STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF TAYLOR,
Public Employer-Respondent,

Case No. C08 F-110

-and-

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

APPEARANCES:

Giarmarco, Mullins and Horton, by John C. Clark, Esq., for the Respondent

Martha M. Champine, Esq., for the Charging Party

DECISION AND ORDER

On July 9, 2009, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent, City of Taylor, did not violate its duty to bargain in good faith under Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e), as alleged in the charge, and recommended that the charge be dismissed. The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. Respondent requested, and was granted, three extensions of time to file exceptions to the Decision and Recommended Order. On September 1, 2009, Respondent filed its exceptions with a supporting brief. (In its exceptions, Respondent did not dispute the ALJ's recommendation for dismissal. Respondent disagreed only with dicta in the ALJ's opinion indicating that the pension negotiation moratorium contained in the parties' previous contracts was lawful.) Charging Party requested, and was granted, an extension to file a response to the exceptions. On October 9, 2009, Charging Party filed its response with a supporting brief.

On March 23, 2010, the Commission received a letter from Respondent requesting leave to withdraw its exceptions to the ALJ's Decision and Recommended Order. Respondent's request is hereby approved, and Respondent's exceptions are dismissed. Inasmuch as there are no longer exceptions to the ALJ's Decision and Recommended Order said Order is adopted by the Commission.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. 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:

CITY OF TAYLOR,
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POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization-Charging Party.
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APPEARANCES:

Giarmarco, Mullins and Horton, PC, by John C. Clark, Esq., for Respondent

Martha M. Champine, 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 and 423.216, this case was heard at Detroit, Michigan on November 1, 2008, 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 the parties on or before February 10, 2009, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Police Officers Association of Michigan filed this charge against the City of Taylor on June 5, 2008. Charging Party represents a bargaining unit of approximately seventy-nine nonsupervisory patrol officers and corporals employed by Respondent in its police department. Article 12 of the parties' most recent collective bargaining agreement, which expired on June 30, 2008, included, among other provisions, the following sentence, "Final average compensation shall not be subject to negotiation and/or Act 312 arbitration in any future contracts until February 1, 2017." The charge in this case alleges that Respondent violated its duty to bargain in good faith by demanding that Charging Party negotiate changes to pensions in their successor agreement that violate the parties' pensions moratorium agreement, and by speaking to a local newspaper about this issue in violation of the parties' negotiating ground rules.

Findings of Fact:

History of the Pension Moratorium Provision

Charging Party became the bargaining representative for Respondent's nonsupervisory patrol officers and corporals in 2002, replacing the employee's previous bargaining agent, the Taylor Corporals/Detectives/Patrolmen/Cadets Association, Fraternal Order of Police (FOP). The contracts between Respondent and the FOP provided employees with a defined benefit pension plan. An employee's pension upon retirement was calculated by multiplying the employee's final average compensation (FAC) by a percentage (pension multiplier) and his or her years of service. The pension multiplier and retirement eligibility provisions were set forth in the contracts. The contracts also contained provisions requiring employees to make contributions to the pension fund. The 1991-1994, 1994-1997, and 1997-2002 collective bargaining agreements between Respondent and the FOP included the following provision:

> A. Pensions for sworn officers who began employment with the City prior to May 30, 1992 will be based on FAC as listed below. *Final Average compensation shall not be subject to negotiation and/or Act 312 arbitration in any future contracts until February 1, 2017. The Association agrees not to seek other pension improvements in bank caps, years of service, percentage multiplier, military service or any other directly related pension benefit for the same period of time. This provision shall not be applicable to demands for wages, longevity, and increases in current sick leave, vacation and/or holiday.* [Emphasis added]
>
> 1. Final Average Compensation as referred to above includes:
>
> a. Base wage
> b. Overtime Pay
> c. Holiday pay
> d. Vacation time earned and/or unused
> e. Bonus and sick days not to exceed capped bank plus current, if any[1]
> f. Longevity pay
> g. School or degree pay
> h. Compensatory time.
>
> B. Officers whose employment with the City began on or after May 30, 1992 shall have their pension computed on base wages only. *This provision shall not be subject to negotiation, mediation, fact finding or the provisions of Act 312 of the Public Acts of 1969, as amended, for a period of twenty-five (25) years terminating on June 1, 2017.*[sic]Should this provision be deemed contrary to law and be made the subject of negotiations prior to February 1, 2017, [sic]the City and/or Union shall have the right to negotiate and/or arbitrate if necessary, Final

[1] Sick leave and vacation leave are placed in banks as they are accrued. There is a cap on the number of sick and vacation hours that can be banked. After an employee reaches the cap, the employee is paid for leave as it accrues. When an employee retires, he is paid a lump sum for his banked sick and vacation leave hours.

