

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

WAYNE COUNTY,
Public Employer-Respondent,

Case No. C09 J-211

-and-

MICHIGAN AFSCME COUNCIL 25 AND
ITS AFFILIATED LOCALS 25, 101, 409, 1659,
1862, 2057, 2926, AND 3317,
Labor Organizations-Charging Parties.

APPEARANCES:

Barbara Johnson, Wayne County Labor Relations Division, for Respondent, before the Administrative Law Judge; Deborah K. Blair-Krosnicki, Chief Labor Relations Analyst, for Respondent on Exceptions

Jamil Akhtar PC, by Jamil Akhtar, for Charging Parties

DECISION AND ORDER

On September 23, 2011, Administrative Law Judge (ALJ) David M. Peltz issued his Decision and Recommended Order in the above matter, finding that Respondent, Wayne County (Employer), violated §10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e), by eliminating the practice of providing health care benefits to employees who retire on duty or nonduty disability pensions, without first bargaining over the subject with Charging Parties, Michigan AFSCME Council 25 and its affiliated Locals 25, 101, 409, 1659, 1862, 2057, 2926, and 3317 (referred to collectively as Unions). Noting that retirement and health care benefits are mandatory subjects of bargaining, the ALJ reasoned that Respondent's more than thirty year practice of allowing employees who retire on disability pensions before reaching the prescribed age and service requirements to collect health care benefits constituted a binding past practice that could not be altered without bargaining. The ALJ stated that if he had the authority to do so, he would recommend that Respondent be required to pay attorney fees and costs because he found the circumstances of Respondent's violation to be "particularly egregious" and because the Commission has found that Respondent violated §10(1)(e) in several different cases in the past few years. The ALJ recommended that

we order Respondent to cease and desist from making unilateral changes in terms and conditions of employment and to provide affirmative relief to the employees harmed by Respondent's unlawful acts. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with §16 of PERA. After requesting and receiving an extension of time, Respondent filed exceptions on November 16, 2011. Charging Party did not file a response to the exceptions.

In its exceptions, Respondent asserts that the ALJ erred in concluding that Respondent made an unlawful unilateral change to terms and conditions of employment when it decided to end the past practice of allowing employees who retired on disability pensions to collect health care benefits, regardless of age or years of service. Respondent contends that the past practice of granting health care benefits to retirees receiving a duty or nonduty disability pension was superseded by the parties' 2008 collective bargaining agreements that incorporate the 2006 Wayne County Health and Welfare Benefit Plan, which contains language that specifically reserves to Respondent the authority to make the "full and final determination as to all issues concerning eligibility for benefits." Respondent also argues that the ALJ erred by considering past MERC cases, in which Respondent was found liable for unfair labor practices. Respondent accuses the ALJ of inferring that Respondent has committed unfair labor practices in this case because it committed unfair labor practices in the past and argues that the ALJ's use of past cases in his analysis shows the ALJ's bias against Respondent. Further, Respondent asserts error in the portion of the ALJ's decision suggesting that this would be an appropriate case for an award of costs and attorney fees to Charging Parties, if we had the authority to make such an award.

I have reviewed Respondent's exceptions and find them to be without merit.

Factual Summary:

I adopt the findings of fact as set forth in the ALJ's Decision and Recommended Order and will not repeat them here, except as necessary. For many years, the collective bargaining agreements between Charging Parties and Respondent have included provisions for pensions and health care benefits for retirees. It is undisputed that, for over thirty years prior to the April 19, 2010 hearing in this matter, Respondent consistently provided health care benefits to retirees receiving a duty disability pension without regard to age or years of service and to retirees receiving a nonduty disability pension with ten years of credited service. Since at least 2000, the parties' collective bargaining agreements have limited health care benefits to retirees who meet certain age and service requirements. None of the parties' agreements covering the years 2000-2004 expressly address health care benefits for those who retire on the basis of disability.

The parties' subsequent agreements¹ have not substantially differed with respect to the treatment of health care benefits for employees who retired on disability pensions. In 2006, a revised Wayne County Health and Welfare Benefit Plan was issued. This Health and Welfare Benefit Plan was expressly adopted in the collective bargaining agreement between Respondent

¹ The most recent of the parties' agreements in the record expired September 30, 2011,

and Local 3317 covering the period from 2004 to 2008² as well as in the agreement covering 2008 to 2011. The collective bargaining agreements covering the period from 2004 to 2008 between Respondent and Locals 25, 101, 409, and 1659,³ and between Respondent and Locals 1862, 2057, and 2926, which were both executed in 2008, adopt the Health and Welfare Benefit Plan without mention of the date of the Plan. All three 2000 to 2004 collective bargaining agreements between Respondent and Charging Parties expressly adopt the 1990 version of the Health and Welfare Benefit Plan. Since 2008, when the most recent agreements between Respondent and Charging Parties became effective, at least four bargaining unit members retired on disability pensions and were provided with medical benefits.

It is undisputed that at the October 26, 2009 meeting of the Wayne County Employees Retirement Board of Directors, the County discussed with the Board the issue of eliminating medical benefits for employees who are granted a disability pension. On October 30, 2009, Charging Parties filed the charge in this matter. On December 4, 2009, Respondent moved for summary disposition contending that the change in medical benefit eligibility for duty and nonduty disability retirees, which Charging Parties alleged Respondent planned to implement on November 1, 2009, had not occurred. Respondent argued that because all employees who received a duty or nonduty disability pension remained eligible for medical benefits, there was no basis for Charging Parties' claim of repudiation.

On March 17, 2010, Respondent issued Administrative Personnel Order 1-2010, which provided that as of May 1, 2010, duty and nonduty disability retirees would only be eligible to receive "discretionary" health care benefits if they also met the age and service requirements for health care benefits with a service pension.

Discussion and Conclusions of Law:

The ALJ's Finding That Respondent Breached Its Duty to Bargain

Given Respondent's undisputed, consistent thirty year practice of not requiring retirees receiving a pension based on disability to meet age or years of service requirements for receipt of health insurance benefits, the ALJ concluded that the parties had tacitly agreed to amend the terms of the collective bargaining agreements to allow disability retirees to receive health care benefits without regard to their age or years of service. The ALJ found that the tacit agreement was sufficient to amend the contract in this case because the collective bargaining agreement did not specifically address the issue of health care benefits for persons retiring on the basis of disability. The ALJ also concluded that Respondent's more than thirty year practice of providing health care benefits to all former employees receiving pensions on the basis of disability was so widely acknowledged and mutually accepted that it became a term and condition of employment.

² The date the parties reached agreement for the 2004-2008 contract between Respondent and Local 3317 is not clear from the record, but was apparently sometime after December 1, 2006 when the latest Wayne County Health and Welfare Benefit Plan became effective.

³ Respondent and Locals 25, 101, 409, and 1659 had not reached a new agreement at the time the record closed in this matter.

Upon thorough review of the record in this matter, I agree with the ALJ's conclusions that a past practice was established, which became a term and condition of employment, for the reasons stated in the ALJ's Decision and Recommended Order.

It is undisputed that the benefits at issue here are mandatory subjects of bargaining. Thus, the parties are bound by their collective bargaining agreements unless their agreements are modified or supplemented. *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 330 (1996) and *Detroit Police Officers Ass'n v Detroit*, 452 Mich 339 (1996) stand for the proposition that a past practice that contradicts terms of a collective bargaining agreement provision may rise to the level of an agreement to modify the contract. Here, Respondent does not dispute the fact that the parties had amended their collective bargaining agreements by more than thirty years of past practice. Indeed, Respondent concedes that the past practice bound the parties until the collective bargaining agreements executed in 2008. Respondent states on page 2 of its exceptions, "The old past practice granting the retiree healthcare insurance to those granted a duty or nonduty disability pension was obviously superseded by the new collective bargaining agreements (which incorporated a new health and welfare benefit plan)." Respondent appears to agree that there was a binding past practice, but contends that the past practice was superseded by the 2008 collective bargaining agreements.

In support of its assertion the past practice of granting health care benefits to retirees receiving a duty or nonduty disability pension was superseded by the parties' 2008 collective bargaining agreements, Respondent points to language in Section 2 of the 2006 Health and Welfare Benefit Plan, which specifically reserves to Respondent's Benefit Plan Administrator the authority to make the "full and final determination as to all issues concerning eligibility for benefits" and provides that the Benefit Plan Administrator shall "interpret the Benefit Plan and shall decide interpretation and application of the Benefit Plan." However, this same language is found in the final paragraph of the 1990 Health and Welfare Benefit Plan. It does not change the authority of the Benefit Plan Administrator and gives no support to Respondent's contention that incorporating the 2006 Health and Welfare Benefit Plan in the 2008 collective bargaining agreements gave Respondent the right to end the practice of providing health care benefits to retirees receiving pensions based on disability.

Moreover, there is no appreciable difference between the language of the 2000-2004 contracts and the contracts executed in 2008 with respect to the eligibility of disability pension recipients for health care benefits. Respondent has argued that the 2006 Health and Welfare Benefit Plan was incorporated by reference into the 2008 collective bargaining agreements, and that language in that plan makes the age and service requirements for health care benefits applicable to all retirees including those who retire on the basis of disability. However, neither the 2006 Health and Welfare Benefit Plan, nor any of the contracts executed in 2008 contain any express reference to health care benefits for retirees receiving disability pensions. Moreover, there is no relevant difference between the 1990 Health and Welfare Benefit Plan incorporated in the 2000-2004 contracts and the 2006 Plan with respect to the age and service requirements for healthcare benefits; like both sets of collective bargaining agreements, both plans generally tie eligibility for health care benefits to eligibility for a pension and make no mention of health care benefits for those who retire on the basis of disability. In light of the past practice related to health care benefits specifically for disability retirees, there must be language specifically

addressing health care benefits for disability retirees to find that the contract language ended the past practice.

Although Respondent contends that the past practice of granting health care insurance to retirees receiving a duty or nonduty disability pension was superseded by the parties' 2008 collective bargaining agreements, Respondent acknowledges in its exceptions that it continued to adhere to its practice of granting health care benefits to disability retirees for a “few years (2008 to 2010)” after the new agreements were in place. *If* the new contracts ended the past practice, it should have been clear to all parties at the time the new contracts were executed that the practice of granting health care benefits to disability retirees had come to an end. However, there is no evidence in the record indicating that Charging Parties were aware, at the time the 2008 contracts were executed, that retirees receiving disability pensions would no longer be eligible for health care benefits unless they met the age and years of service requirements for a standard pension.

Further, Respondent has failed to show that the parties bargained over the applicability of health care insurance age or service requirements for retirees receiving disability pensions when the parties negotiated the new contracts in 2008. Respondent offered no evidence that it informed Charging Parties that the 2008 contracts were intended to end the practice of providing health care benefits to disability pension retirees who did not meet the age and service requirements for a pension that is not based on disability. Additionally, Respondent has failed to show that Charging Party waived its right to bargain over the termination of the past practice. A waiver of bargaining rights must be explicit, clear, and unmistakable. See *Amalgamated Transit Union, v SEMTA*, 437 Mich 441, 460-461, (1991), finding, for there to be a waiver, there must be “evidence that the matter in issue was ‘fully discussed and consciously explored during negotiations and the union must have consciously yielded or clearly and unmistakably waived its interest in the matter.’⁴” Here, there is no evidence that Charging Parties were aware that the termination of the past practice was an issue during the bargaining for the contracts executed in 2008. Respondent had a duty to give notice and an opportunity to bargain over the termination of the past practice, before it terminated the practice. See e.g. *Capital Area Transportation Authority*, 1994 MERC Lab Op 921. Instead, Respondent presented the termination of the past practice to Charging Parties as a *fait accompli* when it issued Administrative Personnel Order 1-2010. By doing so, Respondent breached its duty to bargain.

I further agree with the ALJ that Respondent's reliance on *Butler v Wayne Co*, 289 Mich App 664 (2010) is misplaced. In *Butler*, retirees filed a class-action suit alleging that the Employer unlawfully changed the method for calculation of supplemental life insurance premiums from a flat rate structure to an age rated system. The Court of Appeals concluded that the express terms of the Wayne County Health and Welfare Benefit Plan, which had been incorporated into the parties' contract, specifically authorized the Employer to change to an age rated premium system. Here, there is no specific language in either the contract or in the Wayne County Health and Welfare Benefit Plan that authorizes Respondent to cease its past practice of granting healthcare benefits to retirees receiving disability pensions without regard to whether those retirees meet the age or service requirements for general retirees to receive healthcare benefits.

⁴ Quoting 1 Morris, *Developing Labor Law* (2d ed, 5th supp), ch 13, pp. 332–333.

For the foregoing reasons, I find no error in the ALJ's conclusion that Respondent breached its duty to bargain under §10(1)(e) of PERA when it unilaterally decided to end the practice of providing health care benefits for retirees receiving disability pensions.

Respondent's Allegation That the ALJ Is Biased

On the final page of the ALJ's Decision and Recommended Order, the ALJ states:

The County's decision to eliminate the practice of granting health care benefits to disabled retirees just three months after its attorney and its benefits director acknowledged the existence of the past practice was particularly egregious.

In that same paragraph, the ALJ proceeds to discuss four decisions issued in the past three years in which Respondent was found to have committed unfair labor practices. In three of those cases, Respondent was found to have committed unfair labor practices against Charging Party AFSCME Council 25: *Wayne Co*, 24 MPER 12 (2011); *Wayne Co*, 24 MPER 25 (2011) and *Wayne Co*, 22 MPER 80 (2009) (no exceptions). The fourth case, *Wayne Co*, 22 MPER 65 (2009) (no exceptions), involved a charge brought by Wayne Co. Sheriffs Local 502. The ALJ cites those past cases as part of the justification for his conclusion that Respondent should be assessed costs and attorney fees.

