STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Public Employer-Respondent,

Case No. C07 K-252

-and-

TEAMSTERS LOCAL 214,
Labor Organization-Charging Party,

-and-

DENICE GREER and 194 MEMBERS
OF TEAMSTERS LOCAL 214,
Proposed Intervenors.
_____/

APPEARANCES:

Schultz and Young P.C., by Gregory T. Schultz, for the Respondent

Wayne A. Rudell P.L.C., by Wayne A. Rudell, for the Charging Party

Ernest L. Jarrett P.C., by Ernest L. Jarrett for the Proposed Intervenors

DECISION AND ORDER

On May 19, 2011, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order in the above matter finding that Respondent, Detroit Public Schools (Employer), violated §10 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210, as alleged in the charges. The ALJ found that Respondent repudiated its contractual obligations to Charging Party, Teamsters Local 214 (Union), by failing to timely restore pre-concession wage rates to a bargaining unit of school security officers that Charging Party represented and by failing to timely correct that deficiency upon the demand of Charging Party. The ALJ concluded that due to the clear and explicit language of the agreement between the parties, the Employer acted unlawfully by continuing to apply the wage reduction to the unit of school security officers after the expiration of the concession agreement. However, the ALJ did not recommend an award of back pay because, after the parties reached an impasse in their negotiations, the Employer imposed the wage rate proposed by the Union. He found that the imposed rate took into account the Employer's failure to end the wage reduction as agreed and brought the bargaining unit into close

parity with the concessions given by the other units, while still giving this unit an economic advantage over the others.

The Decision and Recommended Order was served upon the interested parties in accordance with §16 of PERA. Neither Charging Party nor Respondent filed exceptions to the ALJ's Decision and Recommended Order.

On June 13, 2011, Denice Greer and 194 members of Teamsters Local 214 filed their Motion to Intervene and Motion for an Extension of Time to File Exceptions and Brief. At the same time, they filed preliminary exceptions to the ALJ's Decision and Recommended Order. Pursuant to Rule 161(3) of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.161(3), the deadline for filing a response to Proposed Intervenors' motions to intervene and for extension of time was June 23, 2011. On July 6, 2011, Respondent filed its Response and Objections to Motion to Intervene and Motion for an Extension of Time to File Exceptions. On July 8, 2011, Respondent filed its Supplemental Response and Objections to Motion to Intervene and Motion for an Extension of Time to File Exceptions and brief. Inasmuch as both responses were untimely, they have not been considered. Therefore, Proposed Intervenors' July 25, 2011 Reply to Respondent's Response and Objections to Motion to Intervene and Motion for an Extension of Time to File Exceptions has not been considered.

In their preliminary exceptions, Proposed Intervenors assert that there was an ongoing contentious and adversarial relationship with Charging Party, their bargaining representative. Proposed Intervenors claim that the Union persistently denied their requests for information and rejected their efforts to have input in the dispute with the Employer. They also contend that the Union and the Employer stipulated to findings of fact that included events that had not occurred and were detrimental to Proposed Intervenors' interests. Further, they argue that the ALJ improperly relied on those stipulated facts and erred in concluding that back pay should not be awarded.

We have considered each of the arguments made in the Proposed Intervenors' motion to intervene and in their preliminary exceptions, and find that the motion to intervene must be denied.

Discussion and Conclusions of Law:

Under Rule 157 of the Commission's General Rules, 2002 AACS R 423.157, "persons having such an interest in the subject of the action that their presence in the action is essential to permit the commission to render complete relief shall be made parties and aligned as charging parties or respondents in accordance with their respective interests." It appears from the motion to intervene that the Proposed Intervenors seek to become parties to this action and be aligned as charging parties because they are dissatisfied with the Union's representation of their interests in this matter. Proposed Intervenors contend that the Employer unilaterally extended a wage concession agreement beyond its expiration and that they should have been awarded back pay as a result of the Employer's unlawful action.

Under §10(1)(e) of PERA, a public employer has a duty to bargain with the representatives of its employees. Where those employees have an exclusive representative, such as the Union in this case, the duty to bargain runs between the representative and the employer and not between individual employees and the employer. C*ity of Detroit (Wastewater Plant),* 1994 MERC Lab Op

884; 7 MPER 25122. It is the exclusive bargaining representative, not the individual bargaining unit members, that has the right to file an unfair labor practice charge against the employer for an alleged breach of the duty to bargain. Individual bargaining unit members cannot file a charge asserting that their employer has violated §10(1)(e) of PERA if the union does not agree to the filing *Detroit Pub Sch*, 1985 MERC Lab Op 789. See also, *Wayne Co (Cmty Mental Health Agency)*, 21 MPER 73 (2008) (no exceptions).

In this case, Charging Party is the exclusive bargaining representative for the bargaining unit that includes Proposed Intervenors. The Union is the entity with the authority to pursue claims against the Employer related to the collective bargaining agreement. Accordingly, Proposed Intervenors have no standing to file a charge alleging that the Employer violated its duty to bargain by unilaterally extending the wage concession agreement. Further, they have no right to intervene to raise this argument in the charge filed by the Union.

Proposed Intervenors' dissatisfaction with the Union cannot appropriately be resolved as part of this case as no charge has been filed against Teamsters Local 214 in this matter. Proposed Intervenors have filed a separate action against the Union that is currently pending before us in *Teamsters Local 214 -and- Denice Greer*, Case No. CU10 G-035. The breach of duty of fair representation claims that Proposed Intervenors assert against Charging Party should have been raised, if at all, in that case.

Since permitting Proposed Intervenors to intervene in this case would serve no legitimate purpose, their motion is denied. Inasmuch as neither Charging Party nor Respondent has filed exceptions in this matter the ALJ's Decision and Recommended Order is adopted.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission. The Motion to Intervene and Motion for an Extension of Time to File Exceptions and Brief filed by Proposed Intervenors is denied.

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:

DETROIT PUBLIC SCHOOLS,
Public Employer-Respondent, Case No. C07 K-252

-and-

TEAMSTERS LOCAL 214,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Wayne A. Rudell, for the Charging Party

Gregory T. Schultz, for the Respondent

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 *et seq*, this case was assigned to Doyle O'Connor, of the Michigan Administrative Hearing System acting on behalf of the Michigan Employment Relations Commission (MERC). The following findings of fact, conclusions of law, and recommended order are based on the entire record, including timely post-hearing briefs by the parties.

The Unfair Labor Practice Charge and Proceedings:

The original Charge in this matter was filed by Teamsters Local 214 (Union or Teamsters) against the Detroit Public Schools (Employer or DPS) on November 16, 2007, with later amendments and proposed amendments. The dispute involved a unit of school security officers and arose from a wage reduction concession agreement that was to have expired on June 30, 2007. Following the contractually scheduled restoration of the pre-concession wage rates, the parties were to have negotiated the successor rate of pay through a contractual wage reopener. It was asserted that the Employer improperly failed to end the wage reduction concessions and restore the proper higher wage rate on July 1, 2007, in repudiation of the existing collective bargaining agreement and in violation of the mutual duty to bargain in good faith. It was further asserted that in March 2008, the Employer improperly declared an impasse in the wage reopener bargaining and improperly imposed a new wage rate.

The parties engaged in extensive pre-trial efforts at voluntary resolution of the underlying wage dispute, including formal settlement conferences with the administrative law judge on multiple

dates, including January 31, 2008, September 14, 2009, and January 27, 2010. The parties meanwhile litigated multiple related unfair labor practice charges, unit composition disputes, representation election disputes, and a related grievance arbitration.[1]

In April of 2009, I denied cross-motions for summary judgment. The matter was tried on March 24 and May 26, 2010, with post-hearing briefs filed in August 2010.[2]

Findings of Fact:

The Teamsters represented three separate bargaining units of DPS employees, including the unit in dispute. All three of the Teamsters units negotiated and ratified separate agreements instituting wage reduction concessions of 5.71%, which began in 2005 and were to end in June of 2006. Successor agreements were negotiated and ratified by all three Teamsters units which extended those 5.71% wage reduction concessions through June 2007, with the original pre-concession wage rates to then be restored, following which the agreement required that the parties were to have a contract reopener limited to setting new wage rates for the period beginning July 1, 2007. Most, if not all, of the multiple other DPS non-Teamsters bargaining units negotiated and ratified similar wage concession agreements. It is undisputed that the District is in dire financial condition, with an emergency financial manager having been imposed.

