STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

COUNTY OF IONIA and 64A DISTRICT COURT,
Respondents-Public Employers,

Case No. C98 J-206

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 586,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Cohl, Stoker & Toskey, P.C., by Ruth E. Mason, Esq., for Respondent

McCroskey, Feldman, Cochrane & Brock, P.C., by Thomas B. Cochrane, Esq., for Charging Party

DECISION AND ORDER

On August 30, 1999, Administrative Law Judge Roy L. Roulhac issued his Decision and Recommended Order in the above case, finding that Respondents County of Ionia and 64A District Court violated Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210; MSA 17.455(10), by failing to accurately reduce to writing a tentative agreement negotiated between the Employer and Charging Party Service Employees International Union, Local 586. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA, MCL 423.216; MSA 17.455(16). On September 22, 1999, the Employer filed timely exceptions to the Decision and Recommended Order of the ALJ. The Union filed a brief in support of the recommended order and in opposition to the Employer's exceptions on September 30, 1999.

Charging Party represents a bargaining unit consisting of various employees of 64A District Court in the County Ionia. The most recent collective bargaining agreement between the parties covered the period January 1, 1994, to December 31, 1997. That agreement provides, in pertinent part:

> Section 19.1 - Medical Leave - Medical leave may be granted . . . for an employee's disability due to illness or injury . . . . An employee may be on medical leave for a period of not more than one year, or the length of his/her seniority at the time the illness or injury began, whichever is less . . . . An employee on medical leave, who has used all of his/her sick days, shall receive disability pay equivalent to 70% of her gross

pay, up to $400.00 per week, during the period of said medical leave.

> Section 19.8 - Family and Medical Leave Act - Nothing in this agreement will be construed to diminish the rights of any employee or the employer as provided in the Family and Medical Leave Act (FMLA).

The parties reached a tentative agreement on a successor contract in March of 1998. With respect to the issue of medical disability leave, the parties agreed to delete Section 19.1 and "correlate" that provision with Section 19.8. After the tentative agreement was ratified by both parties, the Employer's chief negotiator, Ruth Mason, prepared a final draft of the contract which made no reference to the benefits set forth in Section 19.1 of the former agreement. Gary Venema, the Union's business agent contacted Mason and asserted that the language of the contract did not reflect the tentative agreement reached between the parties concerning medical disability leave. When the Employer refused to modify the draft, Charging Party filed the unfair labor practice charge at issue here.

At the hearing on the charge, Venema testified that it was the Employer who first suggested correlating the medical disability leave provisions. During a bargaining session on January 22, 1998, Venema asked the Employer's representatives whether the proposal would result in a loss of benefits to members of the unit. According to Venema, Mason promised that there would be no actual loss of benefits and that the term "correlate" merely meant that the Employer was going to integrate the language of Section 19.1 into Section 19.8. Venema testified that there were no other discussions specifically pertaining to Section 19.1 following the January 22, 1998, bargaining session. Venema's testimony was corroborated by another member of Charging Party's bargaining team, Tiffany Chapko. Chapko testified that she paid particular attention to the discussion concerning the medical disability leave provisions because she was pregnant at the time and was "personally concerned about the issues." According to Chapko, Mason asserted that bargaining unit members would not lose benefits as a result of the deletion of Section 19.1.

Although Ruth Mason represented the Employer at the hearing and was present during all of the proceedings, she did not testify. The only witness to appear on Respondents' behalf was county administrator Mark Howe. On direct examination, Howe denied that the Employer had made any assertions at the bargaining table that the proposal to delete Section 19.1 would not result in a loss of benefits. On cross-examination, Howe testified that Venema asked questions about various proposals at the January 22, 1998, bargaining session, but that he could not recall any discussion of Section 19.1 in particular.

