STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT BOARD OF EDUCATION,
Respondent-Public Employer,

Case No. C99 J-195

-and-

DETROIT ASSOCIATION OF EDUCATION OFFICE EMPLOYEES, LOCAL 4168,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Gordon Anderson, Esq., for Respondent

Mark Cousens, Esq., and Gillian H. Talwar, Esq., for Charging Party

DECISION AND ORDER

On July 14, 2000, Administrative Law Judge (hereafter AALJ@) Roy L. Roulhac issued his Decision and Recommended Order in the above matter finding that Respondent Detroit Board of Education did not unilaterally change a mandatory subject of bargaining in violation of Section 10(1)(e) of the Public Employment Relations Act (hereafter APERA@), 1965 PA 379 as amended, MCL 423.210; MSA 17.455(10)(1), and recommending that the Commission dismiss the unfair labor practice charge and complaint. On August 31, 2000, Charging Party Detroit Association of Education Office Employees, Local 4168, filed timely exceptions to the Decision and Recommended Order of the ALJ.

The facts of this case are not materially in dispute. Charging Party represents a bargaining unit consisting of clerical employees employed by Respondent. The most recent collective bargaining agreement between the parties expired on June 30, 1997; however, the parties agreed to be bound by its terms during negotiations on a successor contract. Article 5, Section E.1 of the expired contract contains a provision for Aadded pay@ or a longevity bonus. That section provides that A[a]ll employees who have completed eleven (11) years of service as full-time employees of the Board shall receive two hundred fifty dollars ($250) added pay to be paid bi-weekly.@ Traditionally, this $250 payment has been divided equally by the number of pay periods in each year. That is, for employees employed

on a twelve-month basis, the $250 was spread over 26 bi-weekly pay periods, and for employees employed on a ten-month basis, the $250 was spread over 21 bi-weekly pay periods.

This dispute involves Respondent=s cessation of, and claimed inability to make, such payments in the traditional bi-weekly manner beginning in August of 1999. Respondent installed a new computer software system in the summer of 1999 which, it asserts, cannot include longevity payments in the employees= bi-weekly pay. On August 24, 1999, Respondent sent a letter to Charging Party indicating that it was Anot possible to immediately reconfigure the payment of compensation add-ons.@ Respondent later informed Charging Party that the entire $250 longevity payment would be paid in a lump sum at the end of the school year. On October 25, 1999, the Union filed an unfair labor practice charge alleging that Respondent unilaterally discontinued the bi-weekly longevity pay. In recommending dismissal of the charge, the ALJ concluded that Respondent did not violate ' 10(1)(e) of PERA because the Union failed to make a bargaining demand concerning the cessation of longevity payments. The ALJ also found that even if the Union had made a bargaining demand, it failed to show that the change from bi-weekly to annual longevity payments had more than a de minimis impact on bargaining unit members.

On exception, Charging Party contends that the ALJ erred in finding that it had an obligation to demand bargaining with regard to the schedule for payment of longevity. We agree. It is well-established that a party is not required to demand bargaining on a subject that is included in a collective bargaining agreement. See e.g. *St. Clair Intermediate School Dist v. IEA/MEA*, 458 Mich 540 (1998); *Meridian Township*, 1990 MERC Lab Op 153. In the instant case, the collective bargaining agreement, which remained in effect by stipulation of the parties, contained a clause explicitly providing for payment of Aadded pay@ or a longevity bonus on a bi-weekly basis. Under such circumstances, no duty to demand bargaining was imposed upon the Union when Respondent ceased paying longevity in the manner directed by the contract. Thus, the ALJ erred in recommending dismissal of the charge on this basis.

We also disagree with the ALJ=s conclusion that the change in the schedule for longevity payments had only a de minimis impact on members of the bargaining unit. The cessation of bi-weekly payments will directly impact the bi-weekly wages of unit members and deprive them of the use of the longevity payments to which they are contractually entitled to receive each pay period. Compare *Waldron Area Schools*, 1996 MERC Lab Op 115, 119 (school board=s action was de minimis because the change was an isolated incident, and because there was no evidence of *any* impact on unit members= wages). See also *Children=s Aid Society*, 1994 MERC Lab Op 323, 327 (amount of time an employee must wait to receive a paycheck may have a significant impact or be a true hardship on the wage earner). The fact that the impact on some unit members may be as little as $9.61 per paycheck in no way justifies a conclusion that the change was so negligible that employees could not reasonably complain about alteration of the contract. See *City of Ocala*, 24 FPER (LRP) P29,327. Members of the unit had a right to rely upon the terms and conditions set forth in the contract and to expect that they would continue unchanged. *Id.* Accordingly, the ALJ=s finding that the impact on the bargaining unit was de minimis cannot be sustained.

Although not specifically urged as a defense by Respondent, we also note that the doctrine of impossibility is not applicable as an affirmative defense in this case. This well-established doctrine relieves an obligor of its contractual liability if unforeseen circumstances render performance impossible. See e.g. *Associated Musicians of Greater New York*, 176 NLRB 365; 71 LRRM 1228 (1969). However, impossibility of performance is not a defense where the impossibility results from the act of the party seeking to avoid performance or to excuse nonperformance. *Metropolitan District Council of Philadelphia*, 149 NLRB 646; 57 LRRM 1341 (1964), rev=d in part on other grounds, *National Woodwork Mfrs Ass'n v NLRB*, 354 F2d 594 (CA7 1965). In the instant case, it was the implementation of the new computer software system by Respondent which brought about the change in terms and conditions of employment, and the alleged inability of that system to make bi-weekly longevity payments was not so unforeseeable as to relieve the Employer from its contractual obligations. Therefore, the doctrine of impossibility of performance is not a viable defense here.

For the foregoing reasons, we conclude that the Employer violated ' 10(1)(e) of PERA when it unilaterally discontinued longevity pay on a bi-weekly basis to members of the bargaining unit represented by Charging Party.

ORDER

Respondent, Detroit Board of Education and its agents, officers, and assigns, shall:

1. Cease and desist in making unilateral changes in the wages, terms, and working conditions of the employees of Charging Party Detroit Association of Education Office Employees, Local 4168, and;

2. Restore the payment of longevity to the contractually mandated bi-weekly manner to the members of Charging Party, Local 4168, Detroit Association of Education Office Employees, and;

3. Make whole all employees for longevity pay lost as a result of Respondent's unilateral action by payment to them of the sum equal to what they would have received from the date Respondent ceased making bi-weekly payments, together with interest thereon to be paid at the statutory rate, and;

4. Post, for thirty days, copies of the attached notice to employees in conspicuous places, including all locations where notices to employees are customarily posted.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Maris Stella Swift, Chair

_____
Harry W. Bishop, Member

_____
C. Barry Ott, Member

DATED:_____

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APPEARANCES:

Gordon Anderson, Esq.,for the Public Employer

Mark Cousens and Gillian H. Talwar, Esqs., for the Labor Organization

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 1, 2000, by Administrative Law Judge Roy L. Roulhac. Based upon the record and post-hearing briefs filed by March 3, 2000, I make the following findings of fact, conclusions of law, and issue the recommended order set forth below:

The Charge:

The unfair labor practice charge filed by Charging Party Detroit Association of Education Office Employees, Local 4168 on October 25, 1999, reads: AThe Board has unilaterally discontinued the bi-weekly longevity pay.@ The Employer did not file an answer.

Findings of Fact:

The facts are essentially undisputed. The Employer and the Union have been parties to a number of collective bargaining agreements. The most recent one expired on June 30, 1997. The parties have agreed to be bound by its terms during on-going negotiations. The agreement provides in pertinent part as follows:

All employees who have completed eleven (11) years of service as full-time employees of the

Board shall receive two hundred fifty dollars ($250) added pay to be paid bi-weekly.@ (Article 5, Section E.1)

Traditionally, the $250 payment has been divided equally by the number of pay periods in the year.

During the summer of 1999, the Employer installed a new computer system which the Employer contends has been unable to include the longevity payments in employees= bi-weekly pay. In a letter dated August 24, 1999, all Unions that are parties to contracts containing provisions similar Article 5, Section E.1 were advised that it was Anot possible to immediately reconfigure the payment of compensation add-ons.@ Charging Party was informed that the entire $250 longevity payment would be paid in a lump sum at the end of the school year.

During a November 1999, bargaining session, the Employer proposed to amend Article 5, Section E.1 to replace the bi-weekly payments with an annual lump sum payment to be paid at the end of the school years (after June 30 and before August 1).

Conclusions of Law:

The Union claims that the Employer violated PERA by unilaterally changing a mandatory subject of bargaining without reaching impasse and neither proposed the change in the ongoing negotiations nor gave notice of its intent to make the change. I find no merit to the Union=s assertion. It is well-settled that an employer=s bargaining obligation is conditioned upon a bargaining request from the bargaining representative. *Local 586, SEIU* v *Village of Union City,* 135 Mich App 553, 558 (1984). When the Employer notified the Union in August 1999, that it was Anot possible to immediately reconfigure the payment of compensation add-ons@ to permit bi-weekly longevity payments, the Union had an obligation to demand bargaining. However, rather than make a bargaining demand, the Union filed the instant unfair labor practice charge two months later. I find that since Charging Party failed to make a bargaining demand, the Employer did not violate PERA.

Even if the Union had made a bargaining demand, it has failed to show that the change from bi-weekly to annual longevity had more than a *de minimis* impact on bargaining unit members. *City of Detroit*, 1997 MERC Lab Op 346, 351-352. It is noteworthy, that during a November 1999, bargaining session the Employer made a proposal to amend Article 5, Section E.1 by changing longevity payments from bi-weekly to annually.

Based on the above discussion, I find that Charging Party has failed to establish a violation of PERA. Accordingly, I recommend that the Commission issue the order set forth below:

Order

It is hereby ordered that the above unfair labor practice charges be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Roy L. Roulhac
Administrative Law Judge

Dated:_____