STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF ALLEN PARK,
Public Employer-Respondent in Case No. C11 H-132,
Charging Party in Case No. CU11 H-021,

-and-

CITY OF ALLEN PARK INTERNATIONAL
ASSOCIATION OF FIRE FIGHTERS, LOCAL 1410,
Labor Organization-Respondent in Case No. CU11 H-021,
Charging Party in Case No. C11 H-132.
_____/

APPEARANCES:

Tomkiw Enwright P.L.C., by Andrey T. Tomkiw and Daniel J. Rice, for the City of Allen Park

Logan, Huchla & Wycoff, P.C., by Charles E. Wycoff, for the City of Allen Park International Association of Fire Fighters, Local 1410

DECISION AND ORDER

On June 15, 2012, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter pursuant to §§ 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. On July 10, 2014, the Commission received correspondence from Charging Party indicating that the dispute underlying the charge had been settled and requesting that the charge be withdrawn. Charging Party's request is hereby approved. This Decision and Order and the Decision and Recommended Order of the Administrative Law Judge will be published in accordance with Commission policy.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: August 20, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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CITY OF ALLEN PARK INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1410,
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Charging Party in Case No. C11 H-132.
_____/

APPEARANCES:

Tomkiw Enwright P.L.C., by Andrey T. Tomkiw, for the City of Allen Park

Logan, Huchla & Wycoff, P.C., by Charles E. Wycoff and Cassandra Booms, for the City of Allen Park International Association of Fire Fighters, Local 1410

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to §§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 at Detroit, Michigan on November 8, 2011 and January 10, 2012, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before March 1, 2012, I make the following findings of fact, conclusions of law, and recommended order.

I. The Unfair Labor Practice Charges:

On August 12, 2011, the City of Allen Park (the Employer) filed the unfair labor practice charge in Case No. CU11 H-021 against the City of Allen Park International Association of Fire Fighters, Local 1410 (the Union), the collective bargaining representative of employees in the Employer's fire department. In early 2011, the parties had an existing collective bargaining agreement which they had agreed to extend through June 30, 2013. The agreement included provisions requiring the Employer to maintain minimum staffing levels among fire suppression employees. Since staffing was already at the contractual minimum, the contract effectively

prevented the Employer from laying off fire fighters in response to its budget difficulties. In early 2011, the Employer approached the Union seeking contract concessions. The parties met many times between February 2011 and the close of the hearing in this case in January 2012, but could not reach agreement.

The Employer's charge alleges that the Union violated its duty to bargain under §10(3)(c) of PERA by failing, after agreeing to reopen the contract, to bargain in good faith over the Employer's request for contract concessions. As evidence of the Union's bad faith during the parties' negotiations, the Employer asserts that the Union deliberately put off meetings; asked for information that it knew that the Employer did not have in order to justify its refusal to meet; refused to discuss certain subjects; denied that the parties were engaged in bargaining; conditioned further negotiations on nonmandatory terms, i.e., settlement of a grievance; and attempted to circumvent the Employer's designated bargaining representative to bargain directly with City Administrator Dave Tamsen and Fire Chief Doug LaFond.

On August 16, 2011, the Union filed the unfair labor practice charge in Case No. C11 H-132 against the Employer. The Union's charge alleges that the Employer violated its duty to bargain in good faith under §§10(1)(a) and (e) of PERA by repudiating, on and after July 1, 2011, significant provisions of the collective bargaining agreement and a memorandum of understanding (MOU) executed by the parties on August 10, 2010. [1]

The two charges were consolidated and assigned to me for hearing. On October 24, 2011, before the scheduled hearing date, the Employer filed a motion for summary dismissal of the allegation in the Union's charge that the Employer had repudiated the collective bargaining agreement. On November 1, the Union filed a response opposing the motion. On November 4, 2011, I issued an interim order denying the Employer's motion. As noted above, I conducted an evidentiary hearing on the consolidated charges on November 8, 2011 and January 12, 2012.

II. Employer's Motion to Reopen the Record.

On February 24, 2012, the Employer filed a motion to reopen the record to admit new evidence consisting of a DVD of statements made by Union vice-president Craig Hickey at a meeting of the Employer's City Council on January 24, 2012, during which Hickey said that the Union had offered concessions. The Union objected to the admission of this evidence.

Rule 166 of the Commission's General Rules, 2002 AACS, R 423.166, states that a motion to reopen the record following the close of a hearing will be granted only upon a showing of all of the following:

> (a) The additional evidence could not with reasonable diligence have been discovered and produced at the original hearing.

[1] The Union's charge also originally alleged that the Employer unlawfully refused to provide it with information, that the Employer engaged in unlawful direct bargaining with employees, and that the Employer unlawfully interfered with its employees exercise of their rights under §9 of PERA by issuing layoff notices that were later rescinded. The Union, however, did not address these allegations in its post-hearing brief, and I consider them abandoned.

(b) The additional evidence itself, and not merely its materiality, is newly discovered.

(c) The additional evidence, if adduced and credited, would require a different result.

On March 7, 2012, I issued an interim ruling in which I held that the proposed new evidence would have been cumulative since the record already included correspondence from the Union to the Employer referring to Union proposals as concessions.

III. Findings of Fact:

A. The Collective Bargaining Agreement

On October 7, 2008, the parties entered into a collective bargaining agreement which had an effective date of June 1, 2008 and an expiration date of June 30, 2012.

Article III of the 2008-2012 agreement, entitled "Responsibility of the City" includes the following provisions:

> Section 1. The City, through the City, [sic] has the sole right to manage the Fire Department, including the right to maintain order and efficiency . . .
>
> Section 2. The City has the sole right to hire, lay off, assign and transfer employees in accordance with Act 78; to discipline including discharge for cause according to Act 78; to determine the starting and quitting time and schedules to be worked. It being understood that for the duration of this agreement, the normal work day will begin at 8:00 a.m. It is further understood that as of April 1, 1980, the work schedule of employees in the Firefighting Division shall be a 50.4 hour week in a two-platoon system. *The City shall maintain a minimum of 28 personnel in support of the fire suppression and in the Advanced Life Support Transporting Service.* [Emphasis added]
>
> Section 4. It is understood and agreed that any of the powers and authority the City had prior to the signing of this Agreement are retained by the City except those specifically abridged, deleted or granted [sic] by this Agreement.

In addition to the minimum staffing language in Article II, the contract contains another section, Article IX, Section 1, addressing staffing. This section states:

> Minimum Manning. The minimum personnel complement will be seven (7) in fire suppression on-duty each shift to respond to alarms ("Out the Door"), not including the Chief, Deputy Chief or Fire Inspection personnel. The City shall maintain a total of 28 members in fire suppression, again, not including Deputy

> Chief, Chief or Fire Inspection Personnel. This applies to all sections in the contract regarding minimum personnel on duty.
>
> Article XV of the contract reads as follows:
>
> Any future consolidation, merger or automatic mutual aid pact will be negotiated with Firefighter Local 1410 prior to implementation.
>
> Article VIII of the contract, entitled "Bargaining during Contract Term," states:
>
> The City and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waive the right, and each agrees that the other shall not be obligated to bargain collectively on any subject or matter referred to or covered in this Agreement or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated this Agreement. In the event any of the provisions of this Agreement shall be or become legally invalid or unenforceable, such invalidity or unenforceability shall not affect the remainder.

The collective bargaining agreement includes a wage table, in Article XI, setting out the base salaries for each rank for each of the four years of the agreement. The wage schedule provides for annual step increases for employees with the rank of fire fighter through the first six years, and step increases for sergeants, lieutenants, and captains after six months and after one year. Per the agreement, base salaries increased by one percent on July 1, 2008, by one percent again on July 1, 2009 and by one percent again on July 1, 2010. Effective July 1, 2011, base salaries were to increase by 3%, although, as discussed below, the Employer did not implement this increase. According to the wage table, effective July 1, 2011, base salaries for employees covered by the contract were to range from $41, 683 for a fire fighter with no experience to $89,144 for a captain with one year of experience or more.

In addition to the base salaries set out in the wage table, the agreement provides, in Article XI, Section 2, for "step-up pay" for fire fighters performing the duties of a sergeant for a day. It also provides, in Article XI, Section 10, that employees assigned to the "first assigned rescue crew" be paid a bonus or stipend of seven percent of their base salary for that assignment. The fire fighters assigned to the rescue crew normally receive this bonus in a single payment on or about May 1 each year.

The contract provides, in Article IX, Section 2, for the payment of overtime at time and one-half and double time for holidays. The agreement also provides paid vacation, sick and personal leave which can be banked for later use. Per Article IX, Section 9, the firefighters have one paid 24-hour "Super Kelly" day off per month, and one paid 24-hour "Extra Super Kelly" day off every fifteen months. All the Super Kelly days can be banked for later use as paid time

off, but under the contract fire fighters also have the option of receiving a cash payment for their Extra Super Kelly days.[2]

Article IX, Section 20 of the contract provides for the reimbursement of tuition for work related classes, up to a maximum of nine hours per semester. Fire fighters who want to take classes that would be eligible for tuition reimbursement must submit requests for reimbursement during the first week of December prior to the start of the fiscal year, July 1, in which they expect to take the classes. Under the contract, employees who receive pre-approval to take classes are reimbursed a percentage of their tuition for classes actually taken based on the letter grade they receive for the classes. Employees, therefore, must apply for reimbursement again after they receive their grades.

Under the collective bargaining agreement, fire department employees hired on or before December 1, 1991 receive Blue Cross/Blue Shield Community Blue Preferred Provider (PPO) Plan 1 health insurance coverage, with $5/$10 prescription co-pays. Employees hired after that date are covered by a Health Maintenance Organization Plan (HMO) with the same coverage as their base plan. The Employer pays all costs of the Community Blue PPO 1 plan for the more senior employees and for the HMO for the more recent hires. The more recent hires also have the option to buy up to the PPO 1 plan by paying the difference in cost. Unit members are also provided with dental and optical insurance at the Employer's cost

Bargaining unit employees receive, under the collective bargaining agreement, a defined benefit pension with either a 2.9% or 2.5% multiplier, depending on their date of hire.

The contract provides, in Article VI, for a grievance procedure ending in binding arbitration.

B. The August 2010 Memorandum of Understanding

The Employer first approached the Union regarding the possibility of contract concessions in the spring of 2010. The Union agreed to meet. The Employer's chief negotiators at that time were City Attorney Anthony Guerriero and City Administrator Eric Waidelich. Union president Jeff O'Riley and Union vice-president Craig Hickey represented the Union. O'Riley and Hickey told the Employer that the Union was unwilling to reopen the contract but agreed "to help the city out through a memorandum of understanding."

On August 10, 2010, the parties entered into a MOU which, as outlined below, explicitly extended the collective bargaining agreement through June 30, 2013 and modified certain provisions of the agreement for the duration of its term. The MOU also contained other provisions which were to expire on June 30, 2011.

Paragraph 1 of the MOU stated that, in exchange for an early retirement incentive, the Union would agree to the following:

[2] The purpose of the Kelly days is to maintain a regular work week of 50.4 hours per week under the fire fighters' work schedules.

(a) A hiring freeze so as not to replace vacancies in the fire fighting personnel caused by the early retirement incentives;

(b) Amend Article IX Section 1 as follows:

> Minimum Manning
>
> The minimum personnel complement will be *six (6)* in fire suppression on-duty each shift to respond to alarms ("Out the Door"), not including the Chief, Deputy Chief or Fire Inspection personnel. The City shall *maintain a total of 25 members in fire suppression*, again, not including Deputy Chief, Chief or Fire Inspection personnel. This applies to all sections in the contract regarding minimum personnel on duty. This provision will expire on June 30, 2011. [Emphasis added]

(c) A temporary pay freeze for the ranks, i.e., individuals will be promoted but there shall be no pay increase for those who are promoted to a higher rank. Both parties agree that these conditions will expire on June 30, 2011.

The rest of the August 10, 2010 MOU read as follows:

2. The IAFF agrees to amend the wage schedule in Article XI of the collective bargaining agreement as follows:

2010-2011 1% raise scheduled for July 1, 2010 remains as is
2011-2012 3% raise scheduled for July 1, 2011 remains as is
2012-2013 0% raise scheduled for July 1, 2012

3. The IAFF agrees to waive the 7% rescue payment until June 30, 2011.

4. The IAFF agrees to waive step-up sergeant pay until June 30, 2011.

5. The IAFF agrees to waive promotion raises. Promoted officers will go to the appropriate pay for that rank at the expiration or termination of this agreement. This provision continues until June 30, 2011.

6. The IAFF agrees that the extra Super Kelly will not be eligible for pay, and must be scheduled or put into sick or accumulated leave bank. This provision continues until June 30, 2011. If the extra Super Kelly creates overtime, said overtime will be only given in accumulated leave time.

7. The IAFF will temporarily agree that any overtime will be paid at time and one-half (double time for holiday) in accumulated leave with that time to be placed into the accumulated leave bank. Any hours worked over 480 will be paid

in cash in accordance with FLSA.[3] Emergency and holdover overtime will be paid in cash. This provision continues until June 30, 2011.

8. The IAFF agrees to temporarily waive tuition reimbursement. This provision continues until June 30, 2011.

9. The IAFF temporarily agrees that all department training off-duty will be compensated at time and one-half into the accumulated leave/comp bank only. This provision continues until June 30, 2011.

10. Upon expiration of the provisions which expire on June 30, 2011, the parties will revert back to the contract language in effect prior to this memorandum of understanding.

11. The parties also agree that the provisions contained in this memorandum of understanding shall be prospective from the date of signing this memorandum of understanding and not retroactive.

12. Notwithstanding the fact that the collective bargaining agreement is extended to June 30, 2013, the parties agree, on or about March 1, 2011, to discuss the fiscal situation of the City for the 2011-2012 budget year.

13. The City agrees to immediately abide by the provision of Article X, Section 8E of the collective bargaining agreement in filling all promotional ranks including Chief and Deputy Chief with promotional dates starting July 1, 2010.

<u>Contract language changes that will carry through to the end of the contract, June 30, 2013:</u>

1. Unused personal leave time can be put into accumulated leave or sick bank.

2. No. 1 and No. 2 drivers of the shift shall be given the rank of engineer. (This will be subject to paragraphs 4 and 5 on the preceding page concerning temporary waiver of promotional raises.)

3. The collective bargaining agreement between the parties shall be extended for one (1) year and shall expire on June 30, 2013.

4. The parties agree to a 30-day layoff notice in writing to employees who are to be laid off. Laid off employees will be first to fill vacant positions created from the layoffs. A layoff is not considered a termination and an employee that is recalled from layoff is not considered a “new” employee.

[3] Under the federal Fair Labor Standards Act (FLSA), the Employer is required to pay employees for overtime after they have 480 hours of banked overtime.

5. All unused vacation days can be put into an accumulated leave or sick bank. (Subject to paragraph 7 on the preceding page.)

6. The City shall pay for all required schooling or training, including promotional requirements.

7. The City agrees that it shall apply for a "Safer Grant" which may provide funding for displaced employees of the Fire Department . . .

8. The Super Kelly banks referred to in Article IX, Section 9 and 10 of the current collective bargaining agreement will be modified as follows:

   It is the intention of the parties to eliminate the Super Kelly bank. Therefore, the Super Kelly bank in place at the time of this agreement shall be frozen and there shall be no further accumulation. The employee has the right to either transfer the Super Kelly bank to the accumulated leave bank or to use the time in the Super Kelly bank until it is exhausted. Once the time in the Super Kelly bank is exhausted by either transfer or use, this bank will be eliminated. Any Super Kelly worked [sic] shall be placed into the employee's accumulated leave bank and treated as any other accumulated leave time.

   Accumulated Leave Time Bank

   Accumulated leave time (AL) is earned at 1.5x actual hours reported. AL is earned when an off duty employee attends fire department schooling, training, continuing education, or other department events. The AL bank will have a cap of 480 in accordance with FLSA. AL cannot be scheduled to create overtime. Once approved, AL time cannot be cancelled by the Allen Park Fire Department or City of Allen Park.

If this MOU is approved by the mayor and council all fire department employees on layoff will be called back immediately and made whole with no financial ramifications.

If any provision in this MOU is not followed or is changed by the City of Allen Park, all wording reverts to original contract language.

Both parties agree that the MOU remained fully in effect at least through June 30, 2011. On October 11, 2010, the Union filed a grievance asserting that the Employer had failed to comply with paragraph 13 of the MOU by failing to fill the vacant position of deputy chief. In December 2010, ten fire fighters submitted applications for tuition reimbursement for classes they expected to take during the fiscal year beginning July 1, 2011 and were approved to take these classes.

C. The Employer Seeks Additional Concessions in 2011

The Employer's financial problems continued to worsen throughout 2010. In early 2011, the Employer's then-finance director, Tim McCurley, informed other Employer representatives that if the Employer continued its present level of spending it would not have enough money to get through the current fiscal year ending on June 30, 2011. The Employer began looking at ways of immediately cutting spending, including eliminating appointees and instituting changes in employee health care.

The Employer asked the Union to return again to the bargaining table to discuss contract concessions. The Union engaged attorney Charles Wycoff, and his associate Cassandra Booms, to represent it in these negotiations. The Employer's chief negotiator was its attorney, Andrey Tomkiw. At different times thereafter, the Employer's negotiating team included, in addition to Tomkiw, City Attorney Todd Flood, Flood's associate Chris Forsythe, Finance Director McCurley, Fire Chief LaFond, City administrator Waidelich, and interim city administrator Dean Tamsen. In mid-March, 2011 Dave Tamsen replaced Dean Tamsen as city administrator. However, Dave Tamsen did not attend any meetings with the Union's full bargaining team until early August 2011. Although Tomkiw was the chief negotiator, some of the meetings with the Union were scheduled by Flood and held without Tomkiw being present.

Although the hearing on the unfair labor practice charges took place over two days, neither party presented testimony regarding what took place during the parties' meetings in 2011. Instead, they submitted more than sixty pieces of correspondence between the negotiators relative to these negotiations, including letters summarizing what had occurred at prior meetings.

At the parties' first meeting on February 15, 2011, according to the Employer's summary in a letter, the Employer told the Union that the MOU had failed to achieve the expected savings, and that the Employer might not have the ability to pay for all of its obligations under the collective bargaining agreement. It told the Union that it was considering options that included contracting out its fire operations and/or layoffs. The Union asked the Employer to provide some information about the state of its finances. It also asked the Employer to resolve the October 2010 grievance by filling the deputy chief position. The Employer acknowledged that the MOU required it to do this, but stated that it could only comply with its obligations if it could afford them.

The parties met again on February 18. The Union again asked the Employer to fill the deputy chief position. It also told the Employer that it expected the Employer to promote a fire fighter to fill the sergeant position to be vacated by the individual who had been selected to be deputy chief. The Employer asked if the "Union had a position on minimum manning," and the Union stated that it would be willing to consider permitting the Employer not to fill the position created by the promotion to sergeant. Tomkiw told the Union that the Employer needed to discuss many more issues in order to obtain the financial relief it sought from its current obligations under the collective bargaining agreement. There is no evidence that the Employer proposed specific concessions at either the February 15 or February 18 meetings.

Around the time of these meetings, O'Riley was asked by the Employer to bring as many of his members as possible to an emergency meeting. When the employees arrived, they were greeted by Flood, LaFond, the Employer's police chief and the Employer's mayor. The employees were told that if the Union agreed immediately to a change in its health care plan, layoffs could be avoided. O'Riley and Hickey told the Employer representatives that they did not have authority to enter into such an agreement and that this would be against the Union's bylaws. They asked the Employer for a written proposal that included the benefits and costs of the plan.

On February 22, the Employer's City Council voted to send layoff notices to the entire fire department. On February 23, all the fire fighters received memos stating that the memos served as their 30-day notice of layoff as required by the MOU. No layoffs actually occurred as a result of the Council's February 22 action.

On February 23, Tomkiw sent Wycoff a letter stating that the Employer had "requested to reopen the current collective bargaining agreement with the Allen Park Fire Fighters Local 1410 multiple times." The letter stated that "both layoffs and subcontracting were options." Tomkiw said that the Employer was willing to engage in "both decision and effects bargaining," presumably over the subcontracting, but that "time was of the essence." There is no evidence in the record that the Employer had presented the Union with a specific proposal at the time of this letter.

On March 1, Wycoff's office sent Tomkiw a letter stating that it was the Union's understanding from the previous meetings that the Employer would be forwarding the Union's offer to settle the deputy chief grievance to the City Council. The letter also noted that the Union had not consented to opening the contract or made any promises regarding the granting of new voluntary concessions, and referred to the meetings that had occurred in February as arising from the Union's obligation under paragraph 12 of the MOU to meet to consider the Employer's fiscal situation.

The parties met for the third time on March 3. According to the summary of the meeting prepared by Tomkiw and sent to Wycoff's office, the meeting began with the Employer giving the Union some unspecified financial documents. The Employer told the Union that it had a $662,000 budget shortfall for the 2010-2011 fiscal year, and that it anticipated an even larger shortfall in the next fiscal year beginning in July. The parties discussed the documents, with the Union questioning some of the figures and the Employer promising to verify them. The parties also discussed layoffs. The Employer told the Union that it would save approximately $6,000 per month for each fire fighter it laid off. However, the Employer said that it would prefer to accomplish "the desired cost savings" by other means. The summary does not indicate that the Employer told the Union the amount of cost savings it wanted from the Union's bargaining unit in the form of immediate concessions. According to the summary, "The City put on the table, in addition to reopening the contract, the following possibilities to consider: establishing a public safety department, reductions in health care, elimination of overtime, reduction in minimum manning, pay cuts across the board, layoffs, privatization, or contracting out for fire protection services." Later in the meeting, according to the summary, the Employer said that "the City would be asking for various concessions from the fire fighters, including those such as health care, overtime and possibly even voluntary layoffs with possible sunset provisions." According

to the summary, the Employer stated that it was willing to engage in "both decision and effects bargaining for any of these topics," and encouraged the Union to make "other proposals so the City can accomplish the savings it seeks." There is no indication in the summary that the Employer presented the Union with a specific proposal at this meeting

On March 3, the Union filed a request under the Freedom of Information Act (FOIA) with the city clerk for information consisting of: (1) Certified annual audits for 2010, 2009, and 2008, including any notes or memorandums regarding audits; (2) Adopted/approved city budget for 2009, 2008, and 2007, including any amendments or additions; (3) Any amendments to the adopted city budget for 2010 fiscal year; (4) Any materials prepared for 2011 fiscal year budget; (5) All intra-city correspondence and memoranda regarding the Allen Park Fire Department from the last four years, 2011, 2010, 2009 and 2008; (6) All bids, offers, contracts, correspondence or estimates regarding outsourcing fire protection or ambulance services for the City of Allen Park, i.e., private ambulance company, private fire fighters firms or outsourcing above items to other cities. The request was made as a FOIA request but the Union wrote "PERA" on the top of the request.

On March 4, Wycoff's office sent the Employer a letter asking for a response to its proposal regarding the settlement of the deputy chief grievance. It also promised to "sincerely review any formal written proposal from the City regarding concessions." Finally, it told the Employer that it was tentatively interested in exploring consolidation of the fire department with that of the City of Taylor, and would be willing to provide feedback "should the City request further input regarding the issue." On March 7, Wycoff's office sent another letter asking again if the Employer was going to take the Union's offer on the deputy chief grievance to the City Council. The Union asked the Employer to notify it if it did not want to pursue settlement of the grievance so that it could move forward with arbitration of the issue.

On or about March 14, 2011, the Employer promoted a fire fighter to deputy chief, settling the October 2010 grievance and also reducing the number of employees engaged in fire suppression to 24. In May 2011, another fire fighter resigned, dropping the number to 23. The Employer did not fill either of these positions.

On March 15, Wycoff and Flood had a telephone conversation in which Flood said, in effect, that the Employer's current financial state was dire. Wycoff told Flood that Flood needed to provide financial information and documentation to support the statements Flood made during that conversation, including copies of the most recent annual audit, a current cash flow statement, a copy of the current adopted budget and all amendments, and any other financial information supporting his statements. Wycoff said that the Union would meet with the Employer as soon as it had an opportunity to review this information. The parties adjourned a scheduled bargaining session to give Flood the opportunity to provide the information.

According to Dave Tamsen, because McCurley had either left his position as finance director or was about to leave, Tamsen and Flood undertook to gather the financial information that Wycoff had asked Flood to provide. Tamsen testified that he was not even aware of the Union's March 3 information request. Tamsen testified that he and Flood provided as many of the documents as they could find. According to Tamsen, McCurley's permanent replacement

did not start work until about July and it was several more weeks after that before the Employer could get a "true handle" on its financial situation.

On March 21, Tomkiw emailed Wycoff a written proposal. The email also asked for a meeting as soon as possible because "time was of the essence." The proposal read:

1. Reopen CBA

2. Layoff of five (5) firefighters effective March 26, 2011

   a. Layoffs effective until July 2, 2011

   b. Individuals laid off are not eligible to utilize any bank time during layoff

   c. All minimum manning obligations impacted by this layoff are waived.

3. Immediately change all active employees to BC/BS PPO 4

   a. Continue to negotiate health care benefits.

4. Waive all contractual overtime. Apply FLSA only.

On March 22, Wycoff sent Flood a letter reminding him that he had promised to provide certain financial documents in their phone conversation on March 15. Wycoff asked Flood to provide the information within seven days. Wycoff also noted that the Union had not received the information it had requested on March 3.

Later in the day on March 22, Wycoff sent Flood a second letter, with a copy to Tomkiw. This letter included the following paragraphs:

> On Monday, March 21, we received your written demand for changes to the existing collective bargaining agreement. As you are aware, the firefighters have already opened their collective bargaining agreement and made significant reductions to the agreement. You are now demanding even further reductions.
>
> I should say from the beginning, the Allen Park Firefighters are not unmindful of the City's current financial condition. We do not intend to point fingers except to say that the collective bargaining agreement truly contributed little to the current financial situation, as compared to some other activities of the City. The contractual provisions which you now wish us to reopen and reduce are benefits which will have a significant and substantial impact on your employees. It is not going to happen without the issue being seriously considered and without all of the relevant information being made available to the bargaining unit and its members.

> For example, you want reductions in the pension. What reductions are you referring to? You must have an idea of what is needed. Does this mean a new plan? Does it simply mean a reduction in contributions or reduction in benefits, or both? We would like to know what these reductions are.
>
> The same applies to the health care plan. You seem to suggest that the health care plan should change. What are the reductions under the new plan? What are the benefits to the new plan? Are there alternatives?
>
> I believe that you can understand the concern. You must also be mindful that we have a collective bargaining agreement in effect, as amended by the Memorandum of Understanding. While I am certain that I am preaching to the choir, please understand that the Allen Park Firefighters will not accept a repudiation of their agreement with the City. The Allen Park Firefighters are willing to consider and address your concerns, but will not do so blindly and without fully understanding what you are proposing and understanding the effect on the bargaining unit. I am certain that economic necessity is not sufficient justification to repudiate a collective bargaining agreement.
>
> With this said, we respectfully request that you expedite our requests so that a meeting can be held with you at the earliest possible time to attempt a resolution of our mutual concerns.

On April 8, Wycoff sent a second letter to Flood asking for the information the Union had requested on March 3 and March 15.

While these discussions were taking placing between representatives of the Union and Tomkiw and Flood, Dave Tamsen had been exploring ways to save the Employer money on health care. In early 2011, the Employer told its health care consultant that it was looking for approximately a million dollars per year in total savings for health care for all its employees. The consultant suggested two alternative plans. In early April, the Employer scheduled a series of meetings with representatives of the all the unions representing its employees to present information on these plans. Union president O'Riley and vice-president Hickey attended these meetings. At these meetings, representatives of the union representing police department employees presented the Employer with some proposals for alternate health plans. Dave Tamsen testified that the Employer provided all the unions with all the supporting documents about the proposed plans, including information about their benefits and costs, and that side-by-side comparisons of the actual costs to the Employer of each plan and the benefits provided by each plan were made and handed out to the unions. O'Riley, however, testified that the Employer did not provide the Union with a document telling it what the benefits or costs to the employees would be under each of the plans, and that it also never gave the Union a formal proposal to change the health care plan that was accompanied by enough information for the Union to explain the proposed new plan to its members.

On April 11, Tomkiw notified the Union that the Employer had scheduled an informational meeting for April 18 with representatives of all its bargaining units "to discuss the

current budget, the 2011/2012 budget, and the various concessions the City deems vital." Tomkiw said that the Employer hoped that the unions would bring cost cutting ideas to the table. It is not clear from the record whether this meeting took place or what occurred there.

D. Meetings and Discussion April through June 2011

Sometime in early April, O'Riley met with Tomkiw and Chris Forsythe to go over his March 3 information request. Tomkiw told O'Riley that because several city administrators had come and gone over the period, there was not much data immediately available. Tomkiw said that the information was in the computer system and that the Employer would look for it, but that this would take some time.

On April 27, the Union sent the Employer another letter requesting the information it had requested in March. According to this letter, the Union had yet to receive, or receive any specific answer regarding its request for: (1) the 2008 audit, (2) the adopted approved city budgets for the 2007, 2008 and 2009 fiscal years, including amendments; (3) any amendments to the adopted/approved city budget for the 2010 fiscal year; (4) any materials prepared for the 2011 fiscal year budget; (5) all intra-city correspondence and memorandums regarding the Allen Park Fire Department budget from the last 3 years; (6) cash flow statements; or (7) any other financial information in the City's possession which directly related to the City's need to modify the current collective bargaining agreement. On May 2, the Union agreed to limit its request for the information in item five to 2010 to the present. On May 4, the Employer told the Union that the 2008 audit, the budgets it had requested, and the cash flow statements were available for the Union to pick up at the City clerk's office. It said that there were no amendments to these budgets, and that no documents existed corresponding to items four and five. Union president O'Riley testified that the Union never received a response to its March 3 request for documents relating to the outsourcing of fire services.

On May 5, Tomkiw sent Wycoff's office a letter stating that "due to a very recent unexpected turn of events" the Employer was requesting the Union to agree to certain immediate concessions and to modify the collective bargaining agreement and MOU as follows:

1. All contractual minimum manning requirements are waived.

2. In the event of layoffs, the City will provide the union seven (7) days advance notice. Individuals will be laid off by seniority within their position.

3. Across the board pay freeze until further agreement.

4. Health care. City will offer BC/BS PPO 4 or equivalent to eligible employees.

   Employees will be responsible to pay 20% of all premiums paid on their behalf.

5. All overtime will only be paid as mandated by the Fair Labor Standards Act. The Employer will adopt a 207(k) workweek.

6. No leave may be taken which will create an overtime situation.

Tomkiw asked for an immediate meeting.

Wycoff's office replied with a letter dated the same day stating that the Union understood the Employer's financial situations and its possible outcomes. The letter said that the Union was willing to meet and discuss pay freezes, healthcare and overtime/207(k) workweek although it was not prepared to agree to reopen its contract. The Union agreed to meet the following Monday, May 9, and also stated that it would provide its own comprehensive bargaining proposal the following week. The following day, Wycoff's office told the Employer that it could not meet the following Monday as it had originally suggested, but suggested that if the City had a more comprehensive written proposal it should forward it to the Union. Tomkiw then sent Wycoff's office a letter expressing his disappointment that the parties were not meeting immediately. Tomkiw stated "I remain disappointed with the Union's failure to understand the dire circumstances and the urgency to have some good faith bargaining regarding concessions. Again, I stress to you the need for immediate concessions and I hope that you can impress that upon the bargaining unit." Wycoff's office responded that it would not meet with the Employer until it had a chance to meet with its client.

The parties' next meeting was June 7. After that meeting, Wycoff sent Flood a letter stating that while the Union had a collective bargaining agreement and an MOU, it was willing to consider additional concessions "in the context of structured negotiations," which included meetings scheduled in advance and proposals made in writing. Wycoff also asked Flood for more information about the proposed new health care plan, presumably BC/BS PPO 4, and a copy of the proposed budget for the new fiscal year as soon as possible. Wycoff also asked Flood if the items listed in the May 5 letter constituted its entire proposal for concessions or if there would be further proposals on concessions issues.

A week later, on June 13, the Union provided a response to the Employer's May 5 proposals:

1. The APFF agrees to continue the reduced manning provisions of the Memorandum of Understanding currently in effect. We do not agree with the total elimination of minimum manning.

2. We propose to continue the 30 day notice of lay-off required by the collective bargaining agreement and the Memorandum of Understanding currently in effect. Reducing the notice to seven days is not an economic issue and, given the circumstances of the City's current financial condition, should not present a burden.

3. We are willing to discuss the issue of wages. This issue is addressed in our counter-proposal which is included.

4. While we are prepared to negotiate concessions on the issue of health care, we are totally unable to respond to your proposal for lack of sufficient information

concerning coverage and cost. We believe that our proposal is a more direct approach and addresses the needs of our members in a realistic manner.

5. We must reject your proposal on the use of leave days. It is overly broad. According to your proposal, a man on sick leave would have to report to work sick, because it might cause additional overtime. Obviously, there are alternatives and the APFF is prepared to discuss them.

The Union also made a counterproposal, as follows:

1. The new MOU upon ratification by both parties shall become effective for a period of one year.

2. The APFF is prepared to extend the current concessionary minimum manning provisions for a period of one year.

3. The APFF would be willing to give up the three (3%) pay increase about to come due, for just one year, upon an agreement that the money will be paid to the pension fund on behalf of the fire fighters.

4. The APFF proposes the current health care plan be retained. The APFF is agreeable to payment of five (5%) to the cost of the health care insurance.

5. The officers who were promoted as a result of the last Memorandum of Understanding are to be given the salary adjustment provided in the collective bargaining agreement.

6. The City of Allen Park Pension Plan is to be construed as being incorporated in the New Memorandum of Understanding and an actual copy of the Plan is to be incorporated into the agreement as an attachment.

7. The APFF also suggests that the parties engage in discussions relative to the potential for an additional early incentive retirement to be offered with the APFF.

8. All other terms of the original memorandum of understanding are to be unchanged and the document is to be deemed incorporated into the new agreement.

9. This document is to be deemed a package proposal and all proposals for concessions are to be deemed interdependent and can only be accepted as a package. Rejection of one is deemed rejection of all.

10. There is also a need to discuss accumulated leave in context of the Fair Labor Standards Act. This is especially true in the context of compensatory time.

The Union's letter also stated, "Once our agreement has been reached, we would expect that an extension of the collective bargaining agreement may be in order."

On June 29, 2011, the Union filed a grievance asserting that the Employer was violating the minimum staffing levels set forth in the MOU by failing to fill the vacancy left by the fire fighter who resigned in May.

E. Agreement to Extend the MOU

The parties met next on June 21. During this meeting, the parties agreed orally to extend the MOU for one additional month, to July 31, 2011, and to stay all payments required by the agreement for that period while the parties continued to negotiate. The agreement was not reduced to writing. The Union assumed that the agreement would be presented to the City Council for ratification since it constituted a modification of the collective bargaining agreement, but there is no evidence that the parties discussed when the agreement might go before the Council.

On July 7, in a letter to Flood, Wycoff asked if the City Council had approved the one-month extension of the MOU from June 30 to July 31. When the parties met again on July 12, the Union asked again whether the Employer had accepted the one-month extension of the MOU, and was told that the City Council had ratified it in a closed session.

On July 18, Wycoff's office sent a letter to Flood inquiring again about whether the Employer had agreed to the 30 day extension and stating that if the Union did not receive a written confirmation of its acceptance by July 22 the Union would assume that the Employer had rejected the extension.

On July 20, Wycoff sent Flood's office a letter stating that the Union had ratified the 30 day extension of the MOU, but needed written confirmation that the City Council had ratified the extension in a closed session since the Union had been told that the City Council had ratified it in a closed session.

On July 22, the Employer wrote back stating that the "MOU had been extended," but that the extension of the MOU would be presented to the City Council on July 26 as an informational item. On July 26, the Council adopted a motion to extend the MOU for the fire department for an additional 30 days to July 31, 2011.

F. Expiration of the MOU

Both the collective bargaining agreement and the MOU provided that members of the Union's bargaining unit would receive a 3% salary increase on July 1, 2011. According to O'Riley, after July 1, 2011 he had conversations with Flood, Tomkiw, Fire Chief Doug LaFond and City Administrator Dave Tamsen about when the salary increase would be paid. O'Riley testified that they all told him that the Employer could not afford to pay it. As of the close of the hearing in January 2012, the Employer had not implemented the salary increase, or any increase,

for member of the Union's bargaining unit. The Employer's police officers, represented by another union, did receive a wage increase in the summer of 2011.

In paragraph 3 of the MOU, the Union agreed to "waive the 7% rescue payment until June 30, 2011." At the hearing, the parties disagreed over the meaning of this provision. As stated above, the stipend was usually paid in a lump sum each year on May 1. The Employer asserted that no stipend was due until May 1, 2012, while the Union argued that the MOU merely allowed the Employer to delay the payment of the May 1, 2011 stipend until after the MOU expired, or, alternatively, that the members of the rescue crew were entitled at least to a pro rata payment for the period between May 1, 2010 and August 10, 2010 when the MOU went into effect. As of the close of the hearing in this case in January 2012, the Employer had not paid a rescue crew stipend since May 1, 2010.

In paragraph 4 of the MOU, the Union agreed to "waive step-up sergeant pay until June 30, 2011." At the hearing, the parties disagreed over the meaning of this provision. The Employer asserted that it owed no step-up pay to fire fighters serving temporarily as sergeants for the period when the MOU was in effect, while the Union argued that the MOU did not waive the fire fighters' right to compensation for the term of the MOU ,but merely allowed the Employer to put off payment until the MOU expired. In any case, as of the close of the hearing in January 2012, the Employer had neither paid the accrued step up pay which the Union claimed it owed or resumed paying step up pay for temporary sergeant assignments.

In paragraph 5 of the MOU, the Union agreed "to waive promotion raises." The parties agree that under this paragraph employees promoted between August 10, 2010 and the expiration of the MOU are not entitled to pay at their new rank for period during which the MOU was in effect, but disagree over whether the promoted officers were supposed to be placed at the bottom step of the salary scale for their new rank after the MOU expired or receive credit for time spent in that rank while the MOU was in effect. As of the close of the hearing in January 2012, officers promoted while the MOU was in effect were still being paid as if they had not been promoted.

On August 1, 2011, many of the fire fighters had reached their limit of 480 banked hours. The Employer, therefore, was required by the Fair Labor Standards Act to pay them overtime as it was earned instead of putting time in their leave banks. Insofar as the record discloses, the Employer complied with its obligations under the FLSA. However, as of the close of the hearing in January 2012, the Employer continued to put all overtime hours into leave banks where it could legally do so under the FLSA. It also continued to require employees to use or bank their Extra Super Kelly days, and did not give employees the option they had under the contract of receiving it as a cash payment. In addition, the Employer continued as usual to conduct department training during employees' off-duty hours after August 1, 2011, and it continued to compensate employees for attending this training by placing hours into their leave banks instead of paying them for the time.

Paragraph 8 of the MOU "temporarily waived" tuition reimbursement during the term of the MOU. One of the ten fire fighters who submitted applications in December 2010 for tuition reimbursement for the 2011-2012 fiscal year took classes eligible for reimbursement in the fall of 2011. As of the close of the hearing in January 2012, he had not yet received his grades or

become eligible to submit a claim for reimbursement. The other nine fire fighters had not, or had not yet, yet enrolled in the classes they had intended to take between July 1 2011 and July 1, 2012. However, sometime after July 1, 2011, LaFond told the ten fire fighters, who included O'Riley, that they would not be receiving tuition reimbursement.

The Employer continued after the expiration of the MOU to schedule six fire fighters per shift, and not the seven required by the collective bargaining agreement. The Employer did not fill vacancies created in March and May 2011 by the promotion of one fire fighter to deputy chief and the resignation of another. Therefore, on August 1, and at the time the hearing in this matter closed in January 2012, the total number of fire suppression employees was at twenty-three, two below the minimum number required by the MOU and five below the minimum number required by the contract. One of the twenty-three was not available for duty since he was on an extended sick leave.

Dave Tamsen, the Employer's city administrator when the MOU expired, testified that it was his understanding that, as long as the parties continued to discuss concessions, the Employer "would honor the MOU." According to Tamsen, he understood that either the dispute would be resolved by a new concessions agreement or, when the parties got to the point of impasse, "all the provisions of this and the back pay and everything would have to be paid." In his direct testimony, Tamsen said that he felt that a tacit agreement to this effect was implied from the fact that the parties continued to meet. Later, on redirect examination, Tamsen testified that "the union people" – apparently O'Riley and Hickey – told him "we continue to go until we reach an impasse or we get it concluded. If we reach an impasse and we don't resolve issues, then the City owes us the back money, if we reach a conclusion and resolve the issues, we go forward."

I note that Tamsen did not say in his testimony that there was an agreement between the Employer and Union, tacit or otherwise, that the contract concessions granted by the MOU would remain in effect until the parties either reached a new agreement or their negotiations reached impasse. Rather, the tacit agreement to which Tamsen testified seems to have been that the Union would not take action to enforce the Employer's compliance with the terms of the contract until after the parties' negotiations had broken down. However, as discussed below, on August 3, 2011, mere days after the expiration of the extended MOU, Wycoff sent a letter demanding that the Employer "fully comply immediately with all the provisions of the collective bargaining agreement," and on August 16 it filed an unfair labor practice charge alleging that the Employer was repudiating the agreement. By August 2011, therefore, the tacit agreement to which Tamsen referred had clearly evaporated.

G. Discussions in July 2011

On July 7, Flood sent Wycoff a letter stating that the Employer had passed a budget on July 1 which contained "certain assumptions that were made on behalf of the unions." Flood asked to meet no later than July 12 to "discuss concessions of health care, overtime, minimum manning and potential layoffs." Wycoff agreed to meet.

The parties met on July 12. At the July 12 meeting, according to a summary prepared by Tomkiw and mailed to Wycoff's office, the Employer proposed to reduce the minimum number

of fire fighters scheduled per shift to five. It also proposed to make a Health Alliance Plan (HAP) HMO the base plan for all employees in the bargaining unit and to require employees to pay 20% of their health care premiums. The proposal included an option for employees to buy up to Blue Cross/Blue Shield Community Blue PPO 3, with employees paying one hundred percent of the difference in the premium over the HMO. In a letter dated July 12, the Employer asked the Union to respond to its proposal within a week.

On July 20, Wycoff sent Flood's office a letter stating that the Union needed a written confirmation that the City Council had ratified the extension of the MOU to July 31, 2011. The letter also stated that it was imperative that officers who had been promoted under the terms of the August 2010 MOU receive their pay increases, and that the Union would not consider any further proposals by the Employer until this was done. Third, Wycoff stated that the Union needed information from the Employer about a disability retirement benefit for a bargaining unit member. Finally, Wycoff reiterated that the Union had not agreed to reopen the collective bargaining agreement and would not do so "without mutual consideration and clarification of issues we have requested to be considered."

On July 29, the Employer again sent 30-day layoff notices to all its fire fighters. The notice stated that the recipient of the notice would receive notice of the effective date of his layoff from the Fire Chief. No employees were laid off after receiving the July 29 layoff notice.

Some time between July 20 and August 3, the Union presented the Employer with what it labeled its "final position."

1. Absolutely no to the HAP insurance proposal. IAFF will agree to the 20% co-pay on current insurance when all other bargaining units in the city agree.

2. IAFF will agree to a minimum manning provision for five (5) fire fighters. This will not include officers. On actual five (5) man days one ambulance rescue will be placed out of service. This provision will expire on June 30, 2012.

3. Officer Promotions – those individuals promoted but not placed on the proper pay scale must be paid at the contractual rate of compensation. This must be done immediately.

4. We need to clarify the issue of the medical disability retirement and incorporate the agreement in any memorandum of understanding that the parties reach. It is our position that the disability retiree is entitled to 66/23 of his/her final average compensation.

5. Any employee leaving the employment of the city would be able to collect pension at the regular retirement age of 52.

6. IAFF agrees that through the date of June 30, 2012, all department training/classes taken during off duty will be compensated at time and one-half with accumulated leave into the accumulated leave/comp bank. When this bank is full, the employee will be paid in cash in accordance with the terms of FLSA, again at the rate of time and one-half.

7. IAFF will agree that the super Kelly days will not be eligible for pay but will be placed in accumulated leave-comp bank, and must be scheduled prior to being taken. This provision will also expire on June 30, 2012.

8. Three percent (3%) increase across the board from 2011-2012 and 2012-2013.

9. Sections 3, 4, 11 and 12 of the MOU are deleted.

Flood presented this proposal to the Employer's City Council. On August 2, the Employer, though Flood, presented a counteroffer in which the Employer proposed to implement the 20% premium contribution immediately, and abolish it in the event the other unions did not agree to it. The Employer accepted item two of the Union's proposal, but stated that the Union should understand that five fire fighters would be actually be laid off and total staffing would also therefore drop. The Employer agreed to items three, six and seven. The counteroffer does not mention the other items in the Union's proposal.

On August 3, Wycoff's office sent Flood a letter stating that the Union's most recent "position" had not been an offer. The letter stated that the Employer's August 2 counteroffer "did not meet the Union's needs" and was rejected. The Union also pointed out that it had a valid, enforceable collective bargaining agreement, and that both the August 2010 MOU and agreement to extend it had expired. The Union demanded that the Employer fully comply immediately with all the provisions of the collective bargaining agreement, including the immediate payment of monies for which payment had been delayed, all pay raises, and the reinstatement of all employees to the minimum manning standards established by the collective bargaining agreement.

After this letter, the Employer and Union filed their respective unfair labor practice charges. Sometime in August 2011, after the Employer hired the firm of Plante Moran to take over its books, the Employer provided the Union with detailed information about the state of the Employer's current finances.

The parties resumed meeting again in mid-September and participated in mediation, again without success. On November 4, 2011, the Employer sent a third 30-day notice of layoff to all its firefighters, but again did not lay off any employees.

As of the close of the hearing in January 2012, the parties had not reached any new agreement on concessions.

H. Discussions Away from the Bargaining Table

Both parties accuse the other of attempting to negotiate behind the backs of the designated bargaining representatives. Union president O'Riley testified that beginning in about April 2011, Fire Chief LaFond began calling O'Riley into his office alone in order to "throw ideas out to me on how (the Union) could help save the City financially." O'Riley also recalled one incident where he and several other fire fighters were asked by Dave Tamsen to come to Tamsen's office for a meeting. According to O'Riley, they were intercepted in the hallway by

Flood's associate, Chris Forsythe, who told them that the meeting was not going to take place without Tomkiw being present.

Although LaFond did not testify, Dave Tamsen testified that after the meetings with the unions to discuss health care changes in April he asked LaFond to "see if he could get some feedback from the guys about what was going on." Tamsen also testified that there were several occasions during this period where meetings were called with all the unions on short notice because the Employer had "new information it wanted to share with them." Some of this information was additional information about proposed new health care plans. However, Tamsen testified that he also "wanted to let the Union and the troops know that the City was running out of money and that there was potential layoffs coming up, probably at the end of the fiscal year." These meetings apparently included O'Riley and Hickey, LaFond, Tamsen, and perhaps Flood, but not Tomkiw or anyone from Wycoff's office. Sometime around this time, i.e. April or May 2011, Tamsen also suggested that the Employer and the Union get together to discuss only health care changes, and perhaps minimum manning. Tamsen testified that he made this suggestion to Flood and Forsythe and to O'Riley and Hickey, but not to Tomkiw or Wycoff.

According to Tamsen, both O'Riley and Hickey repeatedly told him that if the three of them met without anyone else present they could "settle the contract." Tamsen admitted, however, that O'Riley and Hickey never came to him with a substantive proposal. O'Riley testified that, aside from a brief meeting with Tamsen to discuss the possibility of merger with another city's fire department, he never met or asked to meet individually with any Employer representative on any matter relating to the concessions.

On August 16, Wycoff's office sent a letter addressed to the Employer's mayor and city council asking them to clarify who was its chief negotiator, as Flood, Forsyth, Tamsen, Tomkiw and LaFond had all attempted to negotiate on behalf of the Employer. The letter also warned the Employer that the Union would file an unfair labor practice charge if Employer agents persisted in attempting to negotiate directly with union members. According to O'Riley, the impetus for this letter was several attempts by Flood to get Union vice-president Craig Hickey to talk to Flood alone; when Hickey did not answer Flood's cell phone calls, Chief LaFond called Hickey and asked or told Hickey to call Flood back. LaFond also continued to call O'Riley into his office to try and engage him in discussions about concessions. In mid-September, LaFond gave O'Riley a copy of an apparently confidential memo from City Administrator John Zech to the City Council with suggestions for eliminating the deficit in the current budget. Zech made a number of suggestions in the memo involving the fire department, including that the Employer form a fire authority, enter into a subcontract for fire services with a neighboring community or communities, enter into a contract with a rescue service, or "renegotiate the Union's contract." He did not specifically recommend any of these actions.

IV. Discussion and Conclusions of Law:

A. The Union's Duty to Bargain under PERA

One of the fundamental principles of collective bargaining is that a party fulfills its statutory duty to bargain in good faith under PERA over mandatory subjects of bargaining by

negotiating provisions in a collective bargaining agreement that cover these subjects and that fix the parties' rights and foreclose further bargaining for the term of the agreement. *Port Huron Educ Ass'n, MEA/NEA v Port Huron Area School Dist,* 452 Mich 309, 318. (1996). Once a party has fulfilled its duty to bargain over a mandatory subject by entering into a collective bargaining agreement, it has the right to rely on the agreement as the statement of its obligations, and rights, as to topics covered by the agreement for the duration of that agreement. *Port Huron,* at 327, *Wayne Co.* 24 MPER 12 (2011). This principle applies whether or not the parties include a provision in their collective bargaining agreement stating that they have no obligation to bargain during the life of the contract on subjects covered by the contract, as the parties here did in Article VIII of their collective bargaining agreement. In sum, the duty to bargain in good faith imposed on both unions and employers under PERA does not require either a union or an employer to agree to modify provisions of a collective bargaining agreement during its term and a party can lawfully refuse even to discuss such a proposal.

Parties can, by mutual consent, agree at any time to modify their contract. In this case, I find, the Union consented to modify certain provisions of its collective bargaining agreement when it entered into the MOU in August 2010; the provisions to be modified and period of time during which the modifications were to remain in effect were set out in the MOU itself. However, the fact that the Union agreed in the MOU to modify the collective bargaining agreement does not mean that it had a legal obligation to do so, either in 2010 or in 2011.

Parties may also include a reopener provision in their contract by which they agree to reopen specific subjects for bargaining before the expiration date of their contract. See, e.g., *NLRB v Lion Oil Co*, 352 US 282, 285-286 (1957). The National Labor Relations Board (NLRB) has held that when the parties agree to a reopener provision in their contract, they have a duty to bargain in good faith over the subjects covered by the provision. It has also held that an employer has the same rights to implement its final offer after reaching a good faith impasse on a reopened subject that it would have after the contract expired. *Speedrack, Inc,* 293 NLRB 1054, 1054 (1989).

The Employer argues that paragraph 12 of the August 10, 2010 MOU should be read as an agreement by the Union to reopen the collective bargaining agreement in March 2011. The Union agreed in this paragraph, "notwithstanding the fact that the collective bargaining agreement is extended to June 30, 2013," to discuss the fiscal situation of the City for the 2011-2012 budget year on or about March 1, 2011. The Employer asserts that this language is ambiguous, and should be interpreted, in light of the parties' actions in 2010, as an agreement by the Union to "repeat the process which resulted in the [2010] MOU." I do not find paragraph 12 ambiguous. Rather, it explicitly states that the parties will "discuss" the Employer's fiscal situation in March 2011. I conclude that this language cannot reasonably be read as an agreement by the Union to reopen the collective bargaining agreement.

The Employer also argues that even if paragraph 12 is not ambiguous, the parties had an established practice that was "so widely acknowledged and mutually accepted that it created an amendment to the contract," citing *Port Huron* at 328 and *Macomb Co v AFSCME Council 25 and Local 411and 893,* 294 Mich App 149 (2011). The Employer notes that under these cases, a party seeking to supplant unambiguous contract language must prove that the parties had a

meeting of the minds as to the new terms and conditions. It argues that the number, frequency and content of the meetings between the parties in 2011 indicate that they intended to collectively bargain and not merely meet and discuss. The Employer points to the fact that the parties met numerous times after February 15, 2011 to discuss concessions, to the fact that they exchanged proposals, and to the fact that they agreed to modify the MOU by extending it by one month to July 31, 2011.

I agree with the Employer that after February 15, 2011, the parties, in fact, bargained over the Employer's demand for contract concessions. However, whether the process engaged in by the parties should be termed bargaining, or something else, is completely irrelevant to the issue here, which is whether the Union had a legal obligation to bargain which it violated by its conduct in this case. As noted above, the parties to a collective bargaining agreement may mutually agree to modify their agreement at any time during its term. The fact that a party engages in bargaining, therefore, does not imply that it acknowledges that it has a legal obligation to do so. If that were the case, a union faced with demands for contract concessions could not even engage in give and take over the employer's proposals, to the parties' mutual benefit, for fear of giving up the rights it had bargained for.

In the instant case, the Employer clearly wanted significant concessions from the Union – although how much money it wanted specifically is not stated in the record. The Union stated several times in letters sent to the Employer during the course of negotiations that it had not committed itself to reopening the contract. I held two days of hearing on this matter, during which the parties presented me with some testimony, and more than seventy exhibits. Throughout the hearing, and in its post-hearing brief, the Employer repeatedly suggested that the Union somehow or at sometime promised to give the Employer concessions adding up to the amount of money the Employer felt it needed, but then reneged on this promise. I have included a lengthy statement of facts in this decision for the purpose of demonstrating that the evidence, as presented to me, does not support a finding that the Union made this promise. I note that a promise to provide significant concessions cannot be inferred merely from the fact that the Union agreed to keep meeting. The Union could have had a variety of reasons for continuing to meet, including the good faith hope of reaching an agreement with the Employer on modifications to the contract, public pressure, or the desire to postpone the contracting out of its members' services. The Union's reasons for continuing to meet, however, are irrelevant. Based on the evidence before me, I find that there was no meeting of the minds by the parties on an agreement to reopen the collective bargaining agreement. Because there was no agreement to reopen, I also find that the Union had no duty under PERA to bargain in good faith with the Employer over the Employer's demand that it agree to modify the collective bargaining agreement during the agreement's term. It follows that the Union's course of conduct during these purely voluntary negotiations cannot be found to violate §10(3)(c) of PERA. The Employer's charge, therefore, should be dismissed.

B. The Employer's Repudiation of the Contract and MOU

If a term or condition of employment in dispute is covered by a collective bargaining agreement, the details and enforceability of the contract provision are normally left to arbitration. *Port Huron,* at 321. Where there is a contract covering the subject matter of a dispute which has

provisions reasonably relied on for the action in question, and the contract also has a grievance procedure with final and binding arbitration, the Commission finds that the contract controls and no PERA issue is presented. *St Clair Co Rd Comm,* 1992 MERC Lab Op 533, 538; *City of Royal Oak,* 23 MPER 107 (2010).

The Commission, however, finds a breach of the duty to bargain in good faith where a party's actions constitute a repudiation of the collective bargaining agreement manifesting a disregard for the party's collective bargaining obligations. The Commission has described repudiation as a rewriting of the contract or a complete disregard for the contract as written. *Central Michigan Univ* 1997 MERC Lab Op 501, 507; *Gibraltar Sch Dist,* 16 MPER 36 (2003). The Commission has held that in order for it to find repudiation: (1) the contract breach must be substantial, and have a significant impact on the bargaining unit, and (2) there must be no bona fide dispute over interpretation of the contract. *Gibraltar Sch Dist*; *Crawford Co,* 1998 MERC Lab Op 17, 21; *Plymouth-Canton Cmty Schs,* 1984 MERC Lab Op 894, 897. Where the parties have an agreement that covers both mandatory and permissive subjects of bargaining, and the permissive subject is so intertwined with the mandatory subjects that agreement to one was quid pro quo for agreement to the others, a repudiation of the permissive term constitutes a repudiation of the entire agreement. *City of Roseville,* 23 MPER 55 (2010); *Kalamazoo Co and Kalamazoo Co Sheriff, 22* MPER 94 (2009).

In its motion for summary disposition, the Employer argued that it did not repudiate its obligations under the contract because the management rights section of the contract, Article III, "provides it with plenary power to take any actions needed to maintain law, order and the basic amenities it is charged with providing." The Employer cited the statement in Article III, Section 4, that "it is understood and agreed that any of the powers and authority the City had prior to the signing of this Agreement are retained by the City." However, as the Union pointed out, Article III, Section 4 actually reads, "It is understood and agreed that any of the powers and authority the City had prior to the signing of this Agreement are retained by the City *except those specifically abridged, deleted or granted [sic] by this Agreement.*" [Emphasis added]. As the Union argued in response to the Employer's motion, nowhere in the collective bargaining agreement is there language supporting the Employer's claim that it does not have to adhere to the contract as written. As the Commission stated recently in *Wayne Co,* 24 MPER 12 (2011), "While this Commission has the discretion to determine the scope of "good faith" bargaining during negotiations, we lack authority to nullify contractual obligations simply because they have become onerous to one of the parties."

1. Economic Exigency as a Defense to Repudiation

The Commission has consistently held that even a bona fide financial crisis does not justify a public employer's unilateral repudiation of its obligations under a collective bargaining agreement. *City of Detroit,* 1984 MERC Lab Op 937, aff'd, 150 Mich App 605 (1985); *Wayne Co. Bd. of Comm'rs,* 1985 MERC Lab Op 1037; *Wayne Co,* 24 MPER 25 (2011); *36th Dist Court,* 21 MPER 19 (2008). Indeed, recent legislation, including the Local Government and School District Fiscal Accountability Act, MCL 141.151l et seq., and amendments to Section 15 of PERA, implicitly recognizes that public employers do not have the right to unilaterally modify theircontracts by explicitly giving emergency managers appointed under the Fiscal

Accountability Act the power, under conditions specifically set forth in that Act, to "reject modify, or terminate one or more conditions of an existing collective bargaining agreement." See MCL 145. 1511.

The Employer argues that the Commission should follow the alleged lead of the NLRB and conclude that unilateral changes by an employer to terms and conditions of employment do not constitute repudiation where the changes are due to an "economic exigency." In support of this proposition, it cites *RBE Electronics,* 320 NLRB 80 (1995). In *RBE* and its predecessor, *Bottom Line Enterprises,* 302 NLRB 373(1991), the NLRB held that where an employer is confronted with an economic exigency compelling prompt action during contract negotiations, the employer may implement a proposal or proposals if the parties have reached good faith impasse on these proposals, even if they are not at impasse on the contract as a whole. That is, the Board recognized an "economic exigency" exception to the principle that when parties are engaged in negotiations for a new collective bargaining agreement, an employer is obligated to refrain from making any unilateral changes in mandatory subjects absent overall impasse in bargaining for the agreement as a whole. It held that where exigencies arise during bargaining requiring prompt action on an individual matter, an employer may satisfy its duty to bargain by providing the union with notice and bargaining to impasse over this action alone. Even in those circumstances, however, the employer has the burden of demonstrating that its unilateral action is the result of extraordinary events which are an unforeseen occurrence, having a major economic effect, and requiring the employer to take immediate action. *RBE; Hankins Lumber Co,* 316 NLRB 837, 838 (1995). This burden is, as the Board said in *RBE,* a heavy one. In *RBE,* the Board remanded the case to administrative law judge to apply this test to the employer's unilateral decision to lay off employees and reduce their work hours during negotiations for a first contract.

The Commission, like the NLRB, recognizes exceptions to the general rule that an employer cannot implement a unilateral change during contract negotiations if the parties have not reached impasse on the entire agreement. If the employer can show an economic need to implement a particular proposal while negotiations are ongoing, and the parties have bargained to impasse over this proposal, the employer can lawfully implement it. See *Wayne Co (Attorney Unit),* 1995 MERC Lab Op 199. As noted above, however, the Commission has held that even a bona fide financial crisis does not justify an employer's repudiation of its obligations under a collective bargaining agreement.[4]

The Board noted in *RBE* and in *Bottom Line* that there might be economic exigencies that excuse an employer from its duty to bargain under circumstances other than ongoing negotiations. In *Seaport Printing,* 351 NLRB 1269 (2007), the Board concluded that a mandatory evacuation of the employer's city ordered because of Hurricane Rita constituted an "economic exigency" that excused the employer from bargaining over the decision to lay off its workforce

[4] The Employer's citation to *City of Detroit,* 22 MPER 20 (2009) is not apt. The issue in that case was whether the employer violated its duty to bargain in good faith by setting a deadline for the union to accept its health care proposal during contract negotiations and then withdrawing the proposal when the union did not meet the deadline. The Commission noted that the deadline was not arbitrary, since it was tied to the beginning of the employer's fiscal year, and that the employer's motives for setting the deadline were not suspect since its financial crisis was well documented. The *City of Detroit* case did not involve a repudiation of a collective bargaining agreement.

when it was forced to close its plant. It concluded, however, that the "economic exigency" of the hurricane did not excuse the employer from bargaining over decisions other than the decision to lay off, including the decision to use non-unit employees to perform unit work. However, the parties have not cited any cases, and I am aware of none, in which the NLRB has found an employer's unilateral repudiation of an existing collective bargaining agreement to be justified by an economic exigency.

A public employer subject to PERA normally has the right, when confronted with an economic crisis, to exercise its managerial prerogative to unilaterally reduce the number of its employees. Here, the Employer is prevented by the minimum manning provisions it agreed to from reducing the number of employees in the Union's bargaining unit. However, the Employer has not shown, or attempted to show, that its repudiation of multiple terms of its collective bargaining agreement with the Union was its only option for dealing with its fiscal crisis. Thus, I conclude that even if the economic exigency test as formulated by the NLRB was applicable to contract repudiation and was applied here, the Employer would have failed to meet its burden of demonstrating that it could not comply with the terms of the collective bargaining agreement and the MOU.

2. Expiration of the MOU

The parties disagree over whether the MOU expired on June 30, 2011 or July 31, 2011. The evidence indicates that the parties agreed orally at a meeting on June 21, 2011 to extend the expiration date of the MOU from June 30, 2011 to July 31, 2011. There was no discussion at this meeting about when the agreement to extend would be presented to the City Council for ratification. On July 18, the Union asked the Employer to confirm that the City Council had ratified the agreement and stated that if it did not receive confirmation before July 22 it would assume that the extension agreement had been rejected. A few days later, the Union notified the Employer that its membership had ratified the extension agreement. Insofar as the record discloses, the City Council did not take formal action to approve the extension agreement until July 26, 2011. However, it did formally approve the MOU at its meeting on that date. Since the record indicates that the parties reached an agreement to extend the MOU until July 31, 2011 and that agreement was ratified by both parties within a reasonable time, I find that a binding agreement was created to extend the MOU. I conclude, therefore, that the MOU expired on July 31, 2011.

3. Findings on Repudiation

The Union asserts that all the elements necessary to demonstrate a repudiation of the collective bargaining agreement are present in this case. First, the Employer has committed multiple breaches of its collective bargaining agreement. These breaches, taken together, are substantial and have had a significant impact on the bargaining unit. Second, there is no bona fide dispute over the meaning of either the collective bargaining agreement or the MOU.

I find, as I found in my interim order denying the Employer's motion for summary disposition, that the Employer's failure to pay the 3% wage increase it agreed to pay the Union's members on July 1, 2011 constituted a substantial breach of both Article XI of the collective

bargaining agreement and paragraph 2 of the MOU, that this breach had a significant impact on the bargaining unit, and that the parties had no bona fide dispute over the interpretation of the above provisions in the collective bargaining agreement and the MOU providing for this wage increase. I conclude, therefore, that the Employer violated its duty to bargain in good faith by repudiating its contractual obligation to pay this wage increase.

I find that the Employer's failure to give promotional raises to bargaining unit employees promoted during the term of the MOU constituted a substantial breach of the wage schedule contained in Article XI of the collective bargaining agreement and of paragraphs 1(c) and 5 of the MOU, that this breach had a significant impact on the bargaining unit, and that the parties had no bona fide dispute over whether under these provisions the Employer was required after the expiration of the MOU to give these promotional raises. I conclude, therefore, that the Employer violated its duty to bargain by repudiating its contractual obligation to give these raises. I find that the parties do have a bona fide dispute over whether employees promoted during the term of the MOU should be given credit for their service in their new positions during the term of MOU for purposes of determining their appropriate placement on the salary schedule, and that the Employer's failure to give promoted employees credit for this service would not constitute an unfair labor practice.

I find that the Employer's failure, after expiration of the MOU on July 31, 2011, recommence paying "step up" pay as provided in Article XI, Section 2 of the collective bargaining agreement constituted a substantial breach of that article and paragraph 4 of the MOU. I find that this breach, taken together with the Employer's failure to comply with other terms of the contract, had a substantial impact on employees, and that the parties had no bona fide dispute over the Employer's obligation to recommence making these payments after the MOU expired. I conclude, therefore, that the Employer violated its duty to bargain in good faith by repudiating its contractual obligation to make these payments. I find, however, that the parties had a bona fide dispute over whether the Employer had an obligation, after the MOU expired, to pay employees for "step up" pay allegedly accrued during the term of the MOU, and that the Employer's failure to pay this "step up pay" would not constitute an unfair labor practice

I find that the Employer's failure, after expiration of the MOU on July 31, 2011, to pay employees assigned to the rescue crew a rescue crew stipend for the period prior to the effective date of the MOU constituted a substantial breach of Article XI, Section 10 of the collective bargaining agreement and paragraphs 3 and 11 of the MOU. I find that this breach, taken together with the Employer's refusal to comply with other terms of the contract, had a substantial impact on employees and that the parties had no bona fide dispute over the Employer's obligation to pay this stipend for the period prior to the effective date of the MOU or after its expiration. I conclude, therefore, that the Employer violated its duty to bargain by repudiating its contractual obligation to pay the rescue crew stipends for the period prior to the effective date of the MOU. I find, however, that the parties had a bona fide dispute over whether Employer had an obligation to pay a rescue crew stipend for the period in which the MOU was in effect, and that its failure to pay the stipend for this period would not constitute an unfair labor practice.

I find that the Employer's refusal, after the expiration of the MOU on July 31, 2011, to approve tuition reimbursement for employees who were approved in December 2010 to take

work-related classes during the fiscal year beginning July 1, 2011, constituted a substantial breach of Article IX, Section 20 of the contract and paragraph 8 of the MOU. I find that this breach, taken together with the Employer's failure to comply with other terms of the contract, had a substantial impact on employees and that the parties had no bona fide dispute over the Employer's obligation under the collective bargaining agreement to approve tuition reimbursement for work-related classes taken by these employees during the 2011-2012 fiscal year. I conclude, therefore, that the Employer violated its duty to bargain by repudiating its contractual obligation to approve tuition reimbursement for these employees.

I find that the Employer's failure, after expiration of the MOU on July 31, 2011, to give unit members the option of being paid in cash rather than in the form of paid leave time for overtime, for "Extra Super Kelly" constituted a substantial breach of Article IX, Section 2, and Article IX, Section 9 of the contract and paragraphs 6, 7 and 9 of the MOU. I find that this breach, taken together with the Employer's failure to comply with other terms of the contract, had a substantial impact on employees and that the employees had no bona fide dispute over the Employer's obligation under the collective bargaining agreement to give employees the option of being paid in cash rather than in the form of paid leave time. I conclude, therefore, that the Employer violated its duty to bargain by repudiating its contractual obligation to give unit members this option.

Finally, I find that the Employer's failure, after the expiration of the MOU on July 31, 2011, to maintain the minimum staffing requirements set forth in Article III, Section 1 and Article IX, Section 1 of the collective bargaining agreement constituted a substantial breach of the contract. I find that this breach, taken together with the Employer's failure to comply with other terms of the contract, had a substantial impact on employees even though no bargaining unit employee was laid off. I also find that the parties had no bona fide dispute over the Employer's obligation under the collective bargaining agreement to maintain these staffing levels. I note that a minimum staffing provision is not a mandatory subject of bargaining under PERA unless the particular provision is found to have a demonstrable and significant relationship to employee safety. *Oak Park Pub Safety Officers v Oak Park,* 277 Mich App 317, 330 (2007). However, in this case, it is unnecessary to determine whether the minimum staffing provisions in Article II, Section 2 and Article IX, Section 1 of the collective bargaining agreement were mandatory or permissive subjects because the minimum staffing provisions were included as part of an agreement that included mandatory subjects and were part of the quid pro quo for that agreement.

For reasons discussed above, I conclude that the Employer's charge against the Union should be dismissed, and I recommend that the Commission take this action. I conclude, however, that the Employer violated §§10(1)(a) and (e) of PERA by repudiating the parties' collective bargaining agreement and the parties' MOU dated August 10, 2010 by the conduct set forth above. I recommend, therefore, that the Commission issue the following order. [5]

[5] The Union seeks an order requiring the Employer to pay its costs and attorneys fees. However, the Commission is not authorized to award attorneys fees. See *Goolsby v City of Detroit,* 211 Mich App 214 (1995).

RECOMMENDED ORDER

The City of Allen Park, its agent, officers, and representatives, are hereby ordered to:

1. Cease and desist from repudiating and/or unilaterally modifying the terms and conditions of employment set forth in its collective bargaining agreement with the Allen Park International Association of Fire Fighters Local 1410 (the Union) covering the period June 1, 2008 through June 30, 2013 and in a memorandum of understanding (MOU) with the Union dated August 10, 2010 by:

   a. Failing or refusing to pay eligible members of the Union's bargaining unit the 3% percent salary increase the City agreed to pay them effective July 1, 2011 under Article XI of the collective bargaining agreement and Paragraph 2 of the MOU.

   b. Failing or refusing, after July 31, 2011, to pay members of the bargaining unit the benefits to which they were entitled under the collective bargaining agreement as a result of the expiration of the MOU, including pay raises for promotions made after August 10, 2010; "step-up pay" as provided in Article XI, Section 2; the rescue crew stipend as provided in Article XI, Section 10, tuition reimbursement as provided in Article IX, Section 20; and the option of being paid in cash rather than in the form of paid leave time for overtime as defined in the contract, for "Extra Super Kelly" days, and department training attended during the employees' off-duty hours.

   c. Failing or refusing, after July 31, 2011, to maintain the minimum staffing requirement of 28 fire suppression employees as the City agreed to do in Article III, Section 2 and Article IX, Section 1 of the collective bargaining agreement, and to maintain a minimum staffing level of seven fire suppression employees per shift as required by Article IX, Section 1 of the agreement.

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

   a. Make all members of the Union's bargaining unit whole for any loss of pay incurred as a result of the unlawful conduct described in paragraph one of this order, plus interest at the statutory rate of five percent (5%) per annum, computed quarterly. The City shall provide the Union with a statement of the amount owed to each individual unit members bargaining unit member under this paragraph together with a reasonable and adequate explanation of how these amounts were calculated at least fourteen (14) days before payment is made.

b. Post the attached notice to employees in conspicuous places on the City's premises, including all locations where notices to employees are customarily posted, for a period of thirty (30) days.

The charge in Case No. CU11 H-021 is dismissed in its entirety, and the charge in Case No. C11 H-132 is dismissed except as to the conduct found unlawful in the above decision.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____