STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

ORION TOWNSHIP (DEPT. OF PUBLIC WORKS),
Public Employer-Respondent,

Case No. C03 E-121

-and-

TEAMSTERS LOCAL 214,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Keller Thoma, by Dennis B. DuBay, Esq., for the Respondent

Rudell & O'Neill, P.C., by Wayne A. Rudell, Esq., for the Charging Party

DECISION AND ORDER

On September 15, 2004, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above case, finding that Respondent, Orion Township (Department of Public Works), violated its duty to bargain in good faith when it unilaterally implemented changes in terms and conditions of employment in the absence of impasse. The ALJ found that Respondent had violated Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(e), as alleged in the charge, when it refused to meet with Charging Party, Teamsters Local 214, for additional negotiations after fact finding and unilaterally imposed changes in the terms and conditions of employment. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA. On November 8, 2004, Respondent filed timely exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions. Charging Party did not file a response to the exceptions.

In its exceptions, Respondent contends that the ALJ erred when she concluded that the parties were not at impasse prior to the implementation of new terms and conditions of employment. Respondent contends that the parties were at impasse from January 29, 2002, through and beyond May 1, 2003. Respondent further argues that an attempt by Charging Party to schedule mediation after the parties received the fact finder's report was insufficient to break the impasse.

Factual Summary:

The facts in this case were set forth fully in the Decision and Recommended Order and need not be repeated in detail here. Briefly, the last collective bargaining agreement between the parties expired on December 31, 2001. On September 14, 2001, the parties began negotiations for a new agreement. At this initial meeting, Charging Party presented a written proposal demanding wage increases for each year of the contract, the adoption of a defined benefit pension plan, provision of retiree health care, and various other proposals.

The parties met and bargained on three occasions prior to a fourth meeting on January 29, 2002. At that meeting, Respondent proposed to create voluntary employee beneficiary association (VEBA) accounts for its employees, to be used for health care upon retirement. When they could not reach an agreement, the parties asked for mediation. They met with a mediator for approximately one hour on May 13, 2002, at which time Charging Party would not agree to VEBA accounts and expressed its intention to request fact finding.

Charging Party filed a petition for fact finding on May 21, 2002. The petition listed twenty-one unresolved issues. At an August 5, 2002 prehearing conference with the fact finder appointed by this Commission, the parties agreed to limit the issues at hearing to wages, pensions, and retiree health care. The fact finding hearing took place on November 12, 2002, and on December 6, 2002, the fact finder issued his report recommending that the parties adopt the Respondent's proposal on wages, maintain the existing pension plan, and adopt Respondent's VEBA proposal.

On January 9, 2003, the parties met for the last time. Prior to this meeting, the Respondent's Board told its bargaining representatives that it had made its last best offer and intended to implement the fact finder's recommendations. At the parties' final meeting, which lasted one-half hour, Charging Party accepted the fact finder's recommendations but expressed a belief that portions of the recommendations needed additional negotiation. Specifically, Charging Party proposed a wage reopener for the fourth year and additional payments into VEBA accounts. Respondent's bargaining team responded that it could not agree without the approval of its Board, and agreed to present Charging Party's proposal to the Board at its next meeting. When Respondent's Board directed its bargaining team not to engage in further negotiations and to implement the contract, Charging Party attempted to set up another mediation session.

On February 14, 2003, Respondent sent Charging Party a letter stating that it had exhausted the mediation process and that it would be receiving a draft contract within approximately 10 days. On February 20, Charging Party sent Respondent a letter advising that a mediator had agreed to meet on March 3. The parties did not meet with the mediator, and on March 12, Respondent notified Charging Party that it was not authorized to negotiate further and would implement its last best offer.

On March 18, Respondent sent Charging Party a draft agreement. On April 8, Charging Party responded by pointing out several "errors" in the contract. On April 21, Respondent replied that unless

Charging Party was prepared to sign the agreement, it would implement it effective May 1. On May 1, 2003, Respondent implemented changes in wages and terms and conditions of employment.

Discussion and Conclusions of Law:

Respondent takes exception to the ALJ's findings, maintaining that the ALJ failed to appreciate that the parties were at impasse following the January 9, 2003 meeting, and that further discussions were "unlikely to produce compromise." Respondent acknowledges the rule expressed in *Wayne Co*, 1984 MERC Lab Op 1142, and 1985 MERC Lab Op 244, 250, aff'd 152 Mich App 87, 125 LRRM 2588 (1986), lv den 426 Mich 875 (1986), but states that it does not require an employer to meet with a labor organization for any number of occasions, nor does it require an employer to continue to meet where such meetings would not have produced agreement.

