STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

CITY OF IRON MOUNTAIN,
Respondent-Public Employer,

Case No. C04 K-301

-and-

IRON MOUNTAIN FIREFIGHTERS ASSOCIATION,
LOCAL 554, IAFF/AFL-CIO,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Nantz, Litowich, Smith & Girard, by John H. Gretzinger, Esq., for the Public Employer

Helveston & Helveston, P.C., by Ronald R. Helveston, Esq., and Heather Cummings, Esq., for the Labor Organization

DECISION AND ORDER

On February 9, 2006, Administrative Law Judge Roy L. Roulhac issued his Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Nora Lynch, Commission Chairman

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Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

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DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

This case was heard in Detroit, Michigan, on June 24, 2005, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission (MERC) pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Based on the record and post-hearing briefs filed by August 30, 2005, and a reply brief filed by Charging Party on October 31, 2005, I make the following findings of fact and conclusions of law.

The Unfair Labor Practice Charge:

On November 12, 2004, Charging Party Iron Mountain Firefighters Association, Local 554, IAFF/AFL-CIO, filed an unfair labor practice charge against Respondent City of Iron Mountain alleging that Respondent violated Section 10(1)(a) and (e) of PERA. The charge reads:

> On or about August 30, August 31, September 1 and September 20, 2004, the above named public employer violated Sections 10(1)(a) and (e) of PERA by, *inter alia*, refusing to bargain with the Union over unilateral changes in terms and conditions of employment including directing the Fire Chief to respond to all incidents as the "4th man;" notifying bargaining unit members that as a result of the fire fighter layoff, engines will be staffed with two or three members instead of the current four; directing the Lieutenants to respond to the City of Kingsford in violation of a Letter of Understanding between the City and the Firefighters; and appointing nine Iron Mountain Police Officers to the Iron Mountain Fire Department.

On March 21, 2005, Charging Party amended the charge to allege that Respondent violated PERA by subcontracting bargaining unit work to non-firefighters when it entered into an agreement with the Iron Mountain Police Officers Association on December 20, 2004. On June 22, 2005, Charging Party withdrew all allegations set forth in its November 12, 2004 charge, except the last phrase that reads: "and appointing nine Iron Mountain Police Officers to the Iron Mountain Fire Department.

Findings of Fact:

Respondent has operated a fire department since 1888, and for a number of years has recognized Charging Party as the exclusive bargaining representative for all fire full-time firefighters except the chief. The parties' most recent collective bargaining agreement expired on June 30, 2003.

Before September 1, 2004, Charging Party's bargaining unit included thirteen firefighters. Since 1998, Respondent has had a mutual aid agreement with the City of Kingsford, which provides for automatic aid during rescues or known structure fires in either municipality.1 In November 2002, Respondent and Charging Party entered into a letter of understanding regarding Respondent's mutual aid agreement with the City of Kingsford. It provides, among other things, that the City of Iron Mountain would maintain its practice of responding with four firefighters per rig and calling replacements to ensure that four firefighters remained at the fire station when providing mutual aid to the City of Kingsford.

The parties commenced negotiations for a successor agreement in May 2003. On or about May 5, 2004, Charging Party received a copy of city manager John Marquart's budget recommendations to city council for the next fiscal year. The city manager's recommended action regarding the fire department reads:

> The City currently has thirteen (13) full time firefighters, plus a Chief. This operation costs [sic] the residents of the City $1,057,200 in FY 2004. This is a significant expenditure for a community of almost 9,000 residents. Quite frankly, given the City's fiscal condition, it is an expenditure the City cannot continue to afford. The Department is currently staffed twenty-four (24) hours a day, seven days a week. Staff work with a schedule of twenty-four (24) hours on duty, forty-eight (48) hour off. In the last two months, the Department tallied only 16 hours in actual fire suppression activity. The rest of the time was spent in training, routine office duties, maintenance, etc. By reducing staff from thirteen to nine, a minimum reduction of four staff, the City will save approximately $211,000 in staff costs. The Chief can develop a schedule that would provide the fire station be manned from 7:00 a.m. to 11:00 p.m., with staff now on an eight (8) hour per day schedule. Additional savings would result from lower pension costs, overtime, insurance, health insurance, etc. As part of this scenario, I recommend that the City train current staff in police and public works department [sic] to be able to assist in [sic] the fire department staff in the initial stages of an emergency event during the daylight hours of operation. I recommend that our mutual aid agreement be strengthened and that the City move to develop a regional approach to the fire service. I also recommend that the Chief

1Respondent entered into a similar agreement with the Charter Township of Breitung Fire Department in 2003.