Average Compensation and the factors utilized in computation of Final Average Compensation for all employees. [Emphasis added].

Despite the above language, in their 1997-2002 agreement Respondent and the FOP agreed to an increase in the pension multiplier in exchange for a cap on pensions at seventy percent of FAC.

The first collective bargaining agreement between Respondent and Charging Party after it became bargaining representative covered the years 2002-2005. This agreement provided for a lower employee pension contribution and added a new provision providing for spousal vesting upon the officer's completion of ten years of service. The parties also agreed to eliminate the distinction between less and more senior officers with respect to the way FAC was calculated. Article 12.4 of the parties' 2002-2005 agreement read, in its entirety, as follows:

> Pensions for officers will be based on final average compensation (FAC) as listed below. *Final average compensation shall not be subject to negotiation and/or Act 312 arbitration in any future contracts until February 1, 2017. The Association agrees not to seek other pension improvements in banks caps, years of service, percentage multiplier, military service or any other directly related pension benefit for the same period of time. This provision shall not be applicable to demands for wages, longevity, increases in sick leave, vacations and/or holidays.* Pension benefits for officers hired prior to May 30, 1992 shall not be reopened or changed unless agreed upon by the majority of the sworn officers entitled to the pre-May 30, 1992 pension benefit and the City of Taylor. [Emphasis added.]
>
> (1) Final Average Compensation as referred to above includes:
>
> (a) Base wage
> (b) Overtime pay
> (c) Holiday pay
> (d) Vacation time earned and/or unused
> (e) Bonus and sick days not to exceed capped bank plus current, if any
> (f) Longevity pay
> (g) School or degree pay
> (h) Compensatory time

Article 12.4 was carried over without change into the parties' 2005-2008 contract.

In early 2008, during the term of the 2005-2008 agreement, the parties entered into a memorandum of understanding (MOU) providing that overtime attributable to a certain special detail would not be included in an employee's FAC.

The Parties Begin Bargaining a New Contract

As noted above, the parties' 2005-2008 agreement expired on June 30, 2008. On or about April 15, 2008, the parties met to begin negotiating a successor. Gary Pushee, Charging Party's business agent, was Charging Party's chief spokesperson and John Clark, Respondent's counsel, was chief spokesperson for Respondent. At the first bargaining session, the parties agreed to a set of written ground rules for their negotiations. One of the ground rules read as follows:

> Either party may, with 48 hours prior notice to the other party, issue a media press release regarding issues involving negotiations. Said notice must include the specific subject matter of the media press release.

At this same bargaining session, both parties presented sets of written contract proposals. Respondent's proposals included major changes to pension benefits. First, Respondent proposed to eliminate the defined benefit pension plan for new employees – employees hired on or after July 1, 2008. Second, for employees hired before that date, Respondent proposed to cap FAC at twenty percent above the employee's annual final base wage (excluding longevity, holiday pay and any other additional monies paid to him) at the time of retirement. Third, Respondent proposed to increase employees' pension contributions. Finally, Respondent proposed to exclude overtime and payoffs for accrued vacation and sick leave from FAC. Charging Party objected to the pension proposals as violating the pension moratorium language. It did not indicate whether its objection extended to all four parts of Respondent's proposal. Respondent said that its position was that the pension moratorium was unenforceable. Respondent suggested that the parties enter into a MOU stating that they would discuss Respondent's proposals without either party waiving its legal position as to the enforceability of the moratorium. Charging Party said that it would consider this. A day or so after the meeting, Pushee called Clark and told him that Charging Party would not agree to the MOU. Between April 15 and the date of the unfair labor practice hearing on November 1, 2008, neither party requested to meet again to bargain.

Sometime between April 15 and May 11, 2008, Clark spoke to a reporter from a local newspaper about Respondent's plan to file an action for declaratory judgment in Wayne County Circuit Court seeking to have the moratorium provision declared invalid and unenforceable as against public policy. Clark's comments were printed in the newspaper on May 11. On May 12, 2008, Respondent filed the lawsuit. In the complaint, Respondent maintained that its pension and retiree health insurance costs were skyrocketing. It also asserted that as a result of rising labor costs and falling revenues, Respondent's unreserved fund balance had plummeted and its reserves for contingencies had been extinguished. On June 5, 2008, Charging Party filed the instant charge.

