STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF TRENTON, ,
Public Employer - Respondent,

Case No. C08 A-024

- and -

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES (AFSCME), AND ITS AFFILIATED LOCAL 292,
Labor Organization - Charging Party.
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APPEARANCES:

Steven H. Schwartz & Associates P.L.C., by Steven H. Schwartz, for the Respondent

Miller Cohen P.L.C., by Richard G. Mack, Jr., for the Charging Party

DECISION AND ORDER

On February 4, 2011, Administrative Law Judge Julia C. Stern issued a 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

In the Matter of:

CITY OF TRENTON,
Public Employer-Respondent,

Case No. C08 A-024

-and-

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES (AFSCME), COUNCIL 25, AND ITS AFFILIATED LOCAL 292.
Labor Organization-Charging Party.
____/

APPEARANCES:

Steven H. Schwartz and Associates, P.L.C., by Steven H. Schwartz, for Respondent

Miller Cohen, P.L.C., by Richard G. Mack, Jr.

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on August 1, October 16, November 17 and November 20, 2008, and July 30 and September 8, 2009, before Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules for the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including post-hearing briefs filed by the parties on or before November 30, 2009, and supplemental briefs filed on or before December 13, 2010, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The American Federation of State, County and Municipal Employees (AFSCME), Council 25 and its affiliated Local 292 represent a bargaining unit of nonsupervisory employees of the City of Trenton. This unfair labor practice charge was filed by AFSCME against the City on January 28, 2008. The charge was amended on February 14, April 14 and May 29, 2008. When the charge was filed, the parties had been bargaining for almost three years over the terms of a new contract to replace their 2002-2005 collective bargaining agreement. On January 4, 2008, Respondent declared impasse and implemented its final offer, effective January 14, 2008.

The charge, as amended, originally alleged that Respondent committed multiple violations of Sections 10(1) (a), 10(1) (c), and 10(1) (e) of PERA. The only allegation now remaining is Charging Party's claim that Respondent's January 2008 implementation of changes in terms and conditions of employment ("the implementation") violated its duty to bargain in good faith under Section 10(1) (e). Charging Party originally advanced alternate theories in support of this claim. It asserted that the parties had agreed, in a set of written negotiating ground rules, to extend their 2002-2005 contract past its June 30, 2005 expiration date until they reached agreement on a new contract. It alleged, therefore, that the implementation constituted an unlawful repudiation of the extended contract. Alternatively, Charging Party argued that the implementation was unlawful because: (1) the parties had not reached a bargaining impasse in January 2008; and (2) even if they had, the impasse was caused by Respondent's unlawful insistence on a permissive subject of bargaining.

The alleged permissive subject was a contract proposal which permitted Respondent to alter the retiree health insurance benefits of unit members who had already retired. The 2002-2005 contract contained a provision covering health benefits for active employees and a separate provision covering the health benefits of retirees. When negotiations for the new contract began in the spring of 2005, Respondent proposed to reduce the health insurance benefits it provided to active employees. It also proposed the following new language:

> Effective for all AFSCME employees retiring after July 1, 2005, retiree health insurance and prescription drug benefits shall mirror those provided to active employees. Plans offered and benefit levels, co-pays, deductibles and premium sharing shall be subject to modification through collective bargaining.

July 1, 2005 passed without the parties reaching agreement or impasse on a new contract. Charging Party initially refused to agree to any "mirroring" of retiree health benefits. In July 2006, Charging Party agreed in principle to include mirroring in the new agreement. However, it would not agree to apply mirroring retroactively to July 1, 2005. Several unit employees had retired between July 2, 2005 and July 2006 and were receiving the retiree health insurance benefits set out in the 2002-2005 agreement. As both parties understood the law, if the parties agreed to a contract that included Respondent's proposed new language, Respondent would be legally entitled to change the health insurance benefits of these retirees upon ratification of the contract so that they mirrored those of active employees. Charging Party told Respondent that it had no right to agree to a reduction in benefits for individuals who were no longer part of its bargaining unit. It also asserted that because of its retroactive application to individuals who had already retired, Respondent's proposal was a permissive, and not a mandatory, subject of bargaining. Respondent, however, continued to insist that the contract include mirroring for all employees retiring after July 1, 2005. When it implemented this proposal as part of its final offer on January 14, 2008, it altered the health insurance benefits of all individuals who had retired from the unit after July 1, 2005 so that they mirrored those of active employees. Individuals who retired after January 14, 2008 also received mirrored benefits.

<u>Circuit Court Decision and Partial Settlement of the Charge</u>:

Six days of hearing were held on these unfair labor practice charges between August 1, 2008 and September 8, 2009, during which the parties presented testimony regarding the protracted negotiations that preceded the implementation. Several events of significance occurred before the record in this case closed. As noted above, when Respondent declared impasse in January 2008 and unilaterally implemented its final offer, it reduced the health insurance benefits it had been paying to individuals who had retired after July 1, 2005. In about August 2008, Charging Party and retirees whose health insurance benefits had been reduced filed suit against Respondent in the Wayne County Circuit Court to restore their former benefits, alleging a breach of the 2002-2005 collective bargaining agreement. Some affected retirees reached separate settlements with Respondent before the suit concluded. In April 2009, the Circuit Court, on a motion for reconsideration filed by the Plaintiffs, concluded that the remaining Plaintiffs had demonstrated a breach of the contract and were entitled to permanent injunctive relief. The Circuit Court held that the parties' contract and ground rule agreement clearly and unambiguously extended the 2002-2005 contract until the parties reached a successor agreement. It concluded that the Plaintiffs had retired under that agreement and that their contractual rights to the health insurance benefits provided by that contract vested at the time they retired. Respondent appealed the Circuit Court's decision and its appeal is currently pending before the Court of Appeals.

In addition, on March 2, 2009, the parties ratified a new collective bargaining agreement which provided for mirroring for employees retiring after February 17, 2009. Article 18, Section 5(A) of the parties' 2005-2011 agreement also contained a partial settlement of the unfair labor practice charge, as set out below.

> The Union has no objection if the City makes the following offer (contained in this paragraph) to employees who retired between July 1, 2005 and February 17, 2009: Eligible retirees with a date of retirement between July 2, 2005 and February 17, 2009, who sign a release of all claims which is satisfactory to the City, shall also have any Medicare premium amount the retiree and eligible spouse (if applicable) are responsible for paying offset against the total cost sharing amount owed to the City by the retiree and eligible spouse. In order to be eligible for the above offset of premium and the increase in retiree life insurance described in Article 18, Section 5, C, a retiree's signed release must be received by the City's Human Resources Office no later than Friday, March 27, 2009 at 5:00 p.m.[1]
>
> *All terms and conditions of employment for the July 1, 2005- June 30, 2011 collective bargaining agreement are resolved and contained within the Tentative Agreement [sic], except for the City's decision to impose changes to retiree health insurance for employees who retired between July 1, 2005 and February 17, 2009. Nothing in this Tentative Agreement [sic] shall be construed to affect the terms imposed by the City on January 14, 2008, including the mirroring of retiree health insurance benefits, for employees who retired between July 1, 2005 and February 17,*

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1 The record includes the names of nine individuals who retired from the unit between July 1, 2005 and June 14, 2008 and the effective dates of their retirements. The record does not include the names of individuals who retired between June 14, 2008 and February 17, 2009, if there were any, and does not identify those individuals who signed releases.

2009. The parties agree the Union preserves its right to challenge the City's actions to impose the terms for employees who retired between July 1, 2005 and February 17, 2009, including the City's changes to retiree health insurance benefits and the mirroring of retiree health insurance benefits, and the City maintains its right to defend such actions, in the pending Wayne Court Circuit Court Case No. 09-118469-CL, and the pending MERC Case No. C08 A-024. All other pending issues in MERC Case No. C08-A-024 shall be dismissed by the Union with prejudice as the parties agree that all claims, except those described above, are resolved. The Union shall not file any amendments to its Third Amended Unfair Labor Practice Charge or any new Unfair Labor Practice Charges or grievances for actions by the City which are related to Case No. 08 A-024 or the below listed grievances. The Union does not waive its right to file an Unfair Labor Practice charge or grievance: (a) to enforce this Tentative Agreement [sic]; (b) regarding an action by the City unrelated to this Tentative Agreement; or (c) arising after the Union ratified this Tentative Agreement. [Emphasis added].

On the next to last day of hearing, apparently because of this settlement, Charging Party withdrew its allegation that Respondent had engaged in surface bargaining in violation of Section 10(1)(e) and all of the allegations alleging violations of other sections of PERA. In addition, on December 2, 2009, Charging Party submitted a letter stating that "based upon the developments in the circuit court case," it was withdrawing its allegation that the imposition constituted a repudiation of the parties' collective bargaining agreement. Respondent did not object to the withdrawal of any of these allegations.

Issues Remaining In Dispute:

In September 2010, after reviewing the parties' post-hearing briefs and Article 18, Section 5(A), I asked Charging Party to file a supplemental statement clarifying the issues it believed remained to be resolved by the Commission and the specific relief that it was seeking. Charging Party filed a supplemental brief on November 5, 2010 and Respondent filed a response on December 13, 2010. The parties agree that the settlement contained in Article 18, Section 5(A) does not make this charge moot. According to the supplemental briefs, the issues remaining to be decided by the Commission are as follows:

1. Whether the issue of whether the 2005-2008 contract was extended beyond its expiration date is appropriately before the Commission.

2. Whether Respondent's proposal regarding the mirroring of retiree health benefits was a mandatory subject of bargaining.

3. Whether the parties had reached a good faith impasse in their contract negotiations when Respondent implemented changes in terms and conditions of employment on January 14, 2008 and whether the implementation was lawful.

4. If Respondent is found to have violated its duty to bargain by implementing these changes, what, if any, remedy should be ordered for the unfair labor practice in light of the parties' settlement agreement. The issues in dispute are:

a. Whether, in light of the settlement agreement, a remedial order should be issued requiring Respondent to cease and desist from bargaining in bad faith and/or requiring it to post a notice to employees notifying them of the unfair labor practice.

b. Whether a remedial order should be issued requiring Respondent to rescind the changes it made to the health benefits of individuals who retired between July 2, 2005 and February 17, 2009 (the "interim period") and make them whole for additional costs they incurred as a result of the changes made to their retiree health benefits. [2]

Findings of Fact:

Background

During the five years preceding 2005, Respondent found itself with problems similar to those of many other public employers in Michigan during the same period. First, it had lost and continued to lose a substantial portion of its industrial tax base. Second, pension and health care costs for its employees were increasing rapidly, with an annual average increase of over twenty-five percent. These costs constituted a substantial percentage of Respondent's budget. In 2005, health insurance for retirees alone accounted for about fourteen percent of Respondent's total annual expenditures.

