STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

ROYAL OAK PROFESSIONAL FIRE FIGHTERS ASS'N,
Labor Organization-Respondent,

Case No. CU04 J-060

-and-

CITY OF ROYAL OAK,
Public Employer-Charging Party.
_____/

APPEARANCES:

Rodger Webb, Esq., for the Respondent

C. Brian James, Esq., Assistant City Attorney, for the Charging Party

DECISION AND ORDER

On January 20, 2006, Administrative Law Judge Julia Stern 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

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Nora Lynch, Commission Chairman

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Nino E. Green, Commission Member

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Eugene Lumberg, 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, this case was heard at Detroit, Michigan on June 9, 2005, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including a post-hearing brief filed by the Charging Party on June 23, 2005 and a response brief filed by Respondent on October 4, 2005, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The City of Royal Oak filed this charge against the Royal Oak Professional Fire Fighters Association on October 27, 2004.1 Respondent (hereinafter the Union) represents a bargaining unit of employees in Charging Party's fire department. In November 2004, the voters of the City of Royal Oak adopted a proposal to amend the City's charter to require the City to employ at least 1.17 fire fighters per thousand City residents. Charging Party (hereinafter the Employer) asserts that by sponsoring and supporting this ballot initiative, the Union unilaterally altered a mandatory subject of bargaining in violation of its duty to bargain in good faith under Section 10(3)(c) of PERA.

1 This charge was originally consolidated with Case No. C04 E-124, a charge filed by the Union on May 17, 2004 and amended on August 16, 2004. The Union withdrew its charge at the hearing.

Facts:

Prior to November 2004, the Employer had no rule or policy governing the number of fire fighters it would employ. Article 6 of the parties' 2000-2003 contract gave the Employer the right to determine the methods, means and personnel necessary for departmental or agency operations, as well as the right to relieve employees from duties because of lack of work or lack of funds. Pursuant to Article 14 of this agreement, the Employer also had the right to abolish positions in the department and lay off employees for reasons of economy, for more efficient administration, or for lack of sufficient appropriation of funds.

The 2000-2003 contract expired on July 30, 2003, and the parties began negotiating a successor agreement. The Union did not make any type of minimum manning proposal during these negotiations. On July 6, 2004, the Union filed a petition for compulsory arbitration of the parties' dispute over their contract pursuant to 1969 PA 312 (Act 312), MCL 423.231 et seq. The petition did not list minimum manpower or the management rights language as issues in dispute. The parties continued to bargain after the Act 312 petition was filed.

Sometime before the end of May 2004, the Employer's fire fighters formed an organization called "Royal Oak Firefighters for Citizen Safety." Between about May 30 and June 14, 2004, petitions were circulated among voters in the City of Royal Oak to amend the City's charter to require that the City "employ not less than 1.17 full-time professional firefighters for each 1,000 City of Royal Oak residents as indicated by the most recent United States Census." Slightly more than half of the petitions' circulators appear on the Employer's fire fighter seniority roster, and these fire fighters collected the majority of the signatures. The proposal was placed on the ballot for the City's November 2004 general election.

At a contract negotiation session in early August 2004, the Employer demanded that the Union withdraw the proposal from the ballot as a condition of settling the contract.2 The proposal was not removed from the ballot. Sometime between August 2004 and April 2005, the parties reached a new contract covering the term July 1, 2003 through June 30, 2006. The pertinent management's rights language from Article 6 and Article 14 was carried over into the new agreement without change.

In November 2004, the City's voters adopted the proposal to amend the charter. The proposal required the Employer to add six new fire fighter positions not covered by the Employer's fiscal year 2004 budget. The Employer hired the new fire fighters in January and February 2005.

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2 The Employer introduced a copy of the Union's charge in Case No. C04 E-124, as amended on August 12, 2004, as evidence that the Union had admitted that it sponsored the ballot initiative. The pertinent section of the charge stated:

> On or about August 1, 2004, the City introduced the matter of the Firefighters' sponsorship of a ballot initiative to amend the City of Royal Oak charter into the parties' negotiation, demanding as a condition of settlement of the contract that the Firefighters withdraw the initiative. Said demand, and imposition of same on the collective bargaining process . . . is extortionary and coercive, introduces an illegal subject into collective bargaining, and expressly seeks to chill the firefighters' free exercise of constitutionally and statutorily protected rights.

Discussion and Conclusions of Law:

A union that is the collective bargaining representative for public employees violates Section 10(3)(c) of PERA if it refuses to "bargain collectively" with their employer. Under Section 15, to "bargain collectively" means to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment." Subjects included within that phrase are referred to as mandatory subjects of bargaining. Once a specific subject has been classified as a mandatory subject of bargaining, both parties to a collective bargaining relationship are required to bargain concerning the subject if it has been proposed by either party, and neither party may take unilateral action on the subject absent an impasse in the negotiations.3 The remaining matters not classified as mandatory subjects of bargaining fall outside of the phrase "'wages, hours, and other terms and conditions of employment" and are referred to as either permissive or illegal subjects of bargaining. Parties are not required to bargain over a permissive subject of bargaining. They may bargain by mutual agreement, but neither side may insist on bargaining to the impasse. *Detroit Police Officers Ass'n v City of Detroit*, 391 Mich. 44, 54-55, n 6, (1974), citing *NLRB v Wooster Division of Borg-Warner Corp*, 356 US 342, (1958). See also *Local 1277, Metropolitan Council 23, AFSCME v Center Line*, 414 Mich 642, 652, (1982); *Pontiac Police Officers Ass'n v Pontiac*, 397 Mich 674, 679-681, (1976). An Act 312 arbitration panel has no authority to issue an award on a permissive subject of bargaining. *Center Line,* at 654.

