STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF FLINT,
Public Employer - Respondent,

- and - Case No. C09 F-083

AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, MICHIGAN COUNCIL 25 AND LOCAL 1600,
Labor Organization - Charging Party.
_____/

APPEARANCES:

Winegarden, Haley, Lindholm & Robertson, by L. David Lawson, for the Respondent

Kenneth J. Bailey, Staff Attorney, Michigan AFSCME Council 25, for the Charging Party

DECISION AND ORDER

On May 18, 2012, Administrative Law Judge Doyle O'Connor 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

_____
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

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Labor Organization-Charging Party.
_____/

APPEARANCES:

Kenneth J. Bailey, for the Charging Party

L. David Lawson, for Respondent Public Employer

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, this case was assigned to Doyle O'Connor, Administrative Law Judge (ALJ) of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (MERC). Based upon the entire record, I make the following findings of fact, conclusions of law, and recommended order:

The Unfair Labor Practice Charge:

On June 9, 2009, the Charge was filed in this matter by the American Federation of State County and Municipal Employees, Michigan Council 25 and Local 1600 (AFSCME or the Union) against the City of Flint (Employer). It was alleged that the Mayor of Flint had, in January and February of 2009, met with the Union and reached and signed multiple settlements related to several separate pending grievances. It was further alleged that, after that mayor had retired, the City repudiated the several settlements, leaving six separate settlements unimplemented, and refused to even respond to the Union on the matters.

The matter was set for hearing. The parties were referred for guidance to the Commission decision in *Taylor Schools*, 22 MPER 29 (2009), and to the then recently

issued ALJ decision in *Oakland Univ*, C09 K-241, later adopted by the Commission at 23 MPER 86 (2010)[1]. The hearing date was adjourned multiple times as the parties unsuccessfully sought voluntary resolution.

On October 8, 2010, the Union filed a motion for summary disposition, supported by affidavit. In that motion, the Union acknowledged that five of the earlier disputed six settlements had in fact been implemented, albeit subsequent to the filing of the Charge in this matter, leaving only a dispute over the alleged failure to implement a settlement related to the payment of wage supplements to specific individual employees with workers compensation covered injuries. On October 25, 2010, the Employer filed a response to the AFSCME motion, acknowledging that the disputed settlement had been signed by the then Mayor and had not been complied with. The Employer asserted that the settlement was illegal and therefore unenforceable as it required payments in excess of the minimum payments required by the Workers Compensation statute. The Union's motion was denied on November 4, 2010, premised on a finding that there appeared to be material facts in dispute.

On December 8, 2010 the Employer filed its own motion for summary disposition, asserting that there were no material disputes of fact, and sought adjournment of the hearing scheduled for that day. The matter was not heard that day and the parties engaged in substantive settlement discussions. On May 12, 2011, the Employer, through new counsel, filed what it characterized as a supplemental brief in opposition to the Union's earlier denied motion for summary disposition. On June 23, 2011, the Union renewed its earlier motion for summary disposition; the settlement efforts having apparently proven fruitless. By concurrence of counsel, the matter was heard on oral argument on October 27, 2011, with a bench opinion issued that day.

Findings of Fact and Discussion and Conclusions of Law:

After considering the pleadings and arguments of both parties, I concluded that there were no legitimate issues of material fact and that a decision on summary disposition was appropriate pursuant to Commission Rule R 423.165. See also *Detroit Public Schools*, 22 MPER 19 (2009) and *Oakland County and Oakland County Sheriff v Oakland County Deputy Sheriffs Assoc*, 282 Mich App 266 (2009). At hearing, both parties expressly concurred that there were no material disputes of fact and that, therefore, summary disposition was appropriate. Accordingly, I rendered a bench decision with the substantive portion of my findings of fact and conclusions of law from the bench opinion set forth below.[2]

[1] Later affirmed by the Michigan Court of Appeals in *Oakland Univ AAUP v Oakland Univ*, (Unpub op 2/9/12, Case # 300680).

[2] The transcript excerpt reproduced herein contains typographical corrections and other non-substantive edits for clarity purposes. The unedited transcript is maintained within the Commission case file.

JUDGE O'CONNOR:

> On the competing motions, it doesn't appear that there are any significant dispute of fact.
>
> As I understand it, first, the mayor entered into signed settlement agreements of multiple unrelated grievances with AFSCME, which is the exclusive bargaining agent.
>
> Number two, six agreements were involved in the initial charge with AFSCME later taking the position that the employer complied with five of those settlements, but not the sixth. The sixth one, related to some workers' comp related issues, is still outstanding.
>
> Number three, the employer asserts that it was unusual for the mayor, perhaps especially an outgoing mayor, to settle claims without the human resources or labor relations director involvement. There [is no] dispute… that the mayor had the authority and certainly the apparent authority to enter into a grievance settlement.
>
> Number four, that none of the approximately nine intended beneficiaries of the sixth settlement agreement received the [full] benefit of that settlement.
>
> The charge is that the refusal to comply with the settlement agreement is a repudiation of that agreement and, therefore, an unfair labor practice.
>
> Number six, the employer contends the agreement was illegal, essentially, under the worker's comp statute.
>
> But the issue I'm focused on is why isn't this controlled by the Commission decision in *Oakland University*, Case No. C08 K-241, [23 MPER 86 (2010)] finding it to be a repudiation for an employer to fail to comply with the terms of a prior settlement agreement. In that case, the employer's defense was an assertion that the President of the university had signed the settlement agreement, but an argument was made that such an agreement otherwise violates the statute of fraud and required ratification by the university board.

* * *

As I indicated earlier, the facts are not in dispute. AFSCME is the exclusive bargaining agent of certain City of Flint employees. It met with the mayor of Flint, and settled various grievances. That mayor then left office some period of time after those grievance settlements were reached. [It] was alleged that the employer refused to comply with some six separate settlements, and a charge was filed. During the pendency of the charge, AFSCME notified the Commission that the employer had subsequently complied with five of the settlements. I'm not going to address those.

The sixth one is a settlement agreement related to partial worker's compensation benefits. A copy of that settlement agreement is attached to one of the pleadings, to the Union's motion, and it's not in dispute. It was signed by the mayor on January 13th, 2009. And one of the provisos of it was that individuals who were working essentially light duty jobs, jobs other than their normal jobs because they were injured and therefore receiving partial workers' comp benefits, would receive certain monetary increases and bonuses which had been received by everyone else in the bargaining unit or essentially everyone else, and that those increases and bonuses, while subject to normal tax deductions, would not be treated as income for the purpose of maintaining their right to continue to receive regularly scheduled partial payments under workers' compensation.

Essentially, the settlement agreement said the Employer would not offset those payments against the workers' comp payments. The employer has asserted that this agreement is unenforceable because it violates the workers' compensation statute. I don't see that. The employer ordinarily under the workers' compensation statute, in a variety of circumstances, is entitled to offset the receipt of certain benefits against workers' compensation payments. Being entitled to offset those amounts does not mean the employer is obliged to offset those amounts. The Employer here has agreed not to offset those amounts.

The Employer's brief cites to *Maner v Ford Motor Company*, 196 Mich App 470 (1992), which is an appellate decision which reversed *Smith v Michigan Bell*, 189 Mich App 125 (1991), decision, and made precisely that finding, that the offset is limited to the statutorily mandated offset.

That is essentially where an insurance carrier provides benefits in lieu of worker's comp benefits which are then being disputed and has assignments made, they can then recoup that. That decision

subsequently became of less relevance when the statute was amended at section 418.354 regarding the offset question to change the framework somewhat.

I [also] don't find that this case offends the exclusive remedy proviso. This isn't an effort by individual employees to litigate or claim in some other forum benefits for their injury in addition to benefits provided by the Worker's Compensation Act.

This is a voluntary payment by the Employer pursuant to a settlement agreement [with AFSCME]. I don't see how it could offend the exclusive remedy provision. And regardless, this case is subject to the Public Employment Relations Act, and the bargaining obligations under that Act. And it will be analyzed under that statute's obligation. PERA does not set wages or other compensation, including workers' compensation. It leaves that to the parties to bargain. PERA does compel compliance with agreements once they are reached.

Seen in that light, this case is a run-of-the-mill repudiation of an otherwise binding settlement. There's no uncertainty as to the terms of this settlement. The parties understand the terms of the settlement. They don't disagree about the terms of the settlement. This case I find indistinguishable from *Oakland University* where a settlement was reached at one point in time and later the employer concluded that there was some legal impediment to complying with that settlement.

We have a body of case law on repudiation. And it includes cases where employers rightfully asserted that changes in circumstances disadvantaged the employer if it complied with negotiated agreements, previously negotiated agreements, including where Federal funding would be lost if particular work rules were complied with, where employers asserted that they had to ignore seniority provisions of the contract in order to comply with affirmative action targets required under Federal law.

In each instance where the contractual agreement was unambiguous and where there was not a *bona fide* dispute as to the meaning of the agreement, not enforceability or collateral impact on some other rights in some other forum, where there's no *bona fide* dispute as to the meaning of the agreement we will and do find a repudiation. I think that here the Employer has relied on a tortured reading of the workers' comp statute and obligations under it and case law interpreting it.

> There is no affront here to the workers' comp statute, no disadvantage to any innocent third party carrier. This is a situation, as reflected in the Employer's brief, where the employer is self-insured. You could have a situation where an Employer and the Union reached an agreement that shifted cost in a way which unfairly, and perhaps even unlawfully, disadvantaged an insurance carrier, and the [carrier] might have a claim. This is a self-insured situation where the Employer is agreeing essentially to pay out of one pocket rather than out of another pocket.
>
> The Employer agreed to pay sums above the minimum required by the workers' comp statute, and that is not a prohibited act as I understand it under the workers' compensation statute. The facts, as I detailed them above, support a repudiation finding where there is no material dispute. Number one, a settlement was reached and executed by a person with authority to do so on behalf of the Employer. Number two, there's no dispute as to the terms of the settlement, nor as to which employees those terms apply to. Number three, there is no ambiguity to the terms of the settlement. And number four, the Employer has refused to comply with the settlement terms.
>
> I am, therefore, issuing this bench opinion, which will be followed by a written decision and a recommendation that the Commission adopt an order granting as relief the finding of a repudiation, which is a refusal to bargain in good faith, and enforcing the prior settlement agreement.

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. As set forth on the record, I find that the Employer violated the Act in repudiating an unambiguous and otherwise binding settlement between the parties. Accordingly, I hereby recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

The unfair labor practice charge is sustained. The City of Flint, its officers, agents, and representatives shall:

1. Cease and desist from:

    a. Repudiating or failing to comply with the terms of all settlement agreements reached with AFSCME, including the January 13, 2009

Settlement Agreement regarding payments to be received by individuals then receiving partial workers' compensation benefits.

b. Failing to make payments required pursuant to that January 13, 2009 settlement agreement.

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

   a. Comply with the terms of settlement agreements reached with AFSCME, including by expressly revoking the City's repudiation of the January 13, 2009 Settlement Agreement.
   b. Make all payments which were promised to each employee covered by the terms of the January 13, 2009 Settlement Agreement, together with statutory interest on all late payments.

3. Post the attached notice to employees in a conspicuous place at each relevant City of Flint worksite, and post it prominently on any website maintained by the City of Flint for employee access, for a period of thirty (30) consecutive days. The Union is to be simultaneously provided a copy of the posting and notice of the location(s) where it was posted.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Doyle O'Connor
Administrative Law Judge
Michigan Administrative Hearing System

Dated: May 18, 2012

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the CITY OF FLINT, a public employer under the PUBLIC EMPLOYMENT RELATIONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT

a. Repudiate or fail to comply with the terms of all settlement agreements reached with AFSCME, including the January 13, 2009 settlement agreement.
b. Fail to make payments required pursuant to that January 13, 2009 settlement agreement.

WE WILL

a. Comply with the terms of all settlement agreements reached with AFSCME.
b. Expressly revoke the City's repudiation of the January 13, 2009 Settlement Agreement.
c. Make all payments which were promised to each employee covered by the terms of the January 13, 2009 Settlement Agreement, together with statutory interest on all late payments.

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

CITY OF FLINT

By:_____

Title:_____

Date:_____

This notice must be posted for thirty (30) consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, Detroit, MI 48202-2988. Telephone: (313) 456-3510.