STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DEWITT,
Public Employer-Respondent,

Case No. C02 F-142

-and-

CAPITOL CITY LODGE NO. 141 OF
THE FRATERNAL ORDER OF POLICE,
LABOR PROGRAM, INC., DEWITT
POLICE NONSUPERVISORY DIVISION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Knaggs, Harter, Brake & Schneider, P.C. by Lawrence P. Schneider, Esq., and Marie L. Waalkes, Esq., for Respondent

Wilson, Lawler & Lett, by L. David Wilson, Esq., for Charging Party

DECISION AND ORDER

On June 11, 2003, Administrative Law Judge Julia Stern issued her 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

Dated:

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DEWITT,
Public Employer-Respondent,

Case No. C02 F-142

-and-

CAPITOL CITY LODGE NO. 141 OF
THE FRATERNAL ORDER OF POLICE,
LABOR PROGRAM, INC., DEWITT
POLICE NONSUPERVISORY DIVISION,
Labor Organization-Charging Party
_____/

APPEARANCES:

Knaggs, Harter, Brake & Schneider, P.C. by Lawrence P. Schneider, Esq., and Marie L. Waalkes, Esq., for Respondent

Wilson, Lawler & Lett, by L. David Wilson, Esq., for 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 and 423.216, this case was heard at Lansing, Michigan on October 31, 2002, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before December 11, 2002, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Fraternal Order of Police, Capitol City Lodge No. 141, Labor Program, Inc., DeWitt Police Nonsupervisory Division, filed this charge on June 26, 2002. Charging Party represents a bargaining unit of all full time nonsupervisory police officers employed by the City of DeWitt. Charging Party alleges that Respondent violated its duty to bargain under Section 10(1)(e) of PERA by unilaterally implementing a change in the pay period for bargaining unit employees from weekly to bi-weekly, and by refusing Charging

Party's timely demand to bargain over this change.
Facts:

Charging Party and Respondent are parties to a collective bargaining agreement with the term July 1, 2000 through June 30, 2003. Before July 1, 2002, all of Respondent's employees, including employees in Charging Party's bargaining unit, were paid weekly. On May 21, 2002, Respondent distributed a memo to all its employees stating that, as a result of the elimination of a position in the payroll department, the payroll cycle would be changed from weekly to bi-weekly, effective with the first payroll period in July. On June 3, 2002, Charging Party's counsel wrote to Respondent's city administrator demanding that Respondent bargain with it before implementing the change in the payroll period. In a letter dated June 11, the city administrator stated that it was Respondent's position that the contract's management rights clause, Section 4, and its "zipper" clause, Section 18.10, gave Respondent the right to implement the change. He suggested that if Charging Party felt strongly about the issue, it should bring it up when the parties began negotiating their next collective bargaining agreement. The change from weekly to bi-weekly pay periods was implemented in July 2002 as announced.

Article 4 of the parties' contract provides, in pertinent part:

> (a) The City retains and shall have the sole and exclusive right to manage and operate the city in all of its operations and activities . . . Among the rights of the City, included only by way of illustration and not by way of limitation, is the right to determine all matters pertaining to the services to be furnished and methods, procedures, means, equipment, and machines required to provide such services; to determine the nature and number of facilities, departments, and their locations; to hire personnel; to establish classifications of work and the number of personnel required; to direct and control its operations; to establish, adopt and modify the budget; to maintain its operations as in the past and prior to the recognition of the Lodge; to study and use improved methods and equipment and assistance from non-employee sources; and in all respects to carry out the ordinary and customary functions of the Employer, provided that these rights shall not be exercised in violation of any specific provision of this Agreement.. . .
>
> (b) The Lodge hereby agrees that the Employer retains the sole and exclusive right to establish and administer without limitation, implied or otherwise, all matters not specifically and expressly limited by this Agreement.

