STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

ROYAL OAK TOWNSHIP,
Respondent-Public Employer,

Case No. C99 G-125

-and-

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, COUNCIL 25,
Charging Party-Labor Organization.
____/

APPEARANCES:

Plunkett & Cooney, by Stanley C. Moore, III, Esq. and Elizabeth A. Logan, Esq., for Respondent

Miller Cohen, P.L.C., by Richard G. Mack, Jr., Esq. and Bruce A. Miller, Esq. for Charging Party

DECISION AND ORDER

On April 2, 2001, 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

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Dated: ______

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Miller Cohen, P. L. C., by Richard G. Mack, Jr.and Bruce A. Miller for the Charging Party

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, MSA 17.455(10) *et seq*., this case was heard in Detroit, Michigan on July 7 and August 4, 2000, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission. The proceedings were based upon an unfair labor practice charge filed by the American Federation of State, County and Municipal Employees, Council 25 (the Union or Charging Party), against Royal Oak Township (Employer or Respondent) on July 19, 1999. Based upon the record, and briefs filed by October 11, 2000, I make the following findings of fact and conclusions of law, and issue a recommended order pursuant to Section 16(b) of PERA:

The Charge:

In its July 19, 1999 charge, Charging Party claims that Respondent violated Section 10(1)(e) of PERA by unilaterally reducing the wages and benefits of most of its firefighters and changing their status from full to part-time. Charging Party also claims that the Respondent failed and refused to bargain in good faith; interfered with employees in the exercise of their rights guaranteed by Section 9 of PERA; bargained in bad faith by entering into a settlement agreement which it never intended to implement; and discriminated against employees for the purpose of discouraging membership in a labor organization. In its October 25, 1999 answer, Respondent denied that it committed an unfair labor practice because the parties had not had a collective bargaining agreement since 1990. Respondent filed a motion to dismiss on January 27, 2000, and claimed that it no longer

employed public safety officers; the firefighters it employs are part-time; and Charging Party has never represented part-time employees.

Findings of Fact:

Respondent Royal Oak Township has operated under a State of Michigan debt elimination plan since 1989. Respondent is required to obtain the State's consent to enter into any contract which impacts its budget. Respondent recognizes Charging Party as the exclusive bargaining agent of full-time dispatchers and public safety officers, including police officers and firemen. The parties' latest collective bargaining agreement covered the period January 1, 1991 to December 31, 1993.[1] The management responsibilities clause grants Respondent the right decide the number and type of its personnel. Contract renewal and termination provisions are set forth in Article 2 as follows:

> Renewal Conditions
> This agreement shall be effective on the date signed and shall remain in full force and effect until December 31, 1993, or until a new contract agreeable to both parties and representing any changes that have been negotiated. It shall be automatically renewed from year to year thereafter, unless either party shall notify the other in writing ninety (90) days prior to the anniversary date that it desires to modify this Agreement.
>
> Termination
> In the event that either party desires to terminate this Agreement, written notice must be given to the other party no less than ninety (90) days prior to the desired termination date which shall not be before the 1st anniversary date . . .

In September 1993 letter, Charging Party advised Respondent of its desire to modify the agreement and of intent to schedule collective bargaining meetings dates. However, no meetings were scheduled until four years later. In the interim, the parties continued to comply with the terms of the expired agreement. In 1996, Charging Party filed a grievance that challenged the discharge of a part-time public safety officer Ronnie Karjo. In an August 1998 arbitration award, Arbitrator David S. Tanzman agreed with Respondent's assertion that part-time employees were not included in Charging Party's bargaining unit.

In the meantime, in a July 1997 letter to Respondent, Robert Updike, Charging Party's business agent, requested that negotiating sessions be scheduled. The first of two scheduled meetings was held on September 6, 1997. Charging Party presented Respondent with a comprehensive proposal, which among other things, sought to modify the agreement's recognition clause to allow it to represent both part-time and full-time public safety officers. The proposal was not discussed

[1]The parties presented Joint Exhibit 1, a collective bargaining agreement which covers the period January 1, 1988 to December 31, 1990, as their latest agreement and refer to it throughout the hearing and in their post-hearing briefs. However, Joint Exhibit 2, an August 25, 1998 arbitration award, indicates that their latest agreement covered the period January 1, 1991 to December 31, 1993. After the record was closed, the parties were directed to supplement the record with a copy of the 1990-1993 agreement. Charging Party provided a copy of the agreement, albeit unsigned, on February 27, 2001. It is marked as Joint Exhibit 17. The pertinent provision within both are the same.

