STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY,
Public Employer-Respondent,

Case No. C10 A-024

-and-

MICHIGAN AFSCME COUNCIL 25, AFL-CIO,
Labor Organization-Charging Party.
____/

APPEARANCES:

Marianne G. Talon, Corporation Counsel, and Bruce A. Campbell, Assistant Corporation Counsel for Respondent

Miller Cohen, P.L.C., by Bruce A. Miller, for Charging Party

DECISION AND ORDER

On February 19, 2010, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order on Summary Disposition in the above matter finding that Respondent, Wayne County (Employer), violated §10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(e). After ordering Respondent to show cause why partial summary disposition should not be granted to Charging Party in this matter, the ALJ concluded that there are no material facts in dispute. The ALJ found that while fact-finding proceedings were pending between Respondent and Charging Party, Michigan AFSCME Council 25, AFL-CIO (Union), Respondent unilaterally reduced, from five to four, the number of days in the workweek of certain members of the bargaining units represented by Charging Party. The ALJ concluded that Respondent's actions constituted a violation of its statutory bargaining obligations and recommended that we order Respondent to cease and desist from such unlawful conduct and to take affirmative remedial action. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with §16 of PERA. After requesting and receiving an extension of time, Respondent filed exceptions to the ALJ's Decision and Recommended Order on April 12, 2010. Charging Party requested and was granted an extension of time in which to file its response to the exceptions and on April 27, 2010, filed a brief in support of the ALJ's Decision and Recommended Order.

In its exceptions, Respondent alleges that the ALJ erred by granting summary disposition without affording Respondent an impartial hearing or oral argument. Respondent contends that the ALJ's decision is based upon findings of fact that are not supported by the record. Respondent further asserts that it had no duty to bargain over its decision to lay off employees because it is within the scope of an employer's managerial prerogative and it is within its rights under the collective bargaining agreement to lay off employees for insufficient funds.

We have considered the arguments made in Respondent's exceptions and find them to be without merit.

Procedural History and Findings of Fact:

Unless otherwise stated, we adopt the findings of fact contained in the ALJ's Decision and Recommended Order and will not repeat them here, except as necessary. The ALJ's Decision and Recommended Order in this case, C10 A-024, is limited in scope to the question of the lawfulness of a reduction in the length of the workweek that Respondent imposed on certain members of bargaining units represented by Charging Party; all other issues raised by Charging Party through various amendments to the original charge were severed by the ALJ and given the case number C10 A-024-A.

On January 25, 2010, Charging Party filed a charge with this Commission alleging that Respondent acted in violation of PERA by unilaterally reducing the length of the workweek from five to four days per week and similarly cutting employee wages. After reviewing the charge, the ALJ ordered Respondent to show cause why summary disposition should not be granted in favor of Charging Party and directed Respondent to address ten issues set forth in the order. Respondent was cautioned that if its response to the order did not assert and factually support a valid defense, a decision recommending that we grant partial summary disposition would be issued without a hearing or other proceedings.

The Employer filed its response to the ALJ's order on February 11, 2010, asserting legal defenses, but failing to raise any material issue of fact and without requesting oral argument. Respondent admitted that on January 22, 2010, it notified members of certain bargaining units represented by Charging Party that, until further notice, some of them would be laid off every Friday, and others would be laid off every other Friday.[1] Further, Respondent admitted that the expired contract provided for a standard workweek of five eight-hour days and for layoff and displacement of employees by inverse seniority. The response to the ALJ's order also acknowledged that fact-finding proceedings had been pending since September 1, 2009, and were pending at the time of the January 22, 2010 announcement of the reduction in the length of the workweek.

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1. Respondent alleges in its exceptions that this action did not affect all bargaining unit members, and that it only affected about 470 bargaining unit members, or less than one-third of the employees in the bargaining units represented by Charging Party. Whether all of the bargaining unit members were affected or 470 were affected, the effect on the bargaining units in question was substantial. Thus, the difference in the number of affected employees is not material to the resolution of the issue presented here.

It is undisputed that Respondent has the right to lay off bargaining unit members pursuant to Article 19 of the collective bargaining agreement. Further, Clause 19.01 defines a layoff as a separation from employment resulting from a lack of work or lack of funds. Clauses 19.05 and 19.09 set forth the specific procedures to be followed for layoffs or recalls.

At 11:35 a.m. on February 18, 2010, Respondent filed a motion to disqualify the ALJ at the office of the Commission, in Suite 2-750 of Cadillac Place. According to an affidavit in the record by the ALJ's secretary, the ALJ's Decision and Recommended Order was completed on February 18, 2010, after the deadline for mail to be sent in that day's U.S. mail. It was, therefore, dated February 19, 2010, in anticipation of mailing it the next day, but it was also faxed to the parties on February 18, at 4:00 p.m. According to the ALJ's secretary's affidavit, after she mailed the Decision and Recommended Order on the morning of February 19, 2010, she went from her office at the State Office of Administrative Hearings and Rules (SOAHR), in Suite 2-700 Cadillac Place, down the hall to the Commission's offices. There she retrieved mail for SOAHR ALJs, including Respondent's motion to disqualify, which she delivered to ALJ O'Connor upon her return to SOAHR's offices. At 10:30 a.m. on February 19, 2010, the ALJ faxed to the parties his response to Respondent's motion to disqualify.

Discussions and Conclusions of Law:

Respondent's Right to a Hearing

In its first stated exception, Respondent complained that the ALJ "granted summary judgment without affording Wayne County a hearing." In its fourteenth and final exception Respondent asserts, "Wayne County was also denied the right to an impartial hearing." These two exceptions raise three issues: whether Respondent was erroneously denied an oral argument; whether Respondent was erroneously denied an evidentiary hearing; and whether the ALJ was impartial.

In support of its contention that the ALJ erred in granting summary disposition without granting oral argument in this matter, Respondent relies on § 72(3) of the Administrative Procedures Act (APA), MCL 24.272(3), which states: "The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact." MERC's application of that language was interpreted in *Smith v Lansing Sch Dist*, 428 Mich 248, 259 (1987). There, the Supreme Court held that parties must be given an opportunity to present oral argument in opposing summary disposition. MERC has promulgated procedural rules to ensure compliance with that directive. Rule 161(4) of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423. 161(4) provides:

> Unless otherwise ordered by the commission or administrative law judge, all motions made before or after hearing shall be ruled upon without notice or oral argument. A request for oral argument may be made by the moving party by separate statement at the end of the motion as filed, or by an opposing party by a separate pleading filed within 10 days after service of the motion, or within any

> other period as designated by the commission or administrative law judge designated by the commission.

Respondent submitted written argument and had the opportunity to present oral argument as well. To take advantage of the opportunity for oral argument, Respondent was required to submit a request for oral argument along with its written argument in response to the ALJ's order to show cause. By failing to request oral argument at that time, Respondent agreed to have the ALJ decide the issues before him based on the documents contained in the record. *Teamsters State, Co & Mun Workers, Local 214*, 16 MPER 8 (2003).

In its brief on exceptions, Respondent contends that it did not waive its right to oral argument because it relied on a notice attached to the show cause order, which scheduled a hearing for March 3, 2010. However, notice of an evidentiary hearing is only applicable if there are issues of fact to be resolved. The show cause order clearly indicated that a decision recommending that the Commission grant partial summary disposition would be issued without a hearing if the Employer's response to the order did not assert and factually support a valid defense to the charge. Inasmuch as Respondent's written argument did not assert disputed material facts or a valid legal defense, Respondent's ability to avail itself of the right guaranteed by § 72(3) of the APA to " be given an opportunity to present oral . . . arguments on issues of law and policy" was contingent upon its request for oral argument. Since Respondent chose not to request oral argument, Respondent waived its right to oral argument.

We also note that this matter is distinguishable from *Smith v Lansing Sch Dist.* The *Smith* Court's decision to remand that matter was based in large part on the charging parties' assertion, supported by an affidavit, that they had been promised additional time to submit their written arguments and "that no hearing would be held until their brief was filed." *Smith*, 428 Mich at 253. Here, Respondent has not asserted that there was a similar promise to delay the ALJ's Decision and Recommended Order, nor has it asserted that there was a promise to provide an oral argument without a prior request.

With respect to Respondent's assertion that it was erroneously denied an evidentiary hearing, we note that Commission Rule 165 gives the ALJ the authority to summarily dispose of a case in appropriate circumstances and states:

> The commission or the <u>administrative law judge</u> designated by the commission may on its own motion or on a motion by any party order dismissal of a charge or issue a ruling in favor of the charging party. The motion may be made anytime before or during the hearing. (Emphasis added.)

We also look to *Smith* for guidance on the issue of whether the APA requires an evidentiary hearing to be held. In *Smith*, at 257, the Supreme Court said:

> We agree with appellants that § 72(3) [of the APA] does not require a full evidentiary hearing when, for purposes of the proceeding in question, all alleged facts are taken as true. That is, we construe that portion of § 72(3) to require

affording the opportunity to present evidence on issues of fact only when such issues exist.

As indicated above in the Procedural History and Findings of Fact section of this decision, and as discussed below, there are no material issues of fact in this case. Thus, the decision in this matter depends purely on the resolution of issues of law; therefore, an evidentiary hearing is neither necessary nor appropriate.

