STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY COMMUNITY COLLEGE DISTRICT,
Respondent-Public Employer,

Case No. C00 C-51

-and-

PROFESSIONAL AND ADMINISTRATIVE ASSOCIATION
MFT/LOCAL 4467,
Charging Party-Labor Organization.
____/

APPEARANCES:

Floyd E. Allen & Associates, by Floyd E. Allen, Esq., and Shaun P. Ayer. Esq., for Respondent

Mark H. Cousens, Esq., for Charging Party

DECISION AND ORDER

On June 12, 2001, Administrative Law Judge (ALJ) Roy L. Roulhac issued his Decision and Recommended Order in the above matter finding that Respondent, Wayne County Community College District, did not violate its duty to bargain pursuant to Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210. The ALJ recommended that the charges be dismissed. On August 2, 2001, Charging Party, Professional and Administrative Association MFT/ Local 4467, filed timely exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions. On August 13, 2001, Respondent filed a timely brief in support of the Decision and Recommended Order of the ALJ.

Charging Party is the exclusive bargaining representative for Respondent's full and part-time administrative and professional employees. The collective bargaining agreement between Respondent and Charging Party expired on June 30, 1998. After the expiration of the contract, Respondent filled several vacancies, including the positions for which Donnell Mason II, Pamela Broaden, Lynnaire Barnett and Mary Finlay were hired. According to Charging Party, Respondent filled each of those vacancies without posting the vacancy notice and without offering the position to qualified bargaining unit members as required by the collective bargaining agreement. Additionally, Charging Party contends that Respondent violated PERA by appointing Romatallah Golshan to a non-bargaining unit position while he continued to perform the duties of a bargaining unit position. Charging Party also alleges that Respondent hired Mengisteab Tesfamikael at Step 5 of the salary scale instead of Step 1. It is Charging Party's contention that Respondent's actions unilaterally changed employment conditions of long standing duration.

Several of the allegations set forth in the charge were the subject of grievances filed by Charging Party. Respondent refused to process the grievances as the expired contract provides that the grievance procedure does not apply to matters occurring after the contract's expiration.

Discussion And Conclusions Of Law:

Charging Party contends that Respondent violated Section 10 of PERA by implementing unilateral changes in conditions of employment without first bargaining to impasse. It relies on our ruling in *Plymouth-Canton Community Schs*, 1984 MERC Lab Op 894, to support its contention that the Commission has jurisdiction over this matter. Respondent, on the other hand, contends that the allegations are merely matters of contract interpretation over which the Commission should not exercise jurisdiction. In dismissing the charge, the ALJ determined that the parties' disagreements involve good faith disputes over interpretation of the contract and concluded that *Plymouth-Canton Community Schs* does not apply. Charging Party takes exception to that conclusion.

In *Plymouth-Canton Community Schs*, at 898, we held "that in addition to the circumstances under which we have previously found 'repudiation,' we will decide claims of unlawful unilateral change involving a corresponding breach wherever no contractual procedure exists for final and binding arbitration of the dispute." However, it is not our role to act as an arbiter of mere contract disputes. Thus, we will not exercise jurisdiction over an unfair labor practice charge intertwined with a contract dispute unless the Charging Party can establish that the Respondent has violated PERA. *Mesick Consolidated Schs,* 1987 MERC Lab Op 116, 119.

In this case, it is not necessary for us to determine whether *Plymouth-Canton Community Schs* applies in the context of post-expiration disputes. Charging Party has alleged that, after the expiration of the contract, Respondent unilaterally changed mandatory terms and conditions of employment without first bargaining to impasse. Evidence that is sufficient to prove such an allegation would also be sufficient to establish a PERA violation without regard to the principle enunciated in *Plymouth-Canton Community Schs*.