In *Center Line*, the Michigan Supreme Court held that a contract provision prohibiting an employer from laying off police officers for lack of funds except "in conjunction with layoffs and cutbacks in other departments" was not a mandatory subject of bargaining. The Court held that this clause was within the scope of the city's inherent managerial prerogative because it unduly restricted the city's ability to make decisions regarding the size and scope of municipal services. It noted that the city would no longer be able to base its decisions on factors such as need, available revenues, or the public interest, since it could not decide to lay off police officers without reducing the level of services in other departments. *Center Line,* at 660. The Court noted, however, that minimum manning provisions could be mandatory subjects of bargaining to the extent that they related to or affected employee safety or workload. 662-663.

In *City of Manistee,* 1987 MERC Lab Op 590, a union asserted that two "manning" proposals were mandatory subjects of bargaining because they involved safety. One proposal required the employer to maintain a minimum number of fire fighters on duty at all time. The second required the employer to employ at least eleven full time fire fighters except when it was able to demonstrate an unanticipated financial emergency. The Commission drew a distinction between the two proposals. It concluded that the second proposal was only a permissive subject of bargaining because it raised

3 Although the law prohibits unilateral action by either party, there are few cases involving unlawful unilateral action by unions because unions usually lack the power to effectuate a change in terms or conditions of employment. But see, *St Clair Intermediate School Dist v Intermediate Ed Ass'n/Michigan Ed Ass'n*, 458 Mich 540, (1998), aff'g 1993 MERC Lab Op 101, in which the Court upheld the Commission's conclusion that a union violated PERA when its agent, the Michigan Education Special Services Association (MESSA), increased the lifetime maximum health care benefits offered under its insurance plan during the term of the parties' contract.

no safety issues on its face, and because it unduly restricted the employer's right to determine the level of staffing in its fire department. In *City of Detroit*¸ 1992 MERC Lab Op 82, 85, the Commission reiterated that the level of total employment in a police or fire department is not a mandatory subject of bargaining under PERA.

In this case, the subject of the charter amendment – the total number of fire fighters the Employer would have to employ – was not a mandatory subject of bargaining. Moreover, the Union would not have violated its duty to bargain by circulating petitions to amend the charter even if the subject of the proposed amendment had been a mandatory subject of bargaining. In *Senior Accountants, Analysts and Appraisers Ass'n v Detroit,* 218 Mich App 263, 273-276 (1996), the Court, refusing to enjoin a city charter commission from placing on the ballot certain proposed charter revisions dealing with mandatory subjects of bargaining, held that the employer did not violate its duty to bargain merely by submitting the charter amendments to the electorate. See also *City of Detroit (Fire Dep't),* 1982 MERC Lab Op 150, in which the Commission held that the employer did not unilaterally change terms or conditions of employment when it placed a charter amendment proposal changing seniority rules for fire fighters on the ballot, but did not attempt to impose the changes without collective bargaining even after the amendment was adopted by the voters.

I also find that the Employer failed to show in this case that the Union "sponsored" the charter amendment. Section 10(1)(3) makes it unlawful for a "labor organization or its agents" to take certain actions, but PERA does not define the term "agent." For purposes of defining an agent under PERA, the common law of agency governs. *Capitol Lodge No 141, FOP v Meridian Twp,* 90 Mich App 533, 538 (1979). The basic test for whether an agency relationship has been created is whether the principal has a right to control the actions of the agent. *Meretta v Peach*, 195 Mich App 695, 697 (1992). The Union's members obtained most of the signatures required for the proposal to appear on the ballot, but there is no evidence in the record that the Union's officers circulated petitions. The Union has no general right of control over the actions of its members. There is nothing on the record indicating that the Union asked or authorized its members to act on its behalf in this matter. I conclude that the record here does not establish that the fire fighters were acting as the Union's agents when they circulated the ballot petitions.

Here, a group of the Employer's fire fighters sponsored a ballot initiative that restricted the Employer's inherent managerial right to determine the number of employees and how they are deployed. The Union did not make a proposal at the bargaining table mirroring the ballot initiative, did not insist that the Employer bargain over such a proposal, and did not present a proposal of this nature to the Act 312 arbitration panel. The Employer ultimately failed to persuade its voters that the charter amendment was self-serving, bad policy, a misdirection of resources, or placed unnecessary restrictions on the ability of their elected officials to manage the City's affairs. However, I see no conduct by the Union violating its duty to bargain in good faith. Therefore, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____