STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF FLINT (POLICE DEPARTMENT),
Public Employer - Respondent,

-and-

Case No. C11 K-188
Docket No. 11-000815-MERC

POLICE OFFICERS LABOR COUNCIL,
Labor Organization - Charging Party.
_____/

APPEARANCES:

Keller Thoma P.C., by Daniel Villaire, Jr., for Respondent

Thomas R. Zulch, Police Officers Labor Council, for Charging Party

DECISION AND ORDER

On May 1, 2014, Administrative Law Judge David M. Peltz issued a Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: July 9, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF FLINT (POLICE DEPARTMENT),
Public Employer-Respondent,

-and-

Case No. C11 K-188
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POLICE OFFICERS LABOR COUNCIL,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Keller Thoma, P.C., by Daniel L. Villaire, Jr., for Respondent

Thomas R. Zulch, Staff Attorney, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case arises from an unfair labor practice charge filed on October 31, 2011, by the Police Officers Labor Council (POLC) against the City of Flint. 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 charge was 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). Based upon the entire record, including the transcript of hearing, exhibits and post-hearing briefs filed by the parties on or before March 8, 2013, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge:

The charge asserts that the City of Flint violated its duty to bargain under Section 10(1)(e) of PERA by refusing to bargain the impact or effect of health insurance cost increases imposed by the Employer on bargaining unit members effective the pay period beginning July 9, 2011. According to the Union, Respondent had an obligation to bargain over issues including, but not limited to, the ability of bargaining unit members to chose different health care providers in order to offset the impact of the cost increases.

The City contends that its actions were consistent with the requirements of Public Act 54 of 2011 (PA 54), which mandates that employees bear any increased cost of maintaining health, dental, vision, prescription or other insurance benefits after the expiration date of a collective bargaining agreement and until a successor contract is in place. The City further asserts that bargaining over the impact of cost increases would have been futile because allowing employees to change health care

providers outside of the designated open enrollment period would have put the tax exempt status of its health insurance plans at risk.

This case was initially held in abeyance by agreement of the parties while representatives of the Union and the Employer attempted to reach a voluntary settlement of the dispute or, in the absence of a settlement, agreement on a stipulation of facts. When those efforts proved unsuccessful, an evidentiary hearing was held on December 13, 2012, following which the parties submitted post-hearing briefs.

Findings of Fact:

Charging Party represents two bargaining units of employees of the City of Flint Police Department. Police captains and lieutenants comprise one bargaining unit, while the other POLC unit is made up of police sergeants. The most recent collective bargaining agreements covering both units were in effect from 2006 to 2008. Following the expiration of those agreements, the parties agreed to extend both contracts for one year through June 30, 2009. Thereafter, the parties continued to abide by the terms of the expired agreements with respect to health insurance until the events giving rise to the instant dispute.

With respect to health insurance, the expired contracts provide both units with the same options. Bargaining unit members are entitled to choose between various health plans, including Blue Cross/Blue Shield MVF I, Blue Cross/Blue Shield CMM PPO and an HMO, with the City and its employees sharing the cost of health insurance coverage on an 80/20 basis. The City allows its employees to enroll in the available plans on a "premium only" basis. With respect to these premium only plans, the City's benefit guidebook provides:

> Section 125 (Premium Only Plan): This plan allows you to pay for your monthly health care contributions on a pre-tax basis. This means that the amount of your take-home pay will be higher utilizing the Section 125 Premium Only Plan. These plans do have a minimal effect on your future Social Security benefits. If you do not want to participate in this plan, you must opt out in writing at the Human Resource Office, otherwise you will automatically be enrolled on a pre-tax basis.

For a six-week period in April and May of each year, the City holds its annual open enrollment period during which employees are allowed to select a health insurance plan for the following plan year. Historically, only one open enrollment period has been held for each plan year. The plan year, which coincides with the City's fiscal year, runs from July 1st through June 30th. Employees are not allowed to change health insurance plans after the open enrollment period ends unless a specific "qualifying event" or "status change" occurs, such as marriage or the birth of a child.

The open enrollment period for the 2012 plan year began in April of 2011. As part of the open enrollment process, the City provided its employees with a list of the rates they would be charged for each of the various health plans during the upcoming plan year. In addition, the City held a health fair on May 11, 2011 at which employees were given the opportunity to ask questions and obtain additional information about their health plan options. At or around the same time, Respondent provided Charging Party with the 2011 and 2012 health insurance rates to show the

increases in the City's costs for each of the plans. The open enrollment period closed at 5:00 p.m. on May 27, 2011.