Respondent accuses the ALJ of inferring that Respondent has committed unfair labor practices in this case because it committed unfair labor practices in the past. Respondent argues that the ALJ's use of past cases in his analysis shows the ALJ's bias against Respondent. I disagree. It is clear from the ALJ's Decision and Recommended Order that he cites the four recent cases in which Respondent was found to have committed unfair labor practices only in support of his opinion that we should assess costs and attorney fees for what he finds to be Respondent's "egregious" behavior. The ALJ's conclusion that Respondent committed an unfair labor practice in this case is fully supported by the facts in the record and the law. Each case before this Commission must be decided on its own facts and the applicable law. This Commission cannot and will not issue an order finding a respondent liable for an unfair labor practice in one case merely because it committed a different unfair labor practice in an earlier separately adjudicated case. The ALJ's finding that Respondent unlawfully made a unilateral change to terms and conditions of employment without first giving Charging Party notice and an opportunity to bargain is fully supported by the facts of this case and is affirmed

The ALJ's Suggestion That Costs and Attorney Fees

Should Be Awarded to Charging Parties

Respondent also asserts error in the ALJ's suggestion that this would be an appropriate case for an award of costs and attorney fees to Charging Parties. The ALJ's suggestion was apparently made in response to Charging Parties' request for attorney fees and costs in its post-

hearing brief. Noting that the Commission has declined to award attorney fees since the issuance of the Court of Appeals decision in *Goolsby v Detroit*, 211 Mich App 214 (1995), Charging Parties urged reconsideration of the Commission's authority to grant attorney fees. In support of its contention that the Commission has authority to award costs and attorney fees, Charging Parties point to United States Court of Appeals decisions reviewing National Labor Relations Board (NLRB or Board) decisions finding that the NLRB has such authority. Charging Parties cite *Johnson and Hardin Co v NLRB*, 49 F3d 237 (CA 6, 1995) and *BE & K Const Co v NLRB* 246 F3d 619 (CA 6, 2001) in support of its contention that the Board has the authority to grant attorney fees and, therefore, the Commission does as well. Both cases cited by Charging Parties are inapposite as they involve the award of attorney fees for litigation expenses caused by the respondents' unfair labor practice of filing a retaliatory baseless lawsuit. The issue in both cases was whether the lawsuit filed by the respondent was both baseless and retaliatory such that the filing was an unfair labor practice for which the Board could order costs and attorney fees related to the charging party's defense of the frivolous retaliatory suit. Both cases were based on the decision in *Bill Johnson's Restaurants, Inc v NLRB*, 461 US 731; 103 SCt 2161 (1983), which held that the Board could enjoin, as an unfair labor practice, a baseless lawsuit filed for retaliatory purposes. Relying on *Bill Johnson's Restaurants, Inc*, the Board awarded attorney fees as damages in *BE & K Const Co*.⁵

However, the issue here is not whether attorney fees can be awarded as damages arising out of the unfair labor practice, but whether costs and attorney fees can be awarded to the Charging Parties because, as Charging Parties assert in their post-hearing brief, Respondent has committed “flagrant and continuing violations of PERA.” Our authority to award remedies stems from § 16(b) of PERA which states in relevant part:

If upon the preponderance of the testimony taken the commission is of the opinion that any person named in the complaint has engaged in or is engaging in the unfair labor practice, then it shall state its findings of fact and shall issue and cause to be served on the person an order requiring him to cease and desist from the unfair labor practice, and to *take such affirmative action* including reinstatement of employees with or without back pay, *as will effectuate the policies of this act*. The order may further require the person to make reports from time to time showing the extent to which he has complied with the order. (Emphasis added.)

Section 16(b) does not specifically authorize the award of attorney fees or litigation costs. As the Court of Appeals pointed out in *Goolsby*, at 224, under the American Rule “attorney fees are not recoverable unless authorized by statute, court rule, or a recognized common-law exception.” Although reference is often made to the language “take such affirmative action . . . as will

⁵ In *BE & K Const Co v NLRB*, 536 US 516, 122 SCt 2390, (2002), the Supreme Court granted certiorari on the question of whether the NLRB “may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show the suit was not objectively baseless” Id at U.S. 533, S.Ct 2400. Indicating that “baseless” did not simply mean unmeritorious, unsuccessful, or debatable, the Court found the standard applied by the Board was unlawful and remanded the matter for further proceedings.

effectuate the policies of this act” to justify the extraordinary relief of attorney fees and costs, I agree with the *Goolsby* court that the language in § 16(b) is not sufficiently specific to authorize an award of attorney fees. The legislature specified our authority to require the reinstatement of employees, with or without back pay, and to require persons to make reports showing compliance with our orders. In light of the American Rule, if the legislature had intended to authorize us to award attorney fees, they would have specified that in § 16(b) as well.

In conclusion, although this Commission disagrees with the ALJ's suggestion that this is an appropriate case for the awarding of attorney fees, Commissioner Green and I affirm the ALJ's decision on the issue of Respondent's breach of its duty to bargain and adopt the ALJ's order.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair

Dated: _____

COMMISSIONER GREEN, CONCURRING SEPARATELY:

I concur with the result reached in this matter because I agree with Commission Chair Callaghan that Respondent breached its duty to bargain for the reasons stated in Commissioner Callaghan's opinion. I join in adopting the ALJ's order. I also agree that this is not an appropriate case in which to award attorney fees and costs.

I agree with Commissioner Callaghan that the cases cited by Charging Parties in support of their request for attorney fees are not applicable to the issue before us. As Commissioner Callaghan stated, “the issue here is not whether attorney fees can be awarded as damages arising out of the unfair labor practice.” The issue with respect to attorney fees is not only whether they can be awarded pursuant to the authority granted to the Commission in § 16(b) of PERA, but also whether they can be granted under an exception to the American Rule or pursuant to the inherent authority of an administrative agency to control proceedings⁶ and to regulate professionals who appear before it⁷. However, I agree that none of the theories used in the past

⁶ As in *Teamsters Local 122*, 334 NLRB 1190 (2001).

⁷ See, *Polydoroff v ICC*, 773 F2d 372, 375, (CA D.C. 1985).

by this Commission or by the National Labor Relations Board (NLRB) in support of attorney fee awards apply to this case. In particular, given the dissent on the issue of whether Respondent breached its duty to bargain, there is no basis for finding that Respondent put forth a frivolous defense. However, I note that the NLRB continues to assess attorney fees⁸ and we are often guided by NLRB precedent. *MERC v Reeths-Puffer Sch Dist*, 391 Mich 253, 260; 215 NW2d 672 (1974). Therefore, unlike my fellow commissioners, I am unwilling to conclude that we lack the authority to award attorney fees in an appropriate case.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Nino E. Green, Commission Member

Dated: _____

COMMISSIONER LABRANT, DISSENTING IN PART, CONCURRING IN PART:

I agree with my colleagues that this is not an appropriate case for an award of attorney fees. I reach that conclusion because I find that Respondent has not violated its duty to bargain in good faith under § 10(1)(e) and the charge should be dismissed. I also agree with Commission Chair Callaghan that this Commission lacks the authority to award attorney fees under the language of § 16(b) of PERA as interpreted by the Court of Appeals in *Goolsby v Detroit*, 211 Mich App 214 (1995).

The ALJ found that for over thirty years Respondent gave “tacit approval” to the past practice of providing duty and nonduty disability retirees with lifetime health care benefits. He found that to change that past practice constituted an unfair labor practice. I disagree. In Wayne County, under the terms of the 2006 Health and Welfare Benefit Plan, County employees participate in one of the available retirement plans, one through six, including duty or nonduty disability retirees. The 2006 Health and Welfare Benefit Plan was incorporated into the collective bargaining agreements executed by Respondent and Charging Parties in 2008. Respondent was acting within its authority under the collective bargaining agreements to withhold health care benefits from retirees receiving disability pensions who do not meet the contracts' requirements for receipt of those benefits. It is not an unfair labor practice for Respondent to enforce the terms of the contract.

A finding that a contract has been amended based on past practice arising from the parties' tacit approval is only appropriate if the contract is silent on the issue or ambiguous. *Port Huron Ed Assn v Port Huron Area Sch Dist*, 452 Mich 309, 325 (1996). When, a contract provision is clear and unambiguous, as in this case, a higher standard of proof is necessary. *Id* at 325-326. The party seeking to establish that the past practice modified the contract must show

⁸ Most recently in *Camelot Terrace*, 357 NLRB No. 161; 2011 WL 7121892.

that there has been a meeting of the minds in which both parties agree to the contract modification. *Id* at 326-327. Indeed, as the Court pointed out in *Port Huron* at 330.

[We] should be wary of raising the parties' past actions to the same status as the written provisions in the agreement. .. The agreement embodies mutual assent and, during the duration of the contract, either party should be able to rely on the provisions previously bargained for during negotiation of the agreement. Allowing the agreement to be superseded by anything less than a purposeful decision evidencing similar deliberation would "create the anomaly that, while the parties expend great energy and time in negotiating the details of the agreement, they unknowingly and unintentionally commit themselves to unstated and perhaps more important matters which in the future may be found to have been past practice."⁹

Here, there must be a showing that Respondent intentionally relinquished its right to limit health care benefits to retirees who meet the age and service requirements. A careful review of the facts in this case establishes that Charging Parties and Respondent bargained over health care benefits and retirees' eligibility for such benefits. The parties entered into agreements setting certain age and service requirements for retirees to be eligible for health care benefits. There is no showing that Respondent intended to reject the terms of those agreements. In negotiating their contracts in 2008, the parties incorporated the 2006 Health and Welfare Benefit Plan, which clearly linked eligibility for health care benefits with meeting the age and service requirements to be eligible for standard pension. Similar language included in the contracts explained that retirees were only eligible for health care benefits if they met the age and service requirements for a standard pension. This language made it clear that despite its past leniency in granting health care benefits to disability retirees, Respondent had the right to insist that all retirees, including those who retired on the basis of disability, meet the age and service requirements to be eligible for health care benefits.

Although Respondent may have allowed disability retirees to receive health care benefits without regard to age and years of service for over thirty years, there is insufficient evidence in the record to establish that Respondent intended to waive its right to enforce the express contract provisions. See *Southfield Pub Sch*, 2002 MERC Lab Op 53, where this Commission found that the employer's sixteen year practice of routinely granting all requests for unpaid leaves of absence did not amend the parties' contract because the practice conflicted with contract language that gave the employer the discretion to grant or deny requests for such leaves. In the absence of evidence that there was a meeting of the minds that led to a mutually accepted modification of the contract, I cannot find that Respondent waived its right to require disability retirees to meet the same age and years of service requirements applied to all other retirees to establish eligibility for health care benefits. As in *Southfield Pub Schs*, Respondent exercised its discretion to extend leniency in granting a benefit, but did not waive its right to enforce the plain language of the contract.

⁹ Quoting Elkouri & Elkouri, *How Arbitration Works* (4th ed.), p. 441

Finally, Respondent's 2000-2004, 2004-2008, and 2008-2011 collective bargaining agreements with AFSCME Local 3317 each contain Section 43.09, which expressly rejects the possibility of past practices affecting the contract:

This agreement contains the entire understanding and agreement of the parties. It is further agreed that there are no verbal agreements or understandings or past practices that affect or qualify any term of this agreement."

The language of the contract should be given its plain meaning. The contract sets age and years of service prerequisites for receiving post-retirement health care benefits. Those requirements apply to all retirees, including those whose retirement resulted from disability. Pursuant to the above zipper clause, no past practices apply. See Justice Markman's dissent in *City of Kentwood v Police Officers Labor Council*, 483 Mich 1116, 1118, (2009).

For the foregoing reasons, I would find that the ALJ was incorrect in holding that past practice prevails over the plain language of the contract. I would reverse the ALJ's decision and dismiss the charge.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Robert S. LaBrant, Commission Member

Dated: _____

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION**

In the Matter of:

COUNTY OF WAYNE,
Respondent-Public Employer,

Case No. C09 J-211

-and-

MICHIGAN AFSCME COUNCIL 25 AND ITS AFFILIATED
LOCALS 25, 101, 409, 1659, 1862, 2057, 2926 AND 3309,
Charging Parties-Labor Organizations.

APPEARANCES:

Barbara Johnson, Chief Labor Relations Analyst, for Respondent

Jamil Akhtar for Charging Parties

**DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE**

On October 30, 2009, Michigan AFSCME Council 25 and its affiliated Locals 25, 101, 409, 1659, 1862, 2057, 2926 and 3309 filed an unfair labor practice charge alleging that Wayne County violated Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e), by unilaterally eliminating the practice of providing health care benefits to employees who retire on a duty or non-duty disability pension. Pursuant to Sections 10 and 16 of PERA, this case was assigned to David M. Peltz, Administrative Law Judge of the Michigan Administrative Hearing System, on behalf of the Michigan Employment Relations Commission. Based upon the entire record, including the transcript of hearing, exhibits and post-hearing briefs filed by the parties, I make the following findings of fact, conclusions of law and recommended order.

Findings of Fact:

All of the Charging Party labor organizations represent bargaining units of employees of Wayne County. AFSCME Locals 25, 101, 409 and 1659 are the certified bargaining agents for a broad unit of non-supervisory civilian employees of the County. AFSCME Locals 1862, 2057 and 2926 represent a bargaining unit comprised of the County's civilian supervisory employees. AFSCME Local 3317 is the exclusive bargaining representative of supervisory law enforcement personnel employed by Respondent, including sergeants and lieutenants.

The collective bargaining agreements entered into between Charging Parties and the County all contain language governing retirement and health insurance benefits for bargaining unit members. Since at least 2000, the contracts have included age and service requirements for employees to receive health care benefits upon retirement. For example, the 2000-2004 collective bargaining agreements covering the supervisory and non-supervisory civilian units provide generally that employees hired on or after December 1, 1990 “shall not be eligible for insurance or health care benefits upon retirement unless they retire with thirty (30) or more years of service.” Those agreements contain an exception pursuant to which employees enrolled in specific retirement plans are eligible to retire with health and insurance benefits “provided he or she has fifteen (15) or more years of service and is age sixty (60).” The 2000-2004 collective bargaining agreement covering supervisory law enforcement personnel contain similar age and service requirements. None of the 2000-2004 agreements refer specifically to the subject of health care benefits for employees who retire on a disability pension.

The 2000-2004 contracts for each of the Charging Party locals incorporate by reference the *Wayne County Health and Welfare Benefit Plan* (hereafter “the Plan”). At the time the 2000-2004 contracts were in effect, the most recent version of the Plan was dated June 27, 1991. That document contained the following language with respect to retirement health benefits:

1. Employees in retirement Plans #1 and #3 shall be eligible for health care benefits if they have met all age and service requirements eligibility of their retirement plan.
2. Employees hired before December 1, 1990, shall be eligible for participation in defined retirement plan #2 or defined retirement contribution plan #4. Employees must meet all age and service requirements eligibility to be eligible for insurance and health care benefits.
3. All new employees hired on or after December 1, 1990 shall be eligible for participation in Defined Benefit Plan #2 or Defined Contribution Plan #4, however, said employees shall not be eligible for insurance and health care benefits upon retirement unless they retire with 30 or more years of service.

In July of 2008, AFSCME Locals 25, 101, 409 and 1659 and Respondent executed a new collective bargaining agreement covering the County’s civilian non-supervisory employees for the term December 1, 2004 to September 30, 2008. Like the predecessor agreement, the 2004-2008 contract contains age and service requirements for retirement health care benefits. However, the specific eligibility requirements for each of the various retirement plans offered by the County were modified. Article 30 of the 2004-2008 agreement provides, in pertinent part:

30.01 General Provisions

(C) Employees participating in a retirement plan offered by the County who were hired prior to the date of execution of this Agreement by the County Executive must meet the age and service requirements to be eligible for post-retirement

insurance and healthcare benefits pursuant to the *Wayne County Health and Welfare Benefit Plan*.

* * *

(E) Unless otherwise specified, regardless of the Retirement Plan all employees hired on or after December 1, 1990 shall not be eligible for insurance and healthcare benefits upon retirement unless they retire with thirty (30) or more years of service; however, effective November 16, 2001, employees in Plan No. 2, Plan No. 3, Plan No. 4, and Plan No. 5 shall be eligible to retire with insurance and health care benefits provided he or she has fifteen (15) or more years of service and is age sixty (60) or older. Employees in the Hybrid Retirement Plan (Plan No. 5) hired on or after December 1, 1990 shall only be eligible for insurance and health care benefits upon retirement if they retire with thirty (30) or more years of service.

(F) Regardless of the Retirement Plan, all employees hired, rehired, re-employed and reinstated on or after the date of execution of this Agreement by the County Executive will not receive nor be eligible for Employer-sponsored insurance and health care benefits upon retirement. However, these employees will be eligible to participate in an Employee Health Care Benefit Trust in accordance with 30.10(A) and the terms and conditions outlined in the *Wayne County Health and Welfare Benefit Plan*. Employees participating in the Employee Health Care Benefit Trust who retire from County employment may elect to purchase post-retirement health care insurance from the County at full rate cost, or purchase such insurance from a provider other than that provided by the County. This subsection (30.01(F)) will not apply to terminated employees reinstated through arbitration who were otherwise eligible for post-retirement health care prior to termination.

The 2004-2008 contract covering Locals 25, 101, 409 and 1659 also contains requirements specific to each of the various retirement plans offered by the County. With respect to age and service requirements, these provisions use the phrase “normal” retirement in describing the terms and conditions of each plan. For example, Section 30.03 of the agreement, which sets forth the requirements of the Defined Benefit Plan No. 2, provides, “Normal retirement shall mean 25 years of credited service at age 55, 20 years of credited service at age 60, or eight (8) years of credited service at age 65. Effective November 16, 2001, normal retirement shall also include fifteen (15) years of credited service at age 60.” Section 30.06 of the 2004-2008 contract, which describes the terms of the Hybrid Retirement Plan No. 5, contains the following language:

B. Defined Benefit Provisions

1. Normal retirement shall mean twenty five (25) years of credited service at age 55, twenty (20) years of credited service at age 60, or eight (8) years of credited service at age 65, or thirty (30) years of credited service

without an age requirement. An employee in plan 5 hired prior to the date of execution of this Agreement by the County Executive who retires with thirty (30) years of service, or fifteen (15) years of credited service at 60, will receive medical benefits as otherwise provided under the terms of this Agreement. For employees hired prior to December 1, 1990, normal retirement shall include medical benefits as otherwise provided under this agreement.

* * *

5. Eligible employees shall receive a duty disability retirement benefit. The amount of retirement compensation shall be computed as normal retirement with additional service credit granted from the date of retirement to age sixty (60). The total Plan 5 Duty Disability Benefit including that received under section 30.06(C)((4) below shall not exceed seventy-five percent (75%) of the employee's final average compensation as otherwise provided for in Defined Benefit Plan No. 1.

Payment of Workers' Compensation Benefits will be used to reduce an employee's retirement compensation. No age or service requirements apply.

6. Employees shall be eligible for a non-duty disability retirement upon completion of ten (10) years of credited service. The amount of retirement compensation shall be computed as normal retirement, but based on the actual number of years of credited service and average final compensation at the time of termination. The Employer reserves the right to limit payments from the Retirement System through the use of proceeds from the Employer's long-term disability policy.

Although the 2004-2008 nonsupervisory contract contains provisions concerning duty and non-duty disability retirement benefits generally, the only explicit reference in the agreement to health insurance benefits for employees retiring on a disability pension is contained within Section 30.05(E) of the agreement, which pertains to employees in the Defined Benefit Plan No. 4. That section provides:

Employees who "retire" under the Defined Contribution Plan must meet all age and service requirements to be eligible for insurance and health care benefits. Employees hired prior to the date of execution of this Agreement by the County Executive who "retire" under the provisions of this plan shall be eligible for the same insurance and health benefits as an employee retiring from a Defined Benefit Plan. Effective December 1, 1999, retirement eligible Defined Contribution Plan No. 4 participants who withdraw all funds from the Plan at retirement shall be entitled to survivor health care benefits. Duty and non-duty disability retirees will be eligible December 1, 1997 (if like benefits are available for Defined Benefit Plan employees).

A new version of the *Wayne County Health and Welfare Benefit Plan* was adopted in 2006 and incorporated by reference in the 2004-2008 contract for AFSCME Locals 25, 101, 409 and 1659. Under the new Plan, employees in retirement plans 1 through 6 “may be eligible for health care benefits and life insurance upon retirement, if they have met all the age and service requirements of the applicable retirement plan.” The 2006 version of the Plan further provides that employees hired or rehired on or after December 1, 1990 “shall not be eligible for health care benefits and life insurance unless they retire with thirty (30) or more years of credited service.” Section 2 of the Plan states that the benefit plan administrator “shall have full and final determination as to all issues concerning eligibility for benefits”, including the authority to interpret the Plan and its application.

In March of 2008, AFSCME Locals 1862, 2057 and 2926 executed a new collective bargaining agreement for the County’s civilian supervisory employees covering the period December 1, 2004 to September 30, 2008. Around the same time, a new contract for the bargaining unit of supervisory law enforcement personnel represented by AFSCME Local 3317 was executed. That agreement also covers the period December 1, 2004 to September 30, 2008. With respect to retirement health care benefits, both of these agreements contain substantially the same or similar age and service requirements as the 2004-2008 non-supervisory contract described above, including adoption by reference of the 2006 *Wayne County Health and Welfare Benefit Plan*. This same language was carried over almost entirely intact to the successor contracts for AFSCME Locals 1862, 2057 and 2926 and AFSCME Local 3317, both of which cover the period October 1, 2008 through September 30, 2011. At the time of the hearing in this matter, Locals 25, 201, 409 and 1659 were in fact finding on a successor agreement to replace the parties’ 2004-2008 contract.

Regardless of the general eligibility requirements for retirement health care set forth within the various collective bargaining agreements, the parties stipulated that it has been the practice of the County for the past thirty years to provide health care benefits to employees who retire on a disability pension. At the hearing in this matter, Respondent’s attorney specifically acknowledged that disabled employees have received such benefits without regard to age or years of service with the County. The parties further agreed that at least four AFSCME bargaining unit members have retired on a disability pension since July of 2008 and are currently receiving medical benefits.

At the October 2009 meeting of the Wayne County Employees Retirement Board of Directors, representatives of the County discussed with the Board the issue of eliminating medical benefits for employees who are granted a disability pension. On October 30, 2009, the Unions filed the instant charge alleging that the Board had resolved at that meeting to impose a requirement that employees who retire with a disability pension must have thirty years of service

with the County in order to be eligible for health care benefits.¹⁰ According to the charge, the change was scheduled to go into effect on November 1, 2009.

On December 4, 2009, the County filed an answer in which it denied the factual allegations set forth in the charge. At the same time, Respondent filed a motion seeking to have the charge summarily dismissed on the ground that “[t]here is no basis for the claim.” The motion provided, in pertinent part:

2. Specifically, Charging Party alleges that Respondent refused to abide by a past practice of granting medical benefits to retired employees who are granted a duty disability or non-duty disability pension and repudiated clear language, in collective bargaining agreements with AFSCME Locals 25, 101, 409, 1659, 2057, 2926, 3317 and 3308, granting those benefits. . . . Charging Party claimed that the change in medical benefits would be effective November 1, 2009.
3. November 1, 2009 has passed and employees who receive a duty disability or non-duty disability are still eligible to receive medical benefits.
4. Absent a change in the ability of employees to receive medical benefits when they take a disability retirement, there is no basis for a Charge of repudiation.

In its brief supporting the motion, the County asserted that “November 1, 2009 has passed and nothing has changed. All employees who receive a duty or non-duty disability retirement are eligible for medical benefits.” Attached to the brief was a sworn affidavit of Livia Calderoni, the director of the County’s Benefit Administration Divisions. Calderoni asserted, “The change alleged by the Charging Party concerning medical benefits relating to disability retirement has not been implemented.”

On December 21, 2009, Charging Parties filed a reply to the County’s motion for summary disposition. The Unions argued that the motion should be denied because no employee had retired on a disability pension since November 1, 2009. According to Charging Parties, the County intended to implement the change prospectively when the next member of one of the AFSCME bargaining units seeks to a duty or non-duty disability pension. In an order issued on December 23, 2009, I denied Respondent’s motion for summary disposition on the ground that issues of material fact existed. An evidentiary hearing was scheduled to commence on April 20, 2010.

On March 17, 2010, approximately one month prior to the scheduled hearing in this matter, the County issued Administrative Personnel Order 1-2010 regarding health care for duty and non-duty disability retirees. The order states:

¹⁰ The charge alleged that employees who retired on a duty-related disability had historically not been subject to any age or service requirements, but that employees receiving a non-duty disability pension were entitled to medical benefits as long as they had ten years of credited service in the Wayne County Retirement System. However, as described above, the parties stipulated at hearing that the longstanding practice of the County was to provide health care benefits to both duty and non-duty disability retirees regardless of age and service.

Due to extreme economic challenges that the County is facing, it has had to reevaluate the cost of providing discretionary health care benefits previously provided to employees in receipt of a duty or non-duty disability retirement, who do not meet the age and service requirements for a service pension.

In an effort to address a serious budgetary deficit, the County can no longer afford to provide discretionary health care benefits to employees in receipt of duty and non-duty disability retirements.

Therefore, employees applying for a duty or non-duty disability retirement on or after May 1, 2010 will no longer be eligible to receive health care benefits in conjunction with the duty or non-duty disability pension benefits.

Employees who meet all age and service requirements will still be eligible for health care benefits pursuant to applicable Collective Bargaining Agreements and the County's Health and Welfare Benefit Plan.

Discussion and Conclusions of Law:

Under Section 15 of the Act, public employers and labor organizations have a duty to bargain in good faith over "wages, hours and other terms and conditions of employment." Such issues are mandatory subjects of bargaining. MCL 423.215(1); *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55 (1974). The test generally applied to determine whether a matter is a mandatory subject of bargaining is whether it has an impact upon wages, hours, or conditions of employment, or settles an aspect of the employer-employee relationship. *Detroit v Council 25, AFSCME*, 118 Mich App 211 (1982), enf'g 1981 MERC Lab Op 297. The Commission and the courts have adopted a broad and an expansive interpretation of "wages, hours, and other terms and conditions of employment" under Section 15 of PERA. It is well established that pension and retirement provisions are mandatory subjects of bargaining under Section 15 of PERA. See e.g. *Detroit Police Officers Ass'n v. Detroit*, 391 Mich 44, 63-64 (1974); *St Clair Shores*, 22 MPER 50 (2009). The benefits, coverage, and administration of a health insurance plan are also mandatory subjects of bargaining under the Act. See e.g. *Taylor Sch Dist*, 1976 MERC Lab Op 693; *Houghton Lake Ed Ass'n v Houghton Lake Bd of Ed*, 109 Mich App 1, 7 (1981).

A party violates PERA if, before bargaining, it unilaterally alters or modifies a term or condition of employment, unless that party has fulfilled its statutory obligation or has been freed from it. *Port Huron Education Ass'n v Port Huron Area School District*, 452 Mich 309, 317. A party can fulfill its obligation under Section 15 of PERA by bargaining about a subject and memorializing the resolution of that subject in the collective bargaining agreement. Under such circumstances, the matter is "covered by" the agreement. *Port Huron, supra* at 318; *St. Clair Intermediate Sch Dist*, 2000 MERC Lab Op 55, 61-62. As the Michigan Supreme Court stated in *Port Huron, supra* at 327, "Once the employer has fulfilled its duty to bargain, it has a right to rely on the agreement as the statement of its obligations on any topic 'covered by' the agreement."

In the instant case, Respondent contends that it satisfied its statutory obligation to bargain with Charging Parties by negotiating contract language governing the issue of health care benefits for retirees. According to Respondent, the terms of the parties' collective bargaining agreements, including those set forth within the *Wayne County Health and Welfare Benefit Plan* which is incorporated by reference therein, authorize the County to require that all employees, including disability retirees, satisfy age and service requirements in order to be eligible for retirement health care benefits. Charging Parties, however, assert that both the contracts and the Plan are silent with respect to health care benefits for disability retirees and that the County's refusal to provide retirement health care benefits to employees who receive a disability pension is contrary to the established past practice of the parties which has been in existence for thirty years up to and including May 1, 2010, the date upon which Administrative Personnel Order 1-2010 was issued.

A past practice that does not derive from the parties' collective bargaining agreement may nonetheless become a term or condition of employment which is binding on the parties. *Mid-Michigan Ed Ass'n v St Charles Comm Sch*, 150 Mich App 763, 768(1986), rev'd on other grounds *Port Huron Educ Ass'n, supra*. See also *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Mich Transp Auth*, 437 Mich 441, 454, 455 (1991). If a past practice becomes part of the structure and conditions of employment, the past practice assumes the same significance as other portions of the collective bargaining agreement. *Mid-Michigan, supra at 768*. Where an employer institutes a practice and permits it to continue, it cannot later change the practice without first giving the union notice and an opportunity to bargain. *Id.* This principle recognizes the impracticability of the parties expressly listing or describing every conceivable practice or procedure within the agreement itself.¹¹

In order to create a term or condition of employment through past practice, the practice must be mutually accepted by both parties. Where the collective bargaining agreement is ambiguous or silent on the subject for which the past practice has developed, there need only be "tacit agreement that the practice would continue." *Id.* However, where the contract unambiguously covers a term of employment that conflicts with a party's behavior, a higher standard of proof is required. In such situations, the unambiguous language controls unless the past practice is so widely acknowledged and mutually accepted that it creates an amendment to the contract. *Port Huron Ed Ass'n*, 452 Mich at 329. The Commission has consistently found that a mistake does not create an enforceable past practice. See e.g. *Montcalm County*, 1990 MERC Lab Op 954; *Highland Park Sch Dist*, 1976 MERC Lab Op 622. The nature of a practice, its duration, and the reasonable expectations of the parties may justify its attaining the status of a "term or condition of employment." *Macomb County*, 23 MPER 8 (2010), aff'd *Macomb County v AFSCME Council 25*, ___ Mich App ___, issued September 20, 2011 (Docket No. 296416).

¹¹ The multiple collective bargaining agreements submitted by the parties in this case exemplify this fact. Despite having been renegotiated numerous times, the contracts provide little guidance on the question of when health care benefits will be provided to disability retirees. The failure of the parties to expressly address an issue of obvious significance is entirely predictable where, as here, there is a longstanding and mutually understood past practice governing the behavior and expectations of the parties.

In *DPOA v City of Detroit*, 452 Mich 359 (1996), the Court of Appeals held that the past practice of the medical board rendering a final and binding decision on the issue of whether an employee's disability was duty-related was so widely acknowledged and mutually accepted that it amended the contradictory and unambiguous contract language in the collective bargaining agreement. In finding that there was an agreement to modify the contract, the Supreme Court relied upon statements made by the attorneys for the City and the board of trustees acknowledging the existence of the longstanding practice, as well as the fact that the board of trustees had developed forms for use by the medical board in making the duty-relatedness finding.

In *Macomb County, supra*, a retirement ordinance which was incorporated into the parties' contracts stated that a joint and survivor pension benefit was to be the "actuarial equivalent" of the retiree's straight life allowance at the time of his or her retirement. However, during a succession of contracts over a 24-year period, the parties utilized a unisex mortality table which assumed that the pool of retirees selecting the optional joint and service pension was 100% female without regard for whether it would create equal-in-value pensions. The Commission found that the term "actuarial equivalent" as used in the retirement ordinance was ambiguous and that the use of the 100% female table had become a term and condition of employment which had been tacitly accepted by the parties. In affirming the Commission's finding that the unilateral change in mortality tables was unlawful, the Court of Appeals held that even if "actuarial equivalence" had the unambiguous meaning of "equal in value", as the employer had claimed, the parties' longstanding practice was so widely acknowledged and accepted that it created an amendment to the contract which could not be unilaterally altered.

In *City of Detroit (Dep't of Transp)*, 19 MPER 70 (2006), an unfair labor practice charge was filed after the employer initiated enforcement of a job specification requiring that general auto mechanics possess a commercial driver's license (CDL) as a condition of employment after having previously agreed to refrain from enforcement of that requirement. The Commission held that the employer violated PERA because the requirement had not been enforced for more than a decade after the employer had made the promise that it would not discipline mechanics who lacked a CDL. See also *City of Flint*, 20 MPER 67 (2007) (employer's practice of allowing retirees to designate a non-calendar year with twenty-seven pay dates when calculating final average compensation amended contractual language limiting such designations to years with twenty-six pay dates).

Here, the collective bargaining agreements between Respondent and Charging Parties have contained eligibility requirements for retirement health care generally since at least the 2000-2004 contracts. However, those agreements are essentially silent with respect to the issue of health care benefits for bargaining unit members who, as the result of a disability, stop working for the County under circumstances short of a "normal" retirement. In fact, with the exception of Section 30.05(E) of the 2004-2008 agreement covering Locals 25, 101, 409 & 1659, which pertains solely to nonsupervisory employees in the Defined Benefit Plan No. 4, the County did not cite any provision in either the contracts or the terms of the *Wayne County Health and Welfare Benefit Plan* which specifically references the issue of health care benefits for employees who retire on a disability pension. Accordingly, I conclude that this case should be evaluated under the reduced "tacit agreement" standard for determining whether the past practice

created a term or condition of employment. However, even assuming arguendo that the collective bargaining agreements can be interpreted as specifically requiring that disabled retirees satisfy age and service requirements in order to be eligible to receive health care benefits, I would nevertheless conclude that Respondent's elimination of such benefits violated Section 10(1)(e) of PERA under the particular facts of this case.

The parties stipulated that the County has, for the past 30 years, provided health care benefits to employees who receive a duty or non-duty disability pension. In fact, the parties agreed that since the most recent collective bargaining agreements were negotiated in 2008, at least four bargaining unit members have retired on disability pensions and are receiving medical benefits. Notably, the County has not taken the position that the practice of granting health care benefits to disability retirees was a mistake, mere happenstance or oversight, nor did Respondent assert at the time the unfair labor practice charge was initially filed that the granting of such benefits was a discretionary action which the County was free to unilaterally discontinue. To the contrary, the record establishes that the past practice of the County providing health care benefits to disabled retirees without regard to age and service requirements was so prevalent and widely accepted that even the County's attorney and its benefits director admitted it existed. Respondent, in its motion for summary disposition, asserted that the charge should be dismissed because the change alleged by the Charging Parties had not, in fact, occurred, and that County employees who receive a duty or non-duty disability pension "are still eligible to receive medical benefits." In its brief in support of the motion, which predated both the announcement and implementation of the change, the County asserted that "[a]ll employees who receive a duty or non-duty disability retirement are eligible for medical benefits." The County's benefit director also affirmatively acknowledged in a sworn affidavit the existence of the longstanding past practice by avowing that "[t]he change alleged by the Charging Party concerning medical benefits relating to disability retirement has not been implemented."

