STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Respondent-Labor Organization,

Case No. CU97 J-39

-and-

CITY OF DEARBORN,
Charging Party-Public Employer.
_____/

APPEARANCES:

William Birdseye, POAM Business Agent, for Respondent

Dykema Gossett PLLC, by John A. Entenman, Esq., for Charging Party

DECISION AND ORDER

On October 26, 1998, Administrative Law Judge Roy L. Roulhac 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 any 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.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Date: _____

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-and- **Case No. CU97 J-39**

CITY OF DEARBORN
Charging Party - Employer
_____/

APPEARANCES:

For Respondent: William Birdseye
POAM, Business Agent

For Charging Party Employer: Dykema Gossett PLLC
By John A. Entenman, Esq.

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 et seq, MSA 17.455 et seq, this case was heard in Detroit, Michigan on May 27, 1998, by Roy L. Roulhac, Administrative Law Judge for the Michigan Employment Relations Commission. The proceedings were based upon an unfair labor practice charge filed by the City of Dearborn on October 29, 1997. Based upon the record, including post-hearing briefs filed on or before July 17, 1998, I make the following findings of fact, conclusions of law, and issue the following recommended order pursuant to Section 16(b) of PERA:

The Unfair Labor Practice Charges:

Charging Party City of Dearborn alleges that Respondent Police Officers Association of Michigan violated Sections 10(c)(3) of PERA by the following conduct:

> On or about 10/13/97, the above-mentioned labor organization filed a Petition for Arbitration, Case No. D97 D-0730 listing, as an issue in dispute, "Pension/Retirement", pertaining to the City's Chapter 23 Retirement System

escalator clause, Section 235.12(1). Said subject is barred from Act 312 Arbitration by Section 46.2 of the current collective bargaining contract.

Findings of Fact:

The facts are undisputed. The labor organization and the employer have been parties to collective bargaining agreements involving non-supervisory police officers for approximately thirty (30) years. Negotiations for the July 1, 1988 to June 30, 1990 contract resulted in interest arbitration under 1969 PA 312. Arbitrator Jerome Brooks, in Case No. D88 E-1451, ruled in favor of the Employer's position that employs who retired after July 1, 1998 would not have any redetermination of their pension for a ten-year period and waived their right to submit the issue to Act 312 arbitration for any contract entered into prior to July 1, 1998. The resulting agreement incorporated the following provisions:

§46.ID:

> Effective July 1, 1998, Chapter 23.235.12(1) shall be amended to reflect that a non-supervisory police member who retires on and after July 1, 1998 shall not receive any redetermination of his amount of benefit for the period of the first ten (10) years following his date of retirement.

§46.2

> The City and the Union, and the Union on behalf of those non-supervisory police members it now or in the future represents, expressly agree that each party ... unqualifiedly waives its right to submit for negotiation, and to submit to Act 312 arbitration, any issue constituting a change or modification in the Chapter 23 Retirement System escalator clause (Section 235.12(1) for a consecutive period of ten (10) years from July 1, 1998 through June 30, 1998. It is specifically understood and agreed that neither party, for said ten (10) year period, shall have any obligation to bargain over an escalator clause.
>
> Further, it is specifically understood and agreed that the Michigan Employment Relations Commission, pursuant to the Public Employment Relations Act or otherwise, nor any court of competent jurisdiction, shall have any authority to require either party to bargain nor arbitrate (pursuant to Act 312) concerning any proposal to amend, change, or modify said escalator clause.
>
> The City and the Union hereby agree that this Section 46.2 remains in full force and effect until June 30, 1998, regardless of any earlier

> expiration date of any collective bargaining contract in which it is incorporated, and further agree that this section shall be automatically incorporated in all collective bargaining contracts executed prior to July 1, 1998.

The latest agreement which incorporated the above provisions covered the period July 1, 1994 to June 30, 1997. In April, 1997, during the first negotiating session for a successor contract, the Union proposed a change in the ten (10) year freeze by reducing the freeze to three (3) years, effective July 1, 1997. Although the City expressed its willingness to negotiate the issue, the Union was reminded that the pension escalator demand was only a permissive subject of bargaining and expressly refused to waive its right to insist upon enforcement of the §46.2 waiver.

