STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF HIGHLAND PARK,
Public Employer-Respondent,

Case No. C01 L-245

-and-

POLICE OFFICERS LABOR COUNCIL,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Dykema Gossett, by John A. Entenman, Esq., for the Respondent

John A. Lyons, P. C. by John A. Lyons, Esq., for the Charging Party

DECISION AND ORDER

On February 9, 2004, Administrative Law Judge Julia C. Stern (ALJ) issued her Decision and Recommended Order in the above matter pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. On April 2, 2004, Respondent, City of Highland Park, filed timely exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions. On May 12, 2004, Charging Party, Police Officers Labor Council, filed a timely brief in support of the Decision and Recommended Order of the ALJ.

Pursuant to a September 3, 2004 request by the parties, the Commission has delayed deciding this matter in anticipation of settlement by the parties. On December 8, 2004, the parties filed a stipulation indicating that the dispute underlying the charge had been settled and requesting that the matter be dismissed with prejudice. The parties' joint request is approved, and the matter is hereby dismissed. The Decision and Order and the Decision and Recommended Order of the Administrative Law Judge will be published in accordance with Commission policy.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nora Lynch, Commission Chairman

_____
Harry W. Bishop, Commission Member

_____
Nino E. Green, Commission Member

Dated: _____

NOTICE TO EMPLOYEES

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

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT subcontract bargaining unit work performed by public safety officers represented by the Police Officers Labor Council without giving this labor organization notice and an opportunity to engage in meaningful bargaining over this decision.

WE WILL NOT repudiate our obligations to fire fighters/PSOs represented by the Police Officers Labor Council under the collective bargaining agreement expiring June 30, 2003.

WE WILL, upon demand, bargain with the Police Officers Labor Council over the subcontracting of police work to a third party entity

WE WILL rescind all agreements with third parties to perform police work for the City of Highland Park pending satisfaction of our obligation to bargain over the subcontracting of this work.

WE WILL make the fire fighters/PSOs whole by paying them all sums, including wages, due them under the collective bargaining agreement since December 14, 2001, including interest at the rate of 3% per annum, computed monthly, but less any amounts they received in wages or benefits during this period.

CITY OF HIGHLAND PARK

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, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510

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POLICE OFFICERS LABOR COUNCIL,
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_____/

APPEARANCES:

Dykema Gossett, by John A. Entenman, Esq., for the Respondent

Peter P. Sudnick, Esq., for the Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on January 13, 2003, 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 May 5, 2003, and evidence admitted into the record after the hearing, I make the following findings of fact and conclusions of law, and recommend that the Commission issue the following order.

I. The Unfair Labor Practice Charge:

At the time this charge was filed on December 14, 2001, Charging Party Police Officers Labor Council represented a bargaining unit consisting of public safety officers (PSOs) employed by the City of Highland Park. In June 2001, Ramona H. Pearson was appointed by the Governor of the State of Michigan as emergency financial manager for the City pursuant to the Local Government Fiscal Responsibility Act (LGFRA), MCL 141.1201, et seq. Charging Party alleges that Pearson, acting as the City's agent, violated its duty to bargain under Section 10(1)(e). It asserts that Pearson, without giving Charging Party notice and an opportunity to bargain: (1) unlawfully subcontracted all law enforcement duties formerly performed by

PSOs to Wayne County; (2) established a new fire department; (3) transferred fire fighting duties formerly performed by PSOs to nonunit employees of the new department, including PSOs laid off and immediately recalled to work as fire fighters. Charging Party also alleges that Respondent unlawfully repudiated the parties' existing collective bargaining agreement when it unilaterally set a wage rate for fire fighters/PSOs and failed to pay them the wages and benefits provided for in the parties' collective bargaining agreement.

II. History of this Proceeding and Related Litigation:

In addition to filing this charge, Charging Party filed a suit in Wayne County Circuit Court seeking to enjoin the subcontracting and the layoff of PSOs. This suit resulted in several court orders, as discussed below, which Respondent maintains are relevant to the Commission's determination in this case. Also, a petition for compulsory arbitration pursuant to 1969 PA 312 (Act 312), MCL 423. 231, was pending at the time of the allegedly unlawful unilateral changes. Respondent argues that this petition deprives the Commission of jurisdiction over the charge.

On August 23, 2000, Charging Party and Respondent executed a memorandum of understanding extending their current contract through June 30, 2003, but stating that the parties would continue to negotiate certain subjects. These subjects did not include subcontracting, the creation of a separate fire department, or the assignment of unit work to nonunit employees. On June 21, 2001, around the time of Pearson's appointment as emergency financial manager, Charging Party filed the Act 312 petition, listing nine unresolved issues. The parties held this petition in abeyance while Pearson attempted to determine the amount of the City's indebtedness. The Commission did not appoint the chairman of the arbitration panel, Jerold Lax, until December 20, 2001.1

On December 14, 2001, Charging Party filed its action in Wayne County Circuit Court. Charging Party's request for injunctive relief was based on Section 16(h) of PERA, which allows a party to petition a circuit court for temporary relief upon the Commission's issuance of an unfair labor practice complaint. Charging Party's suit was also based on Section 13 of Act 312, which states that existing wages, hours and other conditions of employment shall not be changed without the consent of both parties while a petition for compulsory arbitration is pending.

After a hearing on December 17, 2001, Circuit Court Judge Kathleen MacDonald refused to enjoin either the layoffs or the provision of police services by Wayne County without hearing further evidence. On February 15, 2002, Judge MacDonald issued a temporary restraining order against the assignment of Charging Party's bargaining unit work to a third party. Judge MacDonald made her order effective March 2, 2002, and instructed the parties to attempt to resolve their dispute. On February 27, 2002, pursuant to Judge MacDonald's order, Respondent recalled the PSOs and terminated its arrangement with Wayne County.

In June 2002, the parties returned to court after Respondent again sought to lay off its PSOs. On

1 This panel issued its award on December 12, 2003. The award resolved the two issues listed on the petition on which the parties had not reached agreement. The panel specifically noted that it was not addressing the propriety of Respondent's contracting for police services.

June 28, Judge MacDonald issued a preliminary injunction finding that the proposed layoffs violated Section 13 of Act 312, restraining Respondent from laying off public safety employees, ordering Respondent to provide Charging Party with an accounting of its finances on a weekly basis, and directing the parties to continue labor negotiations. However, on July 12, 2002, Judge MacDonald modified her February 15, 2002 to allow Respondent to contract with a third party for law enforcement services. Judge MacDonald based her July order on evidence that, after failing to pay its employees for several months, Respondent no longer had enough PSOs to provide both law enforcement and fire protection services. The Court noted that it was not modifying its injunction against the layoff of PSOs or the assignment of bargaining unit work to nonunit employees. After the July 12, 2002 court order, Wayne County Sheriff's deputies recommenced policing the City. The remaining PSOs returned to providing fire protection services only.

I issued a complaint and notice of hearing on the unfair labor practice charge on December 19, 2001. Before the February 3, 2002 scheduled hearing date, Respondent asserted that the Commission did not have jurisdiction over the charge. Respondent argued that because an Act 312 petition was pending, the circuit court had sole jurisdiction over the dispute under Section 13 of that statute. At the parties' mutual request, I agreed to make an interim ruling on the jurisdictional issue before holding an evidentiary hearing. Both parties filed briefs on this issue on or before March 8, 2002. On July 19, 2002, Respondent filed a formal motion to dismiss. In this motion, it asserted additionally that the charge was moot since Judge MacDonald had ruled that Respondent could contract for police services. On August 5, 2002, I issued a ruling denying the motion to dismiss. I concluded that the Commission was not deprived of jurisdiction by the fact that an Act 312 petition was pending because none of the issues involved in the charge, including subcontracting or the transfer of bargaining unit work to nonunit employees, were before the Act 312 panel. I found that there was a dispute of fact over the scope and meaning of Judge MacDonald's order, and declined to dismiss the charge as moot without an evidentiary hearing.

I conducted an evidentiary hearing on January 13, 2003. On July 21, 2003, Respondent filed a motion to admit a copy of a July 1, 2003 contract between Respondent and Wayne County entitled "Agreement for Police Services." Charging Party did not oppose the motion, and I admitted the document into the record. On August 25, 2003, Respondent filed a second motion to reopen the record to admit a copy of an order by Judge MacDonald dated August 29, 2003. This order consolidated and dismissed several actions filed by Charging Party, including Charging Party's original December 14, 2001 request for injunctive relief. Along with its request to admit Judge MacDonald's order as new evidence, Respondent filed a renewed motion to dismiss. Respondent asserted that the unfair labor practice charge was now moot since the Court had dismissed all pending actions. It also argued that Charging Party had elected its remedies, and that the unfair labor practice charge should be dismissed under the doctrine of res judicata.

Charging Party filed a brief opposing the motion to dismiss on September 15, 2003. During oral argument on its motion on October 22, 2003, Respondent's counsel indicated that Respondent's primary argument was that the Commission had no authority to grant Charging Party's request that, as part of the remedy for its alleged unfair labor practices in December 2001, Respondent be ordered to rescind its current contract with Wayne County for police services. Respondent's counsel asserted that this remedy would conflict with Judge MacDonald's July 12, 2002 and August 29, 2003 orders. I informed the parties at the end of oral argument that I would address the arguments raised by Respondent's August 25, 2003

motion in my decision and recommended order.

III. Facts:

In about 1986, Respondent consolidated its police and fire departments into a single public safety department. Charging Party became the bargaining agent for the PSOs. Individual PSOs were assigned to either the police or the fire division of the public safety department. However, with the exception of a few senior officers who were not certified fire fighters, all PSOs were cross-trained to perform both law enforcement and fire fighting functions. PSOs in the police division carried fire equipment and could respond to fire emergencies, and PSOs in the fire division could perform police work when necessary.

The last negotiated collective bargaining agreement covering this unit had an expiration date of July 31, 2000. As discussed above, on August 23, 2000, the parties executed a memorandum of understanding extending their contract, except for certain provisions, through June 30, 2003. The memorandum provided that unit members would receive a wage increase effective September 1, 2000, and that the parties would continue to negotiate wage increases for 2001 and 2002. The memorandum also listed other issues which the parties were to continue to negotiate. According to the memorandum, if the parties failed to reach agreement on all the issues listed in the memorandum by February 28, 2001, Charging Party would initiate mediation and, if necessary, file an Act 312 petition. The parties' negotiations were not successful, and Charging Party filed an Act 312 petition on June 12, 2001 listing nine items at issue and subject to resolution through arbitration.

The collective bargaining agreement in effect in December 2001 contained a "maintenance of conditions" clause:

> Wages, hours and conditions of employment and economic benefits now in existence or legally in effect at the execution of this Agreement or modified by this agreement shall be maintained during the term of this Agreement. No employee shall suffer a reduction in such benefits as a consequence of the execution of this Agreement, except as hereinafter provided.

The contract also contained a management rights clause, Article IV, giving Respondent the right to "lay off personnel for lack of work or funds, or the occurrence of conditions beyond the control of the department." Respondent also had the right under Article IV "to take whatever actions are necessary in emergencies in order to assure the proper functioning of the department." The agreement contained no provisions dealing with the subcontracting of bargaining unit work or the creation of separate police or fire departments.

While the parties negotiated the contract issues left unresolved by their August 2000 memorandum, Respondent's already bad financial situation continued to deteriorate. In April 2001, the Governor, on the recommendation of the State Treasurer, appointed a financial review team to conduct a review of the City's financial condition. On June 20, 2001, Ramona H. Pearson was appointed emergency financial manager for the City. When Pearson assumed her duties, she found the City's financial records in chaos. The City had

numerous bank accounts, some of which had not been reconciled for years. There was almost a complete absence of standard record keeping. Pearson knew that the City was badly in debt. However, because the City's financial records were so bad, Pearson could not immediately determine the amount of the City's total indebtedness. Pearson hired a new acting finance director, Marcel Pultorak, and, with help from the Wayne County auditor's office, began putting the City's records in order. In September 2001, Pearson hired Plante Moran, an accounting firm, to help assess the amount of the City's indebtedness.

Between June 29 and October 16, 2001, Pearson issued a series of budget-cutting directives. Pearson ordered that all purchases have prior approval. She imposed a hiring freeze, cancelled insurance for part-time employees, and suspended the salaries of the Mayor and City Council. Pearson prohibited all but emergency overtime, and eliminated 12 positions. She decreased the budget of the district court unit by $73,000. After obtaining the agreement of all unions representing City employees, Pearson withheld 25% of all wages earned by employees in July and August until October so that Respondent would have cash to pay its small vendors.

On October 16, 2001, Pearson appointed Melvin Turner as Respondent's part-time public safety director. Turner reported to Pearson that Respondent's police and fire stations, in particular the prisoner lockup in the police station, were in terrible condition. Turner noted that both buildings had numerous outstanding MIOSHA violations, and he told Pearson that in his opinion neither building was fit for use.

At some point between October and December 2001, Pearson, Pultorak and Turner decided that the City should find some other entity to take over its law enforcement responsibilities. Pearson and Pultorak testified that they hoped initially that the Michigan State Police would take over these responsibilities without charge to the City. In any case, Pearson and Pultorak concluded that that having someone else provide law enforcement on a permanent basis would save the City a significant amount of money, although they did not attempt to determine at that time exactly how much money would be saved. According to Pearson and Pultorak, they considered the fact that the City had been deferring maintenance on both its police station and its police cars. They agreed that if Respondent were to continue providing police services, it would have to spend a significant amount on repair and replacement. Pearson and Pultorak testified that they also based their decision on the fact that Respondent had numerous pending lawsuits that they believed resulted from inadequate staffing or training of police employees. In addition, they concluded that that a larger law enforcement entity, with more resources, would do a better job on investigations and drug enforcement than Respondent's small public safety department.

Sometime between August and November 2001, Respondent held a meeting with Charging Party representatives, the City of Hamtramck, and the union representing Hamtramck public safety employees to discuss the possibility of merging the public safety departments of the two cities. After the union representing Hamtramck employees expressed its opposition, there was no further discussion of a merger. During this same period, Respondent approached both the Michigan State Police and Wayne County about taking over Respondent's law enforcement responsibilities. After Respondent informed them that it would not be able to consistently pay for these services for some time, both entities indicated that they were not interested. The record does not indicate that Charging Party knew of the discussions between Respondent and the State Police or Respondent and Wayne County.

On December 5, 2001, Plante Moran provided Pearson with a preliminary report on the City's financial condition. According to Plante Moran's estimates, at the end of November 2001 the City had a negative cash balance of over one million dollars. The report also estimated that the City's expenditures would exceed its revenues by eight million dollars between November 2001 and June 2002. Based on that report, Pultorak and Pearson concluded that the City had no cash to pay employees. Pearson obtained an advance on the City's revenue sharing funds so that the City could make its December 18 payroll. Pearson and Pultorak decided to lay off most of Respondent's approximately 40 nonpublic safety employees from December 14, 2001 until January 7, 2002. They also spoke with the Wayne County Sheriff's Department about the City's financial situation. The Sheriff's Department informed Respondent that if Respondent had no police officers, the Sheriff, in the interest of maintaining the peace, would assume temporary responsibility for policing the City. The Sheriff's Department also agreed to discuss providing these services on a permanent basis.

On December 6, 2001, Respondent's labor counsel notified Charging Party that effective December 14, Respondent would lay off its police officers, while retaining its fire fighting staff. At this time, Respondent employed about 50 PSOs. Respondent asked to meet with Charging Party to discuss which PSOs would be laid off and which would remain as fire fighters. The next day, Respondent's counsel sent a corrected letter stating that all public safety employees would be laid off on December 14, and that the City would then establish a fire department.

On Friday, December 7, 2001, Pearson issued a directive to employees stating that all members of Charging Party's unit would be laid off effective 3:00 p.m. December 14, 2001. Pearson's directive also stated that Respondent would "establish a fire department staff," and that, with the participation of Charging Party, Respondent would determine which PSOs would be recalled to work as fire fighters only.

Respondent and Charging Party met on Monday, December 10. Respondent told Charging Party that it intended to abolish the public safety department and to rely on outside agencies for police services. Respondent also informed Charging Party that it intended to establish a new fire department staffed with newly hired fire fighters and recalled PSOs. Respondent intended to pay the fire fighters less than Respondent had paid PSOs under the contract. Charging Party President Morris Cotton testified that Charging Party asked if there were concessions that it could make to avoid these actions. According to Cotton, Respondent said that concessions would not help, that the City could no longer afford a Public Safety Department. Public Safety Director Turner testified that Cotton proposed certain concessions, although Turner did not explain what Cotton's proposal was. According to Turner, the "things that they wanted to give up weren't really effective in terms of reducing the budget."

Following the December 10 meeting, Charging Party sent a letter demanding to bargain over the impact of the layoffs. In this letter, Charging Party accused Respondent of violating Section 13 of Act 312 and of committing unfair labor practices by unilaterally transferring bargaining unit work to outside agencies and to nonunit employees and repudiating the parties' contract. Charging Party requested that Respondent cease and desist from laying off employees and subcontracting services.

The parties met again on December 12, but the record does not indicate what was discussed at this meeting.

Sometime after December 7, Wayne County and the Wayne County Sheriff sued Respondent in Circuit Court to obtain a court order requiring the City to reimburse Wayne County for the provision of police services. On December 13, 2001,Wayne County, the Wayne County Sheriff, and Respondent entered into a consent order under which the Wayne County Sheriff agreed to provide temporary law enforcement services to Respondent, with the stipulation that Respondent would not have to reimburse the County for these services before February 2002. 2

On December 14, all PSOs were laid off and Wayne County Sheriff's deputies commenced policing the City's streets. Respondent sent recall notices to approximately fifteen of the most senior PSOs, excluding those who were not certified fire fighters. Some PSOs did not initially accept the recall. Respondent then posted notices soliciting applicants for fire fighting positions. According to Respondent, because some PSOs changed their minds and accepted the offer, Respondent actually hired only one new fire fighter.

After December 14, 2001, all fire fighters received wages substantially lower than the wages provided in Charging Party's contract. Respondent apparently paid health insurance premiums for those fire fighters who had been PSOs, although not for the fire fighter it hired after December 14. According to Cotton's testimony, as of the date of the hearing, Respondent had not paid the following benefits provided for in the contract since about January 2001: longevity payments, gun allowances, clothing allowances, and educational bonus. According to Cotton, after June 2001, Respondent stopped paying accumulated sick leave to PSOs who left its employment. Cotton also testified that as of the date of the hearing, Respondent owed an unspecified amount in compensatory time payments, and had not paid life insurance premiums or dental insurance premiums for Charging Party's members since about September 2001. Cotton testified that as of the date of the hearing, Respondent was 1.5 million dollars in arrears in its pension contributions. The record did not indicate whether Respondent eliminated these benefits or just did not have the money.

Respondent continued to deal with Charging Party as representative of the former PSOs. According to Turner, although Respondent established the salaries to be paid to the fire fighters, it expected to later negotiate these salaries with Charging Party. At no point did Respondent inform Charging Party that it did not recognize it as the bargaining representative for the fire fighters/PSOs.

