STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

GRAND RAPIDS PUBLIC MUSEUM,
Respondent-Public Employer,

Case No. C01 L-242

- and -

GRAND RAPIDS EMPLOYEES INDEPENDENT UNION,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Varnum, Riddering, Schmidt & Howlett, by John Patrick White, Esq., for the Public Employer

Kalniz, Iorio & Feldstein Co., L.P.A., by Fillipe S. Iorio, Esq., for the Labor Organization

DECISION AND ORDER

On March 26, 2003, Administrative Law Judge (ALJ) Roy L. Roulhac issued his Decision and Recommended Order in the above matter finding that Respondent, Grand Rapids Public Museum (Employer), committed an unfair labor practice in violation of Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e), by engaging in bad faith bargaining with the Grand Rapids Employees Independent Union (GREIU or Union). The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. On April 21, 2003, Respondent filed timely exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions. Charging Party was granted an extension to file a response to the exceptions, and its timely brief in support of the ALJ's Decision and Recommended Order was filed on May 22, 2003.

Respondent's exceptions allege that the ALJ erred in finding that the Employer bargained in bad faith. Respondent contends that its course of action during the collective bargaining process amounted only to hard bargaining, rather than a violation of its duty to bargain. We have carefully reviewed Respondent's exceptions in the light of the entire record and, for the reasons set forth below, we find that the exceptions have merit.

Facts:

The facts of this case were accurately set forth in the ALJ's Decision and Recommended Order and will only be summarized as necessary here. In July 1999, Charging Party became the exclusive representative of a bargaining unit of approximately 16 full-time non-supervisory Museum employees, including curators, exhibit preparers, carpenters, and custodians. In August of 1999, the parties began bargaining a first contract. Between August 1999 and May 2000, the parties met and bargained ten times, and engaged in mediation. Two of the major issues in dispute were agency shop and seniority. The Employer maintained that an agency shop provision would limit its ability to recruit and retain professional employees. The Employer also objected to the Union's seniority proposals, which it felt did not take into account the differences in job functions of Museum employees.

After the mediation session on May 23, 2000, the Union filed a fact finding petition. Fact finding hearings took place on December 18, 2000, and March 14, 2001; the fact finder issued a report on October 26, 2001. Although not all of the recommendations contained in the report were favorable to the Union, the Union expressed to the Employer its willingness to accept the report and meet to reach an agreement. The Employer agreed to meet, but noted that its circumstances were very different than they had been at the first fact finding hearing nearly a year earlier. According to the Employer, after the events of September 11, 2001, it was facing a substantial projected budget deficit, including reductions in admission revenue, state grants and funding from the City of Grand Rapids. On November 19, 2001, the parties held their first meeting after fact finding. At that time, the Employer submitted a summary of the parties' agreement as well as a package proposal that included revisions to the positions it held before fact finding. The Employer maintained its position on most issues, including agency shop and seniority, but offered some concessions in areas such as union leave and release time, posting of positions outside the bargaining unit, and contract duration. The Employer also changed its position with respect to overtime and benefits, which had been the subject of lengthy bargaining, proposing that curators be excluded from overtime eligibility but remain eligible for a management benefits package.

The parties met again on November 26 and November 29, 2001. At the November 29 meeting, the Union proposed a limited time package in which the Union agreed to accept the Employer's proposed language on a substantial number of disputed issues, including maintenance of standards, holidays, administrative and compensatory leave, working out of classification, probationary period, and others; the Union was not willing to compromise on agency shop, seniority, layoff/recall, or pensions. This proposal was rejected by the Employer. After this bargaining session, the GREIU filed the instant charge on December 14, 2001, alleging that the Employer did not engage in the fact finding process in good faith, has refused to consider the recommendations of the fact finder, and has engaged in impermissible surface bargaining. The parties met again on January 24, and February 19, 2002, but did not reach agreement.

Discussion and Conclusions of Law:

The Union alleges that the Employer engaged in bad faith surface bargaining in violation of PERA by refusing to make new proposals or give concessions after receiving the fact finder's report and recommendations, and also by regressive bargaining. The Employer maintains that the fact that the Museum has not acquiesced to the Union's proposals on certain issues, or the fact that the parties have consequently arrived at an impasse in bargaining, is not sufficient to support a claim of surface bargaining.