In response to these financial pressures, Respondent decided to change the way it paid retiree health care benefits under its union contracts and to its unrepresented employees. Instead of negotiating separate health benefits for retirees and providing retirees with these benefits throughout the whole of their retirement, Respondent decided to tie the benefits given to retirees to the benefits paid to active employees and to alter the benefits it paid to those already retired as it bargained new benefit levels for active employees.

Respondent first proposed the concept of mirroring in negotiations with the union representing its nonsupervisory police officers for their 2002-2005 contract. In 2003, an arbitration panel issued an award pursuant to 1969 PA 312 (Act 312) that included this Respondent proposal:

> All employees who retire after July 1, 2002, will be provided with health and prescription drug insurance described in this Section [i.e. the benefits provided to active employees]. However, the level of coverage [for these retirees] after June 30, 2005 shall be identical to that provided to employees who retire after June 30, 2005.

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[2] The parties agree that, because of the settlement agreement, the remedial order should not require Respondent to rescind any other changes it made after declaring impasse in January 2008. They also agree that no relief is due to retirees who reached individual settlements with Respondent.

The union representing the nonsupervisory officers, although opposed to the proposal, did not object specifically to its effective date or argue to the arbitration panel that the panel had no authority to include the proposal in the award because it was a permissive subject.

On March 21, 2005, Respondent's city council passed an ordinance modifying the benefits paid in retirement to its unrepresented employees. The policy, as amended, read as follows:

> Effective for all non-union employees retiring after July 1, 2005, retiree health insurance and prescription drug benefits shall mirror those provided to active employees. Plans offered and benefit levels, co-pays, deductibles and premium sharing shall be subject to modification through action of the City Council. This policy is effective prospectively and does not apply to non-union employees who retire on or before June 30, 2005.

In 2005, Respondent's contracts with Charging Party and with the unions representing its police officers, police command officers, and fire fighters expired. As Respondent began preparing in the spring of 2005 to negotiate new agreements with all four units, Respondent's city council instructed its representatives to negotiate mirroring for all employees retiring after July 1, 2005 into all the new contracts. For the police unit, Respondent proposed the continuation of the mirroring language in the 2002-2005 agreement. This was not an issue in the negotiations, and the language was incorporated into the contract which resulted from an Act 312 award issued in July 2007. In November 2006, Respondent and the union representing its fire fighters entered into a contract with a provision for mirroring retroactive to July 1, 2005. In August 2007, Respondent and the union representing its police command officers also entered into a contract with mirroring language. The period covered by this contract was 2007-2011 and the effective date for the mirroring provision was July 1, 2007.

Negotiations for a Successor to the 2002-2005 Contract

Article 34 of the parties' 2002-2005 contract read, in pertinent part, as follows:

> The Agreement shall continue in full force and effect until June 30, 2005, subject to the remainder of this Article.
>
> Section 1. Termination
>
> If either party desires to terminate this Agreement, it shall, sixty (60) days prior to the termination date, give written notice of termination. If neither party gives notice of termination, or if either party giving notice of termination withdraws the same prior to [the] termination date, this Agreement shall continue in effect from year to year thereafter subject to notice of termination by either party on sixty (60) days written notice prior to that current year's termination date.
>
> Section 2. Amendment or Modification

> If either party desire to modify or change this Agreement, it shall not later than sixty (60) days prior to the termination date or any subsequent termination date, give written notice of desire to amend. If notice of amendment of this agreement has been given in accordance with this paragraph, this agreement may then be terminated by either party on ten (10) days written notice of termination. Any amendments which may be agreed upon shall become part of this agreement without modifying or changing any of the other terms of this agreement.
>
> Section 3. Notices
>
> Notices of Termination or Amendment shall be in writing and shall be sent by certified mail addressed, if to the Union, to Union President, Local 292, Municipal Building, Trenton, Michigan, or to the Employer addressed to the City Clerk, Municipal Building, Trenton, Michigan, or to any such address as the Union or the employer may have provided in writing.

Neither party sent a notice to terminate the contract. However, in January 2005, Cathy Farrell, then Charging Party's president, sent Respondent a letter requesting that it meet and begin negotiating terms for a new agreement. At their first meeting, on February 10, 2005, the parties discussed ground rules for the negotiations. On March 10, 2005, members of the bargaining teams executed a written document entitled "Ground Rules." Items nine and ten of this agreement stated:

> 9. All agreements shall be effective July 1, 2005, unless otherwise agreed upon.
>
> 10. The current agreement will remain in full force and effect beyond June 20, 2005 [sic] on a day to day basis, subject to Article 34.

On April 5, 2005, the parties began negotiations on the substance of the new agreement. Charging Party's first proposal called for a one year extension of the current contract with a three percent wage increase effective July 1, 2005 and the addition of language restricting subcontracting. On April 14, the Employer responded that it would agree to the one year extension under these terms: (1) a two percent wage increase effective July 1, 2005; (2) changes in the health insurance benefits available to active employees; (3) no language restricting subcontracting; and (4) retiree health insurance mirroring effective July 1, 2005. Respondent gave Charging Party the retiree mirroring proposal set out in the charge section above. It also told Charging Party's bargaining team that Respondent's city council had directed its bargaining team to negotiate mirrored coverage for retirees, and that Respondent would not enter into any contract without mirroring.

