STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY,
Public Employer-Respondent,

Case No. C10 J-266
Docket 10-000060-MERC

-and-

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

APPEARANCES:

Wayne County Corporation Counsel, by Bruce Campbell & Nemeth Law, P.C., by Clifford Hammond, for the Respondent

Miller Cohen, P.L.C., by Keith Flynn, for the Charging Party

DECISION AND ORDER

On October 10, 2013, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order in the above matter finding that Respondent, Wayne County (Employer or County), violated its duty to bargain in good faith when it amended a retirement ordinance that provided for a monetary benefit for certain retirees, known as the "thirteenth check." The ALJ found that Respondent violated § 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(e), and recommended that we order the Employer to cease and desist its unlawful actions and to take certain affirmative action. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with § 16 of PERA.

After requesting and receiving an extension of time to file its exceptions to the ALJ's Decision and Recommended Order, Respondent filed exceptions, a brief in support of the exceptions, and a request for oral argument on December 3, 2013. Charging Party requested and was granted an extension of time to respond to Respondent's exceptions. On January 13, 2014, Charging Party filed its response to the exceptions, a brief in support, and a request for oral argument.

In its exceptions, Respondent argues that the ALJ erred in finding that the thirteenth check was contractually guaranteed deferred compensation for active workers. Respondent further asserts that the ALJ erred in finding that the Inflation Equity Fund, from which the thirteenth check was paid, was an expressly negotiated contractual promise between the parties. Respondent further contends that the 2010 amendment to the Retirement Ordinance (Enrolled

Ordinance 2010-514) did not alter employees' contractual eligibility for a thirteenth check. Charging Party argues that Respondent unilaterally changed a mandatory subject of bargaining and repudiated both the collective bargaining agreement and long established past practice. Charging Party further contends that Respondent breached its duty to bargain by amending the Retirement Ordinance while the parties were in negotiations following fact finding without giving Charging Party notice and an opportunity to bargain over the change.

Both parties seek oral argument in this matter. After reviewing Respondent's exceptions and Charging Party's response, we find that oral argument would not materially assist us in deciding this case. Therefore, the parties' requests for oral argument are denied.

On reviewing the record carefully and thoroughly, we find that Respondent's exceptions have some merit.

Factual Summary:

This matter is before us as the result of the Union's charge asserting that Respondent made a unilateral change in terms and conditions of employment when the Wayne County Commission adopted and gave immediate effect to a Retirement Ordinance amendment on September 30, 2010.

Charging Party represents three bargaining units of employees employed by Respondent: the supervisory unit, the nonsupervisory unit, and the sergeants and lieutenants unit. At the time of the actions leading to the charge, the supervisory unit and the sergeants and lieutenants unit each had collective bargaining agreements with Respondent covering the years of 2008 through 2011. The most recent collective bargaining agreement between Respondent and the nonsupervisory unit covered the years 2004 through 2008. The parties' efforts to negotiate a successor agreement for that unit had been unsuccessful, and the matter was submitted to fact finding. The fact finder issued a report on September 17, 2010.

The Wayne County Employees' Retirement System (the Retirement System) is governed by Chapter 141 of the Wayne County Code of Ordinances (the Retirement Ordinance). The Retirement Ordinance is the plan document for purposes of the Internal Revenue Service. The Retirement Ordinance delineates the rules that govern multiple defined benefit plans, a defined contribution plan, a hybrid plan, and the Inflation Equity Reserve Fund (IEF). For the various plans to remain tax-free, the Internal Revenue Service must approve the terms of the plans as detailed in the plan document. The various retirement plans are administered by the Retirement Commission, which was formerly known as the Retirement System Board of Trustees. The Retirement Commission is composed of eight trustees including: four employees who are members of the retirement system; two retired members of the Retirement System; the chairperson of the County Commission; and a representative of the County Executive.

Prior to 1984, Respondent made occasional cost of living adjustments to retiree pension benefits but discontinued the practice in 1984. In 1984, the County's chief financial officer informed the Retirement System Board of Trustees that the County was not in a position to give cost of living adjustments to retirees and suggested that the Trustees determine a self-sustaining mechanism by which they could pay an amount to retirees that would not require the County to provide additional funds. At that time, the Trustees were responsible for administering two funds for members of the defined benefit retirement plans, the active employee reserve and the retired reserve. It was around that time that the creation of an inflation equity reserve fund was first discussed. During the parties' contract negotiations, there was some discussion of creating a replacement for the cost of living adjustments.

On July 24, 1986, Respondent's legislative branch, the Wayne County Commission, established, via Ordinance 86-284, the Inflation Equity Reserve Fund (IEF) to provide retirees with some of the income protection previously provided by the cost of living adjustments that were discontinued in 1984. Ordinance 86-284 amended the Retirement Ordinance to authorize the Retirement System Board of Trustees to determine the threshold percentage rate of return, that is, the assumed percentage rate of return, on the investment of the retirement system funds. If the retirement system earned more than the threshold percentage rate of return, the earnings in excess of the threshold rate would then be divided between the IEF and the active employee reserve based on the percentage value of the retiree reserve versus the active employee reserve. The amount that went into the active employee reserve would reduce the amount the County would otherwise be required to pay into the active employee reserve that year. The ordinance provided: "The Board of Trustees may, not more frequently than once a year, distribute to retired members and survivor beneficiaries a percentage of the balance in the reserve for inflation equity." The percentage distributed to retirees could not be less than 20% or more than 50% of the balance of the fund. The distribution became commonly known as the thirteenth check to distinguish it from the monthly pension checks paid to retirees. After the establishment of the IEF, the Retirement System Board of Trustees annually determined the percentage of the IEF's balance that was to be distributed to retirees and then made the distributions.

Unlike payments made under a defined benefit pension plan, the amount of the thirteenth check is not based on the amount of wages earned during employment. Ordinance 86-284 provided: "The formula for the distribution shall be as from time to time determined by the Board of Trustees and shall take into account the period of retirement and the period of credited service." Based on the retirement ordinance, the Board of Trustees determined that retirees would be assigned two credits for every year of service with the County, up to a maximum of 70, plus two credits for every year the retiree had been retired. The total number of credits assigned to all eligible retirees was then divided into the dollar amount that the Board was going to distribute to get the unit credit value. Each retiree would then receive a check determined by the number of credits he or she had times the unit credit value. There is no evidence that Respondent and Charging Party ever negotiated the amount of a thirteenth check or the formula by which it is calculated. Moreover, retirees eligible for a thirteenth check include both former bargaining unit employees and former employees who were not members of an organized bargaining unit.

The Retirement Ordinance was amended in 1994 by the Wayne County Commission to replace the term "Board of Trustees" with "Retirement Commission." That amendment to the Ordinance was 94-747. It provided in relevant part, "A conflict between the provisions of the retirement ordinance and the provisions of a collective bargaining agreement shall be resolved, to the extent of the conflict, in accordance with the collective bargaining agreement." That language continues to be part of the Retirement Ordinance.

The Ordinance was again amended in 2000 by the Wayne County Commission, with the Union's agreement. The initial paragraph of the amendment stated: "An ordinance to amend 141 (Retirement Ordinance) of the Wayne County Code to add additional language as result of new labor agreements and correction of errors." The amendment, Ordinance 2000-536, eliminated the requirement that the percentage distributed to retirees be an amount between a minimum of 20% and a maximum of 50% of the balance of the fund. This was done to give the members of the Retirement Commission the ability to somewhat stabilize the distributions, which the 20% minimum and 50% maximum rule would not allow. Charging Party's witness Richard Johnson testified that the Union did not object to the amendment after hearing the explanation of the Retirement System Director. According to Charging Party's witness, Hugh McDonald, the Union supported the removal of the 20% and 50% limitations on the distribution from the IEF because the distributions from the fund were moving up and down dramatically and investment yields during that period were rather significant. However, the amendment was never part of any tentative agreement between the parties. The ordinance also contains language making several other amendments to the Retirement Ordinance, including an amendment to limit the recovery of overpayments resulting from system errors.

Pursuant to the Retirement Ordinance as amended in 2000, the amount of the distribution of thirteenth check was discretionary with the Retirement Commission. The ordinance provided in relevant part:

> (b) The Retirement Commission shall credit the reserve with the following amount at the end of each fiscal year: a portion of the excess, if any, of the rate of return on the actuarial value of Retirement System defined benefit assets over the rate established for this purpose by the Retirement Commission, multiplied by the actuarial present value of pensions being paid retired members and survivor allowance beneficiaries, both as reported in the annual actuarial valuation. The Retirement Commission shall establish the portion of the excess rate of return used in this calculation.
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> (c) The Retirement Commission may, not more frequently than once per year, distribute to retired members and survivor beneficiaries a percentage of the balance in the reserve for inflation equity. . . . The percentage of the balance to distribute shall be selected by the Retirement Commission.

Trifold brochures entitled "Wayne County Employees' Retirement System Fact and Information Guide," given to retirees by the Wayne County Retirement System state that in 1986, the Retirement System Board of Trustees finalized a formula for an annual distribution of excess earnings on investments, also referred to as the thirteenth check. The brochures go on to explain that each retiree or beneficiary with a retirement date prior to December 1 of a given year is eligible to receive a share of those earnings in November of the following year. The brochures describe the payment schedule and the means by which the amount of the payment is computed. The brochures also point out that the amount of the thirteenth check will vary each year depending on investment earnings. This language does not appear in any of the parties' collective bargaining agreements. Neither the brochures, Ordinance 86-284, nor any other amendment to the Retirement Ordinance guarantee that a thirteenth check will be paid.

During the period 1986 through 2009, the IEF made yearly distributions to retirees of varying amounts, with total distributions ranging from a low of just over $4 million, in 1986, to a high of over $17 million in 2001, 2002, and 2003. The average amount of the thirteenth check each year ranged from a low of $677 in 1986 to a high of $2953 in 2003. When the distribution was around $5 million, in 1987 and 1988, the average check was around $800. With the exception of 1990, the IEF's reserve rose from its initial reserve of around $12 million in 1986 to 128 million at the end of 2000. In most years during that period, the fund increased significantly due to investment returns well in excess of the threshold interest rate. In 2001, the investment return in excess of the threshold rate dropped significantly. After that, the investment returns only exceeded the threshold rate in two of the years between 2002 and 2009. Distributions continued to be paid each year although nothing was added to the IEF in 2002 through 2005 and 2008 through 2009. As a result, the fund balance fell from its high of $128 million in 2000 to $45 million in 2009.

The record reflects efforts to amend the Retirement Ordinance to change the way the IEF was calculated and distributed as early as June 30, 2010. The proposed amendments included efforts to transfer funds from the IEF to defined benefit plan assets. Notice of the initially unsuccessful efforts was provided to County Employees in an August 24, 2010 letter from the Director of the Employer's Department of Personnel/Human Resources. Subsequently, additional efforts to amend the Retirement Ordinance were made. The proposed amendment that was eventually adopted was protested by the Wayne County Labor Coalition in a September 28, 2010 letter to the Chairman of the Wayne County Commission. The Wayne County Labor Coalition comprises the presidents and representatives of various union locals, including each of the locals representing members of the three AFSCME bargaining units involved in this matter. Copies of that letter were sent to each of the members of the Wayne County Labor Coalition, as well as, all of the County Commissioners and the Wayne County Employees Retirement System Board of Trustees.

On September 30, 2010, the Wayne County Commission adopted Ordinance No. 2010-514 and amended the Retirement Ordinance to limit the reserve of the IEF to $12 million and to prohibit yearly distributions in excess of $5 million. The amount in the IEF in excess of the newly imposed limit, approximately $32 million, was to be debited from the IEF and credited to defined benefit plan assets to cover accrued pension benefits guaranteed to both retirees and active employees. Section 141-32 of Ordinance No. 2010-514 provides:

> (a) The retirement commission shall maintain a reserve for inflation equity provided that the fund shall be limited to no more than $12,000,000.
>
> (b) (1) Subject to the limit of (a) above, the Retirement Commission may credit the reserve at the end of each fiscal year with a portion of the excess, if any, of the rate of return on the actuarial value of retirement system defined benefit assets over the rate established for this purpose by the Retirement Commission.

(2) The Retirement Commission shall establish the portion of the reserve fund available for distribution to retired members and survivor beneficiaries; provided that portion shall not exceed $5,000,000.

(3) The calculation of “defined benefit assets” shall exclude the County's retirement contribution for that fiscal year as set forth in Sec. 141.36 provided the amount in the reserve fund in excess of the limit set forth in (a) above shall be debited from the reserve fund and credited to the Defined Benefit Plan assets and such credit shall offset and/or reduce the County's defined benefit contribution requirement and thereafter be considered Defined Benefit Plan assets.

(c) The Retirement Commission may restrict the distribution and/or the minimum permanent pension to retired members and survivor beneficiaries having a pension effective date prior to dates selected from time to time by the Retirement Commission.

