STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF FLINT,
Respondent-Public Employer in Case Nos. C00 D-56, C00 D-58, and C00 D-64

- and -

68th DISTRICT COURT,
Respondent-Public Employer in Case No. C00 D-60

- and -

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 25, AND LOCALS 1600 and 1799
Charging Party in Case Nos. C00 D-58 and C00 D-60

- and -

FLINT POLICE OFFICERS ASSOCIATION,
Charging Party in Case No. C00 D-56

- and -

FLINT FIRE FIGHTERS UNION, LOCAL 352, IAFF
Charging Party in Case No. C00 D-64
_____/

APPEARANCES:

Frederic E. Champnella, Esq., Keller, Thoma, Schwarze, Schwarze, DuBay & Katz, P.C., for the Public Employers

Michael J. Bommarito, Esq., Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C., for Charging Party AFSCME and its Locals

James M. Moore, Esq., Gregory, Moore, Jeakle, Heinen, Ellison & Brooks, P.C., for Charging Party Flint Police Officers Association

George M. Kruszewski, Esq., Sachs Waldman, P.C., for Charging Party Flint Fire Fighters Union, Local 352, IAFF

DECISION AND ORDER

On February 28, 2002, Administrative Law Judge (ALJ) Nora Lynch issued her Decision and Recommended Order in the above matter finding that Respondents, City of Flint and 68th District Court, did not violate Section 10(1)(a) or (e) of the Public Employment Relations Act (hereafter "PERA"), 1965 PA 379 as amended, MCL 423.10(1)(a) or (e), and recommending that the charges be dismissed. On March 20, 2002, Charging Party American Federation of State, County, and Municipal Employees, Council 25, and Locals 1600 and 1799 (AFSCME) filed timely exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions. On March 22, 2002, Charging Parties Flint Police Officers Association (FPOA), and Flint Fire Fighters Union, Local 352, IAFF (FFU) also filed timely exceptions and a brief in support. On March 29, 2002, Respondent City of Flint filed a motion to disregard Charging Parties' exceptions. AFSCME filed a response to the motion on April 2, 2002. FPOA filed a response to Respondent's motion on April 4, 2002. On April 5, 2002, FFU filed its response to Respondent's motion. On May 1, 2002, Respondents filed a timely brief in support of the ALJ's Decision and Recommended Order, including a request for oral argument. On May 24, 2002, the Charging Parties filed a joint request for oral argument.

Rule 184 of the Commission's General Rules, 2002 MR 1, R423.184 limits motions and briefs filed with the Commission to no more than fifty pages. Typeface used for motions and briefs can be no smaller than twelve characters per inch. Charging Parties' brief, as originally filed, was fifty-four pages, in a typeface somewhat larger than twelve characters per inch. With their response to Respondent's motion, Charging Parties filed a reformatted version of their brief. The reformatted brief, in a typeface of twelve characters per inch, is fifty pages. Inasmuch as the text of the Charging Parties' brief is within the limits set by Rule 184, we will not disregard Charging Parties' brief.

We have reviewed the other arguments in Respondent's motion to disregard exceptions and find them to be without merit. Respondent's motion is denied.

After reviewing the exceptions and briefs filed by the parties, we find that oral argument would not materially assist us in deciding this case. Therefore, the requests for oral argument are denied.

The facts in this case were set forth fully in the ALJ's Decision and Recommended Order and need not be repeated in detail here. Briefly, Charging Parties filed unfair labor practice charges alleging that Respondents made a unilateral change as well as a mid-term contract modification of a mandatory subject of bargaining. Specifically, the City amended its Retirement Ordinance to limit to 26 the number of pays used to calculate final average compensation (FAC) for the purpose of computing pension benefits. Retiring employees are permitted to pick the beginning and ending dates of the years used to calculate the FAC. For a period of about ten years prior to the amendment, some employees did so in a way that included 27 pays. The ALJ found that the City's employees who worked in the pension office and permitted the use of 27 pays in the calculation of the FAC had made a mistake which did not reflect an intent on the part of the City to change the method of computing the FAC to include 27 pays. Thus, she found that the amendment of the Retirement Ordinance was a clarification of the

method of computation and a correction of the mistake. As such, the ALJ found no mid-term modification of the contract. She also found that because Charging Parties failed to meet the standard of proof necessary in order for a past practice to modify the contract, no unilateral change was committed when the Retirement Ordinance was amended.

On exception, Charging Parties allege that the ALJ erred in interpreting the plain meaning of the Retirement Ordinance. In particular, they contend that nothing in the term "annual compensation" requires a year of FAC to be limited to 26 pays. In considering this exception, we look to the general rules of statutory construction. See e.g. *Brady v Detroit*, 353 Mich 243, 248 (1958). It is well-established that provisions pertaining to a specific subject matter must be construed together, and harmonized if possible. See *Brady* at 248. When statutory language is clear and unambiguous, judicial interpretation that varies the plain meaning of the statute is prohibited. The drafters must have intended the plainly expressed meaning, and the statute must be enforced as written. See *Police Officers Ass'n v Lake County*, 183 Mich App 558 (1990); *Hiltz v Phil's Quality Market*, 417 Mich 335, 343 (1983). Furthermore, when terms are not expressly defined in a statute, dictionary definitions may be consulted. See *People v Denio*, 454 Mich 691 (1997).

