STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF ST. CLAIR SHORES,
Public Employer-Respondent,

Case No. C08 L-243

-and-

ST. CLAIR SHORES FIRE FIGHTERS UNION, LOCAL 1744,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Roumell & Lange, P.L.C., by Elizabeth A. Young, Esq., for Respondent

Gregory, Moore, Jeakle, Heinen & Brooks, P.C., by Gordon Gregory, Esq., for Charging Party

DECISION AND ORDER

On March 31, 2009, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

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

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DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

On December 1, 2008, the St. Clair Shores Fire Fighters Union, Local 1744, filed an unfair labor practice charge with Michigan Employment Relations Commission against the City of St. Clair Shores. The charge alleged that Respondent violated Sections 10(1)(a), (b) and (e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. Pursuant to Section 16 of PERA, the charge was assigned to Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules.

On December 9, 2008, pursuant to my authority under Rules 165(1), 2(d) and (3) of the Commission's General Rules. AACS 2002 423.165, I issued an order to the Charging Party to show cause why the charge should not be summarily dismissed because it failed to state a claim upon which relief could be granted under the Act. Charging Party filed a response to my order on January 20, 2009. Respondent was granted permission to file a reply to this order. The reply, which included an affidavit from Respondent's human resources director, was filed on February 24, 2009. Based on undisputed facts as set forth in the charge and pleadings, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

The charge alleges that Respondent violated PERA as follows:

1. By negotiating directly with Fire Department retirees regarding health insurance notwithstanding the fact that the Public Employer and the Charging Party have previously bargained and reached agreement on retiree health insurance.

2. By proposing unilaterally to implement changes in retiree health insurance notwithstanding the fact that such changes were previously agreed upon and there is no impasse in bargaining.

3. By threatening to repudiate the existing collective bargaining agreement provision regarding retiree health care.

4. By undermining the status of the Charging Party as the exclusive collective bargaining representative by negotiating directly with retirees represented traditionally and in the instant negotiations by the Charging Party.

5. By initiating, creating and contributing to the formation of a group to engage in bargaining regarding terms and conditions of employment.

Facts:

At the time the charge was filed, Respondent and Charging Party were currently engaged in negotiating a new collective bargaining agreement. Their existing contract remained in effect pending agreement on the new contract. Article XVI, Section 2 of this contract read as follows:

> Effective with retirements July 1, 2005 and after, retirees and dependent(s) will have the same medical benefit options available to the bargaining unit (currently: Blue Cross/Blue Shield PPO or Community Blue or HAP HMO). The changes made to this article, effective with the retirements July 1, 2005 and after, shall have no impact on any individual retiring prior to that date. Where a retiree or spouse of a retiree is able to provide equal or greater medical-hospitalization coverage through an employer, then said retiree shall not be eligible for benefits under this provision. To be eligible for benefits under this provision, a retiree or spouse who is employed shall be required to submit by the April 30 preceding the fiscal year any and all W-2 forms from all sources of employment for his/her spouse. This will include all members of the department now retired. Spouses of the deceased retirees shall receive complete coverage under this section as long as they receive City Pension benefits under a plan of the Pension and Retirement Act. This coverage, which provides for a semi-private room, shall include for a period of two (2) months all seniority and probationary employees who have exhausted their vacation and sick days. [sic] Retirees and spouses are required under this section to apply for Medicare, if and when eligible, with the premiums being paid by the City from the Act 345 millage, and with the understanding that coverage provided is comparable or better to than the existing plan.

During the parties' negotiations for a successor contract, they reached a tentative agreement which included a provision dealing with health care benefits for already retired individuals. This tentative agreement was rejected by Charging Party's membership shortly before the charge was filed.

On or about November 24, 2008, Respondent held a meeting with a group of individuals who retired from Charging Party's bargaining unit before July 1, 2005. At this meeting Respondent announced changes it planned to make to their existing health care benefits. It is not clear from the pleadings whether Respondent modified its plan as a result of discussions with this group. After the charge was filed, Respondent implemented certain changes to the benefits received by these individuals effective January 1, 2009. Respondent did not alter the existing health care benefits of active employees, the health care benefits promised to those employees after retirement, or the existing health care benefits of any individual who retired after July 1, 2005.

Discussion and Conclusions of Law:

Individuals who have already retired from their public employment are not employees within the definition of PERA or members of the union's bargaining unit. *West Ottawa Ed Assoc v West Ottawa Pub Schs,* 126 Mich 306, 329 (1983), citing *Chemical and Alkali Workers of America, Local Union No 1 v Pittsburgh Plate Glass Co, Chemical Division,* 404 US 157, 172, 179-182 (1971). An employer has no duty to bargain over the concerns of third parties unless these concerns vitally affect the terms and conditions of employment of bargaining unit members. *West Ottawa,* at 330; *Chemical Workers,* at 179. In *Chemical Workers,* the Court held that the future retirement benefits of active workers are part of their overall compensation, and that both the level of future benefits and provisions to protect them against future contingencies were mandatory subjects of bargaining. It concluded, however, that the health insurance benefits paid to already retired individuals was not a mandatory subject because their effect on active employees' retirement plans was "too speculative a foundation on which to base an obligation to bargain." *Chemical Workers,* 180-182.

It is now well established that the National Labor Relations Act, 29 USC 150 et seq, (NLRA) does not restrict an employer from changing the health benefits of already retired employees, although it does prohibit an employer from unilaterally changing the retirement medical benefits of active employees who retire on or after the dates the changes are implemented. *Midwest Power Systems, Inc.*, 323 NLRB 404,406 (1997); *In re Mississippi Power* 323 NLRB 530, 550 (2000). The changes made by the Respondent in this case in January 2009 did not affect the future health insurance benefits of any individual actively employed at that time. I find that Respondent did not unilaterally alter the terms and conditions of employment of employees within the meaning of the Act.

Charging Party asserts that even if retirees are not employees under PERA, Respondent should be held to have violated its duty to bargain by repudiating the parties' contract. It notes that parties in this case have an established practice of negotiating health care benefits for already retired individuals, as evidenced by Article XVI, Section 2 of their contract. Charging Party argues that if an employer is permitted to repudiate its contractual agreements regarding

retiree health care benefits, all retiree health care contract provisions will be rendered meaningless.

Charging Party's argument concerning the parties' past practice was addressed in *Chemical Worker,* at 197. The Court noted that parties do not make a permissive subject mandatory by bargaining and agreeing on that subject. See also *Local 1277 AFSCME v Centerline*, 414 Mich 642, 654 fn 5 (1982). The fact that the parties in this case included provisions addressing the health benefits of already retired employees in their collective bargaining agreements did not convert this topic into a mandatory subject of bargaining.

The Court also held in *Chemical Workers,* at 185 and 187-188, that a mid-term modification of a term of a collective bargaining agreement violates Section 8(d) of the NLRA only when it involves a mandatory subject of bargaining because the modification or repudiation of an agreement concerning a permissive subject of bargaining does not constitute a change in terms and conditions of employment. The Court held that the remedy for an employer's unilateral modification of a permissive contract term lies in a suit for breach of contract, not in an unfair labor practice charge.

Relying on *Chemical Workers,* the National Labor Relations Board (NLRB) held in *Supervalu, Inc,* 351 NLRB No. 41 (2007), that an employer did not violate the NLRA by refusing to comply with an "after-acquired stores" clause in its contract that required it to recognize the union at newly acquired stores upon conducting a card check to establish the union's majority. The NLRB found that the General Counsel had failed to establish that this clause "vitally affected" terms and conditions of employment and that the clause was not a mandatory subject of bargaining. It held that while the employer's action might be a breach of contract, it was not a violation of the employer's duty to bargain under the NLRA for it to refuse to comply with a contract provision that concerned a permissive subject of bargaining. See also *Tampa Sheet Metal Co,* 288 NLRB 322, 325-325 (1988) and *Hope Electrical Corp,* 333 NLRB 933 (2003), in which the NLRB held that because interest arbitration is not a mandatory subject of bargaining under the NLRA, the repudiation of a collective bargaining agreement imposed through interest arbitration is not an unfair labor practice.

PERA does not contain a provision parallel to Section 8(d), but the duty to bargain under Section 15 of PERA includes a prohibition against mid-term modifications of contract provisions addressing mandatory subjects of bargaining. *St Clair Intermediate School Dist v Intermediate Educ Association/Michigan Educ Ass'n, 4*58 Mich 540, 563-569, (1998). As the Court noted in that case, the prohibition is founded on the well established principle that once the parties have reached agreement on a mandatory subject and incorporated it into their contract, they have satisfied their obligation to bargain over that subject for the term of the contract. The parties, of course, have no obligation to bargain or reach agreement on a permissive topic.

The Commission has also held that an employer's repudiation of a provision or provision of its collective bargaining agreement may be tantamount to a rejection of its obligation to bargain. *Jonesville Bd of Ed,* 1980 MERC Lab Op 891; *City of Detroit, (Dept of Transportation),* 1984 MERC Lab Op 937, *aff'd* 150 Mich App 605 (1985). The Commission has not explicitly addressed the issue of whether a party's repudiation of a contractual agreement on a permissive

topic constitutes a violation of its duty to bargain in good faith. However, because Section 10(1) (e) of PERA is patterned on Section 8(a) (5) of the NLRA, Michigan Courts and the Commission have consistently looked to decisions interpreting the NLRA in defining the nature and extent of the obligation to bargain under PERA. *Detroit Police Officers Ass'n v Detroit,* 391 Mich 44, 53 64 (1974) ("we deem that the Legislature intended the courts to view the Federal labor case law as persuasive precedent); *Local 1467, IAFF v City of Portage,* 134 Mich App 466, 470 fn 3 (1984) ("precedent under the NLRA is persuasive in construing PERA's requirements because of the parallel language in the two statutes.) As noted above, the theory underlying a finding of unlawful repudiation is that a party's refusal to honor a contract provision constitutes a rejection of its obligation to bargain. However, a party has no statutory obligation to bargain over a permissive topic. Therefore, in my view, its refusal to comply with a contract provision on a permissive topic does not violate any statutory duty. I recommend that the Commission follow federal precedent and find that while a provision of a collective bargaining agreement dealing with a permissive topic of bargaining may be enforced by an action for breach of contract, a party does not violate its duty to bargain in good faith under PERA by repudiating and/or modifying that provision. Accordingly, I recommend that the Commission find that Respondent did not violate PERA by changing the health care benefits it paid to individuals who retired from employment before July 1, 2005.

Charging Party also alleges that Respondent undermined and bypassed the Charging Party on a subject of bargaining previously agreed to, i.e. health care benefits for retired individuals, by dealing directly with these retired individuals. It asserts that although the retiree group is not a "labor organization," Respondent's negotiation with this group violated Section 10(1) (b) because it interfered with Charging Party's administration.

As discussed above, individuals who have already retired from their public employment are not employees under PERA and are no longer members of a bargaining unit. In allegations of direct dealing, the inquiry focuses on whether the employer's conduct is "likely to erode the union's position as exclusive representative." *City of Detroit (Housing Commission),* 2002 MERC Lab Op 368, 376 (no exceptions), citing *Modern Merchandising,* 284 NLRB 1377, 1379 (1987). Since Charging Party is not the exclusive representative for already retired individuals, and since Respondent has no duty under PERA to bargain with Charging Party over their benefits, I find that Respondent did not bypass Charging Party or engage in unlawful direct dealing by discussing the retirees' benefits with them. I also find that Charging Party has not alleged a violation of Section 10(1) (b) of PERA. That section protects the independence of labor organizations by prohibiting a public employer from dominating them or, to a lesser degree, interfering with their administration. There is no allegation here that Respondent engaged in any conduct that might constitute unlawful domination of or interference with Charging Party.

Based on the discussion and conclusions of law set forth above, I find that the there is no genuine issue of material fact in this case, that the charge does not state a claim upon which relief could be granted under PERA, and that summary dismissal of the charge is appropriate under Rules 165(1), 2(d), and 2(f) of the Commission's General Rules. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____