STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY AIRPORT AUTHORITY,
Public Employer-Respondent,

Case No. C13 D-073
-and- Docket No. 13-002117-MERC

MICHIGAN AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 953,
Labor Organization-Charging Party.
_____/

APPEARANCES:

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

Shawntane Williams, Staff Counsel, Michigan AFSCME Council 25, for Charging Party

DECISION AND ORDER

On October 24, 2014, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: December 5, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

WAYNE COUNTY AIRPORT AUTHORITY,
Public Employer-Respondent,

Case No. C13 D-073
Docket No. 13-002117-MERC

-and-

MICHIGAN AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 953,
Labor Organization-Charging Party.
_____/

APPEARANCES:

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

Shawntane Williams, Staff Counsel, Michigan AFSCME Council 25, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard in Detroit, Michigan on July 18, 2013, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission. At the parties' request, the case was held in abeyance after the hearing while the parties discussed settlement during bargaining for a new collective bargaining agreement. The parties reached a new contract, but did not resolve the disputes giving rise to the charge. Based upon the entire record, including evidence presented at the hearing and post-hearing briefs filed by the parties on March 31, 2014, I make the following findings of fact, conclusions of law, and recommended order.[1]

I. The Unfair Labor Practice Charge:

Michigan AFSCME Council 25 and its affiliated Local 953 filed this charge against the Wayne County Airport Authority on May 1, 2013. Charging Party alleges that Respondent repudiated the parties' existing collective bargaining agreement, and violated its duty to bargain in good faith under PERA, when, on or about the beginning of November 2012, it refused to pay members of Charging Party's bargaining unit the performance incentive bonuses they were

[1] The parties agreed to admit into the record the new collective bargaining agreement reached after the close of the hearing. Respondent also filed a supplemental pleading on June 1, 2014, in which it which drew my attention to *Bedford Pub Schs v Bedford Ed Assn*, 305 Mich App 558 (2014), a decision issued after the briefs were filed.

allegedly due under the collective bargaining agreement. Charging Party also alleges that Respondent repudiated the contract or unilaterally altered terms and conditions of employment when, on November 30, 2011, it announced that it would no longer pay retiree health care benefits to employees retiring on non-duty disability pensions unless they met the age and service requirements for a "normal" retirement. According to Charging Party, it did not learn of Respondent's action until March 2, 2013.

II. Findings of Fact:

A. Background

Respondent was created in 2002 as a public airport authority pursuant to 2002 PA 90, MCL 259.108 et seq. The statute also transferred jurisdiction over Detroit Metropolitan Airport from Wayne County to Respondent. Per §119 of PA 90, Respondent was required to recognize and bargain with the bargaining representatives of the eleven bargaining units of County employees who became its employees after the transfer, and was bound by any existing collective bargaining agreement covering these employees for the remainder of the term of the agreement. PA 90 further provided that "the authority shall honor all obligations of a public sector employer after the expiration of any collective bargaining agreement with respect to transferring employees." Pursuant to the statute, former County employees who became employees of Respondent retained their existing seniority, benefits, and pension service credits.

One of the unions representing Wayne County employees at the airport was AFSCME Local 101, the predecessor to Local 953. Following the expiration of the collective bargaining agreement between Local 101 and Wayne County that covered Respondent's employees, Respondent and Local 101 entered into a collective bargaining agreement for the period 2004 through 2007. In August 2009, they entered into a second agreement covering the period December 1, 2007 through November 30, 2011. This contract included a grievance procedure ending in binding arbitration.

Between 2002 and July 2012, Local 101 represented two bargaining units, one consisting of Respondent's employees and the other of Wayne County employees. There were separate contracts for each unit. In July 2012, AFSCME Local 953 replaced Local 101 as the representative of the unit of Respondent's employees. Local 101 continued to represent a unit of County employees.

B. Refusal to Pay Performance Incentive Bonuses

Two weeks after executing their 2007-2011 collective bargaining agreement, Respondent and Local 101 entered into a memorandum of understanding (MOU) entitled "Performance Incentive Bonus Program." The MOU created what it referred to as a pilot program. Employees in two classifications, maintenance worker and senior maintenance worker, were eligible for performance bonuses if they met certain performance criteria set out in the MOU. The MOU stated:

> *Performance Periods:* Each performance period shall be equal to one year and shall cover the periods October 1, 2008 through September 30, 2009; October 1,

2009 through September 30, 2010; and October 1, 2010 through September 30, 2011.

