

**STATE OF MICHIGAN  
EMPLOYMENT RELATIONS COMMISSION  
LABOR RELATIONS DIVISION**

In the Matter of:

CITY OF DETROIT (POLICE DEPT),  
Public Employer-Respondent,

- and -

Case Nos. C06 B-023 & C06 D-091

DETROIT POLICE OFFICERS ASSOCIATION,  
Labor Organization-Charging Party.

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APPEARANCES:

City of Detroit Law Department, by Bruce A. Campbell, Esq., and Andrew R. Jarvis, Esq., for Respondent

Kalniz, Iorio & Feldstein, by Donato S. Iorio, Esq., for Charging Party

**DECISION AND ORDER**

On July 31, 2007, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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

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

**ORDER**

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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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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APPEARANCES:

Bruce A. Campbell, Esq., and Andrew R. Jarvis, Esq., City of Detroit Law Department, for Respondent

Kalniz, Iorio & Feldstein, by Donato S. Iorio, Esq., for Charging Party

DECISION AND RECOMMENDED ORDER  
OF  
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, this case was heard at Detroit, Michigan on August 25 and November 8, 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 parties on or before February 23, 2006, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges:

Charging Party Detroit Police Officers Association represents a bargaining unit of nonsupervisory police officers employed by Respondent City of Detroit in its police department. Uniformed employees of Respondent's fire and police departments, including Charging Party's members, receive retirement and death benefits from the Policemen and Firemen Retirement System of the City of Detroit (hereinafter the fund, the plan, or the system). The plan is funded primarily by contributions from Respondent made on behalf of its employees and is administered by a board of trustees (the Board). Charging Party filed the charge in Case No. C06 B-023 on February 7, 2006, following the adoption of an ordinance by Respondent's city council that purported to change the amortization period used by the Board to determine Respondent's contribution to the fund. On March 30, 2006, a majority of Board trustees, excluding those

elected by Charging Party's members, voted to adopt an amortization period that reduced Respondent's annual contribution. On April 20, 2006, Charging Party filed the charge in Case No. D-091. The charges were consolidated for hearing. Both charges allege that Respondent violated Section 10(1) (e) of PERA by altering the amortization period established by agreement of the parties in 1993 without giving Charging Party an opportunity to bargain over this change.

Facts:

The Amortization Period and Respondent's Contribution to the Fund

The Policemen and Firemen Retirement fund provides retirement and death benefits to active and retired uniformed city employees, their families and beneficiaries. The Board is responsible for the administration, management and operation of the plan. The Board has eleven trustees. The mayor of the City of Detroit, the president of the city council, the city treasurer, the chief of police and the fire commissioner are each entitled to appoint one trustee. Three trustees are elected by fire fighters and three by police officers. Members of Charging Party's unit elect two trustees, and one trustee is elected by higher ranking officers in the police department.

Pension benefits for employees covered by the system who are represented by a union are established by negotiations between Respondent and the unions. Article 33 of the parties' collective bargaining agreement covers pension issues and Article 45 adopts by reference all provisions of the city charter, city ordinances and resolutions of the city council relating to working conditions and compensation of employees, including those relating to the retirement system. The Board is obligated to honor all agreements between Respondent and its unions and to implement all negotiated changes.

As the governing body of a retirement system, the Board has statutory responsibility under Michigan law to ensure that the system is adequately funded. The Board, acting on the recommendations of the plan's actuary, has the authority and obligation to set the amount of Respondent's annual contribution to the fund in accord with MCL 38.1140m. This statute reads as follows:

The governing board vested with the general administration, management, and operation of a system or other decision-making body that is responsible for implementation and supervision of any system shall confirm in the annual actuarial valuation and the summary annual report required under section 20h(2) that each plan under this act provides for the payment of the required employer contribution as provided in this section and shall confirm in the summary annual report that the system has received the required employer contribution for the year covered in the summary annual report. The required employer contribution is the actuarially determined contribution amount. An annual required employer contribution in a plan under this act shall consist of a current service cost payment and a payment of at least the annual accrued amortized interest on any unfunded actuarial liability and the payment of the annual accrued amortized portion of the unfunded principal liability. For fiscal years that begin before January 1, 2006, the required employer contribution shall not be determined using an amortization

period greater than 40 years. For years that begin after December 31, 2005, the required employer contribution shall not be determined using an amortization period greater than 30 years. In a plan year, any current service cost payment may be offset by a credit for amortization of accrued assets, if any, in excess of actuarial accrued liability. A required employer contribution for a plan administered under this act shall allocate the actuarial present value of future plan benefits between the current service costs to be paid in the future and the actuarial accrued liability. The governing board vested with the general administration, management, and operation of a system or other decision-making body of a system shall act upon the recommendation of an actuary and the board and the actuary shall take into account the standards of practice of the actuarial standards board of the American academy of actuaries in making the determination of the required employer contribution.[Emphases added].

Each year, the plan actuary does a valuation of the fund, computes Respondent's contribution expressed as a percentage of payroll, and presents the Board with a report explaining the actuarial basis for the contribution. In preparing the annual valuation, the actuary uses actuarial assumptions, e.g. assumptions about rates of mortality, employee turnover, rates of investment return, etc., to calculate the plan's actuarial accrued liabilities and the actuarial value of the plan's assets. When the adjusted value of benefits promised in the future exceeds the adjusted fair market value of the plan's assets, the plan has unfunded actuarial accrued liabilities. The unfunded actuarial accrued liabilities are, in effect, a debt owed by Respondent to the fund. Unfunded accrued liabilities are not considered to be a cause for concern as long as they are not allowed to become unreasonably high and as long as there is a sound method in place for making payments toward them.

A plan's unfunded accrued liabilities are normally amortized over a period of time, i.e., the payments on any contribution year's unfunded liability are spread out over a number of years. Although the amortization period is an "actuarial method," different amortization periods are acceptable under actuarial standards. According to the record, fifteen to thirty years is considered reasonable, and the norm for retirement systems is between twenty and thirty years. As set out above, by statute Respondent's required annual contribution must include current service costs (the value of benefits likely to be paid assigned to service being rendered in the current year), plus amortized payments of both interest and principal on the plan's unfunded accrued liabilities. The actuary uses the amortization period adopted by the Board to calculate Respondent's contribution. The Board then uses the actuary's report to set the amount of the contribution.<sup>1</sup>

As with any loan, the longer the period over which the payments on the plan's unfunded accrued liabilities are spread, the smaller the annual payment can be. A longer amortization period means Respondent's annual contribution will be less than it would be with a shorter period. Because Respondent's annual contribution to the fund is so large, the amounts involved

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<sup>1</sup> The actuary normally submits his report in the late spring or early winter based on a valuation date of June 30 of the previous year. Based on this report, the Board sets the contribution due the following June 30. For example, on February 27, 2006, the actuary submitted his report for the valuation period ending June 30, 2005. It included contributions due and payable on June 30, 2006.

are not insignificant. For example, for the contribution period ending June 30, 2005, Respondent's calculated contribution using a twenty year amortization period was approximately ninety-eight million dollars, nine million dollars more than its calculated contribution using a thirty year period. Of course, the more Respondent pays in each year to cover its unfunded liabilities, the more secure the fund and the less likely it is to be unable to meet its future obligations. Theoretically, the use of an excessively long amortization period could result in the fund becoming insolvent.

### Amortization Period History

In 1975, Respondent's city council passed an ordinance establishing an amortization period of thirty years for that year's annual valuation, with the period to decrease by one year at each subsequent annual valuation until the amortization period reached twenty years. Between 1984 and 1992, the Board used an amortization period of twenty years to determine each annual contribution. In 1993, Respondent reached agreement with both Charging Party and the Detroit Fire Fighters Association, the labor organization representing uniformed fire fighters, to increase pension benefits in exchange for the votes of their trustees to increase the amortization period to twenty-five years. They further agreed that each year thereafter the Board would decrease the amortization period by one year. However, the written memoranda of understanding Respondent entered into with the two unions covering the enhanced pension benefits did not include their agreement regarding the amortization period. Rather, the memoranda simply stated that the agreement was conditioned on the following:

The Board of Trustees of the Policemen and Firemen Retirement System shall by appropriate resolution implement the November 20, 1992 alternate actuarial valuations if recommended by the Board's actuary and if such valuation insures proper and required funding and is not violative of the provisions of Article 9, Section 14 of the State of Michigan Constitution.

The Board voted to increase the amortization period to twenty-five years for the valuation period ending June 30, 1992. For each subsequent annual valuation between 1992 and 2004, the Board shortened the amortization period by one year. Thus, when the Board set the contribution rate for the valuation period ending June 30, 2004 in the spring of 2005, it used a thirteen year amortization period.

