STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

VILLAGE OF HOLLY,
Respondent-Public Employer,

Case No. C02 G-168

-and-

TEAMSTERS LOCAL 214,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Dean & Fulkerson, P.C., by Kenneth W. Zatkoff, Esq., for Respondent

Rudell & O'Neill, P.C., by Wayne A. Rudell, Esq., for Charging Party

DECISION AND ORDER

On June 21, 2004, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Nora Lynch, Commission Chairman

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Harry W. Bishop, Commission Member

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Nino E. Green, Commission Member

Dated: _____

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DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, oral argument was held at Detroit, Michigan on February 27, 2003, before David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission. Based upon the entire record in this proceeding, including the brief filed by Charging Party on March 31, 2003, I make the following conclusions of law and recommended order.

The Unfair Labor Practice Charge:

On July 22, 2002, Charging Party Teamsters Local 214 filed an unfair labor practice charge with the Commission alleging that Respondent, Village of Holly, violated Section 10(1) (a) and (e) of PERA. Specifically, the charge asserted that Respondent "threatened to take away medical coverage to a retiree that has already received the benefits since February of 2002 because the Union will not agree to their unilateral conditions." In addition, the charge alleged that the Employer had unlawfully refused to bargain "over conditions of employment pertaining to medical coverage for . . . retirees."

On or about August 14, 2002, Respondent filed an answer denying the allegations set forth in the charge and asserting as an affirmative defense that "[t]he employee involved is not a member of the bargaining unit for which the Charging Party is the exclusive bargaining representative."

An evidentiary hearing was scheduled for February 27, 2003. On that date, I indicated to the parties that none of the allegations set forth by the labor organization appeared to state a valid claim against Respondent under PERA. Therefore, I concluded that dismissal of the charge was warranted under Rule 165, R 423.165, of the General Rules and Regulations of the Employment Relations Commission. The parties were afforded the opportunity for oral argument in accordance with *Smith v Lansing School Dist*, 428 Mich 248 (1987), as well as the opportunity to submit post-hearing briefs setting forth legal authority in support of their respective positions. The parties also jointly submitted several exhibits for purposes of establishing the undisputed facts in this case.

Factual Background:

The material facts in this matter are not in dispute. Charging Party is the collective bargaining representative for a unit of office and waste water treatment plant employees of the Village of Holly, as well as employees in Respondent's water and public works departments. The Union and the Employer were parties to a collective bargaining agreement covering the period July 1, 1999 to June 30, 2003. Pursuant to Article 30, Section 1, of that agreement, the Employer was required to pay fifty percent of the health insurance premiums for regular full-time employees who retire at age 55 with at least 25 years of continuous service with the Village.

On September 6, 2001, Respondent terminated Norman Martin, a member of Charging Party's bargaining unit. At that time, Martin was 47 years old and had worked for the Employer for approximately 21 years.

On September 14, 2001, Charging Party and Respondent entered into a written agreement rescinding the termination notice and reinstating Martin pending approval of his application for disability insurance. The Employer agreed to pay fifty percent of Martin's health insurance premium while that application was pending, but for no more than one year from the date of the agreement. By its terms, the agreement was to terminate if Martin qualified for medical retirement under the Municipal Employees' Retirement System of Michigan (MERS) pension plan.

On January 9, 2002, MERS approved Martin's application for a non-duty disability retirement retroactive to December 1, 2001, and Respondent received timely notification of that fact. Although Respondent was no longer obligated under its agreement with the Union to pay fifty percent of Martin's health insurance premium, it continued to do so throughout the first half of 2002.

In June of 2002, at the Employer's request, Charging Party drafted a letter of understanding (LOU) extending the Village's obligation to pay half of Martin's insurance premium for an additional eighteen

months commencing July 1, 2002. The Union forwarded a copy of the proposed LOU to the Village Manager on or about June 14, 2002.