As noted above, after Judge MacDonald issued a temporary restraining order against the assignment of bargaining unit work to a third party, the PSOs were recalled to work as PSOs on February 27, 2002, and Wayne County Sheriff's deputies ceased patrolling the City's streets.

In March 2002, the City laid off approximately 30 of its 40 non-public safety employees. For about three months between March and July 2002, the PSOs received no paychecks. Although many

2 Respondent intended to reimburse the County from its 2002 State revenue-sharing funds, but was unable to do this. In April 2002, Respondent paid the County for services it provided between December 2001 and February 2002 with money received from drug forfeitures.

PSOs continued to work without pay, many left the City's employment. During this period, Pearson attempted to put the City into bankruptcy, but the State Treasury Department dissuaded her from doing this.

In June 2002, Respondent announced its intention to again layoff the PSOs and contract with Wayne County for police services. As discussed above, on June 28, 2002, Judge MacDonald issued a preliminary injunction restraining Respondent from laying off public safety employees. However, on July 12, after concluding that Respondent did not have enough PSOs to provide both fire and police protection, Judge MacDonald modified her February order to allow Respondent to contract with a third party to for law enforcement services. The Court did not lift the injunction against the layoff of PSOs, and the Court's order specifically stated that employees were to retain their status of PSOs with law enforcement powers. In late July 2002, Wayne County recommenced providing police services and fire fighters/PSOs went back to handling only fire fighting. Around this time, Respondent paid the PSOs the wages they had not received between March and July.

In August 2002, Janet Lazar was hired as interim city administrator. In October 2002, Lazar authored a fiscal recovery plan that Pearson submitted to the State on October 29, 2002. This report recommended that some entity provide police services in exchange for reimbursement by the City. Lazar testified that before she wrote this plan, she compared the costs of maintaining a police department with the costs of subcontracting. Before 2001, according to Lazar, Respondent spent between six and eight million dollars per year on its public safety department out of a budget of 14 million. During this same period, Respondent's expenses exceeded its revenues by about two million dollars per year. Lazar estimated that running a police department, including liability costs, major maintenance and deferred capital expenditures, would cost Respondent somewhere between four and five million dollars per year. Lazar concluded that, based on proposals Respondent had received from both Wayne and Oakland Counties, Respondent should be able to obtain quality police services for about two and one-half million dollars per year. Lazar also concluded that, after making major repairs to the City's water system, the City should be able to run an adequate fire department for another two and one-half million, for a total public safety cost of about five million.

As of the date of the hearing, Respondent had approximately 23 PSOs. These PSOs regularly performed only fire fighting duties, although they retained the PSO title and the law enforcement authority of certified police officers. Respondent was negotiating with several entities, including Wayne and Oakland Counties, to provide police service on a permanent basis. The parties had returned to the negotiating table to discuss the terms of a contract, including the issue of whether the City could contract out its police department; their last bargaining session before the hearing was in December 2002.

As noted above, subsequent to the hearing, Respondent and the County of Wayne entered into an "Agreement for Police Services" for the term July 1, 2003 to June 30, 2007. On August 29, 2003, the Court denied Charging Party's renewed motion for injunctive relief and dismissed all pending actions before the Court between the parties.3

3 As discussed below, I conclude that the Court's August 29, 2003 order would not require a different result in this case. Therefore, it should not be admitted into the record as new evidence. MCL 423.166. A copy of this court order, however, shall be retained in the Commission's file.

IV. Discussion and Conclusions of Law:

A. Preliminary Issues – Effect of the Act 312 Petition and the Circuit Court Action

Respondent's first argument, made in its July 19, 2002 motion to dismiss, was that the Commission did not have jurisdiction over this charge because the charge was filed while an Act 312 proceeding was pending.

The Commission has consistently held that the power to enforce Section 13 of Act 312 lies with the Act 312 arbitrator or the courts, not the Commission. *Bloomfield Twp.*, 2001 MERC Lab Op 187. According to the Respondent, in *City of Flint,* 1993 MERC Lab Op 181, and other cases discussed below, the Commission also held that it does not have jurisdiction to find that an employer violated Section 10(1)(e) of PERA by making unilateral changes in mandatory subjects of bargaining if an Act 312 petition is pending at the time of the alleged unilateral changes.

Section 16 of PERA authorizes the Commission to find and remedy violations of Section 10 of PERA. An employer taking unilateral action on a mandatory subject of bargaining before the parties reach impasse commits an unfair labor practice in violation of Section 10(1)(e) of PERA. *Detroit Police Officers Ass'n v Detroit,* 61 Mich App 487, 490 (1975), *lv den* 395 Mich 756 (1975); *Local 1467 IAFF v City of Portage,* 134 Mich App 466,473 (1984). However, once the parties have reached good faith impasse, an employer is usually free under Section 10(1)(e) to take unilateral action on an issue as long as its action is consistent with its offer to the union. *Detroit Police Officers Ass'n v Detroit,* 391 Mich 44, 56, (1974). Under Section 13 of Act 312, an employer may not alter existing wages, hours of working conditions while an Act 312 proceeding is pending without the consent of the union, even if the parties have reached impasse.

Neither Act 312 nor PERA authorizes the Commission to remedy violations of Section 13 of Act 312. The Commission has rejected the argument that an employer's obligation to bargain in good faith under Section 10(1)(e) of PERA should incorporate the broader prohibition against unilateral action during a 312 proceeding found in Section 13. In *City of Jackson,* 1977 MERC Lab Op 402, a union asserted that the employer had violated its duty to bargain in good faith under PERA by discontinuing cost-of-living payments after reaching impasse, but while an Act 312 petition was pending. The administrative law judge rejected the union's argument. He reasoned that while Section 14 of Act 312 states that Act 312 is "supplementary" to PERA, that section also states that Act 312 "does not amend or repeal" any provision of PERA. The Commission adopted the administrative law judge's decision when no exceptions were filed.

In *Township of Meridian*, 1986 MERC Lab Op 917, the union alleged that the employer unlawfully altered the duties, salary and promotional criteria for a bargaining unit position while an Act 312 petition was pending. The administrative law judge found that the employer had a duty to bargain, but held that the union had waived its right by failing to make a timely demand. She concluded that the fact that an Act 312 petition was pending was not relevant to the charge, because the rights and obligations arising

under Act 312 were distinct from those arising under PERA. The Commission agreed with the administrative law judge that the legislature had not intended a violation of Section 13 to constitute an unfair labor practice under Section 10. In reaching this conclusion, the Commission noted that the statutory purpose of Section 13 was to preserve the integrity of the arbitration process by preserving the status quo during arbitration. It also noted that an expeditious hearing followed by injunctive relief issued by the circuit court was more suited to this purpose than the procedures provided by statute for resolving an unfair labor practice dispute.

In neither of the above cases did the Commission or its administrative law judges hold that the Commission was deprived of jurisdiction to find an unfair labor practice by the fact that an Act 312 petition was pending. In *City of Flint*, *supra*, the union alleged that the employer committed an unfair labor practice when, while an Act 312 proceeding was in progress, it began using volunteers to perform certain functions previously performed by police officer members of the bargaining unit. In that case, the employer had proposed the creation of a uniformed, volunteer organization during the contract negotiations leading to the 312 petition, and the union had rejected the employer's proposal. Citing *City of Jackson*, *supra*, and *Meridian Twp.*, *supra*, the administrative law judge concluded that the charge should be dismissed. He concluded:

> The MERC does not have jurisdiction to find that the employer violated PERA by creating a volunteer police organization while an Act 312 petition was pending. The MERC retains jurisdiction over unfair labor practices committed before the institution of Act 312 proceedings, bad faith conduct unrelated to the compulsory arbitration issues, and bargaining violations after the Act 312 award has been enforced by the court. [Emphasis added]

Adopting the administrative law judge's recommendation that the charge be dismissed, the Commission noted that the parties had bargained over the creation of the volunteer organization.

I agree with Respondent that *City of Flint* does contain language suggesting that the filing of an Act 312 petition might affect the Commission's jurisdiction under PERA. However, I find the instant case to be clearly distinguishable from *City of Flint* on its facts. During the negotiations preceding Charging Party's filing of its Act 312 petition, the parties did not discuss subcontracting or the transfer or unit work to nonunit employees, the creation of a separate fire department, or any issue remotely related to the actions which are the subject of this unfair labor practice charge. The Act 312 petition filed in June 2001 did not list any of these topics as issues to be resolved by the arbitration panel. I find that the conduct alleged to constitute unfair labor practices - the subcontracting and/or transfer of bargaining unit work outside the unit, and the repudiation of the contract – was completely unrelated to the compulsory arbitration issues. I conclude, therefore, that even under the apparent holding in *Flint*, the Commission is not deprived of jurisdiction to find an unfair labor practice in this case.

In Respondent's first motion to dismiss, it also argued that that the charge should be dismissed as moot because Judge MacDonald's July 12, 2002 order explicitly permitted Respondent to contract with a third party to provide police services. In its second motion to dismiss, filed August 23, 2003, Respondent

asserts that the instant unfair labor practice is moot because, in a formal order issued on August 29, 2003, Judge MacDonald dismissed all actions between the parties pending before her, including the action for injunctive relief filed by Charging Party on December 14, 2001. Respondent also argues that the unfair labor practice should be dismissed because Judge MacDonald's August 29, 2003 is res judicata, and because by filing the circuit court action Charging Party elected its remedy. Finally, Respondent argues that Judge MacDonald's July 12, 2002 and August 23, 2003 orders preclude the Commission from ordering Respondent to rescind its July 1, 2003 contract with Wayne County.

I disagree with Respondent that either Judge MacDonald's July 12, 2002 order, or her August 29, 2003 order dismissing Charging Party's pending claims, made this case moot. On December 14, 2001, Charging Party filed a complaint in circuit court asking for injunctive relief under Section 16(h) of PERA, as well as under Section 13 of Act 312. Charging Party did not ask the court to make a determination on the merits of its PERA claim, an issue within the Commission's exclusive jurisdiction, but merely to enjoin Respondent pending the Commission's determination on the merits. On February 15, 2002, Judge MacDonald exercised her equitable jurisdiction to issue a temporary restraining order against the assignment of Charging Party's bargaining unit work to a third party. On July 12, 2002, again exercising her equitable jurisdiction, Judge MacDonald modified her temporary restraining order because she concluded that Respondent did not at that time have enough PSOs to perform both police and fire services. On August 29, 2003, Judge MacDonald dismissed all Charging Party's pending claims. This order, I believe, eliminated all outstanding injunctions issued by the Court. In other words, Respondent is no longer enjoined from any action with respect to its PSOs.

I find, first, that Judge MacDonald did not have the authority to decide whether Respondent violated its duty to bargain under Section 10(1)(e) of PERA when it contracted with Wayne County to provide law enforcement services. This issue is clearly within the Commission's exclusive jurisdiction. Moreover, nothing in Judge MacDonald's orders or in the evidence indicates that she made such a determination. This case is not moot because there are no outstanding injunctions against Respondent's subcontracting of its police work or the other actions covered by this charge. I conclude, moreover, that the absence of an outstanding injunction does not affect the Commission's authority to order Respondent to return to the status quo as it existed in December 2001.

Respondent also argues that Judge MacDonald's August 29, 2003 order bars Charging Party from seeking relief from the Commission as a matter of res judicata and/or election of remedies. I find these arguments to be without merit. The doctrine of res judicata was summarized in *Dart v Dart*, 450 Mich 573, 586 (1999):

> Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. *Eaton Co Bd of Co Rd Comm'rs v Schultz*, 205 Mich 371, 375 (1994). A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. *Id*. at 375-376.
>
> As noted above, the Circuit Court did not have jurisdiction to decide Charging Party's Section

10(1)(e) claims on their merits, and it did not do so.

I assume that when Respondent maintains that this charge should be dismissed as a matter of election of remedies, it means that Charging Party should be barred from bringing these matters before the Commission because it filed a claim in circuit court alleging that the same actions which are the subject of this charge violated Section 13 of Act 312. However, Respondent provided no rationale for its claim, and I see no reason why Charging Party should be forced to abandon its unfair labor practice claim because it sought quicker relief from the circuit court under Section 13.

B. The Creation of a Fire Department and the Transfer of Unit Work

Charging Party alleges that in December 2001 Respondent violated its duty to bargain by unilaterally transferring fire fighting duties formerly performed by PSOs to nonunit employees. I find, however, that Respondent did not transfer the fire fighting work outside the unit. Respondent continued to recognize and deal with Charging Party as the bargaining representative for the employees who performed fire fighting duties after December 14, 2001, including, insofar as the record discloses, the one fire fighters who had not previously been a PSO. In other words, the fire fighting work did not leave Charging Party's unit.

Charging Party also asserts that Respondent had an obligation to bargain over its decision to create a fire department manned by employees known as fire fighters. I disagree. Under Section 15 of PERA, a public employer has a duty to bargain over "wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising under the agreement, and the executions of a written contract, ordinance or resolution incorporating any agreement reached if requested by either party." Respondent's decision to subcontract all the police work that had been performed by PSOs clearly had an effect on their terms and conditions of employment. However, I conclude that Respondent's decision to rename its public safety department and give its employees the title of fire fighter, after subcontracting the police work formerly performed by this department, was not a mandatory subject of bargaining because it did not affect wages, hours, or terms and conditions of employment.

C. Subcontracting of Police Work

Charging Party also alleges that Respondent had a duty to bargain before subcontracting its police work to Wayne County in December 2001. I note, first, that I do not agree with Respondent that no "subcontracting" took place until Respondent and Wayne County entered into a written contract on July 1, 2003. On December 14, 2001, Respondent and Wayne County entered into a consent order stating that the Wayne County Sheriff would provide Respondent with law enforcement services and Respondent would reimburse Wayne County for these services if the State did not do so. The consent order was, in effect, a contract. Although this was an agreement for temporary services, the Respondent fully intended to make this a long-term arrangement if it could. I find that Respondent had made its decision to subcontract its police work by December 14, 2001.

I find, for reasons set forth below, that Respondent had a duty to bargain over its decision in December 2001 to permanently subcontract its police services. It is well established that under PERA an employer has a duty to bargain over a decision to replace employees in an existing bargaining unit with those of a contractor to do the same work under similar conditions of employment. *Detroit Police Officers Assn*

v Detroit, 428 Mich 79, (1987); *Van Buren Public Schools v Wayne Circuit Judge,* 61 Mich App 6 (1975). The Commission, in fact, has held that subcontracting is a mandatory subject of bargaining even when no unit jobs are lost. *Davison Bd of Ed,* 1973 MERC Lab Op 824; *Kalamazoo County,* 1990 MERC Lab OP 786.

In *Van Buren, supra,* the Court applied the tests set out by the U.S. Supreme Court *Fibreboard Paper Products Corp v National Labor Relations Board,* 379 US 203 (1964) to affirm the Commission's holding that the employer had the duty to bargain over the subcontracting of transportation work to a private contractor. The Court held that that an employer has a duty to bargain over the decision to subcontract work previously done by bargaining unit employees under similar conditions where: (1) the employer's basic operations were not altered by the subcontracting; (2) there was no capital investment or recoupment; (3) requiring the employer to bargain would not unduly restrict the employer's right to manage. The Court also discussed the employer's claim that the factors motivating it were not suitable for resolution at the bargaining table because its decision to subcontract was not based on cost savings, but on the subcontractor's ability to provide superior transportation services. The Court concluded that the merits of the Employer's decision were not so clear that bargaining could have served no purpose. The Court suggested that the union might have been able to offer an alternative to the one suggested by the Employer that would "fairly protect the interests and meet the objectives of both," and, at the least, discussion of the issue would have done much to "promote industrial peace," and might even have prevented the present lawsuits.

I agree with Charging Party that Respondent did not alter its basic operations by subcontracting its law enforcement responsibilities to Wayne County. Respondent has the legal responsibility to provide its residents with police protection. The subcontract with Wayne County did not divest Respondent of this responsibility, including legal liability for the actions of Wayne County Sheriff's deputies while performing the patrol and police functions formerly performed by the PSOs.

Similarly, the record does not establish that the subcontracting involved significant capital investment or recoupment. According to Pearson and Pultorak, one of the reasons they decided to subcontract the police work was to avoid making capital investments in police stations and police cars. However, the County did not assume responsibility for providing police facilities under the December 13, 2001 consent order, and Respondent's July 1, 2003 contract with the County specifically requires Respondent to provide an adequately equipped police station and lockup.

I also find that requiring the Respondent to bargain over the subcontracting would not unduly restrict its ability to manage, because the measures Respondent took with respect to public safety in December 2001, including the subcontracting of police work, were permanent, not temporary. Respondent asserts that it had no duty to bargain over contracting with Wayne County to perform its police work because it was faced with an emergency. That is, according to the Respondent, it had to act because it had no cash to pay its employees. Respondent cites *City of Hamtramck,* 1991 MERC Lab Op 7, in which an administrative law judge held that an employer had no duty to bargain over its decision to temporarily subcontract to private contractors certain work that had been performed by employees laid off because of the employer's financial crisis. The administrative law judge stated, at 17, "It is obvious that such emergency-type situation are not amenable to resolution by way of advance notice and bargaining, as would be the case if the

Employer were permanently transferring a regularly occurring City function to an outside contractor." The Commission adopted the administrative law judge's decision in Hamtramck when no exceptions were filed. However, the subcontracting here is distinguishable from the temporary subcontracting that took place in *Hamtramck*. Respondent temporarily laid off almost all its nonpublic safety employees in mid-December 2001 because it had no cash to pay them. However, the changes Respondent made in public safety at that time, including the subcontracting of the police work, were not presented to Charging Party as temporary measures, I find that the permanent subcontracting of police work was part of Respondent's long-term plan to solve its budget problems, and that requiring Respondent to bargain over this decision would not impose an unreasonable restriction on its ability to manage.

Respondent asserts that the subcontracting dispute was not "amenable to collective bargaining." However, Respondent clearly subcontracted the police work to save money, and all the reasons it gave for its decision came back to costs. In addition to saving money on the repair and replacement of the police station and equipment, the subcontracting was to save the cost of providing the PSOs with better police training. Pearson and Pultorak testified that they believed that one of the reasons for the large number of pending lawsuits against the City was that Respondent had deferred giving its police officers adequate training. They also testified that they felt that Respondent public safety department lacked the resources – presumably labs and other technology – to do a good job on investigations and drug enforcement. The record establishes that in December 2001 Respondent's expenditures were seriously exceeding its revenue. Moreover, public safety labor costs were a significant part of Respondent's budget. It seems unlikely that Charging Party, with a bargaining unit of 50 PSOs, could have suggested an alternative to the subcontracting of police work that would have provided Respondent with the cost savings it needed. Nevertheless, Respondent could have given Charging Party the financial information it had available, explained to Charging Party the need to take immediate temporary measures because of the cash shortage, laid out the reasons it believed that the subcontracting would save money and how much Respondent believed it might save, and given Charging Party a fair opportunity to make a proposal. As the Court in *Van Buren* held, bargaining over subcontracting may serve a purpose even when cost savings are not the reason for the decision. That is, discussion of the subject may promote industrial peace and prevent subsequent lawsuits between the parties. I conclude, therefore, that bargaining over the decision to subcontract in this case would not have been without purpose.

