STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF GRANDVILLE,
Respondent-Public Employer in Case No. C98 G-153,
Charging Party in Case No. CU98 G-27,

-and-

POLICE OFFICERS LABOR COUNCIL,
Charging Party-Labor Organization in Case No. C98 G-153,
Respondent in Case No. CU98 G-27.
_____/

APPEARANCES:

Varnum, Riddering, Schmidt & Howlett, by John Patrick White, Esq. for the Public Employer

Law Offices of John Lyons, by Mark P. Douma, Esq., for the Labor Organization

DECISION AND ORDER

On June 17, 1999, Administrative Law Judge Nora Lynch issued her Decision and Recommended Order in the above case, finding that neither party violated Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210; MSA 17.455(10), by refusing to execute a negotiated and ratified collective bargaining agreement. 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 July 14, 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 July 19, 1999.

The facts in this case are not materially in dispute. Briefly, the Police Officers Labor Council (POLC) represents a bargaining unit of patrol officers employed by the City of Grandville. The most recent collective bargaining agreement between the parties covered a three-year period, expiring on June 30, 1996. The parties began negotiations on a successor contract in early 1997. The POLC was represented at the bargaining table by Fred LaMaire. The Employer's spokesperson was city manager Ken Krombeen. During negotiations, the Union sought a pension upgrade from the Municipal Employees Retirement System (MERS) B-3 program to the B-4 benefit level. An actuarial report prepared at the request of the parties set forth a cost factor for the upgrade based on a retirement age of 60 and a 30-year amortization period.

On September 30, 1997, representatives of the parties met for a scheduled Act 312 hearing. Prior to the commencement of the hearing, the parties reached a tentative agreement on a successor

contract. With regard to the pension issue, the parties agreed that the employees would bear the full cost of the upgrade and that an updated actuarial report would be prepared which would reflect "current covered" employees. However, the upgrade was dependent upon the POLC prevailing in its appeal of an Act 312 award issued in a separate dispute involving the sergeants' bargaining unit. Specifically, the relevant provision of the agreement stated, "Go w/ sgts (aft appeal, if B-4 allowed - @ 'ee cost on updated actuarial w/ current covered 'ees." The parties also agreed that the Union could choose to remain with the B-3 program if the cost of the upgrade was determined to be too high. Thereafter, both the City and the Union ratified the tentative agreement.

On November 21, 1997, the circuit judge affirmed the Act 312 award issued in the case involving the sergeants' bargaining unit. In February of 1998, an attorney for the City wrote to the Segal Company seeking an updated actuarial report for the patrol officers. The letter asserted that the original study was based upon inaccurate assumptions which would result in the parties not being able to "meet their funding objectives." The Employer requested that the updated report be prepared based upon an estimated retirement age of 55 and a 10-year amortization period. The Employer also provided the Segal Company with an amended list of bargaining unit members.

The City received the updated actuarial report in March of 1998. With respect to the pension upgrade, the report set forth a cost of 4.92% utilizing a 10-year amortization period and a retirement age of 55. Based on a 30-year amortization and a retirement age of 55, the report estimated the employees' cost to be 2.86%. After receiving the report, the City implemented the terms of the 1996-1999 agreement -- with the exception of the pension provision. As to that issue, the parties were unable to agree on which amortization period should be used to calculate the employees' cost. The Employer argued that the cost of the upgrade should be calculated at 4.92% using the 10-year amortization period and an estimated retirement age of 55, while the Union wished to rely on an assumption based upon an amortization period of 30 years. Ultimately, both parties filed competing unfair labor practice charges which are the subject matter of this dispute.

Discussion and Conclusions of Law:

In dismissing the charges, the ALJ concluded that there was a basic misunderstanding regarding the meaning of the phrase "updated actuarial" which prevented the parties from entering into an enforceable agreement concerning the upgrade to the MERS B-4 benefit level. We agree. While there is no dispute that the employees were to bear the full cost of the upgrade, the parties simply never agreed as to exactly how that cost should be calculated. Specifically, there was no meeting of the minds on the key issues of amortization and estimated age of retirement. The Union's representative testified that the only issue discussed between the parties on September 20, 1997, with respect to the actuarial report pertained to the composition of the bargaining unit itself. According to LaMaire, the parties agreed that certain employees needed to be excluded from the calculations in determining the cost of the pension upgrade. It was his belief that the original actuarial report would be updated only as to that issue. In contrast, Krombeen testified that it was the position of the City's representatives that several key assumptions utilized in the original actuarial report, including amortization and age of retirement, were erroneous and would result in the Employer having to fund a portion of the benefit. However, there is no evidence in the record establishing that this concern was ever communicated to the Union prior to requesting the modifications.

The Employer contends that there was a meeting of the minds in the sense that both parties agreed that the employees were to bear the full cost of the upgrade. According to the City, the only way to ensure that the plan would be fully funded by members of the bargaining unit was to revise several key assumptions utilized in the original actuarial report. Since 1993, all new employees in the police department went into a defined contribution plan, rather than the MERS defined benefit plan. In addition, police officers are eligible to retire at age 55 without penalty. Thus, the Employer theorizes that no employee will actually be in the defined benefit plan for thirty years from the date of the upgrade. The problem with the Employer's argument is that it assumes without any basis in fact that all of the bargaining unit members affected by the upgrade will actually retire at age 55. As LaMaire noted at the hearing, it entirely possible that the affected employees will continue to work until age 65. To the extent that the assumptions relied upon in the original report were in fact erroneous, the precise method for correcting those inaccuracies must be one which is mutually agreed upon by the parties through future negotiations or resolved by contract remedy.

The fact that both parties have already ratified the tentative agreement does not, as argued by the City, establish a violation of the bargaining obligation. In *Genesee County, Seventh Judicial Circuit Court*, 1982 MERC Lab Op 84, we held that an employer was justified in refusing to accept a tentative agreement after a dispute arose with respect to the meaning of certain language. Our finding that there was no meeting of the minds in that case was not in any way dependent on the fact that the disagreement arose prior to either party having ratified the agreement. To the contrary, we held in *Genesee County* that parties "cannot be required to ratify or execute *or implement* a contract" where there is no actual meeting of the minds. *Id.* at 87 (emphasis supplied). In fact, a case which we cited in support of our decision, *City of Fraser*, 1977 MERC Lab Op 838, involved a post-ratification dispute concerning the meaning of language tentatively agreed to by the parties. See also *Buena Vista School District*, 1990 MERC Lab Op 823. Because there was an actual disagreement between the parties as to the meaning of the phrase "updated actuarial," and no evidence of any bad faith on the part of either party in their respective positions on the pension upgrade issue, we conclude that no cognizable PERA violation occurred in this case. See, e.g., *Ann Arbor Public Schools*, 1996 MERC Lab Op 234, 238-239; *City of Mason*, 1988 MERC Lab Op 823, 828; *City of Lansing*, 1986 MERC Lab Op 312, 316. Accordingly, we incorporate and adopt the Decision and Recommended Order of the ALJ.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Maris Stella Swift, Commission Chair

_____
Harry W. Bishop, Commission Member

_____
C. Barry Ott, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF GRANDVILLE,
Public Employer-Respondent in Case No. C98 G-153
Charging Party in Case No. CU98 G-27

- and-

POLICE OFFICERS LABOR COUNCIL,
Labor Organization-Respondent in Case No. CU98 G-27
Charging Party in Case No. C98 G-153
_____/

APPEARANCES:

John Patrick White, Esq., Varnum, Riddering, Schmidt & Howlett, for the Public Employer

Mark P. Douma, Esq., Law Offices of John Lyons, for the Labor Organization

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455(10), this matter came on for hearing at Lansing, Michigan, on December 3, 1998, before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission. The proceedings were based upon consolidated unfair labor practice charges filed by the City of Grandville on July 16, 1998, and by Police Officers Labor Council on July 27, 1998, each alleging that the other had violated Section 10 of PERA. Based upon the record and briefs filed on or before January 25, 1999, 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 Charges:

The charges both allege that the other party has failed and refused to execute the negotiated and ratified bargaining agreement. The dispute centers around a pension upgrade provision in the tentative agreement.

Facts:

The Police Officers Labor Council (POLC) represents a bargaining unit of patrol officers

employed by the City of Grandville. The POLC also represents a supervisory unit of sergeants in the City.

