STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

VILLAGE OF STOCKBRIDGE,
Public Employer - Respondent,

Case No. C10 I-233

- and -

TEAMSTERS LOCAL 580,
Labor Organization - Charging Party.
_____/

APPEARANCES:

Fahey Schultz Burzych Rhodes P.L.C., by Matthew D. Drake and Stephen O. Schultz for the Respondent

Wayne A. Rudell, for the Charging Party

DECISION AND ORDER

On August 19, 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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Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Christine A. Derdarian, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

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TEAMSTERS LOCAL 580,
Labor Organization-Charging Party.
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APPEARANCES:

Fahey Schultz Bruzych Rhodes P.L.C., by Matthew D. Drake and Stephen O. Schultz, for Respondent

Wayne A. Rudell, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard in Lansing, Michigan on January 13, 2011, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission. Based upon the entire record, including a post-hearing brief filed by the Respondent on February 15, 2011, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

Teamsters Local 580 filed this unfair labor practice charge against the Village of Stockbridge on September 17, 2010. Charging Party represents a bargaining unit consisting of the two employees in Respondent's department of public works (DPW). The charge alleges that Respondent violated its duty to bargain by unilaterally altering these employees' regularly scheduled hours and days of work effective September 13, 2010.

Findings of Fact:

Respondent is a small rural community. In September 2010, in addition to its two DPW employees, it employed a village manager, a treasurer, a part-time clerk/administrative assistant,

two part-time crossing guards, a police chief, and one full-time and one part-time police officer. Respondent's DPW maintains water and sewer lines, streets, parks, buildings and cemeteries. It also does brush and leaf removal. Until the change that is the subject of this charge, both of the two DPW employees were regularly scheduled to work five days and forty hours per week. Although they sometimes worked overtime, no evidence was presented that their regular work week ever fell below forty hours. The DPW employees were and are considered full-time employees and receive certain fringe benefits, including pension, health and life insurance. [1]

Charging Party was certified as the representative for a bargaining unit consisting of all full-time and regular part-time DPW employees on July 7, 2008. None of Respondent's other employees are unionized. Charging Party and Respondent began negotiating their first contract in January 2009. Charging Party's chief spokesman was Business Agent Douglas Withey. Charging Party's initial contract proposal included a provision guaranteeing full-time employees 40 hours of work per week, and establishing a typical work week of eight hours per day, five days per week. Respondent countered with a proposal for a workweek of "approximately 30 hours" per week and a typical five day work week.

On August 13, 2010, Respondent gave Charging Party a proposal on the entire contract that it labeled a "final" proposal; this proposal included the same work day/work week language that it had initially proposed. However, neither party contends that they reached impasse either on this proposal or on the contract as a whole before September 13, 2010. On September 23, 2010, Charging Party filed a petition with the Commission for the appointment of a fact finder in the parties' contract dispute. [2] The petition listed a number of unresolved issues in addition to "hours." At the time of the hearing in the unfair labor practice case in January 2011, the parties had not yet reached agreement on a contract and a fact finding hearing was scheduled for later that month.

During the first half of 2010, Respondent's revenue dropped below its budget projections. Respondent operates on a narrow financial margin. According to Respondent Village Manager Dan Dancer, Respondent had no cash reserves in 2010. He also testified that at the end of June 2010, before its July tax collections, Respondent's cash balances briefly dipped below its payroll. Dancer testified that by September 2010, Respondent's financial situation had become unmanageable. According to Dancer, he felt that he could not in good conscience let this situation go on without making changes. [3]

On September 3, 2010, Dancer gave Steve Crandall, a DPW employee on Charging Party's bargaining committee, the following memo:

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[1] In the opening argument made by its counsel at the hearing, and in its post-hearing brief, Respondent asserted that in March 2009, it modified its employee policy manual to make employees working between thirty-two and forty hours per week "full-time employees" eligible for benefits. However, no evidence was entered into the record regarding any policy manual or change made to it.

[2] The fact finding petition was signed on September 9, but was not received by the Commission until September 23.

[3] On cross-examination, Dancer admitted that Respondent has some "headroom" to increase taxes under the Headlee Amendment, which places limits on local governments' taxing ability, and that it could also raise funds by raising water and wastewater rates. As discussed below, however, the fact that Respondent might legally have been able to raise more revenue is not relevant in this case.