Payment of Performance Bonus: Payment under this agreement shall be made no later than the first pay period in November.

Termination: This program shall terminate on November 30, 2011 unless otherwise extended in writing by the parties.

The Performance Incentive Bonus MOU was later attached to the 2007-2011 contract along with other MOUs executed by the parties after the date of the contract.

In the summer of 2011, Local 101 and Respondent began negotiations for a successor to their contract expiring on November 30, 2011. On July 16, 2011, they executed a set of written ground rules which included this paragraph:

> If negotiations are not completed and a tentative agreement is not reached by the expiration date of the current agreement, said current agreement (except Articles 34.01 through 34.05) may be extended on a day-to-day basis until such time as a tentative agreement is reached or until such time as either party shall serve a 48 hour notice to the other that this commitment no longer applies. All general wage increases will cease without extension, effective upon the expiration of the CBA in accordance with Article 48.02.

Articles 34.01 through 34.05 provided for a series of general wage increases, the last of which was implemented on December 1, 2010. Article 48.02 covered drug testing. The parties agree that this was a typographical error, and that the reference in the ground rules should have been Article 49.02. This article stated that the agreement would be in effect until 11:59 pm on November 30, 2011.

Respondent paid performance bonuses to eligible employees in the first pay period in November 2011. At the end of November 2011, when the parties had not yet reached a tentative agreement on a new contract, Local 101 and Respondent signed another agreement extending the contract on a day-to-day basis. The language in the agreement was exactly the same as that in the paragraph from the ground rules quoted above.

The parties were still bargaining and operating under the extension agreement in July 2012, when Local 953 replaced Local 101 as the bargaining agent. On August 28, 2012, Respondent and Local 953 representatives executed a set of ground rules that included the same extension language as the two previous extension agreements.

The parties were still bargaining and operating under the extension agreement at the beginning of November 2012. When employees did not receive performance bonuses in their first paycheck, Local 953 President Bradley Manley complained to Linda Racey, Respondent's director of labor relations. Racey responded that the performance bonus MOU, by its own terms, expired in November 2011 and was not covered by the extension agreements. Manley disagreed,

asserting that because the agreement to extend the contract did not exclude the performance bonuses, Respondent had a contractual obligation to pay these bonuses. However, Charging Party did not file a grievance.

In early October 2013, after a hearing had been held on the charge, the parties executed a new collective bargaining agreement covering the period December 1, 2011 through September 30, 2015. The new contract includes a pay for performance plan under which employees who meet certain performance criteria receive annual salary increases. Like the performance incentive MOU, the new contract also provides lump sum annual bonuses to individuals who volunteer to work 70% of offered snow and ice overtime, and lump sum annual bonuses to the entire unit if certain work-related accident and equipment repair cost targets are met. The contract explicitly provides that the salary increases will be paid only during the life of the agreement and that eligibility for the two bonuses will terminate on September 30, 2015.

C. Elimination of Retiree Health Benefits for Non-Duty Disability Retirees

1. Respondent's November 30, 2011, Memo:

On November 30, 2011, Respondent sent the following memo as an attachment to an email that it sent to all its employees at their work email addresses:

> Due to the ongoing economic challenges that the Wayne County Airport Authority is facing, we have had to reevaluate the cost of providing discretionary health care benefits previously provided to employees in receipt of a non-duty disability retirement who do not meet the age and service requirements for a normal retirement.
>
> In an effort to address these economic issues, the WCAA will no longer provide discretionary health care benefits to employees in receipt of a non-duty disability retirement. Therefore, effective immediately, employees applying for a non-duty retirement who do not meet the age and service requirements for a normal retirement will no longer be eligible to receive health care benefits in conjunction with that non-duty retirement, unless otherwise required by collective bargaining agreement or benefit plan.

Respondent admits that it did not provide separate notice of this change to Local 101 union representatives. Thomas Richards, the president of Local 101 in November 2011, is an employee of Wayne County. He testified that in November 2011, he had a personal email account that Respondent used to communicate with him about union business. Richards testified that he was not notified of any change by Respondent to health insurance for non-duty disability retirees. Manley was vice-president of Local 101 at the time the email was sent. Manley testified that he also used his own personal email for union business at that time. He testified that he rarely checked his work email and, as far as he was aware, Respondent did not require employees to monitor their work email. Manley also testified that he heard nothing about the change described in the November 11, 2011, memo until March 2013. In late February or early March, Manley was contacted by bargaining unit member Terry Aldrich who was seeking to

retire under the non-duty disability provision in the collective bargaining agreement so that she could receive retiree health care benefits. Because Aldrich had been told by Respondent's human resources office to contact her union representative, Manley sent an email to Rosalind Wallace, Respondent's human relations director, on Aldrich's behalf. On March 4, 2013, Wallace emailed Manley a copy of the November 30, 2011, memo.

On March 17, 2013, Manley filed a grievance asserting that Respondent was violating the contract by not providing health care benefits for members retiring on non-duty disability and qualifying for these benefits under the contract. The grievance was moved to step four, the arbitration level, on April 17, 2013. The grievance was never arbitrated because, as Manley testified, Charging Party decided that because this was a change in an established past practice going back to before airport employees became employees of Respondent, a Commission charge was more likely to be successful than a grievance.

2. Past Practice With Respect to Health Care for Non-Duty Disability Retirees:

In March 2010, Wayne County announced, in a memo with wording similar to the memo issued by Respondent on November 30, 2011, that it would henceforth not provide what it termed a "discretionary" benefit, retiree health insurance for employees who retired with a non-duty disability pension and did not meet the age and service credit requirements for a "service" (normal) pension. Local 101 and representatives of other AFSCME locals representing County employees filed an unfair labor practice charge with the Commission alleging that, by this action, the County unilaterally altered an existing term and condition of employment established by past practice. In *Wayne County*, 27 MPER 22 (2012), the Commission agreed and issued an order requiring the County to bargain. The record in that case established, and the County admitted, that for the past 30 years it had consistently been providing retiree health insurance to all employees who retired under the non-duty disability provisions of its various contracts with the AFSCME locals.

Manley became president of Local 953 when it took over representation of the unit from Local 101 in July 2012. Prior to that time, he was a vice-president of Local 101 for about six months in 2011. As of the date of the hearing, Manley had been an employee of the County working at the airport, and then an employee of Respondent, for a total of eighteen years. Manley testified that the County's practice of providing members of his unit with retiree health insurance when they retired on a non-duty disability pension regardless of age and service credits carried over when unit members became Respondent's employees. He also testified that it was his understanding that members of his unit had always received retiree health insurance when they retired on a non-duty disability pension.

Director of Labor Relations Racey testified that, to her knowledge, only a "few" employees in the bargaining unit represented by Local 101 retired under the non-duty disability provision in the contract between the time Respondent became their employer and November 30, 2011. She acknowledged that, to the best of her knowledge, those employees had all received retiree health care benefits. However, Racey testified that Respondent considered these discretionary benefits, in that Respondent was not required to provide these benefits under the

collective bargaining agreement and, under paragraph 9 of the Wayne County Health and Welfare Benefits Plan (the Plan), discussed below, Respondent had the right to discontinue them.

Racey testified that between November 30, 2011, and the date of the hearing, no member of Charging Party's unit retired with a non-duty disability pension. In response to this testimony, Charging Party called bargaining unit member Aldrich. Aldrich began receiving long-term disability benefits in August 2011. She did not apply for a non-duty disability retirement at that time because she was told that she could receive two years of disability benefits and hoped at that time that her disability would not be permanent. She was unable to return to work. In late February 2013, Respondent informed her that she was being terminated, and that her health insurance benefits were ending, at the end of March. Aldrich was fifty-seven years old and had accumulated sixteen years of pension credits at that time. The Wayne County Retirement System is the third-party administrator for Respondent's retirement plans. Aldrich testified that when she called Respondent's human resources department, she was told to contact the Wayne County Retirement System about applying for a non-duty disability retirement. When Aldrich called the Retirement System, however, she was told that since she was in Respondent's Defined Contribution Plan #4, the System would not be disbursing any funds to her and she need not apply for retirement. Aldrich asked about health insurance, but was told that the System "no longer handled that." Aldrich eventually learned, through Manley, that because she did not meet the age and service credit requirements for a normal retirement, Respondent would not provide her with health insurance even if she were to be granted a non-duty disability retirement. Aldrich testified that as of the date of the hearing in July, she had not applied for a non-duty disability retirement because there appeared to be no point in doing so.

3. Pension and Retiree Health Care Provisions in the 2007-2011 Collective Bargaining Agreement

Respondent has pension plans that are separate from those of County employees, and the plan options, contributions, eligibility requirements, and benefits of Respondent's plans are negotiated with Respondent's unions. As noted above, the Wayne County Retirement System, the entity that administers plans for Wayne County employees, is the third party administrator for Respondent's plans. In practice, the pension plans for Respondent's employees are substantially similar to those provided by the County to its employees and the parties' collective bargaining agreements include pension provisions similar to provisions in contracts between Wayne County and its AFSCME locals, including Local 101.

Article 30 of the parties' 2007-2011 contract described the five pension plans covering members of Charging Party's bargaining unit and stated that all employees would participate in one of these plans. The five plans described in the contract were Defined Benefit No. 1, Defined Benefit No. 2, Defined Benefit No. 3, Defined Contribution No. 4 and Hybrid Plan No. 5. "Normal" retirement for employees in Defined Benefit No. 1 in the contract was twenty-five years of credited service at age 50, five years of credited service at age 60, and thirty years of service at any age. For Defined Benefit No. 2, it was twenty-five years of service at age 55, fifteen years of service at age 60, or eight years of service at age 65. For Defined Benefit No. 3, normal retirement was twenty-five years of credited service at 55, fifteen years of credited service at 60 and five years of credited service at 65. For the defined benefit under Hybrid No. 5,

normal retirement was twenty-five years of service at 55, twenty years of service at 60, eight years of service at 65, or 30 years of service regardless of age.

Article 30.06(B)(6) in the 2007-2011 agreement set out the eligibility requirements for, and method of computing, a non-duty disability pension:

> Employees shall be eligible for a non-duty disability retirement upon completion of ten (10) years of credited service. The amount of retirement compensation shall be computed as normal retirement, but based on the actual number of years of credited service and average final compensation at the time of termination. The Employer reserves the right to limit payments from the Retirement System through the use of proceeds from the Employer's long-term disability policy.

Although not explicitly stated in the contract, employees who met the service credit requirement for a non-disability retirement also had to be certified as disabled by the Wayne County Retirement System.

There was no explicit reference in the 2007-2011 contract to retiree health benefits for employees retiring under Article 30.06(6). However, the 2007-2011 contract contained other provisions covering retiree health benefits. Article 29.33 stated that employees hired on or after August 1, 2009, would not be eligible to receive retiree medical care coverage, but instead would be enrolled in a health care savings program (HCSP). Article 30.01(C) of the contract read as follows:

> All new employees hired on or after December 1, 1990, but before November 16, 2001 shall be eligible to participate in Defined Benefit Plan No. 2, Defined Contribution Plan No. 4, or the Hybrid Plan No. 5. Those employees who have previously selected Plan No. 4 may transfer to Plan No. 5 during the one-time transfer enrollment period. (See 30.06). The Hybrid Plan No. 5 shall be mandatory for all new employees hired and former employees re-employed, reinstated or rehired on or after November 16, 2001. *Any employee hired on or after December 1, 1990 shall not be eligible for insurance and health care benefits upon retirement unless they retire with thirty (30) or more years of service; however, effective November 16, 2001 employees in Plan No. 2, Plan No. 3 and Plan No. 4 shall be eligible to retire with insurance and health care benefits provided he or she has fifteen (15) or more years of service and is age sixty (60.)* [Emphasis added].

Article 30.06(A)(2) of the parties' 2007-2011 contract stated that employees electing to transfer from Defined Benefit Plan No. 4 to Hybrid Plan No. 5 and who were hired after November 16, 2001, would have to have 30 years of service to be eligible for retiree health insurance, while employees electing to transfer who were hired before that date would be eligible for retiree health insurance benefits upon completion of 30 years of service at any age or 15 years of service at age 60.

As indicated above, the age and service credit requirements for receiving health care benefits upon retirement under Article 30.01(C) were greater for all plans than the service credit requirement for retiring with a non-duty disability pension.

