STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MICHIGAN TECHNOLOGICAL UNIVERSITY,
Public Employer-Respondent in Case Nos. C05 J-246 and R05 J-131,

-and-

MICHIGAN TECHNOLOGICAL UNIVERSITY CHAPTER,
AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,
Labor Organization-Charging Party in Case No. C05 J-246,
Incumbent Union in Case No. R05 J-131,

-and-

MICHAEL ROGGEMAN,
Petitioner in Case No. R05 J-131.
____/

APPEARANCES:

Butzel Long, PC, by Craig S. Schwartz, Esq., for the Public Employer Respondent

Gregory, Moore, Jeakle, Heinen & Brooks, PC, by Gordon A. Gregory, Esq., and Emilie D. Rothgery, Esq. on the brief, for the Charging Party Labor Organization

DECISION AND ORDER

On March 6, 2007, Administrative Law Judge (ALJ) Julia C. Stern issued her 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 were filed by any of the parties to this proceeding. Therefore, on March 29, 2007, we issued an order adopting the Decision and Recommended Order of the ALJ. Subsequently, the ALJ requested the opportunity to respond to a Motion to Clarify the Decision and Recommended Order filed by Charging Party on March 29, 2007. By a Decision and Order issued April 2, 2007, we set aside our earlier order and remanded the matter to the ALJ to permit her to respond to Charging Party's motion. On April 4, 2007, the ALJ issued an Errata correcting the clerical error that prompted Charging Party's motion. Accordingly, we enter the following order:

ORDER

Pursuant to Section 16 of the Act, the Commission adopts as its order the order recommended by the Administrative Law Judge as corrected by the Errata issued April 4, 2007.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: ____________

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DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10, 12, 13 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, 423.212, 423.213 and 423.16, this case was heard at Lansing, Michigan on May 11, May 12, and July 18, 2006, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the Employer and the Labor Organization on October 9, 2006, I make the following findings of fact, conclusions of law, and recommended order.

The Petition and Charge:

On October 13, 2004, the Michigan Technological University Chapter, American Association of University Professors (the Union) was certified as the collective bargaining agent for a unit of tenured and tenure track teaching faculty employed by Michigan Technological University (the Employer or the University.) On October 10, 2005, the Union filed an unfair labor practice charge against the Employer asserting that on or about June 25, 2005, the Employer unilaterally announced, and then implemented, merit-based salary increases for members of the Union's bargaining unit while the parties were engaged in bargaining their first collective bargaining agreement. The Union alleges that these salary increases constituted a unilateral change in wages and violated the Employer's duty to bargain in good faith under Sections 10(1)(a) and (e) of PERA. The Employer maintains that annual merit-based salary increases had become an existing condition of employment for faculty and that it was allowed and obligated to maintain the status quo during bargaining. It also asserts that the Union waived any rights it may have had to bargain over these salary increases.

On October 14, 2005, Michael Roggeman, a faculty member and member of the bargaining unit, filed a petition for an election to decertify the Union. On November 3, Charging Party filed an amended charge asserting that that Respondent's granting of the salary increase contributed to the filing of the petition. The amended charge also alleged that Respondent violated its duty to bargain in good faith by refusing to continue contract negotiations after the petition was filed. The charge and petition were consolidated for hearing.

Findings of Fact:

Background- History of Faculty Salary Increases

As indicated above, the Union was certified on October 13, 2004. The Union conducted a previous organizing drive in 1999 and 2000, but did not file a petition at that time. Until the Union's election, the Employer's faculty had never been represented by a bargaining agent. Other labor organizations currently represent the University's clerical, skilled trades, food service, custodial, and security employees.

> The University decides whether and how much of a salary increase it will give to unrepresented employees each year as part of formulating its budget for that year. Although budget discussions go on throughout the year, in May and early June the University administration prepares a recommended budget for the upcoming fiscal year beginning July 1. The wage and salary line item in the recommended budget incorporates wage increases to be negotiated with the unions representing University employees and salary increases, including those connected with promotions, for unrepresented employees. Although extensive discussions within the administration lead up to this recommendation, the University's president makes the ultimate decision on the budget to be presented to the University's Board of Control (the Board). By the time the administration presents the Board with a budget, the administration has decided how much money to allocate for salary increases for unrepresented employees and how these increases are to be distributed. The Board formally adopts the budget in late June.

The record in this case includes information regarding the amount and timing of annual salary increases granted to faculty and other unrepresented employees beginning with the 1994-1995 fiscal year. Except for increases associated with promotions, there was no salary increase for faculty or other unrepresented employees in the 2002-2003 and 2004-2005 fiscal years. In the years in which salary increases were given between 1994 and the 1999-2000 fiscal year, the increases were generally effective July 1. In fiscal year 1999-2000, and again in fiscal year 2000-2001, half the increase went into effect in the middle of August, and half in the middle of December. Since the

2001-2002 fiscal year, the effective date of any salary increase has been the middle of August, with faculty receiving the increases in their first paycheck in September.

The University has made it clear to its faculty and unrepresented employees that it prefers to award salary increases based on merit and market/equity factors rather than to give across-the-board raises.1 In most of the years since 1994, the University has not given its unrepresented employees any across-the-board increase but has set aside a certain percentage of the salary budget as a "pool" for merit increases and a smaller percentage as a "pool" for market/equity raises. According to the University's budget director, whose testimony I credit, during the budget discussions for the fiscal year 1997-1998 a committee of University budget unit heads decided that the salary pool that year was not big enough to warrant the effort of allocating the money by merit. The committee decided for that year, and in the future, it would give unrepresented employees across-the-board salary increases whenever the increase amounted to less than two percent. The University gave its unrepresented employees a one percent across-the-board salary increase in the fiscal year 1997-1998. In fiscal year 2001-2002, faculty and unrepresented employees received a 1.5 percent across-the-board increase. Even though it was not clear from the record that the University told faculty about this policy, I credit the testimony of University president Glenn Mroz and Provost David Reed that since 1997 it has been the University's policy to give across-the-board increases only when the salary increase pool amounts to less than two percent of the total salary budget.

While the University's goals include raising the level of faculty salaries, it bases its annual decision on whether and how much to increase salaries for unrepresented employees on its assessment of the University's overall financial situation and other demands on its budget. In 1998, the University prepared a five-year budget model that set a target of a 4.5 percent salary increase for faculty each year. However, the salary increases the Employer actually gave between 1994 and 2004 ranged from a high of six percent in fiscal year 2000-2001 to a low of one percent in the fiscal year 1997-1998. The size of the faculty salary pool was four percent of total salaries in 1999-2000, six percent in 2000-2001, 1.5 percent in 2001-2002, zero in 2002-2003, three percent in 2003-2004, and zero in 2004-2005.