In finding that the Employer failed to bargain in good faith, the ALJ credited the testimony of the Union's witnesses. This decision was apparently based, in part, on the ALJ's determination that Mark Howe changed his testimony on cross-examination with respect to what the Employer said about deleting Section 19.1. On exception, Respondents contend that this conclusion was erroneous. Credibility findings fall within the province of the ALJ and are entitled to stand unless clearly contrary to the record as a whole. *Michigan State University*, 1993 MERC Lab Op 52; *Samaritan Hospital*, 1975 MERC Lab Op 675. Regardless of whether Howe actually wavered on the issue of what was

said at the January 22, 1998, bargaining session, there is sufficient evidence in the record to support the ALJ's decision to credit the Union's witnesses.

As noted, the testimony of Venema and Chapko was consistent with respect to what the Employer said at the bargaining table. According to both of the Union's witnesses, Mason promised that the deletion of Section 19.1 would not result in an actual loss of benefits to members of the bargaining unit. Notably, the Employer did not call Mason to deny this allegation. An adverse inference may be drawn regarding any factual question to which a witness is likely to have knowledge when a party fails to call that witness if she "may reasonably be assumed to be favorably disposed to the party." *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530; *Ready Mixed Concrete Co*, 81 F3d 1546, 1552 (CA 10, 1996). Under these circumstances, we see no reason to set aside the ALJ's decision to credit the Union's witnesses.

Based on the statements made by the Employer's chief negotiator on January 22, 1998, we conclude that there was a meeting of the minds between the bargaining representatives of each party concerning the issue of medical disability leave. Finding no evidence in the record to support the Employer's assertion that Charging Party subsequently agreed to give up the medical disability leave benefits in exchange for a half-percent wage increase, or that the deletion of Section 19.1 was even discussed following the January 22, 1998, bargaining session, we agree with the ALJ's determination that the Employer violated its bargaining obligation by failing to include those benefits in the language of the successor contract. In light of this conclusion, it is not necessary that we address the other arguments raised by the Employer in its exceptions.

ORDER

Pursuant to Section 16 of PERA, we hereby adopt the recommended order of the ALJ as our order in this case.

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

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

COUNTY OF IONIA and 64A DISTRICT COURT
Respondents - Public Employers

Case No. C98 J-206

- and -

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 586
Charging Party - Labor Organization
_____/

APPEARANCES:

For Respondent: Cohl, Stoker & Toskey, P.C.
By Ruth E. Mason, Esq.

For Charging Party: McCroskey Feldman Cochrane & Brock, P.C.
By Thomas B. Cochrane, 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 and 423.216, MSA 17.455(10) and 17.455(16), this case was heard in Detroit, Michigan on February 2, 1999, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission (MERC). The proceedings were based upon an unfair labor practice charge filed by Charging Party on October 5, 1998. Based upon the record, including post-hearing briefs filed by April 5, 1999, I make the following findings of fact and conclusions of law, and issue a recommended order pursuant to Section 16(b) of the PERA:

The Unfair Labor Practice Charge:

The charges reads in pertinent parts as follows:

> In early 1998 the parties negotiated a successor agreement and reached a tentative agreement, which was ratified on April 8, 1998 by the Union and on April 21, 1998 by the County of Ionia. The agreement included a disability benefit for employees. Since that date, the Employer has refused to implement the negotiated changes, including wage increases and retroactive pay. In addition the Employer has refused to accurately reduce the agreement to writing and execute a written contract, unilaterally eliminating the disability benefit. The Employer has refused repeated requests by the Union to meet to discuss the matter.

Respondents filed an answer to February 1, 1999. They denied that the agreement included a disability benefit for employees and affirmatively stated that the deletion of the disability was part of the

tentative agreement. Respondents claim that it is the Union that has refused to execute the agreement although it includes all the issues tentatively agreed to and ratified by the parties.

Findings of Fact:

Charging Party is the certified bargaining agent of certain employees that work in Respondent 64A District Court in Ionia. The latest agreement between Charging Party and 64A District Court covered the period January 1, 1994 through December 31, 1997. Pertinent provisions read:

> Leaves of Absences
>
> Section 19.1 - Medical Leave - Medical leave may be granted . . . for an employee's disability due to illness or injury . . . An employee may be on medical leave for a period of not more than one year, or the length of his/her seniority at the time the illness or injury began, which ever is less. . . An employee on medical leave, who has used all of his/her sick days, shall receive disability pay equivalent to 70% of her gross pay, up to $400.00 per week, during the period of said medical leave.
>
> * * *
>
> Section 19.8 - Family and Medical Leave Act - Nothing in this agreement will be construed to diminish the rights of any employee or the employer as provided in the Family and Medical Leave Act [FMLA].[1]

Bargaining began for a successor agreement in December 1997. Several times, Respondents' agents indicated to Charging Party's representatives that its goal was to "bring the court employees in line with the County employees."