In 2008, before the parties here entered into their 2007-2011 agreement, Respondent promulgated a policy entitled the Wayne County Airport Authority Health and Welfare Benefits Plan (the Plan). The Plan covers health and retiree health benefits for all Respondent's employees. However, Article 29 of the parties' 2007-2011 contract stated that, except where it conflicted with the express terms of the contract, the contract incorporated the terms of the Plan. The retiree health benefits section of the Plan includes this paragraph:

> 9. The Authority reserves the right to modify, amend, replace and/or discontinue any retiree health benefit provision applicable to retirees.

Like the parties' 2007-2011 collective bargaining agreement, the Plan does not contain a provision explicitly addressing receipt of retiree health care benefits by employees retiring with a non-duty disability pension.

The Commission's decision in *Wayne County*¸ 26 MPER 22 (2012) includes provisions from the collective bargaining agreements between Wayne County and its AFSCME locals. The 2007-2011 contract between Respondent and Charging Party contained several provisions similar or identical to provisions in the collective bargaining agreements between Wayne County and its AFSCME locals covering the same period. For example, Article 30.06(B)(6) of the 2004-2008 contract between Local 101 and Wayne County, covering non-duty disability retirement, was identical to Article 30.06(B)(6) of the 2007-2011 agreement between the parties in this case. Like the 2007-2011 agreement, the 2004-2008 contract between Local 101 and Wayne County did not explicitly address health care benefits for employees retiring with a non-duty disability pension. However, Article 30.01(E) of the 2004-2008 contract between Local 101 and Wayne County stated:

> Unless otherwise specified, regardless of the Retirement Plan all employees hired on or after December 1, 1990 shall not be eligible for insurance and healthcare benefit upon retirement unless they retire with thirty (30) or more years of service, however, effective November 16, 2001, employees in Plan No. 2, Plan No. 3 Plan No. 4 and Plan No. 5 shall be eligible to retire with insurance and health care benefits provided he or she has fifteen (15) or more years of service and is age (60) or older. Employees in the Hybrid Retirement Plan (Plan No. 5) hired on or after December 1, 1990 shall only be eligible for insurance and health care benefits upon retirement if they retire with thirty (30) or more years of service.

4. <u>The 2011-2015 Contract</u>:

As of the date of the hearing on this charge in July 2013, the parties were still operating under the extended 2007-2011 contract. On or about October 2, 2013, the parties executed a new contract covering the period December 1, 2011 through September 30, 2015. The record does not reflect whether any unit employee retired with a non-duty disability

pension between the date of the hearing and the date the new contract was executed. In the 2011-2015 contract, Article 30.01(C) provides:

> Any employee hired on or after December 1, 1990 shall not be eligible for insurance and health care benefits upon retirement unless they retire with thirty (30) or more years of service or retire under the provisions of 30.06A.5 or 30.12A.6 [both covering duty-related disability retirements]; however, effective November 16, 2001, employees in Plan No. 2, Plan No. 3 and Plan No. 4 shall be eligible to retire with insurance and health care benefits provided he or she has fifteen (15) or more years of service and is age sixty (60). Employees hired on or after August 1, 2009 will not be eligible to receive retiree medical coverage. Those employees will be placed in the Health Care Savings Plan (HCSP) in accordance with article 29.33.
>
> Article 30.06(6) now reads as follows:
>
> Employees shall be eligible for a non-duty disability retirement upon completion of ten (10) years of credited service. The amount of retirement compensation shall be computed as normal retirement, but based on the actual number of years of credited service and average final compensation at the time of termination. The Employer reserves the right to limit payments from the Retirement System through the use of proceeds from the Employer's long-term disability policy. *Employees hired on or after 11/15/01 but before 8/1/09 retiring under this section after execution of this agreement who receive a non-duty disability retirement will not receive retiree medical coverage unless they have thirty (30) years of service, or if hired prior to 11/15/01 meet the requirements for post-retirement health care insurance as provided in 30.06A* [Emphasis added]

Under Article 30.06A, employees hired prior to November 11, 2001, who transfer from the Defined Benefit No. 4 to the Hybrid Plan are eligible for retiree medical insurance if they leave employer service at age 55 with 25 years of credited service; at age 60 with 15 years of credited service; or at age 65 with 8 years of credited service. Employees hired after August 1, 2009, are not eligible for retiree health care benefits but instead participate in a health care savings plan.

III. Discussion and Conclusions of Law:

A. Refusal to Pay Performance Incentive Bonuses

Charging Party alleges that Respondent repudiated the parties' collective bargaining agreement by refusing to pay performance incentive bonuses due under the extended 2007-2011 collective bargaining agreement. It is well established that the Commission has only a limited role in disputes involving alleged unilateral changes which are also alleged to constitute a breach of a collective bargaining agreement. Where there is a collective bargaining agreement covering the subject matter of the dispute which has provisions reasonably relied on for the action in question, and the contract also has a grievance procedure with final and binding arbitration, the

contract controls and no PERA issue is present. Under such circumstances, the details and enforceability of the contract provisions covering the term or condition in dispute are left to arbitration. *Macomb County v AFSCME Council 25, Locals 411 and 893*, 494 Mich 65 (2013); *Port Huron Ed Ass ' n v Port Huron Area Sch Dist*, 452 Mich 309, 321 (1996).

The Commission, however, will find a violation of the duty to bargain in good faith when a party repudiates its contractual obligations. See e.g. *City of Detroit (Trans Dept)*, 1984 MERC Lab Op 937, aff'd 150 Mich App 605 (1985). As the Commission has frequently stated, it finds repudiation when the actions of a party amount to a rewriting of the contract or a complete disregard for the contract as written. *Central Michigan Univ*, 1997 MERC Lab Op 501, 507; *Cass City Pub Sch*, 1980 MERC Lab Op 956, 960. Repudiation of a prior agreement is unlawful whether that agreement is in the form of a contract provision, a grievance settlement, or a memorandum of understanding, because allowing a party to repudiate a prior agreement undermines trust and the stability of the bargaining relationship. *Oakland University*, 23 MPER 86 (2010).

A finding of repudiation, however, cannot be based on an insubstantial or isolated breach of contract. *Oakland Co Sheriff*, 1983 MERC Lab Op 538, 542; *Michigan State Univ*, 1997 MERC Lab Op 615, 618. Repudiation exists only when: (1) the contract breach is substantial and has a significant impact on the bargaining unit; and (2) no bona fide dispute over interpretation of the contract is involved. *Plymouth-Canton Cmty Schs*, 1988 MERC Lab Op 894; *Gibraltar Sch Dist*, 18 MPER 20 (2005).

The parties do not dispute that they agreed to extend their 2007-2011 collective bargaining agreement on a day-to-day basis after its expiration date. They also agree that the extension agreement was still in effect in November 2012 when Respondent refused to pay performance incentive bonuses. There is no dispute that the extension agreement did not specifically exclude the bonuses. However, Respondent points to the fact that the MOU refers to the program as a pilot program, that it provides for three separate performance periods, and that it states that the program will terminate on November 30, 2011, unless the parties agree in writing to extend it. It argues that, under this language, the program expired because the parties did not explicitly agree in writing to extend it.

If the MOU is viewed as a separate agreement, it clearly expired on November 30, 2011, because the parties did not enter into a separate written agreement to extend it. However, if the MOU was part of the 2007-2011 collective bargaining agreement, the performance bonuses were covered by that agreement, which also included a grievance procedure ending in binding arbitration. I find that there was a bona fide dispute between the parties over whether, under the language of the MOU, the performance incentive bonus program ended on November 30, 2011 even though the 2007-2011 contract was extended past that date. I conclude, therefore, that Charging Party has failed to show that Respondent repudiated the performance bonus performance MOU by refusing to pay the bonuses in 2012.

In addition to arguing that the performance bonus dispute is merely a contract interpretation dispute, Respondent asserts that it would have violated §15(b) of PERA had it paid the performance bonuses in 2012. Section 15(b) states, in pertinent part:

> Sec. 15b. (1) Except as otherwise provided in this section, after the expiration date of a collective bargaining agreement and until a successor collective bargaining agreement is in place, *a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement.* The prohibition in this subsection includes increases that would result from wage step increases. [Emphasis added].
>
> (4) As used in this section:
>
> > (a) "Expiration date" means the expiration date set forth in a collective bargaining agreement without regard to any agreement of the parties to extend or honor the collective bargaining agreement during pending negotiations for a successor collective bargaining agreement.

Respondent asserts that §15b prohibited Respondent from paying additional wages (or benefits) in addition to employees' regular wages after November 30, 2011, the expiration date in the parties' 2007-2011 collective bargaining agreement. In *Bedford Pub Schs*, supra, the Court of Appeals affirmed the Commission's finding that §15b prohibits the payment, after the expiration of a contract, of so-called "lane changes," or "rail increases" i.e., wage increases automatically awarded to employees at the beginning of a school year when these employees attain educational milestones. However, the Commission and the Court have not yet addressed the question of whether paying an annual bonus or other lump sum payment constitutes an increase in the "quantity of [the employee's] wages or benefits" if the amount of the lump sum payment is the same (or less) than the employee received the previous year when the collective bargaining agreement was in effect. However, since I have concluded that Respondent did not violate PERA by refusing to pay the bonuses in this case, it is unnecessary for me to consider whether paying them would have violated §15b.

B. Elimination of Retiree Health Benefits for Non-Duty Disability Retirees

Respondent first argues that this allegation should be dismissed as untimely under §16(a) of PERA because the alleged unilateral change was announced in November 2011, and the charge was not filed until May 2013. Under §16(a) of PERA the Commission is prohibited from finding an unfair labor practice occurring more than six months prior to the filing of the charge with the Commission and the service of a copy thereof upon the party against whom the charge is made. An unfair labor practice charge that is filed more than six months after the alleged unfair labor practice is untimely and must be dismissed. The limitation period under PERA commences when the person knows of the act which caused his injury and has good reason to believe that the act was improper. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983).

On or about November 30, 2011, Respondent sent an email to all its employees at their work email addresses announcing that it was eliminating retiree health benefits for non-duty disability retirees who did not meet the age and service credit requirements to receive such benefits as "normal" retirees. Thomas Richards, president of Local 101 in November 2011, was an employee of Wayne County and not Respondent, and received email communications from

Respondent through a personal email account. Bradley Manley, vice-president of Local 101 at that time, also had a personal email account that he used for union business. Respondent did not send copies of the email to Richards or Manley at the addresses they normally used for union business, and did not dispute Manley's testimony that employees were not required to check their work email accounts. Both Richards and Manley testified that they were not aware of the November 30, 2011, memo at the time it was issued. I find that the record does not establish that Charging Party knew or should have known of the alleged unilateral change before Manley received a copy of the November 30, 2011, memo from Rosalind Wallace on March 3, 2013. I conclude, therefore, that the charge was not untimely.

Although I conclude that the charge was not untimely filed, I note that, based on the record before me, the allegation that Respondent repudiated its contract or unilaterally altered an existing term or condition of employment by eliminating the retiree health insurance benefit appears to be moot. That is, Labor Relations Director Racey testified that no member of Charging Party's bargaining unit retired under the non-duty disability retirement provision of the contract between November 30, 2011, and the date of the hearing in July 2013. Charging Party did not dispute her testimony, although its witness, Terry Aldrich, testified that the elimination of the retiree health benefits was the reason she did not apply for a non-duty disability retirement. In October 2013, the parties executed a new contract that clarifies the circumstances under which employees retiring with a non-disability pension after the date of execution of that agreement are eligible to receive retiree health care benefits. Thus, unless Aldrich or another member of the bargaining unit was granted a non-duty disability retirement between the date of the hearing on July 18, 2013 and the date of the execution of the new contract in October 2013, there is no relief, other than a cease and desist order, that could be granted. However, since the record does not indicate whether there were any such persons, and since Respondent did not argue in its brief that the charge was moot, I do not recommend to the Commission that it dismiss the charge on this basis alone.

In its charge and at the hearing, Charging Party offered alternate theories under which Respondent's elimination of health care benefits for employees who retired with a non-duty disability pension violated its duty to bargain. It argues, first, that this action constituted a repudiation of the parties' collective bargaining agreement. As discussed in the section above, the Commission finds repudiation, and a breach of the duty to bargain in good faith, only when: (1) the contract breach is substantial and has a significant impact on the bargaining unit; and (2) no bona fide dispute over interpretation of the contract is involved. *Plymouth-Canton Cmty Schs*, 1988 MERC Lab Op 894; *Gibraltar Sch Dist*, 18 MPER 20 (2005). Charging Party argues that since the parties' 2007-2011 contract did not explicitly address non-duty disability retirees' health care benefits, the past practice was incorporated into the contract. However, the contract included provisions which arguably gave Respondent the right to eliminate these benefits. These include Article 30.01(C) of the contract and paragraph 7 of the Plan, incorporated by reference into agreement. I find that a bona fide dispute existed over whether Respondent's action violated the collective bargaining agreement. The facts, therefore, do not support a finding that Respondent repudiated the collective bargaining agreement or its collective bargaining obligation.

Charging Party's second theory is that because providing non-duty disability retirees with health care benefits had become a term and condition of employment by past practice, if not by contract, Respondent had a duty to bargain over the elimination of these benefits and could not unilaterally cease to provide them. In *Wayne Co,* supra, the Commission majority held that Wayne County violated its duty to bargain in good faith in March 2010 by unilaterally eliminating its 30 year practice of providing all non-duty disability retirees with health care benefits because this practice had become a term and condition of employment. Member LaBrant, in dissent, concluded that the parties' contracts contained provisions clearly and unambiguously setting out the requirements for receipt of health care benefits upon retirement. He concluded that the County was acting within its authority under these agreements to withhold health care benefits from retirees receiving disability pensions who did not meet the contracts' requirements for receipt of health care benefits

In *County of Wayne v Michigan AFSCME Council 25 and its affiliated Locals 25, 101, 409, 1659, 1862, 2057, 2926, 3317,* unpublished decision issued October 9, 2014, Docket No. 312708, the Court of Appeals reversed the Commission's finding of a violation. The Court held that the Commission erroneously found that the collective bargaining agreements between Wayne County and its unions were silent with regard to health care benefits for disability retirees. It noted that all the contracts, and the Wayne County Health and Welfare Plan incorporated into the contracts, referenced employees needing to meet age and service criteria in order to be eligible for health care benefits upon retirement. The Court concluded that the facts in *Wayne Co* were essentially indistinguishable from those in *Macomb Co v AFSCME Council 25*, 494 Mich 655 (2013). In that case, the Supreme Court held that the parties' dispute over a change in the actuarial table used to calculate joint and survivor retirement benefits was covered by their collective bargaining agreements where unambiguous language in the parties' agreements granted the employer's retirement commission the right to change the table. The Court held in *Macomb* that arbitration was the appropriate procedure for resolving the question of whether a long-established practice of using a different table was so widely acknowledged and mutually accepted that it evidenced an agreement by the parties to modify the unambiguous contract language. In *Wayne Co,* the Court of Appeals held that because retiree eligibility for health care benefits was covered by unambiguous contract language, the issue of whether the parties had an agreement to modify that language was a contract interpretation issue which should be decided by an arbitrator.

Wayne Co is an unpublished decision not involving the parties to this case and is, therefore, not binding. However, this dispute and the dispute in *Wayne Co* are closely related. The past practice upon which Charging Party relies extends back to the time when members of Charging Party's unit were employees of Wayne County. In both cases, the alleged unilateral change was the elimination of retiree health benefits for employees retiring under the non-duty disability retirement provisions of the contract. Finally, the parties' 2007-2011 collective bargaining agreement included the same broad contract language covering retiree eligibility for health care benefits which the Court found in *Wayne Co* to unambiguously cover retiree health care benefits for non-duty disability retirees. I conclude, based on this language, that the parties' 2007-2011 collective bargaining agreement, extended by the agreement of the parties, included unambiguous language covering eligibility for retiree health care benefits. I also conclude that the issue of whether the past practice evidenced an agreement by the parties to modify this

language to exclude non-duty disability retirees was a contract interpretation issue that should have been decided by an arbitrator where, as in this case, the contract included a grievance procedure ending in binding arbitration.

As discussed above, I find that Respondent did not violate its duty to bargain in good faith under §10(1)(e) of PERA by refusing to pay performance bonuses in 2012. I also find that Respondent did not violate its duty to bargain by eliminating retire health care benefits for employees retiring under the non-duty disability provision of the parties' contract in November 2011. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: October 24, 2014