We also find no merit in Respondent's contention that it was denied the right to an impartial decision maker. Respondent filed a motion to disqualify the ALJ and argues that because the ALJ’s Decision and Recommended Order was issued after the motion was filed, but before a ruling on the motion, evidence of bias is clear. We disagree. The motion was filed at the Commission's offices and not at the State Office of Administrative Hearings and Rules, where the ALJ's office is located. As a result, the motion was not received by the ALJ until after the ALJ’s Decision and Recommended Order was issued. Accordingly, this issue is moot.[2] Nevertheless, we have reviewed the ALJ's February 19, 2010 response to the motion to disqualify, and find that in light of the facts asserted therein it would not have been necessary for the ALJ to recuse himself, even if he had not issued his Decision and Recommended Order before receiving the motion. We also note Respondent's assertion in its brief in support of its exceptions that "the ALJ consistently characterizes the County's argument as ‘disingenuous’ and ‘frivolous.’" Respondent contends that the ALJ's use of "inflammatory language . . . contributes to the overwhelming impression that the County did not get a fair opportunity to have its argument considered." We have thoroughly reviewed the arguments Respondent made in response to the ALJ’s show cause order. While we do not adopt the ALJ’s comments about Respondent’s arguments, we agree with the ALJ’s assessment that Respondent's arguments are wholly without merit. This matter was appropriately decided by the ALJ on summary disposition; the material facts are not in dispute and, for reasons discussed more fully below, including the fact that the ALJ’s decision is fully supported by Commission precedent, Charging Party is entitled to prevail as a matter of law. Accordingly, there is no basis to remand the matter for an evidentiary hearing or to a different ALJ.

Respondent's Obligation to Assert a Valid Defense to the Charge

In its brief in support of its exceptions, Respondent argues that the ALJ improperly shifted the burden in this case by requiring it to assert a valid defense to the charge in its response to the ALJ's order to show cause. Respondent notes that Rule 155(1) of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.155(1) does not require a respondent to file an answer to an unfair labor practice charge. Based on that, Respondent contends that it had no obligation to prove anything in response to the unfair labor practice charge. Respondent contends that it was error for the ALJ to find that an unfair labor practice had been committed before Charging Party sustained its charge with credible evidence. While the failure to answer a charge is not an admission of guilt or waiver of any defense, a respondent must still set forth a valid defense to a charge that states a claim upon which relief can be granted under PERA.

2. Moreover, given the length of the ALJ’s Decision and Recommended Order, we cannot imagine that he could have written it in the hours after the motion to disqualify was filed on February 18, 2010.

Under Commission Rule 165, the ALJ is authorized to issue an order to show cause requiring a party to assert facts and arguments of law supporting its contention that summary disposition should not be granted in the opposing party's favor. In this case, after reviewing the charge, the ALJ apparently concluded that Charging Party had asserted sufficient material facts, which if true would establish a prima facie case. The ALJ then, appropriately, issued an order to show cause requiring Respondent to "assert and factually support a valid defense." Contrary to Respondent's assertion that the ALJ was improperly shifting the burden of proof, the ALJ was giving Respondent the opportunity to assert that there were material facts at issue that would justify the holding of an evidentiary hearing and to assert legal defenses to the charge. *Sault Ste Marie Area Pub Sch v MEA*, 213 Mich App 176, 181 (1995). If Respondent had set forth disputed material facts to support the defenses asserted, an evidentiary hearing would have been appropriate. In that instance, the burden of establishing facts in support of the charge would have been on Charging Party. Here, to avoid summary disposition, Respondent merely had to assert material facts in dispute that supported its legal defenses. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237, 507 NW2d 741, 743 (1993). Inasmuch as there were no material facts in dispute, summary disposition was appropriate. *Quinto v Cross and Peters Co*, 451 Mich 358, 362-363 (1996).[3]

<u>The Material Facts Were Undisputed</u>

Respondent alleges that the ALJ based his decision on facts that are not supported by the record and failed to hold Charging Party to its burden of proof. There is no merit to this exception as the material facts were not disputed by Respondent. Respondent admitted that on January 22, 2010, it notified members of certain bargaining units represented by Charging Party that, until further notice, some of them would be laid off every Friday, and others would be laid off every other Friday. Further, Respondent admitted that the expired contract provided for a standard workweek of five eight-hour days and that it provided for layoff and displacement of employees by inverse seniority. Its response to the ALJ's order also acknowledged that fact-finding proceedings had been pending since September 1, 2009, and were pending at the time of the January 22, 2010 announcement of the reduction in the length of the workweek. Based on these undisputed facts, the ALJ concluded that Respondent made an unlawful unilateral change in working conditions by reducing the standard workweek of certain bargaining unit members.

<u>Whether the Reduction in the Workweek Constitutes a Unilateral Change</u>

Respondent excepts to the ALJ's conclusion that it unlawfully unilaterally changed a condition of employment by reducing the standard workweek of employees. It is well established that neither party may take unilateral action on a mandatory subject of bargaining before reaching an impasse in negotiations. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55 (1974). Further, this Commission has held that even in the event of a good faith impasse, a party may not unilaterally impose changes in mandatory subjects of bargaining after fact finding has been requested. *Wayne Co,* 1984 MERC Lab Op 1142, 1144-1145, aff'd 152 Mich App 87 (1986). The length of the workweek and changes made thereto are mandatory

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3. The Commission's rules governing summary disposition are analogous to the Michigan Court Rules governing summary dispositions. See *Flat Rock ESP Ass'n MEA*, 19 MPER 79 (2006) (no exceptions).

subjects of bargaining. *36th District Court*, 21 MPER 19 (2008), aff'd, unpublished opinion per curiam of the Court of Appeals, issued September 29, 2009 (Docket No. 285123); *Ionia Co Rd Comm*, 1984 MERC Lab Op 625, aff'd unpublished opinion of the Court of Appeals, issued September 24, 1985 (Docket No. 78969). See also *Village of Union City*, 1983 MERC Lab Op 510, aff'd in part, rev'd in part 135 Mich App 553 (1984) lv den 421 Mich 857 (1985). As the Court of Appeals reasoned in *Union City*, 135 Mich App at 556, Respondent has the managerial right to decide to cut public services to save money; however, bargaining over sharing the burden of the cuts among many employees or placing the burden only on those lowest in seniority does not unduly restrict Respondent's exercise of its managerial prerogative.

Respondent argues that it had the managerial prerogative to lay off employees. There is no merit to its contentions that the contract provisions setting forth management's rights and lay off procedures authorized the actions Respondent took when it reduced the workweek. The contract expressly defines the term "layoff" as a "separation from employment." The Merriam-Webster Online Dictionary defines separation as "termination of a contractual relationship (as employment or military service)[4]. Similarly, *The American Heritage College Dictionary* (2000) defines separation as "Discharge, as from employment." Here no true separation from employment ever occurred; there was only a reduction in the working hours of affected employees. The employment of the affected employees did not end, as it would in a separation; they remained employed but for fewer hours per week. Moreover, in light of the clear and unambiguous language of the contract in defining layoff and workweek, we agree with the ALJ's conclusion that there is no bona fide good faith dispute over the interpretation of these terms. Further, we have previously distinguished between a layoff and a shortened workweek. As we stated in *36th District Court*, 21 MPER 19 (2008):

> [A]lthough the decision to cut back shifts or hours may have a fiscal effect on the employer similar to a layoff, such a cutback is different from a layoff for those employees who remain employed. . . . [S]uch a decision significantly changes employees' hours, take home pay, and actual working conditions.

See also, *Ionia Co Rd Comm*, 1984 MERC Lab Op 625; *Village of Union City*, 1983 MERC Lab Op 510. Accordingly, we agree with the ALJ that Respondent unilaterally changed terms and conditions of employment while fact finding was pending and thereby violated its duty to bargain under § 10(1)(e) of PERA.

Before implementing a reduction in the workweek, employers must ensure compliance with the language of their collective bargaining agreements, particularly any provisions defining workweek, hours of work, layoff, and other terms related to the contemplated action. In this case, Respondent could have taken lawful action to balance its budget. This Commission cannot find that the path Respondent took in this case complied with its obligations under PERA.

Two further issues were raised by Respondent's exceptions, although not argued in its supporting brief. In its tenth exception, Respondent argues that Charging Party waived its claim "by never asking to bargain about the layoffs, or the manner of the layoffs." Respondent's eleventh exception asserts: "[t]here is a past practice permitting layoffs in less than one week

[4]. See http://www.merriam-webster.com/dictionary/separation.

segments." Respondent did not mention the facts alleged in either of these exceptions when it responded to the ALJ's order to show cause, nor did it make the related arguments contained in the respective exceptions. The ALJ's order to show cause cautioned that if the response did not assert and factually support a valid defense, a decision recommending that we grant partial summary disposition would be issued without a hearing or other proceedings. These issues should have been raised before the ALJ to give him the opportunity to determine whether the facts asserted by Respondent were disputed by Charging Party and whether there was merit to the related legal arguments. Since these issues were not raised before the ALJ, they are not properly before us at this time. See *City of Detroit*, 1993 MERC Lab Op 131; 6 MPER 24028; *Teamsters Local 580*, 1991 MERC Labor Op 575, 576.

We have also considered all other arguments raised by the parties and conclude that they would not change the result in this case. For the aforementioned reasons, this Commission affirms the ALJ's Decision and Recommended Order on Summary Disposition and finds that Respondent violated § 10(1)(e) of PERA.

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:

WAYNE COUNTY,
Respondent-Public Employer, Case No. C10 A-024

-and-

MICHIGAN AFSCME COUNCIL 25, AFL-CIO,
Charging Party-Labor Organization.
____/

Barbara Johnson, for Respondent

Bruce A. Miller, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

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 assigned to Doyle O'Connor, Administrative Law Judge with the State Office of Administrative Hearings and Rules (SOAHR), acting on behalf of the Michigan Employment Relations Commission (MERC).

The Unfair Labor Practice Charge, the Order to Show Cause, and Findings of Fact:

A Complaint was issued on February 2, 2010, based on a charge filed with the Commission on January 25, 2010 by Michigan AFSCME Council 25 (the Union), alleging that Wayne County (the Employer) violated the Act by unilaterally imposing a reduction in the length of the normal work week from five days per week to four days, with a corresponding reduction in pay, and by repudiating the normal layoff and recall mechanisms.

Commission Rule 423.165 allows for a pre-hearing dismissal of a charge, or for a ruling in favor of the charging party. Upon review of the charge, it appeared that an order to show cause why partial summary disposition should not be granted against the Employer might aid in resolving this dispute without the expense or delay that would be entailed by awaiting the scheduled hearing date.[5] As noted in the order to show cause, the Charge, in relevant part,

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[5] The Charge included additional allegations asserting a failure to bargain in good faith, including by regressive bargaining violations and a purportedly unlawful lock out of employees. Since those allegations were likely subject to material disputes of fact, or were raised through proposed amendments to the original Charge, they were not the subject of the earlier order to show cause. All of the additional allegations not addressed by the earlier Order or by this Recommended Decision and Order are severed for separate handling and are given the new case number of C10 A-024-A.

asserted that the County has a contractually established five-day, eight hour per day, workweek and that it similarly has a contractually established typical system of layoff and recall of employees by classification and by inverse seniority. The Charge further asserted that the County, during bargaining and while a fact finding proceeding was pending, unilaterally altered the existing workweek for certain employees represented by the Union by imposing a four-day, eight hour per day, workweek at reduced salary.

Pursuant to Rule 165, R 423.165, of the General Rules and Regulations of the Employment Relations Commission, on February 2, 2010, an order was issued directing the Employer to show cause why summary disposition should not be granted in this matter and directing it to address the following issues:

1. Did the Employer announce on January 22, 2010 that various groups of County employees represented by the union would be laid off without pay for the entire day on every Friday beginning February 5, 2010 or, alternatively as to some County employees, on every other Friday beginning February 12, 2010?
2. Did the pre-existing contract between the Union and the County provide for a standard five day per week eight hour day for most, if not all, such County employees represented by the Union?
3. Did the Charging Party Union consent to the change in the workweek?
4. Did the pre-existing contract between the Union and the County provide for layoff, recall and bumping of employees, because of lack of work or lack of funds, to be accomplished by inverse seniority?
5. Did the Charging Party Union consent to the change in the layoff mechanism?
6. Had fact finding proceedings been initiated by the filing with MERC of a petition for fact finding prior to January 22, 2010?
7. In what material manner do the facts or law presented by this dispute substantively differ from those which led to the Commission decision in *36th District Court*, 21 MPER 19 (2008)?
8. In what material manner do the facts or law presented by this dispute substantively differ from those which led to the Commission decision in *Wayne County*, 1984 MERC Lab Op 1142?
9. What material facts, if any, are in dispute regarding the change in workweek aspect of the charge?
10. Why should summary disposition not be granted in the Union's favor finding that the Employer acted unlawfully in unilaterally altering the length of the workweek and the salary of employees, during bargaining and during the pendency of fact finding?

The Employer was expressly cautioned that if its response to the Order did not assert and factually support a valid defense, a decision recommending the granting of partial summary disposition would be issued without a hearing or other proceedings. The Employer filed a timely

response, which asserted legal defenses addressed below, but which did not raise any material dispute of fact.[6]

In its response to the specific questions in the order to show cause, Wayne County admits that in January of 2010 it announced the reduction of the workweek from five days to four days per week, utilizing the mechanism of one-day layoffs of essentially all relevant bargaining unit employees. The County admits that the pre-existing contract expressly provided for a standard workweek of five eight-hour days and that the pre-existing contract provided for layoff, recall, and bumping of employees by inverse seniority in the event of a reduction of the workforce due to lack of work or lack of funds. The County asserts that it acted in response to a deepening budget shortfall and after unsuccessfully seeking the Union's agreement to other mechanisms for addressing that shortfall, including a proposed 10% pay cut. Further, the County admits that fact-finding proceedings had been pending since September 1, 2009, and were pending at the time of the January 2010 announcement of one day per week layoffs.

It is undisputed that Article 20 of the collective bargaining agreement provides:

> The standard workweek shall begin at 12:01 a.m. Monday and end at midnight Sunday. The workweek of each employee shall consist of five (5) regularly scheduled, recurring eight (8) hour workdays during the standard workweek. The two (2) remaining days, which shall be consecutive, shall be designated as the sixth (6th) and seventh (7th) days of the employee's workweek and shall be known as "off days". . . .

It is further undisputed that Article 19 of the collective bargaining agreement provides, in relevant part:

> 19.01 **Layoff Defined**. Layoff shall be defined as a separation from employment as the result of lack of work or lack of funds. . .
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> * * *
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> 19.05 **Layoff Procedure**. If the employer must eliminate positions for lack of work or lack of funds, employees will be laid off or displaced based upon their seniority order, from lesser to greater seniority…
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> * * *
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> 19.09 **Recall from Layoff**. Recall shall be defined as the process by which an employee who has been laid off . . . is returned to employment, in his or her former classification or lower classification in that class series. . .

Article 8 of the contract, Managements Rights, provides:

> The management of the County and its departments is vested in the County Executive. The Employer possesses the exclusive right to manage the affairs of the County, including, but not limited to the right to: establish starting and quitting time; establish the

[6] The factual claims asserted in the County's response, in particular its claim that it has a severe budgetary shortfall, are assumed true for purposes of this Recommended Decision and Order even though those claims were not supported by affidavit.

size of work crews; assigned days off, and annual leave and regulate other forms of leaves as may be provided for in this Agreement; select the manner in which employees shall be reduced in the classifications in the interest of lay off; and prescribe reasonable rules for just cause disciplinary actions. The employer recognizes that supervision is necessary when work is being performed. However, the level of supervision shall be determined by the employer.

In specific response to the order to show cause, the County sought to factually distinguish the decision in *36th District Court*, 21 MPER 19 (2008), *aff'd,* Court of Appeals unpublished opinion (Case No. 285123, September 29, 2009), by noting that the contract between the 36th District Court and the union representing its employees was still in effect at the time of that dispute whereas the County's contract with the Union had expired by the time the County shortened its workweek. The County did not substantively address the fact that in *36th District Court* the existing definition of the workweek provided that *"The standard workweek of each employee shall consist of five (5) scheduled seven and one-half (7.5) hour work days... Monday through Friday",* whereas the contract language to which Wayne County had agreed provided that the *"The workweek of each employee shall consist of five regularly scheduled, recurring eight hour workdays during the standard work week.*" Additionally, the County failed to address the fact that in *36th District Court,* the employer, as did the County, characterized its shortening of the standard workweek as a one day per week layoff of employees for lack of funds.

The County, again in specific response to the order, sought to factually distinguish the decision in *Wayne County (AFSCME)*, 1984 MERC Lab Op 1142, by asserting that "*Furthermore, in the 1984 Wayne County case, the County imposed a four-day workweek but did not lay off employees pursuant to lay off provisions in the contract*" and that the current dispute "*. . . differs from the situation in 1985 (*sic 1983*) when Wayne County shortened the workweek instead of laying off employees*." That disingenuous factual assertion ignored the express factual finding in the 1984 decision that "*The four-day workweek... was in the form of one-day layoff without the employees having the right to exercise contractual seniority bumping rights . . . . On July 12 the County Executive issued an executive order calling for a Friday layoff of employees performing nonessential services for the County . . . The announced purpose of the Friday layoff was for the purpose of the economy*". *Wayne County (AFSCME)*, 1984 MERC Lab Op 1142, 1147.

In response to the direction that it identify any material disputes of fact precluding summary disposition, the County asserted that its characterization of the days off as single day layoffs, rather than as a shortened workweek, meant that there was no change in the standard workweek.[7]

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[7] The Union filed a 2nd Amended Charge on February 12, 2010, to which were attached copies of the Employer's belated proposal of February 5, 2010, (following receipt of the order to show cause issued in this matter) which sought to amend the existing collective bargaining agreement to eliminate the portions defining the workweek as consisting of five eight-hour days per week.

The Employer's response did not request oral argument on the question of summary disposition. Rather, the County asserted its own motion for summary disposition in its favor.

Discussion and Conclusions of Law:

Under Commission Rule R 423.165, where there is a properly stated charge and no genuine issue of material fact, and instead merely a question of law, an administrative law judge acting for the Commission has the authority and obligation to issue a ruling on the merits of the dispute on summary disposition. *Oakland County and Oakland County Sheriff v Oakland County Deputy Sheriffs Assoc*, 282 Mich App 266 (2009) *Detroit Public Schools,* 22 MPER 19 (2009); *Wayne County (AFSCME Council 25)*, 22 MPER 80 (2009). In this instance, there is no good faith dispute of material fact as to the events which led to the filing of the Charge. Rather, there is a dispute as to the lawfulness of a chosen course of action, with both parties seeking summary disposition.

The case law under PERA is well settled that salary and the length of the workweek are mandatory subjects of bargaining, and that neither side may take unilateral action to alter existing practices regarding such mandatory subjects unless a good faith impasse in bargaining has occurred. *Central Michigan Univ Faculty Ass'n v Central Michigan Univ*, 404 Mich 268 (1978); *IAFF v Portage*, 134 Mich App 466 (1984) [8] It is additionally well settled that even in the event of a good faith impasse, an employer may not unilaterally impose changes in mandatory subjects of bargaining, such as salary and length of workweek, during the pendency of a factfinding proceeding conducted by MERC pursuant to PERA. *AFSCME v Wayne County*, 152 Mich App 87 (1986), *aff'g Wayne County (AFSCME)*, 1984 MERC Lab Op 1142. More recently, in *36th District Court*, 21 MPER 19 (2008), the Commission held that an Employer violated its duty to bargain in good faith when it unilaterally changed the number of days in the workweek from five to four. In that instance, the Commission rejected the Employer's claimed defense that it was merely exercising its managerial prerogative to reduce the size of its workforce to meet economic exigencies. See also, *Ionia County Rd Comm*, 1984 MERC Lab Op 625, aff'd unpublished Court of Appeals # 78969 (September 24, 1989).

The Charge asserts that the County's use of one-day layoffs to shorten the workweek violated the Employer's obligations under PERA notwithstanding the claimed fiscal crisis. There are of course multiple rational ways of devising layoff schemes or other cost saving methods, including negotiated reductions in salary as earlier proposed by the County. The Commission has consistently reaffirmed the principle that a public employer's determination to reduce its work force in size for economic reasons is a valid exercise of managerial prerogative. However, MERC has also consistently held that a different analysis is required where instead of reducing the size of the workforce, the employer reduces the number of days or hours worked by its employees, precisely because that mechanism of cost savings has a profound effect on the

[8] The Union notes in its Charge that the County has been held, several times in the past year, to have failed in its statutory duty to bargain in good faith with this Union. See, *Wayne County*, 22 MPER 80 (2009); *Wayne County*, Case C09 I-150 (October 2, 2009)(on exceptions); See also, *Wayne County (SEIU Local 502)*, 22 MPER 65 (2009). While subjective motive by the Employer is not a controlling issue in this matter, adjudicated findings of other contemporaneous unfair labor practices by an employer are relevant circumstantial evidence of unlawful motive by that employer in the context of a discrimination or bad faith bargaining charge. See, *Oaktree Capitol Mgt*, 353 NLRB No. 27 (2009); *Shattuck Mining Corp v NLRB*, 362 F2d 466, 470 (CA 9, 1966).

earnings and working conditions of those who remain employed. See, *Ionia County Rd Comm; AFSCME v Wayne County (AFSCME); 36th District Court*. The issue presented by this dispute is not over which method of responding to an economic downturn is wiser, preferable, or somehow more 'fair'. Rather, the question is whether one party to the bargaining relationship unilaterally altered or repudiated a previously agreed upon methodology of addressing periodic downturns in a fashion which violates its statutory bargaining obligations. While the County certainly could have, in keeping with the existing workplace rules, laid off ten percent of the employees in the bargaining unit represented by AFSCME to secure the claimed amount needed to meet the budgetary shortfall, the question is whether the County could instead alter those rules and shorten the workweeks of all AFSCME represented employees. The answer is, of course, that the County cannot now unilaterally change existing conditions of employment without violating PERA, any more than it could during the earlier fiscal crisis of 1982-83.

The County seeks to deny culpability by asserting, implausibly, that either the facts in the present dispute are different than in the several previously litigated disputes or that there is a bona fide dispute as to the meaning of the contractual language related to the length of the work week or the meaning of the term "layoff". As noted above, the County is disingenuous in asserting that its most recent imposition of a four-day workweek can be distinguished from that same tactic used by this same employer in 1983. Then, as now, the County asserted the right to shorten the workweek by imposing one-day layoffs across the board, rather than by utilizing the established process of laying off fewer employees for a longer period based on inverse seniority. See, *AFSCME v Wayne County*, 152 Mich App 87 (1986), *aff'g Wayne County*, 1984 MERC Lab Op 1142. Nor can the county claim that it had any legitimate doubt as to the viability of that well-established rule of law where it was most recently affirmed on indistinguishable facts in *36th District Court*, 21 MPER 19 (2008), *aff'd,* Court of Appeals unpublished opinion (Case No. 285123, September 29, 2009).

The County is equally disingenuous in asserting that MERC should defer to arguably available contractual remedies on the County's theory that there is a *bona fide* dispute over the interpretation of the parties' now-expired collective bargaining agreement. To the contrary, there can be no bona fide good-faith dispute over the question of the length of the workweek given the unequivocal outcome in the litigation between these two parties in the 1980s, and the fact that the contract still provides the equally unequivocal mandate that "*The workweek of each employee* ***shall*** *consist of five regularly scheduled, recurring eight hour workdays during the standard workweek*" (emphasis added). Further, there can be no *bona fide* dispute over the length of the workweek where the agreed upon contract language mandates that the remaining two, and only two, consecutive days per week **shall** be "*off days*". Finally, there can be no bona fide good-faith dispute over the proper understanding of the term "layoff", given the outcome of the prior litigation, and given that the contract between the parties continues to define layoff as "*a separation from employment as the result of lack of work or lack of funds*" and where the contract expressly requires that layoffs be by inverse seniority. The action by the County of reducing the workweek of AFSCME bargaining unit employees from five days to four constitutes a unilateral change in existing conditions of employment, and the lawfulness of that unilateral change must be resolved under PERA.

While an employer is certainly able under appropriate circumstances to unilaterally change conditions of employment after exhausting its bargaining obligations, that has not occurred here. The parties are in the midst of a formal fact-finding proceeding under PERA. The purpose of fact-finding is to aid parties in reaching a voluntary and good faith resolution of a pending contractual dispute. For either side to take unilateral action on a fundamental aspect of their relationship is inherently destructive of the bargaining relationship and of the fact-finding process which is an extension of the statutory bargaining process. Such unilateral action during fact-finding has long been held to be unlawful. Indeed, the seminal case on the question involved this same employer and this very same tactic of unilaterally imposing a reduced workweek through one-day layoffs during the pendency of a fact-finding proceeding. *AFSCME v Wayne County*, 152 Mich App 87 (1986), *aff'g Wayne County*, 1984 MERC Lab Op 1142. The County has offered no reason why it should be, in this latest instance, excused from the obligation uniformly imposed on all employers that are subject to PERA.

Finally, the County suggests that its unilateral action is somehow excused by the existence of a claimed financial crisis. As the Commission held in *Wayne County Bd of Commissioners (WCBA),* 1985 MERC Lab Op 1037, even a bona fide financial crisis does not justify an Employer's repudiation of its contractual obligations or permit a unilateral change in conditions of employment. Notably, in that same decision the Commission held that the County's asserted defense of an inability to pay due to a financial crisis was, as a matter of law, "patently frivolous" such that an award of costs and attorney fees to the Charging Party was appropriate. *Wayne County Bd of Commissioners (WCBA),* 1985 MERC Lab Op 1037, 1039.[9]

As detailed above, the County has failed to articulate a valid defense to the charge that it acted unlawfully in unilaterally changing a basic condition of employment during the pendency of a fact-finding proceeding. The County's conduct in reducing the length of the workweek by the mechanism of one-day "layoffs" is now, as it was in 1983, an unlawful unilateral change in the existing well-established conditions of employment constituting a violation of MCL 423.210 (e) and, therefore, summary disposition against the County is appropriate and necessary under Commission Rule 165(2)(g). In accord with the above findings of fact and conclusions of law, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

Wayne County, its officers, agents, and representatives shall:

1. Cease and desist from

[9] Given that the County's defenses in this case are indistinguishable from those earlier rejected by the Commission, and expressly held then to be patently frivolous and contrary to well-established law, were it not for the contrary decision in *Goolsby v Detroit*, 211 Mich App 214 (1995), I would in this instance be inclined to follow the Commission's earlier decision in *Wayne-Westland Community School District,* 1987 MERC Lab Op 381, aff'd, *Hunter v Wayne-Westland Community School District,* 174 Mich App 330 (1989), and in *Wayne County Bd of Commissioners (WCBA),* 1985 MERC Lab Op 1037, and award as compensatory damages to the Charging Party Union the costs and actual attorney fees wrongfully incurred in correcting the unlawful acts willfully committed by the County.

a. Reducing the workweek of AFSCME bargaining unit members from the established five-day workweek to a four-day workweek by the mechanism of one-day layoffs or through any other mechanism.
b. Unilaterally altering any established conditions of employment, including the length of the work day or workweek, during the pendency of the fact-finding proceedings.
c. Failing to bargain in good faith with the representative of its employees, including by participating in good faith in the fact-finding process.

2. Take the following affirmative action necessary to effectuate the purposes of the Act

   a. Restore the workweek of AFSCME bargaining unit members to the established five-day eight hour per day workweek.
   b. Compensate and otherwise make whole any AFSCME bargaining unit members who had their weekly income reduced as a result of the unilateral shortening of the work week though one-day layoffs, together with statutory interest on all amounts owed.
   c. Maintain all existing conditions of employment throughout the fact-finding process.

3. Post the attached notice to employees in a conspicuous place at each County worksite and post it prominently on any website maintained by the County for employee access for a period of thirty (30) consecutive days, and additionally deliver a copy of the notice by mail or email to each employee in the AFSCME bargaining units.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O’Connor
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: February 19, 2010

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, WAYNE COUNTY, 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

a. Reduce the workweek of AFSCME bargaining unit members from the established five-day eight hour per day workweek to a four-day workweek by the mechanism of one-day layoffs or through any other mechanism.

b. Unilaterally alter any established conditions of employment, including the length of the workday or workweek, during the pendency of the fact-finding proceedings.

c. Fail to bargain in good faith with the representative of our employees, including by participating in good faith in the fact-finding process.

WE WILL

a. Restore the workweek of AFSCME bargaining unit members to the established five-day eight hour per day workweek.

b. Compensate and otherwise make whole any AFSCME bargaining unit members who lost income as a result of the unilateral shortening of the work week though one-day layoffs, together with statutory interest on all amounts owed.

c. Maintain all existing conditions of employment throughout the fact-finding process.

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.

WAYNE COUNTY

By:_____________________

Title:____________________ Date:_____________

This notice must be posted for thirty (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, Detroit, MI 48202-2988. Telephone: **(313) 456-3510**.