On January 22, 1998, during the second bargaining sessions, Ruth Mason, Respondents's chief negotiator, read and explained Respondents' proposals to Charging Party's bargaining team. The Employers' proposal regarding Section 19.1 read: "Delete this Section. Correlate with the Family and Medical Leave Act." Gary Venema, the Union's business agent, asked Mason if Section 19.1 would result any loss of actual benefits and what was meant by "correlate". Mason told Venema that there would be no loss of benefits and "correlate" meant that, ". . . they were going to put the two proposals, the medical leave and the family medical leave, they were going to roll it into one proposal."[2] Venema then wrote on his copy of the proposal: "no loss of actual benefit" and circled the word, "correlate".

Tiffany Chapko, a member of Charging Party's bargaining team, corroborated Venema's testimony. She testified that she paid particular attention to the discussion regarding Sections 19.1 and 19.2 because she "was pregnant and . . . was personally concerned about the issues." Chapko, explained

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[1]The FMLA provides up to twelve weeks of unpaid leave for parents, children and employees with serious health conditions. See 29 U.S.C. §260l *et seq.*

[2]The word "correlate" means things reciprocally related so that each directly implies the existence of the other. Because the benefits in Section 19.1 (paid leave) and 19.8 (unpaid leave) are dissimilar, they cannot be correlated.

her recollection of discussions about these provisions: "Mr. Venema bringing up the point that we did not want to lose those benefits, and Mason agreeing that there was not going to be a loss in the benefits. That's what we specifically discussed with all our issues, we are not going to be losing anything. That's why I remember that." Employer witness, county administrator Mark Howe, testified on direct examination that there was no discussion at the table that the proposal to delete 19.1 would not change any benefits. On cross-examination, however, he changed his testimony and said he did not recall whether Section 19.1 was specifically discussed.

Thereafter, the parties tentatively agreed to three non-economic proposals and commenced package bargaining. Throughout this process, the Employer's package proposals included language that Section 19.1 would be deleted and correlated with Section 19.8, the Family and Medical Leave Act provision. There was no other specific discussion regarding Section 19.1 after January 22. The parties reached a tentative agreement in late March 1998, after the Union agreed to drop its demand regarding a vision proposal in exchange for a half per cent wage increase.[3] After the tentative agreement was ratified by both parties, Mason prepared a draft of a final contract. Section 19.1 was deleted. Section 19.8, however, carried forth the language from the 1994 agreement and made no mention of the benefits that were contained in Section 19.1.

Venema contacted Mason, pointed out that the language in the contract's final draft did not reflect the parties' agreement, and asked that draft be corrected. Respondent refused to modify the draft agreement and the unfair labor practice charge followed.

Conclusions of Law:

The evidence establishes that on January 22, 1998, during the only discussion of the Employer's proposal to delete Section 19.1 and correlate it with Section 19.8, Respondents' representative unequivocally stated that there would be no loss of benefits and that the two provisions would be rolled into one. Without further discussion, both parties ratified the tentative agreement.

Respondents suggest the parties pattern of bargaining demonstrates the intent of the parties to delete Section 19.1. Accordingly, they claim that if its proposal to delete Section 19.1 were merely a contract cleanup proposal with no actual loss of benefits proposed, the parties would have agreed to that proposal when they tentatively agreed to all the other economic proposals. They assert that the Employer offered extra wages to obtain a tentative agreement after being advised by the Union negotiator that the Employer would have to buy the benefit.

