STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

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

Case No. C08 A-019

-and-

KALAMAZOO COUNTY SHERIFF'S DEPUTIES ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Nantz, Litowich, Smith, Girard & Hamilton, by John H. Gretzinger, Esq., for Respondents

Michael F. Ward, Esq., for Charging Party

DECISION AND ORDER

On October 15, 2008, Administrative Law Judge Julia C. Stern (ALJ) issued her Decision and Recommended Order finding that Respondents, Kalamazoo County and Kalamazoo County Sheriff, did not violate Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e). The ALJ held that since Act 312[1] eligibility is a non-mandatory subject of bargaining, the Respondents did not violate PERA by unilaterally repudiating an agreement that it would not challenge the Act 312 eligibility of certain employee classifications in its Sheriff's Department. The ALJ also recommended that the Commission not honor the Act 312 contractual provision, because to do so would expand statutory protections without authority from the legislature or the courts. The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. On November 6, 2008, Charging Party filed its exceptions to the ALJ's Decision and Recommended Order, and a brief in support of the exceptions. Respondents filed their brief in support of the ALJ's Decision and Recommended Order on November 19, 2008. On December 1, 2008, the parties requested that the case be put on hold while they sought to resolve their dispute without further action by this Commission.

On February 11, 2009, the parties asked the Commission to resume its review of this matter. On February 24, 2009, Charging Party filed a motion to strike a portion of Respondents' brief in support of the ALJ's Decision and Recommended Order. Charging Party's motion was accompanied by a brief in support of the motion. On the same date, Charging Party filed a reply

[1] 1969 PA 312, as amended by 1976 PA 203 and 1977 PA 303, MCL 423.231-247, provides for compulsory binding arbitration of unresolved contract disputes in city, county, village, or township police and fire departments.

brief in support of its exceptions. On February 25, 2009, Respondents filed their response to Charging Party's motion to strike and reply brief in support of its exceptions.

In its exceptions, Charging Party contends that the ALJ erred in her conclusion that the provision regarding Act 312 eligibility involved a non-mandatory subject of bargaining. Charging Party also asserts that the ALJ erred in her recommendation that the Commission not honor the parties' agreement regarding Act 312 eligibility. Charging Party's motion to strike alleges that Respondents' brief in support of the ALJ's Decision and Recommended Order does not comply with Rule 176 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.176, because it asks the Commission to reject certain ALJ findings to which no exceptions were filed. In Respondents' reply to Charging Party's motion to strike and reply brief in support of exceptions, Respondents argue that the Commission's rules do not provide for reply briefs, and that the motion to strike and reply brief in support of exceptions are an effort to circumvent such rules, are untimely, and should be disregarded.

The Commission's rules do not provide express time limits for filings made after a matter has been held in abeyance pending settlement negotiations, or for filing a motion to strike that is directed at a brief in support of the ALJ's Decision and Recommended Order. Despite the absence of express time limits for such filings, we must look at whether the timing of such filings is reasonable under the circumstances. Thus, a motion to strike that is directed at a brief in support of the ALJ's Decision and Recommended Order should be filed within a reasonable time after the filing of the brief. Here, the parties asked the Commission to hold this matter in abeyance twelve days after Respondent's brief in support of the ALJ's decision was filed. Because the parties were trying to settle this matter, it would have been counterproductive for Charging Party to have filed its motion to strike at that point. Charging Party's motion to strike was filed thirteen days after the parties notified the Commission that they wanted the Commission to resume its review of this matter. Therefore, we find that the motion to strike was filed within a reasonable period of time after the filing of Respondents' brief and it is timely.

Rule 176 provides that parties shall file exceptions to the ALJ's Decision and Recommended Order within twenty days of its issuance.[2] Generally, arguments in support of a party's exceptions may be included in a supporting brief filed with the exceptions. A party may file cross-exceptions or a brief in support of the decision and recommended order within ten days of service of the other party's exceptions.[3] Rule 176 also provides that any exception "that is not specifically urged is waived" and an exception that fails to comply with Rule 176 may be disregarded. The Commission's rules do not provide for a reply to a brief supporting the ALJ's Decision and Recommended Order. See *Washtenaw Co,* 21 MPER 38 (2008).

In this case, Respondents did not file exceptions or cross-exceptions. Respondents' only mention of disagreement with anything in the ALJ's Decision and Recommended Order is in their brief in support of the ALJ's decision. To have the Commission consider their arguments opposing the ALJ's decision, Respondents were required to file cross-exceptions. Had Respondents filed cross-exceptions, Charging Party would have been entitled to respond to them. See *City of Grand*

[2] Rule 183 extends the twenty day period by three days when the ALJ's Decision and Recommended Order is served on the parties by mail.
[3] Pursuant to Rule 183, this period is also extended by three days when the service of the exceptions is by mail.

Rapids, 19 MPER 69, n 1 (2006). See also *Seventeenth Dist Court (Redford Twp)*, 19 MPER 88 (2006).

In its motion to strike, Charging Party contends that the passages in Respondents' brief that take issue with the ALJ's decision should be stricken and should not be considered by this Commission because they fail to conform to the requirements of Rule 176. We agree. Charging Party's motion to strike is granted. The portions of Respondent's brief in support of the ALJ's decision that take issue with the ALJ's decision are stricken and will not be considered. Furthermore, because there is no provision in the Commission's rules providing for the filing of a reply to a response to exceptions, we also decline to consider Charging Party's reply brief in support of its exceptions. See *Washtenaw Co*, 21 MPER 38 (2008).

The Commission has reviewed Charging Party's exceptions, and those portions of Respondents' brief in support of the ALJ's decision that have not been stricken. Because we find Charging Party's exceptions to have merit for the reasons stated below, we reverse the ALJ's Decision and Recommended Order.

Factual Summary:

Charging Party represents a bargaining unit of Respondent's employees assigned to the sheriff's department's law enforcement and jail divisions. Those employees work in positions classified as deputy sheriff (pay grade F-19), sergeant (pay grade F-22), and corrections deputy (pay grade F-17). The deputy sheriff and sergeant positions may be assigned to either the law enforcement division or the jail division, but the corrections deputy position is only assigned to work in the jail.

In the late 1970s, Respondents ended the practice of staffing the jail with deputy sheriffs and created two new bargaining unit positions, corrections officer (CO) I and CO II. Unlike the deputy sheriffs, the COs' were not required to be certified police officers. However, to advance to the position of CO II, CO Is had to undergo the same training required to become a certified officer. Promotion to CO II entitled COs to a raise in salary equaling that of the deputies. In 1980, the requirement for CO Is to advance to CO IIs was changed from the training necessary to be a certified officer to training that was related to their corrections duties. By 1999, almost all CO Is had advanced to the rank of CO II and the Sheriff informed Charging Party that no more COs would be hired. The Sheriff indicated that it was more practical to hire deputies to work in the jail since they were paid the same as the CO IIs, but could also be transferred to positions outside the jail if necessary. By 2002, the jail was staffed almost entirely by employees classified as deputies.

In November 2002, the parties began negotiations for a successor to the collective bargaining agreement that would expire at the end of that month. Respondents' negotiators expressed the need to reduce the costs of operating the jail and indicated that they wanted to hire CO Is to staff the jail without being required to adhere to the parties' agreement that CO Is could be promoted automatically to CO IIs. Charging Party responded by asking Respondents to agree, that if COs were to be hired under those circumstances, Respondents would not challenge the eligibility of COs for Act 312 arbitration. At the parties' next bargaining session, Respondents gave Charging Party a written proposal discussing the CO position and including the statement, "CO Is will be subject to Act 312 arbitration." After several rounds of negotiations, the parties arrived at a tentative agreement for 2003-2004 that included the following provision as Article 24, Section 6:

> Employees in the Corrections Deputy (F-17) classification and employees in the F-19 and F-22 classifications assigned to the jail will be included within the jurisdiction of Act 312 arbitration to the same extent as Deputies on road patrol and the Employer will not challenge their Act 312 eligibility at any time so long as road patrol Deputies have Act 312 arbitration or similar interest arbitration.

After Charging Party's membership ratified the tentative agreement, the parties signed a document titled "Letter of Intent and Commitment" which read as follows:

> This letter is to express the clear commitment of Kalamazoo County Government and the Sheriff of the County of Kalamazoo (Employers) which is shared by the Kalamazoo County Sheriffs Deputies Association, that the provisions of Article XXIV of the new collective bargaining agreement (titled "Corrections Deputies") will not expire on December 31, 2004.
>
> It is further the parties commitment that the Employers will not at any time, either before or after December 31, 2004, challenge the provisions of Article XXIV of the 2003-2004 contract as long as the road patrol deputies have Act 312 arbitration or other similar interest arbitration.
>
> Further, it is the parties shared commitment that the Employer will not seek, at any time before or after December 31, 2004, [to] argue to the Michigan Employment Relations Commission or any other administrative or judicial body or official that the provisions of Article XXIV expire or will become of no effect as of December 31, 2004 or January 1, 2005 or at any time thereafter.

The "Letter of Intent and Commitment" was signed on November 12, 2003, by Charging Party, by the Undersheriff on behalf of the Sheriff, and by the County Administrator on behalf of the County. On December 3, 2003, the Board of Commissioners ratified the collective bargaining agreement. The "Letter of Intent and Commitment" was not presented to the Board of Commissioners for ratification and was not referenced in the agreement. When the parties negotiated a collective bargaining agreement covering the period January 1, 2005 through December 31, 2007, they did not discuss Article 24, Section 6 or the "Letter of Intent and Commitment" during bargaining, and Article 24 was incorporated into the 2005-2007 agreement without change.

Article 12, Section 3 of the parties' 2005-2007 collective bargaining agreement provides the parties with the right to submit unresolved grievances to arbitration at the third step of the grievance procedure. The contract provides that such grievances shall be submitted to "the American Arbitration Association in accordance with its Voluntary Labor Arbitration Rules, then pertaining."

During negotiations that began in October 2007, Respondents advised Charging Party that they considered the matters covered by Article 24, Section 6 to be permissive subjects of bargaining, and that they did not intend to include that provision in the new contract. Respondents claimed that corrections officers are not eligible for Act 312 arbitration. Respondents also told Charging Party that the "Letter of Intent and Commitment" had no legal effect, and that Article 24,

Section 6 would expire with the old contract on December 31, 2007. On December 18, 2007, the Board of Commissioners passed a resolution stating, in part, that it was terminating the "Letter of Intent and Commitment" effective that day.

Charging Party filed an Act 312 petition. Respondents filed an answer to the petition stating that certain bargaining unit employees, including the corrections deputies and deputies and sergeants assigned to the jail, are not Act 312 eligible.[4] Charging Party filed the instant unfair labor practice charge alleging that Respondents violated their duty to bargain in good faith under Section 15 of PERA by repudiating Article 24, Section 6, and the "Letter of Intent and Commitment."

Discussion and Conclusions of Law:

The ALJ found that because Article 24, Section 6 of the parties' agreement prohibits Respondents from challenging the Act 312 eligibility of the classifications at issue after the expiration of the contract, it is not necessary to determine whether the "Letter of Intent and Commitment" was binding upon the Respondents. Since no proper exception has been taken to the ALJ's finding we adopt that finding as our own. The ALJ also found, and we agree, that the parties intended to ensure that corrections deputies and deputies and sergeants assigned to the jail could invoke Act 312 arbitration, or similar interest arbitration, regardless of how Section 2 of that Act was interpreted by the Commission or the courts. The central issue raised by this case is whether the repudiation of a contract provision that extends Act 312 arbitration to classifications that may not otherwise be covered by Act 312 is an unfair labor practice.

Act 312 provides for compulsory interest arbitration in public police and fire departments. The chairperson of the Act 312 arbitration panel is appointed by the Commission under the procedures set out in Section 5 of the Act. Under Section 6 of the Act, the two parties and the State of Michigan split the costs of the arbitration, including a fee to the chairperson. Subpoenas may be issued by the arbitration panel. If a person refuses to obey a subpoena or is guilty of any contempt, the panel or the attorney general may seek the aid of a circuit court. Section 2(1) specifies coverage under Act 312 by defining public police and fire departments to include "any department of a city, county, village or township having employees engaged as policemen, or in fire fighting or subject to the hazards thereof, emergency medical service personnel employed by a police or fire department, or an emergency telephone operator employed by a police or fire department."

Bargaining subjects are classified as mandatory, permissive, or illegal. A mandatory subject is one on which the law requires bargaining. Hours of work and rates of pay are examples of mandatory subjects of bargaining. Interest arbitration is a permissive subject of bargaining. A party may offer to bargain a permissive subject, but the law does not require the parties to bargain a permissive subject, and neither side may insist on bargaining to impasse on a permissive subject. *AFSCME Local 1227 v Center Line,* 414 Mich 642, 652-653, 327 NW2d 822, 826 (Mich 1982). An illegal subject of bargaining is one in which the parties have bargained for something that is prohibited by law. A contract provision for an illegal subject of bargaining is unenforceable. For example, a union security proposal for a closed shop presents an illegal subject of bargaining because a closed shop is prohibited by law. See *Detroit Police Officers Ass'n v Detroit*, 391 Mich

[4] Respondents moved the ALJ to dismiss Charging Party's Act 312 petition in relation to certain, disputed positions. The ALJ did not rule on this motion and the eligibility of the positions whose status is in dispute is being decided in a separate proceeding, *Kalamazoo Co & Kalamazoo Co Sheriff*, Case No. UC08 E-016.

44, 54-55, n 6, 214 NW2d 803, 809 (1974). A proposal to submit a dispute over a mandatory subject of bargaining to Act 312 arbitration, or similar binding interest arbitration, is a permissive subject of bargaining. *Wayne Co Airport Auth*, 20 MPER 34 (2007).

A party may take unilateral action on a permissive subject without first entering into the bargaining process. *Wayne Co Airport Auth*; See *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, at n 7; 214 NW2d 803 (1972). However, a party may not take unilateral action on a permissive subject that is embodied in a bargained agreement. To find otherwise would leave little distinction between a permissive subject of bargaining and a prohibited subject of bargaining upon which an agreement would be unenforceable. In *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n*, 458 Mich 540, 563-569; 581 NW2d 707 (1998), the unilateral modification of a contract was held to be an unfair labor practice. While the modification in that case involved a mandatory subject of bargaining, we disagree with the ALJ's reasoning that the holding in *St Clair Intermediate Sch Dist* applies only to mandatory subjects of bargaining. Although a dispute may involve a permissive subject of bargaining, once an agreement is reached, neither party has a right to unilaterally repudiate the bargain. Moreover, as here, where a permissive subject of bargaining is intertwined with mandatory subjects of bargaining, a repudiation of the permissively bargained part of the agreement is a repudiation of the entire package.

In any negotiation for a collective bargaining agreement the parties have conflicting interests. To reach agreements, each party must give up something to gain something else. The compromises that result in agreement provide stability to the parties' relationship and a degree of reliability as to future interactions. To allow one party to renege on a lawful agreement would negate the stability and reliability that is the goal of good faith bargaining. If settlements can be unilaterally revoked, both stability and the possibility of productive future discussions are undermined. Here, the quid pro quo was an agreement to have a lower wage rate for part of the work force in exchange for an agreement that future wage rates for that particular group would be submitted to binding interest arbitration. That negotiated protection is especially significant in the public sector where strikes are prohibited and the Employer can unilaterally set the new wage rate after the parties reach impasse. If we were to ignore the damaging effect that Respondents' repudiation of Article 24, Section 6 would have on the parties' collective bargaining relationship and their future negotiations, we would fail to exercise what the appellate courts have properly recognized as "MERC's expertise and judgment in the area of labor relations." *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 323 n 18 (1996); *Oakland Co v Oakland Co Deputy Sheriffs Ass'n*, 282 Mich App 266; 765 NW2d 373 (2009); lv den'd 483 Mich 1133 (2009).

Charging Party and Respondents were free to agree to settle the contractual terms of employment of corrections deputies and deputies and sergeants assigned to the jail through private interest arbitration. They also could have agreed that corrections deputies and deputies and sergeants assigned to the jail would receive the same terms and conditions as those awarded by an Act 312 arbitration panel to eligible employees. Instead, in this case, Respondents have obtained and benefited from concessions made by Charging Party, in exchange for an agreement that the benefits of Act 312 eligibility would be extended to certain classifications of employees who are not Act 312 eligible.

We have held that an employer violates its bargaining obligation by refusing to submit an arguably arbitrable grievance to arbitration. See *Washtenaw Co Rd Comm*, 20 MPER 69 (2007); *City of Detroit, Police Dep't*, 1989 MERC Lab Op 331; *City of West Branch*, 1978 MERC Lab Op

352; *City of Mt Clemens*, 1974 MERC Lab Op 336, aff'd 58 Mich App 635 (1975); *Hurley Hospital (City of Flint)*, 1973 MERC Lab Op 584**.** The parties, here, lawfully could have agreed to interest arbitration as a procedure to settle their contract disputes. They lawfully could have tailored their interest arbitration to resemble Act 312 proceedings. It was obvious what they intended to achieve by their agreement. For these reasons, we find that the agreement between Respondents and Charging Party is enforceable and Respondents may not unilaterally modify or repudiate that agreement. We hold that Respondents violated Section 10(1)(e) of PERA by repudiating their agreement not to challenge the Act 312 eligibility of corrections deputies and deputies and sergeants assigned to the jail. We also hold that to the extent that Article 24, Section 6 would require the Commission to contribute public funds without legislative authority, it cannot be enforced. However, the parties' agreement to submit to binding interest arbitration for the successor contract is enforceable and said arbitration must be conducted in accordance with those provisions of Act 312 that do not require action by this Commission. Inasmuch as the parties have provided for the selection of an arbitrator in Article 12, Section 3 of their collective bargaining agreement, that selection procedure shall also apply to the binding interest arbitration under Article 24, Section 6, unless the parties agree otherwise. If the Respondents decline to pay more than one-third of the costs of interest arbitration for the disputed classifications as Act 312 would require and their agreement provides, the Charging Party shall be responsible to pay the remaining two-thirds.

In accordance with the findings of fact and conclusions of law set forth above, we issue the following Order:

ORDER

Respondents Kalamazoo County and Kalamazoo County Sheriff, its officers and agents, are hereby ordered to:

1. Cease and desist from:
    a. Failing or refusing to bargain in good faith with Charging Party, Kalamazoo County Sheriff's Deputies Association.
    b. Repudiating provisions of contracts made with Charging Party.

2. Upon demand, submit to a procedure for binding interest arbitration governing the wages, hours, and other terms and conditions of employment that apply to the corrections deputies and deputies and sergeants assigned to the jail, as follows:

    a. If the parties fail to agree on the selection of a neutral arbitrator or arbitration panel, either party may invoke and all parties shall be bound by the selection procedure established by Section 4 of Act 312, MCL 423.234 for the selection of each parties' delegate to the arbitration panel. The chair of the panel shall be selected in accordance with the arbitrator selection procedure provided for grievance arbitration in Article XII, Section 3 of the parties' collective bargaining agreement covering the period January 1, 2005 through December 31, 2007.
    b. Such binding interest arbitration shall be based upon consideration of the factors enumerated in Section 9 of Act 312, MCL 423.239, and shall

cover the contract period beginning December 31, 2007, and ending at a date to be determined by the arbitrator.

c. Such binding interest arbitration shall be subject to all other provisions of Act 312 that do not require the expenditure of public funds.

3. Post the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees in Charging Party's bargaining unit are normally posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Christine A. Derdarian, Commission Chair

_____

Nino E. Green, Commission Member

_____

Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

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

Case No. C08 A-019

-and-

KALAMAZOO COUNTY SHERIFF'S DEPUTIES ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Nantz, Litowich, Smith, Girard & Hamilton, by John H. Gretzinger, Esq., for Respondents

Michael F. Ward, Esq., for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, this case was heard at Lansing, Michigan on May 20, 2008, before Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules for the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including post-hearing briefs filed by the parties on or before July 28, 2008, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Kalamazoo County Sheriff's Deputies Association represents a bargaining unit of nonsupervisory employees, sworn and nonsworn, employed by Kalamazoo County and the Kalamazoo County Sheriff. It filed this charge against these Respondents on January 25, 2008. The charge alleges that Respondents violated their duty to bargain in good faith under Section 15 of PERA by repudiating a provision of the parties' most recent collective bargaining agreement (Article 24, Section 6), and a letter of agreement entitled Letter of Intent and Commitment (LIC) entered into on November 12, 2003. Charging Party asserts that these agreements prohibit Respondents from challenging the eligibility of certain classifications for statutory interest arbitration under 1969 PA 312 (Act 312), MCL 423.231 et seq. The disputed classifications are corrections deputy (CD) and deputy and sergeant assigned to the Kalamazoo County Jail (the jail.)

The parties' contract expired on December 31, 2006. On or about December 19, 2007, Charging Party filed a petition with the Commission for Act 312 arbitration covering its entire unit.

On January 3, 2008, Respondents filed an answer to the Act 312 petition which asserted that many classifications within the unit, including CDs and deputies and sheriffs assigned to the jail, were not statutorily eligible for Act 312 arbitration.[5] Respondents seek dismissal of the Act 312 petition as to these classifications.

As a remedy for the alleged unfair labor practice, Charging Party seeks an order from the Commission denying Respondents' request to dismiss the Act 312 petition with respect to the classifications covered by the agreements.

Findings of Fact:

Background

Charging Party's unit includes employees with the job titles deputy sheriff (pay grade F-19) and sergeant (pay grade F-22) assigned to the department's law enforcement division, employees with these same job titles and pay grades assigned to the jail division, and employees assigned to the jail division with the title CD (pay grade F-17). It also includes employees, sworn and nonsworn, assigned to the department's administrative and inspections divisions and its office of emergency management. Respondents currently require all deputy sheriffs and sergeants, including those assigned to the jail, to be certified as police officers by the State of Michigan. CDs are not required to be certified police officers.

Prior to the late 1970s, deputy sheriffs were in charge of the day-to-day operations of the Kalamazoo County jail, including ensuring the safety and security of the inmates, distributing medications, and passing meals. The State does not require that employees performing this work be certified police officers. In 1977 or 1978, Respondents removed the deputies from the jail and created two new classifications within the bargaining unit, corrections officer (CO) I and CO II. The COs' job description did not require them to be certified police officers, but promotion to CO II required completion of the same training necessary to become a certified officer. CO IIs were paid the same salary as deputies, while CO Is were paid less. By 1980, Respondents had decided that the training necessary to attain certification as a police officer was not relevant to the corrections officers' duties. The parties agreed that promotion from CO I to CO II would require, instead of police training, a specified amount of education/training in the corrections area and a year of experience as a corrections officer. The parties' agreement was memorialized in a memo issued on January 11, 1980. The memo also stated that a CO I would be automatically promoted to CO II upon meeting the requirements set out in the memo.

Between 1980 and 1999, Respondents hired only a handful of new CO Is. Nearly all quickly met the criteria for promotion to CO II and were promoted in accord with the January 1980 memo. In 1999, Respondents hired a new CO I who already possessed the experience and education/training necessary for promotion to CO II. Charging Party demanded that Respondents promote him immediately, and Respondents agreed to do so. However, shortly thereafter, the Sheriff notified Charging Party that he had decided not to hire any more COs. He told Charging Party that since CO IIs were paid the same as deputies, it would be more efficient to hire deputies to

[5] Respondent also challenges the Act 312 eligibility of other classifications, including polygraph examiner; security deputy; crime lab specialist; sergeant and deputy sheriff assigned to security at the Kalamazoo/Battle Creek International Airport; sergeant-inspections and sergeant-laboratory assigned to the inspections division; and nurse. The eligibility of the positions whose status is in dispute is being decided in a separate proceeding, Case No. UC08 C-016.

staff the jail because he could then transfer them to other positions within the department if he needed to do so.

Between 1999 and 2002, all of the CO Is were promoted to CO II. In addition, most of the CO IIs attained certification status and transferred to vacant deputy positions. By 2002, there were no CO Is and only two CO IIs remaining at the jail. The jail was again staffed almost entirely by employees classified as deputies.

The Collective Bargaining Agreement and the LIC

By 2002, the jail had become overcrowded and outdated. In the summer of 2002, Respondents placed a millage before County voters for funds to construct a justice complex encompassing a new jail and other law enforcement-related facilities. The new, larger, jail was projected to require at least seventy-five additional officers. The millage was rejected. A survey of voters disclosed that one of the reasons the millage failed was that voters objected to the costs of operating the proposed new jail.

In November 2002, Charging Party and Respondents commenced negotiations on a new collective bargaining agreement to replace their contract expiring at the end of that month. Respondents' chief negotiator was attorney Kevin McCarthy. Undersheriff Michael Anderson and County Human Resources Director Rick Kenus were also on Respondents' negotiating team. On December 5, 2002, Respondents gave Charging Party their first set of economic proposals. Respondents' first item was "discuss the corrections officer I position at the jail." During this bargaining session, Anderson explained that Respondents believed that they needed to bring down the operational costs of the jail in order to convince the voters to support a new jail. He said that to do that they needed to staff the jail with CO Is who were paid less than deputies. Anderson told Charging Party that Respondents wanted Charging Party to agree to rescind the 1980 memo requiring Respondents to promote CO Is automatically to CO II. Charging Party said that they had several concerns, including the status of the deputies who were currently assigned to the jail. Charging Party also said that if COs were going to staff the jail, they wanted Respondent not to challenge their eligibility for Act 312 arbitration.

At the next bargaining session, held on December 19, 2002, Respondents presented Charging Party with a written proposal, entitled "Correction Officer I Concept," which included the statement, "CO Is will be subject to Act 312 arbitration." The proposal also stated that a minimum of fifty and a maximum of sixty deputies would remain assigned to the jail, and that a CO I would be automatically promoted to deputy when he or she become certified as a police officer as long as the number of deputies assigned to the jail did not exceed fifty. Charging Party told Respondents that this was not sufficient, and that it needed a written promise that Respondents would not challenge the Act 312 eligibility of its members. At their next negotiating session, held on December 27, Charging Party gave Respondents a counterproposal which included this language: "All bargaining unit employees shall be eligible for PA 312 arbitration and the Employer shall not challenge their Act 312 arbitration eligibility at any future date or time." Respondents rejected the proposal, although the parties agreed that the CO position would be retitled CD.

The parties continued their negotiations toward a new contract. In January 2003, Respondents gave Charging Party a proposal that stated, "The terms and conditions of employment of Correction Deputy Is will be included within the jurisdiction of Act 312 arbitration." Charging

Party said that this language was still not satisfactory because it did not explicitly promise that Respondents would not challenge the CDs' Act 312 eligibility. It also said that this promise had to be in a document separate from the contract so that it would not expire. On February 20, Charging Party presented a proposal which stated, "All employees holding the Corrections Deputy I (F-17) classification shall be eligible for PA 312 arbitration and the Employers shall not challenge their Act 312 arbitration eligibility at any future date or time."

Between February and July 2003, the parties held four bargaining sessions. Counterproposals on the CO issue were exchanged, but the parties could not reach agreement. In March, Respondents proposed the following language:

> The terms and conditions of employment of Corrections Deputies (F-17) will be included within the jurisdiction of Act 312 arbitration. Should the Employer ever seek in the future to contest this jurisdiction over the F-17s in an Act 312 proceeding, neither [sic] party to the Act 312 arbitration may reference this agreement to the Arbitrator. The parties will continue to abide by this Agreement until and unless the Act 312 arbitrator enters a ruling inconsistent with this agreement.

On June 23, as part of a package proposal, Respondent proposed to add the words "or the Employment Relations Commission" at the end of the first sentence above, and "or the Employment Relations Commission enters a ruling inconsistent with this agreement" at the end of the second sentence.

At a meeting on July 9, Charging Party told Respondents that that their Act 312 language was still unacceptable. It also reiterated that any agreement on Act 312 eligibility would have to be in a document separate from the contract so that it would not expire. McCarthy told Charging Party that he did not have the authority to agree to this. McCarthy said that he would have to go back to the County Board of Commissioners, and Charging Party told him to do it. Charging Party President Peter Hanold testified that at the next meeting, on July 16, McCarthy told Charging Party he had been to the Board and had "gotten the authority to negotiate with us." [6]

At the next bargaining session, on August 19, the parties reached a tentative agreement on the CO issue. The tentative agreement included the following provisions:

> 1. The Corrections Officer I classification will be retitled "Corrections Deputy," paid at the F-17 wage scale.
>
> 2. A minimum of fifty-eight (58) Deputies will be assigned to the Jail Division. Employees in the F-19 classification in the Jail Division will not be reduced below the F-19 level due to layoff or transfer into the Jail Division.
>
> 3. Corrections Deputies (F-17) will not be assigned to work outside the jail facility in non-corrections assignments (e.g., road patrol, transport and courts). Only Deputies (F-19) will be assigned to and work in the Transport Section of the Jail Division.

[6] McCarthy did not testify at the hearing. No witness, including Anderson, knew whether McCarthy actually spoke to any Board member at this time.

* * *

5. Employees currently holding the Corrections Officer II classification will retain that classification and pay rate.

6. *Employees in the Corrections Deputy (F-17) classification and employees in the F-19 and F-22 classifications assigned to the jail will be included within the jurisdiction of Act 312 arbitration to the same extent as Deputies on road patrol and the Employer will not challenge their Act 312 eligibility at any time so long as road patrol Deputies have Act 312 arbitration or similar interest arbitration*. [Emphasis added]

* * *

9. The 1980 Memorandum of Understanding relating to the advancement of Corrections Deputy Is to Corrections Deputy II will be voided at the time that the 2004-2005 agreement is signed.

On September 5, 2003, the parties' negotiations broke down over economic issues, and Charging Party told Respondent that it intended to file for Act 312 arbitration. However, on September 11, at the urging of Hanold and Anderson, the parties returned to the table. Deputy County Administrator Peter Battani and the County's Finance Director joined the negotiations. On September 19, the parties reached a tentative contract agreement that included a wage freeze as well as their August 19 agreement on the CO issue. Charging Party's membership ratified the tentative contract agreement after being told that the language on the CO issue would be in a separate letter of understanding. McCarthy then prepared a draft contract and presented it to Charging Party. The draft contract included the language agreed to on August 19 as Article 24. Charging Party told McCarthy that the language had to be in a separate letter of agreement, but McCarthy did not agree that Respondents had agreed to this.

The parties met to discuss this issue on November 7 and again on November 12. Battani was present at the second meeting, along with McCarthy and Anderson. Battani testified that before this meeting he sent emails to both Deb Buchholtz-Hiemestra, the Board chairperson, and Dan McGlynn, the Board vice-chair, about the dispute. Battani also testified that Respondents were opposed to having the agreement in a separate document because there had been instances in the past when letters of understanding had been overlooked or forgotten over time and then resurrected by one of the parties. The parties had reached a stalemate on the issue when, on November 12, either Anderson or McCarthy suggested that the parties both put the agreement on the CO issue in their contract and execute a separate document containing the agreement. McCarthy and/or Battani told Charging Party there was a question as to whether they had the authority to enter into a separate agreement. Battani and McCarthy left the room. Thirty minutes later, Battani returned and stated that they had the authority. Battani testified that neither he nor McCarthy spoke to the Board during that recess. Rather, they decided, after discussion, that Battani and Anderson could sign a letter of agreement if did not give Charging Party anything more than the contract did. The parties then sat down to negotiate a document titled "Letter of Intent and Commitment" which, in final form, read as follows:

> This letter is to express the clear commitment of Kalamazoo County Government and the Sheriff of the County of Kalamazoo (Employers) which is shared by the Kalamazoo County Sheriffs Deputies Association, that the provisions of Article XXIV of the new collective bargaining agreement (titled "Corrections Deputies")will not expire on December 31, 2004.
>
> It is further the parties commitment that the Employers will not at any time, either before or after December 31, 2004, challenge the provisions of Article XXIV of the 2003-2004 contract as long as the road patrol deputies have Act 312 arbitration or other similar interest arbitration.
>
> Further, it is the parties shared commitment that the Employer will not seek, at any time before or after December 31, 2004, [to] argue to the Michigan Employment Relations Commission or any other administrative or judicial body or official that the provisions of Article XXIV expire or will become of no effect as of December 31, 2004 or January 1, 2005 or at any time thereafter.

The LIC was signed on November 12 by Charging Party representatives, by Anderson on behalf of the Sheriff, and by Battani on behalf of the County.

On December 3, 2003, the Board of Commissioners ratified the tentative contract agreement, including the language tentatively agreed to on August 19, 2003 as Article 24 of the new contract. The new contract did not reference the LIC, and the LIC was not presented to the Board for ratification. By December 4, all parties had signed the new contract, which covered the period January 1, 2003 through December 31, 2004. Shortly thereafter, Respondents hired some new employees to work in the jail as CDs.

In January 2006, the parties entered into another collective bargaining agreement covering the period January 1, 2005 through December 31, 2007. Neither party filed or threatened to file an Act 312 petition during the negotiations leading to the 2005-2007 contract. The parties did not discuss Article 24, Section 6 or the LIC during bargaining, and Article 24, Section 6 of the 2003-2004 contract was incorporated into the 2005-2007 agreement without change.

County Challenge to Act 312 Eligibility

In October 2007, the parties began negotiations for a new contract to replace the agreement expiring on December 31, 2007. Respondents had a new chief negotiator, attorney John Gretzinger. At the first bargaining session, Respondents advised Charging Party that they considered the matters covered by Article 24, Section 6 of the old contact to be permissive subjects of bargaining. They stated that they did not intend to include that provision in the new contract. They also told Charging Party that under current decisions interpreting Act 312, correctional officers were not eligible for Act 312 arbitration. Charging Party objected strongly to Respondents' position. At a bargaining session held on November 29, it gave Respondents' negotiating team a copy of the November 12, 2003 LIC and requested that Respondents honor it. Respondents told Charging Party that its position was that the LIC had no legal effect, and that Article 24, Section 6 would expire with the old contract on December 31, 2007.

Respondent County notified Charging Party that it would address these issues at a meeting of its Board on December 18. At that meeting, the Board passed a lengthy resolution which stated, in part, that "Michigan law clearly holds that employees of the Kalamazoo County Sheriff's Department in the classification of Corrections Deputy (F-17) and employees in the (F-19) (Deputy Sheriff) and (F-22) (Sergeant) classification [sic] assigned to work in the Jail do not possess the right to have collective bargaining disputes resolved through the statutory process set forth in 1968 Act 312, MCL 423.231 et seq." The resolution also stated that the Board disagreed with Charging Party that the LIC had any legal effect, and that the LIC did not and could not prohibit the County from asserting in any court of law or administrative tribunal, including the Commission, that the three classifications above were not Act 312 eligible. The resolution also stated that the Board was terminating the LIC effective that day.

After receiving notification of the above resolution, Charging Party filed an Act 312 petition. As indicated above, on January 3, 2008, Respondents filed an answer to the petition stating that certain bargaining unit employees were not Act 312 eligible, and asking that the petition be dismissed as to these positions. These positions included the CDs and the deputies and sergeants assigned to the jail. Charging Party filed a response to the answer in which it asserted that the LIC and the parties' expired contract barred Respondents from challenging the eligibility of the CDs and deputies and sergeants assigned to the jail. It also filed the instant unfair labor practice charge.

Discussion and Conclusions of Law:

Respondents deny that they have repudiated either Article 24, Section 6 of their 2005-2007 collective bargaining agreement or the LIC. As to the former, they point out that they did not file their answer and motion to dismiss the Act 312 petition as to the CDs and deputies and sergeants assigned to the jail until after the collective bargaining agreement had expired on December 31, 2007. In *Wayne Co Airport Authority*, 20 MPER 34 (2007), the Commission held that Act 312 eligibility was not a mandatory subject of bargaining.[7] Respondents argue that they had no obligation to adhere to a contract provision addressing a permissive subject of bargaining after the contract containing that provision expired. Respondents also argue that the LIC never became binding on the Respondent County because the County Board never ratified it.

I find neither of these arguments compelling. An employer's statutory duty under Section 15 of PERA to maintain the status quo after contract expiration until impasse or agreement is reached applies only to mandatory subjects of bargaining. *Local 1467, Intern Ass'n of Firefighters, AFL-CIO v City of Portage*, 134 Mich App 466, 472 (1984). However, parties to a collective bargaining agreement can explicitly agree to extend beyond contract expiration any substantive or procedural rights that would otherwise expire with the contract. *Ottawa Co* v *Jaklinski*, 23 Mich 1, 25 (1985). An example is a case cited by Charging Party in its brief, *Sheet Metal Workers International Assoc, Local 110 Pension Trust Fund v Dane Sheet Metal*, 932 F2d 578 (CA 6, 1991). In that case, the federal court of appeals enforced a contractual agreement requiring an employer to participate in interest arbitration after negotiations broke down despite the fact that the contract containing that

[7] In that case, the employer proposed, during contract negotiations, to eliminate a provision from the prior agreement stating that all employees in the bargaining unit were entitled to Act 312 arbitration. The Commission held that Act 312 eligibility, like interest arbitration, was not a mandatory subject of bargaining. It also held that the employer did not commit an unfair labor practice merely by proposing to remove language addressing Act 312 eligibility from the contract.

agreement had expired before the dispute arose. In the instant case, Article 24, Section 6 of the parties' 2005-2007 contract states that Respondents will not challenge the Act 312 eligibility of the disputed classifications "at any time so long as road patrol Deputies have Act 312 arbitration or similar interest arbitration." Since Act 312 arbitration occurs after a collective bargaining agreement expires and the parties are unable to reach agreement on a new one, Respondents would have no reason to challenge the Act 312 eligibility of the jail officers during the contract term. I find that Article 24, Section 6 explicitly and unambiguously prohibits Respondents' from challenging the Act 312 eligibility of the disputed classifications after the expiration of any contract in which it is contained. The LIC merely reiterates that prohibition. There is no dispute that the Respondent County's Board twice ratified collective bargaining agreements containing Article 24, Section 6. Given that fact, I find it unnecessary to determine whether the LIC itself was binding on the Respondent County.

Charging Party presented extensive testimony on the bargaining history of the LIC and Article 24, Section 6 intended to demonstrate that these agreements were the result of hard bargaining on Charging Party's behalf, that Charging Party obtained these agreements only after giving up a valuable right, i.e., the right of CO Is to automatic promotion to the pay level of a deputy sheriff, and that both Respondents entered into these agreements with open eyes. The facts support Charging Party's contentions. I find that the parties explicitly agreed that Respondents would not do what the Respondent County has now done, which is challenge the eligibility of CDs and deputies and sergeants assigned to the jail after an Act 312 petition was filed. However, the fact there was such an agreement does not mean that Respondents violated their duty to bargain under Section 15 by repudiating it. As noted above, the Commission has held that Act 312 eligibility is not a mandatory subject of bargaining. While a party violates its duty to bargain by unilaterally modifying an existing contract in midterm – which is what Respondents have done in this case – it is well established that a modification is an unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining. *St Clair Intermediate School Dist v Intermediate Educ. Association/Michigan Educ Ass'n,* 458 Mich 540, 563-569, (1998), citing *Chemical and Alkali Workers of America, Local Union No. 1 v Pittsburgh Plate Glass Co, Chemical Division,* 404 US 157 (1971). See also *In re Hope Elec Corp,* 339 NLRB 933 (2003). Following this analysis, while Article 24, Section 6 might be enforceable by an action in circuit court for contract breach, Respondents repudiation of that article does not constitute an unfair labor practice. I conclude, therefore, that the unfair labor practice charge in this case should be dismissed.

The problem with this conclusion is that it leaves undecided a central issue in Respondents' challenge to the Act 312 eligibility of multiple classifications in this bargaining unit. That is, to resolve the dispute over Act 312 eligibility raised by Respondents in their answer and motion for partial dismissal of the Act 312 petition, the Commission must decide whether to dismiss Respondents' challenges to the eligibility of the classifications covered by Article 24, Section 6 because they had previously agreed not to make them.

Act 312 provides a statutory procedure, essentially binding interest arbitration, for resolution of contract formation disputes in public police and fire departments. An employer, employees, or their designated representative initiates arbitration by filing a petition with the Commission. The chairman of the arbitration panel is selected from among a panel of arbitrators appointed by the Commission. The selection procedure, administered by the Commission, is set out in Section 5 of the Act. Act 312 delineates the factors to be considered by the panel in making its award and the

scope of its authority, e.g., on economic issues, the panel is required to adopt the last offer of settlement of one of the parties. Under Section 6 of the statute, the two parties and the State of Michigan split the costs of the arbitration.

Section 2 of Act 312 defines whose disputes are eligible for resolution under that Act:

> Section 2(1). Public police and fire departments means any department of a city, county, village or township having employees engaged as policemen, or in fire fighting or subject to the hazards thereof, emergency medical service personnel employed by a police or fire department, or an emergency telephone operator employed by a police or fire department.

The Commission has the authority to make determinations as to Act 312 eligibility. *AFSCME v Oakland Co (Prosecutor's Investigators)*, 89 Mich App 564 (1979), *rev'd on other grounds*, 409 Mich 299 (1980). However, the Commission does not, as a practical matter, determine the Act 312 eligibility of a specific classification unless a party raises the issue. There have been numerous Commission and appellate court decisions interpreting Section 2. See *Oakland Co*, 20 MPER 63 (2007) for a review and discussion of some of these decisions. In the seminal case on Act 312 eligibility, *Oakland Co (Prosecutor's Investigators),* the Supreme Court adopted a construction of Section 2 restricting its scope to employees performing critical service functions in critical service departments where a work stoppage would result in an imminent threat to public safety.

Respondents assert that the Legislature has established the scope of Act 312 and that parties cannot lawfully by agreement expand the scope of the statute. Charging Party disagrees. It also argues that even if this is true, Article 24, Section 6 and the LIC do not attempt to alter the statute, but merely prohibit Respondents from raising a challenge to Act 312 eligibility. While this is technically true, it is clear from the bargaining history that the object of Article 24, Section 6 and the LIC was to ensure that CDs and deputies and sergeants assigned to the jail would be eligible for Act 312 arbitration regardless of how Section 2 was interpreted by the Commission or the courts.

I agree with Respondents that it would be improper for the Commission to honor the parties' agreement that Respondents not challenge the Act 312 eligibility status of the CDs and deputies and sergeants assigned to the jail. First, it is unclear where this path might lead. The CDs and deputies and sergeants assigned to the jail are public safety employees and they are currently in a bargaining unit with other deputies whose Act 312 eligibility is not in dispute. However, could or would the Commission honor an agreement not to challenge the Act 312 eligibility of a public safety employee not employed in a critical service department, for example, a university police officer? Could an employer and a union obtain Act 312 arbitration for nonpublic safety employees simply by agreeing that the employer would not challenge their eligibility if the union filed a petition? As Respondents point out, nothing in Act 312 or its history suggests that the Legislature intended to allow parties to a collective bargaining relationship to determine the scope of the statute.

I believe that the Commission should recognize a distinction between Act 312 arbitration and ordinary interest arbitration. Act 312 arbitration is a statutory procedure. Per the statute, the Commission assists the parties in selecting an arbitrator, and the costs of the arbitration are partially paid by the State of Michigan. It is clear that Act 312 was not specifically intended as a benefit for public safety employees. Rather, it was enacted to protect the public welfare by providing a method other than a strike for the resolutions of labor disputes for employees whose striking would threaten

public safety. As noted by the Commission in *Wayne Co Airport Authority*¸ the National Labor Relations Board (NLRB) has held that interest arbitration is a permissive subject of bargaining. Parties to a collective bargaining agreement may enter into binding agreements covering permissive subjects. The parties in this case, therefore, could have agreed that contract formation disputes involving the CDs and deputies and sergeants assigned to the jail would be submitted to private interest arbitration. Alternatively, they could have expressly agreed that if a contract covering the unit came into being as a result of an Act 312 award, the CDs and deputies and sergeants assigned to the jail would receive the same fringe benefits and same percentage salary increases awarded by the panel to Act 312-eligible employees. However, the parties did neither of these things. By agreeing that Respondents would not challenge the Act 312 eligibility of the three classifications, the parties in essence awarded themselves a benefit that the Legislature and the courts had not conferred upon them. I do not believe that the Commission can honor this agreement, even if Respondents appear to have unjustly obtained a benefit from it.

For reasons discussed above, I conclude that Respondents did not violate Section 10(1) (e) of PERA by repudiating their agreement not to challenge the Act 312 eligibility of CDs and deputies and sergeants assigned to the jail, and I recommend that the Commission dismiss the unfair labor practice charge. I also recommend that the Commission disregard this agreement in determining the Act 312 eligibility of the classifications challenged by Respondents in their January 3, 2008 answer to the Act 312 petition.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, KALAMAZOO COUNTY AND KALAMAZOO COUNTY SHERIFF, public employers under the PUBLIC EMPLOYMENT RELATIONS ACT, have been found to have committed an unfair labor practice in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT fail or refuse to bargain in good faith with Charging Party, Kalamazoo County Sheriff's Deputies Association.

WE WILL NOT repudiate provisions of contracts made with Charging Party.

WE WILL, upon demand, submit to a procedure for binding interest arbitration governing the wages, hours, and other terms and conditions of employment that apply to the corrections deputies and deputies and sergeants assigned to the jail, as follows:

If the parties fail to agree on the selection of a neutral arbitrator or arbitration panel, either party may invoke and all parties shall be bound by the selection procedure established by Section 4 of Act 312, MCL 423.234 for the selection of each parties' delegate to the arbitration panel. The chair of the panel shall be selected in accordance with the arbitrator selection procedure provided for grievance arbitration in Article XII, Section 3 of the parties' collective bargaining agreement covering the period January 1, 2005 through December 31, 2007.

Such binding interest arbitration shall be based upon consideration of the factors enumerated in Section 9 of Act 312, MCL 423.239, and shall cover the contract period beginning December 31, 2007, and ending at a date to be determined by the arbitrator.

Such binding interest arbitration shall be subject to all other provisions of Act 312 that do not require the expenditure of public funds.

KALAMAZOO COUNTY	KALAMAZOO COUNTY SHERIFF
By:_____	By:_____
Title:_____	Title:_____
Date: _____	Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510.