The duty to bargain is defined in Section 15 of PERA, which provides that:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but this obligation does not compel either party to agree to a proposal or require the making of a concession.[1]

In assessing whether a party has fulfilled its bargaining obligation, we have always been mindful of the language of Section 15, which states that agreement or concessions cannot be compelled. *Ida Pub Schs,* 1996 MERC Lab Op 211, 215; *Center Line Pub Schs,* 1976 MERC Lab Op 729, 733; *Lake Michigan College,* 1974 MERC Lab Op 219 aff'd *Lake Michigan Federation of Teachers v Lake Michigan College*, 60 Mich App 747 (1975). See also *HK Porter v NLRB*, 397 US 99 (1970); *NLRB v American National Insurance Co,* 343 US 395 (1952). To determine whether a party has bargained in good faith, we examine the totality of the circumstances to decide whether a party has approached the bargaining process with an open mind and a sincere desire to reach an agreement. *City of Springfield*, 1999 MERC Lab Op 399, 403; *Unionville-Sebewaing Area Schs,* 1988 MERC Lab Op 86; *Kalamazoo Pub Schs*, 1977 MERC Lab Op 771, 776.

In reaching the conclusion that the Employer engaged in bad faith surface bargaining, the ALJ found that the Employer did not use the fact finder's recommendations to reach an agreement or to meet the Union part way. He found that the Employer's bad faith was demonstrated by its rejection of the Union's agency shop proposal despite the fact finder's recommendation that it be adopted. We have indicated that a fact finder's report provides a basis for further bargaining; however it is not binding and there is no obligation on either party to accept it. In *City of Dearborn*, 1972 MERC Lab Op 749, 758, we stated that while both parties have an obligation to bargain over the fact finder's recommendations and an employer must make a serious attempt to meet the union part way, "the Act does not require the employer to make a concession on any specific issue or to adopt any particular position with respect to an issue." Similarly, in *Wayne County,* 1988 MERC Lab Op 7, we stated that the obligation to bargain over the substantive recommendations of the fact finder does not require a party to adopt the fact finder's recommendations or alter its bargaining positions.

The ALJ compared the Employer's bargaining conduct in this case to that of the employer in *Oakland Community College*, 2001 MERC Lab Op 273. In *Oakland Community College,* we found

[1] Because Section 15 is patterned after section 8(d) of the National Labor Relations Act, as discussed below, we often look to decisions of the National Labor Relations Board (NLRB) and federal courts in defining the nature and extent of the obligation to bargain. *Detroit Police Officers Ass'n v Detroit,* 391 Mich 44 (1974).

that the conduct of the employer during the entire course of bargaining indicated the lack of an open mind and the absence of a sincere desire to reach an agreement. Although we examined specific bargaining proposals, we did so only to evaluate whether, in the context of the entire bargaining process, they constituted evidence of bad faith bargaining because they were designed to frustrate agreement on a contract. We found that throughout bargaining, the employer sought to retain almost total control over working conditions. The employer's proposals included an extremely broad management rights clause, provisions giving it the unrestricted right to reorganize, subcontract, determine merit increases and wage adjustments; it also proposed to severely limit access to the grievance procedure, and refused to recognize seniority or dues checkoff. We concluded that in combination, these proposals were designed to undermine the status and authority of the bargaining representative and deny the union an effective voice in jointly determining terms and conditions of employment. We also found other bad faith conduct, including the fact that the employer responded slowly if at all to the union's proposals, added issues never presented to the fact finder, met once after the fact finder's report, and then immediately declared an impasse. Although the nature of the bargaining proposals and their cumulative effect were a factor in finding a PERA violation, our decision that the employer had bargained in bad faith was based on the totality of the circumstances.

The Union asserts that the failure of the Museum to agree to an agency shop provision is emblematic of the Employer's unwillingness to bargain in good faith, citing *Queen Mary Restaurants Corp v NLRB,* 560 F2d 403 (CA 9, 1977). In that case, the court affirmed the finding of the NLRB (219 NLRB 776, 1975) that the employer had bargained in bad faith, relying in part on the employer's refusal to compromise on union security provisions. However, the employer's adamant positions against union security and a union hiring hall were found to be part of the totality of the circumstances evidencing bad faith bargaining, including demonstrated union animus and evasive and dilatory tactics during bargaining.

The NLRB has taken the same approach in other cases involving union security provisions. For example, in *Oklahoma Fixture Co*, 331 NLRB 1116 (2000), *enforced on other grounds*, 332 F3d 1234 (CA 9, 2003), the NLRB dismissed an allegation of bad faith bargaining in a case involving an employer's proposal to eliminate a union security provision included in the expired contract. The Board stated that it would not make subjective determinations regarding the content of bargaining proposals, including whether they were acceptable or unacceptable to the other party, but would only examine proposals to evaluate whether they were clearly designed to frustrate agreement on a collective bargaining contract. The Board again indicated that the collective bargaining process must be viewed as a whole, not by isolating single elements for scrutiny:

> Thus, regardless of whether one would find that the union's proposals were more reasonable than the respondent's or that the union demonstrated a greater willingness to compromise, neither of these considerations would warrant a finding of a violation under the Act. *Id*. at 1118

Similarly, in *Phelps Dodge Specialty Copper Products Co*, 337 NLRB 455 (2002), the Board affirmed the findings of its ALJ that in the absence of any other bargaining misconduct, the positions taken by the employer in relation to union security and dues checkoff provisions did not amount to an unfair labor practice. See also *National Steel & Shipbuilding Co*, 324 NLRB 1031 (1997).

In the instant case, after examining the bargaining process as a whole, we are unable to find any conduct by the Employer that would demonstrate unwillingness to meet and bargain or that exhibits bad faith.[2] We agree with the Employer that this case is more akin to *Lake Michigan College*. In *Lake Michigan College*, the union requested mediation after the parties met sixteen times, but bargaining proved unsuccessful. After fact finding took place, the union was willing to accept the fact finder's recommendation but the employer rejected it. 60 Mich App 750. Based on the record as a whole, the ALJ found that the employer had merely engaged in hard bargaining, and had not violated its duty to bargain in good faith. *Id*. at 751. The Commission affirmed, holding that the employer had fulfilled its duty to bargain, and that its conduct was permissible in light of the fact that PERA does not compel agreement on a proposal or require the making of a concession. In affirming the Commission, the Court of Appeals noted that "many bargaining sessions were held" and stated that "the fruitfulness of these meetings from the [union's] point of view is not controlling." *Id.* at 753. The Court also stated that to compel a party to agree to a proposal was contrary to the express terms of Section 15.

Here the Employer met and bargained with the Union before and after fact finding. Like the Union, the Employer maintained its position on agency shop and seniority proposals, but it also made concessions in other areas. The Employer advanced reasons for its position, in some instances relying on the unique character of museums and the broad range of classifications/skills in the bargaining unit, which included both professional and non-professional employees. We find that the Employer's reasons were not so illogical as to warrant an inference that they were intended to frustrate bargaining or evince intent not to reach agreement. See *Hickinbotham Bros Ltd*, 254 NLRB 96, 102-103 (1981). We also reject Charging Party's claim that the Employer exhibited bad faith by its change of position after fact finding with respect to excluding professional employees from overtime. Whether or not this proposal was "regressive," as characterized by Charging Party, the fact that a party may change position, or offer less, over the course of long bargaining does not constitute bad faith. See *Waldron Area Schs*, 1996 MERC Lab Op 441; *Alba Pub Schs*, 1989 MERC Lab Op 823.

We recognize the significance of union security provisions to unions and acknowledge that they are almost universal in collective bargaining contracts involving public employees. As we found in *Oakland Community College*, there may be circumstances where an employer's adamant stand on proposals, including those involving union security, when viewed in combination with other bargaining misconduct, would constitute bargaining in bad faith. We do not find such circumstances here. The dissent concludes that the Employer engaged in surface bargaining based on its failure to make significant concessions after fact finding and its failure to adequately explain its position on agency shop. We believe that to find an unfair labor practice based on an employer's failure to make concessions, or its position on one issue, with no other evidence of bad faith, is contrary to both the precedent cited above and to Section 15 of PERA.

Based on the above discussion, and the entire record in this matter, we find that the Employer engaged in permissible hard bargaining. We, therefore, conclude that the unfair labor practice charge in this matter must be dismissed and issue the order set forth below.

[2] We note that the ALJ dismissed Charging Party's allegation of bargaining directly with bargaining unit members, and no exceptions were taken to his finding.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Nora Lynch, Commission Chairman

_____

Harry W. Bishop, Commission Member

COMMISSIONER GREEN, DISSENTING:

After fact finding, the Employer claimed that because of the events that occurred on September 11, 2001, and the aftermath, it was facing a substantial projected budget deficit, including reductions in admission revenue, state grants and funding from the City of Grand Rapids. The testimony as to a projected budget deficit is no more than speculation, of the self-serving kind that is often heard in bargaining. I find no evidence in the record that the September 11, 2001, terrorist attack in New York had an impact upon the Employer's budget that was discernible on November 19, 2001, when the Employer's claim was made

At that time, the parties held their first meeting after fact finding. The Employer, maintaining its previous positions on agency shop and seniority, offered minimal changes in its positions on union leave, steward release time, posting of jobs, and contract duration. I find those changes to be indicative of "surface" bargaining, clothed with the appearance of concessions while conceding little or nothing of substance.

Seven days of unpaid union leave for the bargaining unit, as opposed to five, represented minimal movement on an issue that was hardly critical in these, or any, negotiations. The Employer's position on steward release time, too, was changed little after fact finding, and the change was largely cosmetic.[3] To call the posting of vacancies by a public employer a concession stretches the point.

[3] The Employer's exceptions to the Decision and Recommended Order of the ALJ asserts:" In its pre-fact finding proposal, the Museum proposed that the '[s]tewards may, with permission, be released to investigate or adjust grievances without pay.' *See* Jt. Ex. 10." This assertion misstates the record. Joint Exhibit 10, the Employer's April 20, 2000 proposal stated: "The Stewards may, with the written permission of the Director or his/her designee, be released from their work assignments to investigate or adjust grievances. Such release shall designate whether it is with pay." This more closely mirrors the Employer's post fact finding proposal that permission for paid release time will not be withheld unreasonably.

Prior to fact finding, the Employer proposed a contract that would put an end to bargaining for almost 15 months. The Employer's post fact finding proposal would require the parties to resume bargaining in less than 7 months.[4] These surface proposals, coupled with the Employer's inadequately explained position opposing an agency shop, viewed in the context of the prolonged bargaining, mediation and fact finding history between these parties, evidences an intent to avoid reaching an agreement and constitutes bad faith bargaining on the part of the Employer.

I would impose the remedy recommended by the Administrative Law Judge.

_____

Nino E. Green, Commission Member

Dated: _____

[4] On April 20, 2000, the Employer proposed an agreement that would expire more than 14 months later, on June 30, 2001. [Joint Exhibit 10] On November 19, 2001, after fact finding, the Employer proposed an agreement that would expire 7 months later, on June 30, 2002. [Joint Exhibit 11]

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DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

This case was heard in Lansing, Michigan on March 26, 2002, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. The proceeding was based upon an unfair labor practice charge filed on December 14, 2001, by the Grand Rapids Employees Independent Union, Charging Party, against the Grand Rapids Public Museum, Respondent. Based upon the record and post-hearing briefs filed by June 3, 2002, I make the following findings of fact, conclusions of law, and recommended order pursuant to Section 16(b) of PERA.

The Unfair Labor Practice Charge:

In its December 14, 2001 charge, Charging Party claims that despite Respondent's willingness to attend meetings, Respondent violated PERA by: engaging in bad faith surface bargaining by refusing to make new proposals or give concessions after receiving the fact finder's report and recommendations, and by regressive bargaining.

Part I. Findings of Fact

A. Background

Respondent Grand Rapids Public Museum was created in 1854. A Board of Art and Museum Commissioners that is appointed by the Grand Rapids City Commission has governed the Museum since 1994. Prior to 1994, Museum employees were hired by the City of Grand Rapids and the City provided substantially all of the Museum's financial support. The Museum remains a component of the City's budget and receives over 50% of its revenue from the City. In 2001, the

City contributed $2.3 million of the Museum's $4.3 million operating budget. The remainder of the Museum's revenue is derived from various other sources including, fund-raising campaigns, state grants, fees, and its retail operation. Although the cost is borne by the Museum, its employees remain a part of the City's pension and health insurance systems.

The Museum employs thirty-five full-time employees, approximately 150 part-time employees, and relies on the services of numerous volunteers. The Museum is divided into several sections – the planetarium, administration, exhibits, education, collections, curatorial, building operations, security, and facility use. It is not uncommon for part-time employees, volunteers and supervisors to perform bargaining unit work while preparing for major exhibits.

In July 1999, after a fifteen to one vote for unionization, Charging Party was certified as the exclusive representative of the Museum's employees. The unit includes sixteen employees in the following classification: a curator II (vacant); four curators; one exhibit preparer II; three exhibit preparers level I; two carpenters; two lead custodians; one custodian; a financial assistant III; and an office assistant. Prior to unionization, all members of the bargaining unit were considered by the Museum to be exempt employees under the Fair Labor Standards Act and were, therefore, ineligible to receive overtime. Eleven of the sixteen bargaining unit members - curators, exhibit preparers, and carpenters - were considered professional employees and received a "management benefits package" that included enhanced sick and vacation payouts upon retirement or death, administrative leave, and income maintenance.