> develop a plan to utilize volunteers and/or paid on call staff for the midnight hours. The combination of full time and volunteer Department can work and work effectively to provide the high level of service the residents need.

Shortly thereafter, Charging Party's president Lieutenant Kevin Pirlot contacted city manager Marquart to discuss the proposed changes. When asked on direct examination whether he demanded or requested to bargain, Lieutenant Pirlot answered as follows:

> Yes, I did. At this point I still had not met Mr. Marquart, so I went to City Hall and introduced myself. I told him of my concerns over this event that he had set in motion and demanded that – and informed him that it was a requirement for the City to bargain with the firefighters' union over these events.

Pirlot and Marquart scheduled a bargaining session for June 2, 2004. In the meantime, on May 24, 2004, the city council adopted the city manager's recommendation to layoff four firefighters and cross train police officers as firefighters.

On June 2, 2004, after a brief bargaining session, Charging Party requested the assistance of a state-appointed mediator. On the same day, Respondent sent layoff notices to four members of Charging Party's bargaining unit, informing them that their layoffs, to take effect August 31, 2004, were part of Respondent's efforts to regain control of the City's finances and to eliminate a $551,000 deficit.

During the parties' next bargaining session on June 21, 2004, the city manager told Charging Party's bargaining team that Respondent would consider alternatives that might mitigate the layoffs of the firefighters, but that the decision to cross train police officers was final.2 During the June 21, 2004 bargaining session, Charging Party presented a comprehensive proposal that, among other things, required staffing of the fire department with a minimum of eighteen full-time certified firefighters. Throughout bargaining, Charging Party did not make any proposal regarding Respondent's plan to cross train police officers as firefighters because, according to Lieutenant Pirlot, "the City said that they were going to do what they wanted to do on cross training, and that wasn't a subject for discussion."3

On October 4, 2004, Respondent appointed nine police officers to the Iron Mountain fire department. Two months later, in December 2004, Respondent and the Iron Mountain Police Officers Association ratified a collective bargaining agreement that, among other things, provides that police officers who chose to become firefighters will be trained, at no cost, to be certified as firefighters and receive annual bonuses for maintaining their certification. It also states that the cross trained police officers will not be used to replace full time firefighters; that they will carry their firefighting equipment in their patrol car and respond to fire calls while on duty; and return to their patrol duties when sufficient full time firefighters arrive at the scene. The agreement further provides

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2When Marquart was asked if he told the Union anything regarding the potential for police officers being cross trained, he answered: "Yes. They were aware … that this was a part of the budget proposal that police officers were going to be cross trained, it was a recommendation that was adopted. And we also discussed the ability to come up with alternatives that might mitigate the layoffs of four firefighters."

3On August 23, Charging Party filed a petition for arbitration pursuant to the Police and Fire Compulsory Arbitration Act, MCL 423.231, *et seq.* (Act 312).

that Respondent reserves the right to call off duty fire-trained patrol officers for any reason during manpower shortages.4 Before the execution of this agreement, police officers only reported to structure fire scenes to secure and establish safe areas, take photographs and collect witness statements.

As of the date of the hearing, the cross training of police officers had not been completed. A police officer who was already certified as a fire fighter I has been used on a limited basis as a fire fighter.

Conclusions of Law:

PERA requires an employer to bargain over mandatory subjects. *Detroit Police Officers Ass'n* v *City of Detroit*, 391 Mich 44, 54 (1974); *St Clair Intermediate Sch Dist*, 2001 MERC Lab Op 218. Unilateral changes in a mandatory subject of bargaining or a refusal to bargain over a mandatory subject constitute an unfair labor practice under Section 10(1)(e) of PERA. In *Southfield Police Officers Ass'n v. Southfield*, 433 Mich 168, (1989), *aff'g* 1985 MERC Lab Op 1025, the Court held that an employer is obligated to bargain over the removal or transfer of duties to employees outside the bargaining unit when the work has been exclusively performed by members of that unit. Additionally, in *Detroit Water & Sewerage*, 1990 MERC Lab Op 34, the Commission concluded that if exclusivity test is met, two other elements are essential before a duty to bargain can be found. First, a transfer must have a significant adverse impact on unit employees. The record must, for example, show that unit employees were laid off or terminated because of the transfer, or demoted to lower paying jobs, laid off employees were not recalled as a direct result of the transfer, or unit employees experienced a significant drop in overtime. A mere showing that some positions were lost or speculation regarding the loss of promotional opportunities is not enough to show a significant adverse impact. Second, the transfer dispute must be amenable to resolution through the collective bargaining process. That is, the employer must have based its work transfer decision, at least in part, on either labor or general enterprise costs that the bargaining process could affect.

Respondent contends that firefighting has not been exclusive bargaining unit work for Charging Party's members since 1998, when it entered into a mutual aid agreement with the City of Kingsford. I find no merit to this argument. In determining whether work is exclusive, a basic and essential finding is whether a labor organization's members have exclusively performed the work at issue, or whether other units or other employees have shared the work and could claim the work as their own. *Southfield Police Dep't*, 1993 MERC Lab Op 87, 91-92 (no exceptions); *Washtenaw Co and Sheriff*, 1993 MERC Lab Op 775 (no exceptions). See also *Muskegon Co Sheriff Dept*, 2000 MERC Lab Op 88 (no exceptions), where the ALJ concluded that to be exclusive bargaining unit work, only unit members must have performed the work, usually because of the qualifications needed or the nature of the job. The Commission has never held, and Respondent provides no support for its assertion, that the existence of mutual aid agreements between public and/or private entities means that the work a union's members perform is not exclusive bargaining unit work. I find that the firefighting work that Charging Party's members perform is exclusive bargaining unit work because firefighters from other municipalities who respond to fires in Iron Mountain pursuant to mutual aid agreements are not Respondent's employees and they have no claim to the work as their own.

4Subsequently, the Police Officers Labor Council informed the Iron Mountain Police Officers Association that it would not be a party to an agreement that infringed on the rights of another union and withdrew its representation as their exclusive bargaining representative.

I also conclude that Respondent's decision to cross train police officers to serve as firefighters had a significant adverse impact on Charging Party's bargaining unit. Respondent concurrently decided to cross train police officers as firefighters and to lay off four members of Charging Party's bargaining unit. Additionally, the transfer of bargaining unit work to cross trained police officers was amenable to collective bargaining. The city manger stated in his May 2004 recommendation to the city council that the City would realize approximately $211,000 in staff costs by laying off four firefighters and cross training employees. Additionally, Respondent' indicated in its June 2, 2004 layoff notices that the firefighters' terminations were part of Respondent's efforts to regain control of the City's finances and eliminate a $551,000 deficit. Thus, under the test articulated in *City of Detroit (Water and Sewerage Dept), supra*, I find that Respondent had a duty to bargain with Charging Party before deciding to cross train police officers to serve as firefighters.

Respondent claims that it was not obligated to bargain because Charging Party failed to make a bargaining demand. I disagree. No specific format is required to constitute a bargaining request. Rather, an employer must know that a union made a request to bargain in order to find a refusal to bargain. *Macomb County*, 1998 MERC Lab Op 344; *Michigan State Univ*, 1993 MERC Lab Op 52 at 63 citing *Clarkwood Corp.*, 233 NLRB 1172 (1977). The record shows that after discussing the firefighters' layoffs and the police officers' cross training with Lieutenant Pirlot, Marquart demonstrated his awareness of Charging Party's bargaining request by agreeing to schedule a June 2, 2004 meeting.