In advance of the scheduled June 2007 wage restoration, the parties, as planned, negotiated over the wage reopener. A tentative agreement was reached to continue wage concessions, but at the rate of 3.71% annually, for all three Teamsters units. The 5.71% wage reduction was maintained, pending ratification votes by the members of the several separate Teamsters units. Two of the three Teamsters bargaining units ratified that tentative agreement; however, the third unit, comprised of school security officers, voted to reject the 2007 tentative agreement. In keeping with the practice of the parties, agreements were signed covering the two Teamsters units which ratified the new wage rate, with no agreement reached or signed at that point regarding the wage rate for the security officers unit. Most, if not all, of the other DPS non-Teamsters bargaining units again reached similar concession agreements.

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[1] The parties litigated an extremely contentious grievance arbitration proceeding related to the continuation of the 5.71% wage reduction before Arbitrator Joseph Girolamo, to an inconclusive award in case no. A07 I-0063. The parties also litigated related claims in multiple MERC unfair labor practice cases brought by the Teamsters against the Employer, including*: DPS*, C07 J-228*; DPS***,** C09 G-103*; DPS*, C10 F-129; *DPS*, C10 G-175. There were further claims litigated in a related case, *DPS*, R09 C-047 and in UC09 C-009. Additionally, a petition was filed by a competing labor organization in *DPS-MAP-Teamsters*, R10 B-020, seeking to replace Teamsters as the representative of the school security officers. The Teamsters pursued a charge against another competing labor organization in *POLC*, CU09 G-021. Ultimately, the entire security officer workforce was laid off and replaced by employees of a private contractor, regarding which the Teamsters sought and secured preliminary injunctive relief in Wayne Circuit Court, case # 10-008773-CL, which was later overturned in the Court of Appeals, and pursued *DPS*, C10 G-175, regarding the subcontracting of the work, which has not yet been decided.

[2] Following the filing of post-hearing briefs, the Employer, by letter of September 20, 2010, sought to strike portions of the Union's brief which argued alleged events which pre-dated the dispute in this matter, and which relied, allegedly improperly, on certain exhibits related to the Girolamo arbitration proceeding which were introduced in this proceeding for a limited purpose. The Employer's argument has merit, and I have not, in rendering this Decision, relied on the objected to portions of the Union's brief.

Despite the rejection by the security officers unit of the tentative agreement, and despite the fact that the collective bargaining agreement expressly required a July 1, 2007, restoration of the pre-concession wage rate pursuant to an economic reopener agreement, the DPS continued to apply the 5.71% wage reduction to the security officers. Thereafter, the Teamsters and DPS continued to bargain over the wage rates, with bargaining sessions held in August, September and December, 2007. A new director of labor relations was appointed by DPS, effective November 18, 2007, who met with the Teamsters in December 2007, following which she sought and secured authority from the District to restore the proper wage rate. With an initial hearing on this unfair labor practice charge set for January 31, 2008, the Employer ended its extra-contractual continuation of the 5.71% wage rate reduction, effective January 15, 2008. Bargaining then continued until the District asserted the existence of an impasse and imposed a new wage rate in March 2008.

At trial, in addition to presenting testimony the parties entered into stipulations of fact, which in relevant part included:

1. The District and the Union reached a tentative agreement (ratified by both parties) which included the following language:

   COMPENSATION/REOPENER

   Continue 5.71% wage reduction through June 30, 2007 by adding the following language to Article XXX, which shall be renamed from "Wages" to "Compensation":

   > The 5.71% wage reduction for each bargaining unit member initiated by the parties' 2005 letter of understanding shall continue through June 30, 2007. The parties agree to a reopener on the issue of wages and benefits for the period beginning July 1, 2007, with negotiations to begin immediately. If negotiations on the reopener fail to result in an agreement by June 30, 2007 on wage rates to be effective July 1, 2007, pre-reduction wage rates will be placed in effect on July 1, 2007, subject to continued bargaining obligations on the reopener.

2. Pursuant to the language in Paragraph 1, above, the parties signed a tentative agreement on or about June 29 or June 30, 2007, which would have reduced the concessions from 5.71% to 3.71% for the 2007-2008 Fiscal Year. Similar agreements were reached by the two other bargaining units represented by Teamsters Local 214.
3. The concession amount of 5.71% remained in effect on July 1, 2007.
4. On or about July 18, 2007, the District was notified that the tentative agreement had been rejected by the Union's membership. The tentative agreements reached by the other two Teamsters units were ratified by the membership of those units.
5. The concession amount of 5.71% remained in effect following notification to the District that the tentative agreement had been rejected.
6. The parties met in August, September and December of 2007 and had further discussions regarding resolution of the outstanding wage issue. No agreement was reached.

7. On January 15, 2008, Gwendolyn A. de Jongh, the District's Chief Labor Negotiator, sent a letter to David Sutton, Local 214 Business Representative, advising him that the concessions would end as soon as administratively possible.
8. The concessions did effectively end on or about January 15, 2008 as reflected in the paychecks received on or about February 5, 2008.
9. The parties met in late January 2008, and the District proposed concessions in the amount of 1.7% for the remainder of the fiscal year to achieve the 3.7% initially sought and agreed to by the two other Teamsters bargaining units. As part of the settlement, the District proposed that the District would not return the concessions that were taken between July 1, 2007 and January 15, 2008. These meetings occurred at MERC under the direction of ALJ O'Connor on January 31, 2008 and on February 4, 2008 at the District's Labor Relations office under the direction of mediator James Amar.
10. The Union countered with a proposal that the concessions for the remainder of the year be in the amount of 1.2%. The Union's proposal also incorporated the concept that the District would not return the concessions that were taken between July 1, 2007 and January 15, 2008. The Union's proposal also included resolution of a number of contract issues which the employer asserts were unrelated to the reopener.
11. During bargaining on February 15, 2008, the District passed an offer which incorporated the 1.2% concession amount proposed by the Union, included a task force to address the non-wage issues, and sought dismissal of identified ULPs and Arbitrations.
12. The Union did not respond to that offer on that day but left the negotiations indicating that they would get back to the employer on the offer.
13. By letter of March 6, 2008, Ms. de Jongh advised the Teamsters that DPS was declaring an impasse and implementing the 1.2% concession effective immediately.
14. Effective February 23, 2008, as reflected in the paychecks received on or about March 18, 2008, concessions of 1.2% took effect.
15. [The 1.2%] Concessions ended on June 30, 2008.

Following the Employer's March 6, 2008 imposition of the 1.2% wage reduction, the Teamsters did not seek a return to bargaining. On May 13, 2008, the Teamsters filed an amended charge challenging the propriety of the wage change imposed by the Employer.

Discussion and Conclusions of Law:

The Failure to Pay the Proper Wage Rate Beginning in July 2007

Under Section 15 of PERA, there is a duty to bargain over wages, hours and conditions of employment such that neither party may take unilateral action on a mandatory subject of bargaining

to alter an existing term or condition of employment, absent a good faith impasse in negotiations.[3] Wage rates are the most fundamental of the issues which are subject to the mandatory duty to bargain. A party can fulfill its obligation under the Act by bargaining about a subject and memorializing the resolution of that subject in the contract. Under such circumstances, the matter is "covered by" the agreement.[4] Once a public employer and union have fulfilled the duty to bargain, the parties have a right to rely on the contract as the statement of their obligations on any topic covered by that agreement.[5]

An alleged breach of contract will constitute a violation of PERA if a repudiation can be demonstrated.[6] Repudiation exists when 1) the contract breach is substantial, and has a significant impact on the bargaining unit and 2) no bona fide dispute over interpretation of the contract is involved.[7] The Commission will find a repudiation only when the actions of a party amount to a rewriting of the contract or a complete disregard for the contract as written.[8]

Pursuant to the plain language of the collective bargaining agreement, the 5.71% wage concession was to have ended on July 1, 2007. The parties reached a tentative agreement by June 30 to reduce the wage concession to 3.71%. The Employer maintained the 5.71% wage reduction while awaiting the result of the Teamsters' ratification process. On July 18, 2007, the District received notification from the Teamsters that the tentative agreement had been rejected by the membership. The parties returned to the bargaining process. Nonetheless, the District, without the consent of the Teamsters, continued to calculate wages based on the 5.71% reduction which had by contract expired by July 1, 2007.

The delay in restoration of the wage rate following the June 30 tentative agreement, which would have continued the reduction, but at a rate of 3.71%, was understandable and would not have, standing alone, led to the finding of a violation. A mere, and seeming good faith, delay in implementing a required change in wage rates is not a violation of the duty to bargain.[9] The parties' September and August meetings in which both sides recognized the need for the continuation of some form of substantial wage reduction could also excuse a delay in restoration of the proper wage rate.

However, by no later than the filing of the Charge in this matter on November 16, 2007, the Employer could no longer have held a reasonable expectation of an immediate voluntary resolution that would release it from the obligation to restore the wage rate to pre-concession levels. The Employer offered credible evidence that the failure to promptly restore the rate was at least in part a

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[3] *Port Huron Education Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 317 (1996); Central *Michigan Univ Faculty Ass'n v Central Michigan University*, 404 Mich 268, 277, (1978); *Local 1467, Intern Ass'n of Firefighters, AFL-CIO v City of Portage*, 134 Mich App 466, 472 (1984); *Plymouth Fire Fighters Ass'n, Local 1811, IAFF, AFL-CIO v City of Plymouth, 156* Mich App 220, 222-223 (1986).
[4] *Port Huron, supra* at 318; *St. Clair Intermediate Sch Dist*, 2000 MERC Lab Op 55, 61-62.
[5] *Port Huron, supra* at 327.
[6] See e.g. *City of Detroit (Transp Dept)*, 1984 MERC Lab Op 937, aff'd 150 Mich App 605 (1985) (employer found to have repudiated the contract by refusing to pay negotiated wage increases because it lacked funds); *Jonesville Bd of Ed*, 1980 MERC Lab Op 891, 900-901 (the Commission rejected the employer's attempt to justify its decision to alter the contractual wage rate based on economic necessity and a management rights clause that made no reference to wages).
[7] *Plymouth-Canton Comm Sch*, 1984 MERC Lab Op 894, 897.
[8] *Central Michigan Univ*, 1997 MERC Lab Op 501, 507; *Cass City Pub Sch*, 1980 MERC Lab Op 956, 960.
[9] *Ingham County*, 1989 MERC Lab Op 21.

result of significant and disruptive changes in personnel handling labor relations matters for DPS. The District was without a director of labor relations during a significant part of the dispute, with the position not filled until after the Charge in this matter was filed. The District did, within about two months of securing a new director of labor relations, restore the wage rate to its proper level. Nonetheless, unexplained inadvertence is not a viable legal defense where an Employer has improperly failed to pay several hundred workers at the undisputedly proper, and agreed upon, rate and over the protestations of the Union. The failure to pay the entire bargaining unit at its proper rate of pay, with no bona fide dispute as to the meaning of the controlling contractual provision, was a substantial breach of the contract and rose to the level of a repudiation by the Employer of its contractual and legal obligations.

The Employer's failure to restore the proper wage rate on July 1, 2007, was both a unilateral change in wages paid to all of the employees in the affected unit and an unlawful repudiation of an undisputed provision of the collective bargaining agreement in violation of the duty to bargain under Section 10(1)(e) of PERA.

The Imposition of a New Concessionary Wage Rate in March 2008

An employer may unilaterally impose changes in conditions of employment only where, after good faith bargaining, an impasse exists.[10] The Commission defines a bargaining impasse as the point at which the parties' positions have solidified and further bargaining would be useless.[11] The parties are at impasse when neither side is willing to compromise further.[12]

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.[13] In determining whether the parties have reached a good faith impasse, the Commission looks at a number of factors. Whether a bargaining impasse exists is a matter of judgment. The primary factors are whether there has been a reasonable period of bargaining, the good faith of the parties in negotiations, the importance of the issue or issues as to which there is disagreement, whether the parties' positions have become fixed, and whether both parties are aware of where the positions have solidified.[14]

The party asserting impasse bears the burden of establishing that impasse was reached; it must show that both parties, and not just one, were unwilling to compromise.[15] A good faith impasse will not generally be found where a party has not bargained in good faith, including where unremedied unfair labor practices have been committed by the party asserting impasse.[16]

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[10] *Central Michigan Univ Faculty Ass'n.*
[11] *Oakland Cmty College*, 2001 MERC Lab Op 272, 277; *Wayne Co (Attorney Unit)*, 1995 MERC Lab Op 199, 203; *City of Ishpeming*, 1985 MERC Lab Op 687; *City of Saginaw*, 1982 MERC Lab Op 727.
[12] *Oakland Comm College*, 2001 MERC Lab Op. 272, 277; *Wayne County (Attorney Unit)*, 1995 MERC Lab Op. 199, 203; *City of Saginaw*, 1982 MERC Lab Op. 727.
[13] *Flint Twp*, 1974 MERC Lab Op 152, 157; *Mecosta Co Park Comm*, 2001 MERC Lab Op 28, 32 (no exceptions).
[14] City of Saginaw¸ supra; Memphis Cmty Schs, 1998 MERC Lab Op 377 (no exceptions).
[15] *Oakland Comm College*, at 277.
[16] *City of Warren*, 1988 MERC Lab Op 761.

When the parties are negotiating an entire contract, an employer cannot normally isolate a single issue and declare impasse on that issue.[17] Here, the issue is less difficult because the parties were negotiating pursuant to a narrow economic reopener, such that the only issue necessarily before them was the sole question of the wage rate. While the parties each advanced non-economic, and therefore permissive, proposals at the table, the only issue on which the Employer acted unilaterally was the narrow question of the wage rate.

As acknowledged in the stipulation of facts, the parties met repeatedly after July 18, 2007 in an effort to resolve the wage reopener issue, after the failure of the membership of this one Teamsters bargaining unit to ratify the tentative agreement accepted by the other Teamsters units and by other DPS employee Unions. During those negotiations, the Employer sought to secure an agreement with this Teamsters unit which would not break the pattern financial agreement reached with other units. Such a matching agreement, in order to reach the 3.71% annualized concessions agreed to by the other units, would have required a continuing wage reduction of 1.7%, with no reimbursement for the wage concessions maintained during the period July 1, 2007 through January 15, 2008. The Teamsters sought throughout to secure a more favorable financial arrangement for the security officers than had been accepted by the other units.

After the January 2008 restoration of the proper wage rate, the Union proposed an ongoing wage reduction of 1.2% for the reminder of the fiscal year, that is, through June of 2008, with the District to not reimburse employees for the disputed wage concessions of July 2007 to January 2008. By combining the continued wage reduction of 5.71% from July 2007 into January 2008 with a 1.2 % reduction through June of 2008, that Union proposal would have yielded an annualized wage concession of slightly less than the 3.71% accepted by the other units, by about $25,000 in aggregate for this unit. The Union also proposed resolution of other non-economic issues. On February 15, 2008, the Employer for the first time offered to deviate from the pre-existing wage concession pattern set with the other units and countered by accepting the Teamsters' proposed percentage wage concession, even though it was less than the wage concession other units had accepted. The Employer declined to accept the proposals on other non-economic issues, and made its own additional proposals on non-economic issues. The Union left bargaining that day without responding to the Employer's proposal, but indicated they would do so shortly. On March 6, 2008, with no further response from the Union forthcoming after nearly three weeks, the Employer indicated its belief the parties were at an impasse, and the Employer imposed the 1.2% wage concession, consistent with the economic proposal made by the Union and accepted by the Employer.

Where the parties have engaged in extensive negotiations over a narrow range of topics, and especially where, as here, the party asserting impasse yielded on the economic issue in dispute and accepted the other side's proposal, it would be difficult to not find that impasse had been reached by March of 2008. Here, the Employer ultimately yielded to the Teamsters demand that this one unit secure a better financial deal than the others. It is significant that the bargaining teams for the two parties had reached a tentative agreement in July of 2007, which the Teamsters membership of this one unit then rejected, over the recommendation of their own bargaining team and despite the fact

[17] *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), supra; Univ of Mich*, 1988 MERC Lab Op 204 (no exceptions); *Wolverine Cmty Schs*, 1983 MERC Lab Op 655 (no exceptions).

that the members of the other two Teamsters units accepted the same economic package. Moreover, in February of 2008, when the Employer offered to grant the Teamsters' economic demand despite breaking the pattern deal the Employer had hoped to maintain, it was the Teamsters bargaining team which walked away from the deal.

While unremedied unfair labor practices, such as the failure to restore the proper wage rate in July of 2007, may preclude a finding of a good faith impasse, it need not here. The Employer's July 2007 extension of the wage reduction, while done in reasonable anticipation of a voluntary extension, was nonetheless improper and disruptive of the bargaining relationship. However, the improper conduct was cured, if imperfectly, by the January 2008 restoration of the proper wage level. The new labor relations director sought, and secured, institutional authorization to restore that wage rate without pre-condition. The Employer returned to the table and negotiated with the Teamsters in apparent good faith, such that the Employer yielded on its important and legitimate central bargaining goal of maintaining parity among the different units. For its part, the Teamsters bargaining team similarly compromised by lowering its wage demand. When the Teamsters offered to accept an ongoing wage reduction of 1.2%, with no retroactive correction of the earlier improper wage deduction, the Employer finally accepted the Union's economic demand. That financial combination gave this unit an added benefit of approximately $25,000, distributed throughout the unit. While both sides threw in additional demands on non-economic issues, both also knew that the additional issues were not within the parameters of the economic reopener. It appeared a good faith agreement was on the table as to the sole issue of the proper wage rate. Not only was neither party willing to entertain further movement in bargaining on the wage reopener, their representatives were in agreement on the wage issue. They were legitimately at a deadlock.[18]

Rather than accept the Employer's apparent acquiescence in the Teamsters' proposed economic settlement, the Teamsters bargaining team caucused for less than an hour, and announced they were leaving and would get back to the Employer at some unspecified point in time. After nearly three weeks of silence from the Union, the Employer sent its letter of March 6, 2008, unconditionally imposing the 1.2% wage reduction level which both sides had proposed, for the remainder of the fiscal year which was to conclude on June 30, 2008.

In sum, the parties were faced with inherently difficult negotiations over the sole question of the rate at which employee wages would be reduced by an Employer in undisputed financial distress. The bargainers reached a good faith resolution in June of 2007, which was rejected by the unit members. DPS acted improperly in continuing the 5.71% wage reduction after the July 18, 2007 rejection of the package, and in particularly after the November 2007, filing of the charge in this matter. The Employer restored the status quo ante, albeit imperfectly, in January of 2008 when it began paying the proper wage rate. Continued discussions between the parties led the Teamsters to modify their economic demands and led the Employer to accept the Teamsters 1.2% proposal, in what was a very significant move by the Employer off of its insistence on parity amongst the several units.

The deal should have been, and in essence was, concluded at that point. Both parties recognized that any delay in implementation of the new rate of wage reduction would have meant, merely by the passage of time, that a new higher rate of wage reduction would be necessary to

[18] *Oakland Comm College, supra.*

secure the same annualized outcome. It is apparent that the principle bargainers for the two sides acted reasonably in reaching a responsible compromise. Even after protracted negotiations, and much litigation, the Teamsters simply could not persuade their constituency in this one unit of the wisdom of that compromise package.

Viewing the totality of these circumstances, I find that the parties were at a legitimate impasse in bargaining following good faith negotiations and that, therefore, the Employer did not act improperly in imposing the 1.2% wage reduction rate.