We have consistently stated the importance of mediation and fact finding, indicating that the failure of the parties to utilize these services to the maximum extent necessary may be viewed as indicating a lack of good faith, and contrary to the intent and policies of PERA. *Crestwood Sch Dist*, 1975 MERC Lab Op 609; *Cass Co Road Comm*, 1984 MERC Lab Op 306. In the *Wayne Co* case, we established a rule that parties must bargain for a reasonable time over the substance of a fact finder's report. We stated that in most cases, a reasonable time is 60 days after the issuance of the report, providing the parties are bargaining in good faith. We have found that after fact finding, a party must make a serious effort to reconcile its differences with the other side; simply meeting and discussing the fact finder's report may not be sufficient to satisfy the bargaining obligation. *Oakland Cmty College*, 2001 MERC Lab Op 273; *City of Dearborn*, 1972 MERC Lab Op 749, 759.

In this case, the fact finder's report was issued on December 6, 2002. Thereafter, the parties met on January 9, 2003. At that meeting, which lasted approximately one-half hour, they merely stated their positions regarding the fact finder's recommendations. They did not negotiate, and afterwards Respondent was admittedly unwilling to negotiate. At that time, Respondent advised Charging Party that it accepted the fact finder's recommendations as its last best offer. Charging Party, too, agreed to accept the fact finder's recommendations, but expressed the belief that further negotiation was needed. Following the January 9, 2003, meeting, Charging Party attempted to schedule mediation, but Respondent refused to meet, declaring that impasse had been reached.

We find that under the circumstances of this case, a single meeting after fact finding does not fulfill the requirement of good faith bargaining. Compare *City of Benton Harbor*, 1996 MERC Lab Op 399. We recognize that both sides had taken a firm position on the issues, and that the obligation to bargain the recommendations of a fact finder does not require a party to adopt a recommendation or change its bargaining position. *Wayne Co*, 1988 MERC Lab Op 7. However, we find that the Employer's refusal to meet again or to utilize the assistance of a mediator, based on its unilateral conclusion that compromise was unlikely, is contrary to the obligation to bargain in good faith.

Because Respondent refused to meet with Charging Party after January 9, 2003, we find that it did not satisfy its obligation to meet and bargain in good faith over the fact finder's recommendations for

a reasonable period of time before implementing its offer. Accordingly, we find that Respondent violated its duty to bargain and unlawfully implemented changes in terms and conditions of employment.

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 Chairperson

_____
Nino E. Green, Commission Member

Dated: _____

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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 November 14, 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 January 22, 2004, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

Teamsters Local 214 filed this charge against Orion Township on June 13, 2003. Charging Party represents a bargaining unit of employees in the Orion Township Department of Public Works (DPW). Charging Party alleges that Respondent violated Section 10(1)(e) of PERA by refusing to meet after January 9, 2003 to negotiate a new collective bargaining agreement. Charging Party also alleges that Respondent unlawfully implemented a "contract" containing changes in existing terms and conditions of employment on May 1, 2003. According to Charging Party, Respondent could not lawfully implement changes in terms and conditions of employment at that time because the parties were not at

impasse, and also because Respondent had not fulfilled its obligation to meet and bargain in good faith for a reasonable time over recommendations issued by a fact finder on December 6, 2002. Finally, Charging Party alleges that even if Respondent had the right to implement the "contract," Respondent violated its duty to bargain in good faith because it implemented changes that were inconsistent with its last offer.

Facts:

The last collective bargaining agreement between the parties covering DPW employees had an expiration date of December 31, 2001. The parties began negotiations for a new contract on September 14, 2001. Around this time, they agreed to extend the contract on a day-to-day basis after the expiration date. Throughout negotiations, Teamsters representative Les Barrett was Charging Party's chief negotiator. Charging Party's bargaining team also included Mitch McMurray, a union steward, and Roger Morris, a unit employee. After the first meeting, Dennis DuBay, Respondent's counsel, was Respondent's chief negotiator. Respondent's team also included Township Supervisor Gerald Dywasuk and his assistant, Elizabeth Balch.

The September 14 meeting began with a discussion of ground rules. Charging Party then presented a written proposal. Charging Party had three major demands. First, Charging Party proposed a 12% wage increase for each year of the contract. Secondly, it proposed to eliminate the existing defined contribution pension plan and adopt a Michigan Employee Retirement Services (MERS) defined benefit plan. Third, Charging Party proposed to require Respondent to provide a retiree, and his or her family, with the same health care coverage the retiree had at the time of retirement, with the Respondent paying the full premium for both the retiree and his or her family. Under the 1999-2001 contract, retirees had the right to participate in Respondent's health care plan, but had to pay the entire cost of the premium. Respondent also paid a percentage, based on years of service, of a retiree's Medicare supplemental insurance. Charging Party's September 14 proposal also included demands to increase the amount of vacation time employees received after 20 and 30 years; to increase the minimum callback pay from three hours to five hours for callbacks between midnight and 7 am, and from two to four hours for callbacks at other times; to provide for funeral leave separate from personal leave; and to require Respondent to maintain and launder uniforms, The parties spent the first meeting reviewing Charging Party's proposals. This meeting lasted about one hour.

