STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GENESEE COUNTY,
Public Employer-Respondent,

-and-

MICHIGAN AFSCME COUNCIL 25
AND ITS AFFILIATED LOCALS 496.00 AND 496.01,
Labor Organization-Charging Party in Case No. C10 A-019,

-and-

MICHIGAN AFSCME COUNCIL 25
AND ITS AFFILIATED LOCAL 916, CHAPTERS 1, 2, 3, 4, 8, 9 AND 10,
Labor Organization-Charging Party in Case No. C10 A-021.
_____/

APPEARANCES:

Bruce R. Lillie, Esq., for the Respondent

Kenneth J. Bailey, Esq., Staff Counsel, Michigan AFSCME Council 25, for the Charging Parties

DECISION AND ORDER

On June 17, 2010, Administrative Law Judge Julia Stern issued her 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

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

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

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APPEARANCES:

Bruce R. Lillie, Esq., for Respondent

Kenneth J. Bailey, Esq., Staff Counsel, Michigan AFSCME Council 25, for the Charging Parties

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

On January 22, 2010, Charging Party Michigan AFSCME Council 25 and its affiliated Locals 496.00, 496.01, and 916, Chapters 1,2,3,4,8,9 and 10, filed the above unfair labor practice charges with the Michigan Employment Relations Commission (the Commission) against Genesee County. The charges allege that Respondent violated Section 10(1)(a) and (e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 by repudiating and/or modifying provisions of the parties' collective bargaining agreements during their terms. Pursuant to Section 16 of PERA, the charges were assigned to Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules.

On February 3, 2010, pursuant to my authority under Rules 165(1), (2)(f) and (3) of the Commission's General Rules, AACS 2002 423.165, I issued orders to Respondent to show cause why orders should not be issued in both cases finding it to have violated its duty to bargain in good faith. On March 3, 2010, Respondent filed a position statement in response to my order.

On March 31, 2010, Charging Parties filed a response to the position statement. On May 12, at my suggestion, Respondent filed a supplemental position statement.

Based on facts not in dispute, as set forth in Respondent's position statements, and on the arguments made by the parties, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charges:

Charging Party Local 496.00 represents a bargaining unit consisting of nonsupervisory clerical, maintenance and custodial employees of Genesee County and nonsupervisory clerical employees of the probate, circuit and district courts for which Genesee County is the funding unit. Charging Party Local 496.01 represents a unit of professional and technical employees of the County. The units represented by Local 496 and Local 496.01 are covered by a single collective bargaining agreement. The term of the current agreement is May 24, 2005 through September 20, 2010.

Charging Party Local 916 represents a unit of supervisory employees of the County and the courts. The term of the current collective bargaining agreement covering this unit is September 29, 2005 through December 31, 2010.

On or about December 21, 2009, Respondent announced a series of unpaid furlough/layoff days for Charging Parties' members to take place between January and October 2010. Charging Parties allege that this announcement constituted an unlawful mid-term modification and/or repudiation of provisions in both collective bargaining agreements establishing a "work period" of eighty hours per bi-weekly pay period.

Facts:

The facts as set forth below are not in dispute.

Pertinent Contract Provisions

Article XII (1) of the Local 916 collective bargaining agreement reads as follows:

Section 1 – Work Period

> *The normal work period consists of eighty (80) hours per bi-weekly pay period.* Exclusive of seven (7) day operations, the normal workweek extends from Monday through Friday. [Emphasis added]

Article XIV (1) of the Local 496/496.01 collective bargaining agreement reads as follows:

Section 1 - Work Period

The work period consists of eighty (80) hours per bi-weekly pay period. The normal workweek is Monday through Friday, 8:00 a.m. to 5:00 p.m. with the exception of those departments requiring six (6) or seven (7) day operations or unless stated otherwise in this Article. *Such normal workweek constitutes a mutually satisfactory practice in accordance with the provision of Article II Section 3 of this Agreement.* [Emphasis added]

Article II of the Local 916 agreement and Article II of the Local 496/496.01 agreement contain identical management's right language, as follows:

Section 2 –Employer Rights

The Employer, on its own behalf and on behalf of the public it serves, hereby retains and reserves unto itself, and its designated representatives when so delegated by it, all powers, rights, duties and responsibilities conferred upon and vested in it by the laws and Constitution of the State of Michigan and the United States. Among the right of the Employer, included only by way of illustration and not by way of limitation, is the right to determine all matters pertaining to the services to be furnished and the methods, procedures, means, equipment and machines to provide such service; to determine the size of the work force and to increase and decrease the number of employees retained; to hire new employees; to determine the nature and number of facilities and departments and their locations; to adopt, modify, change or alter its budget, to establish classifications of work; to combine or reorganize any part or all of its operations; to maintain order and efficiency; to study and use improved methods and equipment and outside assistance either in or out of the Employer's facilities; to direct the work force; to assign work and determine the location of work assignments and related work to be performed; to determine the number of employees to be assigned to operations; to select employees for promotion or transfer to supervisory or other positions; to determine the number of supervisors; to make judgments regarding skill and ability and the qualifications and competency of employees; and to establish training requirements for purposes of maintaining or improving the professional skills of employees and for advancement. The Employer shall also have the right to suspend, discipline or discharge employees for just cause; to establish reasonable work rules and to fix and determine penalties for violations of such rules; *to establish and change work schedules and hours*; to provide and assign relief personnel; and to continue and maintain its operation as in the past, *provided, however, that these rights shall not be exercised in violation of any specific provision of this Agreement and, as such, they shall be subject to the Grievance and Arbitration Procedure established herein.*

Section 3 – Practices

It is not the intent of this Agreement to abridge or amend any mutually satisfactory practice currently in effect with regard to wages, hours and other terms and conditions of employment which is not superseded or prohibited by the

> provisions of this Agreement. *However, it is further recognized that such practices may be subjected to modification or termination by the Employer due to new or differing modes of operation, economic feasibility or other changing conditions.* In such instances, if the Union and/or any affected employee considers such action to be unjust or unreasonable, the matter may be pursued through the grievance procedure. [Emphasis added]

Both contracts also include detailed layoff and recall provisions. The first paragraph of the layoff and recall provision in the Local 496/496.01, but not the Local 916, contract states:

> In the event a fiscal year budget is adopted by the Board of Commissioners which would result in the layoff of more than ten (10) non-probationary bargaining unit members, *the Employer and Union will meet to discuss alternatives to layoffs, such discussion to include the possibility of voluntary days off without pay*. *The layoff provisions of the collective bargaining agreement shall prevail unless mutually agreed otherwise by the parties.* [Emphasis added]

Both contracts also include grievance procedures ending in binding arbitration.

Announcement of Furlough/Layoff Days

In the fall of 2009, it became clear to Respondent that it had insufficient funds to cover its operating expenses for the fiscal year beginning October 1, 2009. On September 10, 2009, Respondent met with Charging Parties' representatives to discuss alternatives to permanently eliminating unit jobs. Respondent proposed to shut down all its nonessential operations on eight separate dates between January 1 and October 1, 2010 and to give all nonessential bargaining unit employees these days off without pay. In response to this proposal, Charging Parties offered a number of cost saving suggestions. The parties also discussed a proposal to reduce the employees' hourly wage rates by a small amount during the 2009/2010 fiscal year and then treat the dates when Respondent's operations were shut down as paid days off. However, the parties were unable to reach agreement.

At some point after September 10, however, Respondent decided to proceed with its furlough/layoff day plan. Of the 475 employees covered by the Local 496/Local 496.01 agreement, Respondent determined that seventeen should be exempt from the furloughs as essential employees and another 29 should be exempt on the grounds that the furloughs might jeopardize their status as employees exempt from overtime under the federal Fair Labor Standards Act (FLSA). Respondent decided that another ten unit employees who were on extended sick leave would also not be subject to the furloughs/layoffs. Of the 44 supervisors covered by the Local 916 agreement, Respondent decided to exempt four as essential employees.

On December 21, 2009, Respondent sent all affected employees letters notifying them of their layoff from employment on the following dates:

Friday, January 15, 2010

Friday, March 12, 2010
Monday, April 5, 2010
Friday, May 23, 2010
Friday, June 18, 2010
Friday, July 2, 2020
Friday, August 6, 2010
Friday, September 3, 2010

The notice stated that the employees were recalled effective the day following each layoff day listed above, and that the employee was to report to work on his or her next regularly scheduled work day/shift. The first layoff/furlough day occurred as announced on January 15, 2010.

Charging Parties filed grievances asserting that Respondent's change in the work period and work week violated the contractual hours provisions in both contracts, that the change did not meet the definition of a layoff under the contracts, and that Respondent had failed in any case to follow contractual requirements for notification of layoff and recall. The grievance covering the unit represented by Local 496 was filed on January 11, 2010 and grievances covering Local 496.01's and Local 916's units were filed on January 12. The two Local 496 grievances were consolidated and processed through the grievance procedure to arbitration, and an arbitrator was assigned on February 16.

Discussion and Conclusions of Law:

Under Section 15 of PERA, a public employer is required to bargain collectively with the representatives of its employees over "wages, hours, and other terms and conditions of employment." Once a specific subject has been classified as a mandatory subject of bargaining, neither party to a collective bargaining relationship may take unilateral action on the subject absent an impasse in negotiations. *Central Michigan Univ Faculty Ass'n v Central Michigan University*, 404 Mich 268, 277, (1978). However, when a party negotiates a contract provision that fixes the parties' rights with respect to a mandatory subject of bargaining, it satisfies its obligation under PERA to bargain over that subject for the term of that agreement. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 318 (1996). Once agreement is reached, both parties have a right to rely on the language of the agreement as the statement of their obligations on a topic covered by the agreement. A midterm modification of the contract by either party, without the consent of the other, violates that party's duty to bargain in good faith. *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n*, 458 Mich 540, 565 (1998*); Allied Chemical & Alkali Workers of America v Pittsburgh Plate Glass*, 404 US 157, 183 (1971).

If the term or condition of employment is covered by a provision in a current collective bargaining agreement, and the parties have agreed to a grievance resolution procedure ending in binding arbitration, the details and enforceability of the provision are generally left to arbitration. *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 317-321 (1996). As the Commission stated in *St Clair Co Road Comm*, 1992 MERC Lab Op 533 at 538:

Where there is a contract covering the subject matter of the 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 present.

However, a party's repudiation of a provision or provisions of its collective bargaining agreement may be tantamount to a rejection of its duty to bargain. The Commission has defined repudiation as an attempt to rewrite the parties' contract, a refusal to acknowledge its existence, or a complete disregard for the contract as written. *Central Michigan Univ,* 1997 MERC Lab Op 501; *Redford Twp Bd of Ed,* 1992 MERC Lab Op 894. For the Commission to find an unlawful repudiation, the contract breach must be substantial and have a significant impact on the bargaining unit, and there must be no bona fide dispute over interpretation of the contract language. *Plymouth-Canton Cmty Schs,* 1984 MERC Lab Op 894, 897.

In *36th Dist Court,* 21 MPER 19 (2008), the Commission held that an employer violated its duty to bargain in good faith and repudiated its collective bargaining agreement when it unilaterally changed the number of days worked per week from five days to four in alternating workweeks after the employer and union failed to reach agreement on a plan to address the employer's budget deficit. The employer's proposals included a plan to schedule days off without pay for half of the bargaining unit. The collective bargaining agreement stated, "The standard workweek of each employee shall consist of five (5) scheduled seven and one-half (7.5) hour workdays, excluding the lunch period, Monday through Friday." The Commission rejected the employer's argument that the contract's management rights clause gave it the right to alter an explicit term of the contract by reducing the number of days in the workweek, and it concluded that there was no bona fide dispute over the interpretation of the contract language. The Commission noted that an employer has the inherent managerial right to reduce the size of its workforce for economic of other reasons. However, it reiterated that an employer decision to cut scheduled work hours instead of laying off employees is a mandatory subject of bargaining as it substantially changes the wages and working conditions of employees who remain employed. *Ionia Co Rd Comm,* 1984 MERC Lab Op 625; *Village of Union City*, 1983 MERC Lab Op 510, *rev'd on other grounds,*, 135 Mich App 553 (1984). The Court of Appeals affirmed the Commission's decision in *36th Dist Court v AFSCME Council 25,* unpublished opinion per curiam of the Court of Appeals, entered September 29, 2009 (Docket No. 285123)

In its March 3, 2010 response to my order to show cause, Respondent argues that the parties have a bona fide dispute over whether their contracts permit Respondent to unilaterally modify the "normal work week" set out in both agreements. Respondent points out that Article XIV of the Local 496/Local 496.01 contract explicitly states that the "normal work week" constitutes a "mutually satisfactory practice" within the meaning of Article II, Section 3 of the contract. It argues that Article XIV and Article II, Section 3, together permit Respondent to modify the "normal work week" because of changing conditions, including economic conditions. Respondent acknowledges that Article XIII of the Local 916 contract does not explicitly state that the "normal work week" established by that section is subject to modification. However, it argues that the parties clearly intended to give Respondent the right to modify the workweek of Local 916 employees who supervise many employees represented by Local 496 and Local 496.01 and who share the same office spaces and work hours. Respondent also asserts that it fully complied with the layoff and recall provisions of both contracts in announcing and

implementing the furlough/layoff days. Respondent maintains that the parties' disputes over the meaning of the collective bargaining agreement should be decided by an arbitrator in accord with the contracts' grievance arbitration provisions, and that the charges should be dismissed.

In their March 31 response, Charging Parties point out that their charges allege that Respondent violated its duty to bargain by unilaterally modifying the contractually-established work period, not the work week. According to Charging Parties, both contracts require Respondent to schedule full-time employees to work at least eighty hours within each two-week period. While Respondent may have the right to unilaterally modify the work week under some circumstances, they assert that there is no language in either contract which even arguably gives Respondent the right to unilaterally reduce the bi-weekly work period. As to Respondent's argument that it has complied with the layoff and recall provisions of the contract, Charging Parties assert that this is irrelevant since the furlough days are not layoffs within the meaning of these provisions.

As noted above, after Charging Parties filed their response, I gave Respondent the opportunity to file a supplemental position statement. In its supplemental position statement, Respondent argues that this case is distinguishable from *36th Dist Court* in that Charging Parties have filed grievances and elected to move these grievances to arbitration, while in *36th Dist Court*, the union did not file a grievance. According to Respondent, Charging Parties must believe that this dispute can be resolved through arbitration since they have demanded it. Respondent also argues that there is a dispute over whether the furlough days are a change in the "work period" or a change in the "work week."

As the Commission has repeatedly stated, it does not involve itself in disputes over contract interpretation. However, the Commission has found repudiation when the employer offers a spurious contractual defense. For example, in one of the earliest repudiation cases, *Jonesville Bd of Ed*, 1980 MERC Lab Op 891, 900-901, the Commission held that the employer's decision to alter the contractual wage rate based on economic necessity and a management's rights clause that made no reference to wages was unlawful. In the instant case, both collective bargaining agreements provide for a bi-weekly work period of eighty hours and also define the normal work week. The Local 496/Local 496.1 contract allows Respondent to modify the normal work week in response to changing conditions. However, Respondent points to no contract language giving Respondent the right to alter the bi-weekly work period. I find no evidence of a bona fide dispute over contract interpretation in this case.

As the Commission noted in *36th Dist Court*, while a decision to reduce employee work hours may have the same fiscal effect on an employer as a decision to reduce the number of employees, such a reduction has a significant impact on the salaries and working conditions of employees who remain employed. I find that the announcement of eight unpaid furlough/layoff days for more than 400 employees had a significant effect on Charging Parties' units and constituted a substantial breach of their contracts.

The facts in this case are similar to those in *36th Dist Cour*t in other ways. As in *36th Dist Court*, Respondent took unilateral action to implement furlough/layoff days only after it had failed to persuade the union to agree to them. In September 2010, Respondent met with Charging

Parties to discuss alternatives to layoffs as a means of dealing with Respondent's fiscal problems, as the Local 496/Local 496.1 contract requires. At this meeting, Respondent proposed that Charging Parties agree to days off without pay. The parties discussed this alternative, but could not reach agreement. Because Charging Parties' contracts provided for an eighty hour bi-weekly work period, Charging Parties had no obligation to bargain over a proposal to modify the work period during the term of the contract and Respondent could not reduce the work period without their agreement even after reaching impasse on the issue. Nevertheless, Respondent decided to proceed with its plan to implement the days off without pay without Charging Parties' agreement.

The issue in this case, of course, is not whether furlough days are a wiser approach to dealing with a fiscal crisis than reducing the number of employees, or whether furloughs are fairer to the employees or to the taxpayers. Rather, the issue is whether Charging Parties unit members were entitled to rely on the terms and conditions of employment agreed to by the parties in their contracts during the term of those agreements. I conclude that Respondent's announcement of unpaid furlough/layoff days which reduced the work period set out in Charging Parties' contracts constituted a repudiation of Respondent's obligation to bargain in good faith. I conclude, therefore, that Respondent committed an unfair labor practice in violation of Section 10(1) (e) of PERA, and I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Genesee County, its officers and agents, are hereby ordered to:

1. Cease and desist from repudiating and/or modifying its collective bargaining agreements with AFSCME Local 496.0, AFSCME Local 496.1 and AFSCME Local 916 by reducing the bi-weekly work period of eighty hours without the agreement of the above unions.

2. Make members of the bargaining units represented by Locals 496.0, Local 496.1 and Local 916 whole for loss of pay and any loss of benefits they suffered as a result of the reduction in the work period through the implementation of furlough/layoff days, including interest on these amounts at the statutory rate of five percent, computed quarterly. The method used to calculate the amount of back pay due to each individual member shall be disclosed to his or her bargaining representative prior to payment.

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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

Dated: _____