STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

JACKSON COUNTY,
Public Employer-Respondent,

-and- Case No. C03 E-104

POLICE OFFICERS ASSOCIATION OF MICHIGAN,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Cohl, Stoker, Toskey & McGlinchey, P.C., by John R. McGlinchey, Esq., for Respondent

Martha M. Champine, Esq., Assistant General Counsel, for Charging Party

DECISION AND ORDER

On December 30, 2003, Administrative Law Judge (ALJ) Roy L. Roulhac issued his Decision and Recommended Order in the above matter. The ALJ found that Respondent Jackson County violated Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210, by bypassing Charging Party Police Officers Association of Michigan and bargaining directly with unit members. Respondent filed timely exceptions to the ALJ's Decision and Recommended Order and a brief in support, on January 22, 2004. Charging Party filed a timely response to the exceptions and a brief in support on February 4, 2004.

Factual Summary:

Respondent and Charging Party were signatories to a collective bargaining agreement that expired on December 31, 2001. Due to their inability to reach a new agreement during contract negotiations, the parties subsequently engaged in Act 312 interest arbitration. On April 3, 2003, Respondent proposed a settlement that included a retroactive wage increase for unit members, which Charging Party rejected. On April 15, 2003, Respondent mailed letters to bargaining unit members notifying them of this offer. Each letter contained Respondent's proposal, including the percentage increase for each year of the contract as well as the approximate amount that the employee would receive in retroactive pay if Charging Party accepted the offer. The letter concluded as follows:

> With the rejection of this last settlement offer, the 312 arbitration process will continue. This laborious process will take a long time and cost both sides money. The outcome could be significantly different from the one you have read above. There are no guarantees in this process! We believe this offer is

> fair and ask that all members of the unit review it carefully before we commit to continued arbitration.

The individually tailored pay calculations had not been included in Respondent's proposal to the Union. After receiving the letter, nearly all of Charging Party's unit members contacted the Union president.

Discussion and Conclusions:

In its exceptions, Respondent argues that its April 15 letter to employees did not constitute direct dealing with employees in violation of PERA. The Employer maintains that it merely advised its employees factually of what the offer previously made to the Union would mean to each one of them, information that was not only permissible, but helpful in fully informing employees and promoting successful bargaining. Respondent also asserts that the ALJ inappropriately relied on *Macomb Co Rd Comm*, 1993 MERC Lab Op 842 (no exceptions), which is clearly distinguishable on its facts. Although we agree that *Macomb Co Rd Comm* is not controlling, we adopt the ALJ's conclusion for the reasons that follow.

Respondent communicated its last offer to the individual members of the bargaining unit after that offer had been rejected by their bargaining representative. Additionally, each communication contained a calculation of the amount of retroactive pay that the offer represented to the individual member, with the above quoted advice.

Although it is not an unfair labor practice for an employer to communicate factual information disclosing its position in bargaining, the practice is not without risk. A union's duty of representation runs to the bargaining unit as a whole. To tailor bargaining to the needs or expectations of individual bargaining unit members invites the formation of self-centered constituencies and mitigates against the success of good faith bargaining. Nevertheless, the law permits limited communication regarding the status of bargaining, provided that it is done in a noncoercive manner. *MEA v North Dearborn Heights Sch Dist*, 169 Mich App 39, 45-46 (1988). When evaluating such communications, it is appropriate to consider them in light of the coercive nature of the employment relationship.

In *NLRB v Gissell Packing Co*, 395 US 575 (1969), and its progeny, considerable latitude is afforded to employer communications that address union organizing efforts where a balance is sought between threat and prediction. Thus, we have held that an employer is free to make a prediction as to how it will be affected by unionization. However, the prediction must be carefully phrased on the basis of objective fact to convey the employer's belief as to demonstrably probable consequences beyond its control. *Iosco County Medical Care Facility*, 1999 MERC Lab Op 299, 315; *Michigan State Univ*, 1976 MERC Lab Op 317. We believe that the latitude permitted to an employer communication regarding unionization is not the same as that which is allowed once bargaining rights have been established.

Employer responses to unionization are held to be improper if they are coercive, i.e., if they inhibit or interfere with the exercise of rights guaranteed by law. Employer communications regarding collective bargaining are allowed to the extent that they constitute a fair sharing of information with individual bargaining union members. They are not

allowed if they constitute direct barga ining in derogation of the obligation to bargain with a duly authorized bargaining representative.

In this case, Respondent did more than convey factual information disclosing its bargaining position. Its communication disparaged Charging Party's exercise of the statutory right to invoke Act 312 arbitration. By personalizing its rejected wage offer and characterizing the arbitration process as costly, laborious and time consuming, Respondent attempted to persuade individual bargaining unit members that the representation afforded them by Charging Party was inappropriate and that the acceptance of Respondent's offer would better serve their interests. By dealing in this manner with the individuals represented by Charging Party, Respondent engaged in prohibited direct bargaining.

We have carefully considered Respondent's remaining arguments and find them to be without merit. For the reasons set forth above, we adopt 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

_____
Harry W. Bishop, Commission Member

_____
Nino E. Green, Commission Member

Dated: _____

CHAIRMAN LYNCH, CONCURRING SEPARATELY:

Determining whether direct dealing has taken place is a complex process involving balancing the rights of the workers, the union, and the employer. A fundamental inquiry is whether the employer has chosen to deal with the union through the employees, rather than with the employees through the union. *NLRB v Pratt & Whitney Aircraft Div, United Technologies Corp*, 789 F2d 121 (CA 2 1986). This case is a good example of how close the issue can be.