The parties met again on November 12, 2001. Respondent presented Charging Party with four written proposals. These were: (1) to begin paying standby, in addition to callback, pay; (2) to require employees to take their breaks at their job sites, instead of returning to the garage; (3) to require all new hires to have a Class B commercial drivers license (CDL) with an "N" endorsement; (4) to prohibit employees from storing personal property on Respondent's premises except in their lockers. The parties discussed Respondent's proposals and then returned to list of proposals presented by Charging Party on September 14. Respondent rejected each proposal, item by item. The November 21, 2001 meeting lasted about two and one-half hours. The parties did not reach agreement on any issue.

The parties' third bargaining session took place on December 21, 2001. Respondent gave Charging Party an oral package proposal for a contract to take effect immediately after the expiration of their existing agreement. The package proposal was for a four-year agreement effective January 1, 2002. It provided for wage increases for each year of the contract of 2 ½ %, 2 ½ %, 2 ½ %, and 3%. It included no changes in the pension plan or retiree health care. Respondent's proposal did not increase vacation time for senior employees. However, Respondent proposed to give new hires one week of vacation time during their first year of employment, to be available after completion of the employee's 60 day probationary period. Under the 1999-2001 contract, new hires had no vacation time during their first year of employment. Respondent also proposed to increase minimum callback pay from two and three to four and four (instead of four and five as Charging Party had proposed). Charging Party's bargaining team caucused. When they returned, they said that they would accept the proposal if it included a change to a MERS defined benefit plan and if Respondent agreed to provide health care for retirees and spouses. Charging Party told Respondent that they had to have a MERS defined benefit pension and retiree health insurance to settle the contract. This meeting lasted about three hours. About half this time, the parties were in caucus. The meeting concluded without the parties reaching agreement.

Respondent had never provided retiree health insurance benefits to any of its employees. Balch began researching what health benefits comparable communities provided to retirees. In the process, Balch learned that some communities had established voluntary employee beneficiary association (VEBA) accounts for their employees, with the proceeds of the accounts to be used for payment of health insurance premiums after the employee retires. Under these plans, the employers contributed a specific amount annually to each employee's VEBA account, and the contributions remained tax-free until the employee retired. After the December 21 meeting, Balch and Dywasuk put together figures for the Township Board indicating what the cost of different VEBA packages would be. After considerable debate, the Board decided to implement a VEBA plan for its unrepresented department heads and to offer Charging Party a proposal for a VEBA plan for its members.

The parties met for the fourth time on January 29, 2002. Respondent explained the benefits of VEBA accounts for post-retirement health insurance premiums. Barrett told Respondent that he was familiar with VEBA's and had negotiated these plans in other jurisdictions. Respondent's bargaining team explained that they had, with some difficulty, succeeded in getting the Township Board to approve the concept, and that Respondent intended to set up VEBA accounts for its unrepresented department heads. Respondent then made an oral package proposal that included the establishment of a VEBA account for each member of Charging Party's unit with more than five years of service. Under this proposal, Respondent would contribute $100 per month to each VEBA account. Employees could also roll unused sick pay into the account at the end of each year.[1] Respondent told Charging Party that in order to help offset the cost of the VEBA contributions, it was reducing the wage offer in its December 21 package proposal to 2% for each year of the contract. Respondent stated that in all other respects its package proposal was the same as the one it made on December 21. Barrett testified that Respondent said that the VEBA would be instituted and payments made retroactive to January 1, 2002. Barrett's notes from this meeting also indicate that the VEBA was to be retroactive to that date.

[1] Under the 1999-2001 contract, unused sick time was forfeited.

According to Balch, however, there was no discussion of when the plan would take effect because Charging Party said that the VEBA was unacceptable.[2] After Respondent presented its proposal, Charging Party's bargaining team restated their demand that Respondent pay for health care insurance for retirees. Morris made an emotional speech in which he argued that $1,200 per year would not be enough to provide him or his family with health care after his retirement, and suggested that he would have to leave and find other employment with better retiree benefits. The meeting ended with the parties agreeing to seek the assistance of a mediator.

The parties did not meet again until they met with the mediator on May 13, 2002. Before the meeting, Barrett prepared a summary for the mediator of the parties' positions on the approximately 18 open issues. The summary stated that there had been no tentative agreements reached. According to the summary, Charging Party's position on callback time was the same as its original proposal, and Respondent's position was "no." The summary described Respondent's wage offer as 2% per year, with retroactivity in the first year and "VEBA retroactive to January 1, 2002." With respect to Respondent's proposals on breaks, standby pay, and the storage of personal property, the summary stated that these proposals "may be agreeable (to Charging Party) if health care on retirement is provided." The May 13 meeting lasted about an hour. Most of this time, the parties were meeting with the mediator. The parties did not initial any tentative agreements (TA's) during that meeting. However, they reached informal agreement on some terms, contingent on reaching an overall tentative agreement. These included an increase in the minimum callback time for late-night callbacks to four hours, and Respondent's proposal to give new employees one week of vacation after completion of their probationary period. At the end of the meeting, a ten or fifteen minute discussion took place between Barrett and DuBay about the possibility of reconfiguring the VEBA to make it acceptable to Charging Party. Barrett told DuBay that Charging Party would not agree to a VEBA, no matter how it was structured. The parties did not initial any tentative agreements at this meeting. At the end of the meeting, Charging Party announced that it would file for fact finding.

On May 21, 2002, Charging Party filed a petition for fact finding with the Commission. The petition listed 21 unresolved issues: callback time; holidays; vacation, longevity; personal time; funeral leave; dental/optical coverage; hearing coverage; life insurance for retirees; pension; retiree health care; disability insurance; arbitration provider (AAA or FMCS); uniform allowance; CDL reimbursement; wages; retroactivity of economic benefits; payoff of sick time; breaks; standby pay; and use of lockers. In its answer to the petition, Respondent listed its four proposals, stated that its position on all the other issues was to maintain the status quo, and indicated that it opposed retroactivity for any economic improvements which might be recommended by the fact finder.

On June 25, 2002, the Commission appointed A. Robert Stevenson as the fact finder. The parties held a prehearing conference with the fact finder on August 5, 2002. At this conference, the parties agreed to narrow the issues to be presented to the fact finder. In late September 2002, the parties entered into a signed agreement (hereinafter the September Agreement). It began as follows:

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[2] For reasons discussed below, I find it unnecessary to resolve the dispute between Barrett and Balch regarding the specific terms of Respondent's December 21 offer.

A. Three issues as set forth in paragraph C below will be presented in the fact-finding proceeding.

B. The parties' negotiation teams are in agreement on the matters set forth below which will be included in any contract presented to the principal parties for ratification:

1. The parties agree to a four-year contract effective January 1, 2002 to, and including December 31, 2005.

2. The parties agree that the new contract will be the same as the parties' prior contract (in effect January 1, 1998 – December 31, 2001) except as amended by the following enumerated changes and the final resolution on the three issues that will be submitted to fact-finding

The September Agreement stated that the parties had agreed to add the following sentence to Article VII of their contract, "During their first year of employment new hirees [sic] will be eligible, upon completion of the probationary period, for one (1) week of vacation." The September Agreement also set out contract language agreed to by the parties on the following subjects: (1) the taking of breaks; (2) uniform cleaning allowance; (3) standby pay; (4) storage of personal property; (5) CDL requirements; (6) addition of a Martin Luther King Day holiday; (7) change in the dental and optical plan carrier; (8) funeral and personal leave; (9) change in grievance procedure time limits. The September Agreement did not mention callback pay. Barrett testified that the parties "missed" this issue. According to Barrett, Respondent never told Charging Party that it had withdrawn its December 21, 2001 proposal to increase the late-night minimum callback to four hours, and, as far as Barrett was concerned, this proposal should have been part of the September Agreement.

Paragraph C of the September Agreement listed three issues to be submitted to the fact finder, and the parties' respective positions on these issues. The issues were wages, pensions and retiree health care. Both parties' wage proposals included a wage increase in the first year of the contract retroactive to January 1, 2002. The parties' proposals on pension and retiree health care make no mention of an effective date or retroactivity.

The fact finding hearing took place on November 12, 2002. The fact finder issued his report on December 6, 2002. The fact finder recommended that the parties' adopt the Respondent's proposal on wages. He also stated, "If inflation is a problem in the last year of the contract adjustment can be made through subsequent contract negotiations." The fact finder also agreed with the Respondent's position on the pension plan. He said, "In this case the competitive need for such a change has not been demonstrated and since it would impact other Township employees, I would not recommend the adoption of a MERS pension program at this time." Finally, the fact finder recommended that the parties agree to Respondent's VEBA plan. He stated:

> The Township admits that most of the comparables have some type of retiree health insurance program with varying coverage and exclusions with varying ages for eligibility. However, it is the Township's position that the hourly wage and annual net salary are far above comparables and their 14% contribution to the retirement benefit plan compared to the 10% paid by Macomb Township and Independence Township offsets the retiree benefits those Townships provide.
>
> As a first step to address this cost and because of the trend away from defined benefits I find the Township proposal reasonable and should be favored over the family coverage retiree coverage proposed by the Union. The plan proposed by the employer can be the basis for future negotiations as to the amount of the Township's contributions. Regarding current employees in the bargaining unit is [sic] would be reasonable for the Union and the Township to negotiate contributions in recognition of past service.

The parties met again on January 9, 2003. According to Balch, before this meeting the Board had told its representatives that it had made its best offer. The Board instructed the representatives to inform Charging Party that Respondent accepted the fact finder's recommendations, and that it intended to implement them. At the January 9 meeting, DuBay stated that Respondent was offering wage increases of 2%, 2%, 2%, and 2%; a VEBA plan after five years employment with a contribution of $100 per month plus pay for unused sick time; and the items agreed to in the September Agreement, including the vacation time for new hires. Barrett said that Charging Party agreed to adopt the fact finder's recommendations. However, Barrett stated that there were two areas addressed in the fact finder's report that Charging Party felt needed additional negotiation. These were the wage rate for the fourth year of the contract and additional payments into the VEBA based on past service. Barrett told Respondent that Charging Party believed that the fact finder had, in fact, recommended that the parties continue negotiating on these issues. Charging Party proposed that the contract include a wage reopener for the fourth year of the contract. It also proposed that Respondent put into each existing employee's VEBA account $1,000 for each year of service. At some point, someone on Charging Party's bargaining team said that there would be no signed contract without this "seed money." DuBay disagreed with Charging Party's interpretation of the fact finder's report, stating that he felt the fact finder had recommended that the parties address these issues in negotiations for subsequent contracts. DuBay also said that he had no authority to agree to put money into the VEBA accounts for past service. He told Charging Party that Respondent's representatives would go back to the Board to see what it would authorize the representatives to do. He warned Charging Party that he could not promise anything. DuBay told Barrett that he would report to the Board at its next regular meeting on January 21. The parties agree that DuBay did not explicitly say that the parties were at impasse at this meeting. The January 9 meeting lasted approximately one-half hour.

Sometime shortly after January 9, Respondent's representatives met with the Township Board and presented it with Charging Party's proposals and calculations as to their cost. The Township Board told the bargaining team not to engage in further negotiations, and told Dywasuk and Balch to "implement the contract." On January 24, DuBay called Barrett and told him that the Township would

not change its position. Barrett inquired whether he should set up a mediation session. DuBay said he did not think further mediation would be of any value. Nevertheless, Barrett attempted to set up a meeting with a mediator.

On February 6, DuBay sent Barrett a letter outlining Respondent's position on the status of bargaining. According to DuBay, when Charging Party filed for fact finding, the parties' were at impasse on three issues – wages, retirement plan, and employee retirement health insurance – and the fact finder recommended adoption of Respondent's position on all three issues. When the parties met after the fact finder issued his report, according to DuBay, Respondent indicated that its position on these issues should be implemented, but Charging Party "persisted in its position that the Township's position with respect to the retiree health insurance plan was unacceptable." DuBay implied, but did not explicitly state, that the parties were then at impasse. DuBay stated that he was preparing a draft contract consisting of the terms set out in the parties' prior collective bargaining agreement; the modifications previously agreed to by the parties; Respondent's position on wages, including a 2% wage increase retroactive to January 1, 2002; and, effective January 1, 2003, a VEBA plan to which Respondent would contribute $100 per month per employee plus the value of the employee's unused sick days. According to the letter, Respondent intended to implement these changes even if no agreement was reached.

Despite receiving this letter, Barrett called DuBay again to try to arrange a mediation session. On February 14, DuBay sent Barrett another letter. In this letter, DuBay said that the parties had already engaged in unsuccessful mediation and fact finding, that Respondent had made it clear that its positions had not changed, and that Charging Party had made it clear that it would not sign a contract containing Respondent's VEBA proposal. DuBay stated that Respondent believed that the parties' had exhausted the mediation process. DuBay again implied, but did not state, that the parties were at impasse. He told Barrett that Charging Party would be receiving the draft contract in approximately 10 days.

On February 20, Barrett sent Respondent a letter again suggesting mediation, and indicating that a mediator had agreed to meet with them on March 3. The parties did not meet on March 3. On March 12, DuBay phoned Barrett told him that the Board had not authorized him to meet again, and that the Board had decided to implement its last offer. On March 18, Respondent sent Charging Party a draft proposed agreement with the suggestion that it present the agreement to its membership for ratification. In his cover letter, DuBay said, "The Township is not willing to contribute (to the VEBA) any amount above the $100 per month contribution as set forth in the contract draft."

On April 8, Barrett wrote to DuBay pointing out three "errors" in the draft contract. Barrett maintained that the parties had an agreement to change minimum call back pay from three to four hours that was not reflected in the draft contract. Barrett also pointed out that the draft contract appeared to provide that new employees would be eligible for vacation after six months, rather than after completion of a 60-day probationary period as the parties had agreed. In addition, Barrett noted that the draft contract stated that Respondent would make VEBA contributions effective January 1, 2003. Barrett

asserted that this was contrary to Respondent' position in fact finding which was, according to Barrett, that all items would be retroactive to the start of the contract term.

DuBay replied on April 21. DuBay pointed to language in the draft contract allowing employees to use vacation time after completion of their probationary period, and offered to change the draft contract to make this clearer. DuBay denied that the parties had agreed to a change in the minimum call back pay, and denied that Respondent had ever proposed to make VEBA contributions retroactive to the beginning of the contract term. DuBay stated that unless Charging Party advised it that Charging Party was prepared to sign the collective bargaining agreement, "the Township plans to implement the contract at the start of the first pay in the month of May 2003."

On May 1, 2003, Respondent implemented the changes in wages and terms and conditions of employment set forth in its draft contract. After this date, new bargaining unit employees were permitted to use vacation time immediately after completion of their 60-day probationary period.

Discussion and Conclusions of Law:

The Commission has defined impasse as the point at which the parties' positions have so solidified that further bargaining would be futile. *Oakland Comm College,* 2001 MERC Lab Op 272, 277; *Wayne County (Attorney Unit),* 1995 MERC Lab Op 199, 203; *City of Saginaw,* 1982 MERC Lab Op 727. The determination of whether an impasse exists is made on a case-by-case basis, taking into account the totality of the circumstances and the entire conduct of the parties. *Flint Twp,* 1974 MERC Lab Op 152,156. In determining whether impasse exists, the Commission looks at a number of different factors. These include whether there has been a reasonable term of bargaining, whether the positions of the parties have become fixed, and whether both parties are aware of where the positions have solidified. *Oakland Comm College, supra,* at 277.

The fact the parties have reached a good faith impasse does not terminate the bargaining duty, but only suspends it until circumstances change which break the impasse. *Escanaba Public Schools,* 1990 MERC Lab Op 887, 891; *City of Ishpeming,* 1985 MERC Lab Op 517, 520-521. See also *NLRB v Sharon Hats, Inc* 289 F2d 628 (5th Cir, 1961), *enforcing* 127 NLRB 947 (1960), holding that a substantial change in the bargaining position of either party serves to break an impasse.

In *Taft Broadcasting Co,* 163 NLRB 475, 478 (1967), *enf'd sub nom, Television Artists AFTRA v NLRB,* 395 F2d 622 (DC Cir, 1968), the National Labor Relations Board stated, "After good faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals." As a general proposition, once the parties have reached a good faith impasse, an employer may alter existing wages or other terms of conditions of employment under PERA. *Ottawa Co v Jaklinski,* 423 Mich 1 (1985); *Detroit Police Officers Ass'n v. Detroit,* 391 Mich 44,54-55 (1974). However, in *Wayne Co,* 1984 MERC Lab Op 1142 and 1985 MERC Lab Op 244, *aff'd* 152 Mich App (1986), the Commission held that when the union has filed for fact finding, the employer cannot implement changes in the status quo until the fact finder has issued his or her report and the parties have

bargained for a reasonable time over the substance of the fact finder's recommendations, even if the parties were at impasse prior to fact finding.

I conclude that the parties here had reached good faith impasse on the terms of their contract by the time Charging Party requested the appointment of a fact finder on May 21, 2002. Although Charging Party argues that five relatively short meetings did not constitute a reasonable term of bargaining, I find that by May 21, 2002 the positions of the parties had solidified on the two issues which Charging Party indicated were of critical importance in reaching a contract – the change from a defined contribution to a defined benefit pension plan, and the adoption of a health insurance plan covering retirees and their spouses. Respondent's firm position was that it was not willing to agree to a defined benefit pension plan or to pay health insurance premiums for retirees. Charging Party had rejected Respondent's proposal to establish VEBA accounts to allow employees to pay their own health insurance premiums after retirement, and continued to insist on both employer-paid insurance for retirees and the change in the pension plan. Both parties understood each other's positions, and knew that reaching a contract would not be possible without a concession by either party on these two issues.

I conclude, however, that this impasse was broken at the parties' meeting on January 9, 2003. At that meeting, Charging Party indicated that it was dropping its demand for a defined benefit pension plan, and that it would accept a VEBA plan in lieu of employer-paid retiree health insurance. Charging Party did not accept the VEBA proposal Respondent had made prior to fact finding. Instead, Charging Party made a counterproposal to require Respondent to pay $1000 per year of past service into each employee's VEBA account at the time the account was established, in addition to the monthly contribution of $100 that Respondent had proposed. Charging Party also proposed to add a wage re-opener in the final year of the contract. I find that Charging Party's counterproposal represented significant movement on Charging Party's part from its previous position on the two issues that had brought about the impasse - retiree health care and pension. Because of the instructions it had received from the Township Board before the January 9 meeting, Respondent's representatives could do nothing at that meeting except reject the proposal, and indicate, as they did, that they would present Charging Party's offer to the Township Board. After they did so, on January 21, 2003, the Board instructed them not to meet again, and told Dywasuk to implement its pre-fact finding proposal.

Respondent argues that because Charging Party indicated at the January 9 meeting that it would never agree to Respondent's VEBA proposal, and Respondent clearly rejected Charging Party's proposal to put "seed money" into the VEBA plans, the parties had reached impasse again by the end of the January 9 meeting. I do not agree. First, DuBay told Charging Party at this meeting that he would present its proposal to the Township Board, although he warned it that he could not promise anything. At the end of the January 9 meeting, the parties were not at the point where they both knew that further bargaining would be futile, since they were waiting for the Board's response to Charging Party's proposal.

On January 24, DuBay notified Charging Party that the Board would not "change its position," and that it had instructed him not to meet further. Respondent argues that at that point the parties were at impasse. Respondent maintains, first, that Charging Party was "not willing to move from its position"

between January 9 and May 21, 2003. I find no evidence that Charging Party's took a fixed position after January 9. First, Charging Party never stated that its January 9 proposal was its final offer. Moreover, Barrett's persistent attempts to set up a meeting with a mediator even after he had been repeatedly told that Respondent would not accept Charging Party's proposal suggested that Charging Party was willing to move from its January 9 position. In order for the parties to be at impasse, the evidence must show that neither party is willing to compromise further. *Oakland Comm College, supra*, at 277.

Respondent also asserts that the parties were at impasse because Charging Party was insisting on "seed money" for the VEBA accounts as a condition of contract settlement, and Respondent had already committed as much money to the contract settlement as it was willing to. As Section 15(1) of PERA states, a party's duty to bargain under PERA does not compel it to agree to a proposal or to make a concession. Respondent had no obligation to offer Charging Party more money in the form of "seed money" for the VEBA, or any other benefit. However, DuBay did not tell Barrett on January 9 or 24, or in his letters of February 6 or February 14, that Respondent was rejecting Charging Party's proposal because its costs exceeded Respondent's bottom line. Rather, he merely stated that Respondent was not willing to move from its pre-fact finding VEBA offer. If DuBay had explained to Charging Party that Respondent's position was that it would contribute no more money toward the contract settlement, Charging Party could have countered with a proposal to reduce wages or other benefits to provide more money for the VEBA. As Respondent admits, its proposal on the table in January 2003 included economic improvements in several areas. Whether Charging Party would ultimately have agreed to a contract that reduced other benefits is irrelevant. Since Respondent refused to agree to meet after January 9, or to explain the basis for its rejection of Charging Party's proposal, Charging Party had no reasonable opportunity to either propose or reject such an agreement. Under these circumstances, Charging Party statement on January 9 that it would not agree to a contract without "seed money" is not enough to establish that the parties had reached impasse.

I also find that Respondent did not satisfy its obligation to meet and bargain in good faith over the fact finder's recommendations for reasonable period of time before implementing its offer. The parties met only once after the fact finder made his recommendations. At this meeting, Charging Party made a proposal that represented significant movement from its pre-fact finding position. Respondent's representatives admitted to Charging Party that they did not have authority do anything at this meeting except restate Respondent's previous offer. No actual discussion of Charging Party's new proposal took place at this meeting. Respondent refused to meet again with Charging Party on a face-to-face basis. Neither at the January 9 meeting nor in subsequent correspondence did Respondent explicitly state why it was rejecting Charging Party's new proposal. Although Respondent did not implement its offer until almost five months after the fact finder issued his report, I conclude that no bargaining of any substance took place between the time this report was issued and Respondent's implementation of its last offer.

For the reasons set out above, I find that the parties were not at impasse between January 9 and May 1, 2003, and that Respondent, therefore, violated its duty to bargain by refusing to meet during this period. I also find that Respondent unlawfully implemented changes in terms and conditions

of employment on May 1, 2003 because the parties were not at impasse at the time, and because Respondent had not satisfied its obligation to bargain in good faith over the fact finder's recommendations.

Charging Party argues that Respondent violated its duty to bargain in good faith by implementing changes that were inconsistent with Respondent's last offer.[3] In fact, Charging Party requests that the remedy for Respondent's unfair labor practice include an order requiring it to change the minimum callback pay for late-night callbacks to four hours, give new employees the right to use vacation time after the completion of their 60-day probationary period, and make monthly VEBA account contributions retroactive to January 1, 2002. Charging Party argues that because Respondent's package proposal of January 29, 2002 included these items, Respondent could not implement changes, even after impasse, without implementing these parts of this proposal. Since I have found, as set forth above, that Respondent could not lawfully implement its offer on May 1, 2003, it is not strictly necessary for me to decide this issue. However, I note that I agree with Respondent that the changes it implemented were not inconsistent with its bargaining table position prior to fact finding. I find that the parties' September Agreement set forth what each party was willing to accept, at that time, as the terms of a final settlement. It did not include a proposal by either party to change minimum callback pay. Respondent's VEBA proposal, as set forth in this document, does not mention retroactivity, even though its wage proposal specifically included a retroactive wage increase in the first year of the contract. I conclude that Respondent's final pre-fact finding offer, as set forth in the September Agreement, did not include a proposal to make VEBA contributions retroactive to January 2, 2002. [4]

In sum, I find that on May 21, 2002, when Charging Party filed for fact finding, the parties' positions had solidified on two issues essential to reaching a contract – retiree health care and a defined benefit versus defined contribution pension plan – and that the parties had reached a good faith impasse in their contract negotiations. I find, however, that Charging Party broke the impasse when it made a proposal on January 9, 2003 that included significant concessions on these issues. I find that Respondent acted unlawfully in refusing to meet after January 9 to discuss Charging Party's proposal. I conclude, first, that Respondent had a duty to continue to bargain with Charging Party because the parties were not at impasse. I also find that the January 9 meeting did not, in this case, satisfy Respondent's obligation to meet and bargain in good faith with Charging Party over the fact finder's December 6, 2002 recommendations. Finally, I conclude that Respondent violated its duty to bargain in good faith by implementing changes in terms and conditions of employment contained in a new "contract" on May 1, 2003 because the parties were not at impasse on that date. In accord with these

[3] The Commission has held that, after impasse, an employer may selectively implement portions of its offer to the union, as long as the changes made are not substantially different from or inconsistent with proposals made by the employer during negotiations. *Escanaba Area Schools*, 1990 MERC Lab Op 887; *City of Highland Park*, 1993 MERC Lab Op 71; and *Cass Co Road Comm*, 1983 MERC Lab Op 378.

[4] Respondent does not dispute that it offered to allow new hires to use vacation time after their 60-day probationary period, and the evidence indicates that it implemented this change on May 1, 2003.

findings and conclusions, and the findings of fact set forth above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Orion Township, its officers and agents, are hereby ordered to:

1. Cease and desist from:

a. Refusing to meet and bargain in good faith with Charging Party Teamsters Local 214 over the terms of a new collective bargaining agreement covering employees in Respondent's Department of Public Works.

b. Unilaterally imposing and changing terms and conditions of employment in the absence of an impasse between the parties.

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

a. Upon demand, meet and bargain in good faith with Teamsters Local 214 over the terms of a new collective bargaining agreement covering employees in Respondent's Department of Public Works.

b. Pending satisfaction of its obligation to bargain, restore to employees the terms and conditions of employment in effect prior to May 1, 2003. However, pending satisfaction of its obligation to bargain in good faith over the terms of a new collective bargaining agreement, Respondent may not rescind or reduce any benefit granted to employees as a result of its implementation of a new "contract" on that date.

c. 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, for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, Orion Township has been found to have committed unfair labor practices in violation of the Michigan Public Employment Relations Act (PERA). Pursuant to the terms of the Commission's order,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to meet and bargain in good faith with Teamsters Local 214 over the terms of a new collective bargaining agreement covering employees in Respondent's Department of Public Works.

WE WILL NOT unilaterally impose or change terms and conditions of employment in the absence of an impasse between the parties.

WE WILL, upon demand, meet and bargain in good faith with Teamsters Local 214 over the terms of a new collective bargaining agreement covering employees in Respondent's Department of Public Works.

WE WILL, pending satisfaction of our obligation to bargain, restore to employees the terms and conditions of employment in effect prior to May 1, 2003. However, we will not, pending satisfaction of our obligation to bargain in good faith over the terms of a new collective bargaining agreement, rescind or reduce any benefit granted to employees as a result of our implementation of a new "contract" on that date.

ORION TOWNSHIP

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.