STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MECOSTA COUNTY PARK COMMISSION,
Respondent-Public Employer,

Case No. C99 F-113

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 25
Charging Party-Labor Organization.
_____/

APPEARANCES:

Cohl, Stoker & Toskey, by David G. Stoker, Esq., for Respondent

Miller Cohen, PLC, by Eric I. Frankie, Esq., and Donald Gardner, Staff Specialist, AFSCME Council 25, for Charging Party

DECISION AND ORDER

On January 8, 2001, Administrative Law Judge Nora Lynch issued her Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Dated: _____

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APPEARANCES:

David G. Stoker, Esq., Cohl, Stoker, & Toskey, P.C., for the Public Employer

Donald Gardner, Staff Specialist, AFSCME Council 25, for the Labor Organization

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455(10), this matter came on for hearing at Lansing, Michigan, on March 1, 2000, before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission. The proceedings were based upon unfair labor practice charges filed on June 28, 1999, by the American Federation of State, County, and Municipal Employees, Council 25, alleging that the Mecosta County Park Commission has violated Section 10 of PERA. Based upon the record, including briefs filed by the parties on or before May 10, 2000, the undersigned makes the following findings of fact and conclusions of law, and issues the following recommended order pursuant to Section 16(b) of PERA:

The Charge:

The Union charges that the Employer has unilaterally implemented a final best offer without bargaining in good faith to impasse, and without utilizing fact finding procedures. The Employer denies that it has failed to bargain in good faith and maintains that the implementation of its last offer took place after impasse and prior to the time that the Union filed for fact finding.

Facts:

The Mecosta County Park Commission Employees Chapter, Local 1865, affiliated with Michigan Council 25, AFSCME, represents a bargaining unit of all full-time maintenance employees of the Park Commission. There are three employees in the unit: maintenance foreman, assistant foreman, and maintenance worker. These employees are responsible for repairs and maintenance throughout the Mecosta County Park system.

Negotiations for a successor contract to the 1995-1998 collective bargaining agreement began in January of 1999. Ed Clevenger, staff representative for Council 25, was the chief spokesperson for the Union. The Employer's chief spokesperson was Sherry Samuels; later in the negotiations, attorney David Stoker became involved. Park Commission member James Peek was also on the Employer's team. Park Superintendent David Basch was not a member of the team but sat in on negotiations. At the beginning of bargaining the parties reached agreement on a set of ten ground rules, which included provisions on such matters as meeting dates and times, tentative agreements, caucuses, side bars, and ratification. Ground rule 7 read as follows: "The current Collective Bargaining Agreement entered into and between the parties shall be extended until July 31, 1999."

The parties met approximately seven times between January and June of 1999, each meeting lasting at least two to three hours. Over this period of time all proposals from both sides were discussed and tentative agreement was reached on a number of items. The parties agreed that the chief stumbling block to a contract was management's proposal on work hours. The existing schedule for park maintenance workers was four ten-hour days, year-round. The Employer proposed changing this schedule to five eight-hour days in order to meet its operational needs, particularly during the summer months. The Employer stated a number of reasons to justify the change in schedule. These included having the three employees work more as a team; the aging park infrastructure needed more repairs; and the increased usage of the parks in the summer months, particularly by campers, required more coverage. The Union did not feel a change was justified and did not counter the Employer's proposal other than to suggest that the hours of the non-bargaining unit seasonal help could be changed. The issue of work schedule was discussed at each of the negotiation sessions, often at length. The Employer's initial proposal on February 9 was to change the existing schedule to eight-hour days year-round. This was rejected by the Union. The Employer revised its proposal to provide for eight-hour days from May 1 to October 31 and ten-hour days from November 1 to April 30. This proposal was also rejected by the Union. At the session held on April 27, after approximately six hours of negotiations, the parties agreed that they were not making progress and that mediation could be helpful.

The parties requested the assistance of a Commission mediator and a mediation session was set for June 22, 1999. The meeting on that date started at approximately 10:30 a.m. The teams met separately, the Employer's team at the Park Commission office, and the Union team in the garage area, about 100 feet away. All three members of the bargaining unit were in attendance. The mediator moved back and forth between the two groups.

The parties disagree on what occurred at this mediation session. Employer representatives Basch and Peek testified that after the mediator met with the Union team to determine outstanding issues, he came over to the Employer's team. According to Basch, the Employer gave the mediator an Employer proposal dated June 22, 1999, entitled Employer's Package Proposals. With respect to the hours of work issue, this proposal was the same as the Employer's April 13 proposal: eight hour shifts from May 1 through October 31. According to Basch, the mediator took this proposal to the Union. After a short time the mediator returned to the Employer's team. There was no counter proposal from the Union and the Employer understood its proposal to be rejected. At this point the Employer made a few changes to its proposal, including increasing wages in the first year from $1200 to $1500 across the board, increasing the weekend premium pay provision, and shortening the time period for the eight-hour schedule by a month, to end September 30 rather than October 31. These changes were reflected in a document designated Employer's Last Best Offer and given to the mediator to take to the Union. When the mediator again returned with no counter offer, the Employer decided that further bargaining would be fruitless. Since the summer had already begun and the Employer felt that the change in schedule was necessary to meet its operational needs, a letter was prepared notifying the Union of the Employer's intent to implement its last offer.

According to Union representative Clevenger, on June 22 the mediator first met with the Union team and had them explain their position on outstanding issues. He then walked over to the Employer's team and after about a half hour returned to the Union, discussing the work schedule with them for about fifteen minutes. Clevenger testified that the mediator went back to the Employer's team and returned fifteen minutes later presenting the Union with the Employer's last best offer. According to Clevenger, the Union team was never given a prior proposal dated June 22 as testified to by the Employer's representatives. After receiving the Employer's last offer, Clevenger told the mediator that the Union wanted time to consider this proposal and suggested that they break for the day since it was close to 12 o'clock and the mediator had already indicated that he had an engagement at 1:30 p.m. Clevenger testified that the mediator left the garage and he did not see him after that.

After the meeting, as Clevenger walked to his car, he was approached by Basch who gave him a letter indicating the Employer's intent to implement its last offer. The letter stated in part:

> Because of the urgency of implementing the provisions in the last best offer including the summer schedule, please be advised that the commission is hereby implementing its last best offer effective immediately. New schedules will be provided by the Superintendent. The economic benefits will be paid as soon as payroll can implement the changes.
>
> The Commission regrets having to implement its proposals rather than reaching a mutual agreement, but feels it necessary for the Commission to serve the public. In the event any change of circumstances makes your unit feel that the Employer's proposal

could be subject to further negotiation, please don't hesitate to contact the Commission through the Superintendent or State Mediator.

Clevenger told Basch that he did not feel that the Employer had the right to implement a contract since they were not at impasse. Clevenger stated that he intended to immediately file for fact finding, which would be very expensive for both parties. After returning to his office, Clevenger prepared a fact finding petition which was hand delivered to the Lansing MERC office that afternoon.

Discussion and Conclusions:

Charging Party contends that the Employer committed an unfair labor practice by implementing its proposals at a time when the parties were not at impasse. In addition, Charging Party maintains that the Employer implemented with full knowledge that the Union had filed for fact finding, and violated the parties' agreement to extend the collective bargaining agreement until July 31, 1999. The Employer asserts that the positions of the parties had solidified to the point where further bargaining was useless and they were at impasse; when the Employer received no response to its last best offer, implementation was an operational necessity. The Employer also argues that the Commission requires that fact finding be formally initiated in order to forestall implementation after impasse is reached. Finally, the Employer states that the ground rule extending the contract was nothing more than an agreement between the parties that the terms of the previous contract would continue during negotiations.

An employer may lawfully implement its last offer where an impasse in negotiations has been reached. The Commission has defined impasse as the point at which the positions of the parties have solidified and further bargaining would be futile. *Wayne County (Attorney Unit)*, 1995 MERC Lab Op 199, 203. The Commission has further indicated that the totality of the circumstances must be considered, which includes length of bargaining, participation in mediation, continued flexibility or movement, and whether business necessity exists. *Clinton Comm Sch*, 1999 MERC Lab Op 1; *Memphis Comm Sch*, 1998 MERC Lab Op 377; *City of Benton Harbor*, 1996 MERC Lab Op 399; *Ida Pub Sch*, 1996 MERC Lab Op 211, 214-15.

I find that the totality of the circumstances in the instant case demonstrates that impasse was reached. The parties had seven productive negotiation sessions between January and April of 1999. Thus they had bargained for a reasonable length of time, particularly considering the small size of the bargaining unit. In addition, there was some urgency involved since the Employer's reason for the change in hours was to meet the continuing park maintenance needs and better serve its customers in the summer months. At the time the last bargaining session occurred, the summer was well underway.

The core area of disagreement between the parties was the Employer's proposed change in work schedule, which was discussed at length throughout the negotiations. At the meeting of April 27, both sides agreed that no progress was being made and they requested mediation. Precisely what was said at the mediation session of June 22 is difficult to determine since the parties met separately and communications of the mediator are confidential.[1] The Employer maintains that it submitted two proposals that day, the second being its last best offer. The Union representatives do not remember receiving a proposal other than the last offer. Regardless of whether or not there was an interim offer that day, the record is clear that the Union was aware that the final package presented to them was the Employer's last offer, and they failed to produce a counter offer. Although according to Clevenger's testimony the Union team wished more time to do so, based on the previous pattern of bargaining there is no reason to believe that the Union intended to change its position.

The record reflects that in the course of bargaining the Employer made several adjustments to its proposal on eight-hour work days, which initially was for the entire year, and was eventually reduced to a five-month period. The Union was opposed to any change and did not counter any of the Employer's proposals on the work schedule. A union cannot prevent impasse from being reached by simply remaining silent or "considering" the matter to death. *Saginaw Twp Sch*, 1994 MERC Lab Op 701,707; CATA 1994 MERC Lab Op 921; *City of Pontiac*, 1991 MERC Lab Op 419. The record establishes that the position of the Union was fixed and no movement could be anticipated. Taking all of the above circumstances into account, including the length of negotiations, the parties' participation in mediation, the Employer's business need, and the lack of movement by the Union, I conclude that the Employer was justified in declaring impasse and implementing its last offer.

The Union also claims that implementation was improper since fact finding had been initiated. In *AFSCME Council 25 v Wayne County*, 152 Mich App 87, 97 (1986), *lv den* 426 Mich 875 (1986), *affg* 1984 MERC Lab Op 1142 and 1985 MERC Lab Op 244, the Michigan Court of

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[1]Rule 22 of the Commission's General Rules and Regulations provides: "Information disclosed by a party to a mediator in the performance of mediation functions shall not be divulged voluntarily or by compulsion. All files, records, reports, documents or other papers received or prepared by a mediator while serving as such mediator shall be classified as confidential. The mediator shall not produce any confidential records of, or testify in regard to, any mediation conducted by him, on behalf of any party to any cause pending in any type of proceeding." Based on this rule and on Commission policy, the parties were prohibited from introducing any testimony involving statements by the mediator. See *Menominee County Bd Comm*, 1976 MERC Lab Op 446, 450.

Appeals stated that an employer is not precluded from implementing unilateral changes after an impasse has been reached where there has been no initiation of fact finding procedures. As subsequently found by the Commission, merely announcing an intent to seek fact finding is not sufficient to block implementation of a final offer. *City of Detroit Water & Sewerage,* 1996 MERC Lab Op 318; *City of Highland Park* , 1993 MERC Lab Op 71; *Village of Constantine,* 1991 MERC Lab Op 467, 474. Since Charging Party's petition for fact finding was filed after the Employer announced the immediate implementation of its last offer, it does not operate to bar implementation. I also find that the ground rule extending the terms of the contract through July of 1999 does not prevent implementation of the Employer's last offer. This was not a binding contract extension signed by both sides, but was part of an informal package of ground rules intended to facilitate bargaining and clarify working conditions during negotiations.

Based on the above discussion, I find that Charging Party has failed to demonstrate that the Employer violated its bargaining obligation under Section 10(1)(e) of PERA when it implemented its last offer after impasse had been reached. It is therefore recommended that the Commission issue the order set forth below:

RECOMMENDED ORDER

It is hereby ordered that the charge be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Nora Lynch
Administrative Law Judge

DATED: