

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

In the Matter of:

CITY OF DETROIT,  
Public Employer-Respondent,

Case No. C06 B-036

-and-

ASSOCIATION OF CITY OF DETROIT SUPERVISORS,  
Labor Organization-Charging Party.

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APPEARANCES:

Allen Lewis, Chief Labor Relations Specialist, for Respondent

Webb, Engelhardt and Fernandes, by L. Rodger Webb, Esq., for Charging Party

DECISION AND ORDER

On April 18, 2007, Administrative Law Judge Julia C. Stern (ALJ) issued her Decision and Recommended Order in this matter finding that Respondent, City of Detroit (Employer), did not violate Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e), as alleged in the charge by Charging Party, Association of City of Detroit Supervisors (Union). The ALJ concluded that Respondent did not commit an unfair labor practice by withdrawing its proposed offer during bargaining and unilaterally implementing changes in the terms and conditions of employment. The ALJ found that the parties had reached an impasse during bargaining and, as such, Respondent withdrew its proposals based on a good faith belief that the proposals as a package, had been rejected and further discussion would be futile. In addition, the ALJ held that the changes Respondent implemented were consistent with its outstanding bargaining proposals and, therefore, not in violation of Respondent's duty to bargain in good faith. The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA.

On June 25, 2007, Charging Party filed exceptions to the ALJ's Decision and Recommended Order. In its exceptions, Charging Party alleges that the ALJ erred in finding that Respondent's offer was a package offer that had to be accepted or rejected as a whole. In addition, Charging Party asserts that the ALJ erred in finding that Respondent's withdrawal of its proposal was done in good faith. Charging Party also contends that the ALJ erred in concluding that Respondent's unilateral implementation of changes in wages, hours, and working conditions

does not violate PERA. Upon review of Charging Party's exceptions, we find them to be without merit.

Factual Summary:

We adopt the findings of fact as set forth in the ALJ's Decision and Recommended Order and will not repeat them here, except as necessary. The parties engaged in protracted labor negotiations for almost two years in an effort to reach a successor collective bargaining agreement covering the years 2001 through 2005. The issues went to fact finding, and a fact finding report was issued on August 23, 2005. The fact finding report recommended settlement on eighteen issues. The parties met to discuss the fact finder's recommendations on September 16, 2005, and attempted to reach agreement on the issues.

At the September 16 meeting, Respondent made a verbal offer to the Union of \$0.15 per hour for the refuse collection foremen. The offer included an effective date of August 23, 2005, for retroactive wage adjustments. Respondent's proposal also required employees assigned to twenty-four-hour operations to request leave time at least one hour before the start of the shift from which they planned to be absent. In exchange, Respondent asked that Charging Party withdraw its demand to add default language to the grievance procedure. Respondent explained that it could not accept such a provision since it would automatically allow the Union to prevail on a grievance whenever the Employer failed to respond within the designated time period. Charging Party found Respondent's proposal unacceptable with respect to the amount of the pay adjustment for the refuse collection foreman, the date of retroactivity for wage adjustments, and the grievance procedure. Although they agreed that the one-hour call-in rule would apply only for weekends and holiday work, they were unable to resolve the remaining issues. Contrary to their usual practice upon reaching a tentative agreement on individual issues, the parties did not commit anything to writing to document a tentative agreement on any of the issues discussed at the September 16, 2005 meeting. The parties agreed to meet again on October 21, 2005, and Charging Party promised to provide a compromise proposal on the grievance procedure issue. In the interim, the parties discussed the issues during telephone conferences.

In a telephone conference held on or about October 11, 2005, Respondent told Charging Party that if an agreement was to be reached, Charging Party must change the default language of the proposed grievance procedure. Further, Respondent proposed that if the parties reached an agreement on all the open issues, then the Employer's negotiators would seek authority to offer an increase in the special wage adjustment for the refuse collection foreman from \$0.15 to \$0.50.

On October 21, 2005, Charging Party presented a new proposal on the grievance procedure to Respondent. Respondent reviewed the proposal and found that the proposal was not significantly different from the one previously rejected. Respondent then withdrew its prior verbal offers, and informed Charging Party that it would be imposing terms previously set forth on all open issues as presented to the fact finder. Charging Party then filed the unfair labor practice charge in this matter.

