STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF INKSTER,
Public Employer-Respondent,

-and-

Case No. C13 F-101
Docket No. 13-004229-MERC

AFSCME COUNCIL 25, LOCAL 290.13,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Allen Brothers PLLC, by Charles S. Rudy, for Respondent

Tere McKinney, Staff Attorney, for Charging Party

DECISION AND ORDER

On October 18, 2013, Administrative Law Judge David M. Peltz issued a Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Edward D. Callaghan, Commission Chair

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Robert S. LaBrant, Commission Member

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Natalie P. Yaw, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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AFSCME COUNCIL 25, LOCAL 290.13,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Tere M. McKinney, Staff Attorney, for Charging Party

Allen Brothers, by Charles S. Rudy, for Respondent

DECISION AND RECOMMENDED ORDER
ON SUMMARY DISPOSITION

This case arises from an unfair labor practice charge filed on June 10, 2013, by AFSCME Council 25, Local 290.13 against the City of Inkster. Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the charges were assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (MERC).

The Unfair Labor Practice Charge and Procedural History:

The charge asserts that the City of Inkster violated Section 10(1)(e) of PERA on or about April 1, 2013 when it announced its decision to unilaterally implement furlough days for bargaining unit members. According to Charging Party, the unilateral implementation of furlough days was contrary to the terms of a collective bargaining agreement entered into by the parties on June 12, 2012. The charge and attachments thereto indicate that the City of Inkster and the State of Michigan entered into a consent decree on February 28, 2012 pursuant to the Local Government and School District Fiscal Accountability Act, PA 4 of 2011, MCL 141.1514 *et seq.*

In an order issued on July 2, 2013, I directed the Union to show cause why the charge should not be dismissed without a hearing on the basis that the Local Financial Stability And Choice Act, PA 436 of 2012, MCL 141.1541 *et seq*. suspended Section 15(1) of PERA for employers subject to a consent agreement, including consent agreements entered into pursuant to the Act's predecessor, PA 4 of 2011. Charging Party filed a response to the order to show cause

on July 19, 2013. In its response, Charging Party admits that the City had no duty to bargain with it under PA 436 and its predecessor, PA 4. However, Charging Party asserts that because the City knowingly chose to enter into a collective bargaining agreement following the passage of PA 4, it was bound to honor its obligations and, therefore, the unilateral implementation of furlough days constituted a violation of PERA.

On July 31, 2013, I issued a supplemental pretrial order in which I directed the City to file an answer to the charge or a fact specific position statement addressing the allegations set forth by the Union in its various pleadings. Respondent filed its brief in response to that order on August 22, 2013. Following receipt of the City's response, I scheduled this matter for oral argument.

The parties appeared for oral argument on October 10, 2013. At the hearing, Tere McKinney, counsel for the Union, conceded that the factual allegations set forth in the charge were erroneous and that the parties did not in fact agree on a new contract in June of 2012. Rather, according to McKinney, the City unilaterally imposed terms and conditions on employees within Charging Party's bargaining unit in June or July of 2012 after members failed to ratify a tentative agreement.

After considering the extensive arguments made by counsel for each party on the record, as well as the position statements filed prior to the hearing, I conclude that there are no legitimate issues of material fact and that a decision on summary disposition is appropriate pursuant to Commission Rule R 423.165 (1). 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).

Findings of Fact:

The relevant facts in this matter are not in dispute. On November 9, 2011, the State Treasurer, following a review of the City's records, determined that probable financial stress existed in the City and recommended the appointment of a financial review team by the Governor. Governor Snyder appointed a financial review team on December 2, 2011. Following an in-depth review of the City's financial condition, the financial review team concluded that "a condition of severe financial stress exists within the City. On February 28, 2012, the City and the State Treasurer entered into a consent agreement pursuant to PA 4 of 2011. Citing Section 14a(10) of PA 4, the consent agreement provides that "the duty to bargain pursuant to Section 15 of Public Act 336 of 1947, the Public Employment Relations Act, ceases beginning 30 days after the effective date of this Consent Agreement."

Charging Party represents a bargaining unit consisting of nonsupervisory employees of the City of Inkster, including clerk typists, custodians and park maintenance employees. At the time the consent agreement was entered into, the City and the Union were parties to a collective bargaining agreement which covered the period July 1, 2009 to June 30, 2012. Article VIII of that agreement set forth the hours of work for bargaining unit members. That provision states, in part:

The Regular Workweek

The regular workweek for employees covered hereby shall be forty (40) hours, within a period of seven (7) consecutive calendar days beginning at 12:01 a.m. on Monday. The regular workweek of Code Enforcement Officers covered, hereby shall be forty (4) hours, within a period of seven (7) days beginning at 12:01 a.m. on Sunday and ending at 12:00 midnight the following Saturday.

Regular Workday and Work Shift

The regular work schedule shall be listed by work units as follows: 1) DPS, Parks and Custodians – 7 ½ hours of work plus a thirty minute lunch period. 2) Housing Maintenance – 7 ½ hours of work plus a thirty (30) minute lunch period. 3) Clerical – 7½ hours of work plus a forty-five (45) minute lunch period. The workday shall be a period within twenty-four (24) hours beginning at midnight. Clerical general employees will receive an additional fifteen (15) minutes added to their lunch period.

* * *

The regular work shift shall fall between the hours of 7 a.m. to 6 p.m., Monday through Friday, except upon notice by the City of a change in the work schedule of isolated job classifications issued at least twenty-four (24) hours in advance of the scheduled starting time. Such work schedule changes shall be subject to provisions in Article 32, Special Conference and/or the Grievance Procedure. Any regular work shift hours that occur before 7 a.m. or after 6 p.m. shall be subject to premium pay provisions except for the position of custodian.

After execution of the consent agreement, the City attempted to negotiate changes in terms and conditions of employment with each of its bargaining units, including Charging Party, in an effort to reduce its expenditures and increase its revenues. In July of 2012, a tentative agreement was reached between Local 290.13 and the City containing various concessions, including a 10 percent across-the-board pay cut, the suspension of longevity pay, and the elimination of certain obsolete job classifications. Paragraph 9 of the tentative agreement provided, "All current contract language not specifically modified in this tentative agreement remains status quo." The tentative agreement did not contain any changes to Article VIII of the prior contract. Charging Party's members failed to ratify the agreement and, as a result, the City unilaterally imposed the terms and conditions of employment set forth therein on the bargaining unit.

In the spring of 2013, the City reconsidered its financial circumstances and determined that further employee concessions were necessary in order to reduce its budget and increase revenue. On April 1, 2013, the City announced that it would begin instituting furlough days for bargaining unit members. Furlough days were implemented effective April 5, 2013, resulting in a reduction in the number of hours worked by employees per pay period. In a letter to the City

Manager dated April 8, 2013, the Union asserted that the implementation of furlough days constituted a unilateral change in wages, hours, terms and conditions of work for its members and demanded that the City cease and desist immediately. The Employer responded by asserting that it has no obligation to bargain over the use of furlough days.

Discussion and Conclusions of Law:

Ordinarily, a party violates Section 10(1)(e) of PERA if it unilaterally modifies a term or condition of employment, unless that party has fulfilled its statutory bargaining obligation or has been freed from it. *Port Huron Education Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 317 (1996). Claims alleging a unilateral change in terms and conditions of employment and/or a contract repudiation are premised upon the duty to bargain set forth in Section 15(1) of PERA, which obligates parties to bargain in good faith over "wages, hours and other terms and conditions of employment." MCL 423.215(1). Section 15(1) of PERA provides:

> The public employer shall bargain collectively with the representatives of its employees as described in Section 11, and may make and enter into collective bargaining agreements with those representatives, except as otherwise provided in this section. For purposes of this section, to bargain collectively is to perform a mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or to negotiate an agreement or any question arising under the agreement, and to execute a written contract, ordinance, or resolution incorporating any agreement reached, if requested by either party, but this obligation does not compel either party to agree to a proposal or to make a concession.

Effective March 16 of 2011, Public Act 4 of 2011 was enacted by the Legislature for the stated purpose of placing financial checks and balances on public employers in a state of financial stress or emergency. As part of that statutory scheme, PA 4 authorized the state treasurer to enter into a consent agreement with a local government in a state of financial stress or emergency for a period necessary to achieve the goals and objectives of the agreement. Section 14a of PA 4 suspended Section 15(1) of PERA for employers subject to a consent agreement.

Section 14a of PA 4, stated in pertinent part:

> (1) A consent agreement as provided in Section 13(1)(c) may require a continuing operations plan or recovery plan if required by the state financial authority.
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> * * *
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> (9) Except as otherwise provided in this subsection, the consent agreement may include a grant to the chief administrative officer, the chief financial officer, the governing body, or other officers of the local government by the state treasurer of 1 or more of the powers prescribed for emergency managers in section 19 for such

> periods and upon such terms and conditions as the state treasurer considers necessary or convenient, in the state treasurer's discretion to enable the local government to achieve the goals and objectives of the consent agreement. However, the consent agreement shall not include a grant to the chief administrative officer, the chief financial officer, the governing body, or other officers of the local government of the powers prescribed for emergency managers in section 19(1)(k).
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> * * *
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> (10) Unless the state treasurer determines otherwise, beginning 30 days after the date a local government enters into a consent agreement under this act, that local government is not subject to section 15(1) of 1947 PA 336, MCL 423.215, for the remaining term of the consent agreement.

At the same time that the Legislature enacted PA 4, it also amended Section 15 of PERA to add subsection 9. That subsection provides:

> A unit of local government that enters into a consent agreement under the local government and school district fiscal accountability act, 2011 PA 4, MCL 141.1501 to 141.1531, is not subject to subsection (1) for the term of the consent agreement, as provided in the local government and school district fiscal accountability act, 2011 PA 4, MCL 141.1501 to 141.[1]

As previously noted, the City of Inkster entered into a consent agreement with the State Treasurer pursuant to PA 4 on February 28, 2012. Beginning on that date, the City no longer had any duty to bargain with Charging Party for the duration of the consent agreement as a matter of law. Although PA 4 was suspended on August 12, 2012 and later repealed by the voters of this State, it was replaced by PA 436, which became effective on March 28, 2013. Like its predecessor, PA 436 authorizes the State Treasurer to enter into a consent agreement with a local government in a state of financial stress or emergency for a period necessary to achieve the goals and objectives of the agreement. Section 8(11) of PA 436, MCL 141.1548(11) suspends the duty to bargain set forth in Section 15(1) of PERA for employers subject to a consent agreement. Notably, Section 4(6) of PA 436 provides, in pertinent part:

> All proceedings and actions taken by the governor, the state treasurer, the superintendent of public instruction, the local emergency financial assistance loan board, or a review team under former 2011 PA 4, former 1988 PA 101, or former 1990 PA 72 before the effective date of this act are ratified and are enforceable as if the proceedings and actions were taken under this act, and a consent agreement entered into under former 2011 PA 4, former 1988 PA 101, or former 1990 PA 72

[1] The explicit reference to PA 4 within Section 15(9) of PERA is not rendered nugatory by the repeal of that Act. Enacting Section 2 of PA 436, the successor to PA 4, provides that "whenever possible a reference to . . . former 2011 PA 4, under other laws of this state . . . shall function and be interpreted to reference to [sic] this this act . . . ."

> that was in effect immediately prior to the effective date of this act is ratified and is binding and enforceable under this act.

Based upon the clear and unambiguous language of Section 4(6) of PA 436, I conclude that the consent agreement which was entered into between the City of Inkster and the State Treasurer on February 28, 2012 under PA 4 was in full force and effect on April 1, 2013, when the City announced that it would begin instituting furlough days for bargaining unit members, and it remained in effect on April 5, 2013, when the furlough days were actually implemented. Because there was a binding and enforceable consent agreement in effect, the City was under no obligation to bargain with Charging Party pursuant to Section 8(11) of PA 436 which, as noted, suspends the duty to bargain as set forth in Section 15(1) of PERA for employers subject to a consent agreement. Accordingly, no unfair labor practice can result from the City's implementation of new or changed terms and conditions of employment.

Charging Party contends that the City remains bound by the terms of the June 2012 tentative agreement based upon Section 8(10) of PA 436, which specifies that a consent agreement "shall not include a grant to the chief administrative officer, the chief financial officer, the governing body, or other officers of the local government the powers prescribed for emergency managers" which, pursuant to Section 12(1)(k) of the Act, includes the authority to reject, modify or terminate one or more terms and conditions of an existing collective bargaining agreement. Based upon Section 8(10) of PA 436, Charging Party asserts that the City was without authority under the consent agreement to unilaterally impose terms and conditions of employment on unit members. I find that Charging Party's reliance on Section 8(10) is misplaced, as there was no collective bargaining agreement in effect at the time the furlough days were imposed. Rather, employees were working under terms and conditions unilaterally imposed by the City. It is hornbook law that a contract is an agreement between two or more parties. By definition, therefore, a "contract" cannot be unilaterally imposed. *Redford Union Sch Dist*, 23 MPER 32 (2010) at fn 1. The Commission has held that even lawful changes implemented after the parties have reached an impasse in negotiations do not have the status of a collective bargaining agreement. *Escanaba, supra*; *Wayne County*, 1988 MERC Lab Op 7, 15 at fn 2.

Even assuming arguendo that the parties had entered into a new contract during the term of the consent agreement, I would nonetheless conclude that charge should be dismissed for failure to state a claim under PERA. The Commission has consistently held that an alleged breach of contract will not constitute an unfair labor practice unless a repudiation can be demonstrated. See e.g. *Oakland County Sheriff*, 1983 MERC Lab Op 538, 542. As noted, claims alleging a unilateral change in terms and conditions of employment and/or a contract repudiation are premised upon the duty to bargain set forth in Section 15(1) of PERA. Since Section 15(1) was suspended under both PA 4 and its successor, PA 436, no valid claim under PERA has been stated by the Union in this matter. While it is conceivable that the Union might have a claim for breach of contract in another forum, the Commission has no jurisdiction to remedy such an allegation.

I have carefully considered all other arguments advanced by the parties, including the City's assertion that it did in fact bargain with the Union before implementing the furlough days,

and conclude that they do not warrant a change in the result. I find that based upon the undisputed facts as set forth by the parties, Charging Party has failed to state a claim upon which relief can be granted under PERA. For the reasons stated above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charge filed by AFSCME Council 25, Local 290.13 against the City of Inkster in Case No. C13 F-101; Docket No. 13-004229-MERC is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: October 18, 2013