_____
Nora Lynch, Commission Chairman

Dated: _____

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EMPLOYMENT RELATIONS COMMISSION
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APPEARANCES:

Cohl, Stoker, Toskey & McGlinchey, P.C., by John R. McGlinchey, Esq., for Respondent

Mary M. Champine, Esq., Assistant General Counsel, for Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, on November 14, 2003, Administrative Law Judge Roy L. Roulhac heard this case in Lansing, Michigan for the Michigan Employment Relations Commission. The proceeding was based on a May 13, 2003, unfair labor practice charge filed by Charging Party alleging that Respondent violated PERA by bypassing the Charging Party and attempting to bargain directly with bargaining unit members. Based on the record, including post-hearing briefs filed by December 18, 2003, I make the following findings of fact, conclusions of law and recommended order.

FINDINGS OF FACT:

The facts are undisputed. Charging Party is the certified bargaining representative for deputy sheriffs employed by Respondent Jackson County, a public employer. The parties are operating under a collective bargaining agreement that expired December 31, 2001, and are currently engaged in Act 312 interest arbitration.

On April 3, 2003, the Union's bargaining team rejected a settlement proposal communicated to it by the Employer. Thereafter, on April 15, 2003, the Employer sent letters to each member of the bargaining unit that contained Respondent's most recent

contract proposal that Charging Party's bargaining team had rejected. The letters, individually tailored, also included the approximate amount of retroactive pay that each member would receive for the period January 1, 2002 through May 4, 2003, if a settlement of the contract were reached. The letters closed with the following paragraph:

> With the rejection of this last settlement offer, the 312 arbitration process will continue. This laborious process will take a long time and cost both sides money. The outcome could be significantly different from the one you have read above. There are no guarantees in this process! We believe this offer is fair and ask that all members of the unit review it carefully before we commit to continued arbitration.

Respondent did not provide the retroactive pay calculations to Charging Party prior to sending them to bargaining unit members.

After bargaining unit members received Respondent's April 15, 2003 letter, Deputy David Ritz, Charging Party's president and negotiating team member was "bombarded" with telephone calls from bargaining unit members. Most asked why the bargaining team rejected the Employer's settlement offer and others expressed dissatisfaction with receiving the letter.

Conclusions of Law:

Charging Party claims that the Employer breached its duty to bargain by mailing and communicating to the employees individually tailored wage and retroactive pay information without first providing the information to the Union. According to Charging Party, by communicating directly with its members, Respondent was attempting to coerce them into contacting the bargaining team and demanding that that the Employer's offer be accepted.

Respondent, relying on *Waldron Area Schools*, 1996 MERC Lab Op 441, and cases cited therein, claims that PERA is not violated when an employer communicates to employees a proposal that has already been introduced at the bargaining table to employees. Respondent, however, fails to address Charging Party claim that it communicated retroactive pay information to bargaining unit members that had not been provided to the Union.

It is well settled that information presented to the membership must be what was actually presented to the bargaining agent. *St. Clair County Community College*, 1979 MERC Lab Op 541; *Oakland Community College*, 2001 MERC Lab Op 273, 278. The theory behind this violation is that the bargaining agent, by being deprived of an opportunity to react to an employer's offer, is disparaged by having the offer taken directly to the employees. *Mona Shores Board of Education*, 1989 MERC Lab Op 415, 430. In *Macomb County Road Commission*, 1993 MERC Lab Op 842, 847-848, the employer was found to have breached it duty to bargain under PERA by, among other

things, sending personalized pay information to higher paid bargaining unit members before giving the information to the bargaining representative.

The same result is required here. Respondent violated PERA by communicating individually tailored retroactive pay information to bargaining unit members before providing it their exclusive bargaining agent. Respondent's conduct was an obvious attempt to undermine the Union and coerce members into exerting pressure on Charging Party's bargaining team to accept Respondent's proposal. Based on the above findings of facts and conclusions of law, I recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

It is hereby ordered that Jackson County, its officers, agents and assigns shall:

1. Cease and desist from:

   (a) Refusing to bargain collectively and in good faith concerning wages, hours and working conditions with the Police Officers Association of Michigan by communicating wage information directly to bargaining unit members before providing the information to their exclusive bargaining representative.

   (b) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them in Section 9 of PERA.

2. Upon request, bargain collectively and in good faith concerning wages, hours and working condition with the above named Union as the exclusive bargaining representative of deputy sheriffs.

3. Post copies of the attached notice to employees in conspicuous places on Respondent's premises, including all locations where notices to employees are customarily posted. Copies of this notice shall remain posted for 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Roy L. Roulhac
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

PURSUANT TO AN UNFAIR LABOR PRACTICE PROCEEDING BEFORE THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION, AFTER A PUBLIC HEARING BEFORE AN ADMINISTRATIVE LAW JUDGE IN WHICH JACKSON COUNTY WAS FOUND TO HAVE VIOLATED THE PUBLIC EMPLOYMENT RELATIONS ACT OF THE STATE OF MICHIGAN, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse and fail to bargain collectively and in good faith concerning wages, hours, and working conditions with the Police Officers Association of Michigan as the exclusive representative of deputy sheriffs.

WE WILL NOT communicate wage information directly to bargaining unit members before providing the information to their exclusive bargaining representative.

WE WILL, on request, bargain in good faith with the Union as the exclusive bargaining representative of deputy sheriffs.

By _____

Dated: _____

This notice shall remain posted for a period of thirty consecutive days and must not be altered, defaced, or covered by any other 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, 3026 W. Grand Blvd, Ste. 2-750, Detroit, Michigan 48202-2988.