(d) The formula for the distribution shall be as from time to time determined by the Retirement Commission and shall take into account the period of retirement and period of credited service.

(e) Nothing in this section shall preclude the County from reducing or eliminating its contribution for a fiscal year in which defined benefit assets exceed defined benefit liabilities.

(f) Within 9 months of first annual distribution from this fund, the CFO shall explore and report to the Wayne County Commission whether it is advantageous to issue bonds as a strategy to fully fund the retirement system and reimburse the Inflation Equity fund of $32 million dollars.

At the time of Respondent’s implementation of Ordinance No. 2010-514, the agreements governing the supervisory unit and the sergeants and lieutenants unit were in effect and fact-finding had just been completed in the effort to arrive at a successor agreement for the non-supervisory unit.

As a result of Respondent’s implementation of Ordinance No. 2010-514, Charging Party filed the unfair labor practice charge in this matter on October 1, 2010 alleging that Respondent violated § 10(1)(e) of PERA by “seeking to cancel the thirteenth check.” The charge alleges that the thirteenth check is provided for in at least two provisions of the parties’ collective bargaining agreement:

> In Article 30.01 of the collective bargaining agreement the provisions of the “Wayne County Employees Retirement System shall control except where changed or amended below.” The second place it is referred to in the collective bargaining agreement is at Article 30.05 B 8; “Employees in the Hybrid Retirement Plan shall be eligible for post retirement cost-of-living adjustments in the form of distributions from the Reserve for Inflation Equity.”

The charge further contends that during collective bargaining, Respondent proposed that new hires would not be eligible for the thirteenth check, but active employees would continue to be eligible. Charging Party alleges that, at the same time, Respondent sought to have the County Commission amend the Retirement Ordinance to eliminate the thirteenth check and, by so doing, violated its duty to bargain in good faith. The charge does not allege that Charging Party sought to bargain over the distribution of the thirteenth check, its amount, its funding, or the amount of the balance in the IEF. The charge does not allege that the 2010 amendment to the Retirement Ordinance or its implementation occurred as a *fait accompli*.

During the hearing, Charging Party presented documentary evidence indicating that the presidents of each of the AFSCME locals representing the bargaining units involved in this matter had received notice from the Wayne County Labor Coalition of the proposed amendment to the Retirement Ordinance.[1] Charging Party offered no evidence that it was unaware of the proposed amendment or that it demanded bargaining over its enactment or its effects.

Article 30.01 of the 2008-2011 supervisory unit collective bargaining agreement, Article 30.01 of the 2004-2008 non-supervisory unit collective bargaining agreement, and Article 38.01 of the 2008-2011 sergeants and lieutenants' unit collective bargaining agreement each provide, in relevant part:

> A. The detailed provisions of the Wayne County Employee's Retirement System shall control except where changed or amended below.

Each of the three aforementioned collective bargaining agreements further provides:

> Employees in the Hybrid Retirement Plan shall be eligible for post retirement cost-of-living adjustments in the form of distributions from the Reserve for Inflation Equity.

Article 38.01 I of the sergeants and lieutenants' unit collective bargaining agreement provides: "All employees hired on or after October 1, 2008 shall not be eligible for a 13th check upon retirement." The addendum to Article 30 of the 2008-2011 supervisory unit collective bargaining agreement provides: "All employees hired on or after the date of execution of the 2008-2011 collective bargaining agreement by the Wayne County Executive shall not be eligible for a 13th check upon retirement."

In December 2011, a successor agreement was reached for the non-supervisory unit that became effective on execution by the Wayne County Executive on December 19, 2011 and remained in effect until September 30, 2014. The agreement retained the language of Article 30.01 of the former agreement and added, at Article 30.01 L: "All employees hired on or after December 1, 2010 shall not be eligible for a 13th check upon retirement."

The 2008-2011 collective bargaining agreements for the sergeants and lieutenants' unit and the supervisory unit contain no other language addressing the thirteenth check or the Reserve

[1] We note Charging Party's assertion in its post hearing brief that it was not provided with notice or an opportunity to bargain over the amendment to the retirement ordinance regarding the thirteenth check. However, Exhibit 52, which was offered by Charging Party, indicates that the president of each of the locals representing the three bargaining units involved in this matter were members of the Wayne County Labor Coalition and were notified by the Coalition of the Employer's efforts to amend the Retirement Ordinance in September 2010.

for Inflation Equity. The same is true of the 2004 -2008 collective bargaining agreement and the successor agreement reached in 2011 for the nonsupervisory unit.

Employees in the defined benefit retirement plans hired before 2008 have been treated as eligible for the thirteenth check, but nothing in the current collective bargaining agreements expressly mentions their eligibility.

The Retirement System continued to make thirteenth check distributions in 2010, 2011 and 2012. Retirement fund earnings were well below the threshold rate in 2010 and 2011 and nothing was added to the IEF in 2010 or 2011.[2] In 2011, the County deducted $32 million from the IEF pursuant to the 2010 amendment of the Retirement Ordinance. After that point, distributions were made to retirees in 2011 and 2012, but they were smaller than they had been before. The remaining fund balance, after the 2012 distribution, was considerably less than the amount with which the fund was initiated in 1986. Lower retirement fund earnings mean that the earnings may not surpass the threshold rate and, therefore, there may not be a transfer into the IEF in the near future. This would result in a significant restriction in the Retirement Commission's ability to pay IEF distributions.

<u>Discussion and Conclusions of Law:</u>

On pages two through six of his Decision and Recommended Order, ALJ O'Connor recounted the details of other cases between these parties that were adjudicated between 2009 and 2010 and indicated that Respondent committed repeated unfair labor practices in the other cases. The parties' actions and the findings in those other matters are not relevant to this matter. Each case before this Commission must be decided on its own facts and the applicable law. This Commission cannot and will not issue an order finding a respondent liable for an unfair labor practice in one case merely because it committed a different unfair labor practice in an earlier separately adjudicated case. See *Wayne Co,* 26 MPER 22 (2012) rev'd on other grounds *Wayne Co v Michigan AFSCME Council 25*, unpublished opinion per curiam of the Court of Appeals, issued October 9, 2014 (Docket No. 312708); 2014 WL 5066057.

It is evident, however, that Respondent's motivation for changing the funding of the thirteenth check is its current financial circumstances. While we understand that Respondent has a financial predicament, we must stress that a financial crisis does not excuse a public employer's duty to bargain under PERA. *Wayne Co,* 24 MPER 25 (2011); *36th Dist Court,* 21 MPER 19 (2008).

To a considerable degree, Respondent relies on the findings of the Court of Appeals decisions in *Wayne Co Retirement System v Wayne Co*, 301 Mich App 1 (2013) and contends that the Court's decision is precedent in this matter. Although, based on the record in this matter, we agree with some of the findings of fact made by the Court of Appeals, the legal issues before us differ from those that were before the Court. The Court of Appeals examined the rights of retirees, not the rights of active employees, and, more importantly, focused on the rights and responsibilities of the County and the Wayne County Retirement System under the Public Employee Retirement System Investment Act (PERSIA). The Court made no findings with

[2] The record does not contain data for fund earnings or the investment threshold rate after 2011.

respect to PERA or the parties' duty to bargain. As noted, that matter involved Respondent and the Wayne County Retirement System; Charging Party, AFSCME, was not a party to that action and cannot be bound by findings based on the record in that case.

Respondent contends that we have no jurisdiction because this matter involves retirement benefits. We have no jurisdiction over issues regarding retirees' claims with respect to the thirteenth check, since retirees are no longer public employees. See, *Allied Chemical & Alkali Workers of America v Pittsburgh Plate Glass Co,* 404 US 157 (1971); *Butler v Wayne Co,* 289 Mich App 664, 672 (2010); *West Ottawa Ed Ass'n v West Ottawa Pub Sch Bd of Ed*, 126 Mich App 306, 327-330 (1983), aff'g 1982 MERC Lab Op 629; *St Clair Co*, 20 MPER 9 (2007). However, we do have jurisdiction over benefits that have been promised to active employees as a term or condition of employment; those benefits are mandatory subjects of bargaining. Our findings in this matter are limited to review of the effects of the 2010 amendment to the Retirement Ordinance on active employees.

Under § 15(1) of PERA, a public employer has a duty to bargain in good faith over mandatory subjects of bargaining such as wages, hours, and other terms and conditions of employment. See *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55 (1974). A mandatory subject of bargaining is one that has a significant or material impact on wages, hours and other terms and conditions of employment or settles an aspect of the employer-employee relationship. *Detroit v Michigan Council 25, AFSCME*, 118 Mich App 211, 215-219 (1982). (Where the powers of the boards of trustees of retirement systems are substantial and have a significant effect upon conditions of employment, the composition of such boards is a mandatory subject of bargaining.) Once a subject has been determined to be a mandatory subject of bargaining, the parties must bargain concerning the subject and neither party may take unilateral action on that subject unless the parties arrive at an impasse in their negotiations. *Central Michigan Univ Faculty Ass'n v Central Michigan Univ*, 404 Mich 268, 277 (1978). Michigan Courts and this Commission have long held that pension and retirement provisions are mandatory subjects of bargaining. *Macomb Co v AFSCME Council 25*, 494 Mich 65, 78 (2013); *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 63 (1974). See also *Fraternal Order of Police v Riverview*, 111 Mich App 158, (1981) (The manner by which retirement benefits are computed is also a mandatory subject of bargaining.)

In *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 63 (1974), the Michigan Supreme Court adopted the rationale of the National Labor Relations Board (NLRB) in *Steelworkers (AFL-CIO) (Inland Steel Co),*[3] finding that the NLRB case "has firmly established that pension and retirement provisions are mandatory subjects of bargaining under the NLRA." In *Inland Steel*, the NLRB held:

> There is indeed an inseparable nexus between an employee's current compensation and his future pension benefits. Regardless of the particular economic considerations that may motivate the establishment of a pension system, the fact remains that the employer's financial contribution thereto, in

[3] 77 NLRB No 1 (NLRB), 77 NLRB 1, 21 LRRM (BNA) 1310, (1948) enforced *sub nom, Inland Steel Co v NLRB*, 170 F2d 247 (CA 7, 1948); *cert den* 336 US 960, 69 S Ct 887, 93 L Ed 1112 (1949). See also, *Allied Chemical & Alkali Workers of America v Pittsburgh Plate Glass Co*, 404 US 157, 180 (1971).

> whole or in part, on behalf of the employees provides a desirable form of insurance annuity which employees could otherwise obtain only by creating a reserve out of their current money wages or by purchasing similar protection on the open market. In substance, therefore, the respondent's monetary contribution to the pension plan constitutes an economic enhancement of the employee's money wages. Their actual total current compensation is reflected by both types of items.
>
> Realistically viewed, this type of wage enhancement or increase, no less than any other, becomes an integral part of the entire wage structure, and the character of the employee representative's interest in it, and the terms of its grant, is no different than in any other case where a change in the wage structure is effected.

More recently, the Michigan Supreme Court reaffirmed its holding that the calculation of retirement benefits is a mandatory subject of collective bargaining. *Macomb Co v AFSCME Council 25*, 494 Mich 65, 78 (2013).

The thirteenth check is a benefit received by retirees and is a benefit anticipated by active employees of the type that those "employees could otherwise obtain only by creating a reserve out of their current money wages or by purchasing similar protection on the open market."[4] Where retirement benefits have been promised to active employees, those benefits are mandatory subjects of bargaining.

<u>The Allegations of Midterm Contract Repudiation With the Supervisory Unit and the Sergeants and Lieutenants Unit</u>

As a general rule, a public employer may not lawfully make a unilateral change to a mandatory subject of bargaining during the term of the collective bargaining agreement. *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n*, 458 Mich 540, 552-553 (1998); *36th Dist Court*, 21 MPER 19 (2008), aff'd 3*6th Dist Court v Michigan AFSCME Council*, unpublished opinion per curiam of the Court of Appeals, issued September 29, 2009 (Docket No. 285123); 22 MPER 79. As the Michigan Supreme Court stated in *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 327 (1996): "Once the employer has fulfilled its duty to bargain, it has a right to rely on the agreement as the statement of its obligations on any topic 'covered by' the agreement." At the same time, bargaining unit members have a right to rely upon the terms and conditions in the contract and to expect that they will continue unchanged. *Detroit Bd of Ed*, 2000 MERC Lab Op 375, 377. See also *Wayne Co Cmty Coll*, 20 MPER 59 (2007). When the matter is covered by the agreement, further mandatory bargaining on that subject is foreclosed because the parties have fulfilled their statutory duty to bargain. *Macomb Co v AFSCME Council 25*, 494 Mich 65, 79 (2013); *City of Royal Oak*, 23 MPER 107 (2010); *Pontiac Sch Dist,* 2002 MERC Lab Op 20; 15 MPER 33025.

To be covered by the collective bargaining agreement, a topic need not be specifically mentioned. *See Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 322 n 16

[4] *Steelworkers (AFL-CIO) (Inland Steel Co.),* 77 NLRB No 1 (NLRB), 77 NLRB 1, 21 LRRM (BNA) 1310, (1948).

(1996); *citing Dep't of Navy v Fed Labor Relations Authority,* 962 F2d 48, 61 (CADC 1992). Where the matter involves an alleged refusal to bargain, and the parties have agreed to a grievance arbitration process, we must first determine whether the collective bargaining agreement covers the subject of the dispute. *Macomb Co v AFSCME Council 25,* 494 Mich 65, 81 (2013); *Port Huron Ed Ass'n* at 321; (1996). When determining whether an issue is covered by the contract, the Commission must determine if the contract has provisions that can be reasonably relied on for the action in question. *Port Huron Ed Ass'n,* at 321-322 citing *St Clair Co Rd Comm,* 1992 MERC Lab Op 533, 538.

While the Commission will not exercise jurisdiction over every contract dispute, we will find an unfair labor practice when the alleged breach of the collective bargaining agreement rises to the level of contract repudiation. *City of Detroit*, 22 MPER 11 (2009). Repudiation of a contract term that is a mandatory subject of bargaining is a violation of § 10(1)(e) of PERA. Repudiation exists only when both of the following occur: (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. *City of Detroit*, 26 MPER 21 (2012); *Gibraltar Sch Dist*, 18 MPER 20 (2005). Repudiation warranting Commission involvement can be found only when the actions of a party amount to a rewriting of the contract or a complete disregard for the contract as written. See *Gibraltar Sch Dist*, 16 MPER 36 (2003).

Repudiation is not found where the alleged deviation from the contract terms merely stems from a bona fide dispute over the interpretation of the contract. *City of Detroit*, 22 MPER 11 (2009). See also *Plymouth-Canton Cmty Sch*, 1984 MERC Lab Op 894, 897. This Commission has repeatedly held that there is no breach of the duty to bargain under § 10(1)(e) of PERA when the parties have a good faith dispute over contract interpretation. *Wayne Co*, 19 MPER 61 (2006); *Eastern Michigan Univ*, 17 MPER 72 (2004); *City of Pontiac*, 26 MPER 30 (2012). A good faith dispute over contract interpretation exists where the provisions of the collective bargaining agreement may reasonably be relied on for the actions taken by the parties. *City of Pontiac*, 26 MPER 30 (2012); *City of Royal Oak*, 23 MPER 107 (2010).

The Commission will not exercise jurisdiction over a good faith dispute over contract interpretation where the parties' contract provides a mandatory binding procedure for dispute resolution. *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 321; (1996); *Eastern Michigan Univ*, 17 MPER 72 (2004). See e.g. *City of Royal Oak*, 23 MPER 107 (2010). It is only where the parties have not agreed to a mandatory binding procedure for dispute resolution that the Commission would exercise jurisdiction over a bona fide dispute about contract interpretation. *Blue Water Area Transp Comm*, 26 MPER 25 (2012); *Plymouth-Canton Cmty Sch*, 1984 MERC Lab Op 894, 898.

In this case, both the supervisory unit and the sergeants and lieutenants' unit had effective collective bargaining agreements in place. The County's change to the Retirement Ordinance occurred during the term of those contracts. If the change to the Retirement Ordinance constituted a repudiation of those collective bargaining agreements, that change would be a breach of the duty to bargain. *Wayne Co Cmty Coll*, 20 MPER 59 (2007).

Charging Party relies on two sentences in the collective bargaining agreements to support its claim of repudiation. Those sentences provide:

> The detailed provisions of the Wayne County Employee's Retirement System shall control except where changed or amended below.
>
> * * *
>
> Employees in the Hybrid Retirement Plan shall be eligible for post retirement cost-of-living adjustments in the form of distributions from the Reserve for Inflation Equity.

Charging Party contends that the language in the first of these two sentences incorporates by reference the version of the Retirement Ordinance in effect at the time the parties agreed to the collective bargaining agreement. Charging Party asserts that this language means that the Retirement Ordinance controls, except in two circumstances: (1) where the Ordinance is changed, or (2) where the Retirement System is amended by the collective bargaining agreement. Thus, Charging Party contends that the 2010 amendment does not apply until the expiration of the parties' collective bargaining agreement.

Respondent disagrees with Charging Party's interpretation of the language covering the dispute. The Employer contends that neither the collective bargaining agreements nor past practice prohibit the County from amending the Ordinance as it applies to the thirteenth check. Respondent further asserts that the amendment of the Retirement Ordinance does not affect employee eligibility for the thirteenth check and does not conflict with any of the terms of the collective bargaining agreements. Respondent further contends that the amended Ordinance controls, because nothing in the collective bargaining agreements prohibits amendment of the Ordinance.

It is evident that the collective bargaining agreement covers the parties' dispute over the thirteenth check and Respondent's ability to amend the Retirement Ordinance. Although there is no evidence that the parties bargained over the terms of the thirteenth check, its establishment, its funding, its amount, or its distribution, it is covered by the collective bargaining agreements. The only issue regarding the thirteenth check that is expressly addressed in the collective bargaining agreements is employee eligibility; the parties left the remaining terms to the Retirement Ordinance, which controls the interpretation of the provisions of the parties' collective bargaining agreements relating to retirement benefits. Inasmuch as the matter is covered by the agreement, the parties have satisfied their duty to bargain. Therefore, further mandatory bargaining on that subject is foreclosed and any possible relief is contractual. *Macomb Co v AFSCME Council 25*, 494 Mich 65, 79 (2013); *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 55 (1974); *City of Royal Oak*, 23 MPER 107 (2010).

Whether we agree with Respondent's interpretation or Charging Party's interpretation, it is clear that the parties have a bona fide dispute over contract interpretation. Charging Party's understanding of the language in the collective bargaining agreement on which it relies to support its claim differs from that of Respondent. It is evident that the parties have a dispute over how language in the collective bargaining agreements is to be interpreted. A dispute as to the meaning of a contract does not constitute repudiation of the contract. *Wayne Co*, 19 MPER 61 (2006). The Commission will not exercise jurisdiction over a bona fide dispute over contract interpretation where, as in the case of the supervisory unit and the sergeants and lieutenants unit, the parties' contracts provide mandatory binding procedures for dispute resolution. *City of Royal Oak*, 23 MPER 107 (2010).

We note Charging Party's contention that the parties' past practice amends the contract and covers this matter. As the legislative body responsible for enacting the Retirement Ordinance and creating the Retirement Commission, the Wayne County Commission had the authority to amend the Retirement Ordinance as long as such amendments did not conflict with the County's contractual obligations. See, *United States v Winstar Corp*, 518 US 839, 871-76 (1996). To establish that Respondent was prohibited from amending the Retirement Ordinance by past practice, Charging Party must show the parties had a meeting of the minds wherein they both agreed that Respondent would not amend the Retirement Ordinance or otherwise change the funding of the IEF. *Macomb Co v AFSCME Council 25*, 494 Mich 65, 81-82 (2013). See also, *Wayne Co v Michigan AFSCME Council 25*, unpublished opinion per curiam of the Court of Appeals, issued October 9, 2014 (Docket No. 312708); 2014 WL 5066057. Charging Party may have had an expectation that the IEF would continue to be well-funded and that no funds would be removed from the IEF except disbursements to retirees. However, that expectation is unfounded. There is no evidence that Respondent made any express or implied promise that would intentionally create such an expectation with respect to the funding of the thirteenth check, which has always been a discretionary benefit.

Inasmuch as Charging Party has not established that the parties' dispute results from anything more than a difference in contract interpretation, we find that, with respect to the supervisory unit and the sergeants and lieutenants unit, this matter is more appropriately resolved through the grievance arbitration procedures established under the parties' collective bargaining agreement. Accordingly, for the foregoing reasons, we find the Charging Party has not established that Respondent repudiated the parties' collective bargaining agreements with respect to the supervisory unit or with respect to the sergeants and lieutenants unit and that the charge should be dismissed to the extent that it applies to those two units.

<u>Allegations of Unilateral Change to the Expired Non-Supervisory Agreement</u>

After the expiration of a labor contract, a public employer has a duty to continue to apply the terms of mandatory subjects of bargaining in the expired contract until the parties reach agreement or impasse. *AFSCME Council 25 v Wayne Co*, 152 Mich App 87, 93-94; 393 NW2d 889, 892 (1986). Grievance arbitration is an exception to that general rule. See *Gibraltar Sch Dist* v *Gibraltar MESPA-Transp,* 443 Mich 326, 337, (1993); *Lake Co & Lake Co Sheriff*, 22 MPER 59 (2009). There is no statutory duty to arbitrate after the expiration of the collective bargaining agreement. *Gibraltar Sch Dist* at 345-346. Thus, the right to grievance arbitration after the expiration of the collective bargaining agreement only survives with respect to contract rights that accrued or vested during the contract's term. *Ottawa Co v Jaklinski*, 423 Mich 1, 23-25 (1985).

The relevant collective bargaining agreement between Respondent and the non-supervisory unit expired in 2008. The parties' agreed-upon grievance procedure is contained in Article 10 of that contract and specifically reserves the grievance and arbitration process to differences that arose between the parties during the term of the agreement. Moreover, the thirteenth check is a benefit that was crafted by Respondent to replace a discretionary cost-of-living increase that the County occasionally paid to retirees. It was created by the Wayne County Commission in its enactment of Retirement Ordinance 86-284 and its payment is entirely within the discretion of the Retirement Commission. Therefore, the active employees' "right" to a thirteenth check, if any, would not accrue until those employees have been retired for more than a year and the Retirement Commission has exercised its discretion to make a distribution from the IEF. Thus, active employees had no vested or accrued right to the thirteenth check during the term of the expired contract. Inasmuch as the parties' collective bargaining agreement expired, and active employees had no accrued or vested right to the thirteenth check during the term of the contract, the arbitration provisions of the expired contract are not binding with respect to this matter.

This Commission has the authority to interpret the terms of a collective bargaining agreement where necessary to determine whether a party has breached its statutory obligations. *City of Royal Oak*, 23 MPER 107 (2010); *Univ of Michigan*, 1971 MERC Lab Op 994, 996. Therefore, despite the fact that this matter revolves around a good faith dispute over contract interpretation, since the parties have no binding arbitration provisions, we must examine Respondent's actions with respect to the nonsupervisory unit to determine whether Respondent breached its statutory duty to bargain. *Plymouth-Canton Cmty Sch*, 1984 MERC Lab Op 894, 898. See also *City of Detroit*, 26 MPER 21 (2012).

We have held that even in the event of a good faith impasse, a party may not unilaterally impose changes in mandatory subjects of bargaining after fact finding has been requested. *Wayne Co*, 24 MPER 25 (2011); *Wayne Co*, 1984 MERC Lab Op 1142 and 1985 MERC Lab Op 244, aff'd *AFSCME Council 25 v Wayne Co*, 152 Mich App 87 (1986). After fact finding, parties must make a serious effort to reconcile their differences. *Oakland Cmty Coll*, 2001 MERC Lab Op 273, 277; 15 MPER 33006 (2001). In *Wayne Co*, 1985 MERC Lab Op 244, 250-251, we established a rule that parties must bargain for a reasonable time over the substance of a fact finder's report. We held that in most cases, a reasonable time is 60 days after the issuance of the report, provided the parties are bargaining in good faith.

Here, the parties were unable to negotiate a successor agreement before the contract expired and the matter was submitted to fact finding. The fact finder's report was issued on September 17, 2010. The County amended the Retirement Ordinance less than two weeks after the fact finder's report was issued. At that point, the parties' duty to bargain over mandatory subjects continued. If the amendment to the Retirement Ordinance was contrary to unambiguous language in the collective bargaining agreement such that it constituted a substantial change in terms and conditions of employment, Respondent would have had a duty to bargain over the change. In that event, implementation of a change in a mandatory subject of bargaining during the period shortly after the fact finder's report was issued would be an unfair labor practice. See *Orion Twp (Dep't of Public Works)*, 18 MPER 72 (2005).

During the parties' post-fact finding mandatory negotiations period, Respondent had a duty to give notice and an opportunity to bargain to the Union before taking action that would change a mandatory subject of bargaining. See *City of Detroit (Police Dep't)*, 18 MPER 53 (2005). The Commission has determined that notification must be given to the collective bargaining representative of potential changes in mandatory subjects of bargaining before the employer makes such changes. *City of Detroit, Board of Fire Commissioners*, 1970 MERC Lab Op 953, 957; *City of Detroit*, 1971 MERC Lab Op 211, 216. The Commission has also determined that the change in working conditions occurs when a governing body adopts the change. *City of Westland*, 1977 MERC Lab Op 230; *Ann Arbor Pub Sch*, 1980 MERC Lab Op 1039 (no exceptions).

Although amending the Retirement Ordinance is not necessarily a mandatory subject of bargaining, where the amendment to the Retirement Ordinance affects a mandatory subject of bargaining, such as the thirteenth check, the duty to bargain extends to the amendment to the Retirement Ordinance. Inasmuch as the thirteenth check is covered by the parties' collective bargaining agreement, Respondent had a duty to inform Charging Party of changes it planned to make to the Retirement Ordinance that would affect the calculation of the thirteenth check. See, *Macomb Co v AFSCME Council 25*, 494 Mich 65, 78 (2013). See also, *Fraternal Order of Police v Riverview*, 111 Mich App 158, (1981). The Employer's failure to give notice to the Union of its intention to change the funding for the thirteenth check by amending the Retirement Ordinance during the post-fact finding mandatory negotiations period is a breach of the Employer's duty to bargain.

The essential contract language in resolving this matter is contained in the following sentence:

> The detailed provisions of the Wayne County Employee's Retirement System shall control except where changed or amended below.

As indicated above, the parties dispute the meaning and effect of that sentence. Charging Party would have us read that sentence as nullifying the effect of any amendment to the Retirement Ordinance made during the term of the collective bargaining agreement until the agreement expires. With respect to the nonsupervisory bargaining unit, that argument has no merit since the collective bargaining agreement had already expired when the Retirement Ordinance was amended. Therefore, if the disputed sentence means that amendments to the Retirement Ordinance only take effect after the expiration of the collective bargaining agreement, the 2010 amendment effectively amended the Retirement Ordinance and is binding on the parties.

As the retirement plan document for Internal Revenue Service purposes, the Retirement Ordinance controls the interpretation of provisions of the collective bargaining agreements that apply to retirement benefits. Therefore, the language at issue could easily be read to mean that the detailed provisions of the Retirement Ordinance control unless the Ordinance is changed or amended in a way that is inconsistent with the collective bargaining agreement. That interpretation is supported by Section 141-2 of the Retirement Ordinance, which was added to the Ordinance in 1994 and provides:

> A conflict between the provisions of the retirement chapter and the provisions of a collective bargaining agreement shall be resolved, to the extent of the conflict, in accordance with the collective bargaining agreement.

Nothing in the expired collective bargaining agreement expressly prohibits Respondent from altering the language of the Retirement Ordinance with respect to the thirteenth check or the IEF. The expired collective bargaining agreement contains no language that promises employees or retirees will be paid a thirteenth check or that sets an amount or range of amounts for the thirteenth check. With the exception of providing that employees in the hybrid plan are eligible for the thirteenth check and that certain employees hired after 2008 are not eligible for the thirteenth check, the collective bargaining agreements do not mention the thirteenth check. Significantly, the collective bargaining agreements do not mention that employees in the defined benefit plans are eligible for the thirteenth check, although it appears from the record that the IEF and the thirteenth check were designed for the benefit of those employees. All other details regarding the thirteenth check are contained in the Retirement Ordinance. This supports Respondent's assertion that it had the right to amend the Retirement Ordinance provided the amendment did not conflict with the express provisions of the collective bargaining agreement. Nevertheless, during the mandatory negotiations period, Respondent had a duty to give Charging Party notice and an opportunity to bargain over the amendment to the Retirement Ordinance and its effects.

Where an employer has a duty to bargain, the employer is not required to initiate bargaining. An employer's duty to bargain under PERA is conditioned upon there being a demand for bargaining by the union. *SEIU Local 586 v Village of Union City*, 135 Mich App 553, 557 (1984). See also *Decatur Pub Sch*, 27 MPER 41 (2014); *City of Dearborn*, 20 MPER 110 (2007). We have previously held that "the obligation to request bargaining is waived if such a request would have been either futile or the bargaining subject change was a fact accomplished when notification was received." *Intermediate Ed Ass'n/Michigan Ed Ass'n*, 1993 MERC Lab Op 101, 106.

Since the 1986 enactment of the amendment to the Retirement Ordinance establishing the IEF and the procedures for funding and distribution of the thirteenth check, the Retirement Ordinance has been amended several times. Although there was some evidence that the Union agreed with at least one of the amendments, there is insufficient evidence to find that the amendment establishing the IEF or any of the subsequent amendments were ever negotiated by the parties. Indeed, it is apparent that until the 2010 amendment was enacted, the Union deferred to the Wayne County Commission's right to change the Ordinance. Before it was enacted, the Union objected to the 2010 amendment to the Retirement Ordinance through its membership in the Wayne County Labor Coalition. Clearly, Charging Party was aware of the pending amendment and Respondent's efforts to enact it. However, there is no evidence that the Union ever sought to negotiate with the County over the terms of the amendment or its effect either before or after its enactment. Although Charging Party has argued that the amendment to the Retirement Ordinance was presented as a *fait accompli*, the Union failed to offer evidence to support that argument.

There is no evidence that the parties ever bargained over the funding of the thirteenth check, its amount, or the terms of its distribution. The only issue for which there is evidence of bargaining is employee eligibility for the thirteenth check, an issue that was not altered by the 2010 amendment to the Retirement Ordinance. Although the concept of the thirteenth check is a mandatory subject of bargaining, it is evident that the parties chose not to bargain over its terms. Respondent never promised to pay the thirteenth check to retirees; it merely established a discretionary benefit in its Retirement Ordinance to help retirees on fixed incomes endure the effects of inflation.

When the parties reached agreement on a successor collective bargaining agreement several weeks after the Retirement Ordinance was amended, the successor agreement eliminated the thirteenth check for newly hired employees but made no changes regarding the funding or distribution of the thirteenth check. As with the predecessor agreement, the thirteenth check was covered by the successor agreement, but all details, with the exception of employee eligibility, were left to the Retirement Ordinance. Charging Party has offered no evidence indicating that it demanded bargaining over the funding or distribution of the thirteenth check or over the implementation or effect of the amendment. Although the Employer had a duty to give the Union notice of the amendment to the Retirement Ordinance before its enactment, the Employer's failure did not entitle Charging Party to remain idle after it learned of the amendment. Inasmuch as Charging Party had notice of the proposed amendment before it passed and there were at least three months between the passage of the amendment and the removal of $32 million from the IEF in 2011, the evidence in the record does not support a contention that a request to bargain over the amendment or its effects would have been futile.

We note Charging Party's argument that the thirteenth check and the method for funding it are established by past practice. However, the fact that payments have been made every year since 1986 does not establish a past practice that amends the collective bargaining agreement in a way that gives employees a right to receive a thirteenth check after their retirement. *Macomb Co v AFSCME Council 25*, 494 Mich 65, 81-82 (2013); *Wayne Co v Michigan AFSCME Council 25*, unpublished opinion per curiam of the Court of Appeals, issued October 9, 2014 (Docket No. 312708), 2014 WL 5066057. See also *Southfield Pub Sch,* 2002 MERC Lab Op 53, (the employer's sixteen year practice of routinely granting all requests for unpaid leaves of absence was not sufficient to amend the parties' contract to require the granting of all unpaid leave requests because the practice conflicted with contract language that gave the employer the discretion to grant or deny requests for such leaves). Payment of the thirteenth check is and, always has been, discretionary. The fact that these discretionary payments have been made for almost thirty years does not change their discretionary nature or cause those payments to become an entitlement.

The thirteenth check was designed to replace a discretionary and infrequent COLA payment to retirees. From its inception, the thirteenth check has always been discretionary with the Retirement Commission. The Retirement Commission sets the threshold rate that determines whether earnings are high enough to go into the IEF. The Retirement Commission has always had the discretion to decide whether a distribution should be made from the IEF in any given year. Between 2000 and 2010, the Retirement Commission also had the discretion to determine the amount of any distribution. The employees were never promised that they would receive a thirteenth check after retirement, or that any thirteenth check that the Retirement Commission elected to disperse to them would be of any certain amount or within a particular range of amounts. The removal of the $32 million from the IEF will undoubtedly reduce the amount of any distributions the Retirement Commission decides to make. However, a set amount was never promised and it has always been clear from the wording of the Retirement Ordinance that the amount of the funds in the IEF and the amount of the distributions are dependent on retirement fund earnings. Employees' expectations of receipt of a thirteenth check after retirement continue to be dependent on several factors: their eligibility under the collective bargaining agreement; the Retirement Commission's determination of the threshold percentage rate, the presence of Retirement Fund earnings in excess of the threshold rate; and the Retirement Commission's discretionary decisions as to whether a distribution should be made and the amount of any such distribution. These are the same factors on which employee expectations of receipt of a thirteenth check depended prior to the adoption of Ordinance No. 2010-514.

In sum, the 2010 amendment to the Retirement Ordinance did not alter or conflict with any of the terms of the expired collective bargaining agreement. The amendment does not change any of the terms in the collective bargaining agreement and, in particular, does not change the eligibility of any active employee to receive a thirteenth check in the event that the Retirement Commission determines that one should be issued after current employees retire. The amendment changed the amount that could be held in the IEF and thereby changed the funding for the thirteenth check. The Employer had a duty to inform the Union of its plans to make that change while the parties were in negotiations following the issuance of the fact finder's report. If, the Union had demanded bargaining during that period, it is possible that they may have agreed on something that would have changed the effect of the amendment. However, despite knowing of the amendment before its enactment, the Union chose not to demand bargaining over the enactment of the amendment or its effect. Inasmuch as the parties reached a successor agreement that did not change the effect of the 2010 amendment to the Retirement Ordinance, and the Union was aware of the amendment before it was enacted, we question whether prior notice of the amendment by the Employer to the Union would have led to a different result. Although we find that Respondent breached its duty to bargain with respect to the nonsupervisory bargaining unit by amending the Retirement Ordinance during fact finding without giving prior notice to Charging Party, in light of the discretionary nature of the thirteenth check, and Charging Party's failure to demand bargaining over the amendment to the Retirement Ordinance or its effects, we will not issue a bargaining order in this matter.

We have considered all other arguments submitted by the parties and conclude that they would not change the result in this case. After a careful and thorough review of the record, we find that the ALJ's Decision and Recommended Order is reversed in part and affirmed in part. Charging Party failed to establish that Respondent repudiated the collective bargaining agreements with the supervisory unit and the sergeants and lieutenants unit in violation of § 10(1)(e) of PERA. The charge is dismissed to the extent it applies to the supervisory unit and the sergeants and lieutenants unit. The ALJ's decision is affirmed to the extent that it finds Respondent breached its duty to bargain by taking steps to enact the amendment to the Retirement Ordinance while the parties were in mandatory negotiations following fact finding. We, therefore, issue the following order:

ORDER

The charge in this case is hereby dismissed with respect to the supervisory unit and the sergeants and lieutenants unit. The Employer breached its duty to bargain in violation of § 10(1)(e) with respect to the nonsupervisory unit. Therefore, Wayne County, its officers, agents, and representatives are hereby ordered to:

1. Cease and desist from failing to give notice and an opportunity to bargain to Charging Party, the American Federation of State, County and Municipal Employees, before making unilateral changes to mandatory subjects of bargaining during fact-finding proceedings or during mandatory bargaining subsequent to those proceedings;

2. 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 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION[5]

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

Dated: May 19, 2015

[5] Commissioner Natalie P. Yaw has recused herself and did not participate in the decision in this matter.

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND **WAYNE COUNTY** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail to give notice and an opportunity to bargain to Charging Party, the American Federation of State, County and Municipal Employees, before making unilateral changes to mandatory subjects of bargaining during fact-finding proceedings or during mandatory bargaining subsequent to those proceedings.

WAYNE COUNTY

By:________________________________

Title:______________________________

Date: ___________

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.
Case No. C10 J-266

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

WAYNE COUNTY,
Respondent-Public Employer,

-and- Case No. C10 J-266
Docket 10-000060-MERC

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

Bruce Campbell, Wayne County Corporation Counsel &
Clifford Hammond and Timothy Schramm, Nemeth Burwell, PC, for Respondent

Keith Flynn, 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 long-running dispute 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. (Case No. C10 A-024). 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.

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, involving unilateral efforts by the Employer to reduce wages or benefits during an economic downturn, 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. There were additional claims addressed in parallel cases both before me and before other ALJs, in which Wayne County was uniformly found to have repeatedly acted unlawfully and which will be addressed below.

The present Charge, as more fully discussed below, was originally filed as an amendment to the original Charge, but the allegations were severed and given a new case number. The present Charge arose from a pension ordinance amendment proposed by the County Executive and adopted by the County Commission, which is the County's legislative branch, in September of 2010. The Charge is brought on behalf of three separate AFSCME bargaining units which, as more fully discussed below, present partially differing claims: the supervisory unit; the sergeants and lieutenants unit; and the non-supervisory unit. The new pension ordinance mandated a significant reduction in pension benefits, provided by the County Pension Board through the Inflation Equity Fund, for those already retired and for those who would retire in the future, and it shifted significant resources away from negotiated employee deferred compensation and to the Employer's coffers. The matter was tried over three days, with approximately 9,000 pages of exhibits introduced[6], and with the Employer resting without putting on any testimony following the close of the Union's case in chief.[7] Both parties filed timely post-hearing briefs and then both parties filed supplemental briefs on narrow questions related to the potential impact of several subsequently decided appellate cases.

In February 2010, I issued a decision in favor of the Union on the original Charge, Case No. C10 A-024, related to the "Friday furloughs" and recommended an order directing the Employer to restore the

[6] Counsel, in particular for the Employer, acknowledged on the record that nearly the entirety of the 9,000 pages of exhibits was irrelevant. Indeed, in their post hearing briefs, the parties referenced a mere handful of the voluminous exhibits.

[7] The Employer rested without putting on a single witness despite repeatedly, and vaguely, insisting that there existed genuine disputes of material fact warranting an extensive evidentiary hearing on what objectively appeared to be, and ultimately was, a *factually* undisputed disagreement regarding the legal obligations of the parties.

workweek, cease the unilateral imposition of changes in conditions of employment, and compensate the directly affected employees. In sum, in the earlier Decision, 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 same 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, in the ultimately vain hope that clarity regarding the respective obligations of the parties would foster compliance. 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 litigation continued unabated.

The Amended Charges

As events and acrimony between the parties progressed, the Charge was repeatedly amended. 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 regardless 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" were 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, thereby returning the 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 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 "holiday furloughs" dispute was addressed, a violation found, and remedies recommended, in a decision issued in November 2012, in Case No. C10 A-024-A.

A Fifth Amended Charge was filed, addressing several disputes, including over the County's unilateral decision, in September of 2010 to severely curtail, if not entirely eliminate, the disbursal of so-called "13th checks" to current and future retired employees. That dispute was not resolved in the earlier Decision on the original Charge, and by concurrence of the parties, it was spun off as a separate case under Case No. C10 J-266 and, at the behest of the parties, was held in abeyance for a protracted period.[8]

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. He recommended 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 was 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.

On September 30, 2010, the County Commission adopted an ordinance which purported to change the existing scheme of benefits promised to current and former retirees, in particular those benefits which had previously been disbursed through what was known as the "Inflation Equity Fund" (the IEF). As more fully discussed below, the new ordinance, which was then unilaterally implemented by the County, functioned to immediately transfer significant assets from the pension plan, amounting to approximately $32 million, for the benefit of the Employer. It thereby effectively precluded the disbursal by the pension board of previously negotiated benefits which had been promised to current and future retirees. The ordinance set in place new rules which in essence gutted the negotiated deferred compensation plan.

[8] 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 remained, which was addressed and a remedy ordered in the November 2012 decision in Case NO C10 A-024-A.

Subsequent to the fact-finding process, the parties continued to meet, as is required by law. 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 that the changes imposed went beyond the proposals made by the Employer at the bargaining table. The Union challenged a 20% base pay cut and 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. The 20% pay cut dispute was likewise addressed, a violation found, and remedies recommended, in the decision issued in November 2012 in Case No. C10 A-024-A.

In summary, the Union's multiple amended Charges 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 the myriad changes in conditions of employment were separate violations of the Section 10(1)(e) duty to bargain; and that certain imposed changes were retaliatory and thereby contrary to Section 10(1)(a) of the Act.

As more fully discussed in the November 2012 decision, the Employer asserted that the unilateral substantive changes in conditions of employment were somehow 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 were unreviewable under PERA. Although that claim of immunity from review was earlier rejected, it was re-asserted as the main defense in the present case regarding the County Commission's legislative decision to raid the IEF, albeit at the behest of the County Executive, to eliminate an existing negotiated deferred compensation benefit.

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 each of the other MAHS ALJs assigned to hear disputes under PERA. As will be more fully addressed below, it was established in each of the multiple cases that during the same round of bargaining, that Wayne County acted unlawfully including by: refusing to provide requested information; withholding health care benefits from disabled employees in 2009; withholding a scheduled pay increase in July 2009; withholding a separate scheduled pay increase in July 2010[9]; and of course, unilaterally imposing the Friday and later holiday 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.

Findings of Fact:

The Background Facts[10]

Despite the protracted and acrimonious litigation over this multi-faceted dispute, the core facts were not legitimately in dispute. In truth, the dispute was factually 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. While the Union challenged many of those unilateral Employer efforts at self-help as having been unlawful, it refrained from engaging in the corollary self-help of a work stoppage, presumably based at least in part on the fact that the PERA hearing process was designed to provide remedies in lieu of such disruptive self-help. The obligations and remedies under PERA were carefully calibrated for the very purpose of avoiding 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 contracts 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).

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

[10] The background facts are derived from the record in this matter and from prior formal decisions by MERC and by the several ALJs who have heard various portions of this dispute.

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 22 (2012).[11]

As bargaining continued, in January 2010, the County unilaterally imposed the unlawful "Friday furloughs" on much of the AFSCME unit. The ALJ's 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".

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. 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

[11] 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.

who actually made the decision to implement the draconian 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 punitively 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.[12] 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 withholding of a scheduled pay increase based on its assertion that

[12] 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 with regard to the 2009 pay increase.

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 affected workers and their families for the month of September. 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. The layoff of grant funded employees was evidence that the layoffs in general were punitive rather than driven by budget exigencies, as those layoffs brought no benefit whatsoever to the County's general fund.

On September 17, 2010, the MERC appointed neutral fact-finder Paul E. Glendon issued his report on the bargaining issues facing the parties.[13] Glendon's report recommended 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. In the factfinding hearings, the formal proposal by the County was to exclude all new hires, and only new hires, from the provisions of the Inflation Equity Fund. Instead of utilizing the fact-finders report as an opportunity to re-examine its prior bargaining posture and to return to the table with the Union, the County treated the entire fact-finding process as a mere inconvenient hurdle to be gotten past en route to its intended unilateral implementation of changes to conditions of employment.

The Dispute Over the Inflation Equity Fund

On September 30, 2010, only two weeks after the issuance of the fact-finder's Report, and during the minimum 60-day post-factfinding mandatory negotiation period, and before any substantive bargaining could have taken place in response to the fact-finder's recommendations,

[13] As addressed more fully in the Discussion section below, once a MERC fact-finder's report is issued the parties are expected, indeed required, to re-double their bargaining efforts for at minimum another 60 days during which period unilateral action on a mandatory subject of bargaining by either side is *per se* unlawful.

the County Commission took up a pension ordinance amendment which had earlier been proposed by County Executive Robert Ficano in June of 2010 and introduced by a County Commissioner in August 2010. The ordinance, which was passed and immediately put into effect, had a fundamental impact on pre-existing conditions of employment. It is undisputed that the unilateral implementation of the new ordinance began with the transfer of approximately $32 million to the Employer from funds intended for distribution as part of employee deferred compensation. The new ordinance specifically took away from the otherwise independent pension board authority to maintain more than $12 million dollars in the long existent "Inflation Equity Fund" (the IEF); prohibited disbursals of more than $5 million per year from the IEF; and allowed the Employer to take for its own benefit the approximately $32 million then in the IEF in excess of the newly imposed cap of $12 million. This huge transfer of value from employee compensation and for the Employer's benefit had not been negotiated and occurred despite, as to the non-supervisory unit, the fact that the parties were still in negotiations; still in the fact-finding process; and despite the fact that even the Employer would not assert that the parties were at impasse in bargaining until months later. The ordinance change was also applied as to the supervisory unit and the sergeants and lieutenants unit even though they had valid collective bargaining agreements in place at the time.

The facts regarding the origin of the IEF were never genuinely placed in dispute. Under the pre-existing County Charter, and pursuant to the collective bargaining agreements, there existed an independent pension board, comprised of eight members. Six members represent beneficiary interests, four of whom were elected from amongst active employees, with two elected from retired employees. The County Executive and the chair of the County Commission also sit on the pension board. Over the past several decades, the pension board implemented and administered such benefits as were negotiated for Union members or were granted by the Employer to non-Union employees. The new ordinance took effective authority over the now-substantially depleted IEF away from the pension board.

The principle witness regarding the IEF, and the history of the so-called 13th checks disbursed from the fund, was Ron Yee, who was peculiarly situated to have broad knowledge of the origins of the IEF, its historic handling, and the impact of the change. Yee was initially in the 1980s an AFSCME officer, was then on the AFSCME negotiation team, and was on the pension board as an elected trustee; Yee then switched to management, rising to be the County's Chief Labor Negotiator, later becoming Deputy Director and later still the Director of the Retirement System. Yee was intimately familiar with the handling of the issue, from all sides, over a more than 25 year period, ending with his retirement as director of the retirement system in 2010, just as the disputed ordinance change was being implemented. I fully credited Yee's testimony as it was forthright, very direct, and while extensively knowledgeable. Yee freely acknowledged when he did not know something, or was not sure of specifics, or the like.

Significantly, the County rested its proofs without putting on any testimonial or documentary evidence challenging the Yee testimony. Further, Yee's testimony was supported by the corollary and likewise credible testimony of Hugh MacDonald, a former AFSCME negotiator when the IEF was originally bargained, former director of accounting for the County responsible for monitoring the pension funds, and current retiree pension trustee; as well as by the testimony of Richard Johnson, who had negotiated on behalf of County employees in AFSCME throughout the relevant several decades.

Yee testified, without contradiction, that the IEF was an expressly negotiated contractual promise. Prior to 1984, the parties negotiated cost of living increases as a hedge against inflation for active and retired employees. The IEF was designed and agreed to in 1984 to replace the former, and more costly, system of issuing periodic cost-of-living (COLA) checks to retirees. The IEF was established to collect and hold assets and to annually disburse monies to eligible retirees in place of the former COLA checks, in a form which came to be known as the "13th Check". The specific contractual agreement was that the parties would mutually develop a set of language changes to the County pension to implement a new "immunization investment portfolio" to replace the COLA system. The contractual commitment was that the Employer would invest those funds "on behalf of employees". It took the parties several years of effort to finally devise the IEF, as the implementation of the agreed upon "immunization investment portfolio", and have an enabling ordinance amendment adopted. That resolution was particularly notable as it was a part of the settlement of the 1983-84 AFSCME-County disputes over the unilateral discontinuation of COLA pay for active employees, which was litigated to a conclusion adverse to the County.

The IEF was originally enabled via ordinance amendment in 1986 as a direct result of the 1984 collective bargaining agreement which committed the parties to devising an amendment to the pension ordinance to provide a different mechanism for inflation protection. The pension ordinance, and subsequent amendments, with the obvious exception of the disputed 2010 amendment, was a creature of the collective bargaining process. This fact was expressly acknowledged by the Employer when the ordinance was amended in 2000, regarding the IEF itself. The County Commission motion adopting the 2000 ordinance amendment specified that the amendments were adopted to "*add additional language as a result of new labor agreements*". In this litigation the Employer argued, without any discernible evidence, that the County Commission was in fact mistaken in 2000 when it formally amended the pension ordinance to "add additional language as a result of new labor agreements". The Employer's theory was that the then new labor agreements did not have language in the actual contract documents reflective of the ordinance amendment. The reason for that, as established by the proofs, was that the parties routinely memorialized their pension agreements by the expedient of having the County Commission adopt mutually agreed upon ordinance changes, with the collective bargaining agreements containing language requiring compliance with the new pension ordinance. Additionally, in the several collective bargaining agreements over the years, the parties contractually committed themselves to the maintenance of the retirement benefits described in the then-existing pension ordinance, which they expressly agreed "*shall control except where amended or changed"* within the collective barging agreement.

Throughout the ensuing decades, the Pension Board continued by mutual agreement to be numerically dominated by elected employee and retiree representatives. The IEF was funded by so-called "excess earnings" above the anticipated or target rate of return set by the Pension Board. Each year, the Board applied a long standing set formula to divide actual returns on investments between the Investment Equity Fund (IEF) and the Active Employee Reserve. Monies diverted to the Active Employee Reserve had the effect of reducing the Employer's contributions the following year. Part of the monies placed in the IEF was used to fund that year's 13th check, and a portion might be held in reserve to fund payments in future years. The total disbursed each year was in the $10 million range, but the amount of funds available went up and down depending on the market; the precise amounts disbursed each year were subject to the discretion of the trustees. The reserves held in the IEF above current year needs were later used to fund the 13th check in down-market years.

The 2010 unilateral ordinance change put a new hard cap on the amount that the pension trustees could place, or hold, in the IEF. The implementation of that new cap defined the fund as being $32 million over-funded. Rather than disburse the funds to employees or retirees for whom it had been held in reserve, the $32 million was immediately transferred to the County's coffers pursuant to the new ordinance. As the County's former chief labor negotiator and director of the pension system Yee put it, the County "*robbed Peter to pay Paul*". The annual disbursal for the benefit of employees dropped to the range of $1 million for 2010 from the former average of $10 million. After the unilateral transfer, the

IEF reserve fund had plummeted to approximately $3 million, which was a twenty-seven year low.

The availability of yearly IEF 13th Checks was expressly held out to active employees as a part of their contractually guaranteed deferred pay in exchange for their labor on behalf of the County, including at the bargaining table by Yee as the County's chief negotiator. The pre-existing County pension plan had no built in inflation escalator. The practice of the pension board up to 1984 had been to provide periodic but uncertain COLA payments to retirees, in what was a corollary to the periodic COLA payments received by employees. That methodology was expensive and uncertain as it depended on specific budget allocations by the County Commission. The parties agreed to the IEF methodology as a way of providing a hedge against inflation as part of employee benefits, while taking control of it away from the political process at the County Commission. The parties subsequently agreed to exclude employees hired after certain dates from receiving IEF checks. Even though the precise amount of the IEF checks was never guaranteed, but depended on the markets, by express agreement the precise amount was ultimately controlled by the employee-dominated Board of Trustees exercise of their discretion and by the existence of the IEF reserve funds. That market relationship is now gone, the Trustees discretion is gone, and the IEF reserves are gone as the Employer has raided the cookie jar.

The change effected several different bargaining units represented by AFSCME: the non-supervisory unit, which had an expired contract but was in the factfinding process at the time of the unilateral change; the supervisory unit which had a collective bargaining agreement in effect at the time of the change which expressly required compliance with the then existing pension ordinance unless altered through negotiations; and the sergeants and lieutenants unit which similarly was governed by an extant contract with the same mandate. Each contract explicitly referred to disbursals from the IEF and defined the class of individuals entitled to receive the annual benefit.

Following the pension ordinance change, and in December 2010, the Employer asserted that the parties were then at an impasse in bargaining. Even in the County's supposed last best and final offer, the County only proposed eliminating the IEF payments as to new hires. The Employer then unilaterally imposed a 20% pay cut on the AFSCME non-supervisory 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 the 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.

The parties did finally voluntarily settle on the terms of a new CBA for the non-supervisory unit in December of 2011. That contract maintained, without significant changes, the contract language sought by the Union regarding the length of work week and layoff obligations of which the County ran afoul 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 had the Employer issuing two lump sum payments of 2% each at six month intervals to compensate employees for the earlier withheld annual service adjustments. The new contract included the County’s proposed exclusion of new hires from the benefits paid out of the IEF. The County proposed that the Union, as part of those negotiations, waive the claims in the present unfair labor practice charge. The Union rejected the proposed waiver, and the parties nonetheless settled the contract. That new contract, which runs until 2014, did not resolve the IEF issues including the $32 million transfer, which the parties reserved for resolution at MERC, and which are 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 and pension entitlements 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).

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, if necessary, 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 further defined impasse as the point at which the parties' positions taken in good faith 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 proving 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 generally not 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. Unsurprisingly, an impasse resulting from one party's bad faith conduct does not relieve that party of the duty to bargain. *Warren*, supra at 767.

It is additionally well settled that an employer may not unilaterally impose changes in mandatory subjects of bargaining, such as salary and benefits, 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 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 after good faith bargaining following the issuance of the fact-finders report, 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 (1984):
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> * * *
>
> 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, where a contract is in place, or permit a unilateral change in conditions of employment. Repudiation of contractual obligations is found by the Commission where there is an existing contract, as with the non-supervisory unit here; the contract breach is substantial; the contract breach has a significant impact on the bargaining unit as a whole; and there is no *bona fide* dispute over the interpretation or applicability of the contract language involved. *St. Clair County Road Comm*, 1992 MERC Lab Op 316. The repudiation question is here relevant only to two of the three AFSCME units, which had existing contracts.

As noted in the November 2012 Decision, these parties were hardly 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 County unilaterally devised a scheme of changes to existing conditions of employment which it believed would allow the budget shortfall to 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 the earlier reviewed conduct was 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, this same Employer, for unexplained, and seemingly inexplicable, reasons went back to the same playbook and unilaterally imposed cuts in an effort to “spread the pain” as it saw fit, rather than maintain the existing wage and benefit package mandated by the collective bargaining agreements the County had continued to negotiate and sign in the interim. As was inevitable, in 2011 the Commission held the replay of the County’s unilateral budget balancing actions to have been as unlawful as were the 1980s original. *Wayne County*, 25 MPER 24 (2011).

As held regarding the “Friday & Holiday furloughs”, the County had the absolute right to reduce its spending to meet its budget limitations; indeed, it had the duty to do so and it had readily available and contractually agreed upon mechanisms 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 likewise not entitled to unilaterally impose wage and benefit cuts to avoid reducing services and to instead force employees to bear the brunt of the County’s profligate spending.

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. A 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 match the workforce, and the services to be provided, to the quantity of funds available or allocated. The County contractually bound itself to the creation of a reserve fund to make payments as part of deferred compensation; contractually bound itself to a particular mechanism by which the funds would be disbursed; and contractually bound itself to maintain those funds for the benefit of employees. 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 for the public intact, with a less than full-sized budget. The resort by the County to self-help in seizing the funds, which it had explicitly agreed to set aside for the benefit of employees, was unlawful.

It has now become a convenient public relations gambit to assert that such 13th checks, and the establishment of dedicated funding streams to provide such deferred compensation benefits, amounted to a gift, a gratuity, or a bonus. They are not.[14] The 13th check system is utilized by many employers, in addition to Wayne County, as a method of giving some rough protection against inflation in deferred compensation systems. In the 1970s, it was not unusual to have formal inflation hedges in such systems tied directly to the cost of living indicators (COLA). That system became perceived as both unpredictable and prohibitively expensive by the late 1970s-early 1980s. In Wayne County in particular, the Employer's effort to get out from under the admittedly burdensome COLA increases lead directly to unilateral action by the County and to the 1984 and 1985 adverse Commission decisions. For Wayne County, as established by testimony in the present case, the COLA system was replaced by the 13th check system which created a dedicated funding stream to provide an annual bump which, while guaranteed to be paid, was not guaranteed to actually match the rate of inflation. It might be higher than a traditional COLA payment; it would likely be lower; but the annual receipt was assured.

The focus on the elimination or curtailment of promised deferred compensation payments has its genesis in the present difficult fiscal circumstances, and also in a specifically Machiavellian pressure. Those who have already retired or who are about to retire have the least bargaining power of the several constituencies whose needs compete for limited resources. Office holders rightly seek to satisfy the demand of constituents for maintained services, even with reduced tax revenues. Employers see value in placating those on whose labor they must depend in the coming months or years to provide those services to the public. It is that very recognition of the value of labor peace that underpins the obligations set by PERA. There is, however, little immediate perceived

[14] The reference to retirement obligations for public employees as "gratuities" is not without historical precedent in Michigan, *albeit* not supportive of the assertion. In *Bowler v Nagel*, 228 Mich 434 (1924), the Court specifically rejected the City of Detroit's assertion that amounts paid from retirement funds were "gratuities". However, in *Brown v Highland Park*, 320 Mich 108 (1948), the Court faced a financially beleaguered city and held that, despite *Bowler,* such pension obligations were not individually enforceable "contractual" obligations in nature, such that the City of Highland Park could eliminate the pensions of the widows of police and firemen, by the expedient of a Charter amendment, without offending State law or the Federal Constitutional impairment of contracts clause. Outrage over the impact of that decision helped lead to the 1963 Constitution, which in article 9, section 24, put the theory to rest and defined such public pension benefits as Constitutionally protected entitlements. The same Constitutional Convention adopted article 4, section 48, which authorized the creation of PERA, the unionization of public employees, and the negotiation of enforceable collective bargaining agreements.

value in maintaining peace with those whose labor is no longer of significance.

Additionally at play is a strong dose of willful forgetfulness. Public officials, and the public they serve, see little value in cutting a pay check to someone who did not perform labor last week or last month and whose services are not needed next month. The simple fact, however, is that the retirees, and those to retire in the future, worked in exchange for a specific wage and benefit package which included pensions and the 13th check inflation protection. The monies were earned and they are owed; yet, snatching the payments away currently plays well to the public as 'sound fiscal management' or a 'fair sharing of the pain'.

One only need posit the potential corollary to recognize the unfairness and unreasonableness of the claw-back of payment for labor already provided. The County's actions in repatriating this wealth are, in practical reality, no different than if they showed up at the homes of former employees to announce "*We have decided that 2 years ago (or 10 years ago, or 20) we paid you at an agreed upon hourly rate that we now think was too high. Therefore, we have repossessed your car & we took your kids bikes out of the garage and we are selling them to get our money back."* The populace would be rightfully up in arms at such an affront.

No public official, or fiscal analyst, proposing such schemes of retroactive withdrawals of promised deferred compensation have themselves taken, or offered to take, retroactive pay cuts for their services in prior years (which in many cases arguably are what led to the present fiscal crisis). No one expects current elected officials to give back some percentage of their prior years' pay, but it nonetheless seems reasonable to demand it of retired or soon to retire employees.

Of course the above analysis is unnecessary when good faith bargaining occurs and addresses a fiscal downturn responsibly. Here, after all the drama and all the litigation losses, the County and the Union were finally able to negotiate a new collective bargaining agreement. It restored most of the conditions of employment that had been unlawfully changed. The Union agreed to a wage cut for future work performed. Significantly, the Union agreed that the 13th Check promise would be withheld from new hires. And that is a proper handling of the question. Employees are entitled to know under what package of remuneration they are being asked to give their labor. For an employer to say to employees '*After today, we can no longer pay as much as we did in the past*" may be an unwelcome occurrence; however, it properly allows employees to choose freely to work for the lower wages or to seek employment elsewhere. Just as employees cannot rightly demand more than has been promised, an employer cannot, after the labor has been performed, pay less than was promised.

As to both the supervisory unit and the sergeant and lieutenants units, unexpired collective bargaining agreements were in place at the point in September 2010 when the County unilaterally altered the IEF and snatched $32 million dollars that had been set aside for employee deferred compensation. That resort to self-help was an unarguable repudiation of the Employer's contractual commitments to those two bargaining units. No viable defense has been proffered, much less proved. In the absence of a an even colorable claim to having a good faith dispute as to the meaning of the contractual commitments, such a refusal to comply is a repudiation of the agreements and an unfair labor practice, as it violates the duty to bargain in good faith under section 10(1)(e) of PERA. See, *St. Clair Rd Comm*, supra.

A different analysis applies to the non-supervisory AFSCME bargaining unit, where the prior collective bargaining agreement had expired. While an employer is certainly able, under appropriate circumstances, to unilaterally change conditions of employment after expiration of a collective bargaining agreement and upon exhausting its bargaining obligations, that has not occurred here. At the time the disputed changes were imposed, the parties were in the late stages of a formal fact-finding process 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 pay and benefit cuts during the pendency of a fact-finding 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 benefit cuts followed shortly on the heels of the fact-finders September 2010 report and without any pretense at engaging in a renewed effort to bargain based on the recommendations made by the fact-finder.

In *Orion Twp*, 18 MPER 72 (2005) the Commission most recently reiterated the obligations faced by parties after the issuance of a fact-finders report, holding:

> We have consistently stated the importance of mediation and fact finding, indicating that the failure of the parties to utilize these services to the maximum extent necessary may be viewed as indicating a lack of good faith, and contrary to the intent and policies of PERA. *Crestwood Sch Dist*, 1975 MERC

> Lab Op 609; *Cass Co Road Comm*, 1984 MERC Lab Op 306. In the *Wayne Co* case, [*Wayne Co*, 1984 MERC Lab Op 1142, and 1985 MERC Lab Op 244, 250, aff'd 152 Mich App 87, 125 LRRM 2588 (1986), lv den 426 Mich 875 (1986)] we established a rule that parties must bargain for a reasonable time over the substance of a fact finder's report. We stated that in most cases, a reasonable time is 60 days after the issuance of the report, providing the parties are bargaining in good faith. We have found that after fact finding, a party must make a serious effort to reconcile its differences with the other side; simply meeting and discussing the fact finder's report may not be sufficient to satisfy the bargaining obligation. *Oakland Cmty College*, 2001 MERC Lab Op 273; *City of Dearborn,* 1972 MERC Lab Op 749, 759.

As to the non-supervisory units, the County had not exhausted its bargaining obligations prior to enacting the pension ordinance change and materially altering previously promised portions of the wage and benefit package. The County's actions amounted of a forthright raid on an investment fund which the County had contractually agreed it would maintain for the benefit of employees. The Commission has rightly recognized the entirely corrosive, if not fatal, effect such self-help maneuvers have on the statutorily mandated bargaining process. See, *Kalamazoo County & Sheriff*, 24 MPER 17 (2011). If in the middle of bargaining, either side is allowed to unilaterally grab what it can grab, the prospects dim for the mutual give and take necessary to reach a voluntary resolution. That unilateral change in conditions of employment as to the non-supervisory unit, in particular the seizure of the $32 million dollar fund, during the bargaining process and in the late stages of the factfinding process, was an unfair labor practice under section 10(1)(e) of PERA.

Further, and again only as to the non-supervisory unit that had an expired contract, even assuming *arguendo* that good faith bargaining had occurred over a successor agreement and that an impasse had, contrary to the prior Decision, existed in either October or December 2010 between the County and the Union as to the non-supervisory unit, the changes would still be unlawful. Under PERA, when parties have exhausted the bargaining process, including fact-finding, and are at a good faith impasse, the Employer is privileged to unilaterally implement changes in conditions of employment consistent with the Employer's final offer. *Ottawa Co v Jaklinski,* 423 Mich 1 (1985); *Detroit Police Officers Ass'n v. Detroit,* 391 Mich 44, 54-55 (1974).

Here, the Employer's formal final offer in the factfinding proceeding as to the non-supervisory unit was that the IEF payments would be made only to existing employees or then-retired employees and would be denied to all new hires. What the Employer implemented was far more draconian than its final offer. Instead of merely closing the door to future accruals of the benefit, the Employer engineered an ordinance change which it utilized to drain the investment fund from which payments to both current employees and future hires would have been drawn. That change was of course not consistent with what had been proposed at the table by the Employer and, consequently, the Employer's over-reaching conduct would have been unlawful even if the parties had been at a good faith impasse.

I have above found that the County's actions were a straightforward repudiation of existing agreements as to the supervisory and sergeants and lieutenants units, as well as an unlawful unilateral change in the midst of bargaining, and the fact-finding process, as to the non-supervisory unit. The County proffered no traditionally accepted or viable defense to its otherwise straightforwardly unlawful conduct. The Employer did advance multiple esoteric defenses which are addressed below, with the remainder of the discussion divided into narrow sub-sections specific to the County's several claims.

1. Financial Exigencies Do Not Excuse a Statutory Violation

As in the prior litigation, the County asserts 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.[15]

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. As seen in instance after instance by this agency, most employers and most 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 themselves play by the rules. A union cannot likely sell a new concessionary deal to its members where, as here, the Employer is, with an openly stated belief in its own impunity, 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).

[15] Notably, a different outcome may well arise where an overspending governmental entity legitimately and formally seeks bankruptcy protection.

2. Deferral to Arbitration Is Not Appropriate

Just as in the recent prior cases, 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. First, as to the non-supervisory unit, arbitration was presumably not available as its collective bargaining agreement with the County had expired and with it the duty to arbitrate.[16] Further, and to the contrary, there was never a *bona fide* good-faith dispute over the question of the contractually mandated benefits, or over the right of either party to unilaterally abandon or modify its own obligations. As in the prior cases there is no question amenable to arbitration here, as the County has repudiated its obligations rather than asserted a good faith dispute over some detail of its duties. 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; however, here the deferred compensation benefit cut applied across the board to the entirety of the several AFSCME units. The cut was indisputably unilateral and occurred during a period when respectively, collective bargaining agreements were in place or the bargaining obligation still attached. The County proposal to the Commission to remand the matter to arbitration is merely a tactic intended to avoid substantive and effective review or remedy. 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). 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 where there is any good faith dispute as to the nature of the contractual obligation. *Port Huron Ed Ass'n v Port Huron Area Sch Dist,* 452 Mich. 309, 317-321 (1996). Here there is no good faith dispute over the parameters of the Employer's obligations; rather, the County seeks to instead unlawfully reject its existing obligations contrary to its duty to bargain. Where such repudiation has occurred, the Commission is prohibited, by prior decision of our Supreme Court, from deferring to contractual arbitration and must instead enforce the statutory obligations on behalf of the people of the State. See, *Detroit Fire Fighters Ass'n v. City of Detroit*, 408 Mich. 663, 676 (Mich 1980). Moreover, the County's asserted defenses are statutory and Constitutional rather than

[16] The Respondent has previously taken the position, as to these same parties, that there is no duty to arbitrate disputes which arose after expiration of an agreement, such as here with the non-supervisory unit. See, *AFSCME Council 25 v Wayne County*, 290 Mich App 348 (2010).

contractual and, therefore, are not within the purview of a private arbitrator.

3. The Parties Were Not at Impasse in October 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. As held in the November 2012 Decision, and as to the non-supervisory AFSCME unit, the parties were not at a good faith impasse in bargaining in December 2010, as then asserted by the Employer, and therefore could not possibly have been at an impasse earlier in October of 2010 when the disputed pension changes were enacted.

4. The County Had Not Bargained In Good Faith Prior to Declaring Impasse

Even assuming *arguendo* that an impasse had, contrary to the prior Decision, existed in either October or December 2010 between the County and the Union as to the non-supervisory unit 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).

In this series of cases, there can be no question but that the County engaged in bad faith bargaining, where the County made demands which sabotaged any possibility of securing an 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; a draconian health insurance cut off; and then deferred compensation benefit cuts. 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 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 the County is a large and sophisticated employer with many decades of experience in labor negotiations and a track record in litigation arising from the 1980s disputes. The County knows how to comport itself within the ordinary bounds of the law and chose to do otherwise.

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 Employer 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 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).

5. The Separation of Powers and Legislative Body Constitutional Authority Defenses

The County asserted a defense that the Charges should be dismissed in deference to the legislative authority of the County Commission. It was argued that the County Commission's decision to amend the pension ordinance 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).[17]

The underlying theory has likewise been resoundingly rejected. It is a truism that the County Commission has exclusive authority to decide for itself what ordinances to adopt and to later amend, repeal, or replace such ordinances; however, the mere adopting of an ordinance does not lawfully effectuate changes in conditions of employment where a bargaining obligation otherwise exists. That claim of an ability to sidestep bargaining obligations imposed by State statute by the expedient of enacting conflicting local laws was flatly rejected, as to retirement benefits, in the seminal *Detroit Police Officers Association v Detroit*, 391 Mich 44 (1974). See also, *AFSCME et al v Detroit*, 218 Mich App 263 (1996); *City of Detroit (Fire Fighters),* 1982 MERC Lab Op 150. Simply, the County Commission can indeed pass any local ordinance or even Charter amendment that it sees fit to enact; however, neither the County Commission nor the County Executive can implement such changes without first fulfilling the duty to bargain under State law.

The County further asserted that the "Employer" could not be held liable for an unfair labor practice based on actions of its purportedly separate legislature. The argument is based on a nonsensical syllogism, which begins with the unremarkable fact that the Union negotiates collective bargaining agreements with the County Executive, with the major premise then offered that such negotiations necessarily require the

[17] 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*, 297 Mich App 597 (2012).

conclusion that the County Executive is the “Employer”; the secondary premise is the equally obvious fact that the County Commission is a legislative body separate from the County Executive; the offered conclusion is that therefore the County Commission is *not* the Employer, and therefore could not have violated PERA through unilateral changes to conditions of employment which only an *employer* is prohibited from making. While such constructs may find utility in an undergraduate logic class, they are ill-suited to legal argument or to the regulating of the affairs of major institutions.

The defects in the syllogism are myriad. First, the County Executive is not the “Employer” and neither is the County Commission. The “Employer” is *Wayne County* which is the only legally recognized body politic which can hold property, authorize contracts, sue, and be sued in its own name (in for example the present regulatory action). Second, while the Union meets with the County Executive (or his designees) to negotiate a collective bargaining agreement, any such agreement is subject to ratification, or rejection, by the County Commission, underscoring that the “Employer” is of two equal, joined, and necessary parts when it comes to labor relations. Regardless, the PERA, when it prohibits action by a “public employer” likewise and expressly prohibits the same action by “any officer or agent” of that “employer”, such that, any action by the County Commission, the County Executive, or a mere department head or supervisor of the County, would be attributable to the County for purposes under PERA.

In effect, what the County asks through this theory is that the Commission, as an administrative agency, ignore, set aside, or reverse the seminal interpretation of PERA by the Michigan Supreme Court in a 40-year old decision, perhaps predictably, involving Wayne County itself. When PERA was enacted in 1965, it created entirely new, and often equally uncertain and unwelcome, obligations on public employers. There was then legitimate good faith uncertainty about such fundamental questions as which entity was the employer and who spoke for it. The Wayne County Civil Service Commission brought an action for declaratory judgment respecting who was the employer of employees of Wayne County for purposes of collective bargaining under PERA. In that action, the Civil Service Commission asserted that based on long standing State statutory authority, which had created the Wayne County Civil Service System, it had exclusive authority over such things as setting wages and benefits for County employees and that it, not the County Commission (then called a Board of Supervisors), was the statutory “employer” for purposes under PERA. See, *Civil Service Commission for the County of Wayne v Wayne County Board of Supervisors*, 384 Mich 363 (1971).

The Court recognized the legitimate difficulties faced by efforts at compliance with the then-new PERA and its then unfamiliar obligations. There was then uncertainty about which branch of local government or which particular entity was, in effect, in charge when it came to labor relations when employees chose to unionize under PERA. Nonetheless, the Court sought, with until now near uniform success, to put to rest such arguments. Where differing branches of government sought to assert control over bargaining based on prior rights or powers, in the face of new statutory obligations under PERA, the Court found that the newer statutory obligations under PERA operate "*to the extent of repugnancy*" as a repeal of prior statutory obligations or rights. Citing, *Breitung v Lindauer*, 37 Mich 217 (1877).

The Court found that "*In short shrift this means that the purposed thrust of the act of 1965* [of regulating bargaining] *must be implemented as provided therein*" and that conflicting claims of *"authority and duty"* made by a particular governmental entity were "*diminished pro tanto by the act of 1965 to the extent of free administration of the latter according to its tenor*". To paraphrase and follow the command of *Civil Service v Wayne County*, the Wayne County Commission remains a separate branch of the County government, co-equal with the County Executive in most matters and with greater powers regarding the ultimate allocation of resources; however, any claims of unreviewable action by the County Commission in the field of labor relations, including regarding employee wages and benefits, "was diminished *pro tanto*" by the passage of PERA.

6. The Retired Status of Prior Recipients of the 13th Checks Does Not Insulate the County From Liability

The County asserts that MERC lacks jurisdiction to resolve this dispute, which the County defines as involving a mid-term modification to benefits of already retired former employees, in reliance on its interpretation of the decision in *Butler v Wayne County*, 289 Mich App 662 (2010).[18] The County is correct that a violation of PERA will not be found as to a refusal to bargain regarding already retired individuals, for they are not "employees" under the Act, and therefore, not subject to mandatory bargaining obligations. However, the County's analysis of the issue is defective. Under PERA, enforceable agreements can be reached promising current employees deferred compensation benefits that will be collected only in retirement. Neither party is obliged to re-negotiate such

[18] In *Wayne County*, 26 MPER 22 (2012) MERC upheld a finding of a violation by the County, in unilaterally withholding health care benefits from disability retirees, specifically finding Wayne County's reliance on the Butler decision to be "*misplaced*". The *Butler* decision was an unremarkable one, finding that the complained of action by the employer had been specifically authorized by the contract in question.

promises as to individuals who have already retired, as they are no longer "employees" under the Act, and the Union is no longer their exclusive bargaining agent. The parties may nonetheless choose to negotiate over benefits to be received by already retired individuals; however, such bargaining topics are deemed "permissive" in that either party may refuse to negotiate over the questions.

Simply, future pension rights for existing employees are mandatory subjects of bargaining. Regarding already retired individuals, promised benefits are locked in and changes in those benefits are at best a permissive subject of bargaining. Collective bargaining agreements predictably, and almost necessarily, frequently contain agreements as to both mandatory and permissive subjects. Those agreed upon benefits become intertwined such that a repudiation of one benefit is a repudiation of the entire package and therefore a violation of PERA. See, *Kalamazoo County & Sheriff*, supra.

Additionally, as to the not yet retired employees, the unlawful repudiation is in denying them the contractual right to collect promised benefits in the future, such as here, the 13th checks in such amounts as the market forces may make available under the formula used by the pension board to allocate 'excess earnings'. Further, as to current employees of Wayne County, the repudiated promise of most immediate significance is the Employer's promise to maintain the IEF reserve funds "for the benefit of employees" and to not spend it for its own purposes. Here, current employees are entitled to insist that the County restore the funds, and funding mechanism, so that when the current employees retire in the future, the funds necessary to provide them with their promised and anticipated 13th checks will still be there.

Moreover, and as the County is well aware, a violation may be found where an Employer contractually promises to provide certain benefits upon retirement and then, without bargaining, repudiates that promise. In *Wayne County (AFSCME),* 26 MPER 22 (2012), one of the series of cases arising from this same 2009-2010 bargaining debacle, the Commission found a violation and ordered relief where the County unilaterally announced that it would no longer provide health care benefits to certain classes of employees who left work on a disability pension. That change altered existing promised benefits, was unilateral, and was therefore unlawful.

7. The *Studier* Decision Is Irrelevant to Any Analysis Under PERA

The County relies on a tortured application of the decision in *Studier v MPSERS*, 472 Mich 642 (2005), to excuse its unilateral changes, which would otherwise be unlawful under PERA. The *Studier* case involved a claim by public school retirees challenging an increase in their insurance premium copays as a claimed violation of Article 9, section 24 of the Michigan Constitution. That clause of the Constitution expressly protects "accrued financial benefits" under public pension plans from any later impairment. The Court held that the Constitutional protection extended only to traditional pension benefits under a pension plan, that is the usual monthly pension check, and that the Constitutional protection did not extend to non-pension benefits, such as retiree health insurance, or to other collateral benefits offered under State statutes. *Studier* did not address any issues under PERA.

It perhaps states the obvious, but this unfair labor practice case is not about the Constitutionality of a County ordinance change. The rights protected under PERA may well not rise to the level of independently Constitutionally-protected, nor does that standard need to be met to prevail in an unfair labor practice case. None of the multiple bargaining violations already found arising from Wayne County's conduct during the 2009-2010 bargaining cycle likely rise to the level of Constitutional violations. The statutory right of employees to not have their wages unilaterally cut, the length of their workweek shortened, their continued receipt of health insurance coverage denied, or as here, the continued functioning of the negotiated IEF gutted, do not need to rise to the level of Constitutionally-protected rights to be nonetheless protected under PERA.

8. The *Wayne County Retirement System v Wayne County* Decision Is Irrelevant to Any Analysis Under PERA

The County relied heavily on a September 2011 decision by Wayne County Circuit Court Judge Sapala, in *Wayne County Retirement System v Wayne County*, in which the trail court opined that the unilateral changes to the IEF benefits were not unlawful under 1963 Const art 9, section 24. The Circuit Court made certain findings regarding the nature of the collective bargaining agreements between the County and the Union, in *dicta*, and significantly, in a case in which the Union was not a party. The County seeks to grant special significance to the Circuit Court's finding that the IEF benefits were not "accrued financial benefits". Of course they were not, and therefore they were not Constitutionally protected against impairment. If the involved employees were not represented by Unions and subject to collective bargaining agreements, the County would have had a free hand in changing conditions of employment, as is routinely true regarding non-union employees. That recognition alters nothing regarding the lawfulness of the conduct under PERA. Regardless, the Sapala decision was reversed in *Wayne County Retirement System v Wayne County*, 301 Mich App 1 (2013). The appellate court found that the ordinance challenged in this case also violated the Public Employee Retirement System Investment Act (PERSIA), MCL 38.1132 *et seq*, and ordered restoration of the improperly diverted $32 million dollars. The appellate court did not address the PERA questions that are before this tribunal. Except to the extent that the relief ordered herein may be duplicative in part of the relief already ordered by the Court of Appeals, both of the decisions are irrelevant to these proceedings.

9. The *Macomb County* Decision Supports the Finding of A Violation in this Instance

Both parties rely on the Michigan Supreme Court decision in *Macomb County v AFSCME Council 25*, ___Mich___ (No. 144303, June 12, 2013). In that case, the Court reversed MERC in its earlier finding of a violation where Macomb County acting through its retirement board altered a long standing reliance on a particular actuarial table used to calculate benefits, to the disadvantage of some retirees. The decision functioned primarily to return the Commission to a closer hewing to the standard provided under *Port Huron Education Ass'n v Port Huron Sch Dist*, 452 Mich 309 (1996).

In *Macomb County*, at the MERC ALJ level, no violation of the statute was found. The Commission decision reversing ALJ Stern was in turn ultimately reversed by the Supreme Court. The grounds prove not relevant to the present matter. The Supreme Court found the underlying collective bargaining agreement in Macomb to be unambiguous and that it expressly provided discretion to the retirement board to make the challenged change in mortality tables. The Court held that MERC had erred by relying on a past practice, *albeit* of several decades duration, of using the same actuarial table as a basis for finding an unlawful unilateral change, rather than respecting the unambiguous language of the contract which, even if long unused, expressly allowed the retirement board to make the change in mortality tables.

The Court in *Macomb* reaffirmed the right of parties to rely on their agreements, as held in the earlier *Port Huron* case, the holding of which remains controlling law. In the instant case, the unambiguous language of the contracts supports a finding of a violation.[19] The parties here expressly provided for a particular benefit to be funded and disbursed in a particular manner. Their agreements were memorialized both in

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[19] The Union did here additionally make a "past practice" argument in support of its opposition to the unilateral changes made by the Employer, but I find the argument to be mere surplusage where the express contract language precluded the action taken by the Employer.

contract and in ordinance. The County sought, unsuccessfully as to the non-supervisory unit, to negotiate a prospective change in entitlement to benefits. Failing at that, the County acted unilaterally in passing and then enforcing an ordinance to unilaterally almost entirely take away a negotiated benefit. The *Macomb* decision affirms rather than detracts from the enforcement of rights as to an unambiguous agreement.

A portion of the *Macomb* decision re-affirms earlier case law requiring MERC to refer back to arbitration disputes "covered by" a collective bargaining agreement which had in it an arbitration clause where there was any colorable claim that the complained of conduct was allowed under the contract. The Court held that such disputes are for arbitrators, not the Commission, to decide. Here, the "covered by" analysis fails for two separate reasons. First, as to the non-supervisory unit, which contains the bulk of the effected employees, there was no contract in place at the time of the unilateral change in conditions and no arbitration clause to which the matter could be deferred. Second, as more fully discussed above, the County simply had and advanced no even arguable basis under the prior ordinance or several collective bargaining agreements which could excuse its conduct. Simply, no plausible contractual defense was proffered. Rather, the Employer here advanced statutory and Constitutionally based defenses which are not amenable to resolution by a private arbitrator.

Moreover the County seeks to turn the *Macomb* decision on its head. In *Macomb*, the Court found that the contract language expressly granted the retirement board the discretion to make certain decisions, and the retirement board made such a decision well within its established discretion. Here, the unilaterally imposed new Wayne County ordinance took away from the pension board the discretion which the parties had expressly agreed the pension board alone would wield.

10. The Fact that the Prior Agreements of the Parties Were in Part Memorialized In Ordinance Amendments Does Not Excuse Unilateral Changes

The County advances the additional novel and implausible theory that because the pension obligations immediately in dispute were primarily recorded in an ordinance rather than in the collective bargaining agreements, the unilateral change was not a violation of the duty to bargain. The County relies on the unremarkable assertion that because the County Commission as a legislative body has the right to adopt ordinances, it has the corollary right to repeal or amend ordinances. First, under *Detroit Police Officers Ass'n (DPOA) v. Detroit,* 391 Mich 44, 54-55 (1974), it is perfectly appropriate for parties to memorialize their negotiated agreements in various forms. The Supreme Court in *DPOA* expressly noted that under the plain language of PERA, it is proper for parties to negotiate and to then record their deal in a collective bargaining agreement, in a memorandum of understanding, or by passing an appropriate ordinance or resolution, as in the *DPOA* case itself which involved a municipal pension ordinance. In relevant part, the statute provides that once a deal has been struck, it may be memorialized by "*the execution of a written agreement, ordinance, or resolution*" incorporating the agreed upon terms. See, 423.215 (1). It is not in the least uncommon for parties to memorialize a municipal pension deal by passing an amended ordinance, as here, and especially as to pension issues where typically, a union representing some employees negotiated beneficial changes which are then applied across the board to all employees, even those not in a bargaining unit.

Moreover, in addition to the original 1986 and the revised 2000 ordinance, the parties did, in fact, memorialize their deferred compensation agreements in the several collective bargaining agreements. In those agreements, the parties contractually committed themselves to the maintenance of the retirement benefits described in the then-existing pension ordinance, which they expressly agreed "*shall control except where amended or changed*" within the collective bargaining agreement itself. Thus, the pre-existing ordinance was incorporated by reference in the parties' written agreements.

Conclusion

The County has offered no substantive or valid reason why it should, in this latest instance, be excused from the obligations uniformly imposed on all other 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. 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 retirement related benefit cuts were an unlawful unilateral change in basic conditions of employment implemented in violation of the County's well-established obligations under Section 10(1)(e) of PERA to bargain in good faith, to refrain from repudiating prior agreements, and to maintain pre-existing conditions of employment during the bargaining process.

I have carefully considered any additional arguments asserted by the parties in this matter and have determined that they do not warrant a change in the result. For the reasons set forth above, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

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

1. Cease and desist from

    a. Failing to bargain in good faith with the representative of its employees, including by failing to participate 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 benefits during the pendency of good faith bargaining and fact-finding proceedings;
    e. Seizing assets held for the benefit of employees, during the bargaining process and prior to the conclusion of fact-finding proceedings and good faith bargaining;
    f. Where an unexpired collective bargaining agreement is in place, repudiating the terms of such agreements and refusing to comply with the unambiguous obligations under such agreements;
    g. Interfering in the holding and distribution of assets by the retirement board from the IEF when it is acting pursuant to authority expressly granted to it by the parties, whether through agreement memorialized in the pension ordinance or in separate written collective bargaining agreements.

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

    a. Bargain in good faith with AFSCME regarding successor collective bargaining agreements as to each of the several units as the respective contracts expire;

b. Affirmatively renounce reliance on the September 30, 2010 pension ordinance amendment;

c. Restore to the Inflation Equity Fund the entirety of the approximately $32 million in assets diverted from the IEF following the adoption of the September 30, 2010 ordinance amendment, to the extent that the assets have not already been restored pursuant to an order of the Court in the collateral proceedings;

d. Affirmatively renounce and cease any effort at enforcement of the $12 million cap on assets held in the IEF, unilaterally imposed through the adoption of the September 30, 2010, ordinance amendment;

e. Affirmatively renounce and cease any effort at enforcement of the $5 million cap on annual distributions from assets held in the IEF, unilaterally imposed through the adoption of the September 30, 2010, ordinance amendment;

f. Provide statutory interest to, or otherwise make whole, the IEF for the deprivation of the approximately $32 million in assets and the intervening lost earnings on those assets;

g. Refrain from any interference in the distribution of the so-called "13th checks" by the retirement board, including in the distribution of any make-up or backpay checks as may be issued in the discretion of the retirement board;

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

i. Provide the Union with the full calculation of amounts reimbursable to the IEF, or unit members, and interest on same;

j. 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: October 10, 2013

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. Seize assets held for the benefit of employees, during the bargaining process and prior to the conclusion of fact-finding proceedings and good faith bargaining;
e. Where an unexpired collective bargaining agreement is in place, repudiate the terms of such agreements and refuse to comply with the unambiguous obligations under such agreements;
f. Interfere in the holding and distribution of assets by the retirement board from the Inflation Equity Fund.

WE WILL

a. Bargain in good faith with AFSCME regarding successor collective bargaining agreements as to each of the several units as the respective contracts expire;
b. Maintain all existing conditions of employment throughout the bargaining and fact-finding process;
c. Affirmatively renounce reliance on the September 30, 2010 pension ordinance amendment;
d. Restore to the Inflation Equity Fund the entirety of the approximately $32 million in assets diverted from the IEF following the adoption of the September 30, 2010 ordinance amendment, to the extent that the assets have not already been restored pursuant to an order of the Court in the collateral proceedings;
e. Affirmatively renounce and cease any effort at enforcement of the $12 million cap on assets held in the IEF, unilaterally

imposed through the adoption of the September 30, 2010, ordinance amendment;

f. Affirmatively renounce and cease any effort at enforcement of the $5 million cap on annual distributions from assets held in the IEF, unilaterally imposed through the adoption of the September 30, 2010, ordinance amendment;
g. Provide statutory interest to, or otherwise make whole, the IEF for the deprivation of the approximately $32 million in assets and the intervening lost earnings on those assets;
h. Refrain from any interference in the distribution of the so-called "13th checks" by the retirement board, including in the distribution of any make-up or backpay checks as may be issued at the discretion of the retirement board;
i. Otherwise make whole all current or former AFSCME bargaining unit members adversely effected by the unilateral changes in conditions of employment found unlawful in the Decision in MERC Case No C10 J-266;
j. Provide the Union with the full calculation and method of calculation of amounts reimbursable to the IEF, or unit members, and interest on same;
k. Cooperate with the pension board in providing 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.

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.