Negotiations for a 1996-1999 collective bargaining agreement for the police officers began in early 1997. City Manager Ken Krombeen was the spokesperson for the City; labor representative Fred LaMaire represented the POLC. The Union sought a pension benefit upgrade from the MERS (Municipal Employees Retirement System) B-3 program to a B-4 benefit level. During negotiations the parties had jointly requested an actuarial report from the Segal Company. This report, dated March 21, 1997, set forth a cost factor for the upgrade based on a 30-year amortization.

A pension upgrade had also been a subject of negotiations with the POLC sergeants' bargaining unit. The sergeants' bargaining unit reached impasse on that issue and submitted it to Act 312 compulsory arbitration. On April 18, 1997, the Act 312 panel issued its award adopting the union's last offer of settlement, which was an upgrade to the MERS B-4 plan, with the employee paying the actual cost of such upgrade through payroll deduction, capped at 2.64% of wages from July 1, 1997 to June 30, 1999. The City subsequently appealed this award on the basis that the actuarial assumptions were not correct and would result in the employees not paying the full price of the upgrade.

On September 30, 1997, representatives of the patrol officers unit and the City met for a scheduled Act 312 hearing. On that day the parties bargained and eventually reached a tentative agreement. Item 2 of that agreement covered retirement and read as follows:

> Go w/ sgts (after appeal, if B-4 allowed - @ 'ee cost on updated actuarial w/ current covered 'ees

On that day the parties met in separate rooms rather than participating in face to face bargaining. The Union's position in earlier bargaining had been that the Employer should pay the cost of the upgrade. Under the terms of the tentative agreement, the Union agreed that the employees would bear the cost of the upgrade. It was also agreed that since at the time the cost was unknown, the Union had the option of remaining with the B-3 program in the current contribution if the cost was determined to be too high.

LaMaire testified that there was general discussion on September 30 in side bars with respect to the fact that the March 21, 1997 actuarial report did not accurately reflect the makeup of the bargaining unit. According to LaMaire, the parties agreed that certain employees needed to be excluded from calculations in determining costs for the pension upgrade; these included recent promotions and employees who were under the defined contribution plan. He did not recall any other changes being discussed.

According to Krombeen, City representatives felt that an updated actuarial was key to their agreement with respect to the upgrade. Krombeen testified that their experience with the sergeants' bargaining unit made them aware that using the standard MERS assumptions would not

represent full costs. What Krombeen termed inaccurate assumptions utilized in the previous actuarial report included a retirement age of 60 and a 30-year amortization period, as well as the number of eligible employees. Since 1993, all new employees in the police department went into a defined contribution plan, rather than the MERS defined benefit plan. In addition, police officers are eligible to retire at age 55 without penalty. Under these circumstances the City felt that a 10-year amortization period was appropriate. They determined this by looking at the current employees in the unit, determining how many years of service and time they had remaining between their existing age and age 55, and averaged that to approximately 10 years; this reflected the number of years of contribution that could be anticipated from these employees until the age of 55 when they could retire. The Employer theorized that since no employee would actually be in the defined benefit plan for 30 years from the date of the upgrade, if a 30-year period was used the cost of the upgrade would fall to the City because it would be required to continue the contribution after the employee left.

As indicated above, the upgrade to the B-4 plan was dependent on the POLC prevailing in the appeal of the Act 312 award in the sergeants' bargaining unit. On November 21, 1997, the circuit judge denied the petition filed by the City to vacate the arbitration award and affirmed the decision of the arbitrator.

On February 11, 1998, an attorney for the Employer wrote the following letter to the Segal Company:

> On October 28, 1997, Michael Karlin of your office prepared a report for Mr. Gordon Lindsay of MERS reporting on the additional cost of increasing the benefits for the subject group from B-3 to B-4. As you know from our telephone conversations, this is a non-renewing group (no new entrants). The union has bargained for an increase in their benefits from B-3 (2.25% of FAC) to B-4 (2.5% of FAC). As part of our collective bargaining negotiations, the members have agreed to pay the cost for this increase. Our mutual objective is to fully fund the increase by the time that the last person in the unit retires from employment.
>
> The October 28 report was prepared based on a 30-year amortization of past service liabilities. In addition, you advised that the valuation assumes that the retirement probability is low. These two assumptions will understate the contribution and the city and union will not be able to meet their funding objectives. We also need to point out that the December 31, 1996 valuation and the October 28 report were both prepared assuming that there were 12 members in this unit. However, two individuals (officers Kartowicz and Santo) have been promoted to the sergeant's group. I have attached a list of the remaining ten officers.

