relating to Johnson' s condition, the packet of information did not include a progress report dated August 27, 2008, which seems to relate specifically to the issue of Johnson' s eligibility for duty disability benefits. Curiously, that document contains an allegation that the fire department misrepresented the diagnosis of a physician who was treating Johnson for his injuries. It was only after Charging Party discovered that the initial disclosure was incomplete and submitted a complaint to the fire department that the missing document was finally turned over to the DFFA, more than four months after the Union first submitted the Authorization to Release Medical Information/Records form to the department' s medical records division.

In its post-hearing brief, Respondent asserts that the 2008 progress report was not included in the initial packet of information because its representatives did not believe the document was germane to the pending grievance. However, the City is not the arbiter of relevancy when a labor organization makes a request for information relating to a bargaining unit member. The request submitted by Charging Party on August 26, 2009, was open-ended, referring to " any and all information" regarding Johnson' s medical " condition." In fact, Pegg testified without contradiction that the fire department had always provided an employee' s complete medical file whenever an authorization was submitted. Moreover, Respondent failed to call Martinico, Daley or any other witness to support its claim that the document was omitted from the initial disclosure because it was deemed

© 2023 Thomson [illegible] claim to original U[illegible] Government Works.

immaterial by City representatives. While it is conceivable that the progress report was inadvertently left out of the initial packet of information, there is simply no evidence in the record establishing that the omission was justifiable. For these reasons, I conclude that Respondent violated its duty to bargain in good faith by failing or refusing to fully comply with Charging Party' s request for Johnson' s medical records.

Lastly, I find that Respondent acted unlawfully with respect to the Union' s request for information relating to the possible transfer of the DPFRS to MERS. There is no dispute that the City failed to provide any documentation in response to the Union' s May 13, 2010, request for information. According to the evidence introduced by the DFFA at hearing, Respondent did not believe that the Union was entitled to the information under PERA because the issue of transferring control of the retirement system to MERS was not the subject of any ongoing negotiations between the City and the Union. Such an interpretation of Section 10(1)(e) of the Act is without any merit. As noted, the employer has a duty to disclose information requested by a labor organization as long as there exists a reasonable probability that the information will be of use to the union in carrying out its statutory duties. A change in the administration of the retirement system would certainly have the potential to impact current and former fire department employees in a myriad of ways. Because retirement benefits are a term and condition of employment for DFFA members, the information sought by the Union was presumptively relevant and the City had a duty to promptly comply with the request.

In its post-hearing brief, the City asserts that it had no duty to provide Charging Party with information regarding a possible transfer of the retirement system to MERS because such documentation simply did not exist. In support of this contention, the City refers to written correspondence from Employer representatives to McNamara which the Union introduced into evidence at hearing. It is true that Mack, in his initial response to the Union, asserted that the fire department did not have any documents pertaining to the Union' s information request. However, Mack' s response did not speak to the issue of whether the City itself was in possession of such information. In fact, the Union' s request was forwarded by Respondent' s representatives to Martinico, the City' s labor relations director. Notably, in his various communications with the Union, Martinico never denied that the transfer of the retirement system to MERS was under consideration or that the City had documents in its possession relating to that issue. Instead, he asserted that the Union had not demonstrated that it was entitled to such information and that he was unaware of any meetings which had occurred between the City, MERS and other interested parties. Notably, the City did not call Martinico or any other witness to testify at hearing in support of its claim that the documents sought by the DFFA did not exist. Under such circumstances, I conclude that the record supports a finding that the City violated its obligation to bargain in good faith with respect to the Union' s request for information relating to the possible transfer of the DPFRS to MERS.

II. Repudiation Claims

Findings of Fact:

Failure to Pay Unused Sick Time

Article 22, Subsection (B)(9)(e) of the collective bargaining agreement covers the issue of payment to bargaining unit members for unused sick leave upon retirement. On or about May 13, 2008, the City and the DFFA entered into a memorandum of understanding (MOU) to modify that section of the agreement for certain unit members who retire on or after July 1, 2008. Pursuant to that MOU, the contract now provides:

1) Effective July 1, 2008, a member shall receive full pay for eighty-five percent (85%) of the unused accumulated sick bank amounts, except DFFA members allied to DPOA shall receive one hundred percent (100%) of the unused accumulated sick banks, or

2) chose to receive the 3-year average of twenty-five percent (25%) of the unused sick leave bank as provided in 1) above, and have that sum included in the average final compensation used to compute the member' s service pension of their retirement

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

allowance. For any member choosing to exercise this option, the lump sum payment the member will receive will be the remaining value of the unused accrued sick leave bank as provided in 1) above.

All other provisions of Article 22, Subsection (9)(e) shall remain the same.

After the MOU went into effect, issues arose over how the agreement was to be implemented. Meetings were held between the City and the Union at which Respondent' s representatives conceded that it had made mistakes which resulted in some bargaining unit members receiving the wrong payment amounts. Those members had not been made whole by the time of the hearing in this matter. As of the date of hearing, however, the Union had not been able to determine exactly how many unit members were still owed money by the City or how much money was involved.

Failure to Implement Step Increases

In fire department parlance, the term " step increase" means a wage increase that comes from proceeding to the next level of pay within the same rank based on length of service within that rank as set forth in Article 22, subsection A of the contract. The term " step increase" can also refer to a wage increase that comes from proceeding to the next higher rank pursuant to a seniority-based promotional system as set forth in Schedule 1 of the agreement.

Pegg received calls from DFFA members above the rank of fire fighter who indicated that they had not received their step increases in a timely manner. Pegg investigated the issue by performing a random sampling of 61 bargaining unit members above the rank of fire fighter. Using promotion notifications issued by the City and information received from the pension board, Pegg examined the date that each of these random members were promoted, the position to which they were promoted, what step increases should have occurred during that time period and the dates upon which each member had their wages adjusted. This information was then compiled into a document which the parties referred to at the evidentiary hearing as the " master list." Of the 61 bargaining members identified on the master list, 21 individuals had not received their step increase on the proper date.

The Union provided a copy of the master list to City representatives during settlement discussions which were held at the MERC offices on November 16, 2010. At that conference, Respondent promised that by no later than February 11, 2011, it would provide payroll information for the 21 employees identified on the master list as a first step toward determining whether errors had occurred and to establish whether further review of payroll data was needed.

At hearing, Pegg testified that the City provided information for only one or two of the 21 names listed by the Union. However, documentation submitted into evidence by Charging Party appears to show that Respondent provided information to the Union regarding nine bargaining unit members on May 15, 2011 and May 23, 2011. Pegg later admitted that during a meeting with the City on May 18, 2011, the Union was provided with payroll information for 10 employees. Pegg testified that as of the date of the hearing, he had yet to thoroughly review that information.

At the time the unfair labor practice charge was filed, none of the 21 employees had received any payment from Respondent to compensate them for the delay in implementation of the increase. Subsequent to the filing of the charge, the City provided retroactive pay to some of the members listed on the master list. However, those payments did not include any interest.

Failure to Pay Parity Retroactive Pay

Schedule 1 of the parties' contract describes the parity relationships which exist between positions with the DFFA bargaining unit and positions within the City of Detroit Police Department. Subsection A of Schedule 1 provides:

Traditional police-fire pay parity means that the full time Police Officer and the full time Fire Fighter, whose base salaries are the same, will experience identical salary rate changes with identical effective dates throughout the fiscal year so that the

© Thomson Reuters. No claim to original U.S. Government Works.

total base pay of a Police Officer is equal to that of a Fire Fighter in any fiscal year covered by this Agreement. Similarly, the Fire Sergeant and Fire Engine Operator have parity with the Police Investigator; the Fire Lieutenant has parity with the Police Sergeant, the Fire Captain with the Police Lieutenant, the Battalion Fire Chief with the Police Inspector, and the Chief of Fire Department with the Deputy Chief-West Operations.

On December 15, 2008, an Act 312 award was issued in a case involving the City and the DPLSA. The panel adopted the police union' s wage proposal, which called for a three percent wage increase retroactively from January 1, 2008, and another three percent increase effective July 1, 2008. The section of the panel' s decision pertaining to wages makes no reference to longevity pay or other benefits. After the award was issued, Anita Berry, Respondent' s labor relations supervisor, issued a memo to employees in the City' s payroll department in which she summarized the economic changes awarded in the DPLSA proceeding, including the aforementioned wage increases, and noted that " [u]nder the parity relationships contained in the DFFA contract, these changes also apply to those corresponding ranks in the DFFA."

Employees in the DPLSA bargaining unit received the first wage increase in January or February of 2009, with retroactive pay for the period January 1, 2008, through the date of implementation. For employees in parity positions within the DFFA unit, the first wage increase was implemented in March of 2009. Some retroactive pay was included, but there was no payment covering the months of May and June of 2008. In addition, the City did not compensate Charging Party' s members retroactively for longevity, comp time and furlough sellback.

The Union brought this issue to Respondent' s attention and several meetings were held between the parties. On September 29, 2009, DFFA representatives wrote to Torleice Anderson of the City' s payroll division and asserted that the non-payment of retroactive pay for May and June of 2008 and retroactive payment of longevity, comp time and furlough sellback remained unresolved. The City responded via a letter to Pegg dated October 7, 2010. In that letter, Respondent' s human resources director, Gail Oxendine, asserted that the process of making retroactive payments would be completed by November 5, 2010. However, according to Pegg, the remainder of DFFA employees with parity to police positions were not paid in full by that date.

At the settlement conference held in this matter on May 18, 2011, the parties agreed to exchange letters setting forth their respective positions on the DPLSA parity wage increase issue. Respondent provided Pegg with a spreadsheet indicating the specific amounts paid to Charging Party' s members and asserted that the City had fully complied with the terms of the Act 312 wage increases for all DFFA members with parity to positions within the DPLSA unit. Pegg indicated that such information was not helpful and that he wanted to see the actual payroll registers. The City representatives agreed to check and see if that was possible, but Pegg never received any of the requested documentation.

At a pretrial conference held by ALJ O'Connor on November 16, 2010, the parties once again agreed to exchange letters setting forth their positions on this issue. The Union submitted its position statement on November 23, 2010. In the letter, the DFFA clarified that the allegation is related solely to the City's implementation of the January 1, 2008, wage adjustment. [1]

Martinico submitted a letter to the DFFA on behalf of Respondent on December 3, 2010. With respect to the January 1, 2008, wage adjustment, Martinico wrote:

[I]t is clear that the Long award did provide for a 3% wage adjustment for DPLSA members, and by virtue of parity, for pay-allied DFFA members, effective January 1, 2008. This increase was implemented in March of 2009 and applied retroactively to January 1, 2008. I understand from your correspondence dated November 23, 2010, on this matter that there are further issues alleged by DFFA as to whether these retro increases were properly paid for the entire period, and properly applying to intervening Longevity, CT and furlough sellback payouts. I will have these issues promptly investigated and respond to you separate regarding them.

Despite Martinico' s assurance that he would investigate the matter, the Union never received any further response from the City pertaining to this dispute.

© 2017 Thomson Reuters. No claim to original U.S. Government Works.

Improper Deductions for Medicare and Social Security

Article 22, subsection (B)(1)(g) of the parties' collective bargaining agreement provides, " For employees hired after March 31, 1986, the employee and the City of Detroit are required to contribute the hospitalization insurance portion of the Social Security Tax. (In calendar year 2002 the tax is 1.45%)." Pegg testified without contradiction that there are no DFFA members covered by Social Security.

Beginning in 2008, Charging Party began receiving complaints from its members that the City was deducting money from their paychecks for Medicare and Social Security. As noted, the Union filed a charge alleging that the City was making improper Medicare deductions on December 30, 2009. The DFFA added an allegation concerning Social Security deductions when it filed its first amended charge on August 5, 2010.

At the hearing in this matter, the Union presented documentation pertaining to four of its members as evidence of the allegedly improper deductions. Exhibits 46 and 47 are copies of paystubs for Charlie Pritchett, a bargaining unit member who was hired by Respondent prior to 1986. The first paystub, which is dated March 19, 2010, lists a deduction for " MEDC" in the amount of $1,275.50 for that pay period. According to Pegg, MEDC denotes a Medicare deduction. The second paystub, dated April 1, 2010, indicates a year-to-date deduction amount for MEDC of $2,199.40.

Ex. 48 is a paystub for bargaining unit member Reginald Amos dated April 16, 2010. The paystub shows a MEDC deduction of $231.85 for the pay period and a year-to date total of $1,693. According to Pegg, Amos began working for Respondent prior to 1986.

Ex. 49 is a paystub for Dale Fahoome, a member of the DFFA unit who was hired by the fire department after 1986. The paystub, which is dated August 20, 2010, shows that for the year-to-date, the City had deducted $628.19 from Fahoome' s wages under the Federal Insurance Contributions Act (FICA), which is a payroll tax imposed on employers and employees to fund social security and Medicare.

Ex. 50 is a W-2 form for unit member Robert Gray for the tax year 2009. The form indicates that Gray, who was hired by the City prior to 1986, earned $5,721 in " social security wages." The last page of the W-2 is an earnings record for Gray for the years 1971 through 2009. The document shows that Gray had no " taxed social security earnings" for the period 1989 thorough 2008, but that in 2009 he was taxed in the amount of $5,721.

At a prehearing conference before ALJ O' Connor on November 26, 2010, the Union agreed that on or before January 1, 2011, it would provide the City with a list of the names of the DFFA members who had Medicare and Social Security deducted from their paychecks. Thereafter the City was to provide payroll information for those members and an explanation as to why the errors occurred.

On December 30, 2011, the Union provided to Respondent a list of the names of 62 bargaining unit members whom the DFFA believed wrongfully had Medicare and/or Social Security deductions taken from their wages since June 30, 2009. In the cover letter accompanying this document, the Union clarified that the list was " a representative list of just those people we are aware of at present; this is not necessarily a complete list."

Sometime after May 18, 2011, the City provided the DFFA with a spreadsheet which appears to set forth the names of unit members and the amount of year-to-date Medicare and Social Security deductions for each of these individuals. The list showed that 30 members had Medicare deducted from their paychecks in amounts ranging from $2.52 to $2,458.09, while Social Security was deducted from four members in amounts ranging from $9.42 to $6,621,60.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Pegg testified that he did not understand the information which the City had provided and that the problem with erroneous Medicare and Social Security deductions has continued through the date of the hearing.

Failure to Properly Credit Employees for Sick Leave Accrual

Article 22, subsection (B)(9)(a) of the collective bargaining agreement provides, " Employees who work an average 48 hour week will accumulate ten (10) hours per month in their Current Sick Leave Bank and fifty (50) hours per year in their Reserve Sick Leave Bank. Effective July 1, 1998, banks shall accumulate without limitation."

Sometime in 2006, Charging Party became aware that employees were not being properly credited for accrued sick leave. Union Treasurer Robert Shinske testified that he performed a review of his own time records and determined that he had been shorted about 84 hours of leave time. After providing this information to management, Respondent credited him the hours that he was owed. The problem reoccurred in 2007 and again in 2008. Both times, Shinske reported the issue to Respondent and the problem was quickly remedied. When Shinske realized he had not been credited for the proper number of sick leave hours in 2009, however, the City refused to take any immediate action on his behalf. Instead, Shinske was told by management that he would have to wait for the payroll department to conduct an audit. Despite submitting additional information to Respondent, Shinske was never credited for the missing hours. As of the date of hearing in this matter, he was still owed 170 hours of accrued sick leave time and he was not receiving any sick leave credit.

Union Secretary Jeffrey Pegg attended meetings with representatives of the fire department' s payroll division in 2009, 2010 and 2011 to discuss the issue of improperly calculated sick leave. In addition, Pegg met with individual DFFA members regarding the problem. In 2009, Pegg disseminated a questionnaire to the membership at large regarding this issue and he received responses from 420 of the approximately 1,000 members of the DFFA. Based upon these meetings and the questionnaire results, Pegg concluded that every employee in the fire department had been impacted by the City' s failure to properly account for accrued sick leave. Pegg himself was short 50 hours of reserve banked time as of the date of the hearing. Pegg requested that the City conduct an audit of his payroll records, but the investigation never occurred. Pegg testified that he was told by management officials that the problem could not be fixed until a new computer system is put in place to track sick leave and that the new system was not scheduled to be installed for another five to ten years.

Steven Kirschner, Vice President of Local 344, testified that he attended meetings with City representatives at which the problem of inaccurate sick time credits was discussed. According to Kirschner, Respondent explained at these meetings that the problem originated with the relocation of the fire department' s payroll division to offices within the Coleman A. Young Municipal Center. City representatives told Kirschner that the sick leave records were packed up and shipped over to the new location, but the boxes were never opened.

When the parties engaged in settlement discussions at the MERC offices on November 16, 2010, the City promised that it would look into the issue and, by no later than December 3, 2010, advise the Union how long it would take to complete sick leave audits. There is nothing in the record to indicate that Respondent ever provided this information to the Union, nor did the City submit evidence establishing that the problem has been remedied. In fact, Respondent did not call any witnesses to testify with respect to this issue.

Discussion and Conclusions of Law:

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 Education Ass ' n v Port Huron Area Sch Dist, 452 Mich 309, 317 (1996); *Detroit Bd of Education*, 2000 MERC

© 2017 Thomson Reuters. No claim to original U.S. Government Works.

Lab Op 375, 377. 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 Cnty 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 Cnty Comm Coll*, 20 MPER 59 (2007). The employer' s duty to maintain the status quo pending satisfaction of its bargaining obligation continues even after the expiration of a collective bargaining agreement. Local 1467 IAFF v City of Portage, 134 Mich App 466 (1984); Detroit Police Officers Ass ' n v Detroit, 61 App 487 (1975).

The Commission' s role in disputes involving alleged contract breaches is limited. *Genesee Twp*, 23 MPER 90 (2010) (no exceptions). Where there is a collective bargaining agreement covering the subject matter of the 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 present. Macomb County v AFSCME Council 25, Locals 411 and 893, 494 Mich 65 (2013). An alleged breach of contract will constitute a violation of PERA only if a repudiation can be demonstrated. See e.g., City of Detroit (Transp Dept), 1984 MERC Lab Op 937, aff' d 150 Mich App 605 (1985); *Jonesville Bd of Ed*, 1980 MERC Lab Op 891, 900-901. A finding of repudiation cannot be based on an insubstantial or isolated breach of contract. *Oakland Cnty Sheriff*, 1983 MERC Lab Op 538, 542. Repudiation exists when (1) the contract breach is substantial, and (2) no bona fide dispute over interpretation of the contract is involved. *Plymouth-Canton Comm Sch*, 1984 MERC Lab Op 894, 897. The Commission will find a repudiation only when the actions of a party amount to a rewriting of the contract or a complete disregard for the contract as written. *Central Michigan Univ*, 1997 MERC Lab Op 501, 507; *Cass City Pub Sch*, 1980 MERC Lab Op 956, 960.

With respect to Respondent' s alleged failure to pay unused sick time to its members pursuant to the terms of the MOU entered into by the parties on June 25, 2008, I find that the Union has failed to establish a violation of Section 10(1)(e) of PERA. It is undisputed that certain members of Charging Party' s bargaining unit were not paid the proper amount at the time of retirement. However, there is no evidence that the City is ignoring the MOU entirely or engaging in an outright refusal to implement its terms. To the contrary, the record indicates that the City has met with Union representatives regarding this issue, admitted that there is a problem and attempted remedy the issue by making at least some of the affected employees whole for their losses. Moreover, the Union was unable to establish to any degree of specificity the number of employees who were impacted by the issue, the amount of the underpayments or the identity of any employee to whom the City still owes money as of the date of hearing in this matter. Under such circumstances, I conclude that Charging Party has failed to establish that the City repudiated the terms of the MOU. At best, the record establishes that there was an insubstantial or isolated breach of contract for which the appropriate venue for relief is the grievance arbitration process as agreed to by the parties in their contract.

Similarly, there is nothing in the record to suggest that the City repudiated its contractual obligation to pay step increases to bargaining unit members in a timely manner. The Union presented evidence that at least some members of the DFFA unit above the rank of fire fighter did not receive their step increases at the time required by the collective bargaining agreement. However, there is no evidence that this is a problem which affected even a majority of the members of Charging Party' s unit who fall within that group. In fact, the master list provided by the Union shows that of the 61 members chosen at random, 40 received their step increases on the date required by the contract. With respect to the remainder of unit members included on the master list, Respondent engaged in efforts to address the issue. City representatives met with Charging Party in May of 2011 and provided additional information concerning the problem. In addition, Pegg testified that after the charge was filed, the City made retroactive step increase payments for at least some of the 21 members identified by the Union on the master list. I conclude that the Union has not established a repudiation based upon these facts.

While there undoubtedly have been some problems with respect to Respondent' s implementation of step increases for certain members of the DFFA bargaining unit, Charging Party did not establish that the delays amounted to anything more than an isolated contract breach for which resolution via the grievance process is appropriate. While a breach of contract may have occurred, no PERA violation has been proven by the Union.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

As with the above allegations, Charging Party' s contention that the City repudiated the collective bargaining agreement by failing to make retroactive wage payments to DFFA members constitutes an attempt by the Union to utilize the Commission' s unfair labor practice procedure as a substitute for the grievance administration process. On December 15, 2008, the Act 312 panel issued an award providing for a three percent wage increase for DPLSA members effective January 1, 2008, and a second increase in that same amount effective July 1, 2008. Shortly thereafter, Respondent' s labor relations supervisor acknowledged in writing that the same wage increases would apply to members of Charging Party' s unit who are parity allied with DPLSA positions. In fact, it is undisputed that the first wage increase was implemented for all eligible DFFA members in March of 2009, including several months of retroactive pay. When the Union later notified City representatives that there were some retroactive payments missing, Respondent met with the Union and promised to resolve the matter. If any money was still owed to parity allied DFFA members following those discussions, the Union should have filed a grievance and had the matter addressed via the procedure agreed upon by the parties in their collective bargaining agreement. Likewise, the question of whether the January 1, 2008, wage increase encompasses retroactive payment for longevity, comp time and furlough sellback is a matter for a grievance arbitrator to resolve. On these facts, the Union has failed to establish that Respondent repudiated the contract in violation of PERA.

I conclude that the same analysis applies with respect to the Union' s claim that Respondent violated the Act by making deductions for Medicare and Social Security from the paychecks of DFFA members. There is no dispute that there were improper payroll deductions which affected some of Charging Party' s members. However, the record does not establish that this was a widespread issue which had a substantial effect on the bargaining unit. Pegg, the sole witness to testify regarding this issue, did not identify or even speculate as to the total number of affected employees. The Union introduced into evidence paychecks showing that Medicare and/or Social Security deductions were made, however those documents pertained to only four members of a bargaining unit consisting of more than 1,000 individuals. The only other documentary evidence introduced by the Union was the spreadsheet which the City provided to DFFA representatives after the charge was filed. There was no testimony explaining the spreadsheet and Pegg asserted that he did not understand the information contained therein. However, the document appears to show that 34 members of Charging Party' s unit had Medicare and/or Social Security deducted from their paychecks in 2011. Based upon the record presented, I find that Charging Party has failed to meet its burden of proving that Respondent engaged in a wholesale disregard of its contractual obligations, as is required to establish a repudiation in violation of Section 10(1)(e) of PERA.

In contrast, the Union has demonstrated a clear repudiation by Respondent of Article 22, subsection (B)(9)(a) of the parties' collective bargaining agreement.

The contract provides that unit members who work an average 48-hour week will accumulate ten hours per month in their current sick leave bank and fifty hours per year in their reserve sick leave bank without limitation. The record establishes without any contradiction that since 2006, Respondent has failed to properly credit DFFA members for the accrued sick leave time they have earned. At first, the City was responsive to Union complaints concerning this issue. When DFFA members notified the fire department' s payroll division that their accrued leave time balance was incorrect, Respondent promptly remedied the problem by crediting employees for the hours that they had been shorted. Beginning in 2009, however, Respondent failed or refused to take any immediate or effective remedial action. Instead, the City set forth a host of unfulfilled promises and excuses, including blaming the issue on an antiquated computer system and complications arising from an office relocation.

Although the City repeatedly promised to conduct payroll audits to correct the sick leave balances, the issue remained unresolved, even as of the date of the hearing in this matter. For example, Shinske' s accrued sick leave balance was still short 170 hours as of June 15, 2011, while Pegg was owed 50 hours of reserve bank time. In contrast to the repudiation claims discussed above, Charging Party presented evidence establishing that the problem with accrued sick leave balances was widespread. Based upon discussions with bargaining unit members, meetings with representatives of the fire department' s payroll division and questionnaires distributed to the DFFA membership as a whole, Pegg was able to determine that every employee in the fire department had been impacted by this issue. Respondent has not identified any language in the contract that would conceivably

© 2023 Th[illegible] in to original U.S. Government Works.

justify what amounts to a complete abrogation of its bargaining obligation. As noted, 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*; *Wayne Cnty Comm Coll.* The City' s longstanding failure or refusal to fully comply with Article 22, subsection (B)(9)(a) of the contract constitutes a substantial breach of its duty to bargain and an unfair labor practice in violation of Section 10(1)(d) of PERA.

In conclusion, I find that Respondent breached its duty to bargain under Section 10(1)(e) of PERA by failing or refusing to supply relevant information to the Union regarding: (1) the calculation of lump sum payments for retiring members; (2) the medical condition of bargaining unit member Jason Johnson; and (3) the possible transfer of the administration of employee retirement benefit plans from the DPFRS to MERS. In addition, I find that Respondent repudiated its obligations under Article 22, subsection (B)(9)(a) of the collective bargaining agreement by failing to properly credit Charging Party' s members for the accrued sick leave time that they have earned. Finally, I conclude that Respondent did not repudiate the terms of the contract with respect to (1) the payment of unused sick time; (2) the payment of step increases for parity allied members above the rank of firefighter; (3) the retroactive implementation of the January 1, 2008, Act 312 award pursuant to the parity provisions in the contract; and (4) deductions for Medicare and Social Security.

I have carefully considered all other arguments set forth by the parties in this matter and conclude that they do not warrant a change in the result. Accordingly, I recommend that the Commission issue the order set forth below.

Recommended Order

Respondent City of Detroit, its officers and agents, are hereby ordered to:

1. Cease and desist from refusing to bargain collectively with the Detroit Firefighters Association, Local 334, IAFF, by failing or refusing to provide it with information relevant and necessary to carry out its responsibility of engaging in collective bargaining and administrating and enforcing the contract between the parties.

2. Cease and desist from repudiating its obligation to credit Charging Party' s members for the accrued sick leave time that they have earned pursuant to Article 22, subsection (B)(9)(a) of the contract.

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

a. To the extent that it has not done so, furnish Charging Party with the following information without delay:

i. Information requested by Charging Party on July 2, 2009, regarding the calculation of lump sum pay for all bargaining unit members who retired effective July 1, 2008, through the present;

ii. The complete medical record for bargaining unit member Jason Johnson;

iii. Information requested by Charging Party on May 13, 2010, regarding the possible transfer of the administration of employee retirement benefit plans from the Detroit Police and Fire Retirement System to the Municipal Employees' Retirement System.

b. Comply with the terms of Article 22, subsection (B)(9)(a) of the contract by crediting bargaining unit members for the accrued sick leave time they have earned.

c. Make members of Charging Party' s bargaining unit whole for any loss they have incurred as a result of the conduct described above.

d. Post the attached notice to employees in conspicuous places on Respondent' s premises, including all places where notices to employees are customarily posted, for a period of thirty (30) consecutive days.

© 2023 Thomson Reuters. No claim to origin U. S. Government Works.

Statutes Cited
PERA Section 10(1)(e)

Footnotes

1 After the Act 312 award was issued, a dispute arose between Respondent and the DPLSA regarding the meaning and application of the award as it pertains to the July 1, 2008, wage increase. The arbitrator conducted additional proceedings and, according to the City's post-hearing brief in this matter, issued a supplemental Act 312 award on January 10, 2010. However, that award was not made part of the record in this case.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

19 MPER ¶ 50, 19 Michigan Pub. Employee Rep. ¶ 50, 2006 WL 6822859

Michigan Employment Relations Commission

OAK PARK PUBLIC SAFETY OFFICERS ASSOCIATION, Labor Organization - Respondent, and CITY OF OAK PARK, Public Employer - Charging Party.
No. CU03 A-005
LYNCH, GREEN
June 27, 2006

Related Index Numbers
15.43 Uniformed Services, Fire Fighters
42.11 Mandatory Subjects, Case Law
43.64 Special Subjects, Police and Fire
55.1 Employees Eligible
55.25 Michigan Act 312
73.45 Refusal to Bargain in Good Faith, Insistence to Impasse on Nonmandatory Subject
74.31 Types of Orders, Cease and Desist

APPEARANCES:
Keller Thoma P.C., by Dennis B. DuBay, Esq., for Charging Party
Frank A. Guido, Esq., General Counsel, Police Officers Association of Michigan, for Respondent

Judge / Administrative Officer
LYNCH
GREEN

Ruling

MERC upheld an ALJ's recommended determination that a union breached its duty to bargain in good faith when it submitted non-mandatory subjects of bargaining to Act 312 arbitration. It decided that the union's proposal concerning a minimum daily shift of seven sworn public safety officers would improperly mandate bargaining as to the total size of the work force. It found that the work the union sought to preserve was also historically performed by city employees belonging to another bargaining unit. Therefore, the union violated PERA provisions by submitting its proposal to compulsory arbitration under Act 312, MERC determined.

Union can't seek arbitration of staffing proposals

Meaning

MERC rejected the union's contention that the ALJ applied an incorrect legal standard in finding that issues of staffing must be "inextricably intertwined with safety" to constitute mandatory subjects of bargaining. It interpreted case law concerning staffing issues as holding that "a manning proposal is a mandatory subject of bargaining when there is competent evidence of the proposal's demonstrable and significant relationship to the safety of employees."

Case Summary

MERC upheld an ALJ's recommended determination that a union breached its duty to bargain in good faith when it submitted non-mandatory subjects of bargaining to Act 312 arbitration. It rejected the union's contention that the ALJ applied an incorrect legal standard in finding that issues of staffing must be "inextricably intertwined with safety" to constitute mandatory subjects of bargaining. MERC interpreted case law concerning staffing issues as holding that "a manning proposal is a mandatory subject

of bargaining when there is competent evidence of the proposal's demonstrable and significant relationship to the safety of employees." In conclusion, MERC also upheld the ALJ's issuance of a cease and desist order.

MERC decided that the union's proposal concerning a minimum daily shift of seven sworn public safety officers would mandate bargaining as to the total size of the work force, a determination clearly reserved for management. It found that the work the union sought to preserve was also historically performed by city employees belonging to another bargaining unit. Therefore, the union violated PERA provisions by submitting its proposal to compulsory arbitration under Act 312, MERC determined.

Full Text

Decision and Order

On May 17, 2005, Administrative Law Judge (ALJ) David Peltz issued his Decision and Recommended Order in the above matter finding that Respondent, Oak Park Public Safety Officers Association (Union) breached its duty to bargain in good faith when it submitted non-mandatory subjects of bargaining to Act 312 arbitration. The ALJ found that Respondent had violated Section 10(3)(c) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(3)(c), and recommended that Respondent be ordered to cease and desist from insisting to the point of impasse on, or submitting to arbitration under Act 312, proposals which constitute permissive subjects of bargaining. The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. After requesting and receiving an extension of time to file exceptions, Respondent filed timely exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions on July 6, 2005. Charging Party was granted an extension until August 18, 2005 to file a response to the exceptions; it filed its response and a brief in support of the ALJ's Decision and Recommended Order on August 22, 2005.

In its exceptions, Respondent contends that the ALJ erred in finding that it violated PERA by presenting issues of minimum staffing and layoff and recall in the proposals it presented to the Act 312 arbitration panel. Respondent asserts that the ALJ applied an incorrect legal standard in finding that issues of staffing must be "inextricably intertwined with safety" to constitute mandatory subjects of bargaining. For the reasons discussed below, we agree with the ALJ's conclusion that Respondent's proposals concerned non-mandatory subjects of bargaining and its attempts to pursue such proposals in Act 312 arbitration violated Section 10(3)(c) of PERA.

Facts:

The Oak Park Public Safety Officers Association represents sworn public safety officers (PSOs) employed by the City of Oak Park (City). Command officers and civilian dispatchers are in separate bargaining units. Prior to the expiration of the parties' collective bargaining agreement covering the period from July 1, 1997 to June 30, 2001, the City notified the Union that the City would no longer recognize or negotiate the following contract provisions related to manning:

Article VIII Hours of Work, Section 8.1:

C. There will be 4 platoons of 10 employees working 12 hour shifts from 7am to 7pm and 7pm to 7am. In addition, there will be an 8 hour shift of 5 employees with the hours of work to be determined by the City but posted for employee selection with the annual sign up. Upon mutual agreement between the parties, the hours of work for the 8 hour shifts may be modified on a temporary basis. The 12 hour shift must be completely staffed before any employees may work an 8 hour shift.

D. There will be a minimum of 7 Officers working per shift unless an Officer is assigned to dispatch duties then there will be a minimum of 8 Officers assigned to operations.

Article XXX Two Person Patrol Cars, Section 30.1:

There shall be at least one two-person car on duty during the night shift. Said car shall contain two sworn uniformed officers, PSO I or PSO IIs. Any additional two person cars shall be at the discretion of management. A back-up car shall be dispatched whenever circumstances require that a one person patrol car be dispatched to a crime in progress. Members of the department, including standby personnel, may be assigned to the patrol function at the discretion of the director, except for permanently promoted detectives unless in cases of national emergencies or civil unrest.

Article XXXVII Minimum Manpower, Section 37.1:

The Department shall maintain no less than 45 sworn bargaining unit members assigned to [the] operations division. Said numbers do not include civilian dispatchers. The City will fill all budgeted positions as soon as possible, without delay.

On February 13, 2002, the Union petitioned for compulsory arbitration under MCL 423.231 et seq. (Act 312). Its last settlement offer proposed to raise minimum shift strength to eight officers per shift. On January 28, 2003, the City filed the instant charge alleging that the Union violated Section 10(3)(c) of PERA by bargaining to impasse on non-mandatory subjects of bargaining and submitting them to the Act 312 arbitration panel. The City continued to assert before the Act 312 panel that Article VIII, Sections 8.1 (C) and (D), Article XXX, Section 30.1 and Article XXXVII, Section 37.1 of the expired contract should not be included in a new agreement. In addition, the City took the position that Article XXXIII, Layoffs, Sections 33.4 and 33.5 of the parties' contract should be eliminated as well. Those sections provided:

33.4 No layoffs of Public Safety Officers shall occur until all non-Public Safety Officers or civilians who perform police and fire duties are laid off first. Said duties are to be defined as work presently or previously performed by Public Safety Officers.

33.5 Public Safety Officers who have been laid off shall be rehired before non-Public Safety Officers or civilians who perform police and fire duties.

On March 21, 2003, the City amended its charge to add a claim that the Union violated PERA by bargaining to impasse on Sections 33.4 and 33.5 of the expired agreement, and by submitting them to the Act 312 arbitration panel.

On August 20, 2003, the Union filed an amended petition under Act 312 in which it agreed to the exclusion of: Article VIII, Section 8.1 (C) and (D), Article XXX, Section 30.1, and Article XXXVII, Section 37.1, the four contract provisions that were the subject of the City's initial unfair labor practice charge. The Union also withdrew its proposal to increase the shift staffing levels to eight officers per shift. In place of these provisions, the Union proposed the following language:

To the extent the City of Oak Park continues to operate a public safety department, providing joint fire and police protection, the City shall maintain on duty, at all times, assigned to the operations division (excluding non-operations personnel which includes, the detective bureau, administrative officer, fire inspector, community relations/civil defense coordinator and training officer) a safety/staffing level of seven (7) public safety officers, of which a minimum of five (5) public safety officers shall be fire certified, in addition to possessing law enforcement certification. A minimum of five (5) fire certified public safety officers shall be deployed for a structural fire, including one (1) fire certified public safety officer to operate fire apparatus including pumping equipment, and no less than four (4) fire certified public safety officers to suppress the structural fire, of which no less than two (2) fire certified public safety officers shall be required to physically enter the hazardous area of a structural fire, with two (2) fire certified safety officers outside the hazardous area available for assistance, rescue and operation of additional fire equipment and apparatus. When a fire incident arises, a minimum of two (2) public safety officers shall be deployed as primary and back-up to perform law enforcement responsibilities.

The Employer shall maintain the safety/staffing level of seven (7) public safety officers on duty in operations at all times by hold-over or call-in of necessary personnel. In the event of such hold-over or call-in, the affected employees shall be paid at the

overtime rate. The procedure for hold-over or call-in, as well as payment of overtime, shall be in accordance with provisions of the collective bargaining agreement.

On September 10, 2003, the first day of hearing in this matter, the City again amended its unfair labor practice charge by adding an allegation that the Union had unlawfully demanded to bargain over the following non-mandatory topics:

A. A proposal which seeks to require minimum daily staffing in the Operations Division of seven Public Safety Officers.

B. A proposal which seeks to require a minimum number of personnel to respond to any structure fire, whether or not they are needed at the scene.

C. A proposal which seeks to restrict and/or prohibit the utilization of other on-duty and off-duty bargaining unit personnel, other on-duty and off-duty members of the Public Safety Department and staff members of the communities in applicable mutual aid pacts from performing police and fire functions on behalf of the City of Oak Park.

Discussion and Conclusions of Law:

Relying on Jackson Fire Fighters Ass'n, 1996 MERC Lab Op 125, *aff'd* Jackson Fire Fighters Ass'n, Local 1306 v. City of Jackson, 227 Mich App 520; 575 NW2d 823 (1998), the ALJ found that the Union violated Section 10(3)(c) of PERA by submitting to the Act 312 panel its proposals to assign a minimum of seven PSOs per shift and to deploy a minimum of five PSOs to a structural fire. The ALJ found that the evidence did not establish that the minimum staffing proposal was "inextricably intertwined" with employee safety and, thus, was a permissive subject of bargaining not appropriately submitted to an Act 312 panel. *Citing* Local 1227 AFSCME v. Center Line, 414 Mich 642; 327 NW2d 822 (1982), the ALJ also held that the Union violated PERA by insisting to impasse and submitting to arbitration its proposal to prohibit the City from laying off bargaining unit members until all nonmembers performing police or fire fighting work are laid off. Although the Union ultimately withdrew from the Act 312 panel's consideration its proposals to maintain two-person patrol cars during the night shift and a minimum operations division staff of 45 bargaining unit members, the ALJ concluded that the submissions violated PERA notwithstanding their subsequent withdrawal.

The Union has taken exception to the ALJ's conclusions regarding its proposals for a minimum number of officers per shift, a minimum number of officers to be deployed to a structural fire and the protection of bargaining unit members from layoff. The Union takes no exception to the ALJ's conclusion regarding the proposals that it withdrew from the Act 312 panel's consideration. For the reasons that follow, we adopt the ALJ's recommendations.

In Jackson Fire Fighters Ass'n, the Commission held that a union's proposal to retain a contract provision mandating a minimum complement of fifteen fire fighters on each twenty-four hour shift was a permissive subject not properly submitted to Act 312 arbitration because a reduction in minimum daily shift would not have a significant impact on fire fighter safety. The Court of Appeals affirmed MERC's decision, finding it to be based on "sufficient evidence," following the precedent established in Sault Ste Marie v. Fraternal Order of Police, 163 Mich App 350, 356; 414 NW2d 168 (1987) and Local 1227 AFSCME v. Center Line, 414 Mich 642; 327 NW2d 822 (1982), that a claim that a manpower proposal affects safety must be supported by "some evidence." The Court declined to address the distinction between "related to safety" and "inextricably intertwined with safety" because it found that the Commission's decision was correct under either standard. Jackson Fire Fighters Ass'n, Local 1306 v. City of Jackson, 227 Mich App 520, 526-27; 575 NW2d 823 (1998).

The Union asserts that "related to" safety is a sufficient test or standard to apply to determine whether a manning proposal constitutes a mandatory subject of bargaining. While we agree that "inextricably intertwined" may be an awkward standard to apply, we find an equivalent standard to be that utilized by the Commission in Jackson that is, there must be a significant impact on fire fighter safety. While we agree that the previous case law, reviewed at length by the ALJ, is not totally consistent, what can be gleaned from prior decisions is that a manning proposal is a mandatory subject of bargaining when there is competent

evidence of the proposal's demonstrable and significant relationship to the safety of employees. That is, there must be competent evidence that a manning proposal has an impact upon the risk of injury or harm to a member or members of the bargaining unit.

The Union's latest proposal has two elements: a minimum daily shift of 7 PSOs, and a minimum staffing level to be deployed to a fire, including how many PSOs will be deployed and how they will be utilized. We find that whether the first part of this proposal is a mandatory subject of bargaining has been answered by Jackson, where the Court of Appeals analyzed a similar proposal as follows:

It is important to note that [the union proposal] governs the number of fire fighters on duty per shift, not the number actually assembled at a fire scene. The number at the scene determines what action may safely be undertaken to combat a blaze and may include not only on-duty personnel but also off-duty fire fighters called in, volunteers, and those responding pursuant to mutual assistance pacts with other fire departments. Consequently, the evidence in this case fails to demonstrate a causal nexus between the city's proposed reduction in daily staffing and fire fighter safety, and the union's contention that reducing the number of fire fighters on duty would adversely affect safety is without merit. Even if a reduction in the daily staff would delay response to a fire, *that affects the level of fire protection offered the citizens of Jackson and does not raise a safety issue with respect to the fire fighters.* [Emphasis added]

We agree that it is the number of fire fighters or personnel at the fire scene, not the number per shift, that impacts safety. The fire crews assembled at the scene may include fire fighters from several sources, including fire fighters on duty, fire fighters called back, and fire fighters furnished by mutual aid from other departments. To mandate bargaining as to the number of officers per shift would be to mandate bargaining as to the total size of the work force, a determination clearly reserved to management. Consequently, we adopt the ALJ's recommendation as to this issue.

The second element of the Union's proposal refers to the number of PSOs sent to the fire scene and how they will be utilized in operating fire equipment and performing fire suppression tasks. The Union has proposed that the City's current practice of sending five fire fighters to the scene of a structure fire be preserved, with the proviso that they be fire certified PSOs. The ALJ found that the Union's proposal is almost identical to the City's current practice. The record reflects that this is consistent with the City's practice and complies with safety standards promulgated by MIOSHA. The utilization of personnel at the fire scene has an impact upon the risk of injury or harm to members of the bargaining unit, and we find this type of manning proposal would ordinarily constitute a mandatory subject of bargaining. However, in this case, because the Union's proposal additionally seeks to limit the personnel at the scene to PSOs, we reach a different conclusion.

A union has a legitimate interest in whether and when the work of its members may be assigned outside of the bargaining unit, and employers generally have a duty to bargain the diversion of work to nonunit employees and the subcontracting of work to others. Plymouth Fire Fighters Ass'n, Local 1811 v. Plymouth, 156 Mich App 220; 401 NW2d 281 (1986); Lansing Fire Fighters Union, Local 421 v. Lansing, 133 Mich App 56; 349 NW 2d 253 (1984). However, when the work at issue historically has been performed by members of more than one bargaining unit, assignment of that work to other bargaining units whose members already perform that work is not a mandatory subject of bargaining. Southfield Police Officers Ass'n v. Southfield, 433 Mich 168; 445 NW2d 98 (1989); *City of Detroit Water and Sewerage,* 1990 MERC Lab Op 34. Here, the work sought to be preserved has been performed by members of the Union's bargaining unit, by members of a command officers bargaining unit, and by personnel furnished through mutual aid from other communities with whose employees the City has no collective bargaining relationship. Because the work sought to be preserved has also historically been performed by City employees belonging to another bargaining unit, we hold that the Union violated PERA by submitting its proposal to compulsory arbitration under Act 312.

Exception has been taken to the ALJ's conclusion that the City has no duty to bargain the Union's proposal that a minimum of two PSOs be deployed as primary and backup to perform law enforcement responsibilities when a fire incident arises. It is not disputed that backup is a safety measure, but the ALJ considered the availability of mutual aid to be sufficient. We agree that backup protection in law enforcement is a matter directly impacting safety. We also find that the Union's proposal seeks to

protect the work of the unit. However, we adopt the recommendation of the ALJ as to this issue for the reason that the Union's proposal, as submitted, would mandate the level of service that the City provides. Whether to provide manpower to perform law enforcement responsibilities when a fire incident arises is a permissive subject of bargaining.

The ALJ also concluded that the Union violated PERA by submitting to the Act 312 panel a proposal to prohibit bargaining unit members from being laid off until all nonmembers performing police work are laid off. The ALJ relied upon Local 1227 AFSCME v. Center Line, where the Court held that a contract provision allowing police officers to be laid off "only in conjunction with layoffs and cutbacks in other departments" involved a non-mandatory subject of bargaining because the number of employees in other departments was unrelated to safety. Here, the Union's proposal affects only those City employees who perform public safety duties. However, the proposal would require that "all non-Public Safety Officers or civilians who perform police and fire duties" be laid off first and defines police and fire duties as "work presently or previously performed by Public Safety Officers." The proposal directly impacts employees in other bargaining units, including command officers and civilian dispatchers. As such, the proposal involves a non-mandatory subject of bargaining and the Union violated PERA by submitting the proposal to the Act 312 arbitration panel.

Because it is unnecessary for us to do so in order to reach the conclusions governing our decision in this matter, we decline to rule on the admissibility of the National Fire Association materials offered in evidence by the Union. Since the Union has not taken exception to the ALJ's finding regarding its two-man car proposal and its proposal to maintain a minimum staff of forty-five sworn bargaining unit members assigned to the Public Safety Department's operations division, we adopt the ALJ's Decision and Recommended Order.

Order

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission. [1]

Decision and Recommended Order of Administrative Law Judge

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on September 10, September 11, September 16, September 30, and October 30, 2003, before David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission. The proceeding was based upon an unfair labor practice charge filed by the City of Oak Park on January 28, 2003, and amended on March 21, 2003 and September 10, 2003. The charge alleges that the Oak Park Public Safety Officers Association violated Section 10(l)(3) of PERA by demanding bargaining over, and taking to impasse, various permissive subjects of bargaining. Based upon the entire record, including the pleadings, transcript and post-hearing briefs filed by the parties on or before January 14, 2004, I make the following findings of fact, conclusions of law, and recommended order.

I. The Unfair Labor Practice Charge and Procedural Background:

The Oak Park Public Safety Officers Association (Respondent or the Union) represents a bargaining unit consisting of all sworn public safety officers (PSOs) employed by the City of Oak Park (Charging Party or the City), excluding all command officers and the Director of Public Safety. Command officers and civilian dispatchers are in separate bargaining units. The most recent contract between the Union and the City covered the period from July 1, 1997 to June 30, 2001. Prior to the expiration of that agreement, in a letter dated April 24, 2001, then assistant city manager James D. Hock notified the Union president, Officer Kevin Loftis, that effective July 1, 2002, the City would no longer recognize the following provisions of the contract: Article VIII, Section 8.1(C) and (D); Article XXX, Section 30.1; and Article XXXVII, Section 37.1. Hock indicated that such provisions covered non-mandatory subjects of bargaining, and he advised the Union that the City would not negotiate the issues set forth in those provisions as part of any subsequent labor agreement. Hock also notified the Union that any memorandum

of understanding, grievance decision or settlement relating to those issues would not be honored following the expiration of the agreement.

One of the contract provisions identified by Hock in the April 24, 2001, letter, Section 8.1, governs the hours of work of bargaining unit members. That provision states, in pertinent part:

C. There will be 4 platoons of 10 employees working 12 hour shifts from 7am to 7pm and 7pm to 7am. In addition, there will be an 8 hour shift of 5 employees with the hours of work to be determined by the City but posted for employee selection with the annual sign up. Upon mutual agreement between the parties, the hours of work for the 8 hour shift may be modified on a temporary basis. The 12 hour shift must be completely staffed before any employees may work an 8 hour shift.

D. There will be a minimum of 7 Officers working per shift unless an Officer is assigned to dispatch duties then there will be a minimum of 8 Officers assigned to operations.

Article XXX, Section 30.1, of the contract, which is entitled "Two Person Patrol Cars" provides:

There shall be at least one two-person car on duty during the night shift. Said car shall contain two sworn uniformed officers, PSO I or PSO IIs. Any additional two person cars shall be at the discretion of management. A back-up car shall be dispatched whenever circumstances require that a one person patrol car be dispatched to a crime in progress. Members of the department, including stand-by personnel, may be assigned to the patrol function at the discretion of the director, except for permanently promoted detectives unless in cases of national emergencies or civil unrest.

The final provision identified in Hock's April 24, 2001, letter sets forth minimum manpower requirements for the City's public safety department. That provision, Article XXXVII, Section 37.1, states as follows:

The Department shall maintain no less than 45 sworn bargaining unit members assigned to [the] operations division. Said numbers do not include civilian dispatchers. The City will fill all budgeted positions as soon as possible without delay.

The parties engaged in collective bargaining and mediation but failed to reach agreement on a successor contract. The final mediation session was on January 22, 2002. On that date, Hock wrote to the Union and reiterated the City's position that Sections 8.1, 30.1 and 37.1 of the expired contract involved non-mandatory subjects of bargaining. In a letter to Hock dated January 30, 2002, the Union took the position that Sections 8.1 and 37.1 of the contract covered mandatory subjects of bargaining, and that such language must remain in full force and effect until a new agreement is negotiated. The Union further indicated that it would file an unfair labor practice charge if the City altered those sections of the contract.

On February 13, 2002, the Union filed a petition for compulsory arbitration under MCL 423.231 et seq. (Act 312), MERC Case No. D01 D-0557. Attached to the Act 312 petition was the Union's last settlement offer, dated September 19, 2001. Paragraph 9 of the settlement offer stated, "Minimum Manning: Raise minimum shift strength to 8 Officers working per shift." In its answer to the petition, dated March 4, 2002, the City objected to paragraph 9, arguing that minimum manning is a permissive subject of bargaining and, therefore, an issue over which the Act 312 arbitration panel lacks jurisdiction to decide.

On August 29, 2002, the Commission appointed Edward Rosenbaum as impartial arbitrator and chairperson of the Act 312 panel. Chairperson Rosenbaum conducted a prehearing conference on December 13, 2002, at which time the Union demanded that the Act 312 panel make a determination as to whether the aforementioned contractual provisions concerned mandatory or permissive subjects of bargaining. Rosenbaum directed the parties to file briefs with respect to the minimum manning issues.

On January 28, 2003, the City filed the instant charge with the Commission, alleging that the Union violated Section 10(3)(c) of PERA by demanding bargaining over, and taking to impasse, certain permissive subjects of bargaining, namely Sections 8.1(C) and (D), 30.1 and 37.1 of the expired agreement, and by submitting such issues to the Act 312 arbitration panel for inclusion

in a new contract. In its February 24, 2003, answer to the charge, the Union conceded to having made a demand to bargain involving minimum manning, but argued that such matters "are in their entirety mandatory subjects as they are issues related to and/or inextricably intertwined with safety."

The first hearing before the Act 312 panel was scheduled for September 16, 2003. The parties submitted their respective briefs on the minimum manning issue to Chairperson Rosenbaum on or before February 25, 2003. In a letter to the parties dated March 6, 2003, Rosenbaum indicated that he would postpone a decision on the matter until the fall in the hope that the unfair labor practice proceeding would be resolved in the meantime.

On March 17, 2003, the parties exchanged lists of proposed "comparable communities" and position statements. Once again, the Union listed minimum manning as an issue to be decided by the Act 312 panel and proposed an increase in staffing levels to eight officers per shift. In its position statement, the Employer continued to assert that Sections 8.1(D) and (C), 30.1 and 37.1 of the expired contract should not be included in the new agreement. In addition, the Employer took the position that Sections 33.4 and 33.5 of the parties' contract should be eliminated as well. Those provisions, which were first negotiated in 1984, provide:

33.4 No layoffs of Public Safety Officers shall occur until all non-Public Safety Offices or civilians who perform police and fire duties are laid off first. Said duties are to be defined as work presently or previously performed by Public Safety Officers.

33.5 Public Safety Officers who have been laid off shall be rehired before non-Public Safety Officers or civilians who perform police and fire duties.

On March 21, 2003, the City amended its unfair labor practice charge to include an allegation that the Union violated Section 10(3)(c) of PERA by demanding bargaining over, and taking to impasse, Sections 33.4 and 33.5 of the expired agreement, and by submitting such issues to the Act 312 arbitration panel for inclusion in a new contract. In its April 21, 2003, answer to the amended charge, the Union asserted that the provisions pertaining to layoffs involve mandatory subjects of bargaining since they "reflect the impact of management's decision to layoff bargaining unit members.

On August 20, 2003, the Union filed an amended petition for compulsory arbitration under Act 312 and, at the same time, submitted a revised position statement to Chairperson Rosenbaum. The Union agreed to the exclusion of the four contract provisions which were the subject of the City's initial unfair labor practice charge: Section 8.1 (D) and (C); Section 30.1; and Section 37.1. In addition, the Union withdrew its proposal to increase the staffing levels to eight officers per shift. In place of the eliminated provisions, the Union proposed the following contract language:

To the extent the City of Oak Park continues to operate a public safety department, providing joint fire and police protection, the City shall maintain on duty, at all times, assigned to the operations division (excluding non-operations personnel which includes, the detective bureau, administrative officer, fire inspector, community relations/civil defense coordinator and training officer) a safety/staffing level of seven (7) public safety officers, of which a minimum of five (5) public safety officers shall be fire certified, in addition to possessing law enforcement certification. A minimum of five (5) fire certified public safety officers shall be deployed for a structural fire, including one (1) fire certified public safety officer to operate fire apparatus including pumping equipment, and no less than four (4) fire certified public safety officers to suppress the structural fire, of which no less than two (2) fire certified public safety officers shall be required to physically enter the hazardous area of a structural fire, with two (2) fire certified safety officers outside the hazardous area available for assistance, rescue and operation of additional fire equipment and apparatus. When a fire incident arises, a minimum of two (2) public safety officers shall be deployed as primary and back-up to perform law enforcement responsibilities.

The Employer shall maintain the safety/staffing level of seven (7) public safety officers on duty in operations at all times by hold-over or call-in of necessary personnel. In the event of such hold-over or call-in, the affected employees shall be paid at the overtime rate. The procedure for hold-over or call-in, as well as payment of overtime, shall be in accordance with provisions of the collective bargaining agreement.

On September 10, 2003, the first day of hearing in this matter, the Employer once again amended its unfair labor practice charge to include an allegation that the Union had unlawfully demanded to bargain over the following permissive topics:

A. A proposal which seeks to require minimum daily staffing in the Operations Division of seven Public Safety Officers.

B. A proposal which seeks to require a minimum number of personnel to respond to any structure fire, whether or not they are needed at the scene.

C. A proposal which seeks to restrict and/or prohibit the utilization of other on-duty and off-duty bargaining unit personnel, other on-duty and off-duty members of the Public Safety Department and staff members of the communities in applicable mutual aid pacts from performing police and fire functions on behalf of the City of Oak Park.

The Union responded to the City's second amended charge on the record at the start of the hearing in this matter, arguing that the Employer had grossly misrepresented its latest proposal. According to the Union, the August 20, 2003, proposal does not seek a fixed staffing number per shift, but rather a minimum staffing level with respect to the performance of police and fire work involving operation of fire equipment and apparatus and the performance of fire suppression tasks. Based upon this distinction, the Union asserted that its amended proposal involved a mandatory, rather than permissive, subject of bargaining.

II. Facts:

A. Background

The City of Oak Park consists of approximately 5.5 square miles and has a population of about 30,000 residents. A variety of structures are located within the City, including single and multiple family dwellings, retail and office buildings and light industry, as well as schools, government buildings and medical facilities. No hospitals are located within the City limits. The size and population of the City has increased as a result of the recent annexation of property from adjacent Royal Oak Township, including an office building and a multi-story apartment complex occupied by approximately 500 to 700 residents.

In 1954, the City of Oak Park consolidated its separate police and fire departments into a single public safety department. All sworn personnel employed by the City's public safety department are required to be dually trained and certified as both law enforcement officers and fire fighters. They are also trained and licensed as medical first responders, which is classified as the lowest level of medical response below Emergency Medical Technician (EMT) and Paramedic. None of the officers work in either a dedicated law enforcement or firefighting capacity. Sworn personnel employed by the department of public safety include the director, deputy director, command officers (lieutenants and sergeants) and public safety officers.

The public safety department operates one fire station, which is located near the center of the City. The department maintains four fire suppression vehicles consisting of two "pumper" or "engine" trucks and two 50-foot "Telesquirt" trucks with ladders. The department also maintains eleven police cruisers, seven of which are licensed by the State as medical first responder vehicles and carry equipment such as backboards, oxygen, defibrillators and other medical supplies and a self-contained breathing apparatus (SCBA). Officers assigned to the police cruisers carry with them their personal fire gear, including coat, pants, boots, helmet, and SCBA face piece.

At the time of the hearing in this matter, there were fifty individuals working for the department in the Public Safety Officer (PSO) classification, including forty PSOs and ten PSO IIs. The PSO I job description, which has been in existence for many years, states that the primary function of the position is "To protect life and property through the enforcement of laws and ordinances and the performance of general fire fighting work; to perform specialized duties under emergency conditions; to perform a variety of housekeeping and maintenance chores; and to perform work as required." Specific firefighting duties set forth in the PSO I job description include responding to fire alarms, laying and connecting hose lines, pumping water, driving

fire fighting apparatus, operating and utilizing equipment in controlling and extinguishing fires and conducting fire prevention inspections. Law enforcement duties and responsibilities of the PSO I classification include receiving requests for assistance and handling complaints made by the public, investigating accidents, transporting prisoners, interviewing suspects, prisoners, witnesses and complainants, searching for and preserving evidence, directing traffic and writing tickets.

The PSO II classification, which is set forth in the parties' collective bargaining agreement, is covered by the PSO I job description described above. PSO IIs are expected to perform the same duties as PSO IIs, plus additional duties specifically associated with their respective assignments. At the time of the hearing, there were ten individuals employed in the classification of PSO II: seven investigators, a fire inspector, an administrative assistant and a community service coordinator. They are compensated at a rate eight percent higher than PSO Is. PSO IIs are appointed by the director of the public safety department based upon job performance and supervisor recommendations. A PSO II assignment typically lasts between two and five years, following which time the officer is returned to his or her position as a PSO I. PSO IIs are generally scheduled to work Monday through Friday, from 8:00 or 8:30 a.m. to 5:00 p.m. However, the hours of the community service coordinator position are somewhat irregular and often include weekends and nights.

PSO I and IIs employed by the City of Oak Park are required to attend a State-approved fire academy and pass a competency examination before they can be utilized to fight a structural fire. At the time of hearing, all PSOs employed by the department of public safety had either obtained the requisite fire fighter certification, were newly-hired and in the process of achieving such certification, or had worked in the capacity of full-time fire fighter prior to 1988 and, therefore, were not subject to the State of Michigan certification requirements. Most of the individuals falling in the latter category attended the University of Michigan fire training program, an 80-hour course in basic fire skills. With respect to law enforcement duties, all PSOs employed by the department are subject to the State certification process pursuant to which officers are required to attend a police academy and pass a competency exam.

Individuals hired by the department of public safety as PSOs are immediately sent to what the parties refer to as "Oak Park University," where they receive three weeks of basic training, including an orientation consisting of a review of department manuals, rules and regulations, and a broad operational overview. Thereafter, the newly hired officers are required to attend field officer training recruit school (FTO), a highly structured 12-14 week orientation program to prepare them to work on the road and fulfill police and basic fire fighting responsibilities. Upon passage of an oral examination administered at the conclusion of the FTO course, officers are assigned by the department to a patrol unit to perform police work and limited fire fighting duties pending completion of their fire academy coursework and fire fighter certification.

In addition to the PSOs, the department employs fifteen command officers in the classifications of Public Safety Lieutenant and Public Safety Sergeant. Command officers, who are represented for purposes of collective bargaining in a separate unit, are required to possess the same fire fighter and law enforcement certifications as the PSOs. In addition, command officers receive additional training specific to their supervisory duties, including incident command training. At the time of hearing, all lieutenants and sergeants employed by the department, other than newly promoted command officers, had received specialized fire officer training. Lieutenants and sergeants assigned to patrol platoons work the same schedule as the PSOs in the units to which they are assigned, as described more fully below. Command officers who are not assigned to patrol operations typically work Monday through Friday, from 8:00 or 8:30 a.m. to 5:00 p.m.

All sworn officers employed by the department of public safety, including PSOs, lieutenants and sergeants, are trained and licensed by the State as medical first responders, which involves a two-week course typically conducted at a regional training academy. Several members of the department, including a sergeant and four PSOs, have also received training as hazardous materials technicians and have been assigned to the Eastern Oakland County Regional Response Team. Other officers have received training in specialized areas such as high-angle rescue and weapons of mass destruction incident command.

B. Organizational Structure

G. Robert Siefert is the Director of Public Safety for the City of Oak Park. Siefert is the chief administrative officer for the Department of Public Safety and is directly responsible for the overall management of the department. Siefert is assisted in that capacity by a deputy director and a civilian administrative secretary. Below the director and deputy director, the Public Safety Department is divided into four patrol platoons, a fire bureau and an investigations bureau.

1. Patrol Platoons

The four patrol platoons, which are designated Platoons A, B, C & D, work as individual units performing police, fire and first response medical services throughout the City on rotating shifts. Each platoon is supervised by a lieutenant, who is directly responsible for all actions associated with the operation of the platoon. When the department is operating at full-strength, there are 10 PSO Is and one sergeant assigned to each patrol. However, at the time of the hearing in this matter, there were nine PSO Is assigned to Platoons A and D, while Platoons B and C were comprised of eight PSO Is per unit. Four newly-hired PSO Is were undergoing training at the time of hearing and had not yet been assigned to a specific platoon. In addition, one PSO I was on military leave, while another officer was off work for medical reasons.

The department operates on a twelve hour schedule with two shifts, one beginning at 7 a.m., the other at 7 p.m. Two platoons are assigned to each shift. At the time of the hearing in this matter, Platoons A and C were assigned to work the day shift and Platoons B and D were scheduled to work nights. When Platoons A and B are working, Platoons C and D are off-duty, and vice versa. Personnel assigned to patrol operations work repeating 14-day cycles consisting of two days on, two days off, three days on, three days off, two days on, and two days off.

2. Fire Bureau

The fire bureau is commanded by Lieutenant Chris Petrides, who serves as the department's fire marshal. Petrides is responsible for fire operations, prevention, education, and inspection, as well coordinating fire suppression and maintenance of fire apparatus. He also oversees administration of the department's communications and records sections. The classifications under Lieutenant Petrides' supervision include sergeant, fire inspector, community services coordinator/emergency services coordinator, administrative clerk, school crossing guard and civilian dispatchers. The fire inspector, who is a PSO II, is responsible for overseeing fire inspections conducted by the patrol officers and also has duties relating to apparatus maintenance.

Six civilian dispatcher positions were in existence at the time of the hearing; however, two of the dispatcher positions were vacant and one dispatcher was on temporary medical leave. The civilian dispatcher position is represented for purposes of collective bargaining by the Oak Park Dispatchers Association, which is affiliated with the Police Officers Association of Michigan. The civilian dispatchers are responsible for answering all non-emergency and 911 telephone calls which are received by the department and dispatching officers to perform fire, police and emergency medical services. They also maintain radio communications with officers in the field, handle walk-in traffic at the station and manage the flow of paperwork through the department.

The civilian dispatcher position has been in existence since approximately 1998. Prior to that time, dispatching duties were assigned to the PSO classification. Today, PSOs continue to perform dispatching work, filling in for the civilian dispatchers as needed. According to the Union's testimony, PSOs are called upon to perform dispatcher work approximately four to five hours almost every evening. Members of the command officers unit also provide occasional assistance when one or more of the civilian dispatchers is busy or on a break.

3. Investigations Bureau

The investigations bureau is commanded by Lieutenant M. McNeilance, who supervises one sergeant, six detectives, each of whom are classified as PSO IIs, a youth officer, a property clerk and an administrative clerk. Personnel assigned to the

investigations bureau conduct criminal investigations for the department of public safety, including follow-up investigations. They also screen incident reports and determine which matters may be remanded to the patrol division for further investigation. In addition, the investigations bureau is responsible for administering criminal prosecutions for the City of Oak Park, including preparing cases for trial and managing witnesses. Personnel assigned to the investigations bureau primarily work Monday through Friday, from 8:00 a.m. or 8:30 a.m. to 5:30 p.m.

C. Shift Levels

It is undisputed that the department of public safety has repeatedly reduced the minimum staffing requirements per shift for on-duty PSOs during the course of the past thirty years. In 1981, the department operated with nine sworn officers on-duty per shift. That number was reduced to eight officers on-duty per shift in April of 1990, with one PSO working as a dispatcher, two officers assigned to standby and five officers on patrol. After the department created the civilian dispatcher position in 1998, the minimum number of sworn public safety officers on-duty per shift was reduced to seven.

On May 7, 2002, the department released a memo stating "Effective immediately supervisors are permitted to allow shift strength to be six officers." Following issuance of the memo, the department has been operating at a minimum staffing level of at least six PSOs on duty per shift. Typically, four PSO Is are assigned to road patrol, while two officers remain at the station in a standby capacity. However, if there are no prisoners being housed at the station and no housekeeping or maintenance work to be performed, one of the standby officers may also be assigned to road patrol. When less than six PSO IIs are available for a particular shift, the department will either hold a PSO I over from another shift or call in an off-duty officer to meet the minimum staffing requirements. There have been isolated instances, however, when the number of officers on duty per shift has briefly fallen below the minimum staffing level of six PSOs. It is also not uncommon for there to be more than six PSO Is working on a given shift.

There is always at least one command officer on duty during each shift. When both a lieutenant and a sergeant are on-duty at the same time, the lieutenant typically remains at the station unless his or her presence is needed at a fire scene or to provide assistance with a law enforcement matter. Under such circumstances, the day-to-day responsibility for supervising the PSO Is in the field lies with the sergeants, who function as assistant platoon leaders and are typically on the road throughout their shifts, unless the lieutenant is off-duty. Sergeants also respond to calls, make traffic stops and, on occasion, serve as backup for the PSOs. In addition, the sergeants are responsible for reviewing reports, performing job evaluations, and issuing discipline.

There are situations in which additional personnel may be needed as the result of a major structure fire, the occurrence of simultaneous incidents or other emergencies. The department has three plans in place should such situations arise, and the determination of whether to call for backup and which plan or plans to implement is made by the incident commander, who is typically the highest ranking command officer at the fire scene. On occasion, a high ranking officer at the station house may also initiate a call for backup. These backup plans consist of the following measures: (1) the use of on-duty officers from other bureaus, as well as other on-duty personnel and command officers; (2) calling up off-duty departmental personnel; and (3) mutual aid agreements with other communities. Each of these plans are discussed individually below.

1. Non-Operational On-Duty Personnel

The first plan calls for the use of other on-duty staff, including command officers and PSO IIs from other bureaus within the department, such as the fire inspector or detectives, to provide backup and assistance to the on-duty patrol platoons. As noted, PSO IIs and command officers who are not assigned to patrol operations typically work from 8:00 or 8:30 a.m. to 5:00 p.m., Monday through Friday. In the event that a call comes in during those hours, non-operational personnel may be summoned to respond to a fire or police incident or to function in a standby capacity at the station. Although PSO IIs and command officers have duties which may require them to be away from the station during business hours, such as conducting investigations or

appearing in court, they are equipped with telephones, portable radios and, in some cases, pagers, and are in regular contact with the department throughout the day.

As explained above, PSO IIs and command officers have at least the same level of fire fighter training and certification as PSO IIs, and the sergeant and lieutenant job descriptions have included fire fighting responsibilities for at least nineteen years. Moreover, PSO IIs and command officers have in fact performed fire fighting duties in the past. For example, Deputy Director Bruce Smith testified that when he was a lieutenant in charge of the investigations bureau, he worked with a sergeant from that bureau and a group of detectives, each of whom were classified as PSO IIs, in fighting a fire in a three-story medical building, and that he personally led a wave of fire fighters into the building in an attempt to extinguish the fire.

There is some delay inherent with the use of non-operational staff as backup. Although there may be times when PSO IIs or command officers are on the road when the call for backup comes in and may arrive at the fire scene very quickly, they generally will not be in a position to respond to an incident as rapidly as the on-duty patrol officers. Unlike PSO Is, non-operational personnel do not carry their fire fighting equipment with them in their vehicles. Therefore, PSO IIs and command officers who are out in the field when a request for assistance is made typically must return to the station first to pick up their fire fighting equipment before proceeding to the incident. Moreover, if additional personnel are needed at night or on weekends, the option to use PSO IIs and command officers as backup will typically not be available.

2. Departmental Call-Back

The second backup plan which the department has instituted involves calling in off-duty officers to perform fire fighting and law enforcement duties. The department maintains a list setting forth the names and phone numbers of all sworn personnel, including PSO I and IIs and command officers. Although any officer on the list may be subject to call-back at any time, individuals who live closest to the station and who have indicated their willingness to be available as backup are identified on the list with an asterisk and are the first to be contacted by the department in an emergency situation. When a command officer or PSO II is called back, he or she is typically assigned supervisory tasks at the fire scene. However, non-operational personnel may be called upon to assist in an interior attack or to perform other fire fighting duties.

As with the first backup plan, there is a measure of delay inherent in the use of departmental call-back as a means of providing backup in the event of a fire or other emergency. Employees of the public safety department are not required to live in Oak Park and, according to the testimony of Director Siefert and Officer Loftis, many officers actually live some distance from the City. In fact, none of the individuals identified with an asterisk on the departmental staff list actually reside within the City limits. It may take as much as a half-hour for the department to reach an off-duty officer in an emergency situation, and another half-hour for that individual to actually make it back to the station. Upon arriving at the station, the officer will typically need additional time to assemble his or her equipment and, if necessary, proceed to the fire scene.

3. Mutual Aid

The final backup plan involves the use of mutual aid pacts. A mutual aid pact is a contractual agreement between two or more communities to provide assistance and share resources and equipment in the event of a fire or other emergency. With respect to fire situations, Oak Park is a member of the Oakland County Emergency Assistance Plan, which was adopted in 1992 and, at the time of hearing, included approximately 25 communities throughout the county. Oak Park also participates in a four-party fire mutual aid pact involving the neighboring communities of Berkley and Huntingdon Woods, as well as Beverly Hills, which is located approximately five miles from Oak Park. With respect to police mutual aid, Oak Park is a participant in the Oakland County Law Enforcement Mutual Aid Agreement, which consists of approximately 33 communities countywide.

In addition to these formal mutual aid agreements, the Oak Park city council has passed a resolution giving Director Siefert the authority to extend aid to, or seek assistance from, any police or fire agency at his discretion. Moreover, police mutual aid is

often provided to Oak Park on an informal basis by officers from neighboring communities who may be passing through the City or patrolling areas near its boundaries, and vice versa. According to Director Siefert, officers from different departments routinely drive by each other's traffic stops and look out for the safety of their fellow officers. The Oakland County Sheriffs Department also has police jurisdiction within Oak Park and can enter the City to perform law enforcement functions with or without Charging Party's invitation. [1]

None of the mutual pacts to which Oak Park is a member mandate that the participating communities actually provide assistance, and no agency may be held liable under such agreements for denying a request for backup or leaving the scene of an emergency. Officer Loftis testified that he was involved in fighting a fire on Christmas Eve in 1998 in which mutual aid was requested but did not respond, and his testimony was corroborated by the incident report which shows that a request for assistance from Huntington Woods was made by the department. However, the record establishes that the City of Royal Oak voluntarily provided assistance to Oak Park for a period of time that evening at the fire scene, and neither Siefert nor Petrides could recall any situation in which Oak Park was unable to secure the assistance of another agency during an emergency.

As with the previously discussed backup plans, mutual aid typically involves some delay before backup is available. The decision to call for mutual aid is generally made by the commanding officer at the fire scene, who must first communicate that request to dispatch. The dispatch officer must then contact supervisory personnel within the agency from whom mutual aid is being sought. If that agency is not available or is unwilling to provide assistance, additional time may elapse while another community is contacted. However, in an effort to minimize the potential for delay, Oak Park may, as a precautionary measure, ask another agency to go on standby in the event of an emergency, and neighboring communities often monitor each other's radio communications and anticipate that a request for aid may be forthcoming. In fact, the record indicates that Oak Park and Beverly Hills share the same radio frequency.

D. Fire Response Practices

The specific fire response practices utilized by the public safety department are set forth in a series of general orders. A one-bell response pertains to a nonstructural fire, typically involving a vehicle, dumpster or grass fires. In such situations, General Order No. 6, entitled "Emergency Medical Service and Fire Response Order" calls for the department to send one truck, two PSO IIs and a patrol vehicle with one officer. A command officer may also respond if he or she determines that additional assistance is necessary. The record establishes that command officers attend a majority of one-bell fires. A two-bell response signifies a structure fire the size of a single dwelling or smaller. Pursuant to General Order No. 6, a two-bell response calls for the department to send one pumper truck with two officers, one patrol unit and a supervisor. In addition, all available units not already on assignment are required to respond to the scene. For a three-bell response, which pertains to all structures larger than a single family dwelling, General Order 6 requires that the department send two pumper trucks, all available patrol units and a supervisor.

In practice, the department does not actually differentiate between a two and three-bell response. Rather, the department follows the three-bell response procedures outlined in General Order No. 6 for every structural fire occurring within the City. When a structure fire call is received, the department sends two trucks, usually driven by the standby officers who were working at the station at the time of the call. All but one of the PSO Is who are on road patrol also respond to the fire scene, including the district car in whose geographical area the fire is occurring. The remaining PSO I reports back to the station on standby status to watch over prisoners or handle police calls. If there are no prisoners at the station, the PSO I will typically attend the fire and call-back would be used to fill the standby position at the station. A lieutenant or sergeant is also sent to the scene to serve as incident commander. Thus, the department's initial response to every structure fire is typically at least five PSO Is and a supervisor. However, there may be situations in which one or more of the PSO Is on-duty is responding to other incidents at the time and cannot immediately report to the fire scene. Under such circumstances, the officer is instructed to notify the incident commander and clear the scene as soon as possible.

The first officer to arrive at the fire scene surveys or "sizes up" the situation and conveys that information to the incident commander, who relies on the officer's report until he or she can physically make it to the fire. One of the PSO Is is assigned the task of engineer, also known as pump operator. The engineer wraps the hydrant with supply line and hooks the line into the outlets which supply water to the tank. The engineer then places the engine in pump mode and is responsible for monitoring the pumping operation and associated instruments to ensure a continual supply of water. If the water stream were to stop while an interior attack is in progress, the officers are expected to discontinue their suppression operations and use the hose as a lifeline to guide them out of the building. Although the engineer needs to stay in close proximity to the truck and does not participate in an interior attack, he or she is able to perform other tasks around the engine, such as changing SCBA bottles.

As required by the Michigan Occupational Safety and Health Act (MIOSHA), an incident commander is present at every structure fire to which members of the department respond. The incident commander is typically the most senior command officer on duty at the time of the fire call. If the fire grows larger, the incident commander may expand the command structure by assigning specific supervisory duties to other officers, including sector commander and safety officer responsibilities. As set forth in the department's General Order No. 95, the incident commander is responsible for the overall coordination and direction of all activities on the incident scene, including the health and safety of all personnel. According to the general order, the duties of the incident commander include, but are not limited to, an assessment of incident priorities in the following priority: life safety; incident stabilization; and property conservation.

Upon arrival at the fire scene, the incident commander conducts his or her own "size up" and begins developing strategic goals and tactical objectives, including a decision regarding whether to engage in an interior attack of the structure or adopt a defensive mode and remain outside. In making that determination, the incident commander will consider factors such as the size of the fire and how long it has been in progress. The incident commander must also develop a plan for the deployment of resources to meet the established goals and objectives. Because fires are dynamic in nature, this is an ongoing process. Other factors to be considered by the incident commander as the fire develops may include: the stability of the structure; the height and size of the structure; whether auxiliary lighting is needed; the weather; ventilation; whether additional personnel are needed to fight the fire; the estimated number of people within and around the fire; whether there are handicapped individuals or people with other special needs inside the structure; available routes of ingress and egress; the development of a rescue plan; the progress of ongoing rescue operations; the availability of water and pump capacity; and the existence of enclosures or fire separations within the building.

In the event that the incident commander orders an interior attack, the department follows the "two-in/two-out" rule as required by MIOSHA. This rule states that when officers enter a burning structure, they do so in teams of at least two and remain in constant visual or voice contact with one another. In addition, a team of at least two officers must remain outside the structure ready to initiate an immediate rescue should one be necessary. General Order No. 104 states that one of the two individuals located outside the structure may be assigned an additional role during that time, such as incident commander, "so long as this individual is able to perform assistance or rescue activities without jeopardizing the safety or health of any fire fighter working at the incident." Whether it is actually possible for an incident commander to perform such duties depends on factors such as the size of the fire and the resources required. Director Siefert testified that if the fire involves a standard 800 square foot, three-bedroom home, the incident commander could stand outside the door and serve as one of the "two-out" while still effectively performing his or her duties as command officer. According to Siefert, such multi-tasking is less likely to occur if a larger structure is involved. Officer Loftis testified that he has never personally observed an incident commander take part in interior fire fighting activities.

With respect to the question of interior entry into a burning structure, the City of Oak Park Public Safety Department has adopted an "aggressive interior attack" philosophy for fighting fires. This means that the officers responding to the fire scene attempt to enter the structure, identify the source of the fire and extinguish it as quickly as possible to prevent the fire from spreading. In commenting upon this philosophy at the hearing, Officer Loftis testified that time is "of the essence in fighting fires" and noted that during the initial stages, a fire doubles in intensity every two minutes. According to Loftis, "There has to be a quick initial response if you are going to save the structure, the contents, and anybody inside the structure." Director Siefert agreed

with Loftis that the first few minutes of a fire are critical with respect to determining how big it ultimately becomes. Siefert testified that "time is the enemy with fire, and the sooner we can attack and extinguish a fire in its incipient stages, the less risk to everyone, including the public and the officers." However, Siefert explained that response time is only one factor affecting the department's ability to safely extinguish the fire. For example, if the fire was burning for some time before it was discovered and the department was notified, the officers may arrive at the scene quickly only to find the entire structure ablaze.

Siefert also testified that despite the department's policy of "aggressive interior attack," the safety of the officers takes first priority over all other considerations, including the prevention of property loss. As noted, the incident commander is charged with protecting the well being of the officers at the scene, and an interior attack will not be initiated if he or she determines upon arrival that there is insufficient manpower or equipment. Under such circumstances, the incident commander will attempt to procure additional personnel pursuant to one of the plans described above. If those attempts fail, the incident commander will adopt a defensive mode until help arrives and, if necessary, allow the structure to burn down to protect the safety of the officers. According to Siefert, the department's "consideration for safety in tactical situations would be the rule of the day, that we would not expose anyone to a danger that, in a case where we didn't have adequate resources." Siefert testified that the incident commander is also expected to order his officers to abandon a burning structure if an interior attack is underway and the situation deteriorates so that additional assistance is required. Corroborating Siefert's testimony, Fire Marshal Petrides explained, "[E]verything I've ever been taught or heard from others or commanders prior to me becoming a commander were that there isn't a building in our town that's worth one of our people's lives."