because Respondent indicated that more time was needed to review it. According to Updike, he was unable to secure additional meetings despite trying at least a half dozen times. He explained that he Respondent's representatives "would either not be available or, if we were able to agree tentatively on meetings, then some way they would not be available." In September 1998, Charging Party renewed its demand to bargain and requested dates that Respondent's representative would be available to negotiate. Respondent was reminded that it had not responded to its 1997 proposal nor made any effort to reschedule the cancelled meeting. Respondent did not respond to this request.

Charging Party filed an unfair labor practice charge (Case No. C98 I-200) on September 29, 1998, after Respondent petitioned the Oakland County Circuit Court for a declaratory judgment to allow it to contract with the Oakland County Sheriff's Department (OCSD) to provide the Township's police services. The charge alleged that Respondent negotiated with the OCSD without its knowledge, repudiated the collective bargaining agreement which prohibited subcontracting police work, and refused to bargain over subcontracting or its effects. The case was set for hearing in December 1998, February, March and June 1999. Each hearing was postponed while the parties explored settlement. The parties entered into the following agreement during a June 3, 1999 pre-hearing conference:

> Effective June 5, 1999 the Royal Oak Township Public Safety Department shall cease from providing police services. Bargaining unit employees shall be allowed to apply for available positions within the Oakland County Sheriff's Department . . .
>
> Bargaining unit employees who choose to remain employed with Royal Oak Township shall be transferred to the fire unit within the Public Safety Department. It is agreed that the affected officers shall be subject to the Royal Oak Township drug testing policy as enumerated in the memorandum of understanding contained in the parties' collective bargaining agreement. It is further agreed said officers shall be subject to standard background checks pursuant to Royal Oak Township policy . . .
>
> Provided that all bargaining unit members who choose to remain employed by Royal Oak Township have been afforded the opportunities specified herein no later than June 30, 1999, Charging Party shall cause the unfair labor practice charge in Case No. C98 I-200 to be withdrawn.[2]

A few days later, on June 7, Jerry Saddler, the Township Supervisor, and Fire Chief Tyrone Scott met with the public safety officers employees and encouraged them to transfer to the OCSD with a promise of severance pay and the opportunity to earn more money. Employees who elected to remain employed by Respondent were told that they could transfer to the fire department as fire fighters and their pay and benefits would remain in effect. Eight employees chose to remain employed by Respondent and worked as public safety officers with their same pay and benefits. Six were earning \$11.35 or \$14.55 per hour, and two \$7.50 per hour. The OCSD began to provide police service to the Township on June 5. The following week, on June 11, the former public safety officers duties were limited to fire fighting.

[2] The case was administratively closed on June 24, 1999.

During a June 25, 1999 meeting, Respondent presented Charging Party with financial projections for a restructured public safety department. The Township Supervisor explained how the fire department and the fire fighters' salaries would impact the Township's financial condition and its obligation to comply with the terms of the debt elimination plan. Respondent informed Charging Party that it was considering making fire department employees part-time and reducing their pay to $7 per hour. Three days later, on June 28, the Union sent the following letter to Respondent:

> The Union requests that negotiations begin as soon as possible on behalf of those employees represented by AFSCME who will remain as employees of Royal Oak Township in the role of firefighters.
>
> The Union will be prepared to present our demands at that time.
>
> Please know that unilateral changes in the wages, hours and other terms and conditions of employment will cause the Union to file charges of Unfair Labor practices.

Respondent's legal counsel, the Bloomfield Law Center, Inc., sent two responses to Charging Party's bargaining request.[3] In a July 2 letter she related that available dates to negotiate would be provided when the Township supervisor returned from a two week vacation. Four days, later on July 6, she wrote the following letter:

> I am writing in response to your letter dated June 28, 1999. Please know that the contract between the parties dated January 1988, has expired and there is no contract in effect at this time. More importantly, negotiations between the parties since 1993, have failed to produce an agreement and the parties have reached an impasse. Hence, the Township **can not** [sic]legally engage or commit any Unfair Labor Practice. Moreover, the Township is forming a **NEW** Fire Department and wages, hours and other terms and condition of employment have yet to be established. Again the Township **can not** [sic] unilaterally change what does not exist. However, if you wish to participate, negotiate or have an imput [sic] regarding said issues, please note, Mr. Jerry Saddler, Supervisor, will be on vacation for the next two (2) weeks. Upon his return, I will contact you with available dates for the parties to meet.