On April 15, Charging Party submitted a counterproposal for a two year contract extension with a wage freeze, no changes in health care coverage and "continued negotiations on non-economic language and retirement benefit mirroring." Respondent's written response, dated April 19, read as follows:

> As indicated at the bargaining table on April 15, 2005, and reiterated this morning, the City will not agree to a contract extension or settlement that does not specifically

provide for the mirroring of post-retirement health insurance benefits. The Union's proposal of April 15, 2005 is therefore rejected.

Thereafter, Charging Party presented a series of proposals on contract language and, on August 31, 2005, presented its first full contract proposal. The parties met approximately twenty-five times between April 5, 2005 and August 2007. These meetings included a meeting with a mediator on February 28, 2007. Throughout bargaining, Respondent altered its position on many significant issues. However, all of Respondent's proposals during this period, without exception, included the retiree health benefits mirroring language in the form set out in Respondent's original proposal. Although the parties discussed other topics, Respondent repeatedly returned to this proposal and restated its position that the contract had to contain a mirroring provision and that the mirroring had to be effective on July 1, 2005. During this period, Charging Party attempted, without success, to persuade Respondent to agree to fund health savings accounts as a condition of Charging Party's agreement to the proposed changes in health benefits for both active employees and future retirees. It told Respondent that its membership was telling it, at monthly membership meetings, not to bring back any proposal that altered their health care benefits. The first indication by Charging Party that it would consider retiree mirroring was on July 14, 2006, when it stated that "it would like to discuss a January 1, 2009 date for implementation of Respondent's mirroring proposal." On July 21, 2006, Charging Party presented a set of proposals that included the following:

> Effective for all AFSCME employees retiring after July 1, 2006, retiree health insurance and prescription drug benefits shall mirror those provided to active employees. Plans and benefit levels, co-pays, deductibles and premium sharing shall be subject to modification though collective bargaining – upon condition of the implementation/establishment of a health savings/retirement plan for employees.

During discussion of this proposal, Charging Party said that it would agree to the mirroring of retiree benefits effective upon ratification of the contract if certain conditions were met. It told Respondent, however, that it was adamant about not agreeing to a retroactive date of July 1, 2005, because there were, at that time, two individuals who had retired from the bargaining unit after that date. Upon their retirement, these individuals had begun receiving the health insurance benefits the 2002-2005 collective bargaining agreement provided for retirees. Charging Party told Respondent that it could not bargain over these individuals' benefits. On August 7, 2006, Respondent gave Charging Party a new proposal which contained the same mirroring language as its previous proposals.

Charging Party changed chief spokespersons several times during the course of the negotiations. In August 2006, Jeannette DeFlorio became Charging Party's chief negotiator. At DeFlorio's first bargaining session, DeFlorio told Respondent that she considered Respondent's mirroring proposal to be a permissive subject of bargaining because it involved the benefits of retirees and not the future retirement benefits of active employees. DeFlorio reiterated that Charging Party did not believe that it was appropriate for it to agree to alter these benefits since the retirees were no longer members of its unit and could not vote on ratification of the contract.

On December 8, 2006, Charging Party filed a petition for fact finding, On June 6, 2007, the parties stipulated to ten open issues on which the fact finder was to make recommendations,

including health care benefits for active employees and Respondent's mirroring proposal. At the fact finding held on August 8 and 9, 2007, Charging Party indicated that it would accept mirroring for future retirees. However, it argued that mirroring should not be imposed on employees who retired before the contract was ratified. Three more individuals had retired from the unit between July 2006 and August 2007. The fact finder recommended that the parties agree to July 1, 2005 as the effective date for the mirroring provision. He concluded that since the contract for employees retiring after July 1, 2005 had not been resolved, employees who retired after that date had no vested rights to those benefits in any case.

The parties met four times between the issuance of the fact finding report on September 28, 2007 and Respondent's declaration of impasse on January 14, 2008. The first of these meetings took place on October 17, 2007. At this meeting, Respondent made a settlement offer based on the fact finder's recommendations. The offer included Respondent's mirroring proposal. At a meeting on November 16, 2007, Charging Party made a counteroffer which included Respondent's mirroring language, including the effective date of July 1, 2005, if Respondent set up a retiree health savings plan within fifteen days of ratification of the contract and an in-house health reimbursement account by July 1, 2009. Respondent did not accept the counteroffer. At their fourth meeting, on December 6, 2007, Charging Party withdrew the proposal made on November 16 and stated again that it would not agree to a retroactive date for the mirroring of retiree health care.

On January 4, 2008, Respondent wrote to Charging Party declaring impasse and its intention to implement, effective January 14, 2008, its last offer of settlement and all prior tentative agreements. In a letter dated January 10, DeFlorio reiterated that she believed that Respondent's mirroring proposal was a permissive subject of bargaining. She stated that if the parties had reached impasse, Respondent had caused it by insisting on this permissive subject. She warned Respondent that if it implemented changes in terms and conditions of employment based on this impasse, Charging Party would file an unfair labor practice charge.