Article 18.10 states:

> Waiver Clause. It is the intent of the parties hereto that the provisions of this Agreement, which supercedes all prior agreements and understandings, oral or written, express or implied, between such parties shall govern their entire relationship and shall be the sole source of any and all rights or claims which may be asserted in arbitration hereunder, or otherwise.

> The provisions of this Agreement can be amended, supplemented, rescinded or otherwise altered only by mutual agreement in writing hereafter signed by the parties hereto.
>
> The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Lodge, for the life of this Agreement, each voluntarily and unqualifiedly waive the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation or either or both of the parties at the time they negotiated or signed this Agreement.

Appendix A contains the wage schedules for each year of the contract. The third sentence of Appendix A reads, "Accordingly, with the first full pay period beginning on or after the dates indicated, the following pay schedules will be effective for patrol officers." This is the only reference in the contract to pay periods.

Discussion and Conclusions of Law:

Respondent's principal argument is that Article 4 and Article 18.10 of the parties' collective bargaining agreement unambiguously give it the right to change the payroll period without further bargaining. In *Port Huron Area School District*, 452 Mich 309, 318-321 (1996), the Supreme Court held that when an employer raises the contract as a defense to a claim that it has unilaterally altered terms and conditions of employment, the procedure for determining whether an employer must bargain involves a two-step analysis. According to the Court, the Commission must first determine whether the issue the union seeks to negotiate is "covered by," or "contained in," the collective bargaining agreement. If so, the employer has satisfied its obligation to bargain, and the details and enforceability of the provision are properly left to arbitration.[1] However, if the issue is not "covered by" the contract, the question becomes whether the union has waived its right to bargain.

In the instant case, the only mention of payroll periods in the contract is in Appendix A. Appendix A

---

1 Respondent cites *Gogebic MESPA v. Gogebic Community College*, 246 Mich. App 342 (2001), *aff'g* 1999 MERC Lab Op 28, as a case finding that the union waived its duty to bargain over a change in the dental insurance carrier. In fact, the Court of Appeals affirmed the Commission's finding that dental insurance was a subject "covered by" the parties' collective bargaining agreement. The Court held that the employer had no duty to bargain over the change because the union had the opportunity to bargain for a specific dental carrier but failed to do so. *Twp. of West Bloomfield*, 1991 MERC Lab Op 525, also cited by Respondent, also held that the issue in dispute was "covered by" the contract. In that case, the Commission held that by entering into a detailed contract clause covering promotions and the criteria for promotions the employer had satisfied its duty to bargain over changes in the written promotional exam.

contains the employees' wage schedule; the fact that the phrase "pay period" appears in Appendix A is clearly incidental. I find that the subject of payroll periods is not covered by or contained in the parties' collective bargaining agreement. I conclude that the issue, then, is whether the union waived or relinquished its right to bargain during the term of the contract over a change in the pay period.

The Commission and Courts have consistently held that a waiver of bargaining rights under PERA must be "clear, unmistakable and explicit." *Amalgamated Transit Union v SEMTA,* 437 Mich 441 (1991); *Southfield Police Officers Assn v Southfield,* 162 Mich App 729 (1987); *Lansing Fire Fighters v Lansing,* 133 Mich App 56 (1984). The Commission has also consistently held that a zipper clause or broadly worded management rights clause will not, standing alone, serve as a waiver of bargaining rights. *Ingham Co.*, 2001 MERC Lab Op 96; *Wexford Co.*, 1998 MERC Lab Op 162-195,196; City *of Rochester,* 1982 MERC Lab Op 1372.2

