STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

TUSCOLA COUNTY MEDICAL CARE FACILITY,
Charging Party-Public Employer in Case No. CU00 E-21,
Respondent in Case No. C00 F-110,

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), MICHIGAN COUNCIL 25, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS and SUPERVISORY UNIT C CHAPTER OF AFSCME LOCAL 2641,
Respondent-Labor Organization in Case No. CU00 E-21,
Charging Party in Case No. C00 F-110.
_____/

APPEARANCES:

Nantz, Litowich, Smith & Girard, by Steven K. Girard, Esq., for the Public Employer

Donald Gardner, Staff Specialist, for the Labor Organization

DECISION AND ORDER

On March 26, 2001, Administrative Law Judge James P. Kurtz issued his Decision and Recommended Order in Case No. CU00 E-21, finding that Respondent-Labor Organization has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge. In Case No. C00 F-110, the Administrative Law Judge found that Respondent-Public Employer has not engaged in and was not engaging in certain unfair labor practices, and recommended 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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TUSCOLA COUNTY MEDICAL CARE FACILITY,
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AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), MICHIGAN COUNCIL 25, AFL-CIO, and SUPERVISORY UNIT C CHAPTER OF AFSCME LOCAL 2641,
Labor Organization Respondent-Charging Party in Case No. C00 F-110
_____/

APPEARANCES:

Nantz, Litowich, Smith & Girard, by Steven K. Girard, Atty, for Public Employer

Donald Gardner, Staff Specialist, for the Labor Organization

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

This case was heard at Detroit, Michigan on September 1, 2000, before James P. Kurtz, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission, pursuant to complaints and notices of hearing dated May 18, 2000 in Case No. CU00 E-21, and June 30, 2000 in Case No. C00 F-110, issued under Section 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.216, MSA 17.455(16). Based upon the record and post-hearing briefs filed by November 30, 2000, the undersigned makes the following findings of fact, conclusions of law, and recommended order pursuant to Section 16(b) of PERA, and Section 81 of the Administrative Procedures Act of 1969, MCL 24.281, MSA 3.560(181):

Charge and Background Matters:

The charge in Case No. CU00 E-21 was filed on May 3, 2000 by the Public Employer, a public nursing home facility operated by the Family Independence Agency of Tuscola County. This charge alleged that Michigan AFSCME Council 25 violated PERA as follows:

> The Union, through its agent Richard Kloor, has violated its duty to bargain by failing and refusing to execute a collective bargaining agreement reached on 2/10/00

and forwarded to the Union for execution on 3/15/00.

The Union responded to the charge on June 16, acknowledging that it had not executed the contract because the document prepared by the Employer did not accurately reflect the agreement made at the bargaining table. The Union alleged that its staff representative responsible for the bargaining had requested that the Employer return to the table to resolve the differences, but the1Employer had refused to do so in violation of its obligation to bargain under PERA. AFSCME Council 25 and its affiliated Local 2641 filed a refusal to bargain countercharge against the Employer on June 19. The charge alleged that the Employer significantly altered the tentative agreement reached on February 10 relative to wages when preparing the final contract document.

Council 25 and Local 2641 of AFSCME are signatories to the collective bargaining agreements with the Employer, and are collectively referred to herein as the Union.[1] As framed by the parties, the only issue in these cases is whether the Union made a unilateral mistake at the February 10 meeting when the tentative agreement was reached, or whether there was no meeting of the minds on the disputed wage issue. If the former, then the Employer prevails and the Union must execute the contract; and if the latter, the Union prevails and the parties must return to the bargaining table.

Factual Findings:

These charges involve the bargaining between the parties on a new contract to replace the one that expired on January 6, 1999. The expired contract covered both the Union's unit of nonsupervisory employees (Unit B), and its unit of supervisory employees (Unit C) involved in this proceeding. The Employer asked that each unit have its own contract, so it was agreed that the nonsupervisory contract, covering about 130 employees, would be negotiated first. The supervisory unit contains only four employees and classifications, and one of these positions was vacant at the time of the negotiations. The Employer has a policy of making only written proposals to the Union because of a misunderstanding several years ago that led to an arbitration proceeding to resolve the dispute.