Discussion and Conclusions of Law:

The duty to bargain under Section 15 of PERA extends to those subjects found within the scope of the phrase "wages, hours and terms and conditions of employment." Subjects included within that phrase are referred to as mandatory subjects of bargaining. Once a specific subject has been classified as a mandatory subject of bargaining, the parties are required to bargain concerning the subject if it has been proposed by either party, and neither party may take

unilateral action on the subject absent an impasse in the negotiations. The remaining matters not classified as mandatory subjects of bargaining are referred to as either "permissive" or "'illegal" subjects of bargaining. The parties may bargain by mutual agreement on a permissive subject, but neither side may insist on bargaining to the point of impasse. *Detroit Police Officers Ass'n* v *City of Detroit*, 391 Mich 44, 54-55 (1974). The parties are not prohibited from discussing an illegal subject of bargaining, although a contract provision embodying an illegal subject is unenforceable. *Detroit Police Officers Ass'n; Michigan State AFL-CIO v MERC*, 453 Mich 362, 380 (1996).

A party can fulfill its statutory duty by bargaining about a subject and entering into a contract that fixes the parties' rights and forecloses further mandatory bargaining. *Port Huron Educ Ass'n, MEA/NEA v Port Huron Area School Dist*, 452 Mich 309, 318 (1996). In addition, a party may knowingly and voluntarily relinquish its right to bargain about a matter by agreeing to clear and unambiguous contract language that unmistakably waives its rights. *Port Huron*, at 320; *Amalgamated Transit Union v Southeastern Michigan Transportation Authority*, 437 Mich. 441, 461 (1991).

Pensions, and all significant provisions of pension plans, are mandatory subjects of collective bargaining under PERA. *Detroit Police Officers Ass'n v City of Detroit*, 212 Mich App 383, 391 (1995); *Detroit Police Officers Ass'n*, 391 Mich 44 at 63. The charge in this case alleged that Respondent demanded to bargain over changes in the pension provisions of the collective bargaining agreement in violation of the pension moratorium contained in Article 12.4. In its brief, however, Charging Party asserts only that Respondent unlawfully sought these changes. The record reflects that in April 2008, Respondent presented proposals which Charging Party claimed were within the scope of the pension moratorium. Respondent argued that the pension moratorium clause was invalid. Charging Party disagreed. Respondent then suggested that the parties agree to leave the proposals on the table, with Charging Party reserving the right to argue later that it had no obligation to bargain over them. Charging Party rejected this suggestion. After this exchange, neither party requested further bargaining. Apparently, both parties agreed to wait until the pension moratorium issue was resolved. I conclude that Respondent did not violate its duty to bargain simply by bringing its proposals to the bargaining table, even if Charging Party had no obligation to bargain over them. I find no evidence that Respondent insisted to impasse on any of the disputed provisions or that it refused to continue bargaining unless Charging Party agreed to discuss them. For this reason, I recommend that the Commission dismiss the allegation that Respondent committed an unfair labor practice by demanding that Charging Party negotiate changes which allegedly violated the parties' pension moratorium agreement.

However, it is apparent that the parties have an ongoing dispute over the validity and scope of the pension moratorium provision which both parties wish to have resolved. For this reason, I will analyze the arguments raised by Respondent in its brief, even though the discussion that follows is dicta.

Respondent makes three arguments in its defense. First, it asserts that the pension moratorium is contrary to the purposes of PERA, including its goal of promoting good faith bargaining and the prompt resolution of labor disputes. Respondent points out that, like other municipalities in Michigan, it is now facing an unprecedented economic crisis of undeterminable

duration, with falling revenues and escalating pension and insurance costs. It maintains that gaining control over these costs is absolutely vital to both its short and long term fiscal stability. Respondent asserts that for collective bargaining to be viable, it is essential that the parties be free to negotiate on a regular basis, especially with respect to economic subjects. The lengthy pension moratorium that Article 12.4 arguably provides, it asserts, conflicts with the fundamental purposes of the Act. Accordingly, Respondent asks the Commission to declare the pension moratorium provision unenforceable as contrary to PERA.

Respondent's second argument is that the pension moratorium provision is too ambiguous, confusing and contradictory be given any effect. It points out that although Article 12.4 begins with an absolute prohibition on negotiations over FAC, its second sentence refers to "any other directly related pension benefit." Respondent maintains that since this phrase is undefined in Article 12.4, it could be interpreted to broaden the moratorium beyond FAC. However, according to Respondent, the next sentence, beginning "This provision shall not be applicable . . ." carves out exceptions so significant as to render the first sentence, and the entire clause, meaningless. Respondent also argues that under any reading, the pension moratorium clause does not encompass Respondent's proposal to eliminate the defined benefit plan for new hires or its proposal to increase employee pension contributions.[2]

Respondent's third argument is that the parties, by negotiating numerous changes in pensions since 1992, have demonstrated their intent to render the pension moratorium provision null and void. Respondent cites *Port Huron Ed Ass'n,* at 312, in which the Supreme Court held that unambiguous contract language controls unless there is a past practice so widely acknowledged and mutually accepted that it amends the contract, and *Detroit Police Officers Ass'n v Detroit,* 452 Mich 339 (1996). In the latter, the Supreme Court held that by effectively ignoring an express provision in the city charter/collective bargaining agreement over a period of decades, the parties had demonstrated their agreement to modify that provision.

In *Ann Arbor Fire Fighters Local 1733,* 1990 MERC Lab Op 528, an employer argued, as Respondent does here, that a so-called pension moratorium agreement was contrary to the purposes of the Act. The employer filed an unfair labor practice charge after the union argued to an Act 312 arbitration panel that the pension moratorium provision in the parties' expired contract barred the panel from ruling on the employer's proposals to make certain changes in benefits not specifically related to pensions. Specifically, the employer proposed to replace longevity increases incorporated into the employee's base wage with lump sum longevity payments and to change the rate of payment for compensatory hours paid out in a lump sum upon retirement for recently hired employees from double time to time-and-a-half. The union argued that the employer had waived its right to bargain over these changes because the changes would affect FAC and, therefore, the amount of the employees' pensions. The clause upon which the union relied read, in pertinent part, as follows:

> b. The parties further agree that, except as provided in paragraph c, neither shall alter or attempt to alter, add to or attempt to add to, through negotiation,

[2] It is not clear whether Charging Party is arguing that the pension moratorium covers all of the pension proposals made by Respondent on April 15, 2008. The charge alleges only that Respondent demanded to bargain changes to the pension provisions "involving the components of final average compensation," and Charging Party's brief does not even mention Respondent's proposal to increase the pension contribution.

> arbitration or court or administrative action, any provision or practice related to pension benefits currently in effect. This prohibition shall be for a period of ten (10) years, commencing July 1, 1981. The parties further agree that this prohibition does not preclude procedural changes adopted by the City's Pension Board based on recommendations from the Board's actuary as related to actuarial assumptions which to not affect retirees' benefit levels.
>
> c. If mutually agreed to, either party may raise, during collective bargaining, an issue related to manning or pension. If the issue or issues raised are not agreed to by the parties, the issue or issues cannot be submitted to arbitration unless the parties mutually agree to their submission.

Over a year before the charge was filed, a grievance arbitrator ruled that the above language constituted a broad ban on changes in "virtually anything" related to pensions.

The Commission first noted that while bargaining waivers contained in a contract are presumed to expire with the expiration of the contract, in *Ann Arbor Fire Fighters* the parties had clearly expressed their intent that the waiver extend beyond the contract term. It also rejected the employer's argument that it should declare the clause invalid or unenforceable because the agreement was unconscionably long. It stated that it was not authorized by PERA to police the contents of agreements to redress imbalances in bargaining power between parties, and held that it was not willing to hold that parties could not enter into a valid bargaining waiver of ten years duration.

In this case, there is no dispute that the parties freely and knowingly entered into the contract language which is the subject of this dispute. As the Commission noted in *Ann Arbor Fire Fighters*, it is not the Commission's role to reform an agreement reached by parties to a collective bargaining relationship or to alter the bargain they intentionally reached, even if this agreement has bad consequences for one of the parties or for the bargaining unit as a whole. [3] One of the fundamental purposes of PERA is the encouragement of the voluntary settlement of disputes and the incorporation of these settlements into written agreements. In *Ann Arbor*, the Commission refused, I believe correctly, to hold that parties cannot enter into a valid agreement waiving their rights to bargain over a specific topic or topics after the expiration of the document in which the waiver is contained. Like the pension moratorium in *Ann Arbor*, the moratorium in this case has an ending date, even though it is a decade into the future. I am as reluctant as the Commission was in *Ann Arbor* to hold that a bargaining waiver with an ending date is an "unconscionable" agreement.[4] I conclude that the pension moratorium contained in Article 12.4

[3] Although neither party makes this point, the inevitable effect of the pension moratorium in the current economic climate is reduced wages, benefits and job security for active members of the unit.

[4] In support of its argument, Respondent cites two cases arising under the National Labor Relations Act. Neither of the cases is apposite. In National *Labor Relations Board v Reed & Prince Mfg Co*, 118 F2d 874 (1941), the Court held that it was an unfair labor practice for an employer to insist on a contract clause in which the union and employees agreed that during the term of the agreement or "at any time in the future" they would not request or demand either a closed shop or dues checkoff. In *National Labor Relations Board v National Licorice Co*, 309 US 350 (1940), *the* Supreme Court affirmed the National Labor Relations Board's finding that the employer committed multiple unfair labor practices, including coercing its employees into signing individual contracts promising not to demand a closed shop or a signed agreement with the union, and affirmed the Board's order requiring the employer to take no action to enforce the agreements.

was not an illegal agreement, and that it would be inappropriate for the Commission to declare this agreement invalid.

I agree with the Commission in *Ann Arbor*, however, that a pension moratorium, as a written waiver of the right to bargain, must clearly and unmistakably waive a party's right to bargain over the subjects in dispute. In *Ann Arbor*, the Commission concluded that the broad language of the moratorium clause in that case did not constitute a clear and unmistakable waiver of the employer's right to bargain over whether longevity payments should be included in the base wage, or whether employees should be paid double time for their accumulated compensatory time at retirement, because neither of these topics were explicitly mentioned in the provision. In this case, Respondent argues that Article 12.4 does not clearly and unmistakably waive anything because it contains so many contradictions that it is without meaning. I disagree. Read as a document drafted by parties familiar with both the collective bargaining process and pension terms of art, I find the language unambiguous. The second sentence, "Final Average Compensation shall not be subject to negotiation and/or Act 312 arbitration in any future contracts until February 1, 2017," clearly and unambiguously expresses the parties' intent that neither party be compelled to bargain over proposals to change how FAC is computed for the duration of the moratorium. Both parties clearly knew that this sentence would not become an issue unless the parties disagreed, and they clearly did not intend to prohibit themselves from mutually agreeing to changes in FAC for the period of the moratorium. The third sentence clearly waives Charging Party's right to demand bargaining over increases in the amount of sick, vacation and bonus leave employees can be paid for at retirement, i.e. banks caps, as well as other components of the pension unrelated to FAC, such as service credits and the pension multiplier. Again, this sentence gave Respondent the right to refuse to bargain over proposals of this nature, but did not prohibit Charging Party from making such proposals or the parties from mutually agreeing to them. Finally, the fourth sentence makes it clear that the parties' duty to bargain over wages, longevity pay, sick, vacation and holiday pay is not affected by the provision.

Applying the unambiguous language of Article 12.4 to the actual proposals presented by Respondent in April 2008, I find that Charging Party had a right to refuse to bargain over the exclusion of overtime pay and accrued vacation and sick leave from FAC, and the imposition of a ceiling on FAC, because these issues affect how FAC is computed. I find that Article 12.4 does not waive Respondent's right to bargain over an increase in the employee contribution to the pension fund, a subject not mentioned in the clause and unrelated to FAC. I also find that Respondent did not waive its right to bargain over a change from a defined benefit to a defined contribution pension plan for new employees. FAC is a term with meaning only in the context of a defined benefit pension plan. However, Article 12.4 does not clearly and unambiguously require Respondent to provide a defined benefit plan for new employees hired after the term of the expired contract and not previously covered by any pension plan.

I also find that the parties did not agree to modify Article 12.4 by agreeing to certain changes in the pension provisions over the term of the moratorium. As indicated above, when parties enter into language waiving a party's rights to bargain, they expect the waiver to take effect only when the other party asserts it. Insofar as the record discloses, Respondent and Charging Party mutually agreed to bargain over the changes in FAC that were incorporated into their 2002-2005 contract. The fact that these changes were proposed and agreed to by one of the

parties does not demonstrate that the parties agreed that the pension moratorium could not be asserted by either party for the remainder of its life.

Charging Party also alleges that Respondent violated its duty to bargain by speaking to a newspaper about the pension moratorium issue without giving Charging Party advance notice, thereby allegedly violating the parties' negotiating ground rules. I addressed a similar argument in *Grand Rapids Public Museum,* 2002 MERC Lab Op 222, a decision and recommended order written by me and adopted by the Commission when no exceptions were filed. See also *Sault Ste Marie Ed Ass'n,* 20 MPER 89 (2007), (no exceptions). After reviewing decisions on this issue by labor relations agencies in other states and the National Labor Relations Board, I concluded that a violation of a negotiating ground rule should be considered an unfair labor practice only in the context of the parties' other conduct. I continue to adhere to that view, and I find that Respondent's decision to speak to the newspaper in this case, standing alone, does not support a finding that it was bargaining in bad faith.

In accord with the findings of fact and discussion and conclusions of law above, I conclude that Respondent did not violate its duty to bargain by its conduct in this case. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge in this case is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: _____