Respondent also contends that it satisfied its duty to bargain when it attempted to discuss the police officers' cross training at the June 2, 2004 bargaining session, but Charging Party ended the session and requested a mediator. This assertion is also without merit because a week earlier, on May 24, the city council adopted the city manager's recommendation to cross train police officers. The Commission has long held that an employer seeking to make a change in a mandatory subject of bargaining must first notify the union and give the union an opportunity to bargain before implementing the change. An employer who notifies the union of its decision only after the decision becomes a *fait accompli* violates its obligation to bargain in good faith. *St Clair Intermediate Sch Dist*, 17 MPER 77 (2004); *Intermediate Ed Ass'n/Michigan Ed Ass'n*, 1993 MERC Lab Op 101, 106; *City of Westland*, 1987 MERC Lab Op 793, 797. Here, Charging Party made a timely demand to bargain, but Respondent decided to transfer work outside of the bargaining unit before bargaining over the issue.

I have carefully considered all other issues raised by the parties and find they do not change the result. Included is Respondent's contention that the charge is untimely. The record reflects that Respondent decided to cross train police officers on May 24, 2004, and Charging Party filed its charge on November 12, 2004, within the six-month limitation period set forth in Section 16(a) of PERA.

Based on the above finding of facts and conclusion of law, I conclude that Respondent violated its duty to bargain under Section 10(1)(e) when it refused to bargain over its decision to cross train and appoint police officers as firefighters. I also find that Respondent's action, designed to discourage membership in the Union and evade its obligations under PERA, violated Section 10(1)(a). I, therefore, issue the following recommended order.

RECOMMENDED ORDER

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

1. Cease and desist from:

a. Refusing to bargain collectively with the Iron Mountain Firefighters Association, Local 554, by transferring bargaining unit work to police officers outside the bargaining unit without giving that labor organization notice and an opportunity to engage in meaningful bargaining.

b. Discouraging membership in the aforesaid labor organization by discriminatorily transferring bargaining unit work or by discriminating against employees in any other manner in regard to their hire and tenure of employment or any other term and condition of employment.

c. In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 9 of PERA.

2. Take the following affirmative action in order to effectuate the policies of the Act:

a. Upon demand, rescind its actions of transferring the work performed by the firefighters and reinstate the status quo as it existed before the unlawful transfer.

b. Upon demand, bargain with the Iron Mountain Firefighters Association, Local 554, regarding wages, hours, and other terms and conditions of employment within the meaning of Section 15 of PERA, including any decision to transfer work previously performed exclusively by its members and the effects of that decision.

c. Post copies of the attached notice to employees in conspicuous places on Respondent's premises, including all locations where it customarily posts notices to employees. A City of Iron Mountain representative shall sign the notices, post them for thirty consecutive days and take reasonable steps to prevent them from being altered, defaced, or covered by any other material.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Roy L. Roulhac
Administrative Law Judge

Dated:_____

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION FOUND THAT THE CITY OF IRON MOUNTAIN COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). BASED UPON THE COMMISSION'S ORDER, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL cease and desist from failing to collectively bargain with the Iron Mountain Firefighters Association, Local 554, by transferring bargaining unit work without giving that labor organization notice and an opportunity to engage in meaningful bargaining.

WE WILL cease and desist from discouraging membership in the labor organization by discriminatorily transferring bargaining unit work or by discriminating against employees in any other manner regarding their hire, tenure or any other term and condition of employment.

WE WILL cease and desist from any other manner interfering with, restraining or coercing employees in the exercise of rights guaranteed by Section 9 of PERA.

WE WILL take the following affirmative action in order to effectuate the policies of the Act:

a. Upon demand, rescind its transfer of work performed by the firefighters to cross-train police officers and reinstate the work as it existed before the unlawful transfer.

b. Upon demand, bargain with the Iron Mountain Firefighters Association, Local 554, regarding wages, hours and other terms and conditions of employment within the meaning of Section 15 of PERA, including any decision to transfer work previously performed exclusively by its members and the effects of that decision.

All of our employees are free to engage in lawful, concerted activity through representatives of their own choice for the purpose of collective bargaining or other mutual aid or protection as provided by Section 9 of the Public Employment Relations Act.

CITY OF IRON MOUNTAIN

BY: _____

TITLE: _____

Dated: _____

Direct questions about this notice to the Michigan Employment Relations Commission, 3026 W. Grand Blvd, Ste. 2-750, Box 02988, Detroit, MI 48202. Phone (313) 456-3510.