Discussion and Conclusions of Law:

In its exceptions, the Charging Party contends that the ALJ erred in concluding that the Employer's September 16 proposal regarding the outstanding issues constituted a package offer. Upon thoroughly reviewing the record in this matter, we are persuaded that the ALJ was correct in concluding that the offer was made as a package. As the ALJ explained, the parties had been negotiating for years; they had reduced the disputed issues to just the few that were discussed on September 16; and it was apparent from the parties' actions at that meeting that Charging Party realized that the proposal presented that day constituted a package offer that would be withdrawn if a contract was not reached. Contrary to the parties' usual practice when there was a tentative agreement on individual issues, the proposals were not reduced to writing for the parties to initial them. Their failure to formalize any claimed agreement in their usual manner indicates that there was no actual agreement.

Charging Party also asserts that the ALJ erred by finding that Respondent's withdrawal of its verbal proposal was based on its belief that Charging Party had rejected the proposal and was done in good faith. In deciding whether the Employer bargained in good faith here, we must view the totality of the circumstances. We must look at the bargaining process and the communications between the parties during that process to determine if the Employer approached bargaining with an open mind and a sincere desire to reach an agreement. *Grand Rapids Pub Museum*, 17 MPER 58 (2004), *City of Springfield*, 1999 MERC Lab Op 399, 403; *Unionville-Sebewaing Area Sch*, 1988 MERC Lab Op 86; *Kalamazoo Pub Sch*, 1977 MERC Lab Op 771, 776. After months of bargaining, fact finding hearings, a fact finders' report, and further bargaining, Respondent offered to give concessions if Charging Party would eliminate the default language that the Union had proposed for the grievance procedure. Respondent explained to Charging Party that it could not agree to a grievance proposal that would automatically allow Charging Party to prevail on grievances whenever Respondent failed to meet the time period set for its response. However, when the parties met on October 21, Charging Party's new proposal on the grievance procedure continued to contain a default provision. The Employer, understandably, viewed that as a rejection of the Employer's package proposal and as an indication that the parties would not be able to reach a contract. It is evident that the Employer reasonably believed that further efforts at bargaining would be futile and that the parties had reached impasse.

In its exceptions, Charging Party also contends that it would have agreed to drop its demand for a default provision in the grievance procedure in exchange for movement on the special wage adjustment for the refuse collection foremen. However, Charging Party's assertion that it was willing to concede this issue is not sufficient to avoid a finding that the parties had reached impasse. Moreover, Charging Party's condition for dropping the default provision was a further concession by Respondent that its chief negotiator was not authorized to make. The decision of whether an impasse exists requires us to look at a number of factors: whether the parties have negotiated for a reasonable term; whether the parties' positions have solidified and whether the parties are aware of where the positions have solidified. *Oakland Cmty Coll*, 2001 MERC Lab Op 273, 15 MPER 33006 (2001); *City of Benton Harbor*, 1996 MERC Lab Op 399, 406, 9 MPER 27091 (1996). One party's declaration that impasse has or has not been reached is not determinative. *St Ignace Area Sch*, 1983 MERC Lab Op 1042, 1046; *Munson Medical Center*, 1971 MERC Lab Op 1092, 1100-1102 (no exceptions). Charging Party's contention that

the parties could have reached agreement is not determinative to our conclusion regarding the existence of an impasse.

Charging Party also excepts to the ALJ's finding that it failed to clearly inform the Employer that it was willing to drop its proposal to include the default language in the grievance procedure in order to arrive at a contract. However, Charging Party fails to point to anything in the record that contradicts the ALJ's conclusion. We agree with the ALJ that the record does not support a finding that the Union informed the Employer that it would withdraw the proposal to change the grievance procedure at any point prior to the Employer's notice that it was going to impose its final written offer. At the point Respondent declared that impasse had been reached, it had no reason to believe that further negotiations would be successful. Thus, the Employer could lawfully impose its final offer when it decided to do so. See *Waldron Area Sch Bd of Ed*, 1997 MERC Lab Op 256; *City of Detroit (Water & Sewerage Dep't)*, 1996 MERC Lab Op 330, 9 MPER 27078 (1996) (no exceptions).

As noted in Charging Party's exceptions, Respondent had cautioned Charging Party prior to the October 21 meeting that if they were unable to reach agreement at that meeting, the Employer would impose its last written offer. We do not agree with Charging Party's contention that Respondent's warning of the consequences of failing to reach agreement indicates bad faith or a plan to withdraw its September 16 proposals. It is evident that Respondent's position regarding the default provision in the grievance procedure was not going to change. After informing Charging Party that it could not accept such a provision, Respondent also cautioned Charging Party of the probable and legal consequences of failing to reach agreement. Such a warning is not indicative of bad faith.

Lastly, Charging Party contends that the ALJ erred in finding that Respondent could lawfully implement its last offer prior to fact finding. Charging Party does not except to the ALJ's finding that impasse was reached and Respondent could lawfully impose its last best offer. Instead, Charging Party contends that the terms imposed by Respondent were regressive and not Respondent's last offer. Charging Party asserts that Respondent's last offer included the concessionary verbal proposals discussed at the September 16 meeting and that those proposals should have been included in the terms imposed. As stated above, those verbal proposals were part of a package, which could only be binding on the parties if Charging Party accepted the concession demanded by Respondent, that is, the withdrawal of the proposal to include default language in the grievance procedure. We agree with the ALJ for the reasons stated in her decision that after Charging Party's rejection of the package offer, Respondent could lawfully implement the terms of the last offer made prior to fact finding. See *Waldron Area Sch*.

The Commission agrees with the ALJ that the Respondent did not violate its duty to bargain in good faith and was lawfully able to impose its last written offer. We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case. We, therefore, find that the Charging Party failed to establish that Respondent violated Section 10(1)(e) of PERA.

**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

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Christine A. Dardarian, Commission Chair

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Nino E. Green, Commission Member

\_\_\_\_\_  
Eugene Lumberg, Commission Member

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

STATE OF MICHIGAN  
EMPLOYMENT RELATIONS COMMISSION  
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In the Matter of:

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ASSOCIATION OF CITY OF DETROIT SUPERVISORS,  
Labor Organization-Charging Party.

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APPEARANCES:

Allen Lewis, Chief Labor Relations Specialist, for the Respondent Employer

L. Rodger Webb, Esq., for the Charging Party Labor Organization

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 July 10 and July 14, 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 November 22, 2006, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Association of City of Detroit Supervisors (Charging Party or the Union) filed this charge against the City of Detroit (Respondent or the City) on February 26, 2006. Charging Party represents a bargaining unit consisting of certain supervisory employees of Respondent, including refuse collection foremen; auto repair foremen, subforemen and supervisors; senior and head storekeepers; and senior gas station attendants. Charging Party asserts that on or about October 11, 2005, the parties reached a tentative agreement on the terms of a new collective bargaining agreement. It alleges that on October 21, 2005, Respondent violated its duty to bargain in good faith under Section 10(1)(e) of PERA by repudiating this tentative agreement and withdrawing the offer on which it had been based. Charging Party also alleges that on February 8, 2006, Respondent unlawfully implemented changes in terms and conditions of employment that were not consistent with its proposals to the Union.

## Findings of Fact:

### Contract Negotiations and Fact Finding

On October 10, 2003, the parties began negotiations for a successor collective bargaining agreement that was to cover the years 2001-2005. Respondent's chief negotiator was labor representative Sharlena Chaney. Charging Party's chief negotiator was its attorney, L. Rodger Webb. The parties had nine meetings between that date and August 10, 2004, when Charging Party filed a petition with the Commission for the appointment of a fact finder. Between August 2004 and the fact finding sessions in April 2005, the parties met twice more.

The parties submitted more than fifteen unresolved issues to the fact finder. Among the most significant were: (1) Charging Party's proposal to modify the grievance procedure so that a grievance would be deemed granted or dropped if a party failed to comply with procedural time limits; (2) Charging Party's proposal to increase the amount of union release time for its president; (3) Respondent's proposal to require all employees assigned to 24-hour operations to notify their supervisors at least one hour before the start of their shift that they would not be in to work; and (4) Respondent's proposal to eliminate the contract's "protection" clause. This clause guaranteed that unit employees would not be economically disadvantaged by later contract settlements reached with other bargaining units. There were also two wage issues remaining unresolved. The first was whether refuse collection foremen would receive the \$.50 per hour special wage adjustment that the parties had agreed to for other classifications in the unit.<sup>1</sup> The second was the effective date of the special wage adjustments. Charging Party's position was that the special wage adjustments should be retroactive to the beginning of the contract term. Respondent's position was that the special wage adjustments should be effective on the date the bargaining unit ratified the new agreement.

Fact finder Richard Mittenthal issued his report on August 23, 2005. Mittenthal made recommendations on eighteen issues. He found that the refuse collection foremen supervised employees who had received special wage adjustments, and recommended that the position be included in the list of classifications receiving such adjustments. He recommended that the special wage adjustments be retroactive to July 1, 2004 for the refuse collection foremen and to July 1, 2003 for other classifications. Mittenthal recommended that the parties adopt Respondent's one-hour call-in proposal, that the protection clause remain in the agreement, and that release time for the Union president remain the same with provision made for a substitute in the event that the president was unavailable. He suggested that the parties include some modification to the grievance procedure similar to that proposed by Charging Party. Mittenthal also agreed with Charging Party that Respondent should be required to regularly provide overtime records and that it should reimburse employees for safety glasses. He agreed with Respondent that the contract's 14-month limitation on the use of "prior infractions" in imposing discipline should be extended to 18 months, and that sick leave accrual schedules should be removed from the contract. On all other issues, Mittenthal recommended that the contract language remain the same.

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<sup>1</sup> Respondent agreed to give salary adjustments to unit members whose subordinates had received such adjustments. The parties disagreed over whether refuse collection foremen fell into this category.

### Negotiations After The Fact Finder's Report

On September 16, 2005, Chaney and Craig Rice, a representative of the department of public works, met with Charging Party's bargaining team to discuss the fact finder's recommendations. The meeting began with Chaney handing Charging Party's bargaining team a written summary of the fact finder's recommendations. The parties then went over the issues in the order listed on the summary. Charging Party president Dennis Wheeler testified in detail about this meeting. However, as noted below, he often contradicted his own testimony. Chaney, who also testified at the hearing, had only a sketchy memory of this meeting.

The parties usual bargaining method was to present proposals in writing and initial individual proposals as they reached tentative agreement on them. During the September 16 meeting, both bargaining teams made oral proposals. Although the parties reached agreement on many issues, they did not reduce any of their agreements to writing. Chaney acknowledged that she might not have used the word "package" to refer to Respondent's proposals at this meeting. However, according to Chaney, both parties understood that Respondent's proposals were conditioned on Charging Party's acceptance of the entire offer. Wheeler denied that Chaney offered Charging Party a "package deal." However, at one point in his testimony Wheeler himself used the word "package" to refer to Respondent's offer.

The first issue on Respondent's summary of the fact finder's recommendations was the grievance procedure. Chaney told Charging Party that Respondent could not accept the fact finder's recommendation. She said that Respondent could not control the actions of the different departmental divisions that had to answer grievances, and that Respondent could not agree to a procedure under which it would default on a grievance when it failed to comply with a grievance time limit. Charging Party offered to present a new proposal on the grievance procedure that might be more acceptable to Respondent. Insofar as the testimony indicates, the parties did not discuss the content of this proposal, but returned to the other issues listed on the written summary.

On the issue of the one-hour call-in rule, Wheeler testified that Charging Party told Chaney that it would accept the fact finder's recommendation if the package included a \$.50 special wage adjustment for the refuse collection foremen. Later in his testimony, however, Wheeler said that Charging Party suggested that the one-hour call-in rule recommended by the fact finder be limited to weekends and holidays, and that Respondent said that it could live with this because during weekdays it usually had supervisors who could fill in for absent employees. Charging Party agreed to extend the time limits on the use of prior infractions for disciplinary purposes. It agreed to withdraw its proposal on overtime, as the fact finder had recommended, and to adopt alternate language proposed by Respondent. Respondent agreed to adopt the fact finder's recommendation that unit members be reimbursed for safety glasses, and his recommendation that the City provide the Union with overtime lists. It agreed to provide union release time to a substitute when the union president was not available. The parties agreed that all other contract language, including the protection clause, would remain the same as in the previous contract.

When the parties reached the wage issues, however, they ran into further disagreement. Chaney proposed a special wage adjustment for refuse collection foremen of \$.15 per hour, rather than the \$.50 recommended by the fact finder, and an effective date for all special wage adjustments of August 23, 2005, the date of the fact finder's report. It was unclear from the testimony whether the parties agreed to August 23, 2005 as the effective date for the special wage adjustments at this meeting. Wheeler testified that the Union agreed to this date and also that it proposed a January 2004 effective date. Both Wheeler and Chaney agreed, however, that Charging Party angrily pointed out that the fact finder had found that the refuse collection foremen's subordinates had, in fact, received wage adjustments and that it insisted that the \$.50 wage adjustment for refuse collection foremen had to be in the contract. The meeting ended soon after.

On about October 11, Chaney, Webb and Charging Party president Dennis Wheeler participated in a telephone conference. Wheeler testified in some detail as to what was said during this conference. Wheeler testified that Chaney initiated the October 11 conference, and that she said that Respondent's labor relations director had told her to declare impasse but that they wanted to try and get an agreement. According to Wheeler, Chaney then said either " 'I can get you' or 'I have got you' the \$.50, but we cannot live with [your] grievance procedure [proposal.]" Wheeler related these different versions of this statement at different points in his testimony. According to Wheeler, Chaney said, as she had before, that Respondent could not control the actions of individuals in the departments who were responsible for answering grievances. Wheeler testified that Chaney asked if Charging Party could come up with a compromise proposal on the grievance procedure by the parties' next scheduled bargaining session on October 21. According to Wheeler, Chaney said, "If you can come up with a compromise on October 21, we'll have a contract." Wheeler admitted that Chaney also said that if Charging Party did not "come up with something" on that day, Respondent "would impose." Wheeler testified that he and Webb told Chaney that they would present Charging Party's new proposal on October 21. Wheeler testified that they also said, "If [the City] could come part way, the grievance procedure would not 'be a hold up' for the contract." According to Wheeler, the parties also discussed the effective date of the special wage adjustments. At one point in his testimony, Wheeler said that Charging Party offered January 2004 as the effective date, and Chaney said she would try to come up with a proposal for a date earlier than August 23, 2005. At another point, Wheeler testified that he and Webb agreed to Respondent's proposed date of August 23, 2005 in return for the \$.50 for the refuse collection foremen. Wheeler summed up the parties' positions at the end of this meeting as follows: "[at the next meeting on October 21] we were going to bring in a compromise [proposal] on our grievance procedure, and they were going to come in with a proposal [that] assured that the refuse collection foremen got the \$.50. They would come in with a reasonable retroactive date. . . and we would leave with a contract."

Chaney had no specific recollection of an October 11 telephone conference, although she testified that she had numerous telephone conversations with Wheeler and/or Webb between September 16 and October 21. Chaney testified generally to what she remembered telling Wheeler and Webb during these conversations. According to Chaney, she had no authority to offer Charging Party a special wage adjustment of \$.50 for the refuse collection foremen. She testified, however, that she told Webb and Wheeler that if the parties reached agreement on all

the other outstanding issues, she would approach Respondent's then-labor relations director, Roger Cheek, and ask him to make a decision on whether to offer the \$.50.

Between October 11 and October 21, Charging Party drafted new proposed language for the grievance procedure. In the new proposal, Charging Party would have to serve Respondent with written notice that it had failed to comply with a time limit and give Respondent another ten days to comply or request a special conference before the grievance was deemed granted.

Chaney was not available on October 21, and labor relations representative Reginald Jenkins attended the October 21 meeting in her place. Webb handed Jenkins Charging Party's proposal on the grievance procedure. Jenkins, who was admittedly not familiar with the details of the parties' recent negotiations, went to telephone Chaney. Jenkins returned within five or ten minutes. He said that he had talked to Chaney and that the City was not going to accept Charging Party's proposal. According to Wheeler, Jenkins told Charging Party that Chaney had said that "it was not like [the Union] had said." Jenkins then announced that that the City's "last best offer" on all issues was its last table position, or written offer. Jenkins explained that he was referring to Respondent's last offer prior to fact finding. Insofar as the record indicates, Charging Party did not say anything in response to Jenkins' announcement. Wheeler testified that when Jenkins made this statement, Wheeler "just closed off." Jenkins told Webb and Wheeler that Chaney would get back to them, and the meeting ended.

#### Respondent's Declaration of Impasse and Implementation of its Last Offer

Wheeler testified that neither Chaney nor any other Respondent representative called him after October 21 to discuss the contract negotiations. He testified that he talked to Chaney numerous times on other issues between October 21 and February 2006, but that when he raised the topic of negotiations Chaney said that it was "out of her hands."<sup>2</sup> Charging Party did not write or otherwise attempt to contact Respondent's labor relations director, although it did try, unsuccessfully, to get the mayor's office to intervene on its behalf. According to Wheeler, he felt that it would be futile to try to talk to the labor relations director since Respondent's labor relations staff had not contacted him after the October 21 meeting.

On February 8, 2006, Charging Party received a letter from Respondent's new labor relations director, Barbara Wise-Johnson. The letter read:

The bargaining teams for the City of Detroit and Association of City of Detroit Supervisors have met and have been unable to reach agreement on those issues contained in fact finder Richard Mittenhal's report dated August 23, 2005. Therefore this letter is to serve as notice to ACODS that the City is imposing its last proposals on the open issues.

The MERC ruling calling for a 60-day period for negotiations, beginning with the issuance of the fact finder's report, elapsed as of Saturday, October 22, 2005. During this period, the Association requested that the City increase its economic

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<sup>2</sup> Chaney testified that either Wheeler or Webb called her the day after the October 21 meeting and that she spoke to them. However, she could not remember anything that was said. I credit Wheeler's testimony on this point.

offer to include the classification of Refuse Collector Foreman to those that are to receive a special wage adjustment. While the City did consider your proposal, in light of the current economic climate it must be rejected.

The contractual provisions the City of Detroit is imposing, as contained in the City's last proposals, are as follows: [There followed a list of Respondent's positions on issues presented to the fact finder.]

The parties did not meet again after Respondent's February 8 letter. On February 26, 2006, Charging Party filed the instant unfair labor practice charge.

#### Discussion and Conclusions of Law:

##### Alleged Tentative Contract Agreement

Charging Party asserts that the parties reached a tentative agreement on a contract during their October 11 telephone conference. According to Charging Party, during this conference the parties resolved their only two remaining issues when Respondent conceded to Charging Party's demand for the \$.50 special wage adjustment for the refuse collection foremen and Charging Party conceded to Respondent's demand that it drop its attempt to put a default provision in the grievance procedure. Charging Party acknowledges that it was to present Respondent with a new grievance procedure proposal on October 21. However, according to Charging Party, it was understood that the Union would not continue to insist on the issue if it was not successful in persuading Respondent to accept its compromise proposal. Respondent denies that there was a tentative agreement on the terms of the contract. According to Respondent, the parties did not reach agreement on either the special wage adjustment for the refuse collection foremen or the grievance procedure.

In order for the parties to a collective bargaining relationship to have an agreement on a contract, tentative or otherwise, they must have a meeting of the minds. A party cannot be required to ratify, execute or implement a contract where there has been no actual meeting of the minds. *Buena Vista Schs*, 16 MPER 65 (2003); *City of Grandville*, 1999 MERC Lab Op 513, 157. In determining whether there has been a meeting of the minds on a contract provision, the Commission looks to the expressed words of the parties and their actions. *Lakeville Cmty Schs*, 1990 MERC Lab Op 56, 59.

I conclude that the parties did not have a meeting of the minds on the terms of a new contract. Chaney testified that she did not have the authority to offer Charging Party a \$.50 special wage adjustment for the refuse collection foremen. Wheeler was convinced that she did make this offer, but seemed to be uncertain about the exact words Chaney used. If Chaney said that she "could get" the \$.50 special wage adjustment, as Wheeler testified at one point, she may have merely been expressing confidence that she could persuade the labor relations director to authorize this offer once all other issues were resolved. The parties also had not reached agreement on the grievance procedure. Wheeler testified that on October 11, Charging Party agreed to drop its attempt to modify the grievance procedure if Respondent did not accept its compromise proposal on October 21. However, according to Wheeler, what he actually said was

that Charging Party would not allow the grievance procedure to “hold up” a contract. I do not believe that Wheeler’s statement adequately conveyed the message that Charging Party would drop the issue if Respondent rejected Charging Party’s new proposal. Wheeler also seemed uncertain as to whether the parties had an agreement on the effective date of the special wage adjustments by the end of the conference. In sum, although Wheeler was clearly optimistic that the parties could reach a contract on October 21, his testimony indicated that neither party believed on October 11 they had actually arrived at an agreement.

#### Respondent’s Conduct at the October 21 Meeting

At the October 21, 2005 meeting, Respondent withdrew the proposals it had made after the fact finder’s report, including proposals to which the parties had tentatively agreed. Charging Party argues that even if the parties did not reach a tentative contract agreement on October 11, Respondent’s conduct at the October 21, 2005 meeting amounted to unlawful surface or regressive bargaining. Charging Party cites *Driftwood Convalescent Hospital*, 312 NLRB 247, 252 (1993), and *Arrow Smith & Door Co*, 281 NLRB 1108, fn 2 (1980), for the proposition that an employer’s withdrawal of a proposal that has been tentatively agreed upon during collective bargaining without good cause is evidence of a lack of good faith. It notes that the administrative law judge for the National Labor Relations Board in *Driftwood* found that an employer who failed to either explain to the union its reasons for repudiating the tentative agreements or call any witnesses to explain its conduct had failed to establish that it had good cause for withdrawing from these agreements and substituting regressive proposals.

The Commission has held that a party’s unilateral repudiation of a tentative agreement is not per se evidence of bad faith. *Clare-Gladwin Intermediate Sch Dist*, 1987 MERC Lab Op 637, reconsideration den 1987 MERC Lab Op 102. It holds that it is necessary to look at the party’s entire course of conduct, and its reasons for repudiating the agreement, to determine whether the repudiation evidences a desire to delay, avoid, or otherwise impede negotiations. *Clinton-Ingham-Eaton Cmty Mental Health*, 17 MPER 23 (2004) (no exceptions); *Pinckney Cmty Schs*, 1993 MERC Lab Op 313.

Respondent did not explain, during the parties’ very brief meeting on October 21, 2005, its reasons for withdrawing its proposals and returning to its pre-fact finding position. At the hearing, however, Respondent asserted that its September 16 proposals were a package. It asserted that it withdrew its package offer on October 21, 2005 because Charging Party had not accepted it, and because by October 21 it had become clear that parties would not be able to reach a contract based on this offer.

I agree with Respondent that Charging Party either knew or should have realized that Respondent’s September 16 proposals, including those to which the parties had agreed, constituted a package offer that would be withdrawn if the parties did not reach a contract based on these proposals. On September 16, 2005, the parties had been negotiating their contract for almost two years, had met almost a dozen times, and had presented their arguments to a fact finder. The September 16 meeting during which the parties discussed the fact finder’s recommendations did not follow the parties’ usual bargaining format, in that the parties did not present their proposals in writing and did not sign off on their agreements. I find that both

parties recognized that the agreements they reached on September 16 were conditioned on their reaching a contract based on the proposals made at this meeting. In addition, on October 11, Chaney warned Charging Party that if the parties did not reach agreement on a contract on October 21, Respondent “would impose.” Since the parties had tentatively agreed to everything except three Charging Party proposals, Chaney can only have meant that after that date, Respondent intended to withdraw the offers it had made after fact finding.

I also agree with Respondent that its decision to withdraw its September 16, 2005 proposals on October 21, 2005 was based on a good faith belief that Charging Party had rejected these proposals and that further discussion would be futile. When the parties met on September 16, Respondent made proposals on the remaining wage issues that represented a compromise between its original position and what the fact finder had recommended. Respondent also explained why it felt it was unable to agree to a modification to the grievance procedure that would result in it defaulting on a grievance when it failed to meet grievance time limits. Charging Party did not agree to Respondent’s proposal on a special wage adjustment for the refuse collection foremen and did not agree to withdraw its “default” proposal. On October 21, 2005, Charging Party presented yet another proposal under which Respondent’s failure to act on a grievance would result in the grievance being granted. Although Charging Party apparently intended to drop the issue if Respondent did not accept its October 21 proposal, it did not make its intention clear to Respondent either before or on October 21. It was, therefore, reasonable for Respondent to conclude on October 21 that the parties would not be able to reach a contract based on its September 16 proposals. I find that Respondent’s withdrawal of its September 16 offer was made in good faith and was not evidence of an intention to delay, avoid or otherwise impede agreement on a contract.

#### Respondent’s February 8, 2006 “Implementation”

Charging Party argues that Respondent’s February 8, 2006, implementation of changes in terms and conditions of employment was not lawful because it was not consistent with Respondent’s “last offer” at the time of impasse. Charging Party does not dispute that the parties were at impasse on February 8, 2006. Rather, according to Charging Party, “any impasse reached was reached at the parties’ September 16 meeting and/or the conference call between Chaney, Wheeler and Webb,” not at the October 21 meeting. Therefore, Charging Party argues, any changes Respondent implemented had to be consistent with its outstanding proposals on those dates. For example, according to Charging Party, Respondent was required to implement a special wage adjustment for the refuse collection foremen of either \$.15 or \$.50 per hour, and it could not “remove the protection clause” from the agreement.

An employer may not make unilateral changes after impasse that are substantially different from any that the employer has proposed during negotiations. *NLRB v Crompton-Highland Mills*, 337 US 217, 225 (1949). However, after bargaining to an impasse, an employer does not violate its duty to bargain by making unilateral changes that are reasonably comprehended within its pre-impasse proposals. *Cass Co Rd Comm*, 1983 MERC Lab Op 378; *Escanaba Area Schs*, 1990 MERC Lab Op 887, 891, citing *Taft Broadcasting Co*, 163 NLRB 475 (1967). In this case, on October 21, Respondent’s withdrew its September 16, 2005 offer. At that time, Respondent’s only outstanding offer was the written proposal it had presented to

Charging Party just prior to the fact finding proceeding. Insofar as the record discloses, the changes Respondent implemented on February 8, 2006 were consistent with this proposal. I find that Respondent could lawfully implement the terms of this offer. See *City of Highland Park*, 1993 MERC Lab Op 71 (no exceptions), in which the administrative law judge concluded that an employer who withdrew a package offer after the union rejected it could lawfully implement changes contained in an earlier offer that remained outstanding at the time of implementation. I conclude, therefore, that Respondent did not violate its duty to bargain in good faith by unilaterally implementing changes in terms and conditions of employment on February 8, 2006.<sup>3</sup>

In accord with the findings of fact and conclusions of law set forth above, I conclude that Charging Party failed to establish that Respondent violated Section 10(1)(e) of PERA in this case. I recommend, therefore, that the Commission issue the following order.

### RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern  
Administrative Law Judge

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

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<sup>3</sup> I note that both Charging Party and Respondent appear to be under the impression that in addition to implementing changes in terms and conditions of employment for bargaining unit members, e.g., the one-hour call-in rule, Respondent also “implemented a contract” on February 8, 2006. However, a last offer implemented by an employer after the parties have reached impasse is not a contract. A bona fide impasse does not terminate an employer’s bargaining duty, but merely suspends it until circumstances change which break the impasse. *City of Ishpeming*, 1985 MERC Lab Op 517. See also *Airflow Research & Mfg Corp*, 320 NLRB 861 (1996). Respondent did not “remove the protection clause from the contract” on February 8, 2006, because the parties had no contract at that time.