STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

FRENCHTOWN CHARTER TOWNSHIP,
Public Employer-Charging Party in Case No. CU02 B-009,
Respondent in Case No. C02 B-054,

-and-

FRENCHTOWN PROFESSIONAL FIRE FIGHTERS,
IAFF LOCAL 3233,
Labor Organization-Charging Party in Case No. C02 B-054,
Respondent in Case No. CU02 B-009.
_____/

APPEARANCES:

Logan, Huchla & Wycoff, P.C., by Charles E. Wycoff, Esq., for the Employer

Alison L. Paton, Esq., for the Labor Organization

DECISION AND ORDER

On March 19, 2004, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter. The ALJ found that a proposal of the Frenchtown Professional Fire Fighters, IAFF Local 3233 (Union), involving the creation of new bargaining unit positions was a permissive subject of bargaining; the Union therefore violated its duty to bargain in good faith by presenting this proposal to the Act 312 panel. The ALJ recommended dismissal of the charge against the Frenchtown Charter Township (Employer), on the basis that since an Act 312 panel does not have jurisdiction over permissive subjects of bargaining, an alleged agreement to bring the issue of shift commander to Act 312 arbitration is unenforceable and no repudiation occurred.

The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA. On April 12, 2004, the Union filed timely exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions. On April 20, 2004, the Employer was granted an extension to file a response to the exceptions, and its timely response and a brief in support were filed on May 26, 2004.

In its exceptions, the Union alleges that its proposals to establish the new ranks of fire

captain/shift commander and mechanic, along with wage rates and promotional criteria for these positions, constitute mandatory subjects of bargaining. In addition, it asserts that the Township unlawfully repudiated its agreement with the Union to submit the issue of shift commander to Act 312 arbitration.

We have carefully and thoroughly reviewed the record in the light of the exceptions and briefs and have decided to affirm the ALJ's findings and conclusions. We agree with the ALJ that an employer has an inherent managerial right to create new positions within the bargaining unit and, accordingly, the Union's proposals regarding the creation of fire captain/shift commander and mechanic positions were permissive subjects of bargaining. *Menominee Pub Schs*, 1977 MERC Lab Op 666. As such, by submitting these proposals to Act 312 arbitration, the Union committed an unfair labor practice. With respect to its alleged agreement with the Employer to allow the issue of shift commander to be decided by the Act 312 panel, we agree with the ALJ that the parties cannot confer such jurisdiction on the panel. In *Local 1277 AFSCME v Center Line*, 414 Mich 642 (1982), the Michigan Supreme Court affirmed that an Act 312 panel can only compel agreement as to mandatory subjects of bargaining. Unlike contracts that establish an arbitrator's jurisdiction by mutual consent, the jurisdiction of an arbitration panel under Act 312 has been established by the legislature. We believe that an agreement to expand that jurisdiction to include matters beyond those contemplated by the statute is an impermissible intrusion upon legislative prerogative. Consequently, we hold that an agreement to submit a non-mandatory subject of bargaining to an Act 312 panel is unenforceable. Therefore, we adopt the 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

_____
Nora Lynch, Commission Chairman

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Harry W. Bishop, Commission Member

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Nino E. Green, Commission Member

Dated:_____

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APPEARANCES:

Logan, Huchla & Wycoff, P.C., by Charles E. Wycoff, Esq., for the Employer

Alison L. Paton, Esq., for the Labor Organization

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on June 11, 2002, and January 29, 2003, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before May 19, 2003, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges and Background:

The Frenchtown Professional Fire Fighters Association, IAFF Local 3233 (hereinafter the Union), represents a bargaining unit of regular full-time fire fighters employed by Frenchtown Charter Township (hereinafter the Employer). On February 20, 2002, the Union filed a petition pursuant to 1969 PA 312 (Act 312), MCL 423.231 et seq., seeking compulsory arbitration of the parties' dispute over the terms of a new collective bargaining agreement. On February 21, 2002, the Employer filed the charge in Case No. CU02 B-009 against the Union. The Employer alleged that the Union engaged in "sham" bargaining with the intention of avoiding agreement on a contract so that the parties' dispute could be resolved by an Act 312 arbitration panel. The Employer also alleged that the Union unlawfully insisted to impasse on

nonmandatory subjects of bargaining by including proposals covering these subjects in its petition for Act 312 arbitration.

On February 28, 2002, the Union filed the charge against the Employer in Case No. C02 B-024. The Union alleged that the Employer violated its duty to bargain in good faith by engaging in an overall course of conduct designed to avoid an agreement. The Union also alleged that the Employer unlawfully repudiated a written agreement entered into by the parties in 1999 stating that if the parties could not reach agreement on the creation of a new position, shift commander, the Union would have the right to "process the issue through 312 arbitration at the next negotiations." The charge alleged, in addition, that the Employer unlawfully changed terms and conditions of employment without bargaining when it passed a new township ordinance, and that it discriminated against the Union president because of his union activities. The Union later amended its charge to allege that the Employer violated its duty to bargain by unilaterally changing a rule regarding the dissemination of internal fire department documents. The charges were consolidated for hearing.

On January 29, 2003, before the commencement of the second day of hearing on these charges, the parties submitted a written stipulation to withdraw all allegations, except for the following:

> 1. The Employer's charge set forth in Paragraph 3(1)(2) of its Unfair Labor Practice Charge against the Union, to-wit: that IAFF, Local 3233 has breached its duty to bargain pursuant to the mandates of Sections 10 and 16 of PERA by insisting to impasse on non-mandatory subjects of bargaining including, but not limited to, command structure, minimum manning and such other issues that are either permissive or illegal subjects of bargaining.
>
> 2. The Union's counter-charge set forth in Paragraph 3(4), to-wit: on or about January 11, 2002, and thereafter, the Township has indicated its intention to repudiate the parties' prior contractual agreement (dated 2/23/99) under which the parties agreed that if they could not reach agreement on the issue of "Shift Commander," "that "the union shall have the full right to process the issue through Act 312 arbitration at the next negotiations."

The parties also stipulated that two allegations contained in the Union's charge be held in abeyance pending the outcome of other litigation. The Union withdrew these allegations on March 1, 2004.

Facts:

The Employer's fire department provides fire protection and rescue services. It responds to fire scenes and emergencies including car accidents, hazardous waste spills and downed power lines. The Union's bargaining unit consists of 19 fire fighter/EMTs, a fire inspector, a training/equipment coordinator, and a secretary/dispatcher. There are no command positions in the Union's unit. A full-time chief heads the fire department. The Employer also employs paid on-call fire fighters, including three employees with the rank of lieutenant. The paid-on call fire

fighters do not work regular hours, but respond to emergency scenes after receiving notice via pager. The paid on-call fire fighters are represented by another labor organization.

The full-time fire fighters/EMTs staff the Employer's two fire stations on a round-the-clock basis, working rotating 24-hour shifts. The fire chief, fire inspector, training/equipment coordinator and secretary/dispatcher work 8 hours per day, 40 hours per week. The duties of the full-time fire fighters include checking vehicles, checking equipment, filling out incident reports after runs, and cleaning and maintaining the station house. Each full-time fire fighter is responsible for keeping his own living area clean during his shift, and there is a schedule of cleaning and maintenance tasks to be performed each day within the station. When the fire chief is not present, no one is assigned to supervise the fire fighters' performance of these tasks. According to the Union president, Ron Gerlach, the absence of a supervisor causes ongoing friction among the fire fighters because individual fire fighters have "different ideas about what constitutes clean." Also, according to Gerlach, fire fighters are sometimes frustrated by the absence of a supervisor if they want to get something done and not everybody is willing to do a task at the same time.

Since about 1999 or 2000, some full-time fire fighters have performed mechanical maintenance work on department vehicles. This has included changing brake light assemblies, headlights and other switches; changing dome lights and strobe lights on fire engines; doing maintenance on fire engine pump panels; replacing gauges, batteries, belts, and alternators; and installing new brake cables. Fire fighters do not receive extra compensation for this work.

As noted above, Charging Party's bargaining unit includes a training/equipment coordinator. However, since about 2001, full-time fire fighters, at the chief's request, have sometimes conducted training sessions for other fire fighters. They are paid an extra $5 per hour for conducting this training, an amount unilaterally established by the fire chief. The Union has objected to this amount as too low.

The duties of full-time fire fighters also include serving as incident commanders at emergency scenes. Chapter 4-1 of Standard 1561 of the National Fire Protection Association Standards states that an incident commander should be assigned at all fire scenes. The incident commander is responsible for the overall coordination and direction of activities and the safety and health of all personnel at the scene. In the Employer's fire department, the most senior full-time fire fighter in the first vehicle arriving at the scene serves as the incident commander until either the fire chief or a paid on-call lieutenant arrives at the scene and elects to make himself the incident commander. The fire chief comes to all major emergency scenes occurring within his normal working hours, and emergencies occurring at other times if the incident commander calls him. However, the fire chief usually chooses not to serve as the incident commander. If a paid-on call lieutenant responds to a call, he usually assumes the role of incident commander. However, according to Gerlach, paid on-call lieutenants show up at less than half of all emergency scenes. Consequently, most of the time the incident commander is the most senior full-time fire fighter whose vehicle is first at the scene.

Full-time fire fighters receive no extra compensation for serving as incident commanders. Because the full-time fire fighters rotate between the fire engine and the rescue unit, the same

fire fighter does not consistently serve as the incident commander for all runs on his shift. According to Gerlach, the Employer's system for assigning incident commanders presents a safety risk because the incident commander is not always the most qualified fire fighter at the scene. Gerlach testified that, in the Union's view, incident commanders should only be fire fighters who hold both Fire Officer I and Fire Officer II certifications.[1] Gerlach also testified that he believes that the fact that the incident commander is not consistently the same person presents a safety risk.

To address its concerns about incident commanders, the lack of supervision in the fire stations, and pay for providing training, the Union proposed the creation of a separate bargaining unit position, "shift commander" during negotiations for the parties' 1998-2000 contract. The proposed position was to have supervisory authority over, and serve as the training instructor for, other full-time personnel on duty at the station. Under the Union's proposal, the shift commander would also serve as incident commander at all fire scenes in the absence of the fire chief. The Union proposed two ranks for the position, lieutenant and captain.

On February 23, 1999, the parties' reached a tentative agreement on the terms of a new contract for the term 1998-2000. The parties had not reached agreement on the Union's proposal to create the shift commander position. The written tentative agreement executed on February 23 included the following:

> The parties agree to meet and confer on the issue of "shift commander." If agreement is not reached the union shall have the right to process the issue through 312 arbitration at the next negotiations.

Both parties ratified the tentative agreement, including the above language. On April 1, 1999, the parties entered into a signed contract with an expiration date of December 31, 2000. The contract provided that if negotiations for a successor agreement extended beyond this expiration date, the contract would continue in full force and effect until the parties reached agreement on a successor contract. The parties did not include the paragraph regarding shift commanders in their signed contract. The contract contained a "zipper clause," Article XXIX, which included the following paragraph:

> All conditions of employment in effect covering Employees in the bargaining unit established in Article II of this agreement prior to and at the time of this Agreement which are inconsistent with the terms of this Agreement, are null and void and of no further force and effect. This agreement terminates and supersedes all post [sic] practices, agreements, procedures, traditions, and rules and regulations on all matters covered in this Agreement.

The contract also contained the following provision, Article X:

> The Township shall have complete and unrestricted discretion to contract out bargaining unit work or use paid on-call employees, subject to compliance with

[1] Fire officer training teaches fire fighters how to be better leaders, and includes training in serving as incident commander.

> Article XVI of this Agreement and except that any contracting out of bargaining unit work or use of paid on-call employees shall not reduce the number of employees below fifteen (15) Employees or the current number of scheduled hours of work for the fifteen (15) Employees employed as of the date this Agreement is executed.

After the contract was signed, the parties held several meetings to discuss the shift commander issue. They were again unable to reach agreement.

The parties began negotiation for a successor contract in about September 2000. The parties agreed that they would initially attempt to reach agreement by meeting without attorneys or representatives of the international union. They agreed that if no agreement were reached, nothing previously discussed or agreed upon would be binding in future negotiations. During the initial negotiations, the Union submitted proposals on only five issues. These proposals did not include proposals to create new positions. The Employer made proposals on two issues. The Employer did not propose during those negotiations to modify Article X.

On or after November 16, 2001, the parties decided to begin negotiations anew in accord with their September 2000 agreement. The parties met on January 10 or 11, 2002. At that meeting, both sides presented lengthy new proposals. The Union's 35 contract proposals included proposals creating four new bargaining unit positions: fire captain, assistant fire inspector, designated training instructor, and designated mechanic. The Employer's proposals included a proposal to modify Article X of the 1998-2000 contract by removing the minimum manning language.

On February 20, 2002, the Union filed a petition for Act 312 arbitration. The petition listed 7 joint issues; 25 Union issues, including the creation of the four new positions; and 10 Employer issues. The Union did not list modifications to Article X as a Union issue in its petition. The Union described the Employer's proposal to remove the minimum manning language from Article X as follows:

> Minimum Manning – delete Article X; Union concedes that the current provision is only a permissive subject of bargaining, but Union reserves right to counter propose a modified Article X which would qualify as a mandatory subject of bargaining.

The parties continued to bargain after the Act 312 petition was filed. On or about November 25, 2002, the Union presented the Employer with the following proposals regarding the creation of new bargaining unit positions. According to the Union, these proposals represent what the Union is seeking from the 312 panel on this subject.

> <u>Fire Captains/Shift Commanders</u>
>
> Effective immediately, a new 24-hour rank classification of "Fire Captain" is established, with one Fire Captain per each fire station for each shift, to be filled in accordance with the promotions article set forth herein. The base annual salary

for Fire Captain shall be 115% of the base annual salary for a full-paid Fire Fighter/EMT &[sic] Level II. The Fire Captain shall serve as the shift commander having immediate supervisory authority over, and shall serve as the training instructor for, the other full-time personnel on duty at the station. In addition, the Fire Captain shall, in the absence of the Fire Chief taking command, serve as the incident commander at all fire/emergency scenes; if two or more Fire Captains are on the scene, the most senior Fire Captain shall serve as the incident commander at the scene. The Fire Captain shall at all times be under the supervision of, and shall perform such duties as directed by, the Fire Chief.

Mechanics

Effective immediately, a new rank classification of Mechanic is established, with one Mechanic per each shift, to be filled in accordance with the Promotions article set forth herein. The base annual salary for Mechanic shall be equal to the base annual salary for Training/Equipment Coordinator. Mechanics shall be responsible for vehicle maintenance/repair (appropriate to their certification and training) as directed by the Fire Chief. Mechanics shall at all times be under supervision of, and perform such duties as directed by, the Fire Chief.

Promotions

Promotions shall be made in accordance with the following:

* * *

Fire Captains: Only those employees having Fire Officer I and Fire Officer II certification are eligible to apply; the applicant with the greatest full-time Frenchtown Fire Department seniority shall be selected for the promotion.
Mechanics: Only those employees having current state mechanic certification are eligible to apply; the applicant with the greatest full-time Frenchtown Fire Department seniority shall be selected for the promotion.

At the second day of hearing in the unfair labor practice case, the Union stated that after it filed the Act 312 petition it decided not to present the Act 312 panel with a minimum manning proposal. The Union stated that it has also made a proposal in the Act 312 arbitration to delete the subcontracting language from Article X. The record does not indicate when the Union first made this proposal, or the specific language the Union proposed.

Discussion and Conclusions of Law:

The Commission has primary jurisdiction to determine whether a particular topic is a mandatory subject of bargaining. *Jackson Fire Fighters Assoc,* 1996 MERC Lab Op 125, *aff'd Jackson Fire Assoc, Local 1306 v City of Jackson (On Remand),* 227 Mich App 520 (1998). An Act 312 arbitration panel has no jurisdiction to issue an award on a nonmandatory subject of bargaining. *Local 1277, AFSCME v Center Line,* 414 Mich 642, 654 (1982). The Union has

before the 312 panel proposals to create two new positions, and a proposal covering criteria for promotion to the new positions. The Employer asserts that the Union's proposals to create the new positions are not mandatory subjects of bargaining. One of the parties' principal purposes in this case is to have the Commission determine the scope of the Act 312 panel's authority over these issues.

Proposals to Create the Fire Captain/Shift Commander and Mechanic Positions

On or about November 24, 2002, the Union presented the Employer with proposals to create two new positions, fire captain/shift commander and mechanic. I conclude that the Union's proposals are permissive subjects only.

As the Union acknowledges, the Commission has held that an employer has an inherent managerial right to create a new position within the bargaining unit. The first Commission case discussing this issue appears to have been *City of Dearborn*, 1975 MERC Lab Op 225. In that case, the union alleged that the employer had a duty to bargain over its decision to create a new command position in its fire department. The administrative law judge held that this was a question of first impression for the Commission. He noted that in *Westwood Community Schools*, 1972 MERC Lab Op 313, the Commission had recognized a category of working conditions which were not subject to the bargaining obligation because they lay "at the core of entrepreneurial control." He stated, at 233:

> In the opinion of the undersigned, the determination of how a public employer will fulfill its functions, how that is to be performed, and the creation of job classifications to perform that work come within the areas of exclusively management decisions.

No exceptions were filed to the administrative law judge's decision in *Dearborn.* However, in *Menominee Public Schools*, 1977 MERC Lab Op 666, 668, the Commission, citing *Dearborn*, held that the employer had acted within its managerial prerogative when it unilaterally established a new bargaining unit position, athletic director/coach. The Commission found that the employer had no duty to bargain over its decision to create the position and establish qualifications for it. The Commission affirmed this holding in *City of Hamtramck*, 1985 MERC Lab Op 1123. In that case, the Commission found that the employer had not established a new position, but simply changed aspects of an existing one. However, the Commission, at 1126, reaffirmed that the creation of a new bargaining unit position is not a mandatory subject of bargaining, although the employer has a duty to bargain over the wages, hours, and working conditions of the new position. The Commission also noted in that case that an employer's inherent managerial prerogative includes the right to eliminate unit positions, *Centerline School District*, 1982 MERC Lab Op 756; *Flint Health Department*, 1977 MERC Lab Op 289, and to make routine work assignments within the scope of an employee's normal job duties. *City of Saginaw*, 1973 MERC Lab Op 975. See also *City of Warren*, 1988 MERC Lab Op 761.

The Union asserts that these precedents are inapplicable because the Employer has already decided to have the full-time fire fighters provide the services and perform the duties that the Union would assign to the fire captain and the mechanic. The Union points out that

bargaining unit members are already serving as incident commanders at emergency scenes, are acting as training instructors, and perform certain mechanic duties. However, the Union is proposing to change the Employer's existing assignment of duties by consolidating them in new positions. As the administrative law judge noted in *City of Dearborn*, an employer has the inherent managerial right not only to decide what services it will provide, but also to determine how the work will be performed. In my view, an employer has the inherent right to create, or refuse to create, new bargaining unit positions because how work is to be distributed among employees is part of its determination as to how the work will be done.

The Union also argues that its proposals are mandatory subjects of bargaining because they are fundamentally wage proposals. According to the Union, if its proposals are deemed permissive, the Employer could continually assign bargaining unit members new and greater responsibilities without having to bargain over additional pay for these duties unless and until the Employer decided to create a new position. The Union's proposals, however, go beyond extra pay for extra work. As discussed above, the Union's proposals to create new bargaining unit positions involve the Employer's right to determine how it will assign and distribute work.

The Union asserts, in addition, that its fire captain/shift commander proposal is a mandatory subject of bargaining because it "has safety underpinnings." According to the Union, even the proposal to create the mechanic position is related to safety because the Union's proposal ensures service work on emergency vehicles will be performed only by those qualified to perform it. A permissive subject of bargaining, such as manning, may become mandatory if it is inextricably intertwined with safety issues. *City of Detroit v DFFA*, 204 Mich App 541, 553 (1994); *City of Trenton v Trenton Fire Fighters Union, Local 2701*, 166 Mich App 285, 295 (1988). Here, however, the Union does not assert that its proposal to give the fire captain/shift commander supervisory authority over full-time fire fighters in the station, or its proposal to assign all training work to the new position, involve safety issues. I find, moreover, that the Union has not established even a causal nexus between its proposal to have only fire captains/shift commanders serve as incident commanders and safety at a fire/emergency scene. Union President Gerlach testified that, in his opinion, the fire fighters would function better at a fire scene if only one person served as incident commander, if the fire fighters knew in advance who the incident commander would be, and if incident commanders were required to have certain knowledge and training. Gerlach also stated that he would feel more confidence in an incident commander who was a full-time fire fighter, as opposed to one that had another job, i.e. a paid on-call lieutenant. According to National Fire Protection Association standards, an incident commander should be assigned at all fire scenes. However, neither these standards nor MIOSHA regulations governing the supervision of emergency operations at an emergency require or suggest that incident commanders have any particular level of experience or specialized training. Moreover, there is no evidence that the Employer's current system of appointing incident commanders has resulted in any actual, as opposed to perceived, increased safety risk to fire fighters at the scene. See *City of Sault Ste. Marie v FOP*, 163 Mich App 350 (1987). There is also no evidence that fire fighters are being required to perform, or are performing, mechanical systems work that exceeds their training or abilities. I conclude that the Union's proposals to create the fire captain/shift commander and mechanic positions do not have a sufficient connection to safety issues to be considered mandatory subjects of bargaining.

For the reasons set forth above, I conclude that the Union's proposals to create the new positions of fire captain/shift commander and mechanic are permissive subjects of bargaining.

Shift Commander Agreement

On February 23, 1999, the parties entered into a written agreement stating that if the parties failed to reach agreement on the issue of shift commander during the term of their 1998-2000 contract, the Union would have the right "to process the issue through 312 arbitration at the next negotiations." The Union asserts that the Employer violated its duty to bargain in good faith by "repudiating" this agreement when it asserted that the 312 panel lacked jurisdiction over the shift commander issue, citing *Ingham County Bd of Comm,* 1999 MERC Lab Op 360, and *City of Detroit,* 2001 MERC Lab Op 234. According to the Union, even if the Commission concludes that its fire captain/shift commander proposal is a nonmandatory subject of bargaining, the Commission should find that the Act 312 arbitration panel has the authority to include this proposal in its award.

The Employer argues that the agreement regarding shift commanders was superceded by the 1998-2000 signed contract which did not include this provision. According to the Employer, Article XXIX of the 1998-2000 contract makes it clear that this contract was a fully integrated agreement, intended to incorporate all of the prior agreements of the parties. However, the shift commander agreement did not concern a term of that contract. Rather, it purported to address the rights of the Union after the contract expired. I find that the parties' agreement to permit the Union to take the shift commander issue to Act 312 arbitration in the next contract negotiations did not address "matters covered by the (1998-2000) Agreement," or conflict with any term of that contract.

I conclude, however, that the February 23, 1999 agreement is not enforceable because it purports to give the Act 312 panel jurisdiction which it does not possess. In *Local 1277, AFSCME v Center Line,* supra at 654, 655 the Supreme Court clearly held that an Act 312 arbitration panel can only "compel agreement" as to a mandatory subject of bargaining. It held that since Act 312 complements PERA, and under PERA the duty to bargain extends only to mandatory subjects, it would be inconsistent to conclude that the arbitration panel had the authority to issue an award on a nonmandatory topic. The Court also recognized that in providing for interest arbitration under Act 312, the legislature intended that there be limits on the panel's authority. That is, while parties to a collective bargaining relationship may voluntary bargain and reach agreement on permissive subject of bargaining, an Act 312 panel cannot require agreement on this subject. In this case, the Employer has not agreed to include a provision creating a shift commander position in its collective bargaining agreement.

I also conclude that because the agreement was unenforceable, the Employer did not commit an unfair labor practice by "repudiating" the Employer did not "repudiate" the unenforceable agreement in this case.

I conclude that the Union violated its duty to bargain under Section 10(3)(c) by insisting to impasse and presenting the Act 312 panel with proposals to create the new bargaining unit

positions of fire captain/shift commander and mechanic, and that the Employer did not unlawfully "repudiate" the parties' unenforceable agreement.

Minimum Manning/Subcontracting

The Employer's charge asserts that the Union violated its duty to bargain by insisting to impasse on a nonmandatory subject, the continuation of the minimum manning language in Article X of the current contract. The Employer first raised the minimum manning issue by proposing that the language be deleted from Article X during contract negotiations in January 2002. The Union continued to insist on maintaining this language until it filed the Act 312 petition, where it acknowledged that current minimum manning provision was only a permissive subject of bargaining. At the beginning of the second day of hearing in the this case, the Union stated that it had not presented and was not intending to present a minimum manning provision to the Act 312 panel. In its brief, the Employer does not pursue its allegation that the Union violated PERA by insisting to impasse on the continuation of the minimum manning language.

Article X also contains language permitting the Employer to subcontract bargaining unit work. Neither party disputes that subcontracting is a mandatory subject of bargaining. At the second day of hearing in this case, the Union stated that it had submitted a proposal to the Act 312 panel to eliminate the subcontracting language from Article X. Since the Act 312 petition does not list this as a Union issue, evidently the Union made this proposal sometime after it filed the Act 312 petition. Neither the Employer's charge nor the parties' stipulation as to the issues remaining to be decided contains any reference to subcontracting, or the Union's conduct in presenting a subcontracting proposal to the panel. The Employer did not raise the issue of the Union's conduct in presenting this proposal at the unfair labor practice hearing. In its brief, the Employer argues, for the first time, that the Union should not be permitted to submit its subcontracting proposal to the panel. The Employer asserts that the Union did not comply with the requirements of Section 3 of Act 312 because the subcontracting issue was never submitted to mediation, and because the Union never made a written request to arbitrate this issue.

Since the Employer raised the issue for the first time in its brief, and the Union did not have the opportunity to respond, I decline to determine whether the Union violated its duty to bargain in good faith by submitting a proposal to eliminate the subcontracting language in Article X to the Act 312 panel.

Summary of Conclusions:

I conclude that the Union's proposal to create the new bargaining unit position of mechanic was a permissive subject of bargaining. I find that the Union violated its duty to bargain in good faith by insisting to impasse and presenting this proposal to the Act 312 arbitration panel, and that the Act 312 arbitration panel does not have jurisdiction to include this proposal in its award.

I conclude that the Union's proposal to create the new bargaining unit position of fire captain/shift commander is also a permissive subject of bargaining, and that the Union violated its duty to bargain in good faith by insisting to impasse and presenting this proposal to the Act

312 panel. I conclude that the parties' February 23, 1999 agreement did not give the Act 312 panel jurisdiction to include a proposal on this subject in its award and, because the agreement was unenforceable, that the Employer did not unlawfully "repudiate" it by objecting to the panel's jurisdiction.

I conclude that the issue of whether the Union violated its duty to bargain in good faith by presenting the panel with a proposal regarding subcontracting is not appropriately before me in this case, because the Employer did not raise the issue until after the hearing.

In accord with the findings of fact, discussion, and conclusions of law above, I recommend that the Commission dismiss the charge against the Employer in its entirety, and that it issue the following order.

RECOMMENDED ORDER

Frenchtown Professional Fire Fighters, IAFF Local 3233, its officers and agents, are hereby ordered to cease and desist from submitting proposals regarding the creation of new bargaining unit positions, a nonmandatory subject of bargaining, to Act 312 arbitration.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____