When a collective bargaining agreement has expired, the parties are required to bargain in good faith in an effort to reach a new agreement. It is the obligation of the public employer to continue to apply the terms of the expired agreement governing "wages, hours, and other terms and conditions of employment", known as "mandatory subjects", until such time as impasse is reached in the bargaining process. The terms of the expired contract regarding mandatory subjects of bargaining, survive the expired contract by operation of law. *Wayne Co Gov't Bar Ass'n* v *Wayne Co*, 169 Mich App 480, 485-486 (1988). If a public employer takes unilateral action on a "mandatory subject" of bargaining before reaching an impasse in negotiations, the employer has committed an unfair labor practice. *Local 1467, International Ass'n of Firefighters, AFL-CIO* v *Portage* 134 Mich App 466, 472 (1984).

Charging Party alleges that Respondent acted unilaterally to modify terms and conditions of employment without reaching an impasse. Nothing in the record indicates the parties are at impasse.

Thus, we will proceed to determine whether Respondent has implemented a unilateral change in the terms and conditions of employment on these issues and whether a PERA violation has occurred.

If a matter has a "significant impact on 'wages, hours, or other conditions of employment' or settles an aspect of the employer-employee relationship" it is a "mandatory subject" of bargaining. *Portage* at 472. We must determine whether a given subject is a "mandatory subject of bargaining" on a case-by-case basis. In doing so, we must also be mindful of the fact that because public employees are forbidden to strike, Section 15 of PERA must be construed even more expansively than its counterpart in the National Labor Relations Act[1]. *Detroit Police Officers Ass'n* v *Detroit Police Dep't*, 61 Mich App 487, 490-491 (1975).

In the matter before us, Charging Party claims that Respondent modified the procedure for filling vacancies. We agree, as Charging Party argues, that the procedure for filling vacancies within the bargaining unit affects the promotional opportunities of unit members. Contract provisions regarding promotion have been determined to be a mandatory subject of bargaining. *Detroit Police Officers Ass'n* v *Detroit Police Dep't*, at 491-493. Respondent does not dispute Charging Party's contention that the matters raised are mandatory subjects of bargaining. Thus, the issue before us is whether Respondent made a unilateral change without reaching impasse.

Charging Party has offered evidence that prior to the expiration of the collective bargaining agreement, for each bargaining unit vacancy that Respondent sought to fill, Respondent provided the Union with a vacancy notice which the Union President signed and dated before the vacancy was posted in accordance with Article XVII of the collective bargaining agreement. Charging Party alleges that the required notices were not posted with respect to the positions filled by Mason, Broaden, Barnett and Finlay. Although Charging Party was provided with an opportunity to present evidence at the hearing, it failed to offer testimony or other evidence substantiating this allegation, and there is no basis for finding that a unilateral change occurred.

With respect to the charges that Respondent failed to offer the four positions to bargaining unit members, Charging Party has not offered evidence that, prior to the contract's expiration, bargaining unit members had consistently, or even generally, been offered vacant positions before Respondent offered the positions to outsiders. Such evidence would be necessary to show that Respondent's later failure to offer positions to qualified bargaining unit members constitutes a unilateral change in violation of PERA.

It appears that Respondent's failure to offer a position to a bargaining unit member was the source of a prior dispute between the parties over the interpretation of the contract. That dispute was subsequently arbitrated. Evidently, Respondent has continued to apply the same interpretation of the collective bargaining agreement that it applied before the contract's expiration. There is no basis for finding a unilateral change with respect to the alleged failure to offer the positions to bargaining unit members if, as it appears, Respondent has been consistent in its application of the contract language.

The same is true with respect to the charge regarding hiring Mengisteab Tesfamikael at Step 5 of the salary scale instead of Step 1. The evidence does not show that Respondent has changed the way it interpreted the applicable contract language. Charging Party offered sufficient evidence to

1 29 USC 151 – 169.

establish that Tesfamikael was hired at Step 5 of the salary scale instead of Step 1. Although there was testimony that no employee had been hired at Step 5 in the past, Charging Party offered evidence that Respondent had hired two new employees above Step 1 in 1987. That matter was grieved and went to arbitration. In 1988, an arbitrator ruled that Respondent must hire all future new employees at Step 1, unless the Union consents to a higher pay level.

Despite the 1988 arbitration decision interpreting contract language almost identical to that of the expired contract, Respondent contends that the language of the contract does not restrict it to hiring new employees at Step 1. Charging Party has cited no case law to support its apparent assertion that the 1988 arbitrator's decision was incorporated into the collective bargaining agreement such that it became a term or condition of employment. Charging Party has offered no evidence that Respondent ever complied with the arbitrator's decision and later changed its position, or that Respondent ever acknowledged that it was restricted by the most recent contract to hiring new employees at Step 1 of the salary scale. Inasmuch as Respondent's interpretation and application of the contract language appears consistent, a unilateral change has not been established.

In the bill of particulars, Charging Party alleges that Respondent violated PERA by appointing Romatallah Golshan, to the non-bargaining unit position of instructor while he continued to perform the bargaining unit position of Campus Assistant Dean, Electronics. Charging Party asserted that this constituted a unilateral change in the appointment process. Charging Party has not offered evidence of the work Golshan performs, or of his inclusion in, or exclusion from, a given bargaining unit. While Charging Party had three exhibits marked with respect to Golshan's appointments, it failed to lay a foundation for their admissibility or to offer them into evidence at the hearing.

The expired collective bargaining agreement provides for both full-time and part-time bargaining unit positions. Charging Party has pointed to nothing in the contract that prohibits a member of another bargaining unit from also holding a part-time position in Charging Party's bargaining unit. Nor has Charging Party identified anything in the collective bargaining agreement that would prohibit a bargaining unit member from holding a part-time position in another unit. More importantly, Charging Party has failed to offer evidence of Respondent's practices prior to the contract's expiration with respect to permitting employees to hold dual appointments.

In its post-hearing brief and its brief in support of its exceptions to the ALJ's Decision and Recommended Order, Charging Party contends that allowing Golshan to perform bargaining unit work while also performing work in a different bargaining unit amounts to assigning bargaining unit work to a non-bargaining unit member. However, this was not alleged in the charge or the bill of particulars, nor was it litigated at the hearing. Moreover, Charging Party has not alleged, or offered evidence of, any impact on unit employees as a result of Golshan's supposed performance of both bargaining unit and nonbargaining unit work. Thus, even assuming that a PERA violation occurred in this case, we would find any violation to be de minimis. See *City of Detroit (Water And Sewerage)*, 1990 MERC Lab Ops 34, 40-41.

We have carefully considered each of the arguments set forth by Charging Party in its exceptions and brief. We believe we are statutorily mandated to determine whether Respondent instituted unilateral changes in mandatory subjects of bargaining without first reaching impasse. However, finding no evidence establishing that Respondent instituted unilateral changes in mandatory subjects of bargaining, we agree with the ALJ's conclusion that the charges should be dismissed.

ORDER

The charges in this case are dismissed in their entirety.

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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APPEARANCES:

Mark H. Cousens and Gillian H. Talwar, Attorneys, for the Public Employer

Floyd E. Allen & Associates, by Floyd E. Allen and Shaun P. Ayer, for the Labor Organization

DECISION AND RECOMMENDED ORDER ON MOTION TO DISMISS

On March 30, 2000, the Professional and Administrative Association/MFT, Local 4467, filed an unfair labor practice charge against Wayne County Community College District. The charge alleges that Respondent violated Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210; MSA 17.455(10), by breaching its duty to bargain in good faith; instigating unilateral changes to the terms of the contract without reaching agreement or impasse; refusing to comply with the terms of the contract; and failing to provide information.

In a May 1, 2000 response to a request for a bill of particulars, Charging Party outlined over twenty instances of alleged unilateral changes in appointments between November 30, 1998 and March 30, 2000; ten instances of Respondent's alleged failure to provide information between January 15, 2000 and March 5, 2000; and eight instances of unilateral interim appointments on unspecified dates. At the outset of a February 13, 2001 hearing, Charging Party withdrew all but six of the allegations set forth in its bill of particulars. Withdrawn were allegations occurring outside of the six-month statute of limitations period; claims that arose after the charge was filed; and claims relating to the Employer's alleged failure to provide information. Remaining at issue are six instances of Respondent's alleged unilateral changes in appointments between November 1999 and January 2000. At the hearing, Respondent made a motion to dismiss these allegations.

Based on the record and post-hearing briefs filed by April 16, 2001, I make the following findings of fact, conclusions of law, and issue the recommended order set forth below:

Facts:

Charging Party is the exclusive bargaining representative for Respondent's full and part-time administrators and professional employees. The parties' collective bargaining agreement expired on June 30, 1998. The Employer has refused to extend the contract and to process grievances that arose after the contract expired. Article VIII of the expired contract contains a grievance procedure culminating in final and binding arbitration. It also provides that the grievance procedure shall not be involved in matters occurring after the contract's expiration.

Bargaining Unit Members Not Given Primary Consideration

In March 1998, a few months before the contract expired, Charging Party filed a grievance challenging Respondent's appointment of a non-bargaining unit member to an accounting supervisor position. Charging Party claimed that Respondent violated the contract by failing to post a notice of the vacancy or to give primary consideration to a bargaining unit member. Article XVII – Vacancies – provides that Respondent shall give primary consideration to applicants from within the bargaining unit if their qualifications are superior or equal to other qualified applicants.[2] According to Charging Party, the term "primary consideration" means that preference must be given to a bargaining unit members if their qualifications are equal or superior to those of non-unit members.

In a May 8, 2000 ruling, an arbitrator denied Charging Party's March 1998 grievance. The arbitrator disagreed with Charging Party's characterization of the meaning of Article XVII. He observed that "primary consideration" generally means first consideration, although it had a number of meanings, including, to keep in mind, to take into account, to make allowance for, to study, to view tentatively, etc. He noted that even before "primary consideration" must be given to a bargaining unit member, "there must be a finding that the applicants involved are 'qualified' and that the bargaining unit member's qualifications are 'superior or equal' to the other applicants." Based on the record, the arbitrator ruled that he could not conclude that the grievant's qualifications were superior or equal to those of the candidate Respondent appointed to the position.

In the meantime, between November 1999 and January 2000, while the above grievance was pending arbitration, Respondent appointed three non-bargaining unit members to interim registrar positions and one to an interim campus student services advisor position. Respondent did not offer either of the positions to bargaining unit members. According to Charging Party, these appointments violated Articles XVII and XXVII of the contract because several bargaining unit members' qualifications were superior or equal to the appointees. Respondent has refused to process grievances relating to these appointments.

Employee Hired at Step 5 Instead of Step 1

On January 31, 2000, after the contract expired, Respondent hired an auxiliary services coordinator at step 5 of the pay scale. Article XXVI of the expired contract contained a salary schedule for full time employees; a provision for annual salary increases for full and part-time employees for each year of the three-year contract; and a table showing annual step increases for employees in various classifications. Respondent has also refused to process a grievance related to

[2] Article XXVII also provides states that in filling a full-time bargaining unit position on an interim basis, such position will be first offered to qualified full-time bargaining unit members before being filled by a person outside of the bargaining unit.

this appointment. A similar dispute arose between the parties in 1988. An arbitrator upheld a grievance filed by Charging Party that alleged a violation of XXVI after Respondent hired two employees at step 5 instead of step 1 of the pay scale.

Non-bargaining Unit Member Performing Bargaining Unit Work

On January 18, 2000, bargaining unit member Romatallah Gohshan, a campus assistant dean, returned to a non-bargaining unit faculty position. However, in addition to teaching, he has continued to perform his former duties and is paid for this additional work in addition to his teaching salary. Gohshan attends campus assistant dean council meetings and has been given the title of campus assistant dean of electronics and manufacturing technology.

Conclusions of Law:

Respondent argues that it followed the terms of the contract in appointing new hires to interim positions and hiring an auxiliary services coordinator at step 5 instead of step 1. It reasons that Charging Party's allegations are nothing more than good-faith disputes about the expired contract's interpretation and not unfair labor practices. According to Respondent, the charge should be dismissed because Charging Party failed to allege that there has been a repudiation or renunciation of the parties agreement.

Charging Party concedes that the Employer's actions involve contract disputes and the Employer has the right to refuse to arbitrate grievances that have arisen after the contract expired. However, it argues that the Employer cannot simultaneously refuse to arbitrate grievances and claim exemption from the Commission's jurisdiction because of a grievance procedure that it refuses to use. Charging Party, relying on *Plymouth-Canton Community Schools*, 1984 MERC Lab Op 894, contends that the Commission has jurisdiction in this matter because the Employer has unilaterally changed a well-established and long-standing contractual term of employment and has refused to arbitrate grievances arising from its conduct. I disagree.

In *Plymouth-Canton*, during the term of the parties agreement, the employer unilaterally changed the length of the work year from 52 to 48 weeks for certain bargaining unit positions. The parties had a good-faith dispute over whether the permitted the employer to make the change. The contract's grievance arbitration procedure only provided for advisory arbitration. In a case of first impression, the Commission held that in addition to circumstances under which it had previously found "repudiation," it would also decide claims of unlawful unilateral change involving a corresponding contract breach when no contractual procedure exists for final and binding arbitration.[3] In *Mesick Consolidated Schools*, 1987 MERC Lab Op 116, the Commission expanded its finding in *Plymouth-Canton* by concluding that even where there was no provision for binding arbitration, the charging party must establish that the employer violated PERA and not merely the contract.

Contrary to Charging Party's assertion, I find that the principle set forth in *Plymouth-Canton* has no application to the facts of this case. There, the contract dispute arose during the term of the

[3]The Commission had found "repudiation" to exist when (1) the contract breach involved is substantial, and has a significant impact upon the bargaining unit, and (2) no bona fide dispute over interpretation of the language of the contract is involved. *Jonesville Board of Education*, 1980 MERC Lab Op 891.

contract and the parties' agreement did not provide for binding arbitration. Here the disputes arose after the expiration of a contract with a binding arbitration grievance procedure that the parties contractually agreed not to use after the contract expired. Moreover, Charging Party does not even assert that the alleged contract violations involve "repudiation." *Mesick, supra.* I find, therefore, that Charging Party is precluded from insisting that the Commission act as an arbitrator to decide post-contract disputes while ignoring contract language that prohibits the use of grievance procedure after the contract's expiration date. Compare the Administrative Law Judge's decision in *St Clair County Probate & Juvenile Court (Children's Shelter)*, 1991 MERC Lab Op 24.

Even if the parties had not mutually agreed to refrain from using the grievance procedure after the contract expired, the disputes, as Charging Party concedes, are "amenable to the grievance procedure." I find that the parties' disagreement involves good-faith contract interpretations rather than unilateral change in a well-established and long-standing contractual term of employment as alleged by Charging Party. For example, in a May 2001 award, an arbitrator upheld Respondent's view that the contract did not give preference to bargaining unit members whose qualifications were equal or superior to non-bargaining unit applicants for vacant positions. In 1988, an arbitrator agreed with Charging Party that Respondent was required to start new employees at step 1 instead of step 5 of the salary schedule. The parties, however, continue to disagree about the meaning of the contract provisions involved in both arbitration awards. Respondent insists that its appointments were consistent with the contract, while Charging Party claims that they were not.

Based on the above discussion, I find that Respondent did not violate its duty to bargain with Charging Party over the appointments at issue. The disputes are covered by an expired contract that contained a binding grievance-arbitration procedure which the parties agreed would not be used to resolve disputes arising after the contract expired. Respondent's refusal to process the instant complaints is consistent with their agreement. I have carefully considered all other arguments raised by the parties and conclude that they do warrant a change in the result. I, therefore, recommend that Respondent's motion to dismiss be granted and the Commission issue the following order:

RECOMMENDED ORDER

The unfair labor practice charge is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Roy L. Roulhac
Administrative Law Judge

Dated: ______________