On June 26, 2002, Respondent faxed a copy of a revised LOU to Charging Party. The Employer's proposal added language indicating that continuation of coverage for Martin "shall be for this Retiree only" and specified that the agreement "is made to address a special situation and shall not be perceived to be a precedent or interpreted as establishment of a custom or practice." That same day, Charging Party responded to the Employer's proposed LOU with its own revised draft. The Union's proposal omitted the provision specifying that continuation of coverage "shall be for this Retiree only." In addition, the Union's draft provided that the agreement "is made to address a special situation and add to the provision of Article 30, Section 1 to include qualification for a medical retirement."

In a letter to Charging Party dated June 27, 2002, the Village Manager indicated that the Employer would not agree to language specifying that the agreement would "add to the provision of Article 30, Section 1." Respondent characterized that provision as "unacceptable" and "a deal breaker" and indicated that such modification of the collective bargaining agreement should be discussed during upcoming contract negotiations.

On July 8, 2002, the Union sent another proposed LOU to the Employer. This draft was essentially identical in substance to Charging Party's initial proposed agreement of June 14, 2002, with the exception of language specifying that continuation of coverage "shall be for the retiree and spouse only." In a cover letter attached to the draft, the Union wrote that "[t]his offer in no way removes the possibility that both parties reserve the right to argue the effects of the letter of understanding on a similarly situated employee in the future."

On or about July 10, 2002, Respondent notified the Union by letter that the Holly Village Council had decided to withdraw the offer of partial payment for continued health insurance for Martin due to "the Union's refusal to accept language in the letter of understanding that was required by the Village." However, Respondent indicated that it would continue providing health insurance for Martin if the Union were to agree to accept the language in the Employer's June 27, 2002 letter. Respondent gave the Union until 5:00 p.m. on July 23, 2002, to accept its final offer. Charging Party did not agree to the offer and, as a result, Respondent stopped contributing to Martin's health insurance premium.

Discussion and Conclusions of Law:

In *Smith v Lansing School Dist*, 428 Mich 248 (1987), the Michigan Supreme Court held that the Commission has the authority under PERA, the Commission's rules, and the Michigan Administrative Procedures Act, MCL 24.271 et seq., to dismiss a charge for failure to state a claim without conducting a full evidentiary hearing where there are no material issues of fact. Rule 165(1) states, "The commission or administrative law judge designated by the Commission may, on its own motion, order dismissal of a charge. The motion may be made at any time before or during the hearing."

I find that summary disposition is appropriate in this matter. Respondent was under no contractual obligation to continue paying a portion of Martin's health care premium. Because Martin was 47 years old when he retired on disability and had worked for the Village for less than 25 years, he was not eligible for health benefits under Article 30, Section 1, of the collective bargaining agreement. Nor was Respondent obligated to continue making contributions to Martin's health care premium pursuant to the September 14, 2001 agreement, since that agreement expired on its terms when Martin qualified for retirement benefits under MERS effective December 1, 2004. Although the parties later entered into negotiations concerning a formal agreement to extend Martin's benefits, each offer made by the Union on or after June 26, 2002, was a proposal to modify the existing contract in some way, either directly or by clarifying how it was to be interpreted. While the parties may agree to negotiate a change during the effective term of the written agreement, bargaining is not required and either party has the right to refuse to discuss or agree to a midterm modification of the contract. *St. Clair Intermediate School Dist v Intermediate Education Ass'n*, 458 Mich 540, 565-566 (1998).

Martin's status as a retiree also precludes any finding that the Village had a legal duty to bargain with Charging Party before modifying or eliminating his health insurance benefits. It is well-established that issues relating to individuals who are not employees, including retirees, are permissive subjects of bargaining, and that an employer has no obligation to bargain concerning such matters unless they "vitally affect" the terms and conditions of employment of bargaining unit members. *City of Grosse Pointe Park*, 2001 MERC Lab Op 195, 198 (no exceptions), citing *Allied Chemical & Alkali Workers of America v Pittsburgh Plate Glass*, 404 US 157 (1971). See also *Woodhaven School Dist*, 1990 MERC Lab Op 221; *Mona Shores*, 1989 MERC Lab Op 414; *Ottawa EA v West Ottawa Bd of Ed*, 126 Mich App 306 (1983), aff'g 1982 MERC Lab Op 629.

While recognizing that modification of Martin's health insurance benefits constituted a permissive subject of bargaining, the Union nevertheless contends that Respondent acted unlawfully in bargaining that issue to impasse. Parties may voluntarily discuss and agree to permissive subjects of bargaining. *AFSCME, Local 1277 v Center Line*, 414 Mich 642, 652 (1982). Even when parties have successfully bargained about a permissive subject, a party may lawfully reject the bargain. *Pittsburgh Plate Glass, supra*, at 187-188. Although it is unlawful to take a nonmandatory subject of bargaining to impasse, what that rule prohibits is insistence upon a permissive subject as a condition precedent to reaching an agreement on other mandatory bargaining subjects. See e.g. *NLRB v Borg-Warner Corp*, 356 US 342, 349 (1958). In the instant case, Respondent's demand that the Union agree to its terms regarding an extension of benefits for Martin did not impede negotiations on any mandatory bargaining subject or have any effect on the abilities of the parties to fulfill their mandatory bargaining obligations. The contract between the parties covered the issue of health care retirement benefits, and the parties were not yet in negotiations on a successor agreement. I conclude that the Village could validly negotiate, as it did, on the issue of an extension of benefits for Martin without impacting the permissive nature of that issue.

I also find nothing in the record to suggest that the Employer's conduct in this matter "vitally affected" the terms and conditions of employment of bargaining unit members so as to transform the issue into a mandatory subject of bargaining. To satisfy the "vitally affects" test, the effect on active employees must be established with certainty. Mere speculation about the impact of retiree benefits on active

employees is insufficient. *Pittsburgh Plate Glass, supra*, at 180. In the instant case, members of the bargaining unit are in exactly the same position that they would have been had the incident with Martin never occurred. The Village remains obligated under the terms of the existing contract to pay fifty percent of the health insurance premiums for regular, full-time employees who retire at age 55 with at least 25 years of continuous service with the Village. To the extent that Charging Party is dissatisfied with this provision, it remains free to negotiate changes regarding retirement health care benefits when bargaining on a successor contract commences.

In an attempt to establish that Respondent's actions had some discernible impact on its members, Charging Party suggests, for the first time in its brief, that because Respondent continued to pay fifty percent of Martin's premium following the termination of the parties' September 14, 2001 agreement, a term or condition of employment was created which superceded the language of the contract. Charging Party seems to argue that Respondent violated PERA by insisting that its members give up that benefit as a precondition to the Village's continuation of health care benefits for Martin.

In order to create a term or condition of employment through past practice, the practice must be mutually accepted by both parties. Where, as here, the contract unambiguously covers a term of employment that conflicts with a party's behavior, the unambiguous language controls unless the past practice is so widely acknowledged and mutually accepted that it creates an amendment to the contract. *Port Huron Education Ass'n v Port Huron Area School Dist*, 452 Mich 309, 329 (1996). In such circumstances, the party "seeking to supplant the contract language must submit proofs illustrating that the parties had a meeting of the minds with respect to the new terms or conditions -- intentionally choosing to reject the negotiated contract and knowingly act in accordance with past practice." *Id*. See also *Grand Rapids Community College*, 1998 MERC Lab 739, 742. Here, the record indicates that the Village contributed to the health insurance premiums of one retiree for a period of approximately seven months. Charging Party has failed to allege any facts which would suggest that the parties had a meeting of the minds concerning modification of Article 30, Section 1, of the contract.

I have carefully considered all other arguments advanced by Charging Party, including its contention that Respondent unlawfully retaliated against Martin, and conclude that they do not warrant a change in the result. For the above reasons, I find that Respondent did not violate Sections 10(1)(a) and (e) of PERA. Since Charging Party has been given full opportunity for argument and no cause of action under PERA has been raised, summary dismissal is appropriate. *Smith v Lansing School Dist*, *supra*. Therefore, it is recommended that the Commission issue the following order dismissing the charge.

RECOMMENDED ORDER

It is hereby recommended that the unfair labor practice charge be dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge

Dated: _____