STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CLINTON-EATON-INGHAM COMMUNITY
MENTAL HEALTH ADMINISTRATION,
Respondent-Public Employer,

Case No. C02 J-234

-and-

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 459,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Foster, Swift, Collins & Smith, P.C., by Stephen O. Schultz, Esq., for Respondent

Bobay, Kaechele & Wilensky, P.C., by Neal J. Wilensky, Esq., for Charging Party

DECISION AND ORDER

On March 25, 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

_____
Nora Lynch, Commission Chairman

_____
Harry Bishop, Commission Member

_____
Maris Stella Swift, Commission Member

Dated: _____

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DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Lansing, Michigan on January 24, 2003, before David M. Peltz, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including the transcript of hearing and briefs filed by the parties on or before March 20, 2003, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge:

On October 25, 2002, the Charging Party, Office and Professional Employees International Union (OPEIU), Local 459, filed an unfair labor practice charge alleging that the Respondent, Clinton-Eaton-Ingham Community Mental Health Administration (CEI-CMH), violated Section 10(1)(a) and (e) of PERA by bargaining in bad faith during negotiations over the implementation of a wage compensation study.

Facts:

Charging Party is the collective bargaining representative for a unit of about 400 employees of CEI-CMH, including approximately fifty secretarial/clerical employees. The Union and the Employer were parties to a collective bargaining agreement covering the period October 1, 1999 to September 30, 2002. Section 7.1 of that agreement allowed for a reopener of the salary schedule and economic sections of the agreement during the term of the contract.

In 1999, the Employer proposed a study to evaluate the wages of various CEI-CMH classifications, including secretarial/clerical positions represented by Charging Party, as compared to similar positions within the labor market. The Union agreed to cooperate in the study with the understanding that neither the Employer nor Local 459 would be obligated to implement any of its recommendations. In a letter dated January 15, 1999 and signed by representatives of both Local 459 and CEI-CMH, the parties agreed that any changes resulting from the study "would be subject to negotiations and appropriate ratification." The parties reaffirmed their intent to participate in the study in a letter of understanding dated April 28, 2000. In that agreement, the parties resolved to prioritize the order in which positions which would be evaluated with respect to wage adjustments. They also acknowledged that "fiscal and contractual restraints of the Employer may prevent the immediate implementation of any or all recommendations arising" from the study.

In a subsequent letter of understanding dated June 20, 2000, the parties agreed to broaden the study to include issues of job classification and complexity, as well as compensation. The agreement specified that the compensation/classification study would be discontinued if either party raised an objection to the process. CEI-CMH and Local 459 also reaffirmed their agreement that neither party would be obligated to implement any of the study's recommendations.

The compensation/classification study was completed in January of 2001. The study concluded, in pertinent part, that the secretarial/clerical employees represented by Charging Party were being paid at approximately four percent below the market rate for such positions. However, it contained no specific recommendations concerning wage adjustments for the secretarial/clerical classifications. Rather, the study concluded:

> The Board has many options related to implementation of the study findings. It may adopt the findings as presented and include them in the current pay structure, or use the findings as a basis for renegotiating the 459 contract. Alternatively, the Board may wish to establish an incremental phase-in of market pay over several years to minimize the impact on finances.
>
> * * *
>
> Whether the Board should or should not adjust pay at this time is a matter that must be decided by the Board within the larger context of its pay philosophy, negotiating parameters and financial constraints. In establishing market-based

> salary levels, it is our intention to provide a basis for decision-making by the Board. We do not attempt to establish compensation policies for our clients.

Upon receipt of the study, the parties instituted discussions concerning the impact of its findings on Charging Party's members. Those negotiations did not result in any agreement. In a letter to the Union dated July 30, 2001, CEI-CMH Deputy Director Michael Sturley indicated that he would "not recommend to the Board of Directors to adjust Local 459 Secretarial/Clerical wages" based upon the results of the compensation/classification study. According to the letter, management believed that the four percent disparity was not so significant as to warrant a wage increase, and that it would be "unfair to raise the secretarial and clerical groups to 100% [of the market rate] when other [CEI-CMH] groups are significantly behind."

On November 28, 2001, Local 459 and the Employer entered into an agreement to make certain changes to the collective bargaining agreement pursuant to the contract's wage reopener provision, including a 2.9% wage increase for all of Charging Party's members retroactive to October 1, 2001. In response to concerns raised by CEI-CMH employees concerning Respondent's refusal to take further action with respect to the classification/compensation study, the parties agreed to include the following language in the wage opener agreement:

> The Union Clerical Compensation Study: A joint Labor/Management committee shall be formed to negotiate how the clerical compensation study and future compensation studies shall be implemented and funded, although it is agreed that any changes shall not be deducted from general wage increases.

The wage reopener agreement was subsequently ratified by both the CEI-CMH board of directors and the membership of OPEIU Local 459.

The Employer selected its executive director, Robert Sheehan, as its chief spokesperson on the joint labor/management committee. Charging Party's lead negotiator was its president, Jeff Fleming. Also serving on the committee were officials from OPEIU Local 512, which represents a separate group of CEI-CMH employees. The joint committee met on a number of occasions throughout the remainder of 2001 and the early part of 2002 without reaching any agreement with respect to wage adjustments. Sheehan testified that following the ninth meeting, the committee members informally decided to disband the group on the ground that progress was not being made. Thereafter, Sheehan and Fleming decided to focus their discussions regarding the study specifically on the secretarial/clerical employees in Charging Party's unit.

On May 9, 2002, Sheehan, Fleming and two other Local 459 officials met without the presence of representatives from Local 512. At the meeting, Fleming and Sheehan discussed a plan which, when fully implemented, would result in a four percent wage adjustment for the secretarial/employees. Sheehan attempted to structure the plan so that it would be unique, non-precedent setting and would not be perceived as an actual wage increase. Under the plan, the first step of the secretarial/clerical pay scale was to be lowered, the midpoint was to remain the same, and all other steps increased so as to convey the impression that the change was merely a broadening of the salary range rather than a pay raise. In addition, the plan was to be implemented gradually in order to spread out the cost of the adjustment and make it less

attractive to other CEI-CMH employees, with a two percent increase effective July 1, 2002 and the other two percent on October 1, 2003. Funding for the change was to come from salary appropriations in the existing budget as opposed to a new line item.

Throughout the May 9th meeting, Sheehan repeatedly insisted that any agreement reached between the parties regarding implementation of the classification/compensation study for the secretarial/clerical employees should be characterized as a "technical wage adjustment" as opposed to a wage increase. Sheehan testified that a true wage increase would require formal ratification by the board of directors, and that the board would never approve a four percent across-the-board pay raise given that the Employer was facing a deficit at the time. Sheehan testified credibly that he told Fleming at the meeting that as long as the agreement was perceived as a "technical wage adjustment" and not a wage increase, the deal could proceed and he would only need to seek the board's informal approval to modify the pay scale.

At the hearing in this matter, Fleming testified that Sheehan told him flatly that the agreement would not require board ratification. However, Fleming also acknowledged that Sheehan wanted to portray the agreement as a widening of the pay scale, and that he repeatedly expressed his desire to have the plan characterized as a "technical wage adjustment." In fact, the phrase "technical wage adjustment" appears three times in Fleming's notes from that bargaining session. I credit Sheehan's testimony concerning what was said at the May 9th meeting and conclude that the Union had notice that public perception of the deal as a wage increase would put the issue before the board and result in its rejection.

The parties did not enter into any written agreement on May 9, 2002. However, Fleming testified that as a result of their discussions that day, he believed that the parties had reached an agreement on implementation of the classification/compensation study for the secretarial/clerical employees. In contrast, Sheehan testified that he viewed the meeting as the "beginning [of] a discussion that some day may lead to an agreement."

On June 6, 2002, Sheehan sent Fleming a spreadsheet illustrating what the secretarial/clerical pay scale would look like as a result of the first year adjustment. The following day, Fleming sent Sheehan an e-mail in which he wrote:

> Attached is my initial draft of the clerical comp study LOU. Let me know what you think.
>
> Thought of two more issues while drafting it.
>
> 1) If the intent is to truly hold employees harmless, if a current employee receives a promotion and is placed on step 1, they should receive the unreduced step 1 rate. This should be a very rare event, but just trying to cover all my bases. The language in the LOU covers this event.
>
> 2) Yesterday you raised the question as to whether the Residential Services Worker would be included in these technical salary adjustments. As I thought more about our conversation, I wondered if you were making an offer to include

> the position. If so, I wanted to be clear that I would be willing to include that position in these adjustments.

The letter of understanding drafted by Fleming does not the set forth any specifics regarding the adjusted pay scale. Instead, Fleming wrote "[INSERT SALARY RANGES]" on the second page of the document.

Sheehan responded to the above e-mail message on June 10, 2002. Sheehan indicated that Fleming's suggestion regarding the hold-harmless provision "looks good." With respect to the issue of whether to include the residential services position as part of the agreement, Sheehan wrote, "I was not suggesting that we include them in this change – one tough problem at a time is enough." Later that day, Sheehan again wrote to Fleming, this time requesting that two additional clauses be included in the letter of understanding in order to "reinforce the intent" of the agreement. In an e-mail message dated June 11, 2002, Fleming indicated that he would make the changes which Sheehan had requested.

Around this time, Sheehan began receiving phone calls and e-mail messages from CEI-CMH employees and board members regarding a wage increase for secretarial/clerical employees. According to Sheehan:

> It started with E-mails from clerical staff thanking me for giving them a raise, and they were very happy about that. Those were 459 members in the clerical unit.
>
> Then I started getting calls from 459 members not in the clerical unit saying, "Hey, wait a minute. I thought we had a budget problem. What is going on here?
>
> Then I started getting calls from board members who said, "I hear there is an increase going on. I thought you guys were in the middle of trying to cut the budget. What is happening here?

Upon realizing that the change was being seen as a pay raise as opposed to a wage adjustment, Sheehan contacted Fleming on June 19, 2002, and told him that he would be unable to move forward on the plan.

Despite having been made aware of the Employer's intentions, Fleming sent a "final" version of the letter of understanding to Sheehan on June 27, 2002, with a cover letter indicating that the Union had "agreed to [CEI-CMH's] last proposal" concerning implementation of the classification/compensation study. As with the earlier draft, the June 27 letter of understanding included the "[INSERT SALARY RANGES]" notation in lieu of any specific numbers. At the hearing, Fleming acknowledged that the Employer never actually labeled or identified any document as its "last proposal."

While this was ongoing, CEI-CMH and Local 459 were also involved in negotiating a successor collective bargaining agreement utilizing target-specific bargaining (TSB), a joint

labor/management cooperative approach to solving problems in the work place. The parties met with the TSB facilitator and mutually decided that the dispute over implementation of the classification/compensation study should not be inserted into the TSB process.

On June 10, 2002, Sheehan sent a letter to Fleming in which he expressed the Employer's willingness to continue negotiations over implementation of the classification/compensation study. The letter provides, in pertinent part:

> Management is very willing to continue negotiations on this issue. However, during recent discussions, labor and management agreed that this issue would be dealt with outside of the TSB/negotiation process, via any of a number of means, including the unfair labor practice suit that you indicated OPEIU Local 459 may be pursuing to resolve this issue. If 459 would like to negotiate around this issue, it can be placed into the TSB process, using the TSB problem statement that already exists regarding this issue. Please let [Director of Human Resources] Terri Singleton and the TSB committee know if 459 would like to address this issue via the TSB process.

Charging Party did not request further discussions on the subject; instead, the Union sought to resolve the matter via the instant charge.

Discussion and Conclusions of Law:

Charging Party contends that Respondent violated its obligation to bargain in good faith by failing to implement the classification/compensation study for the secretarial/clerical employees within its bargaining unit. Specifically, Charging Party argues that the Employer unlawfully reneged on a tentative agreement reached between Sheehan and Fleming on May 9, 2002, to implement a four percent wage adjustment for its secretarial/clerical employees. In support of this contention, the Union relies upon the Commission's decision in *City of Benton Harbor*, 1980 MERC Lab Op 993. In that case, negotiations on a new collective bargaining culminated with the union accepting and ratifying the employer's final offer. At the request of the employer, the union typed up the new agreement and submitted it to the city manager for his signature. However, the city manager neither signed the agreement nor offered any explanation for his inaction. On exception, the Commission found the employer's delay of over four months in executing the agreement was not excusable and affirmed the ALJ's conclusion that its actions constituted a PERA violation. As a remedy, the employer was ordered to implement the terms of the agreed upon contract.

I find *Benton Harbor* distinguishable on its facts. In *Benton Harbor*, the parties clearly had a meeting of the minds on the terms of their tentative agreement. The employer made an offer which the union accepted. There was no indication that the employer did not understand that the union had agreed to all of the conditions of the offer. In the instant case, although the basic structure of an agreement was in place as a result of the May 9, 2002, meeting, the parties were still discussing significant details concerning the plan during the weeks which followed that meeting. In addition to issues concerning the hold harmless provision and the possible inclusion of the residential services worker, the parties had yet to agree upon the various pay scales to be

implemented as part of the agreement. Even the "final" letter of understanding which Charging Party sent to the Employer on June 27, 2002, was silent with respect to the specific salary ranges to be implemented. Parties cannot be required to ratify, execute or implement a contract where this is no actual meeting of the minds. *Genesee County, Seventh Judicial Circuit Court*, 1982 MERC Lab Op 84, 87.

Even if Sheehan and Fleming could be said to have reached a meeting of the minds on May 9, 2002, I find that Respondent did not act in bad faith in refusing to execute that agreement. It is well-established under PERA that the repudiation of a tentative agreement is not per se bad faith bargaining; rather, it is necessary to look at a party's entire course of conduct to determine whether the repudiation evidences a desire to delay or otherwise impede negotiations. See e.g. *Manistee Fire Fighters Association*, 1987 MERC Lab Op 590, and cases cited therein. Based upon the record in this case, I find no such intent on the part of Respondent with respect to negotiations on the classification/compensation study.

The Commission considered somewhat analogous facts in *Clare-Gladwin Intermediate School District*, 1987 MERC Lab Op 637, reconsideration den 1987 MERC Lab Op 1021. In *Clare-Gladwin ISD,* the employer's negotiator reached a tentative agreement with the union on a successor collective bargaining agreement and notified the union's bargaining team that a deal had been reached. However, upon meeting with the superintendent and the negotiating committee of the school board, he discovered that the tentative agreement which he had negotiated exceeded the board's wage guidelines. Rather than presenting that agreement to the full school board for ratification, the negotiator made a new offer to the union with less favorable terms. The Commission found that the employer had not violated its duty to bargain in good faith by refusing to submit the original tentative agreement to the board. In so holding, the Commission noted that the employer had acted promptly to rectify the situation, and that there was no evidence suggesting that its negotiator knowingly misrepresented the board's position, its actions, or his own authority during the bargaining process. See also *City of Saginaw (Police Department),* 1988 MERC Lab Op 197 (no exceptions) (union did not act in bad faith in withdrawing from tentative agreement based upon its belief that it could no longer sell the agreement to its membership after details of the agreement became public).

Similarly, I find no evidence in the instant case suggesting that Respondent was acting underhandedly or in bad faith. The record establishes that the Employer was facing a budget deficit, and Sheehan knew that the board would not approve a four percent wage increase for the secretarial/clerical staff under such circumstances. Thus, he stressed to the Union that any agreement should be characterized as a "technical wage adjustment" so as to avoid having to go to the board for formal ratification. He also insisted that the proposed agreement should be "unique" and "non-precedent setting" and that the terms of the deal should convey the impression that the Employer was merely widening the pay scale for its secretarial/clerical employees rather than raising their wages. I find that Sheehan was upfront with Fleming concerning the situation, and that the Union knew or should have understood the consequences which would result if the agreement was seen as something other than a pay scale adjustment. Moreover, upon realizing that the deal was being perceived by the board and other CEI-CMH employees as a wage increase, and before the execution of any final written agreement, Sheehan promptly informed Fleming that he would be unable to move forward on the plan. Shortly

thereafter, he notified the Union by letter that the Employer was willing to continue negotiations concerning the classification/compensation study. On these facts, I conclude that Respondent did not act in bad faith by refusing to execute the May 9, 2002, tentative agreement.

It is true that at the time of hearing in this matter, approximately fifteen months had passed since the November 28, 2001, agreement was signed establishing the joint labor/management committee to "negotiate how the clerical compensation study and future compensation studies shall be implemented and funded." Charging Party contends that this delay in bringing the secretarial/clerical wages to full market value is itself evidence of bad faith on the part of the Employer, and that this Commission should order Respondent to "implement" the results of the study. I disagree. The provision in the wage reopener agreement relied upon by the Union does not set forth any specific date by which a wage adjustment must occur. Moreover, given that the study itself contains no specific recommendations concerning an appropriate wage adjustment or guidelines on how that adjustment should be funded, I interpret the November 28th agreement as merely an acknowledgment that the parties would continue to bargain in good faith over the issue. I find no evidence suggesting that Respondent has violated that obligation. As noted, the Employer offered to resume negotiations regarding implementation of the study in June of 2002, and the Union never requested any further discussions on the subject.

For the above reasons, I recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge

Dated: _____