In sum, I conclude that under the principles established in *Van Buren,* Respondent had the obligation to bargain with Charging Party over its decision in December 2001 to permanently subcontract police work performed by PSOs to a third party.

D. Respondent's Other Defenses –Effect of Existing Contract Provisions, and Charging Party Alleged Failure to Make a Timely Demand to Bargain

Respondent argues that it had no duty to bargain because it had the right under the management rights language of the parties' contract to subcontract the police work. It also asserts that since Charging Party takes the position that Respondent violated the maintenance of conditions and recognition clauses of the contract, the parties' dispute should not be resolved through an unfair labor practice charge but through the contract's grievance arbitration procedure. I find both these arguments to be without merit.

In *Port Huron EA v Port Huron Area S.D.,* 452 Mich 309, 321 (1996), the Court noted that the Commission, like the NLRB, must often review a collective bargaining agreement to ascertain whether a party has breached its statutory duty to bargain. The Court also discussed the difference between whether a subject is "covered by" a collective bargaining agreement and whether the right to bargain about a mandatory subject has been waived by the agreement. It stated, at 319, "A waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union has exercised its bargaining right and the question of waiver is irrelevant." The Court held that in reviewing an agreement for a PERA violation, the Commission's initial charge is to determine whether the agreement "covers" the dispute. If the term or condition in dispute is "covered" by the agreement, the details and enforceability of the provision are left to arbitration.

Here, the parties' contract did not contain a provision dealing with subcontracting. Unlike the parties in the cases cited by Respondent, *Village of Romeo,* 2000 Lab Op 296, and *City of Hamtramck,* 1991 Lab Op 7, the parties here never bargained over this subject. I find that Charging Party did not exercise its right to bargain over the subcontracting of unit work by negotiating the maintenance of conditions clause, and I conclude that the issue of subcontracting was not "covered" by the parties' contract.

If the issue in dispute is not "covered" by the contract, the Commission must then determine whether the union has clearly and unmistakably waived its right to demand bargaining. *Port Huron, supra,* at 319-320. Article IV of the contract gave Respondent the right to lay off personnel for lack of funds or the "occurrence of conditions beyond its control." Respondent had the right to lay off PSOs under this provision. I conclude, however, that this provision did not clearly and unmistakably waive Charging Party's right to bargain over the subcontracting of the PSOs' law enforcement work. Likewise, I conclude that Charging Party did not waive its right to bargain the decision to subcontract when it agreed to give Respondent the right to "take whatever actions are necessary in emergencies in order to assure the proper functioning of the department." As discussed above, I find that Respondent's subcontracting of the PSOs law enforcement work was not merely a temporary response to an emergency.

Respondent also asserts that it had no duty to bargain over the subcontracting because Charging Party never demanded to bargain over this issue, but only over the effects of the layoff of the PSOs. As Respondent points out, an employer's obligation to bargain is triggered by a timely demand. *Local 586, SEIU v Village of Union City,* 135 Mich App 553 (1984); *United Teachers of Flint v Flint School District,* 158 Mich App 138 (1986). However, a party has no duty to demand bargaining when the action is presented to it as a *fait accompli*. *Allendale P.S.,* 1997 MERC Lab Op 183, 189; *Intermediate Education Association,* 1993 MERC Lab Op 101, 106; *City of Westland,* 1987 MERC Lab Op 793-798. On December 7, 2001, Respondent's labor counsel notified Charging Party by letter, and Pearson issued a directive to employees, stating that all public safety employees would be laid off on December 14, and that the City would then establish a fire department. When the parties met on December 10, Respondent told Charging Party that it intended to abolish the public safety department and to rely on outside agencies for police services. In all its communications with Charging Party, Respondent treated the subcontracting decision as final. I find that Charging Party did not waive its right to bargain by failing to demand to bargain over the decision to subcontract the police work after December 7, 2001.

E. Repudiation of the Collective Bargaining Agreement:

Charging Party alleges that Respondent unlawfully repudiated the collective bargaining agreement when it dismantled the public safety department, created a separate fire department, and ceased paying the wage rates and a whole host of other contractual benefits set forth in the contract. As discussed in Section III (B) above, I find that Respondent had no duty to bargain over the renaming of its public safety department or the designation of its employees as fire fighters after it subcontracted its police work. I also conclude that these actions, by themselves, did not constitute a repudiation of the contract, including the maintenance of conditions clause.

I agree with Charging Party, however, that in December 2001 Respondent repudiated the parties' collective bargaining agreement when it refused to pay its fire fighters the wages provided for in that agreement. The Commission has defined repudiation as an attempt to rewrite the contract, a refusal to acknowledge its existence, or a complete disregard for the contract as written. *Central Michigan Univ.*, 1997 MERC Lab Op 501; *Redford Twp. Bd of Ed.*, 1992 MERC Lab Op 894. The Commission will not find repudiation where a bona fide dispute exists between the parties concerning the interpretation of the contract. *Ingham County Bd of Commissioners,* 1999 MERC Lab Op 360. Here, however, there is no evidence of a dispute over the interpretation of the wage or any other provision of the collective bargaining agreement.

In *Jonesville Bd of Education,* 1980 MERC Lab Op 891, one of the Commission's earliest "repudiation" cases, the Commission found that the employer committed an unfair labor practice when it unilaterally changed the wage rate in the parties' contract because its nonlabor costs had increased. The administrative law judge noted that the Commission did not ordinarily remedy breaches of contract, but she concluded that in that case the employer's action constituted a "renunciation of the collective bargaining principle." See also, *City of Detroit (Fire Department),* 1976 MERC Lab Op 652; *Howard Brissette, d/b/a The Golden Key,* 1967 MERC Lab Op 664. In *City of Detroit,* 1984 MERC Lab Op 937, *aff'd* 150 Mich App 605 (1985), the employer was held to have repudiated the parties' collective bargaining agreement by refusing to pay negotiated wage increases because it lacked funds. As the Commission held in *Wayne County Bd of Commissioners,* 1985 MERC Lab Op 1037, even a bona fide financial crisis does not justify an Employer's repudiation of its contractual obligations.