The County's reliance on *Butler v Wayne County*, 289 Mich App 664 (2010), to support its decision to eliminate the practice of providing health care benefits to disabled retirees is misplaced. In *Butler*, retirees of Wayne County filed a class action suit for breach of contract after the Employer changed the method for the calculation of supplemental life insurance (SLI) premiums from a flat rate structure to an age-rated system. The Court of Appeals concluded that the claimed past practice could not be relied upon where it was contrary to the express terms of *Wayne County Health and Welfare Benefit Plan*, which was explicitly incorporated by reference in the parties' collective bargaining agreement. The Court held:

[T]he CBA's only explicit reference to SLI provides that "[s]upplemental life insurance is available under a group plan at the option of the employee." It makes no mention of what the rate is or how it will be calculated. However, because the CBA incorporates the Plan, it contains an express provision that SLI will, at some point, be changing to an age-rated-premium system and that retirees will be eligible to "transfer" to that plan. Accordingly, plaintiff's contention that there is no provision contained in the CBA that relates to how the SLI rate will be calculated is without merit.

Id. at 677. Here, Respondent has not cited to any language in either the collective bargaining agreements or the Plan granting it the right to withhold health care benefits from disabled retirees “at the County’s option” as was the case in *Butler*. *Id.* at 673.

Despite the County’s attempt to rely on language in the contract pertaining to retirement health care generally, it is clear in this record that Respondent was fully aware of, and knowingly acted in accordance with, the long-standing practice relative to health care benefits for disability retirees. From the above statements of the County’s attorney and its benefits director, as well as Respondent’s consistent application of the policy over a 30-year period, I conclude that health care benefits for all employees who retire in receipt of a disability pension was a past practice so widely acknowledged and mutually accepted that it became a term and condition of employment such that the elimination thereof by Respondent, without first providing Charging Parties with notice and an opportunity to bargain, constituted a violation of Section 10(1)(e) of the Act.

The County’s decision to eliminate the practice of granting health care benefits to disabled retirees just three months after its attorney and its benefits director acknowledged the existence of the past practice was particularly egregious. Moreover, this case represents the fourth time over the course of the past several years in which this same public employer has been found to have violated its duty to bargain in good faith under PERA. In *Wayne County*, 24 MPER 12 (2011), the Commission held that the County repudiated its contractual obligation toward the charging parties by failing to make annual service adjustment payments to members of non-supervisory and supervisory bargaining units. In *Wayne County*, 24 MPER 25 (2011), the Commission concluded that the County violated its statutory bargaining obligation by unilaterally reducing the length of the workweek for unit members. In that case, there were no material facts in dispute and the Employer’s position was indistinguishable from arguments previously rejected by the Commission in a case involving the same parties. After no exceptions were filed in *Wayne County*, 22 MPER 80 (2009), the Commission affirmed the finding of the ALJ that the County breached its duty to bargain in good faith by ignoring the union’s request for presumptively relevant information. In that matter, the County chose to similarly ignore an order to show cause which had been lawfully issued by the ALJ. See also *Wayne County*, 22 MPER 65 (2009) (no exceptions) (County failed to satisfy its obligation to supply relevant information to the union). Were it not for *Goolsby v Detroit*, 211 Mich App 214, 224 (1995), a decision which the Commission has urged the Court of Appeals to reconsider, I would follow MERC’s earlier decision in *Wayne-Westland Community Sch Dist*, 1987 MERC Lab Op 381, aff’d sub nom *Hunter v Wayne-Westland Community Sch Dist*, 174 Mich App 330 (1989) and award attorney fees and costs to Respondent as compensatory damages.¹²

I have carefully considered the remaining arguments of the parties and conclude that they do not warrant a change in the result. For the reasons stated above, I recommend that the Commission issue the following order.

¹² In *City of Detroit*, Case No. C09 I-166, issued June 2, 2011, ALJ Doyle O’Connor distinguished the *Goolsby* decision and proposed that the Commission assess sanctions against the charging parties for engaging in conduct abusive to the process. That decision is currently pending on exception before the Commission. If the Commission adopts ALJ O’Connor’s recommended remedy in *City of Detroit*, I would recommend that it consider similar remedies in this matter, given the multiple and egregious violations by the County.

RECOMMENDED ORDER

It is hereby ordered that the County of Wayne, its officers, agents and assigns, shall:

(1) Cease and desist from refusing to bargain collectively and in good faith concerning wages, hours and working conditions with AFSCME Council 25 and its affiliated Locals 25, 101, 409, 1659, 1862, 2057, 2926 and 3309 by unilaterally imposing age and service requirements on bargaining unit members who retire with a duty or non-duty disability pension.

(2) Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively and in good faith concerning wages, hours and working conditions with the above named Unions.

(b) Restore to individuals the terms and conditions of employment that were applicable prior to May 1, 2010 with respect to the availability of health care benefits for bargaining unit members who retired with a duty or non-duty disability pension and who were denied health care benefits.

(c) Make individuals whole for any losses they may have suffered because of the unlawful imposition of any unilateral changes in policies governing the availability of health care benefits for bargaining unit members who retired with a duty or non-duty disability pension and who were denied health care benefits, including interest at the statutory rate.

(d) Post copies of the attached notice to employees in conspicuous places on the Employer's premises, including all locations where notices to employees are customarily posted and on any website routinely utilized by the County of Wayne for employee access. Copies of this notice shall remain posted for 30 consecutive days.

David M. Peltz
Administrative Law Judge

Dated: September 23, 2011

NOTICE TO ALL EMPLOYEES

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

WE WILL cease and desist from refusing to bargain collectively and in good faith concerning wages, hours and working conditions with AFSCME Council 25 and its affiliated Locals 25, 101, 409, 1659, 1862, 2057, 2926 and 3309 by unilaterally imposing age and service requirements on bargaining unit members who retire with a duty or non-duty disability pension.

WE WILL upon request, bargain collectively and in good faith concerning wages, hours and working conditions with the above named Unions.

WE WILL restore to individuals the terms and conditions of employment that were applicable prior to May 1, 2010 with respect to the availability of health care benefits for bargaining unit members who retired with a duty or non-duty disability pension and who were denied health care benefits.

WE WILL make individuals whole for any losses they may have suffered because of the unlawful imposition of any unilateral changes in policies governing the availability of health care benefits for bargaining unit members who retired with a duty or non-duty disability pension and who were denied health care benefits, including interest at the statutory rate.

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

WAYNE COUNTY

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 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, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510.