Conclusion and Recommended Remedy

For the reasons set forth above, I find that the Employer violated the duty to bargain in good faith by repudiating its agreement with the Teamsters through failing to restore the proper wage rate on July 1, 2007, and by failing to timely correct that deficiency upon the demand by the Teamsters.

I do not recommend the awarding of back pay for the period of July 1, 2007 through January 15, 2008, for to do so now would not restore the bargaining relationship nor would it effectuate the purposes of the Act. When the bargainers reached apparent agreement on February 15, 2008 on the annualized wage rate for the period July 1, 2007 to June 30, 2008, and the parties then nonetheless reached impasse in bargaining, it would have been a mere accounting trick for the Employer to have done other than it did. In order to reach the annualized wage reduction proposed by both sides, the Employer could have reimbursed employees for the improperly maintained wage reduction of 5.71% for the period of July 2007 to January 15, 2008 and then imposed an even larger wage reduction for the period March 2008 to June 2008 than the 1.2% proposed by both sides. Ordering it to do so now would further elevate form over substance, where instead the Employer imposed just what the Teamsters had proposed, a 1.2% reduction with no back pay, which taken together brought this Teamsters unit into close parity with the concessions given by the other units, while still offering this one unit an economic advantage over the others. Further, such an order would fail to take into account the reality of the fact that if the Employer paid out the disputed sums now, it could not, with the elimination of the unit, otherwise recoup the annualized savings which both sides recognized were necessary and proposed.

Tolerating the Employer's action in imposing both a new wage rate and no back pay, for what I found to have been an improper change in the wage rate, could be seen as a ratification of a seeming retroactive change in conditions of employment. It is not. A claim by an employer of an ability to impose retroactive changes in economic conditions of employment could not be countenanced, even assuming a legitimate impasse. First, it must be observed that the basic employment agreement involves the individual exchange of labor for value. It may offer little solace, but every employee is free to individually refuse to provide labor at a proposed reduced rate, regardless if that rate is agreed to by a union or lawfully imposed by an employer. It is entirely different, and improper, for an employer to accept labor performed at a compensation rate actually offered and paid and to then seek to retroactively reduce that rate by recouping, for the employer's own benefit, wages or benefits already tendered to the employee.[19]

[19] Such an effort would regardless likely run afoul of the Michigan Payment of Wages Act, MCL 408.481, *et seq.* See also, in a corollary context, *Conn et al v Wage and Hour Div and DPS*, Case # 2010-948, 949, 950, 951 (April 22, 2011, Wright), finding unlawful an agreement to reduce wages by payment by the Employer with what amounted to IOUs.

Under these singular facts, I find that the Employer did not violate its duty to bargain in good faith when it imposed a new wage rate effective March 6, 2008, which had been proposed by the Union and accepted by the Employer, and which encompassed leaving in place earlier continued wage concessions. I have carefully considered all other arguments asserted by the parties in this matter and have determined that they do not warrant a change in the result.[20]

I recommend that the Commission issue the following order:

RECOMMENDED ORDER

Detroit Public Schools, its officers, agents, and representatives shall:

Cease and desist from:

1. Unilaterally altering negotiated wage rates for employees represented by an exclusive bargaining agent, absent an impasse following good faith bargaining, and

2. Refusing to bargain in good faith with an exclusive bargaining agent of its employees, including by repudiating the terms of agreements reached with an exclusive bargaining agent.

I do not recommend any award of backpay, as the Employer's legitimate imposition of a new wage scheme in March 2008 obviated any backpay liability. I also do not recommend the ordering of the posting of a notice, as the relevant workforce is no longer employed by DPS.

I recommend the dismissal of the remainder of the claims raised in the unfair labor practice charge.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Doyle O'Connor
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____

[20] In particular, the parties engaged in significant argument over what arguments were asserted in the collateral arbitration proceedings, a dispute which I find irrelevant to my holdings in this matter. See, *AFSCME (Wayne County)* 23 MPER 1 (2010), *aff'd*, Mich Ct of App # 295536 (March 22, 2011) for the proposition that it is generally not an unfair labor practice to advance a colorable argument in a collateral forum.