The University has followed more or less the same system in all the years in which it has granted salary increases based on merit and equity. The money for merit increases is distributed to University academic departments or schools according to their percentage of the total salary budget. Each department or school receives a communication from the administration telling it the size of the merit increase pool by percentage of the salary budget, the size of the market/equity pool by percentage of the salary budget, and the dollar amount of the increases to be awarded to faculty promoted from assistant to associate professor and from associate to full professor during the previous year. In some years, the departments/schools have been allowed by the administration to add their own funds to the merit increase pool. The department or school determines how the merit funds allocated to it will be distributed among its faculty and other unrepresented employees. The department chair or dean of the school submits the department's recommendations to the University administration. Usually the distribution of merit funds is part of the department's performance review process. In many departments, there are departmental charters or other established intradepartmental procedures that set out the factors the chair is to consider in assessing merit and/or the weight to be given to each factor in deciding to give merit increases. In at least one department, a faculty committee advises the chair on the allocation of merit pay. A department chair's recommendation regarding individual merit salary increases must be approved by a dean, the University provost and the University president. A department is not required to explain to the administration how it made its decision on each faculty member's pay, but it must describe the

1 A market-based wage increase is awarded when the University determines that the salary it pays to a particular faculty member is not competitive with the salary he or she could earn at a comparable institution. Merit increases are awarded based on the individuals' achievements.

general procedures it follows.

The procedure for distributing the money set aside for market/equity raises varies from year to year. In some years, the departments and schools have received the money as a percentage of their salary budget, and have distributed it among their faculty as they do with the merit increase funds. In other years, the University's central administration has awarded increases to individual faculty members based on recommendations made by department chairs.

Each year, the University administration determines how much of a salary increase it will pay faculty promoted from assistant to associate professor and from associate to full professor during the previous year. In those years when the University has awarded salary increases based on merit and equity, the department chairs receive worksheets for calculating and reporting the amount of each faculty member's merit, equity, and promotional increases, if any, and a deadline for completing the allocation process and turning in their worksheets.

During the Union's election campaign in the spring of 2004, some faculty expressed concern that their wages would be frozen because of the pending petition. On its website, the Union responded to this question as follows:

> Once the union is elected the university cannot unilaterally <u>decrease</u> salary or benefits. At the minimum, the status quo must be maintained. There is nothing to stop the university from awarding fair, equitable pay increases to the faculty as a whole. (Emphasis in original).

On May 26, 2004, University president Mroz sent the Union officers a response to a letter they had sent to the faculty on the topic of faculty salaries. Mroz's letter included the following paragraph:

> With regard to raises this coming year, if the financial picture were more positive, I would recommend a general salary increase to the Board. I feel very strongly about the need to attract and retain outstanding faculty and salaries are one of the key factors in accomplishing this. I can assure you that my motivation would not be to "attempt to buy votes." In addition to the constraints in our financial condition, as I understand it, changes in compensation levels could be considered an unfair labor practice while your petition is pending. I assure you that we are working to bring stability to our budget and more forward thinking and planning so that raises become more predictable.

In its June 9, 2004 response, the Union told Mroz:

> The fact that the Chapter has filed a petition for a collective bargaining election should have no effect whatsoever on the decision to implement salary increases. Sound advice from your lawyers will inform you that the plans for salary increases need not be delayed because of the election petition. The Chapter remains committed to working for fair salary increases for all MTU faculty and would not interfere with the administration's decision to go ahead with any planned across-the-board salary increases during the pendency of the petition. You will have noted that selective salary increases might be problematic. If you wish, the Chapter would welcome signing any document prepared by your lawyers to this effect.

The budget adopted by the Board for the 2004-2005 fiscal year contained no wage increases for faculty or other employees other than those connected with promotions.

<u>Events Between the Union's Certification and the Beginning of Negotiations</u>

On November 12, 2004, Union president Bruce Barna wrote to Ellen Horsch, the University's vice president for administration and the individual generally responsible for its labor relations. Barna stated that the Union was in the process of preparing to engage in collective bargaining and that it expected to contact the Employer shortly to set up a meeting to discuss ground rules and a negotiating schedule. The Union requested that the Employer refrain from any and all unilateral changes in wages, hours, and other conditions of employment, "such as those that serve to reduce salary or fringe benefits, or increase out-of-pocket costs of benefits," until such time as the parties could meet and negotiate a collective bargaining agreement. The Union stated, however, that it "would welcome an offer of across-the-board enhancements to salary and fringe benefits." Horsch replied in a brief letter dated November 18. Her letter stated, "Until we conclude negotiations, the University will adhere to past practices in regard to terms and conditions of employment."

During the following months, the Union was occupied in setting up an internal structure, selecting a bargaining committee, developing bargaining priorities and drafting bargaining proposals. The Union did not make a request to begin contract negotiations until early March 2005. However, between November and March, representatives of the Union met with representatives of the Employer, including Horsch, on a monthly basis to discuss issues of mutual concern. Although there was discussion in these meetings concerning what constituted "past practices," there is no evidence that the parties specifically discussed whether the University had a "past practice" of giving an annual faculty salary increase.

The University has a cafeteria-style benefit plan for its nonrepresented employees. In the fall of each year, a University committee reviews these benefits and makes recommendations to the president regarding changes. In the fall of 2005, the University, at the recommendation of its committee, added back to its plan dental benefits that had been removed in a previous year. However, the co-pay and premiums were higher than employees had paid when dental benefits had last been part of the plan. On December 3, the Union wrote the Employer stating that it did not object to the changes per se, but complaining that the changes had not been negotiated. The Union reminded the Employer that it had the obligation to refrain from implementing unilateral changes in terms and conditions of employment until the parties could reach a collective bargaining agreement. In a letter dated December 14, the Employer replied:

> The University will adhere to past practices in regards to terms and conditions of employment. At times before a contract is negotiated, the University may find it necessary to implement changes in procedure or practice; we will do so consistent with past practices. Since we have yet to begin the formal bargaining process, the University must continue to conduct business consistent with past practice and current policies.

The Union did not pursue the matter further.

In February 2005, the Employer announced a plan to expand its External Research Incentive Program (ERIP) from the school of forest resources and environmental sciences to all University departments. ERIP provided faculty with additional money for research activities. At a meeting on February 11, the Union told the Employer that it considered the proposed expansion of ERIP to be a change in wages, hours or terms or conditions of employment. On February 23, it wrote Respondent stating that it would be prepared to discuss this issue at the bargaining table, and requested that the University terminate any plans to extend the existing program until it could be negotiated. Thereafter, the Employer notified the Union and the faculty that it was withdrawing its plans to extend ERIP to faculty members outside the school of forest resources.