In the meantime, on July 2 letter, the Township clerk advised the fire fighters that their temporary employment would continue for an additional week because background material needed to qualify them for potential employment with the fire department had not been completed. Respondent's Board of Trustees posted a notice to all fire fighters that informed them that effective July 17, their wages would be reduced to $9 per hour, with no fringe benefits, and after thirty days, their medical insurance would be discontinued. The fire fighters hours of work were also reduced from 40 to 20 hours per week.

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[3] Respondent was represented by H. Wallace Parker and Carolyn G. Keemer of the Bloomfied Law Center, Inc., until May 19, 2000, six weeks before the hearing, when Elizabeth A. Logan of Plunkett & Cooney, entered an appearance.

Conclusions of Law:

Charging Party's principal claim is that Respondent violated PERA by unilaterally reducing the employees' pay and work hours, and discontinuing their medical insurance. Under PERA, a party commits an unfair labor practice if, before bargaining, it unilaterally alters or modifies a term or condition of employment, unless that party has fulfilled its statutory obligation or has been freed from it. See *Port Huron Education Ass'n* v *Port Huron Area Schools*, 452 Mich 309, 317 (1996). An employer's obligation to bargain is conditioned upon a request for bargaining from the employees or their representation. *St Clair Prosecutor v AFSCME,* 425 Mich 204, 242 (1986); *Local 586, SEIU v Village of Union City*, 135 Mich App 553, 557 (1984) lv den 421 Mich 857 (1985). A union's statement that an issue should be negotiated, or even its protest that the employer's action is unlawful, does not constitute a demand to bargain. *Genesee County Board of Commissioner*, 1994 MERC Lab Op122. Respondent advances three arguments to demonstrate that its actions did not violate PERA. Each will be considered in turn.

I. Express Waiver of Bargaining Rights and Inherent Management Right

First, Respondent claims that the express language in the management responsibilities clause should end the debate because Charging Party contractually granted it the right to determine whether the newly created fire department would be staffed with only part-time fire fighters. This argument does not address the issue presented in this case and requires little comment. To find that a union waived its right to bargain about an issue, there must be clear and unmistakable evidence that it knowingly and voluntarily relinquished its right. *Port Huron Ed Ass'n v. Port Huron Area School Dist*, 452 Mich 309, 317; 550 NW2d 228 (1996); *Detroit Board of Education*, Court of Appeals, Docket No. 192852, (Unpubl. 3/27/1998; *Wayne State University*, 1997 MERC Lab Op 484; *St. Clair County Road Comm*, 1992 MERC Lab Op 533, 538. Here, the contract language giving Respondent the right to determine the number and type of its personnel cannot remotely be interpreted as clearly and unmistakably authorizing Respondent to unilaterally reduce employees pay and work hours or to discontinue their medical insurance. There is nothing in the clause that explicitly refers to reducing employees' pay, hours of work, or eliminating their insurance benefits.

Respondent also contends that employers have an inherent management right to change employment conditions that are not expressly restricted or granted in a collective bargaining agreement. This view, however, is at odds with Commission precedent. An employer has a managerial right to determine the level of its workforce and to reduce the number of its employees. *Village of Union* City, 1983 MERC Lab Op 510, and cases cited there. Reorganization plans that eliminate positions and reassign job function to existing or newly created positions are not mandatory bargaining subject and employers are only required to bargain in good faith with its employees bargaining agent regarding the impact of its plan. *Local 128, AFSCME* v *Ishpeming*, 1985 MERC Lab Op 687, aff'd in part, 155 Mich App 491. However, an employer has an obligation to bargain over a decision to alter working hours. See also *Ionia County Road Commission*, 1984 MERC Lab Op 624 and *Township of Oscoda (Police Department),* 1983 MERC Lab Op 751. In *Village of Union City*, *supra*, the Commission distinguished an employer's decision to lay off employees, as one within the core area of managerial control, from the decision to cut back scheduled shifts or hours as a means of averting layoffs. In commenting on this difference in *Ionia County*, the Commission observed that:

> The latter decision, although it may have a fiscal effect for the Public Employer that is equivalent to a layoff, is distinguishably different from a layoff for all those employees who remain actively employed. Such a decision significantly changes their hours, their take-home pay, and their actual working conditions, and, as such, is subject to prior bargaining. 1984 MERC Lab Op 627-628

Similarly, an employer must bargain over an adjustment of wages, *Jackson Comm. College Classified & Technical Ass'n,* 197 Mich App 708, and the elimination of insurance benefits, *Port Huron, supra.*

Thus, I conclude that the contract's management responsibilities clause does not constitute an express waiver of Charging Party's right to bargain about Respondent's reduction of employees' wages and hours or the discontinuation of their medical insurance. Nor do these action fall within the realm of Respondent's inherent management rights.

II. Failure to Demand Bargaining

Respondent's second argument is that Charging Party failed to make a bargaining demand. It contends that Charging Party's June 28 letter does not mention bargaining about the employees' part-time status or compensation issues, but was a request to bargain a new contract in general, and at best, only protested unilateral action. It is well-established, however, that no specific format is required to constitute a bargaining request. Rather, an employer must know that a request is being made and there must be a statement or action by the employer that would constitute a refusal to honor the request. *Macomb County,* 1998 MERC Lab Op 344; *Michigan State University*, 1993 MERC Lab Op 52 at 63 citing *Clarkwood Corp*., 233 NLRB 1172 (1977). In the June 28 letter, Charging Party not only protested Respondent's unilateral action, but expressly requested that negotiations begin as soon as possible on behalf of bargaining unit members who elected to remain employed by Respondent as firefighters. Thus, I find that Respondent knew that Charging Party's letter was a request to bargain, but refused to honor the request.

Even if Charging Party had been more specific and explicitly stated that it wanted to bargain about the reduction in the employees hours and pay, and the discontinuation of their medical insurance, the demand to bargain would have been futile. Respondent had failed to respond to Charging Party's prior requests to bargain and completely ignored the comprehensive proposal submitted by Charging Party in September 1997. Moreover, in its July 6 response to Charging Party's letter, Respondent expressed its view that the parties had reached an impasse in negotiations although the record demonstrates that the parties had held only one bargaining session since the contract expired in 1993. A union is not required to specify disputed issues or include alternatives to an employer's plan in a written demand for bargaining. Such matters would normally be reserved for later bargaining sessions. *City of Detroit, Dept of Health*, 1991 MERC Lab Op 41, 48. Here, the Union noted in its request to bargain that it would be prepared to present its bargaining demands

during negotiations.

III. No Collective Bargaining Agreement in Effect

Finally, Respondent claims that the Union not only expressly waived its right to bargain by negotiating the management responsibilities clause in the collective bargaining agreement and impliedly by its failure to demand bargaining, it also impliedly waived its right to determine whether employees should be full or part-time through the parties' unique and unusual relationship, or lack thereof, over the last decade. Respondent emphasizes that the collective bargaining agreement expired over ten years ago and there has been very little activity by either party to negotiate a new contract. According to Respondent, the sparse activity coupled with Charging Party's 1993 notice to modify the contract makes clear that the notice essentially operated to terminate the contract.

These arguments are circular and inconsistent. The record establishes, however, that Respondent continued to recognize the Union as the employees bargaining agent and to acknowledge the existence of a contract. The parties not only processed and arbitrated a grievance under the terms of the contract, but as recently as June 3, 1999, as a condition of settling a prior unfair labor practice charge, Respondent agreed to transfer employees to its fire unit, subject to their compliance with a memorandum of understanding contained in their collective bargaining agreement. Moreover, the Commission has interpreted duration clauses similar to the one in this case to be contracts of indefinite duration which can be terminated at will by either party. See *Pickney Community Schools,* 1994 MERC Lab Op 376. Here, unlike in *Pickney,* neither party exercised its right to terminate the agreement after it expired in 1993.

The unilateral changes made by Respondent represent a basic and clear failure to negotiate in good faith. Respondent also refused to bargain in good faith by failing to respond to Charging Party's bargaining proposal, ignoring its requests to schedule meetings to negotiate a successor contract, and by repudiating its agreement to transfer public safety officers who chose to remain employed to its fire unit with the same pay and benefits. An appropriate remedial order that would effectuate the purposes of PERA requires that Respondent cease changing employees' hours, pay, and benefits; restore the *status quo ante*; reimburse employees who suffered monetary losses because of Respondent's unilateral action; and post a notice. *St Charles Comm School* 1985 Mich Lab Op 114, 117; *City of Riverview,* 1979 MERC Lab Op 854, aff'd 111 Mich App 158 (1981).

I have carefully considered all other arguments advanced by the parties and conclude that they do not warrant a change in the result. Included is Respondent's contention that the fire fighters are not covered by the terms of the collective bargaining agreement because they are now part-time employees, and the Commission should defer to the Arbitrator Tanzman's determination that part-time employees are not included in the bargaining unit. Suffice it to note that unit determination is within the exclusive province of the Commission. *Michigan State Univ.*, 1984 MERC Lab Op 807. It is well-settled that part-time police officers who performed bargaining unit work on a regular basis should be included in the unit with other employees. *Village of Chelsea*, 1979 MERC Lab Op 826; *City of Perry, Police Dep't,* 1992 MERC Lab Op 596. See also the Administrative Law Judge's discussion in *Township of Oscoda (Police Dep't), supra,* where the union, like the Charging Party in this case, agreed not to represent part-time employees.

Based on the findings of fact and conclusions of law set forth above, I find that Respondent violated Section 10(1)(e) of PERA by unilaterally changing hours of work, wages and benefits

without bargaining, refusing to bargain in good faith by failing to respond to Charging Party's bargaining proposal, ignoring its requests to schedule meetings to negotiate a successor contract, and by repudiating its agreement to transfer public safety officers who chose to remain employed to its fire unit with the same pay and benefit. To remedy Respondent's unilateral changes, I recommend that the Commission issue the order set forth below:

Recommended Order

It is ordered that the Royal Oak Township, its officers, agents, representatives, and successors shall:

A. Cease and desist from:

1. Refusing to bargain collectively and in good faith concerning wages, hours, and working conditions with the American Federation of State County and Municipal Employees, Council 25, and unilaterally changing the working hours, pay, and benefits of its bargaining unit members.

2. Unilaterally imposing and changing terms and conditions of employment, in the absence of a lawful impasse.

3. In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them in Section 9 of PERA.

B. Take the following affirmative action to effectuate the policies of PERA, and to remedy its unfair labor practices:

1. Upon request, bargain collectively and in good faith concerning wages, hours, and working conditions with the above named Union as the exclusive bargaining representative of fire fighters and embody in a signed agreement any understanding reached.

2. Restore to the fire fighters the terms and conditions of employment that were applicable prior to July 17, 1999, and continue them in effect until the parties reach either an agreement or a good-faith impasse in bargaining.

3. Make the fire fighters whole for any losses they may have suffered because of the unlawful imposition of and changes in terms and conditions on and after July 17, 1999, including interest at the statutory rate.

4. Post copies of the attached Notice to Employees in conspicuous places on its premises, including all location where Notices to Employees are customarily posted for thirty (30) consecutive days. The notices shall not be altered, defaced or covered by any other material.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

____

Roy L. Roulhac
Administrative Law Judge

Dated:______________

NOTICE TO EMPLOYEES

After a public hearing before an administrative law judge of the MICHIGAN EMPLOYMENT RELATIONS COMMISSION, ROYAL OAK TOWNSHIP was found to have committed unfair labor practices in violation of the MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). Based upon an ORDER of the COMMISSION, WE HEREBY NOTIFY OUR EMPLOYEES that:

> WE WILL NOT refuse to bargain with the collective bargaining representative, AFSCME, Council 25, of our fire fighters by unilaterally changing their working hours, pay and benefits without first giving notice and bargaining, upon request, with AFSCME, Council 25.
>
> WE WILL rescind our unilateral change in the working hours, pay, and benefits of the fire fighters and restore the conditions that existed prior to July 17, 1999, including making them whole for any loss of wages and benefits to the date of compliance with the Commission's order.
>
> WE WILL, upon request, recognize and bargain in good faith with AFSCME, Council 25, regarding the hours of work, pay, and benefits of fire fighters, and if an agreement is reach, we will embody the terms in a signed collective bargaining agreement.

All of our employees are free to engage in lawful, concerted activity through representatives of their own choice for the purpose of collective bargaining or other mutual aid or protection as provided by Section 9 of the Public Employment Relations Act.

ROYAL OAK TOWNSHIP

____

DATE:____________