E. Law Enforcement Response Practices

At hearing, Director Siefert acknowledged that backup is "an important consideration in assigning law enforcement," and several of the general orders issued by the department specifically address the issue of additional personnel for police runs. For example, General Order No. 62 indicates that both a primary and a backup unit should be used during police chases, and that certain situations may call for the involvement of more than two vehicles to "enhance officer safety (i.e. multiple armed felons, etc,)." General Order No. 92 states that two officers should be dispatched to a domestic violence response "whenever possible" and that "one officer responses should be avoided." General Order No. 89, which pertains to "high risk incidents" also contemplates the use of more than one officer when responding to special situations, including barricaded persons, hostage takers/domestic hostages, armed suicidals, high-risk search/arrest warrant service and narcotics raids.

Situations may arise in which, due to an ongoing fire or simultaneous emergency incidents, there may be only one PSO I available to handle law enforcement runs. For example, while a fire incident is ongoing, one PSO I usually returns to the fire station in a stand-by capacity. During the time that the officer is on stand-by status, he or she may also get dispatched to perform law enforcement duties without there being backup immediately available. Officer Loftis testified that PSO Is are frequently sent on runs alone. However, the record establishes that when circumstances warrant the deployment of more than one officer, the dispatcher will immediately request backup from the neighboring department. The PSO is instructed as to which department has been called and is expected to wait for backup to arrive before responding to the scene. Siefert testified that the responding officer will typically drive close to the scene while waiting for mutual aid to respond. As noted above, police mutual aid is also provided to Oak Park on an informal basis as officers from neighboring communities pass through the City or patrol near its boundaries.

F. Fires Statistics and Injuries

Both parties introduced statistical evidence concerning the number of times the department responded to calls during the period 2000 to 2002. According to the Union's testimony and exhibits, which were based upon data from the Courts Law Enforcement Management System (CLEMIS), a county-wide public safety database, the department responded to 365 fire incidents in Oak Park in 2000, including 75 structure fires, and 21,598 police calls. In 2001, the department responded to 446 fire incidents, of which 107 were structure fires, and 21,004 police calls. According to the CLEMIS reports, there were 292 fire incidents in

Oak Park in 2002, including 59 structure fires, and 18,676 police calls. The Employer's statistics were based upon on a survey of the actual reports prepared by the dispatchers, PSOs and command officers around the time of each incident. According to the Employer's testimony and exhibits, there were 302 fire incidents within Oak Park in 2000, including 48 structure fires. The City's survey for 2001 indicates that there were 397 fire incidents to which the department responded, of which 93 were structure fires. The City's data for 2002 shows 247 fire incidents, including 59 structure fires. Toward the conclusion of the hearing, the Union stipulated that the discrepancy between its statistics and those of the Employer were not materially significant.

Evidence was also introduced by the parties concerning injuries suffered by PSO IIs while fighting fires in Oak Park. All but two of the incidents happened more than seventeen years prior to the start of the hearing in this matter, and all of the injuries occurred during situations in which call-back was utilized. For example, the Union presented evidence concerning a house fire which occurred on November 22, 1981. Officers Luxton and Grindem were on a hose team inside the house when the floor collapsed. Grindem started to fall through the floor and was pulled out by Luxton. Grindem suffered a knee injury and was off work for eight weeks. At the time that Grindem sustained his injury, call-back had been requested by the department but additional personnel had not yet arrived on the scene. In commenting on this incident at hearing, Fire Marshal Petrides testified that the number of officers gathered at the fire scene was likely not a contributing factor in Grindem's injury. According to Petrides, "[Grindem] went through the floor probably because it was full of smoke and he couldn't see. That's pretty typical. ... Having a third person behind you isn't going to make any difference in that regard. And he was pulled out by Officer Luxton, so his backup person did the job that he was supposed to do."

II. Positions of the Parties:

The City contends that Respondent's minimum staffing proposal which it submitted to the Act 312 arbitration panel on August 19, 2003, is not inextricably intertwined with safety and, therefore, is not a mandatory subject of bargaining. According to Charging Party, the public safety department has appropriate regulations in place to maintain the safety of the fire fighter at the fire scene. In support of this contention, Charging Party cites the fact that the department has in place an incident command system, and that it adheres to the "two-in/two-out" rule as defined by MIOSHA. In addition, backup forces are available whenever needed through the use of non-operational, on-duty personnel, departmental call-back and mutual aid.

The City further contends that a delay in assembling an appropriately sized crew does not raise a safety issue for the fire fighters on the ground, since the incident commander will adopt a defensive mode until additional personnel have arrived. According to Charging Party, the Union's testimony concerning injuries suffered by PSO Is over the years fails to demonstrate that its proposal is inextricably intertwined with a genuine or significant impact on fire fighter safety. Charging Party contends that the injuries would have occurred no matter how many PSO Is were in the initial response or how many officers eventually arrived at the fire scene through call-back or mutual aid.

Charging Party argues that the Union's demand with respect to the minimum number of personnel deployed at the scene of a structure fire, as well as its proposal that at least two PSO Is be deployed as primary and backup to perform law enforcement responsibilities when a fire incident arises, are part of a thinly veiled effort to "back into" the Union's proposed daily staffing level of seven on-duty PSO Is. According to Charging Party, such proposals are not mandatory subjects of bargaining and, therefore, the Union violated Section 10(l)(3) of PERA in submitting such issues to the Act 312 panel.

Charging Party contends that the Union's submission to Act 312 arbitration of the layoff and recall provisions from Article XXXIII of the parties' expired contract also constituted a violation of the duty to bargain. The civilian dispatchers are in a different bargaining unit and covered by a different collective bargaining agreement. According to Charging Party, it is well-settled that a bargaining unit may not condition the layoff of unit members on the layoff of other non-unit personnel. Charging Party further contends that dispatching is not the exclusive work of the PSO unit.

Finally, Charging Party asserts that the Union breached its duty to bargain under PERA by demanding retention of a provision in the prior contract mandating that there be at least one two-person car on duty during the night shift, and a provision requiring

the department to maintain no less than 45 sworn bargaining unit members assigned to the operations division. According to Charging Party, both provisions are permissive subjects of bargaining. Charging Party contends that the Union's subsequent withdrawal of the proposals did not render these allegations moot because the issues involve important questions of public interest and are likely to reoccur.

Respondent argues that the minimum staffing provision for PSO Is which it submitted to the Act 312 panel on August 19, 2003, is a mandatory subject of bargaining. According to the Union, the "inextricably intertwined with safety" test cited by Charging Party is merely descriptive, not prescriptive, and other formulations of the test, including "related to safety" and "affecting safety" are equally valid. Based upon its analysis of judicial and administrative decisions addressing the minimum staffing issue, Respondent submits the following language as the standard which the Commission should utilize for determining whether a minimum staffing proposal constitutes a mandatory subject: whether there is a significant impact on safety to the extent that safety concerns are arguably intertwined with and inseparable from, the minimum staffing issue.

Respondent further contends that regardless of which standard is applied, the evidence demonstrates that its staffing proposal was a proper subject for compulsory arbitration. Respondent asserts that the minimum manning issue in this case is unique because it involves a public safety department whose officers are certified to perform both firefighting and police work. Respondent argues that by the very nature of this dual capacity, added levels of stress and fatigue are self-evident, as its members may be called upon be called upon to fight a fire after having already spent many hours performing law enforcement duties. According to Respondent, the unpredictable nature of fires in Oak Park and the established history of PSO I injuries, as well as the department's policy favoring aggressive interior attacks, further demonstrate that its staffing proposal, which links the staffing number to police and fire operations, including the operation of fire equipment and apparatus in the performance of fire related tasks, has a significant impact on safety.

With respect to law enforcement response practices, the Union contends that its staffing proposal addresses the department's current practice, which leaves only one PSO I available to perform police duties when a structural fire occurs. Respondent argues that this practice may leave the officer without backup and, therefore, is inherently unsafe. Respondent further contends that the department's backup plans are ineffective and fail to alleviate the safety concerns which gave rise to its proposal. According to Respondent, all three backup plans fail to take into account the safety issues which arise when on-duty officers must wait for additional personnel to arrive on the scene.

Finally, the Union argues that the merits of its proposal are corroborated by information from the National Fire Protection Association (NFPA). Although materials published by the NFPA were not admitted into the record at hearing, Respondent contends that they still may be relied upon as a secondary source of information.

III. Discussion and Conclusions of Law:

Under Section 15 of PERA, a public employer and union representative have a duty to bargain in good faith over "wages, hours, and other terms and conditions of employment. ..." MCL 423.215(1). Such issues are referred to as mandatory subjects of bargaining. Either party may insist on bargaining over a mandatory subject, and neither party may take unilateral action on such an issue prior to reaching an impasse in negotiations. Detroit Police Officers Ass'n v. Detroit, 391 Mich 44, 54-55 (1974). Issues falling outside the scope of such classification are considered permissive or illegal subjects of bargaining. Grand Rapids Comm College Faculty Ass'n v. Grand Rapids Comm College, 239 Mich App 650, 656-657 (2000); Southfield Police Officers Ass'n v. Southfield, 433 Mich 168, 177-178 (1989). The test generally applied to determine whether a subject is mandatory or permissive is whether the matter has a significant impact upon wages, hours, or other conditions of employment, or settles an aspect of the employer-employee relationship. City of Manistee v. Manistee Fire Fighters Ass'n, Local 645, 174 Mich App 118, 122 (1989), *aff'g Manistee Fire Fighters Ass'n,* 1987 MERC Lab Op 590; City of Detroit v Michigan Council 25, AFSCME, 118 Mich App 211, 215.

What constitutes a mandatory subject is determined on a case-by-case basis, and the Commission has primary jurisdiction to decide whether a particular topic is a mandatory or permissive subject of bargaining. Jackson Fire Fighters Assoc, 1996 MERC Lab Op 125, *aff'd* Jackson Fire Assoc, Local 1306 v. City of Jackson (On Remand), 227 Mich App 520 (1998); Manistee, 174 Mich App at 122. An Act 312 arbitration panel has no authority to issue an award on a permissive subject of bargaining. Local 1277, Metropolitan Council No. 23, AFSCME, AFL-CIO v. City of Center Line, 414 Mich 642, 653. Therefore, it is an unfair labor practice for either party to insist to impasse on a nonmandatory subject or to submit such an issue to arbitration under Act 312. Id. at 653; *Manistee, supra. See also* Detroit Fire Fighter Ass'n, Local 344, IAFF v. Detroit, 96 Mich App 543, 545-546 (1980). In the instant case, Respondent has before the Act 312 panel a minimum staffing proposal, as well as a proposal to maintain the layoff and recall provisions set forth in the expired contract. Two other proposals which Respondent submitted to the Act 312 panel and then subsequently withdrew are also at issue in this case, one requiring the Employer to deploy at least one two-person car during the night shift, and the other mandating the size of the bargaining unit.

A. Minimum Manning

Generally, manning issues, including decisions regarding the number of individuals to be employed and their allocation to particular functions, do not constitute mandatory subjects of bargaining, but rather are reserved to the public employer as a matter of management prerogative. Center Line, supra; Benzie County, 1986 MERC Lab Op 55, 59. However, issues of employee workload and safety constitute conditions of employment and, therefore, are mandatory subjects of bargaining. City of Sault Ste Marie v. Fraternal Order of Police Labor Council, 163 Mich App 350, 355 (1987). *See also* Alpena v. Alpena Fire Fighters Ass'n, 56 Mich App 568, 575 (1974), *overruled in part on other grounds,* Detroit v. Detroit Police Officers Ass'n, 483 Mich 410, 483 n 65 (1980), and cases cited therein. In prior cases, both the Commission and the Court of Appeals have held that the test for determining whether a minimum staffing provision constitutes a mandatory or permissive subject of bargaining is whether the staffing requirement is "inextricably intertwined" with the safety of the officers or fire fighters. City of Trenton v. Trenton Fire Fighters Union, Local 2701, IAFF, 166 Mich App 285, 295 (1988); *City of Wyandotte,* 1989 MERC Lab Op 1020; City of Detroit, 1992 MERC Lab Op 82.

In an attempt to establish that the minimum staffing clause at issue in the instant case implicates the safety of its members and, as such, constitutes a mandatory subject of bargaining, Respondent dedicates much of its brief to questioning whether prior Commission decisions have placed undue reliance on the phrase "inextricably intertwined with safety." The Union argues that over the years, many different forms of the test have been applied in minimum staffing situations, including whether the staffing provision "affects safety" or "concerns safety." While conceding that "inextricably intertwined with safety" is one statement of the test, the Union argues that such language should not be interpreted as a different standard entirely, but rather as a parallel descriptive phrase which is no more strict than the "affects safety" or "concerns safety" formulations. Based upon its review of prior Commission case law, as well as decisions of the Court of Appeals, Respondent contends that the proper test for determining whether a minimum staffing proposal constitutes a mandatory subject is whether the proposal "has a significant impact on terms and conditions of employment, such as safety, to the extent that safety concerns may arguably be deemed intertwined with and inseparable from the minimum staffing issue in dispute."

The Commission has already considered and flatly rejected an almost identical attempt to narrow application of the "inextricably intertwined with safety' language. In Jackson Fire Fighters Ass'n, Local 1306, 1996 MERC Lab Op 125, the employer filed a charge alleging that the union had violated its bargaining duty under PERA by submitting to Act 312 arbitration a proposal requiring that a minimum of 15 fire fighters be assigned to each shift. Relying upon evidence establishing the extensive safety policies of the fire department and the availability of backup forces, the ALJ found in favor of the employer, concluding that the union's proposed minimum staffing requirements were not "inextricably intertwined" with fire fighter safety. In so holding, the ALJ characterized the "inextricably intertwined" test as a "stricter standard" than whether the staffing proposal "affected" or was "related to" safety. On exception, the union argued that the ALJ erred in concluding that the appropriate standard to be applied was the "inextricably intertwined with safety" test. The union asserted that "inextricably intertwined with safety" was one of two alternate tests for establishing that a staffing issue is a mandatory subject of bargaining, and that if either test is met,

the issue is a mandatory subject. The union argued that the second, more liberal test, required only that the Union show that the staffing issue is "related to safety."

The Commission disagreed with the union and adopted the legal analysis of its ALJ. Finding no merit to the union's "alternate test" theory, the Commission concluded, "There is but one test to be applied in such cases; minimum staffing issues become bargainable only when they are inextricably intertwined with employee safety." Id. at 133. In so holding, the Commission referred to its decision in City of Detroit Fire Department, 1992 MERC Lab Op 82, affirmed in an unpublished opinion (Docket No. 149506, issued September 26, 1994), in which it stated, "[T]he evidence must show that the safety of employees and the number of employees scheduled per shift is "inextricably intertwined." That is, there must be at the minimum, evidence demonstrating a genuine or significant impact on safety." 1992 MERC Lab Op 82 at 85. The Court of Appeals subsequently affirmed MERC's decision in Jackson but explicitly declined to address whether there exists any distinction between issues "related to" safety and those "inextricably intertwined" with it, finding that sufficient evidence existed to affirm the Commission "under either statement of the criterion." Jackson Fire Fighters Ass'n, 227 Mich App at 527 n 1.

Respondent criticizes Jackson and contends that it was wrongly decided. Respondent asserts that the ALJ in Jackson reached an "unsupported and incorrect conclusion" when she characterized the "inextricably intertwined with safety" standard as a "stricter" test than "related to safety," and that the Commission engaged in an "unduly narrow and restrictive application of the 'inextricably intertwined with safety test'" which placed an "improper burden" upon the union. This argument must be rejected. Jackson stands as the Commission's most recent enunciation of the standard which should be applied in a minimum staffing case such as this, and I am bound to follow it pursuant to the doctrine of stare decisis. Thus, it is not sufficient in this case for the Union to show that its minimum staffing proposal is "related to" "affects" or "concerns" safety. To establish that the minimum staffing proposal constitutes a mandatory subject of bargaining, the evidence must demonstrate that the proposal is inextricably intertwined with the safety of its members; i.e. that the staffing proposal has a genuine or significant impact on safety. Jackson, 1996 MERC Lab Op at 132-133; Trenton, 166 Mich App at 295.

Respondent contends that even if the "inextricably intertwined with safety" standard, as enunciated by the Commission in Jackson, is applied in the instant case, its minimum staffing proposal constitutes a mandatory subject of bargaining. As described above, the Union's August 20, 2003, proposal would set a minimum staffing requirement of seven PSO Is on duty per shift at all times, establish the minimum manpower required per task or apparatus at the scene of a structure fire, and mandate that the City deploy a minimum of two PSO Is to perform police work when a fire incident arises. Respondent argues that this proposal is distinguishable from the minimum staffing language at issue in cases such as Jackson and Trenton in that it does not call for a fixed number of officers to be employed by the department or on-duty per shift, but rather seeks to ensure that there are a sufficient number of PSOs to safely operate the equipment and apparatus and perform the tasks demanded by the City. Regardless of whether the Union's proposal is framed in terms of officers per shift or per task, I find that the record in this case fails to establish that the Union's minimum staffing proposal has a significant impact on the safety of its members.

The Union's minimum manning proposal would require that the City maintain a staffing level of seven PSO Is on-duty per shift. However, the record indicates that the City's current minimum staffing level of at least six PSO Is on-duty per shift is sufficient to safely fulfill the duties and responsibilities required by the department and mandated by law. When a structure fire call is received, the department's current policy is to send at least five PSO Is and one command officer to the fire scene. The remaining PSO I typically reports back to the station and remains on stand-by. At the fire scene, one PSO is assigned the task of engineer, while the other four officers make up the "two-in/two-out" contingent required for interior entry under MIOSHA and the department's General Order No. 104. Pursuant to MIOSHA and General Order No. 95, an incident command system is set up, with the most senior lieutenant or sergeant designated to coordinate and direct all activities at the fire scene, including matters relating to officer safety. If, upon arriving at the fire scene, the incident commander determines that there is insufficient manpower or equipment to engage in an interior attack, the incident commander is not expected to order officers into the structure until additional personnel can be assembled.

With respect to the use of backup forces for fire suppression, the record establishes that the City has in place detailed plans to ensure the deployment of adequate personnel when necessary. Depending on the size of the structure involved and the nature of the fire, the incident commander can serve as one of the "two-out" for an interior attack. If there are simultaneous emergencies or circumstances at the fire scene which require the assistance of additional officers, the incident commander can order the deployment of supplementary personnel from other staff who are on-duty at the time, including lieutenants, sergeants and PSO IIs. Non-operational personnel are in contact with the department and available for deployment during business hours, Monday through Friday and, to a limited extent, in the evenings and on weekends. If on-duty non-operational personnel are unavailable, the department has additional manpower it can draw from by calling up off-duty PSOs, or by requesting the assistance of officers from other departments through one of the mutual aid pacts in which the City is a member. Based upon this evidence, I conclude that the department's reduction in minimum daily staffing to six PSO Is on duty per shift does not significantly impact the safety of Respondent's members.

The second aspect of the Union's proposal would establish the minimum number of PSOs required per task at the scene of a structure fire. Specifically, the proposal would require that at least five PSOs be deployed at every fire scene, including one PSO to operate the apparatus and no less than four PSOs to suppress the fire and make up the "two-in/two-out" contingent. While this is identical to the City's current practice with respect to the minimum number of personnel initially assembled at the fire scene, I find that the Union's proposal is not inextricably intertwined with safety. By specifying that the initial response must always include a designated number of PSOs, the clause unduly restricts Charging Party's ability to determine the composition of its workforce and essentially prevents the City from using command officers and other non-operational staff as it sees fit, whether as part of the initial response or as backup in the case of simultaneous emergencies. It would also place a severe limitation on the City's ability to freely use the incident commander and other personnel as part of the "two-in/two-out" equation. As noted, all command officers and PSO IIs employed by Charging Party have at least the same level of certification and training as PSO Is, and fire fighting duties have long been part of their job descriptions. If Respondent's proposal was truly aimed at improving safety, then the use of qualified non-operational personnel at the fire scene, in whatever capacity, would have no bearing on the issue. The clear purpose of this aspect of the Union's proposal was to protect bargaining unit jobs by requiring the City to keep more of its members on the street on a daily basis.

The Union contends that only PSOs should be relied upon for the initial response to a structure fire since they are the only employees of the Public Safety Department who can respond to a fire in a prompt and efficient manner. According to Respondent, the City's backup procedures are inadequate because each backup plan involves a significant delay in officer response time and, therefore, will result in increased risk to the fire fighters who are assembled at the scene. However, the evidence indicates that response time is only one factor affecting the department's ability to fight the fire. More importantly, the testimony of Director Siefert and Fire Marshal Petrides reveals that despite the City's policy favoring aggressive interior attacks, fire fighter safety is the department's first consideration and that an interior attack will not be undertaken unless and until adequate manpower and equipment have been assembled at the fire scene. The policy of the department, as described by Siefert and Petrides, is to adopt a defensive mode in such situations and, if necessary, to allow the structure to burn down if an interior attack cannot be safely conducted. Thus, while the delay associated with the department's backup plans may increase the risk to the citizens of Oak Park and their property, fire fighter safety will not be affected. It is well-established that the level of fire protection services provided to citizens is not subject to the duty to bargain under Section 10 of PERA. *See e.g. Wyandotte,* 1989 MERC Lab Op at 1023; Detroit, 1992 MERC Lab Op at 86.

With respect to the department's law enforcement practices, the evidence establishes that there may be times when PSO IIs are sent on police runs by themselves. However, there is nothing in the record to suggest that safety considerations require there to be two officers on every police run, or that a two-person car is inherently safer than a one person response. *See generally* Sault Ste Marie, 163 Mich App at 356-357 (minimum manning clause not a mandatory subject of bargaining where there was no evidence showing that two-person patrols were safer than one-person patrols). Moreover, the record establishes that when the nature of the call indicates that more than one officer should be deployed, such as in cases involving domestic violence or high risk incidents, back up is requested immediately by the dispatcher and the responding officer is not expected to go to the scene until mutual aid arrives. As noted above, while the delay associated with calling for backup may impact the safety of the

citizens of Oak Park, it is not a matter over which Charging Party is required to bargain. Finally, the record indicates that police mutual aid is also provided to Oak Park on an informal basis and that personnel from other departments routinely monitor the safety of Charging Party's officers, and vice versa.

In an attempt to prove that its minimum staffing proposal is inextricably intertwined with the safety of its members, Respondent relies upon statistics setting forth the number of fires which have occurred in Oak Park in the years preceding the hearing, as well as evidence pertaining to injuries suffered by PSO Is since 1979. The testimony and exhibits describing PSO I injuries plainly show the dangers which are inherent to the profession. However, the Union failed to establish any correlation whatsoever between this evidence and staffing levels, and it would require the undersigned to engage in speculation and conjecture in order to find such a nexus. It is just as likely that any or all of these injuries would have occurred regardless of how many officers were deployed at the scene at the time the incidents occurred. Similarly, I fail to see how evidence showing a fluctuating number of fires per year establishes that the Union's minimum staffing proposal has a genuine or significant impact on PSO safety.

Finally, Respondent argues that the safety concerns implicit in its proposal are corroborated by materials published by the National Fire Protection Association (NFPA). In particular, the Union relies upon sections of the Fire Protection Handbook and the NFPA 1500 Standard on Fire Department Occupational Safety and Health Program. The record indicates that the NFPA's safety guidelines are not binding on governmental agencies and municipalities, and that neither the City of Oak Park nor the State of Michigan have explicitly adopted any of the organization's recommendations. At hearing, I ruled that the materials were hearsay under MRE 801(c) and that neither publication was admissible under MRE 707, the learned treatise exception to the hearsay rule. Under that exception, statements contained in treatises are admissible only on cross-examination and for the limited purpose of impeachment. Moreover, if admitted, such materials may be read into evidence, but not received as an exhibit. MRE 707. *See also* Stachowiak v. Subczynski, 411 Mich 459 (1981) (treatises shall not be used as substantive evidence); Fletcher v. Ford Motor Co, 128 Mich App 823 (1983) (safety publications drafted by voluntary publications constitute learned treatises). Respondent now contends that identification of the NFPA publications as "treatises" allows for their consideration by the Commission as "secondary source materials." I disagree and reaffirm my earlier ruling with respect to the inadmissibility of the NFPA documents.

Based upon the above discussion, I conclude that the evidence presented does not establish that the minimum staffing provision submitted by the Union to the Act 312 panel is inextricably intertwined with PSO safety. I find the minimum staffing clause to be a permissive subject of bargaining. Accordingly, I find that Respondent violated Section 10(3)(c) of PERA by bargaining to impasse on the staffing proposal.

B. Layoff and Recall

Charging Party contends that the Union violated its duty to bargain under Section 10(3)(c) by insisting to impasse and presenting to the Act 312 arbitration panel a proposal to maintain the layoff and recall language set forth in Sections 33.4 and 33.5 of the collective bargaining agreement. That language prohibits the department from laying off any bargaining unit member until all non-members, including civilians, who "perform police and fire duties are laid off first. Said duties are to be defined as work presently or previously performed by Public Safety Officers." The contract further requires that PSOs who have been laid off shall be rehired before non-PSOs or civilians who perform such duties. The City argues that this layoff and recall provision is a permissive subject of bargaining because the language restricts its ability to layoff PSO IIs before civilian dispatchers. According to the Union, the provision does not restrict the City's ability to determine the size or composition of its workforce, but rather merely seeks to require the City to bargain over the impact of any layoff decision on its members. Respondent contends that its members have performed dispatch work for years, and that the clause merely seeks to protect the integrity, workload and safety of the unit.

In Center Line, supra, the Michigan Supreme Court found that an Act 312 arbitration panel did not have the authority to compel inclusion of a no-layoff provision in a collective bargaining agreement. The layoff clause at issue in Center Line provided, "The word 'layoff means a reduction in the working force due to a decrease of work or general lack of funds. If for lack of funds,

police officers may be laid off only in conjunction with layoffs and cutbacks in other departments." Distinguishing an earlier Court of Appeals decision, Alpena, supra, 56 Mich App 568, the Court in Center Line concluded that the manpower clause was not a mandatory subject of bargaining:

We interpret this clause as one that is within the scope of management prerogative. The clause unduly restricts the city in its ability to make decisions regarding the size and scope of municipal services. [T]he city no longer would be able to base its decision on factors such as need, available revenues, or public interest. The decision regarding layoffs could only be based on the level of services in other departments if the layoff clause was to be upheld. This severely restricts the city in its ability to function effectively and poses serious questions with regard to political accountability for such decisions. [T]he clause is a mild restriction, but it speaks to the very essence of the [city's decision-making process.]

Center Line, 414 Mich at 660.

I find Center Line to be controlling with respect to this issue. Because PSOs have performed and continue to perform dispatch work for the department, the layoff and recall provision at issue in this case would clearly prohibit the City from laying off a single PSO until each and every civilian dispatcher is laid-off first. I conclude that the layoff and recall language which Respondent submitted to the Act 312 panel in the instant case, like the clause at issue in Center Line , deprives Charging Party of its ability to make policy decisions regarding the number of PSOs needed to operate the department and the level of fire and law enforcement services to offer its citizens. While Respondent has the right to demand bargaining over the impact of a decision to layoff bargaining unit members, including the safety and workload of the remaining PSOs, seniority, and "bumping" rights, the Union may not demand to bargain over and take to impasse a proposal conditioning the layoff of its members on the layoff of non-unit employees.

C. Two-Person Patrols and the Size of Bargaining Unit

Charging Party argues the Union breached its duty to bargain under PERA by submitting to the Act 312 arbitration panel proposals to maintain two provisions in the expired contract, one pertaining to two-person patrol cars on duty during the night shift, the other mandating that the City maintain no less than 45 sworn bargaining unit members assigned to the operations division. Although Respondent ultimately withdrew these proposals just prior to the hearing in this matter, Charging Party contends that the charges are not rendered moot because the issues raised therein involve important questions of public interest and are capable of repetition. Because these allegations relate to the statutory duty to bargain, I agree with the City that a decision is required in this instance even though the provisions are no longer before the Act 312 panel. *See e.g. Rochester Comm Sch,* 1994 MERC Lab Op 640, 644 (no exceptions); *Ingham County and Ingham County Sheriff,* 1988 MERC Lab Op 170, 172; *Kent County,* 1991 MERC Lab Op 549, 551 n 1; *Wayne State Univ,* 1991 MERC Lab Op 496; 499-500.

The Union did not present a defense with respect to either of the allegations at issue here, and it is clear that both provisions constitute permissive subjects of bargaining. With respect to Section 30, as it relates to the use of two-person patrol during night shifts, there is no evidence establishing a link between PSO safety and two-person patrol cars. As noted above, the record indicates that backup is readily available either informally or through mutual aid and, depending on the nature of the incident, PSOs are be expected to wait for backup to arrive before proceeding to the scene. Therefore, I find that the Union's submission of the two-person patrol language violated Section 10(3)(c) of PERA. The Union's submission to Act 312 arbitration of a provision pertaining to minimum staffing in the operations division was similarly unlawful. Decisions regarding the size and scope of municipal services are within a public employer's inherent managerial authority, and provisions relating to staffing levels or the size of the total work force are not mandatory subjects of bargaining. *Center Line, supra.See also Leoni Twp,* 1986 MERC Lab Op 689, 694 (no exceptions); Manistee Fire Fighters Ass'n, 1987 MERC Lab Op at 606.

IV. Conclusion:

WESTLAW © 2021 Thomson Reuters. No claim to original U.S. Government Works.

In summary, I find that Respondent's attempt to take the issues of minimum staffing, layoff and recall, two-person cars during the night shift, and size of the bargaining unit to binding arbitration over the objection of the City constitutes a violation of its bargaining obligation under PERA. The contract provisions pertaining to minimum staffing and layoffs must be withdrawn from presentation to the Act 312 arbitration panel, and Charging Party must be permitted to eliminate the layoff and recall provision from the collective bargaining agreement.

All other arguments raised by the parties have been carefully considered and do not warrant a change in the result. Accordingly, I hereby recommend that the Commission issue the order set forth below. Because of the technical nature of the violation, it is not recommended that a notice be posted.

Recommended Order

The Oak Park Public Safety Officers Association is hereby ordered to cease and desist from insisting to the point of impasse on, or submitting to arbitration under Act 312, proposals which constitute permissive subjects of bargaining, including daily shift minimum staffing, layoff and recall, two-person patrol cars, and minimum staffing in the operations division.

Footnotes

1 Commissioner Eugene Lumberg did not participate in this case.

1 Charging Party's witnesses testified that there is also State Police post located within Oak Park. However, the record was insufficient to establish that the City could reasonably expect to receive assistance from the troopers assigned to that facility.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

31 MPER ¶ 61, 31 Michigan Pub. Employee Rep. ¶ 61, 2018 WL 2979814

Michigan Court of Appeals

Michigan Education Association, Respondent-Appellant, v. Vassar Public Schools, Charging Party-Appellee
No. 337899
MURRAY, SERVITTO, BOONSTRA
May 22, 2018

Related Index Numbers
3.21 Public Employee Collective Bargaining Law, Amendments
3.22 Public Employee Collective Bargaining Law, Interpretation or Construction
21.112 Definitions, Constitutional, Due Process
42.32 Prohibited Subjects, Statutory
42.44 Determination of Bargaining Subject Status, Conflict With Laws
46.21 Provisions Inconsistent with Statute, Conflict with Existing Legislation
43.58 Job Security, Recall Rights and Procedures
71.711 Review by State Board of Hearing Officer's Report, Exceptions, Timeliness
74.31 Types of Orders, Cease and Desist
74.321 Types of Orders, Restoration of Status Quo Ante, Specific Affirmative Action
MERC's decision, 30 MPER 62, affirmed in unpublished decision

Judge / Administrative Officer
MURRAY
SERVITTO
BOONSTRA

Ruling

In an unpublished decision, the Michigan Court of Appeals affirmed MERC's ruling regarding an unfair practice charge. It accepted MERC's conclusion that a teachers' union committed an unfair practice by demanding arbitration concerning a prohibited subject of bargaining under PERA provisions, i.e., a school employer's refusal to recall a laid-off teacher to an open position. The court rejected the union's argument that it did not commit any unfair practice when it contended that the employer's failure to recall the teacher violated his due process rights.

Court rules: union commits ULP by demanding arbitration of grievance

Meaning

The court explained that, when a party demands to arbitrate a grievance that concerns a prohibited subject of bargaining, that party commits an unfair labor practice regardless of the legal theory the party advances to support its grievance.

Case Summary

In July 2014, the employer-school district laid off several teachers. In August 2014, one teacher notified the employer that he was interested in an open first grade teaching position, but the employer did not select him for the position. The union filed a grievance alleging that the employer violated its contractual duties – as well as the teacher's procedural due process rights – by refusing to return the teacher to an available position. After the employer denied the grievance, the union demanded arbitration of the grievance. The employer filed an unfair practice charge. In a decision reported at 30 MPER 62, MERC ruled that the union committed an unfair practice by demanding arbitration concerning a prohibited subject of bargaining under PERA provisions. In an unpublished decision, the Michigan Court of Appeals affirmed. It rejected the union's argument that it did not commit

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

any unfair practice when it asserted that the employer's failure to recall the teacher violated his due process rights. Regardless of the union's theory of wrongdoing, the court determined, MERC was entitled to conclude that the union committed an unfair practice by demanding to bargain if the demand concerned a prohibited subject of bargaining. The court also determined that, regardless of whether the teacher was discharged or was not recalled, the union violated PERA provisions by demanding to bargain over a prohibited subject of bargaining. The court declined to address the issue of waiver. It upheld MERC's conclusion that the union committed an unfair practice by demanding to arbitrate the issue raised in the grievance.

Full Text

Unpublished Opinion

Before: Murray, C.J., and Servitto and Boonstra, JJ.

Per Curiam.

Respondent, Michigan Education Association, appeals as of right the order of the Michigan Employment Relations Commission [see 30 MPER 62] adopting the recommendation of an Administrative Law Judge and granting summary disposition to charging party, Vassar Public Schools, on the basis that the MEA violated the Public Employment Relations Act (PERA), MCL 423.201 et seq., by demanding to arbitrate a grievance that concerned a prohibited subject of bargaining. The MEA demanded arbitration after Vassar denied its grievances regarding Vassar's failure to recall a teacher, Jeffry Staple, who had been laid off. We affirm.

I. Facts

Vassar laid off Staple and six other teachers in July 2014. In August 2015, Staple informed Vassar that he was interested in an open first-grade teaching position in the district. Vassar openly posted the position on August 25, 2015.

Section 9.4 of the collective bargaining agreement provides a five-level grievance process to resolve disputes. At the fifth level, the grievance may be submitted to arbitration. However, the grievance process does not apply to "[e]valuation, layoff or recall of a teacher provided the district complies with board policy," or "[a]ny matters which are prohibited subjects of bargaining provided the district complies with Board policy."

On September 9, 2015, the MEA filed a grievance asserting that Vassar refused to recall Staple to an available position for which he was certified and qualified. The MEA asserted that Vassar had deprived Staple of a significant property interest in his employment without procedural due process and violated its duties under the CBA by refusing to return Staple to an available position. The MEA sought to have Vassar return Staple to a position for which he was certified and qualified to teach, and reimburse him for back pay and insurance premiums. Vassar denied the grievance for three reasons: (1) Staple had been rated "minimally effective" and Board policy was to only recall "effective" teachers; (2) recall was within Vassar's sole authority under PERA; and (3) Vassar had reserved its right to direct layoffs and recalls.

The MEA subsequently filed a demand for arbitration on the basis of "[f]ailure to recall," and Vassar filed an unfair labor practice charge. Both parties filed for summary disposition before the MERC, which ultimately decided that the MEA committed an unfair labor practice by demanding arbitration concerning a prohibited subject of bargaining under the PERA [see 30 MPER 62].

II. Standard of Review

When reviewing a decision from the MERC, this Court reviews de novo questions of law, including issues of statutory interpretation. AFSCME Council 25 v Faust Pub Library, 311 Mich App 449, 452; 875 NW2d 254 (2015). In the absence of a factual dispute, this Court will only set aside the MERC's rulings if they violate a constitution or statute, or if they involve

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

a substantial and material error of law. Id. The MERC's findings of fact are conclusive if competent, material, and substantial evidence on the record supports them. Id. This Court reviews de novo preserved questions of constitutional law. *Saginaw Ed Ass ' n v* Eady-Miskiewicz, 319 Mich App 422, 450-451; 902 NW2d 1 (2017). This Court also reviews de novo issues of statutory interpretation. Pohutski v City of Allen Park, 465 Mich 675, 681; 641 NW2d 219 (2002).

III. Arbitration Demands as Unfair Labor Practice

The MEA argues that the MERC erred by finding that it committed an unfair labor practice by demanding to arbitrate its grievance because it did not contest that Vassar had the right to lay off Staple, but instead argued that Vassar's failure to recall him violated his right to due process. We reject that position because when a party demands to arbitrate a grievance that concerns a prohibited subject of bargaining, that party commits an unfair labor practice regardless of the legal theory the party advances to support its grievance.

"The primary obligation placed upon the parties in a collective bargaining setting is to meet and confer in good faith." Detroit Police Officers Ass 'n v Detroit, 391 Mich 44, 53; 214 NW2d 803 (1974). When parties do not act in good faith, the enforcement mechanism is an unfair labor practice charge. Id. at 56-57. Parties must discuss mandatory subjects of bargaining. Id. at 55. However, while parties may discuss prohibited subjects of bargaining, demanding to bargain over a prohibited subject is an unfair labor practice. Calhoun Intermediate Sch Dist v Calhoun Intermediate Ed Ass ' n, 314 Mich App 41, 49-50; 885 NW2d 310 (2016).

The PERA provides that certain subjects are "prohibited subjects of bargaining" and are "within the sole authority of the public school employer to decide." MCL 423.215(4). These subjects include "[d]ecisions . . . when conducting a recall from a staffing or program reduction[,] . . . any decision made by the public school employer pursuant to those policies, or the impact of those decisions on an individual employee or the bargaining unit." MCL 423.215(3)(k).

While the MEA argues that it was grieving Vassar's violation of Staple's right to due process, not its failure to recall him, the legal theory under which the MEA proceeds is inapplicable. The MERC's exclusive jurisdiction over unfair labor practice claims "forecloses actions under other statutes or legal theories where the alleged wrongdoing raises an unfair labor practice issue." Kent Co Deputy Sheriffs ' Ass ' n v Kent Co Sheriff, 238 Mich App 310, 320; 605 NW2d 363 (1999). [1] Accordingly, regardless of MEA's legal theory of wrongdoing, the MERC was entitled to conclude that the MEA committed an unfair labor practice by demanding to bargain if the demand concerned a prohibited subject of bargaining. For reasons that will be discussed, the MERC did not err when it determined that the MEA's grievance concerned prohibited subjects of bargaining. Therefore, the MERC did not err when it found that the MEA committed an unfair labor practice by demanding to arbitrate its grievance.

IV. Prohibited Subjects of Bargaining

The MEA argues that its grievance did not concern prohibited subjects of bargaining under the PERA and that the MERC erred by applying law concerning MCL 423.215(3)(m) (concerning discharge) to a situation involving MCL 423.215(3)(k) (concerning recalls). The MEA also argues that Staple was constructively discharged. For several reasons, we conclude that the MEA's positions lack merit because regardless of whether Staple was discharged or was not recalled, the decision was a prohibited subject of bargaining under PERA and the MEA improperly pursued arbitration.

First, the MEA argues that Staple was not laid off, he was effectively discharged. Whether Staple was not recalled or was effectively discharged is immaterial because both decisions are prohibited subjects of bargaining.

The PERA provides that certain subjects are "prohibited subjects of bargaining" and are "within the sole authority of the public school employer to decide." MCL 423.215(4). In pertinent part, those subjects include:

© 2023 Thomson Reuters. No claim to original U. S. Government Works.

(k) Decisions about the development, content, standards, procedures, adoption, and implementation of the public school employer's policies regarding personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position, as provided under . . . MCL 380.1248, any decision made by the public school employer pursuant to those policies, or the impact of those decisions on an individual employee or the bargaining unit.

* * *

(m) For public employees whose employment is regulated by . . . MCL 38.71 to 38.191, decisions about the development, content, standards, procedures, adoption, and implementation of a policy regarding discharge or discipline of an employee, decisions concerning the discharge or discipline of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit. . . . [MCL 423.215(3).]

To the extent that an employer improperly discharges an employee, "it commits an unfair labor practice and [the] MERC has exclusive jurisdiction over unfair labor practices." Ranta v Eaton Rapids Pub Sch Bd of Ed, 271 Mich App 261, 268-269; 721 NW2d 806 (2006).

The MEA cannot avoid the operation of PERA by arguing that Staple was constructively discharged rather than not recalled. If Staple was laid off and not recalled, MCL 423.215(3)(k) applies; if Staple was discharged, MCL 423.215(3)(m) applies. Regardless of whether either section applies, Vassar's decision concerned a prohibited subject of bargaining under MCL 423.215(4). While the parties may discuss illegal subjects of bargaining, any contractual provisions pertaining to the enforcement of illegal [2] subjects of bargaining are unenforceable. Mich State AFL-CIO v Mich Employment Relations Comm, 212 Mich App 472, 486; 538 NW2d 433 (1995), aff'd 453 Mich 362 (1996). An arbitration panel cannot issue an award when the parties do not have a duty to bargain over a subject. Local 1277, Metro Council No 23, AFL-CIO v City of Center Line, 414 Mich 642, 654; 327 NW2d 822 (1982). While parties may discuss prohibited subjects of bargaining, demanding to bargain over a prohibited subject is an unfair labor practice. Calhoun Intermediate Sch Dist, 314 Mich App at 49-50. By attempting to seek arbitration under the parties' CBA grievance procedure, regardless of whether Staple was discharged or not recalled, the MEA demanded to bargain over a prohibited subject of bargaining. The MERC did not commit a substantial and material error of law when it determined that the MEA committed an unfair labor practice.

Second, the MEA argues that it may demand arbitration under the parties' CBA because the CBA incorporated statutes, the Michigan and United States Constitutions, and Board policies. The MEA argues that PERA does not "insulate [Vassar] from violating the Constitution, other state law, and its own policies." According to the MEA, it must be allowed to challenge Vassar under the parties' CBA when Vassar violates anything incorporated into the contract.

Regardless of what provisions parties incorporate into their contract, those provisions may not violate PERA. Again, any contractual provisions pertaining to the enforcement of illegal subjects of bargaining are unenforceable. Mich State AFL-CIO, 212 Mich App at 486. To the extent that the MEA argues that Vassar improperly interpreted the meaning of "effective" in its own policy, the MEA challenges Vassar's decision about the implementation of the employer's policy regarding conducting a recall. PERA precludes bargaining on this issue. MCL 423.215(3)(k). [3] And to the extent that the MEA argues that Vassar improperly failed to recall Staple, the MEA challenges Vassar's decision about how the implementation of a recall policy impacted an individual employee. Again, this is a prohibited subject of bargaining. MCL 423.215(3)(k). Any provision regarding an illegal subject of bargaining is unenforceable, Mich State AFL- CIO, 212 Mich App at 486, and the parties cannot demand to arbitrate such a provision, see Local 1277, 414 Mich at 654. The MEA cannot demand arbitration on these issues because they are illegal subjects of bargaining.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

To the extent the MEA argues that the MERC's decision violated Staple's due process rights because he was not provided with notice and a hearing before his effective discharge, this does not provide an independent basis for challenging Vassar's decision under the parties' CBA. PERA's procedures regarding adjudication of unfair labor practices are sufficient to satisfy constitutional due process requirements. Ranta, 271 Mich App at 268; Detroit Bd of Ed v Parks, 417 Mich 268, 283; 335 NW2d 641 (1983). By complying with PERA, Vassar provided Staple with sufficient due process.

Third, the MEA briefly argues that Staple's effective discharge was arbitrary and capricious. An argument that a layoff was arbitrary and capricious is essentially a claim that a teacher's layoff was a subterfuge for discharge. Summer v Southfield Bd of Ed, 310 Mich App 660, 664; 874 NW2d 150 (2015). Such claims were formerly decided by the MERC as unfair labor practices or, under limited circumstances, were decided by the State Tenure Commission (STC). Id. at 668-669. However, since the enactment of the Revised School Code, MCL 380.1 et seq., "the courts, not the STC or any other administrative agency, have jurisdiction over layoff-related challenges." Id. at 670. Accordingly, a challenge through the parties' CBA grievance procedure by an attempt to seek arbitration is not the proper place for a teacher to raise a challenge that a layoff of effective discharge was arbitrary and capricious—the proper place to do this is in the circuit court.

We conclude that the MERC did not commit a substantial and material error of law by concluding that the MEA committed an unfair labor practice when demanding to arbitrate these issues. Accordingly, the MERC did not err when it granted summary disposition on the MEA's claim.

V. Waiver

The MEA argues that the MERC erred by concluding that Vassar could not waive its right to avoid arbitration over a prohibited subject of bargaining and that its decision that Vassar could not do so undermined the parties' freedom to contract. The MEA's position misstates the MERC's holding. The MERC held as follows:

A waiver of the Employer's statutory rights must be clear and unmistakable. . . . The language of § 9.4 of the collective bargaining agreement says nothing about waiver of the Employer's right to decline to participate in arbitration over a prohibited subject of bargaining.

The MERC went on to state that, even had the contract contained such language, it would have been an agreement concerning a prohibited subject of bargaining and thus unenforceable. We agree with the MERC that the parties' CBA did not waive Vassar's statutory rights.

Vassar has the statutory right to make decisions regarding the hiring, firing, and layoff of teachers in its sole discretion. See MCL 423.215(3). Under the CBA, Vassar reserved its right to "[d]irect the working forces, including the right to hire, promote, suspend and discharge employees, . . . and to lay off employees." "[W]aivers of statutory rights must be clear and unambiguous." *Saginaw Ed Ass ' n*, 319 Mich App at 449. The MEA's assertions rest on the premise that Vassar impliedly waived its statutory rights by incorporating various laws into the parties' CBA. An implied waiver is by its very nature neither clear nor unambiguous. See Roberts v Mecosta Co Gen Hosp, 466 Mich 57, 68-69; 642 NW2d 663 (2002) (stating that implications are not sufficient to constitute an intentional and voluntary relinquishment of a known right). Because Vassar did not clearly and unambiguously waive its statutory rights, and instead explicitly reserved those rights, the MERC did not err by concluding that Vassar did not waive its right to decline to participate in arbitration over a prohibited subject of bargaining.

Because there is no indication that Vassar actually attempted to waive its statutory rights under PERA regarding prohibited subjects of bargaining, it is unnecessary to address the MEA's separate argument that Vassar was legally entitled to do so. This Court will not rule on hypothetical questions. AFSCME Council 25 v State Employees ' Retirement Sys, 294 Mich App 1, 7; 818 NW2d 337 (2011).

Affirmed.

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

Cases Cited
30 MPER 62

Footnotes

1 An exception exists when there is a challenge to the layoff itself, in which a teacher's exclusive remedy lies with the courts instead of with MERC. Baumgartner v Perry Pub Sch, 309 Mich App 507, 528; 872 NW2d 837 (2015).

2 "Illegal subjects are synonymous with prohibited subjects." Calhoun Intermediate Sch Dist, 314 Mich App at 48 n 4.

3 Breaking MCL 423.215(3)(k) down into its component parts, it prohibits bargaining on three distinct things: (1) "[d]ecisions about the development, content, standards, procedures, adoption, and implementation of the public school employer's policies regarding personnel decisions when conducting . . . a recall . . ."; (2) "any decision made by the public school employer pursuant to those policies"; or (3) "the impact of those decisions on an individual employee . . . ."

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

2 MPER ¶ 20081, 2 Michigan Pub. Employee Rep. ¶ 20081, 1989 WL 1700096

Michigan Employment Relations Commission

MONA SHORES BOARD OF EDUCATION
No. C88 H-209
No. CU88 J-68
1989 MERC Lab Op 414
TANZMAN, CHAIRMAN; PATTON & ROUMELL, MEMBERS
May 10, 1989

Related Index Numbers
15.124 Educational Employees, Professionals, Psychologists
15.128 Educational Employees, Professionals, Substitute Teachers
42.11 Mandatory Subjects, Case Law
43.122 Compensation, Wages and Salaries, Supplemental Pay
43.131 Compensation, Benefits, Health Insurance
43.46 Job Content and Scheduling, Workload
43.612 Special Subjects, Education, Class Size
43.622 Special Subjects, Education, School Calendar
71.211 Investigation and Complaint, Investigation, Burden of Proof
72.51 Refusal to Bargain in Good Faith, Continuous Duty to Negotiate
72.533 Refusal to Bargain in Good Faith, Indicia of Good/Bad Faith and Surface Bargaining, Imposing Conditions
72.535 Refusal to Bargain in Good Faith, Indicia of Good/Bad Faith and Surface Bargaining, Reasonableness/Legality/Sufficiency of Proposals
72.536 Refusal to Bargain in Good Faith, Indicia of Good/Bad Faith and Surface Bargaining, Right to Reject Proposals
72.538 Refusal to Bargain in Good Faith, Indicia of Good/Bad Faith and Surface Bargaining, Totality of Conduct
72.55 Refusal to Bargain in Good Faith, Direct Communication With Employees
72.5892 Refusal to Bargain in Good Faith, Defenses to Refusal to Bargain Charge, Nonmandatory Subject, Contractual
72.591 Refusal to Bargain in Good Faith, Defenses to Refusal to Bargain Charge, Other
72.64 Unilateral Change in Term or Condition of Employment, Changes After Expiration of Contract
72.667 Unilateral Change in Term or Condition of Employment, Defenses to Unilateral Change, Other
73.435 Refusal to Bargain in Good Faith, Indicia of Good/Bad Faith and Surface Bargaining, Inconsistency of Position
73.440 Refusal to Bargain in Good Faith, Indicia of Good/Bad Faith and Surface Bargaining, Totality of Conduct
73.58 Other Unfair Practices, Unlawful Strike/Picketing Activity

APPEARANCES:
For the Public Employer: Miller, Johnson, Snell & Cummiskey, by Mark C. Eriks, Esq. and Craig A. Mutch, Esq.
For the Labor Organization: White, Beekman, Przybylowicz, Schneider & Baird, P.C., by Arthur R. Przybylowicz, Esq.

Judge/Administrative Officer
TANZMAN, CHAIRMAN; PATTON & ROUMELL, MEMBERS

Case Summary

School district lawfully refused to bargain relative to pay for on-call substitute teachers. Although union had right bargain about what full-time teachers get when they act as substitutes, reference to substitute's pay does not make substitute's pay mandatory subject of bargaining where such pay does not "vitally affect" pay that full-time teachers receive when acting as substitutes. Administrative law judge's decision was adopted where no exceptions were filed.

WESTLAW © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Full Text

DECISION AND ORDER

On April 13, 1989 Administrative Law Judge Joseph B. Bixler issued his Decision and Recommended Order in the above entitled matter, finding that the Respondents Mona Shores Board of Education and Mona Shores Teachers Education Association did engage in and were engaging in certain unfair labor practices, and recommending that they cease and desist therefrom and take certain affirmative action as set forth in the Decision and Recommended Order of the Administrative Law Judge attached hereto.

The Decision and Recommended Order of the Administrative Law Judge was issued and served upon the interested parties in accordance with Section 16 of Act 336 of the Public Acts of 1947, as amended.

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

ORDER

Pursuant to Section 16 of the Act, the Commission hereby adopts as its Orders the Orders recommended by the Administrative Law Judge.

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Sections 10 and 16 of the Public Employment Relations Act (PERA), 1947 PA 336, as amended by 1965 PA 379 and 1973 PA 25, MCLA 423.210, MSA 17.455(10), this matter came on for hearing at Lansing, Michigan on November 23, 1988, before Joseph B. Bixler, an Administrative Law Judge for the Michigan Employment Relations Commission. The proceedings were based upon unfair labor practice charges filed by the Mona Shores Board of Education and the Mona Shores Teachers Education Association, MEA/NEA wherein each alleged the other had violated Section 10 of PERA. Because the two cases involve the collective bargaining between the parties, they were consolidated for hearing. Based upon the record made at the hearing and the briefs filed by the parties on March 9, 1989, the undersigned makes the following findings of fact, conclusions of law, and issues the following recommended order pursuant to Section 16(b) of PERA:

The Unfair Labor Practice Charges:

In the unfair labor practice charge, as amended, and absent deletions made at the hearing, the Education Association, hereinafter sometimes referred to as the Union, makes the following allegations to support its unfair labor practice change and claim of a violation of Section 10(1)(a)(b) and (e) of PERA:

3. Respondent, Board of Education of Mona Shores Schools, has violated Section 10 of the Michigan Public Employment Relations Act (the Act) in that:

A. Charging Party, Mona Shores Teachers' Education Association, MEA/NEA, is the sole and exclusive bargaining representative for the professional personnel employed by Respondent.

B. Charging Party and Respondent are parties to a collective bargaining agreement which expired at midnight, August 29, 1988.

C. Respondent has placed preconditions on bargaining, having unilaterally determined before coming to the bargaining table what the final outcome of certain contracted provisions must be.

© 2023 Thomson Reuters. No claim to original U.S. Government Work.

1. Respondent demanded that if a multi-year agreement were reached that it must contain caps on insurance , a lesser insurance program, and other cost containment measures.

2. Respondent demanded that if a contract were for a single year, that members must accept a lesser insurance program and cost containment measures. For a one year agreement, the Respondent also predetermined and demanded that the same program that had been in the previous contract could not continue, even if there had been no additional cost to the district.

3. Respondent's actions have indicated that insurance was more than a cost concern in that Charging Party at one time suggested maintenance of the present insurance package with a balancing decrease in Respondent's salary offer, but Respondent flatly refused to consider such alternatives.

4. Respondent preconditioned a settlement on all other issues on the table until such time as Charging Party agreed to Respondent's insurance proposal by announcing that "There will be no significant change in the contract unless there is a cap on the insurance costs."

5. Charging Party further received a letter from the Respondent in May of 1985, shortly after the previous contract was settled, which read in view of all of the Respondent's actions of 1988, indicates that Respondent predetermined its 1988 bargaining position on insurance as long as three years ago. (Copy supplied with Bill of Particulars earlier filed.)

. . .

E. Respondent refuses to bargain over the issue of substitute teacher pay despite the fact that the pay to substitute teachers has a substantial impact on the terms and condition of employment for bargaining unit members.

F. Respondent refuses to bargain over working conditions for bargaining unit members, including but not limited to, school psychologists and social workers in that Respondent refuses to make proposals and/or respond to proposals made by Charging Party.

G. Respondent has verbally agreed to several working conditions, including but not limited to, notifying elementary teachers of IEPC meetings in advance, and the utilization of record days, but refuses to put such working conditions in writing despite a clear statutory duty to do so.

H. Respondent has engaged in bargaining directly with certain members of the bargaining unit by issuing and/or attempting to issue individual employment contracts which are not in accordance with the terms and conditions of employment set forth in the collective bargaining agreement.

The actual names of the individuals are too numerous to list and each and every individual is unknown to Charging Party, although said names are already known to the Respondent. The persons can, however, be described by classification.

. . .

I. On or about August 9, 1988, and prior to an impasse on the working calendar, Respondent set the first day of school for the 1988-89 school year, and ordered bargaining unit members to report on August 29, 1988.

J. Respondent has unilaterally repudiated the current collective bargaining agreement of the parties by ordering bargaining unit members to report to work on August 29, 1985, a day upon which the current collective bargaining agreement calls for bargaining unit members to be on summer break.

. . .

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

L. Respondent has rejected several counterproposals made by Charging Party even though said counterproposals met all objections made by Respondent to Charging Parties previous proposals on said terms and conditions of employment.

. . .

2. On 8/22/88, Charging Party made a counterproposal to Article 602.1 relative to class size which met all previous objections by Respondent. Despite the fact that said counterproposal met all previous objections, Respondent refused to agree to the contractual provision, but instead responded that "We can't argue against this, we just aren't going to put it in the contract."

3. The Association made an initial proposal on Article 602.4 relative to notification of certain meetings. Respondent objected to secondary teacher's and specialist's notifications being required. Charging Party then altered its position to meet the concerns of Respondent in a counterproposal of 8/25/88. Respondent verbally said the district could comply with this counterproposal, but again refused to put said provision in the contract.

. . .

N. Respondent has refused to bargain over protecting all of the bargaining unit member's income by long term disability insurance, but insists on protecting only the basic salary of employees.

O. Respondent has refused to bargain in good faith in that it has taken a take it or leave it approach to bargaining.

P. Prior to making a calendar proposal to Charging Party, prior to any bargaining on calendar whatever, prior to reaching impasse on the subject, and prior to any need whatever to accept a calendar, Respondent did willfully and intentionally publish and distribute a calendar to parents for the entire first semester of the school year. (Attached as Exhibit A) [omitted].

Q. On or about October 17, 1985, Respondent did order the insurance benefits for members of Charging Party cancelled. Said action was taken without advance notice, without an opportunity for Charging Party to bargain over said cancellation, and further constitutes a reputation (sic) of Respondent's duty to continue the benefits of the previous collective bargaining agreement under which said members had earned said benefits far beyond the date of cancellation. (See Exhibit B, attached) [omitted].

R. Respondent has directly communicated with members of Charging Party in an attempt to circumvent Charging Party's bargaining team, and avoid negotiating with the elected representatives of said members. Said communication have been incomplete and untruthful, thereby misleading members of Charging Party and undermining Charging Party's bargaining team. (Exhibit C, attached) [omitted].

S. Respondent has published information to parents and members of the community that are inaccurate, misleading, and false in an effort to bargain in the public and discredit Charging Party. (Exhibits D, E, & F, attached) [omitted].

. . .

U. While Respondent continued to refuse to negotiate the rate of substitute teachers with Charging Party, or about October 24, 1988, it advertised and solicited potential substitute teachers for a rate more than 250 percent of its customary rate for substitutes, without having first offered said rate to Charging Party and without bargaining in good faith over said rate to the point of impasse.

V. Respondent and its representatives have, through their total course of conduct, including but not limited to those actions set forth in paragraphs C through U above, evidenced a lack of honesty of purpose and that requisite integrity which is an inherent necessity if collective bargaining is to be conducted in good faith. Moreover, Respondent's conduct further evidences

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

that it is merely engaging in "surface bargaining," lacking an open-minded attitude and a sincere desire to arrive at a mutually acceptable agreement, both of which are a fundamental and necessary ingredient if good faith negotiations are to transpire as dictated by the Act.

In the unfair labor practice charge filed by the School District on October 27, 1988, and amended on November 4, 1988, the School District alleges that the Education Association has violated Section 10(3)(a) and (c) of PERA by the following activity:

A. The Board of Education and the Association were parties to a collective bargaining agreement which expired at midnight, August 29, 1988.

B. On Monday, October 17, 1985, the Association, its members, and agents and those acting in concert with them, began a strike to enforce demands made during the course of collective bargaining.

C. The Association has placed preconditions on bargaining, having unilaterally determined before coming to the bargaining table that it would not enter a collective bargaining agreement which does not contain MESSA Super Med II health insurance with no caps placed on the insurance rates.

D. The Association failed to send negotiators and/or representatives to the bargaining table who had authority to enter into agreements or tentative agreements. Specifically, the Association sent letters to potential substitute teachers dated October 11, 1988 stating that "teachers in Mona Shores will withhold services beginning October 17, 1988" despite the fact that the parties had previously scheduled a bargaining session for the evening of October 12, 1988. (A copy of the letter is attached as Exhibit A.) [omitted].

E. The Association has insisted to impasse its proposal on daily substitute teacher pay despite the fact that the pay to daily substitute teachers is a nonmandatory subject of bargaining.

F. The Association has directly communicated with members of the Board of Education in an attempt to circumvent the Board of Education's bargaining team. Said communications have been incomplete and untruthful and have contained proposals which had not previously been made to the Board of Education's bargaining team during the course of the negotiation process, thereby misleading members of the Board of Education and undermining the Board of Education's bargaining team. (Exhibit B attached) [omitted].

G. The Association has published information to parents and members of the community regarding the bargaining process which is inaccurate, misleading, and false in an effort to bargain in public and undermine the Board of Education's bargaining team.

H. The Association has refused to bargain in good faith in that it has taken a take it or leave it approach to bargaining.

The Facts:

As is admitted in the pleadings, the Association is the collective bargaining agent of the teachers employed by the School District. The parties began negotiating on a successor to the contract that expired on August 29, 1988. The parties met some 23 times beginning on May 25, 1988. On October 30, 1988 an agreement was reached. The Association membership ratified the agreement and the School Board approved the agreement. It is what occurred while negotiating to reach this contract that is alleged to be an unfair labor practice within the meaning of Section 10(1) or 10(3) of PERA.

The allegations of the Association are considered in the order in which they are set forth in the post-hearing brief filed by the Union. Only those allegations briefed are considered.

Refusal to Bargain a Wage Rate for On-Call Substitutes:

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

It is admitted by the School District that it refuses to bargain relative to the pay to be paid to on-call substitute teachers. Substitute teachers as on-call employees had been excluded from the collective bargaining unit described in the expired contract. This contract provided that bargaining unit teachers, when acting as on-call substitutes, receive a percentage of the pay that the School Board paid to substitute teachers. Presumably a teacher when filling in as a substitute would continue to receive his/her annual salary in addition to the percentage of the substitute pay. Both parties cite *Grand Rapids Public Schools,* 1986 MERC Lab Op 560, 567, as supporting their position that a school district is obligated to bargain over the pay and conditions of employment of substitutes. The Commission's decision in the *Grand Rapids* case was affirmed by the Court of Appeals in a non-published opinion on April 26, 1988. In the *Grand Rapids* case the Commission stated relative to the bargaining in regard to non-unit employees, relying upon various cases of the federal courts, as follows:

Matters involving individuals outside the employment relationship, although not normally a subject of bargaining, are not wholly excluded from bargaining between the union and employer under federal law. Teamsters Union v. Oliver, 358 US 382, 43 LRRM 2374 (1979); Fibreboard Corp. v. Labor Board, 379 US 203, 57 LRRM 2609 (1964); Chemical Workers v. Pittsburgh Plate Glass Co., 404 US 157 (1971). In the latter case, the Supreme court held that even though retirees are not employees within the meaning of the National Labor Relations Act, an employer, nevertheless, might have a duty under this Act to bargain over benefits paid to retirees if it could be shown that this issue vitally affected the interests of the employees in the unit. The Court concluded, however, that benefits paid to current retirees did not vitally affect the unit, and that therefore the employer had no obligation to bargain over these benefits.

The Union in the instant case argues that because the full-time teachers in its bargaining unit have been paid, under the expired contract, a percentage of whatever substitutes received, this makes the pay of the substitutes a mandatory subject of bargaining. While this may "vitally affect" what the full-time teachers get, it does not "vitally affect" the full-time teachers. The Union has the right to bargain about what full-time teachers get when they act as substitutes. If the Union is not satisfied with the percentage of the substitute's pay, which apparently was satisfactory in the past, it should either seek a different percentage or a different rate for the full-time teachers in a dollar amount. The reference to the substitute's pay does not make the substitute's pay a mandatory subject of bargaining. It does not "vitally affect" the pay that the full-time teachers receive when acting as substitutes.

This portion of the unfair labor practice charge should be dismissed, and that is recommended below. At the time that this matter came up both parties had proposals on the table relative to the pay for teachers while substituting that were unrelated to the pay of the substitutes.

Bargaining as to School Psychologists and Social Workers:

Social workers and school psychologists are part of the Union's bargaining unit. In the original proposals made by the Union on or about May 25, 1988, the Association had a proposal to establish a workload for school psychologists and social workers. When this proposal was brought up during the bargaining, the chief negotiator stated that they would talk about it, but he said they would not agree to this limitation. The Union negotiator states that the Employer said no and that they were not going to agree to any workload statement in the contract. The record does disclose that the matter was discussed further.

The issue is not whether the caseload of psychologists and social workers is bargainable; this was decided in Central Michigan Univ. Faculty Ass'n v. Central Michigan Univ., 404 Mich 268, 280 (1978). The undersigned is of the opinion, however, that the Respondent-Employer in this case has met its bargaining obligation by listening to a presentation of the Charging Party during collective bargaining. Section 15 of PERA specifically provides that any party to collective bargaining is not required to agree to any contractual provision. The Commission has recognized that a public employer or a labor organization representing public employees may fulfill its bargaining obligation by discussing and listening to proposals relative to a mandatory subject of bargaining. In *Woodhaven School Dist.,* 1987 MERC Lab Op 290, 297, the Commission determined the obligation is to "listen to Charging Party's proposals, to discuss them, and to consider them in good faith." It is recommended the Commission issue the order set forth below dismissing this allegation of the charge.

WESTLAW © 2023 Thomson Reuters. No claim to original U.S. Government Works.

The Establishment of the First Day of School:

As noted above, the last collective bargaining agreement expired on August 29, 1988. During negotiations the parties had both made proposals relative to the first day of school as included in a school calendar. The School District had uniformly held to an opening day of August 29.

On August 3, 1988, the School District's bargaining team spokesperson informed the Union's negotiators that parents had been calling about the opening day of school and stated that while the School District would like to bargain about it and reach an agreement on it, if an agreement could not be reached, he was going to recommend at the August 9 School Board meeting that the Board adopt an August 29 opening day. This adoption was not to include any of the other terms of the calendar. The Union's negotiators were informed that because the next bargaining session was not set until either the 12th or 15th of August, that it was necessary to get an opening day. The parties did not reach agreement at the bargaining session on August 3rd and on August 9th the School Board adopted an opening day. The Charging Party's negotiators were notified of this on August 15.

The Union points to the many cases of the Commission that have determined that school calendars are a mandatory subject of bargaining. *Fowlerville Bd. of Ed.,* 1977 MERC Lab Op 392; *Reese Public School Dist.,* 1967 MERC Lab Op 489. The Employer points to *Saginaw Public Schools,* 1981 MERC Lab Op 996, 1003, in which the Commission stated as follows relative to school calendars:

We hold that, regardless of whether the parties can be said to have agreed on an opening date for the next school term in May, 1979, Respondent was justified in implementing its proposed opening date and announcing it to the employees on August 17. The Commission has previously considered the particular problems arising from the Employer's duty to bargain in good faith over the school calendar. In *Centerline Public Schools,* 1975 MERC Lab Op 729; *Fowlerville Bd. of Ed.,* 1977 MERC Lab Op 392; and *Port Huron Area Schools,* 1979 MERC Lab Op 888, we have developed a rule for the determination of impasse in this situation which allows an employer to set a specific date for the opening of school, absent specific agreement by the Union, where sufficient bargaining over the calendar has taken place and where the date for the normal beginning of the school term is approaching. This rule recognizes that the Union should not, by withholding its agreement on an opening date, be able to delay the bargaining of the school term until other outstanding issues are settled between the parties....

In the case at hand, the parties had bargained enough over the calendar and its opening date. The announced adoption was only as to the opening day. The record makes it clear that the School District was ready to bargain over the other terms contained in a school calendar. Based on the foregoing, it is recommended that the Charging Party be found by the Commission not to have sustained its burden of proof that the School District refused to bargain about the school calendar, and I recommend that this allegation of the charge be dismissed in the order set forth below.

The Cancellation of the Insurance:

School began, as noted above, on August 29, 1988. The parties were still bargaining. On October 17, 1988, the members of the Union engaged in a strike. On October 17, after the strike began, the Respondent-School District notified the employees and Union it was cancelling the insurance benefits of the striking employees. The Union alleges this occurred without bargaining or giving prior notice to it. The record supports the contention that the Union was not given prior notice of the cancellation. The Employer relies upon various National Labor Relations Board (NLRB) cases to support its position that it had no obligation to pay for insurance or anything else while the Union's members were not working. The Employer begins with the General Electric Co, 80 NLRB 510, in which the NLRB stated "It is axiomatic that [an employer] is not required under the (National Labor Relations) Act to finance an economic strike against it by remunerating the strikers for work not performed." This doctrine was affirmed in Ace Tank and Heater Co., 167 NLRB 663. In another case, *Trading Post, Inc.,* 219 NRLB 298, the NLRB stated that an employer was justified in not paying its share of hospitalization insurance premiums when they were striking and actually ceasing the making of payments. The NLRB stated as follows:

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

We do not find Respondent's September 20, 1973 letters to its employees, advising them it would not pay its share of hospitalization insurance benefits due on September 29, to have been unlawful. Strikers, whether economic or unfair labor practice strikers, are not entitled to compensation for the period they were on strike hence, Respondent was within its rights in ceasing to pay its share of the premiums. Illinois Bell Telephone Co., 179 NLRB 681 (1969), enf'd, 446 F2d 815 (7th Cir., 1971). We note that, while not itself paying its share of the premiums, Respondent nevertheless made it possible for the strikers to pay their shares directly. Though we find, infra, that Respondent was by this time under an obligation to bargain with the Union, the non-payment of benefits to strikers during their period of striking is not a matter about which a company has an obligation to bargain; hence, we find no violation of Sec: 8(a)(5) in this respect.

The Commission reached the same result in *Monroe Mercy Hospital,* 1973 MERC Lab Op 336. In that case, the Commission found that terminating rights of strikers (engaged in a legal strike) that had not accrued before the strike, was not violative of Section 16(1) of the Labor Mediation Act. Section 16(1) of the LMA is the same as Section 10(1)(c) of PERA.

The Union does not cite any precedent of the Commission that would be contrary to the holding of the NLRB relative to an Employer's obligation to pay for anything for non-working employees and especially employees who are engaged in a strike prohibited by PERA. I see no reason to reach a conclusion other than that reached by the NLRB. It is recommended that the Commission find that this aspect of the unfair labor practice charge is without merit and issue the order set forth below.

Failure of the Employer to Bargain Relative to Bargaining Unit Members at IEPC Meetings, Record Days and Class Size:

In regard to the IEPC meetings, the Union's representatives made proposals that the School District give the membership notice of upcoming meetings. When this was first submitted, the representatives of the School District responded that there would be difficulties and that only elementary teachers would be interested, not the elementary specialist in art, music, etc. The Charging Party then changed the proposal to modify the notice requirement to the elementary teachers and not the specialists. The School District spokesman, according to the Union negotiator, stated the School District "refused to agree to it," or "they weren't going to agree to it" and make the notice a part of the contract. The proposal was subsequently withdrawn prior to the entry into a new contract.

The allegation in the unfair labor practice relative to the IEPC conferences is that the Employer had agreed to it but refused to put it in writing. This record contradicts this claim. The record discloses that it was discussed, there was some movement, but there was no agreement that any notice to employees be put into writing. In fact, the proposal was actually withdrawn. Here again the undersigned finds the Union has not sustained its burden of proof, and recommends that the Commission issue the order set forth below dismissing this aspect of the charge.

Record Days:

The Association submitted a proposal giving the high school teachers three half days when the students were out of school to correct exams, and also an equivalent of one full day for the updating of records and completing other professional duties. In the past, the School District had provided three half days for examinations at the high school. The School Board refused to agree to giving the three half days and a full day for updating the records. The fact that it was not agreed upon is again substantiated by the testimony of the Union representative. The proposal on these days was subsequently withdrawn prior to the entry into the new contract.

Again, the undersigned finds that this aspect of the charge, which was that the record days were agreed upon and that the Employer refused to put it into writing, is not substantiated by the record. The Court of Appeals has stated that Commission determinations on unfair labor practice charges must be substantiated by evidence in the record. Univ. of Michigan v. MERC, 95 Mich App 482 (1980). In that case the Court of Appeals stated at page 491:

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

The most significant of the Commission's unsupported findings, however, is that the University had permitted meetings in the staff lounge on numerous previous occasions. The evidence was uncontroverted that University officials had no knowledge of any prior Union meetings conducted in the staff lounge, and would have cancelled any such meeting if they had so known.

In the case at hand, this record does not establish that there had been an agreement on record days and, therefore, the Employer could not have been obligated to put it into writing.

Class Size:

In regard to class size, the record discloses that the Association had submitted a proposal that required equalization of class size among teachers assigned to teach a particular subject. On September 14, 1988, the School District submitted a proposal relative to class size. The bargainer for the Union maintains that adjustments were made in the class size matter, but the School District still would not agree. The School District negotiator stated that the Union at times changed its proposals relative to class size stating, "some of which they would give as proposals that, in their mind, apparently, remedies those; in our mind, they did not." Thus, it appears that there was no agreement relative to class size. This proposal again was withdrawn prior to the entry into the new contract.

Based on the foregoing, the undersigned finds that this aspect of the unfair labor practice charge does not establish a violation of the bargaining obligation imposed by PERA, and recommends the Commission issue the order set forth below dismissing this part of the charge.

Misleading and Inaccurate Information to the Association's Members and the Community:

On October 10, 1988, the School District sent out a document to the members of the Union. This document was a summary of various offers that, it was alleged, had been made to the Union. The Employer admits these summaries are not totally accurate, but states any inaccuracy should be excused because it was made under the pressure of a threatened strike and asked only employee consideration of the proposals.

While the undersigned does not condone illegal strikes or the threat thereof nor does the Commission, it appears that if a public employer is going to communicate with represented employees relative to bargaining, the burden is on the employer to be accurate. Anything else, as in the case at hand, leads to the festering rancor of litigation. While the Commission has passed many a time on election propaganda and disavowed any intent to police such propaganda, what is involved in the instant case is quite different. Represented employees are being communicated with by a public employer for the purpose of convincing them they should take a different view than their established bargaining representative. I believe this course of action demands accuracy. A finding of a violation based upon somewhat inaccurate presentation to Union members, is merely a restatement of what an Administrative Law Judge found in *St.Clair Co. Comm. Coll.,* 1979 MERC Lab Op 541. In that case it was stated that what is presented to the membership must be what was actually presented to the bargaining agent.

Based on the foregoing, the undersigned finds that the Mona Shores School District, by publication of an inaccurate letter on October 10, 1988, violated its bargaining obligation imposed by Section 10(1)(e) of PERA. It is recommended the Commission issue the order set forth below to remedy this violation.

Preconditioning Bargaining: [1]

The thrust of this charge is that the School District had determined that there would be a reduction in health insurance premiums as a price of a contract. The record does not support this position, It does reveal that the Employer determined early in bargaining that health insurance costs must be reduced and capped, as is evidenced by the Employer's first proposal of June, 1988. Subsequent to this, on October 3rd the Employer submitted other proposals, giving various alternatives for health care insurance. These positions do not amount to a refusal to bargain as required by PERA. The Employer did move, did bargain. Although

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

the alternatives presented by the Employer were not acceptable to the Union, Section 15 does not require anyone to agree. The parties were on a collision course from the beginning of bargaining as evidenced by the Employer's unfair labor practice charge accusing the Union of taking an adamant position on health care.

Based on the foregoing, the undersigned concludes that the parties to this matter did engage in collective bargaining, and that the Employer did not violate its obligation to bargain imposed by Section 10(1)(e) of PERA by insisting upon a reduction in health insurance costs and a refusal to sign a contract without such a reduction. The parties did reach an agreement on health insurance as is evidenced by the fact that they reached a subsequent collective bargaining agreement. It is recommended the Commission dismiss this aspect of the unfair labor practice charge in the order set forth below.

The Unfair Labor Practice Charge Against the Union:

This unfair labor practice charge in many ways parallels that of the Union against the School District. Again, I will consider the allegations in order:

Preconditioning Bargaining:

This allegation of the violation of Section 10(3)(c) of PERA is couched in terms of the Union insisting as a precondition to bargaining on a maintenance of the present health care insurance. This is essentially the same allegation that was made against the School District. The Union takes the attitude that it was willing to change some of its insurance demands and that this, therefore, indicated the bad faith on the part of the School District. It is quite different, however, to change demands when one is on the receiving end, rather than on the end of bargaining that requires the economic payment. One may accede much more easily on the receiving end than the paying end. As noted in the discussion in the unfair labor practice charge against the School District, the undersigned is of the opinion that the parties merely engaged in hard bargaining on the subject of health insurance, and that the record does not establish that the Union has violated Section 10(3)(c) bargaining requirements. It is recommended the Commission dispose of this violation in the order set forth below.

The Allegation that the Union Did Not Bargain in Good Faith:

The violation argument of the School District is based upon the fact that the Union struck for eight days beginning October 17, 1988. The Employer argues that this strike, under the circumstances revealed by this record, was a breach of the bargaining obligation imposed by PERA. The School District relies upon *Warren Ed. Ass'n,* 1977 MERC Lab Op 818, in which the Commission said it would look in strike situations to the "totality of circumstances" surrounding the bargaining as to whether a strike was evidence of bad faith bargaining. The School District also looks to later decisions of an Administrative Law Judge rendered in *Lake Orion Ed. Ass'n,* 1984 MERC Lab Op 770. In this case an ALJ decided, without exception, that the union committed an unfair labor practice by engaging in a work stoppage without exhausting mediation and fact finding. The determination in the *Lake Orion* case was based upon the Commission's decision in *Lamphere School Dist.,* 1978 MERC Lab Op 194. In the *Lamphere* case the Commission decided striking without first exhausting the impasse resolution procedures provided for in PERA, namely mediation and fact finding, was evidence justifying a finding of union failure to bargain in good faith.

The Commission has uniformly required the use of mediation and fact finding by public employers prior to implementation of their last offer upon impasse. This is much the same as its finding that a refusal of a labor organization to go to fact finding, when all the circumstances were considered, amounts to a refusal to bargain. In *Warren Ed. Ass'n,* 1977 MERC Lab Op 818, the Commission found, when considering the totality of the Union's conduct, that the Union had refused to bargain stating as follows:

. . . Specifically, we find that Respondent's rejection of proffered recourse to fact finding, the strike and strike related activity are evidentiary in determining whether the duty to bargain has been breached.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

In light of the circumstances as a whole, including Respondent's conduct away from the table and its circumvention of impasse resolving procedures contemplated by the legislature, we further find that Respondent's action amounted to a refusal to bargain in good faith.

In regard to employers, the Commission, as noted above, has demanded that an employer, prior to implementation of its last best offer during bargaining, must proceed to both mediation and fact finding. *City of Ishpeming,* 1984 MERC Lab Op 871. The Commission was very specific on this point in *Cass County Rd. Comm'n,* 1984 MERC Lab Op 306, 317, in which it stated fact finding must be exhausted prior to the implementation of a last best offer. Other cases holding the same view are *County of Wayne,* 1985 MERC Lab Op 244 and 1984 MERC Lab Op 1142, *aff'd* 152 Mich App 87 (1986), and *City of Warren,* 1985 MERC Lab Op 1062. Evenhanded law administration in the case at hand requires that the same conclusion be reached. On October 10, 1988, the Union had written a letter indicating its intent to strike on October 17, 1988. This was done despite the fact that there were bargaining sessions scheduled for October 17, 1988.

Based on the foregoing, the under signed recommends that the Commission find that the Union, Mona Shores Teachers Education Association, MEA/NEA, has violated its bargaining obligation imposed by Section 10(3)(c) of PERA by engaging in a strike or work stoppage for the purposes of affecting collective bargaining. It is recommended that this violation be remedied by issuing the order set forth below in Case No. CU88 J-68.

RECOMMENDED ORDERS

It is recommended in Case No. C88 H-209 that the Commission issue the following order to remedy the violation relative to communicating directly with represented employees.

ORDER

Upon the entire record in this case and pursuant to Section 16 of PERA, the Commission orders the Mona Shores Board of Education to cease and desist from:

a) Failing to bargain collectively in good faith with the Mona Shores Teachers Education Association, MEA/NEA as the exclusive representative of its professional employees, with respect to rates of pay, wages and hours of employment, and other terms and conditions of employment by presenting to employees information that incorrectly characterized what had been presented to the bargaining agent at the bargaining table.

All allegations of the unfair labor practice charges not found specifically to be a violation of PERA herein are dismissed.

ORDER

Upon the entire record in this case and pursuant to Section 16 of PERA, the Commission orders that the Mona Shores Teachers Education Association, MEA/NEA, cease and desist from:

a) Failing to bargain collectively in good faith with the Mona Shores Board of Education in respect to wages, hours of employment and other terms and conditions of employment by engaging in a work stoppage without having first exhausted the dispute resolution provisions set forth in PERA, specifically mediation and fact finding.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes

1 This is the same as the Employer's claim of a fixed position on health insurance. It is clear the parties began on a collision course on health insurance. It is clear, however, that both bargained the subject.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

3 MPER ¶ 21057, 3 Michigan Pub. Employee Rep. ¶ 21057, 1990 WL 10609951

Michigan Employment Relations Commission

WOODHAVEN SCHOOL DISTRICT
No. C88 K-318
1990 MERC Lab Op 221
March 9, 1990

Related Index Numbers
43.211 Hiring and Dismissal, Recruitment, Hiring Practices
72.591 Refusal to Bargain in Good Faith, Defenses to Refusal to Bargain Charge, Other
72.611 Unilateral Change in Term or Condition of Employment, What Constitutes Change
72.667 Unilateral Change in Term or Condition of Employment, Defenses to Unilateral Change, Other

APPEARANCES:
For the Public Employer: Clark, Hardy, Lewis, Pollard and Page, P.C. by William G. Albertson, Esq.
For the Charging Party: Hoekenga, Amberg, McNenly, Zuschlag, Firestone and Lee, P.C., by Dirk F. Zuschlag,Esq.

Case Summary

School district had no duty to bargain over its decision requiring job applicants to obtain physical examinations as precondition of employment where job applicants were not "employees" within meaning of PERA and preemployment physicals did not "vitally affect" active unit members.

Full Text

Decision and Order

On September 13, 1989, Administrative Law Judge Joseph B. Bixler issued his Decision and Recommended Order in the above case, recommending dismissal of charges filed against Respondent Woodhaven School District under Section 10(1)(e) of the Public Employment Relations Act (PERA or the Act), 1947 PA 336, as amended by 1965 PA 379 and 1973 PA 25, MCL 423.210, MSA 17.455(10).

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of PERA. On October 5, 1989, Charging Party Woodhaven Education Association filed timely exceptions to certain findings of the Administrative Law Judge and to his recommendation that the charge be dismissed. A timely brief in response to these exceptions was filed by Respondent on October 16, 1989. Charging Party submitted a reply brief on October 30, 1989.

We have reviewed Charging Party's exceptions in light of the record, including briefs submitted by both parties. For reasons set forth below, we find these exceptions to be without merit.

Charging Party is the bargaining representative of Respondent's professional employees, including teachers. The charge in the instant case was filed on November 29, 1988 and alleges that in or about October, 1988, Respondent unilaterally altered existing terms and conditions of employment for employees in Charging Party's unit by instituting a requirement that newly-hired employees undergo physical examinations.

Respondent does not deny that it began requiring physical examinations without giving Charging Party prior notice and an opportunity to bargain. According to Respondent, it actually instituted this requirement in 1987. Respondent also does not dispute that it is obligated under PERA to bargain regarding mandatory physical examinations for existing employees. It asserts,

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

however, that the physical examinations in this case were pre-employment physicals required only of individuals who had not yet become employees. Respondent denies that it had an obligation to bargain over these mandatory pre-employment physical examinations.

The Administrative Law Judge rejected Respondent's first claim that the instant charge was untimely filed under Section 16(a) of PERA. Next, the Administrative Law Judge held that the physicals in this case were clearly pre-hire or recruiting requirements. Thirdly, the Administrative Law Judge agreed with Respondent that it had no duty to bargain over a physical examination imposed as a pre-hire requirement. The Administrative Law Judge held that the parties' inclusion of employees "to be employed" in the recognition clause of their contract did not impose an obligation on Respondent to bargain over a pre-hire requirement.

Charging Party excepts to the Administrative Law Judge's holding that pre-hire requirements, including pre-hire physical examinations, are not mandatory subjects of bargaining. It also excepts to the Administrative Law Judge's holding that Respondent did not require physical examinations for active employees in this case. Charging Party asserts that the record shows that at least two employees in its unit were not required to take physicals or told of this requirement until after they were hired. Thirdly, Charging Party maintains that the Administrative Law Judge erroneously failed to address its claim that Respondent violated its duty to bargain over the impact of the physical examination requirement on active employees.

An employer has no duty under PERA to bargain with the union over issues relating to non-employees, including retirees, except where these issues "vitally affect" the terms and conditions of employment of active unit members. West Ottawa Education Association v. West Ottawa Board of Education, 126 Mich App 306 (1983). In West Ottawa, the Court affirmed a Commission finding that the employer in that case had no duty to bargain over a plan to hire retired teachers as consultants. The Court in that case relied in part on Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass, 404 US 157 (1971), which established the "vitally affects" test.

In City of Detroit, 1989 MERC Lab Op 788, we held that job applicants are not "employees" under PERA. We also held that an employer does not have to bargain about the drug testing of job applicants because such testing does not vitally affect the terms and conditions of active employees. In this regard we followed the lead of the National Labor Relations Board (NLRB) in See Star Tribune, 295 NLRB No. 63, 131 LRRM 1404 (1989). City of Detroit is also in accord with Detroit Police Officers Ass'n v. Detroit, 391 Mich 44 (1974), holding that recruiting requirements are not mandatory subjects of bargaining under PERA.

As set forth above, we have previously found that job applicants are not "employees" within the meaning of the Act. An employer's duty to bargain over issues relating to job applicants is limited to those which "vitally affect" active unit members. The record here contains no evidence to support a finding that requiring job applicants to obtain physical examinations as a precondition to employment vitally affects Respondent's members. We conclude therefore that Respondent in this case had no duty to bargain over the institution of a requirement of pre-hire physicals for job applicants.

We also agree with the Administrative Law Judge that the parties' contractual recognition agreement did not affect Respondent's obligation to bargain over pre-hire physical examinations. It is by no means clear that the disputed recognition language was intended to do anything other than ensure that new employees would automatically be included in the unit at the time of their hire. Assuming arguendo that the parties did intend to expand the scope of their unit, we are still without authority to order Respondent to recognize Charging Party as the bargaining agent for individuals who do not meet the definition of an "employee" under the Act.

However, Charging Party also asserts that Respondent did in fact require physical examinations of individuals whose employment relationship had already commenced. Discussion of this contention requires a review of the facts in the record.

Respondent testified that it began requiring pre-hire physical examinations sometime in 1987. The job postings for teacher positions did not include any mention of a physical examination requirement. There was no indication in the record that Charging Party learned about this requirement until the fall of 1988.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

In order for his or her employment with Respondent to become final, a teacher must sign an employment contract and this contract must be approved by Respondent's School Board. The teacher's seniority date is the date of the Board's approval, whether or not the teacher has commenced providing services before this date.

From about March, 1988, when Respondent's current Director of Personnel was hired, through the fall of 1988, Respondent hired approximately 20-21 teachers. Director of Personnel Eugene Washchuk testified that the majority of these new teachers were told at the time of their second interview that physical examinations were required and had completed these examinations before starting to work. He admitted, however, that some teachers who were not hired in sufficient time before the beginning of the school year did not have their examinations before they started to work or even before their contracts were approved. He also admitted that the physical examination requirement may not actually have been enforced against every new teacher. Washchuk testified, however, that to the best of his recollection he informed all teachers in their final interviews that physical examinations were required.

Charging Party presented two witnesses who were hired by Respondent in the fall of 1988. Both of these witnesses were interviewed by Washchuk late in August, 1988. Linda Burnett, a special education teacher, had her final interview about two weeks before the school term began. She could not recall being advised at that time that a physical examination would be required, but she admitted that Washchuk might have said this. According to Burnett, she signed her written employment contract at this final interview. About a week later she was informed that she had a job. She reported for work on the first day of the semester, September 6, at which time she was asked to sign certain other forms. Burnett was not informed about the physical examination requirement at this time.

About three weeks after the start of school, Burnett was called by the Personnel Department and informed that all new hires were required to have a physical examination. Since Burnett was pregnant at the time, she asked if she could be examined by her own doctor. She was first informed that she could, but later was told that she would have to go to Seaway Hospital to be examined by a doctor there. At this point Burnett enlisted the intervention of Charging Party, who was able to obtain Respondent's agreement to an examination by Burnett's doctor. Burnett completed this examination by about the beginning of October. The record does not indicate the date on which Burnett's contract was approved by the School Board.

Jill Polander was hired as a full-time substitute art teacher in the fall of 1988. She had previously been a part-time substitute. Polander was interviewed on the Saturday before the beginning of the fall school term. On the morning of the first day of school, September 6, she was called and asked if she could begin work. Two weeks later, Polander was told that she had a full-time job. Approximately a week later, Polander reported to the Board offices to sign some paperwork. At this time she was informed that she had to go to Seaway Hospital for a physical. It took about 10 days for Polander to comply with this requirement. Meanwhile, Polander's contract had been approved by Respondent's Board of Education on September 19, 1988.

The record did not contain any evidence that Respondent required a physical of any other new teacher after he or she had begun providing services. One individual hired in the fall of 1988 may never have been asked to get an examination, either before or after he began work.

On October 24, 1988, Charging Party filed a grievance alleging that job applicants were within its bargaining unit and that mandatory pre-employment physicals violated its contract with Respondent. As a result of this grievance, Respondent began including a physical examination requirement on all of its teacher job postings. Respondent also no longer recommends to the Board that it approve a teacher's contract until the teacher has completed his or her physical examination.

An employer has an obligation to bargain over the terms and conditions of "employees" within the bargaining unit. If an employer makes a job offer contingent on the completion of a physical examination or drug test, the employment relationship clearly does not commence until the employee has fulfilled the contingency, even if the employee has already begun providing services. See discussion in Star Tribune, supra.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

In October, 1988, Respondent acted to ensure that its job offers were understood to be contingent on completion of the physical examinations by adding this requirement to all of its job postings. Even before this date, however, the record indicates that the majority of teachers hired were told about the contingency at the time of their job offer and were required to complete their physical examinations, if at all, before they began work. The evidence here establishes only that two teachers hired on short notice before the start of the 1988 school term were not required to complete their examinations before their employment became final and may not have been told about the requirement at the time of their job offers. There is no evidence that Respondent intended to impose a physical examination requirement on its existing active employees. If it inadvertently did so in the case of Burnett and Polander, these were merely isolated incidents not effecting a permanent change in the terms and conditions of employment of bargaining unit members. We find no violation by Respondent on these facts.

Charging Party's final exception is to the Administrative Law Judge's failure to find that Respondent violated its duty to bargain over the "impact" of the pre-employment physical requirement on active employees. By this Charging Party apparently means the possible use of the results of the pre-employment physical examinations in subsequent employment decisions involving active employees. However, the record does not indicate that Charging Party demanded to bargain over this issue or that Respondent refused to so do. We see no basis for finding a breach of Respondent's duty to bargain over "impact" in this case.

In accord with the discussion above, we affirm the Administrative Law Judge's finding that Respondent had no duty to bargain over a requirement that job applicants obtain physical examinations as a precondition of employment. We also affirm his finding that Respondent did not unilaterally alter terms and conditions of employment for existing employees in this case. We adopt his recommendation that the charge be dismissed.

Order

Pursuant to Section 16 of PERA, we adopt the recommendation of the Administrative Law Judge in this case. The charge herein is dismissed in its entirety.

Decision and Recommended Order of Administrative Law Judge

This case was heard at Detroit, Michigan on May 8, 1989 before Joseph B. Bixler, Administrative Law Judge for the Michigan Employment Relations Commission, pursuant to a complaint and notice of hearing issued under Section 16 of the Public Employment Relations Act (PERA), 1947 PA 336, as amended by 1965 PA 379 and 1973 PA 25, MCLA 423.216, MSA 17.455(16). Based upon the record and the briefs filed by the parties on August 7, 1989, the undersigned hereby makes the following findings of fact, conclusions of law, and recommended order pursuant to Section 16(b) of PERA:

The Unfair Labor Practice Charge

In the unfair labor practice charge filed on November 29, 1988, and after deletions and withdrawals at the hearing, the Charging Party alleges that the Woodhaven School District has violated PERA by the following:

3(i) For over 8 years, the parties' (sic) contracts have required each bargaining unit member to have a tuberculosis test once he/she is hired but before he/she begins his/her duties; this is the only relevant contract provision that requires any sort of physical, mental or similar medical test, evaluation, examination or procedure.

With the deletion of conclusionary matter the charge provides:

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

3(m) On or about October 14, 1988, the Respondent announced to newly hired bargaining unit members that, notwithstanding their respective notifications of employment, the Respondent required each to undergo a physical examination before assuming his/her duties and as a condition of employment.

3(o) The Respondent failed and/or refused to give the Charging Party notice and a reasonable opportunity to bargain before announcing or implementing its unilateral changes in the established policies, practices and procedures alleged above; further, the Respondent has denied the Charging Party's demand to bargain over same, but has instead made its determination to proceed unilaterally.

The Facts

The Charging Party is the collective bargaining representative of the professional employees of the School District. They have had collective bargaining agreements covering at least nine years. The record discloses that the School District hired a Ms. Burnett and a Ms. Polander about September 6, 1988. Burnett was interviewed twice for a vacant special ed teaching position. These two interviews occurred a week before school began on September 6, 1988. Polander began work as a full-time substitute about two weeks after the September 6, 1988 school year began.

After Burnett was at work three weeks she was informed that she was required to take a physical examination. When Burnett signed her various forms she stated that she was not told anything about a physical examination but does concede that the School District's representative may have mentioned that she was required to have a physical. Polander, as noted above, began work as a full-time substitute after the school year began. Polander was told that she was required to take a pre-employment physical about the third week of school. Polander took the physical after she had been working ten to eleven days in the full-time substitute position. The record discloses that one other employee was hired without a pre-employment physical.

The Issues

The Charging Party maintains that the pre-employment physical, as reflected by this record, constitutes a unilateral change of working conditions that the Charging Party claims is a mandatory subject of bargaining.

The School District takes three positions: First, the unfair labor practice charge was filed more than six months after the District had begun requiring pre-employment physical examinations. Secondly, the School District maintains that the dispute in this matter is a good faith dispute as to the proper interpretation of the collective bargaining agreement. Lastly, the School District maintains that a pre-employment physical examination does not constitute a mandatory subject of bargaining.

Discussion and Recommendation

The Charging Party looks to the recognition clause of the collective bargaining agreement that recognizes the Charging Party as a representative for:

All full-time and regularly part-time certified professional personnel whether under contract, on leave, employed or to be employed by the board of education . . . .

Based on this the Charging Party maintains that the School District was required to bargain relative to those "to be employed."

The first defect in this argument arises out of the Supreme Court of Michigan decision which was in agreement with the Commission determination that there is no requirement to bargain about qualifications or preconditions for employment. City of Detroit, 1971 MERC Lab Op 237, *aff'd,* Police Officers Assn v. Detroit, 391 Mich 44, 85 LRRM 2153 (1974). In the City of Detroit case the Michigan Supreme Court stated in agreement with the Commission at page 51:

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

2. The City is not required to bargain over recruiting requirements for patrolmen. The duty to bargain extends only to those "terms and conditions of employment" that affect employees after they have commenced their employment relationship.

Thus, even if the School District has agreed to a recognition clause that includes those "to be employed" does not give rise to an obligation to bargain over those "to be employed."

Contracting on a permissive subject of bargaining does not make it a mandatory subject of bargaining. The Commission has found that the mere fact that parties have agreed to bargain relative to a nonmandatory subject of bargaining, such as pre-hire requirements, such an agreement does not make a non-mandatory subject of bargaining a mandatory subject of bargaining. In *Flint School Dist.*, 1984 MERC Lab Op 336, the Commission specifically affirmed the conclusions of law of the ALJ, who stated at page 342 as follows:

I find that the Employer cannot insist once the original contract has expired that this permissive provision be put into a new or successor contract without the consent of the Union. *To hold otherwise would turn the permissive subject of bargaining into a mandatory one which could be bargained to impasse and unilaterally implemented* after such impasse. Accordingly, I conclude that the Employer could not insist to the point of impasse on including the administrative seniority provisions in any new collective bargaining agreement negotiated by the parties. See *Lake Orion Bd of Ed,* 1983 MERC Lab Op 172, 178. [Emphasis Added]

I conclude, therefore, based on the foregoing, that if there is a contractual obligation on the part of the Board of Education to recognize the Charging Party this does not mean a pre-hire physical for a person just hired is a refusal to bargain. As stated in the *Flint* case such a holding would make a mandatory subject of bargaining out of a non-mandatory subject of bargaining.

In regard to the sequence of events involving the two teachers hired, the Charging Party seems to contend that the right to administer a pre-hire physical or institute or require a pre-hire physical after the teachers have been working was waived by the Board of Education. Clearly this puts form far above substance. It would also require the School District to give physicals to employees before it determined whether they were to be hired. At best this type of argument sets forth a contract dispute as to whether the employee was covered by the contract. The Commission has determined time and time again that it will not become involved in collective bargaining disputes if the collective bargaining agreement contains a clause providing for binding arbitration. *Plymouth-Canton Comm. Schools,* 1984 MERC Lab Op 894. In those other cases involving a breach of contract where there is a binding arbitration clause the Commission has determined it would not get involved absent a renunciation of the contract. *City of Saginaw,* 1986 MERC Lab Op 209; *City of Kalamazoo,* 1984 MERC Lab Op 797; *City of Garden City,* 1987 MERC Lab Op 547; *C.S. Mott Comm. College,* 1982 MERC Lab Op 1478; *City of Flint,* 1982 MERC Lab Op 1416; *Parchment Public Schools,* 1982 MERC Lab Op 1146; *Dryden Comm. Schools,* 1982 MERC Lab Op 821. The Commission has always required the terms of the contract breached to be of such a nature as to amount to a complete renunciation of the collective bargaining principle. This is not what the record reveals in the case at hand.

In regard to the claim that the unfair labor practice charges were filed later than six months following the institution of a pre-hire physical, the undersigned finds that this record does not support this contention. However, in view of the determination above that pre-hire requirements of an employer are a non-mandatory subject of bargaining, the undersigned finds that this determination is not required.

Based on the foregoing the undersigned finds, and recommends that the Commission find, that the School District of Woodhaven by requirement of a pre-hire physical, even if administered subsequent to the employee beginning to work, does not violate the bargaining obligation imposed by PERA. It is recommended that the Commission dismiss the unfair labor practice charges by issuance of the order set forth below:

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Order

The unfair labor practice charges filed in this matter are hereby dismissed.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

17 MPER ¶ 48, 17 Michigan Pub. Employee Rep. ¶ 48, 2004 WL 6012413

Michigan Employment Relations Commission

VILLAGE OF HOLLY, Respondent-Public Employer, and
TEAMSTERS LOCAL 214, Charging Party-Labor Organization.
No. C02 G-168
LYNCH, BISHOP, GREEN
August 9, 2004

Related Index Numbers
15.33 Administrative Service Employees, Municipal
43.131 Compensation, Benefits, Health Insurance
43.137 Compensation, Benefits, Retirement

APPEARANCES:
Dean & Fulkerson, P.C., by Kenneth W. Zatkoff, Esq., for Respondent
Rudell & O'Neill, P.C., by Wayne A. Rudell, Esq., for Charging Party

Judge / Administrative Officer
LYNCH, BISHOP, GREEN

Ruling

MERC adopted an ALJ's recommended dismissal of an unfair practice charge alleging the municipal employer threatened to take away medical coverage to a retiree and refused to bargain over medical coverage for retirees. The ALJ found the employer was under no contractual obligation to continue paying a portion of the retiree's health premium. As a result of the retiree's status as a former employee, the village had no legal duty to bargain with the union before modifying or eliminating his health insurance benefits, the ALJ further found.

Village's revocation of retiree's health insurance did not violate PERA

Meaning

It is well-established that issues relating to individuals who are not employees, including retirees, are permissive subjects of bargaining, and that an employer has no obligation to bargain concerning such matters unless they "vitally affect" the terms and conditions of employment of bargaining unit members.

Case Summary

Where no exceptions were filed, MERC adopted the decision of an administrative law judge (ALJ) recommending the dismissal of an unfair practice charge. The charge alleged that the municipal employer threatened to take away medical coverage to a retiree and refused to bargain over medical coverage for retirees. The ALJ found the employer was under no contractual obligation to continue paying a portion of the retiree's health premium and that, as a result of the retiree's status as a former employee, the village had no legal duty to bargain with the union before modifying or eliminating his health insurance benefits. Nothing in the record indicated that employer's conduct "vitally affected" the terms and conditions of bargaining unit members so as to transform the issue of the retiree's health insurance benefits into a mandatory subject of bargaining, the ALJ concluded.

Full Text

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Decision and Order

On June 21, 2004, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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.

Decision and Recommended Order of Administrative Law Judge on Summary Disposition

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, oral argument was held at Detroit, Michigan on February 27, 2003, before David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission. Based upon the entire record in this proceeding, including the brief filed by Charging Party on March 31, 2003, I make the following conclusions of law and recommended order.

The Unfair Labor Practice Charge:

On July 22, 2002, Charging Party Teamsters Local 214 filed an unfair labor practice charge with the Commission alleging that Respondent, Village of Holly, violated Section 10(1) (a) and (e) of PERA. Specifically, the charge asserted that Respondent "threatened to take away medical coverage to a retiree that has already received the benefits since February of 2002 because the Union will not agree to their unilateral conditions." In addition, the charge alleged that the Employer had unlawfully refused to bargain "over conditions of employment pertaining to medical coverage for ... retirees."

On or about August 14, 2002, Respondent filed an answer denying the allegations set forth in the charge and asserting as an affirmative defense that "[t]he employee involved is not a member of the bargaining unit for which the Charging Party is the exclusive bargaining representative."

An evidentiary hearing was scheduled for February 27, 2003. On that date, I indicated to the parties that none of the allegations set forth by the labor organization appeared to state a valid claim against Respondent under PERA. Therefore, I concluded that dismissal of the charge was warranted under Rule 165, R 423.165, of the General Rules and Regulations of the Employment Relations Commission. The parties were afforded the opportunity for oral argument in accordance with Smith v Lansing School Dist, 428 Mich 248 (1987), as well as the opportunity to submit post-hearing briefs setting forth legal authority in support of their respective positions. The parties also jointly submitted several exhibits for purposes of establishing the undisputed facts in this case.

Factual Background:

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

The material facts in this matter are not in dispute. Charging Party is the collective bargaining representative for a unit of office and waste water treatment plant employees of the Village of Holly, as well as employees in Respondent's water and public works departments. The Union and the Employer were parties to a collective bargaining agreement covering the period July 1, 1999 to June 30, 2003. Pursuant to Article 30, Section 1, of that agreement, the Employer was required to pay fifty percent of the health insurance premiums for regular full-tune employees who retire at age 55 with at least 25 years of continuous service with the Village.

On September 6, 2001, Respondent terminated Norman Martin, a member of Charging Party's bargaining unit. At that time, Martin was 47 years old and had worked for the Employer for approximately 21 years.

On September 14, 2001, Charging Party and Respondent entered into a written agreement rescinding the termination notice and reinstating Martin pending approval of his application for disability insurance. The Employer agreed to pay fifty percent of Martin's health insurance premium while that application was pending, but for no more than one year from the date of the agreement. By its terms, the agreement was to terminate if Martin qualified for medical retirement under the Municipal Employees' Retirement System of Michigan (MERS) pension plan.

On January 9, 2002, MERS approved Martin's application for a non-duty disability retirement retroactive to December 1, 2001, and Respondent received timely notification of that fact. Although Respondent was no longer obligated under its agreement with the Union to pay fifty percent of Martin's health insurance premium, it continued to do so throughout the first half of 2002.

In June of 2002, at the Employer's request, Charging Party drafted a letter of understanding (LOU) extending the Village's obligation to pay half of Martin's insurance premium for an additional eighteen months commencing July 1, 2002. The Union forwarded a copy of the proposed LOU to the Village Manager on or about June 14, 2002.

On June 26, 2002, Respondent faxed a copy of a revised LOU to Charging Party. The Employer's proposal added language indicating that continuation of coverage for Martin "shall be for this Retiree only" and specified that the agreement "is made to address a special situation and shall not be perceived to be a precedent or interpreted as establishment of a custom or practice." That same day, Charging Party responded to the Employer's proposed LOU with its own revised draft. The Union's proposal omitted the provision specifying that continuation of coverage "shall be for this Retiree only." In addition, the Union's draft provided that the agreement "is made to address a special situation and add to the provision of Article 30, Section 1 to include qualification for a medical retirement."

In a letter to Charging Party dated June 27, 2002, the Village Manager indicated that the Employer would not agree to language specifying that the agreement would "add to the provision of Article 30, Section 1." Respondent characterized that provision as "unacceptable" and "a deal breaker" and indicated that such modification of the collective bargaining agreement should be discussed during upcoming contract negotiations.

On July 8, 2002, the Union sent another proposed LOU to the Employer. This draft was essentially identical in substance to Charging Party's initial proposed agreement of June 14, 2002, with the exception of language specifying that continuation of coverage "shall be for the retiree and spouse only." In a cover letter attached to the draft, the Union wrote that "[t]his offer in no way removes the possibility that both parties reserve the right to argue the effects of the letter of understanding on a similarly situated employee in the future."

On or about July 10, 2002, Respondent notified the Union by letter that the Holly Village Council had decided to withdraw the offer of partial payment for continued health insurance for Martin due to "the Union's refusal to accept language in the letter of understanding that was required by the Village." However, Respondent indicated that it would continue providing health insurance for Martin if the Union were to agree to accept the language in the Employer's June 27, 2002 letter. Respondent gave the Union until 5:00 p.m. on July 23, 2002, to accept its final offer. Charging Party did not agree to the offer and, as a result, Respondent stopped contributing to Martin's health insurance premium.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Discussion and Conclusions of Law:

In Smith v Lansing School Dist, 428 Mich 248 (1987), the Michigan Supreme Court held that the Commission has the authority under PERA, the Commission's rules, and the Michigan Administrative Procedures Act, MCL 24.271 et seq., to dismiss a charge for failure to state a claim without conducting a full evidentiary hearing where there are no material issues of fact. Rule 165(1) states, "The commission or administrative law judge designated by the Commission may, on its own motion, order dismissal of a charge. The motion may be made at any time before or during the hearing."

I find that summary disposition is appropriate in this matter. Respondent was under no contractual obligation to continue paying a portion of Martin's health care premium. Because Martin was 47 years old when he retired on disability and had worked for the Village for less than 25 years, he was not eligible for health benefits under Article 30, Section 1, of the collective bargaining agreement. Nor was Respondent obligated to continue making contributions to Martin's health care premium pursuant to the September 14, 2001 agreement, since that agreement expired on its terms when Martin qualified for retirement benefits under MERS effective December 1, 2004. Although the parties later entered into negotiations concerning a formal agreement to extend Martin's benefits, each offer made by the Union on or after June 26, 2002, was a proposal to modify the existing contract in some way, either directly or by clarifying how it was to be interpreted. While the parties may agree to negotiate a change during the effective term of the written agreement, bargaining is not required and either party has the right to refuse to discuss or agree to a midterm modification of the contract. St. Clair Intermediate School Dist v Intermediate Education Ass'n, 458 Mich 540, 565-566 (1998).

Martin's status as a retiree also precludes any finding that the Village had a legal duty to bargain with Charging Party before modifying or eliminating his health insurance benefits. It is well-established that issues relating to individuals who are not employees, including retirees, are permissive subjects of bargaining, and that an employer has no obligation to bargain concerning such matters unless they "vitally affect" the terms and conditions of employment of bargaining unit members. *City of Grosse Pointe Park,* 2001 MERC Lab Op 195, 198 (no exceptions), *citing* Allied Chemical & Alkali Workers of America v Pittsburgh Plate Glass, 404 US 157 (1971). *See also Woodhaven School Dist,* 1990 MERC Lab Op 221; *Mona Shores,* 1989 MERC Lab Op 414; Ottawa EA v West Ottawa Bd of Ed, 126 Mich App 306 (1983), *aff'g* 1982 MERC Lab Op 629.

While recognizing that modification of Martin's health insurance benefits constituted a permissive subject of bargaining, the Union nevertheless contends that Respondent acted unlawfully in bargaining that issue to impasse. Parties may voluntarily discuss and agree to permissive subjects of bargaining. AFSCME, Local 1277 v Center Line, 414 Mich 642, 652 (1982). Even when parties have successfully bargained about a permissive subject, a party may lawfully reject the bargain. Pittsburgh Plate Glass, supra, at 187-188. Although it is unlawful to take a nonmandatory subject of bargaining to impasse, what that rule prohibits is insistence upon a permissive subject as a condition precedent to reaching an agreement on other mandatory bargaining subjects. *See e.g.* NLRB v Borg-Warner Corp, 356 US 342, 349 (1958). In the instant case, Respondent's demand that the Union agree to its terms regarding an extension of benefits for Martin did not impede negotiations on any mandatory bargaining subject or have any effect on the abilities of the parties to fulfill their mandatory bargaining obligations. The contract between the parties covered the issue of health care retirement benefits, and the parties were not yet in negotiations on a successor agreement. I conclude that the Village could validly negotiate, as it did, on the issue of an extension of benefits for Martin without impacting the permissive nature of that issue.

I also find nothing in the record to suggest that the Employer's conduct in this matter "vitally affected" the terms and conditions of employment of bargaining unit members so as to transform the issue into a mandatory subject of bargaining. To satisfy the "vitally affects" test, the effect on active employees must be established with certainty. Mere speculation about the impact of retiree benefits on active employees is insufficient Pittsburgh Plate Glass, supra, at 180. In the instant case, members of the bargaining unit are in exactly the same position that they would have been had the incident with Martin never occurred. The Village remains obligated under the terms of the existing contract to pay fifty percent of the health insurance premiums for regular, full-time employees who retire at age 55 with at least 25 years of continuous service with the Village. To the extent that

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Charging Party is dissatisfied with this provision, it remains free to negotiate changes regarding retirement health care benefits when bargaining on a successor contract commences.

In an attempt to establish that Respondent's actions had some discernible impact on its members, Charging Party suggests, for the first time in its brief, that because Respondent continued to pay fifty percent of Martin's premium following the termination of the parties' September 14, 2001 agreement, a term or condition of employment was created which superceded the language of the contract. Charging Party seems to argue that Respondent violated PERA by insisting that its members give up that benefit as a precondition to the Village's continuation of health care benefits for Martin.

In order to create a term or condition of employment through past practice, the practice must be mutually accepted by both parties. Where, as here, the contract unambiguously covers a term of employment that conflicts with a party's behavior, 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 Education Ass'n v Port Huron Area School Dist, 452 Mich 309, 329 (1996). In such circumstances, the party "seeking to supplant the contract language must submit proofs illustrating that the parties had a meeting of the minds with respect to the new terms or conditions -- intentionally choosing to reject the negotiated contract and knowingly act in accordance with past practice." *Id. See also Grand Rapids Community College,* 1998 MERC Lab 739, 742. Here, the record indicates that the Village contributed to the health insurance premiums of one retiree for a period of approximately seven months. Charging Party has failed to allege any facts which would suggest that the parties had a meeting of the minds concerning modification of Article 30, Section 1, of the contract.

I have carefully considered all other arguments advanced by Charging Party, including its contention that Respondent unlawfully retaliated against Martin, and conclude that they do not warrant a change in the result. For the above reasons, I find that Respondent did not violate Sections 10(l)(a) and (e) of PERA. Since Charging Party has been given full opportunity for argument and no cause of action under PERA has been raised, summary dismissal is appropriate. Smith v Lansing School Dist, supra. Therefore, it is recommended that the Commission issue the following order dismissing the charge.

Recommended Order

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

Cases Cited

2001 MERC Lab Op 195
404 U.S. 157
356 U.S. 342
414 Mich. 642
M.C.L. 423.210

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

18 MPER ¶ 72, 18 Michigan Pub. Employee Rep. ¶ 72, 2005 WL 6710388

Michigan Employment Relations Commission

ORION TOWNSHIP (DEPT. OF PUBLIC WORKS), Public Employer-Respondent, and TEAMSTERS LOCAL 214, Labor Organization-Charging Party.
No. C03 E-121
LYNCH, GREEN
November 3, 2005

Related Index Numbers
15.121 Educational Employees, Professionals, Teachers
42.11 Mandatory Subjects, Case Law
42.21 Permissive Subjects, Case Law
43.624 Special Subjects, Education, Teacher Evaluations
47.521 Grievance Arbitration, Arbitrability, Scope

APPEARANCES:
Keller Thoma, by Dennis B. DuBay, Esq., for the Respondent
Rudell & O'Neill, P.C., by Wayne A. Rudell, Esq., for the Charging Party

Judge / Administrative Officer
LYNCH
GREEN

Ruling

MERC adopted an ALJ's recommended determination that a municipal employer violated its duty to bargain in good faith when it unilaterally implemented changes in terms and conditions of employment, absent impasse. MERC found that the employer's single meeting with the union after fact finding took place did not fulfill the requirements of good faith bargaining. It agreed with the ALJ's issuance of a cease and desist order, accompanied by a directive for the employer to bargain in good faith (upon demand by the union) and to restore employees to prior terms and conditions of employment.

Township employer errs in implementing new employment conditions

Meaning

MERC has found that after fact finding, a party must make a serious effort to reconcile its differences with the other side; simply meeting and discussing the fact finder's report may not be sufficient to satisfy the bargaining obligation. Here, MERC reasoned that employer's refusal to meet more than once after fact finding and its refusal to utilize a mediator's assistance was contrary to the obligation to bargain in good faith.

Case Summary

Upon considering the municipal employer's exceptions from an ALJ's recommended decision and order, MERC adopted the ALJ's determination that the employer violated its duty to bargain in good faith when it unilaterally implemented changes in terms and conditions of employment, absent impasse. MERC found that the employer's single meeting with the union after fact finding took place did not fulfill the requirements of good faith bargaining. It reasoned that employer's refusal to meet again after fact finding and its refusal to utilize a mediator's assistance was contrary to the obligation to bargain in good faith. MERC agreed with the ALJ's issuance of a cease and desist order, accompanied by a directive for the employer to bargain in good faith (upon demand by the union) and to restore employees to prior terms and conditions of employment.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Full Text

Decision and Order

On September 15, 2004, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above case, finding that Respondent, Orion Township (Department of Public Works), violated its duty to bargain in good faith when it unilaterally implemented changes in terms and conditions of employment in the absence of impasse. The ALJ found that Respondent had violated Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(e), as alleged in the charge, when it refused to meet with Charging Party, Teamsters Local 214, for additional negotiations after fact finding and unilaterally imposed changes in the terms and conditions of employment. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA. On November 8, 2004, Respondent filed timely exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions. Charging Party did not file a response to the exceptions.

In its exceptions, Respondent contends that the ALJ erred when she concluded that the parties were not at impasse prior to the implementation of new terms and conditions of employment. Respondent contends that the parties were at impasse from January 29, 2002, through and beyond May 1, 2003. Respondent further argues that an attempt by Charging Party to schedule mediation after the parties received the fact finder's report was insufficient to break the impasse.

Factual Summary:

The facts in this case were set forth fully in the Decision and Recommended Order and need not be repeated in detail here. Briefly, the last collective bargaining agreement between the parties expired on December 31, 2001. On September 14, 2001, the parties began negotiations for a new agreement. At this initial meeting, Charging Party presented a written proposal demanding wage increases for each year of the contract, the adoption of a defined benefit pension plan, provision of retiree health care, and various other proposals.

The parties met and bargained on three occasions prior to a fourth meeting on January 29, 2002. At that meeting, Respondent proposed to create voluntary employee beneficiary association (VEBA) accounts for its employees, to be used for health care upon retirement. When they could not reach an agreement, the parties asked for mediation. They met with a mediator for approximately one hour on May 13, 2002, at which time Charging Party would not agree to VEBA accounts and expressed its intention to request fact finding.

Charging Party filed a petition for fact finding on May 21, 2002. The petition listed twenty-one unresolved issues. At an August 5, 2002 prehearing conference with the fact finder appointed by this Commission, the parties agreed to limit the issues at hearing to wages, pensions, and retiree health care. The fact finding hearing took place on November 12, 2002, and on December 6, 2002, the fact finder issued his report recommending that the parties adopt the Respondent's proposal on wages, maintain the existing pension plan, and adopt Respondent's VEBA proposal.

On January 9, 2003, the parties met for the last time. Prior to this meeting, the Respondent's Board told its bargaining representatives that it had made its last best offer and intended to implement the fact finder's recommendations. At the parties' final meeting, which lasted one-half hour, Charging Party accepted the fact finder's recommendations but expressed a belief that portions of the recommendations needed additional negotiation. Specifically, Charging Party proposed a wage reopener for the fourth year and additional payments into VEBA accounts. Respondent's bargaining team responded that it could not agree without the approval of its Board, and agreed to present Charging Party's proposal to the Board at its next meeting. When Respondent's Board directed its bargaining team not to engage in further negotiations and to implement the contract, Charging Party attempted to set up another mediation session.

W © 2023 Thomson Reuters. No claim to original U.S. Government Works.

On February 14, 2003, Respondent sent Charging Party a letter stating that it had exhausted the mediation process and that it would be receiving a draft contract within approximately 10 days. On February 20, Charging Party sent Respondent a letter advising that a mediator had agreed to meet on March 3. The parties did not meet with the mediator, and on March 12, Respondent notified Charging Party that it was not authorized to negotiate further and would implement its last best offer.

On March 18, Respondent sent Charging Party a draft agreement. On April 8, Charging Party responded by pointing out several "errors" in the contract. On April 21, Respondent replied that unless Charging Party was prepared to sign the agreement, it would implement it effective May 1. On May 1, 2003, Respondent implemented changes in wages and terms and conditions of employment.

Discussion and Conclusions of Law:

Respondent takes exception to the ALJ's findings, maintaining that the ALJ failed to appreciate that the parties were at impasse following the January 9, 2003 meeting, and that further discussions were "unlikely to produce compromise." Respondent acknowledges the rule expressed in *Wayne Co,* 1984 MERC Lab Op. 1142, and 1985 MERC Lab Op. 244, 250, *aff'd,* 152 Mich. App. 87, 125 LRRM 2588 (1986), *lv. den,* 426 Mich 875 (1986), but states that it does not require an employer to meet with a labor organization for any number of occasions, nor does it require an employer to continue to meet where such meetings would not have produced agreement.

We have consistently stated the importance of mediation and fact finding, indicating that the failure of the parties to utilize these services to the maximum extent necessary may be viewed as indicating a lack of good faith, and contrary to the intent and policies of PERA. *Crestwood Sch. Dist.,* 1975 MERC Lab Op. 609; *Cass Co. Road Comm.,* 1984 MERC Lab Op. 306. In the *Wayne Co.* case, we established a rule that parties must bargain for a reasonable time over the substance of a fact finder's report. We stated that in most cases, a reasonable time is 60 days after the issuance of the report, providing the parties are bargaining in good faith. We have found that after fact finding, a party must make a serious effort to reconcile its differences with the other side; simply meeting and discussing the fact finder's report may not be sufficient to satisfy the bargaining obligation. *Oakland Cmty. College,* 2001 MERC Lab Op. 273; *City of Dearborn,* 1972 MERC Lab Op. 749, 759.

In this case, the fact finder's report was issued on December 6, 2002. Thereafter, the parties met on January 9, 2003. At that meeting, which lasted approximately one-half hour, they merely stated their positions regarding the fact finder's recommendations. They did not negotiate, and afterwards Respondent was admittedly unwilling to negotiate. At that time, Respondent advised Charging Party that it accepted the fact finder's recommendations as its last best offer. Charging Party, too, agreed to accept the fact finder's recommendations, but expressed the belief that further negotiation was needed. Following the January 9, 2003, meeting, Charging Party attempted to schedule mediation, but Respondent refused to meet, declaring that impasse had been reached.

We find that under the circumstances of this case, a single meeting after fact finding does not fulfill the requirement of good faith bargaining. *Compare City of Benton Harbor,* 1996 MERC Lab Op 399. We recognize that both sides had taken a firm position on the issues, and that the obligation to bargain the recommendations of a fact finder does not require a party to adopt a recommendation or change its bargaining position. *Wayne Co.,* 1988 MERC Lab Op. 7. However, we find that the Employer's refusal to meet again or to utilize the assistance of a mediator, based on its unilateral conclusion that compromise was unlikely, is contrary to the obligation to bargain in good faith.

Because Respondent refused to meet with Charging Party after January 9, 2003, we find that it did not satisfy its obligation to meet and bargain in good faith over the fact finder's recommendations for a reasonable period of time before implementing its offer. Accordingly, we find that Respondent violated its duty to bargain and unlawfully implemented changes in terms and conditions of employment.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Order

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

Decision and Recommended Order of Law Administrative Judge

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on November 14, 2003, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before January 22, 2004, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

Teamsters Local 214 filed this charge against Orion Township on June 13, 2003. Charging Party represents a bargaining unit of employees in the Orion Township Department of Public Works (DPW). Charging Party alleges that Respondent violated Section 10(1)(e) of PERA by refusing to meet after January 9, 2003 to negotiate a new collective bargaining agreement. Charging Party also alleges that Respondent unlawfully implemented a "contract" containing changes in existing terms and conditions of employment on May 1, 2003. According to Charging Party, Respondent could not lawfully implement changes in terms and conditions of employment at that time because the parties were not at impasse, and also because Respondent had not fulfilled its obligation to meet and bargain in good faith for a reasonable time over recommendations issued by a fact finder on December 6, 2002. Finally, Charging Party alleges that even if Respondent had the right to implement the "contract," Respondent violated its duty to bargain in good faith because it implemented changes that were inconsistent with its last offer.

Facts:

The last collective bargaining agreement between the parties covering DPW employees had an expiration date of December 31, 2001. The parties began negotiations for a new contract on September 14, 2001. Around this time, they agreed to extend the contract on a day-to-day basis after the expiration date. Throughout negotiations, Teamsters representative Les Barrett was Charging Party's chief negotiator. Charging Party's bargaining team also included Mitch McMurray, a union steward, and Roger Morris, a unit employee. After the first meeting, Dennis DuBay, Respondent's counsel, was Respondent's chief negotiator. Respondent's team also included Township Supervisor Gerald Dywasuk and his assistant, Elizabeth Balch.

The September 14 meeting began with a discussion of ground rules. Charging Party then presented a written proposal. Charging Party had three major demands. First, Charging Party proposed a 12% wage increase for each year of the contract. Secondly, it proposed to eliminate the existing defined contribution pension plan and adopt a Michigan Employee Retirement Services (MERS) defined benefit plan. Third, Charging Party proposed to require Respondent to provide a retiree, and his or her family, with the same health care coverage the retiree had at the time of retirement, with the Respondent paying the full premium for both the retiree and his or her family. Under the 1999-2001 contract, retirees had the right to participate in Respondent's health care plan, but had to pay the entire cost of the premium. Respondent also paid a percentage, based on years of service, of a retiree's Medicare supplemental insurance. Charging Party's September 14 proposal also included demands to increase the amount of vacation time employees received after 20 and 30 years; to increase the minimum callback pay from three hours to five hours for callbacks between midnight and 7 am, and from two to four hours for callbacks at other times; to provide for funeral leave separate from personal leave; and to require Respondent to maintain and launder uniforms, The parties spent the first meeting reviewing Charging Party's proposals. This meeting lasted about one hour.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

The parties met again on November 12, 2001. Respondent presented Charging Party with four written proposals. These were: (1) to begin paying standby, in addition to callback, pay; (2) to require employees to take their breaks at their job sites, instead of returning to the garage; (3) to require all new hires to have a Class B commercial drivers license (CDL) with an "N" endorsement; (4) to prohibit employees from storing personal property on Respondent's premises except in their lockers. The parties discussed Respondent's proposals and then returned to list of proposals presented by Charging Party on September 14. Respondent rejected each proposal, item by item. The November 21, 2001 meeting lasted about two and one-half hours. The parties did not reach agreement on any issue.

The parties' third bargaining session took place on December 21, 2001. Respondent gave Charging Party an oral package proposal for a contract to take effect immediately after the expiration of their existing agreement. The package proposal was for a four-year agreement effective January 1, 2002. It provided for wage increases for each year of the contract of 2 1/2%, 2 1/2%, 2 1/2%, and 3%. It included no changes in the pension plan or retiree health care. Respondent's proposal did not increase vacation time for senior employees. However, Respondent proposed to give new hires one week of vacation time during their first year of employment, to be available after completion of the employee's 60 day probationary period. Under the 1999-2001 contract, new hires had no vacation time during their first year of employment. Respondent also proposed to increase minimum callback pay from two and three to four and four (instead of four and five as Charging Party had proposed). Charging Party's bargaining team caucused. When they returned, they said that they would accept the proposal if it included a change to a MERS defined benefit plan and if Respondent agreed to provide health care for retirees and spouses. Charging Party told Respondent that they had to have a MERS defined benefit pension and retiree health insurance to settle the contract. This meeting lasted about three hours. About half this time, the parties were in caucus. The meeting concluded without the parties reaching agreement.

Respondent had never provided retiree health insurance benefits to any of its employees. Balch began researching what health benefits comparable communities provided to retirees. In the process, Balch learned that some communities had established voluntary employee beneficiary association (VEBA) accounts for their employees, with the proceeds of the accounts to be used for payment of health insurance premiums after the employee retires. Under these plans, the employers contributed a specific amount annually to each employee's VEBA account, and the contributions remained tax-free until the employee retired. After the December 21 meeting, Balch and Dywasuk put together figures for the Township Board indicating what the cost of different VEBA packages would be. After considerable debate, the Board decided to implement a VEBA plan for its unrepresented department heads and to offer Charging Party a proposal for a VEBA plan for its members.

The parties met for the fourth time on January 29, 2002. Respondent explained the benefits of VEBA accounts for post-retirement health insurance premiums. Barrett told Respondent that he was familiar with VEBA's and had negotiated these plans in other jurisdictions. Respondent's bargaining team explained that they had, with some difficulty, succeeded in getting the Township Board to approve the concept, and that Respondent intended to set up VEBA accounts for its unrepresented department heads. Respondent then made an oral package proposal that included the establishment of a VEBA account for each member of Charging Party's unit with more than five years of service. Under this proposal, Respondent would contribute $100 per month to each VEBA account. Employees could also roll unused sick pay into the account at the end of each year. [1] Respondent told Charging Party that in order to help offset the cost of the VEBA contributions, it was reducing the wage offer in its December 21 package proposal to 2% for each year of the contract. Respondent stated that in all other respects its package proposal was the same as the one it made on December 21. Barrett testified that Respondent said that the VEBA would be instituted and payments made retroactive to January 1, 2002. Barrett's notes from this meeting also indicate that the VEBA was to be retroactive to that date. According to Balch, however, there was no discussion of when the plan would take effect because Charging Party said that the VEBA was unacceptable. [2] After Respondent presented its proposal, Charging Party's bargaining team restated their demand that Respondent pay for health care insurance for retirees. Morris made an emotional speech in which he argued that $1,200 per year would not be enough to provide him or his family with health care after his retirement, and suggested that he would have to leave and find other employment with better retiree benefits. The meeting ended with the parties agreeing to seek the assistance of a mediator.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

The parties did not meet again until they met with the mediator on May 13, 2002. Before the meeting, Barrett prepared a summary for the mediator of the parties' positions on the approximately 18 open issues. The summary stated that there had been no tentative agreements reached. According to the summary, Charging Party's position on callback time was the same as its original proposal, and Respondent's position was "no." The summary described Respondent's wage offer as 2% per year, with retroactivity in the first year and "VEBA retroactive to January 1, 2002." With respect to Respondent's proposals on breaks, standby pay, and the storage of personal property, the summary stated that these proposals "may be agreeable (to Charging Party) if health care on retirement is provided." The May 13 meeting lasted about an hour. Most of this time, the parties were meeting with the mediator. The parties did not initial any tentative agreements (TA's) during that meeting. However, they reached informal agreement on some terms, contingent on reaching an overall tentative agreement. These included an increase in the minimum callback time for late-night callbacks to four hours, and Respondent's proposal to give new employees one week of vacation after completion of their probationary period. At the end of the meeting, a ten or fifteen minute discussion took place between Barrett and DuBay about the possibility of reconfiguring the VEBA to make it acceptable to Charging Party. Barrett told DuBay that Charging Party would not agree to a VEBA, no matter how it was structured. The parties did not initial any tentative agreements at this meeting. At the end of the meeting, Charging Party announced that it would file for fact finding.

On May 21, 2002, Charging Party filed a petition for fact finding with the Commission. The petition listed 21 unresolved issues: callback time; holidays; vacation, longevity; personal time; funeral leave; dental/optical coverage; hearing coverage; life insurance for retirees; pension; retiree health care; disability insurance; arbitration provider (AAA or FMCS); uniform allowance; CDL reimbursement; wages; retroactivity of economic benefits; payoff of sick time; breaks; standby pay; and use of lockers. In its answer to the petition, Respondent listed its four proposals, stated that its position on all the other issues was to maintain the status quo, and indicated that it opposed retroactivity for any economic improvements which might be recommended by the fact finder.

On June 25, 2002, the Commission appointed A. Robert Stevenson as the fact finder. The parties held a prehearing conference with the fact finder on August 5, 2002. At this conference, the parties agreed to narrow the issues to be presented to the fact finder. In late September 2002, the parties entered into a signed agreement (hereinafter the September Agreement). It began as follows:

A. Three issues as set forth in paragraph C below will be presented in the fact-finding proceeding.

B. The parties' negotiation teams are in agreement on the matters set forth below which will be included in any contract presented to the principal parties for ratification:

1. The parties agree to a four-year contract effective January 1, 2002 to, and including December 31, 2005.

2. The parties agree that the new contract will be the same as the parties' prior contract (in effect January 1, 1998-December 31, 2001) except as amended by the following enumerated changes and the final resolution on the three issues that will be submitted to fact-finding

The September Agreement stated that the parties had agreed to add the following sentence to Article VII of their contract, "During their first year of employment new hirees [sic] will be eligible, upon completion of the probationary period, for one (1) week of vacation." The September Agreement also set out contract language agreed to by the parties on the following subjects: (1) the taking of breaks; (2) uniform cleaning allowance; (3) standby pay; (4) storage of personal property; (5) CDL requirements; (6) addition of a Martin Luther King Day holiday; (7) change in the dental and optical plan carrier; (8) funeral and personal leave; (9) change in grievance procedure time limits. The September Agreement did not mention callback pay. Barrett testified that the parties "missed" this issue. According to Barrett, Respondent never told Charging Party that it had withdrawn its December 21, 2001 proposal to increase the late-night minimum callback to four hours, and, as far as Barrett was concerned, this proposal should have been part of the September Agreement.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Paragraph C of the September Agreement listed three issues to be submitted to the fact finder, and the parties' respective positions on these issues. The issues were wages, pensions and retiree health care. Both parties' wage proposals included a wage increase in the first year of the contract retroactive to January 1, 2002. The parties' proposals on pension and retiree health care make no mention of an effective date or retroactivity.

The fact finding hearing took place on November 12, 2002. The fact finder issued his report on December 6, 2002. The fact finder recommended that the parties' adopt the Respondent's proposal on wages. He also stated, "If inflation is a problem in the last year of the contract adjustment can be made through subsequent contract negotiations." The fact finder also agreed with the Respondent's position on the pension plan. He said, "In this case the competitive need for such a change has not been demonstrated and since it would impact other Township employees, I would not recommend the adoption of a MERS pension program at this time." Finally, the fact finder recommended that the parties agree to Respondent's VEBA plan. He stated:

The Township admits that most of the comparables have some type of retiree health insurance program with varying coverage and exclusions with varying ages for eligibility. However, it is the Township's position that the hourly wage and annual net salary are far above comparables and their 14% contribution to the retirement benefit plan compared to the 10% paid by Macomb Township and Independence Township offsets the retiree benefits those Townships provide.

As a first step to address this cost and because of the trend away from defined benefits I find the Township proposal reasonable and should be favored over the family coverage retiree coverage proposed by the Union. The plan proposed by the employer can be the basis for future negotiations as to the amount of the Township's contributions. Regarding current employees in the bargaining unit is [sic] would be reasonable for the Union and the Township to negotiate contributions in recognition of past service.

The parties met again on January 9, 2003. According to Balch, before this meeting the Board had told its representatives that it had made its best offer. The Board instructed the representatives to inform Charging Party that Respondent accepted the fact finder's recommendations, and that it intended to implement them. At the January 9 meeting, DuBay stated that Respondent was offering wage increases of 2%, 2%, 2%, and 2%; a VEBA plan after five years employment with a contribution of $100 per month plus pay for unused sick time; and the items agreed to in the September Agreement, including the vacation time for new hires. Barrett said that Charging Party agreed to adopt the fact finder's recommendations. However, Barrett stated that there were two areas addressed in the fact finder's report that Charging Party felt needed additional negotiation. These were the wage rate for the fourth year of the contract and additional payments into the VEBA based on past service. Barrett told Respondent that Charging Party believed that the fact finder had, in fact, recommended that the parties continue negotiating on these issues. Charging Party proposed that the contract include a wage reopener for the fourth year of the contract. It also proposed that Respondent put into each existing employee's VEBA account $1,000 for each year of service. At some point, someone on Charging Party's bargaining team said that there would be no signed contract without this "seed money." DuBay disagreed with Charging Party's interpretation of the fact finder's report, stating that he felt the fact finder had recommended that the parties address these issues in negotiations for subsequent contracts. DuBay also said that he had no authority to agree to put money into the VEBA accounts for past service. He told Charging Party that Respondent's representatives would go back to the Board to see what it would authorize the representatives to do. He warned Charging Party that he could not promise anything. DuBay told Barrett that he would report to the Board at its next regular meeting on January 21. The parties agree that DuBay did not explicitly say that the parties were at impasse at this meeting. The January 9 meeting lasted approximately one-half hour.

Sometime shortly after January 9, Respondent's representatives met with the Township Board and presented it with Charging Party's proposals and calculations as to their cost. The Township Board told the bargaining team not to engage in further negotiations, and told Dywasuk and Balch to "implement the contract." On January 24, DuBay called Barrett and told him that the Township would not change its position. Barrett inquired whether he should set up a mediation session. DuBay said he did not think further mediation would be of any value. Nevertheless, Barrett attempted to set up a meeting with a mediator.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

On February 6, DuBay sent Barrett a letter outlining Respondent's position on the status of bargaining. According to DuBay, when Charging Party filed for fact finding, the parties' were at impasse on three issues -- wages, retirement plan, and employee retirement health insurance -- and the fact finder recommended adoption of Respondent's position on all three issues. When the parties met after the fact finder issued his report, according to DuBay, Respondent indicated that its position on these issues should be implemented, but Charging Party "persisted in its position that the Township's position with respect to the retiree health insurance plan was unacceptable." DuBay implied, but did not explicitly state, that the parties were then at impasse. DuBay stated that he was preparing a draft contract consisting of the terms set out in the parties' prior collective bargaining agreement; the modifications previously agreed to by the parties; Respondent's position on wages, including a 2% wage increase retroactive to January 1, 2002; and, effective January 1, 2003, a VEB A plan to which Respondent would contribute $100 per month per employee plus the value of the employee's unused sick days. According to the letter, Respondent intended to implement these changes even if no agreement was reached.

Despite receiving this letter, Barrett called DuBay again to try to arrange a mediation session. On February 14, DuBay sent Barrett another letter. In this letter, DuBay said that the parties had already engaged in unsuccessful mediation and fact finding, that Respondent had made it clear that its positions had not changed, and that Charging Party had made it clear that it would not sign a contract containing Respondent's VEBA proposal. DuBay stated that Respondent believed that the parties' had exhausted the mediation process. DuBay again implied, but did not state, that the parties were at impasse. He told Barrett that Charging Party would be receiving the draft contract in approximately 10 days.

On February 20, Barrett sent Respondent a letter again suggesting mediation, and indicating that a mediator had agreed to meet with them on March 3. The parties did not meet on March 3. On March 12, DuBay phoned Barrett told him that the Board had not authorized him to meet again, and that the Board had decided to implement its last offer. On March 18, Respondent sent Charging Party a draft proposed agreement with the suggestion that it present the agreement to its membership for ratification. In his cover letter, DuBay said, "The Township is not willing to contribute (to the VEBA) any amount above the $100 per month contribution as set forth in the contract draft."

On April 8, Barrett wrote to DuBay pointing out three "errors" in the draft contract. Barrett maintained that the parties had an agreement to change minimum call back pay from three to four hours that was not reflected in the draft contract. Barrett also pointed out that the draft contract appeared to provide that new employees would be eligible for vacation after six months, rather than after completion of a 60-day probationary period as the parties had agreed. In addition, Barrett noted that the draft contract stated that Respondent would make VEBA contributions effective January 1, 2003. Barrett asserted that this was contrary to Respondent's position in fact finding which was, according to Barrett, that all items would be retroactive to the start of the contract term.

DuBay replied on April 21. DuBay pointed to language in the draft contract allowing employees to use vacation time after completion of their probationary period, and offered to change the draft contract to make this clearer. DuBay denied that the parties had agreed to a change in the minimum call back pay, and denied that Respondent had ever proposed to make VEBA contributions retroactive to the beginning of the contract term. DuBay stated that unless Charging Party advised it that Charging Party was prepared to sign the collective bargaining agreement, "the Township plans to implement the contract at the start of the first pay in the month of May 2003."

On May 1, 2003, Respondent implemented the changes in wages and terms and conditions of employment set forth in its draft contract. After this date, new bargaining unit employees were permitted to use vacation time immediately after completion of their 60-day probationary period.

Discussion and Conclusions of Law:

The Commission has defined impasse as the point at which the parties' positions have so solidified that further bargaining would be futile. *Oakland Comm College,* 2001 MERC Lab Op. 272, 277; *Wayne County (Attorney Unit),* 1995 MERC Lab Op. 199,

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

203; *City of Saginaw,* 1982 MERC Lab Op. 727. The determination of whether an impasse exists is made on a case-by-case basis, taking into account the totality of the circumstances and the entire conduct of the parties. *Flint Twp.,* 1974 MERC Lab Op. 152, 156. In determining whether impasse exists, the Commission looks at a number of different factors. These include whether there has been a reasonable term of bargaining, whether the positions of the parties have become fixed, and whether both parties are aware of where the positions have solidified. Oakland Comm. College, supra, at 277.

The fact the parties have reached a good faith impasse does not terminate the bargaining duty, but only suspends it until circumstances change which break the impasse. *Escanaba Public Schools,* 1990 MERC Lab Op. 887, 891; *City of Ishpeming,* 1985 MERC Lab Op. 517, 520-521. *See also* NLRB v. Sharon Hats, Inc., 289 F2d 628 (5th Cir, 1961), *enforcing,* 127 NLRB 947 (1960), holding that a substantial change in the bargaining position of either party serves to break an impasse.

In Taft Broadcasting Co., 163 NLRB 475, 478 (1967), *enf'd sub nom,* Television Artists AFTRA v. NLRB, 395 F2d 622 (DC Cir, 1968), the National Labor Relations Board stated, "After good faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals." As a general proposition, once the parties have reached a good faith impasse, an employer may alter existing wages or other terms of conditions of employment under PERA. Ottawa Co v. Jaklinski, 423 Mich. 1 (1985); Detroit Police Officers Ass'n v. Detroit, 391 Mich. 44, 54-55 (1974). However, in *Wayne Co.,* 1984 MERC Lab Op. 1142 and 1985 MERC Lab Op. 244, *aff'd.,* 152 Mich App (1986), the Commission held that when the union has filed for fact finding, the employer cannot implement changes in the status quo until the fact finder has issued his or her report and the parties have bargained for a reasonable time over the substance of the fact finder's recommendations, even if the parties were at impasse prior to fact finding.

I conclude that the parties here had reached good faith impasse on the terms of their contract by the time Charging Party requested the appointment of a fact finder on May 21, 2002. Although Charging Party argues that five relatively short meetings did not constitute a reasonable term of bargaining, I find that by May 21, 2002 the positions of the parties had solidified on the two issues which Charging Party indicated were of critical importance in reaching a contract -- the change from a defined contribution to a defined benefit pension plan, and the adoption of a health insurance plan covering retirees and their spouses. Respondent's firm position was that it was not willing to agree to a defined benefit pension plan or to pay health insurance premiums for retirees. Charging Party had rejected Respondent's proposal to establish VEBA accounts to allow employees to pay their own health insurance premiums after retirement, and continued to insist on both employer-paid insurance for retirees and the change in the pension plan. Both parties understood each other's positions, and knew that reaching a contract would not be possible without a concession by either party on these two issues.

I conclude, however, that this impasse was broken at the parties' meeting on January 9, 2003. At that meeting, Charging Party indicated that it was dropping its demand for a defined benefit pension plan, and that it would accept a VEBA plan in lieu of employer-paid retiree health insurance. Charging Party did not accept the VEBA proposal Respondent had made prior to fact finding. Instead, Charging Party made a counterproposal to require Respondent to pay $1000 per year of past service into each employee's VEBA account at the time the account was established, in addition to the monthly contribution of $100 that Respondent had proposed. Charging Party also proposed to add a wage re-opener in the final year of the contract. I find that Charging Party's counterproposal represented significant movement on Charging Party's part from its previous position on the two issues that had brought about the impasse -- retiree health care and pension. Because of the instructions it had received from the Township Board before the January 9 meeting, Respondent's representatives could do nothing at that meeting except reject the proposal, and indicate, as they did, that they would present Charging Party's offer to the Township Board. After they did so, on January 21, 2003, the Board instructed them not to meet again, and told Dywasuk to implement its pre-fact finding proposal.

Respondent argues that because Charging Party indicated at the January 9 meeting that it would never agree to Respondent's VEBA proposal, and Respondent clearly rejected Charging Party's proposal to put "seed money" into the VEBA plans, the parties had reached impasse again by the end of the January 9 meeting. I do not agree. First, DuBay told Charging Party at this meeting that he would present its proposal to the Township Board, although he warned it that he could not promise anything.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

At the end of the January 9 meeting, the parties were not at the point where they both knew that further bargaining would be futile, since they were waiting for the Board's response to Charging Party's proposal.

On January 24, DuBay notified Charging Party that the Board would not "change its position," and that it had instructed him not to meet further. Respondent argues that at that point the parties were at impasse. Respondent maintains, first, that Charging Party was "not willing to move from its position" between January 9 and May 21, 2003. I find no evidence that Charging Party's took a fixed position after January 9. First, Charging Party never stated that its January 9 proposal was its final offer. Moreover, Barrett's persistent attempts to set up a meeting with a mediator even after he had been repeatedly told that Respondent would not accept Charging Party's proposal suggested that Charging Party was willing to move from its January 9 position. In order for the parties to be at impasse, the evidence must show that neither party is willing to compromise further. Oakland Comm. College, supra, at 277.

Respondent also asserts that the parties were at impasse because Charging Party was insisting on "seed money" for the VEBA accounts as a condition of contract settlement, and Respondent had already committed as much money to the contract settlement as it was willing to. As Section 15(1) of PERA states, a party's duty to bargain under PERA does not compel it to agree to a proposal or to make a concession. Respondent had no obligation to offer Charging Party more money in the form of "seed money" for the VEBA, or any other benefit. However, DuBay did not tell Barrett on January 9 or 24, or in his letters of February 6 or February 14, that Respondent was rejecting Charging Party's proposal because its costs exceeded Respondent's bottom line. Rather, he merely stated that Respondent was not willing to move from its pre-fact finding VEBA offer. If DuBay had explained to Charging Party that Respondent's position was that it would contribute no more money toward the contract settlement, Charging Party could have countered with a proposal to reduce wages or other benefits to provide more money for the VEBA. As Respondent admits, its proposal on the table in January 2003 included economic improvements in several areas. Whether Charging Party would ultimately have agreed to a contract that reduced other benefits is irrelevant. Since Respondent refused to agree to meet after January 9, or to explain the basis for its rejection of Charging Party's proposal, Charging Party had no reasonable opportunity to either propose or reject such an agreement. Under these circumstances, Charging Party statement on January 9 that it would not agree to a contract without "seed money" is not enough to establish that the parties had reached impasse.

I also find that Respondent did not satisfy its obligation to meet and bargain in good faith over the fact finder's recommendations for reasonable period of time before implementing its offer. The parties met only once after the fact finder made his recommendations. At this meeting, Charging Party made a proposal that represented significant movement from its pre-fact finding position. Respondent's representatives admitted to Charging Party that they did not have authority do anything at this meeting except restate Respondent's previous offer. No actual discussion of Charging Party's new proposal took place at this meeting. Respondent refused to meet again with Charging Party on a face-to-face basis. Neither at the January 9 meeting nor in subsequent correspondence did Respondent explicitly state why it was rejecting Charging Party's new proposal. Although Respondent did not implement its offer until almost five months after the fact finder issued his report, I conclude that no bargaining of any substance took place between the time this report was issued and Respondent's implementation of its last offer.

For the reasons set out above, I find that the parties were not at impasse between January 9 and May 1, 2003, and that Respondent, therefore, violated its duty to bargain by refusing to meet during this period. I also find that Respondent unlawfully implemented changes in terms and conditions of employment on May 1, 2003 because the parties were not at impasse at the time, and because Respondent had not satisfied its obligation to bargain in good faith over the fact finder's recommendations.

Charging Party argues that Respondent violated its duty to bargain in good faith by implementing changes that were inconsistent with Respondent's last offer. [3] In fact, Charging Party requests that the remedy for Respondent's unfair labor practice include an order requiring it to change the minimum callback pay for late-night callbacks to four hours, give new employees the right to use vacation time after the completion of their 60-day probationary period, and make monthly VEBA account contributions retroactive to January 1, 2002. Charging Party argues that because Respondent's package proposal of January 29, 2002 included these items, Respondent could not implement changes, even after impasse, without implementing these parts of this proposal.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Since I have found, as set forth above, that Respondent could not lawfully implement its offer on May 1, 2003, it is not strictly necessary for me to decide this issue. However, I note that I agree with Respondent that the changes it implemented were not inconsistent with its bargaining table position prior to fact finding. I find that the parties' September Agreement set forth what each party was willing to accept, at that time, as the terms of a final settlement. It did not include a proposal by either party to change minimum callback pay. Respondent's VEBA proposal, as set forth in this document, does not mention retroactivity, even though its wage proposal specifically included a retroactive wage increase in the first year of the contract. I conclude that Respondent's final pre-fact finding offer, as set forth in the September Agreement, did not include a proposal to make VEBA contributions retroactive to January 2, 2002. [4]

In sum, I find that on May 21, 2002, when Charging Party filed for fact finding, the parties' positions had solidified on two issues essential to reaching a contract -- retiree health care and a defined benefit versus defined contribution pension plan -- and that the parties had reached a good faith impasse in their contract negotiations. I find, however, that Charging Party broke the impasse when it made a proposal on January 9, 2003 that included significant concessions on these issues. I find that Respondent acted unlawfully in refusing to meet after January 9 to discuss Charging Party's proposal. I conclude, first, that Respondent had a duty to continue to bargain with Charging Party because the parties were not at impasse. I also find that the January 9 meeting did not, in this case, satisfy Respondent's obligation to meet and bargain in good faith with Charging Party over the fact finder's December 6, 2002 recommendations. Finally, I conclude that Respondent violated its duty to bargain in good faith by implementing changes in terms and conditions of employment contained in a new "contract" on May 1, 2003 because the parties were not at impasse on that date. In accord with these findings and conclusions, and the findings of fact set forth above, I recommend that the Commission issue the following order.

Recommended Order

Respondent Orion Township, its officers and agents, are hereby ordered to:

1. Cease and desist from:

a. Refusing to meet and bargain in good faith with Charging Party Teamsters Local 214 over the terms of a new collective bargaining agreement covering employees in Respondent's Department of Public Works.

b. Unilaterally imposing and changing terms and conditions of employment in the absence of an impasse between the parties.

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

a. Upon demand, meet and bargain in good faith with Teamsters Local 214 over the terms of a new collective bargaining agreement covering employees in Respondent's Department of Public Works.

b. Pending satisfaction of its obligation to bargain, restore to employees the terms and conditions of employment in effect prior to May 1, 2003. However, pending satisfaction of its obligation to bargain in good faith over the terms of a new collective bargaining agreement, Respondent may not rescind or reduce any benefit granted to employees as a result of its implementation of a new "contract" on that date.

c. Post copies of the attached notice to employees in conspicuous places on Respondent's premises, including all locations where notices to employees are customarily posted, for a period of 30 consecutive days.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes

1 Under the 1999-2001 contract, unused sick time was forfeited.

2 For reasons discussed below, I find it unnecessary to resolve the dispute between Barrett and Balch regarding the specific terms of Respondent's December 21 offer.

3 The Commission has held that, after impasse, an employer may selectively implement portions of its offer to the union, as long as the changes made are not substantially different from or inconsistent with proposals made by the employer during negotiations. *Escanaba Area Schools,* 1990 MERC Lab Op. 887; *City of Highland Park,* 1993 MERC Lab Op. 71; and *Cass Co. Road Comm.,* 1983 MERC Lab Op. 378.

4 Respondent does not dispute that it offered to allow new hires to use vacation time after their 60-day probationary period, and the evidence indicates that it implemented this change on May 1, 2003.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

2 MPER ¶ 20160, 2 Michigan Pub. Employee Rep. ¶ 20160, 1989 WL 1700175

Michigan Employment Relations Commission

HART PUBLIC SCHOOLS BOARD OF EDUCATION
No. C87 I-204
No. CU87 I-54
November 3, 1989

Related Index Numbers
22.41 Jurisdiction, Exclusive Representation
43.618 Special Subjects, Education, Length of School Day
46.13 Type of Agreement, Tentative Agreement
62.36 Types of Strikes, Unfair Practice
72.17 Interference/Coercion/Restraint, Direct Communication With Employees
72.531 Refusal to Bargain in Good Faith, Indicia of Good/Bad Faith and Surface Bargaining, Evasive Tactics and Delay
72.535 Refusal to Bargain in Good Faith, Indicia of Good/Bad Faith and Surface Bargaining, Reasonableness/Legality/Sufficiency of Proposals
72.537 Refusal to Bargain in Good Faith, Indicia of Good/Bad Faith and Surface Bargaining, Time and Place of Meeting
72.538 Refusal to Bargain in Good Faith, Indicia of Good/Bad Faith and Surface Bargaining, Totality of Conduct
72.55 Refusal to Bargain in Good Faith, Direct Communication With Employees
72.613 Unilateral Change in Term or Condition of Employment, Adequacy of Notice of Change
72.667 Unilateral Change in Term or Condition of Employment, Defenses to Unilateral Change, Other
73.1 Interference With or Restraint of Employees' Rights
73.440 Refusal to Bargain in Good Faith, Indicia of Good/Bad Faith and Surface Bargaining, Totality of Conduct
73.441 Refusal to Bargain in Good Faith, Indicia of Good/Bad Faith and Surface Bargaining, Withdrawal of Proposals
73.58 Other Unfair Practices, Unlawful Strike/Picketing Activity

APPEARANCES:
For the Employer: Merle W. Grover, Consultant, Grover & Associates, Inc.
For the Charging Party: Kathryn A. VanDagens, Attorney, White, Beekman, Przybylowicz, Schneider & Baird, P.C.

Case Summary

Union's unfair practice charge, alleging that school district engaged in surface bargaining by failing to meet at reasonable times, was dismissed where there was no evidence that school district at any time refused to meet with union or was unreasonable in scheduling negotiations either as to dates or length of negotiation sessions.

Full Text

DECISION AND ORDER

On September 25, 1989 Administrative Law Judge Nora Lynch issued her Decision and Recommended Order in the above entitled matter, finding that the Respondent in Case No. C87 I-204, Hart Public Schools, has not engaged in and was not engaging in certain unfair labor practices, and recommending that the charge and complaint in the above entitled matter be dismissed as being without merit.

The Administrative Law Judge also found that Respondent in Case No. CU87 I-54, the Hart Education Association, has engaged in and was engaging in certain unfair labor practices. She recommended that this Respondent cease and desist therefrom and take certain affirmative action as set forth in the Decision and Recommended Order of the Administrative Law Judge attached hereto.

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

The Decision and Recommended Order of the Administrative Law Judge was issued and served upon the interested parties in accordance with Section 16 of Act 336 of the Public Acts of 1947, as amended. The parties have had an opportunity to review said Decision and Recommended Order for a period of at least twenty days from the date of service thereof on the parties, and no exceptions have been filed by any of the parties to the proceedings.

ORDER

Pursuant to Section 16 of the Act, the Commission hereby adopts as its Order the Order recommended by the Administrative Law Judge. The charges and complaint in Case No. C87 I-204 are dismissed.

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Section 10 and 16 of the Public Employment Relations Act (PERA) 1947 PA 336, as amended by 1965 PA 379 and 1973 PA 25, MCLA 423.210, MSA 17.455(10), this matter came on for hearing at Grand Rapids, Michigan on December 10, 1987 and February 18, 1988, before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission. The proceedings were based upon unfair labor practice charges filed in Case No. C87 I-204 on September 1, 1987 by the Hart Education Association and in Case No. CU87 I-54 on September 30, 1987 by the Hart Public Schools, both alleging violations of Section 10 of PERA. Based upon the entire record in this proceeding, including the pleadings, transcript of the hearing, exhibits and brief filed by the parties on or before June 7, 1988, the undersigned makes the following findings of fact and conclusions of law and issues the following recommended order pursuant to Section 16(b) of PERA:

The Unfair Labor Practice Charges:

The charge filed in Case No. C87 I-204 alleges that the Employer has violated PERA by the following conduct:

On or about August 10, 1987, Respondent unilaterally extended the working hours and lengthened the time period of all secondary teaching class periods. This action was taken unilaterally by Respondent, without providing notice to or an opportunity for the Association to bargain over this action....

On or about August 10, 1987, Respondent unilaterally shortened Association members' duty free lunch period. This action was taken unilaterally by Respondent, without providing notice to or an opportunity for the Association to bargain over this action....

Respondent has undermined the collective bargaining process and acted in derogation of its duty to bargain in good faith by engaging in regressive bargaining by initially proposing a calendar calling for certain one-half days of teacher instruction and then later repudiating that proposal and submitting a new proposal doubling the amount of instruction time required of Association members for those days in question thereby frustrating agreement on that issue.

Respondent has undermined the collective bargaining process and acted in derogation of its duty to bargain in good faith by directly distributing Respondent's bargaining material to Association members and debating the merits of Respondent's position without prior notice to and consent of the Association.

Respondent has undermined the collective bargaining process and acted in derogation of its duty to bargain in good faith in that it has willfully failed to meet at reasonable times and to confer in good faith with respect to wages, hours, and other terms and conditions of employment....

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Respondent has discriminated in regard to hire, tenure, and other terms and conditions of employment and has otherwise interfered with, restrained and coerced employees in the exercise of their rights guaranteed by PERA in that it refused to permit a teacher to resign without penalty from the school district in order to accept a position in another school district, although permission is normally and routinely given, in order to penalize and discourage membership in the Association. [1]

Respondent and its representatives have, through their total course of conduct, including but not limited to those actions set forth above, engaged in per se violations of PERA, is engaging in "surface bargaining," and is otherwise acting in bad faith and in derogation of its duty to bargain in good faith....

The Employer's charge filed in Case No. CU87 I-54 assert that the following conduct of the Union is in violation of PERA:

Respondent, through its agent and representative, James Cunningham, on or about September 16, 1987, in violation of the Michigan Employment Relations Act, has evidenced an intent to refuse to bargain in good faith by attempting to withdraw previously agreed upon and settled matters that were being negotiated between the parties. Specifically, Respondent is attempting to withdraw an agreement reached on August 24 and acknowledged on August 25, 1987, wherein the Respondent had agreed that the changes in the length of class periods could be extended, in some cases, from fifty-two to fifty-five minutes.

The Respondent Association, through its officers and agents, to wit: James Cunningham, Alice Cunningham, Jim Newkirk, James Quinn, Christine Okoren and Phillip Kenyon did violate Section 2 of PERA by unlawfully engaging in prohibitive concerted activities by withholding services and aided, caused and encouraged other members of the Association to withhold services from the Hart Public Schools on August 31, 1987, in violation of Michigan Law (PERA).

The above individuals picketed front of said school buildings, thereby impeding ingress and egress for students and teachers who were exercising their lawful rights to attend and work in the public schools in Hart, Michigan, as provided by Michigan law.

Respondent Association, through its agents and representatives, has attempted to coerce and interfere and intimidate bargaining unit members who elected not to violate the Michigan law and continue to work during the illegal work stoppage by posting picture of said bargaining unit members boarding or exiting from school buses on the day of the teachers' illegal work stoppage in the teacher lounge.

Background:

The Hart Education Association (Association) represents a bargaining unit consisting of all teachers employed by the District. The Association and the Employer were parties to a collective bargaining agreement with an expiration date of August 31, 1987. Article XVII of that contract provided that the parties would begin negotiations for a new contract covering those areas allowable under the law on or before June 1.

The parties began negotiations on May 26, 1987. The chief spokesman for the Association was president James Cunningham. Merle Grover, labor relations consultant, was the spokesman for the Employer, along with elementary school principal Jane Thocher.

The parties met on June 23, July 20, July 27, July 28, August 17, August 24 and August 30. On August 31, 1987, the first day of school for students, the majority of members of the Association did not report for work. On that date a number of teachers picketed in front of the school building. Pictures were taken of those substitute teachers who reported to work on that day. These pictures were later posted on the bulletin board in the teachers' lounge at the Hart High School under the heading "SCABS." Additional facts are discussed below under the relevant subject headings.

Case No. C87 I-204

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Failure to Meet at Reasonable Times/Surface Bargaining:

On April 13, 1987 Union president Cunningham sent a letter to the president of the Hart Board of Education requesting that the Employer commence bargaining with the Association for a new agreement. In that letter Cunningham specified certain times that the Association representatives would not be available for bargaining sessions. These dates included June 12-20, June 29-July 6, and possibly August 3-7. Subsequently Grover also indicated certain dates when he was unavailable. The parties first met for bargaining on May 26, 1987, and thereafter on at least seven occasions during the summer, including one mediation session.

Before discussing the negotiations further, it must be noted that the Union relies primarily on the testimony of its only witness, the Union president, to support its claim of surface bargaining. In the opinion of the undersigned, it is impossible to give any significant weight to the President's testimony due to his total failure to recall the specifics of the various bargaining sessions, including what topics were discussed, the position of the parties, when the meetings were scheduled, how long they lasted, and whether and when agreement was reached on various topics. The president's general recollection of events is so sketchy as to be of little or no value and certainly insufficient evidence to substantiate the charge of surface bargaining. Other record evidence is discussed below.

On May 26, 1987, the Union presented its contract proposal to the Employer. This proposal consisted of a document which indicated old contract language on the left side of the page and the Union's suggested changes on the right. At the next bargaining session of June 23, the Employer responded. The Employer followed its long standing practice of accepting and responding to Association proposals rather than presenting its own proposals. This response was usually verbal rather than in writing.

The parties participated in mediation on August 24, 1987. During the course of mediation the Association offered two package proposals, however no agreement was reached. The next day the parties met and the Board presented a document entitled "Negotiation Status as of 8/25/87" which the Union reviewed. The Union president made notations on this document indicating that the Union agreed by writing "OK," or that the Union disagreed by writing "No" in the margin. This document indicates that the parties agreed on a number of topics and were close to agreement on several others.

In the opinion of the undersigned, the foregoing evidences nothing more than the usual give and take of collective bargaining. I find the Union's charge that the Employer intended to delay and obfuscate issues and engage in dilatory tactics to prevent a final collective bargaining agreement totally unsupported by the record. No evidence was presented that the Employer at any time refused to meet with the Association or was unreasonable in scheduling negotiations either as to dates or length of negotiation sessions.

Charging Party has failed to meet its burden of proof that the Employer has willfully failed to meet at reasonable times or has engaged in surface bargaining and it is therefore recommended that these allegations be dismissed.

