STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

LADBROKE RACING MICHIGAN, INC.,
d/b/a LADBROKE DRC (DETROIT RACE COURSE),
Respondent-Public Employer,

Case No. C99 F-109

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 79,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Dawda, Mann, Mulcahy & Sadler, P.L.C., by Keith James, Esq., for Respondent

Rita L. Smith, Esq., Staff Attorney, for Charging Party

DECISION AND ORDER

On July 21, 2000, Administrative Law Judge James P. Kurtz 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.

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: _____

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SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU), LOCAL 79,
Charging Party-Labor Organization
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APPEARANCES:

Dawda, Mann, Mulcahy & Sadler, P.L.C., by Keith James, Atty, for Respondent-Employer

Rita L. Smith, Staff Atty, for Charging Party Union

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

This unfair labor practice case was heard at Detroit, Michigan on July 26, and September 1, 1999, before James P. Kurtz, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission (MERC), pursuant to a complaint and notice of hearing dated June 18, 1999, issued under the provisions of Section 23(b) of the Labor Relations and Mediation Act (LMA), 1939 PA 176, as amended, MCL 423.23, MSA 17.454(25). The record in this matter was closed by the letter of the undersigned dated December 21, 1999. Based upon the pleadings and record, including the post-hearing brief filed by Respondent on November 1, 1999, I make the following findings of fact, conclusions of law, and recommended order pursuant to Section 23(c) of the LMA, and Section 81 of the Administrative Procedures Act of 1969, MCL 24.281, MSA 3.560(181):

The Unfair Labor Practice Charge:

This unfair labor practice charge was filed on June 14, 1999, by the above-named labor organization, the Union, on behalf of a bargaining unit of race track employees that it represented at Ladbroke DRC, the Employer. The charge named and was served on the Employer's resident agent, because all of the Employer's racing operations had been closed permanently since on or before December 31, 1998. The Employer is no longer an employer in this State, and its racing facility in Livonia has been sold and subsequently demolished. The charge alleged as follows:

> On or about January 1999, the Union became aware that the Employer provided severance packages to non-union personnel upon the closing of its facility. The Employer did not provide similar severance packages to its Union employees. The union believes that this action was discriminatory and in retaliation for union membership and activities.

While the charge is worded in terms of discrimination by the Employer under Section 16(3) of the LMA, the Union also treated the charge as alleging a refusal to bargain under Section 16(6). Both sections of the statute will be considered in this decision. The explicit contention of the Charging Party is that the Employer was obligated to offer to the employees represented by the Union the same severance package that it offered to its other employees, whether represented or not.

On July 30, 1999, the Employer's answer denied the allegations of the charge, noting that it had settled with other unions representing its employees, and that it had offered a severance package to Local 79 that was opposed by its leadership and rejected by the rank and file by more than a three to one margin in June 1998. At the hearing and in its brief the Employer moved to dismiss the charge, claiming it was untimely filed; that no "anti-union animus" was shown in regard to the denial of closing benefits to Union members; that the Commission lacked jurisdiction over the Employer since it is no longer an employer in Michigan; and that the charge was defective on its face for failing to allege a violation of Michigan law. At the July 26 hearing the Union withdrew 11 other charges that it had filed against the Employer. Only the Union provided witnesses and documentary evidence at the hearings in this case.

Factual Findings:

Ladbroke Racing Michigan, Inc., d/b/a Ladbroke Racing, owned a private, pari-mutuel thoroughbred racing facility and simulcast operation in Livonia, Michigan, known as Ladbroke Detroit Race Course, or Ladbroke DRC. Charging Party Union has represented for many years a bargaining unit of employees who provided services at the DRC, including such areas or operations as simulcast, starters and outriders, security, admissions and sellers, mutuel employees, and maintenance and grounds personnel. The Union's last collective bargaining agreement with Respondent expired on May 28, 1996, and the parties have been attempting without success to negotiate a new agreement since that date.