<u>2005 Contract Negotiations and Salary Increases</u>

The Employer hired an experienced contract negotiator, attorney Thomas Hustoles, to conduct its negotiations with the Union. Horsch put together the Employer's negotiating team, helped formulate the Employer's bargaining positions and generally acted as facilitator, but was not part of the bargaining team. The head of the Union's bargaining team was professor Madhukar Vable. The parties' first negotiation session was March 24, 2005. They began by discussing ground rules and the order of bargaining. The Union proposed to present the proposals it deemed least controversial first, leaving the most controversial proposals, including economic proposals, to the end of bargaining. Hustoles suggested that the parties pursue a more traditional course, with the Union presenting all its noneconomic proposals first, and the parties resolving as many noneconomic issues as possible before moving on to the economic issues. The Union did not object. At the next two bargaining sessions, on April 25 and April 26, the Union presented the Employer with a set of noneconomic proposals. At their fifth bargaining session, on May 5, the parties agreed to a set of written ground rules, although the ground rules did not address the order of bargaining. I find that the parties had a general agreement that they would discuss and try to resolve noneconomic issues first, but that there was no specific agreement that neither party would present an economic proposal until the parties had bargained all noneconomic issues to agreement or impasse.

The bargaining teams immediately experienced difficulties dealing with each other. Hustoles testified that he was frustrated by what he saw as the unprofessional conduct and irrational positions of the Union's inexperienced bargaining committee. He did not hide his opinion of the Union's bargaining team. The Union's bargaining committee were irritated by Hustoles' repeated references to his years of experience, and bristled at what they saw as his arrogance and attempts to bully them. The parties had four additional negotiating sessions between May 5 and June 23, 2005. They discussed the Union's noneconomic proposals, and the Employer offered counterproposals, but the parties did not reach tentative agreement on any issue. During these meetings, Hustoles told the Union that he was concerned that portions of the Union's proposed union security and checkoff proposals were illegal. Hustoles mentioned language in the clause stating that the service fee would be equivalent to dues.2 He also said that he did not believe that a provision allowing faculty members to resign from the Union only during an annual window period was consistent with the law, and that he believed that a provision requiring the University to impose a furlough equivalent to one percent of the faculty member's salary on faculty who refused to execute checkoff forms was illegal. Hustoles also told the Union that the University was opposed in principle to requiring nonmembers to pay service fees to the Union. In addition, he objected to a Union proposal, presented on June 8, entitled "Faculty Participation in Governance," on the basis that it dealt with nonmandatory subjects of bargaining, including the selection of chairs and deans. The parties also argued over whether the contract should refer to the Employer as "Michigan Technological University" or "The Board of Control of Michigan Technological University."

While the parties were discussing these issues, the University was completing its annual budget. Three or four times a year, the University schedules a public meeting called the President's Forum. One of these meetings was held on about June 23, 2005. At this meeting, University president Mroz did a presentation on the budget for the upcoming fiscal year beginning July 1. During this presentation, he said that he was going to recommend a merit adjustment for the faculty of three percent and a marketplace equity adjustment of .7 percent. Mroz also said at the meeting that "union employees" would also receive an increase in their wages. The administration did not specifically invite the Union to attend the President's Forum, although Terry Munson, a member of the Union's negotiating team, was present.

The Board adopted the administration's proposed budget at its meeting on June 25, 2005. At this meeting, Horsch reported to the Board that the University was bargaining with the Union but

2 In response to the Employer's objection, the Union altered its proposal to state that the agency fee would be "an Association-determined percentage of Association dues."

had not reached agreement. She also reported that the Employer's contracts with its other labor unions were expiring in the coming months but that negotiations with these unions had not yet begun. Some faculty members, including Munson, attended this meeting. No one representing the Union addressed the Board at this meeting.

On June 27, an article was published in the daily University publication, "Tech Today," about the wage increases included in the budget. The article stated, "Three percent will be distributed at the unit level while 0.7 will be available centrally for marketplace and equity adjustments." The Board chairman was quoted as stating that he approved the raise pool because "it was important to attract and retain the finest faculty and staff."

At the parties' next scheduled negotiation session on July 7, the parties continued to discuss the Union's noneconomic proposals. There was no discussion at the July 7 meeting of the University plans to implement raises for faculty. Horsch testified that the University did not feel it was necessary to address the issue in bargaining because "the salary process was business as usual." Union president Barna testified that the Union did not feel it was necessary to raise the issue because it assumed, from the University's statement that union employees would receive negotiated raises, that the University did not intend to implement salary increases for the faculty without negotiating them. The parties continued discussing noneconomic issues on July 8 and July 11, 2005. They had still reached almost no tentative agreements and were still trading proposals and counterproposals about the language of the preamble and recognition clause.

On July 11, 2005, the University sent a memo to its budget unit heads announcing that that for this fiscal year there was a three percent merit increase salary pool and .7 percent market/equity pool for faculty and unrepresented staff. The memo also stated that the increases for promotion to associate and full professor were to be increased to $3,500 and $5,000 respectively. The July 11 memo included a specific time line for completing the allocation process and required the departments to submit their salary worksheets to the University's human resources department by August 8. It stated that employees would receive their salary increases in their September 2 paycheck. On July 25, the administration e-mailed worksheets to the departments.

In early July, Barna contacted the Union's counsel, Gordon Gregory, and expressed his concern that the University intended to implement salary increases for faculty. On July 11, Gregory and Hustoles had a telephone conversation in which they talked about the proposed salary increases and the parties' lack of progress at the bargaining table. Hustoles complained bitterly to Gregory about the Union's bargaining committee. Hustoles and Gregory discussed the legal issues that Hustoles believed were raised by the Union's union security proposal. Hustoles confirmed that the University intended to proceed with merit increases. He told Gregory that he had no role in that decision. Gregory told Hustoles that it was inappropriate for the Employer to take that action unilaterally. Hustoles then mentioned that a member of the Union's bargaining team, Munson, had been at the Board meeting but had not raised an objection. Gregory told Hustoles that he planned to send a letter to the University complaining about the increases.

On July 14, Gregory sent Horsch the following letter:

> On June 24, 2005, the Board of Control, without notice to or bargaining with the Association, adopted a budget granting a 3.7% salary increase to faculty with implementation scheduled for the fall semester. It was announced subsequently that the 3.7% increase would be distributed as 3% for merit and .7% for equity and market. This action was also taken without notice to or bargaining with the Association.
>
> The Board's unilateral action was taken notwithstanding an express understanding with Administration negotiators that economic issues, particularly salary, would be

> negotiated after the resolution of most noneconomic issues. That understanding has been breached. The rationalization that the Board acted in accordance with prior practice and policy is without merit since faculty have no had a meaningful salary increase in a number of years.
>
> The Association considers the aggregate 3.7% increase inadequate. The amount of the increase and the distribution of that increase between merit, across-the-board and equity/marketplace adjustments are mandatory subjects of collective bargaining. The Association intends to present proposals and to bargain for departmental input concerning the mechanism for allocating merit based salary increases. Accordingly, without waiver of its right to bargain on the subject of wages, the Association would not object to using all or a portion of the 3.7% as an across-the-board increase with an additional increase to be negotiated.
>
> I suggest that you contact Dr. Barna if you have any questions.

On July 27, Horsch sent Gregory a reply that simply acknowledged receipt of the letter and stated that if the University had any questions it would contact Barna. According to Horsch, after she received this letter the University sought a legal opinion on the lawfulness of implementing the wage increase. She did not attempt to discuss the issues raised in the letter with Barna or any other Union representative.

Bargaining sessions had been scheduled for July 26 and July 27. The July 26 meeting was cancelled when Hustoles missed his plane. On that day, the Union faxed Hustoles a written proposal on fringe benefits and leave time. Hustoles replied with the following e-mail to Vable:

> We do not understand why time will be spent on elaboration of benefits and leave proposals. As we explained at the beginning of negotiations, the normal course of bargaining is for the association to present a complete non-economic proposal, at which time the employer responds, and then the parties try to resolve as many of those issues as possible, at which time economic issues are considers [sic]. It is our position that we have not yet reached impasse on outstanding non-economic issues, so any discussion of leaves and benefits is premature.

At the July 27 session, Hustoles told the Union's bargaining team that its benefit and leave proposal was premature because the parties had not yet reached impasse on the majority of noneconomic items still on the table. According to Hustoles, the parties spent the rest of that meeting talking about a Union proposal on tenure and promotions. Hustoles testified that there was no further discussion at that meeting of the benefit and leave proposal, and no discussion of the Employer's plan to implement wage increases. Vable had a more detailed recollection of this meeting. According to him, Hustoles was angry at the Union for presenting its benefit and leave time proposal. He told the Union that the parties would have to start making progress on the noneconomic issues before they were ready to begin discussing economics. According to Vable, the parties argued about whether the grounds rules prohibited the Union from bringing an economic proposal to the table before the parties were done discussing noneconomic issues. At some point, Hustoles became offended and rose as if to leave the room. According to Vable, he told Hustoles that the Union was ready to proceed but that "we want to know when we can expect a reply to our attorney." Vable and Union bargaining team member Nancy Grim testified that Vable accused the University of committing an unfair labor practice. University budget director Deborah Lassila, a member of the Employer's bargaining team, denied that Vable used the word "unfair labor practice," although she agreed that Vable expressed disappointment with the University's decision to move forward with the raises and that he asked Hustoles for a response to Gregory's letter. Vable, Lassila and Grim testified that Hustoles responded, "It's in the administration's hands," or "You chose to correspond with us through your attorney, and I will reply to him." The Union then caucused, and according to Vable, decided that it was important to continue bargaining even if the Employer would not discuss economic proposals. The parties returned to their discussion of the Union's noneconomic proposals. Lassila corroborated the salient points of Vable's testimony, and I credit his testimony about this meeting.

On July 29, Vable sent Hustoles the Union's salary proposal by e-mail. In this e-mail he said,

> The Administration [sic] unilateral decision on merit raises in the midst of negotiation has caused a great deal of perturbation across the university. In an effort to quell some of these disturbances and address some of the many questions being raised, we have decided to release our proposals. It would be inappropriate to release the proposals to the faculty before giving it to you. We will give you the green copies of our proposals at our August 3 meeting.
>
> In context of your point in the e-mail and also made at the negotiating table about the presentation of non-economic articles before the economic articles we have a difference in interpretation as to what was implied. I am sure in your mind it meant the sequence of presentation implied resolution or impasse before consideration of economic proposals. In our mind it implied only a sequence of presentation but without the limitation of resolution or impasse. Having said that, I think we can continue our negotiation and when we have considered all non-economic articles and reached a mutual understanding about resolution or impasse we will move to consideration of economic articles. See you on August 3.

The Union's salary proposal covered wages for the 2005-2006, 2006-2007, and 2007-2008 fiscal years. For 2005-2006 fiscal year, it proposed an across-the-board increase of two percent plus a fixed adjustment of $1,200, together with a four percent merit increase to be "allocated to academic faculty in that academic unit according to procedures approved by a majority of academic faculty in that unit by a secret ballot." The proposal stated that the University could implement market-based adjustments at any time after notice to the Union but that such adjustments would not be considered part of the salary increase pool. The Union proposed that the increases for promotions to associate and full professor be $4,000 for the 2005-2006 fiscal year.

The agenda for the August 3 negotiating session was discussion of the Union's tenure and promotion proposal. The Union gave the Employer another copy of its salary proposal at that meeting. It was not the parties' practice to discuss proposals at the same meeting at which they were presented, and the Union did not attempt to discuss its salary proposal on August 3. During the meeting, Hustoles raised the issue of an e-mail that the Union had sent to its members accusing the Employer of violating the negotiating ground rules by giving the raise while the parties were still discussing noneconomic issues. He told the Union that there was nothing that foreclosed the University from acting in accord with past practice in giving raises. The parties argued about whether the raises were a past practice. The parties eventually returned to discussing the tenure and promotion proposal.

Sometime on August 3, Gregory telephoned Hustoles. He told Hustoles that the Union was upset over the Employer's refusal to discuss economic issues. Hustoles said that he had not refused to discuss economic issues, but that the parties had agreed on a sequence of bargaining. He said that the Employer wanted to keep talking about noneconomic issues until the parties were making no more progress. He also said that the Employer had received the Union's economic proposals, and that it would make a response at the appropriate time. Hustoles and Gregory went on to discuss the progress of negotiations, and Hustoles explained that he felt that the Union team was taking unreasonable positions on noneconomic issues. He said again that the parties needed to make more progress on these issues before they were ready to discuss economics. Gregory suggested that he and Barna meet directly with Hustoles and Horsch, and or that the parties use a mediator. When the conversation turned to the wage increases, Hustoles told Gregory that the Union had not raised an objection to the wage increases, and that the Union had proposed that the Employer maintain the status quo. Gregory mentioned the July 14 letter and stated that it was clear that the Union was prepared to negotiate with respect to an additional amount of increase as well as the method of distribution. Gregory told Hustoles that he could not understand why an Employer "would put money on the table before negotiations had essentially begun." Hustoles replied that the Union had taken an unreasonable position with respect to across-the-board raises. At the end of their telephone conversation, Gregory referred again to the July 14 letter. It is at this point that Hustoles' and Gregory's recollection of their conversation diverges. Hustoles testified that Gregory told him, "the Union was not going to file an unfair labor practice charge because the University had it between a rock and a hard place." According to Gregory, he said, "we are not going to file an unfair labor practice at this time." Gregory's account of this conversation was more complete, and I credit his version. Moreover, as discussed in the sections below, I do not believe that whether or not Gregory said that the Union was not going to file an unfair labor practice "at this time" is material.

Hustoles testified that he understood Gregory to be agreeing on behalf of the Union to withdraw its objections to the wage increases. After the conversation ended, Hustoles immediately called University president Mroz and told him that Gregory had said that the Union was not going to file an unfair labor practice charge over the salary increases. According to Mroz, until this conversation the University had not made a final decision on whether to implement the increases, but that after this conversation he decided to go ahead.

Another bargaining session was held on August 12. According to Vable, he asked again about the July 14 letter, and Hustoles said again that he would not discuss it. The parties returned to discussing the Union's noneconomic proposals.

On August 19, Mroz wrote the following in a letter to deans and department chairs:

> Michigan Tech has a bright future as a university of distinction and prominence in the nation. At the core, the university must be recognized for high quality teaching, scholarship and service to students. Many recent national and international awards to faculty members attest that this quality is pervasive at Michigan Tech. To be sustainable, faculty and staff must work in an atmosphere where performance is rewarded in a predictable manner. We have repeated throughout the year that compensation is a priority. To back away from that promise is simply not acceptable; it would erode confidence, morale and lead to the loss of faculty and the staff members.
>
> Therefore we will consistent with prior practice, continue to move forward with raises for faculty and staff based on merit, marketplace and equity considerations. We are also increasing promotional salary adjustments for those moving from Assistant to Associate Professor (from $3000 to $3500) and Associate Professor to Professor ($4000 to $5000). This is necessary now and into the future to move Michigan Tech to a position of distinction and national prominence; a university where it is clear that quality is rewarded. This is key to the execution of our strategic plan. The suggestion to unilaterally give across the board salary increases rather than increases based on merit, marketplace and equity, is as counterproductive to the University as across the board decreases and furloughs have been in the past.

Barna was sent a copy of this letter, and the letter was widely distributed on campus. The department chairs were instructed to tell individual faculty members how much of a salary increase they were to receive sometime between August 22 and August 30. The promotional, merit and equity raises were effective August 14, 2005, and faculty received them in their first September paycheck.

In September, cards began to be circulated for an election to decertify the Union. The parties met for negotiating sessions on September 9, 15, 16, and 22. On September 15 and 16, Gregory and a representative of the Union's national organization attended the bargaining sessions. The parties began to make progress and reached tentative agreements on several significant noneconomic issues. Hustoles told the Union that he did not believe that the parties were going to get an immediate agreement on the remaining noneconomic issues, and agreed to begin discussing the Union's economic proposals. On September 22, the parties began going over the Union's salary and benefits proposals. The Employer's bargaining team had a number of questions about the proposals. David Chesney had recently replaced Vable as the Union's chief negotiator. He told the Employer that as he was not part of the committee that drafted the wage proposal he was not prepared to discuss the details of the proposal. The parties did discuss the benefits proposal, and the Union agreed to rework some language in the proposal. At the next session, on October 10, the parties went over the Union's wage proposal in detail.

The decertification petition was filed on October 14, 2005. Thereafter, a Commission election agent advised Horsch that the Employer should not continue to meet with the Union, and the Employer told the Union that it would suspend negotiations while the petition was pending. The parties did not meet again after October 10, 2005.

Discussion and Conclusions of Law:

Implementation of the 2005 Salary Increases

The Employer's Duty to Bargain

Under both PERA and the National Labor Relations Act (NLRA), 29 USC 150 et seq., the federal statute upon which PERA is modeled, an employer has the obligation to bargain with the representative selected by a majority of its employees for purposes of collective bargaining with respect to wages and wage-related issues, as well as other conditions of employment. The amount of any salary increase, whether the money is to be distributed across-the-board or by merit, the amount of the increase paid to employees upon their promotion within the unit, are all subjects upon which an employer is required to bargain. An employer's unilateral implementation of a wage increase while it is engaged in bargaining a contract with the union is a violation of its duty to bargain in good faith, even though the employer may be attempting in good faith to reach a contract. *NLRB v Katz*, 369 US 736 (1962). As the Supreme Court said in *Katz,* at 743, a unilateral change in conditions of employment under negotiation is "a circumvention of the duty to negotiate which frustrates the objectives of [the NLRA] much as does a flat refusal to bargain."

In *Munson Medical Center,* 1971 MERC Lab Op 932, the Commission held that an employer violated its duty to bargain in good faith when it granted wage increases during contract negotiations over the union's objection (the union proposed that the contract be made retroactive to the date of the increases and that the increases be held in escrow until a contract was reached). However, both the Commission and the National Labor Relations Board (NLRB) have held that an employer's *refusal* to give wage increases during contract negotiations may also be an unfair labor practice when those wage increases have themselves become an established condition of employment. For example, in *Mid-Michigan Cmty College*, 1988 MERC Lab Op 471, the Commission held that an employer unilaterally changed a ten-year past practice by refusing to permit employees, while contract negotiations were ongoing, to move to the next level of the salary scale based on their experience. The principal is clear:

> Whenever the employer by promises or by a course of conduct has made a particular benefit part of the established wage or compensation system, then he is not at liberty unilaterally to change this benefit either for better or worse during . . . the period of collective bargaining. *NLRB v Dothan Eagle,* 434 F2d 93, 98 (1970).

In practice, however, it can be difficult to determine if an employer's wage increases have become "part of the established wage or compensation system." In *Mid-Michigan*, the Commission held that the employer who was obligated to give its newly-organized employees step increases did not have to give them an across-the-board raise, even though the employer usually gave its unrepresented employees some sort of across-the-board raise on July 1 each year. The Commission adopted the finding of its administrative law judge that there was no such obligation where there was no "ascertainable" or "set" wage increase that the employer could have implemented without bargaining. Compare, *Guy Gannett Publishing Co,* 295 NLRB 376 (1989), where the National Labor Relation Board (NLRB or the Board), with one dissent, held that an employer could not refuse to give its newly-organized employees a wage increase when it had given all its unrepresented employees across-the-board increases ranging from four to 8.9 percent every year on the same date for at least the previous six years.