> As you are the union representative for the Teamsters, I am providing you notice that beginning Monday September 13 all Village of Stockbridge full-time, hourly employees will be scheduled for not more than 32 hours per work week. The reduction of hours is necessitated by the condition of the current Village budget and will continue at least through February of 2011. In addition, no hours more than 32 may be worked and no overtime may be worked without approval by me. Should work conditions require additional hours (i.e. a snowfall), I will authorize hours exceeding 32 on a temporary basis. Overtime will remain at hours worked over 40 in a pay period and/or emergencies on weekends.

Per the memo, the work week for the two DPW employees was changed from five to four days, with one employee scheduled to work Mondays through Thursdays and the other Tuesdays through Fridays. The employees' weekly wages were reduced accordingly. Their health and other fringe benefits were not affected by the change. As noted in the memo, Respondent also reduced the hours of its other full-time employees to 32 per week. In addition, Dancer became a part time employee.

Dancer explained his decision to implement the reduced work week as follows:

> There were two pieces in my thinking and my decision-making. The first one, of course, was financial, the condition of the budget, the condition of the Village revenue. The second one was to protect benefits for employees. The way I imagined it was I could either lay someone off indefinitely to get the budget in alignment – that person would lose their benefits – or I could reduce hours across the board and people could maintain their benefits but keep the budget in line. It's that simple.

Dancer did not send a copy of the September 3 memo directly to Withey. Withey received it from Crandall sometime between September 3 and September 13.

Discussion and Conclusions of Law:

A public employer has the inherent managerial right under PERA to determine the size and scope of the services it provides to its citizens. *Metropolitan AFSCME Council No 23 and Local 1277 v City of Center Line,* 414 Mich 642, 660-661 (1982). The Court held in that case that a public employer must be permitted to make such decisions based on its assessment of factors such as need, available revenues, and the public interest, and that to require bargaining over these decisions raised serious questions of political accountability. The Court held that an employer has a duty to bargain over the impact on employees of its decision to reduce their numbers. However, it concluded that a contract proposal which allowed a municipal employer to lay off members of the bargaining unit "only in conjunction with layoffs and cutbacks in other departments," was not a mandatory subject of bargaining because it unduly restricted the employer's ability to make decisions about the size and scope of services.

As the Commission stated in *Benzie Co,* 1986 MERC Lab Op 55, 59, an employer's managerial right extends both to the determination of the number of employees it will employ

and the amount of resources it will commit to each of its various functions. It follows that a public employer does not have a duty to bargain over its decision to reduce the level of services it provides by reducing the number of employees rather than seeking more revenue from its taxpayers.

The Commission has long held, however, that the duty to bargain over "hours" set forth in Section 15 of PERA includes the obligation to bargain over the number of hours worked per week as well as how these hours are scheduled. *Flint Township,* 1974 MERC Lab Op 152. In decisions issued after *Center Line* and affirmed by the Courts, the Commission held that PERA imposes a duty on employers to bargain over the decision to reduce the number of days or hours employees regularly work rather than laying some of them off. *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); *Ionia Co Rd Comm*, 1984 MERC Lab Op 625, *aff'd* in unpublished opinion issued September 24, 1985, Docket No. 78969; *36th District Court,* 21 MPER 19 (2008), *aff'd* in an unpublished opinion issued September 29, 2009, Docket No. 285123; *Wayne Co,* 24 MPER 25 (2011). As it stated most recently in *Wayne Co,* the Commission has concluded that while an employer has the managerial right to decide to cut public services to save money, 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 an employer's exercise of its managerial prerogative. Moreover, as the Commission noted in *36th District Court* and in *Wayne Co:*

> [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.

Here, Respondent argues that "MERC case law requiring layoff instead of a reduction in hours" exalts form over substance. It asserts that these precedents are not applicable "where layoff is not practical and would lead to all employees being worse off." The cases above, however, do not "require layoff instead of a reduction in hours." Where, as here, the parties have no existing contract covering work hours or the length of the work week, an employer's obligation is merely to give the union the opportunity to bargain over whether the employees' work week will be reduced when Respondent decides to cut the services they provide.

Respondent argues that bargaining over a reduction in the workweek as an alternative to layoff is not practical, since the employer may not be able to wait to act until it can go through bargaining, mediation and fact finding in order to reach impasse and implement its proposal. However, the determination of whether an impasse exists is made on a case-by-case basis, taking into account the totality of the circumstances and the entire conduct of the parties. When the parties are negotiating an entire contract, an employer cannot normally isolate a single issue and declare impasse on that issue. *Flint Twp*, at 157. However, the Commission has recognized that it may be appropriate for an employer engaged in contract negotiations to implement its offer on a single issue when the parties have reached impasse on that issue and immediate action is required. *Wayne Co. (Attorney Unit),* 1995 MERC Lab Op 199; *Univ of Mich.*, 1988 MERC Lab Op 204 (no exceptions); *Wolverine Cmty Schs.* 1983 MERC Lab Op 655 (no exceptions). An employer's obligation is to engage in good faith bargaining with a sincere desire to reach

agreement and to refrain from unilateral action before the parties have exhausted the prospects of reaching an agreement. It is not true that an employer that proposes to reduce the workweek of unit employees as an alternative to laying some of them off must, in all situations, engage in protracted bargaining before it can lawfully implement its proposal.

Respondent is correct, of course, that reducing the workweek may have been better than laying one of the employees off for both the DPW employees and Respondent. Had Respondent given Charging Party the opportunity to bargain over these alternatives, Charging Party might have agreed to the reduced workweek rather than a layoff. It might also have proposed some other alternative, such as a reduction in fringe benefits. It is the fact that Respondent acted *unilaterally* that constitutes the alleged unfair labor practice.[4] When public employees designate a union to represent them for purposes of collective bargaining under Section 11 of the Act, their employer acquires an obligation under Section 15 to meet and bargain with that union with respect to their wages, hours and other terms and conditions of employment. Accompanying that obligation is a duty to refrain from unilateral action, even if the employer believes that one course of action is better for all parties.

In the instant case, Respondent presented no evidence that the parties had reached impasse over either the contract as a whole or its contract proposal to reduce the number of hours worked per week. There was also no evidence in the record that Respondent put Charging Party on notice that it needed to immediately reduce its work force before Respondent announced on September 3, 2010 that it was reducing the hours and number of days worked per week by its DPW employees.[5] In the absence of such evidence, I find that there was no impasse and that Respondent acted unilaterally when it announced the change. I conclude that Respondent violated its duty to bargain in good faith when it unilaterally announced on September 3, 2010 that it was reducing the number of hours and number of days worked per week for employees in the bargaining unit.

Finally, Respondent argues that if a traditional make whole remedy is ordered in this case, the employees will lose because Respondent will likely have to either eliminate one of its DPW positions or convert them both to part time positions without benefits. The traditional make-whole remedy for a unilateral change in conditions of employment, however, merely restores the status quo pending the employer's satisfaction of its obligation to bargain. A traditional remedy in this case would not prohibit the parties from negotiating an alternative to the elimination of positions or prohibit the employer from implementing its proposal if the parties are unable to agree and reach impasse. I am not persuaded that a departure from the traditional remedy is warranted in this case. I recommend, therefore, that the Commission issue the following order.

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[4] Respondent does not deny that it acted unilaterally to reduce the employees' hours. Rather, it asserted that it had no obligation to bargain over the reduction in hours.

[5] The Commission has consistently held that a union has no duty to demand bargaining if such a request would be futile or the decision is presented as a fait accompli. *Allendale Pub Schs*, 1997 MERC Lab Op 183, 189; *City of Westland*, 1987 MERC Lab Op 793, 797.

RECOMMENDED ORDER

The Village of Stockbridge, its officers, agents, and representatives shall:

1. Cease and desist from unilaterally changing the regularly scheduled days and hours of work of employees in the bargaining unit represented by Teamsters Local 580.

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

a. Reinstate the five-day, forty hour workweek that existed for bargaining unit employees prior to September 13, 2010 pending satisfaction of its obligation to bargain with Teamsters Local 580 over the reduction in days and hours of work.

b. Make employees whole for loss of pay suffered as a result of its unilateral decision to reduce the number of hours they regularly worked, with interest on the amounts owed at the statutory interest rate of five percent (5%) per annum, computed quarterly, and provide Teamsters Local 580 with a statement indicating how each employees' back pay was calculated.

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **VILLAGE OF STOCKBRIDGE** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally change the regularly scheduled days and hours of work of employees in the bargaining unit represented by Teamsters Local 580.

WE WILL reinstate the five-day, forty hour workweek that existed for bargaining unit employees prior to September 13, 2010 pending satisfaction of our obligation to bargain with Teamsters Local 580 over the reduction in the employees' days and hours of work.

WE WILL make bargaining unit employees whole for loss of pay suffered as a result of our unilateral decision to reduce the number of hours they regularly worked, with interest on the amounts owed at the statutory interest rate of five percent (5%) per annum, computed quarterly, and provide Teamsters Local 580 with a statement indicating how each employee's back pay was calculated.

As a public employer under PERA, we are obligated to bargain in good faith with representatives selected by the majority of our employees with respect to rates of pay, wages, hours of employment or other conditions of employment.

VILLAGE OF STOCKBRIDGE

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510. Case No. C10 I-233.