STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF ROOSEVELT PARK,
Public Employer-Respondent,

Case No. C13 B-022
-and- Docket No. 13-000072-MERC

TEAMSTERS LOCAL 406,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Parmenter O'Toole, by Michelle R. Landis, for Respondent

Kalniz Iorio & Feldstein Co LPA, by Fil Iorio and Kurt Kline, for Charging Party

DECISION AND ORDER

On November 6, 2013, Administrative Law Judge Julia C. Stern 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

_____
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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Kalniz, Iorio and Feldstein, by Kurt W. Kline, for Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard in Lansing, Michigan on June 27, 2013, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission. I base the following findings of fact and conclusions of law upon the testimony of witnesses and exhibits admitted into the record at the hearing. I have also considered the arguments made by Charging Party in its March 27, 2013 response to my February 20, 2013 order to show cause why the charge should not be dismissed and the arguments made by Respondent in its April 3, 2013 reply to Charging Party's response and in its June 10, 2013 motion for summary disposition.

The Unfair Labor Practice Charge:

Teamsters Local 214 filed this unfair labor practice against the City of Roosevelt Park on February 4, 2013. The charge was amended on March 27, 2013. Charging Party represents a bargaining unit consisting of three employees in Respondent's Department of Public Works. A collective bargaining agreement covering this unit expires on November 14, 2014. On or about September 17, 2012, pursuant to provisions in the agreement, the parties commenced negotiations on wages and health insurance for the final two years of the contract. On or about January 9, 2013, the parties' negotiators reached an agreement on these issues. This agreement was ratified by Charging Party's membership later on January 9, 2013.

The charge, as amended, alleges that Respondent violated its duty to bargain in good faith under §10(1)(e) of PERA by refusing to honor the January 9 agreement. The charge, as amended, also alleges that Respondent violated PERA by, sometime before January 9, 2013, unilaterally changing unit employees' health insurance benefits when the parties had not reached a good faith impasse in bargaining. Finally, the charge alleges that on or about March 25, 2013, Respondent unlawfully declared impasse and unilaterally imposed changes in mandatory subjects of bargaining when no good faith bargaining impasse had been reached.

Findings of Fact:

The parties' current collective bargaining agreement covers the term December 1, 2010 through November 30, 2014. Article II of Schedule A of the agreement sets out the wage rates for the first and second years of the contract. It also states that, prior to December 1, 2012, the Union and Employer will initiate negotiations over wage rates for the remaining two years of the agreement. In addition, Article VII(1) of Schedule A of the contract states:

> Effective January 1, 2011 and for a time period that covers two years (2011 and 2012) the Employer shall continue to provide the current Blue Cross Blue Shield Community Blue PPO Plan, and with a $5/$25/$50 prescription drug co-pay package, with no reimbursement to the employee. Prior to December 1, 2012, the Union and Employer will initiate negotiations over a health insurance package for the remaining two years of this Agreement.

On September 17, 2012, Charging Party sent Respondent a letter stating that it wanted to negotiate changes or revisions in the wage and health insurance provisions in the contract. The parties' first negotiation session was held the same day. At that meeting, Respondent was represented by City Manager Anthony Chandler and Mayor Susan Lumley, who is also a member of Respondent's City Council. Charging Party's bargaining team consisted of Charging Party Business Representative David Dumond and unit employees Josh Wright and Steve Biesiada.

Dumond testified on behalf of Charging Party regarding the first meeting and Chandler testified on behalf of Respondent. Chandler testified that Respondent presented a proposal that employees begin paying a ten percent premium contribution for their health insurance. According to Chandler, Respondent also proposed a two percent wage increase for the first year of the reopener, which would be the third year of the contract, and a 1.5 percent wage increase for the following year. As Chandler recalled it, Respondent told Charging Party that employees needed to contribute to their health care because Respondent had to comply with Act 152, i.e., the Publicly Funded Health Insurance Contribution Act, 2011 PA 152, MCL 15.561 et seq. Chandler testified that certain other issues were discussed, such as whether the wage increase could be expressed as a dollar amount rather than a percentage, but that Charging Party did not make a proposal.

According to Dumond, neither party presented an actual proposal at the first meeting. Dumond testified that Chandler said that due to changes in the law, employees would have to

make a contribution toward their health insurance. He did not recall any specific mention being made of Act 152. Dumond initially testified that he told Chandler that Charging Party understood that employees would have to begin making a contribution to their premium due to changes in the law, but that it would like a wage increase to offset the cost of the contribution. Later in the hearing, however, Dumond testified that Charging Party did not agree to begin making a contribution to the health care premium because the law required it. Rather, according to Dumond, the employees realized that it looked bad to citizens that they had no health care contribution. Dumond stated that Charging Party's position was that Act 152 did not apply to unit employees in the fall of 2012. I conclude that Dumond, as he testified initially, told Chandler at the first meeting that Charging Party acknowledged that changes in the law now required that unit employees contribute to their health care.

The second bargaining session was held on September 18. Again, Dumond's and Chandler's recollections of this meeting differed. According to Dumond, Respondent proposed a ten percent employee contribution for health insurance and a wage increase of two and one-half percent for both years. Chandler testified that his notes from that bargaining session did not indicate that Respondent made a new proposal at the September 18 meeting. Chandler also denied that Respondent offered a wage increase of two and one-half percent at the September 18 meeting or at any other time during negotiations. He testified that he did recall that figure being discussed, but testified that it was brought up by Charging Party. As discussed below, I find it unnecessary to determine in this case whether the parties reached a good faith bargaining impasse at any time during their negotiations. Therefore, I also find it unnecessary to decide which individual, Dumond or Chandler, testified accurately regarding Respondent's initial wage offer.

On or about October 1, 2012, Chandler met with Respondent's City Council to discuss the progress of negotiations. Sometime in November 2012, the City Council voted to adopt the "hard cap" option for complying with Act 152.[1] According to Chandler, the resolution covered only Respondent's unorganized employees.[2] In December, Respondent's health insurance policies renewed and premium increases went into effect. Respondent recalculated the premium contributions its unorganized employees were already paying and began deducting the new amounts from their paychecks. Respondent did not begin deducting premium contributions from the paychecks of Charging Party's members.

The third bargaining session was held on December 3, 2012. Mayor Lumley did not attend that meeting, and Chandler was Respondent's only representative. Chandler and Dumond agree that Chandler told Charging Party that Respondent had adopted the hard cap option, although they disagree about whether he said it had been adopted for all employees or only for unorganized employees. They agree, however, that Respondent's table proposal was now the hard cap amount for both the remaining years of the contract rather than the ten percent premium contribution it had offered earlier. Under Respondent's proposal, the amount employees would

[1] The "hard cap" option places dollar figure caps on the amount a public employer can pay per year per covered employee for medical benefit plan coverage. The caps are set out in the statute, but subject to revision each year in accord with changes in the consumer price index. Act 152 also allows an employer to deduct premium contributions in accord with these caps from the paychecks of covered employees.

[2] Chandler's testimony was the only evidence on this point.

contribute for the first year, i.e., the third year of the contract, was less than ten percent. However, it was impossible to determine with certainty the amount of the employees' contribution for the second year because the amount depended on several factors, including how much the premium increased and the hard cap amounts set for that year. Charging Party told Chandler that Charging Party did not want to agree to the hard cap when it did not have the numbers to determine the premium contribution amount. According to Dumond, he reminded Chandler that Respondent had already offered a two and one-half percent wage increase and a fixed ten percent employee health care contribution for both years of the contract.

The next meeting was January 3, 2013. Again, Chandler was Respondent's sole representative. Both Dumond and Charging Party bargaining committee member Wright, in addition to Chandler, testified regarding that meeting. There was discussion at that meeting about agreeing to the hard cap contribution for the first year and some type of reopener for the second year. However, Charging Party's negotiating team eventually told Chandler that it wanted the ten percent employee contribution for both years and not the hard cap amount. It also proposed a three percent wage increase for both years. Chandler told Charging Party that he would bring Charging Party's offer to the City Council. On January 7, 2013, Chandler met with the City Council in a closed session to discuss the negotiations. According to Chandler, Charging Party's offer was not well received by the Council.

Charging Party's bargaining team met with Chandler again on January 9, 2013. Again, both Dumond and Wright, in addition to Chandler, testified about that meeting. According to Dumond and Wright, Chandler told Charging Party that Respondent had already adopted the hard cap option, and that was what Charging Party had to take. Dumond testified that he asked Chandler how the City Council could adopt the hard cap option when the parties had not even negotiated it yet, and Chandler replied that the City Council had to make a decision as to which option to adopt before it paid its health insurance premiums. Chandler agrees that he told Charging Party's team that Respondent's offer was still the hard cap, but denies that he told them they had no other option because the City Council had already adopted it. All three witnesses agree that Chandler also told Charging Party that a two percent wage increase was all that the City Council would approve. After some further discussion, Charging Party told Chandler that it would accept the hard caps and the two percent wage increase if Respondent also agreed to reimburse bargaining unit employees $50 per month for using personal cell phones on the job. Dumond and Wright testified that Chandler said, "I can get this done," and Chandler admitted that he might have said something to that effect. The parties then prepared a writing, labeled tentative agreement, stating that a letter of agreement would be drafted with these terms and included as an addendum to the contract. The writing was signed and dated by Dumond and Chandler. The parties agree that Chandler did not state during the January 9 meeting that he needed to, or would, bring the agreement to the City Council, or seek the approval of Mayor Dumas. They also agree that Chandler did not explicitly tell Charging Party's bargaining team that City Council did not have to approve the agreement.

The members of Charging Party's bargaining unit, by phone, agreed to the tentative agreement. On January 10, after this vote had taken place, Dumond emailed Chandler a document entitled "Addendum of Agreement." This document reflected the terms agreed to on January 9. It also stated that prior to November 30, 2013, the parties would initiate negotiations

for a health insurance plan to cover the remainder of the contract period. Chandler made some changes to the language, and returned it on January 11. Later that day, after Dumond and Chandler had agreed on language, Chandler called Dumond and told him that Mayor Lumley did not agree with the terms of the agreement because of the cell phone reimbursement. He said that Respondent could agree to the hard cap contribution and the two percent wage increase without the cell phone reimbursement. On February 4, as noted above, Charging Party filed the instant charge.

Sometime around March 4, 2013, after the original charge was filed, Respondent's City Council voted to reject the January 9, 2013 agreement. On March 25, 2013, at Respondent's request, Dumond met with Chandler and Respondent's counsel Michelle Landis. Chandler and Landis told Dumond that Respondent could agree to the hard cap insurance premium and the two percent wage increase without the cell phone reimbursement. They also asked Dumond if he had another proposal for Respondent. Dumond replied that his proposal was that Respondent honor the January 9 agreement. Landis told him that Charging Party was not negotiating in good faith and that the parties were at impasse until Charging Party came up with another proposal.

After the March 25, 2013 meeting, Dumond called Chandler and offered the hard cap contribution, a two percent wage increase, and to drop the $50 per month cell phone reimbursement in exchange for a $700 signing bonus the first year, and a $600 signing bonus the second year. Chandler rejected the proposal. He told Dumond that the parties were obviously at impasse and henceforth Dumond would have to talk to Landis.

No evidence was placed on the record in this case regarding whether the parties returned to the bargaining table after this conversation. Charging Party did not assert that in the charge or at the hearing that Respondent refused to continue negotiations based on its assertion of impasse.

As of the close of the hearing on June 27, 2013, Respondent had not begun deducting health insurance premium contributions from the paychecks of bargaining unit members. It also had not implemented a wage increase or any other change to employees' terms and conditions of employment.

Discussion and Conclusions of Law:

It is well established that ratification by a public entity's governing body is presumed to be a condition precedent to the formation of a binding collective bargaining agreement. An exception is where the equitable doctrine of estoppel must be applied to prevent a manifest injustice. *Genesee Co,* 1982 MERC Lab Op 84, 87; *North Dearborn Heights Sch Dist*, 1967 MERC Lab Op 673, 679 (no exceptions); *Shelby Twp*, 1989 MERC Lab Op 704, 708.

Charging Party argues that the presumption does not apply here because Charging Party and Respondent have a binding collective bargaining agreement, and the January 9, 2013 agreement was only an addendum to that agreement. It also argues that Respondent was estopped from repudiating the agreement because Chandler, Respondent's bargaining agent, assured Charging Party that he had the authority to enter into the addendum on wages and benefits.

All three witnesses agree that the only thing Chandler said to Charging Party's bargaining team about his authority to enter into a binding agreement was his statement at the January 9, 2013 meeting, "I can get this done," or something to this effect. I find that this statement could not have reasonably been interpreted by the bargaining team as an assurance that Chandler had the authority to enter into a final agreement. I find this to be true even if Chandler had not taken Charging Party's previous offer to the City Council and returned to the bargaining table stating that the City Council would not accept it. I also find that none of the other factors upon which the Commission has traditionally relied in finding equitable estoppel are present in this case. Chandler did not misrepresent to Charging Party that the tentative agreement had been ratified by City Council, and the terms of the tentative agreement were never implemented. Thus, Charging Party did not rely to its detriment on any misrepresentation of fact concerning the agreement's ratification. Compare, *City of Coldwater*, 1972 MERC Lab Op 362. Moreover, Chandler, after his conversation with Major Lumley persuaded him that it would be pointless to present the tentative agreement to the City Council, acted promptly to notify Charging Party of this fact so that negotiations were not delayed. Compare, *Royal Oak Twp*, 1982 MERC Lab Op 874; *City of Hamtramck*, 1982 MERC Lab Op 723.

In support of its argument that the general rule requiring ratification of collective bargaining agreements should not be applied here, Charging Party points out, correctly, that not all agreements made between union and employer representatives must be ratified by the employer's governing body to be binding. Charging Party also correctly points out that when the parties negotiate a modification to an existing collective bargaining agreement, whether the parties intended the agreement to be subject to ratification is crucial. For example, in *City of Battle Creek*, 1994 MERC Lab Op 440, the Commission held that there was no evidence that the parties intended an agreement reached by party representatives to add two positions to the bargaining unit to be a tentative agreement. It held that the fact that the employer's city council had not ratified the agreement did not excuse the employer's refusal to sign a written document memorializing the agreement. In *City of Pontiac*, 1992 MERC Lab Op 234, also cited by the Charging Party, the Commission held that a written contract addendum providing for wage adjustments for skilled trades employees was a binding agreement. The parties entered into a memorandum of understanding during the term of their existing collective bargaining agreement that stated that they would negotiate these wage adjustments. The uncontradicted testimony of the union's witnesses was that it was the understanding of the negotiators of the memorandum that the wage adjustments would go into effect immediately upon completion of the negotiations. The Commission held that the skilled trades' addendum was negotiated as part of the contract, and that there was no evidence to indicate that the parties intended or anticipated that wage agreements reached pursuant to that memorandum would be subject to further ratification by either party.

Here, however, the parties' existing collective bargaining agreement explicitly states that both wages and health insurance for the final two years of the agreement, i.e. 2013 and 2014, will be negotiated by the parties during the term of the agreement. In other words, the parties clearly and unambiguously expressed their intent to reopen the contract as to these two subjects during the contract term.

In *Speedrack, Inc*, 293 NLRB 1054 (1989), the National Labor Relations Board (NLRB or the Board) discussed the effect of reopener provisions on the parties' exercise of rights normally foreclosed during the term of a contract. The Board stated that when parties agree to a reopener provision, they essentially choose flexibility over stability as to those provisions of their contract governed by the reopener, because they waive the right to refuse to bargain over matters governed by the contract during its term. The Board noted that in *NLRB v Lion Oil Co*, 352 US 282, 285–86, (1957), the Supreme Court held that §8(d) of the National Labor Relations Act (NLRA) did not prohibit a union from striking over a demand to modify a collective bargaining agreement pursuant to a reopener clause, as long as the strike occurred more than 60 days after the contractually permitted notice to modify. The Board concluded that the reopening of a contract pursuant to a reopener clause is equivalent to the expiration of the contract with respect to the terms covered by the reopener. It held, at 1056:

> Thus, in cases involving terminated contract provisions - whether terminated through a reopener or terminated through the expiration of a contract - we will assume, *in the absence of evidence of a contrary intent*, that the parties intended to reserve to themselves the freedom of action that is a normal part of the collective bargaining process when contractual provisions governing the matters on the bargaining table are not in effect. [Emphasis added].

These include, as the Board held in *Speedrack*, the right of the employer to implement its final offer on the subjects covered by the reopener after bargaining to a good faith impasse.

I find the Board's discussion of reopener clauses relevant to the issue here. I conclude that it should be assumed, in the absence of some evidence of contrary intent, that when the parties reopened their contract with respect to wages and health insurance in September 2012 they intended all the normal principles of bargaining over the terms of a new contract to apply to these negotiations. These principles would include, as discussed above, that ratification by Respondent's governing body was a precondition to the formation of a new binding agreement on the subjects covered by the reopener. In this case, there was no evidence that the parties *did not* intend that tentative agreements negotiated pursuant to the reopener provisions be made subject to ratification. Therefore, I conclude that Respondent did not violate its duty to bargain in good faith by refusing to acknowledge the tentative contract agreement reached with Charging Party on January 9, 2013 as a binding contract, since that tentative agreement was never ratified by Respondent's City Council.

The amended charge also alleges that Respondent violated its duty to bargain in good faith by unilaterally changing unit employees' health insurance benefits when the parties had not reached a good faith impasse in bargaining. As discussed above, there is a dispute over whether, in November 2012, Respondent's City Council adopted the hard cap option for complying with Act 152 for all employees, or only for unorganized employees. There also appears to be a dispute about whether members of Charging Party's bargaining unit were covered by Act 152, given that there was a collective bargaining agreement in effect which had been reopened with respect to

health insurance.[3] However, there is no dispute that as of the date of the hearing, Respondent had not implemented any change to unit employees' health insurance benefits, including any requirement that employees contribute to the insurance premium, or any other change to their existing terms or conditions of employment. I conclude that even if Respondent's City Council did pass a resolution for the calendar year 2013 unilaterally adopting the hard cap option for all employees that action, by itself, would not constitute a violation of its duty to bargain in good faith with Charging Party.

Finally, the charge, as amended, alleges that on or about March 25, 2013, Respondent unlawfully declared that the parties had reached an impasse in their negotiations and unilaterally imposed changes in mandatory subjects of bargaining. First Chandler and Landis, and later Chandler by himself, told Dumond that the parties had reached impasse. However, the record established that Respondent did not thereafter implement any unilateral changes to employees' terms and conditions of employment. Moreover, no evidence was presented that after telling Charging Party that impasse had been reached, Respondent refused to meet or bargain. I find that whether or not the parties had actually reached impasse, the statements made by Chandler and Landis did not, standing alone, violate Respondent's duty to bargain under PERA. I conclude, therefore, that the charge should be dismissed. I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: November 6, 2013

[3] Section 5(1) of Act 152 states that if a collective bargaining agreement or other contract that is inconsistent with sections 3 and 4 is in effect for a group of employees of a public employer on the effective date of this act, the requirements of section 3 or 4 do not apply to that group of employees until the contract expires. However, the requirements of sections 3 and 4 apply to any extension or renewal of the contract.

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