STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

36th DISTRICT COURT,
Public Employer - Respondent,

Case No. C05 G-139

- and -

MICHIGAN AFSCME COUNCIL 25 and LOCAL 3308,
Labor Organization – Charging Party.
_____/

APPEARANCES:

Constance J. Allen, Esq., and Kotz, Sangster, Wysocki and Berg, P.C. by Heather G. Ptasznik, Esq., (on exceptions) for the Public Employer

Miller Cohen, P.L.C., by Richard G. Mack Jr., Esq., and Robert Fetter, Esq., (on the brief) for the Labor Organization

DECISION AND ORDER

On April 20, 2006, Administrative Law Judge (ALJ) Roy L. Roulhac issued his Decision and Recommended Order in the above matter finding that Respondent, the 36th District Court (the Employer), violated its duty to bargain in good faith when it unilaterally changed the number of days worked per week from five days to four in alternating workweeks. The ALJ found that Respondent's actions repudiated its collective bargaining agreement with Charging Party, Michigan AFSCME Council 25 and Local 3308 (the Union), and thereby violated Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(e). The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. Respondent was granted an extension until June 14, 2006 to file exceptions to the ALJ's Decision and Recommended Order. On June 12, 2006, Respondent filed exceptions and a brief in support of the exceptions. On June 19, 2006, Charging Party filed a brief in support of the ALJ's Decision and Recommended Order.

In its exceptions, Respondent contends the ALJ erred in finding that it failed to meet its bargaining obligations and in finding that there was a repudiation of the contract. Upon reviewing the record carefully and thoroughly, we find that the exceptions are without merit.

Factual Summary:

As stated in the ALJ's decision, the facts in this case are uncontested. During the period at issue, the Union and the Employer were parties to a collective bargaining agreement covering the period of July 1, 2001 through June 30, 2006. Beginning in March 2005 and continuing for a period of three months, the parties attempted to draft a letter of understanding addressing a plan to cope with the Court's budget deficit for the 2005-2006 fiscal year. By the end of June, they had not reached an agreement. Between June 27, 2005 and July 1, 2005, the Employer notified employees that, with the exception of those performing essential services, the entire workforce would be laid off one day each week from July 12, 2005 until the end of October 2005.

On June 29, 2005, the Union sent a letter to the Employer stating that there was specific language in the existing contract regarding the workweek, the workday, and layoffs. The Union's letter asserted that there was no need to bargain over those issues since they had previously been negotiated, but offered to meet with the Employer to mitigate damages if the Court implemented its new schedule. On July 5, 2005, the Union filed the charge in this matter alleging that the Employer was repudiating the collective bargaining agreement by scheduling reductions in the employees' work schedules.

On July 26, 2005, Respondent sent an amended layoff notice advising employees that they would be laid off every other Friday between August 12 and October 21, 2005. Charging Party filed a grievance the same day alleging that by changing the workweek from five to four days, Respondent violated the collective bargaining agreement's provisions regarding the workweek, layoffs, and recall.

The parties stipulated that the days off without pay would have a significant impact on the employees, which would include a 9.2% wage reduction along with lower pension benefits and increased workloads.

Discussion and Conclusions of Law:

In its exceptions, Respondent contends that the ALJ erred in concluding that it was not authorized to reduce the employees' workweek pursuant to the management rights clause contained in Article 10 of the parties' collective bargaining agreement. According to the Employer, the contract does not prohibit it from partially closing the Court and that its right to do so is reserved in the agreement's management rights clause. Respondent further contends that there was no repudiation of the contract because there was a bona fide dispute over its interpretation. Article 10 reads, in relevant part:

> It is understood and agreed by the parties that the Employer possesses the sole and exclusive power, duty and right to operate and manage the Court. . . . The powers, authority and discretion of the Employer to exercise its rights and carry out its responsibilities shall be limited only by the specific and express terms of this Agreement. (Emphasis added.)

Article 17 of the contract states, in relevant part, "The standard workweek of each employee shall consist of five (5) scheduled seven and one-half (7.5) hour workdays, excluding the lunch period, Monday through Friday." Although Article 17 also allows the Employer, after appropriate notice to the Union and employees, to establish a workweek of five consecutive days other than Monday through Friday, it does not give the Employer the option of changing the

workweek to something other than five consecutive days. The express terms of Article 17 limit both the workweek and the Employer's discretion to change the workweek's composition. Thus, it is apparent that Respondent is not authorized to reduce the number of days in the workweek under the management rights clause of Article 10. Moreover, since the collective bargaining agreement specifically addresses the number of days in the workweek clearly and unambiguously, we agree with the ALJ that the record does not support Respondent's contention that there is a bona fide dispute over the interpretation of the contract.

The Employer contends that the change imposed was not a substantial breach of the contract even though it may have had a substantial impact on the bargaining unit. While a public employer's determination to reduce the work force for economic reasons is within the scope of managerial prerogative, the Respondent's decision in this case was not to reduce the size of the work force but rather to reduce the number of days worked by each of its employees. In *Ionia Co Rd Comm*, 1984 MERC Lab Op 625, *aff'd*, unpublished opinion of the Court of Appeals, issued September 24, 1985 (Docket No. 78969), the Commission held that although the decision to cut back shifts or hours may have a fiscal effect on the employer similar to a layoff, such a cutback is different from a layoff for those employees who remain employed. The Commission explained that such a decision significantly changes employees' hours, take home pay, and actual working conditions. 1984 MERC Lab Op 627-628. Inasmuch as the composition of the workweek is covered by unambiguous contract language in the matter before us, such a significant change as that imposed by the Employer is a substantial breach of the contract.

Further, in its exceptions, the Employer contends that it did not fail to meet its bargaining obligations under PERA because "Charging Party withdrew from bargaining and as such, this freed the 36th District from its duty to bargain." Moreover, the Employer denies that there was a repudiation contending that it did not act in bad faith because it "engaged in good-faith negotiations over a three-month period and it was Charging Party who in bad faith withdrew from the bargaining process." We disagree. The Employer complains that the ALJ did not address these issues in his decision. We, therefore, address the parties' respective duties to bargain below.

PERA prohibits a mid-term modification of a mandatory subject of bargaining without the agreement of both parties. See *St Clair Intermediate Sch Dist v Intermediate Educ Ass'n/Michigan Educ Ass'n*, 458 Mich 540, 552-567, 581 NW2d 707, 714-721 (1998). Since the parties were operating under an existing collective bargaining agreement, the Union had no duty to bargain or to demand bargaining over a change to that agreement proposed by the Employer. In negotiating that contract, the Union and the Employer had already bargained and agreed that the workweek would consist of five consecutive days lasting seven and a half hours each. Thus, the Union was not required to demand bargaining on that subject to require that the previously agreed-upon terms be maintained. As we stated in *Detroit Bd of Educ*, 2000 MERC Lab Op 375, 377, "Members of the unit had a right to rely upon the terms and conditions set forth in the contract and to expect that they would continue unchanged." Because the Employer sought a mid-term modification, the Union was not required to agree to bargain on that issue. Instead, the Employer was obligated to secure the Union's consent before imposing its desired change.

Respondent's obligation in this case was not limited to bargaining to impasse. Unlike an impasse that is reached after a contract's expiration, an impasse reached over a proposed mid-term modification of the contract does not allow a party to impose the new terms that it desires.

If the parties had continued to bargain and reached impasse over the issue of the number of days in the workweek, the Employer would have remained bound by the terms of the existing contract. The matter had been bargained over and agreed-upon when the contract was negotiated. Thus, the number of days in the workweek was not subject to change without mutual consent. See *St Clair Intermediate Sch Dist*, at 458 Mich 540, 565-567.

After careful examination of all other issues raised by Respondent, we agree with the ALJ that Respondent's unilateral decision to reduce the number of days in the employees' workweek constituted repudiation of its bargaining obligation and therefore is an unfair labor practice in violation of Section 10(1)(e) of PERA. We, therefore, affirm the ALJ's decision and enter the following order.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

36th DISTRICT COURT,
Respondent–Public Employer,

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- and -

MICHIGAN AFSCME COUNCIL 25 and LOCAL 3308,
Charging Party–Labor Organization.
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APPEARANCES:

Constance J. Allen, Esq., for the Public Employer

Miller Cohen, P.L.C., by Richard G. Mack, Jr., Esq. and Robert Fetter, Esq. (on the brief), for the Labor Organization

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

This case was heard in Detroit, Michigan, on October 26, 2005, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission (MERC) pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Based on the record and the parties' post-hearing briefs filed by December 16, 2005, I make the following findings of fact and conclusions of law.

The Unfair Labor Practice Charge:

On July 5, 2005, Charging Party Michigan AFSCME Council 25 and Local 3308 filed an unfair labor practice charge against Respondent 36th District Court. The charge reads:

> The Employer and Union have a collective bargaining agreement, which provides the length of the employee work day and work week. The Employer is repudiating the bargaining agreement by scheduling reductions in the work schedule of all employees. By these and other acts, the Employer is violating PERA.

The Employer filed an answer denying the allegations contained in the charge on July 20, 2005.

Finding of Facts:

The facts in this case are undisputed. Charging Party is the bargaining representative for the majority of Respondent's unionized employees. In March 2005, the parties began discussing ways to address a budget deficit for the 2005-2006 fiscal year. Over the next three months, they discussed drafting a letter of understanding similar to one that they executed in 2003, which

provided for closing the Court on Fridays. Respondent's first proposal, dated June 24, 2005, provided that "in recognition of the City of Detroit's fiscal budget deficit and the Court's goal of minimum permanent layoffs of employees," the Court will schedule Friday and Monday of each week as a day off without pay for half of the employees. Respondent noted that the change from five regular work days to four was "not a change in work hours, but a layoff for lack of funds."

Between June 27, 2005 and July 1, 2005, without reaching an agreement or impasse, Respondent sent three notices to employees informing them that except for those performing essential services, beginning July 12, and one day a week thereafter until the end of October 2005, the entire workforce would be laid off. On June 29, Charging Party sent the following letter to Respondent:

> After seeking legal opinion on the issue of Impact of Layoff on members of AFSCME, Local 3308, I hereby rescind my Request to Bargain. Please disregard my letter dated 6-28-05 regarding same.
>
> As indicated by the Contract between the 36th District Court and AFSCME Local 3308, there is already language regarding the Work Week, language regarding the Work Day as well as specific language regarding layoffs. Therefore, there is no need to bargain on these issues that have previously been negotiated.
>
> The Union will agree to meet with you to mitigate damages we will experience if the Court implements this new schedule.

On July 26, 2005, Respondent sent amended layoff notices to employees advising them that they would be laid off every other Friday from August 12 until October 21, 2005 and that additional layoff dates might be imposed. In each of the four notices, employees were told that they were expected to return to work on the scheduled workday immediately after each layoff day.

Charging Party filed a grievance on July 26, 2005, alleging that by changing the work week from five to four days, Respondent violated the collective bargaining agreement's provisions involving the work week, and layoffs and recall. The grievance, which alleges violations of Sections 14 and 17 of the agreement, reads:

> The Court changed the Work Week of five consecutive days to four consecutive days with every Friday being off, effective July 22, 2005. The Court also will be closed on July 12, 2005.
>
> The change was due to extreme budget cuts from the City of Detroit. The Court cited the Layoff provision in the contract for their reasons for the change. The layoff language in the Contract is being misinterpreted and applied incorrectly by the Court. The result is all employees are being forced to take a 20 percent pay cut with loss of other various benefits. The Court has not complied with the Layoff Language, which is their remedy when there is a loss of funds. The Court, in fact, changed the Work Week. Because of this misinterpretation, the Court's actions have impacted several other Articles which will cause loss of benefits.

Article 14 of the contract contains extensive procedures for the layoff and recall of employees. Article 17 defines the standard work week as five scheduled seven and one-half hour work days.

The parties stipulated that the days off without pay had a significant impact – 9.2 percent wage reduction, lower pension benefits and increased work loads - on bargaining unit members.

Conclusions of Law:

Charging Party's asserts that Respondent repudiated the collective bargaining agreement by reducing its members' work week from five days to four. Respondent asserts that this matter does not involve contract repudiation, but rather a bona fide dispute over its contractual and inherent right to partially close the Court and layoff the entire work force.

Although a breach of a collective bargaining agreement is not *per se* a violation of PERA, the Commission has recognized that an employer's "repudiation" of a provision or provisions of a collective bargaining agreement may, in rare circumstances, be tantamount to a rejection of its obligation to bargain. *City of Detroit, Dep't of Transportation*, 1984 MERC Lab Op 937, *aff'd* 150 Mich App 605 (1985); *Jonesville Bd of Ed*, 1980 MERC Lab Op 891. The Commission has described repudiation as an attempt to rewrite the contract, a refusal to acknowledge its existence or a complete disregard for the contract as written. *Central Mi Univ*, 1997 MERC Lab Op 501; *Redford Twp Bd of Ed*, 1992 MERC Lab Op 894. For the Commission to find repudiation, the contract breach must be substantial and have a significant impact on the bargainING unit, and there must be no bona fide dispute over the contract's interpretation. *Plymouth-Canton C S*, 1984 MERC Lab Op 894, 897; *Twp of Redford Police Dep't*, 1994 MERC Lab Op 49, 56 (no exceptions); *Linden C S*, 993 MERC Lab Op 763 (no exceptions).

The parties stipulated that the reduction in the employees' hours had a significant impact on the bargaining unit, and I find that the contract breach was substantial. Bargaining unit members have a right to rely upon the terms and conditions set forth in the contract and to expect that they will continue unchanged. *Detroit Bd of Ed*, 2000 MERC Lab Op 375, 377. Reducing the work week from five days to four reduces the employees' wages, pension benefits and other terms and conditions of employment.

Respondent, however, claims that the contract does not prohibit it from partially closing the Court, and that as part of its rights reserved in the agreement's management rights clause, it is authorized to manage and operate the Court, reduce services and layoff employees. Respondent also contends that Charging Party acknowledged in its grievance that Respondent was misinterpreting and misapplying the contract. I disagree. Article 10, the management rights clause, reads:

> It is understood and agreed by the parties that the Employer possesses the sole and exclusive power, duty and right to operate and manage the Court, the Departments, and programs and carry out constitutional, statutory and administrative policy mandates and goals. The powers, authority and discretion of the Employer to exercise its rights and carry out its responsibilities shall be limited only by the specific and express terms of this Agreement.

There is nothing in Article 10 or anywhere in the contract that explicitly or implicitly authorizes Respondent to reduce the employees scheduled work week. A public employer has an inherent right to determine the size of its work force. *AFSCME, Local 1277 v City of Center Line*, 414 Mich 642 (1982); *Benzie* Co, 1986 MERC Lab Op 55, 59. A decision by an employer to reduce the work force for economic reasons goes to the very essence or heart of its ability to operate. It is well settled that an employer's decision to reduce the size of its work force or reorganize positions within a bargaining unit is within the scope of managerial prerogative and is not a mandatory subject of bargaining. *Swartz Creek C* S, 1994 MERC Lab Op 223; *Ishpeming Supervisory Employees, Local 128, AFSCME v City of Ishpeming*, 155 Mich App 501, 508-516 (1986), *aff'g* in part 1985 MERC Lab Op 687. However, this case does not involve a decision by Respondent to reduce the size of the work force.

Rather, as an alternative to layoffs, Respondent changed the employees work week from five days to four days every other week. In *Village of Union City*, 1983 MERC Lab Op 510, *aff'd* in part, *rev'd* in part, 135 Mich App 553 (1984), the Commission distinguished an employer's decision to layoff employees from a decision to cut back scheduled shifts or hours as a means of averting layoffs. In commenting on this difference, the Commission observed in *Ionia Co Rd Comm*, 1984 MERC Lab Op 625, *aff'd*, unpublished opinion per curiam of the Court of Appeals, 9/24/1985 (Docket No. 78969), that:

> The latter decision [to cut back scheduled shifts or hours], although it may have a fiscal effect for the Public Employer that is equivalent to a layoff, it is distinguishably different from a layoff for all those employees who remain actively employed. Such a decision significantly changes their hours, their take-home pay, and their actual working conditions, and, as such, is subject to prior bargaining. 1984 MERC Lab Op 627-628.

I find that the dispute between the parties does not constitute a bona fide disagreement over the interpretation of a provision in the collective bargaining agreement, as Respondent asserts. Article 10, the management rights clause relied on by Respondent, does not authorize Respondent to reduce the employees' work week, which Article 17 clearly and unambiguously defines as "five scheduled seven and one-half hour work days." By reducing the employees' work week, Respondent completely disregarded Article 17 as written, and rewrote it to provide for a work week of four days every other week. I conclude that Respondent's decision to reduce employees' hours constitutes a repudiation of its bargaining obligation and, therefore, an unfair labor practice in violation of Section 10(1)(e) of PERA. Even a bona fide financial crisis does not justify an employer's repudiation of its bargaining obligation. *Village of Union City, supra*; *Capac C S*, 1984 MERC Lab Op 1195; *Ionia Co Rd Comm, supra*; *Wayne Co & William Lucas, Co Exec*, 1985 MERC Lab Op 168; *Co of Wayne*, 1985 MERC Lab Op 833; *Wayne Co, & Wayne Co Bd of Comm'ners & William Lucas, Co Exec*, 1985 MERC Lab Op 1037. *Cf. Co of Wayne*, 1985 MERC Lab Op 851, where the Commission found that a bona fide dispute existed over whether the employer's reduction in the work week violated contract language.

I have carefully considered all other arguments advanced by the parties and conclude that they do not warrant a change in the result. Based on the above findings of fact and conclusions of law, I recommend that the Commission issue the order set forth below:

Recommended Order

Pursuant to Section 16(b) of the Public Employment Relations Act, the Respondent 36th District Court, its officers, agents and representatives, shall:

1. Cease and desist from repudiating the collective bargaining agreement by reducing the work week of bargaining unit members without reaching an agreement or impasse with AFSCME Council 25 and Local 3308 as required by Section 10(1)(e) of PERA.

2. Make the employees represented by AFSCME Council 25 and Local 3308 whole for any loss of pay and benefits they suffered as a result of its unilateral decision to reduce the work WEEK, until the regular work week is restored, with interest on the loss of pay at the statutory rate of five percent per annum, computed quarterly.

3. Post the attached notice on Respondent's premises, in a place or places where notices to employees are customarily posted, for a period of thirty consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Roy L. Roulhac
Administrative Law Judge

Dated: