STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY,
Public Employer-Respondent,

Case No. C10 A-024-A

-and-

MICHIGAN AFSCME COUNCIL 25, AFL-CIO,
Labor Organization-Charging Party.
_____/

Nemeth Law, P.C., by Clifford Hammond, for Respondent

Miller Cohen, P.L.C., by Bruce A. Miller and Keith Flynn, for Charging Party

DECISION AND ORDER ON RECONSIDERATION

On September 9, 2014, at its regularly scheduled Commission meeting, upon the motion of Commissioner Robert S. LaBrant, the Commission voted to reconsider its August 12, 2014 vote to adopt a draft decision partially granting Respondent's motion for reconsideration of the Commission's June 11, 2014 Decision and Order.

Procedural History

On November 8, 2012, Administrative Law Judge Doyle O'Connor (ALJ) issued his Decision and Recommended Order in this 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 May 29, 2014, the Commission received a letter from Respondent indicating that the dispute underlying the charge has been settled. Respondent submitted a stipulation by both parties agreeing to the withdrawal of the charge and its dismissal with prejudice. In accordance with our usual procedure, we issued our June 11, 2014 Decision and Order, which approved the request for withdrawal of the charge and directed that the June 11, 2014 Decision and Order and the Decision and Recommended Order of the Administrative Law Judge be published in accordance with Commission policy.

On June 26, 2014, Respondent filed its Motion to Reconsider and Clarify MERC's June 11, 2014 Decision and Order. In its Motion, Respondent asked that this Commission reconsider the portion of our order providing for publication. The ALJ's Decision and Recommended Order includes three related documents: the Decision and

Recommended Order on the underlying merits of the case; Appendix A, the ALJ's July 14, 2010 interim order; and Appendix B, the ALJ's November 8, 2012 order denying Respondent's fifth motion to disqualify the ALJ. In its Motion, Respondent asked that we not publish the Decision and Recommended Order including the two appendices, or, in the alternative, that we sever and not publish the two appendices. Charging Party filed its Response to Motion for Reconsideration on June 30, 2014. In its Response, Charging Party stated that it neither concurred with nor opposed Respondent's Motion.

At our August 12, 2014 meeting, we voted to reconsider the June 11, 2014 Decision and Order and to publish the ALJ's Decision and Recommended Order on the underlying merits of the case with the first of the two appendices. Upon further consideration at our September 9, 2014 meeting, we determined that both appendices must be severed from the ALJ's Decision and Recommended Order, and neither appendix will be published.

Discussion and Conclusions of Law:

Rule 154 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.154, governs the withdrawal of charges. It provides that a "charge may be withdrawn by the charging party following the issuance of a proposed decision and recommended order upon approval by the commission." Where parties have settled their dispute and nothing is to be gained by continuing to adjudicate the issues, we often allow the charge to be withdrawn upon the request of the charging party. Typically, in such cases we publish the ALJ's decision and recommended order along with the Commission's decision and order.

Publication of the ALJ's decision and recommended order is important to our mission to educate the public. Publishing ALJ decisions provides information to our constituents on how the ALJ ruled on the issues in the case and how our ALJs are likely to rule on similar issues in the future. Also, our practice of publishing ALJ decisions encourages settlement at the earliest possible dates and avoids unnecessary expenditures of public funds. Thus, it has long been the Commission's practice to publish the ALJ's Decision and Recommended Order when we approve the withdrawal of charges after the ALJ's decision has been issued. *Grand Rapids Educ Support Personnel Ass'n, MEA/NEA*, 23 MPER 5 (2009). See, e.g., *Southfield Pub Sch*, 23 MPER 83 (2010); *Oakland Co Rd Comm* (AFSCME), 22 MPER 92 (2009); *Innovative Teaching Solutions*, 22 MPER 12 (2009); *Detroit Housing Comm* (AFSCME), 21 MPER 53 (2008); *Wayne Co Airport Auth*, 19 MPER 13 (2006); *Clinton-Eaton-Ingham Cmty Mental Health Auth*, 19 MPER 1 (2006); *Kent Co & Kent Co Sheriff*, 18 MPER 23 (2005); *Highland Park*, 17 MPER 86 (2004); *Teamsters Local 214*, 16 MPER 74 (2003); Cf. *Buchanan Cmty Sch*, 22 MPER 44 (2009).

Where the parties have settled the case and both agree that not publishing the ALJ's decision will aid their efforts for a peaceful and productive labor relationship, we have, in some cases, permitted exceptions to our practice of publishing the ALJ's decision. In these cases, the parties jointly requested that the ALJ's decision not be

published. See, *Washtenaw Co* (AFSCME), 27 MPER 56 (2014); *Mundy Twp*, 26 MPER 55 (2013); *Detroit Pub Sch*, 25 MPER 6 (2011); *Detroit Pub Sch*, 23 MPER 84 (2010); *Wayne Co*, 22 MPER 93 (2009).

In *Grand Rapids Educational Support Personnel Ass'n*, the respondent moved for reconsideration of our order granting the charging party's request for leave to withdraw the charge. The respondent's motion sought to avoid publication of an ALJ's decision and recommended order. The charging party opposed the respondent's motion for reconsideration. In declining the respondent's motion, we noted that the respondent had not objected to publication of the ALJs decision and recommended order in its reply to the charging party's request for leave to withdraw the charge. Therefore, we found the request that the ALJ's decision not be published to be untimely and denied the request.

In the matter before us, it was Respondent that submitted the parties' stipulation agreeing to withdrawal of the charge and its dismissal with prejudice. In submitting the parties' stipulation, Respondent did not object to the publication of the ALJ's Decision and Recommended Order nor was there anything in the parties' stipulation indicating that the parties preferred that the ALJ's decision not be published. Both AFSCME and Wayne County have been parties in previous cases in which the charge has been withdrawn and, pursuant to the joint request of the parties, we have determined that the ALJ's decision would not be published. They both should have been aware of our practice of publishing ALJ decisions. If they wanted to avoid publication of the ALJ's decision, the parties in this case should have addressed the issue of publication when they requested withdrawal of the charge.

Nevertheless, we find some merit to Respondent's motion and agree that the decision on the merits should be severed from the two appendices. Each appendix is an order by the ALJ addressing, at least in part, one of Respondent's motions to disqualify. If the case had not been settled, the appendices would have been considered by the Commission in determining whether the ALJ should have disqualified himself from hearing the case. If the ALJ committed prejudicial error in refusing to disqualify himself from the case, that could have caused us to remand the matter for a further hearing. Appendix A is an interim order issued by the ALJ on July 14, 2010, to address various procedural issues including a motion by Respondent to disqualify the ALJ. The interim order discusses the circumstances of the disqualification motion at length. Appendix B, is the ALJ's November 8, 2012 order denying Respondent's fifth motion to disqualify. Thus, both appendices concern matters that we would only need to consider if we were reviewing the question of whether the ALJ erred by not disqualifying himself. Inasmuch as the charge has been withdrawn, we do not need to determine whether the ALJ erred in his rulings denying Respondent's motions for disqualification. We, therefore, see no public benefit in publishing Appendix A or Appendix B.

Since the charge has been withdrawn and we do not need to make a decision on the merits of the case, we will publish only the document that will further our mission of educating the public on the laws we administer. That document is the Decision and

Recommended Order of the Administrative Law Judge on the merits of the unfair labor practice charge. It will be published without the appendices.

ORDER

Respondent's motion for reconsideration is granted in part and denied in part. It is hereby ordered that this Decision and Order and the Decision and Recommended Order of the Administrative Law Judge, without its appendices, will be published. Appendix A, the ALJ's July 14, 2010 interim order and Appendix B, the ALJ's November 8, 2012 order denying Respondent's fifth motion to disqualify the ALJ will not be published.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: October 17, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

WAYNE COUNTY,
Respondent-Public Employer,

-and- Case No. C10 A-024-A

MICHIGAN AFSCME COUNCIL 25, AFL-CIO,
Charging Party-Labor Organization.
_____/

Clifford Hammond & Linda G. Burwell, Nemeth Burwell, PC, for Respondent

Bruce A. Miller & Austin Garrett, Miller Cohen, PC, for Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201, *et seq*, this case was assigned to Doyle O'Connor, Administrative Law Judge with the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (MERC).

The Unfair Labor Practice Charge and Proceedings:

The original Charge in this matter was filed in January of 2010, by Michigan AFSCME Council 25 (the Union), alleging that Wayne County (the Employer) violated the Act by, in the midst of the bargaining process, unilaterally imposing a reduction in the length of the normal work week from five days per week to four days, with a corresponding reduction in pay, and by repudiating the pre-existing normal layoff and recall-by-seniority mechanisms. This change was referred to by the Employer as "Friday furloughs", which were imposed on a significant portion of the AFSCME-represented employees. The unilateral "Friday furloughs" were described by the Employer as intended to accomplish the Employer's earlier stated goal of securing a 10% reduction in its labor costs. That initial Charge asserted additional bargaining obligation violations, as described more fully below.

The facts underlying the original Charge, and much of the ensuing disputes, as well as the proffered Employer defenses, were all a nearly identical replay of a prior dispute between these very same parties, under indistinguishable circumstances, which

was addressed, and resolved adverse to the Employer, in *Wayne County*, 1984 MERC Lab Op 1142; aff'd, 152 Mich App 87 (1986). Despite, or perhaps because of, the fact that the earlier *Wayne County, supra*, decision was both *res judicata* as to these parties and is regardless the controlling law on the questions presented herein, this litigation has been extraordinarily protracted, convoluted, and bitter.[1] There were additional claims addressed in parallel cases both before me and before other ALJs, in which Wayne County was found to have acted unlawfully and which will be addressed below.

The February 2010 Decision Granting Partial Summary Disposition

In February 2010, I issued a decision and recommended order granting summary disposition in favor of the Union on the Charge related to the "Friday furloughs" and recommended an order directing the Employer to restore the workweek, cease the unilateral imposition of changes in conditions of employment, and compensate the directly effected employees. In sum, I found the Employer's conduct, and its proffered defenses, legally and factually indistinguishable from the conduct of the same Employer in unilaterally imposing such Friday furloughs during bargaining, as to the workforce, which had been held unlawful in 1984. See, *Wayne County*, 1984 MERC Lab Op 1142. I severed the remaining claims so that the County could immediately pursue exceptions with MERC. That recommended decision on summary disposition and the recommended relief were adopted by the Commission in March 2011. See, *Wayne County*, 24 MPER 25 (2011).

The Amended Charges

As events and acrimony between the parties progressed, the Charge was repeatedly amended, as is not uncommon in ongoing labor disputes. A Second Amended Charge added the allegation that the Employer had, in February 2010, made improper late-stage and retaliatory bargaining demands, focused on the Employer's effort to alter the length of the work week. The Third Amended Charge asserted that the Employer had, following the decision holding the Friday furloughs unlawful, announced in May 2010 that it would recoup a similar cost savings by unilaterally imposing "Holiday furloughs" on many unit employees. These "Holiday furloughs" as announced would take away the pre-existing paid holidays for Memorial Day, the 4th of July, and Labor Day, and additionally convert those former short holiday weeks into essentially week-long unpaid layoffs for much of the bargaining unit. Like the earlier "Friday furloughs", the new "Holiday furloughs" would allegedly be imposed irrespective of the pre-existing contractual obligation to layoff and recall by seniority.

The announced "Holiday furloughs" were forestalled when the negotiators for the parties reached a tentative agreement on a successor collective bargaining agreement. That tentative agreement was not ratified by the Union membership, thereby returning the

[1] I apologize to the reader for the extraordinary length of this decision, which because of the acrimony between the parties and the nature of both the dispute and the litigation, must address multiple issues, many of which were substantively addressed by only one party or the other in their respective post-hearing briefs.

parties to the obligation to continue negotiations. The Fourth Amended Charge added claims related to the re-instituted "Holiday furloughs" which were, because of the passage of time, applied only to the July 4th and Labor Day holiday weeks. This time, the Employer added the more draconian threat to additionally deprive all employees subject to the holiday furloughs of health insurance coverage for themselves and their families for the entire months of July and September. The health insurance cut-off was premised on the fact that the Employer chose to schedule the "Holiday furloughs" to begin prior to the first day of the month, with the apparent sole purpose of the scheduling being to facilitate the Employer's assertedly unprecedented claim that it need not provide health insurance to the families of any employee not on the payroll on the first day of the month. The Union additionally asserted that the "Holiday furloughs" were an unlawful lock-out of the employees in an effort by the Employer to force acceptance of the contract terms recently rejected in the Union ratification vote. The Union also argued that the purported lock-out was a violation of the existing contractual ban on lockouts and strikes, and was therefore a repudiation of that contract language.

A Fifth Amended Charge was filed, addressing several disputes. The first was a dispute over the County's alleged unilateral decision to cease providing so-called "13th checks" to retired employees. That dispute is not resolved in this Decision, as it was spun off as a separate case under Case No. C10 J-266, which remains pending.[2] Also addressed in the Fifth Amended Charge was the County's attempted implementation of the cut-off of family insurance coverage, including a retroactive cut-off of coverage for the month of September 2010. In a collateral action in Wayne County Circuit Court, an injunction was issued largely blocking the insurance cut-off, although a claim for related relief remains.

On September 17, 2010, the MERC appointed fact-finder issued his report, based on extensive proofs by both parties focused on the Employer's financial status and ability to pay, recommending that employees accept a 5% pay cut while largely recommending the maintenance of other existing conditions of employment. The fact-finding process is a statutorily mandated system designed to attempt to narrow the differences between parties with the goal of facilitating voluntary resolution of labor disputes. Either side is free to accept or reject the fact-finder's recommendation. Here, the Union accepted the recommended 5% pay cut; however, the Employer rejected that recommendation.

Subsequent to the fact-finding process, the parties continued to meet. In December 2010, the Employer asserted the existence of an impasse in bargaining and announced further unilateral changes in conditions of employment. A Sixth Amended Charge asserted that the new unilateral changes were unlawful as the parties were not at a good faith impasse and the changes imposed went beyond the proposals made by the Employer at the bargaining table. The Union challenged a 20% base pay cut. In particular, the Union challenged as improper the application of the 20% base wage pay cut to those individual employees who had been subjected to multiple "Friday furlough"

[2] That matter was long held in abeyance, at the request of the Employer, and has more recently been scheduled for trial, then adjourned at the County's request, and is now set for trial in November 2012.

and "Holiday Furlough" layoff days, with the Union asserting that the layoff days amounted to a 12%, or more, annual pay cut in addition to the imposed 20% cut. Additionally, the Union challenged a claimed new right of the Employer to sub-contract unit work without limitation. Also, in December of 2010, the County asserted the right to unilaterally dispense with the prior commitment to a 40-hour work week, thereby, in essence retroactively excusing its previously litigated unilateral changes in the work week.

Finally, an April 4, 2011, amendment to the Charge at trial added claims related to work allegedly being assigned to non-unit members during the June to September "Holiday furlough" days. In addition to its defenses on the merits, the County asserts that amendment is barred by the statute of limitations.

In summary, the Union's multiply amended Charge alleged that the Employer had failed to bargain in good faith throughout, contrary to its obligations under Section 10(1)(e) of PERA; that the unilateral implementation of changes in conditions of employment were separate violations of the Section 10(1)(e) duty to bargain; and that certain of the imposed changes were retaliatory and thereby contrary to Section 10(1)(a) of the Act.

As more fully discussed below, the Employer asserted that its "Friday furloughs" and subsequent "Holiday furloughs" were within its ordinary management rights. The County further asserted that its demands for economic concessions, and unilateral implementation of those demands, were warranted by economic exigencies. Additionally, the County asserted that the decisions by its executive branch on how to implement the County Commission's legislative determination to cut budgeted gross salary costs by 10% were unreviewable under PERA. Further, the County asserted that the Charges were all time barred, based on the Employer's assertion that the statute of limitations began to run when the Legislative branch voted a 10% cut in the budget, rather than the much later date on which the executive branch proposed and later implemented changes intended to meet that budget cut.

In the course of the litigation, and as more fully discussed in the July 2010 Interim Order discussed below, I dismissed several of the Charges brought by AFSCME under separate case numbers and indicated the belief that many of the claims asserted in this case by AFSCME likely failed to state claims. Many of those challenged claims in this case were subsequently explicitly withdrawn or were implicitly abandoned.

The July 2010 Interim Order

An Interim Order was issued on July 14, 2010 and addressed a multitude of issues. As the July 2010 Order did not dismiss or sustain any unfair labor practice charge in its entirety, that Order was not subject to direct or immediate appeal to the Commission. As noted in the July Order, separate orders in collateral cases involving the same parties, dismissing several Charges by the Union were simultaneously issued. That Order is incorporated fully in this final decision disposing of the entire ULP Charge as

amended, by appending the July 2010 Interim Order in its entirety at the end of this decision and incorporating it in this Decision by reference[3]. See, Appendix A.

The Employer's Fifth Motion to Disqualify

The trial on the underlying disputes between the parties was much delayed, occasioned by multiple adjournments requested by Respondent, with the first several days of evidentiary hearing held in October 2010. Additional trial days were held in December 2010, with the trial scheduled to recommence in March 2011. In February 2010, the County brought a motion to disqualify the assigned ALJ, which was denied, following oral argument, in a bench decision of March 3, 2010. That motion to disqualify was repeatedly refiled on the same grounds and with varying new allegations, which each refiling accompanied by a demand to adjourn trial.

In a Decision issued on March 24, 2011, on the County's appeal, the Commission adopted the earlier recommended grant of partial summary disposition on the merits of the original Charge, finding that there were no material disputes of fact and that the defenses asserted by the County were "*wholly without merit*". The Commission likewise rejected the County's assertion that it had been wrongly denied oral argument, where none was requested; that it had been wrongly denied an evidentiary hearing, where there were no material disputes of fact; and that it had been denied the right to an impartial decision maker. See, *Wayne County*, 24 MPER 25 (2011).

On March 30, 2011, following the Commission Decision of March 24 on the merits of the original claims and on the eve of trial scheduled for March 31, 2011, the Respondents filed an "emergency" fifth motion to disqualify and to again adjourn trial, premised on essentially the same grounds as previously raised. The motion to again adjourn trial was denied. That fifth motion to disqualify was argued, and denied, on the record on April 29, 2011[4].

A separate Decision on the fifth motion to disqualify was prepared to satisfy the repeated insistence of the County that the motion rulings be memorialized more formally than in the transcribed bench opinions. Decisions on a motion to disqualify an ALJ are not subject to review by MERC, which reviews the substantive handling of claims filed with it by parties and then referred by MERC to MAHS for adjudication before an administrative law judge employed by MAHS. Rather, under the controlling Executive Orders, decisions regarding disqualification are subject to judicial review at the conclusion of the proceedings before MAHS and MERC on the merits.[5] The separate Decision on disqualification is being released simultaneous with this Decision and Recommended Order on the merits of the remaining substantive claims pending between

[3] Incorporated within the July 2010 Interim Order is a significant excerpt from the April 2010 Order Regarding Compliance that was also issued at the insistence of Wayne County's counsel. The scheduled July 2010 trial referenced in the Orders was adjourned at the behest of the County.
[4] The hearing on the 5th motion to disqualify was delayed at the request of the Employer to accommodate the travel schedule of one its attorneys.
[5] See, Executive Order No. 2005-1, Section II(E).

the parties and, merely for convenience and clarity, is appended in its entirety to this Decision. That appendix is not a substantive part of this Decision. See, Appendix B.

This Decision and Recommended Order on the merits will in turn be subject to administrative appeal, by the filing of exceptions with MERC, and only upon the issuance of MERC's final Decision will the administrative proceedings be complete and subject to judicial review.

The Collateral Unfair Labor Practice Charges

During the pendency of this case, the parties litigated multiple other claims, arising from differing factual scenarios, both before me and before other MAHS ALJs. As will be more fully addressed below, it was established that during the same round of bargaining Wayne County acted unlawfully in multiple cases including by: refusing to provide requested information; by withholding health care benefits from disabled employees in 2009; by withholding a scheduled pay increase in July 2009; by withholding a separate scheduled pay increase in July 2010[6]; and of course by unilaterally imposing the Friday furloughs in 2010. The County was additionally found to have brought a meritless ULP Charge against the Union in an improper effort to block a collateral contract enforcement action in the Wayne County Circuit Court.

The Employer's Motion to Reopen the Proceedings

This matter was tried on multiple days, generating eighteen volumes and over two thousand five hundred pages of transcript, with one hundred and eighty documentary exhibits.[7] The record in this matter closed with the filing of post-hearing briefs on September 13, 2011.

In December of 2011, at long last, the parties voluntarily reached, mutually ratified, and executed a successor collective bargaining agreement. Contemporaneous with that contract settlement, the parties resolved various matters pending before this agency, MERC, and the Court of Appeals. As more fully discussed below, the parties did not resolve the merits of the remaining disputes addressed in this Decision.

On February 1, 2012, the Employer filed a motion to reopen the record and I provided a briefing schedule requiring a response from the Union by no later than February 17, 2012, and allowing the Employer to file a reply by no later than March 2, 2012, although such reply briefs are not normally allowed by MERC's Rules regarding motions. I considered the Union's timely response, supported by affidavit, and I also considered the Employer's reply even though untimely filed on March 6, 2012. Neither

[6] That matter was not litigated to conclusion, as more fully described below.

[7] There was an additional 50 page transcript of the separate record made of a special conference on February 17, 2011, held regarding the courtroom misconduct of one of the attorneys.

the Employer's motion nor the Employer's reply to the Union's response were supported by affidavit. The Employer's motion to reopen the evidentiary hearing was denied in an order of March 23, 2012, which indicated that the issue would be more fully addressed in this decision on the merits.

A portion of the pending allegations addressed in the motion to reopen arose from disputed changes in conditions of employment unilaterally imposed by the Employer in December 2010 on the assertion that a good faith impasse in bargaining had occurred. Many of the disputed actions addressed in the motion to reopen pre-dated the December 2010 assertion of impasse. Of course, even where a good faith impasse in bargaining is reached, that impasse status is necessarily transitory.

The Employer's request to reopen the record proposed to introduce proofs not newly discovered, but rather regarding events occurring after the close of the record, including to:

a. Introduce the Tentative Agreement (TA) or subsequently signed Collective Bargaining Agreement (CBA) reached by the parties in December of 2011 and

The Employer's proposal was further to introduce testimony regarding events occurring after the conclusion of the hearing and necessarily long after the complained of events, including to:

b. Introduce testimony on how a new CBA was reached and executed in December of 2011;
c. Introduce testimony on how the details of the new CBA might affect any possible back pay remedy for the period of October 2011 forward;
d. Introduce testimony on whether the failure of the parties to reach an agreement on conditions of employment for periods prior to October 1, 2011 operates as a waiver of claims related to prior periods.

The requests are severable. The first is whether to introduce the 2011-2014 CBA as an exhibit, which would not require scheduling additional hearing dates. The proposed testimony (*part b, above*) relating to how the parties finally reached a CBA in late 2011 is not relevant to whether there existed an earlier good faith impasse in 2010 or whether earlier alleged changes in conditions of employment were lawful.

The proposed testimony on how the CBA might affect a possible wage rate related remedy (*part c, above*) does not require reopening the record. Typically, such a claimed cut-off of liability would be addressed between the parties or at a compliance hearing, where a violation is found and a financial remedy ordered. Regardless, based on the Union's response to the motion, it appears that there is no dispute on the question of prospective wage and benefit rates from the December 19, 2011, date of the new agreement forward.

The Employer's motion conceded, albeit obliquely, that the parties did not, as part of the recent CBA, reach any agreement regarding wage rates for the period preceding October 1, 2011. The Employer suggested that it would seek to show through testimony (*part d, above*) that the failure to secure an agreement for that prior period should be treated as a waiver by the Union, or function as an estoppel, regarding its claims that unlawful unilateral changes were imposed during that period. In the doubtful event that such an issue were relevant, the Johnson affidavit submitted by the Union in opposition to the motion to reopen is uncontested and asserts that the parties expressly understood that the agreed upon changes in terms and conditions of employment were, as is typical, prospective only. Moreover, it is uncontested that the parties did expressly agree, as part of the CBA, to resolve some, but not all, pending litigation, with the mutual withdrawal of other pending unfair labor practice claims or appeals related to the annual service adjustment.

MERC Rule 423.166 allows for the reopening of a record, prior to a decision being issued, if newly discovered potentially outcome-determinative evidence is proffered. Here, the evidence offered relates solely to events post-dating the complained of acts and would not be relevant to the determinations necessary to resolve the pending charges. For the above reasons, the Employer's motion to reopen was, and is, denied, with one exception. As it does not require reopening the evidentiary hearing, I will treat as accepted into evidence, as Employer Exhibit 180, the undisputedly authentic signed Collective Bargaining Agreement which runs from December 19, 2011 through September 30, 2014.

Findings of Fact:

Despite the protracted and acrimonious litigation over this matter, the core facts were not largely in dispute. In truth, the dispute was factually fairly straightforward. Like many, if not most, public employers these days, Wayne County is indisputably suffering from a decrease in tax revenues owing to both the economic downturn and tax policies. Unlike most public employers, Wayne County chose to repeatedly engage in self-help in the form of unilateral changes to well established conditions of employment as a way of attempting to address its own prior, and ongoing, budgetary and policy choices. The Union challenges many of those unilateral efforts at self-help as having been unlawful. The obligations and remedies under PERA are carefully calibrated to avoid the tit-for-tat resort to self-help that would occur in an unregulated environment.

The parties' collective bargaining relationship goes back many decades. The most recent contract expired and the disputes addressed in this, and in the many collateral decisions, arise from the Union's challenges to certain unilateral actions taken by the Employer during the bargaining process to secure a successor agreement.

In June 2009, the Employer withheld contractually mandated 2% pay increases owed to certain employees, called annual service adjustments, which was held on summary disposition to be unlawful by ALJ Peltz in April 2010 and later affirmed by the Commission. See *Wayne County,* 24 MPER 12 (2011).

In September 2009, formal fact-finding proceedings were initiated with MERC. Such proceedings are a creature of statute and are a part of the bargaining process. Fact-finding is a mechanism designed to assist parties in fulfilling their mutual obligations to bargain in good faith and those proceedings are intended to deter disruptions of public services as a result of unresolved labor disputes. The parties were each well aware that it is unlawful for an employer to make unilateral changes in conditions of employment during the pendency of such fact-finding proceedings, as was first established in *Wayne County (AFSCME)*, 1984 MERC Lab Op 1142; *aff'd*, 152 Mich App 87 (1986).

In October 2009, the County acted to withhold health care benefits from certain disabled County employees. That conduct resulted in another finding by ALJ Peltz in 2011 that the County had acted unlawfully in unilaterally changing employment conditions during bargaining, which was most recently affirmed by the Commission in *Wayne County*, 26 MPER __ (C09 J-211) (September 17, 2012).[8]

As bargaining continued, in January 2010, the County unilaterally imposed the unlawful "Friday furloughs", on much of the AFSCME unit. The ALJ Recommended Decision and Order on summary disposition regarding the Friday furloughs was issued in February 2010.

Later in February 2010, the County interjected late in the bargaining process demands essentially designed to eliminate the contractual work week obligations which had previously been freely entered into and which had been the focus of the findings of unlawful conduct by the County regarding both the 1983 and the 2010 "Friday furloughs". The parties were scheduled to begin fact-finding hearings on Monday, February 8, 2010. A bargaining session was scheduled for the immediately preceding Friday, which the County cancelled unilaterally. The County then emailed to the Union new proposals which eliminated the workweek language, substantially eroded the layoff and recall language, and gave the County the unfettered right to subcontract any AFSCME work, thereby eliminating prior contractual protections. The Union objected to the introduction of new substantive proposals so late in the process and to the unprecedented method of presenting them via email without the opportunity for discussion, questioning, or bargaining.

In May 2010, the County announced its intent to unilaterally impose "Holiday furloughs" that were expressly designed to make up for the lost financial concessions the County had sought to unilaterally impose through the unlawful "Friday furloughs". Also in May 2010, the negotiators for the parties reached a tentative agreement (TA) on a new collective bargaining agreement, which was rejected by a vote of the AFSCME

[8]Notably, in his Decision on the health insurance case, ALJ Peltz recommended an award of attorneys fees against the County premised on an established and egregious pattern of repeated willful violations of their bargaining obligations and of the Act. The Commission affirmed the finding of unlawful conduct, but rejected the proposed award of fees.

membership.[9] After the TA was rejected, the County renewed its announced intent to impose "Holiday furloughs" with the additional announced intent to add to the layoffs a cut-off of health insurance for the entire month for any employee, and their family, who were directly impacted by the "Holiday furloughs". The threatened health insurance cutoff was unprecedented, having not occurred in either the 1983 or 2010 unilateral "Friday furloughs". The Employer human resources and labor relations staff witnesses each denied being the one who actually made the decision to implement the health insurance cutoff.

In June 2010, the County carried through with its announced intent and laid off a significant portion of the workforce, approximately 560 employees out of the unit of approximately 1500 workers, beginning the week before the 4th of July holiday week. The change in layoff date was designed to have the effected employees off the payroll on the first day of the month in order to bolster the County's claimed entitlement to cut such employees off from health insurance for the entire month. The manipulation of the layoff dates to support the cutoff of health insurance was itself unprecedented. The purpose and function of the enhanced "Holiday furloughs", with health insurance cutoff, was to increase the cost to the AFSCME unit members of having rejected the concessions in the May tentative agreement.

As with the 1983 and 2010 "Friday furloughs", the County ignored the long existent agreement, which it had repeatedly renewed even after losing the 1983 litigation, to use the common method of laying off the least senior employees in order of seniority. Instead the County unilaterally changed to a method it asserted was designed to "spread the pain" by laying off a large section of the workforce for several brief periods. Only the AFSCME non-supervisory unit among the County's multiple bargaining units, faced the "Holiday layoffs" and the County witnesses, including its director of human resources Tim Taylor and its chief negotiator Mark Dukes, acknowledged that the laying off of the members of one bargaining unit, while no other County employees were laid off, through such "Friday furloughs" or "Holiday furloughs", was an unprecedented move.

Also in June 2010, the County again unilaterally withheld a 2% pay increase owed certain employees, despite the fact that ALJ Peltz had held in April of 2010 that the indistinguishable 2009 unilateral refusal by the County to pay a scheduled pay increase was unlawful.[10] Even though the parties were then actively engaged in bargaining and in the fact-finding process, the County would later implausibly defend the June 2010

[9] Such rejections at ratification are expected and not inappropriate, and the County Commission similarly rejected the TA reached by the parties during the 1982-83 dispute.

[10] As a part of the December 2011 contract settlement, the County withdrew its challenge in the Michigan Court of Appeals to the Commission Decision reported at *Wayne County*, 24 MPER 12 (2011), adopting Peltz' finding that the 2009 withholding of a pay increase was unlawful. The parties had already briefed before me on summary disposition the question of the legality of the 2010 unilaterally withheld pay increase, with the County conceding that the 2009 and 2010 cases were indistinguishable. As part of the 2011 settlement, the Union withdrew the ULP then awaiting decision on the 2010 withheld 2% pay increase, the outcome of which was otherwise seemingly inevitable given the Commission's already published Decision affirming Peltz.

withholding of a scheduled pay increase based on its assertion that the parties subsequently reached an impasse in bargaining in December of 2010.

In August 2010, the County unilaterally imposed on a large portion of the workforce a "Holiday furlough", with that layoff of approximately 520 employees timed to precede the Labor Day holiday to again bolster the County's claimed right to withhold health insurance from the effected workers and their families for the month of September. During that layoff period, as in July 2010, the County assigned non-unit employees to perform work ordinarily performed by the laid off workers, at times at higher hourly rates or even on overtime at time and one-half. Rather than terminate functions, the County allowed certain of the work to pile-up during the layoff, and threatened workers with discipline if they did not quickly enough catch up on the backlog upon their return to work. In a particularly perverse and punitive twist, the County laid off workers whose jobs were fully funded by grants from other entities, even if that meant returning grant funds as unspent. Environmentalists paid entirely through Federal grant money were laid off, leaving work undone, with a resulting obligation that the County return Federal funds as unspent. Classifications such as the food service inspectors and dieticians had their work pile up while they were on layoff. The Union points in particular to the layoff of grant funded employees as evidence that the layoffs in general were punitive rather than driven by budget exigencies, as those layoffs brought no benefit to the County's general fund.

During the "Holiday layoffs" at a number of work locations, supervisors and even unpaid volunteers performed some of the work of AFSCME unit members. As an example, road repair work was done by higher paid supervisors and the use of supervisory personnel to perform such work was unprecedented. Even AFSCME unit members who had not been laid off were brought in on an overtime basis to perform work of their laid off co-workers.

In addition to asserting bargaining violations related to the "Holiday furloughs", AFSCME asserted that the action constituted a repudiation of the language of the prior collective bargaining agreement provided at *Article 13-Strikes and Lockouts*:

> 13.01 Adequate procedure has been provided by this Agreement and the Public Employment Relations Act (PERA), as amended, for the settlement of any grievance(s), dispute(s), or impasses which may arise between . . . the Union . . . and the Employer.
>
> * * *
>
> 13.04 The Employer agrees that it shall not lock out its employees.

Throughout bargaining, the County sought a 10% per year savings in labor costs, proposing that it could be accomplished through a variety of cuts to wages or benefits. The County's economic concession proposal, since September 2009, expressly provided that if some package of the sought after concessions were not ultimately agreed to by the Union, the Employer would unilaterally impose direct wage cuts ". . .*until the County*

realizes the necessary 10% base wage rate concession savings per employee". The Union resisted the 10% concession package and insisted on restoration of the unilateral changes which had been imposed by the County and which were litigated in this and the collateral cases. While the parties reached agreement on many items, they did not secure a ratified agreement and then participated in fact finding proceedings.

In September 2010, the MERC fact-finder issued a report recommending a 5% employee pay cut, while for the most part leaving in place the remainder of the status quo of the parties' relationship. The Union accepted the fact-finder's recommended financial package, including the 5% across the board pay cut, which the County rejected. Also in September, the County announced that it intended to retroactively cut off family health insurance coverage for many of the unit employees. A circuit court injunction sought by the Union blocked the threatened health insurance cutoff and the Union and the Employer later entered into a process by which most, if not all, employee health care claims were reimbursed.

The parties continued, as they are obliged to do, to meet in an effort to negotiate a new contract, following the issuance of the September 2010 fact-finder's report. The Employer asserts that the parties were at impasse as of the last bargaining session which was held on November 9, 2010. However, it was at that session that the Union offered the significant concession of accepting a 5% wage reduction and suspending the already contractually mandated 2% annual service adjustment, which the County had earlier been found to have unlawfully unilaterally withheld. The Union did demand retention of the long standing contractual language on the workweek and layoffs by seniority. While those concessions by the Union did not yield an immediate agreement with the County, they did signal significant movement by the Union on the central economic dispute between the parties. County labor relations director Mark Dukes testified that a significant part of the reason the parties were apart on economics in December 2010 was the Union's unwillingness to allow the Employer to retain the previous unlawful withholding of wages arising from the layoff days.

In December 2010, the Employer acted on its assertion that the parties were at an impasse in bargaining. The Employer then unilaterally imposed a 20% pay cut on the AFSCME unit, including on that large segment of the workforce which had already undergone the partial "Friday furloughs" and the extended "Holiday furloughs", which together amounted to an approximate 12% cut in annual pay. County human resources director Tim Taylor acknowledged that no other bargaining unit was required to undergo both the layoff days and the full wage cut. The County, as part of its unilateral implementation of new employment terms, also purported to grant itself a new essentially unlimited right to subcontract that work performed by AFSCME members, even though it had agreed with other bargaining units to retain ordinary limited contractual restraints on sub-contracting of existing unit work. Additionally, the County asserted that it was dispensing with the long extant contract language on the length of the workweek, in an effort to *post hoc* ratify the earlier "Friday" and "Holiday" layoffs.

In a pre-trial order of July 2010, I suggested to the parties that proofs as to Wayne County's economic status were not relevant to the claim that unilateral changes imposed during the bargaining process were unlawful, based on longstanding MERC case law, which holds that a deficit in funding does not excuse unilateral repudiation of otherwise binding obligations. I later found that economic data would be potentially relevant regarding the Union's amended charges which asserted that certain actions by the Employer were done in retaliation for the Union's efforts to enforce PERA, including through the pursuit of the multiple unfair labor practice charges on which it prevailed, as motive is always an issue regarding a retaliation claim. The County provided extensive testimony from its finance staff and even more extensive documentary proofs. In sum, it was undisputed throughout that Wayne County had long been accruing and was then facing a significant budget shortfall in the estimated range of up to $160 million in an overall budget of more than two billion dollars. Certainly not all of that then-projected deficit was attributable to the expenses of employing the AFSCME unit members, nor repairable by any combination of changes to their conditions of employment[11], although the AFSCME unit represents a significant portion of the County's overall workforce.

The parties did finally settle on the terms of a new CBA in December of 2011. That contract, as submitted in evidence by the County, maintains without significant changes the contract language sought by the Union regarding the length of work week and layoff obligations which the County ran afoul of in 1983 and again in the January 2010 events which begat this litigation. The new contract included a wage concession by the AFSCME unit, as sought by the Employer, but has the Employer issuing two lump sum payments of 2% each at six month intervals to compensate employees for the earlier withheld annual service adjustments. That contract runs through September 2014. That new contract did not resolve the issues further addressed herein.

Discussion and Conclusions of Law:

The case law under PERA is well settled that salary, the length of the workday or workweek, and benefits such as health insurance are all mandatory subjects of bargaining, and that neither side may take unilateral action to alter existing practices regarding such mandatory subjects unless a good faith impasse in bargaining has occurred. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55 (1974); *Central Michigan Univ Faculty Ass'n v Central Michigan Univ*, 404 Mich 268 (1978); *International Association of Fire Fighters (IAFF) v Portage*, 134 Mich App 466 (1984). It is additionally well settled that an employer may not unilaterally impose changes in mandatory subjects of bargaining, such as salary and length of workweek, during the pendency of a fact-finding proceeding conducted by MERC pursuant to PERA. *AFSCME v Wayne County*, 152 Mich App 87 (1986), *aff'g Wayne County (AFSCME)*, 1984 MERC Lab Op 1142. The purpose of the bar on the imposition of unilateral changes prior to the

[11] And to the contrary, County Commission Chairman Edward Boike testified and opined that a significant portion of the County's budget deficit was a result of the County executive's insistence on maintaining a top-heavy management team with a hundred or more appointees on salaries in excess of $100,000 a year, while lower paid line positions needed to provide services were being eliminated.

conclusion of fact-finding is that the process is designed, and mandated by statute, as a mechanism for the good faith and voluntary resolution of labor disputes. Only upon the exhaustion of settlement efforts, including fact-finding, and in the event of a resulting impasse in negotiations, may one party appropriately assert that it has in "good faith" reached an impasse and then unilaterally impose changes in pre-existing conditions of employment. See, *AFSCME v Wayne County*, supra.

As the Court of Appeals held in affirming the Commission's *Wayne County* decision in 1986:

> The general principles of law governing an employer's right to implement changes in wages and other working conditions during the negotiation process are well established and have been set forth by this Court in *Local 1467, International Ass'n of Firefighters, AFL–CIO v. Portage*, 134 Mich.App. 466, 472–473, 352 N.W.2d 284 (1984):
>
> * * *
>
> "Neither party may take unilateral action on a 'mandatory subject' of bargaining absent an impasse in negotiations. An employer taking unilateral action on a 'mandatory subject' of bargaining prior to impasse in negotiations has committed an unfair labor practice. MCL 423.210(1)(e); MSA 17.455(10)(1)(e). This prohibition against unilateral action prior to impasse serves to foster labor peace and must be liberally construed, particularly in light of the prohibition against striking by public employees set forth in MCL 423.202; MSA 17.455(2)." (Citations and footnote omitted.) See also, *Ottawa County v. Jaklinski*, 423 Mich. 1, 12–13, 377 N.W.2d 668 (1985).

As the Commission held in *Wayne County Bd of Commissioners (WCBA)*, 1985 MERC Lab Op 1037, even a *bona fide* financial crisis does not justify an Employer's unilateral repudiation of its contractual obligations or permit a unilateral change in conditions of employment.

There is a significant difference under the law in the analysis of the propriety of unilateral employer changes in conditions of employment before, and after, fulfilling the bargaining obligation. In essence, there is a presumption that any unilateral changes prior to the completion of the bargaining process have not been made in good faith. Once the bargaining process has been exhausted, and assuming good faith conduct throughout, the law recognizes both the right and the need for the employer to act decisively and unilaterally to define future conditions of employment. Determining whether a "good faith" impasse existed requires a review of the totality of the circumstances. *Warren Education Association*, 1977 MERC Lab Op 818. If a public employer takes unilateral action on a "mandatory subject" of bargaining before reaching a "good faith" impasse in negotiations, the employer has committed an unfair labor practice. *IAFF* v *Portage*, supra.

The Commission has defined impasse as the point at which the parties' positions have so solidified that further bargaining would be futile. *Wayne County (Attorney Unit)*, 1995 MERC Lab Op 199, 203; *City of Saginaw*, 1982 MERC Lab Op 727. Simply declaring impasse and asserting the right to implement changes in mandatory subjects of bargaining is not sufficient. The Employer bears the burden of establishing the existence of a "good faith" impasse and that neither party was willing to further compromise. *Oakland Comm College*, 2001 MERC Lab Op 273, citing *NLRB v Powell Electric Mfg. Co*, 906 F2d 1007 (CA 5 1990); *Huck Mfg Co. vs. NLRB*, 693 F2d 1176, 1186 (CA 5 1982). However, it is also well established that a good faith impasse will not generally be found where a party has not bargained in good faith, including where unremedied unfair labor practices have been committed by the party asserting the existence of an impasse. See, *Detroit Public Schools*, 25 MPER 77 (2012); *City of Warren*, 1988 MERC Lab Op 761. An impasse resulting from one party's bad faith conduct does not relieve that party of the duty to bargain. *Warren*, supra at 767.

Because of the complexity of the proceedings and multiplicity of issues, the remainder of the discussion is divided into the following sections, each of which relate to claimed violations of the duty to bargain under Section 10(1)(e) of PERA which all occurred prior to the claimed impasse in bargaining and which all involved alleged unilateral changes in mandatory subjects of bargaining and/or a repudiation of contractual obligations: **1) The Shortened Work-Week and Work-Year; 2) The Health Insurance Cut-off Related Bad Faith Bargaining Claim; 3) Alleged Late Notice of Layoff; 4) The "Holiday layoffs" Lock-Out Claim;** and **5) The Transfer of Unit Work Claim**. Following those sections, the unilateral changes imposed after the Employer claimed an impasse existed in December 2010 are addressed at: **6) The Post Fact-Finding 20% Wage Cut and Imposed Changes in Obligations Regarding Sub-Contracting of Unit Work**. The next section addresses an Employer overall defense regarding the various unilateral changes in conditions, at: **7) The Statute of Limitations and Legislative Body Constitutional Authority Defenses**. Finally, the claims that certain conduct constituted unlawful retaliation are addressed at: **8) The PERA Retaliation Claims.**

1) The Shortened Work-Week and Work-Year

In the 1980s Wayne County cases and more recently, in *36th District Court*, 21 MPER 19 (2008), the Commission held that an employer violated its duty to bargain in good faith when it unilaterally changed the number of days in the workweek from five to four. In the *36th Dist Court* instance, the Commission again rejected the Employer's claimed defense that it was merely exercising its managerial prerogative to reduce the size of its workforce to meet economic exigencies. See also, *Ionia County Rd Comm*, 1984 MERC Lab Op 625, aff'd unpublished Court of Appeals # 78969 (September 24, 1989). Similarly in *Goodrich Schools*, 22 MPER 103 (2009) the Commission predictably treated a unilateral change in the workday or work year as analytically indistinguishable from a unilateral shortening of the work week. Additionally, in *Village of Stockbridge*, 25 MPER 31 (2011) (no exceptions), ALJ Stern found a unilateral change in the length of the work day similarly unlawful. None of those holdings were inherently remarkable, as

the fundamental equation in the workplace exchange of value for labor is the amount of salary exchanged for work performed.

The Charge asserts that the County's earlier unilateral use of one-day layoffs[12] and later "Holiday layoffs" to shorten the workweek and/or work year in order to decrease employee compensation violated the Employer's obligations under PERA notwithstanding the claimed fiscal crisis. There are of course multiple rational ways of devising layoff schemes or other cost saving methods, including negotiated reductions in salary as ultimately agreed to herein by the parties. The Commission has consistently reaffirmed the principle that a public employer's determination to reduce its work force in size for economic reasons is a valid exercise of managerial prerogative. However, MERC has also consistently held that a different analysis is required where instead of actually reducing the size of the workforce, the employer reduces the number of days or hours worked by its employees, precisely because that mechanism of cost savings has a profound effect on the earnings and working conditions of those who remain employed. See, *Ionia County Rd Comm; AFSCME v Wayne County; 36th District Court, supra*.

The issue presented by this dispute is not over which method of responding to an economic downturn is wiser, preferable, or somehow more 'fair'. Rather, the question is whether one party to the bargaining relationship unilaterally altered or repudiated a previously agreed upon methodology of addressing periodic downturns in a fashion which violated its statutory bargaining obligations. While the County certainly could have, in keeping with the existing workplace rules, laid off ten percent of the employees in the bargaining unit represented by AFSCME to secure the claimed amount needed to meet the budgetary shortfall, the question is whether the County could instead alter those rules and shorten the workweeks or work years of many of the AFSCME represented employees.

What is not at issue in this litigation is the recognized near absolute right of management to determine the size and scope of its workforce, for budgetary or policy reasons. Management is entitled to choose to do less in terms of providing services to the public, or to try to do the same work with fewer staff by doing it more efficiently. Absent a contractual restriction, management has the right to lay workers off, again for budgetary reasons, for lack of work, or just based on a policy decision that some existing function of government is not worth the cost of continuing, or even that they just do not want to provide that service. A public employer in Michigan, absent some voluntary contractual restriction to the contrary, has the right to reorganize or eliminate its provision of services without having any duty to bargain over such a decision to eliminate services or restructure itself. See, *Royal Oak Twp,* 2001 MERC Lab Op 117,126; see also *City of Detroit (AME)* 23 MPER 30 (2010).

That right of management is not disputed in this case. Here the parties long ago mutually recognized and addressed the inevitable fact of periodic layoffs, whether due to the sort of cyclical downturns that routinely occur, or due to some intervening event like the recent extraordinary economic downturn. These parties have a long track record of

[12] The unlawfulness of the Friday furloughs has already been established.

managing, both well and badly, such layoffs. The testimony established that, not surprisingly, periodic layoffs have been a constant, with the parties having chosen a fairly typical layoff mechanism. When positions were eliminated due to budgetary, or other, reasons, the least senior employees in the effected classification were laid off. When and if conditions improved, such employees were recalled to employment, again in order by seniority. Layoffs by seniority is not the only lawful scheme for selecting which individuals bear the brunt of economic downturns, but it is a traditional one, and of more significance, it is the one these parties have repeatedly and voluntarily chosen in their contract negotiations.

Eliminating positions, and ending careers for the foreseeable future, is not an attractive prospect for either management or the workforce. That very unattractiveness of the option is one of the reasons it is selected in advance of the arrival of bad times. The prospect of cutting services to the public, and of losing experienced workers, is expected to infuse caution into the handling of a difficult situation. By its nature, the prospect of layoffs forces the parties to mutually confront difficult choices in a way that so-called "spread the pain" options do not. Public sector management is expected, indeed mandated, to live within its budgetary means. Allowing quick and relatively invisible fixes to overspending does little to enforce fiscal discipline in decision making. The harder choice of telling the public that because of earlier over-spending, or inaccurate forecasts, a park must close, or garbage won't be picked up as frequently bears a cost to public officials and to elected officials of a sort that does not occur when a unilateral pay cut can be imposed. Similarly, unions are expected to act for the greater good of their membership. The prospect of significant and long term layoffs of voting union members, with the resultant destruction of livelihoods and frequently the doubling up of work on the remaining workforce, is expected to temper the union's bargaining posture.

As an example of alternatives, in some workplaces, the scheme in place allows management the greater flexibility of balancing qualifications with seniority, or the ultimate flexibility of unilaterally selecting who is to be laid off. Another alternative, sometimes adopted by *ad hoc* agreement in response to an extraordinary fiscal problem, is to spread the pain more uniformly, by across-the-board salary cuts or having each employee serve the same number of days off without pay. Here the parties had no such alternative measure in place and were unable to agree on an *ad hoc* fix for this group of employees.[13]

These parties were also not without a history or guidance on the very question of what to do when an economic downturn hit. The early 1980s saw a significant economic downturn. These same parties, AFSCME & Wayne County, became embroiled then in an indistinguishable squabble over how to handle the resulting shortfall in revenue. The parties then had in place an indistinguishable layoff-by-seniority scheme. The County sought to avoid the resulting cuts in service by "spreading the pain" across-the-board.

[13] The parties, AFSCME Council 25 and the County, did devise just such a mutually acceptable arrangement for the AFSCME represented unit of County supervisors. Post-hearing, and as otherwise noted, the parties did ultimately reach a mutually agreeable new CBA, which included across-the-board wage reductions.

The Union refused to move off of the previously agreed upon layoff method. Then, the County unilaterally imposed "Friday furloughs", whereby all but those employees unilaterally deemed non-essential by the County were ordered to take a series of Fridays off without pay. The budget shortfall would then be spread more evenly across all employees, with arguably little disruption of service. The County did it without the Union's concurrence and without exhausting its bargaining obligations. The Commission held that conduct to be unlawful; ordered it reversed; was affirmed in a published Court of Appeals decision; and the resulting rule became the black letter law by which not just these parties, but all public sector parties, understood their obligations in ensuing years.

Twenty five years later, the Employer, for unexplained, and seemingly inexplicable, reasons went back to the same playbook and unilaterally imposed "Friday furloughs" in an effort to spread the pain, rather than comply with the "layoff the least senior" mechanism mandated by the collective bargaining agreements the County had continued to negotiate and sign in the interim. The parties had maintained the same basic prior language from the early 1980s contract regarding layoff procedures.[14] As was inevitable, in 2011 the Commission held the replay of the County's unilateral budget balancing layoffs to have been as unlawful as were the 1980s original. *Wayne County*, 25 MPER 24 (2011).

In the interim between the adverse ALJ and adverse Commission Decisions on the "Friday furloughs", the County turned to a new mechanism to reduce its own overspending—"Holiday furloughs". The question here is whether those short-term holiday furloughs are in any relevant way different from the unlawful short-term Friday furloughs. The unavoidable answer is that they are indistinguishable. Rather than eliminate positions for which adequate funding did not exist, and lay off the least senior employees, the County chose a different route. They sought to maintain a workforce of similar size, while forcing essentially across the board cuts in salary accomplished by unpaid furlough days. Rather than truly sharing the pain, such a mechanism effectively insulates the decision makers from their fiscal carelessness. Cutting salaries through individualized furlough days seeks to avoid the unpleasantness of making the public fully aware of the cuts in programs needed to balance the budget. The mechanism of furlough days allows the County to let the work pile up while the employees take unpaid days off, only to return to an increased workload, for reduced pay.

As held regarding the "Friday furloughs", the County had the absolute right to reduce its workforce to meet its budget limitations; indeed, it had the duty to do so and it had a readily available and contractually agreed upon mechanism for doing so. What it did not have the right to do was unilaterally change the rules in the midst of the latest, unpredictable but nonetheless inevitable, downturn. The County was not entitled to impose a unilateral wage cut and an attendant increase in workload on employees to avoid reducing the workforce and to instead force the remaining employees to bear the brunt of the County's profligate spending.

[14] An insubstantial change had been made to the contractual language.

The County's witnesses made clear the difficulty they had in reining in the spending in different areas. The 3rd Circuit Court vastly overspent the budget provided to it by the County. The jail was under certain court mandates, which led to further cost overruns, far above budgeted amounts. However, what the County witnesses did not address was why the County did not itself stop spending when it ran out of money. The agreed upon method for stopping the spending was to, simply enough, stop. If there were more programs or employees than the budget could support, the County's obligation was to make the necessary decisions as to which programs to eliminate or reduce. That question was not one impeded by any duty to bargain with the Union over the decision to eliminate programs or functions, as no such duty exists.

The function of PERA is not to set the terms of the employment deal struck between employees and their employers. PERA functions to regulate the means to reach such deals and to enforce good faith compliance with voluntarily agreed upon arrangements. One purpose of such enforcement is to facilitate the reaching of future agreements, as the necessary predicate for successful future negotiations is that the parties are cognizant that they are each legally entitled to expect, and compel, compliance by the other with the terms mutually agreed upon. See, *Kalamazoo County & Sheriff*, 24 MPER 17 (2011).

Here, as in the 1980s, the County agreed to a perfectly ordinary set of contractual obligations which left it with the unfettered right to decide the size of its workforce and to match that workforce to the quantity of funds available or allocated. The County failed at its obligation to manage its affairs. Instead, perhaps understandably, the County's leadership wanted to have it all---a full size workforce with all the programs intact, with a less than full-sized budget. Despite repeatedly over the decades agreeing to the same layoff mechanism that was enforced by MERC and the Courts during the similar 1980s downturn, the County sought to replay its 1980s furlough-days method of avoiding harder decision-making.

Of course the Union could have earlier agreed to alter the pre-existing agreement and to implement an across the board pay cut, or even to a scheme of Friday furloughs. The Union leadership, in fact, reached such tentative agreements with the Employer; however, the Union membership, as is its right, voted to reject such proposals. The effect of the Union membership vote was to say, bluntly, they would rather insist on enforcing the existing *status quo* layoff method and see some of their coworkers face long term layoffs than have all of the members share in a particular pay cut. As with the County, the Union membership can be criticized for not timely making some of the hard decisions available; however, both parties were legally free to make their own choices, but neither party was free to unilaterally make choices for the opposing party.

But again, PERA does not dictate to parties the choices they should make. It does regulate the ability of the parties to unilaterally escape obligations which they have voluntarily undertaken. PERA does prohibit either side from unilaterally altering the mutual obligations. Just as the Union could not here have demanded that the County resort to across the board pay cuts rather than impose long term layoffs, the County

cannot unilaterally scrap the agreed upon layoff scheme and instead impose what are undisguised share-the-burden mechanisms.

At the outset of this litigation, the County had imposed Friday furloughs on several hundred employees, which were announced to last long enough to approximate a 10% savings in personnel costs. That scheme was held unlawful. The County then switched to mandating that, essentially, that same block of several hundred workers take 17 days in unpaid holiday furloughs in that same fiscal year. The shift was as unsubtle and functionally meaningless as if the County had switched to unilateral Monday furloughs as a means of compliance with the decision prohibiting unilateral Friday furloughs.

The County seeks to deny culpability by asserting, implausibly, that either the facts in the present dispute are different than in the several previously litigated disputes or that there is a *bona fide* dispute as to the meaning of the contractual language related to the length of the work week or the meaning of the term "layoff". As noted above, the County is without logical, or legal, support in asserting that its unilateral salary cuts by the imposition of a four-day workweek, or the most recent replacement of that tactic with similarly unilateral "Holiday layoffs", can be distinguished from that same tactic used by this same employer in 1983. Then, as now, the County asserted the right to extract concessions by imposing short-term layoffs across the board, rather than by utilizing the established process of laying off fewer employees for a longer period based on inverse seniority. See, *AFSCME v Wayne County*, 152 Mich App 87 (1986), *aff'g Wayne County*, 1984 MERC Lab Op 1142. Nor can the County claim that it had any legitimate doubt as to the viability of that well-established rule of law where it was most recently affirmed on indistinguishable facts in *36th District Court*, 21 MPER 19 (2008), *aff'd*, Court of Appeals unpublished opinion (Case No. 285123, September 29, 2009). See also, *Village of Stockbridge*, supra.

The County makes the equally unavailing argument that MERC should defer to arguably available contractual remedies on the County's theory that there is a *bona fide* dispute over the interpretation of the parties' collective bargaining agreement. To the contrary, there was never a *bona fide* good-faith dispute over the question of the length of the workweek, or the contractually mandated layoff mechanism, given the unequivocal outcome in the litigation between these same two parties in the 1980s, and the fact that the contract still provides the equally unequivocal mandate that "*The workweek of each employee shall consist of five regularly scheduled, recurring eight hour workdays during the standard workweek*" (emphasis added). The later imposition of week-long layoffs surrounding holiday weeks, which were expressly described by the County as an effort to recoup the savings from the prohibited layoff days, is equally and functionally indistinguishable. It involves the same unilateral abandonment by the County of the agreed upon layoff method and the same unilateral across the board cut in salary.

Similarly, there can be no *bona fide* good-faith dispute over the proper understanding of the term "layoff", given the outcome of the prior litigation, and given that the contract between the parties continues to define layoff as "*a separation from*

employment as the result of lack of work or lack of funds" and where the contract expressly requires that layoffs be by inverse seniority. Here there was no separation from employment during the "Holiday layoffs"; rather there was a brief unpaid interruption of employment. As the Commission held in *Wayne County*, 24 MPER 25 (2011):

> There is no merit to [Wayne County's] contentions that the contract provisions setting forth management's rights and lay off procedures authorized the actions Respondent took when it reduced the workweek. The contract expressly defines the term "layoff" as a "separation from employment." The Merriam-Webster Online Dictionary defines separation as "termination of a contractual relationship (as employment or military service). Similarly, *The American Heritage College Dictionary* (2000) defines separation as "Discharge, as from employment." Here no true separation from employment ever occurred; there was only a reduction in the working hours of affected employees. The employment of the affected employees did not end, as it would in a separation; they remained employed but for fewer hours per week. Moreover, in light of the clear and unambiguous language of the contract in defining layoff and workweek, we agree with the ALJ's conclusion that there is no bona fide good faith dispute over the interpretation of these terms.

The action by the County of unilaterally selecting many AFSCME members to serve short-term denials of work and consequent cuts in compensation through "Holiday layoffs", rather than following the long established layoff-by-seniority system, constitutes a unilateral change in existing conditions of employment, and the lawfulness of that unilateral change must be resolved under PERA.[15]

While an employer is certainly able, under appropriate circumstances, to unilaterally change conditions of employment after exhausting its bargaining obligations, that has not occurred here. At the time the disputed changes were imposed, the parties were in the midst of a formal fact-finding proceeding under PERA. The purpose of fact-finding is to aid parties in reaching a voluntary and good faith resolution of a pending contractual dispute. For either side to take unilateral action on a fundamental aspect of their relationship is inherently destructive to the bargaining relationship and of the fact-finding process, which is an extension of the statutory bargaining process. Such unilateral action during fact-finding has long been held to be unlawful. Indeed, the seminal case on the question involved this same employer and this very same tactic of unilaterally imposing a pay cut through mass short-term layoffs during the pendency of a fact-finding

[15] In its post-hearing brief, the Employer asserts as a defense the failure of the Union to expressly demand bargaining over the effects of the "Holiday layoffs". The Commission has consistently held that a union has no duty to demand bargaining over a unilateral change when that change is presented as a *fait accompli,* as here, and, further, it is well established that a party is not required to demand bargaining on a subject that is already included in a collective bargaining agreement, as here. *Allendale Public Schools,* 1997 MERC Lab Op 183, 189; *County of Wayne,* 1985 MERC Lab Op 833, 839; *St. Clair Intermediate School Dist v IEA/MEA*, 458 Mich 540 (1998); *Meridian Township*, 1990 MERC Lab Op 153.

proceeding. *AFSCME v Wayne County*, 152 Mich App 87 (1986), *aff'g Wayne County*, 1984 MERC Lab Op 1142. The County's action in imposing the "Holiday layoffs" followed immediately on the heels of the February 2010 Decision and Recommended Order finding the Friday furloughs unlawful.

Finally, the County suggests that its unilateral action is somehow excused by the existence of a claimed financial crisis. As the Commission held in *Wayne County Bd of Commissioners (WCBA),* 1985 MERC Lab Op 1037, even a *bona fide* financial crisis does not justify an Employer's repudiation of its contractual obligations or permit a unilateral change in conditions of employment during a fact-finding proceeding. Notably, the County persists in this argument despite the fact that in that same decision of nearly 30 years ago the Commission held that the County's asserted defense of an inability to pay due to a financial crisis was then so untenable that it was, as a matter of law, a "*patently frivolous*" defense such that an award of costs and attorney fees to the Charging Party was appropriate. *Wayne County Bd of Commissioners (WCBA),* 1985 MERC Lab Op 1037, 1040-41, relying in part on the prior rejection of the "economic necessity" defense in *City of Detroit (DOT),* 1984 MERC Lab Op 937, *aff'd* 150 Mich App 605 (1985). See also, rejecting the economic necessity defense, *Jonesville Bd of Ed*, 1980 MERC Lab Op 891, 900-901; *Taylor Bd of Ed*, 1983 MERC Lab Op 77.

The County has offered no substantive reason why it should, in this latest instance, be excused from the obligation uniformly imposed on all employers that are subject to PERA. This holding, as was true of the historical *Wayne County* cases, does not require that the County continue to provide services in excess of its budgetary capacity; instead, it requires the County to exercise budgetary discipline in the manner to which it has voluntarily committed itself, both before and after this dispute. Layoffs by inverse seniority was the mechanism available to the County to immediately reduce expenditures. The County cannot now unilaterally change existing conditions of employment without violating PERA, any more than it could during the earlier economic downturn of 1982-83. The "Holiday layoffs" were an unlawful unilateral change in basic conditions of employment implemented in violation of the County's well-established obligation under Section 10(1)(e) of PERA to maintain pre-existing conditions of employment during the bargaining process.

2) The Health Insurance Cut-off Related Bad Faith Bargaining Claim

During the June-July and August-September 2010 "Holiday layoffs", the Employer took the additional step of cutting off health insurance coverage for the families of the laid-off workers. The cutoff was premised on the Employer's theory that because the workers were not actively employed at work on the first day of the month, the County was not obliged to pay its portion of their health care premiums. The County accomplished the claim that the employees were not eligible for health insurance by openly manipulating the "Holiday layoffs" schedule so that employees were not at work on the last day of June and first day of July as well as the last day of August and first day of September. The originally announced schedule for the "Holiday layoffs" had the employees working on the first of the month. The schedule was changed after, and in

apparent response to, the vote in May 2010 by the employees to reject the tentative agreement reached between the parties. The Employer offered no lawful or rational explanation for starting the respective "Holiday layoffs" before the end of the preceding month, leaving only the punitive goal of stripping the employees and their families of health insurance coverage for several months.

There is nothing in the collective bargaining agreement between the parties that supports the Employer theory that active employees may be denied health insurance coverage for themselves and their families merely because they are absent from work on the first of the month, whether by happenstance, or as here, by County manipulation of their schedules. The County relies on language from the separate health and welfare plan which requires the County to institute health insurance for new hires, rehires, or individuals returning from a leave of absence effective after the first of the month following their hire/rehire date. Assuming *arguendo* that the benefit plan is controlling over the contract, there is nothing in the benefit plan which remotely suggests the intent of the parties to apply that provision to employees returning from a short-term furlough. If the County's theory were accepted, the County could permanently avoid any contractual obligation to ever provide health insurance to any of its employees by the simple expedient of shuttering its doors on the first of every month hereafter.

In collateral litigation, a circuit court injunction prohibited the County from cutting off health insurance during the 4th of July "Holiday layoffs". The County later sought to retroactively impose the cutoff of health insurance for the Labor Day "Holiday layoffs", which was likewise challenged in collateral litigation. During the pendency of these ULP proceedings, the parties represented that they had reached an agreement which had resulted in the County reimbursing most, if not all, employee claims which would have been otherwise covered by health insurance.

The Union nevertheless sought a finding and remedy for the health insurance cutoff. The County, in its post-hearing brief, asserts that, as a result of the after-the-fact settlement, the dispute over health care coverage is moot. Given the acrimony between the parties, and the extensive resulting history of litigation, and the possibly extant claims for individual relief, the matter should be addressed.[16]

The unilateral cutoff of health insurance coverage for hundreds of County employees, and their families, was an unlawful change in established conditions of employment, and therefore, a violation of the Employer's duty to bargain in good faith. It was further a repudiation of the County's clear contractual obligations, over which there

[16] An otherwise moot issue may be reviewed if it is deemed to be of public significance and is expected to recur while simultaneously likely to evade judicial review. *Wayne County Int Sch Dist*, 1993 MERC Lab Op 317, 324; *Jackson Community Coll*, 1989 MERC Lab Op 913. See also *City of Warren v Detroit*, 261 Mich App 165 (2004); *Whitman v Mercy-Memorial Hosp*, 128 Mich App 155 (1983). The settling of a labor dispute does not necessarily render moot a refusal to bargain charge. *Ingham County*, 1998 MERC Lab Op 321; *Cass County Rd Comm*, 1984 MERC Lab Op 306, 308; *cf, Brighton Schls*, 22 MPER 88 (2009).

was no *bona fide* dispute and, again, therefore a violation of the Employer's duty to bargain in good faith under PERA Section 10(1)(e).[17]

3) Alleged Late Notice of Layoff

The Employer initially announced in May of 2010 that the so-called "Holiday layoffs" would be imposed on much of the AFSCME workforce. The County withdrew the announced "Holiday layoffs" when the parties then reached a tentative agreement. That proposed agreement was rejected and the County issued a new notice that it would re-instate the "Holiday layoffs"; however, because of the passage of time, the Memorial Day layoffs would not occur and instead the July 4th and Labor Day layoffs would be lengthened over their originally announced duration.

The Union contended that the second notice of "Holiday layoffs" had given less than the contractually mandated 14-day minimum notice required for legitimate layoffs, at least as to the July 4th "Holiday layoffs". The Charge asserts that the failure to give the minimum notice was a repudiation of the contractual obligation regarding minimum notice of layoffs and therefore an unfair labor practice. The Employer counters that it provided timely emailed notice, if not timely actual hand-delivered physical notice to each employee.[18]

I find the dispute over minimum notice moot. Those "Holiday layoffs" have been separately found to be unlawful, a make whole remedy has been recommended, and the dispute over the adequacy of the amount of advance notice of the unlawful denials of work is irrelevant. The "Holiday layoffs" were not in fact legitimate layoffs, as that term is used in the collective bargaining agreement.

Moreover, there is contract language covering the question of how and when notice of an actual layoff must be given. The Employer presented a colorable claim of compliance with those obligations and does not dispute that it has the obligation to give the contractually mandated minimum notice when implementing layoffs. Further, the Employer relies on a prior arbitration decision which arguably supports the Employer's interpretation of compliance with the time limits. Regardless of whether or not an arbitrator would find that the County properly and timely gave notice of the supposed layoffs, no repudiation of contractual obligations related to the timing of "Holiday layoffs" notices has been established. Therefore, even if I had not found the dispute moot,

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[17] The assertion that the health insurance cut-off also constituted unlawful retaliation is discussed *infra*, at Decision section 8.

[18] The Commission has the authority to interpret the terms of a collective bargaining agreement where necessary to determine whether a party has breached its collective bargaining obligations. *University of Michigan,* 1971 MERC Lab Op 994, 996, citing *NLRB v C & C Plywood Corp,* 385 US 421 (1967). However, if the term or condition in dispute is "covered by" a provision in the collective bargaining agreement, and the parties have agreed to a grievance resolution procedure ending in binding arbitration, the details and enforceability of the provision are generally left to arbitration. *Port Huron Ed Ass'n v Port Huron Area Sch Dist,* 452 Mich. 309, 317-321 (1996). The Commission will not find repudiation on the basis of an isolated breach. *Crawford County Bd of Comm'rs,* 1998 MERC Lab Op 17, 21.

I would find that an unfair labor practice regarding this notice-of-layoff issue has not been established and that portion of the amended Charge must be dismissed.

4) The "Holiday layoffs" Lock-Out Claim

A part of one of the multiply-amended charges by the Union was the assertion that the "Holiday layoffs" were an unlawful "lockout" of employees for the purpose of forcing them to accept changes proposed by the Employer. The statute does not expressly make a strike or a lockout an unfair labor practice under Section 10 of PERA.

The lockout allegations present a question of first impression. A 'lockout' is the withholding of work from employees by an employer during a labor dispute for the purpose of attempting to compel the employees to accept an employer proposal. See, MCL 423.201(1)(d). It is the corollary to a 'strike' in which employees withhold their services from an employer in an effort to force the employer to change conditions of employment. See, MCL 423.201(1)(j). Both such strikes and lockouts are prohibited by PERA. See, MCL 423.202. I find that the second announced set of "Holiday layoffs", coming when they did on the heels of the employees' rejection of a tentative agreement, and with the unprecedented cutoff of health insurance coverage, were a denial of work implemented in a manner intended to compel employees to accept concessions which they had otherwise rejected.

Prior to 1994, PERA contained no express prohibition against a public employer lockout of employees. The Act did prohibit all strikes by public employees where the withholding of services sought to induce a change in conditions of employment.[19] In 1994, the Legislature amended PERA through Act 112, which, in pertinent part, newly and expressly prohibited only public school employers from instituting a lockout for any reason and likewise expressly prohibited only public school employees from engaging in an unfair labor practice strike.

The Interim Order of July 2010 in this matter noted that it had been correctly asserted by the Employer that Michigan law applies a canon of statutory construction which presumes that the specific inclusion of one thing necessarily implies the exclusion of the other or alternative outcome.[20] An unstrained reading of the 1994 amendments establishes that lockouts and unfair labor practice strikes are expressly prohibited only where public schools are involved and, thus, both are arguably permitted in all other public employment settings governed by PERA. That Order found that it appeared likely that the Employer was correct; that under the statute, as amended by Act 112, lockouts and unfair labor practice strikes are permitted weapons in labor disputes where a public school is not involved. The Order directly suggested that the statutory "lockout" claim

[19] There remains an unresolved question of whether the original PERA prohibition on strikes also necessarily barred what are known as 'unfair labor practice strikes', that is, a withholding of services not for the purpose of seeking a change in conditions of employment, but rather to protest allegedly unlawful conduct by an Employer. See, *Melvindale North Allen Park Schools*, 1992 MERC Lab Op 400; clarified, 1995 MERC Lab Op 53; aff'd *sub nom*, *Melvindale-North Allen Park Federation of Teachers v Melvindale-North Allen Park Schools*, 216 Mich App 31 (1996).

[20] *Expressio unius exclusio alterius*, see, *Dawe v Bar-Levav & Assoc*, 485 Mich 20 (2010).

was likely not viable. Additionally, the Order noted that neither the statutory nor the related contract repudiation lockout theories appeared to warrant consideration of any relief other than the ordinary make-whole remedies otherwise available in the event the Union prevailed.

The Union did not address the statutory lockout question in its post-hearing brief, thereby implicitly abandoning the claim. Because the claim had not been explicitly withdrawn by the Union, the Employer did address the issue in its post-hearing brief and the dispute warrants resolution.

As asserted by the Employer, we are obliged to apply the statute according to its plain language and to enforce Legislative amendments as written. Until 1994, PERA did not expressly prohibit either lockouts by employers or unfair labor practice strikes by employees. The only strikes expressly prohibited were those designed to coerce a change in conditions of employment. With the 1994 amendments, PERA now contains an express provision prohibiting school employers from locking-out their employees *"in order to bring pressure upon the affected employees . . . to accept the employer's terms of settlement of a labor dispute*". MCL 423.201(1)(d). The Act similarly now expressly prohibits school employees from striking for the purpose of *"protesting or responding to acts alleged or determined to be an unfair labor practice committed by the public school employer"*. MCL 423.201(1)(j); see also, MCL 423.206(1). Necessarily, nonschool employers must be found to be not prohibited from, under appropriate circumstances, resorting to a lockout as a bargaining tactic, just as non-school employees are not expressly barred by statute from engaging in legitimate unfair labor practice strikes.[21] Based on the above analysis, the statutory lockout claim, standing alone, is without merit.

However, there remains the question of whether the Employer's conduct in locking out the employees under the circumstances found above constitutes a Section 10(1)(e) failure to bargain in good faith violation. As noted above, the statute appears to give an employer a clear right to use the lockout as a bargaining weapon, at an appropriate juncture. The appropriate corollary analysis is that applied to the question of whether economic strikes by employees are, in and of themselves, a failure to bargain in good faith. In *Lamphere Sch v Lamphere Federation of Teachers*, 400 Mich 104, 112-114, 252 NW2d 818, 821– 822 (Mich 1977), the Court rejected the employer's arguments that a public employer could pursue a common law damages claim against a union for a non-violent strike, precisely because the conduct was regulated by PERA. In *Kent County Education Ass'n and Rockford Educational Support Personnel Association*, 1994 MERC Lab Op 110, the Commission held:

> In drafting this Section [10(3)], the Legislature did not make striking or encouraging a strike an unfair labor practice although it presumably could have easily done so. We have held that a strike may, in the context of

[21] As the Employer correctly asserts, the Michigan Supreme Court has held that the Legislature acted well within its authority in adopting these very amendments to PERA which rationally distinguished between the rights and obligations of school vs non-school employers and unions in addressing their respective labor disputes. *Mich AFL-CIO v MERC*, 453 Mich 362, 382 (1996).

> other conduct, be evidence of a refusal to bargain in good faith. *Warren Education Association*, 1977 MERC Lab Op 818. Striking prior to utilizing statutory dispute resolution mechanisms, i.e. mediation and fact-finding, has been held to be evidence of bad faith bargaining. *Wayne County MEA/NEA*, 1982 MERC Lab Op 1556; *Lake Orion Education Association*, 1984 MERC Lab Op 770, *Hart Public Schools*, 1989 MERC Lab Op 950. A strike does not constitute a *per se* failure to bargain in good faith, however. *Detroit Board of Education v. Detroit Federation of Teachers*, 55 Mich App 499 (1974); *Lamphere School District v. Lamphere Federation of Teachers*, 67 Mich App 485 (1976).
>
> In short, although PERA clearly prohibits strikes by public employees, it does not provide a direct statutory remedy. In order for a strike to be remedied as an unfair labor practice, it must be found to be evidence of a failure to bargain in good faith . . .

The same analysis must be applied to the resort by a non-school employer to the economic weapon of a lockout. That is, under particular circumstances, a lockout may be evidence of a failure to bargain in good faith, and therefore a violation of PERA Section 10(1)(e). Here, the initially announced "Holiday layoffs" were objectively an effort by the Employer to recoup the savings it had sought to unilaterally extract from employees upon the finding that the "Friday furloughs" were unlawful. As such, the motivation was an economic one; however, the second announced round of "Holiday layoffs" requires a different analysis.

When the May 2010 tentative agreement was reached, the initially announced "Holiday layoffs" were forestalled. When that TA was voted down by the AFSCME membership, a new and more draconian set of "Holiday layoffs" was announced. This time, the "Holidays" would be manipulated artificially to wrap around the end of one month and the beginning of another. The sole function of that change in scheduling was to attempt to bolster the Employer's claim of entitlement to deprive the employees, and their families, of health insurance for the month. The manipulation of the layoff dates was designed to both punish the AFSCME membership for having voted the tentative agreement down and to thereby coerce a change in bargaining posture by dramatically increasing the pain caused by the short-term layoffs. Had such a "lockout" tactic been employed after reaching a good faith impasse, it might have been defensible. Instead the tactic was announced in May of 2010, a point in time that the Employer acknowledges was well before even it claims to have reached an impasse in bargaining, and significantly, it was employed while the parties were in the midst of the fact-finding process. As such, the resort to the lockout is evidence of a failure to bargain in good faith and provides additional grounds for finding a Section 10(1)(e) violation.

AFSCME's charge raised another rationale for its 'lockout' claims; that is, that the alleged partial lockout constitutes a violation of Article 13, Section 13.04 of the prior collective bargaining agreement and thereby constituted a unilateral change in conditions of employment. As indicated in the July 2010 Order, the theory that the alleged lockout

would constitute such a straightforward breach of contract as to constitute a repudiation of the agreement would require the Union to meet a high threshold by establishing that there was no good faith dispute as to the meaning or applicability of the "no lockout" contract language.

The prior collective bargaining agreement between the parties provided at *Article 13-Strikes and Lockouts*:

> 13.01 Adequate procedure has been provided by this Agreement and the Public Employment Relations Act (PERA), as amended, for the settlement of any grievance(s), dispute(s), or impasses which may arise between . . . the Union . . . and the Employer.
>
> * * *
>
> 13.04 The Employer agrees that it shall not lock out its employees.[22]

The contract repudiation related lockout claim was similarly neither affirmatively withdrawn nor addressed in the Charging Party's post-hearing brief, and as such may be deemed abandoned. Regardless, substantial questions exist which would likely have precluded finding a violation. First, it is not clear that the Employer's conduct rose to such a level as to constitute a repudiation of this portion of the contract. Second, the parties were in a period post-expiration of the contract. While no-strike and no-lockout clauses are mandatory subjects of bargaining[23], and while it is ordinarily unlawful to take unilateral action on a mandatory subject of bargaining without first fulfilling the bargaining obligation, it is unclear whether a no-lockout clause would similarly survive contract expiration. While a repudiation of a no-lockout commitment would certainly impinge on the most basic condition of employment, that is, the right to continue to work, a lockout appears to be a statutorily sanctioned weapon in bargaining under appropriate circumstances, at least as to non-school employers. Weighing the conflicting interests involved would require a fuller record on this esoteric question, and therefore, the Charging Party has failed to establish a PERA Section 10(1)(e) violation based on the contract repudiation lockout theory.

5) The Transfer of Unit Work Claim

As noted above, at trial in April 2011, the Union amended its Charge to assert that during the Summer 2010 "Holiday layoffs", certain work was improperly assigned to supervisory and other non-unit employees. AFSCME asserts that such assignments were an improper diversion of unit work without bargaining, which can constitute an unfair

[22] This language was retained unchanged in the successor negotiated agreement which runs from December 19, 2011 to September 30, 2014.
[23] See, *NLRB v Boss Mfg Co*, 118 F2d 187 (7th Circ 1941).

labor practice. The Contract, at Article 22, provides unequivocally that: "Non-bargaining unit employees shall not perform unit work except in a *bona fide* emergency". A union has a legitimate interest in whether and when the work of its members may be assigned outside of the bargaining unit, and employers generally have a duty to bargain the diversion of work to non-unit employees and the subcontracting of work to others. *Plymouth Fire Fighters Ass'n, Local 1811 v Plymouth*, 156 Mich App 220 (1986); *Lansing Fire Fighters Union, Local 421 v Lansing*, 133 Mich App 56 (1984).

The Employer asserts that the April 2011 amendment of the Charge was untimely and that the allegations are barred by the statute of limitations. MERC's Rules do allow for the amendment of Charges at trial, or even after trial to comport with the proofs. See Rule 423.153 (1). An amendment may relate back to the date of original filing, particularly if it merely adds a new theory on why relief is warranted in an already pending dispute, but will not relate back if the proposed amendment adds a party or essentially adds a new cause of action. See, *City of Pontiac*, 22 MPER 46 (2009). Here, the amendment in essence merely adds a new theory for relief related to events that were already the subject of a timely Charge.

The Employer further notes that AFSCME called "*only 17 witnesses*" to establish the diversion of unit work related to the "Holiday layoffs" affecting more than 500 AFSCME represented employees. To the contrary, while AFSCME's proofs were arguably anecdotal, they were substantial, and it would not have been necessary or appropriate to call in all or most of the 500 employees. AFSCME's proofs solidly established that during the "Holiday layoffs" supervisors in multiple locations, and even apparently unpaid volunteer civilians, were used to perform work normally performed by AFSCME members. Additionally, even the Employer's final witness, a construction supervisor, quite frankly disclosed that multiple supervisors did unit road repair work during the "Holiday layoffs", and that such use of supervisors to perform unit work was unprecedented. A self-created shortage of workers owing to an employer's own layoff of workers cannot be deemed a "*bona fide*" emergency, such as would be true in the event of hurricane, flood, civil disturbance, epidemic, or the like.

Notwithstanding the above, I do not recommend finding a PERA Section 10(1)(e) bargaining violation based on the performance by non-unit individuals of unit work during the "Holiday layoffs". First, there was no permanent or long term reassignment of unit work, nor the claim of entitlement to reassign such work. It appeared that in many, but certainly not all, cases of the performance of unit work by non-unit members, there was no actual re-assignment of work; rather, it was largely a function of individual employees choosing to pitch in to help out during a crisis caused by the County's imposition of the ill-planned and precipitous "Holiday layoffs". While such performance of work may have been a contractual violation, that question is not before this agency, but is rather properly a grievance matter.[24] Further, to the extent that any remedy could

[24] The Commission has appropriately distinguished between unilateral changes in working conditions that have a continuing impact on the bargaining unit and mere departures from the contract's terms. See, *Grass Lake Community Schs*, 1978 MERC Lab Op, 1186, 1190; *Linden Community Schs*, 1993 MERC Lab Op 763 (no exceptions); and *Oakland County Sheriff Dep't*,

be ordered for an improper reassignment of unit work as part of this ULP case, those remedies are subsumed in the remedies recommended for the improper layoffs themselves and any further remedy would be improperly duplicative and speculative.

AFSCME also complains that much of the work went undone during the "Holiday layoffs" and was left to stack up to the disadvantage of unit members. Additionally, unit members were threatened with discipline for not timely catching up their work upon their return; however, there was no proof of any actual discipline imposed. Regardless, these facts do support finding a violation. Certainly the piling up of work is a consequence of many layoffs and could give rise to contractual grievances. Alone, such a disadvantage to employees would not warrant a finding of a violation of PERA.

6) The Post Fact-Finding 20% Wage Cut and Imposed Changes in Obligations Regarding Sub-Contracting of Unit Work

As indicated in the findings of fact, in December 2010, the Employer asserted that it believed the parties were at an impasse in bargaining. The Employer then announced it was unilaterally imposing substantive changes in basic conditions of employment including an across the board 20% pay cut on the AFSCME unit, which was also imposed on that large segment of the workforce which had already undergone the unlawful short-term furloughs that together amounted to an approximate 12% cut in annual pay. The County also purported to grant itself a new essentially unlimited right to subcontract work performed by AFSCME members, even though the Employer had agreed with other bargaining units to retain ordinary limited contractual restraints on sub-contracting of existing unit work. The County also asserted that it was dispensing with the decades-old contract language on the length of the workweek, in an effort to *post hoc* ratify the earlier "Friday" and "Holiday" layoffs, which had been held unlawful in recent proceedings as in the 1980s litigation.

As discussed above, where parties have bargained in good faith, utilized fact-finding, and remain at an impasse in bargaining, an employer has considerable leeway to implement changes in conditions of employment consistent with its final offer.[25] The prohibition against unilateral action prior to a legitimate impasse serves to foster labor peace and must be liberally construed, particularly in light of the prohibition against striking by public employees. If a public employer takes unilateral action on a "mandatory subject" of bargaining before reaching a "good faith" impasse in negotiations, the employer has committed an unfair labor practice in violation of PERA Section 10(1)(e) by failing to bargain in good faith. *IAFF* v *Portage,* supra.

1983 MERC Lab Op 538. See also, *City of Grand Rapids*, 22 MPER 70 (2009) on the use of volunteers.

[25] Because the changes in conditions of employment as implemented were not consistent with the Employer's earlier offers, and significantly more onerous, the Employer has separately herein been found to have violated the anti-retaliation provisions of PERA Section 10(1)(a) and for the same reason the implemented changes would, even assuming a good faith impasse, have been a violation of the duty to bargain under PERA Section 10(1)(e).

The whole point of the prohibition on various forms of unilateral action is that for one party to exercise sole authority over basic terms of the relationship is destructive of the entire fabric of labor relations and the very premise of good faith bargaining—that is, that making compromises results in a binding agreement that gives each side stability. If such conditions can be unilaterally altered, both stability and the possibility of productive future discussions are destroyed. To find otherwise, would dismantle the balance of compromises reached by parties through good faith bargaining and would be destructive of the goal of voluntary resolution of labor disputes, which is the underpinning of government regulation of labor disputes. *Oakland Univ*, 23 MPER 86 (2010); *Kalamazoo County & Sheriff*, 22 MPER 94 (2009). See also, MCL 423.1, wherein the labor policy of the State is declared: "[*T]he best interests of the people of this state are served by the prevention or prompt settlement of labor disputes. . . and that the voluntary mediation of such disputes under the guidance and supervision of a governmental agency*" will best promote those interests.

Moreover, and to put it bluntly, it is especially important that parties play by the rules during hard times. Many public entities are facing extreme financial distress. In most instances, the employers and the unions representing the employees are, albeit grudgingly and frequently with some drama, acting responsibly and making new deals which take into account the present economic realities. After several decades in which unions in the public sector generally were able to regularly deliver improvements in working conditions, it is understandably difficult for union leadership to go to the membership, often repeatedly, to seek approval of objectively unattractive new terms of employment. The resolute and responsible actions now asked of such union leaders cannot reasonably be expected to occur if employers do not play by the rules. A union cannot likely sell a new concessionary deal to its members where, as here, the employer is with seeming impunity openly flouting the rules by unilaterally and adversely changing conditions of employment. Further, to ignore the corrosive effect such unilateral conduct would have on future negotiations would be to fail to exercise what the appellate courts have properly recognized as "MERC's expertise and judgment in the area of labor relations." *Port Huron Education Ass'n v Port Huron Area School District*, 452 Mich 309, 323 n18 (1996).

Here, the December 2010 unilateral changes must be examined to determine three interrelated issues: a.) whether there was in fact an impasse in bargaining such that no further progress could reasonably be anticipated; b.) whether the claimed impasse was preceded by "good faith" bargaining; c.) whether the terms as unilaterally implemented were consistent with the Employer's prior bargaining offers.

a.) The parties were not at impasse in December 2010.

As also discussed above, the Commission has defined impasse as the point at which the parties' positions have so solidified that further bargaining would be futile. *Wayne County (Attorney Unit)*, 1995 MERC Lab Op 199, 203; *City of Saginaw*, 1982 MERC Lab Op 727. Simply declaring impasse and asserting the right to implement changes in mandatory subjects of bargaining is not sufficient. As resort to such self-help

is disfavored, the Employer bears the substantial burden of establishing the existence of a "good faith" impasse and that neither party was willing to further compromise.

Here, the Employer asserts that the parties were at impasse as of the last bargaining session which was held on November 9, 2010. The Employer's assertion of impasse must be rejected based on the record evidence of the change in the Union's bargaining stance which was articulated at that session. The Union had previously rejected the Employer's 10% wage concession demand. At the November bargaining session, the Union offered the significant concession of accepting a 5% wage reduction and suspending, but not eliminating, the already contractually mandated 2% annual service adjustment. The Union insisted on retention of the protective language on the workweek and on layoffs. While those concessions by the Union did not yield an immediate agreement with the County, they did signal significant movement such that there could not be a finding that neither party was willing to further compromise. The December 2011 contract settlement encompassed the essential terms being debated by the parties in November 2010: a wage cut of 7% to be accomplished through either a straight wage cut or furlough days; other wage and benefit reductions with a calculated value of 3%; retention of the protective language on the workweek; retention of the protective language on subcontracting; and Employer payment of the earlier withheld annual service adjustments in two lump sum payments of 2% each, to be paid at six month intervals. In essence, the Employer secured the wage concession which had been discussed and the Union secured the recision of the unilateral changes earlier imposed by the Employer.

The Employer, which has the burden to do so, has failed to establish that neither party was willing to further compromise or that the positions of the parties had become fixed. *Memphis Community Schools*, 1999 MERC Lab Op 377. Here the parties, as established by the Employer's motion to reopen, actually did reach a deal in 2011, premised on the November 2010 proposed compromises, and seemingly objectively better for both sides than the terms imposed in December 2010. The Union had resisted the Employer's demanded 10% pay cut, seeking to secure instead the less onerous 5% cut recommended by the fact-finder in September of 2010. Ultimately, the Union accepted a 7% pay cut, with other benefit changes. For its part, the Employer agreed to restore the earlier disputed definition of the workweek, which it had unsuccessfully attempted to repudiate in the 1983 and 2010 "Friday furloughs" disputes and had purported to eliminate in the December 2010 imposition; it restored the restrictions on sub-contracting which it had unilaterally struck in December 2010; and it provided two lump sum payments of 2% to employees which remedied the 2009 and 2010 disputes over the withheld annual service adjustments.

b.) The County had not bargained in good faith prior to declaring impasse.

Even assuming *arguendo* that an impasse had existed in December 2010 between the County and the Union, such that disfavored unilateral action was permissible, there must still be a review of the totality of the circumstances to determine if that alleged impasse was reached in "good faith". *Capac Comm Schls*, 23 MPER 46 (2010); *Flint Twp*., 1974 MERC Lab Op 152, 157; *Warren Education Association*, 1977 MERC Lab

Op 818; *Mecosta Co. Park Comm*., 2001 MERC Lab Op 28, 32 (no exceptions). It must be determined whether the party asserting the existence of an impasse "*has actively engaged in the bargaining process with an open mind and a sincere desire to reach an agreement*" See, *Union-Sebewaing Area Schools*, 1988 MERC Lab Op 86, relying in turn on *DPOA v Detroit*, 391 Mich 44 (1975).

To the contrary, many of the County demands seemed designed to avoid reaching an agreement. Early in bargaining, the County proposed maintaining the parties' preexisting language which placed certain very limited restrictions on the ability of the County to subcontract AFSCME unit work. The Union initially countered with its proposal to strengthen the restrictions on subcontracting, but then acquiesced and agreed to maintain the old contractual language. The County's response was to refuse to take 'Yes' as an answer. The County later resurrected the seemingly resolved issue of subcontracting. This was done in a context where the County had agreed to similar reasonable restrictions on subcontracting covering other bargaining units. To demand *carte blanche* as to this AFSCME unit was predictably seen by AFSCME's bargainers as a punitive response to their effort to enforce rights under the Act. Moreover, making such a demand signaled that the Employer sought unilateral future authority over the very existence of the unit and any obligations to the employees, for to eliminate any restrictions on subcontracting this one unit's work is to target the most basic of conditions of employment, that is, the existence of work to be performed.