In September 1997, the parties reached a tentative agreement for a successor contract which, among other things, included a change in the pension escalator freeze to be effective July 1, 1997. The Union membership, however, failed to ratify the tentative agreement and on October 13, 1997, eight months prior to the time limit set forth in §46.2 the Union filed an Act 312 arbitration petition which included a demand that the ten (10) year freeze be reduced. Subsequently, the City filed an unfair labor practice charge claiming that the Union was unlawfully demanding Act 312 arbitration of a non-mandatory bargaining subject.

Conclusions of Law:

The issue presented in this case is whether §46 of the parties' agreement constitutes a waiver of the Union's right to submit the pension escalator issue to Act 312 arbitration on October 13, 1997. According to Charging Party, by demanding that a change in the pension escalator be incorporated in a contract commencing July 1, 1997, the Union submitted a non-mandatory bargaining subject to Act 312 and thereby bargained in bad faith in violation of PERA.

The Union seeks dismissal of the charge because the pension escalator freeze only extends to June 30, 1998; the parties have bargained to impasse on the issue; and the arbitrator's decision on the petition will not be rendered nor will the successor contract be executed prior to June 30, 1998. Therefore, the Union claims it is not foreclosed from negotiating a pension improvement which takes effect after June 30, 1998, when the freeze expires.

I find no merit to any of the Union's arguments. Although enforcement and interpretation of collective bargaining agreement are not the Commission's function under PERA, the question of whether parties have expressly waived their rights to bargain by language in a collective bargaining agreement is a statutory question although it obviously requires interpretation of the agreement. See *City of Ann Arbor,* 1990 MERC Lab Op 528. In order for contract language to effect a waiver of bargaining rights, it must be 'clear and

unmistakable.' See *Lansing Fire Fighters* v *Lansing*, 133 Mich App 56, 349 N.W.2d 253 (1984); *Kent Co. Ed. Ass'n* v *Cedar Springs*, 157 Mich App 59, 66, 403 N.W.2d 494 (1987); *Southfield Police Officers Association* v *Southfield*, 162 Mich App 729 (1987);*City of Westland*, 1987 MERC Lab Op 793, 801; *City of Royal Oak*, 1988 MERC Lab Op 605.[1]

In the instant case, the Union's right to bargain regarding the retirement system escalator clause is included in §46.2 of the collective bargaining agreement. The language of §46.2 is sufficiently specific to constitute a waiver of the Union's right to bargain over changes in the pension escalator clause. The Union unqualifiedly waived its right to negotiate and to submit to Act 312 arbitration any issue constituting a change of modification of the retirement system escalator clause for a consecutive period of ten (10) years from July 1, 1988 through June 30, 1998. Despite the clear contract language, on October 13, 1997, eight months prior to the June 30, 1998, expiration of the pension escalator freeze, the Union submitted the issue to Act 312 arbitration.

The Union would have this tribunal believe that the charge should be dismissed because the arbitrator's decision on the merits of the pension escalator issue will not be decided until after the June 30, 1998, expiration of the ten (10) year freeze. This claim, however, ignores the pivotal fact that the matter is not properly before the arbitrator because it waived its right submit the issue to Act 312 arbitration. I find that the Union violated PERA by submitting a non-mandatory subject of bargaining to Act 312 arbitration. All other arguments raised by the Union have been carefully considered and do not warrant a change in the result.

Recommended Order

The Police Officers Association of Michigan, its officers, agents and representatives are hereby ordered to cease and desist from engaging in bad-faith bargaining by submitting non-mandatory bargaining subjects to Act 312 arbitration.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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[1] In *Organization of School Administrators* v *Detroit Board of Education*, 229 Mich App 54, (1998), the Court observed: A waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union *has exercised* its bargaining right and the question of waiver is irrelevant. *Port Huron Ed Ass'n, 452 Mich 309, 319, quoting* Dept. Of Navy v *Federal Labor Relations Authority*, 295 US App DC 239, 248; 962 F2d 48 (1992).

Roy L. Roulhac
Administrative Law Judge

Dated:_____