Employers often have compensation systems combining performance reviews with merit increases given in connection with these reviews at about the same time each year. The Commission has not addressed the issue of whether salary increases given pursuant to these types of programs constitute a "part of the established compensation system." However, the NLRB generally holds that an employer must continue an established merit raise program while negotiating its first contract with the employees' bargaining representative, even though the employer has exercised discretion in awarding salary increases under that program. The NLRB has noted that in these circumstances, employees have a reasonable expectation that this wage increase will be part of their ongoing conditions of employment, at least until their employer and their union have reached an agreement on a new wage scale, and that an employer's refusal to continue its past practice effectively communicates to employees that they are worse off because they selected the union as their bargaining representative. The Employer has cited a number of such cases in its brief. In *Allied Products Corp,* 218 NLRB 1246 (1975), the employer had a four-year practice of reviewing each employee's performance annually and giving him or her a merit raise of between ten and twenty-five cents per hour. The NLRB held that the employer could not lawfully abandon this practice without bargaining with the union. In *Rochester Institute of Technology,* 264 NLRB 1020 (1982), the Board held that an employer could not discontinue its policy of granting new employees merit increases ranging from zero to thirteen percent, depending on their evaluation by the supervisor, on July 1 of their first full year of employment. In *Dynatron/Bondo Corp,* 323 NLRB 1263 (1997), the employer was held to have committed an unfair labor practice by discontinuing its long-standing practice of granting employees merit raises of between fifteen and fifty cents per hour at the end of their probationary periods and on their anniversary dates. In *Harrison Ready Mix Concrete Co,* 316 NLRB 242 (1995), the employer had a practice of giving an annual raise that included both a cost-of-living component and a merit increase that ranging from zero to two percent based on the employee's evaluation. The NLRB held that the employer violated its duty to bargain by unilaterally refusing to give any raise while the parties were bargaining. In *Eastern Maine Medical Center,* 253 NLRB 224 (1980), the Board applied similar reasoning to an annual wage increase given to maintain the employer's competitiveness. In that case, the employer conducted a wage survey each year in December, announced the results of this survey to its nurses in March, and implemented wage increases in keeping with this survey in April. The NLRB held that these wage increases were existing conditions of employment, and that the employer violated its duty to bargain by conducting the survey but refusing to implement the wage increase while the parties were bargaining.

Although an employer's merit review system may have become an established term and condition of employment which it cannot unilaterally discontinue, it does not follow that the employer has no duty to bargain with the union over wage increases granted pursuant to that system. In *Daily News of Los Angeles,* 315 NLRB 1236 (1994), the NLRB held that the employer that had an established practice of granting merit raises that were fixed as to timing but discretionary in amount was precluded from discontinuing that practice without bargaining to agreement or impasse with the union. However, the Board at 1239, cited the following passage from *Oneita Knitting Mills,* 205 NLRB 500, fn 1 (1973):

> An employer with a past history of a merit increase program neither may discontinue that program . . . nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected. [Citing *Katz*]. What is required is maintenance of preexisting practices, i.e. the general outline of the program, however, the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted.

See also *General Motors Acceptance Corp,* 196 NLRB 137 (1972), where the NLRB held that that an employer who had a policy of evaluating employee performance and giving merit increases at irregular times and in irregular amounts had an obligation to continue the general outline of its program, despite the discretion exercised by the employer with respect to the salaries of individual employees under the program.

For more than a decade, the University's practice has been to decide how much of a salary increase to give its faculty at the time it establishes its annual budget. Except in those years in which the president recommended to the Board that no salary increases be given at all, since 1994 the Employer has given its unrepresented employees annual salary increases sometime between early July and early September. The increase has almost always been in the form of a combination of merit and market/equity pay. The only years when this was not the case were years when the total amount of money allocated for salary increases amounted to less than two percent of the salary budget. Although there is no evidence that all faculty members knew of this policy, I have credited the Employer's witnesses' testimony that the University adopted this "two percent" rule in 1997 and applied it again in 2001-2002 when it gave faculty a 1.5 percent across-the-board raise. The University also had well established procedures at the department level for distributing the money to individual faculty members according to merit and equity.

Each fiscal year during this period, however, the University has made an independent decision on the size of the salary "pool," and the percentages to be allocated to merit pay, market/equity pay, and promotional increases. Although the University, of course, must live within its means, the size of the pool and the way it allocated is a discretionary decision. The amount of money allocated to faculty salaries has varied considerably from year to year. Except for the two years in which unrepresented employees received no salary increase, the size of the salary pool was different each year between 1999 and 2005. Not only did the size of the salary pool vary from year to year, but there was no established formula for dividing the money among merit, market and promotional pay. In 2005, the percentage allocated to market/equity increases in 2005 was higher than at any time in the past, and the University increased the amount of the promotional increase from $3,000 to $4,000 for promotion from assistant to associate professor and from $4,000 to $5,000 for promotion from associate to full professor. I find that while the University had an established practice of granting wage increases to its faculty each summer, the size of the salary pool, and the percentages allocated to merit pay, market/equity pay, and promotional increases, were not established terms of employment constituting "part of the established compensation system." I conclude that after the Union was certified it had the right, and the University had the obligation, to bargain over all aspects of the University's 2005 salary increases which were not controlled by past practice. This included the size of the salary pool as well as the percentage allocated to merit pay, market/equity pay, and promotional increases.

The Union's Alleged Failure to Demand Bargaining

The Employer argues that even if the Union had the right to bargain over aspects of the salary increases, it waived its right by its failure to make a timely demand to bargain. An employer has no duty to bargain unless and until it receives demand from the Union. *Local 1586, SEIU v Village of Union City*, 135 Mich App 553 (1984). However, a demand to bargain does not have to take any particular form or contain any specific wording, as long as it is clear to the employer that a request for bargaining is being made. *St Clair Intermediate Sch Dist,* 17 MPER 77 (2004); *Michigan State Univ*, 1993 MERC Lab Op 52, 63.

When the University announced the salary increases in June 2005, it was clear that, in accord with past practice, the increases would not be implemented until the fall. There was nothing in the University's announcement that suggested that salary increases were a *fait accompli* and that a demand to bargain by the Union would be futile. However, the Union did not sit on its hands after this announcement, as the University seems to suggest. On July 14, 2005, a little more than two weeks after the Board's adoption of the budget, the Union sent the Employer a letter in which it clearly registered its objection to the University's unilateral implementation of the wage increases, the amount of the salary pool, and the allocation of the salary pool between merit and market/equity pay. The Union disputed the University's claim that it was merely acting in accord with past practice, pointing out that faculty had received no raise for several years. It also made a counterproposal – that the University use all or some of the salary pool to implement an immediate across-the-board increase while the parties continued negotiating a contract. I find that this letter constituted a demand to bargain, since it should have been clear to the Employer from this letter that the Union desired to negotiate over salary increases implemented while the parties were negotiating a contract.

The Employer, of course, had no obligation to agree to the Union's proposal for an across-the-board wage increase. Insofar as the record discloses, however, the Employer never explicitly rejected the Union's proposal. Had it done so, the burden would have been on the Union to make another proposal or tell the Employer that it was opposed to any faculty salary increases while negotiations were still going on.