When it became apparent in the spring of 1998 that the DRC would be terminating all operations at the end of the current year, the negotiations also involved a closing agreement. In about May, the Employer made a non retroactive package offer to the Union of an "interim collective bargaining agreement and facility closing agreement," set forth in 26 paragraphs. This management proposal, also referred to as the Employer's last offer, provided for certain additional wages and benefits, reinstated and/or modified most of the articles of the expired contract, and deleted 11 articles out of approximately 46 in the expired contract. The proposal also provided for the payment of a pre-closing bonus after ratification by the membership, and the payment of another final closing bonus in an employee's final paycheck. These bonuses varied with the seniority of the employee and the amount of time worked prior to the payment or closing date.

On June 25, 1998, the Local president sent a letter to the Employer advising it that the employees had rejected the management offer by more than a three to one margin. The Local president noted that the Union had made no recommendation to its membership for accepting or rejecting the offer, but it had merely offered a straightforward explanation of the proposal. In the same letter the president enclosed for the Employer's information a copy of an agreement made by the Union with another race track in the local area that is separately owned, Hazel Park, whose employees are also represented by the Union. See *Hazel Park Harness Raceway, Inc.*, 1999 MERC Lab Op 452, which case did not involve the Union's bargaining unit. The president indicated that if he did not hear from the Employer by July 6, he would assume that further negotiations would be handled through the Commission mediator, and he would contact the mediator to set up a meeting. The last meeting of the entire negotiation teams of both parties was the one where the Employer presented its package proposal that the employees rejected. After this rejection, the principals and attorneys of the Employer and the Union, with the assistance of the Commission mediator, continued to meet and talk about the issues separating them until the track was finally closed, but no contract agreement was ever reached.

The only evidence of further negotiations between the parties after the June rejection of the management proposal is contained in a series of correspondence, mainly between counsel for the Employer and the Union. On August 19 the Employer's attorney wrote to the Union attorney relative to a meeting scheduled for August 26 with the mediator, in which the attorney hoped that the Union might articulate its specific concerns relative to the rejected management offer. The Employer's attorney explained that he had been notified by another Union attorney that a court matter involving the same parties was also scheduled for August 26. He asked for a new meeting date and time. He also asked that the Union present specific language proposals in response to the Employer's earlier offer, and that it explain what areas of the Hazel Park agreement would apply to his client.[1] In late August or September the Employer received a list of the Union's proposed changes to the 26 paragraph last offer. This Union response accepted eight of the Employer's 26 proposals, and modified or requested further negotiations as to the remainder.

On September 4 the Employer's attorney sent to the Union attorney a revised proposal regarding automation, and confirmed that the "Union would be providing us with a settlement proposal concerning the costs of resolving all outstanding grievances." On October 28 the Union's attorney sent a revised proposal to the Employer's counsel and the mediator, covering the term of the agreement, health benefits, pension fund contributions, and expedited handling and arbitration of grievances. The record is silent after this letter as to any further dealings between the two parties. The live racing season for the track ended on November 8, and the Employer's work force was reduced at that time, leaving only the simulcast operations open until the final closing at the end of the year.

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[1]While not clear in the record, this meeting was apparently held on August 25, 1998.

Sometime in the fall of 1998, a member of the Union's bargaining committee received a copy of an Employer memorandum with an attached release of claims dated September 18, 1998. This document was directed to employees who were not in the Union's bargaining unit, and who were being laid off at the end of the live racing season. The memorandum offered the unnamed employee separation pay of $1257.00 in consideration for an unconditional release of the Employer of any and all claims the employee may have against it. All Employer benefits were to cease on November 30, and the agreement was to remain a secret. The parties made no effort to compare the separation pay in the release with the bonuses of the Employer's last offer to the Union, but that offer, if accepted, would have paid high seniority employees a pre-closing bonus of $1200.00, and an additional $250.00 as a final closing bonus.

The Union offered evidence by employees who had a number of conversations during the fall of 1998, and into early 1999, with various Employer officials and supervisors relative to the offer of a severance package to employees in the Union's bargaining unit. When asking Employer representatives or agents whether they would receive some type of severance package, the employees testified that they were told that they would definitely get something, but the amount was unknown. In one instance, the employee was told that it may be similar to what was given to Hazel Park employees, who apparently received some type of signing bonus in a new contract. No severance or separation package was offered or given to the members of the Union's bargaining unit upon the closure of the track, and this unfair labor practice charge was filed.