The bargaining on the supervisory contract began with the first meeting on January 18, 2000. The parties had exchanged their first written proposals, and the remainder of the negotiations relevant to this proceeding were conducted from the Employer's written proposals. The Employer requested that the supervisory contract be harmonized with the one covering the nonsupervisory employees, and the Union agreed. The parties made progress at the January 18 session, changing those items dealing with the unique role of supervisors. After the Union canceled an early February meeting, the parties met on February 10. Prior to this meeting, the Employer supplied the Union

[1]The name of the labor organizations in the caption are corrected to conform to the name of the bargaining representative set forth in the collective bargaining agreement.

with its second proposal typed on four pages, plus an additional page summarizing their agreements to date. It was this document that the Union staff representative used to negotiate from throughout the February 10 meeting. The three unit supervisory employees were in attendance at this meeting. The negotiations for the Employer were handled by its attorney, with other Employer officials or employees on the team.

With regard to the issue of wages, the Union had asked for an "across-the board" increase for all four supervisors. The Employer, on the other hand, throughout the negotiations set forth a complete wage scale with specific amounts at each step of the scale. For purposes of this proceeding, only the final step is relevant, since the three supervisors were long term employees. At the expiration of the old contract all of the supervisors were paid $10.65 per hour. The Employer's first two proposals offered an $11.00 rate to the laundry/housekeeping and maintenance supervisors, and to address what it felt was an inequity in rates offered $12.50 for the diversional therapy supervisor and $11.50 for the dietary supervisor. The rates for the second and third years of the contract were left open.

The February 10 meeting was conducted with the bargaining teams in separate rooms and the representative of each team shuttling back and forth between the two groups. After an initial discussion between the two representatives, wherein the Union expressed strong disagreement with certain items included in the Employer's second proposal, the Employer prepared its third proposal, handwritten on one page, which like the previous proposals addressed all outstanding issues. This proposal indicated as to wages, "No change at this time." Copies of this third proposal were given to the staff representative for his team. After meeting with his team, the staff representative met with the Employer's attorney and verbally indicated that all 13 items were acceptable to the Union, except the Employer's proposals on union security and wages. The Employer attorney wrote "OK" on his copy next to the 11 items agreed to, and then returned to his team to prepare the Employer's "final offer."

The Employer's last and final (fourth) proposal was handwritten with the first page noting the date and time of presentation as 4:30 p.m. on February 10. This offer stated that all items in the prior or third proposal were acceptable, except the proposals on wages and to change union security. The Employer withdrew its union security proposal, thereby leaving only wages at issue. The Employer offered a 25 cent per hour signing bonus for the first or "lost" year of the contract, retroactive to the expiration of the prior contract and calculated by the number of hours each supervisor had worked. A sample calculation of this bonus was made on the first page of the offer. The first page of the "Final Offer" referred to an attached handwritten page labeled "Exhibit A," which set forth a complete wage scale that contained an increase larger than was offered in the first three Employer proposals. To illustrate the exact increase, the attorney added a column to the wage schedule listing the exact amount each employee would receive based on their current hourly wage of $10.65. The new wage offer applicable to the existing employees was $11.40, or 75 cents for the first two supervisors; $13.00, or $2.35 for the diversional therapy supervisor; and $12.00, or $1.35 for the dietary supervisor. The offer included a 50 cent across the board increase for the second and third years of the contract, plus some other provisions that are not relevant to this proceeding.

The Employer attorney then met with the staff representative and gave him four copies of the Employer's final offer, emphasizing that it was a final or last best offer, and that there were items in the proposal that had not been previously discussed with the Union. The staff representative put these copies of the final offer with his "packet of papers," or in his pocket, as he had apparently also done with the Employer's third offer, and he continued working from the Employer's typed second proposal, which was the offer on the table at the beginning of that session. The attorney stated that rather than reopening the contract, an increase had been given in its second and third years. He explained the Employer's rationale for the differences in increases among the four supervisory classifications, and he emphasized that the increased amounts were being added to their present base rate of $10.65 per hour.

On the last page of the second proposal, which listed the wage scale in the contract, the staff representative inserted in handwriting the amounts of the increases in the final offer next to the increased rates that had been offered in the second proposal. Thus, 75 cents is written next to the two lower paid supervisory rates of $11.00, which when added together give a rate of $11.75, rather than the rate of $11.40, which was the actual rate in the Employer's final offer. The same error was made as to the other two classifications, $2.35 being added to $12.50 for the diversional therapy supervisor, and $1.35 added to the rate of $11.50 for the dietary supervisor.[2] The base rate of $10.65 is handwritten on the same page, along with the $11.75 figure, and 50 cents is noted for years two and three of the contract. This document was then taken back to the unit for consideration.

The staff representative returned to the Employer's office several times during the Union's caucus to clarify questions that arose, but indicated to the Employer that he thought the parties had a tentative agreement. Among other questions, he wanted to be sure that the raise was over what the employees were currently earning. He also asked if there was any flexibility regarding the increase for the two lowest paid supervisors, and he was told by the Employer attorney that the offer was final. Finally, the Union indicated it would accept the offer if the Employer would put it into effect at the next full payroll period, which was the following Sunday, rather than waiting until execution of the written contract. The Employer agreed as long as the unit ratified the agreement. Since the unit members were all present that evening, the agreement was immediately ratified, and the Employer put it into effect as promised. The Employer's board ratified the agreement a few days after the implementation, and the Union was so notified by letter dated February 16. The Employer promised to draft the written contract and forward it to the Union the next week.

[2]The Employer noted that had these been the actual rates of its offer, they would have amounted to more than the Union had initially proposed, which amounts the Employer had no intention of accepting or granting.

While the final contract document was being drafted, the staff representative contacted the Employer's attorney to question whether the implemented wage rates were correct. On March 15, the attorney forwarded to the Union copies of the contract for execution and stated in a cover letter that the wage rates were identical to the final offer made by the Employer and ratified by the parties. When signed copies of the contracts were not returned, the attorney again wrote to the Union requesting execution of the contract. The letter noted that the administrator of the Facility had been informed by members of the bargaining unit that the Union would not sign the new agreement because they wished to receive 75 cents more than the ratified rates.[3] The Union responded in an April 17 letter in which it stated:

> The wages described in the draft do not reflect the rates presented to the members of the bargaining unit and me during our last bargaining session. As you recall, we worked from what I believe was your second proposal and increased those amounts.

The staff representative suggested that the parties return to the bargaining table to clarify the matter, either with or without a mediator. The Employer attorney responded by letter on April 20, outlining the course of bargaining and the various written offers, and demanding that the Union sign the collective bargaining agreement or an unfair labor practice charge would be filed.

Discussion and Conclusions:

The only issue in this case is whether the parties made a mutual mistake regarding wages on February 10 when they reached a tentative agreement, or whether the Union made a unilateral mistake. If mutual mistake was involved, then the Union's argument that there was no meeting of the minds has substance, and its request that the parties return to the bargaining table must be granted. If the mistake was unilateral, the Union must accept the contract that was offered by the Employer and ratified by both sides. Part of the problem in this case, in the opinion of the undersigned, is the method of bargaining, where the two bargaining teams did not meet face to face, especially at the crucial final wrap-up of the contract. The shuttle bargaining meant that any questions, clarifications, and the like, were discussed and worked out by the two representatives meeting alone in the hallways, and there was no way for the bargaining teams to clarify issues at a joint meeting. Thus, what the employees apparently thought they were ratifying on February 10, was not what the Employer had offered, and it seems probable that such a mistake would be less likely to happen if the parties had wrapped up their agreement in a joint session.

The Employer relies on *Saginaw County Sheriff*, 1991 MERC Lab Op 315, 320-321, as the

[3]Where this figure comes from is not explained in the record, since the amount involved for the two lowest paid supervisors is the difference between the Employer's offered rate of $11.40 per hour, and the Union's assumed rate of $11.75, or 35 cents difference per hour.

unilateral mistake case most analogous to the present one, distinguishing the more recent decision of the undersigned in *Durand Police Dep't*, 2000 MERC Lab Op 135, 139-140, as a mutual mistake case with a remedy attached. This somewhat mischaracterizes the conclusion in *Durand,* probably due to the author's turgid reasoning and writing. At bottom, *Durand* is also a unilateral mistake case that subsequently took on the look of a mutual mistake. The parties in *Durand* had reached a contract by the last minute concessions of the Employer, among which was to grant certain wage improvements, along with an extra wage increase and an additional sixth year for the contract to the year 2000. The union in *Durand* agreed to draft the contact and after some delay did so. The final contract, however, contained the originally agreed upon expiration date in 1999, rather than the 2000 date, but did provide for the additional wage increase, now outside the contract term. At this point the mistake was unilateral, but the employer did not notice the error and the contract was executed with the wrong expiration date, thereby taking on an aura of mutual mistake. Only when the Union came knocking on the door in 1999 to bargain a new contract did the Employer become concerned and check its records relative to the negotiations and the tentative agreement originally made by the parties. In the *Saginaw* case, *supra*, the union originally objected to one part of a package health proposal, but said or did nothing thereafter, even when, some four months later, that package became part of a tentative agreement and the final contract. The mistake, if any, was on the part of the union for not questioning the matter or raising the issue when the tentative agreement was reached. The offending contract provision in *Saginaw* was, therefore, held to be binding on it.

I agree with the Employer that there is no mutual mistake in this case, but only a unilateral one on the part of the Union. The Employer was very careful throughout the negotiations to document its proposals and offers, and the only deviation therefrom was the last minute agreement to immediately implement the wage increases if the Union ratified the tentative agreement at that time. The staff representative's use of the typed second proposal of the Employer to record any changes, rather than deal with the handwritten third and final proposals may be understandable, but any mistake in doing so cannot be laid at the feet of the Employer. The final offer that laid out the contract wage schedule is clear on its face, and the Union's failure to refer to it in the final decision making on a tentative agreement was not caused by any failure or obfuscation on the Employer's part. In fact, the record establishes that the Employer took great care to explain the terms of the final wage offer to the staff representative at their last meeting. It is not the responsibility of the Employer to monitor the document being used by the Union representative to record an offer, especially where it has already been put in writing. The record is clear that copies of the final offer were given to the Union representative by the Employer attorney prior to its consideration by the unit members, and that like the third offer it was merely included with the other "papers" that the representative was carrying with him. The suggestion of the Union that the final offer may have been merely an after the fact summation by the Employer is not supported by the record, especially in view of the several admissions of the representative that he had received the offer before its acceptance by the membership.

In conclusion, I find that the *Durand* and *Saginaw* decisions are applicable to the instant case, and that the Employer herein has satisfied its bargaining obligation owed to the Union. See also *Port Austin P S*, 1977 MERC Lab Op 974, 981-983. The Union, not the Employer, made the mistake in the wage rates presented to the membership. Therefore, the contract as drafted by the

Employer must be executed by the Union. Although the employees may have been misinformed when they ratified the contract, it was not due to any action or inaction on the part of the Employer. As noted in *Port Austin*, both parties have an equal burden to clarify the terms and meaning of a contract before it is ratified, and the failure of one party to do so does not excuse it from adhering to the bargain made by its agent.

With the above findings, the charge filed by the Union against the Employer seeking a return to the bargaining table must be dismissed, and the charge filed by the Employer must be sustained with an order that the Union execute the contract. *Michigan Council 55, AFSCME v Village of Chesaning*, 62 Mich App 157, 160 (1975), *enf'g* 1974 MERC Lab Op 580, 597-598; *City of Battle Creek*, 1994 MERC Lab Op 440, 441-443, 445; *East Detroit Fed of Teachers*, 1980 MERC Lab Op 840, 847-848; *City of Memphis*, 1978 MERC Lab Op 688, 690, 693. All other arguments raised by the parties have been considered and do not change the result. Accordingly, I recommend that the Commission enter the following order:

ORDER

Based upon the findings and conclusions set forth above, in Case No. CU00 E-21 the Union is ordered to cease and desist from refusing to sign the collective bargaining agreement reached with the Employer on February 10, 2000; to execute the document prepared and forwarded to it by the Employer in March 2000; and to return the executed copies to the Employer. The charge filed by the Union against the Employer in Case No. C00 F-110 is dismissed. Given the circumstances herein and the small size of the bargaining unit, a more formal order and the posting of a notice is not warranted.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

James P. Kurtz
Administrative Law Judge

DATED: