STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MACOMB COUNTY, MACOMB COUNTY ROAD COMMISSION,
& 16TH JUDICIAL CIRCUIT COURT,
Public Employers-Respondents,

Case No. C07 E-111

-and-

TEAMSTERS LOCAL 214,
Labor Organization-Charging Party,
_____/

APPEARANCES:

Hardy, Lewis & Page, PC, by Mark D. Filak, Esq., for the Respondents

Rudell & O'Neill, PC, by Wayne A. Rudell, Esq., for Charging Party

DECISION AND ORDER

On September 5, 2008, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondents have not engaged in and were 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

In the Matter of:

MACOMB COUNTY, MACOMB COUNTY ROAD COMMISSION,
& 16TH JUDICIAL CIRCUIT COURT,
Public Employers-Respondents,

-and-

AFSCME COUNCIL 25 AND ITS AFFILIATED LOCALS 411
AND 893,
Labor Organizations-Charging Parties in Case No. C07 D-083,

-and-

INTERNATIONAL UNION, UAW AND ITS LOCALS 412
AND 889,
Labor Organizations-Charging Parties in Case Nos. C07 D-086 and C07 D-087,

-and-

TEAMSTERS LOCAL 214,
Labor Organization-Charging Party in Case No. C07 E-111,

-and-

MICHIGAN NURSES ASSOCIATION,
Labor Organization-Charging Party in Case No. C07 E-115.
_____/

APPEARANCES:

Hardy, Lewis & Page, PC, by Mark D. Filak, Esq., for the Respondents

Miller Cohen, PLC, by Richard G. Mack, Jr., Esq., for Charging Parties AFSCME Council 25 and its affiliated locals

Georgi-Ann Bargamian, Esq., Associate General Counsel, International Union, UAW, for Charging Parties UAW and its locals

Rudell & O'Neill, PC, by Wayne A. Rudell, Esq., for Charging Party Teamsters Local 214

Frederick J. Vocino, Labor Representative, for Charging Party Michigan Nurses Association

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, this case was heard at Detroit, Michigan on November 28, 29, and 30, 2007 before Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by all parties on or before February 22, 2008, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges and Summary of the Case:

This case consists of five unfair labor practice charges filed by unions representing employees receiving pension benefits from the Macomb County Retirement System (the retirement system or the system) against Macomb County (the County), the Macomb County Road Commission (the Road Commission), and the 16th Judicial Circuit Court (the Court). All the charges allege that the Respondents had a duty to bargain under Section 10(1)(e) of PERA over the adoption by the Macomb County Retirement Commission (the Retirement Commission or the Commission) of a new mortality table/assumptions for the calculation of joint and survivor pension benefits and/or the effects of this action on employees. The new table was adopted by the Commission on November 17, 2006 to take effect on July 1, 2007. It replaced a table that had been used by the system since 1982. The old table assumed that the pool of retirees electing joint and survivor benefits was 100% female. The table adopted in November 2006 assumed a ratio of 60% male to 40% female, a ratio that more closely approximated the system's experience. As a result of the change in mortality table, employees who retired after July 1, 2007 and chose a joint and survivor pension received lower monthly pension benefits than they would have had they retired before that date.

Charging Parties were all notified of the change on or about December 27, 2006, and made separate demands to bargain. In March and April 2007, Respondent Macomb County (hereinafter the County), on behalf of all the Respondents, replied to these demands with letters refusing to bargain. The County asserted that the Retirement Commission had the right to make the change, that the matter was covered by Charging Parties' contracts, and that the change was consistent with both the retirement ordinance and the parties' collective bargaining agreements.

Charging Parties AFSCME Council 25 and its affiliated Locals 411 and 893 (hereinafter referred to collectively as AFSCME) represent bargaining units of employees employed by the County (Local 411) and the Road Commission (Local 893). AFSCME filed the unfair labor practice charge in Case No. C07 D-083 against these Employers on April 18, 2007. Charging Parties International Union, UAW and its Locals 412 and 889 (hereinafter referred to collectively as the UAW) represent ten bargaining units of County employees covered by six collective bargaining agreements. The UAW filed the charges in Case Nos. C07 D-086 and C07 D-087 on April 25, 2007. Charging Party Teamsters Local 214 (the Teamsters) represents two units of employees of the Court, and filed the charge in Case No. C07 E-111 against this Employer on May 24, 2007. Charging Party Michigan Nurses Association (hereinafter the MNA) represents a

bargaining unit of public health nurses employed by the County. The MNA filed the charge in Case No. C07 E-115 on May 30, 2007. All of the charges were consolidated for hearing.

Findings of Fact:

The Retirement Ordinance & the Collective Bargaining Agreements

The Macomb County Retirement System Ordinance (the retirement ordinance or ordinance) was passed in 1946. The ordinance established the system, created the Retirement Commission, and details the rules under which the system operates. By ordinance, four members of the Commission are officers of the County or Road Commission or their designees, and the remaining three members are elected by employee members of the system. The ordinance also generally establishes the benefits available to employees who are members of the system, including all employees not represented by unions.

Section 53 of the ordinance states:

> Not all of the provisions of this Ordinance are applicable to employees of the county who are members of a collective bargaining unit; such provisions are applicable only if they are specifically provided for in the appropriate collective bargaining agreement. The provisions of the Ordinance applicable to union employees shall be governed by the terms and conditions of the collective bargaining agreement in effect at the time of their separation from County employment.

In November 2006, there were collective bargaining agreements in effect covering all the bargaining units represented by the Charging Parties. All these agreements included pension benefit provisions and grievance procedures ending in final and binding arbitration. Except for the agreement between the Road Commission and AFSCME Local 893, all the contracts also contained the following paragraph:

> Retirement Benefits. The Employer shall continue the benefits as provided by the presently constituted Macomb County Employees' Retirement Ordinance and the Employer and the employee shall abide by the terms and conditions thereof, provided, that the provisions thereof may be amended by the Employer as provided by the statutes of the State of Michigan and provided further that an annual statement of employee's contributions will be furnished to the employee.

All the contracts, including Local 893's agreement, included references to the retirement ordinance in provisions dealing with specific benefits.

Section 22 of the ordinance describes how a standard monthly "straight life" pension benefit is to be calculated, including that the straight life allowance for members represented by a union shall be "as detailed in the applicable collective bargaining agreement in effect at his/her termination of County employment." In general, the factors used to calculate a straight life pension, including the amount of the employee's required contribution to the retirement system,

the formula for computing final average compensation, pension multipliers, and the maximum pension, are negotiated between Charging Parties and Respondents and incorporated into their collective bargaining agreements. However, some of the contracts are silent on some of these topics. If a collective bargaining agreement is silent on one or more of these topics, the straight life pensions of employees covered by that agreement are calculated using the factors set out in the ordinance and the collective bargaining agreement.

Charging Parties' collective bargaining agreements also cover other types of pension benefits, including annuities to individuals who leave their employment before retirement age, non-duty death retirement allowances, and deferred retirement benefits. Historically, new pension benefits have usually been granted first to unrepresented employees and then negotiated with the unions. In any case, unionized employees covered by the system do not receive new or improved pension benefits unless and until these benefits are negotiated with their bargaining representatives and incorporated into their union contracts.

Section 26(a) of the retirement ordinance allows retirees to elect to receive, instead of a straight life pension, a reduced pension that provides benefits to their survivors after the retiree's death. Section 26(a) begins with the following paragraph:

> Prior to the receipt of his/her first monthly retirement payment but not thereafter, a member may elect to receive his/her retirement allowance as a straight life retirement allowance payable throughout his/her life or he/she may elect to receive *the actuarial equivalent,* at that time, of his/her straight life retirement allowance in a reduced retirement allowance payable throughout his/her life and nominate a beneficiary, in accordance with the provisions of Option A, B, C, D or E set forth below. If a member does not elect an option, his/her retirement allowance shall be paid as a straight life retirement allowance. [Emphasis added]

The language stating that optional benefits are to be the "actuarial equivalent" of a straight life benefit has been in the ordinance since at least 1980. Section 26(a) goes on to explain the various joint and survivor options, including a "pop up" option (Option E) under which benefits revert to the straight life amount if the retiree outlives his or her survivor.

In November 2006, Section 15 of the ordinance, entitled "Mortality Tables," read as follows:

> The Retirement Commission shall from time to time adopt such mortality and other tables of experience, and a rate or rates of regular interest, as are necessary in the Retirement System on an actuarial basis. *For purposes of determining actuarial equivalent Retirement Allowances, the Retirement Commission is currently using a 7 ½% interest rate and a blending of male and female rates based on the 1971 group annuity mortality table projected to 1984 with ages set back 2 years* . . . [Emphasis added].

The highlighted language in Section 15 was added to the ordinance after the Commission adopted a unisex mortality table for the calculation of joint and survivor benefits in 1982, as

discussed in the section below.

Although all Charging Parties' members are allowed to elect joint and survivor benefits, in November 2006 there was no general reference to these benefits in any of their contracts. Most of the contracts included the following "pop-up" option language from the ordinance:

> Upon the death of the beneficiary, the retirant will receive a retirement allowance equal to one hundred percent of the amount specified by Section 26(a) above for the remaining lifetime of the retirant. The reduced retirement allowance payable during the joint lifetime of the retirant and his/her beneficiary together with the retirement allowance payable to one upon the death of the other *will be actuarially equivalent to the retirement allowance provided by Section 22 as a single life annuity.* This provision shall be without force or effect unless or until the retirant submits acceptable documentation of the death of his/her beneficiary to the Secretary of the Retirement Commission. [Emphasis added].

Some of the contracts covering members of UAW Local 412 also included the following provision:

> Option D. A retirant shall have the option of selecting survivor's benefits in conjunction with the retirement option described in Section 26(a) of the Macomb County Employees' Retirement Ordinance commonly known as "Option D – Level Income Option." *Said survivor's benefits shall correspond to those benefit*s known as Option A – 100% Survivor Allowance, Option B - 50% Survivor Allowance and Option C – Allowance for 10 years Certain and Life Thereafter, as described in Section 26 of said Ordinance. [Emphasis added].

<u>Adoption of the 100% Female Mortality Table</u>

As discussed above, straight life pension benefits are calculated using factors set out in the ordinance and/or the collective bargaining agreements. Males and females under the same collective bargaining agreements retiring at the same age with the same number of service credits and the same final average compensation receive the same monthly straight life pension benefits. However, because males and females, on the average, have different life expectancies, separate male and female mortality tables are used for actuarial valuation purposes, i.e. to help calculate the cost to the system of paying the benefits promised and the employer contributions required to keep the system funded. Prior to 1982, the system also used separate male and female mortality tables to calculate the reduced joint and survivorship pension benefits of male and female retirees. Because the survivors of females are assumed to be male, and vice versa, the reduced pension benefits of a female retiree choosing an optional benefit under which she and her survivor would continue to receive benefits for the length of both their lives were calculated using a male mortality table to estimate the length of her survivor's life. The reduced pension benefits of a male retiree choosing optional benefits for him and his survivor were similarly calculated using a female mortality table. Since males have lower average life spans, prior to 1982 female retirees electing optional benefits had their benefits reduced by a smaller amount than male retirees. However, in 1982, after a ruling by the United States Supreme Court that the

use of separate mortality tables in calculating pension benefits for males and females constituted unlawful sex discrimination, the Michigan Attorney General issued an opinion stating that public pension systems were required to adopt sexually neutral mortality tables to compute optional retirement benefits. The Commission then asked Gabriel, Roeder and Smith (GRS), its actuarial firm, to study the cost to the system of adopting a sexually neutral mortality table.

GRS presented its report to the Commission on July 26, 1982. The report discussed two "approaches to compliance." The first was to develop a merged sex mortality table based on the ratio of males to females in the pool of retirees choosing optional benefits. The ratio would be determined using the system's own past experience and that of similar systems. This mortality table would then be used to calculate the pension benefits of all retirees electing optional benefits. GRS noted that, in the system's current retiree pool, 74% of those who had elected survivorship benefits were men. It also noted that in many other public retirement systems at the time, the distribution was 90% male/10% female. GRS did not say in its report that this approach was necessary to ensure that joint and survivor benefits were "actuarially equivalent" to the straight life benefit. However, it recommended this approach as the one that would "best continue the basic principle that the costs to the system remain the same whether a retiree chooses straight life or survivor option benefits."

However, the GRS report also explained that a unisex mortality table based on the ratio of males to females choosing optional benefits would "prescribe substantially lower benefits than at present for women electing a joint and survivor benefit, and slightly higher benefits than at present for men." According to GRS, the only way to ensure that no participant received a "lesser benefit than under present procedures" would be to adopt a unisex mortality table that assumed that the pool of retirees electing survivorship options was 100% female.[2] This table would be used to calculate optional pension benefits for both men and women. The GRS report stated, "This would necessarily entail a cost for the plan since men electing optional forms of payment would be subject to a smaller reduction in benefits than required on an actuarial basis. The more male retirants electing an optional form, the greater would be the cost." The report concluded:

> These two approaches represent the reasonable extremes. There are any number of combinations in between, each of which would (i) reduce benefits for female retirants electing optional forms and (ii) be likely to increase the cost of the plan somewhat. If the change is made at the same time that the rate of regular interest is increased, the difference between old and new factors would be diminished. An increase in the assumed interest rate results in smaller reductions for those electing survivor benefit options.

The GRS report included the following comment in a footnote:

> The Retirement System Ordinance provides that an optional benefit will be the "actuarial equivalent" of the standard benefit. The Retirement Commission could adopt a rule stating that for purposes of determining amounts of optional benefits,

[2] That is, the mortality table would assume that the pool of survivors was 100% male, who would not live as long (actuarially) as female survivors.

> the actuarial equivalent will be based upon a stipulated interest rate and unisex mortality table. This could eliminate the need for an ordinance change.

GRS provided the Commission with charts comparing how benefits would change for male and female retirees retiring at different ages with beneficiaries of different ages under four different unisex mortality tables. The four tables assumed ratios of male to female of 90/10, 75/25, 50/50 and 0/100 respectively. GRS also provided figures for how employer costs would change with these different assumptions. It was clear from these figures that adopting a table that assumed a higher ratio of female to male retirees would cost the system more, and require higher employer contributions, than adopting a table that assumed a lower ratio of females. After reviewing and discussing the GRS report, the Commission voted to adopt the 100% female (or 0/100) mortality table.

2006 GRS Recommendations and Commission Actions

In 1993, GRS performed an experience study to review the various actuarial assumptions that the system was using to calculate employer contributions and employee optional benefits. Insofar as the record discloses, GRS did not recommend any change in the mortality tables used to calculate the optional pension benefits in 1993. After 2000, employer contributions to the system increased dramatically. In 2006, at the recommendation of one of the employee representatives on the Commission, the Commission asked GRS, still the system's actuary, to do another experience study.

GRS presented its report, based on the system's experience between 2001 and 2005, to the Commission on October 13, 2006. The report recommended a number of changes, including the adoption of a different mortality table for the annual actuarial valuation, and a change in the mortality table/assumptions used to calculate optional benefits. The report concluded that joint and survivorship pensions, as currently calculated, were not "actuarially equivalent" to straight life pensions. It stated:

> Currently, when a member elects one of these optional forms of payment the benefit is reduced to reflect the probability that benefit will be paid over a longer period due to the joint life expectancy of the retiree and the spouse. The reduction is based on the following assumptions: 7.5% interest rate and the 1971 Group Annuity Mortality Table projected to 1984, for females, set back two years. *This assumption set is not actuarially equivalent to the assumptions proposed for use in the annual actuarial valuation. As a result, it is more costly to the System if a member elects an optional form of payment compared to the liability valued assuming a single life form of payment.*
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> * * *
>
> Retirees can elect alternate forms of pension payments at retirement. In many systems the assumptions used in calculating optional forms of payment are based on the same assumptions used in the annual valuations, resulting in forms of payment (options) that are "actuarially equivalent" to the normal form of pension

payment. Under the Macomb County Employees Retirement System, because these actuarial assumptions are different, the optional form of payment is more valuable than the single life annuity form of payment. Federal law required that the mortality assumption used to calculate the optional forms of payment be independent of the member's gender. Because the mortality assumption proposed for use in the annual valuation is sex-distinct it cannot be used in the calculation of optional forms of payment. However, the mortality assumption proposed for use in calculating optional forms uses a blend of male and female rates designed to have the same present value, on average, as the straight life normal form of payment.

Present: 7.5% annual interest rate, compounded annually, and 100% of the female rates from the 1971 Group Annuity Mortality table projected to 1984, with ages set back two years. The blended table is 100% of the female table.

Proposed: 7.5% annual interest rate, compounded annually, and a unisex blend of the male and female rates from the 2000 RP Mortality table projected for 15 years, with no set back on ages. The blended table is 60% of the male table and 40% of the female table.

GRS' recommendation was based on fact that, during the period covered by the experience study, 59.6% of the system's retirees who had elected optional benefits were male. According to GRS, only with the change in mortality assumptions would the additional "load" on the system from the optional benefits be zero, i.e. it would not cost the system more when someone elected a survivorship form of payment, and the optional benefits would be actuarially equivalent to the straight life allowance.

No one from GRS testified at the hearing. The UAW presented one expert witness, an actuary with pension experience largely in the private sector. The actuary testified that the term "actuarial equivalent" means "of equal value based on the same set of actuarial assumptions," or, more generally, "equal in value." He testified that, contrary to GRS' assertion in its report, pension systems generally use different actuarial assumptions to determine optional benefits and to value straight life benefits for purposes of determining their costs to the system, because the assumptions used in actuarial valuations are almost always sex specific. For this reason, according to the actuary, the term "actuarial equivalence" is usually used in pension plan documents only to set one form of optional benefit against another. The actuary did not disagree with GRS' conclusion that, using the 100% female mortality table, it cost the system more when a retiree elected an optional benefit than when he or she chose a straight life allowance. However, he testified that it was common, at least in the private sector, for optional benefits to have a higher cost to a system than straight life benefits. He testified that, in his opinion, the Commission had adopted a definition of the term "actuarial equivalent" in Section 15 that recognized that the cost of optional benefits might be higher than a straight life allowance.

Representatives of GRS appeared at the Commission's October 13, 2006 meeting to discuss their report. The minutes reflect that a GRS representative asked if "actuarially

equivalent" was specifically defined in the ordinance in terms of the interest rate and mortality table. The Commission's legal counsel replied that it was, in Section 15, and that the ordinance should probably be amended so that "actuarially equivalent" would be defined as the assumptions adopted by the Commission so the ordinance would not have to be amended each time assumption changes were adopted. He said "the intent is that all forms of retirement options are to be of equal value," and "there does need to be some clarification within the ordinance in that respect." One of the Commissioners asked the County's legal representative whether the Commission had the authority to take an action that would impose a benefit change on employees. He replied that he believed that if there were going to be changes made to the ordinance that affected employee benefits, the unions should be made aware of them prior to the changes. The Commission then voted to table action on the GRS report until its November meeting.

Gary Cutler, one of the Commissioners, is an accountant. At the November 17, 2006 Commission meeting, Cutler gave a presentation during which he argued that the 100% female table had become a past practice that should not be changed without collective bargaining. Cutler also argued, based on a present value analysis, that the 60/40% table recommended by GRS would not result in individuals who elected joint and survivor benefits receiving the same benefit as they would if they chose a straight life allowance. The County's finance director, David Diegel, disagreed with Cutler on both points. According to the minutes, Diegel said, "The pie was equal at one time and over time, for whatever reason, people who have taken the optional form of benefit are getting a bigger pie."

The Commission voted, four to three, to implement all of GRS' recommended changes in assumptions, including the change in the mortality table used to calculate optional pension benefits for employees retiring after July 1, 2007. The Commission selected the July 1, 2007 date for this change to give the County the chance to meet and confer with the Charging Parties regarding this change.

Notice to Charging Parties, Demands to Bargain, and Response

On December 27, 2006, the County's human resources director sent a letter to all unions representing employees covered by the system notifying them of the Commission's November 17 decision to adopt a new mortality table for the calculation of optional benefits. The letter stated that the County anticipated that the change adopted by the Commission would have an effect on the retirement benefits of their members. On February 27, 2007, the County scheduled a meeting to discuss the change with union representatives. Prior to the meeting, the County sent copies of the GRS experience study to all the unions, along with a "narrative summary" prepared by the County explaining the change. The explanation included two examples of how pension benefits might be affected by the change to the mortality table. In the first example, the retiree would receive about $40 per month less in pension benefits under the new table; in the second, a retiree with a higher pension would receive $169 per month less. The narrative summary ended with the following sentence, "These changes are necessary to ensure that employees retiring under the optional form of payment receive a benefit that is equal to but not greater than those retirees who elect a straight life benefit."

All the Charging Parties had representatives at the February 27 meeting, and all expressed opposition to the change. Between February 26 and April 5, all the Charging Parties made formal demands to bargain. AFSCME's letter, dated February 26, 2007, demanded to bargain "over changes in pension benefits." Teamsters Local 214 sent a letter dated March 2, 2007 demanding to bargain over "the unilateral change." On April 5, the MNA sent the County a letter stating that the change in retirement benefits constituted a mid-term modification of its contract. The MNA stated, however, that it would be willing to negotiate such a change with the County and offered to meet. The UAW's letter was also sent on April 5. This letter stated that the union demanded bargaining "over the decision and its effects concerning pension ordinance actuarial assumption changes vis a vis contractual pension benefits, including optional survivor benefits."

On March 13, 2007, the County's human resources director sent letters to the AFSCME Council 25 staff representative and to the Teamsters responding to their demands. On April 10 and 16, 2007, the County sent letters to the UAW and the MNA. The letters all stated that Sections 15 and 26 of the ordinance gave the Commission the authority to make the change. They also stated:

> The change you are referring to is within the sole discretion of the Retirement Commission and consistent with the language of your Labor Agreement. [The County then quoted the contract provision titled "Retirement Benefits" set out in full in the first section of these facts]
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> * * *
>
> Your demand to bargain is moot as this issue has already been bargained and the language the parties have agreed to clearly provides, through the Retirement Ordinance, the Retirement Commission's right, authority and obligation to adopt such mortality and other tables of experience, consistent with the action of the Retirement Commission on November 17, 2006.

Discussion and Conclusions of Law:

The Mortality Table as a Subject for Bargaining

Retirement plans, including aspects of the plan which have a significant effect on terms and conditions of employment such as composition of the plan's board of trustees, are mandatory subjects of bargaining under PERA. *Detroit Police Officers Ass'n v City of Detroit,* 391 Mich 44 (1973); *City of Detroit v Michigan Council 25, American Federation of State, County and Municipal Employees*, 118 Mich App 211 (1982). Pension benefits, including the methods by which benefits are calculated, are mandatory subjects. *City of Riverview v Lieutenants and Sergeants Ass'n,* 111 Mich App 58 (1981). In *Riverview,* as in *Mt Clemens Fire Fighters Union, Local 838, v City of Mt Clemens,* 58 Mich App 635 (1975), the Court of Appeals found the methods used to determine final average compensation, and thus an employee's pension benefit, to be a mandatory subject of bargaining.

According to Charging Parties, Respondents had a duty to bargain with Charging Parties

before taking any action which altered existing pension benefit levels. They point out that Respondents have never increased or improved pension benefits for their members without requiring Charging Parties to bargain these new benefits into their contracts. Respondents assert that they had no obligation to bargain over the adoption of the new mortality table because they had no control over this decision. According to Respondents, the Retirement Commission has the right and obligation under the ordinance to adopt mortality tables and other assumptions used to calculate the joint and survivor benefits.

I find Respondents' argument to be without merit. As noted above, it is well established that pension benefits, and the methods of calculating them, are mandatory subjects of bargaining. It is also well established that the fact that a pension plan is administered by an independent board does not remove an employer's obligation to bargain over these subjects. *Detroit Police Officers Ass'n v City of Detroit*, 212 Mich App 383 (1995), *aff'd* 452 Mich 339 (1996). As the Court noted in that case, "an employer is responsible for its bargaining obligations regardless of whatever actions are taken by an independent pension board." In fact, the Retirement Commission here has acknowledged Respondents' bargaining obligations by its practice of not implementing new or improved pension benefits for unionized employees until instructed by Respondents to do so. [3]

I agree with Respondents that there are aspects of pension administration which are solely within the control of the plan's trustees and, therefore, outside the scope of bargaining. As Respondents note, in *City of Detroit (Police Dept)*, 20 MPER 91 (2007) (no exceptions), I held that the City of Detroit had no duty to bargain over a change in the amortization period used to calculate the City's annual contribution to its police and fire employees' pension plan. In that case, the Court of Appeals had held that the plan's trustees, and not the City, had the statutory authority to set the amortization period because the trustees had a fiduciary responsibility to ensure that the plan was adequately funded and the amortization period was an integral element of the calculation of the City's required contribution. See *Policemen and Firemen Retirement System of Detroit*, 270 Mich App 74 (2006). For the same reasons, the actuarial assumptions used in a plan's valuation might be considered a matter within the sole control of the plan's trustees. However, the mortality table at issue here, although an "actuarial assumption," is used to calculate the benefits received by retirees from the system. While Respondents' contributions are affected by the choice of the mortality table used for this purpose, they are also affected by the methods used to calculate final average compensation. In general, if benefits rise, so must Respondents' contributions. I find that like the methods used to calculate final average compensation, the mortality table used to calculate joint and survivor pension benefits is a matter properly within Respondents' control and is a mandatory subject of bargaining under PERA.

Whether the Mortality Table Was "Covered By" the Collective Bargaining Agreements

Respondents' also argue that they had no duty to bargain over the new mortality table adopted in November 2006 because they had already satisfied their obligation to bargain over

[3] Although Respondents assert that they were powerless to decide which assumptions would be adopted, the County knew that the Commissioners were considering a change in a mortality table which would reduce benefits but did not object to the proposed change.

this topic. According to Respondents, the collective bargaining agreements provide that the parties will abide by the ordinance, and the ordinance mandates that joint and survivor benefits be the actuarial equivalent of a straight life benefit. Thus, according to Respondents, the method for calculating the joint and survivor benefit was "covered by" these collective bargaining agreements. According to Respondents, any claim that the change in the mortality table was inconsistent with the ordinance is simply a dispute over contract interpretation which should have been resolved through the grievance procedure.

Charging Parties disagree that the change in the mortality table was "covered by" their collective bargaining agreements or that this is merely a dispute over contract interpretation. They argue that their contracts were silent or ambiguous on the methods used to calculate joint and survivor benefits, including the mortality table. According to Charging Parties, there was an established past practice of using a specific mortality table and that this table had become a term or condition of employment which could not be unilaterally changed if it altered the level of benefits.

In *Port Huron Educ Ass'n, MEA/NEA* v *Port Huron Area School Dist*, 452 Mich 309, 234-236(1996), the Michigan Supreme Court held that an employer may defend against a charge that it has unilaterally altered working conditions by arguing that it has fulfilled its duty to bargain by negotiating for a provision in the collective bargaining agreement that fixes the parties' rights and forecloses further bargaining. The Court stated:

> In cases in which statutory and contractual issues overlap, the MERC, like the NLRB, must often review the contract to determine whether there is a statutory violation. The MERC does not involve itself with contract interpretation when the agreement provides a grievance process that culminates in arbitration. *Sanilac Co. Bd of Comm'rs v Sanilac Co Employees*, 1993 MERC Lab Op 750, 755; *Police Officers Ass'n of Michigan v Romulus*, 1992 MERC Lab Op 170. . . . In reviewing an agreement for any PERA violation, the MERC's initial charge is to determine whether the agreement "covers" the dispute. If the term or condition in dispute is "covered" by the agreement, the details and enforceability of the provision are left to arbitration.
>
> Where there is a contract covering the subject matter of a dispute, which has provisions reasonably relied on for the action in question, and the contract also has a grievance procedure with final and binding arbitration, the Commission finds that the contract controls and no PERA issue is presented. *St Clair Co Rd Comm v Local 516M Service Employees Int'l Union*, 1992 MERC Lab Op 533, 538]. [FN 16]
>
> > FN16. A subject need not be explicitly mentioned in an agreement in order for the subject to be "covered by" the agreement. *Dep't of Navy v Federal Labor Relations Authority*, 962 F2d 48, 61 (1992). . .

The Court agreed, however, that if a collective bargaining agreement is ambiguous or silent on a subject, and there is a "tacit agreement that the parties' mutually accepted past practice will continue" the past practice becomes a term or condition of employment that cannot

be a unilaterally altered. *Port Huron* at 325-327, citing *Amalgamated Transportation Union v Southeastern Michigan Transportation Authority,* 437 Mich 441,454 (1991).

Subsequent to *Port Huron,* in *Gogebic Cmty College Mich Educ Support Personnel Assoc v Gogebic Cmty College,* 246 Mich App 342 (2001), the Court of Appeals affirmed the Employment Relations Commission's finding that the employer had satisfied its obligation to bargain over a dental benefits carrier by entering into a contract provision that provided for dental insurance but did not specify a carrier. The Court said:

> Because the issue of dental coverage is "covered by" the collective bargaining agreement, the union exercised its right to bargain concerning this issue and could have negotiated for more specific terms, if it had wished to do so. *Gogebic* at 350.

In *University of Michigan*¸ 18 MPER 5 (2005) (no exceptions), a Commission administrative law judge held that an employer had satisfied its obligation to bargain over increased health insurance deductibles and co-pays by negotiating a contract provision that unit employees would "be eligible to participate in the University's Group Health Care Programs," but did not specify benefit levels or contributions. The administrative law judge found that the parties' agreement with respect to health insurance was contained within the contract, and that the union had the opportunity to bargain for more specific language but failed to do so.

In the instant case, all Charging Parties' collective bargaining agreements contain extensive provisions "covering" pension benefits. I find that these collective bargaining agreements contain the entirety of the parties' agreements with respect to pension benefits, including their agreement that where a contract is silent on a topic relating to an existing benefit, Respondents will follow the ordinance. For example, none of the Charging Parties' contracts reference all five optional forms of joint and survivor benefits, but all five are available to Charging Parties' members under Section 26(a) of the ordinance. I also find that Charging Parties' collective bargaining agreements were not silent or ambiguous with respect to the method for calculating joint and survivor pension benefits, and that the parties had no tacit agreement that joint and survivor benefits would continue to be calculated as they had in the past. Rather, I conclude that the parties were satisfied, and agreed, to have these benefits calculated as provided in the ordinance.

What method did the ordinance provide in November 2006 for calculating optional benefits? Section 26(a) of the ordinance states that a joint and survivor pension benefit is to be the "actuarial equivalent" of the retiree's straight life allowance at the time or his or her retirement. Both GRS, from the evidence of its reports, and the UAW's expert witness appear to agree that the precise definition of "actuarially equivalent" is "equal based on the same set of actuarial assumptions." Prior to 1982, the optional benefits and the straight life allowances were "actuarially equivalent" within that definition of the term since the same sex-based mortality tables/assumptions were used both to calculate joint and survivor pension benefits and to determine the value of a straight life allowance. When the system was forced in 1982 to switch to a sex-neutral mortality table to calculate benefits, this was no longer the case. However, as the UAW's witness agreed, the term "actuarial equivalent" also means, more loosely, "equal in value." What the term means in the context of this ordinance requires an analysis of the interaction between the language of Section 26(a), the language of Section 15, and past practice

including the Retirement Commission's 1982 decision to adopt a mortality table knowing that optional benefits calculated using this table would not be equal in cost to a straight life benefit. I find that the meaning of the term "actuarial equivalent" in the ordinance involved bona fide questions of contract interpretation which are properly subject to resolution through the grievance arbitration procedures set out in the parties' contracts. I also find that Respondents did not violate their duty to bargain when they acted to change the assumptions/method used to calculate joint and survivor benefits under the parties' collective bargaining agreements because they reasonably relied on the language of the ordinance to make this change.

Bargaining Over Effects

While all the Charging Parties demanded to bargain over the change in pension benefits, the UAW's April 5, 2007 letter demanded to bargain over both "the decision and its effects." It was clear from the demands to bargain and the parties' discussions that all the Charging Parties opposed any change in the mortality table used to calculate joint and survivor benefits that reduced the level of these benefits. All the Charging Parties, including the UAW, received essentially the same response to their demands to bargain. The County's April 10 response to the UAW's demand stated the matter was "covered by" the parties' collective bargaining agreement and that Respondents had, therefore, satisfied its duty to bargain over the change. As discussed above, I agree with this conclusion. The UAW argues that Respondents had a separate duty to bargain over the effects of its decision to change the mortality table and that it violated its duty to do so. However, after receiving the County's April 10 response, the UAW did not identify any specific issues it wished to discuss under this heading. I find that the evidence does not establish that Respondents refused to bargain with the UAW over the effects of its decision to change the mortality table used to calculate joint and survivor pension benefits.

In sum, I conclude that a mortality table used by a pension system to calculate joint and survivor forms of pension benefits is a mandatory subject of bargaining under PERA. However, I conclude that in this case, the collective bargaining agreements between the parties covered the method of calculating these benefits, including the mortality table, by incorporating the language of the Macomb County retirement ordinance on this point. I conclude that Respondents did not violate their duty to bargain in good faith under PERA in implementing the change in the mortality table adopted by the Retirement Commission in reasonable reliance upon the language of the ordinance, although I find that the parties had a bona fide dispute over the proper interpretation of this language. Based on these conclusions, and on the findings of fact set forth above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charges are dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____