Class Schedule:

On July 28, 1987, the Employer proposed that the length of the class period for the middle school and high school be changed from 50 minutes to "no more than 55 minutes." The reason for the proposed change was to comply with the Michigan School Code which required 990 hours rather than the existing 960. The last contract provided for a maximum of 315 minutes teaching per day. In order to comply with that provision, the Employer proposed to add two minutes to the first five class hours, and five minutes to the last hour.

At a mediation session held on August 24, the Union made two proposals regarding class length, each as part of a package proposal. The Association proposal of 11:00 a.m. on that date reflected the following language: "will accept increase to 52 and 55 minutes (sec)." The Association proposal of 8:00 p.m. the same date states: "teaching hours-no more than 55 minutes in secondary." The document entitled "Negotiation Status as of 8/25/87" referred to above indicates that the Union president had indicated "OK" next to the following language:

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Page 11---Teaching hours

Board: Middle School and High School teachers will teach six classes not to exceed 55 minutes each

HEA: Agrees on new language 8/24

A memo was distributed to teachers on August 26 or 27 indicating a daily schedule of five 52-minute periods and one 55-minute period to begin Tuesday, September 1, 1987. According to the Union president, the Union immediately notified the Board that a mistake had been made in marking "OK" on the August 25 document although he did not remember the exact date when this occurred. According to Grover, the Association did not communicate this to the Employer until after the teacher strike of August 31. Grover testified that the Employer was informed by the Union president that it had improperly interpreted the Association's position at a bargaining session subsequent to the strike.

According to the Union president, he first became aware that a new schedule was to be implemented by reading an article in the local newspaper around August 10 or 11th. Cunningham testified that at that time he asked the superintendent or the principal what the new schedule would be and was told that there would be 52-minute and 55-minute class periods. The school newsletter published sometime in August also referred to a new class schedule. A grievance was filed by the Union regarding the revised class schedule sometime in August. [2]

Charging Party asserts that the Employer made a unilateral change in class schedule without the agreement of the Union and prior to discussing the matter at the bargaining table. This allegation is unsupported by the record. The record reveals that the issue of a class schedule change was discussed several times by the parties and, as evidenced by the Union's proposal of August 24 and the negotiation summary of August 25, tentatively agreed to prior to its implementation. Although the Union apparently relies on articles in a local newspaper and in the school newsletter to support its claim of prior implementation, no evidence was introduced to substantiate when these articles appeared, their content, or their source.

I conclude that the Employer announced the revised schedule late in August when the school year was imminent and action had to be taken to bring the District into compliance with the School Code. Under these circumstances, I find that the Employer had a right to rely on the Union's representation that it agreed to the change in schedule, even though it was part of a package proposal. It is therefore recommended that this allegation be dismissed.

Lunch Period:

The 1984-87 contract provides at Article 5, Section B: "All teachers shall have a duty free uninterrupted lunch period of at least thirty (30) minutes." In negotiations for the new agreement, neither side proposed any change to this language. In 1986 the published daily schedule was as follows:

1986 DAILY-SCHEDULE:

9:00---9:50 1st Hour

9:45---10:44 2nd Hour

10:48---11:38 3rd Hour

11:38---12:08 Lunch

12:12---1:02 4th Hour

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

1:06---1:56 5th Hour

2:00---2:50 6th Hour

ALL HIGH SCHOOL STUDENTS AND TEACHERS WILL HAVE LUNCH AT 11:38

The following schedule was published for 1987:

1987 DAILY-SCHEDULE:

First Lunch Schedule

8:50

8:55---9:47 1st Hour

9:51---10:43 2nd Hour

10:47---11:39 3rd Hour

11:39---12:05 Lunch

12:09---1:01 4th Hour

1:05---1:57 5th Hour

2:01---2:56 6th Hour

Second Lunch Schedule

8:50

8:55---9:47 1st Hour

9:51---10:43 2nd Hour

10:47---11:39 3rd Hour

11:43---12:35 4th Hour

12:35---1:01 Lunch

1:05---1:57 5th Hour

2:01---2:56 6th Hour

Principal Thocher testified that the 30 minutes is measured from when the children leave the teacher's care to when they return, or from one bell to the next bell. According to Thocher, no teacher in the Hart Public Schools was allotted less than 30 minutes

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

for lunch in the 1987 school year, although in the high school teachers formerly had a few minutes longer than the scheduled 30 minutes and this practice was eliminated in 1987.

The 1987 schedule above indicates that the time labeled "lunch" is 26 minutes. However, because the next hour of instruction does not begin until four minutes later, there is a total of 30 minutes break from the end of one class to the start of the next. Given no evidence to the contrary, I can only conclude that this is a distinction without a difference and no actual change in the teacher's lunch time was effected nor did the teachers suffer any loss remediable by the Commission. It is therefore recommended that this allegation be dismissed.

Regressive Bargaining:

At a bargaining session in June, the Employer made a proposal regarding the school calendar which contained certain half-days of instruction. These included August 31, September 4, October 7, January 22, April 1, and June 6. In July, the Employer proposed a school calendar which eliminated some of the proposed half days of instruction, specifically August 31, October 7 and June 6. The negotiators for the Employer explained that the new superintendent, who had taken over July 1, did not favor half-days. There is no indication that this issue remained in dispute in late August.

The Union claims that the Employer engaged in regressive bargaining in violation of PERA when it proposed a school calendar which increased the number of full work days from the prior calendar proposal. According to the Union, when it is placed in a position of watching the Employer offer less throughout the course of bargaining, rather than remain static or offer more, attempts to reach an agreement are necessarily frustrated. The Commission has specifically rejected such an argument, finding that a claim of regressive bargaining must be considered in the context of the employer's total course of conduct in bargaining. In *Kalamazoo Public Schools,* 1977 MERC Lab p 771, the Commission stated as follows:

Charging Party and employee organizations generally should disabuse themselves of the notion that an employer's offer on compensation, hours, or working conditions that is novel or even on first glimpse regressive is per se a refusal to bargain in good faith. See e.g., Federation of Teachers v. Lake Michigan College, 60 Mich App 747, 90 LRRM 2100(1975), *aff'd* 1974 MERC Lab Op 219.

See also *Wolverine Community Schools,* 1983 MERC Lab Op 655; *Manistee Intermediate School District,* 1982 MERC Lab Op 44.

Since the Union has failed to demonstrate that the Employer's overall conduct evidences a failure to bargain in good faith, it is recommended that this allegation be dismissed.

Direct Bargaining with Employees:

A meeting of the Hart Public Schools Board of Education was held on August 17, 1987 which was attended by teachers as well as members of the public. At the meeting the Union president read the following letter:

It is with regret that the Hart Education Association must inform you, as representatives of the Hart Board of Education, that the Association members have unanimously empowered their bargaining team with the authority to call a school-wide job action. This action has only been undertaken by the Association after serious and lengthy discussion and debate.

The Association's bargaining team has been faced with a series of unfair labor practices originating from your spokesman at the table. This can be shown by such actions as:

(1) Regressive bargaining,

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

(2) Imposing additional work hours without a bargaining position,

(3) Failing to bargain in a sincere and fair manner.

The Association does express its desire to continue to meet and bargain with your representatives in an attempt to reach a fair and equitable contract for both parties. However, if the actions of the Board's representatives continue, then the Association's bargaining team will have no other alternative than to impose the job action.

Hopefully this action will never become necessary, for we believe that you and the Board are willing to bargain fairly in the future. We further believe that any job action by the Association members can not be in the best interest of you, the Board and the school district. But, if the recent bargaining situation continues as it has, then the Association must find that it has no other recourse to follow.

Following this presentation, Grover distributed a packet of information regarding the status of contract negotiations to all present at the meeting. This document indicated the table position of each side. According to the Union president, Grover went on to discuss the merits of the Employer's position and the demerits of the Association's position. According to Grover, he made a statement regarding the Board's position on the wage proposal but no discussion took place.

The Union claims that by distributing information directly to the Association's membership the Employer engaged in direct bargaining with the employees in violation of PERA. As far as this record reveals, after the Union accused the Board of failing to bargain in a sincere manner, Grover distributed a document to inform those present at the meeting of the status of negotiations and the position of both sides. In light of the Union president's generally poor recollection of events, I am unable to credit his testimony that discussion regarding the merits of the parties' positions took place. Rather, I credit Grover's testimony that the Employer simply notified those present of the status of negotiations. Public statements regarding the status of negotiations do not constitute a violation of an employer's bargaining duty. *Garden City Public Schools,* 1977 MERC Lab Op 600, 608. It is therefore recommended that this allegation be dismissed.

Case No. CU87 I-54:

Attempt to Withdraw Agreement:

As discussed above, the Union president indicated agreement on the length of class periods in the Union proposal of August 24 and in the summary of negotiations dated August 25, 1987. The Union president later informed the Board that this agreement was made in error. In his testimony, Grover acknowledged that the Union's proposal on class schedule was part of a package proposal.

Whether or not the class schedule was agreed to in error, it is clear that this item was part of an overall package proposal which was not accepted by the Board. Since no overall tentative agreement had been reached, I find that the Union's change of position or withdrawal of its agreement does not amount to an unfair labor practice. This does not negate the above finding that the Employer had the right to rely on the Union's representation of agreement for the purposes of implementing a class schedule necessary to begin the school year.

Withholding of Services:

As indicated above, the parties had a lengthy session with a mediator on August 24, 1987. The Association offered package proposals at that meeting but no contract was reached. The parties also met the following day, August 25, and summarized the status of negotiations. The teachers reported for work on Wednesday, August 26, and Thursday, August 27; these were teacher days only, no students were in attendance. Negotiation sessions were held on Thursday, August 27 and Sunday, August 30. On

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

August 30, the parties exchanged wage proposals, with the Association finding the Board's wage proposal unacceptable. On Monday, August 31, the first day students were scheduled for classes, a majority of the teachers failed to report.

The Commission has found that although a public sector strike does not constitute a per se refusal to bargain, such strike activity can be evidentiary of bad faith bargaining. *Warren Education Association,* 1977 MERC Lab Op 818; *Lamphere Federation of Teachers,* 1978 MERC Lab Op 194. The Commission has further found that a strike occurring prior to the utilization of the full scope of statutory impasse resolution mechanisms does constitute bad faith bargaining. *Wayne County MEA/NEA,* 1982 MERC Lab Op 1556; *Lake Orion EA,* 1984 MERC Lab Op 770; *AFSCME, Council 25,* 1984 MERC Lab Op 871. In the instant case, Union members withheld their services after only one mediation session, and without any attempt to utilize statutory fact finding procedures. In line with the above cases, I find that a strike under these circumstances constitutes bad faith bargaining. The record does not support the Union's contention that the purpose of the strike was "to publicize the unfair labor practices of the Employer, not to induce, influence, or coerce a change in the conditions or compensation, or the rights, privileges, or obligations of employment, as prohibited by PERA." It is therefore recommended that the Commission issue the order set forth below.

Picketing:

On August 31, the day of the strike, Association members picketed in front of the high school, middle school, and elementary school. The picketing took place approximately 50 to 200 yards from the entrance of the buildings. There is no evidence that Association members blocked either ingress or egress of students and teachers attempting to attend school, or that the picketing was other than peaceful.

There is no provision in PERA prohibiting picketing.[3] This allegation does not state a cause of action under PERA and it is therefore recommended that it be dismissed.

Coercion and Intimidation of Bargaining Unit Members:

The Union president took photographs of individuals boarding or exiting from Hart Public School buses on the morning of August 31, 1987. Many of these pictures subsequently appeared on a bulletin board in the teachers' lounge at Hart Public High School along with the word "SCABS." Some of these teachers were also identified by name.

The Employer contends that the pictures were posted in the teachers' lounge at the high school solely for the purpose of intimidating those employees who reported for work on August 31, 1987. The Employer maintains that conduct of this nature goes to the very core of PERA in that it intimidates and coerces employees who elect to provide services as required by law when other employees are engaged in an illegal strike.

There is no evidence directly linking the Association with the placement of pictures on the bulletin board. However, even if this link were to be established, in the opinion of the undersigned this conduct would not constitute an unfair labor practice. Section 10(3)(a)(i), prohibiting a labor organization from restraining or coercing public employees in the exercise of the rights guaranteed in Section 9, has been found applicable to situations involving actual or threatened economic reprisals or physical violence by the Union. *Detroit Association of Educational Office Employees,* 1980 MERC Lab Op 4. I find that the Union's attempt to embarrass or insult teachers who did not participate in the illegal strike by publicly labeling them "scabs" does not constitute restraint or coercion within the meaning of the Act. See *NLRB v. Driver's Local 639, 362 US 274, 45 LRRM 2975(1960)* . It is therefore recommended that this allegation be dismissed.

Based upon the above finding of fact and conclusions of law, it is recommended that the Commission issue the following orders.

Case No. C87 I-204:

IT IS HEREBY ORDERED that the charges in this matter be dismissed in their entirety.

© 2023 Thomson Reuters. Claim to original U.S. Government Works.

Case No. CU87 I-54:

IT IS HEREBY ORDERED that the Hart Education Association, its officers and agents, cease and desist from refusing to bargain in good faith with the Hart Public Schools by engaging in strike activity without first exhausting the dispute resolution mechanisms of the Commission.

Footnotes

1 Since Charging Party failed to introduce evidence to support this allegation or to discuss it in the post hearing brief, it will not be considered and is regarded as having been withdrawn.

2 None of these documents were introduced as exhibits.

3 Although the Labor Mediation Act does contain provisions regarding picketing, these are not incorporated into PERA. See *Greater Detroit Building Trades et al,* 1977 MERC Lab Op 743.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

TRUE COPY
RECEIVED
JUL 23 1984
Mich. State Law Library

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

LAKE ORION EDUCATION ASSOCIATION,
MEA/NEA,
Respondent

-and-

Case No. CU82 I-50

LAKE ORION COMMUNITY SCHOOL
DISTRICT,
Charging Party

APPEARANCES:

For the Respondent — Harvey Wax, Esq., Levin, Levin, Garvett & Dill

For the Charging Party — William G. Albertson, Esq., Clark, Hardy, Lewis, Pollard & Page, P.C.

DECISION AND ORDER

On March 7, 1984 Administrative Law Judge Nora Lynch issued her Decision and Recommended Order in the above entitled matter, finding that the Respondent-Lake Orion Education Association did engage in certain unfair labor practices, and recommended that it cease and desist therefrom.

The Decision and Recommended Order of the Administrative Law Judge was issued and served upon the interested parties in accordance with Section 16 of Act 336 of the Public Acts of 1947, as amended. The parties have had an opportunity to review said Decision and Recommended Order for a period of at least twenty days from the date of service thereof on the parties, and no exceptions have been filed by any of the parties to the proceedings.

ORDER

Pursuant to the Section 16 of the Act, the Commission hereby adopts as its Order the Order recommended by the Administrative Law Judge.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

William M. Ellmann, Commission Chairman

Morris Milmet, Commission Member

David S. Tanzman, Commission Member

Dated: JUL 17 1984

This document paid for with State I

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter Of:

LAKE ORION EDUCATION ASSOCIATION, MEA/NEA,
Respondent

- and -

LAKE ORION COMMUNITY SCHOOL DISTRICT,
Charging Party

TRUE COPY

Case No. CU82 I-50

APPEARANCES:

For the Respondent — Harvey Wax, Esq., Levin, Levin, Garvett & Dill

For the Charging Party — William G. Albertson, Esq., Clark. Hardy, Lewis, Pollard & Page P.C.

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Section 10 and 16 of the Public Employment Relations Act, 1947 PA 336, as amended by 1965 PA 379 and 1973 PA 25, MCLA 423.210, MSA 17.455(10), hereafter referred to as PERA or the Act, this matter came on for hearing at Detroit, Michigan before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission, hereafter referred to as the Commission. The proceedings were based upon unfair labor practice charges filed by the Lake Orion Community School District, hereafter referred to as Charging Party or the Employer, on September 3, 1982 wherein it was alleged that the Lake Orion Education Association, MEA/NEA, hereafter referred to as the Union or Respondent, had violated Section 10 of PERA. Based upon the entire record in this proceeding including the pleadings, transcript of the hearing, exhibits and briefs filed by the parties, the undersigned makes the following findings of fact and conclusions of law and issues the following recommended order pursuant to Section 16(b) of PERA:

The Unfair Labor Practice Charge:

In the charge filed on September 3, 1982 the Employer alleges that the Union has breached its duty to bargain in good faith in the following respect:

Respondent and its members initiated and

> participated in a strike within the meaning of Section 1 and as prohibited by Section 2 of the PERA at a time the parties were attempting to negotiate a collective bargaining agreement, without first requesting, initiating or otherwise participating in the compulsory statutory impasse resolution procedures of mediation and fact finding. Said strike commenced September 3, 1982 and is ongoing.

At hearing the parties agreed to the following stipulation:

> Respondent and its members initiated and participated in a work stoppage commencing Friday, September 3, 1982 and continuing through Friday, September 10, 1982.

Other relevant facts are set forth below.

Facts:

The Lake Orion Education Association MEA/NEA represents a bargaining unit of all certified personnel employed by Lake Orion School District. Bargaining for a successor agreement to the 1979-1982 contract between the parties began in April of 1982. The chief negotiator for the School Board was Gary Collins. The Union's chief spokesman was the Uniserve Representative Ed Meissner. At the first meeting held on April 20, Collins stated that the Board wished to have a collective bargaining agreement before an upcoming June millage vote. Union representatives indicated that they were not opposed to the concept of trying to wrap up the contract before June. The parties met on May 11, 26, and 27. By mutual agreement, the parties adjourned for the months of June and July and resumed bargaining on August 5.

During the meeting which took place on August 5 the parties tentatively agreed to a 1982/83 school calendar. The parties continued to negotiate on August 9, 13, 16, 20, 23, 25, and 28. On August 28 both parties identified what they felt were priority items. The Union's priorities included provisions regarding salary improvement, health insurance, class size and seniority. The Employer identified its priorities in the areas of management rights, the grievance procedure, and a wage freeze. Prior to the meeting of August 28 the parties had discussed extending the contract which was due to expire August 31. The Employer offered to extend the contract under the condition there

would be no annual increments; in the alternative the Union was given a copy of work rules that would be implemented if there was no extension of the contract. The work rules continued much of the contract but deleted provisions for arbitration and eliminated incremental steps. At the meeting on August 28 the Union representatives objected to the lack of increments but stated that they would discuss the matter with the membership. After the membership meeting on August 31, the Union reported back that they would not accept the contract extension without increments and acknowledged that as of September 1 they were working under the work rules.

The next meeting took place on Wednesday, September 1. At that meeting each party withdrew several items, but no progress was made in the areas that had been identified as priority. Collins stated that as the parties were at a stalemate, he intended to request the services of a state mediator at their next meeting. Meissner raised no objection but stated at hearing that the parties were not at a point where mediation was necessary. The Union representatives indicated that they wished to meet over the upcoming Labor Day weekend, however Collins had another commitment. The Union agreed to the Employer's next proposed meeting date of September 7.

Pursuant to the school calendar agreed upon by the parties on August 5, the teachers reported for work on August 26 and 27, teacher preparation days. The teachers also reported on Monday, August 30, the first day of classes, as well as August 31, September 1, and September 2.

On September 2 at 4:00 p.m., a Union membership meeting was held. At that meeting a vote was taken on whether or not to withhold services. Prior to the vote a lengthy discussion took place regarding the progress in negotiations. Three major concerns were expressed: 1) the regressive language being proposed by the Board; 2) the lack of negotiations over the Labor Day weekend; and 3) the conduct of the Board with respect to arbitration awards

issued under the previous agreement.[1/] At the close of the meeting the members voted to withhold services.

No notice was given to the Employer prior to the work stoppage which began on Friday, September 3. On that day Collins called Meissner, and requested a meeting over the weekend. Collins then contacted the mediator and the parties agreed to meet Sunday, September 5. Mediation sessions were held on September 5 from 1:30 to 4:30 p.m., and on September 7 from 7:00 to 12:00 p.m. While bargaining was ongoing the teachers picketed; some of the picket signs read "No Contract - No Work" and "Negotiate, don't Litigate."

The evening of September 8, Collins received a phone call from the Superintendent who told Collins that at a Board meeting that night the Union said they were ready, willing, and able to bargain the next day. Collins indicated to the Superintendent that he would be available and reported to the school district the next day, notifying the teachers he was ready for bargaining. Meissner, however, was bargaining at another school district and indicated he was not available on such short notice. Meissner spoke to Collins by telephone and both agreed that the frequency of meetings had never been an issue during bargaining. They agreed to meet later in the day and issue a joint statement to indicate that the frequency of bargaining sessions was not an issue in negotiations.

The meeting on September 9 began at approximately 7:00 p.m. At that time Collins proposed the following statement:

> The Lake Orion School District and the Lake Orion Education Association hereby agree that the number of meetings, the frequency of meetings and the availability of the negotiating team has neither been an issue in negotiations or an impediment to the settling of a contract.

[1/] One arbitration award concerned administrators' seniority in the teachers' bargaining unit; the other involved a mid-year layoff. The issue of administrative seniority was appealed to Circuit Court and was also the subject of an unfair labor practice charge filed on May 6, 1982. The Employer's conduct in adopting a seniority policy in conflict with the contract was found to be an unfair labor practice and remedied by the Commission. Lake Orion School District, 1983 MERC Lab Op 172.

Meissner offered counter proposals because he did not like the language of this proposal. Finally, after caucusing with his bargaining team, Meissner initialed the proposal. According to Meissner, his team felt that he should initial the statement so that bargaining could proceed, however he could repudiate it after the night was over if necessary. Later that evening at approximately 12:00, the Union for the first time proposed a back-to-work agreement. The parties discussed the proposal for some time. The Employer indicated that it wished to consider the proposal further and suggested that they adjourn until the next evening.

On Friday, September 10, at approximately 6:15 p.m. the parties initialed the following document:

> Extension of Contract and Proposal to Resolve the Outstanding Issues
>
> 1. The Lake Orion School District and the Lake Orion Education Association agree to extend the entire 1979-1982 contract until a successor agreement is reached.
>
> 2. Further, the parties acknowledge that each teacher shall be paid at their 1981-82 rate during the period of this extension of the 1979-1982 agreement. It is understood that the salary schedule remains a negotiable item.
>
> 3. The parties will continue to negotiate in good faith the outstanding issues until October 15, 1982. As of October 15, 1982 the unresolved issues shall be submitted to fact finding through the procedures of the Michigan Employment Relations Commission by a joint submission.
>
> 4. It is further agreed that the parties will negotiate for a minimum of 10 hours per week, with dates and times to be mutually agreed upon, commencing the week of September 12 and ending as of the joint submission to fact finding should that be necessary.
>
> 5. The Board agrees to reinstitute all fringe benefits and to pay any back premiums for said fringe benefits.
>
> 6. Finally, it is understood that the members of the Lake Orion Education Association shall report to work on September 13, 1982 and shall provide service on a continuous uninterrupted basis. The Board shall take no disciplinary actions against any teacher as a result of the recent work stoppage which occurred from September 3, 1982 to September 10, 1982.

The teachers returned to work on Monday, September 13 and the parties continued to negotiate. On October 15, 1982 the parties

made a joint request for fact finding. On November 1, 1982 the parties were notified by the Commission that they should undertake further efforts to reduce the number of unresolved issues through negotiations and mediation before a fact finder would be appointed.

Discussion and Conclusions:

As indicated above, the Union does not deny that there was a work stoppage for the period beginning September 3 through September 10, 1982. However, the Union argues that this work stoppage was not a "strike" within the meaning of Sections 1 and 2 of PERA. Section 1(a) of PERA reads as follows:

> 'Strike' means the concerted failure to report for duty, the willfull absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment, for the purpose of inducing, influencing, or coercing a change in the conditions, or compensation, or the rights, privileges, or obligations of employment.

The Union asserts that the work stoppage was not undertaken for the purpose of inducing a change in working conditions, but rather was a protest against the Board's lawlessness and bad faith. The Union points to the following examples of the Employer's unlawful conduct which motivated the work stoppage: 1) the regressive and obdurate posture of the Board in negotiations; 2) the Board's unilaterally imposed work rules and its contractual and statutory violations during the previous school year; and 3) the Board's refusal to negotiate over the Labor Day Weekend. For reasons discussed below, I find that the Board's conduct in these three areas was not indicative of bad faith.

In terms of the Board's posture in bargaining, the fact that an employer does not propose improvements in wages or other working conditions does not in itself establish an unfair labor practice. Such a position may simply indicate that the employer is engaged in hard bargaining. See Saginaw County Board of Health, 1976 MERC Lab Op 183, Lake Michigan Community College, 1974 MERC Lab Op 219, aff'd 60 Mich App 747, 90 LRRM 2100 (1975). In the instant case, both sides found it difficult to make concessions in priority areas, yet both continued to negotiate. There is

nothing in the record to indicate that the Board totally refused to modify its position, or had a take-it-or-leave it attitude which would indicate bad faith bargaining.

The Union's challenge to the Board's imposition of work rules is also without a legal basis. Once a contract has expired, an employer has the right to establish interim work rules which need not entirely duplicate the former collective bargaining agreement. The Commission has found that an arbitration clause is the type of provision which may be discontinued pending negotiation of a new agreement. Crestwood School District, 1975 MERC Lab Op 716, Fowlerville Public Schools, 1977 MERC Lab Op 392. In regard to the Union's objections regarding the Employer's appeal of the arbitrator's award, the Commission has stated that it will not preclude parties from access to any legal forum under threat of finding an unfair labor practice. City of Highland Park, 1982 MERC Lab Op 75. City of Saginaw, 1982 MERC Lab Op 60.

Finally, the Union points to the "callous nonchalance of the school district's negotiators concerning the Association's desire to meet over the Labor Day weekend" as illustrative of the Board's bad faith. The record reveals that the parties always accomodated each other in terms of meeting dates. The chief negotiators agreed informally as well as formally in a signed document that the number of meetings and the availability of the negotiating team was not an impediment to settling the contract. Although the Union expressed its desire to meet over the Labor Day weekend, there is no record evidence that the Union indicated to the Employer that such a meeting was crucial. Thus the Employer's action scheduling a later date was not unreasonable considering the established practice of the parties.

In summary, I find that the record does not support the Union's claim that the Employer's conduct in the three areas discussed above was illegal or indicative of bad faith. On the contrary, by specifying that these were the reasons behind the

work stoppage, the Union is admitting that it engaged in a strike within the meaning of Section 1 of PERA. It is clear that the Union members were seeking to make the Board change its position on wages and other proposals. In particular, the fact that the Union was objecting to the interim work rules brings this case squarely within the reasoning of the Michigan Court of Appeals in Warren Education Association v. Adams, 57 Mich App 496, 88 LRRM 3251 (1975). In Warren it was admitted by the Union that the purpose of its strike was to seek reinstatement of the provisions of the previous expired contract which had been deleted or modified by interim operating regulations. The Court of Appeals reasoned as follows:

> Plaintiff Association argues here, as they did below, that the work stoppage by the teachers was not a 'strike' within the meaning of the act, since it was not for the purpose of coercing 'a change in the conditions' but rather to seek a return to the conditions as they existed under the expired contract. As appealing as the argument may be, the error in the logic of the argument is patent. Since the prior contract expired by its own terms on August 15, 1973, the status quo is not the situation as it existed under the expired contract, but rather the situation in which no contract exists and the interim operating regulations do exist. Since the teachers were seeking a change from the situation as it existed under the interim operating regulations they were seeking a 'change in the conditions' within the meaning of the ...statute. [Emphasis added]

There can be no doubt that the withholding of services in the instant case was for the same purpose as that in Warren. The Union's chief negotiator indicated that the teachers did not intend to return to work unless there was a tentative agreement or extension of the old contract. This concern is reflected in the back-to-work proposal; the first item in that document required an agreement to extend the entire 1979-82 contract until a successor agreement was reached. Picket signs reading "No Contract - No Work" are a further indication of the teachers' intent.

Having found that the Union engaged in a strike within the meaning of Section 1 and 2 of PERA, the only remaining question is whether the strike under the particular circumstances revealed by this record constitutes an unfair labor practice. The

Commission has found that a strike, while not an unfair labor practice per se, may constitute evidence of bad faith bargaining. Warren Education Association, 1977 MERC Lab Op 815, Lamphere Federation of Teachers, 1978 MERC Lab Op 194. The Commission has looked at the circumstances surrounding the strike, in particular, whether the parties have utilized mediation and fact finding. The importance of these impasse resolution techniques has been continually stressed by the Commission; the failure of the parties to participate in the statutory procedures has been viewed as indicating a lack of good faith. Lamphere Federation of Teachers, supra, Crestwood School District, 1975 MERC Lab Op 608. The Commission clearly stated this rule in its recent decision in Wayne County MEA/NEA (Woodhaven School District), 1982 MERC Lab Op 1556. In that case the Union engaged in a strike without requesting or participating in mediation. The Commission affirmed the Administrative Law Judge's findings of an unfair labor practice using the following language:

> We think the rule is well settled that refusal to utilize the full scope of statutory impasse resolution mechanisms prior to engaging in a strike is clear evidence of a lack of good faith in the bargaining process.

In the instant case the Union went on strike, without prior notice to the Employer, at a time when its chief negotiator admitted that there was no impasse and without any attempt to utilize the mediation process. The fact that the Association later participated in mediation and jointly petitioned for factfinding does not negate its original conduct in resorting to a strike before exhausting these statutory procedures. Lamphere, supra at 203. Under these circumstances I find that the Union has failed to bargain in good faith in violation of Section 10(1)(e) of PERA.

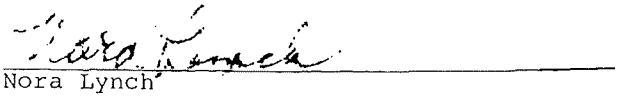
Based upon the above findings of fact and conclusions of law it is recommended that the Commission issue the order set forth below:

RECOMMENDED ORDER

IT IS HEREBY ORDERED that the Lake Orion Education Association, MEA/NEA cease and desist from failing or refusing to

bargain in good faith with the Lake Orion Community School District.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Nora Lynch
Administrative Law Judge

DATED: MAR 7 1984

TRUE COPY

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF ISHPEMING, DPW EMPLOYEES' CHAPTER OF LOCAL 1282, MICHIGAN COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), AFL-CIO,
Respondent in Case Nos. CU83 B-11 and B-14

-and-

CITY OF ISHPEMING, CLERICAL EMPLOYEES', CHAPTER OF LOCAL 1282, MICHIGAN COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), AFL-CIO,
Respondent in Case Nos. CU83 B-12 and B-15

-and-

CITY OF ISHPEMING, SUPERVISORY EMPLOYEES' CHAPTER OF LOCAL 1282, MICHIGAN COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, (AFSCME), AFL-CIO,
Respondent in Case No. CU83 B-13 and B-16

-and-

CITY OF ISHPEMING,
Public Employer-Charging Party

This document paid for with State

APPEARANCES:

Green, Renner, Weisse, Rettig, Rademacher & Clark, P.C., by Nino E. Green, for the Respondent-Labor Organizations

David M. Savu, Esq., for the Public Employer-Charging Party

DECISION AND ORDER

On July 17, 1984 Administrative Law Judge James P. Kurtz issued his Decision and Recommended Order in the above entitled matter, finding that the Respondents - Michigan Council 25, AFSCME (Chapters of Local 1282) did engage in and were engaging in certain unfair labor practices, and recommended that it cease and desist therefrom.

The Decision and Recommended Order of the Administrative Law Judge was issued and served upon the interested parties in accordance with Section 16 of Act 336 of the Public Acts of 1947, as amended. The parties have had an opportunity to review said Decision and Recommended Order for a period of at least twenty days from the date of service thereof on the parties, and no exceptions have been filed by any of the parties to the proceedings.

ORDER

Pursuant to Section 16 of the Act, the Commission hereby adopts as its Order the Order recommended by the Administrative Law Judge.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

William M. Ellmann, Commission Chairman

Morris Milmet, Commission Member

David S. Tanzman, Commission Member

Dated: AUG 28 [illegible]

This document filed for web State

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter Of:

CITY OF ISHPEMING, DPW EMPLOYEES' CHAPTER OF LOCAL 1282, MICHIGAN COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), AFL-CIO,
Respondent in Case Nos. CU83 B-11 and B-14

- and -

CITY OF ISHPEMING, CLERICAL EMPLOYEES', CHAPTER OF LOCAL 1282, MICHIGAN COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), AFL-CIO,
Respondent in Case Nos. CU83 B-12 and B-15

- and -

CITY OF ISHPEMING, SUPERVISORY EMPLOYEES' CHAPTER OF LOCAL 1282, MICHIGAN COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, (AFSCME), AFL-CIO,
Respondent in Case No. CU83 B-13 and B-16

- and -

CITY OF ISHPEMING,
Public Employer-Charging Party

APPEARANCES:

Green, Renner, Weisse, Rettig, Rademacher & Clark, P.C., by Nino E. Green, for the Respondent-Labor Organizations

David M. Savu, Esq., for the Public Employer-Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

These cases, along with the other cases enumerated below, were heard at Ishpeming, Michigan on August 24 and 25, 1983, before James P. Kurtz, Administrative Law Judge for the Michigan Employment Relations Commission, based upon complaints and notices of hearing dated February 22, 1983, issued under the provisions of Section 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended by 1973 PA 25, MCLA 423.216, MSA 17.455(16). Based upon the entire record taken in this matter, including the post-hearing briefs filed by the parties on or before January 23, 1984, the undersigned hereby makes the following findings of fact, conclusions of law, and recommended

order pursuant to Section 16(b) of PERA:

Charges and Background Matters:

The six charges treated in this decision were all filed on February 18, 1983, by the public employer, City of Ishpeming, herein referred to as the City or Employer, against three separate chapters of Local 1282, Michigan Council 25, American Federation of State, County and Municipal Employees, AFL-CIO, herein collectively referred to as the Union or AFSCME. The Union chapters represent three separate bargaining units of City employees. The charges also named various employees and/or agents of the Union whom it is not necessary to enumerate herein. The first three charges, Case Nos. CU83 B-11, B-12, and B-13, relate to an alleged illegal strike authorized and participated in by the Union and its membership commencing on January 7, 1983 and continuing until January 11, 1983. The second set of charges, Case Nos. CU83 B-14, B-15, and B-16, against the same three labor organizations relate to an alleged failure to bargain in good faith by the Union at the time of the aforesaid strike by requiring the Employer to settle contracts with the other two chapters before the particular chapter would approve a tentative agreement and return to work. The principal agent of the Union named in the charges is AFSCME staff representative, Edward P. Faccio.

The charges in Case Nos. CU83 B-11 and B-14 involve the bargaining unit composed of employees employed in the department of public works (DPW) of the City. This bargaining unit has apparently been represented by the Union for many years and is the largest of the three bargaining units. See Case No. R65 J-195 in which a certification issued on January 26, 1966. The charges in Case Nos. CU83 B-12 and B-15 involve the collective bargaining unit of office clerical employees employed by the City. The Union was certified as the bargaining representative of this unit on March 25, 1975 in Case No. R75 A-44. The charges in Case Nos. CU83 B-13 and B-16 cover the unit of all supervisory employees of the City. The Union was also certified as the

representative of this unit on March 25, 1975 in Case No. R75 A-43. At the time of the events involved in these charges contracts covering all three bargaining units had expired on December 31, 1982, and the contract had been extended on a day to day basis.

The Union contends that the work stoppage involved in these charges was of brief duration during which the parties continued to bargain, and that collective bargaining agreements were thereafter reached and implemented by the parties. The Union argues that the Employer does not seek to challenge its contracts with the Union and has offered no evidence of damage or loss, so the issues raised by the charges are now moot. See City of Saginaw, 1984 MERC Lab Op 104, 106. However, in view of the statutory prohibition in PERA of strikes by public employees and the public policy considerations surrounding such prohibition, I conclude that the subsequent reaching of a contract by the parties does not render the issues raised by the charges moot, and that the Employer is entitled to the cease and desist order that it seeks if a violation is made out on the facts. See Lamphere Fed. of Teachers (Lamphere School Dist.), 1978 MERC Lab Op 194; see also Warren Education Assoc. (Warren Consoldiated Schools), 1976 MERC Lab Op 974. As noted in the foregoing precedent a finding as to whether the Union's conduct set forth in the charges violated its bargaining obligation under Section 10(3)(c) of PERA must be based upon the totality of its conduct. Therefore, I find that it is superfluous and a duplication to entertain two sets of charges relating to the same strike and the negotiations surrounding said strike. Accordingly, I will recommend that the charges filed by the Employer in Case Nos. CU83 B-11 through B-13 be dismissed, since the strike conduct involved in such charges must be considered as part of the refusal to bargain allegations contained in Case Nos. CU83 B-14 through B-16.

Other Unfair Labor Practice Charges:

At the same time as the above charges were heard two

other cases filed by the parties were also litigated. The Employer filed Case No. CU82 J-77 against the Union on October 28, 1982. This charge involved the Employer's attempt to remove the position of City treasurer from the supervisory bargaining unit represented by AFSCME without the consent and agreement of the Union. Specifically the Employer objected to the Union's letter to the City treasurer dated October 11, 1982 requesting that she tender her dues required by the supervisory contract, and that a refusal by her to pay such dues would result in the Union requesting that the Employer terminate her pursuant to the terms of the collective bargaining agreement. The parties agreed at the hearing that this case involved essentially a unit clarification question as to whether the City treasurer/finance director was an executive position exempt from the bargaining unit represented by the Union.

At the hearing the Employer moved to withdraw Case CU82 J-77. The Union objected to such withdrawal on the ground that the issue raised by the charge had not been resolved by the parties, and the undersigned agreed with the Union's objection. Subsequently, on November 2, 1983, the Employer filed Case UC83 K-43, involving the same supervisory bargaining unit. In this new case the Employer sought to exclude as executive employees various other positions in the Union's supervisory bargaining unit in addition to the City treasurer. The hearing on these issues was conducted before Administrative Law Judge Joseph B. Bixler on February 29 and March 1, 1984 at Ishpeming Michigan.[1] Since the issues raised in Case No. CU82 J-77 overlap and are included in the issues litigated in UC83 K-43, the undersigned will not issue a separate decision on the unfair labor practice charge. Instead, the record taken in Case No. CU82 J-77 relative to the status of the City treasurer will be referred to and considered with the record in Case No. UC83 K-43, and one decision will issue by the Commission on the various unit issues raised

[1]ALJ Bixler at the same time heard the charge in Case No. C84 A-22, filed by AFSCME against the City, and a decision and recommended order issued on that case on June 28, 1984.

in the two cases.

Also, at the hearing held on August 24 and 25, 1983, the charge in Case No. C82 L-397 filed by the Supervisory Employees Chapter of the Union against the City on December 6, 1982 was heard. This charge involved the alleged wrongful termination of two members of the supervisory bargaining unit, Lambert Chard and George Stagliano, and the transfer of another bargaining unit member, Richard Burke, to a non-bargaining unit classification. Since the issues raised by this charge are not related to the cases involving the January 1983 strike, a separate decision will issue in regard to Case No. C82 L-397.[2]

Factual Findings Regarding Strike Cases:

Negotiations on new collective bargaining agreements in the three bargaining units to replace the contracts expiring on December 31, 1982 became embroiled with other labor relations problems between the parties, as exemplified by the cases noted above. Also, the parties were involved in a dispute over a reorganization plan proposed by the City during the past year or two. These problems were aggravated by the fact that the City had been for some time cutting back on its work force due to its financial condition, and it had offered no increases for 1983. Given this background, negotiations on a new contract for 1983 and beyond faced some large hurdles and involved some rather deep disagreements between the parties. There is no disagreement, however, between the parties in regard to the facts relative to the strike cases and the bargaining that took place in connection therewith.

The parties last met prior to the strike on the evening of January 6, 1983, at which time they were unable to make any progress on the issues that separated them. The next morning, Friday, January 7, most of the employees in the three bargaining

[2]Three additional charges filed by each of the chapters of the Union against the Employer on December 27, 1982, Case Nos. C82 L-424, L-425, and L-426, alleging a failure to bargain in good faith were withdrawn by the Union on March 11, 1983 as part of the settlement of the strike and entering into new collective bargaining agreements.

units did not report to work and picket lines were placed at the City hall and the public works garage. Intensive bargaining began between the parties. The Union staff representative advised the City at various times that the employees were not willing to go back to work until all the contracts were settled, and that the Union was bargaining the three contracts as if it were one bargaining unit. The Union also insisted the clerical contract would first have to be settled, then the supervisory, and lastly the DPW contract. A tentative agreement on the clerical contract was reached on January 7, and on Saturday January 8 tentative agreements were reached in the other two bargaining units. That evening all three tentative agreements were voted down by the employees, who still refused to return to work. The Employer requested that they do so because of a large snowfall and the need for plowing the streets.

On Sunday January 9, a tentative agreement in regard to the clerical unit was reached late in the day with an agreement that the employees would report to work on Monday January 10. During the day on January 10 in the presence of a State mediator tentative agreements were reached in both the DPW and supervisory units. The Employer again requested that the DPW employees return to work immediately because of the snow emergency. The Union refused to agree to their return until the supervisory contract was finalized. All of the tentative agreements were accepted by the employees and all units returned to work on Tuesday, Janaury 11, 1983.

Written contracts in each of the bargaining units for the calendar year 1983 were subsequently executed by the parties, reserving for decision the issues involved in the various cases noted above.

Discussion and Conclusions:

Under the Lamphere case cited above, the Union's refusal to utilize the full scope of statutory impasse resolution mechanisms prior to engaging in a strike is considered evidence of a lack of good faith in the bargaining process. See also Wayne County

MEA/NEA (Woodhaven School Dist.), 1982 MERC Lab Op 1556, 1558, 1564-1565; East Jordan Public Schools (Northern Michigan Ed. Ass'n), 1982 MERC Lab Op 1101, 1110-1111; Detroit Public Schools (Teamsters Local 214), 1979 MERC Lab Op 213, 220; Warren Ed. Ass'n (Warren Consol. Schools), 1977 MERC Lab Op 818. Also, a labor organization may not insist to the point of impasse that an Employer bargain with it on a nonmandatory subject of bargaining as a condition of reaching an agreement. Coloma Community Schools, 1983 MERC Lab Op 314, 318 (formal recognition of another labor organization in the contract); Carrollton Twp., DPW, 1983 MERC Lab Op 346, 351 (tape recording negotiations); accord Inland Lakes Schools, 1984 MERC Lab Op 173, 177 (ground rules as a precondition to bargaining). Also, a labor organization's rejection of tentative agreements without adequately informing the Employer of the basis for its disagreement may be evidence of bad faith bargaining. Woodhaven School Dist., 1976 MERC Lab Op 771, 777; Onstead Ed. Ass'n(Onstead Comm. Schools), 1976 MERC Lab Op 521, 526.

In the instant case, there is no evidence that the Respondents made any attempt to utilize or exhaust mediation and other dispute resolution mechanisms of the Commission prior to commencing the strike on Janaury 7, 1983, some seven days after the expiration of the prior contracts. The presence of the mediator on the last day of the strike when settlements in all three bargaining units were finally concluded shows the wisdom of the Commission's rule in regard to exhausting its procedures before such drastic action is taken by a labor organization. Further, the statments of the staff representative of the Union relative to the fact that all three contracts must be settled before the employees would return to work are also evidence of a lack of good faith. Under the aforesaid precedent the insistence on settling a contract in a second or third bargaining unit before the employees would return to work, I find to be conditioning settlement on a nonmandatory subject of bargaining in violation of Section 10(1)(c) of PERA. See also Flint School

Dist., 1984 MERC Lab Op ___ (4-19-84). The record is not sufficient to make any finding or conclusion on the initial rejection of tentative agreements by the Union, but such further findings would not change the conclusion herein. It is also noted that the strike occurred at the time of a very heavy snowfall, thereby compounding the effects of the strike on the City.

Accordingly, under the totality of the circumstances in this case I conclude that the actions of each of the Respondent-Unions did not amount to good faith bargaining within the meaning of Section 10(1)(c) of PERA, and that the City is entitled to an appropriate cease and desist order to prevent any such similar conduct in the future. I reject the City's request that the Union be fined for its actions in this case, since I find no statutory or other basis for such a remedy. See Warren Ed. Ass'n (Warren Consol. Schools), 1975 MERC Lab Op 76. I also reject the City's suggestion that other extraordinary remedies, such as its costs and attorney fees, be recommended in this case. See Local 586, SEIU v. Village of Union City, ___Mich App___ (No. 72084, 6-19-84). Given the litigious history of both sides outlined above, I conclude that extraordinary relief is not justified in this or any of the other Commission cases involving these parties.

RECOMMENDED ORDER

It is hereby recommended that the Commission issue an order that the City of Ishpeming Supervisory Employees Chapter, Clerical Employees Chapter, and Public Works Employees Chapter of Local 1282, Michigan Council 25, American Federation of State County and Municipal Employees, AFL-CIO, cease and desist from refusing to bargain in good faith with the City of Ishpeming by engaging in strike activity without first exhausting dispute resolution mechanisms of the Commission and by conditioning the settlement of contracts on the settlement of other contracts

in other bargaining units.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

James P. Kurtz
Administrative Law Judge

JUL 17 1984

DATED: _____

TRUE COPY

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

MICHIGAN STATE LAW LIBRARY

NOV 22 1982

In the Matter of:

WAYNE COUNTY MEA/NEA,
Respondent

-and-

Case No. CU80 H-46

WOODHAVEN SCHOOL DISTRICT
BOARD OF EDUCATION,
Charging Party

APPEARANCES:

For the Respondent — Daniel J. Hoekenga, Esq., Hiller, Larky and Hoekenga

For the Charging Party — William G. Albertson, Esq., Clark, Hardy, Lewis, Fine & Pollard, P.C.

DECISION AND ORDER

On April 23, 1982, Administrative Law Judge Nora Lynch issued her Decision and Recommended Order finding that the Respondent Wayne County MEA/NEA was guilty of bad faith bargaining by engaging in a strike when the mediation services of this agency had not been utilized. The Administrative Law Judge recommended that the Commission issue a cease and desist order. In all other respects, the charges brought by the Woodhaven School District Board of Education were found by the Administrative Law Judge to be unsupported.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accordance with Section 16(b) of the Public Employment Relations Act (PERA), Public Act 336 of 1947, as amended by Public Act 379 of 1965 and Public Act 25 of 1973, MCLA 423.216, MSA 17.455(16). Thereafter, the Respondent labor organization filed exceptions in which it alleges 1) factual error in the finding that Respondent's members had participated in a strike; 2) evidentiary error in excluding evidence that would have shown the teachers were locked out; 3) error of law in concluding that Charging Party was not estopped from charging the Respondent with bad faith bargaining after Charging Party herein had obtained a temporary restraining order from the Wayne County Circuit Court dated April 2, 1980, at

11.16 82

which time Charging Party allegedly disclaimed any contention of bad faith bargaining; 4) error of law in concluding that under all the circumstances of this case Respondent had refused to bargain in good faith.

We have reviewed the record in this case including transcript, exhibits, briefs, and exceptions. We conclude that the exceptions are uniformly without merit. We agree with the Administrative Law Judge that this Commission is not precluded by a court order restraining a public sector strike on a showing of irreparable harm from determining the substance of a related unfair labor allegation brought under PERA, Section 10(3)(c). This is a matter within the Commission's exclusive jurisdiction, and is not in any event one which was addressed by the Circuit Court in Wayne County No. 80-10179-CL.

We concur likewise with the Administrative Law Judge's conclusions that Respondent did call a strike on or before March 10, 1980, at a time when the state mediator had not yet held his first joint meeting with the parties. We think the rule is well settled that refusal to utilize the full scope of statutory impasse resolution mechanisms prior to engaging in a strike is clear evidence of a lack of good faith in the bargaining process. "Only where the mediator is afforded adequate time and opportunity to seek alternatives and compromises can the process achieve its normal degree of effectiveness. ....[O]nly where the mediator is given a reasonably opportunity to assist the parties in settling a dispute can they be deemed to have satisfied their duty to exhaust available impasse resolution services." Lamphere Federation of Teachers, 1978 MERC Lab Op 194,200. Under all the circumstances in evidence herein as summarized by the Administrative Law Judge we conclude that the Wayne County NEA/NEA showed a lack of good faith in the bargaining process. Accordingly, the Administrative Law Judge's opinion is endorsed in all respects.

ORDER

It is hereby ordered that the Wayne County MEA/NEA cease

and desist from refusing to bargain in good faith with the Woodhaven School District.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Morris Milmet

Morris Milmet, Commission Chairman

William M. Ellmann, Commission Member

Elaine Frost, Commission Member

Dated: NOV 16 1982

TRUE COPY

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter Of:

WAYNE COUNTY MEA/NEA,
Respondent

- and -

Case No. CU80 H-46

WOODHAVEN SCHOOL DISTRICT,
BOARD OF EDUCATION,
Charging Party

APPEARANCES:

For the Respondent — Daniel J. Hoekenga, Esq., Hiller, Larky and Hoekenga

For the Charging Party — William G. Albertson, Esq., Clark, Hardy, Lewis, Fine & Pollard, P.C.

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Section 10 and 16 of the Public Employment Relations Act, 1947 PA 336, as amended by 1965 PA 379, and 1973 PA 25, MCLA 423.210, MSA 17.455(10), hereafter referred to as PERA or the Act, this matter came on for hearing at Detroit, Michigan on December 9, 1980 before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission, hereafter referred to as the Commission. The proceedings were based upon unfair labor practice charges filed by the Woodhaven School District, hereafter referred to as Charging Party or the Employer, on August 22, 1980, and supplemented on October 24, 1980, wherein it was alleged that the Wayne County MEA/NEA, hereafter referred to as the Union or Association or Respondent, had violated Section 10(3) of PERA. Based upon the entire record in this proceeding, including the pleadings, transcript of the hearing, exhibits and briefs filed on or before November 17, 1980, the undersigned makes the following findings of fact and conclusions of law and issues the following recommended order pursuant to Section 16(b) of PERA:

The Unfair Labor Practice Charge:

In the charge filed August 21, 1980 Employer alleges that the Union has breached its duty to bargain in good faith in the following particulars:

> A. Respondent and its members initiated and participated in a strike within the meaning of Section 1 and thus prohibited by Section 2 of the PERA, at a time the parties were attempting to negotiate a collective bargaining agreement, without first initiating or otherwise participating within the compulsory statutory impasse resolution procedures of mediation and fact finding. Said strike commenced March 10, 1980 and continued to April 18, 1980.
>
> B. At the commencement of Respondent's strike, throughout the duration of said strike and to the present date, Respondent has maintained to impasse a proposal which constitutes, at best, a permissive subject of bargaining, to wit: preferential hiring consideration for persons who are members of Respondent's larger labor organization but who have no employment relationship whatsoever with Charging Party.

The Employer supplemented its charge on October 24 by adding the following:

> C. Respondent, without first engaging in collective bargaining whatsoever, effected a unilateral change of the following terms and conditions of employment: appointment to and maintenance and operation of the curriculum study council.

Facts:

The Employer and the Woodhaven Education Association, predecessor to Wayne County MEA/NEA, were parties to a collective bargaining agreement which expired on August 31, 1979. In the early part of July 1979, the parties began bargaining for a successor agreement and written proposals were exchanged. The parties failed to reach an agreement prior to the opening of school, and on August 27, 1979 the Board adopted a school calendar. Part of the Union's proposal made in July 1979 included the following new language to be added to Article IX as Section I:

> When vacancies occur, the Board agrees to employ laid off certified teachers from the districts where the local association is affiliated with WC-MEA/NEA.

When this proposal was first introduced, a negotiator for the Employer objected on the basis that it sounded like a Union hiring hall and that it referred to people who were not in the bargaining unit. During bargaining in August of 1979 the Union's chief spokesman, Ken Gabel, made a statement at the table to the effect that this section held a very high priority to him and the Union and that without Section I there more than likely could not be a tentative agreement. In November of 1979 a statement was again made at the table by Gabel that consideration had to be given in this area if there was to be a finalized agreement. In April 1980 the Union modified its proposal to state that the Employer would offer interviews to laid off certificated teachers from districts where teachers are represented by Wayne County-MEA/NEA.

The teachers reported to work, pursuant to the calendar adopted by the Board, until March 10, 1980. From March 10 until April 18, 1980 the teachers participated in a strike. At that time approximately 20 issues remained unsettled. At the inception of the strike, Donald Mitchell, negotiator for the District, contacted the Commission requesting the services of a mediator. Although a mediator was originally assigned to the school district in June of 1979 by the Commission, the parties had not utilized or requested the services of a mediator until March 3, 1980. The mediator first met with the parties on March 18, 1980, and after a number of sessions recommended fact finding. At that point the Union did not refuse to participate in fact finding, but a Union representative, George Trudell, did make a statement that they would not participate in jointly or unilaterally requesting fact

finding.

On April 30, 1980 the Commission appointed a fact finding panel. Prehearing conferences were held on May 23 and June 4, 1980; the fact finding hearing was held on June 5 and June 6, 1980. The fact finders' report issued early in August 1980. Neither side accepted the report as a basis for settlement. Between the time of the fact finders' report and the date of hearing in this matter, December 9, 1980, one formal meeting was held between the parties. Neither side made any movement and the same issues remain outstanding, including the proposal for preferential interviewing. The Union did not offer to withdraw its preferential interviewing proposal nor did the Employer request its withdrawal. The proposal did go to fact finding as an issue.

Relative to the charge regarding the curriculum study council, the record reflects the following. The curriculum study council makes advisory decisions regarding curriculum matters in the District. The council consists of the Assistant Superintendent, two curriculum coordinators, and approximately sixteen teacher representatives selected by the Association. The council has been in operation in Woodhaven for approximately 10 years and is the subject of Article XXIII of the former collective bargaining agreement. That Article indicates that the council functions in an advisory and consultive capacity and that the Board's failure to place recommendations into effect will not constitute a basis for a grievance.

Prior to the 1980-81 school year, the council met the first Thursday of each month. The Association normally notified the Employer in September which teachers had been appointed to the council. On September 2, 1980 John Schultz, Assistant Superintendent, wrote to Morrison, President of the Union,

asking his cooperation in getting the members of the council assembled and identified in order to allow for a meeting on September 4. Morrison met with Schultz, indicated he needed more time to assemble the council, and agreed that September 25 would be an appropriate meeting day. On that date three teachers appeared, apparently confused as to what their position and function was. No meetings of the council have been held since that time. When Schultz's calls to Morrison received no response, Schultz requested a meeting with the Association which was set for October 22. At that meeting Morrison indicated that he had a list of teachers, however he did not offer it to the Employer then nor has he ever made that information available to the Employer.

Discussion and Conclusions:

In its post hearing brief, Respondent contends that Charging Party must be estopped from its "after the fact" allegation of bad faith bargaining as it was not alleged at the circuit court hearing when the Employer requested that the strike be enjoined.[1] Under Section 16(a) of PERA charges may be brought at any time within six months of the alleged unfair labor practice. Further, the Commission has indicated that parties have a clear right under PERA to pursue unfair labor practice complaints even though the underlying dispute may be settled through statutory or other impasse procedure; a Commission order may operate to modify the conduct of the parties to avoid future violations. Garden City Pub. Sch. 1977 MERC Lab Op 600, 604. I therefore find the Employer's charges to be properly before the Commission.

As indicated in the Charge stated above, Charging Party

[1] Exhibit 3, the Temporary Restraining Order of Hon. John M. Wise is the only evidence in the record relative to this proceeding. See discussion below.

alleges that the Respondent-Union has violated PERA in three respects: 1) taking a permissive subject of bargaining to impasse; 2) making a unilateral change in an existing condition of employment; and 3) initiating and participating in a strike without utilization of the Commission's impasse resolution procedures. These allegations will be discussed below in that order.

According to Commission precedent, hiring and recruiting procedures and standards are matters within the core of entrepreneurial control and not subject to mandatory collective bargaining. City of Detroit 1971 MERC Lab Op 237, Board of Education of the City of Detroit 1974 MERC Lab Op 813, Recorders Court City of Detroit 1978 MERC Lab Op 313. It is clear that, following this precedent, the Union's proposal regarding preferential hiring/interviewing would constitute a permissive rather than a mandatory subject of bargaining. It is equally clear that as a permissive subject of bargaining the Union cannot insist to impasse on its acceptance.[2/] Taylor School District, 1976 MERC Lab Op 1006, City of Detroit Fire Department, 1979 MERC Lab Op 105, aff'd, 96 Mich ap 543 (1980), Kenowa Hills Board of Education, 1980 MERC Lab Op 967. What must be determined in this case is whether the Union's conduct in pressing its proposal on preferential hiring/interviewing constituted "insistence" to the extent that it was made a condition to any agreement between the parties. Under the standards established by the federal courts, it is not necessary that insistence upon a permissive subject of bargaining be the sole reason for the impasse, but that a particular non-mandatory

[2/] An agreement to hire only union members may well be in violation of the Section 10(1)(c) prohibition against discrimination as to hire and tenure of employment to encourage or discourage union memberships.

subject matter was posited as an ultimatum or as a precondition to the negotiation of an agreement. Philip Carey Mfg. Co. v NLRB, 331 F2d 720, 55 LRRM 2821 (CA 6 1965) cert. den, 379 US 888, 57 LRRM 2307 (1961), NLRB v Wooster Div of Borg-Warner Corp., 356 US 342 42 LRRM 2034(1958), Intl. Longshoremens Assoc. v NLRB, 277 F2d 681, 45 LRRM 2551 (CA DC). The Employer argues that the Union representative's statements to the effect that there would very likely be no tentative agreement without this proposal, or that consideration would have to be given in this area if there was to be a finalized agreement, constitute such an ultimatum. In the opinion of the undersigned, the Union did not press its proposal to the point of ultimatum as urged by the Employer. The statements set forth above were made relatively early in the bargaining process in August and November of 1979; the Union subsequently modified its proposal in April 1980. Although the remarks indicate that the Union considered this section important, I do not construe them to mean that agreement on that language was absolutely essential to a final contract. I therefore find that Charging Party has not established a violation of PERA in this regard.

The second allegation relates to the Union's failure to appoint members to the curriculum study council. As reflected in Article XXIII of the expired agreement, the curriculum study council funtions only as an advisory and consultive body, with final authority being reserved to the Board. In order to find that the Union has made an illegal unilateral change in this area, it is of course necessary to classify the curriculum study council as a mandatory subject of bargaining. In the opinion of the undersigned, this advisory council does not fall within such a classification. Under the Michigan Supreme Court's analysis in Faculty Assoc. v Central Michigan University, 404 Mich 268, 100 LRRM 2401

(1978), the scope of collective bargaining is limited if the subject matter falls clearly within the educational sphere rather than the employment sphere, i.e., those matters crucial to the employer-employee relationship. Although it may be desirable and appropriate to have teacher input into matters of curriculum, ultimately what subjects are taught in the school system falls within the educational sphere and is a matter of management prerogative. Based on this record I find the curriculum study council to be a voluntary group with an advisory function which did not constitute a term and condition of employment such as would necessarily continue in effect after the expiration of the collective bargaining agreement. Warren Consolidated Schools, 1975 MERC Lab Op 129. I therefore find that the Association's refusal to select or name representatives on this council did not constitute an unfair labor practice as a unilateral change in working conditions.

Finally, the Charging Party contends that Respondent initiated and participated in prohibited strike activity without first initiating or otherwise participating in compulsory impasse resolution procedures. At hearing, Respondent attempted to present evidence on the issue of whether or not a strike had occurred over the objection of Charging Party. At the time of the hearing this issue had been adjudicated before a Wayne County Circuit Court Judge[3] and an Administrative Law Judge of this Commission.[4] Both the Judge and the Commission found the teachers at Woodhaven

[3] See Temporary Restraining Order in Case No. 80-101719-CL issued April 2, 1980 by Hon. John M. Wise. Exhibit #3

[4] Case No. C80 E-111, affirmed by the Commission on October 9, 1981, 1981 MERC Lab Op _____.

School District participated in a strike within the meaning of Section 1 of PERA and prohibited by Section 2 of PERA. The undersigned, taking official notice of these findings, did not permit Respondent to relitigate this issue. Herein it is found that a strike did occur from March 10, 1980 to April 18, 1980.

In Warren Education Association, 1977 MERC Lab Op 815, the Commission determined that a public sector strike does not constitute a per se refusal to bargain, although it may constitute evidence of bad faith bargaining. In Warren, the Commission considered the total bargaining context, noted that the Union was more inclined to resort to a work stoppage than to utilize available statutory impasse resolutions mechanisms, and found that the Union's actions amounted to a refusal to bargain in good faith. In Lamphere Federation of Teachers, 1978 MERC Lab Op 194, the Commission, upon remand of the Court of Appeals, 67 Mich App 485 (1976), analyzed a bargaining situation in which a strike had occurred after only one day of mediation. In that case the Commission stated at page 202 as follows:

> In the instant matter, Respondent contends that it has fulfilled its duty to mediate by virtue of the fact that the parties continued to meet with the mediator during the course of the strike. It is clear from the record, however, that Respondent engaged in a strike after only one day of mediation, a day in which much had been achieved and much remained to be explored. Since an express purpose of both LMRA and PERA is to regulate the conduct of parties to labor disputes in an effort to minimize work stoppage, we conclude that parties must do more than this to satisfy their duty to mediate prior to engaging in a strike.

At page 203 the Commission further stated:

> ... We nevertheless reject Respondent's contention that this Commission cannot properly find a Section 10 (3)(c) violation based upon a party's failure to reasonably and adequately utilize the mediation process prior to engaging in a strike.

It is clear from this record that the strike took place without any attempt on the part of the Union to utilize the mediation process. After the strike began, when the Employer requested mediation and fact finding, the Union did participate, however under Lamphere, supra, this is not sufficient to meet the statutory duty to bargain in good faith. Accordingly, I find that the Union's participation in a strike without prior utilization of the statutory impasse resolution provisions constitutes a violation of Section 10(3)(c) of PERA.

Based upon the above findings of fact and conclusions of law, it is recommended that the Commission issue the order set forth below. It is further recommended that all other aspects of the charge be dismissed, and that Charging Party's request for litigation expenses be denied. See Ludington Area Schools, 1976 MERC Lab Op 985, compare Arbor Instant Printing 1979 MERC Lab Op 524.

RECOMMENDED ORDER

It is hereby ordered that the Woodhaven Education Association cease and desist from refusing to bargain in good faith with the Woodhaven School District.[5]

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Nora Lynch

Nora Lynch
ADMINISTRATIVE LAW JUDGE

APR 23 1982

DATED: _____

[5] As in Lamphere, supra, it is concluded that neither posting of a notice to employees nor notification to the Commission of steps toward compliance is necessary.

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION
* * * * * * * * * * *

In the Matter of:

TRUE COPY

EAST JORDAN PUBLIC SCHOOLS,
BOARD OF EDUCATION,
Respondent in Case No. C80 H-238
Charging Party in Case Nos. CU80 I-64
through I-68

- and -

NORTHERN MICHIGAN EDUCATION ASSOCIATION,
Charging Party in Case No. C80 H-238
Respondent in Case Nos. CU80 I-64
through I-68

Case Nos. C80 H-238
CU80 I-64
CU80 I-65
CU80 I-66
CU80 I-67
CU80 I-68

APPEARANCES:

For the Employer — G. Michael White, Esq., Thrun, Maatsch and Nordberg

For the Labor Organization — James F. Wynn, Esq., Foster, Swift, Collins & Coey, P.C.

DECISION AND ORDER

On June 30, 1982 Administrative Law Judge Nora Lynch issued her Decision and Recommended Order in the above entitled matter, finding that the Respondent in Case Nos. CU80 I-65 and CU80 I-68, Northern Michigan Education Association, did engage in and were engaging in certain unfair labor practices, and recommended that it cease and desist therefrom as set forth in the Decision and Recommended Order of the Administrative Law Judge attached hereto. Additionally, the Administrative Law Judge recommended dismissal of the remaining charges filed against the Northern Michigan Education Association and dismissal of all charges filed against the East Jordan Public Schools Board of Education in Case No. C80 H-238.

The Decision and Recommended Order of the Administrative Law Judge was issued and served upon the interested parties in accordance with Section 16 of Act 336 of the Public Acts of 1947, as amended. The parties have had an opportunity to review said Decision and Recommended Order for a period of at least twenty days from the date of service thereof on the parties, and no exceptions have been filed by any of the parties to the proceedings.

7.28 82

ORDER

Pursuant to ection 16 of the Act, the Commission hereby adopts as its Order the Order recommended by the Administrative Law Judge.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Morris Milmet, COMMISSION CHAIRMAN

William M. Ellmann, COMMISSION MEMBER

Elaine Frost, COMMISSION MEMBER

Dated: JUL 2 8 1982

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter Of:

TRUE COPY

EAST JORDAN PUBLIC SCHOOLS,
BOARD OF EDUCATION,
Respondent in Case No. C80 H-238
Charging Party in Case Nos. CU80 I-64 through I-68

- and -

NORTHERN MICHIGAN EDUCATION ASSOCIATION,
Charging Party in Case No. C80 H-238
Respondent in Case Nos. CU80 I-64 through I-68

Case Nos. C80 H-238
CU80 I-64
CU80 I-65
CU80 I-66
CU80 I-67
CU80 I-68

APPEARANCES:

For the Employer — G. Michael White, Esq., Thrun, Maatsch and Nordberg

For the Labor Organization — James F. Wynn, Esq., Foster, Swift, Collins & Coey, P.C.

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Sections 10 and 16 of the Public Employment Relations Act, 1947 PA 336, as amended by 1965 PA 379 and 1973 PA 25, MCLA 423.210, MSA 17.455(10), hereafter referred to as PERA or the Act, this matter came on for hearing at Lansing, Michigan on June 16, 1981 before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission, hereafter referred to as the Commission. The proceedings were based upon unfair labor practice charges filed in Case No. C80 H-238 by the Northern Michigan Education Association, (NMEA), hereafter referred to as the Union or Association, on August 29, 1980 and amended on September 17, 1980 and, in Case Nos. CU80 I-64 through CU80 I-68, by the East Jordan Public Schools Board of Education, hereafter referred to as the Employer, on September 22, 1980; all charges allege violations of Section 10 of PERA. Based upon the entire record in this proceeding, including the pleadings, transcript of the hearing, exhibits and briefs filed by the parties on or

before October 16, 1981, the undersigned makes the following findings of fact and conclusions of law and issues the following recommended order pursuant to Section 16(b) of PERA:

The Unfair Labor Practice Charges:

In its original charge filed on August 29, 1980 the Union alleges the following:

> On or about August 21, 1980 Employer's agent, Superintendent Melvin J. Rullman announced the respective bargaining positions of the Employer and Charging Party at a public Board of Education meeting despite the fact that no impasse had occurred between the parties. The Employer's agent, Superintendent Rullman, described the Board's salary offer as a 4% increase on the base which would have the result of the BA salary ranging from $11,670.00 to $20,079.00 over a 20-year period, the BA +20 scale ranging from $12,024.00 to $20,430.00 on a 20-year scale, and the MA salary schedule starting at $12,841.00 and ending at $21,247.00 on a 20-year scale. The Employer's agent, Superintendent Rullman, also announced that the representatives of Charging Party were presently proposing a 12% increase on the base.
>
> Employer and its representatives have through their total course of conduct, including but not limited to those actions described above, evidenced a lack of honesty of purpose and that requisite integrity which is an inherent necessity if collective bargaining is to be considered in good faith.

In an amendment to the above charge filed on September 17, 1980, the Union further alleges:

> On or about September 15, 1980 representatives of the Charging Party attempted to establish a date for further negotiations with the Public Employer. The chief negotiator for the Public Employer indicated that the Public Employer had no intention of further meeting and that the Public Employer would only meet to agree upon a tentative agreement based upon the "final offer" of the Public Employer made on or about September 14, 1980.
>
> Accordingly, the Public Employer's actions in refusing to meet at reasonable times and places for the purposes of negotiations with Charging Party constitutes a blatant violation of the Public Employment Relations Act and a classic example of boulwarism which is prohibited by

the Public Employment Relations Act.

The Employer's charges are as follows:

CU80 I-64 Notwithstanding [this] clear contractual obligation to set forth those items which the association (NMEA) intends to raise for negotiation by June 30, the NMEA not only failed to timely provide such notification but did not provide the Board with any comprehensive itemization of proposals whatsoever until August 8, 1980.

CU80 I-65 Beginning on August 28, 1980 which is the first scheduled day for teachers to report for duty, the teachers represented by the NMEA, at the deliberate and defiant behest of the NMEA, and with its full support and authorization, have collectively completely withheld their services and refuse to report for teaching duty.

CU80 I-66 On September 7, 1980 the NMEA formally stated to the Board negotiating team that their firm position on the issue of salary increase over the 1979-80 salary schedule was 11.5%. Notwithstanding this statement to the Board, the NMEA published and distributed to the media and the public dated September 9, 1980 identified as a position paper from the East Jordan Education Association/NMEA-MEA/NEA to parents and concerned citizens of East Jordan in which it was explicitly stated that the East Jordan teachers would accept a Board proposal which was in fact for an 11.135% increase.

This deliberate misrepresentation to the public of the NMEA bargaining table position ..... constitutes a deliberate and blatant violation of the NMEA statutory duty to bargain in good faith with the Board.

CU80 I-67 This allegation was withdrawn at hearing.

CU80 I-68 [Such] deliberate,inappropriate,and unjustified determination to collectively withhold services and refuse to report for duty prior to making any attempt whatsoever to participate in the mediation procedures provided under the Act and in the complete absence whatsoever of any allegations of bad faith bargaining by the Board and in complete absence of impasse and in the complete absence of any unfair labor practice charges against the Board ... constitutes a deliberate and blatant violation of the NMEA statutory duty to bargain in good faith with the board.

Facts:

The NMEA represents a bargaining unit of teachers employed

by the East Jordan Public Schools Board of Education. In June of 1980 bargaining began for a 1980-81 contract. Negotiation procedures in the 1977-80 master agreement provided in Section 1.6(b) as follows:

> Contract negotiations shall commence each year hereafter by a notice mailed or delivered by the Association to the Board on or before June 30 setting forth, without limitation, the request of the Association for items to be negotiated.

In early June, Robert Snyder, chief negotiator for the NMEA, went to the Superintendent's office to request that negotiations begin, however the superintendent was not in his office at the time. On June 11, 1980, Snyder wrote a letter to Ed Drenth, secretary of the East Jordan Board of Education, stating that the Union was prepared to begin negotiations on the 1980-81 contract. Snyder also indicated that the Union's regular bargaining team would consist of Larry Gee, Phil Goble, and Bob Snyder; in addition Roger Ransom and Leonard Staley, the MEA-NEA representative, would be involved.

The first bargaining session took place in the latter part of June. The Employer's representatives at that meeting were Thomas Oakley, Labor Relations Consultant for the Michigan Association of School Boards, the Board president, and Superintendent Rullman. The Union's team in attendance consisted of Snyder, Ransom and a teacher. The parties discussed ground rules and agreed that they would initial all tentative agreements (TA's) and have a combination of day and evening meetings; they did not agree to keep the table positions of the parties confidential. Snyder stated that the Union would have proposals on the grievance procedure, personal business days, and on the economic part of the contract. Oakley indicated that he would have written proposals for the Union at the next meeting and that he would appreciate written

proposals from the Union as well.

The next meeting took place in late July. The parties exchanged written proposals at a meeting on August 8 and there were approximately four bargaining sessions prior to August 28, the scheduled first day of work for teachers. At the meeting of August 21 the Employer's representatives told the Union team that they planned to contact a state mediator.

A Board of Education meeting also took place on August 21. At that meeting, in response to a question from the floor relating to the Board's position on salaries, Superintendent Rullman responded that the Board's salary offer was 4%. He further indicated that the BA salary range was from $11,670.00 to $20,079.00, the BA + 20 scale was from $12,024.00 to $20,430.00, and the MA salary schedule was $12,841.00 ending at $21,247.00, all on a 20-year scale. Rullman did not indicate how many teachers were at the top or bottom of the scale at that time. Out of approximately 56 teachers, 5 or 6 teachers were at the top of the scale at the 20th step; one or possible two would appear at the low end of the scale.

On August 22, the Association was notified of the appointment of a state mediator. The first date the mediator had available was August 28; although the Union requested that the parties meet during the day on August 28, the Employer's team indicated that they would meet after the normal work day had ended. On August 28, the first scheduled day of school, the teachers began withholding their services. The strike was apparently pursuant to a "no contract-no work" policy adopted by the Association in August.

The parties continued to meet and bargain with the assistance of the state mediator in September. After a bargaining session on September 8, 1980 the Association published a position paper dated September 9, 1980 addressed to parents and concerned

citizens of East Jordan. This position paper indicated the following:

> The Board's proposal of $1,250.00 would be acceptable to the East Jordan teachers if this new salary was added to the base (beginning) salary and then that amount used to calculate the rest of the salary schedule.

At the next session following the publication of this paper, Oakley questioned the Union as to whether the language quoted above was a new proposal since their table position on September 7 had been 11.5% and the position paper reflected a percentage of 11.135. The Union did not respond to the question. At hearing Staley testified that this was simply a miscalculation which was unintentional and which the Union was unaware of at the time.

On September 14, 1980 the parties met with the mediator and exchanged proposals. At 8:20 p.m. the Board submitted a proposal marked "final offer" and indicated that that was the end of bargaining for the evening. Staley said that he would take the offer back to the membership but under no circumstances would he take it back for ratification. On September 15, Staley called Oakley requesting that they set another date for negotiations. According to Staley, Oakley stated "Well, we'll meet if you would be willing to ratify or to TA what we have offered you. And if there is -- we can't do that, then there's really no reason to meet." When Staley asked Oakley "Are you sure?" Oakley responded that he did not wish to meet.

Oakley's version of this conversation differs from that of Staley. According to Oakley, Staley called him late in the afternoon on September 15 and stated that the teachers had rejected the Board's final proposal as presented the previous evening. Oakley asked Staley if he would take the offer to the NMEA for a final ratification and Staley responded that he would not. Oakley

then asked if there had been a change in the Association's position that he could communicate to the Board. Staley said there was no change and at that point asked if there had been a change in the Board's position. Oakley responded in the negative and indicated that the Board would not meet until the 17th and he would therefore not know of any change until that date. At that time the Board would decide what course of action they would take. Oakley testified that Staley did not request additional meetings and that he, Oakley, did not refuse to meet further.

At the Board meeting on September 17 the Board decided to go to court to seek injunctive relief relative to the strike. Subsequent to a filing of a Motion for Preliminary Injunction by the East Jordan Public Schools, a judge of the Charlevoix circuit court met informally with the parties and recommended that the Board review its position to determine if it could make movement towards a settlement, conditioned on the Association returning to work for a three-day period. On Sunday, September 21, the Board met to review its proposals. They modified those proposals and subsequently met with the Union between the 22nd and the 24th, however, no settlement was reached by the end of the day on the 24th.

The teachers did not report to work on Thursday morning September 25 and the Board sought immediate injunctive relief. The parties again met with the circuit court judge who requested that the parties make a sincere effort to resolve the dispute without a hearing. After further bargaining the parties again failed to reach an agreement and met at the court house the next day. The judge then scheduled a hearing late in the afternoon in order to permit additional bargaining. At 3:50 p.m. the Board presented a package proposal which represented concessions in six areas which included binding arbitration, a more liberal layoff and recall proposal, and an increase in salary. The parties discussed this proposal for

approximately 20 to 25 minutes. The Union then caucused and came back with a counter proposal at approximately 4:30 p.m., dropping one proposal and modifying their salary proposal. When the parties were again unable to reach an agreement, the Board requested that the hearing take place. The injunction hearing took place on Saturday, September 27. Although an injunction was not granted, the teachers reported to work on Monday and have continued to work without interruption since that time. Shortly thereafter the Union requested that negotiations be resumed and although bargaining continued, no agreement had been reached at the time of hearing.

DISCUSSION AND CONCLUSIONS:

Charges in C80 H-238:

The Union charges that the Employer has violated Section 10(1)(e) of PERA in two respects: 1) the public statement made by the Board's agent concerning the respective positions of the parties concerning salary was deceptive; and 2) upon issuance of the document entitled "final offer" of the Board, the Board failed and refused to schedule subsequent meetings with the Association in furtherance of negotiations.

As to the first allegation, the record reflects that at a public Board meeting, Superintendent Rullman, in response to a question from the floor, set forth the range of salaries offered to the teachers by the Board. There is no allegation that his figures were in error. Rather the Union charges that because Rullman did not indicate how many teachers were at step 20, he deceived the public and was acting in bad faith. I am unable to conclude that Rullman's action constituted misrepresentation or a deliberate attempt to mislead the public. Even if his remarks could be interpreted as "propaganda" this Commission has indicated that, as with pre-election propaganda, it does not regard its function to be to

police statements made in the course of negotiations. Warren Community Schools, 1975 MERC Lab Op 129, POAM and Ottawa County, 1981 MERC Lab Op 441; see also Board of Education of the City of Detroit, 1980 MERC Lab Op 49, Lapeer County General Hospital, 1980 MERC Lab Op 534.

The Union also alleges that the Employer refused to meet after making what it termed a "final offer." Although the testimony of Employer and Union representatives differs as to the conversation which took place on September 15, looking at the record as a whole it seems highly unlikely that the Employer's representative would take the position that they would no longer meet. I credit Oakley's statement to the effect that no meeting could be held until the Board was contacted and informed of the progress of negotiations. The record reflects that the Board continued to negotiate and make concessions after this time. Accordingly, I conclude that the Union charges should be dismissed in their entirety.

Charges CU80 I-64 through CU80 I-66; CU80 I-68:

In Case No. CU80 I-64 the Employer alleges that the Union's failure to comply with the contractual obligation to provide written notification of negotiation proposals before June 30 is indicative of its bad faith. I do not find that such conduct standing alone constitutes an unfair labor practice, although the Union's delay in this regard does reflect on the bargaining process as discussed below. Similarly, in evaluating the Union's conduct alleged to be a violation of PERA in Case No. CU80 I-66, misrepresentation to the public regarding the salary offer, I conclude that an unintentional minor error in calculations, with ample opportunity for the Board to reply, did not constitute a violation of the Act. (See cases cited above regarding negotiation propaganda.)

The gravamen of the Employer's complaint is contained in Case Nos. CU80 I-65 and CU80 I-68, namely the threats to withhold

services, and the actual withholding of teacher services without any attempt to initiate or participate in the mediation process. The record reflects that the exchange of written proposals did not occur until early August. Three or four meetings were held after that time. Just prior to the scheduled opening of school, the Employer requested the services of a mediator. The teachers, however, withheld services before any mediation session took place. In Warren Education Association, 1977 MERC Lab Op 815, the Commission noted the importance of statutory impasse resolution techniques such as fact finding and mediation and found that the Union's strike without utilization of such mechanisms amounted to a refusal to bargain in good faith. Similarly, in Lamphere Federation of Teachers, 1978 MERC Lab Op 194, the Commission found a Section 10(3)(c) violation where the Union went on strike after only one day of mediation.

The record reveals that after bargaining for only a short time and with no attempt to utilize mediation or fact finding, the Union withheld services. In line with Warren E.A. supra and Lamphere Federation of Teachers supra, I find that such action constitutes a violation of Section 10(3)(c) of PERA. Accordingly, I recommend that the Commission issue the order set forth below. It is further recommended that all other allegations be dismissed and that posting of notices not be required.

RECOMMENDED ORDER

It is hereby ordered that the Northern Michigan Education Association cease and desist from refusing to bargain in good faith with the East Jordan Public Schools Board of Education.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Nora Lynch

Nora Lynch
ADMINISTRATIVE LAW JUDGE

DATED: JUN 30 1982