Discussion and Conclusions:

No authority has been cited by the Union for its somewhat novel major premise that an employer going out of business has an obligation to offer to represented employees the same severance benefits that the employer granted to its non represented employees. This dooms the Union's hope of obtaining some type of severance pay for its membership through this proceeding. In general, there is no requirement that an employer treat its employees equally, whether represented or not, absent evidence of unlawful motivation under the LMA or PERA. *Central Michigan Univ.*, 1994 MERC Lab Op 247, 251 (higher wage increase given to unrepresented clericals), and cases cited therein; *Detroit Wastewater Treatment Plant*, 1993 MERC Lab Op 716, 721 (some unit employees receive paid lunch hours and others do not); *City of Holland*, 1992 MERC Lab Op 461, 464 (disparity of dental benefits between unorganized and organized employees). The key to a finding of unlawful discrimination under the LMA in these cases is that there must be evidence that an employer's actions were taken in order to undermine the bargaining representative, or to discriminate or retaliate against the employees because of their union membership and/or activities within the meaning of Section 8 of the LMA. No such evidence exists in this case, and speculation as to the actions or motives of the Respondent does not constitute competent, material and substantial evidence on the record as a whole. *MERC v Detroit Symphony Orchestra, Inc.*, 393 Mich 116, 87 LRRM 3095 (1974).

The fact that various Employer representatives may have asserted, when questioned, that the employees would receive some type of severance package upon closing of the facility does not change the result herein. Such casual comments of a speculative nature do not bind the Employer in any way,

especially where the employees are represented by a labor organization. In this case the employees involved were represented by the Union, and where such representative status exists the Employer could not deal directly with its employees regarding wages, hours, and working conditions, including severance matters, but it had to deal and bargain only with their bargaining agent, the Union. *Detroit Fire Dep't*, 1991 MERC Lab Op 443, 448, 461-463 (dealing directly with unit employees and a minority labor organization); *cf. Mason County Eastern P. S.*, 1993 MERC Lab Op 5, 16 (informal meetings of employer and union representatives held to be inconsequential and not intended to undermine or interfere with the bargaining representative).

With regard to the question whether the Employer fulfilled its bargaining obligation owed to the Charging Party Union, the answer is the same as above: There is simply no evidence of any refusal to bargain with the Union by the Employer, either within the six months limitation period of Section 23(2)(a) of the LMA, MCL 423.23(2)(a), MSA 17.454(25)(2)(a), or in the months preceding that limitation period. The charge was filed in mid-June, and was served with the notice of hearing dated June 18, 1999, so the limitation period in this case began in mid to late December 1998, just before the final closing of the racing facility. The record establishes that while full-table negotiations ceased after the bargaining unit turned down the Employer's final offer in June 1998, representatives of the parties keep meeting and/or exchanging proposals on an informal basis until the first week of November 1998, when the season for live racing was ending. In view of the lack of any factual substantiation, where the fault lies for the failure of the bargaining process is at this point an academic exercise. It appears likely that whatever negotiations were taking place, they were stalled or short circuited by the closing down of the track, and apparently no attempt thereafter to revive them was made by either party. In any event, no specific bargaining issue has been raised by the facts in this case.

In view of the above findings and conclusions, discussion of the remaining defenses of the Employer is unnecessary. In regard to its defense that it is no longer doing business in Michigan and that no remedy, therefore, is available to the Union, see, for example, *Kleen Brite Systems*, 1984 MERC Lab Op 46, 51 (unfair labor practice case); and *Saginaw Valley Baking Co.*, 1969 MERC Lab Op 619, 620 (representation case), which cases resulted in dismissal of Commission proceedings after the complete and final cessation of business by the employer. In conclusion, I recommend that the following order be entered in this matter by the Commission:

ORDER DISMISSING CHARGE

Based upon the above findings of fact and conclusions of law, the unfair labor practice charge and complaint in this matter are dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

James P. Kurtz
Administrative Law Judge

DATED:_____