I find no merit to Respondent's arguments. Respondents offered nothing to rebut Charging Party's evidence, which I credit, that during the only discussion of the Employer's proposal to delete Section 19.1 and correlate it with Section 19.8, Charging Party was told that it would not result in any

[3]Venema testified that the "actual contract came down to you [Mason] wanting the Union to back off vision, and that's where the extra half percent came in." Respondent's witness Mark Howe answered, "yes" when asked on direct examination if he approved, "an additional half percent increase in order to achieve this collective bargaining agreement."

loss of benefits and Section 19.1 would be rolled into Section 19.8. Mason, whom Venema and Chapko testified made the statement, did not testify although she was present during the hearing. Moreover, Respondent witness Howe, who was called to rebut Venema's testimony, testified that he did not recall any discussion of the issue.

Respondents mischaracterize the record in their attempt to demonstrate that Charging Party was granted a half percent wage increase in exchange for deleting Section 19.1. Neither Venema nor Respondent witness Howe testified that a half percent increase was granted in exchange for deleting Section 19.1. Venema's related that the half percent increase was granted when the Union "back[ed] off [its] vision" proposal. Howe testified than an additional half percent increase was approved in order to achieve an agreement. Venema, while admitting on cross-examination that he "imagined" that he might have said that he would not give up a benefit without receiving something in return, there is no evidence that he or the Union ever specifically agreed to give up the medical leave benefits set forth in Section 19.1.

I find that Respondents violated their bargaining obligation by failing to include a provision in the contract which reflected the parties agreement at the bargaining table that there would be no loss of benefits by deleting Section 19.1 and correlating it into Section 9.8. Although Respondents could not correctly "correlate" the benefits in Sections 19.1 and 19.8, their attempt to simply delete the benefits in Section 19.1 altogether conflicts with their own definition of correlate and demonstrates bad faith bargaining. I also find that when the parties discussed these proposals on January 22, there was a meeting of the minds and no unresolved questions remained regarding the meaning of the Employers' proposal on medical leave benefits. Respondents are therefore bound by their representation that the benefits set forth in Section 19.1 would be deleted and rolled into Section 19.8. *Lakeville Community Schools,* 1990 MERC Lab Op 56; *Cf Saginaw County and Sheriff*, 1991 MERC Lab Op 315, and cases cited therein.

I have carefully considered all other arguments raised by Respondents and they do not warrant a change in the result. I conclude that Respondents have refused to bargain with the Charging Party in violation of Section 10(1)(e) of PERA and recommend that the Commission issue the following order:

Recommended Order

Respondents County of Ionia and 64A District Court, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

A. Refusing to bargain in good faith with Service Employees International Union, Local 586, by failing and refusing to reduce to writing the agreement regarding medical leave benefits reached by the parties on January 22, 1998.

B. In any other manner refusing to bargain in good faith in violation of Section 10(1)(e) of PERA.

2. Take the following affirmative action to remedy the unfair labor practice found herein:

A. Upon request prepare a written agreement which sets forth the medical leave benefits agreed to by the parties on January 22, 1998.

B. Post, for thirty (30) days, copies of the attached Notice to Employees in conspicuous places, including all places were notices to employees are customarily posted.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Roy L. Roulhac
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

PURSUANT TO AN UNFAIR LABOR PRACTICE PROCEEDING BEFORE AN ADMINISTRATIVE LAW JUDGE OF THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION, THE **COUNTY OF IONIA & 64A DISTRICT COURT**, WERE FOUND TO HAVE VIOLATED THE PUBLIC EMPLOYMENT RELATIONS ACT OF THE STATE OF MICHIGAN. PURSUANT TO THE ORDER OF THE COMMISSION WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL Cease and desist from failing and refusing to bargain in good faith with the, by not reducing to writing the agreement regarding medical benefits reached by the parties on January 22, 1998.

WE WILL upon request, bargain with the Service Employees International Union, Local 586 by preparing a written agreement which sets forth the medical benefits agreed to by the parties on January 22, 1998.

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County of Ionia and 64A District Court

_____

By

Dated:_____

(This notice must remained posted for a period of thirty (30) days. Questions concerning this notice shall be directed to the Michigan Employment Relations Commission, 1200 Sixth Street, 14th Floor, Detroit, Michigan 48226, (313) 256-3540.)