On June 8, 2011, Public Act 54 of 2011 (PA 54) went into effect. PA 54 amended PERA to cap wages and benefits following contract expiration. The amended language, set forth in MCL 423.215b(1), provides that after the expiration date of a collective bargaining agreement and until a successor contract is in place, employees shall bear any increased cost of maintaining health, dental, vision, prescription or other insurance benefits that occurs after the expiration date.

The City's 2012 plan year began on July 1, 2011. In an email dated July 7, 2011, the City's retirement and benefits manager, Suzi Bye, notified Charging Party and representatives of the City's other labor organizations that bargaining unit members who were without a contract at the start of the plan year would be responsible for the increased cost of their health insurance plans as a result of the passage of PA 54. The email provides, in pertinent part:

> [T]hose employees with currently expired contracts will not be receiving step increases and are responsible for paying the increase in the employer's rates for insurance coverage (health, dental and vision).
>
> Since the City's new plan year was effective on July 1, 2011 the difference in the employer's cost for medical plans will begin being deducted from those affected employees' paychecks starting with pay ending 07-09-11 (check date 07-14-11).
>
> The amount of the additional deduction(s) ranges from $13.27 to $313.44 per month (not including dental or vision), depending on the individual's choice of healthcare and whether they have a single, double or family contract. Dental & Vision rates will be included but are still being determined.
>
> These deductions will continue until a new contract is ratified.
>
> Please share this information with your affected employees/members so that they may plan for the impact of the new bill/law.

On July 8, 2011, POLC attorney Brendan Canfield submitted a demand to bargain regarding the impact of the increase in health insurance costs to the City's human resources director, Donna Poplar. The reference line of the letter specifies that the demand was made on behalf of both the police sergeants and the police captains and lieutenants bargaining units. The letter provides, in pertinent part:

> The Police Officers Labor Council (POLC) recently learned that the City of Flint will be unilaterally implementing health care cost increases on the Sergeants' and Captains'/Lieutenants' bargaining units. The City asserts that it is instituting these increases pursuant to MCL 423.14(b)(1) [sic].

* * *

> [T]he City's unilateral implementation of the health care cost increases has resulted in a change of circumstances for the members of the bargaining units. The POLC demands to bargain the impact and effect of the health care increases. The POLC specifically demands to bargain members' ability to choose health care providers, among other issues. POLC Staff Representative Lloyd Whetstone is available to bargain with the City.

Neither Canfield nor Whetstone received a response from the City regarding the July 8, 2011, bargaining demand.

On July 11, 2011, sergeant Rick Hetherington, president of the police sergeants bargaining unit, sent an email to Tonja Petrella, who was the City's human resources and labor relations coordinator at that time. In the email, Hetherington demanded that prior to the implementation of the changes, the City "should allow the employees to select a health care plan based on the modified pay structure." The email continued, "We would request that the city delay implementation to allow for discussions with the union about the effects on the bargaining unit, and to provide for an opportunity for the members to review the cost increases and make informed health care selections."

Petrella responded to Hetherington's email that same day and denied that the City had any obligation to bargain with the Union over the effects of the increase in health insurance costs. Petrella wrote:

> Public Act 54 is an amendment to Public Act 336 of 1947 (PERA). As you are aware, it is PA 336 that defines permissive, mandatory and prohibited subjects of bargaining as well as the remedies that are available to either party if an Unfair Labor Practice is committed. With the passage of PA 54, the City of Flint is statutorily mandated to implement its provisions. It is the City's contention that this amendment to PA 337 [sic], along with its specific address to who it affects, makes the unilateral implementation of its provisions mandatory, as well as a prohibited subject of bargaining.
>
> In addition, the City of Flint was not made aware of this act until some time after it passed on June 8, 2011. Health Insurance open enrollment concluded on May 27, 2011. The City of Flint had no way of knowing at any time prior to, or during the open enrollment period that this act would be passed, notwithstanding its implications to any members of your . . . bargaining [unit]. Although the City understands and appreciates your concerns, we will not be offering an open enrollment to accommodate this act.

On some unspecified date after the passage of PA 54, Suzi Bye, Respondent's retirement and benefits manager, contacted the City's outside health care consultant, Cornerstone, and inquired as to whether the new law constituted a qualifying event which would trigger a new open enrollment period. Bye also posed the same question to Blue Cross/Blue Shield. At hearing, Bye testified that representatives of both entities responded to her inquiry by indicating that PA 54 did not trigger another open enrollment period. Bob Erlenbeck, the Respondent's risk and benefits administrator, came to the same conclusion. He testified that based upon his interpretation of IRS regulations, PA 54 did not constitute a qualifying event and that if a new open enrollment period was held because of

the new law, the City could lose its tax-exempt status for its health plans. Nevertheless, both Bye and Erlenbeck agreed that the decision whether to hold a new open enrollment period ultimately rested with the City's human resources director.

The increase in health insurance costs for members of Charging Party's bargaining units became effective beginning with the pay period ending July 9, 2011. By way of example, the premium contribution rate paid by Sergeant Heatherton for the Health Plus Options HMO plan increased from $75 to $150 per month as a result of the implementation of the changes required by PA 54. Employee contributions for dental and vision insurance did not change, as there was no increase in cost for that coverage during the 2012 plan year.

At the time of the events giving rise to this dispute, the City was operating under the authority of an emergency financial manager. On April 12, 2012, the emergency financial manager, Michael Brown, reached a tentative agreement with the police sergeants unit and the police captains and lieutenants unit. Both units ratified their respective agreements the following day. On April 6, 2012, Brown "accepted and adopted" the agreements by way of Orders No. 14 and 15. As of that date, the City stopped deducting the increased health insurance premiums.

Discussion and Conclusions of Law:

Charging Party alleges that the City violated PERA by refusing to bargain over the impact of its decision to pass the cost of health insurance rate increases to its employees. 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). 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 Sch Dist*, 452 Mich 309, 317; *Detroit Bd of Education*, 2000 MERC Lab Op 375, 377. 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* at 318; *St Clair Cnty ISD*, 2005 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." At the same time, bargaining unit members have a right to rely upon the terms and conditions in the contract and to expect that they will continue unchanged. *Detroit Bd of Ed, supra*. See also *Wayne Cnty Comm Coll*, 20 MPER 59 (2007). At the expiration of a collective bargaining agreement, wages, hours, and other terms and conditions of employment that are mandatory subjects of bargaining survive a contract by operation of law during the bargaining process. *Wayne Co Gov't Bar Ass'n v Co of Wayne*, 169 Mich App 480, 485-486 (1988).

It is well established that the benefits, coverage, and administration of a health insurance plan are mandatory subjects of bargaining under Section 15 of PERA. 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). Thus, it is generally a violation of Section 15 of PERA for a public employer to make changes to health insurance coverage without first bargaining with the exclusive representative. On June 8, 2011, however, the Legislature amended PERA to provide for an exception to the employer's

duty to bargain changes to health insurance benefits. PA 54, which was given immediate effect, requires a public employer to pass on to its employees any increases in benefit costs, including health insurance, which arise during the period between contract expiration and the commencement of a successor agreement. The amended language of PERA, as set forth in MCL 423.215b(1), specifically states:

> Except as otherwise provided in this section, after the expiration date of a collective bargaining agreement and until a successor collective bargaining agreement is in place, a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement. The prohibition in this subsection includes increases that would result from wage step increases. *Employees who receive health, dental, vision, prescription, or other insurance benefits under a collective bargaining agreement shall bear any increased cost of maintaining those benefits that occurs after the expiration date*. The public employer is authorized to make payroll deductions necessary to pay the increased costs of maintaining those benefits. [Emphasis supplied.]

Charging Party does not dispute that there were increases in costs for the City of Flint to maintain its health insurance plans for the 2012 plan year. The Union further acknowledges that because its bargaining units were without collective bargaining agreements on July 1, 2011, when the new plan year went into effect, the City lawfully passed on the cost of health insurance rate increases to its employees pursuant to the express terms of PA 54. However, the Union asserts that Respondent nevertheless had an obligation under Section 15 of PERA to bargain over the impact and effects of the new law on its members, including whether to afford employees the opportunity to choose different health care providers in order to offset the impact of the cost increases. Charging Party asserts that Respondent unlawfully ignored its demands for impact bargaining and that, as a remedy, the City should be required to make its members whole for any increased costs paid under PA 54 from the date of implementation through April 6, 2012, when the successor collective bargaining agreements became effective for both units.

The City does not dispute that it made the unilateral decision to pass on the cost of health increases to Charging Party's members or that it refused to bargain with the Union over the effects of that decision. However, Respondent asserts that the charge must be dismissed because neither the decision nor the effects thereof are bargainable issues under PA 54.

It is well established that even where there is no bargaining obligation with respect to a particular decision, an employer does have a duty to give the union an opportunity for meaningful bargaining over the effects of that decision. *AFSCME, Metropolitan Council #23 and Local 1277 v City of Centerline*, 414 Mich 642; *Ishpeming Supervisory Employees v City of Ishpeming*, 155 Mich App 501 (1986); *Ecorse Bd of Ed*, 1984 MERC Lab Op 615; *Capac Cmty Sch*, 1984 MERC Lab Op 1195; *Good Samaritan Hospital*, 335 NLRB 901 (2001); *Transmarine Navigation Corp*, 179 NLRB 389 (1968). For example, in *City of Detroit (Health Dept)*, 1991 MERC Lab Op 41, the Commission held that the employer had no duty to bargain over its decision to create new supervisory positions and transfer to them the duties previously performed by nonsupervisory bargaining unit employees whose positions had been eliminated. According to the Commission, requiring a public employer to bargain to impasse over such a decision would place an improper restraint on the employer's ability

to delegate its supervisory authority and unacceptably interfere with its ability to manage. The Commission held, however, that the employer had a duty to give the union an opportunity for meaningful bargaining over the effects of that decision. Similarly, in *St Joseph*, 1996 MERC Lab Op 274, the Commission held that although the employer had no duty to bargain over its decision to assign lawn-mowing duties to fire fighters, it did have an obligation to negotiate over the effect of its decision upon the union's request.

The City asserts that the instant charge should be dismissed because PA 54 relieved public employers of the duty to bargain regarding any aspect of the implementation of the new law, including the impact of the PERA amendment on employees. In considering this argument, the primary goal must be, as it is in all matters of statutory construction, to ascertain and effectuate the intent of the Legislature. *Lakeview Community Sch*, 25 MPER 37 (2011), aff'd 302 Mich App 600 (2013); *Casco Twp v Secretary of State*, 472 Mich 566, 571 (2005); *Tryc v Michigan Veterans' Facility*, 451 Mich 129 (1996). It is a well-established principle of statutory construction that the Legislature is presumed to be aware of statutory interpretations by the courts and by the administrative bodies charged with statutory enforcement. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505-506 (1991); *Parker v Bd of Ed of Byron Center Pub Sch*, 229 Mich App 565, 570-571 (1998). Thus, it must be assumed that the Legislature was aware that both the Commission and the courts have recognized that a public employer has a duty to bargain over the impact a decision has on its employees, regardless of whether the decision itself is subject to the bargaining obligation. In fact, the Legislature has previously accounted for this proposition in the course of enacting other PERA amendments. When the Legislature expanded the list of prohibited subjects of bargaining by amending Section 15 of PERA, it included language barring public school employers from negotiating over the decision to contract with a third party for noninstructional support services. Section 15(3)(f) also made the procedures for obtaining the contract, the identity of the third party, and "the impact of the contract on individual employees or the unit" prohibited subjects. See also Sections 15(3)(h), (j), (k), (l), (m), (n) and (o), each of which amended PERA to include a specific prohibition on impact bargaining. Thus, the Legislature was clearly aware of the distinction between the obligation to bargain a decision versus the duty to bargain the effects thereof, yet it chose not to include language prohibiting the latter when it enacted PA 54. The only reasonable conclusion is that this omission by the Legislature was intentional.

In the instant case, the record establishes that Charging Party made a clear and unequivocal demand to bargain over the impact of the increases in health insurance costs brought about by the passage of PA 54. Canfield, the FOP's staff attorney, testified credibly and without contradiction that, on or about July 8, 2011, he sent a letter to the City's human resources director, Donna Poplar, in which he sought to bargain the impact and effect of the health care increases. In the letter, which referenced both the police sergeants and the police captains and lieutenants units, Canfield demanded to negotiate over the ability of unit members to choose health care providers outside of the normal open enrollment period. Three days later, sergeant Rick Hetherington, president of the police sergeants bargaining unit, sent an email to Tonja Petrella, who was, at the time, the City's human resources and labor relations coordinator, demanding that the City delay implementation of the cost increases to allow for "discussions with the union about the effects on the bargaining unit, and to provide for an opportunity for the members to review the costs increases and make informed health care selections." I find that the issues raised by Canfield and Hetherington clearly pertained to the effects of the City's decision to pass on the cost of health care increases to bargaining unit members and that the parties could have bargained over these issues without impinging on Respondent's duty

to implement the requirements imposed by PA 54. By ignoring or rejecting the Union's demand to bargain the impact of the change, the City violated its duty to bargain under Section 15 of PERA.1

Respondent contends that negotiations would have been futile because the only subject of bargaining specifically referenced by Charging Party in connection with the implementation of the changes required by PA 54 was the Union's demand to allow unit members the option to make changes in coverage and/or enroll in new health insurance plans after the closing of the 2012 plan year open enrollment period. According to the City, such a change is precluded by IRS regulations which require that an employer have only one open enrollment period per plan year, during which time each employee must make an irrevocable choice with respect to health care coverage for that plan year. The City asserts that the only exception to this requirement is if a "qualifying event" occurs, such as marriage or the birth of a child, which may permit an employee to revoke an election during the plan year. Respondent argues that PA 54 does not constitute a "qualifying event" under IRS regulations and that if it were to allow employees to change their coverage options because of the new law, the City could risk losing the tax-exempt status of its health insurance plans.

At the outset, it should be understood that the Commission has no jurisdiction to enforce federal law or independent authority to offer definitive interpretations of IRS regulations. In considering the defense asserted by Respondent in this matter, the Commission's role is limited to determining whether the City's reliance on federal law excuses it from what would be, in the absence of that authority, its obligation to bargain in good faith under PERA. Under the facts presented in the instant case, this inquiry essentially involves an examination of whether the City acted reasonably and in good faith in rejecting the Union's demands to bargain over the impact of the increases in employee health care costs.

Section 125 of the Internal Revenue Code, 26 USC § 125, enacted in 1978, sets forth rules and regulations governing "cafeteria plans." Cafeteria plans are an exception to general federal income tax rules applicable to employee income. Cafeteria plans allow employees to pay certain qualified expenses, such as health insurance premiums and flexible spending accounts, on a pre-tax basis, thereby reducing the employee's total taxable income. Employers also benefit from implementing a cafeteria plan by saving on the employer portion of Federal Insurance Contributions Act (FICA), Federal Unemployment Tax Act (FUTA) premiums and Medicare taxes. *Benefits of Section 125 Plans*, Section125Plans.com, retrieved April 21, 2014. To qualify as a cafeteria plan, the plan must offer employees a choice between at least one taxable benefit, such as cash, and one qualified benefit. 26 USC § 125(d)(1). A "premium only plan" is a type of cafeteria plan which allows employers to deduct the employee's portion of the insurance premium directly from their paychecks. A Section 125 plan is the only means by which an employer can offer employees a choice between taxable and nontaxable benefits without the choice causing the benefits to become taxable. *IRS FAQs for Government Entities Regarding Cafeteria Plans*, retrieved April 21, 2014.

A cafeteria plan must be codified in a written plan instrument which specifically describes all benefits and establishes rules for eligibility and elections. A failure to operate in accordance with the

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1 Although the City had a duty to bargain the impact of PA 54, it did not have to engage in such negotiations prior to implementing the changes required by the new law, as requested by Hetherington in his July 11, 2011 email to Petrella. The Commission has held that there is no duty to bargain the impact of a management decision prior to its implementation. See e.g. *Kalamazoo County Sheriff*, 1992 MERC Lab Op 63.

terms of the plan instrument or the requirements of Section 125 may cause the IRS to disqualify the plan and result in the loss of tax benefits for plan participants. One of the requirements under IRS regulations is that a cafeteria plan must provide that participant elections are irrevocable and cannot be changed during the period of coverage, generally the plan year. 26 CFR § 1.125-4(c). However, cafeteria plans may permit an employee to change their pre-tax deferral election when certain events, known as qualifying events or "changes in status" occur. *Id.* See also *Internal Revenue Service Regulation 1.125-4: Permitted Election Changes*, IRC, 2002FED ¶7320. Events entitling an employee to make election changes mid-year include a change in legal marital status, a change in the number of dependents or place of residence, a change in coverage of a spouse or dependent under another employer plan, the addition or improvement of a benefits package option, a loss of coverage under any group health coverage sponsored by a governmental or educational institution, changes in 401(k) contributions, the occurrence of a COBRA qualifying event, if an employee, spouse or dependent becomes enrolled in coverage under Medicare or Medicaid, an employee taking Family Medical Leave Act (FMLA) leave, or the issuance of judgments, decrees or orders. 26 CFR § 125-4(c) – (f).

Also included in the list of qualifying events entitling an employee to make election changes mid-year under 26 CFR § 125-4(f) are cost changes which are defined as follows:

> (2) *Cost changes*
>
> (i) *Automatic changes*. If the cost of a qualified benefits plan increases (or decreases) during a period of coverage and, under the terms of the plan, employees are required to make a corresponding change in their payments, the cafeteria plan may, on a reasonable and consistent basis, automatically make a prospective increase (or decrease) in affected employees' elective contributions for the plan.
>
> (ii) *Significant cost changes*. If the cost charged to an employee for a benefit package option (as defined in paragraph (i)(2) of this section) significantly increases or significantly decreases during a period of coverage, the cafeteria plan may permit the employee to make a corresponding change in election under the cafeteria plan. Changes that may be made include commencing participation in the cafeteria plan for the option with a decrease in cost, or, in the case of an increase in cost, revoking an election for that coverage and, in lieu thereof, either receiving on a prospective basis coverage under another benefit package option providing similar coverage or dropping coverage if no other benefit package option providing similar coverage is available.
>
> * * *
>
> (iii) *Application of cost changes*. For purposes of paragraphs (f)(2)(i) and (ii) of this section a cost increase or decrease refers to an increase or decrease in the amount of the elective contribution under the cafeteria plan, whether that increase or decrease results from an action taken by the employee (such as switching between full-time and part-time status) or from an action taken by an employer (such as reducing the amount of employer contributions for a class of employees).

The IRS regulations do not define "significant cost change" for purposes of a mid-year election change. However, in example 7 to 26 CFR § 125-4(f)(2), an increase of approximately ten percent (10%) in dependent care cost was deemed sufficiently "significant" to entitle an employee to make a mid-year change:

> Example 7. (i) Employee G is married to Employee H and they have one child, J. Employee G's employer, O, maintains a calendar year cafeteria plan that allows employees to elect coverage under a dependent care FSA. Child J is cared for by Z, G's household employee, who is not a relative of G and who provides child care services at an annual cost of $4,000. Prior to the beginning of the year, G elects salary reduction contributions of $4,000 during the year to fund coverage under the dependent care FSA for up to $4,000 of reimbursements for the year. During the year, G raises Z's salary. Employee G now wants to revoke G's election under the dependent care FSA, and make a new election under the dependent care FSA to an annual amount of $4,500 to reflect the raise.
>
> (ii) The raise in Z's salary is a significant increase in cost under paragraph (f)(2)(ii) of this section, and an increase in election to reflect the raise corresponds with that change in status. Thus, O's cafeteria plan may permit G to elect to increase G's election under the dependent care FSA.

As noted, Section 125 of the Internal Revenue Code was raised by the City as a defense to the unfair labor practice charge brought by the Union in the instant case. However, Respondent did not call a tax expert or an authority in health care law as a witness to establish that the City acted in good faith in rejecting the Union's bargaining demand. The only direct evidence introduced by the City in support of its Section 125 defense was the testimony of its risk and benefits administrator, who asserted that PA 54 did not constitute a qualifying event for purposes of IRS regulations. However, there is no indication in the record that Erlenbeck was qualified to interpret the federal tax code. In fact, at the hearing, neither Erlenbeck nor any other Employer witness was able to identify or cite any specific IRS regulation which supported such a conclusion. Suzi Bye, the City's retirement and benefits manager, testified that she made inquiries to both Blue Cross/Blue Shield and the City's health care consultant, Cornerstone, regarding the impact of PA 54 on the Respondent's health care plans. According to Bye, both entities responded by indicating that the new law did not trigger an open enrollment period. However, the specific individuals who allegedly made that assessment were not identified by Bye at hearing or called to testify by Respondent in support of its Section 125 defense, and there is nothing in the record to suggest that the responses received by the City constituted authoritative advice regarding whether an increase in premiums brought about by PA 54 constituted a "significant cost change" for purposes of 26 CFR § 125-4.

Based upon the authority set forth above, it appears that the "significant cost change" exception to the prohibition on mid-year election changes under 26 CFR § 125-4(f)(2) would be applicable to the cost increase imposed on Charging Party's members in July of 2011 and that, at the very least, Respondent had an obligation to fully and properly investigate the tax implications of the Union's bargaining demand instead of rejecting that demand outright. The record establishes that after the open enrollment period for the City's 2012 plan year ended, the Legislature enacted PA 54, which requires that employees bear any increased cost of maintaining health or other insurance

benefits after the expiration date of a collective bargaining agreement and until a successor contract is in place. In accordance with the new law, Respondent announced that Charging Party's bargaining unit members would be responsible for the increased cost of their health insurance plans as a result of the passage of PA 54. Pursuant to the notice sent by the City to its labor organizations, the premium increases for bargaining unit members ranged from $13.27 to $313.44 per month. The increases became effective during the 2012 plan year, beginning with the pay period ending July 9, 2011. By way of example, the premium contribution rate paid by Sergeant Heatherton increased from $75 to $150 per month as a result of the implementation of the changes required by PA 54. Although the phrase "significant increase in cost" is not defined by the IRS regulations, the increases to which Charging Party's members were subjected in the instant case would be considered "significant" by any reasonably objective definition of that term.

Respondent asserts that 26 CFR § 125-4(f)(2) is not applicable in the instant case because the increases in health insurance costs were established before the open enrollment period and made known to the Union and its members prior to the expiration of the designated time period for making elections. Therefore, the City contends that there were no "significant cost increases" during the course of the plan year which would constitute a status change for purposes of federal regulations. It is true that the costs increases were announced by Blue Cross/Blue Shield and other health care providers prior to the start of the 2012 plan year and that both parties, as well as members of the bargaining unit, were aware of those changes before the conclusion of the open enrollment period. However, there can be no dispute that the cost to individual employees for health insurance did not increase until the pay period ending July 9, 2011, when the City's implementation of PA 54 became effective. This would seem to fall squarely within the language of 26 CFR § 125-4(f)(2), which lists a significant increase in "the cost *charged to an employee* for a benefit package option" as the triggering event which would entitle an employee to make mid-year elections; i.e. 26 CFR § 125-4(f)(2) applies when an employee has to pay significantly more out of pocket for health insurance during the plan year, regardless of the reason for the change. This conclusion is consistent with the analysis set forth by the State of Wisconsin, which determined that premium share increases for public employees resulting from legislation similar to PA 54 "is deemed to be a significant increase and is a qualifying event" for purposes of Section 125 so as to entitle employees to make mid-year changes to their coverage. See *Recent Changes to Your WRS/Group Health Insurance Benefits*, Wisconsin Department of Employee Trust Funds FAQ, September 19, 2011.

It should be reiterated that the above analysis does not constitute a legal conclusion that the cost increases imposed by the City on Charging Party's members in fact constituted a "significant increase in cost" for purposes of 26 CFR § 125-4. Rather, I merely find that the language of the federal regulations relied upon by the City to justify its outright rejection of Charging Party's bargaining demand seemingly contradicts Respondent's position that such negotiations would necessarily have been futile. Even assuming that the statutory provisions cited above could be characterized as ambiguous with respect to the tax implications of allowing employees to make mid-year elections under these circumstances, Respondent had a duty under PERA to conduct a thorough investigation into the matter rather than simply rejecting the Union's bargaining demand. For example, the City could have consulted with a certified public accountant or other recognized tax expert to determine whether employees could be allowed to make mid-year election changes under

26 CFR § 125-4(f)(2) or pursuant to some other provision in the IRS regulations.2 Alternatively, the City could have attempted to obtain from the IRS a private letter ruling, or PLR, which constitutes a binding advisory opinion based upon the set of facts presented by the entity making the request. Internal Revenue Bulletin: 2013-1; *Understanding IRS Guidance – A Brief Primer*, IRS.gov, retrieved April 21, 2014. Yet, there is nothing in the record suggesting that the City took such action or that it made any real effort to seek authoritative advice regarding the tax implications of the Union's demand to bargain.

Casting further doubt on whether Respondent acted in good faith is the fact that the City's reliance on IRS regulations appears to have been asserted for the first time as a defense to the unfair labor practice charge filed by the Union. There is no indication in the record that Respondent ever referenced federal law as justification for its refusal to engage in impact bargaining until the hearing in this matter. In fact, in responding to Hetherington's bargaining demand, Petrella simply asserted that the City's implementation of PA 54 was a prohibited subject of bargaining about which Respondent would not engage in negotiations.

Even assuming arguendo that Respondent had fully investigated its options under Section 125 and in good faith reached the conclusion that the changes imposed as a result of PA 54 did not constitute a "significant cost increase" for purposes of 26 CFR § 125-4(f)(2), there were still other issues about which the parties could have bargained without jeopardizing the tax exempt status of the City's cafeteria plans. For example, the parties could have explored the possibility of allowing bargaining unit members to make changes to their health insurance plans for the remainder of the 2012 plan year, but with the understanding that the premiums for new or modified coverage would be made on a post-tax basis outside of the cafeteria plan until the next open enrollment period. See Example 4(iii) to 26 CFR § 125-4(f)(2). Additionally, the City's benefit guide, which was admitted into the record as a Respondent exhibit, specifically provides that employees have the option of electing not to pay their health insurance premiums on a pre-tax basis. Thus, the City could have engaged in negotiations with the Union concerning the health benefits available to any bargaining unit member who had opted out of enrolling in a Section 125 "premium only plan" for the 2012 plan year.

Respondent contends that even if there were no potential tax implications of bargaining with the Union over allowing employees to change their coverage options, the negotiations would have nevertheless been futile because the City was experiencing a "severe economic hardship" and could not have afforded to hold a second open enrollment period. However, the City had the right to negotiate with Charging Party over the costs associated with allowing employees to make mid-year election changes. The Commission has held, for example, that an employer may not lawfully refuse

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2 For example, IRS regulations allow employers to shorten the length of the plan year under certain circumstances. In 2007, the Treasury Department and the IRS published proposed regulations under Section 125. 72 Fed Reg 43938 (August 6, 2007). The proposed regulations require that a cafeteria plan year must be 12 consecutive months and must be set out in the written cafeteria plan. Consistent with Prop. Treas. Reg. § 1.1250-1(d)(2), a plan year may be shortened where there is a "valid business purpose." Taxpayers are entitled to rely on the proposed regulations. If a change in the plan year does not satisfy this valid business purpose requirement, the plan year for the cafeteria play remains the plan year that was in effect prior to the attempted change. See IRS Notice 2012-40.

to comply with a union's request for information on the ground that providing the information would be too costly; rather, as part of its duty to bargain in good faith, the employer is required to either provide the union with the specific information requested or negotiate with the union over the cost of compiling that information. See e.g. *Cheboygan Area Schools*, 88 MERC Lab Op 47; *Michigan State University*, 1986 MERC Lab Op 407. In any event, it is well established that even a bona fide financial crisis does not entitle a public employer to repudiate its bargaining obligations under PERA. *Wayne County Board of Commissioners*, 1985 MERC Lab Op 1037; *Capac Cmty Sch*, 1984 MERC Lab Op 1195; *City of Detroit, Transp Dep't*, 1984 MERC Lab Op 937; *Ionia Co Rd Comm*, 1984 MERC Lab Op 625, aff'd , unpublished opinion per curiam of the Court of Appeals, 9/24/1985 (Docket No. 78969); Village of Union City, 1983 MERC Lab Op 510, aff'd in part, rev'd in part, 135 Mich App 553 (1984); *Jonesville Board of Ed*, 1980 MERC Lab Op 891.

For the above reasons, I conclude that Respondent had a duty to bargain with the Union over the impact or effects of its decision to pass on health care cost increases to Charging Party's members and that the City failed to establish that such negotiations would have been futile.

The final issue to determine is the appropriate remedy for the City's violation of Section 10(1)(e) of PERA. An unlawful refusal to bargain about the effects of a decision generally results in a limited make whole remedy intended to promote meaningful bargaining over impact issues and to approximate the results of good-faith effects bargaining. See e.g. *Ecorse Bd of Ed*, 1984 MERC Lab Op 615 and *Transmarine Navigation Corp*, 170 NLRB 389 (1986). In the instant case, the parties reached agreement on a new contract after the charge was filed and the City subsequently stopped deducting the increased premiums from the paychecks of Charging Party's members. As a result of the City's unlawful refusal to bargain, however, unit members were precluded from making changes to their health care coverage from the pay period ending July 9, 2011 to April 6, 2012, the date upon which the emergency manager "accepted and adopted" the new contracts. It is, therefore, impossible to determine the specific amounts that Charging Party's members might have saved had the City not repudiated its bargaining obligation.

Charging Party argues that the City should be required to make its members whole for any increased costs paid under PA 54 from the date of implementation through April 6, 2012, when the successor collective bargaining agreements became effective for both units. Such a remedy, however, would effectively obviate the result intended by the Legislature when it enacted PA 54 and, thus, give employees an unwarranted windfall. At the same time, any remedy which fails to include some form of make whole relief would essentially constitute an endorsement of Respondent's disregard of its bargaining obligations under PERA. Under such circumstances, I find that the remedy which will most approximate the results of good-faith bargaining is an order requiring the City to pay the members of Charging Party's units the difference between the cost increases actually imposed on them pursuant to PA 54 and the cost increases for which they would have been responsible under the new law had they been allowed to change to the least expensive health insurance plan in which they could have enrolled beginning July 1, 2011, and continuing through April 6, 2012, the date that the successor collective bargaining agreements went into effect.

I have carefully considered all other arguments set forth by the parties in this matter and conclude that they do not warrant a change in the result. Accordingly, I recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

Based upon the above findings of fact and conclusions of law, Respondent City of Flint, its officers, agents, and representatives are hereby ordered to:

1. Cease and desist from refusing to bargain collectively and in good faith concerning wages, hours and working conditions with the Police Officers Labor Council.

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

    a. Make whole the employees in the police captains and lieutenants unit and the police sergeants unit for any losses they may have suffered because of the City's unlawful refusal to bargain the impact of the imposition of 2011 PA 54 by paying the members of Charging Party's units the difference between the cost increases actually imposed on them pursuant to PA 54 and the cost increases for which they would have been responsible under the new law had they been allowed to change to the least expensive health insurance plan in which they could have enrolled beginning July 1, 2011, and continuing through April 6, 2012, the date that the successor collective bargaining agreements went into effect, including interest at the statutory rate, computed quarterly.

    b. Post copies of the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees are commonly posted, for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: May 1, 2014

NOTICE TO ALL EMPLOYEES

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

WE WILL cease and desist from refusing to bargain collectively and in good faith concerning wages, hours and working conditions with the Police Officers Labor Council.

WE WILL pay the members of Charging Party's units the difference between the cost increases actually imposed on them pursuant to PA 54 and the cost increases for which they would have been responsible under the new law had they been allowed to change to the least expensive health insurance plan in which they could have enrolled beginning July 1, 2011, and continuing through April 6, 2012, the date that the successor collective bargaining agreements went into effect, including interest at the statutory rate, computed quarterly.

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

CITY OF DETROIT

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.