In *Metropolitan Edison Co. v NLRB,* 460 US 693,708 (1983), the Supreme Court affirmed the NLRB's holding that, under the NLRA, a waiver of a statutorily protected right will not be inferred from a general contractual provision unless the undertaking is explicitly stated – the waiver must be clear and unmistakable. The NLRB has held that a union's waiver of its statutory right to bargain over a particular matter can occur by express language in a collective bargaining agreement, or may be implied from the parties' bargaining history, past practice, or a combination of both. *KIRO, Inc.*, 317 NLRB 1325, 1327 (1995)*; The Register-Guard,* 301 NLRB 491, 496 (1991). As the NLRB stated in *Trojan Yacht,* 319 NLRB 741, 742, (1995) to meet the "clear and unmistakable" standard, the contract language must be specific, or it must be shown that the matter sought to be waived was fully discussed and consciously explored, and that the waiving party thereupon consciously yielded its interest in the matter. See also, *Waxie Sanitary Supply*, 337 NLRB No. 43 (2001); *Johnson-Bateman*, 295 NLRB 180, 184, (1989); *Rockwell International Corporation*, 260 NLRB 1346 (1983).

The Commission has found waivers based on zipper clauses combined with a bargaining history indicating that the union knowingly waived its right to bargain. In *Capital Area Transit Authority,* 1994 MERC Lab Op 921, the Commission held that the union waived its right to bargain over the elimination of overtime pay practices and a lunch schedule not covered by the agreement. The Commission's finding was based on these facts: (1) the employer stated at the beginning of contract negotiations that it intended to terminate these practices; (2) the union elected not make any proposals during negotiations concerning the practices; (3) the union entered into a contract containing a zipper clause which stated that the agreement would take the place of all prior contracts, both written and oral. See also, *City of Grand Rapids (FD),*

---

2 The Commission routinely finds waivers based on detailed language in a management rights clause. See, e.g., *Wayne Co. Health Dept,* 1999 MERC Lab Op 99; *Macomb Co.,* 1998 MERC Lab Op 844; *Traverse City Public Schools,* 1993 MERC Lab Op 860; *University of Michigan,* 1991 MERC Lab Op 116; *River Rouge School District,* 1981 MERC Lab Op 663; *University of Michigan,* 1971 MERC Lab Op 994. In addition, before *Port Huron,* the Commission sometimes applied the waiver test in circumstances where it might now find that the subject was covered by the contract. See, e.g., *Oakland Co.*, 1989 MERC Lab Op 1099; *City of Westland,* 1987 MERC Lab Op 793.

1997 MERC Lab Op 69, 80.

The NLRB has also found zipper clauses, combined with a bargaining history, to be evidence of a clear and explicit waiver. In *TCI of New York*, 301 NLRB 822 (1991), the NLRB held that the union waived its right to bargain over the elimination of a bonus not covered by the contract when it agreed to new zipper clause language proposed by the employer. Unlike the zipper clause in the parties' previous agreements, the new clause stated that the agreement's terms would supersede "all prior agreements, understandings and past practices, oral or written, express or implied" between the parties." The NLRB found that the employer's proposal signified that the employer wished to obtain the union's agreement to an alteration in the ground rules of the bargaining relationship, and that it put the union on notice that the employer was seeking such a change. The fact that the union initially opposed the modified language, but later agreed to it, indicated that the union knowingly agreed to redefine the bargaining relationship as the employer had proposed. Similarly, in *Columbus Electric Co.*, 270 NLRB 686 (1984), *enf'd*, 795 F2d 150 (DC Cir, 1986), the Board held that a union waived its right to bargain over the cessation of a Christmas bonus when the union agreed to a zipper clause after discussing it during the parties' last contract negotiations.

Respondent asserts that the Commission should apply the same standard used in normal statutory construction to the interpretation of the contract. It argues that changing the payroll period is an "ordinary and customary function," and that the management rights clause of the contract, Article 4.0, clearly and unmistakably gave it the right to make this change. I conclude, however, that this language is too broad and indefinite to constitute a waiver of Charging Party's right to bargain over a change in the payroll period. Respondent also asserts that the zipper clause, Article 18, unambiguously waives Charging Party's right to bargain over any matter covered or not covered by the contract. However, as indicated above, the Commission will not find a broad zipper clause like Article 18 to constitute a waiver of the right to bargain over a matter not covered by the contract unless there is extrinsic evidence, either from past practice or bargaining history, that the union consciously waived its rights. Respondent presented no such evidence here. I conclude that Respondent has not established that Charging Party waived its right to bargain over a change in the payroll period.

Respondent also argues that it had no duty to bargain over the change in the payroll period because the effect of this change on employees was de minimis.

In *Children's Aid Society*, 1994 MERC Lab Op 323, the Commission held that the addition of two weeks to the "lag time" for paychecks, i.e. the length of time employees had to wait between earning their wages and the issuance of their paycheck, was a mandatory subject of bargaining. The Commission stated, at 327:

> The amount of time an employee must wait to receive a paycheck, while not as significant as the amount of pay, may still have a significant impact on the wage earner. As noted by the Union, employees who are on a strict budget or who have timely bills to pay will find the delay in pay dates to be a true hardship.

In *Detroit Board of Ed*, 2000 MERC Lab Op 375, the Commission held that the employer had a duty to bargain over a decision to pay longevity bonuses annually, in a lump sum, instead of in bi-weekly payments. The Commission also held that the impact on employees of this change was not de minimis, even though the change reduced employees' regular paychecks by less than $10. Furthermore, the National Labor Relations Board (NLRB) has held that a change from a weekly to a bi-weekly pay period is a mandatory subject of bargaining under the National Labor Relations Act, (NLRA) 29 U.S.C. 151 et seq. *Visiting Nurse Services, Inc.*, 325 NLRB 1125 (1998), *enf'd*, 177 F3rd 52 (1st Cir, 1999); S *& I Transp. Inc.*, 311 NLRB 1388 (1993).

In accord with the cases discussed above, I conclude that the effect of a change in the payroll period from weekly to bi-weekly is not de minimis, and that such a change is a mandatory subject of bargaining under PERA.

In sum, I conclude that a change in the payroll period from weekly to bi-weekly is not de minimis and is a mandatory subject of bargaining. I also find that payroll periods were not "covered by" the parties' contract. Finally, I conclude that the evidence does not establish that Charging Party waived its right to bargain over the change. I find that in July 2002 Respondent unlawfully changed the payroll period for employees represented by Charging Party from weekly to bi-weekly before satisfying its obligation to bargain, and that it unlawfully refused to bargain with Charging Party over this issue. I recommend that the Commission issue the following order:

RECOMMENDED ORDER

Respondent City of DeWitt, its officers and agents, are hereby ordered to:

1. Cease and desist from unilaterally altering the payroll period for employees represented by Capitol City Lodge No. 141 of the Fraternal Order of Police, Labor Program, Inc., DeWitt Police Nonsupervisory Division.

2. Upon demand, bargain with the above labor organization over the change in the payroll period from weekly to bi-weekly.

3. Pending satisfaction of its obligation to bargain, reinstate weekly pay periods for employees represented by the above labor organization.

4. Post the attached notice to employees in conspicuous places on the Respondent's premises, including places where notices to employees are customarily posted, for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern

Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the City of DeWitt has been found to have committed an unfair labor practice in violation of the Michigan Public Employment Relations Act (PERA). Pursuant to the Commission's order,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT *alter the payroll period for employees represented by the Capitol City Lodge No. 141 of the Fraternal Order of Police, Labor Program, Inc., DeWitt Police Nonsupervisory Division, without, upon a demand by the union, bargaining to agreement or impasse.*

WE WILL, *upon demand, bargain in good faith with the above labor organization over a change in the payroll period from weekly to bi-weekly.*

WE WILL, *pending satisfaction of our obligation to bargain, reinstate weekly pay periods for employees represented by the above labor organization.*

CITY OF DEWITT

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission/Bureau of Employment Relations,

Cadillac Place, 3026 W. Grand Blvd., Suite 2-750, PO Box 02988, Detroit, MI 48202-2988.