B. Pre-Fact-Finding Bargaining

Between August 1999 and May 2000, the parties met in ten bargaining sessions and participated in mediation. They exchanged proposals and counter-proposals and reached agreement on some issues. With few exceptions, however, the parties did not change their positions after presenting their initial proposals. On September 14 and 24, 1999, the Union presented non-economic proposals to the Employer that included provisions for agency shop; seniority, layoff and recall, and preservation of bargaining unit work. In its October 4, 1999 response, the Employer indicated that it would reserve comment on the Union's agency shop proposal until it reviewed the notice to employees regarding fees, appeal procedures, and the method of calculating the agency shop assessment.

The Union submitted comprehensive non-economic proposals on October 27 and November 10, 1999 that included provisions on agency shop, seniority, maintenance of standards, discharge and discipline, grievance procedure, and language limiting the manner that volunteers, supervisors and part-time employees could be used to perform bargaining unit work. In its October 4 and November 10, 1999, responses, the Employer refused to agree to any of the Union's proposals. During bargaining sessions on December 7 and 16, 1999, the parties maintained their respective positions.

On February 7, 2000, the Union presented economic and non-economic proposals. The Union's wage proposal included a 12.7% increase effective July 1, 1999; 3.4% effective January 1, 2000; and a 3.3% increase effective January 2, 2001 with a "one-time payment of 38.3% of employees' current salaries. In its March 16, 2000 response, the Employer proposed a 3.5% increase effective July 1, 2000. The Employer agreed that professional employees – curators, exhibit preparers, and carpenters - would continue to receive a management benefits package that

included enhanced vacation and sick leave pay outs, income maintenance benefits, and administrative leave. However, in its April 20, 2000 proposal, the last before fact-finding, the Employer deleted enhanced management benefits for professional employees and proposed to "grand-father" them at their existing levels with new professional employees accruing benefits at non-management levels. After mediation on May 23, 2000, the Union filed a fact-finding petition.

C. Fact Finding:

During two days of fact-finding – December 18, 2000 and March 14, 2001 – the parties presented evidence on over two-dozen outstanding issues to Commission-appointed fact finder Mario Chiesa. Before and after the issuance of the fact finder's report, the Employer sent a number of communications to employees, some in response to questions placed in a suggestion box. In the July/August issue of *Discoveries*, the Director informed employees that since the Union had not agreed to the Employer's wage proposal and the parties were still engaged in fact finding, the Museum could not legally give bargaining unit employees any wage/salary adjustments. A question placed in the suggestion box on October 22, 2001, asked for legal support for this assertion. The Director cited a Michigan Court of Appeals decision for the view that after fact finding had been initiated, neither party could make unilateral changes and that parties must bargain for a reasonable time, generally considered to be sixty days, over the substance of the fact finder's report.

On October 26, 2001, the fact finder issued his fifty-eight-page report. His recommendations are summarized as follows:

Issue	Accepted Position of
1. Duration	Compromise: three years effective 7/1/2000[5]
2. Wages	Compromise: 3.5% increase effective 7/01/2000 and 7/01/2001; 3% effective 7/01/2002
3. Agency Shop/Service Fee	Union – provisions almost universal
4. Work Preservation	Compromise: continue to use volunteers, but not to displace full-time employees; continue current procedure for using part-time employees and for using supervisors to perform bargaining unit work. No recommendation on maintaining full-time employees at present level.
5. Pension	Compromise
6. Overtime	All bargaining unit members eligible; two hours of call-in time; strict rotation by seniority; charge for time asked but not worked; equal distribution.
7. Health Insurance	Employer
8. Vacations	Members of unit receiving "management-level benefits" continue to receive. Others to receive non-management level using accumulation schedule proposed by Employer.
9. Sick Leave	Same as above. Employees receive one day of

[5] The Employer proposed a one-year agreement effective upon signing and continuing until 6/30/2001. The Union proposed three years effective July 1, 1999, the certification date.

	sick leave for each month he/she works twelve or more complete days; employees required to substantial use of sick leave; intentional falsification of affidavit grounds for discharge; employer discretion to grant unpaid sick leave.
10. Severance Pay	Employer – does not agree to a mandatory severance program.
11. Income Maintenance (income allowance in the event of illness or disability)	Part of "management level benefits." Continue status quo for professionals.
12. Union Bargaining Committee (Leave for Union Business)	Union with modifications. The Employer proposed 5 days of unpaid leave; the Union proposed 7 days of paid leave; the fact finder recommended 7 days of paid leave.
13.Union Stewards/Representatives (Leave to Investigate Grievances)	Stewards may, with written permission that shall not be unreasonable withheld, be released to investigate or adjust grievances with pay.
14. Grievance Procedure	Employer with modifications
15. Discharge and Discipline	Union with modifications
16. Maintenance of Standards	Union, with exceptions
17. New or changed Jobs	Employer with modifications
18. Seniority	Union with modifications; further negotiations regarding vacancies, promotions, demotions and lateral transfers
19. Probationary Period	Union
20. Job Security/Subcontracting	Compromise
21. Shift and Schedule Preference	Employer
22. Professional Development	Employer
23. Uniforms	Employer with modifications
24. Special Conferences	Employer

D. Negotiations After Fact-Finding

On November 2, 2001, a few days after the fact finder's report was issued, the Employer sent employees an E-mail that stated in part:

> As anticipated, Mr. Chiesa drafted a compromise recommendation with the hope that it will aid both parties in reaching a first collective bargaining agreement. He has drafted a number of compromises for both the GREIU and the Museum which he recommends that the parties consider. I understand that the process requires that the two parties expend at least sixty days in new negotiations based on the report. The Museum's administration is reviewing the report and will be discussing it with the Museum Board. After we have a chance to meet with the union's bargaining team, we anticipate that we will be able to provide all employees with additional information

In a November 9 letter, the Union informed the Employer that although it did not prevail on a number of disputed issues, it was willing to accept the fact finder's recommendations and

requested a meeting to discuss the report and reach an agreement. The Employer's November 13 response indicated its willingness to meet but noted, "Nearly one year had passed since the first [fact-finding hearing] was held, and the environment in which we all find ourselves is vastly different than that which we enjoyed in 2000." According to the Employer, after the events of September 11, 2001, the Museum was faced with a $433,000 budget deficit, and reduced admission revenue, state grants, and funding from the City of Grand Rapids.

The parties held their first meeting after fact-finding on November 19, 2001. The Employer submitted a summary of the parties' agreements and a package proposal that included the following revisions to its pre-fact finding positions.

Employer's 11/19/01 Proposal	Employer's Last Pre-Fact Finding Proposals
1. Union Bargaining Committee: Seven days of unpaid leave for union business or training	Five days of paid leave
2. Union Stewards/Representatives: Stewards may, with written permission that shall not be unreasonably withheld, be released to investigate or adjust grievances with pay.	Stewards may, with written permission, be released to investigate or adjust grievances without pay.
3. New or Changed Jobs: Agreed to post, for informational purposes, full-time positions outside the bargaining unit.	Not agreed
4. Overtime: Curators not eligible for overtime and will retain management benefits package.	All classifications eligible.
5. Vacation, Sick Leave, Income Maintenance, Administrative leave: Only curators will retain management vacation benefits.	Professional employees currently receiving management level benefits will be "grand-fathered." New professional employees to receive non-management level benefits.
6. Wages: 3.5% increase effective 7/1/2000; 3.0% increase effective 7/1/2002	3.5% effective 7/1/2000
7. Duration/Termination: Effective upon date of signing and continue through 6/30/2002	Effective upon date of signing and continue through 6/30/2001

During a brief November 26 meeting, the parties discussed agency shop and seniority. Neither party offered new proposals. The parties next met on November 29. The Union presented a limited-time package proposal in which it agreed to accept the Employer's proposed language on a substantial number of disputed issues.[6] The Employer did not accept the Union's package proposal.

On January 24, 2002, the parties met again. Although neither party offered any new proposals, the Employer, among other things, explained its reason for rejecting the Union's agency

[6] Including wage increases in amount less than recommended by the fact finder; leave for union business; unpaid leave to adjust and investigate grievances; grievance procedure; intentional falsification of sick leave as basis for summary discharge and Employer's discretion to grant unpaid sick leave for up to one year; availability of an on-premises conference room for disciplined or discharged employee to meet with union steward prior to immediately leaving premises; Employer not required to provide Union with all information that might form the basis for discipline; maintenance of standards; new or changed jobs; shift and schedule preference; minimum overtime pay and overtime assignments; holidays; administrative and compensatory leave; other authorized leave; professional development; severance package; working out of classification; uniforms; indemnification; special conferences; contract duration; ethics policy; probationary period; and vacancies, promotions, and transfers

shop provision. The Employer explained that it would be placed at a competitive disadvantage in recruiting and retaining professional employees if they were required to pay union dues or an agency fee. An Employer witness testified, however, that only one employee, a non-professional, had indicated that she would not remain with the Museum if she were required to pay union dues or an agency fee. The parties last met on February 19, 2002. Neither party proposed anything new.

Conclusions of Law:

The duty to bargain is defined in Section 15 of PERA as the mutual obligation of parties to meet at reasonable times and confer in good faith with respect to wages, hours, other terms and conditions of employment, or the negotiation of an agreement. However, this obligation does not require a party to agree to a proposal or make concession.

The Union claims that the Employer engaged in impermissible bad faith surface bargaining by not making a serious attempt to meet the union part way or use the fact finder's suggested compromises in an attempt to reach an agreement. The Union also contends that the Employer's bad faith is demonstrated by its regressive bargaining proposals and its correspondence to employees and the Union, before and after the fact finder's report was issued. The Union, asserts that it demonstrated a willingness to accept the fact finder's recommendations and even offered concessions beyond those recommended.

The Employer asserts that the uncontradicted evidence establishes that there is no basis for the Union's surface bargaining charge. According to the Employer, it met and conferred with the Union on many occasions, made many proposals, and even gave concessions after fact finding. Moreover, the Employer contends that its proposals and bargaining positions do not evidence an intention to undermine the Union's representational status or avoid reaching an agreement. The Employer likens this case to *Lake Michigan Federation of Teachers* v *Lake Michigan College*, 60 Mich App 747 (1975). There the parties engaged in sixteen bargaining sessions before the employer requested mediation. After no agreement was reached, the union requested fact finding and accepted the fact finder's recommendation. The employer rejected the recommendations and offered a proposal that the employees did not accept. When the school refused to compromise its positions, the union filed an unfair labor practice charge. In upholding the Commission's finding that the school engaged in "hard bargaining" rather than bad faith surface bargaining, the Court noted that the parties engaged in many bargaining sessions and the fruitfulness of those meetings from the Union's point of view was not controlling.

I disagree with the Employer's claim that this case is governed by *Lake Michigan*. The Commission latest review of parties' obligation to bargain under Section 15 of PERA is set forth in *Oakland Community College*, 2001 MERC Lab Op 273. There the Commission restated the following test:

> In determining whether a party has violated its statutory duty to bargain in good faith, the totality of the party's conduct must be examined to determine "whether it has actively engaged in the bargaining process with an open mind and a sincere desire to reach an agreement." See e.g., *Unionville-Sebewaing Area Schools*, 1988 MERC Lab Op 86, 89 (quoting *Detroit Police Officers Ass'n* v. *City of Detroit*, 391 Mich 44, 53-54 (1975)). Although we will not evaluate substantive terms of collective bargaining agreements or compel concessions, it is proper, under curtain

> circumstances, for this Commission to examine proposals and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining. See e.g. *Flint Twp*, supra at 165. See also *Public Service of Oklahoma*, 334 NLRB No. 68 (2001); *Reichhold Chemicals (Reichhold II)*, 288 NLRB 69; 127 LRRM 1265 (1988), aff'd in pertinent part sub nom *Teamsters Local 515* v. *NLRB*, 906 F2d 719; 134 LRRM 2481 (DC Cir. 1990), cert denied 498 US 1053. (1991).

In *Oakland Community College*, the Commission, while observing "there was a fine line between surface bargaining and "hard bargaining," concluded that the employer's proposals, taken in their entirety and viewed in the context of Respondent's conduct during negotiations, clearly evidenced the College's desire to avoid its statutory duty to bargain in good faith.

In this case, shortly after the fact finder's report was issued, the Employer communicated to its employees that the fact finder "drafted a compromise recommendation with the hope that it will aid both parties in reaching a first collective bargaining agreement." However, I find that the Employer did not use the fact finder's compromise recommendations to reach an agreement or to meet the Union part way. After reviewing the report, the Union informed the Employer that it was willing to accept the fact finder's recommendation although it did not prevail on a number of disputed issues. However, other that agreeing that Stewards may, with written permission that shall not be unreasonably withheld, be released to investigate or adjust grievances with pay, the Employer rejected the recommendations, even those favorable to its position. The limited post-fact finding proposals made by the Employer did not address any of the key issues in dispute.

The Employer's bad faith surface bargaining is demonstrated by its response to the Union's agency shop/service fee proposal and the fact finder's recommendation. While proclaiming that agency shop/service fee provisions are almost universal and noting that employees who joined the Union indicated their willingness to support the Union, the fact finder recommended adoption of the Union's proposal. Fifteen of the sixteen bargaining unit members voted for unionization. The Employer continued to justify its rejection of an agency shop/service fee proposal because the payment of union dues or a service fee would restrict it ability to attract or retain professional employees. However, the Employer's own witness refuted this claim by testifying that only one employee, a non-professional, opposed paying union dues or a service fee and indicated that she would not remain with the Museum if she were required to do so.

Finally, I find that the Employer's regressive bargaining proposals are evidence of its failure to bargain in good faith. Prior to unionization, professional employees (eleven of the sixteen bargaining unit members) received a "management benefits package" that provided for increased vacation and sick leave accumulations and payouts, income maintenance and administrative leave. Prior to fact finding, the Employer agreed that professional employees would continue to receive the "management benefits package." In its last proposal before fact finding, the Employer proposed that employees receiving the "management benefits package" be grand-fathered and new employees receive non-management benefits.

The Commission has held that while making a proposal in contract negations that offer less than that party's previous proposal is not *per se* bad faith, successively less generous offers, when made without reasonable justification and without any significant compensatory proposals may indicate an intention not to reach an agreement. A party's conduct must be viewed in its totality to determine whether the allegedly regressive proposals are a tactic to avoid reaching a good-faith

agreement. *City of Springfield,* 1999 MERC Lab Op 399; *Kalamazoo Public School,* 1977 MERC Lab Op 771. The Employer offered no offsetting "compensatory" proposals or justification for it regressive proposal. I conclude that these factors coupled with the Employer conduct throughout the bargaining process were calculated to avoid reaching an agreement.

I find no merit to the Union claims that the Employer's e-mail to employees in response to an October 22, 2001 suggestion box question, its November 2 e-mail to employees, and its November 9, 2001 letter to the Union indicate that the Employer was not interested in seriously considering the fact finder's recommendations and imply that the Employer was counting down the days until it could declare impasse and impose its last offer. Rather, in the e-mails the Employer only provided a summary of Michigan law regarding the parties' obligation to bargain before and after the filing of a fact-finding petition. Similarly, I do not read the Employer's November 9, 2001 letter to the Union as signaling the Employer's disinterest in seriously considering the fact finder's recommendations. Based on the above findings of fact and conclusions of law, I recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

The Grand Rapids Public Museum, its officers and agents are hereby ordered to:

1. Cease and desist from:

   (a) Refusing to bargain collectively and in good faith concerning wages, hours, and working conditions with The Grand Rapids Employees Independent Union by bargaining with the Union in bad faith with no intention of entering into a final and binding collective bargaining agreement.

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

2. Take the following affirmative action necessary to effectuate the policies of the Act.

   (a) Upon request, bargain collectively and in good faith concerning wages, hours, and working conditions with the Grand Rapids Employees Independent Union as the exclusive bargaining representative of non-supervisory employees and embody in a signed agreement any understanding reached. The initial year of the Union's certification as the exclusive bargaining representative of employees in the above unit will begin on the date the Respondent commences bargaining in good faith with the Union as such representative.

   (b) Post, for thirty consecutive days, copies of the attached notice to employees in conspicuous places on Respondent's premises, including all locations where notices to employees are customarily posted.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Roy L. Roulhac

Administrative Law Judge

NOTICE TO EMPLOYEES

PURSUANT TO AN UNFAIR LABOR PRACTICE PROCEEDING BEFORE THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION, AFTER A PUBLIC HEARING BEFORE AN ADMINISTRATIVE LAW JUDGE IN WHICH GRAND RAPIDS PUBLIC MUSEUM WAS FOUND TO HAVE VIOLATED THE PUBLIC EMPLOYMENT RELATIONS ACT OF THE STATE OF MICHIGAN, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse and fail to bargain collectively and in good faith concerning wages, hours, and working conditions with Grand Rapids Employees Independent Union as the exclusive representative of non-supervisory employees.

WE WILL NOT in any manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to them by Section 9 of the Public Employment Relations Act.

WE WILL, on request, bargain in good faith with the Grand Rapids Employees Independent Union as the exclusive representative of non-supervisory employees.

By: _____

Dated: _____

(This notice shall remain posted for a period of thirty (30) consecutive days and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Office of the Michigan Employment Relation Commission, 3026 W. Grand Blvd, Ste.2-750, Box 02988, Detroit, Michigan 48202-2988.)