> We would like you to prepare a special supplemental valuation of the increase in the liability resulting from the change from B-3 to B-4. The benefit program change will take effect for retirements occurring after July 1, 1998. The benefit increase will affect only the ten remaining officers. Our experience tells us that the officers in this group will likely retire at age 55. As a result, prepare the valuation on the assumption that all members of this group will retire at age 55. We would also like you to report the cost based on an amortization of the increase in the past service liabilities over a period of ten years. . . .

A copy of this letter was send to LaMaire on February 26, 1998.

In March of 1998 the City received the actuarial report, which included a series of documents reflecting costs based on different assumptions. According to the report, based on a 10 year amortization and retirement at age 55, the cost of the upgrade was 4.92%. Utilizing a 30 year amortization and retirement at age 55, the cost would be 2.86%.

The Employer implemented the terms of the 1996-1999 contract except for the pension provision. That article provides at Section 58b:

> Effective July 1, 1998, the retirement plan shall be upgraded from MERS B-3 Plan with F-55/15 Rider to the MERS B-4 Plan with F-55/15 Rider, with the employee paying <u>(to be determined)</u> through payroll deduction.

The parties could not agree on the figure to be inserted in this provision. The Employer asserted that the cost of the upgrade was 4.92%, based on a 10 year amortization and retirement at age 55. The Union objected on the grounds that this was higher than what the sergeants were paying and contrary to the negotiated agreement. The Union took the position that a 30 year amortization should be utilized, making the cost of the upgrade 2.86%, and refused to sign an agreement with the Employer's figure.

<u>Discussion and Conclusions</u>:

Each party charges that the other has failed and refused to execute the negotiated bargaining agreement, specifically the pension provision. The essential terms of the pension provision in the tentative agreement involved an updated actuarial report and an agreement that employees would bear the cost of the upgrade. Each side interpreted the agreement differently. It was the Union's understanding that the actuarial report would be updated only with respect to the makeup of the bargaining unit, since that was the only matter discussed between the parties. The Employer, on the other hand, felt that the terms of the previous actuarial report would not reflect the full cost of the upgrade. Since the Union had agreed that the employees would bear the cost of the upgrade, the Employer wished to ensure that the report accurately reflected this and changed certain

assumptions used in the previous report. It apparently chose to be particularly careful in this respect because of its previous experience with the sergeants' unit. Thus there was clearly a basic misunderstanding as to what was involved in arriving at a cost for the pension proposal, perhaps fostered in part by the fact that the parties met separately rather than across the table.

In *Genesee County, Seventh Judicial Circuit Court, et al*, 1982 MERC Lab Op 84, after a tentative agreement was reached a disagreement arose as to the meaning of certain language and the employer refused to ratify the agreement. The Commission stated as follows:

> When, ultimately, a disagreement as to the meaning of the promotional language in the tentative agreement became apparent, the Employers or any one of them was justified in refusing to accept the agreement. *See,City of Fraser*, 1977 MERC Lab Op 838. (Language referring to a cap on the number of vacation-sick "days" was agreed upon, but the parties disagreed as to the meaning of the term "days.") In short, where there is no actual meeting of the minds, the parties cannot be required to ratify or execute or implement a contract.

Similarly, in *City of Mason*, 1988 MERC Lab Op 823, the parties each drew different conclusions from ambiguous language regarding a cap on longevity payments and each charged a refusal to bargain. The ALJ found that there was no meeting of the minds and dismissed both charges. He found that there was no deliberate renunciation of the agreement by the employer, nor was the reluctance of the union to bargain further under the circumstances grounds to find a refusal to bargain.

I reach the same conclusion here. The record reflects no evidence of bad faith on the part of either the Employer or the Union. Rather, there was simply no meeting of the minds with respect to the pension upgrade; each side interpreted the provision to their own advantage. As I find no violation of PERA by either side, it is recommended that the Commission issue the order set forth below:

RECOMMENDED ORDER

It is hereby ordered that the charges be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Nora Lynch
Administrative Law Judge

DATED: _____