During contract negotiations for both the parties' 2001-2004 contract and its successor, Respondent made contract proposals addressing the calculation of its contribution to the fund. For the 2001-2004 contract, Respondent proposed a provision giving it the right to obtain recommendations from an additional actuary if it disagreed with the actuarial assumptions or methods used by the plan's actuary. Per the proposal, if this actuary's recommendations differed from those of the plan's actuary, a third actuary would be selected whose recommendations would be adopted by the Board. The terms of the 2001-2004 contract were settled by issuance of an arbitration award pursuant to 1969 PA 312, MCL 423.321 et al (Act 312). The arbitration panel rejected Respondent's proposal on the basis that it took from the Board authority pension boards traditionally possessed.

In August 2004, during negotiations for the parties' subsequent contract, Respondent presented Charging Party with a proposal entitled "Actuarial assumptions, methods and City contribution rate." Respondent proposed that a separate valuation of assets and liabilities be done for its contribution for Charging Party members. It also proposed again that it be allowed to obtain the recommendation of an additional actuary regarding the actuarial basis for this contribution, and that disagreements between that actuary and the plan's actuary over actuarial assumptions and methods of calculation be resolved by a third party. The proposal did not actually prescribe an amortization period. However, during negotiations, Respondent told Charging Party that a longer amortization period was critical because it would provide Respondent with immediate cost savings that it needed because of its budget deficit. At the bargaining table, Respondent offered Charging Party a three percent wage increase effective July 1, 2005 if it agreed to this proposal. Charging Party did not accept the proposal and the parties' dispute over the terms of their contract went to Act 312 arbitration. Respondent presented its "actuarial assumptions, methods and City contribution rate" proposal to the arbitration panel, minus its offer of a wage increase. As of the date of the hearing in this case, Respondent's proposal was part of its last offer to the arbitration panel, which had not yet issued its award.

#### 2004 Litigation and Subsequent Board Action

An amortization period of fifteen years was used to calculate Respondent's contribution for the valuation period ending June 30, 2002. In late 2003, a Board trustee brought the 1975 ordinance to the attention of the Board's legal counsel and asked him if the ordinance required the Board to use a twenty year amortization period. The Board's counsel drafted a memo for the Board opining that the Board was required to follow the ordinance. On March 25, 2004, the trustees voted seven to two, with two trustees abstaining, to adopt a fourteen year amortization period for the valuation period ending June 30, 2003. However, the Board also voted to seek a declaratory ruling on whether they were bound by the ordinance. On May 17, 2005, the Circuit Court ruled that the Board was required to follow the ordinance. It concluded that there was no conflict between the ordinance and the statute, MCL 38.1140m, because the latter merely set a ceiling on the amortization period.

Respondent did not make its contribution on June 30, 2005, and the Board filed a lawsuit against it. Respondent eventually made the payment after issuing pension obligation certificates to cover part of the sum. Throughout 2005, Respondent made statements to Charging Party and to the press suggesting that Respondent was on the verge of insolvency. On December 14, 2005, while the Circuit Court's order was on appeal to the Court of Appeals, Respondent's city council, over Charging Party's objection, passed a new ordinance providing that the amortization period for the fund be set at thirty years effective June 30, 2004. On January 16, 2006, Charging Party sent Respondent a demand to bargain over the alleged change and requested that the ordinance not be implemented. Respondent did not respond to Charging Party's bargaining demand. Charging Party then filed the charge in Case No. C06 A-023.

In February 2006, the Court of Appeals reversed the Circuit Court in *Policemen and Firemen Retirement System v Detroit*, 270 Mich App 74. The Court of Appeals concluded that MCL 38.1140m unambiguously gave the Board the right and obligation to determine the required employer contribution, and that this determination necessarily included setting the

amortization period. The Court stated that a plain reading of the statute lead to the conclusion that while the amortization period could not be longer than thirty years, the plan's actuary and the Board had the discretion, within that limit, to determine the appropriate amortization period. It also stated that since the Board had the responsibility to ensure that the plan was adequately funded and to determine the employer's annual contribution, and the amortization period was an integral element of the calculation of the contribution, it was self-evident that the Board, not the City, had the authority to set the amortization period. The Supreme Court denied leave to appeal in *Policemen and Firemen Retirement System v Detroit*, 477 Mich 892 (2006).

On February 27, 2006, the actuary submitted his valuation report for the period ending June 30, 2005 to the Board. The report included alternate calculations of Respondent's contribution rate for the fiscal years ending June 30, 2006 and June 30, 2007 based on amortization periods of twelve and thirteen years and twenty years, respectively. The actuary commented that the fund had a "very high 99% funded ratio as a result of the issuance of pension obligation certificates."

On March 30, 2006, the Board voted seven to two to adopt an amortization period of thirty years for the actuarial valuation for the period ending June 30, 2005. The negative votes were cast by the trustees elected by Charging Party's members. One of these trustees stated at the meeting that he believed that the trustees elected by members of the Detroit Fire Fighters Association had reached an agreement with trustees appointed by Respondent to vote in favor of the longer amortization period in return for benefits to that union's members.

After the March 30, 2006 meeting, Charging Party sent Respondent a letter demanding that the status quo be maintained with respect to the amortization period until the Act 312 panel issued its award. When Respondent did not respond to this letter, Charging Party filed the charge in Case No. C06 D-091.

#### Discussion and Conclusions of Law:

Pension and retirement provisions have long been held to be mandatory subjects of bargaining under PERA. *Detroit Police Officers Ass'n v City of Detroit*, 391 Mich 44 (1974). See also *City of Riverview v Fraternal Order of Police*, 111 Mich App. 158, 161 (1981), holding that the manner by which retirement benefits are computed is subject to collective bargaining under 10(1)(e). In *Detroit Police Officers Ass'n*, the Court concluded that the Respondent in this case could not avoid its duty to bargain by incorporating the substantive details of the retirement plan applicable to Charging Party's members into its city charter.

In *City of Detroit v Michigan Council 25, American Federation of State, County and Municipal Employees*, 118 Mich App 211 (1982), the Court of Appeals concluded that the composition of both the Board in the instant case and the board of trustees of Respondent's general retirement fund were mandatory subjects of bargaining. Citing its holding in *Houghton Lake Ed Ass'n v Houghton Lake Cmty Schs*, 109 Mich App 1, 6 (1981) that the employer had the duty to bargain over the identity of the administrator of its employees' health insurance plan because this had a material and significant effect or impact upon the conditions of employment, the Court rejected Respondent's characterization of the pension boards' functions as merely

administrative or ministerial. Among the powers of the boards that the Court found had a significant effect on conditions of employment were the boards' power to compute Respondent's contribution liability to the funds and its authority to determine the investment of funds. *City of Detroit* at 218-219.

The National Labor Relations Board recognizes that employees' terms and conditions of employment include not only the benefits they are entitled to receive from their pension fund, but the viability of that fund. In *Carrier Corp*, 319 NLRB 184 (1995), the National Labor Relations Board (NLRB), holding that an employer had the obligation to bargain over its plan to merge two pension plans, stated, at 193:

The Board with consistent court approval has long considered the viability of benefit funds to be a vital and significant aspect of employees' terms and conditions of employment, and concerning which employees have a clear economic stake. *Centra, Inc.* 314 NLRB 814 fn 3, 816-818 (1994); *Central Management Co*, 314 NLRB 763, 780-781 (1994); *Lawrenceville Ready Mix Co*, 305 NLRB 1010 1011 fn 4, (1991); *Aztec Bus*, 289 NLRB 1021, 1037 (1988); *Bastian-Blessing*, 194 NLRB 609, 613-614 (1971), 195 NLRB 1109 (1972) (supplemental decision); enfd 474 F2d 49 (CA 6, 1973); *Stone Board Yard v NLRB*, 715 F2d 441, 446 (CA 9, 1983).

In the instant case, the amortization period used by the Board has a direct effect on the amount of Respondent's annual contribution to the fund, which in turn affects the fund's viability. I find that the amount of the annual contribution, which is based in part on the amortization period, has a significant impact on terms of employment because the stability of the fund depends upon it, and the future pension benefits of active employees in Charging Party's unit depend on the fund's ability to meet its obligations far into the future.<sup>2</sup>

If the amortization period was a matter under Respondent's control, I would find it to be a mandatory subject of bargaining. However, MCL 38.1140m, as interpreted by the Court of Appeals in *Policemen and Firemen Retirement System v Detroit*, 270 Mich App 74 (2006), clearly gives the right and responsibility to determine the amortization period to the Board, not to Respondent. The Court held in that case that the Board, and not Respondent, had authority to determine the amount of Respondent's contribution. It also held that since the amortization period was an integral part of the calculation of the contribution the Board, and not Respondent, had the authority to set the amortization period.

It is true that the Commission and Courts have held that the fact that a pension plan is administered by an independent board does not remove an employer's obligation to bargain over pension benefits. In *Detroit Police Officers Ass'n v City of Detroit*, 212 Mich App 383, (1995), *aff'd* 452 Mich 339 (1996), the Court of Appeals affirmed the Commission's holding that Respondent violated its duty to bargain when the Board of the Policemen and Firemen

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<sup>2</sup> Were the fund in this case to become insolvent, the obligations of the fund would devolve on Respondent. However, as Respondent reminded its unions and the public during the period when the amortization period was at issue, Respondent could itself become insolvent.



Retirement System passed a resolution transferring to itself from the plan's medical board of review responsibility for determining whether a disability was duty-related. Respondent and the Board argued that the Commission lacked authority to find an unfair labor practice because the Board, and not the City, passed the resolution. They asserted that since the Board was acting in its capacity as a fiduciary and not as an agent of the City, its actions were not subject to Commission review. The Court rejected these arguments, holding that it was "improper for an employer to remove a subject of mandatory bargaining from the scope of PERA by assigning its management to a body insulated from PERA." The Court also noted that it agreed with the Commission's statement that "an employer is responsible for its bargaining obligations regardless of whatever actions are taken by an independent pension board." *City of Detroit*, 1993 MERC Lab Op 424, 432.

However, determining eligibility for pension benefits is a function of the plan that could be handled by various individuals, including Respondent's own representatives. As indicated in *Policemen and Firemen Retirement System v Detroit*, 270 Mich App 74 (2006), the amount of Respondent's contribution to the fund has to be determined by the Board, not Respondent, because the Board is responsible for insuring that the plan has adequate funds to pay the future benefits that Respondent and its unions have agreed to. *Policemen and Firemen* did not address the question of whether Respondent had a duty to bargain with its unions over the amount of its contribution. However, if Respondent has no control over the amount of its contribution, it follows that it has no obligation to bargain over this issue. In fact, making the amount of the contribution subject to the duty to bargain carries the same risks as giving Respondent the right to determine what its contribution will be. Although the unions have an interest in the viability of the fund, they might be tempted to agree to allow Respondent to make an excessively low contribution in exchange for other benefits to their members. Such an agreement would create a conflict between the trustees' obligation to honor the parties' agreements and their fiduciary responsibilities.

Of course, the amortization period is only one part of the calculation of Respondent's contribution. Moreover, actuarial standards of practice do not dictate what the amortization period must be, as long as the amortization period is within an acceptable range. Over the last thirty years, the Board has used many different amortization periods, all of which were within the acceptable range and none of which presumably jeopardized the viability of the fund. Nevertheless, as the Court held in *Policemen and Firemen Retirement System*, the amortization period is an integral element of the calculation of the contribution. As such, it is a matter for the Board's trustees to determine as fiduciaries of the fund.

The evidence indicates that in 1993 the parties, along the with Detroit Fire Fighters Association, agreed to increase the length of the amortization period, and then gradually decrease it, in exchange for increased pension benefits for the unions' members. Since 1993, Respondent has presented Charging Party with contract proposals giving Respondent more control over the amount of its contribution in exchange for other benefits. However, the fact that parties have bargained over a topic in the past does not make it a mandatory subject of bargaining. *Metropolitan Council No 23 v City of Center Line*, 414 Mich 642, fn 5 at 654, (1982). I also note that the parties' agreement to gradually decrease the amortization period was not made part of their 1993 written memorandum of understanding. The issue of whether such an agreement is

legally enforceable, as involving a matter not properly within the parties' control, is therefore not before me.

I conclude that the amortization period used by the Policemen and Firemen Retirement System of the City of Detroit in calculating the City's annual contribution to the fund is not a mandatory subject of bargaining because it is, by statute, a matter to be determined by the Board of Trustees in the exercise of their fiduciary responsibilities. I find, therefore, that the March 30, 2006 vote of the Board setting an amortization period of thirty years did not constitute a violation of Respondent's obligation to bargain in good faith. I also find that the passage by Respondent's city council of an ordinance in December 2005 that purported to set an amortization period for the fund did not violate Respondent's obligation to bargain in good faith under Section 10(1) (e) of PERA, as the this ordinance did not effect a change in terms and conditions of employment. In accord with these findings, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern  
Administrative Law Judge

Dated: \_\_\_\_\_