The Retirement Ordinance in the instant case provides that FAC . . . "shall mean the average of the highest annual compensation paid . . . ." Because the term "annual compensation" is clear and unambiguous, we do not have authority to interpret this term in order to vary its plain meaning. See *County of Lake, supra*. We do, however, have the authority to consult the dictionary definition of the word "annual" since it is not expressly defined in the Ordinance. See *Denio, supra*. Webster's II New College Dictionary defines "annual" as "[d]etermined by a year's time," and the Retirement Ordinance at issue defines "compensation" as "[a] member's salary or wages paid by the city *for personal services rendered by him to the city* . . ." (emphasis added). Construed together, the words "annual" and "compensation" clearly means the amount of a member's pay for personal services rendered by him to the city within a year's time. Because anything more than 26 bi-weekly pay periods encompasses pay for services rendered beyond one year's time, we agree with the ALJ's plain meaning of the term, and therefore find no merit to Charging Parties' argument in this regard.

Charging Parties further allege on exception that the ALJ erred in concluding that there was no mid-term modification of the contract. It is well-settled that when there is express contract language to the contrary, a higher standard of proof is required to prove that a mid-term modification occurred. Parties are generally free to take from, add to, or modify an existing contract. See *Gogebic Cmty College v Gogebic Cmty College Mich Educ Support Pers Ass'n*, 246 Mich App 342 (2001); *Soltys v Soltys*, 336 Mich 693 (1953). However, while a meeting of the minds is necessary for the creation of a binding contract, the same meeting of the minds is also necessary in order to modify a contract after it has been made. See *Gogebic, supra*; *Universal Leaseway System, Inc. v Herrud & Co.*, 366 Mich 473 (1962). Like any other contract, a collective bargaining agreement is the product of mutual assent and informed understanding. In order to require a party to bargain anew before enforcing a right set forth in the contract, there must be proof that the parties knowingly, voluntarily, and mutually agreed to new obligations. See *Gogebic, supra*; *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 326-7 (1996). As discussed above, the contract term at issue is clear and

unambiguous, and its plain meaning does not permit more than 26 bi-weekly pay periods to be included in a member's annual compensation. Because the amendment to the Retirement Ordinance did not modify the contract but merely clarified it, no meeting of the minds was necessary. Therefore, we agree with the ALJ that a mid-term contract modification did not occur when the Retirement Ordinance was amended.

Charging Parties also contend on exception that the ALJ erred when she found that the Ordinance amendment did not amount to an unlawful change of a past practice that relates to a mandatory subject of bargaining. As discussed above, in order for a past practice to take from, add to, or modify an existing contract with express language to the contrary, a meeting of the minds is necessary such that the parties must have knowingly, voluntarily, and mutually agreed to the new obligations. See *Gogebic*, *supra*. Considering the record as a whole, we find insufficient evidence to indicate that there was any such agreement between the parties. As the ALJ noted, the use of 27 pay periods was never raised at the bargaining table, nor formally communicated to bargaining unit members. Moreover, any management officials who were aware of the situation discovered it inadvertently and did not take any action for or against it. In fact, the current Payroll and Retirement Supervisor testified that there is no source of authority for the calculation of FAC using 27 pay periods. We, therefore, find that the purported practice of using 27 pays does not meet the standard necessary to modify the parties' express contractual agreement, and hold that the amendment to the Retirement Ordinance did not amount to an unlawful change of a mandatory subject of bargaining.

All other arguments raised by Charging Parties have been carefully considered and do not warrant a change in the outcome of this case.

ORDER

The charges in this case are hereby dismissed in their entirety.

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 FLINT,
Respondent-Public Employer in Case Nos. C00 D-56,
C00 D-58, and C00 D-64

- and -

68th DISTRICT COURT,
Respondent-Public Employer in Case No. C00 D-60

- and -

AMERICAN FEDERATION OF STATE, COUNTY, AND
MUNICIPAL EMPLOYEES, COUNCIL 25, AND LOCALS 1600 and 1799
Charging Party in Case Nos. C00 D-58 and C00 D-60

- and -

FLINT POLICE OFFICERS ASSOCIATION,
Charging Party in Case No. C00 D-56

- and -

FLINT FIRE FIGHTERS UNION, LOCAL 352, IAFF
Charging Party in Case No. C00 D-64
_____/

APPEARANCES:

Frederic E. Champnella, Esq., Keller, Thoma, Schwarze, Schwarze, DuBay & Katz, P.C., for the Public Employers

Michael J. Bommarito, Esq., Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C., for Charging Party AFSCME and its Locals

James M. Moore, Esq., Gregory, Moore, Jeakle, Heinen, Ellison & Brooks, P.C., for Charging Party Flint Police Officers Association

George M. Kruszewski, Esq., Sachs, Waldman, O'Hare, Bogas & McIntosh, P.C., for Charging Party Flint Fire Fighters Union, Local 352, IAFF

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Sections 10 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 Detroit, Michigan, on March 9, 12, and 14, 2001, before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission. The proceedings were based upon unfair labor practice charges filed by the above named labor organizations, alleging that the City of Flint and 68th District Court had violated Section 10 of PERA. Based upon the record, including briefs filed by the parties on or before June 4, 2001, 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 allege that the Employer[1] has refused to bargain in good faith by unilaterally changing the method of calculating final average compensation (FAC), thereby reducing pension benefits of employees. In January of 2000, the Employer issued directives that limited each year of compensation used to compute FAC to 26 bi-weekly pays and subsequently amended the City's Retirement Ordinance to reflect this policy. Since employees had previously been allowed to include a 27th pay in their FAC computations, the Unions allege that this action by the Employer constituted a mid-term contract modification and a unilateral change in terms and conditions of employment in violation of PERA.

Facts:
Background:

The Charging Parties are labor organizations representing various bargaining units of employees of the City of Flint and the 68th District Court. AFSCME Local 1799 represents a bargaining unit of classified supervisory employees employed by the City and the 68th District Court; AFSCME Local 1600 represents non-supervisory employees. The Flint Police Officers Association represents a unit of all employees of the Flint Police Department possessing the rank of police officer. The Flint Fire Fighters Union, Local 352, is the bargaining agent for a unit of all classified employees of the Flint Fire Department. These employees are members of the City's retirement system, which also includes Hurley Medical Center employees. Each of the labor organizations has a collective bargaining agreement with the Employer, incorporating by reference Appendix B, the Retirement Ordinance of the City of Flint, and providing that pension benefits are to be calculated according to the express formula contained therein. City employees exempt from union representation are also covered by the Retirement Ordinance.

The Ordinance provides for two types of pension plans: defined benefit and defined contribution. The instant case concerns the defined benefit plan. Under this plan, the pension amount is determined using the following formula:

[1]Use of the term "Employer" encompasses the 68th District Court; the Court has used the City to act on its behalf in administering pension benefits for 68th District Court employees.

Years of service x multiplier x final average compensation (FAC) = pension benefit

The multiplier used in the calculation may vary, depending on the particular bargaining unit and when the employee was hired.

Section 35-6 of the Retirement Ordinance includes the following definitions:

> COMPENSATION. A member's salary or wages paid by the city for personal services rendered by him to the city, and including worker's compensation paid in accordance with contracts in existence between the city and recognized bargaining units and ordinances of the city. Compensation for any year shall not exceed $200,000 adjusted by the Commissioner of Internal Revenue to reflect cost-of-living increases. Effective January 1, 1994, compensation for any year shall not exceed $150,000 adjusted by the Commissioner of Internal Revenue to reflect cost-of-living increases.
>
> FINAL AVERAGE COMPENSATION.
> . . . shall mean the average of the highest annual compensation paid said members by the City of Flint during any period of three years of his credited service contained within his five years of credited service immediately preceding the date his employment with the City last terminates.

Pursuant to Section 35-8 of the Ordinance, the general administration, management, and responsibility for the operation of the retirement system is vested in a nine-member Board of Trustees. These nine members, selected by the City Council, are as follows: a City Councilperson; chief administrator; director of finance; president and CEO of Hurley Medical Center or his/her designee; a police officer or firefighter; a general member not employed by the Board of Hospital Managers; two general members employed by the Board of Hospital Managers; and a member who has retired from the system. The Board may recommend changes to the ordinance; final approval rests with the City Council.

The individual responsible for the administration of the retirement system is the City's finance director, a position currently held by Matthew Grady. The payroll and retirement supervisor is responsible for computing final average compensation. This is a non-union position currently held by Lisa DeDolph. DeDolph was initially an employee benefits clerk who became the payroll and retirement supervisor in July of 1997 when Ellen Zimmerman, the former supervisor, retired.

Under the City's retirement system, employees have two options with respect to pension calculation. They may select their own best years for use in the calculation of FAC, since they are most familiar with special circumstances, such as whether a year contained substantial overtime or retroactive pay. The only restriction is that the annual periods may not overlap. The

other option available to employees is to allow the payroll and retirement office to select their best years. The retirement office computes FAC by using the employee's W-2 forms reflecting 26 pays for their first and second highest years (within the last five years of employment), and creating a combination or "hybrid" year from January to the retirement date, and from the retirement date to the end of the year in the third highest year. As described further below, in June of 1991 a method of including 27 pays in the calculation of FAC began to be utilized.

History of Calculation of FAC with 27 Pays:

The City's payroll and retirement supervisor, a non-union position, is responsible for computing final average compensation for employees. The job description for the position indicates that this individual "interprets policies and procedures in the administration of the various retirement plans within the retirement system according to ordinances, contracts, laws and regulations." The position has been held by a number of individuals prior to and during the period in question. Georgia Steinhoff held the position of payroll and retirement supervisor from 1984 through 1990. Eugene Owens, who worked as deputy finance director for the City for approximately 16 years, served as acting payroll and retirement supervisor for approximately ten months in 1991. Ellen Zimmerman held the position from April 1991 until July of 1997, followed by Lisa DeDolph, the current supervisor. [2]

Steinhoff testified to the procedures used in the office while she was supervisor beginning in 1984. According to Steinhoff, a prospective retiree would come in for an interview and a worksheet was prepared showing their gross wages for either the last five or ten years, depending on their bargaining unit. The worksheet reflected annual wages, rather than a pay-by-pay breakdown. Steinhoff and the employee then reviewed it to determine the best years to use in calculating the employee's pension. According to Steinhoff, there was never anything in writing reflecting a formula for calculating FAC, she was simply trained in that methodology. She testified that the Retirement Ordinance was the "Bible" of the retirement office which she would refer to whenever there was a question on how things should be done. According to Steinhoff, she first became aware of an issue relating to using 27 paydays for FAC calculation after she had retired and Zimmerman called to ask about it. Steinhoff did not remember precisely when the conversation took place. She recalled that Zimmerman told her that individuals were requesting that their FAC be calculated by selecting pay dates, and asked if this had been done before. Steinhoff testified that she told Zimmerman that they could pick their years as long as the years did not overlap.

After Steinhoff retired, Owens, the deputy finance director, was temporarily in charge of the office for a period of eight to ten months in 1991.[3] Owens had no specific training on how to calculate FAC but worked with the clerks in the office who were familiar with the process. Owens testified that during that period of time he recalled only a few individuals who selected their own years; generally the retirement office utilized the employee's last three years which were ordinarily the highest. According to Owens, during the time he worked in the retirement

[2] The parties agreed to make the depositions of Zimmerman and DeDolph, which were taken pursuant to a related proceeding in Genesee County Circuit Court, part of the record in this case.

[3] Owens also served as interim finance director for a period of one month in November 1991 just prior to his retirement, and then served as acting finance director until a replacement was hired in February of 1992.

office an individual came to the office with his own calculations, including a list of every payday for the last five years. This employee selected three years which did not overlap, each of which started and ended on a payday, thereby encompassing 27 paydays. In other words, he did not select three consecutive years, but constructed a period of 365 days during which he received 27 paychecks, skipped some time, and then constructed another 365 day period with 27 paychecks. When Owens retired in 1992, he used this methodology to select years for FAC. According to Owens, he did not specifically ask if it was appropriate, however no one in the office "raised any red flags" so he presumed it was acceptable. Owens testified that he did not go out of his way to tell other employees about this method, but he would tell them about it if they asked.

Zimmerman began work as the payroll and retirement supervisor in April of 1991; she was trained by Steinhoff. According to Zimmerman, her staff would prepare estimates but she herself made the vast majority of FAC calculations. The exception was during retirement incentive windows which occurred in 1994 and 1996. During those periods she and her staff had to perform an extraordinary amount of work in a short time and segmented the work somewhat because of the volume, however there was always a review process in place. Zimmerman testified that when Owens retired he submitted his years to her for FAC which included 27 paydays. According to Zimmerman, she remembered thinking that it was wrong, since they had never done it that way before. She recalled that Owens told her that it was fine, someone else had done it, and there was nothing in the ordinance to prevent it. Zimmerman testified that she needed some guidance and recalled talking to the then finance director, Mark Puckett, who sent her to Lucian Henry in labor relations. She testified that Henry told her: "You can do it now or you can do it later." Zimmerman interpreted this to mean that he was aware of the method and if they tried to resist it, they would not succeed. She termed this as "capitulation" rather than approval. Zimmerman recalled discussing it with Steinhoff, the former retirement supervisor, who told her than an individual who raised the issue in the past had been allowed to select their dates. Zimmerman testified that she was uncomfortable with allowing employees to pick periods with 27 pays since it was contrary to the normal method which she had learned from Steinhoff. She received nothing in writing from her supervisor or labor relations. Zimmerman testified that her thought process at the time was that this method was not going to continue, that it would be reversed. She did not expect it to "snowball" the way it did.

Zimmerman conducted retirement seminars during the incentive periods in 1994 and 1996. She testified that she gave the following instructions:

> We have been informed that employees are to be allowed to select their dates for final average compensation if they choose to do so. If you choose to do so, you can obtain payroll records through us by filling out a request form at the retirement office. If you choose to select your dates, these are the rules: They must be signed, they must be dated, it must be in writing. We will use the dates that you select. We'll calculate it based on the dates you select. We will not calculate an alternative method to see if you would have gotten more or less. We will rely on you to do your homework. If you select your dates, they must be submitted before your effective date of retirement.

In the packet of materials handed out at the seminars there was a form which could be filled out to obtain a five-year pay history. Zimmerman testified that she did not recall going into the 27 pay issue at the seminars; she thought that for the most part the employees knew and that the news had "spread like wildfire." According to Zimmerman, although the 27 pay issue was not part of a standard discussion, if employees asked why it might be beneficial to pick their own years, it was explained to them. When Zimmerman retired in 1997, she designated years with 27 pays for use in calculating her own pension benefit.

