STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF FLINT and 68TH DISTRICT COURT,
Public Employers-Respondents,

Case Nos. C00 D-058 & C00 D-060
- and - (On Compliance)

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), COUNCIL 25, LOCALS 1600 AND 1799,
Labor Organizations-Charging Parties
_____/

APPEARANCES:

Keller Thoma, P.C., by Frederic E. Champnella II, Esq. for the Public Employers

Martens, Ice, Klass, Legghio & Israel, P.C., by Michael J. Bommarito, Esq. for the Labor Organizations

DECISION AND ORDER

On March 15, 2006, Administrative Law Judge (ALJ) Roy L. Roulhac issued his Decision and Recommended Order on Compliance in the above case finding that Respondents City of Flint (the City) and Sixty-Eighth District Court have not fully complied with our March 1, 2005 Decision and Order on Remand in this matter. The ALJ found that our Order requires Respondents to recalculate final average compensation by using twenty-seven pay dates for one of the three best years designated by employees who retired between January 20, 2000 and September 23, 2003, and who had their final average compensation calculated using only twenty-six pay dates. The ALJ recommended that we order Respondents to perform the recalculation by adding a twenty-seventh pay date to one of the years designated by the retirees that results in the highest FAC. He further recommended that we order Respondents to pay the retirees any pension benefits lost from the period of their retirement until the adjusted pension amount is paid, with interest computed at the statutory rate of five percent per annum, computed quarterly. The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA.

On April 7, 2006, Respondents filed timely exceptions to the ALJ's Decision and Recommended Order, a brief in support of the exceptions, and a Request for Oral Argument. On April 13, 2006, Charging Parties AFSCME, Council 25, Locals 1600 and 1799 filed a timely brief in support of the ALJ's Decision and Recommended Order and also filed a Request for Oral Argument.

After reviewing the exceptions and briefs filed by the parties, we find that oral argument would not materially assist us in deciding this case. Therefore, the requests for oral argument are denied.

In their exceptions, Respondents contend that the ALJ erred in his interpretation of the remedy ordered by the Court of Appeals. We have reviewed Respondents' exceptions and find them to be without merit.

Factual Summary:

Charging Parties and Respondents are parties to collective bargaining agreements that incorporate by reference the City's retirement ordinance. The retirement ordinance provides for calculating pension benefits based on a formula that uses an employee's final average compensation (FAC) as a factor. FAC is defined in Section 35-6 of the ordinance as the "average of the highest annual compensation paid . . . during any period of three years of his credited service contained within his five years of credited service immediately preceding the date his employment with the City last terminates."

Employees have two options for selecting their three years of highest annual compensation: 1) they can designate non-overlapping years, or 2) they can rely on the City's retirement office to select those years. In 1991, some employees began selecting three non-calendar years with twenty-seven pay dates in each year by designating years that start or end on a pay date. During the period in question, the Retirement Office computed the FAC for employees who did not designate their own years by using compensation paid to them during their two highest calendar years of credited service plus a hybrid year.[1]

As of January 20, 2000, pursuant to a memorandum issued by the City's finance director, retirees who selected the three years used to calculate their FAC were limited to selecting years with twenty-six pay dates. Subsequently, the City amended the retirement ordinance to limit the pay dates used in calculating FAC to twenty-six for each year. In April 2000, Charging Parties and the representatives of certain bargaining units of Respondents' employees filed unfair labor practice charges asserting that the City unilaterally changed a mandatory subject of bargaining covered by existing labor agreements, thus reducing pension benefits, and violating PERA. They alleged that Respondents engaged in an unlawful mid-term contract modification and claimed that since 1991 the parties had a past practice of allowing employees to select three years with twenty-seven pay dates each to compute their FAC.

This Commission issued a Decision and Order on October 23, 2002, finding that Respondents did not violate Section 10(1)(a) and (e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(a) and (e). In that decision, we found that Charging Parties failed to establish that Respondents had made a unilateral midterm modification to the parties' collective bargaining agreements when the City of Flint amended its retirement ordinance to limit to twenty-six the number of pays used to calculate the FAC for computing

1 The hybrid year consisted of earnings received in the retirement calendar year plus earnings received in the portion of the third highest year from the retirement date until the end of the year. This amount necessarily resulted in twenty-seven pay dates because it included twenty-six pays received prior to retirement, as well as the final pay, which was earned before, but received after, the retirement date.

pension benefits. We determined that the memorandum and the amendment clarified, rather than modified, the retirement ordinance. We further found that Respondents' practice of allowing retiring employees to select years with twenty-seven pay dates to calculate retirement benefits was not an established past practice and, therefore, did not replace express contract provisions. See *City of Flint*, 2002 MERC Lab Op 322.

