STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

LAKE COUNTY AND LAKE COUNTY SHERIFF,
Public Employers - Respondents,

Case No. C07 A-011

-and-

POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization - Charging Party.
_____/

APPEARANCES:

Cohl, Stoker, Toskey & McGlinchey, PC, by Bonnie G. Toskey, Esq., for Respondents

George Mertz, Esq., Assistant General Counsel, for Charging Party

DECISION AND ORDER

On February 7, 2008, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above case finding that Respondents, Lake County and Lake County Sheriff (collectively, the Employers), violated Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e), by refusing to arbitrate a grievance filed by Charging Party, Police Officers Association of Michigan (POAM or the Union). Charging Party filed the grievance on behalf of Joseph Luce, a County deputy who was terminated between the expiration date of the parties' 2003-2005 collective bargaining agreement and the date that Respondents ratified the 2006-2008 agreement. The ALJ held that the grievance is arguably arbitrable and that Respondents violated their duty to bargain in good faith by refusing to submit the Luce grievance to an arbitrator for a decision on the issue of arbitrability. The ALJ recommended we order Respondents to cease and desist from repudiating their obligation to arbitrate grievances under their 2006-2008 collective bargaining agreement with POAM. The ALJ also recommended we order that, upon demand, Respondents participate in the process of arbitrating the grievance filed by POAM regarding Luce's termination. The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. On March 3, 2008, Respondents filed exceptions to the ALJ's Decision and Recommended Order. Charging Party did not file a response.

In their exceptions, Respondents allege that the ALJ erred by *sua sponte* noting that the effective date of the 2006-2008 collective bargaining agreement made the Luce grievance arguably arbitrable. Respondents further allege that the ALJ erred by finding that the Luce grievance is arguably arbitrable despite the Employers' repeated notice to POAM that it would not retroactively apply the 2006-2008 agreement's grievance procedure. Respondents also argue that the ALJ erred by finding that the issue of whether the Luce grievance is arbitrable is to be decided by an arbitrator. Finally, Respondents contend that the ALJ erred by holding that they committed an unfair labor practice by refusing to arbitrate a grievance filed after the parties' 2003-2005 collective bargaining agreement had expired and before the parties ratified the 2006-2008 agreement. We have reviewed Respondents' exceptions, and we find them to be without merit.

Factual Summary:

Charging Party and Respondents were parties to a 2003-2005 collective bargaining agreement that provided a grievance procedure concluding in binding arbitration, as well as a provision stipulating that Respondents must demonstrate just cause for terminating an employee. As of the contract's expiration on December 31, 2005, no agreement had been reached to extend the term or provisions of the contract.

The parties began negotiating a new collective bargaining agreement during August 2005 and reached a tentative agreement in May 2006. The tentative agreement was drafted in the form of a list of changes to the parties' 2003-2005 contract. The parties agreed that, except for the enumerated changes listed in the tentative agreement, all language from the previous contract would become part of the new agreement. The tentative agreement did not state when the contract would take effect. However, the agreement provided that a change in the seniority provisions accepted by the parties would not be retroactive, nor would the new language apply to any pending grievances.

On July 19, 2006, Charging Party ratified the tentative agreement. Respondents did not immediately submit the tentative agreement to the County's board of commissioners for ratification. Counsel for Respondents, John McGlinchey, prepared a draft contract that was sent to Charging Party on August 10, 2006. The draft provided the contract was effective January 1, 2006 and would be in full force and effect until December 31, 2008. On September 19, 2006, after McGlinchey and Charging Party's business representative, Patrick Spidell, agreed to a few clerical changes to the draft and to modify the retiree health insurance provisions with a letter of understanding, Spidell signed the contract.

On September 15, 2006, several days before the contract was signed by Spidell, Respondents terminated Deputy Joseph Luce. Charging Party filed a grievance on September 20, 2006. Respondents denied the grievance, stating that the discharge was subsequent to the expiration of the old contract and prior to the Employers' execution of the new contract. In support of its position, Respondents contended that, based on *Ottawa Co v Jaklinski*, 423 Mich 1; 377 NW2d 668 (1985), the right to be discharged for just cause does not survive the expiration of a labor contract and, therefore, employers have no

obligation to arbitrate a post-contract discharge based on an alleged violation of the just cause discharge standard contained in an expired labor contract. The Union informed Respondents it disagreed with the Employers' interpretation of the *Jaklinski* case, claiming that there is nothing in the case that would prevent a just cause standard from applying to the discharge of Luce.

On October 12, 2006, Charging Party's local union president, Ron Brown, notified Respondents' board of commissioners that Charging Party was appealing Luce's grievance to the third step of the grievance procedure and would ultimately seek arbitration if the grievance procedure did not resolve the issue. On October 17, 2006, McGlinchey sent a letter to Spidell stating that the agreement ratified and executed by POAM would be presented to the board of commissioners for ratification/execution. The letter also stated that the Employer did not consent to arbitrate grievances filed after the expiration of the old contract, particularly the one involving the Luce discharge. As late as October 26, 2006, the parties were communicating with each other about the grievance issue, with Respondents taking the position they would not arbitrate the issue. On October 26, the contract was signed by both Respondents, even though the parties continued to negotiate over retiree health insurance issues. Shortly thereafter, the parties agreed to substitute retiree health insurance language proposed by Charging Party for the language in the ratified agreement. Brown signed the contract on November 8, 2006. The retiree health insurance changes then became effective, and employees received wage increases that were made retroactive to January 1, 2006.

Discussion and Conclusions of Law:

As the ALJ correctly states in her Decision and Recommended Order, this Commission has long held that a refusal to proceed to arbitration on a grievance that is arguably arbitrable is a violation of the duty to bargain in good faith. See *City of Detroit*, 1994 MERC Lab Ops 884; 7 MPER 25122 (1994); *City of Mt Clemens*, 1974 MERC Lab Op 336, 340, aff'd 58 Mich App 635 (1975). See also *Hurley Hospital*, 1973 MERC Lab Op 584, 588; *City of Ann Arbor*, 1993 MERC Lab Op 186; and other cases cited in ALJ's Decision and Recommended Order. Respondent contends that the ALJ erred by holding it committed an unfair labor practice by refusing to arbitrate a grievance filed after the parties' 2003-2005 collective bargaining agreement had expired and before the parties ratified the 2006-2008 agreement. For us to agree with Respondent's contention, we would have to find that the grievance is clearly not arbitrable under both the 2003-2005 contract and the 2006-2008 contract. The record does not support such a finding.

We agree with the ALJ for the reasons stated in her decision that the Employers had no duty under the expired 2003-2005 contract to arbitrate the Luce grievance. Arbitration is a recognized exception to the general rule that an employer has a statutory duty to maintain existing terms and conditions of employment after the expiration of a collective bargaining agreement. See *Gibraltar Sch Dist v Gibraltar MESPA-Transp*, 443 Mich 326, 335-346 (1993). Where a grievance has been filed after the contract's expiration and in the absence of contract language providing that the arbitration provisions extend beyond the life of the contract, an employer may lawfully refuse to arbitrate a

grievance over whether a discharge was in compliance with contractual just cause requirements. See *Ottawa Co v Jaklinski*, 423 Mich 1 (1985). Since the parties' 2003-2005 contract did not extend the right to arbitration beyond the contract's expiration, that contract did not require Respondents to arbitrate the Luce grievance.

Thus, the question of whether the Luce grievance is arguably arbitrable hinges on whether there is some basis for such a finding in the 2006-2008 contract. As the ALJ noted, the 2006-2008 contract expressly provides that it became effective January 1, 2006, several months before Luce's discharge and the filing of the grievance. That effective date was included in the initial draft of the contract by Respondents' counsel and Respondents have pointed to nothing within the four corners of the contract setting a different effective date for the arbitration provision or excepting the arbitration provision from the contract's January 1, 2006 effective date. In support of their contention that the Luce grievance is not arbitrable, Respondents point to communications made during the final phase of negotiations, after Charging Party ratified the contract, but before Respondents did so. Respondents contend that those communications, asserting the Employers did not consent to the arbitration of grievances filed after the expiration of the 2003-2005 contract, were sufficient to prevent the arbitration provision in the 2006-2008 contract from being retroactive to that contract's effective date. However, after sending those communications, Respondents signed the 2006-2008 contact, which does not expressly incorporate those communications and appears to be inconsistent with them. Indeed, the contract did not address the issue of retroactive arbitration. Thus, we agree with the ALJ that the Luce grievance is arguably arbitrable under the 2006-2008 contract. Upon finding the grievance in this matter is arguably arbitrable, we conclude the Respondents violated their duty to bargain in good faith under Section 10(1)(e) by refusing to submit the grievance to arbitration.

In their exceptions, Respondents allege the ALJ erred by *sua sponte* pointing out the 2006-2008 collective bargaining agreement provides an effective date of January 1, 2006, thus rendering the Luce grievance arguably arbitrable. Rule 172(1) of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.172(1), provides, "An administrative law judge . . . shall inquire fully into the facts involved in the proceeding before him or her." A full inquiry into the facts involved in the proceeding should include reading the exhibits and applying the law to facts gleaned from those exhibits and the rest of the record, as the ALJ did here. The ALJ properly considered facts in the record that led her to conclude that the Luce grievance is arguably arbitrable.

We make no finding on the question of whether the arbitration provision in the 2006-2008 contract is retroactive to January 1, 2006 or whether the Luce grievance is arbitrable. That is not the issue before us. Inasmuch as we have found that the issue is arguably arbitrable, the question of actual arbitrability is left to the arbitrator or the courts. *City of Detroit (Police Dep't)*, 1989 MERC Lab Op 699, 700; 2 MPER 20124 (1989).

We have considered all other arguments presented by Respondents and conclude they would not change the result in this case.

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

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
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APPEARANCES:

Cohl, Stoker, Toskey & McGlinchey, PC, by Bonnie G. Toskey, Esq., for Respondents

George Mertz, Esq., Police Officers Association of Michigan, for Charging Party

DECISION AND RECOMMENDED ORDER
I. 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 Lansing, Michigan on June 29, 2007 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 September 11, 2007, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Police Officers Association of Michigan filed this charge against Lake County and the Lake County Sheriff on January 24, 2007. Charging Party represents a bargaining unit of nonsupervisory police officers employed by the Respondents. According to Charging Party, in May 2006, the parties reached tentative agreement on a new contract effective from January 1, 2006 to December 31, 2006. Both Charging Party's members and Respondent Lake County's Board of Commissioners subsequently ratified the tentative agreement. A contract embodying its terms was executed by all parties on or before the middle of November 2006. Charging Party alleges that Respondents unlawfully repudiated this agreement, in violation of their duty to bargain in good faith under Section 10(1) (e) of PERA, when they refused to arbitrate a grievance filed on behalf of an employee terminated between the date of the tentative agreement and the date that Respondent Lake County's Board of Commissioners ratified the agreement.

Findings of Fact:

The parties' 2003-2005 collective bargaining agreement expired on December 31, 2005. There was no agreement to extend the contract or any of its terms. This contract contained a grievance procedure ending in a binding arbitration and a provision requiring Respondents to have just cause for terminating an employee.

The parties began negotiating a successor agreement in August 2005. Neither the grievance arbitration nor the just cause provisions were discussed during negotiations. On May 23, 2006, the parties reached tentative agreement on the terms of a new contract. The tentative agreement, which included both pay raises for employees retroactive to January 1, 2006 and higher employee health insurance contributions, took the form of a list of changes to the previous contract agreed to by the parties. The parties understood that, except for these changes, all language from the previous contract would carry over into the new agreement. The tentative agreement initialed by the parties did not state when the contract was to be effective. The agreement did state that a change in seniority provisions agreed to by the parties would not be retroactive, and that the new language would not be applicable to any pending grievances.

On July 19, 2006 Charging Party notified Respondents' attorney, John McGlinchey, that its members had ratified the tentative agreement. Respondent Lake County did not immediately submit the tentative agreement to its Board of Commissioners for ratification. Instead, McGlinchey prepared a draft contract which he sent to Charging Party business representative Patrick Spidell on August 10. The first paragraph of the draft contract, modeled on the first paragraph of the previous agreement, read:

> This AGREEMENT made and entered into this _____ day of _____ 2006, effective January 1, 2006, unless otherwise provided by and between LAKE COUNTY BOARD OF COMMISSIONERS and the LAKE COUNTY SHERIFF (hereinafter referred to as the "Employer" and the POLICE OFFICERS ASSOCIATION OF MICHIGAN (hereinafter referred to as the "Union" or "POAM."

The draft also included a clause stating that the agreement would be in full force and effect until December 31, 2008. The cover page stated that the agreement was "effective January 1, 2006 to December 31, 2008."

Spidell asked McGlinchey to make certain changes to the draft. Only one, the addition of language to a new contract provision dealing with retiree health insurance, was substantive. On August 30, McGlinchey sent Spidell a second draft that corrected the clerical errors, as well as a proposed letter of understanding dealing with the retiree health care issue. Spidell had several subsequent discussions with McGlinchey about that issue. Spidell told McGlinchey that Charging Party's local affiliate was not satisfied with the letter of understanding and did not want to sign the contract until the issue was resolved. However, Spidell signed the second draft on Charging Party's behalf and returned it to Respondent on September 19, 2006.

On September 15, 2006, Respondents terminated deputy Joseph Luce. On September 20, Charging Party filed a grievance asserting that Luce's termination was without just cause. Respondents denied the grievance. On September 25, McGlinchey wrote to Spidell as follows:

> As you probably are aware, subsequent to the expiration of the labor contract between the POAM, Lake County and the Lake County sheriff, and prior to the Employer's execution of the successor agreement, Joe Luce was discharged from employment. Under the ruling of the Michigan Supreme Court in *Ottawa Co v Jaklinski*, 423 Mich 1; 377 NW2d 668 (1985) the right to be discharged for just cause does not survive the expiration of a labor contract. As a result, there is no obligation for an employer to arbitrate post-contract discharges based on an alleged violation of the just cause standard contained in an expired labor contract.
>
> The County and Sheriff intend to execute the successor labor contract. However, the employer wishes to make clear that by doing so it does not agree to any retroactive application of the grievance procedure/arbitration to Mr. Luce's grievance. Should the Union have a different legal interpretation of this matter, please let me know immediately.

Spidell told McGlinchey that he needed to refer the issue to Charging Party's counsel. On October 3, 2006, Charging Party counsel George Mertz wrote McGlinchey as follows:

> This letter is in response to your letter of September 25, 2006 to Pat Spidell referencing the recent discharge of Joe Luce from the Lake County Sheriff Department. As you may have already suspected, the POAM certainly does have a different interpretation of the Michigan Supreme Court's ruling in *Ottawa Co v Jaklinski*, 423 Mich 1 (1985). It is the Union's position that there is nothing in the *Jaklinski* ruling that would prevent a just cause standard from applying to the discharge of Mr. Luce and the Union would not agree to any actions by the Employer which contradict this interpretation.
>
> Feel free to contact me or Mr. Spidell should you have any questions with regard to the Union's position.

On October 12, Charging Party local union president Ron Brown notified Respondent's Board of Commissioners that Charging Party was appealing Luce's grievance to the third step of the grievance procedure. The notice indicated that in the event the grievance was not satisfactorily resolved, the union would request arbitration.

On October 17, McGlinchey sent Spidell another letter:

> As I have not heard from you since our last telephone conference and as the Employer wishes to expedite the above matter, this letter is to advise you that the agreement ratified/executed by the POAM will be presented to the Board of Commissioners for its ratification/execution (as well as the Sheriff.) I have previously advised you that by ratifying/executing the agreement, the Employer

> does not consent to arbitrate grievances filed after the contract expired, particularly that which has been filed on behalf of Joe Luce. No "retroactive" arbitration of post-contract grievances is required by law concerning matters of (just cause) discipline under Michigan law.
>
> I anticipate the Board and Sheriff will ratify and execute the successor agreement shortly. The Employer will process retroactive pay increases (as we agreed during bargaining) following ratification/execution.

On October 25, Spidell sent Respondent a proposed letter of understanding incorporating new language into the retiree health insurance provision. Spidell told McGlinchey that the local union would not sign the contract without this change. On October 25 or 26, Respondent's Board of Commissioners ratified the contract. On October 26, 2006, Lake County Sheriff Robert Hilts and Board chairman James Clark executed the contract, in the same form as it had been signed by Spidell in September. A copy with their signatures was given to Spidell. Shortly thereafter, the parties agreed to substitute the retiree health insurance language proposed by Charging Party on October 25 for the retiree health provision in the ratified agreement. Local president Brown signed the contract on November 8, 2006. Respondent then put the insurance changes into effect and employees received wages increases retroactive to January 1, 2006.

On October 26, Clark wrote to Brown in response to his October 12 letter. Clark told Brown that Respondent would not agree to arbitrate Luce's grievance. Clark referred to McGlinchey's September 25 letter, and suggested Brown talk to Spidell. On October 30, Charging Party sent a request for a list of possible arbitrators for the Luce grievance to the Federal Mediation and Conciliation Service (FMCS). Although the FMCS subsequently sent the list, the parties never selected an arbitrator.

II.

Discussion and Conclusions of Law:

Both federal law and PERA strongly favor arbitration to resolve disputes arising under a collective bargaining agreement. In *Kaleva-Norman-Dickson Sch Dist No 6 v KND Teachers' Ass'n,* 393 Mich 583, 592 (1976), the Michigan Supreme Court quoted *United Steelworkers of America v Warrior & Gulf Navigation Co,* 363 US 574, 582-583, 585 (1960), as follows:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. Absent an express provision excluding [a] particular grievance from arbitration or the most forceful evidence of a purpose to exclude the claim, the matter should go to arbitration . . .

The Commission has long held that an employer's refusal to proceed to arbitration on a grievance which is arguably arbitrable under the parties' collective bargaining agreement constitutes a violation of its duty to bargain in good faith. *Hurley Hospital,* 1973 MERC Lab Op 584; *City of Mt Clemens,* 1974 MERC Lab Op 336, aff'd 58 Mich App 635 (1975), *Ludington Area Schs,* 1976 MERC Lab Op 985; *City of Detroit (Police Dept),* 1989 MERC Lab Op 331; *City of Ann Arbor,* 1993 MERC Lab Op 187. It has emphasized, however, that in finding an

employer guilty of an unfair labor practice in refusing to submit an arguably arbitrable dispute to an arbitrator, it is not making a finding on the ultimate arbitrability of the grievance, an issue properly decided by the arbitrator or the courts. *City of Mt Clemens,* at 339; *Hurley Hospital,* at 588.

Respondents asserts that they had no obligation to arbitrate the grievance filed over Luce's termination because the parties' 2003-2005 contract had expired and the 2006-2008 agreement had not yet gone into effect at the time Luce was discharged. It is well established under both federal and Michigan law that a party has a duty to arbitrate a grievance only if it has contracted to do so. Arbitration is a recognized exception to the general rule that an employer has a statutory duty to maintain existing terms and conditions of employment after the expiration of a collective bargaining agreement until agreement or impasse. *Gibraltar School Dist v Gibraltar MESPA-Transportation,* 443 Mich 326, 335-346 (1993). [1] An employer has a duty to arbitrate a grievance after contract expiration only if it arises under the expired contract, i.e. it involves facts and occurrences that arose before expiration; the action taken after expiration infringes a right that accrued or vested under the agreement; or, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the contract. *Gibraltar,* at 348; *Jaklinski,* at 21-22, 24-25. The right not to be discharged except for just cause is not the kind of right which accrues or vests during the contract's term. *Jaklinski,* at 25. Therefore, Respondents had no obligation under the 2003-2005 agreement to arbitrate Luce's discharge unless the parties explicitly agreed that they would arbitrate grievances over terminations occurring in the hiatus between contracts. There is no dispute that there was no such agreement.

Charging Party's argument that Respondents were obligated to arbitrate Luce's grievance has two parts. It points out first that when Luce was terminated, the parties had reached a tentative agreement on a contract with just cause and grievance arbitration clauses and Charging Party's membership had ratified that agreement. According to Charging Party, when Luce was terminated Charging Party was simply awaiting Respondents' execution of the agreement. Charging Party asserts that Respondents should be required to arbitrate Luce's grievance since at the time he was terminated the parties had agreed to continue the just cause and arbitration provisions. However, as discussed above, a party has no obligation under PERA to arbitrate a grievance unless it has contracted to so. As Respondents point out in their brief, a tentative collective bargaining agreement does not as a general rule become a binding contract under PERA until the employer's governing body takes formal action to ratify it. *City of Flint,* 16 MPER 11 (2003); *City of Pontiac,* 1992 MERC Lab Op 245, 248; *North Dearborn Heights Sch Dist,* 1967 MERC Lab Op 673. See also *Munising Pub Schs,* 1996 MERC Lab Op 167, 173. When Luce was terminated on September 15, 2006, the Lake County Board of Commissioners had not ratified the parties' 2006-2008 contract. There was, therefore, no binding arbitration agreement in effect on the date that Luce was discharged.

[1] In *Ottawa Co v Jaklinski,* 423 Mich. 1, (1985), the union argued that the employer had an obligation to maintain arbitration as a condition of employment after contract expiration. The Court, at 12-13, rejected this argument by noting that the parties had reached impasse before the employee was terminated, implying that the employer would have been required to arbitrate the grievance had it arisen earlier. However, *Gibraltar* put this argument to rest.

However, as Charging Party also points out in its brief, the Board of Commissioners subsequently ratified, and all parties executed, a contract stating that it was "effective January 1, 2006 unless otherwise provided by" the parties.[2] The contract does not provide for another effective date for the grievance arbitration or just cause provisions. Respondents assert that McGlinchey, in letters to Spidell dated September 25 and October 17, 2006, clearly stated that Respondent did not agree to "retroactive" arbitration of the Luce's grievance. However, Respondents subsequently executed a document which, on its face, appears to provide otherwise. I find that the Luce grievance is arguably arbitrable under the parties' 2006-2008 collective bargaining agreement. I conclude, therefore, that Respondents violated their duty to bargain in good faith by refusing to submit the Luce grievance to an arbitrator. I note, however, that this does not constitute a finding that the grievance was arbitrable, but only that the issue of arbitrability is an issue of contract interpretation which should be decided by an arbitrator. In accord with this conclusion, and the findings of fact set forth above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondents Lake County and Lake County Sheriff, their officers and agents, are hereby ordered to:

1. Cease and desist from repudiating their obligation to arbitrate grievances under their 2006-2008 collective bargaining agreement with Charging Party Police Officers Association of Michigan.

2. On demand, participate in the process of arbitrating the grievance filed by Charging Party regarding the termination of Joseph Luce.

3. Post the attached notice in conspicuous places on Respondents' premises, including all places where notices to employees in Charging Party's bargaining unit are customarily posted, for a period of thirty consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____

[2] The *Jaklinski* Court noted, at 10, that the union could not demand to arbitrate the grievance in that case because, although the parties had reached a new contract, the grievance procedure and arbitration clause of the new agreement were not given retroactive effect.