STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

Case No. C08 B-047

-and-

DETROIT FIRE FIGHTERS ASSOCIATION,
IAFF, LOCAL 344,
Labor Organization-Charging Party.
_____/

APPEARANCES:

City of Detroit Law Department, by Andrew Jarvis, Esq., for the Public Employer

Allison L. Paton, P.C., by Allison L. Paton, Esq., for the Labor Organization

DECISION AND ORDER

On April 9, 2010, Administrative Law Judge Peltz issued his Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

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

In the Matter of:

CITY OF DETROIT,
Respondent-Public Employer,

Case No. C08 B-047

-and-

DETROIT FIRE FIGHTERS ASSOCIATION,
IAFF, LOCAL 344,
Charging Party-Labor Organization.
_____/

APPEARANCES:

City of Detroit Law Department, by Andrew Jarvis, for the Public Employer

Allison L. Paton, P.C., by Allison L. Paton, for the Labor Organization

DECISION AND RECOMMENDED ORDER ON 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 December 16 and 18, 2008, before David M. Peltz, Administrative Law Judge of the State Office of Administrative Hearings and Rules, on behalf of the Michigan Employment Relations Commission. Based upon the entire record, including the transcripts of hearing, exhibits and briefs filed by the parties on or before February 25, 2009, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge:

On February 26, 2008, the Detroit Fire Fighters Association, IAFF, Local 344 filed an unfair labor practice charge against the City of Detroit. The charge, as amended on April 24, 2008 and July 17, 2008, set forth ten separate allegations of unlawful conduct by the

City. At the start of hearing in this matter, the Union indicated that it would proceed on only four of the ten counts, each of which is described below.[1]

In Count 2 of the charge, the Union alleges that the City repudiated its contractual obligations by failing to implement a two percent wage adjustment beginning in December of 2003. Charging Party contends that the wage adjustment was mandated by "parity" language in the collective bargaining agreement which, according to the Union, states that certain bargaining unit positions shall be subject to the same wage changes as specified positions within the City of Detroit Police Department. Charging Party contends that it learned of the wage increase for the police positions in May of 2008.

Count 3 of the charge asserts that the Employer repudiated the contract by deducting the wrong amount from bargaining unit members' paychecks for the employee death benefit. Charging Party asserts that it became aware of the alleged repudiation in February of 2008.

In Count 4, Charging Party asserts that the City violated PERA by making changes to established practices and policies relating to the acquisition of medical records and forms by employees without providing the Union with notice and an opportunity to bargain. These changes, which the Charging Party contends were unilaterally implemented by the Employer in January of 2008, included a requirement that employees pay fees to obtain medical records and supplemental insurance forms.

Lastly, in Count 9 of the charge, the Union alleges that the Employer unilaterally and without bargaining instituted a requirement that bargaining unit members wear uniforms whenever they are required to report to a location, including trips to the medical division.

Findings of Fact:

I. Parity Pay

Charging Party represents a bargaining unit consisting of all non-civilian employees of the City of Detroit fire department, including senior chief, deputy chief, fire marshal, battalion chief, captain, lieutenant and fire fighter. Schedule I of the most recent contract states, in pertinent part:

> A. Traditional police-fire pay parity means that the full time Police Officer and the full time Fire Fighter, whose base salaries are the same, will experience identical salary rate changes with identical effective dates throughout the fiscal year so that the total base pay of a Police Officer is equal to that of a Fire Fighter in any fiscal year covered by this Agreement. Similarly, the Fire Sergeant and Fire Engine Operator have parity with the

[1] The Union withdrew Counts 1 and 6 of the amended charge. The parties agreed that Counts 5, 7, 8 and 10 would be held in abeyance, with the understanding that these matters may be tried at a future date upon the request of the Union. At no time since the record in this matter closed has Charging Party made such a request. Accordingly, I find that the Union has effectively abandoned these allegations and recommend that the Commission dismiss Counts 5, 7, 8 and 10 in their entireties.

> Police Investigator; the Fire Lieutenant has parity with the Police Sergeant, the Fire Captain with the Police Lieutenant, the Battalion Fire Chief with the Police Inspector, and the Chief of Fire Department with the Deputy Chief-West Operations.[2]

In the fall of 2007, members of the bargaining unit informed Charging Party that the deputy police chief of western operations had been given a two percent wage increase. The Union began making inquiries to determine whether this information was accurate. Sometime before the end of the year, Respondent's labor relations director, Barbara Wise Johnson, confirmed to Charging Party that the City had indeed implemented a two percent wage increase within the police department in December of 2003, and that the raise had not been passed on to fire department positions entitled to parity under the contract. When asked by the Union why such changes had not been applied to applicable fire department positions, Johnson replied, "You caught me." On or about January 1, 2008, Charging Party filed a class action grievance over the parity pay issue.

At the time of the hearing in this matter, the City had implemented the two percent wage increase for all active bargaining unit members subject to parity under the contract retroactive to December of 2003, and it had made parity payments to some, but not all, employees who retired after the wage increase went into effect for the police department positions. However, Respondent refuses to pay eligible unit members interest on the retroactive payments for both active and retired employees. Moreover, retiree pensions have not been recalculated to account for the effect of the wage increase on final average compensation.

II. Death Benefit Contribution

Fringe benefits are set forth in Article 22, Section B of the contract between the parties. Part 2 of that provision, which governs death benefits, provides, in pertinent part:

> (2) Contributions:
>
> > (a) On behalf of employees in ranks or classifications with a parity relationship to the employees represented by the Detroit Police Lieutenants and Sergeants Association and employees in higher ranks or classifications, by the City, $20.70 per year per employee, and by the employee, 25¢ per week or $13.00. The current death benefit is $6,000.
> >
> > (b) On behalf of employees in ranks or classifications with a parity relationship to the employees represented by the Detroit Police Officers Association, by the City, $13.30 per year per employee, and

[2] The contract introduced as evidence at hearing covers the period July 1, 1998 to June 30, 2001. Although neither the Union nor the Employer put any evidence into the record establishing that the terms of this agreement remain in effect, counsel for both parties clearly assume this in their post-hearing briefs. Therefore, I will do the same for purposes of this decision.

> by the employee, 20¢ per week or $10.40 per year. The current death benefit is $4,900.

Paychecks are issued by Respondent on a bi-weekly basis. Accordingly, employees in ranks or classifications with a parity relationship to the employees represented by the Detroit Police Lieutenants and Sergeants Association are supposed to have 50¢ deducted from each paycheck, while 40¢ should be deducted from the paychecks of employees in ranks or classifications with a parity relationship to the employees represented by the Detroit Police Officers Association.

In January of 2008, Charging Party learned that the City was deducting the wrong amounts from its members' paychecks by inverting the contribution amounts required under Article 22 of the contract.[3] In a letter dated February 12, 2008, the Union notified the City of this error and requested that Respondent adjust the deductions and reimburse any money that may be owed to bargaining unit members. Although the fire commissioner promised the Union that the necessary corrections would be made, no action had been taken by Respondent at the time this case was heard on December 16 and 18, 2008.

Article 12 of the parties' contract governs payroll errors and adjustments and provides, in part:

> 1. When by payroll error an employee is underpaid or overpaid, the City is expressly authorized to correct the underpayment or overpayment by payroll adjustment. The City shall notify an employee in writing fourteen days prior to making any payroll recovery.
>
> The correction of the underpayment shall be made within sixty (60) days after notification to the Department personnel officer.
>
> 2. For over-payment, the City is authorized to deduct up to one hundred ($100) dollars bi-weekly. If the employee separates from City service, the entire unpaid balance shall be recoverable immediately.
>
> If the recovery of overpayment amounts to more than $2,500, the representatives of the City and the affected employee shall meet in order to attempt to reach agreement on a reasonable recovery schedule. Such schedule shall be subject to the maximum weekly and bi-weekly payment deductions contained in this article. If agreement is not reached, the issue shall be subject to the contractual grievance/arbitration procedure.

[3] Unique Williams, a payroll specialist with the City, testified that all employees were paying 40¢ per pay period. However, Williams admitted on cross-examination that she had not actually checked the records for all of Charging Party's members.

III. Medical Records

Since at least 1998, members of Charging Party's bargaining unit have been able to purchase optional or "supplemental" health and life insurance through the Employer. The full cost of supplemental insurance is paid by the employee and is deducted from his or her paycheck. Prior to January of 2008, employees wishing to apply for supplemental insurance would make a request to the City to fill out the required forms and have them transmitted to the insurance company. Historically, this service was provided by Respondent at no cost to its employees. Similarly, Respondent did not charge bargaining unit members a fee to obtain copies of their medical records from the fire department's medical division, nor did the City require that requests for such records be made in writing.

On January 28, 2008, Respondent issued Bulletin #09/08 to all fire department employees. The bulletin, which was entitled "Fee for Medical Records" stated:

> Effective February 4, 2008, the Fire Medical Division will access [sic] a fee to make copies of medical records. Medical records are deemed as information that pertains to a patient's health care, medical history, diagnosis, prognosis or medical condition and is maintained by a health care provider or health facility in the process [sic] of the patient's health. The following fee schedule shall apply:
>
> [For medical records, the fee is $1.00 per page for 1-20 pages, 50¢ for 21-50 pages and 20¢ for more than 50 pages. For supplemental insurance forms, the fee is $12.00 per insurance form.]
>
> Employees that are under the care of a surgeon must make their request through the surgeon's office to have supplemental insurance forms filled-out by the treating physician.
>
> Payment for copies of medical records/and or supplemental insurance forms must be made in the form of cash only.
>
> Please be advised, all requests for copies of Medical Records must be in writing to the Fire Medical Division. The written request must be dated and signed not more than 50 days before submitted. The medical records will be copied within 30 days of the written request.

Subsequent to the issuance of Bulletin #09/08, bargaining unit members have in fact been required to pay a fee to the Employer to obtain copies of their medical files and supplemental insurance forms. Testimony at the hearing established that access to such records is often necessary to allow a bargaining unit member or the Union to challenge a decision made by Respondent's medical division regarding whether an injury occurred in the line of duty so that an employee may qualify for duty disability leave. However, there is nothing in the record suggesting that the Union itself has ever been charged a fee to obtain

medical records, nor is there any indication that the City intends to apply the new policy to future requests for medical documentation by Charging Party.

IV. Uniforms

Respondent has had written guidelines in place governing the wearing of uniforms by fire department employees for at least thirty years. Those guidelines are incorporated in Policy Directive 12, which provides:

> Work Uniform:
> Each member below the rank of Battalion Fire Chief shall be issued regulation work uniforms, which may be worn in the quarters and at fires. Unless otherwise stipulated or with special permission of the Executive Fire Commissioner, work uniforms shall not be worn with any part of the full dress uniform. Department issued work uniforms shall not be worn while on leave.
>
> Dress Uniform:
> Members of the uniform force shall wear the dress uniform upon entering the fire station when reporting for duty and when leaving the fire station upon completion of a tour of duty. Members not actually on duty shall not use any part of the uniform for the purpose of identifying themselves as members of the Department. Members not actually on duty shall in no case wear any part of the uniform that is considered Department property for any purpose whatsoever after 1000 hours, without special permission of the Executive Fire Commissioner.
>
> Attire When Reporting to Superior:
> When any member of the uniform force is ordered to appear before the Executive Fire Commissioner, Deputy Executive Fire Commissioner, Chief of Fire Fighting Operations, Deputy or Assistant Chiefs, or Battalion Fire Chiefs, he shall present himself in full dress uniform even though he may be on leave, unless under suspension, when no portion of the uniform may be worn.
>
> Court/Public Appearances:
> The full dress uniform shall be worn when members are representing the Department in court, at public meetings or on special details. Members shall wear the full dress uniform, when directed to form with apparatus in front of quarters, during the passing of a funeral for a deceased member or public official.

Article 22, Section B(7) ("Uniforms") and Article 23 ("Safety") of the parties' collective bargaining agreement describe the uniforms and equipment which are to be issued to bargaining unit members. However, the contract is silent with respect to where and when said uniforms are to be worn by fire department employees.

Prior to June of 2003, bargaining unit members regularly wore their uniforms while working, whether they were on regularly scheduled active duty or working overtime. However, employees who were on sick leave or who were on leave as a result of a duty-related injury were not required by the City to wear their uniforms when they were ordered to report to the fire department's medical decision for physical therapy or other medical appointments.

On May 1, 2008, an arbitration award was issued in a dispute arising from the termination of Derek Esaw from his position as a sergeant with the City fire department. Esau was discharged for failing to submit to a drug screen which had been ordered by Respondent prior to his return to work. Esaw appeared for the drug test several times but was unable or unwilling to provide a reliable urine sample. Respondent's substance abuse policy provided that a refusal to submit to a drug test "while on duty or off duty in complete or partial uniform" was punishable on first offense by discharge. The arbitrator granted the grievance and returned Esaw to work, concluding that the mandatory penalty of discharge was not a required outcome because at the time of the testing, Esaw was neither on duty nor in uniform.

On June 6, 2008, Respondent issued Bulletin 49-08 in response to the Esaw grievance arbitration decision. The bulletin, which went into immediate effect, provides that employees who are on or off duty are required to wear the appropriate uniform any time they are ordered to report to the fire headquarters, the City law department, meetings as a representative of the fire department, training sessions and medical appointments. Charging Party was not given notice or an opportunity to bargain regarding the new uniform policy.

Discussion and Conclusions of Law:

I. Parity Pay and Death Benefit Contribution

Charging Party contends that the City repudiated the parties' contract by failing to maintain parity between fire and police positions, and by deducting the wrong death benefit contribution amounts from the paychecks of its members. Although the Commission does not enforce contracts per se, it does have the authority to interpret the terms of a collective bargaining agreement where necessary to determine whether a party has repudiated its collective bargaining obligations. An alleged breach of contract will constitute a violation of PERA if a repudiation can be demonstrated. See e.g. *City of Detroit (Transp Dept)*, 1984 MERC Lab Op 937, aff'd 150 Mich App 605 (1985) ; *Jonesville Bd of Ed*, 1980 MERC Lab Op 891, 900-901. Repudiation exists when 1) the contract breach is substantial, and has a significant impact on the bargaining unit and 2) no bona fide dispute over interpretation of the contract is involved. *Plymouth-Canton Comm Sch*, 1984 MERC Lab Op 894, 897. The Commission will find a repudiation only when the actions of a party amount to a rewriting of the contract or a complete disregard for the contract as written. *Central Michigan Univ*, 1997 MERC Lab Op 501, 507; *Cass City Pub Sch*, 1980 MERC Lab Op 956, 960.

Although Respondent asserts that no members of the bargaining unit have been overcharged for their death benefit contributions, the City does not contest the fact that it has been deducting the wrong amount from the paychecks of at least some of its employees, nor does Respondent dispute that parity positions within Charging Party's unit did not immediately receive the two percent wage increase given to parity positions within the police department in 2003. Neither at the hearing, nor in its post-hearing brief, has the City alleged that the nonpayment of the wage increase and the erroneous paycheck deductions were the result of any bona fide dispute over the meaning of the existing agreement, nor is there any evidence in the record suggesting the existence of any good faith dispute over interpretation of the contract. Although the City partially remedied the parity issue by making retroactive payments to active employees, back pay is still owed to some employees who retired after 2003. Moreover, no employee covered by the parity language has, of yet, been made completely whole because the City has refused to pay interest on the retroactive payments made to both active and retired employees and has, thus far, failed to adjust retiree pensions to account for the proper final average compensation. The City has also made no corrections to employee death benefit contributions, despite having been made aware of the problem by January of 2008 at the latest. There is nothing in the record to suggest that the City ever provided the Union with an explanation for its delay in remedying these issues.

In its post-hearing brief, Respondent argues that no PERA violation should be found in this matter because its delay in implementing the two percent wage increase and its failure to deduct the proper death benefit amounts resulted in no hardship to Charging Party's members. I disagree. Unit members have a right to rely upon the terms and conditions in the contract and to expect that they will continue unchanged. *Detroit Bd of Ed*, 2000 MERC Lab Op 375, 377. See also *Wayne County Community College*, 20 MPER 59 (2007). Furthermore, wages are a critical issue for most employees, and the Commission has consistently held that a failure to pay wages, including retroactive pay, as well as other actions affecting employees' pay and benefits, has a significant impact on terms and conditions of employment. See e.g. *City of Detroit*, 20 MPER 15 (2007) (no exceptions) (repudiation found where employer refused to pay employees the entirety of what was owned them until after charge was filed and failed to provide the union with an explanation for the delay); *City of DeWitt*, 16 MPER 38 (2003) (no exceptions) (change in the payroll period from weekly to bi-weekly had a substantial impact on unit); *Detroit Bd of Education*, *supra* (cessation of biweekly payments was not a *de minimis* violation even though the impact on some employees was less than $10.00 per paycheck); *Children's Aid Society*, 1994 MERC Lab Op 323, 327 (the addition of two weeks to the length of time employees had to wait between earning their wages and the issuance of their paycheck was found to have a significant impact on terms and conditions of employment).

I find that Respondent's actions in connection with this matter constitute a significant breach of its obligations under the collective bargaining agreement, and that such conduct cannot fairly and in good faith be characterized as isolated or insubstantial. By its conduct, Respondent has, in essence, written the wage increase provision out of the contract without first bargaining with the Union, and has unilaterally modified the bargained-for death benefit contribution language. Accordingly, I find that Respondent, by these actions,

has repudiated its agreement with Charging Party, thereby violating its duty to bargain in good faith under Section 10(l)(e) of PERA.

II. Medical Records and Uniforms

Charging Party asserts that Respondent violated PERA by changing the policies and procedures pursuant to which its members may acquire copies of their medical records and supplemental insurance forms without first giving the Union notice and an opportunity to bargain, and by unilaterally instituting a requirement that unit members wear uniforms to medical appointments and for therapy sessions. According to the Union, these changes were contrary to the mutually accepted past practice of the parties which became a term of the collective bargaining agreement and cannot be modified without its consent.

Under Section 15 of the Act, public employers and labor organizations have a duty to bargain in good faith over "wages, hours and other terms and conditions of employment." Such issues are mandatory subjects of bargaining. MCL 423.215(1); *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55 (1974). The test generally applied to determine whether a matter is a mandatory subject of bargaining is whether it has an impact upon wages, hours, or conditions of employment, or settles an aspect of the employer-employee relationship. *Detroit v Council 25, AFSCME*, 118 Mich App 211 (1982), enf'g 1981 MERC Lab Op 297. The Commission and the courts have adopted a broad and an expansive interpretation of "wages, hours, and other terms and conditions of employment" under Section 15 of PERA. *Local 1383, Fire Fighters v. Warren*, 411 Mich 642, 652 (1981). Matters relating to the working environment have been found to impact working conditions and constitute mandatory subjects of bargaining. *County of Wayne*, 1989 MERC Lab Op 1135 (office space); *Holland Public Schools*, 1989 MERC Lab Op 346, (smoking policies). See also *Ford Motor Co*, 441 US 488 (1979) (availability and prices of food served on employer's premises); *Master Slack*, 230 NLRB 1054 (1977) (layaway purchase program at the employer's outlet store), enfd 618 F2d 6 (6th Cir. 1980); *Owens-Corning Fiberglass*, 282 NLRB 609 (1987) (employee discounts on products manufactured by the employer); *Superior Forwarding Co*, 282 NLRB 806 (1987) (discounted fuel prices for personal use).

It is well established that work rules governing employee appearance, including the wearing of uniforms, are working conditions which are proper subjects of bargaining under both PERA and the National Labor Relations Act (NLRA) as amended 29 USC § 151. See e.g. *Public Service Company of New Mexico*, 337 NLRB No. 31 (2001); *Equitable Gas Co*, 303 NLRB 925, 929-931 (1991), modified on other grounds 966 F2d 861 (CA4 1992); *City of Saginaw*, 1990 MERC Lab Op 755, 761-762; *Detroit Water and Sewerage Dept*, 1989 MERC Lab Op 169, 175; *Transportation Enterprises, Inc*, 240 NLRB 551, 560 (1979). Similarly, I find that the unilateral implementation of a fee for bargaining unit members to obtain medical records and insurance forms constitutes a mandatory subject of bargaining because it may impact terms and conditions of employment or result in financial hardship. Free access to medical records and forms is a benefit to employees and is directly related to the employment relationship. The evidence establishes that copies of medical records may be required by the Union or its members to challenge a decision made by Respondent's medical division regarding whether an injury occurred in the line of duty. Unit members

need supplemental health forms in order to apply for optional health and life insurance available through the Employer. Although supplemental insurance is optional, it nevertheless constitutes a benefit of employment. See e.g. *City of Detroit (Fire Dept)*, 1991 MERC Lab Op 443, 447-448.

A party violates PERA if, before bargaining, it unilaterally alters or modifies a term or condition of employment, unless that party has fulfilled its statutory obligation or has been freed from it. *Port Huron Education Ass'n v Port Huron Area School District*, 452 Mich 309, 317; *Detroit Board of Education, supra*. A party can fulfill its obligation under Section 15 of PERA by bargaining about a subject and memorializing the resolution of that subject in the collective bargaining agreement. Under such circumstances, the matter is "covered by" the agreement. *Port Huron, supra* at 318; *St. Clair County ISD, supra*. As the Michigan Supreme Court stated in *Port Huron, supra* at 327, "Once the employer has fulfilled its duty to bargain, it has a right to rely on the agreement as the statement of its obligations on any topic 'covered by' the agreement."

Although there are provisions in the parties' collective bargaining agreement governing what uniforms and equipment Respondent must provide to its employees, the contract is silent with respect to the circumstances under which said uniforms must be worn. Similarly, there is no language in the agreement pertaining to the acquisition of employee medical records and supplemental insurance forms. However, a past practice that does not derive from the parties' collective bargaining agreement may nonetheless become a term or condition of employment which is binding on the parties. *Mid-Michigan Ed Ass'n v St Charles Comm Sch*, 150 Mich App 763, 768(1986), rev'd on other grounds *Port Huron Educ Ass'n, MEA/NEA v Port Huron Area Sch Dist*, 452 Mich 309 (1996). See also *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Mich Transp Auth*, 437 Mich 441, 454, 455 (1991). If a past practice becomes part of the employer's structure and conditions of employment, the past practice assumes the same significance as other portions of the collective bargaining agreement. *Mid-Michigan, supra at 768*. Accordingly, where an employer institutes a practice and permits it to continue, it cannot later change the practice without first giving the union notice and an opportunity to bargain. *Id*.

When a collective bargaining agreement unambiguously covers a term of employment that conflicts with a parties' past practice, "[t]he unambiguous contract language controls unless the past practice is so widely acknowledged and mutually accepted that it amends the contract." *Port Huron, supra* at 312. Comparatively, when the collective bargaining agreement is ambiguous or where, as here, the contract is silent on the subject for which the past practice has developed, there need only be tacit agreement that the practice would continue. *Amalgamated, supra* at 454-455.

There is no dispute that bargaining unit members who were on sick leave or off work for a duty-related injury were not required to wear uniforms to medical appointments or for therapy sessions until the issuance of Bulletin #49-08 in June of 2008. In fact, the department's Policy Directive 12, which has been in existence for many years and which describes in detail the circumstances under which uniforms must be worn, makes no reference whatsoever to there being a uniform requirement for medical appointments or

therapy sessions. To the contrary, the directive, which was offered into evidence by Respondent, explicitly states that uniforms "shall not be worn while on leave" and prohibits employees "not actually on duty" from using any part of the uniform to identify themselves as members of the department. Likewise, prior to the issuance of Bulletin #09/08, unit members had not been required to pay a fee to obtain copies of their medical records or supplemental insurance forms, regardless of whether the employee in question was being treated by a surgeon.[4] The consistent application of these policies constitutes evidence of a tacit agreement that they would continue. Under such circumstances, I conclude that Respondent violated the Act by unilaterally altering its uniform policy and by unilaterally instituting a requirement that unit members pay fees for the acquisition of medical records and forms.

With respect to the remaining aspects of the medical records policy unilaterally implemented by the City in January of 2008, I find that no PERA violation occurred. The requirement that employees make a written request for copies of their medical records, as well as the rule requiring that such requests be signed and dated not more than 50 days prior to the submission thereof, does not constitute significant changes in terms or conditions of employment so as to require bargaining prior to implementation. See e.g. *City of Highland Park*, 1989 MERC Lab Op 194; *Hurley Hospital (City of Flint)*, 1974 MERC Lab Op 74; *City of Pontiac*, 1974 MERC Lab Op 884. The fact that an Employer has followed a consistent practice does not turn a permissive subject of bargaining into a mandatory one. *University of Michigan*, 1989 MERC Lab Op 720, 725.

I have carefully considered the remaining arguments of the parties and conclude that they do not warrant a change in the result. For the reasons stated above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Counts 5, 7, 8 and 10 of the unfair labor practice charge are hereby dismissed in their entireties.

It is hereby ordered that the City of Detroit, its officers, agents and assigns, shall:

(1) Cease and desist from denying the existence of, or otherwise repudiating, the terms and conditions set forth in the collective bargaining agreement entered into between the City of Detroit and the Detroit Fire Fighters Association, IAFF, Local 344, by refusing to pay bargaining unit members wage increases to which they are entitled under the aforementioned agreement, and by failing to deduct the proper death benefit contribution amounts from the paychecks of bargaining unit members.

---

[4] In its post-hearing brief, Respondent contends that it discontinued the practice of providing medical records and forms free of charge because the service had become costly and burdensome. However, there is no competent evidence in the record supporting this assertion. Even if true, increasing costs, while perhaps relevant to the parties during bargaining, would not justify unilateral action by the Employer.

(2) Cease and desist from refusing to bargain collectively and in good faith concerning wages, hours and working conditions with the Detroit Fire Fighters Association, IAFF, Local 344, by unilaterally instituting a fee for the acquisition of medical records and supplemental insurance forms and by unilaterally changing rules governing the wearing of uniforms in the absence of a lawful impasse.

(3) Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively and in good faith concerning wages, hours and working conditions with the above named Union.

(b) Make bargaining unit members whole for any loss of pay, plus interest at the statutory rate, computed quarterly, for the period of time in which they were individually denied wage increases because of the unlawful activity of the City of Detroit, beginning in December of 2003, with the full method of calculation and actual individual calculations disclosed to Charging Party prior to the payment thereof.

(c) Recalculate pension benefits for bargaining unit members in "parity positions" who retired from employment with the City of Detroit subsequent to December of 2003 to account for the effect of the wage increase on final average compensation and make said retirees whole for any loss of pension benefits resulting from the unlawful conduct of the City of Detroit, with the full method of calculation and actual individual calculations disclosed to Charging Party prior to the payment thereof.

(d) Make bargaining unit members whole for any loss of pay, plus interest at the statutory rate, computed quarterly, for the period of time in which the wrong death benefit contributions were deducted from members' paychecks, with the full method of calculation and actual individual calculations disclosed to Charging Party prior to the payment thereof. Nothing herein shall require the rescission of benefits granted.

(e) Restore to unit members the terms and conditions of employment that were applicable prior to January 28, 2008 with respect to the acquisition of medical records and supplemental insurance forms, and June 6, 2008 with respect to the wearing of uniforms, and continue them in effect until the parties reach either an agreement or a good-faith impasse in bargaining.

(f) Make bargaining unit members whole for any losses they may have suffered because of the unlawful imposition of any unilateral changes in policies governing the acquisition of medical records and supplemental forms, including interest at the statutory rate.

(g) Post copies of the attached notice to employees in conspicuous places on the Employer's premises, including all locations where notices to employees are customarily posted and on any website routinely utilized by the City of Detroit fire department for employee access. Copies of this notice shall remain posted for 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: _____

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the City of Detroit, a public employer under the PUBLIC EMPLOYMENT RELATIONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT deny the existence of, or otherwise repudiate, the terms and conditions set forth in the collective bargaining agreement entered into between the City of Detroit and the Detroit Fire Fighters Association, IAFF, Local 344, by refusing to pay bargaining unit members wage increases to which they are entitled under the aforementioned agreement, and by failing to deduct the proper death benefit contribution amounts from the paychecks of bargaining unit members.

WE WILL NOT refuse to bargain collectively and in good faith concerning wages, hours and working conditions with the Detroit Fire Fighters Association, IAFF, Local 344, by unilaterally instituting a fee for the acquisition of medical records and supplemental insurance forms and by unilaterally changing rules governing the wearing of uniforms in the absence of a lawful impasse.

WE WILL upon request, bargain collectively and in good faith concerning wages, hours and working conditions with the above named Union.

WE WILL make bargaining unit members whole for any loss of pay, plus interest at the statutory rate, computed quarterly, for the period of time in which they were individually denied wage increases because of the unlawful activity of the City of Detroit, beginning in December of 2003, with the full method of calculation and actual individual calculations disclosed to Charging Party prior to the payment thereof.

WE WILL recalculate pension benefits for bargaining unit members in "parity positions" who retired from employment with the City of Detroit subsequent to December of 2003 to account for the effect of the wage increase on final average compensation and make said retirees whole for any loss of pension benefits resulting from the unlawful conduct of the City of Detroit, with the full method of calculation and actual individual calculations disclosed to Charging Party prior to the payment thereof.

WE WILL make bargaining unit members whole for any loss of pay, plus interest at the statutory rate, computed quarterly, for the period of time in which the wrong death benefit contributions were deducted from members' paychecks, with the full method of calculation and actual individual calculations disclosed to Charging Party prior to the payment thereof. Nothing herein shall require the rescission of benefits granted.

WE WILL restore to unit members the terms and conditions of employment that were applicable prior to January 28, 2008 with respect to the acquisition of medical records and supplemental insurance forms, and June 6, 2008 with respect to the wearing of uniforms, and continue them in effect until the parties reach either an agreement or a good-faith impasse in bargaining.

WE WILL make bargaining unit members whole for any losses they may have suffered because of the unlawful imposition of any unilateral changes in policies governing the acquisition of medical records and supplemental insurance forms, including interest at the statutory rate.

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

CITY OF DETROIT

By: _____

Title: _____

Date: _____

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