The Court of Appeals affirmed in part and reversed in part our Decision and Order in *Flint Professional Firefighters v City of Flint*, unpublished opinion per curiam of the Court of Appeals, issued June 17, 2004 (Docket Nos. 244953, 244961, and 244985). The Court agreed with the Commission that the retirement ordinance expressly limited year long periods to only twenty-six pay periods. However, the Court found that Respondents' practice of including twenty-seven pay dates in at least one year of retiring employees' benefit computations did constitute a past practice sufficient to amend the written contract between the parties. The Court ordered that employees were entitled to have their retirement benefits calculated using twenty-seven pay dates in at least one of the three years used to determine their FAC. Pursuant to direction from the Court of Appeals, the Commission issued an Order on Remand on March 1, 2005 instructing Respondent to comply with the remedy set forth by the Court.

Respondents determined that to comply with our Order on Remand, they should recalculate the retirement benefits of forty-one retirees whose FAC had been calculated based on the retirees' selection of three non-calendar years with twenty-six pay dates. When Respondents recalculated the FAC, Respondents utilized the retirees' two best calendar years with twenty-six pay dates, and a hybrid-year[2] with twenty-seven pay dates *if* this resulted in a higher FAC than using the three non-calendar years with twenty-six pay dates. If this resulted in a lower pension benefit, Respondents continued to calculate the FAC using the three non-calendar years with twenty-six pay dates. Respondents' use of two calendar years and a hybrid-year to recalculate FAC resulted in reduced pensions for thirteen of the forty-one retirees.

On March 15, 2005, Charging Parties requested that this Commission conduct a compliance hearing pursuant to Rule 177 of the General Rules of the Employment Relations Commission, 2002 AACS, R 423.177. A hearing on compliance was held on August 9, 2005, and on March 15, 2006, the ALJ issued his Decision and Recommended Order in this matter.

Discussion and Conclusions of Law:

Respondents contend that to comply with the Court of Appeals order they must calculate the FAC based on two calendar years of twenty six pay-dates and one hybrid year of twenty-seven pay-dates. We agree with the ALJ that Respondents have misread the Court's opinion. Respondents' method of calculating the FAC conflicts with our March 1, 2005 Order and that of the Court of Appeals.

The issue before the Commission in the original unfair labor practice charge was whether Respondents made a unilateral change in a mandatory subject of bargaining by restricting employees to selecting years with only 26 pay dates for use in calculating their FAC. Neither the employees' right to select non-calendar years nor Respondents' use of a hybrid year when the employees failed to select the years themselves was at issue when this matter was initially addressed

2 The hybrid year was calculated in the same way Respondents had done previously. See footnote 1.

by this Commission. That did not change when the matter was appealed to the Court.

As noted by the ALJ, Respondents' use of the hybrid year was merely one fact relied upon by the Court of Appeals in finding a past practice of using a non-calendar year with twenty-seven pay dates for at least one of the three years used to compute the FAC. The Court did not require or authorize the use of the hybrid year to replace one of the three non-calendar years selected by the retirees. Nor did the Court authorize Respondents to use calendar years in lieu of the non-calendar years selected by the retirees. In a related case, *Miller v City of Flint*, unpublished opinion per curiam of the Court of Appeals, issued February 27, 2007 (Docket No. 271430), the Court explained its ruling in *Flint Professional Firefighters* on this issue. In the *Miller* case, the Court affirmed a trial court's finding that the City was to calculate each retiree's FAC based on "the average of the highest annual compensation" using two years with twenty-six pay dates and one year with twenty-seven pay dates. The Court explained that, in that case, the City was permitted to make the FAC computations based on the City's selection of the years that would result in the highest average annual compensation. However, the Court held "if a retiree selected three 365-day periods within the parameter of the trial court's ruling that resulted in higher annual compensation, . . . the city would be required to accept the retiree's selection and use it in determining the retiree's FAC."

In this case, the retirees have selected three non-calendar years with twenty-six pay dates. Respondents merely need to add one pay date to one of the three non-calendar years *selected* by the retirees to comply with the Court's order that the FAC be based on two years with twenty-six pay dates and one year with twenty-seven pay dates. Accordingly, the Commission agrees with the ALJ's Decision and Recommended Order.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

CITY OF FLINT and 68th DISTRICT COURT,
Respondents-Public Employer,

Case Nos. C00 D-58 & C00 D-60
(On Compliance)

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), COUNCIL 25, LOCALS 1600 and 1799,
Charging Parties-Labor Organizations.
_____/

APPEARANCES:

Keller, Thoma, P.C., By Frederic E. Champnella, II, Esq., for the Public Employer

Martens, Ice, Klass, Legghio & Israel, P.C., by Michael J. Bommarito, Esq., for the Labor Organizations

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

A compliance hearing was held by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission (MERC) on August 9, 2005, in Detroit, Michigan. On March 15, 2005, AFSCME Council 25, and Locals 1600 and 1799 filed a request for hearing on compliance pursuant to Commission Rule 177, MR 1, R 423.177. The parties filed post-hearing briefs on October 10, 2005.

Background Facts:

Charging Parties AFSCME, Council 25 and Locals 1600 and 1799 are parties to collective bargaining agreements with the Respondents City of Flint and the 68th District Court ("Respondent" or "City"). The agreements incorporate by reference the City's retirement ordinance, which provides for calculating pension benefits based on a formula that uses an employee's final average compensation (FAC) as a factor.[3] The higher an employee's FAC, the greater his retirement benefit. Section 35-6 of the ordinance defines FAC as the "average of the highest annual compensation paid … during any period of three years of his credited service contained within his five years of credited service immediately preceding the date his employment with the City last terminates."

The City's payroll and retirement supervisor is responsible for computing FAC. Employees have two options for selecting their three highest years of annual compensation to compute their FAC. They can designate non-overlapping years themselves, or they can rely on the Retirement

[3]The retirement benefit formula for AFSCME-represented and other City employees is: *Annual Retirement Benefit = Pension Factor x Years of Service x Final Average Compensation.*

Office to select them. Beginning in 1991, some employees began selecting three non-calendar years with twenty-seven pay dates in each year by designating years that start or end on a pay date.

The Retirement Office computes the FAC for employees who do not designate their own years by using compensation paid to them during their two highest calendar years of credited service and a hybrid-year. The hybrid-year, which always results in twenty-seven pay dates, consists of earnings received in the retirement year plus earnings received in the portion of the third highest year from the retirement date until the end of the year.[4] The FAC for these employees always included compensation received but not earned in the years used in the computation. It was based, in part, on W-2 wages for the two highest calendar years of compensation, which included the first pay in the year, although all or part of that pay was always attributable to work done outside the year. Moreover, a retroactive payment due to a contract settlement was included in the year it was received, even if it were attributable to work done outside the year.

On January 20, 2000, pursuant to a memorandum from the City's finance director and the City's amendment of the retirement ordinance, an employee's annual compensation was expressly limited to salary or wages earned and received over the course of 26 pay periods. After the ordinance amendment, and even after the parties entered into new collective bargaining agreement in September 2003, Respondent continued to allow employees to designate their best three years to use in FAC calculation, but limited them to selecting only twenty-six pay dates in each year.

In April 2000, AFSCME Council 25 and its Locals 1600 and 1799, the Flint Police Officers Association and the Flint Fire Fighters Union, Local 352, filed unfair labor practice charges alleging that by limiting each FAC year to twenty-six pay dates, the City unilaterally changed a mandatory subject of bargaining covered by existing labor agreements, reduced pension benefits and violated PERA. According to the unions, by establishing a twenty-six pay limitation that never existed, the City engaged in an unlawful mid-term contract modification. Alternatively, they claimed that since 1991, the parties had a past practice of allowing employees to select three years with twenty-seven pay dates to compute their FAC years. See *City of Flint*, 2002 MERC Lab Op 322, for a detailed statement of facts.

In *Flint Professional Firefighters, et al v City of Flint, et al*, 18 MPER 15 (2004), unpublished opinion per curiam of the Court of Appeals, the Court agreed with the Commission's findings that: (1) "annual compensation" means the amount of pay an employees receives for personal services rendered within one year, i.e., any consecutive 365-day period; (2) the retirement ordinance clearly limits a year for FAC computation purposes to twenty-six pay dates and the ordinance's amendment clarified, rather than modified, the collective bargaining agreements; and (3) the *employees'* practice of selecting twenty-seven pay dates in each of their three best FAC years was not a past practice that replaced the express contract provisions. The Court, however, unlike the Commission, found that the *Retirement Office* had a past practice of using twenty-seven pay dates in at least one year of an employee's FAC calculation and of including payments made but not earned during a particular year period, and that the Retirement Office's practice amended the contract. The Court concluded that with no negotiations and agreement between the parties, the ordinance amendment constituted an impermissible mid-term modification of the parties' collective

[4]For example, if an employee retired on June 30, 1990, and 1989, 1988 and 1987 were the highest to the lowest calendar years of compensation, the FAC computation would include all pay received in calendar years 1989 and 1988, plus compensation received in the hybrid-year. The hybrid-year would consist of all pay received in 1990 and July 1 through December 31, 1987.

bargaining agreements in violation of MCL 423.210(1)(e). To remedy the unfair labor practice, the Court ordered the following relief:

> We hold that any relief regarding employees represented by petitioners be limited to eligible employees who retired on or after January 20, 2000, the date the retirement ordinance amendment was passed, *and who had all three best years calculated using only twenty-six pay dates.* These employees are entitled to a FAC calculation using twenty-seven pay dates in *one of the three best years* in accordance with the City's past practice. (Citation omitted) (Emphasis in original).

The Court remanded the cases to the Commission to effectuate its decision and grant any further warranted relief as provided in MCL 423.216. On March 1, 2005, the Commission issued a Remand Order directing Respondent to comply with the Court's remedy.

The Compliance Dispute:

Respondent identified forty-one employees who were entitled to relief. These employees retired after January 2000, and had selected three non-calendar years with twenty-six pay dates as their best years for their FAC computation. Respondent, however, did not use the best years the retirees selected to recalculate their FAC. Rather, it utilized their two best calendar years with twenty-six pay dates, and a hybrid-year to create the equivalent of a twenty-seventh pay, the same method it used to calculate the FAC for retirees who did not designate their best years. If a retiree's pension benefit were higher using their selection of three non-calendar years with 26-pay dates than Respondent's recalculation using two calendar years and a hybrid-year, the retiree received the higher pension.[5, 6] Respondent's recalculation of the retirees benefits using two calendar years and a hybrid-years resulted in reduced pensions for thirteen of the forty-one post-January 20, 2000 retirees.

Charging Party claims that the Court's order must be implemented by adding a twenty-seventh pay to one of the retirees' designated years that results in the highest FAC. This is, according to Charging Party, the only recalculation method that is consistent with the retirees' right, acknowledged by both parties prior to the compliance stage and by the Court of Appeals, to designate non-calendar years for FAC purposes.

Respondent acknowledges that retirees may designate years to calculate their FAC, but argues that the hybrid-year method, the bedrock upon which the Court's "past practice" finding was predicated, is the only way to add a twenty-seventh pay to their FAC computation. The Court, according to Respondent, held that the "past practice" developed only "when the Retirement Office personnel performed the calculations [using a hybrid-year], rather than the employee choosing his own years." Respondent, therefore, contends that Charging Party's focus on the retirees' selection

[5]Respondent also used this method to recalculate the FAC for nine hundred fifty retirees who retired before January 20, 2000. Although Respondent introduced evidence of these recalculations at the compliance hearing, I find that they have no probative value in deciding the issue presented in this case. Respondent's recalculations for these employees resulted in class action litigation in *Rutherford, et al. v City of Flint, et al.*, Genesee Co Circuit Court Case No. 03-76113-MZ and *Miller et al. v City of Flint et al.*, Genesee Co Circuit Court Case No. 01-070776-CZ.

[6]During the recalculations, the City found that some employees inadvertently designated some years with 26.5 pay dates, some with twenty-seven pay dates, and one with pay periods of another employee.

of years is a "red herring" designed to inflate the relief the retirees are entitled to under the Court's order.

I find that Respondent misreads the Court's decision. The Court did not find that Respondent's use of the hybrid-method to calculate FAC was the "past practice." Rather, the Court held that the unions presented sufficient evidence to establish a past practice by the Retirement Office of:

> [U]sing twenty-seven pay dates *in at least one year* that is included in an employee's FAC calculation and of including payments made but not earned during a particular year period. Therefore, we hold that the MERC did err in determining that the amendment to the City's retirement ordinance was not a unilateral modification of the parties' collective bargaining agreements. (Emphasis in original.)
>
> The testimony from past supervisors and the current supervisor of the Payroll and Retirement Office unequivocally established that monies received, but not earned, in a particular year were regularly used in FAC calculations when the retirement office personnel performed the calculations, rather than the employee choosing his own years. In particular, accrued sick and vacation time was always included in the employee's final year, retroactive payments due to contract settlements were included in the year the employee received payment, W-2's were used to determine the employee's best years, and the office's practice of including a hybrid-year necessarily included twenty-seven pay dates for that year. Although this evidence does not indicate that twenty-seven pay dates were included in each of the employee's three best years, it does demonstrate the City's long-standing regular practice of including in its FAC calculations monies paid but not earned in a particular year. This methodology is clearly at odds with the amendment's directive that annual compensation shall not "include income received during the 26 pay periods which was not also earned during the 26 pay periods." Despite the clear terms of the contract, for decades the City's personnel continually utilized a method that included monies paid but not earned during a specific year period.[7] Accordingly, we find that this practice was "so widely acknowledged and mutually accepted that it created an amendment to the contract." (Citation omitted.)

The Court's statement that the retirement "office's practice of including a hybrid-year necessarily included twenty-seven pay dates for that year," which Respondent cites to support its claim that the use of a hybrid-year formed the basis for the Court's past practice finding, is but one of several examples that the Court found of the Retirement Office's regular practice of including monies received, but not earned, in FAC calculations when it performed the calculations, rather than employees choosing their own years. It provides no support for Respondent's assertion.

There is nothing in the Court's remedy, as Respondent implies, that directs it to use the hybrid-method to recalculate the employees' FAC. Nor is it the only method where the equivalent of one twenty-seventh pay can be added to their FAC calculation. A twenty-seventh pay can also be added to FAC calculations by selecting a non-calendar year that starts and ends on a pay date, as

[7]Footnote 7 in opinion: "Furthermore, we note that if a particular calendar year naturally contained 27 pay dates, the City automatically included all of the pay dates in that year's calculation."

some employees routinely did to include twenty-seven pay dates in each of their three best FAC years before the retirement ordinance was amended.

The Court's remedy addresses those employees who designated their FAC years "*and who had all three best years calculated using only twenty-six pay dates*." Because these employees selected three non-calendar years as their best years, the use of two calendar years and a hybrid-year deprives them of a right, which Respondent concedes they have, to a FAC computation using the years they designated as their best years. I find, therefore, that in order to satisfy the Court's order to "recalculate final average compensation by using twenty-seven pay dates for *one of the three best years*," Respondent must add a pay date to one of the years selected by the retirees that results in the highest FAC. The holding is consistent with the Court's past practice finding of including twenty-seven pay dates in at least one year that is included in an employees' FAC calculation, and of including payments made but not earned during a particular year period. This finding also preserve the employees' continuing right to designate their best years for the FAC computation.

I have carefully considered all other arguments advanced by the parties and conclude that they do not warrant a change in the result. Based on the above discussion, I recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

It is ordered that Respondents City of Flint and the 68th District Court, its officers and agents, shall comply with the Court of Appeals decision and MERC's Order on Remand by recalculating final average compensation by using twenty-seven pay dates for one of the three best years designated by employees who retired on or after January 20, 2000, and before their collective bargaining agreements expired on September 23, 2003, and who had their final average compensation calculated using only twenty-six pay dates. Respondent is ordered to perform the recalculation by adding a twenty-seventh pay date to one of the years designated by the retirees that results in the highest FAC. Respondent is also ordered to pay the retirees any pension benefits lost from the period of their retirement until the adjusted pension amount is paid, with interest computed at the statutory rate of five percent per annum, computed quarterly.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Roy L. Roulhac
Administrative Law Judge

Dated: _____