STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

VAN BUREN TOWNSHIP,
Public Employer-Charging Party,

MERC Case No. CU15 I-028
-and- Hearing Docket No. 15-052747

POLICE OFFICERS LABOR COUNCIL,
Labor Organization-Respondent.
_____/

APPEARANCES:

Cummings, McClorey, Davis & Acho, P.L.C., by Ethan Vinson, for Charging Party

Thomas R. Zulch, Police Officers Labor Council, for Respondent

DECISION AND ORDER

On August 31, 2016, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: October 18, 2016

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

VAN BUREN TOWNSHIP, Case No. CU15 I-028
Charging Party-Public Employer, Docket No. 15-052747-MERC

-and-

POLICE OFFICERS LABOR COUNCIL,
Respondent-Labor Organization

_____/

APPEARANCES:

Cummings, McClorey, Davis & Acho, P.L.C., by Ethan Vinson, for the Charging Party-Public Employer

Thomas R. Zulch, Attorney for Police Officers Labor Council, for the Respondent-Labor Organization.

DECISION AND RECOMMENDED ORDER

On September 15, 2015, Van Buren Township (Township), filed the present unfair labor practice charge against Police Officers Labor Council (POLC or Union), alleging that the Union violated its duty to bargain in good faith. Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was assigned to Administrative Law Judge, Travis Calderwood, of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (Commission). Based upon the record as whole, including the transcript of the oral argument held before the undersigned in Detroit, Michigan, on October 29, 2015, along with post-hearing briefs filed by the parties on or before December 28, 2015, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge:

The Township, in its charge against the Union, alleges that the Union violated its duty to bargain in good faith by its insistence on negotiating to impasse and filing for Act 312 Arbitration over changes related to benefits attributable to the Municipal Employees' Retirement System of Michigan (MERS) in spite of a clear and unambiguous waiver set forth in the parties' collective bargaining agreement.

On September 30, 2015, the Union filed its response to the charge.

On October 2, 2015, I convened a telephone conference with the parties in which I communicated my opinion that there were no material facts in dispute. The parties agreed to present oral arguments and submit post-hearing briefs. Oral argument was held on October 29, 2015, with briefs being received on or before December 28, 2015.

Findings of Fact:

The following findings of fact are based upon the undisputed facts as set forth in the parties' pleadings and at the October 29, 2015, oral argument.

The POLC represents a bargaining unit comprised of police command officers employed by the Township. The POLC and Township were parties to a collective bargaining agreement in effect from January 1, 2010, through December 31, 2013. Section 1 of Article XXI contained the following provisions relevant to the present proceeding:

> B. The Union on behalf of itself and members of the collective bargaining unit waives any right to negotiate on any item that involves the pension, including each of the individual items herein above set forth, as well as any other benefits attributable to the MERS pension plan until such time as actuaries employed by MERS certify that the plan is one hundred percent (100%) actuarially funded. In addition, the Union waives any right to file a grievance or engage in any other forum for benefits related to the MERS pension plan with the exception that if an individual believes that he or she is not receiving the appropriate pension such issue would be subject to the grievance procedure. However, neither the grievance procedure, arbitration, administrative actions or court procedures shall be utilized in order to obtain an increase in any of the individual items herein above set forth or any other item associated with the plan until it is certified by actuaries employed by MERS to be one hundred percent (100%) actuarially funded.
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> C. The Union, on behalf of itself and its members waives the right to utilize Act 312 of the Public Acts of 1969 or any other amendment or act which the State may pass providing for arbitration of any issue related to the MERS pension plan until it has been certified to be one hundred percent (100%) actuarially funded by actuaries employed by MERS.
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> D. The Union does not waive its right to negotiate future increases in wages which may impact the pension plan in terms of an increased pension based upon wage increases.
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> G. In the event that in any year it is actuarially determined that a contribution of more than seventeen percent (17%) (the Employer's twelve percent (12%) contribution and the employee's five percent (5%) contribution) is required the employee shall be liable for all amounts and percentages over and above the seventeen percent (17%) contributed by the employer and the employee. The

> employer shall have no responsibility whatsoever to make any contribution above twelve percent (12%) until such time as actuaries employed by MERS certify that the fund is one hundred percent (100%) actuarially funded.

Prior to the agreement's expiration, the parties began negotiating over a successor agreement; meeting and settling several issues. The parties participated in mediation over issues concerning the employee and employer pension contribution and wages. On or about May 12, 2015, the POLC filed a petition seeking compulsory arbitration under Act 312. The petition identified two economic issues. The first issue dealt with possible increases to the employee pension contribution and sought to cap employees' maximum liability under Subsection G above to nine percent (9%). The second issue sought to establish a wage increase for sergeants of one percent (1%) in 2015 and 2016, and a two percent (2%) increase in 2017.

Attorney Ken Zatkoff was selected as the Chairperson for the Act 312 hearing. A telephone conference was held on June 15, 2015. Zatkoff sent the parties a letter dated June 16, 2015, indicating that two issues would be submitted to the panel, the maximum employee pension contribution and wage increase for sergeants. That letter went on to require that the parties exchange their last best offers on or before September 4, 2015.

On September 15, 2015, the Township filed the present unfair labor practice charge.

Discussion and Conclusions of Law:

At oral argument the POLC presented four separate arguments in support of its claim that the charge should be dismissed in its entirety. First, the POLC claimed that the Township's filing of the charge was untimely and outside PERA's strict six month statute of limitations. Second, the POLC argued that the Township's participation in negotiations over the pension contribution issue constituted a waiver of the moratorium set forth in Article XXI, Section 1(B). Third, the POLC argued that the moratorium language contained in Article XXI, Section 1(B) did not apply to the pension contribution. Lastly, the POLC argued that under Commission precedent, the moratorium was invalid because it lacked a specific end date or duration.

Under Section 15 of PERA, a public employer is required to bargain collectively with the representatives of its employees over "wages, hours, and other terms and conditions of employment." Once a specific subject has been classified as a mandatory subject of bargaining, neither party to a collective bargaining relationship may take unilateral action on the subject absent an impasse in negotiations. *Central Michigan Univ Faculty Ass'n v Central Michigan University*, 404 Mich 268, 277 (1978). Under PERA it is clear and undeniable that pensions, and all significant provisions of pension plans, are mandatory subjects of collective bargaining. *Detroit Police Officers Assn v City of Detroit*, 212 Mich App 383, 391 (1995); *Detroit Police Officers Ass'n v City of Detroit*, 391 Mich 44, 63 (1974).

A party may satisfy its obligation to bargain over a mandatory subject of bargaining when it negotiates a contract provision that fixes the parties' rights with respect to that subject, for the term of that agreement. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 318

(1996). Agreement on such a subject enables both parties to rely on the language of that agreement as the statement of their obligations regarding that topic as covered by the agreement.

In addition, a party may knowingly and voluntarily relinquish its right to bargain about a matter by agreeing to clear and unambiguous contract language that unmistakably waives its rights. *Port Huron*, at 320; *Amalgamated Transit Union v Southeastern Michigan Transportation Authority*, 437 Mich 441, 461(1991).

The Commission has previously found that a waiver contained within a collective bargaining agreement was presumed to expire at the same as the collective bargaining agreement it is contained within. See *Capac Community Schools*, 1984 MERC Lab Op 1195; *Wayne County*, 1985 MERC Lab Op 168. The waivers in those cases did not have an explicit end date nor did they evidence a clear intent for the effect of the waiver to survive contract expiration.

However, in *Ann Arbor Fire Fighters Local 1733*, 1990 MERC Lab Op 528, the Commission refused to invalidate a ten-year "pension moratorium" clause in a collective bargaining agreement that survived the original collective bargaining agreement it had been contained in. The Commission, in rejecting the employer's argument that it should declare the clause invalid or unenforceable because the agreement was unconscionably long, stated that it was not authorized by PERA to police the contents of agreements to redress imbalances in bargaining power between parties, and held that it was not willing to hold that parties could not enter into a valid bargaining waiver of ten years duration. In addressing its earlier decisions in *Capac Community Schools* and *Wayne County*, the Commission stated:

> In these cases, however, the contractual waiver had no explicit expiration date. We refused as a matter of law to presume that the parties intended their waiver to extend past the expiration of the document in which it was found. Here, however, the parties clearly and unmistakably agreed to a ten year pension moratorium. While the scope of this agreement may be in dispute, the length of it is not.

In *City of Taylor*, 23 MPER 33 (2010) (no exceptions), the ALJ, albeit as self-described dicta, considered the validity of another "pension moratorium" clause which precluded negotiation and/or Act 312 arbitration over pension related issues until 2017. The ALJ, in offering her opinion regarding the validity of the waiver, stated:

> In *Ann Arbor*, the Commission refused, I believe correctly, to hold that parties cannot enter into a valid agreement waiving their rights to bargain over a specific topic or topics after the expiration of the document in which the waiver is contained. Like the pension moratorium in *Ann Arbor*, the moratorium in this case has an ending date, even though it is a decade into the future. I am as reluctant as the Commission was in *Ann Arbor* to hold that a bargaining waiver with an ending date is an "unconscionable" agreement.

Both *Ann Arbor Fire Fighters Local 1733* and *City of Taylor*, stress the importance that the waiver of a fundamental right, the right to bargain over a mandatory subject, have a definitive end date. The Commission in *Ann Arbor Fire Fighters Local 1733*, went so far as to state that

"[w]hile the scope of this agreement may be in dispute, the length of it is not." In the present case, not only is the scope of the waiver in dispute, but so too is whether the condition precedent to the expiration of the waiver could ever be satisfied. Here the waiver is only extinguished at such time as actuaries employed by MERS certify that the pension plan is 100% funded. Accordingly there is no end date similar to the waivers considered in *Ann Arbor Fire Fighters Local 1733* and *City of Taylor*.

Additionally, under *Capac Community Schools* and *Wayne County*, the Commission used the lack of a clear intent by the parties that the waivers extended past the agreement's expiration date as justification to find them invalid; the waivers in *Ann Arbor Fire Fighters Local 1733* and *City of Taylor*, which were not held to be invalid, did evidence a clear intent. The waiver here, durational issues aside, does not show a clear intent by the parties that it was to extend past the expiration of the collective bargaining agreement because, while unlikely, it is possible that during the term of that agreement the condition precedent necessary to extinguish the waiver, i.e., the plan being 100% funded, could have been satisfied.

Accordingly it is the opinion of the undersigned that the waiver is invalid and that the attempts by the Union to bargain over the issues related to pension and seek the inclusion of said issues within Act 312 arbitration do not constitute a violation of its duty to bargain in good faith. I have considered all other arguments as set forth by the parties and have determined such do not warrant a change in the conclusion. As such, and for the reasoning set forth above, I recommend that the Commission issue the following order dismissing the charge in its entirety:

RECOMMENDED ORDER

The unfair labor practice charge filed by Van Buren Township against the Police Officers Labor Council is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: August 31, 2016