The Commission has held that an employer has the inherent managerial right to create a new classification and establish the qualifications for that position, although there is a bargaining duty over the wages, hours and working conditions of a new bargaining unit position, as well as a bargaining obligation over any impact on the unit. *City of Hamtramck,* 1985 MERC Lab Op 1123, 1124; *City of Menominee,* 1977 MERC Lab Op 666, 668.

I conclude, however, that the position of "fire fighter" was not a new position. The Commission defines a position by the duties it performs. Before December 14, 2001, there were PSOs - those assigned to the fire division of the public safety department - whose regular job assignment was to fight fires. After December 14, 2001, many of these same individuals did the same work they had done before that

date, albeit as fire fighters at a lower rate of pay. As PSOs, the fire fighters were required to be certified police officers; they performed police work when necessary. However, nothing in the record indicates that the job duties of a fire fighter in Respondent's fire department after December 14, 2001 differed significantly from those of a PSO assigned to the fire division in its former public safety department. I also note that by continuing to recognize Charging Party as their bargaining representative, Respondent appears to have acknowledged that fire fighter was not a new position.

Finally, Respondent argues that Pearson's "near plenary powers" under the LGFRA allowed her to take the actions she took with respect to Charging Party's unit in December 2001, including setting a new wage rate for fire fighters. According to Respondent, at the time of Pearson's appointment in June 2001, the City was party to three collective bargaining agreements. None of these contracts was to expire before June 2003. Respondent maintains that, since labor costs comprised between 60% and 75% of the City's budget, Pearson could not address the City's financial crisis without addressing its labor costs. Moreover, Respondent argues, Pearson could not fully comply with the terms of the City's collective bargaining agreements and perform her responsibilities as emergency financial manager.

MCL 141.122(h) gives an emergency financial manager the authority to:

> Exercise all of the authority of the local government to renegotiate existing labor contracts and act as an agent of the unit in collective bargaining with employees or representatives and approve any contract or agreement. [Emphasis added]

Under the LGFRA, an emergency financial manager has the authority of the local government employer to bargain and renegotiate labor agreements. The LGFRA does not give the emergency financial manager rights not possessed by the employer under PERA, such as the right to take unilateral action on mandatory subjects of bargaining or the right to unilaterally modify the terms of a labor agreement. Whether or not an emergency financial manager needs the authority to repudiate or modify collective bargaining agreements to effectively perform his or her job is a question for the legislature, not this Commission.

I conclude that Respondent unlawfully repudiated the wage provisions of the collective bargaining agreement in December 2001 when it set a wage rate for fire fighters that was lower than the rate provided by the parties' contract. As I noted in my findings of fact, while the record establishes that Respondent failed to pay the fire fighters many other benefits provided for in the contract, it is not clear whether Respondent deliberately repudiated its contractual obligations or simply lacked the funds to meet these obligations. However, I find these benefits to be debts owed to the members of Charging Party's unit, and I will recommend to the Commission that Respondent be ordered to make the employees whole with interest.

D. Summary of Conclusions:

To summarize, I conclude, first, that the Commission is not deprived of jurisdiction to find the Respondent violated its duty to bargain under PERA because an Act 312 petition was pending at the time of the alleged unilateral changes. I also conclude that orders issued by the Wayne County Circuit Court with respect to Respondent's subcontracting of its police work did not make this case moot, and that that these orders do not justify the dismissal of this charge on the principal of res judicata. I conclude that Charging Party did not "elect its remedy" by seeking injunctive relief from the Court. I also conclude that the Court's

actions do not affect the Commission's authority to order Respondent to return to the status quo as it existed before December 2001 until it satisfies it obligation to bargain.

I conclude that that Respondent did not unilaterally transfer bargaining unit work to nonunit employees when it created a fire department in December 2001. I find that Respondent did not refuse to recognize Charging Party as the bargaining agent of the fire fighters employed by the new department, and, therefore, none of the PSOs' work was transferred outside the unit. I also conclude that Respondent did not have an obligation to bargain over its decision to create a fire department staffed by fire fighters after it had subcontracted its police work.

I conclude, however, that Respondent did have an obligation to bargain with Charging Party over the subcontracting of police duties formerly performed by PSOs to Wayne County in December 2001. I find that: (1) Respondent did not alter its basic operations by subcontracting; (2) the subcontracting did not involve significant capital investment or recoupment; (3) requiring the Respondent to bargain over the subcontracting would not unduly restrict its ability to manage because the subcontracting was not temporary, and was not simply a response to Respondent's emergency cash shortage; (4) bargaining over the subcontracting would not have been purposeless. I find no merit in Respondent's arguments that it did not commit an unfair labor practice by subcontracting the police work because the parties' collective bargaining agreement permitted it to act unilaterally. I also find that because Respondent announced its decision to subcontract the work as a *fait accompli*, Charging Party did not waive its right to bargain over this decision by failing to demand bargaining over this decision immediately after Respondent announced it.

I also conclude that in December 2001 Respondent unlawfully repudiated its collective bargaining agreement with Charging Party. I find that the fire fighter position that Respondent purported to create in December 2001 was not a new position because its regular duties were the same as those previously performed by PSOs in the fire division of Respondent's public safety department. I conclude that Respondent violated Section 10(1)(e) by refusing, on and after December 14, 2001, to pay the fire fighters the wages established by the collective bargaining agreement expiring on June 30, 2003. As discussed above, I cannot determine from this record whether Respondent repudiated other terms of its contract, or acknowledges its obligations as debts owed to the employees that it has not yet been able to pay. I recommend to the Commission, however, that Respondent be ordered to acknowledge its contractual obligations as debts owed to the employees, and to make them whole with interest.

RECOMMENDED ORDER

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

1. Cease and desist from subcontracting bargaining unit work performed by PSOs represented by Charging Party Police Officers Labor Council without giving this labor organization notice and an opportunity to engage in meaningful bargaining over this decision.

2. Cease and desist from repudiating its obligations to fire fighters/PSOs represented by Charging Party Police Officers Labor Council under the collective bargaining agreement expiring June 30, 2003.

3. Upon demand, bargain with Charging Party over the subcontracting of police work.

4. Rescind all agreements with third parties to perform police work for the City of Highland Park pending satisfaction of Respondent's obligation to bargain over the subcontracting of this work.

5. Make the fire fighters/PSOs whole by paying them all sums, including wages, due them under the collective bargaining agreement since December 14, 2001, including interest at the rate of 3% per annum, computed monthly, but less any amounts they received in wages or benefits during this period.

6. Post the attached notice to employees in conspicuous places on the Respondent's premises 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: _____