Similarly, the County sought to eliminate any effective restrictions on its ability to manipulate the workweek, work year, or salaries of this unit. Against the backdrop of the 1980s litigation wherein the County was found to have acted unlawfully, the County seemingly willfully engaged, in 2010, in the exact same unlawful scheme of substituting "Friday furloughs" for the agreed upon layoff-by-seniority method of addressing economic downturns. The County then, quite predictably, was found to have acted unlawfully regarding the 2010 furloughs. Its response was to insist on the elimination of the contractual workweek language, precisely so that it could no longer be compelled to follow the contractual layoff arrangement. Very late in bargaining, literally on the eve of the beginning of the fact-finding hearing, the County placed a proposal before the fact-finder to eliminate the relevant language on the workweek.[26] For the County to make such a demand of AFSCME regarding the workweek language was predictably understood by AFSCME's bargainers as an insistence on the right to, at the County's future whim, ignore its contractual layoff obligations.

The combined demands to eliminate any effective definition of the work week with the demand for the removal of the existing limited restrictions on subcontracting

[26] The Union sought to establish that the very act of raising such a proposal at that late stage in bargaining was, in and of itself, an unlawful tactic. In isolation, I would not find the tactic *per se* unlawful; however, it is a significant piece of the totality of circumstances leading to the conclusion that the County did not act out of a desire to actually reach a negotiated settlement.

would have effectively gutted any resulting contract.[27] MERC, like the NLRB, has held unlawful such demands which give an employer exclusive future control over such significant terms and conditions of employment which thereby effectively strip the union of its role. See, *A-1 King Size Sandwiches, Inc*, 265 NLRB 850, aff'd *NLRB v A-1 King Size Sandwiches*, 732 F2d 872 (CA 11, 1984), cert den, 468 US 1035 (1984); *McClatchy Newspapers, Inc*, 299 NLRB 1045 (1990) and *McClatchy Newspapers, Inc*, 321 NLRB 1386, 1390-92 (1996) (" *McClatchy II*"), *enf'd*, 131 F3d 1026 (CADC, 1997), *cert denied*, 524 US 937 (1998). For AFSCME to acquiesce was implausible, for to do so would have required that it virtually abdicate for the future its role as exclusive bargaining agent and would have denigrated significant portions of any collective bargaining agreement from the status of a contract to that of mere suggestions. The Employer demands here were inconsistent with a sincere desire to reach an agreement. *City of Springfield*, 1999 MERC Lab Op 399. The Employer's conduct was rather posturing, or going through the motions of the bargaining process, in anticipation of a planned unilateral implementation upon reaching a purported impasse

Here, there can be no question that the County engaged in bad faith bargaining, where the County made demands which sabotaged any possibility of securing agreement and where there were pervasive unremedied violations of the Act including multiple unilateral changes in conditions of employment during the bargaining effort; unlawful unilateral changes in conditions of employment during the fact-finding process; retaliatory holiday furloughs; and a draconian health insurance cut off. Adjudicated findings of other contemporaneous unfair labor practices by an employer are relevant circumstantial evidence of unlawful motive by that employer in the context of a discrimination or bad faith bargaining charge. See, *Oaktree Capitol Mgt*, 353 NLRB No. 27 (2009); *Shattuck Mining Corp v NLRB*, 362 F2d 466, 470 (CA 9, 1966). Each separate finding of an unfair labor practice must nonetheless stand on its own merits; however, unlawful conduct occurring between the same parties during the same round of negotiations is certainly relevant. Indeed, such contemporaneous acts are unavoidably part and parcel of analyzing a party's conduct and the "totality of the circumstances". It is of particular significance that many of the contemporaneously litigated unfair labor practices involved the very wage concession issue, or surrogates for that issue such as the Friday furloughs, on which the County asserts that the parties reached impasse.

As noted by ALJ Peltz in *Wayne County*, C09 J-211(Sept 2011), this same public Employer has been found to have violated its duty to bargain in good faith under PERA with this same Union multiple times during this same round of contract negotiations. In *Wayne County*, 26 MPER 2 (2012), the Commission adopted Peltz' recommended finding that the County violated its duty to bargain by, during this same round of bargaining, repudiating its contractual obligation to provide health insurance benefits to certain disabled County workers. In *Wayne County*, 24 MPER 12 (2011), the Commission held that the County violated the duty to bargain by repudiating its contractual obligations by failing to make annual service adjustment increases of 2% of

[27] It is far from controlling, but is notable, that the MERC appointed fact-finder determined that the County offered no factual support at all for its proposed elimination of the subcontracting language or for eliminating the language on the normal workweek.

salaries in 2009 to members of the AFSCME bargaining units, again while the parties were at the table in this round of bargaining. As noted above, an indistinguishable claim was pending, but later withdrawn, in *Wayne County*, C10 F-158, arising from the unilateral withholding of the 2010 annual 2% service adjustment, which notably occurred after the 2009 unilateral withholding had already been found to have been unlawful. In *Wayne County*, 24 MPER 25 (2011), the Commission concluded that the County violated its statutory bargaining obligation by unilaterally reducing the length of the workweek for these same unit members, likewise as a part of this bargaining round. In that case, there were no material facts in dispute and the Employer's position was indistinguishable from arguments previously rejected by the Commission in the 1980s case involving the same parties. After no exceptions were filed in *Wayne County*, 22 MPER 80 (2009), enf'd (Unpub CA No 294459) (March 1, 2010), the Commission affirmed the finding of the ALJ that the County breached its duty to bargain in good faith by ignoring this same Union's request for presumptively relevant information. The County was additionally found to have brought a meritless ULP Charge against the Union in an improper effort to block a collateral contract enforcement action in the Wayne County Circuit Court. *AFSCME Council 25*, 22 MPER 102 (2009), aff'd 24 MPER 19 (CA Unpub # 295536, 3/22/11).

In addition to the improper bargaining demands and prior adjudications, the findings in the present matter establish the remainder of the "totality of the circumstances" preceding the claimed reaching of a good faith impasse. Herein, the County has been found to have acted unlawfully in this recent round of bargaining by unilaterally imposing changes in conditions of employment during the fact-finding process, including the "Holiday furloughs" and the health insurance cutoff. Additionally, the County has been found to have acted unlawfully in retaliating against employees by the manner in which, and the purpose for which, the "Holiday layoffs" and health care cuts were imposed. Additionally, aspects of the Employer's conduct after its declaration of impasse are also found, *infra*, to have been retaliatory and therefore unlawful.

In its post-hearing brief, the Employer focuses on the number of times the parties were at the table. The number of bargaining sessions can be a factor in determining whether a good faith effort was made. See, *Memphis Community Schls*, 1998 MERC Lab Op 377. Here, the parties met extensively, with over 40 sessions. That many sessions would easily satisfy the bargaining obligation, if good faith bargaining had taken place. Meeting with the opposing party is necessary, but merely meeting is not sufficient. Absent here was the requisite willingness to "*actively engage in the bargaining process with an open mind and a sincere desire to reach an agreement"*. See, *Union-Sebewaing Area Schools, supra.*

The Employer's post-hearing brief discloses an extraordinary basis for the assertion made in December 2010 that the parties were at impasse over the wage negotiations. In its brief, the Employer admits that in determining that the parties had unbridgeable differences on wages, and in therefore declaring impasse, the Employer held against the Union its insistence that the Employer compensate employees for the

unlawfully withheld annual service adjustments and the unlawful Friday furloughs[28], as to each of which the Commission has ordered remedies. A party cannot lawfully declare impasse premised on its own unlawful demand, as here, that the Union yield on remedies ordered for prior unfair labor practices.

In the context of the multiple separately adjudicated findings of unlawful Employer conduct, as well as the unlawful conduct found in this case, the Employer cannot establish that it and the Union were at a "good faith impasse' in bargaining in December 2010. Therefore, the unilateral changes of December 2010 were unlawfully imposed contrary to the bargaining obligations under PERA Section 10(1)(e).

c.) The December 2010 imposed terms were not consistent with prior Employer offers

Even in the event of a good faith impasse, an Employer's imposed changes must be consistent with its last best offer. The terms imposed need not be precisely the same as, or the entirety of, the Employer's final offer; however, they cannot, consistent with the duty to bargain in good faith, be materially worse than the terms offered. Here the Employer had sought throughout bargaining to secure a 10% across the board savings on salary for each of the two fiscal years in question. Its final demand of a 20% prospective cut was consistent with the earlier demand for two years worth of cuts, as it would have allowed the County to recoup both portions of the demanded cuts. However, as implemented, the 20% cut imposed a significantly greater burden on that substantial portion of the AFSCME unit which had already undergone the "Friday & Holiday furloughs". In its post-hearing brief, the Employer derides the Union's assertion that there should have been an off-set against the 20% pay cut, at least for those employees who had already taken a cut, with the Employer's brief asserting that "*The County had never offered such an offset"*. This assertion is blithely made despite the Employer's same post-hearing brief accurately quoting the County's bargaining proposal as providing just such a promise of a set-off in providing that if unilateral implementation of a pay cut did occur, it would "*continue . . . **until** the County realizes the necessary 10% base wage rate concession savings per employee. . .*" (Emphasis added).

The 20% cut thereby came in addition to, and without a set-off for, the approximately 12% prior cut secured through the Friday furloughs, which were earlier deemed unlawful, but had not been actually remedied, and the substitute "Holiday furloughs", which merely re-created the Friday furloughs in order to skirt MERC's ordered remedy. As such, the 20% cut could not be treated as the good faith imposition of the Employer's final offer, even if a good faith impasse were found to have existed. For this separate reason, the December 2010 unilaterally imposed 20% pay cut was unlawful and in violation of the duty to bargain under PERA Section 10(1)(e).[29]

[28] The Employer's post-hearing brief included in that litany the "Holiday furloughs" which had been imposed, but of course had not yet then been litigated.

[29] The Union advances the additional theory, which I reject, that the implementation of the 20% wage cut was otherwise unlawful because, as implemented, it did not include the options earlier offered by the Employer that might have softened the blow as to individual employees. The Employer's demand had been for a percentage cut which could have been accomplished by various combinations of wage cut, increased health insurance contributions, or furlough days.

The Employer further deviated from its prior offers in December 2010, in additionally announcing the imposition of expanded sub-contracting rights. Earlier in bargaining, the Employer had proposed to retain the limited pre-existing restraints on subcontracting of unit work. The Union had ultimately agreed to the Employer's proposed language; however, the Employer then withdrew its proposal to maintain the existing language as to the AFSCME unit, even though the County agreed to maintain comparable language as to other County bargaining units. Upon declaring impasse, the County purported to impose new language allowing it to subcontract the AFSCME work without any restriction. Such an imposition was unlawful under these circumstances where the County had engaged in multiple bargaining duty violations. However, the claim as to the imposition of the new subcontracting language is seemingly moot as the new CBA executed in December of 2011 retained the same language limiting subcontracting as had the predecessor CBA. There was no factual claim raised that during interregnum between the County's asserted imposition of changes to the subcontracting language and the execution of the new CBA that the Employer relied on the purported new authority to actually engage in any new sub-contracting which would have otherwise been prohibited. For that reason, while the imposition was unlawful, no remedy is recommended with respect to the December 2010 subcontracting language dispute.

Similarly, the December 2010 purported unilateral elimination of language defining the workweek of AFSCME unit members was unlawful, but there was no factual claim established that during interregnum between the County's asserted imposition of changes to the workweek language and the execution of the new CBA, the Employer relied on the purported new authority to again alter the work schedules of AFSCME unit members. For that reason, while the imposition was unlawful, no remedy is recommended, as the December 2010 workweek language dispute is moot.

In summary, the County's claim of entitlement to impose changes in conditions of employment must be rejected as the parties were not at a good faith impasse in bargaining. The County had, throughout the bargaining and fact-finding process, failed in its duty to bargain in good faith and committed multiple bargaining related and retaliatory unfair labor practices. Additionally, the terms actually implemented were significantly more onerous than the Employer's prior offers and were, therefore, separately unlawful. Accordingly, the unilateral implementation of changes in December 2010 violated the duty to bargain under PERA Section 10(1)(e).

7) The Statute of Limitations and Legislative Body Constitutional Authority Defenses

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The Union ignores that the Employer's demand had made clear that the availability of the options was contingent on a *negotiated* resolution, but that in the absence of an agreement, the Employer would impose straight pay cuts. As indicated above, the imposed terms need not be identical to those earlier offered, but may not be materially worse. Here, the Employer's imposed wage concession terms were consistent with prior demands, but for the failure to apply a set-off.

The County throughout asserted a linked defense that the Charges should be dismissed as untimely or in deference to the legislative authority of the County Commission. The premise of this theory is the novel argument that for purposes of calculating the Charging Party's compliance with the PERA six month statute of limitations the triggering action was the County's August 2009 vote to implement a budget for the 2010 fiscal year that encompassed a 10% reduction in overall salary costs.

Of course, the entire argument is a *non sequitur*. The triggering events for the filing of this unfair labor practice charge were the steps actually taken by the County Executive following the adoption of the budget, and not the County Commission's mere adoption of the budget itself. The six-month statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Community Schools*, 1994 MERC Lab Op 582, 583. The Commission has consistently held that when a charge involves an alleged unlawful unilateral change in terms and conditions of employment, the statute of limitations begins to run from the date the Employer announces the change, as the unlawful conduct is completed with the announcement of the unilateral change. *City of Detroit (DPOA)*, 21 MPER 70 (2008); *Lapeer Co*, 19 MPER 45 (2006). *Livonia Pub Schs*, 1983 MERC Lab Op 992; *Deckerville Cmty Schs*, 1985 MERC Lab Op 1131. The statute begins to run only when the charging party knows, or has reason to know, of the action which is alleged to have caused harm. *Wines v Huntington Woods*, 121 Mich App 650 (1983). Here, the mere passage of a reduced budget by the County Commission in 2009 could not have been presumed by the Union to have necessarily led to the unilateral imposition of changes in conditions of employment by the County Executive. The disputed steps by the County Executive to implement the budget reductions began in January of 2010. The Charge was immediately and therefore timely filed in January of 2010, and was timely amended further as additional events unfolded.

It was further argued that the County Commission's decision on how much to spend on salary costs is unreviewable under PERA, for to do so would purportedly infringe on the separate legislative authority of the County Commission. Such claims for exemption from the strictures of PERA by various units of government have been routinely rejected, whether based on a charter or even Constitutional authority. See, *Wayne County Civ Serv v Wayne County*, 384 Mich 363 (1971); *Pontiac Police v Pontiac*, 397 Mich 674 (1976); *CMU Faculty v CMU*, 404 Mich 268 (1978). Regardless, the novel theory of unreviewable legislative action would likely run afoul of federal and state constitutional protections against Legislative impairment of contracts, the taking of private property rights by the government without compensation, and the constitutional guarantee of substantive due process. See, *AFT Michigan v State of Michigan*, __Mich App__ (Case No 303702, 8/16/12).

The County Commission's adoption of a 10% cut in salary expenditures could have been lawfully followed by the long-term layoff of sufficient members of the AFSCME unit to accomplish the cost cutting goal or by some other mutually agreed to, and therefore lawful, alternative solution. Instead, the executive acted unilaterally, and here, unlawfully and in violation of the duty to bargain in good faith under Section 10(1)(e) of PERA.

8) The Retaliation Claims

In its 4th and 5th amended Charges, the Union asserts that the "Holiday layoffs" separately constituted a violation of Section 10(1)(a) of PERA which prohibits employer action which has the effect of interfering with, restraining, or coercing public employees in the exercise of their rights under PERA. Again, an employer is generally free to layoff its workers for lack of funds, lack of work, or for policy reasons, absent some voluntarily agreed to contractual limitation. That use of such otherwise absolute discretionary authority becomes unlawful only if utilized with a discriminatory purpose, as alleged and established here. See, *MERC v Reeths-Puffer School District*, 391 Mich 253, 259 (1974); *City of Grand Rapids*, 1984 MERC Lab OP 118; *Southfield Schls 22 MPER 26 (2009)*; *Parchment School District*, 2000 MERC Lab Op 110 (no exceptions; and *Coldwater Community Schools*, 2000 MERC Lab Op 244. See also, *Vacuum Plating Corp*, 155 NLRB No 73 (1965) (involving otherwise permissible layoffs used for unlawful retaliatory purpose).[30]

Following the rejection of the May 2010 tentative agreement, the Employer implemented the actual "Holiday furloughs" in a manner deliberately fashioned to cause more disadvantage to employees than the originally planned layoffs, in particular, by cutting off health insurance coverage for the workers and their families. The Union further asserts that the particular classifications of employees targeted for layoff had no rational basis and that, taken with other proofs, that fact separately supports a finding that the "Holiday layoffs", as implemented, had an unlawful retaliatory purpose. Certain grant funded positions were subjected to the "Holiday layoffs", contradicting the claimed economic purpose of those short-term layoffs. The testimony of employees working as environmentalists established that they were targeted for layoff, even though it resulted in needed work going undone and in the consequent return to the outside funding sources of monies otherwise available under restricted grants. Those positions were not funded by the County general fund, or by any County funds, and therefore the layoffs had no budgetary purpose. The Unions proofs on these issues were less than comprehensive, but were nonetheless far more than anecdotal.

The layoffs of individuals in grant funded positions supports the Union allegation that the "Holiday layoffs" were in fact not layoffs motivated in the traditional sense by either lack of work or of funds. They were not an exercise in ordinary managerial discretion. Rather, the holiday furloughs were a unilateral wage cut. The Employer accomplished the reduction of annual salary while retaining a full time workforce. With the environmentalists as an example, the County gave back money to grant agencies,

[30] Federal precedent under the NLRA is given great weight in interpreting PERA, at least where PERA's language is identical to that of the NLRA, although MERC is not bound to follow "every turn and twist" of NLRB case law. *Kent County*, 21 MPER 61, 221 (2008); *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 537; *Marquette Co. Health Dep't*, 1993 MERC Lab Op 901, 906.

rather than fully employee the environmentalists. As with the food inspectors and the dieticians, all the work of the environmentalists remained and needed to be done.

The economic irrationality of laying off environmentalists and other grant funded individuals, and returning money to the outside grant agencies, supports a finding that the holiday layoffs were retaliatory. The County had devised a scheme, unilaterally, whereby many County employees would be compelled to serve Friday furloughs, that is a four-day week, to reduce their annual salary. AFSCME rejected that unilateral imposition and, based on well-established case law arising from an indistinguishable effort by this same employer in the 1980s, AFSCME prevailed. The County was prohibited by a decision of this agency from continuing the Friday furloughs. The County then threatened AFSCME members with the three Summer of 2010 holiday furloughs as an essentially indistinguishable pay cut. AFSCME and the County agreed that the AFSCME membership would vote on a compromise plan, which was presumably less onerous. It was rejected by a vote of the AFSCME membership. The County responded with not only the earlier threatened "Holiday furloughs", but a substantially more onerous version. Most outlandishly, the County extended the furloughs precisely so that they would overlap the last and first days of the months to support an implausible and indefensible further unilateral change by depriving all of the laid off employees and their families of health insurance for the months following the holiday furloughs.

Likewise, the use of non-unit personnel to perform some of the bargaining unit work during the holiday furloughs undercuts the Employer assertion that the layoffs were ordinary or economically motivated. There was clearly no lack of work. While there was certainly a lack of funds generally, the Employer was nonetheless willing to devote its financial resources to getting the work done, at times at even greater cost than having AFSCME members perform the work. The Employer even paid supervisors on overtime, apparently at time and a half of their already presumably higher wages to do the work of laid-off employees. As noted above, the Employer's final witness, a construction supervisor, was quite frank in disclosing that non-bargaining unit supervisors did unit work during the "Holiday furloughs" and that such use of supervisors to perform unit work was unprecedented. He further acknowledged that ten or eleven bargaining unit crew members were called in per day on overtime during that week to cover for other unit employees supposedly laid off 'for lack of funds'. As noted by the Union, during the same time frame, the County incurred some $7 million in costs for overtime alone, albeit much of which likely was unrelated to the "Holiday furloughs".

Based on all of the above, I find that the Employer's action in implementing the second-round of "Holiday furloughs" was accomplished in a punitive fashion, intended to interfere, restrain, and coerce AFSCME unit members in direct retaliation for their having voted to reject the May 2010 tentative agreement, as well as to coerce those employees regarding any future exercise of their rights, and therefore establishes a violation of Section 10(1)(a) of PERA.

The manner in which the 20% pay cuts were implemented across the board by the Employer in December 2010 separately supports a finding of a Section 10(1)(a) coercion

or retaliation violation. The across the board wage cut was implemented after the "Friday furloughs" and "Holiday layoffs" had been unilaterally imposed on a significant portion of the AFSCME represented employees. Those employees affected by the unlawful "layoffs" had been furloughed for as many as thirty-three unpaid days in one year. The offered explanation for the layoff days was that they were intended to secure from this AFSCME unit the 10% per year savings secured from other County units through concession agreements. However, the 20% pay cut imposed by the County at the point in December 2010 when it asserted that the parties were at impasse, amounted to the entirety of the wage concession for the full two-year period that the County had asserted it needed to meet its budget targets. Despite that fact, the County did not impose a lesser wage cut in December 2010 that would have taken into account the earlier unilaterally imposed wage cuts arising from the several dozen days off without pay. The County not only did not credit the overall bargaining unit with the savings, it did not credit the individual employees who were hit with both the layoff days and the full prospective wage cut.

An employer, which is legitimately at impasse with a union in bargaining, has authority to impose changes in conditions of employment consistent with its final offer. The imposition of a 20% wage cut on top of the prior double-digit wage loss for much of the unit was not consistent with the Employer's bargaining demands or its final offer. That magnitude of combined cuts greatly exceeded the savings the Employer asserted it was seeking from each unit. Even Employer witness Tim Taylor acknowledged that no other County bargaining unit was forced to undergo both the layoff days and the 10% per year wage cut. The failure to credit the AFSCME unit as a whole, or alternatively, the directly affected employees who served the layoff days with "time served" converted the Employer-demanded 20% savings into a substantially larger, and retaliatory, cut in earnings, in violation of Section 10(1)(a) of PERA.[31]

As noted above, the Employer's post-hearing brief made extraordinary admissions supporting a finding of unlawful intent. As a part of its explanation for declaring impasse in December 2010, the Employer's brief admits that it's own demands required that the Union yield on recouping for employees the wage losses incurred through the Employer's unilateral withholding of the annual service adjustment and through the "Friday furloughs", each of which the Commission held to have been unlawful. The admission in the brief is consistent with the testimony of County negotiator Mark Dukes, in particular at the May 26, 2011 hearing, that a significant part of why the parties were apart on economics in December 2010 was the Union's unwillingness to allow the Employer to retain the wages it had previously unlawfully withheld. Duke's testimony established that his own conclusion that the parties were at impasse on economics was premised on the unwillingness of the Union to yield on the remedies in the unfair labor practice cases in which the Union had then already prevailed.

[31] Because the imposed wage cut combined with the prior layoff days was at such great variance from the Employer's final offer in bargaining, its imposition would have constituted a violation of the duty to bargain in good faith under Section 10(1)(e) of PERA, even assuming the parties had in December 2010 been otherwise at a good faith impasse in bargaining.

A party can only lawfully insist to the point of impasse on topics that are mandatory subjects of bargaining. The Employer here was not entitled to declare impasse, in whole or in part, based upon the unwillingness of the Union to yield on remedies for the already litigated unfair labor practice charges on which the Union had already prevailed at the ALJ level and on which it would ultimately prevail before the Commission. The Employer's unlawful retaliatory intent and continuing animus is underscored by the further assertion in its post-hearing brief that the Union's conduct in pursuing the very unfair labor practice charges in which the Union prevailed was itself "*bad faith*" conduct by the Union "*intended to stifle negotiations*". The declaration of impasse, premised at least in part on the Union's refusal to yield on remedies for prior unfair labor practices, was itself a violation of PERA, as it constituted discrimination against these employees for pursuing remedies under the Act contrary to the express prohibition in the anti-retaliation provisions of Section 10(1)(d) of PERA.[32]

Conclusion

The Employer violated its duty to bargain in good faith under Section 10(1)(e) of PERA by its course of conduct during contract negotiations, including by: unilaterally and adversely altering the workweek, work-year, and salaries of effected employees; by the manner of implementation of the second round of "Holiday layoffs"; by unilaterally cutting off health care coverage for employees and their families; by unilaterally imposing changes in conditions of employment, including a 20% pay cut, and eliminating protections related to preservation of the workweek and subcontracting in December 2010; and by making bargaining demands which were not designed to seek a negotiated settlement. In addition, the Employer violated its obligations under Section 10(1)(a) of PERA by retaliating against AFSCME members in the imposition of the "Holiday furloughs" and related health insurance cutoffs, and by the manner of implementation of the 20% pay cut. Finally, the Employer violated Section 10(1)(d) of PERA in declaring impasse in December 2010, in part, in retaliation for the Union's pursuit of remedies before the Commission.

The County did not act unlawfully in allegedly giving late notice of certain of the furlough days; in the alleged statutory "lockout" of employees; in the alleged repudiation of a contractual no-lockout pledge; or in allegedly transferring unit work to non-unit employees and volunteers. Accordingly, dismissal of those portions of the amended Charge is appropriate.

RECOMMENDED ORDER

Wayne County, its officers, agents, and representatives shall:

1. Cease and desist from

[32] No separate remedy is recommended based on the 10(1)(d) violation, as any remedy would be duplicative.

a. Failing to bargain in good faith with the representative of its employees, including by participating in good faith in the fact-finding process;
b. Unilaterally altering any established conditions of employment during the bargaining process and prior to the conclusion of good faith bargaining and fact-finding proceedings;
c. Asserting that there exists an impasse in bargaining where there are related and unremedied unfair labor practices committed by the Employer;
d. Unilaterally altering the length of the workday, workweek, work-year, or otherwise reducing employee salaries during the pendency of good faith bargaining and fact-finding proceedings;
e. Imposing any form of "Friday furloughs", "Holiday furloughs", or any similar form of short-term layoffs targeting the employees of a particular bargaining unit, where, as here, there is a pre-existing obligation to utilize a system of layoffs by inverse seniority, during the bargaining process and prior to the conclusion of fact-finding proceedings and good faith bargaining.

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

a. Compensate and otherwise make whole any AFSCME bargaining unit members who had their income or work hours reduced as a result of the unilateral "Holiday furloughs" or "Holiday layoffs" of June to September, 2010, together with statutory interest on all amounts owed;
b. Compensate and otherwise make whole any AFSCME bargaining unit members who incurred health care costs during any cutoff of insurance related to the June through September 2010 "Holiday furloughs" or "Holiday layoffs", where such costs would otherwise have been covered by group insurance in the absence of any interruption in employment, together with statutory interest on all amounts owed;
c. Compensate and otherwise make whole any AFSCME bargaining unit members who had their income reduced as a result of the unilateral change in wage rates or salaries imposed by the Employer, in or following, December 2010, except as may have been expressly authorized for payroll periods covered by the new collective bargaining agreement in effect for the period December 19, 2011 through

September 30, 2014, together with statutory interest on all amounts owed;

d. Otherwise make whole all AFSCME bargaining unit members adversely effected by the unilateral changes in conditions of employment found unlawful in this Decision;

e. Provide the Union with the full calculation of reimbursable amounts, and interest on same, as to each employee in the unit, together with a reasonable opportunity for the Union to review and seek correction of such calculations, prior to the distribution of reimbursement amounts;

f. Provide each bargaining unit member to whom a reimbursement is owed a detailed accounting of the method of calculation of all amounts reimbursed, with a separate check for the reimbursable amount, and with disclosure of the fact that the reimbursement is being made pursuant to the Order in this matter;

g. Maintain all existing conditions of employment throughout the bargaining and fact-finding process.

3. Post the attached notice to employees in a conspicuous place at each County worksite and post it prominently on any website maintained by the County for employee access for a period of thirty (30) consecutive days, and additionally deliver a copy of the notice by mail or email to each employee in the AFSCME bargaining units.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O'Connor, Administrative Law Judge
Michigan Administrative Hearing System

Dated: November 8, 2012

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT

a. Fail to bargain in good faith with the representative of its employees, including by participating in good faith in the fact-finding process;

b. Unilaterally alter any established conditions of employment during the bargaining process and prior to the conclusion of good faith bargaining and fact-finding proceedings;
c. Assert that there exists an impasse in bargaining where there are related and unremedied unfair labor practices committed by the Employer;
d. Unilaterally alter the length of the workday, workweek, work-year, or otherwise reduce employee salaries during the pendency of good faith bargaining and fact-finding proceedings;
e. Impose any form of "Friday furloughs", "Holiday furloughs", or any similar form of short-term layoffs targeting the employees of a particular bargaining unit, where, as here, there is a pre-existing obligation to utilize a system of layoffs by inverse seniority, during the bargaining process and prior to the conclusion of fact-finding proceedings and good faith bargaining.

WE WILL

a. Compensate and otherwise make whole any AFSCME bargaining unit members who had their income or work hours reduced as a result of the unilateral "Holiday furloughs" or "Holiday layoffs" of June through September, 2010, together with statutory interest on all amounts owed;
b. Compensate and otherwise make whole any AFSCME bargaining unit members who incurred health care costs during any cutoff of insurance related to the June through September 2010 "Holiday furloughs" or "Holiday layoffs", where such costs would otherwise have been covered by group insurance in the absence of any interruption in employment, together with statutory interest on all amounts owed;
c. Compensate and otherwise make whole any AFSCME bargaining unit members who had their income reduced as a result of the unilateral change in wage rates or salaries imposed by the Employer, in or following, December 2010, except as may have been expressly authorized for payroll periods covered by the new collective bargaining agreement in effect for the period December 19, 2011 through September 30, 2014, together with statutory interest on all amounts owed;
d. Otherwise make whole all AFSCME bargaining unit members adversely effected by the unilateral changes in conditions of employment found unlawful in this Decision;
e. Provide the Union with the full calculation of reimbursable amounts, and interest on same, as to each employee in the unit, together with a reasonable opportunity for the Union to review and seek correction of such calculations, prior to the distribution of reimbursement amounts;
f. Provide each bargaining unit member to whom a reimbursement is owed a detailed accounting and explanation of the method of

calculation of all amounts reimbursed, with a separate check for the reimbursable amount, and with disclosure of the fact that the reimbursement is being made pursuant to the Order in this matter;

g. Maintain all existing conditions of employment throughout the bargaining and fact-finding process.

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

WAYNE COUNTY

By: _____

Title: _____

Date: _____

This notice must be posted for thirty (30) consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, Detroit, MI 48202-2988. Telephone: (313) 456-3510.