Lisa DeDolph became the payroll and retirement supervisor in July of 1997 after serving as employee benefits clerk. DeDolph has an associate's degree in accounting. She testified that she was trained by Zimmerman on how to perform pension calculations; she did not receive training or guidance with respect to any related legal requirements. DeDolph testified that it was the general rule that employees could select their own best three years; she did not view it as a 26 vs. 27 pay issue until the matter was raised in late 1999. According to DeDolph, when the pension office made the calculation, 26 pays were used; when employees submitted their own years, they generally submitted years with 27 pays. DeDolph testified that she also made FAC calculations for Hurley Medical Center employees, however Hurley employees were not allowed to select their years because the pension office did not have payroll records for them going back five years. According to DeDolph, at the end of 1999, a Hurley employee came to her with a five-year print out of his wages and asked to select his years. Because DeDolph was unsure of how to handle this matter, she brought the issue to the Retirement Board. Subsequent developments are discussed below.

Labor relations personnel also testified with respect to their knowledge of the pension calculation issue. Gary Bates served as personnel and labor relations director from 1991 to 1995. Bates testified that when he retired he asked the payroll clerk to figure his best three years. Bates then presented this information to Zimmerman for his pension calculation. According to Bates, he simply trusted that his pension was calculated appropriately. Bates testified that he did not know that years with 27 paydays had been utilized until the issue was raised in a Retirement Board meeting when he was serving as acting city administrator in June or July of 2000, after the legal proceedings had begun. Bates testified that his brother, who retired from the City's DPW in June of 1997, did not utilize 27 paydays in his pension calculation, and that Bates did not know about this type of calculation or he would have informed his brother. Bates also testified that the matter was never raised in negotations during his tenure as labor relations director.

Lucian Henry was the City's labor relations manager during this period. Henry testified that he recalled Zimmerman questioning him at the time of the early-out program.[4] According to Henry, he thought Zimmerman's questions had to do with allowing employees to choose a particular year where they had very large retroactivity or backpay checks during one of their best three out of five years. Henry testified that he told Zimmerman that the early retirement option did not change the procedure, and that if she did not allow it, she would end up having to recalculate their pensions. Henry testified that employees had always had the right to designate the years to be used in the FAC calculation, however he was totally unaware of employees

[4] Lucian Henry, who was seriously ill at the time of hearing and on a medical leave of absence, testified from his hospital bed in a deposition taken on April 18, 2002. He is since deceased.

utilizing 27 pays for that purpose. According to Henry, had he understood that, he would have opposed such a fundamental change since to allow employees to do that was ridden with problems. In addition, he testified that this type of change would have had to be approved by City Council.

Marcantonio (Tony) Morolla has worked for the City of Flint since 1974. He has held the position of personnel and labor relations director for the City since October 21, 1996. In that position he is the chief labor negotiator for the City. Morolla testified that he first became aware of the 27 pay issue after the matter had been challenged before the Commission and in court proceedings. Prior to that time he had heard something to the effect that when people retired, going out on a payday was advantageous, but he was not aware of the particulars. According to Morolla, there were no discussions with respect to the matter in negotiations with any of the City unions. The parties stipulated that no proposals were made by either the Employer or the Unions regarding the manner of computing final average compensation.

City records reflect that from January 1991 to January 2000, out of 671 retirements (including both union and non-union employees), approximately 284 employees retired utilizing 27 pays in each of the years for FAC; 333 employees retired with FAC calculations based on fewer than 27 pays. Union officials and high level supervisory/management employees were included in both categories.

Developments in January 2000:

On January 11, 2000, at a special Retirement Board meeting, the Hurley Medical Center employee who had approached DeDolph earlier requesting to choose his own years for FAC addressed the Board regarding the 26 vs. 27 pay issue in the calculation of FAC. He objected to the difference in treatment between Hurley and City employees. After discussion and a meeting in executive session, Steinhoff, the former payroll and retirement supervisor now a member of the Board, made a motion that annual compensation referred to in the Ordinance for the calculation of FAC be deemed to include that pay actually received by an employee during any one-year period consisting of 365 days; that members be informed of this opportunity to select any periods that consist of one year; and that a written policy be formulated and approved by the Board of Trustees evidencing this resolution within 30 days or as soon as possible. According to the minutes of this meeting, Vice-chairman Hugh Rose stated that he strongly disagreed with the motion; that use of three 27-pay periods was far and above what the City or Hurley Hospital had intended by final average compensation, and this was the wrong way to interpret the issue. Finance Director Matt Grady expressed his agreement with Rose. After discussion, the motion passed by a vote of 5 to 3.

On January 13, Grady instructed DeDolph to use 26 pays in calculating FAC. DeDolph had attended the Board's January 11 meeting and understood the resolution to mean that she was to continue calculating FAC utilizing 27 paydays if requested. She asked Grady to put his instructions in writing. Grady wrote the following memo to DeDolph on January 13 regarding "Employee Retirements – 26 vs 27 pays:"

> Pursuant to our discussion today, you are to use 26 pays for calculating the final average compensation for all employees (Hurley and City of Flint) for retirement benefits until we receive an opinion from the Flint City Attorney's Office and from the Hurley Hospital attorney on this matter.

On January 25, 2000, the Board of Trustees formally adopted a resolution reflecting the policy for calculating FAC discussed at the January 11 meeting. On January 26, 2000, Grady sent another memo to DeDolph indicating that she was to continue to use 26 pays for calculating FAC for all employees. Copies of this memo were sent to the Chairman of the Retirement Board and all Board members. Union representatives subsequently became aware of the policy reflected in the memo.

On March 8, 2000, the legislative committee of the City Council met to consider the following proposed amendment to Section 35-6 of the retirement ordinance:

> SEC 1. That the Code of the City of Flint shall be amended by the restating of Chapter 35-6 to read as follows:
>
> Sec. 35-6 Definitions
> Annual Rate of Compensation. A member's salary or wages earned and received annually over the course of 26-pay periods. Annual compensation shall not include income received during the 26-pay periods which was not also earned during the 26-pay periods. Annual compensation shall be consistent with the compensation schedules established by the City Council which are on file in the City Clerk's office.

At that meeting, the president of AFSCME Local 1600 addressed the Council opposing the proposed ordinance amendment. In addition, the following statement was drafted by the Flint Fire Fighters Union, signed by representatives of the other Charging Party Unions, and submitted to the Mayor and City Council:

> The Flint Fire Fighters Union has learned that the Council has on its agenda for March 8th a proposed change in the retirement ordinance, which would alter the method by which final average compensation is computed. Recently, the City, through Finance Director Mathew Grady, has directed the Payroll and Retirement Supervisor to not include in the calculation of the final average compensation the 27th paycheck that a member had selected to use in determining the member's final average compensation. We presume that the proposed ordinance is intended to codify this directive.
>
> In the past, members of this bargaining unit always have been permitted to select whatever 365 day periods they wished to use in computing their highest three

years and those 365 day periods in the past often have included ones in which the members had received a 27th pay. This practice is in accordance with Section 1 of Appendix B of the contract which defines "final average compensation" as "the average of the highest annual compensation paid said members during any period of 3 years of his credited service contained within his 5 years of credited service immediately preceding the date his employment with the City last terminates. There is nothing in the language of Appendix B, as incorporated into our contract, which permits the City to dictate what 365 day period a member can use or to exclude any portion of the wages that the individual has received during that period.

Mr. Grady issued his directive without any prior negotiations with, or the agreement of, the Flint Fire Fighters Union. Similarly there has been no notice to the Union that the City is contemplating a change in the retirement ordinance which would be intended to change the longstanding method of computing final average compensation for members of this bargaining unit. Michigan's Public Employment Relations Act (PERA) prohibits unilateral changes in wages, hours, and working conditions. Under PERA, it long has been recognized that the method of computing final average compensation is a mandatory subject of bargaining protected from unilateral change, encompassed within this definition. It is the Union's position that Mr. Grady's unilateral action violated the City's duty to bargain under PERA. Any unilateral action by the City in the retirement ordinance, to the extent it is intended to apply to this bargaining unit, similarly would violate the City's duty to bargain under PERA.

The Union urges the Council to take no action on this ordinance and instead to order the restoration of the status quo within the City. Instead, any proposed changes in the method by which final average compensation is computed must be brought to the bargaining table, where they belong.

At its meeting held on March 27, 2000, the City Council adopted the amendment to Section 35-6 of the ordinance. Since January of 2000, employees have been precluded from utilizing 27 pays in FAC calculations. The parties agree that the use of 27 pays increases pension benefits by at least 3.7%. [5]

Positions of the Parties:

The Charging Party Unions maintain that by limiting each year of final average compensation to 26 pays, the Employer made a unilateral change in a mandatory subject of bargaining covered by existing labor agreements which reduced pension benefits and violated PERA. By establishing a 26-pay limitation which never previously existed, the Employer engaged in an unlawful mid-term contract modification. In the alternative, the

[5] A consulting actuary who testified for the Employer estimated that for those who were able to choose 27 pays, the added cost to the City was approximately $5.8 million.

Unions argue that the parties had a past practice of allowing employees to designate years used in computing FAC, which for almost ten years has included the ability to designate years with 27 pays. The Employer's unilateral change in this past practice constitutes a violation of PERA.

The Employer asserts that the Council's action simply clarified the obvious: annual compensation means that which is earned and received in 26 bi-weekly pay periods, thereby covering a 52-week year in any calculation for annual compensation.[6] The 27th pay represents work performed in the year preceding the year selected, thereby mistakenly and illegally misconstruing the concept of annual compensation. Allowing employees to designate years with 27 pays was a mistake which occurred in the pension office without the knowledge of City administration. Under these circumstances, no binding past practice can be found since the parties did not knowingly and mutually agree to it; in short, there was not the legally required "meeting of the minds." The Employer also maintains that the alleged practice violates the City Code and the federal tax laws and regulations.[7]

Discussion and Conclusions:

PERA obligates a public employer and the exclusive representative of its employees to bargain over wages, hours, and working conditions, which are termed mandatory subjects of bargaining. There is no question that pension plans and their substantive terms are included in the category of mandatory subjects of bargaining. *Police Officers Assn v Detroit*, 391 Mich 44, 214 NW2d 803 (1974); *Fraternal Order of Police v Riverview*, 111 Mich App 158, 314 NW2d 463(1981); *Mt Clemens Firefighters Union, Local 838, IAFF v City of Mt Clemens*, 58 Mich App 635, 228 NW2d 500 (1975). The collective bargaining agreements between the Employer and the Charging Party Unions indicate that the parties have bargained over this issue, and have incorporated provisions in their respective contracts that retirement benefits are generally to be determined in accordance with Appendix B, the City of Flint Retirement Ordinance. The issue presented in this case is twofold: did the Employer's action in adopting the amendment to the Retirement Ordinance constitute a mid-term modification of the contracts; and, if not, was a past practice established which, despite contrary contract language, created a term and condition of employment which could not be changed without bargaining.

[6] The Employer acknowledges, and does not challenge, the fact that every 11 or 12 years there will be a year where W-2 earnings include 27 pays; this is a normal part of the bi-weekly pay cycle.

[7] This decision does not reach the issue of whether the 27-pay formula violates the Internal Revenue Code which is beyond the jurisdiction of the Commission. See *Detroit Fire Dept, 1976 MERC Lab Op 652*; *Muskegon Hts School Dist*, 1993 MERC Lab Op 654.

As quoted above, the Ordinance defines FAC as the average of the highest annual compensation paid during any three years of credited service contained within the five years of service immediately preceding the date employment terminates. Charging Parties argue that the Ordinance contains no limitation on the number of pays that may be included in a year to compute FAC. However, the argument that FAC encompasses any compensation "paid" during this period ignores the term "annual." In *Stover v Retirement Board of City of St Clair Shores Firemen & Police Pension System,* 78 Mich App 409, 260 NW2d 112 (1977) lv app den, 272 NW2d 692, the court of appeals, in interpreting similar statutory language governing police and fire pensions, found that the term final average compensation was not ambiguous but had a plain meaning. The court stated that "average final compensation means the average of the highest annual compensation received by a member during a certain number of years immediately preceding that member's retirement." It further stated that "annual compensation received refers to that pay which is received by a member for work done that year." The court in *Lansing Firefighters Assoc, Local 421, IAFF v Bd of Trustees of Lansing Policemen's and Firemen's Retirement System,* 90 Mich App 441, 282 NW2d 346 (1979) applied the same reasoning in interpreting the term final average compensation found in the Lansing city charter. In the instant case the record demonstrates that the City's retirement office has always utilized W-2 forms when it is responsible for calculating FAC, which reflect 26 pays for 52 weeks of work. It is obvious that the method of calculating FAC using 27 pays includes compensation for work done outside of the one-year period. I find that the term annual compensation is not ambiguous, and its clear meaning is payment for work performed in a one-year or 52-week period. I therefore find that the Employer's March 27 amendment to the Ordinance specifying that annual compensation consisted of wages earned and received annually over the course of 26 pay periods did not constitute a mid-term modification of the labor agreements but simply clarified the existing definition.

Charging Parties also argue that regardless of contract language, a past practice exists which cannot be changed without bargaining. Whether a past practice can modify a contract depends upon the language of the contract and the actions of the parties. *Port Huron Ed Assn v Port Huron Area Sch Dist*, 452 Mich 309, 550 NW2d 228 (1996); *Detroit Police Officers Assoc v Detroit,* 452 Mich 339, 551 NW2d 349 (1996). Both of these cases originated with unfair labor practice charges brought before the Commission.

In *Port Huron Area Sch Dist,* 1990 MERC Lab Op 903, the contract provided that health insurance benefits would be prorated for teachers who worked less than a full year. For several years the district failed to prorate benefits. When a large number of new teachers were hired midyear, the district reexamined the contract and informed the teachers that their benefits would be prorated. When the union requested bargaining, the district refused, indicating that the matter had already been negotiated and included in the collective bargaining agreement. The union then filed an unfair labor practice alleging that the school district refused to bargain in violation of Section 10(1)(e) of PERA. The ALJ recommended dismissal of the charge, finding that the district had already bargained the matter and its failure to prorate benefits was simply a mistake or oversight, not a conscious decision by the district to amend the contract. The Commission reversed, relying on the Court of Appeals decision in *Mid-Michigan Ed Assoc v St. Charles Com*

Sch, 150 Mich App 763, 389 NW2d 482 (1986). In that case the Court of Appeals agreed with the Commission's finding that a past practice constituted a term of employment which could not be unilaterally changed, even though it was contrary to contractual language. In *Port Huron* the Commission concluded that the employer knew or should have known that it was paying insurance benefits to its teachers without regard to hire date, and the parties had tacitly accepted the benefits as a term of employment.

When *Port Huron, supra,* reached the Michigan Supreme Court, the Court reversed the Commission's finding of an unfair labor practice. The Court also overruled *Mid-Michigan Ed Assn v St Charles, supra,* to the extent it held that a practice could be found to modify unambiguous contract language without the parties' intent to amend the contract. In evaluating the effect of a past practice, the Court found that different standards exist, depending on contract language. Where the collective bargaining agreement is ambiguous or silent on the subject in which the past practice has developed, there need only be tacit agreement that the practice will continue. However, the Court required a higher standard of proof where the agreement unambiguously covers a term of employment which conflicts with the parties' past behavior. It found that when the language of the collective bargaining agreement is unambiguous, it controls, unless the past practice is so widely acknowledged and mutually accepted that it amends the contract. It stated further that the party seeking to supplant the contract language "must submit proofs illustrating that the parties had a meeting of the minds with respect to the new terms or conditions--intentionally choosing to reject the negotiated contract and knowingly act in accordance with the past practice." The Court also stated that simply because a party "knew or should have known" it was acting contrary to the agreement is insufficient to overcome express language of the agreement.

In the companion case, *DPOA, supra,* the Supreme Court utilized the test set forth in *Port Huron* but reached a different result, finding the particular past practice so prevalent and widely accepted that there was an agreement to modify the contract. The Court concluded that the city intentionally chose to reject the negotiated contract and knowingly acted in accordance with past practice; it found that the parties had a meeting of the minds with respect to the new terms and conditions and there was in effect an agreement to modify the contract.

Given the finding that the language of the ordinance defining annual compensation is unambiguous, the higher level of proof established by the Court in *Port Huron, supra,* is required. In other words, the practice must be so widely acknowledged and mutually accepted that it amends the contract, and there must be a meeting of the minds. I agree with the Employer that the Charging Parties have failed to establish these elements. There is no dispute that employees have been allowed to select their own years for calculation of FAC and that this was understood by the retirement office and labor relations personnel. However, the subsequent development, whereby one employee devised a method of increasing his pension by utilizing 27 pays in his FAC calculation, was never specifically discussed with responsible management officials. Payroll and retirement personnel who calculated pension benefits operated with a great degree of autonomy, with supervisory personnel assuming that calculations were being performed

correctly. To the extent that the issue of the utilization of 27 pays was raised at all, it was not clearly presented or understood, possibly because so closely linked with the concept of the employees' ability to choose their own best years for FAC. Although many Union officials were aware of the methodology, it was never raised at the bargaining table or communicated formally to bargaining unit members to enable all members to take advantage of it. Instead, only certain employees who were "in the know" reaped the benefit. Although a great number of employees did take advantage of the method, over half of those who retired during this period did not. As soon as the finance director became aware that employees were utilizing 27 pays in the calculation of FAC, he directed that this method be discontinued. Under these circumstances, no mutual acceptance or meeting of the minds can be found. Rather, as argued by the Employer, a mistake was made which was generally unknown to management officials and unauthorized by City Council.

In analyzing whether there was intent to modify the agreement, the Supreme Court recognized in *Port Huron, supra,(at 331, n 21)* that the Commission has consistently found that a mistake does not create an enforceable past practice. For example, in *Highland Park Sch Dist*, 1976 MERC Lab Op 622, the employer had mistakenly made pension contributions for administrative employees for over nine months. The Commission found that the payments made in error did not establish a working condition precluding the employer from immediately ceasing such payments when the error was discovered. Similarly, in *Montcalm County*, 1990 MERC Lab Op 954, the county erroneously paid medical insurance benefits to part-time employees for a year, even though the collective bargaining agreement provided medical insurance to full-time employees only. When the county became aware of the error, it refused to pay benefits for new part-time employees and the union alleged that the county was unilaterally changing a term and condition of employment in violation of PERA. It was found that the payment of benefits had been a mistake and no unfair labor practice was committed by correcting the error. See also *Berkley Police Dept*, 1973 MERC Lab Op 139; *Clinton Twp*, 1975 MERC Lab Op 32; *Garden City Sch Dist*, 1990 MERC Lab Op 430.

There is no question that the mistake in this case occurred over a long period of time and had a substantial financial impact. This, however, does not change the fact that there was no intent on the part of the Employer to change the calculation formula for FAC to permit the use of 27 pays. Whether through inattention, oversight, or misunderstanding, the responsible management representatives in the pension office and labor relations were unaware that this was being done until the issue was raised before the Retirement Board by the Hurley Medical Center employee in January of 2000. At that time it was immediately corrected by the finance director and taken to City Council for clarification. I find that the correction of this error did not constitute an unfair labor practice by the Employer.

Based on the above discussion, I find that Charging Parties have not established a violation of Section 10(1)(a) or (e) by the Employer. It is therefore 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: _____