In January 2008, as part of the implementation and consistent with its last offer, Respondent altered the health insurance benefits it provided to active employees. It also altered the health benefits of the six individuals who had retired from the unit between July 1, 2005 and January 14, 2008 so that these benefits mirrored the benefits Respondent now provided to active employees. Unit members who retired after January 14, 2008, including three who retired between January 14 and June 14, 2008, also received mirrored benefits.

As noted above, the unfair labor practice charge was filed on January 28, 2008 and, in August 2008, Charging Party and retirees whose benefits had been reduced filed suit in Wayne County Circuit Court. The parties did not meet again to bargain until early 2009. On February 17, 2009, the parties reached a tentative agreement on a new contract which contained the partial settlement agreement set out above. The contract was ratified on March 2, 2009.

Discussion and Conclusions of Law:

Is the Contract Extension Issue Appropriately Before the Commission?

In April 2009, the Wayne County Circuit Court held, in an action to which both Respondent and Charging Party were parties, that the parties had agreed to extend their 2002-2005 collective bargaining agreement until they reached agreement on a new contract. Whether the parties agreed to extend their contract was also an issue in the unfair labor practice case because Charging Party alleged that Respondent's January 14, 2008 implementation constituted an unlawful repudiation of the extended agreement. By the time the hearings had concluded in the unfair labor practice case, the contract extension issue had already been decided by the Circuit Court. Instead of arguing collateral estoppel, however, Charging Party elected to withdraw its repudiation allegation.

Respondent did not object to the withdrawal. However, it now argues in its supplemental brief that the Commission should decide whether the contract was extended because it has the exclusive jurisdiction to do so. Respondent asserts that the Circuit Court usurped the Commission's jurisdiction when it held that the 2002-2005 collective bargaining agreement was extended by the parties' agreement on ground rules.

The Commission has the authority to interpret the terms of a collective bargaining agreement where necessary to determine whether an unfair labor practice has been committed, including whether an employer has unlawfully repudiated its obligations under an existing agreement. *University of Michigan,* 1978 MERC Lab Op 995, 996, citing *NLRB v C & C Plywood Corp,* 385 US 421 (1967). However, the Commission has never been held to have exclusive jurisdiction over issues of contract interpretation. In its April 2009 decision, the Circuit Court concluded, based on Article 34 of the 2002-2005 agreement and the parties' March 2005 agreement, that it was the intent of the parties that the 2002-2005 collective bargaining agreement continue in full force and effect beyond its term until the parties agreed to a successor collective bargaining agreement which could then be applied retroactively. I find no merit to Respondent's argument that the Commission must decide whether the 2002-2005 agreement was extended because it is the only entity with authority to do so. The allegation that Respondent committed an unfair labor practice by repudiating the agreement was withdrawn. Therefore, the issue of whether the 2002-2005 agreement was extended is no longer before me.

Because Charging Party withdrew its allegation that Respondent repudiated its collective bargaining agreement, my analysis of whether Respondent violated its obligation to bargain addresses only the issues raised by Charging Party's alternate argument, i.e. that Respondent's January 2008 implementation was unlawful because the parties had not reached a good faith impasse at that time. My analysis assumes, for purposes of this charge, that the parties' 2002-2005 contract was not in effect when Respondent declared impasse in January 2008.

Was the Mirroring Proposal a Mandatory Subject of Bargaining?

It is well established that pension and retirement provisions are mandatory subjects of bargaining under PERA, as they are under the National Labor Relations Act (NLRA) 29 USC 151 et seq. *Detroit Police Officers Ass'n v Detroit,* 391 Mich 44, 63-64 (1974). However, in *Allied Chemical & Alkali Workers of America v Pittsburgh Plate Glass Co,* 404 US 157 (1971), the Supreme Court created a distinction between the future retirement benefits of active workers and the benefits paid to individuals already retired. In that case, an employer had cancelled the health insurance benefits it had been providing to retirees under a collective bargaining agreement and

substituted a monthly payment to be used for supplemental Medicare coverage. The Court noted that the future retirement benefits of active workers are mandatory subjects of bargaining because they are "part and parcel" of their overall compensation. The Court held, however, that retired individuals are not employees within the meaning of the NLRA. It concluded, therefore, that the statutory requirement that an employer bargain over the wages, hours, and terms and conditions of employment of unit employees did not encompass the health insurance benefits received by retired individuals.

Since the retirees were not employees, the *Allied* Court reasoned, their concerns would constitute a mandatory subject of bargaining only if these concerns vitally affected the terms and conditions of employment of active employees. The Court then concluded that the health benefits received by retirees in that case did not vitally affect the terms and conditions of employment of active employees. The Court rejected the union's argument that requiring bargaining over retiree benefits would mitigate uncertainty for unit employees about their future benefits and facilitate future agreement concerning active employees' retirement plans. It noted that unit employees could have no assurance that if they advanced the interests of the already retired they would receive similar consideration after they themselves had retired. The Court concluded that the health insurance benefits paid to individuals who had already retired were permissive subjects of bargaining only. The Court held that while the employer in that case may have breached the collective bargaining agreement, it had not violated the NLRA. It held that that a modification of a collective bargaining agreement, even if done unilaterally and during its term, constitutes a violation of the NLRA only when it changes a term which is a mandatory subject of bargaining. Because the health benefits of retirees were a permissive subject of bargaining, the Court concluded that the employer had not committed an unfair labor practice.

Relying upon *Allied Chemical,* the Commission and Michigan Courts have held that retirees are not employees under PERA and that the concerns of already retired individuals are not mandatory subjects of bargaining unless they vitally affect the terms and conditions of employment of active employees. See, e.g., *West Ottawa Ed Ass'n v West Ottawa Public Schools Bd of Ed,* 126 Mich App 306, (1983). In *Village of Holly,* 17 MPER 48 (2004) (no exceptions), the union and employer entered into a series of a temporary letters of understanding (LOUs) under which the employer agreed to contribute to the health insurance premium of an individual who had retired for medical reasons shortly before becoming eligible to receive retiree health insurance under the parties' collective bargaining agreement. When the parties were unable to reach agreement on the language of another LOU, the employer ceased making a premium contribution for this individual. The union filed a charge alleging that the employer violated its duty to bargain by insisting to impasse on a permissive subject, the modification of the retiree's health insurance premium. The administrative law judge concluded that the employer had no obligation to bargain before ceasing to contribute to the retiree's insurance premium. He noted that members of the bargaining unit were in exactly the same position that they would have been in had the incident with this individual never occurred, and that there was nothing in the record to suggest that the issue of his insurance vitally affected their terms and conditions of employment.

As noted above, the future retirement benefits of active employees are mandatory subjects of bargaining. I find that a proposal to make retiree health insurance benefits mirror those received by active employees is a mandatory subject as it applies to the future retirement benefits of current

employees. When Respondent first presented Charging Party with its mirroring proposal in April 2005, the proposal did not affect the retirement benefits of anyone who had already retired and was a subject over which Charging Party was obligated to bargain. If Respondent had modified its proposal after July 1, 2005 so that it applied only to future retirees, this proposal would also have been a mandatory subject over which Respondent could lawfully have insisted to impasse. The only issue here is whether Respondent could lawfully insist that Charging Party agree to include a provision in its contract which altered the retirement benefits of individuals who had already retired.

Respondent concedes that the benefits of the already retired are mandatory subjects only if the retiree concerns vitally affect the terms and conditions of employment of active employees. It asserts that in this case the retirement benefits of employees and the benefits of those individuals who retired after July 1, 2005 were intertwined. This was true, but only because Respondent insisted on a retroactive effective date for its mirroring proposal. The mere fact that a party combines a mandatory and permissive subject in the same proposal does not convert the permissive subject into a mandatory one. See, e.g., *Borden, Inc,* 279 NLRB 396 (1986*).* Here, Respondent's mirroring proposal and its effective date were not inseparable, and Respondent could have modified its mirroring proposal so that it did not affect the benefits of individuals who had already retired. It could also have lawfully adjusted its economic offer to the unit, if necessary, to compensate for the loss of the savings it had expected to achieve from its original proposal.

Respondent also asserts that its proposal vitally affected employees' terms and conditions of employment because the very substantial cost of providing health care to retirees ultimately affects the compensation it can offer to active employees. It is true that Respondent's limited and shrinking resources are the source for both employee compensation and retiree benefits. However, I find that the fact that retirees and employees compete for the same finite resources supports Charging Party's argument that a union should not be forced to bargain over the benefits of current retirees because the interests of employees and retirees are fundamentally different. Finally, Respondent seems to argue that it would simply be unfair to allow those individuals who retired while Respondent had a mirroring proposal on the table to escape the mirroring concession imposed upon its other employees. It points out that the individuals whose benefits became a subject of dispute were employees at the time Respondent presented its mirroring proposal, and that they voluntarily chose to retire before the parties reached a new agreement under which they could have expected to receive mirrored benefits. However, I do not see the relevance of Respondent's fairness argument to the question of whether Respondent's proposal was a mandatory or permissive subject. I find that Respondent has not demonstrated that its proposal to alter the retirement health benefits of individuals who had already retired vitally affected the terms and conditions of employment of active unit members.

Respondent also argues that the retiree health care benefits of public employees who retire in the interim period between contracts should be designated mandatory subjects of bargaining as a matter of public policy. It points out that contracts are often not resolved in the public sector until after the stated expiration date, and that unions and employers regularly agree to make their new contracts retroactive to the expiration date of their expired agreements. It is true that, in the absence of economic weapons to resolve disputes, public sector contract negotiations sometimes continue for a long period of time, and that parties regularly negotiate new contracts with proposals covering terms and conditions of employment retroactive to the expiration date of their prior contract.

However, as discussed above, retiree benefits are not terms and conditions of employment as that term is used in PERA because retirees are not employees under the Act. Respondent's argument also ignores the fact that if the benefits of employees who retire between contracts were deemed a mandatory subject, a union could lawfully propose an increase in retirement benefits specifically for individuals who retire during negotiations and bargain this proposal to impasse. I see no reason to carve out an exception to the well established rule that the benefits of already retired individuals are nonmandatory subjects of bargaining.

In sum, I find that when Respondent first presented it to Charging Party in April 2005, Respondent's proposal to mirror the retirement health insurance benefits of employees retiring after July 1, 2005 was a mandatory subject of bargaining. I conclude, however, that after this date passed and individuals retired from the bargaining unit, Respondent's proposal became a permissive subject because it had the effect of altering the retirement benefits of individuals who had already retired and, therefore, were no longer members of the bargaining unit.

Was Good Faith Impasse Reached and Was the Implementation Lawful?

One of the fundamental distinctions between mandatory and permissive subjects of bargaining is that while a party may lawfully make a proposal on a permissive subject, it cannot lawfully insist on this proposal to impasse or as a condition of reaching agreement on mandatory subjects. In *NLRB v Wooster Division of Borg Warner,* 356 US 342 (1958), the Supreme Court held that the NLRA does not license an employer to refuse to enter into an agreement on the ground that the agreement does not contain some proposal that is not a mandatory subject. It concluded that such conduct effectively constitutes a refusal to bargain in good faith over wages, hours, and terms and conditions of employment. Another fundamental distinction between mandatory and nonmandatory subjects is that absent a good faith impasse, an employer is prohibited from making unilateral changes in mandatory subjects of bargaining after contract expiration. *Taft Broadcasting Co,* 163 NLRB 475, 478 (1967). The duty to bargain in good faith under PERA has been held to incorporate both these distinctions. See *Detroit Police Officers Ass'n v City of Detroit,* 391 Mich 44, at 55, fn 6 and 56, fn 7 (1974); *Michigan State AFL-CIO v Michigan Employment Relations Comm,* 212 Mich App 472, 486 (1995); *Central Michigan University Faculty Ass'n v Central Michigan University,* 404 Mich 268 (1978); *Local 1467, International Ass'n of Firefighters, AFL-CIO v City of Portage,* 134 Mich App 466, 473 (1984).

As the Commission held in *South Redford Sch Dist,* 1988 MERC Lab Op 447, a party violates its duty to bargain by insisting that a nonmandatory subject be included in a contract even if its insistence on the proposal is not the sole cause of the parties' inability to reach agreement, as long as the permissive topic is put forth as a precondition to any agreement on mandatory issues. *Industrial Union of Marine & Shipbuilding Workers v NLRB,* 320 F.2d 615, 618 (CA 3, 1963), cert. denied, 375 US 984(1964); *Latrobe Steel Co v NL*RB, 630 F2d 171, 180 (CA 3, 1980). Where an impasse has been created even in part by insistence on bargaining about a permissive subject, the impasse is not valid under the Act and none of the terms of a final offer predicated on such an improper impasse can be lawfully implemented. *Boise Cascade Corp*, 253 NLRB 462 (1987); *Retlaw Broadcasting Co,* 324 NLRB 138, 143 (1997); *Quality House of Graphics, Inc,* 336 NLRB 497, 509 (2001).

When Respondent declared impasse in January 2008, there were many issues other than the effective date of the mirroring proposal still unresolved between the parties. However, Respondent was insisting that any contract between the parties include mirroring for all individuals who had retired after July 1, 2005. I conclude that Respondent violated its duty to bargain in good faith by insisting to impasse on a permissive subject of bargaining. I find that because the impasse was created in part by Respondent's insistence on a permissive subject of bargaining, the impasse was not valid. I conclude, therefore, that Respondent violated its duty to bargain in good faith by implementing changes in terms and conditions of employment for members of Charging Party's bargaining unit in January 2008.

Of individuals who retired between July 1, 2005 and February 17, 2009, (whom Respondent calls the "interim retirees), at least three were employees at the time Respondent implemented its mirroring proposal. I find that for these employees, as well as the rest of the bargaining unit, Respondent's implementation of its mirroring proposal constituted an unlawful unilateral change in their future retirement benefits, a term of their employment.

The eight individuals who were already retired when Respondent implemented its mirroring proposal, however, were not members of the bargaining unit when Respondent unlawfully implemented these changes. I find that Respondent's January 2008 reduction in their health benefits was not a change in a term or condition of employment because these individuals were no longer employees when this change was made

I note that in two recent cases, *Kalamazoo Co*, 22 MPER 94 (2009), and *City of Roseville,* 23 MPER 55 (2010), the Commission discussed and distinguished the Supreme Court's holding in *Allied Chemical* that a unilateral midterm modification of a permissive term of a collective bargaining agreement is not an unfair labor practice. In both *Kalamazoo* and *Roseville*, the parties had entered into open-ended letters of understanding in which the unions explicitly agreed to certain concessions on mandatory subjects in return for the employers' agreement on permissive terms. In *Kalamazoo,* the union explicitly agreed to a lower wage rate for certain non-312 eligible employees as the quid pro quo for the employer's agreement to binding interest arbitration in the future for these classifications. In *Roseville,* the union agreed to allow subcontracting of some unit work in exchange for a promise by the employer to maintain a certain level of staffing. Both employers asserted that they had the right to repudiate these agreements because they involved permissive subjects. The Commission held that the employers violated their duty to bargain in good faith under PERA. They concluded that an employer violates its duty to bargain in good faith by unilaterally repudiating bargained-for agreements in which permissive and mandatory subjects are intertwined. The Commission stated that to find otherwise would leave little distinction between a permissive subject of bargaining and an illegal or prohibited subject upon which agreement would be unenforceable. It also concluded that to permit an employer to unilaterally renege on a settlement agreement containing both mandatory and permissive topics would seriously undermine the stability and reliability of agreements that is a goal of good faith bargaining. Although both *Kalamazoo* and *Roseville* involved free-standing letters of understanding, the logic of these cases would seem to extend to a party's repudiation of a collective bargaining agreement containing both permissive and mandatory subjects. However, as discussed above, since Charging Party withdrew its repudiation allegation, I am precluded from finding a repudiation violation in this case.

What is the Appropriate Remedy?

Charging Party contends that the appropriate remedy for Respondent's unfair labor practice should include a cease and deist order prohibiting Respondent from insisting to impasse on changes in retiree health insurance benefits and an order requiring Respondent to post a notice to employees on Respondent's premises notifying them of the unfair labor practice. It points out that active employees as well as retirees were harmed by Respondent's insistence on a permissive subject of bargaining because that insistence impeded resolution of their collective bargaining agreement. Respondent argues that the settlement agreement contained in the parties 2005-2011 agreement prohibits notice posting or any remedy directed at the active employees, since the settlement states that "all pending issues" in the unfair labor practice case will be withdrawn by Charging Party except for the City's decision to impose changes to retiree health insurance for employees who retired between July 1, 2005 and February 17, 2009. Charging Party disagrees with Respondent's interpretation of the settlement agreement.

The parties in this case entered into an agreement which purportedly resolved certain aspects of the unfair labor practice charge. After this agreement, Charging Party withdrew some of the allegations in its original charge. The Commission was not a party to this agreement, and is not bound by it. As set out above, I have concluded that Respondent unlawfully insisted to impasse on a permissive subject of bargaining. I have also concluded that in January 2008 it unlawfully unilaterally altered existing terms and conditions of employment. The Commission's standard remedial order for these types of violations includes an order requiring the employer to cease and desist from the conduct constituting the unfair labor practice and an order requiring the employer to post a notice to unit employees advising them of the unfair labor practice. Since Charging Party does not agree that it agreed to forego this remedy, I will recommend to the Commission that the remedial order include a cease and desist order and notice posting.

The other remedial issue is whether the Commission should order Respondent to restore the retirement health care benefits of individuals who retired between July 1, 2005 and February 17, 2009, except for those who reached separate settlements with the Respondent, to the level provided for in the 2002-2005 collective bargaining agreement, and to make these individuals whole for any monetary losses they incurred as a result of Respondent's alteration in their benefits. The parties agree that the relief ordered by the Commission should be limited to individuals who retired within that window. The relief Charging Party seeks is essentially the relief ordered by the Wayne County Circuit Court in the decision which Respondent has appealed to the Court of Appeals. Charging Party admits that it is seeking this relief from the Commission on behalf of the retiree plaintiffs in the circuit court action in case the Court of Appeals overturns the Circuit Court's order. Charging Party argues that the Commission has the authority to order make whole relief for retirees, citing *Macomb Co,* 23 MPER 8 (2010).

In *Macomb Co,* the employer unilaterally changed the mortality tables it used to calculate pension benefits for retirees who elected the joint and survivor option under the pension plan. The change was announced in November 2006 and applied to the future pension benefits of employees who retired after July 1, 2007. Unlike the instant case, the employer did not alter the retirement benefits of any individuals who had already retired. However, by the time the Commission issued its decision concluding that the employer had violated its duty to bargain by unilaterally changing a

term of employment, a number of unit employees had had their pension benefits calculated at retirement using the new table. The Commission's remedial order required the employer to restore the status quo by recalculating the pension benefits of the individuals who retired after July 1, 2007 using the old mortality table and compensating them, with interest, for the benefits they should have received.

Macomb Co involved a unilateral change in a mandatory subject, the future retirement benefits of unit employees. I have found in this case that, as the employer did in *Macomb,* Respondent unlawfully unilaterally altered the future retirement benefits of employees who had not yet retired when it implemented its mirroring proposal in January 2008. By the parties' agreement, however, the make whole relief for this violation is limited to employees who retired before February 17, 2009. According to the record, at least three unit employees retired between Respondent's implementation of its mirroring proposal in January 2008 and February 17, 2009. It is not clear from the record whether any or all of the three reached separate settlements with Respondent.

As discussed above, I find no basis on this record for concluding that Respondent violated its duty to bargain under PERA in January 2008 by altering the retiree health benefits of individuals who had already retired. Accordingly, I will recommend to the Commission that it order Respondent to make those individuals who retired between January 14, 2008 and February 17, 2009 whole for the losses they suffered as a result of Respondent's unlawful January 2008 unilateral change in their future retiree health insurance benefits, but that its order not include individuals who retired before January 14, 2008.

RECOMMENDED ORDER

Respondent City of Trenton, its officers and agents, are hereby ordered to:

1. Cease and desist from:

a. Insisting, as a precondition to reaching a collective bargaining agreement with AFSCME Council 25 and its affiliated Local 292, that the union agree to a contract provision altering the retiree health benefits of individuals who had already retired from the union's bargaining unit;

b. On or about January 14, 2008, unilaterally altering terms and conditions of employment, including the future retiree health benefits of employees in the bargaining unit, without reaching a good faith impasse on the terms and conditions of a new collective bargaining agreement.

2. Take the following action to effectuate the purposes of the Act:

a. Make whole those individuals who retired from the bargaining unit between January 14, 2008 and February 17, 2009, and who did not execute a release of claims, by:

(1) Providing them during their retirement with the retiree health care benefits they would have received had they retired prior to January 14, 2008, i.e., the retiree health care benefits set out in the 2002-2005 collective bargaining agreement;

(2) Compensating them for any monetary losses they incurred as a result of Respondent's unlawful unilateral change in their retirement health benefits, including interest at the statutory rate of five percent (5%) computed quarterly.

b. Post copies of the attached Notice to Employees in conspicuous places on its premises, including all locations 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

Dated: ______________