The Employer argues that the Union's presentation of its salary proposals for all three years of the collective bargaining agreement did not constituted an adequate demand to bargain over the Employer's proposal to implement salary increases in the fall of 2005. It notes that where an employer proposes to change terms or conditions of employment during contract negotiations, a union waives its duty to bargain if its fails to demand bargaining and make counterproposals on that specific issue, citing *Stone Container,* 313 NLRB 336 (1993); *Allied Kentucky, Inc,* 326 NLRB

1350 (1998). I agree with the Employer that the Union had a duty to demand bargaining over the implementation of the 2005 salary increases, and that the presentation of its contract proposals were not a demand to bargain over the Employer's proposal to implement salary increases while the parties were still negotiating. However, the Union's decision to suddenly bring its economic proposals to the bargaining table out of order should have cleared up any doubt that the Employer might have had that the July 14 letter constituted a demand to bargain over the salary increases. At the beginning of negotiations, the parties agreed generally not to discuss the Union's economic proposals until they had finished discussing its noneconomic proposals. Both parties agreed in late July 2005 that they were not at impasse with respect to, or finished discussing, noneconomic issues.3 The Union clearly put its economic proposals on the table in late July only because the Employer was proposing to implement salary increases and had made no response to its July 14 letter except to acknowledge its receipt.

Hustoles was annoyed by the Union's presentation of its economic proposals out of order. I find that its was not unreasonable for the Employer to refuse to discuss these proposals at this time, since the parties had agreed generally to resolve noneconomic issues first and had made little headway in this area. However, at the July 27 meeting, Hustoles made it clear that not only did he not want to discuss the Union's economic proposals out of order, he also did not intend to address the issues raised by the Union's July 14 letter. That is, the Employer rejected any discussion of the 2005 salary increases at the bargaining table, either in the context of contract negotiations or as separate issue. I find that this rejection, coupled with the Employer's failure to provide the Union with any substantive response to its July 14 letter, amounted to a refusal to bargain over the salary increases. I also find that the Union had no reasonable expectation after the August 3 meeting that the Employer would agree to discuss the 2005 salary increases and, therefore, that it had no obligation to formulate another proposal specific to this issue.

Gregory's Statement that the Union Would Not File a Charge

The Employer also argues that the Union waived its duty to bargain, or was estopped from filing this unfair labor practice charge, by Gregory's statement to Hustoles on August 5 that "the Union did not intend to file an unfair labor practice charge." I cannot agree with the Employer that the Union, through Gregory, acquiesced to the salary increases. To the contrary, in the August 5 telephone conversation with Hustoles, Gregory complained about the Employer's implementation of the salary increases and suggested that the parties try meeting with a mediator or in sidebar negotiations. Gregory grudgingly acknowledged that if the Union filed an unfair labor practice charge that caused the Employer to halt its announced wage increase, the faculty would blame the Union. The Union thus "was between a rock and a hard place." Gregory did not tell Hustoles that the Union did not object to the salary increases.

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3 The Employer argues in its brief that it cannot be found guilty of refusing to bargain over the implementation of the wage increases because at the time of the implementation, the Union was insisting on nonmandatory, and in the case of portions of its union security proposal, illegal subjects of bargaining. However, in July 2005, the parties were still discussing these various proposals. The record does not establish that the Union had unlawfully insisted to impasse on any nonmandatory subject of bargaining. Moreover, the Employer never asserted that it was implementing salary increases because the parties had reached impasse at the bargaining table.

The Employer relies on an NLRB case, *Queen of the Valley Hospital*, 316 NLRB 721 (1995), for its position that Gregory's statement that the Union would not file an unfair labor practice charge constituted a waiver. In that case, a union asked an employer to go forward with announced wage increases while the union's representation petition was pending. The employer agreed to do so if the union agreed not to file unfair labor practice charges or objections to the election asserting that the wage increases were unlawful. In accord with the employer's request, the union wrote a letter expressly waiving its right to file any future unfair labor practice charge or objections in connection with the implementation of a the pay raise. The employer implemented the wage increase. After the union lost the election, it filed objections and a charge. The Board concluded that the parties had, by this letter, settled their dispute and, with one dissent, held that the union's letter constituted a "clear and unmistakable" waiver of the right to file an unfair labor practice charge over the wage increases.

In *Queen of the Valley*, the union, which had not been certified as the employees' bargaining representative, had no right to demand bargaining over the employees' wages. There was no dispute that the union wanted the employer to implement the wage increase as announced. To protect itself, the employer demanded that the union waive its rights in writing, and it did so. In the instant case, the sole evidence of waiver is a single statement by the Union's attorney during a private telephone conversation with the Employer's chief negotiator, during which conversation the Union's attorney also complained about the Employer's unilateral action and stated that the Union wanted to bargain. I find that Gregory's statement that the union did not intend to file an unfair labor practice charge "at that time" was not a "clear and unmistakable" waiver of the Union's right to bargain over the salary increase.

Summary of Findings

In sum, I find that the Employer had a duty to bargain over the aspects of the 2005 salary increases that had not become established practices, including the amount of the increase and the distribution of that increase among merit pay, market/equity pay, and promotional increases. I find that the Union demanded to bargain over these issues in its July 14, 2005 letter. I find that the Employer's failure to respond to the July 14, 2005 letter or discuss the implementation of the increases at the bargaining table constituted a refusal to bargain over mandatory subjects of bargaining. I also find that that the Union did not agree at any time to allow the Employer to implement the salary increases without bargaining. Based on these findings, I conclude that the Employer's unilateral implementation of salary increases violated its duty to bargain in good faith with the Union over the wages, hours, and terms and conditions of employment of the faculty members it represents.

Refusal to Negotiate After Decertification Petition Filed

The Union asserts that the Employer violated its duty to bargain by terminating negotiations after the decertification petition was filed. In *Midwest Piping & Supply Co*, 63 NLRB 1060 (1945), the NLRB held that when two unions presented claims to be recognized as the exclusive bargaining representative, an employer violated the NLRA by recognizing and bargaining with one of them. In *Shea Chemical Corp*, 121 NLRB 1027 (1958), the Board extended the *Midwest Piping* rule of employer neutrality to bargaining with an incumbent union. It held in *Shea* that, when faced with conflicting claims that raised “a real question concerning representation,” an employer could not lawfully bargain with an incumbent unless and until the Board had settled the question concerning representation. It noted, however, that the employer must permit the incumbent union to administer its contract and process grievances. *Shea* involved a petition by a rival union. In *Telautograph Corp,* 199 NLRB 892 (1972), the NLRB extended this rule to negotiations during the pendency of a decertification petition.

The Commission adopted the *Midwest Piping/Shea Chemical* principal of employer neutrality in *City of Dearborn,* 1967 MERC Lab Op 286, although it concluded in that case that the employer had not, in fact, engaged in contract negotiations with the incumbent union while a representation petition filed by another union was pending. In *Woodward General Hospital,* 1967 MERC Lab Op 635, the Commission cited *Shea Chemical* in holding that an employer did not unlawfully refuse to bargain with an incumbent union after a timely decertification petition was filed.

Since that time, however, the NLRB has explicitly overruled *Shea Chemical.* In *RCA Del Caribe*¸262 NLRB 963 (1982), the Board decided that an employer should not be obligated to cease bargaining with an incumbent union when a petition was filed by a rival union. It noted that employees might perceive an employer’s withdrawal from the negotiating table when an agreement with the incumbent union was imminent as a repudiation of the incumbent or an expression of preference for the rival union. It concluded that “preservation of the status quo” through continued bargaining with the incumbent union was a better way for the employer to maintain neutrality. Shortly thereafter, the Board overruled *Telautograph* in *Dresser Industries, Inc*, 264 NLRB 1088 (1982). Citing *RCA Del Caribe,* the Board held that a rule obligating an employer to withdraw from contract negotiations solely because a decertification petition had been filed was not the best way to achieve employer neutrality.

In *Paw Paw Pub Schs*, 1992 MERC Lab Op 376, the Commission reviewed, and rejected, the Board’s reasoning in *RCA Del Caribe*. The Commission endorsed the view of the dissenting Board member in *RCA Del Caribe* that allowing an employer to continue contract negotiations with an incumbent union provided it with too many opportunities to influence the election by bestowing on or withholding favors from the incumbent union. The Commission held that it would continue to require an employer to stop bargaining with an incumbent union when a valid representation petition was filed. The Commission reaffirmed its position again in *17thDistrict Court,* 19 MPER 88 (2006).

In the instant case, the Union urges the Commission to follow the Board and hold that the Employer was not privileged to terminate negotiations after the decertification petition was filed. It points out that it was not until shortly before the petition was filed that the parties had begun to make progress in negotiations, and argues that the Employer’s withdrawal from the negotiating table put an end to this progress and fueled employee dissatisfaction with the Union. As discussed above, the Commission has refused to adopt the NLRB’s view, as expressed in *RCA Del Caribe* and *Dresser,* that employer neutrality during an election campaign is best maintained by allowing the employer and the incumbent union to continue their contract negotiations. I am, of course, bound by the Commission's view.4

Remedy

The Commission has held that a finding that an employer has violated its duty to bargain in good faith with an incumbent union requires the dismissal of a decertification petition filed during the period when this unfair labor practice remains unremedied because the existence of a question concerning representation within the meaning of Section 12 of the PERA is inconsistent with any outstanding violation of an employer's obligation to bargain. *Dickinson Co Bd of Comm*, 1983 MERC Lab Op 221, 239. See also, *Royal Ascot, Inc,* 1976 MERC Lab Op 717; *Melvindale-Northern Allen Park Pub Schs,* 1992 MERC Lab Op 564; *Wexford Co,* 1998 MERC Lab Op 160. Since the decertification petition in this case was filed after the Employer unilaterally implemented salary increases in violation of its duty to bargain in good faith, I must recommend that the petition be dismissed.

In *Brownstown Twp¸* 19 MPER 35 (2006), cited by the Union in its brief, and *Ingham Co and Sheriff*, 18 MPER 68 (2005), two of my decisions adopted by the Commission when no exceptions were filed, I analyzed the factors set out by the NLRB in *Overnite Transp Co,* 333 NLRB 1392 (2001), and *Master Slack Corp*, 271 NLRB 78 (1984), to determine whether the employers' unremedied unfair labor practices tainted representation petitions filed by rival labor organizations. These factors include: (1) the length of time between the unfair labor practices and the withdrawal of recognition or filing of the petition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. In *Brownstown,* I found that that the representation petition should be dismissed because of the employer's unfair labor practice and, in *Ingham Co*, that it should not. I conclude an analysis of these factors in this case leads to the conclusion that the decertification petition was tainted by the Employer's unfair labor practice. The filing of the petition followed closely on the heels of the Employer's unlawful unilateral implementation of the salary increase. The Employer's unilateral action on the critical issue of salaries while the parties were involved in negotiating their first contract communicated to employees that the Union was essentially powerless and irrelevant. I find that the Employer's action naturally tended to cause faculty dissatisfaction with their labor representative and that a free and fair election could not be conducted in these circumstances. I recommend to the Commission that it dismiss the petition in Case No. R05 J-131. I also recommend that the Union's certification year be extended for a reasonable period to allow for the resumption of good faith bargaining between the parties. I conclude that given the location of the Employer and the difficulties this may present in scheduling negotiations, and the length of time elapsed since the parties have been at the bargaining table, a reasonable period in this case would be four months after the completion of the posting period.

RECOMMENDED ORDER

Michigan Technological University, its officers and agents, are hereby ordered to:

1. Cease and desist from:

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4 I agree with the Employer that if the Commission overrules its longstanding precedent and adopts the NLRB's reasoning, this decision should not be applied retroactively to make the Employer's withdrawal from the negotiating table unlawful.

a. Refusing to bargain with the Michigan Technological University Chapter, American Association of University Professors, over mandatory subjects of bargaining, including the amount of a proposed salary increase for members of the above Union’s bargaining unit and the distribution of that increase among merit pay, market/equity pay, and promotional increases.

b. Implementing salary increases for members of the Union’s bargaining unit without satisfying its obligation under PERA to bargain in good faith.

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 to effectuate the policies of PERA:

a. Upon demand, bargain with the Union over the amount of any salary increase granted to employees while the parties are engaged in bargaining a collective bargaining agreement and the distribution of that increase among merit pay, market/equity pay, and promotional increases.

b. Post the attached notice to employees in conspicuous places on the University’s premises, including all places where notices to faculty are typically posted, for a period of thirty (30) consecutive days.

The petition in Case No. R05 J-131 is dismissed. The Union’s certification year is extended to a date not less than ninety days after the completion of the notice-posting period. Any representation petition filed prior to the expiration of the extended certification year shall be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: ______________

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND **MICHIGAN TECHNOLOGICAL UNIVERSITY** 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 refuse to bargain with the Michigan Technological University Chapter, American Association of University Professors (the Union) over mandatory subjects of bargaining, including the amount of a salary increase for members of the Union's bargaining unit and the distribution of that increase among merit pay, market/equity pay, and promotional increases.

WE WILL NOT implement salary increases for members of the Union's bargaining unit without satisfying our obligation under PERA to bargain in good faith.

WE WILL NOT in any other manner interfere with, restrain or coerce employees in the exercise of rights guaranteed by Section 9 of PERA.

WE WILL, upon demand, bargain with the Union over the amount of any salary increase granted to employees while the parties are engaged in bargaining a collective bargaining agreement and the distribution of that increase among merit pay, market/equity pay, and promotional increases.

> As a public employer under the PERA, we are obligated to bargain in good faith with representatives selected by the majority of our employees with respect to rates of pay, wages, hour of employment or other conditions of employment. All of our employees are free to form, join or assist in labor organizations and to engage in lawful concerted activity through representatives of their own choice for the purpose of collective bargaining or other mutual aid and protection.

MICHIGAN TECHNOLOGICAL UNIVERSITY

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 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.