STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

HURLEY MEDICAL CENTER,
Public Employer-Respondent,

MERC Case No. C17 G-066

-and-

REGISTERED NURSES AND PHARMACISTS ASSOCIATION (RNRPH),
Labor Organization-Charging Party.
_____/

APPEARANCES:

Giarmarco, Mullins & Horton, P.C., by John C. Clark, for Respondent

Miller Cohen, PLC, by Richard G. Mack, Jr., for Charging Party

DECISION AND ORDER

On October 11, 2017, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Summary Disposition[1] in the above matter finding that Respondent Hurley Medical Center (Employer) breached its duty to bargain in good faith in violation of § 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e). The ALJ found that Respondent violated its duty to bargain by refusing to meet with Charging Party, Registered Nurses and Registered Pharmacists Association (Union), to discuss its latest bargaining proposal unless the Union restricted itself to asking questions about that offer. The ALJ also concluded that an impasse did not exist because Respondent's latest bargaining proposal contained issues that the parties had not discussed before. She noted that after receiving the Employer's latest bargaining proposal, the Union had requested to meet to negotiate over the changes. The ALJ explained that for good faith bargaining, both parties needed to be able to "express their views regarding the issues on the table and to offer suggestions and/or make counterproposals." The ALJ found that since no meeting occurred after the Employer presented its June 8, 2017 proposal, and the Union had not rejected the Employer's last proposal, the parties not reached impasse. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

On November 3, 2017, Respondent filed exceptions to the ALJ's decision, a brief in support of the exceptions, and a request for oral argument. After requesting and

[1] MAHS Hearing Docket No. 17-015268

receiving an extension of time, the Union filed its brief in support of the ALJ's Decision and Recommended Order on December 15, 2017.

In its exceptions, Respondent asserts that the ALJ erred by: 1) denying Respondent's request for an evidentiary hearing, 2) concluding that Respondent refused to bargain in good faith with Charging Party, and 3) concluding that the parties had not reached an impasse.

After reviewing the record in this matter, we find that oral argument would not materially assist us in deciding this case and, therefore, deny Respondent's request for oral argument.

We have reviewed the exceptions filed by Respondent and find them to be without merit.

Factual Summary:

Procedural history

The Union, the Registered Nurses and Registered Pharmacists Association, represents nurses and pharmacists employed by Hurley Medical Center. On July 20, 2017, the Union filed a charge alleging that the Employer breached its duty to bargain by failing and refusing to continue to bargain toward a new collective bargaining agreement. Attached to the charge were the Employer's June 8, 2017 email to the Union with the attachments to that email: a cover letter, stating that the Employer had enclosed its "Last Best Offer as well as a summary of the proposed changes," along with the June 8, 2017 offer. Also attached to the charge were numerous emails between the Union's attorney and the Employer's attorney regarding the contents of the June 8, 2017 email, whether the parties would meet to discuss it, and whether that discussion would also include negotiations over the proposed changes included in the Employer's offer.

On July 24, 2017, Charging Party filed a motion for immediate summary disposition. In that motion, the Union argues:

> [T]he vast majority (if not all of) [sic] the evidence proving such is in writing, and attached to the unfair labor practice charge filed in this case; this is because the communication between the parties concerning the effort to continue bargaining has been in writing. Thus, there is no need for an evidentiary hearing to show a breach of this bargaining obligation.

On July 27, 2017, the Employer filed a petition for fact finding. A copy of that petition was filed with the ALJ on August 2, 2017, along with the appearance of the Employer's attorney. The Employer filed a response to the Charging Party's motion for immediate summary disposition on August 10, 2017. In that response, the Employer contended that the ALJ should deny the Union's motion because: 1) the Employer disputes

the Union's allegation that the Employer refused to negotiate; and 2) the Employer contends that questions of fact exist that render summary disposition inappropriate. Additionally, the Employer's response requested oral argument and an evidentiary hearing to present testimony in support of its position.

On August 22, 2017, the Union filed a supplemental brief for its motion for immediate summary disposition. To that brief, the Union attached four exhibits, including: the Union's chart listing the instances in which the Union contends that the Employer's June 8, 2017 proposal represents a change from the Employer's prior offers; a red-lined version of the Employer's June 8, 2017 proposal; prior proposals from the Employer; and additional communications between the parties regarding a possible future meeting and the scope of the discussion at such meeting.

Respondent filed a supplemental response to Charging Party's motion for immediate summary disposition on September 5, 2017. In Respondent's supplemental response, the Employer argues that the chart attached to the Union's supplemental brief is incorrect, that the parties are at impasse, and that it had not refused to negotiate, but had actively sought to move the parties dispute forward by seeking fact finding. Attached to Respondent's supplemental response is an affidavit from the Employer's labor relations officer, Barry Fagan, discussing some of the issues that the Union indicated were new concepts on the chart attached to the Union's supplemental brief, as well as: a list of the dates and times that the parties were scheduled for negotiation or mediation sessions, some of the Union's contract proposals, some of the Employer's contract proposals, and various other communications between the parties.

The ALJ conducted oral argument on September 8, 2017. In a September 21, 2017 email to the ALJ, Charging Party requested that the ALJ issue a written Decision and Recommended Order.

The Parties' Communications Regarding the Employer's June 8, 2017 Proposal

On June 8, 2017, the Employer's attorney, John C. Clark, sent an email to the Union's attorney, Richard G. Mack, Jr., containing what Clark referred to as the Employer's "Last Best Offer" for a new collective bargaining agreement and a cover letter explaining the Employer's position. Clark's letter states:

> After over a year of negotiations, including at least forty negotiation sessions, both privately and through a State-appointed mediator, it is Hurley Medical Center's position that the parties have reached an impasse. . . In that regard, enclosed please find Hurley Medical Center's Last Best Offer, as well as a summary of the proposed changes. As you will note, this LBO addresses all issues that have been the subject of negotiations over the last 14 months. This LBO is presented through the mediator and is "off the record" which as you fully understand, means it cannot be utilized in any litigation or administrative proceeding.

Although the Employer's June 8, 2017 proposal contained a one-page sheet listing the Employer's explanation of the changes from its prior proposals, unlike earlier proposals that the parties had exchanged, the June 8, 2017 proposal was not red-lined. The summary sheet indicates certain specified items that were changed and others that were not changed.

Clark's cover letter ends by stating:

> In the spirit of transparency, we respectfully request that your client's executive committee bring this LBO to the full membership for a ratification vote. RNRPh members deserve to know where Hurley stands. We look forward to hearing from you after that vote takes place.

Mack responded by email the same day, stating that the Union would review the Employer's proposals and noting that the Union did not agree with the Employer's assertion that the proposal was "off the record" and could not be used in litigation or administrative proceedings.

Mack sent an email to both Clark and the mediator, on June 14, stating that the Union was available to meet on June 22, but the Union had not heard from the Employer as to whether it was available to meet on that date.

Clark responded by email the following day, June 15, stating that the Employer was waiting for the Union's vote on the June 8 proposal. Clark also noted that the Employer was working on the Union's information request and planned to have a response to Mack the following week.

The next day, June 16, Mack wrote to both Clark and the mediator stating that they needed to meet to discuss the "long list of changes and new concepts you have introduced into negotiations." Mack argued that the parties could not be at impasse because the Employer had made such significant movement in its most recent proposals in certain areas. He asserted that there were several new concepts within the Employer's new round of proposals that the Union liked and that the parties needed to discuss them to make sure the Union leadership understood the proposals. He noted that the Union members had questions about the proposals and the Union leadership needed the Employer's answers about those issues to be able to respond to members' questions. He also asserted that the proposals did not appear to be complete and asked whether the Employer was refusing to meet.

On June 19, 2017, Clark responded by email, in which he requested that Mack put his questions in writing for Clark's "review and consideration." Clark also asked Mack to indicate which proposals the Union believed to be incomplete and indicated that "thereafter, we can determine if it's necessary to meet."

Mack responded later that day by indicating that it was not possible to list the questions for each change and that the Union's questions were centered around the Employer's explanation of the many changes the Employer had made. Mack noted that in the past they would discuss new concepts that were introduced in negotiations and stated that the Employer's refusal to meet "prompts me to recommend expanding the ulp charges to include this recent example of refusal to bargain in good faith. Your client's obligation under the law is specifically to 'meet at reasonable times and confer in good faith . . .'"

A few minutes later, by email, Clark stated that they were not refusing to meet and asserted that Mack's "refusal to provide a basic list of questions your client has in regards to our LBO is suspect, and frankly is not acceptable." Clark then demanded a list of the Union's questions regarding the Employer's proposal.

Later on June 19, Mack responded with two general questions that the Union wanted to ask about each proposal: "What was the justification for this proposal?" and "What does the employer seek to gain?" Mack also suggested that the parties discuss alternatives and asked that they review the previous proposals to compare and discuss them. Mack ended the email by asking if the questions he had listed were enough to meet the Employer's preconditions for a meeting.

On June 21, 2017, Clark sent a letter to Mack stating that he and Barry Fagan, the Employer's chief labor officer, were willing to meet with Mack and the Union president, Pamela Campbell, "to review the LBO and answer your questions." Clark again requested a list of the Union's questions prior to the meeting and gave the Union a choice of two half-day sessions for their meeting. Clark ended the letter by stating, "It is our hope to squarely answer your questions so that the LBO can be submitted to RNRPh membership for a vote."

Mack responded by email on June 22, in which he acknowledged receipt of the Employer's June 21 letter, and explained that the Union intended to return to the bargaining table. He questioned whether it was correct to read the Employer's letter as limiting the meeting to asking questions about the recent proposals, rather than negotiating towards a new contract. Mack stated, "If the Employer does not intend to negotiate at this next meeting we are scheduling, please make that known in writing, immediately."

Clark responded later that day stating: "The last and best offer, submitted on June 8 is really our best and last offer. I'm not sure why that is so difficult for you to understand." Clark further indicated that he believed that Mack's previous email was a rejection of the Employer's offer. Mack responded by denying that the Union was rejecting the June 8 offer and by insisting that they were expecting to negotiate.

On June 23, Mack sent a letter to Clark agreeing to the Employer's proposal to meet on the afternoon of June 28 and suggesting that they start the meeting at noon. Mack questioned the half-day bargaining session and indicated that the Union would prefer a full day to negotiate. Mack reiterated his client's intention to meet for negotiations. Mack

asked Clark to let them know if the Employer did not intend to permit negotiations at the meeting. Mack stated that if the Employer did not provide notice that it would not negotiate at the meeting, the Union would prepare for negotiations. Mack also indicated that the Union was accepting the Employer's proposals on Article 19 and Article 22, and that the Union's acceptance of those proposals were concessions on its behalf. Also, Mack again requested a red-lined version of the June 8 proposal and asked that it be provided, "by or before Monday, June 26." He also questioned the statement in Clark's June 21 letter indicating that Clark and Fagan would meet with Mack and Campbell. Mack stressed that the parties' collective bargaining agreement provided that the Union would be represented in negotiations by a committee of no more than six persons. Mack opined that the Employer had not demonstrated a justification for excluding members of its bargaining team from the meeting and asserted that the entire Union bargaining team would be present for the next negotiations.

On June 27, Clark sent an email to Mack regarding the agreement to meet on June 28, stating, "the sole purpose of any offered meeting this week was limited to answering questions about our LBO." He warned, "Unless that premise is specifically accepted by you in writing this evening or first thing tomorrow, there will be no meeting tomorrow or Friday."

Minutes later, Mack responded to Clark, by email, asking if the Employer was refusing to negotiate and asking that Clark state as much in writing or meet with the Union the next day as previously scheduled.

Clark responded about 20 minutes later declaring that the parties would not be meeting that week. About half an hour later, Mack sent an email to Clark asserting that the Employer is refusing to bargain and asking to be notified when "the Employer decides to stop its refusal to bargain."

On July 18, 2017, the Employer's labor relations officer, Barry Fagan, sent an email to Pamela Campbell, the Union president, with copies to Mack and Clark, urging the Union to allow its members to vote on the LBO and stating that if a new collective bargaining agreement was not in place by September 16, 2017, the former collective bargaining agreement would be terminated.

Mack responded the next day complaining again about the fact that the June 8 proposal was not red-lined, as prior proposals had been, and accusing the Employer of refusing to engage in further bargaining despite the Union's acceptance of two provisions in the Employer's most recent proposal. Mack's July 19, 2017 email contends that the Employer was refusing to bargain in violation of labor laws and requested a red-lined version of the June 8 proposal prior to the close of business on that date. The Union filed its unfair labor practice charge on July 20, 2017. On July 27, 2017, the Employer filed a petition for fact finding.

On August 18, 2017, Fagan sent an email to Campbell asking if she had time to meet with him to review the Employer's June 8, 2017 offer. He suggested going through the offer to make sure she understood its provisions and to answer any questions she might have. He indicated that the entire bargaining team was welcome to attend, but that he would prefer that neither party's attorney attend.

On August 21, Campbell responded to Fagan stating that she would like to meet to negotiate. She stated that she would talk to the Union bargaining team to find out who would attend the meeting "(whether no attorneys, or less than the full team)" and asked Fagan to indicate possible meeting dates. Later that day, Campbell reiterated that the meeting would be to negotiate from the June 8, 2017 proposal and suggested a meeting date and time. She again noted that she would discuss with the Union bargaining team which other team members "(i.e. attorneys, other committee members)" would attend and let him know in advance.

Fagan responded the following morning, August 22, 2017, stating that he invited the Union team to discuss the "last best offer" and to answer questions to ensure a clear understanding. He stated that it was to be a "non-lawyer" meeting. He went on to say, "Clearly, the purpose of the proposed meeting was not to negotiate." Fagan further stated "If you are interested in meeting for the purpose described above, let me know. Otherwise, I will not proceed with scheduling it."

In the Union's motion for immediate summary disposition, the Union asserts that the Employer sent an email to all Union members threatening to terminate the existing contract on September 16, 2017. In that email, the Employer states that the parties have been in negotiations for over a year and that the Employer offered "what was believed to be a very fair contract in the form of the Last Best Offer . . . The Union attorney confirmed that they had no intention of letting members decide for themselves." The email urges the employees to reach out to Union officials for further clarification or to voice their opinions.

The Contents of the Employer's June 8, 2017 Proposal

According to the Union's charge, the Employer's June 8, 2017 proposal contained many changes from the Employer's previous positions. The Union describes the June 8 proposal as a "complete contract proposal" that is not "redlined." The Union argues that "the reader cannot determine where the Employer made its many changes." According to the ALJ's decision, the Employer provided the Union with a red-lined version of the proposal after the unfair labor practice charge was filed. A copy of the red-lined version of the June 8 offer was attached to Charging Party's August 22, 2017 supplemental brief. Also attached to the Union's supplemental brief was a chart prepared by the Union comparing proposals made by the Employer prior to June 8, 2017, with some of the ones in the June 8 proposal. The Union's chart lists over 20 issues in the June 8 proposal that the Union views as "new concepts" and two that the Union views as tentative agreement changes.

In her Decision and Recommended Order, the ALJ identified four provisions in the June 8 proposal in which she found merit to the Union's assertion that they contain issues that were not previously raised in the Employer's earlier proposals. Those were the proposals regarding: Union release time for the Union's bargaining chair and president, lump sum bonuses, the pharmacist wage scale, and longevity pay.

In the Employer's September 5, 2017 response to the Union's August 22, 2017 supplemental brief for motion for immediate summary disposition, the Employer argues that the proposals that the Union contends contain new concepts had either been previously discussed by the parties during the course of their negotiations, concepts the parties had already agreed upon, concessions which inured to the benefit of the Union, or simple clerical errors. To support its response, the Employer attached an affidavit from Barry Fagan. In that affidavit, Fagan asserted that the chart contained in the Union's filing incorrectly describes proposals in the Employer's June 8 offer. Fagan addressed the issues in which the Union claims that the Employer included a new concept in the June 8 proposal. In looking specifically at the provisions subsequently identified by the ALJ as containing new concepts, we find that neither Fagan's affidavit nor the other submissions by the Employer indicate that the ALJ erred in finding that these proposals contain changes from the Employer's prior offers. Moreover, in the summary sheet that accompanied the June 8 proposal, the Employer admitted that the proposal contained some changes from its prior offers.

According to Fagan's affidavit, in the Employer's March 30, 2017 proposal and in discussions at the bargaining table the Employer had agreed to permit both the Union bargaining chairperson and president full release time. He stated that the primary distinction between those prior proposals and the June 8, 2017 offer is that under the later offer, the Employer would only pay for 16 hours per week for the two positions combined and that such release time could only be used in "four (4) eight-hour blocks." (The red-lined version of the June 8 proposal states, "Paid release time can be used in four (4) or eight (8) hour blocks as mutually agreed upon.") Fagan contends that the Employer's position on union release time in the June 8 offer is a "concession, since it guarantees full release time to RNRPh." However, Fagan also indicated that the Employer significantly reduced the amount of union release time that it is willing to pay for, from the 1.8 FTE previously paid by the Employer to 16 hours per week for the two employees combined. The June 8 proposal would allow the two employees to have union release time equal to 1.8 FTE if it is paid for by the Union.

Fagan stated that the proposal in the June 8 offer increasing pharmacist wage steps from 2 to 8 steps would only affect new hires and aligns pharmacist wage steps with those of registered nurses. However, Fagan gave no indication that the proposal to increase wage steps from 2 to 8 for that job category had been discussed or offered prior to the June 8 proposal. The Employer submitted a copy of its March 23, 2017 proposal showing the pharmacist wage scale for 2016-2017. A graduate pharmacist working one year was paid $57.83 per hour. There were two steps for a pharmacist: with only one year of experience, a pharmacist would make $58.83 per hour; a pharmacist with two years of experience was

paid $60.14 per hour. However, according to the June 8, 2017 proposal both a graduate pharmacist and a pharmacist would have to be in their seventh year of employment before their wage would equal or exceed the wage rate on the 2016-2017 two-step wage scale. Under the June 8, proposal, there is also new language stating:

> Pharmacist will be placed in the appropriate Step based on years of continuous service in the RNRPh HMC Union. Pharmacist with a higher hourly rate than their years of service as outlined in the scale above will be Red-Circled until thev reach a step that warrants a higher hourly rate or receive a contractual increase. Any Pharmacist that is still Red-Circled will receive a 1.25% Lump Sum based on their status and base hourly rate at lime of payout, which will be paid the first full pav in December of 2017; if the contract is in effect

With respect to longevity pay, Fagan stated that throughout the negotiations the Employer attempted to either eliminate or reduce longevity pay. He said that the Employer made a concession by agreeing to continue longevity pay at a flat rate. Under the previous collective bargaining agreement longevity pay was for employees with 10 or more years of service and was based upon a percentage of employees' straight time wages and hours during the fiscal year. Under the earlier contract that percentage increased based on the number of years of service in excess of 10 years. The Employer's March 23, 2017 proposal kept the earlier percentage chart for longevity pay but reduced the amount that employees would receive by 25% per year beginning in 2018 and continuing until 2020 when longevity pay would be totally discontinued. The Employer's June 8, 2017 proposal would shift longevity pay to a flat rate calculation based on an employee's position as a nurse or as a pharmacist and the employee's status as full time or part time, with part time rates varying based on hours (.9 down to .1) without regard to the number of years of service in excess of 10.

There were also changes between the Employer's earlier proposals and the June 8, 2017 offer with respect to lump sum bonuses. The Employer's March 23, 2017 offer provided for employees to "receive a one-time lump sum signing bonus equal to .5% of their base hourly rate at their status as of signing of July 1st, 2017." That proposal does not indicate whether the .5% of the hourly wage would have been based on wages paid during a particular timespan or for a certain number of hours. That is not clear from the proposal. The June 8 offer increases the amount of the lump sum bonus from .5% to 1% and provides that the 1% is based on all hours worked from June 2016 through June 2017. Whether that timeframe was discussed previously is not evident from Fagan's affidavit. The Union states that the timeframe is a new concept, and the Employer has not denied that.

Fagan also indicated that the June 8 proposal contains a change in vacation time allowing employees to use vacation time in one-hour increments as opposed to two-hour increments. He also noted a change in the wording of Article 16.C.6, which Fagan said clarifies prior proposals related to department shutdowns due to a holiday. Fagan

described a change in Article 26, short-term assignments, as a clarification of the parties' current practice. Additionally, Fagan attributed several other changes in the June 8 proposal to clerical errors or unintentional omissions.

Discussion and Conclusions of Law

The Duty to Bargain

The issue before us is whether the Employer breached its duty to bargain in good faith after it submitted its June 8, 2017 proposal to the Union. Section 15 of PERA, MCL 423.215(1), "requires a public employer to bargain collectively with the recognized representatives of its public employees." In order to bargain collectively, the parties must meet and "confer in good faith with respect to wages, hours, and other terms and conditions of employment" MCL 423.215(1). *River Rouge Sch Dist v River Rouge Ed Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued September 1, 2016 (Docket No. 326925); 30 MPER 16.

For us to find that Respondent violated PERA by refusing to bargain, there must have been a demand to bargain from Charging Party and a statement or action by Respondent clearly indicating a refusal to comply with the bargaining demand. See *Michigan State Univ*, 1993 MERC Lab Op 52, 63 citing *NLRB v Rural Elec Co*, 296 F2d 523, 524-25, (CA 10, 1961). See also, *Interurban Transit Partnership*, 20 MPER 107 (2007). In any negotiation for a collective bargaining agreement the parties have conflicting interests. To reach agreements, each party must give up something to gain something else. The compromises that result in agreement provide stability to the parties' relationship and a degree of reliability as to future interactions. *Kalamazoo Co & Kalamazoo Co Sheriff*, 22 MPER 94 (2009). We cannot require parties to agree or to make concessions, and their failure to do so is not, *by itself*, enough to establish a failure to bargain in good faith. *Grand Rapids Pub Museum*, 17 MPER 58 (2004). In assessing whether a party has fulfilled its bargaining obligation, we have always been mindful of the language of Section 15, which states that agreement or concessions cannot be compelled. *Grand Rapids Public Museum*, 17 MPER 58 (2004); *Interurban Transit Partnership*, 20 MPER 107 (2007).

Pursuant to § 10(1)(e) of PERA, a public employer may not "refuse to bargain collectively with the representatives of its public employees . . . " MCL 423.210(1)(e). In determining whether a party has violated its statutory duty to bargain in good faith, the totality of the party's conduct must be examined. We must look at the bargaining process and the communications between the parties during that process to determine whether Respondent has "actively engaged in the bargaining process with an open mind and a sincere desire to reach an agreement." *City of Grand Rapids*, 22 MPER 70 (2009); *Grand Rapids Pub Museum*, 17 MPER 58 (2004); *Unionville-Sebewaing Area Sch*, 1988 MERC Lab Op 86, 89.

Between June 8 and June 27, 2017, the attorneys for the parties exchanged numerous emails in which the Union demanded to bargain over the Employer's June 8, 2017 proposal. In the Employer's responses, the Employer indicated that it was willing to meet with part of the Union's bargaining team, i.e. just the Union's attorney and its president, and only for the purpose of answering the Union's questions about the June 8 proposal. The Employer made it clear that any discussion between the parties would be limited to questions about the proposal and the Employer would not engage in negotiations. In the parties' email exchanges on June 27, the Employer clearly and expressly refused to negotiate with the Union. Accordingly, we agree with the ALJ that the Employer breached its duty to bargain in good faith.

Employer refusal to meet with the Union bargaining team

Section 15 of PERA, MCL 423.215(1), "requires a public employer to bargain collectively with the recognized representatives of its public employees." As the National Labor Relations Board stated in *Racine Die Casting Co, Inc*, 192 NLRB 529, 530 (1971)[2]:

> Each party to the collective bargaining process has a right to choose its representative, and there is a correlative duty on the opposite party to negotiate with the appointed agent.

The Union's bargaining team included the Union's president, its attorney, and up to four other persons. However, when offering to meet with the Union to discuss the June 8 offer, the Employer repeatedly sought to limit the Union's choice of representatives. When the Employer's attorney offered to meet, he limited attendance at the meeting to the parties' attorneys, the Employer's labor relations officer, and the Union's president. Mack objected to that and pointed out that the prior version of the collective bargaining agreement permitted the Union to have a bargaining team of up to six people. However, Clark gave no explanation for seeking to restrict the number of Union bargaining team members permitted to participate in the offered meeting. Also, when Fagan offered to meet with Campbell, he indicated that he would prefer that the attorneys not attend. Then, when he withdrew his offer to meet with Campbell, he stated that it was to have been a "non-lawyer" meeting. Fagan gave no rationale for making the proposed meeting a "non-lawyer" meeting.

The Employer must bargain with the Union's chosen representatives and is not entitled to pick and choose members of the Union's bargaining team. See, for example, *Caribe Staple Co, Inc & Suarez*, 313 NLRB 877, 889 (1994), where the NLRB found that the employer violated Section 8(a)(5) and (1) of the NLRA by refusing to set a negotiating date unless the Union agreed to reduce the size of its bargaining committee. See also

[2] Board precedent is often given great weight in interpreting PERA in those cases where PERA's language is analogous to that of the NLRA. *Oakland Co,* 2001 MERC Lab Op 385, 389. See also *Gibraltar Sch Dist* v *Gibraltar MESPA-Transp*, 443 Mich 326, 335; 505 NW2d 214 (1993); *St. Clair Intermediate Sch Dist* v *Intermediate Educ Ass'n*, 458 Mich 540, 559; 581 NW2d 707 (1998).

Vibra-Screw, Inc., 301 NLRB 371, 377 (1991), where the NLRB found that the employer unlawfully refused to bargain with the union when the employer refused to meet because four discharged employees were on the union's bargaining committee.

The National Labor Relations Board further stated in *Racine Die Casting Co, Inc*, 192 NLRB 529, 530 (1971):

> [T]here may be extraordinary situations, which render any attempt at good-faith bargaining a futility, where one party to negotiations may validly object to an agent of the other.

The Employer has failed to provide any justification for its demand to limit the Union participants in meetings to discuss the changes in the June 8, 2017 proposal. Accordingly, we find that the Employer's refusal to meet with Union's chosen representatives is a further indication of the Employer's breach of its duty to bargain in good faith.

Employer insistence that union membership vote before further negotiations

The Employer's attorney's June 8, 2017 cover letter ends by stating:

> In the spirit of transparency, we respectfully request that your client's executive committee bring this LBO to the full membership for a ratification vote. RNRPh members deserve to know where Hurley stands. We look forward to hearing from you after that vote takes place.

Clark's letter implies that the Union had not kept its membership informed on their Employer's bargaining position. It also indicates that the Employer believed that it had the right to demand that the Union conduct a vote without regard to the Union's executive committee's assessment of the Employer's proposal.

The Employer made similar assertions in subsequent communications to the Union's representatives. In a June 15, 2017 email, Clark insisted that the Employer was waiting on the Union's vote on the June 8 proposal before responding to the Union's request to meet. In that email Clark implied that the Employer had the right to delay meeting until the Union could inform the Employer of the results of a union membership vote on the June 8 proposal.

On July 18, 2017, in an email to the Union chairperson, Pamela Campbell, the Employer's labor relations officer Barry Fagan also urged the Union to allow its members to vote on the June 8 proposal and reiterated that if a new collective bargaining agreement was not in place by September 16, 2017, the former collective bargaining agreement would be terminated. Even after the charge had been filed, the Employer's labor relations officer withdrew an invitation to meet with the Union President when she indicated that she wanted to negotiate at the meeting.

The Commission has long held that the ratification procedures of a labor organization are internal union matters beyond the area of employer concern. *City of Saginaw*, 1988 MERC Lab Op 197; 1 MPER 19056 (no exceptions). As the Commission stated in *Chippewa Valley Pub Sch*, 1979 MERC Lab Op 602, 608:

> What a labor organization does with a tentative contract after it is reached at the table is not the employer's concern, just as it is none of the union's business into the deliberations of a public school board in regard to its ratification of the same contract. . . . the ratification procedures are the province of each party.

See also *Village of Chesaning*, 1974 MERC Lab Op 580, 585-586. In this case, the parties had not even arrived at a tentative agreement. Yet the Employer repeatedly insisted that the Union take its June 8 proposal to the Union membership for a vote and sent an email to the Union membership complaining that the Union's attorney had acknowledged that the members were not going to be allowed to vote on the Employer's proposals. The Employer's actions in this regard are an indication that the Employer was not approaching the bargaining process with an open mind and a sincere desire to reach an agreement.

The Employer's Contention that the Parties Were at Impasse

The Employer contends that the ALJ erred by finding that the Employer failed negotiate in good faith and points to the fact that the parties had participated in 40 negotiation sessions and 60 hours of mediation over the previous 18 months. The Employer argues that the "impasse was not 'broken' by *Respondent's inclusion of a handful of new proposals* in the LBO"[3] (emphasis added).

Impasse has been defined as the point at which the parties' positions have so solidified that further bargaining would be futile. *Oakland Cmty Coll*, 2001 MERC Lab Op 273, 277; 15 MPER 33006 (2001); *Wayne Co (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. *Wayne Co (Attorney Unit)*, at 203; *Oakland Cmty Coll*, at 277; *City of Saginaw,* 1982 MERC Lab Op 727.

However, simply declaring impasse and asserting the right to implement changes in mandatory subjects of bargaining is not sufficient. The parties are only at impasse when neither party is willing to compromise. *NLRB v Powell Elec Mfg Co*, 906 F2d 1007, 1011-1012 (CA 5, 1990). The party asserting impasse bears the burden of establishing that

[3] Respondent's brief on exceptions, page 9.

impasse was reached; it must show that both parties, not just one, were unwilling to compromise. *Oakland Cmty Coll*, at 277.

Additionally, if the parties have reached a good faith impasse, that does not terminate the bargaining duty, but only suspends it until circumstances change which break the impasse. *Escanaba Pub Sch*, 1990 MERC Lab Op 887, 891; 4 MPER 22013 (1990); *City of Ishpeming,* 1985 MERC Lab Op 517, 520-521.

Clearly, the parties had numerous negotiation sessions; this is a factor to be considered in determining whether the parties were at impasse. We note the Employer's assertion that a "$20,000,000.00 difference in the parties' economic proposals, after more than a year of bargaining, constitutes an impasse." However, the Employer has not offered facts that establish that both parties' positions on the economic proposals were fixed at the time of the June 8 offer or, more importantly, during the period following that offer when the Employer refused to negotiate with the Union. Fagan indicated in his affidavit that the June 8 offer contained several concessions and other changes from the Employer's prior proposals. The Employer also admitted in its brief on exceptions that the June 8 offer contained "*a handful of new proposals*." Indeed, since the Employer made changes to the economic proposals in its June 8 offer and those changes had not been previously discussed, it is not clear that the Employer's position was truly fixed prior to submitting the June 8 proposal. Nor is it clear from the evidence in the record that the Union knew where the Employer's position had solidified. Moreover, the Employer has not shown facts that would establish that the Union's position had solidified or where it had solidified. The Employer has not offered facts that support a finding that the parties were at impasse on June 8, 2017, or after the June 8 proposal had been given to the Union. We note the Employer's assertion that it needed an evidentiary hearing to present facts establishing an impasse.

However, even if we were to find that the parties were at impasse prior to June 8, 2017, the facts that the *Employer's* June 8 proposal contained significant changes from its prior offers and the Union demanded bargaining over those changes, required the Employer to meet with the Union's bargaining team to discuss and even negotiate. To comply with its duty to bargain in good faith, the Employer needed to meet with the Union, not only to answer the Union's questions about the changes, but to allow both parties to freely engage in discussions over those changes and other unresolved issues, and to make new proposals or counterproposals with open minds and sincere desires to reach an agreement.

This is analogous to the situation that occurs when an employer wants to make a change to existing terms and conditions of employment. See, for example, *City of Detroit*, 20 MPER 68 (2007). In that case, the employer must give the union notice and an opportunity to bargain over the proposed change. A timely bargaining demand by the union triggers the employer's duty to bargain in good faith. See *Decatur Pub Sch*, 27 MPER 41 (2014). The same is true here with respect to the Union's demand to bargain over the changes proposed by the Employer in the June 8 offer. The Employer cannot

impose these new changes, whether or not they are concessions, without giving the Union an opportunity to bargain.

We note the Employer's argument that "the introduction of new concepts only breaks an existing impasse if they constitute a 'substantial change' in the bargaining position of one party." *Kalkaska Co Rd Comm*, 29 MPER 65 (2016). The Employer's reliance on *Kalkaska* is misplaced. As we noted in *Kalkaska*, "Once the parties have reached impasse, an employer is usually free under § 10(1)(e) to take unilateral action on an issue as long as its action is consistent with its offer to the union." See *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 56 (1974). In *Kalkaska,* we found the parties were at impasse and that the impasse was not broken by an insubstantial change in the union's bargaining position. [4] However, the facts of this case are significantly different from those of *Kalkaska*. In this case, it is the *Employer* that has changed its prior offer. Whether the changes are substantial or not, the Union, upon demand, has a right to negotiate over those changes before the Employer can impose its last offer. An employer cannot declare impasse indicating that it is in a position to impose its last best offer, then present a proposal that contains changes from the terms of its prior offer, and without further bargaining, declare that the parties are still at impasse. The Employer must negotiate over the changes from its prior offer. Whether or not these parties were at impasse on or before June 8, 2017, the fact that the Employer offered a new proposal containing language not previously discussed by the parties breaks any impasse, and, since the Union made a timely bargaining demand, requires additional good faith negotiations by the parties.

Appropriateness of Summary Disposition

Respondent contends that the ALJ erred because summary disposition may only be granted in favor of the moving party where there is no genuine issue as to any material fact. The Employer further argues that the party opposing the motion must be given the benefit of every reasonable doubt and all inferences from pertinent facts must be drawn in favor of that party. In support of that argument, the Employer contends that the ALJ committed reversible error by denying Respondent's request for an evidentiary hearing. The Employer relies on the ALJ's remarks during oral argument that the question of whether the parties had actually reached impasse depended on "too many factors for me to determine without an evidentiary hearing." As we indicated above, the undisputed facts regarding the Employer's June 8, 2017 proposal made it unnecessary for the ALJ to determine whether the parties were at impasse when the Employer refused to meet with the Union to discuss that proposal.

[4] The question in *Kalkaska* was whether the change in the union's bargaining position was substantial enough to break the impasse. The same question was present in the two cases we relied upon with respect to this issue in *Kalkaska*: *Strange & Lindsey Beverages, Inc.*, 219 NLRB 1200 (1975); *Sharon Hats, Inc*, 127 NLRB 947, 956 (1960), enfd 289 F2d 628 (CA 5, 1961).

Rule 165 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.165, authorizes an ALJ to summarily dispose of a case in appropriate circumstances and states:

> The commission or *administrative law judge* designated by the commission may, on its own motion or on a motion by any party, order dismissal of a charge or issue a ruling in favor of the charging party. The motion may be made any time before or during the hearing. (Emphasis added.)

We also look to *Smith v Lansing Sch Dist*, 428 Mich 248, 250-251, 255-259 (1987) for guidance on the issue of whether the Administrative Procedures Act, MCL 24.201 – 24.328, requires an evidentiary hearing to be held. In *Smith*, at 257, the Supreme Court said:

> We agree with appellants that § 72(3) [of the APA] does not require a full evidentiary hearing when, for purposes of the proceeding in question, all alleged facts are taken as true. That is, we construe that portion of § 72(3) to require affording the opportunity to present evidence on issues of fact only when such issues exist.

A mere claim that there are disputed facts is insufficient to justify an evidentiary hearing. If facts are disputed, it is up to Respondent to assert the facts that it claims support its defense to the charge. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237, (1993). While the Employer's filings contain conclusory statements and differing interpretations of the facts, Respondent has not specified any material facts that are disputed. Although the parties dispute the interpretation and legal implications of the facts, none of Respondent's submissions to the record in this matter indicate the presence of disputed material facts.

There is no dispute over the fact that the Employer refused to meet to negotiate with the Union bargaining committee after the Employer provided the Union with the June 8, 2017 proposal. The record contains undisputed documentary evidence that the Employer refused to negotiate with the Union after June 8. The Employer acknowledges in its August 10, 2017 response to the Union's motion for summary disposition that it offered to meet with Campbell and Mack alone to discuss questions they may have had regarding the June 8, 2017 offer. However, it is also evident from the exchange of emails that the Employer was not willing to negotiate at that meeting and had a "take it or leave it" attitude with respect to its last proposal. The Employer has offered no facts to dispute the evidence in the record that it refused to negotiate with the Union after it gave the Union the June 8, 2017 proposal. The record also contains undisputed evidence, including statements from the Employer, that its June 8 proposal contained changes from its earlier proposals and that the Union demanded to bargain over those changes.

Inasmuch as the parties' communications about meeting to discuss the Employer's June 8, 2017 proposal were written, the Employer has provided written acknowledgments

of the fact that the June 8 proposal contained changes from its earlier proposals, and these documents are included in the record, there was sufficient evidence in the record for the ALJ to determine that the Employer had breached its duty to bargain in good faith after it submitted the June 8 proposal to the Union.

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case. For the reasons set forth above, we find the exceptions of Respondent to be without merit and affirm the Administrative Law Judge's decision. In light of the fact that the parties have now agreed to a new collective bargaining agreement, we hereby modify the Order recommended by the ALJ. Accordingly, we adopt the following Order.

ORDER

Respondent Hurley Medical Center, its officers and agents, are hereby ordered to:

1. Cease and desist from refusing to bargain in good faith with the Registered Nurses and Pharmacists Association.

2. Cease and desist from conditioning its agreement to meet with the above labor organization on the labor organization's agreement to limit itself to asking questions during those meetings.

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

    a. Post the attached notice on Respondent's premises in all places where notices to employees in the Registered Nurses and Pharmacist Association's bargaining unit are customarily posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: January 2, 2019

NOTICE TO EMPLOYEES

UPON THE FILING OF AN UNFAIR LABOR PRACTICE CHARGE BY THE REGISTERED NURSES AND PHARMACISTS ASSOCIATION, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND **HURLEY MEDICAL CENTER** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE 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 bargain in good faith with the Registered Nurses and Pharmacists Association.

WE WILL NOT condition our agreement to meet with the above labor organization on the labor organization's agreement to limit itself to asking questions during those meetings.

HURLEY MEDICAL CENTER

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 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.
MERC Case No. C17 G-066

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

HURLEY MEDICAL CENTER,
Public Employer-Respondent,

Case No. C17 G-066
-and- Docket No. 17-015268-MERC

REGISTERED NURSES AND PHARMACISTS ASSOCIATION (RNRPH),
Labor Organization- Charging Party.
_____/

APPEARANCES:

Giarmarco, Mullins & Horton, P.C., by John C. Clark, for Respondent

Miller, Cohen, PLC, by Richard G. Mack, Jr., for Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

On July 20, 2017, the Registered Nurses and Pharmacists Association (RNRPH) filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against Hurley Medical Center pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MCL 423.216. Pursuant to Section 16 of PERA, the charge was assigned to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System.

Along with the charge, the RNRPH filed a motion for summary disposition. Respondent filed a response to the motion on August 10, 2017. Charging Party filed a supplement to its motion on August 22, and Respondent filed a supplement to its response on September 5, 2017. On September 8, 2017, I held oral argument and at the end of argument I granted the motion on the record. After I rendered my decision from the bench, Respondent agreed to meet, the parties scheduled a meeting date, and the parties agreed to hold the case in abeyance. However, on September 21, 2017, Charging Party requested in writing that I issue a written decision. Based on facts contained in the pleadings and not in dispute as set forth below, and the arguments made in the pleadings and at oral argument I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

Charging Party represents a bargaining unit of registered nurses and pharmacists employed by Respondent. Since March 2016, the parties have been attempting to negotiate a new collective bargaining agreement. Although there are currently other unfair labor practice charges pending involving these parties, including charges alleging that Respondent bargained in bad faith during the negotiations, the instant charge alleges only that Respondent violated Section 10(1)(e) of PERA by refusing to bargain over the terms of a new proposal, labeled by Respondent as its last best offer (LBO), it presented to Charging Party on June 8, 2017. The original charge also alleged that Respondent bargained in bad faith by refusing Charging Party's request that it provide Charging Party with a "redlined" version of its proposal, i.e., a version that clearly identified the changes from Respondent's prior proposals. However, after the charge was filed, Respondent provided the requested document. A redlined version of the proposal is included with the pleadings in this case.

Pertinent Facts:

Respondent's June 8, 2017, Proposal

Between March 2016 and June 2017, the parties held approximately 40 negotiation sessions, including eight sessions with a mediator beginning in January 2017. During the course of these negotiations, the parties exchanged numerous proposals and counter-proposals that deviated from the language of the parties' previous agreement. Respondent's proposals and counter-proposals were in the form of individual articles from the current contract, with language that Respondent proposed to delete struck out and language that Respondent proposed to add written in red.

On June 8, 2017, Respondent sent Charging Party, by email, a proposal in the form of a complete contract. This was the first time Respondent had presented its proposals together as an entire contract. The June 8, 2017, proposal was labeled LBO. The cover letter sent with the proposal said that the LBO addressed all the issues that had been the subject of negotiations. Respondent also said that it was its position that the parties were at impasse, and asked Charging Party to submit the LBO to its membership for a ratification vote. In addition, the letter said that because the LBO was presented through the mediator, it was "off the record" which, according to Respondent, meant that it could not be utilized in any litigation.

There is no dispute that many of the articles in the June 8 proposal had been presented to Charging Party in the same form earlier in the negotiations. However, Charging Party attached to its supplemental motion a list of more than 20 proposals in the June 8 offer that Charging Party considered "new" proposals, while stating that its list was not comprehensive. Some of the new proposals represented movement by Respondent toward Charging Party's position. For example, Respondent increased its salary offer from a .5% increase in both the 2017-2018 fiscal year and the 2018-2019 fiscal year to a 1.25% increase in both years.[5] Other new proposals were apparently intended to clarify Respondent's intent in its earlier proposal, and some did both. Four of the examples contained in Charging Party's list of new proposals are set out below.

[5] Charging Party's most recent salary proposal was a 7% increase in the first year of the contract and 3% increases in the second and third years.

Union release time for Bargaining Chair and President.

Current contract language: The bargaining Chairperson and the PRR Chairperson will be granted full-time union release from their home department equal to 1.8 FTE to handle union business. The Medical Center agrees that during working hours, on the Medical Center's premises and without loss of pay, the chair of the bargaining unit and grievance committee member shall be allowed to: . . .

Respondent's last proposal before June 8 (March 30, 2017): The Bargaining Chairperson and PRR Chairperson may be granted full-time union release from their home department equal to 1.8 FTE to handle union business. The Medical Center Agrees that during working hours, on the Medical Center's premises the chairperson of the bargaining unit and grievance committee member shall be allowed to . . .

Respondent's June 8, 2017 proposal (language changes underlined): The bargaining Chairperson and the PRR Chairperson will be granted full time union release from their home department equal to 1.8 FTE to handle union business between the two parties if paid for by the union. The Employer will pay up to sixteen (16) hours per week, combined, of the release time outlined above, for resolving matters with Hurley Medical Center Management or designee. Any release time paid by the Medical Center must be mutually agreed upon in advance by the union and the manager prior to the release taking place. Paid release time can be used in four (4) or eight (8) hour blocks as mutually agreed upon and at no time can any unused paid time allotted per week be banked to use at a later/date time. The Medical Center agrees that during working hours, on the Medical Center's premises the chairperson of the bargaining unit and grievance committee member shall be allowed to . . .

Lump Sum Bonuses

Current Contract: No lump sum bonus during term of contract.

Respondent's last proposal before June 8 (March 23, 2017): Employees will receive a one-time lump sum signing bonus equal to .5% of their base hourly rate at their status [sic] as of signing of [sic] July 1, 2017.

June 8, 2017 proposal: Employees will receive a one-time lump sum bonus of 1% on their base hourly rate at time of payout, on all hours worked from July 1, 2016 to June 30, 2017, which will be paid in the first full pay period of August 2017, if the contract is in effect.

Pharmacist Wage Scale

The current contract and all Respondent's previous proposals provided for a two-step salary schedule for pharmacists, with pharmacists moving to the second step after one year of service.

The June 8, 2017 offer expanded the number of steps from two to eight, with the lowest step making $10 per hour less than current beginning wage and the highest step making $2 more per hour than the current maximum pharmacist wage. The offer also added the following language:

> Pharmacist[sic] will be placed in the appropriate Step based on years of continuous service in the RNRPh HMC Union. Pharmacist [sic] with a higher hourly rate than their years of service as outlined in the scale above will be Red-Circled until they reach a step that warrants a higher hourly rate or receive a contractual increase. Any Pharmacist that is still Red-Circled will receive a 1.25% Lump Sum based on their status and the base hourly rate at time of payout, which will be paid the first full pay in December of 2017 if the contract is in effect.[6]

Longevity Pay

Current Contract: Starting at 10 years of service, employees receive a lump sum longevity payment in the month following their anniversary date. The longevity payment is a percentage of the employees' straight time wages, and the percentage gradually increases with increasing years of service. The contract contains a chart indicating the percentage at all amounts of service up to 41 years.

Respondent's last proposal before June 8 (March 23, 2017): Longevity payments are gradually reduced by Respondent paying a smaller percentage of the amount employees are entitled to under the chart in the contract, until June 30, 2020, when longevity payments are eliminated entirely.

June 8 proposal: After July 1, 2018, employees will be eligible for Longevity based on 10 or more calendar years of service in the RNRPh Union and the status held for the greatest length of time by the employee during the fiscal year.

The June 8 proposal contains a new chart pursuant to which employees would receive annual flat rate "longevity" payments which varied based on the number of hours they worked rather than their years of service, i.e. full-time employees would receive the largest payment, an employee with ".9 status" would receive less, etc. with employees with .1 status receiving the smallest amount. Payments would no longer be based on percentage of wages, but the flat rate payments to pharmacists would be greater at all "status" levels than the payments to nurses.

[6] "Red-Circled" in this context, meant that pharmacists' current hourly rate would remain the same.

Respondent's position with respect to the four proposals discussed above is that further bargaining over them was unnecessary because: (1) the only change in the union release proposal in the June 8 offer was that Respondent has now agreed to pay for some release time for the union president and bargaining chair, i.e. this is a concession; (2) the parties discussed both percentage wage increases and lump sum bonuses during the course of their negotiations, and the increase in the lump sum bonus is a concession; (3) the increase in the number of wage steps for pharmacists and the lower starting rate will affect only new hires, and no current pharmacist will suffer a pay cut; (4) regardless of how the longevity is calculated,, Respondent is still seeking to reduce longevity pay while Charging Party is demanding that it be increased.

As noted above, Charging Party identified more than twenty changes in Respondent's proposals that it felt were new. These included changes in the articles on jury duty; evaluation and promotion; call-in pay, short-term reassignments; who is offered time off on days when the patient census is lower than normal; pay for working additional hours; use of temporary employees; and scheduling.

Charging Party Asks to Meet and Bargain over the June 8 Proposal

Charging Party's immediate email response to receipt of the June 8 proposal was that it would review the proposal and provide a response, but that it did not agree that the proposal was "off the record." On June 14, 2017, Charging Party attempted to schedule another meeting with the mediator. On the morning of June 16, Charging Party sent Respondent this email:

> We need a meeting to discuss the LONG LIST of changes and new concepts you have introduced into negotiations. We cannot be at impasse given that you have made such significant movement in your most recent proposals in certain areas (less movement in others.) The bargaining team feels you have rewritten many areas, and we have many questions for you. There are a number of new concepts within your new round of proposals that we like, so we need to discuss them to make sure that we have an understanding of what they are. Plus the proposal does not appear to be complete. Our members also have questions, and we need to get your answers so we can give them answers. Are you refusing to meet? [Capitalization in original].

Respondent replied by email on June 19, asking Charging Party to submit its questions to Respondent in writing for review and consideration, and to identify which proposals it believed were incomplete. Respondent said it would then determine whether it was necessary to meet.

In an email later that day, Charging Party replied that its questions centered around Respondent's explanations for the changes in its proposals, and that it was not possible or a good use of time to try to list all its questions. Charging Party stated that Respondent's proposal made substantial changes to many different articles, and asked Respondent if it was really refusing to meet to go over these changes. Ten minutes later, Respondent emailed its response:

> We are not refusing to meet. However, we want any meeting, if necessary to be productive. Your refusal to provide a basic list of questions your client has in regards to our LBO is suspect, and quite frankly is not acceptable. Send me a list of questions for our review.

Charging Party's response came fifteen minutes later:

> Questions on each proposal (and more to come)
>
> What was the justification for this proposal?
> What does the employer seek to gain?
> Let's discuss alternatives
> Let's review the previous proposals to compare and discuss.

Charging Party also asked Respondent if Respondent needed more questions in writing for it to agree to meet.

Respondent's response was in the form of a letter to Charging Party dated June 21, 2017. In the letter, Respondent said that it was willing to meet to review the last best offer and answer Charging Party's questions, but that it would be very helpful to have these questions prior to the meeting. It suggested dates for a meeting.

On June 22, 2017, Charging Party sent Respondent this email:

> Just so we are clear, the Union intends to return to the bargaining table to negotiate towards a fair and equitable contract. One way your letter could be read is to only permit questions asked about your most recent proposals, as opposed to negotiating towards a new contract. If the Employer does not intend to negotiate at this next meeting we are scheduling, please make that known in writing, immediately.

Later that same day, Respondent emailed Charging Party as follows:

> The last and best offer, submitted on June 8th is really our last and best offer. I'm not sure why that is so difficult for you to understand. In one of your recent emails, you indicated your group had questions about the LBO. In response we offered to meet with you next week to discuss. Based on your email below, it looks like that offer has been rejected.

An hour later, Charging Party wrote:

> We are not rejecting anything, but expecting to negotiate the June 8th offer. Doesn't seem hard to understand at all.

On June 23, 2017, Charging Party sent Respondent a letter. In this letter, Charging Party suggested meeting on June 28, and stated again that Charging Party believed that the June 8

proposal contained significant changes from Respondent's prior proposals, including some that represented movement in Charging Party's direction. The letter included the following:

> Your recent emails claim that the Employer has presented a "last and best offer," while agreeing to a meeting for purposes of clarifying the June 8 proposal. Please be clear: the Union very much wants to meet, and intends for this meeting to be negotiations over the June 8 proposal. If the Employer does not intend to permit negotiations on June 28, let us know immediately. Otherwise, the Union will prepare for the June 28 meeting as if we are negotiating.

Charging Party attached to its letter new union proposals on jury duty and on retirement benefits. It also noted that although Respondent had suggested a meeting with only Charging Party's counsel and president present, Charging Party intended to have its entire bargaining team at the June 28 meeting.

On June 27, Respondent sent Charging Party the following email:

> As was clearly stated in our correspondence to you dated June 21, 2017, the sole purpose of any offered meeting this week was limited to answering questions about our LBO. Unless the premise is specifically accepted by you in writing this evening or first thing tomorrow, there will be no meeting tomorrow or Friday.

Charging Party's response, a half hour later, was:

> We are all set to meet tomorrow at noon, in order to negotiate, as I clearly stated in my letter sent to you last Friday … You received this letter and articles, so please do not pretend with your email that you did not.
>
> So the Employer and Union are both free tomorrow afternoon. I personally think negotiation would be fruitful, given the Employer's recent movement toward the Union and the Union's recent movement toward the Employer. Are you refusing to meet to negotiate? If so, state as much in writing. If not, or if you have no response, we will see you tomorrow at noon.

Twenty minutes later, Respondent responded as follows:

> Unfortunately, that was not the confirmation that was requested. Therefore, we are not meeting this week.

Charging Party responded with an email accusing Respondent of unlawfully refusing to bargain. The next correspondence between the parties was around July 18, 2017, when Respondent sent Charging Party an email stating that since Charging Party had not and would not be submitting Respondent's LBO to its membership for a ratification vote, Respondent was exercising its right to terminate the parties' collective bargaining agreement on September 16, 2017. On July 27, 2017, Respondent filed a petition for fact finding with the Commission.

On August 18, 2017, Respondent's Labor Relations Officer, Barry Fagan, sent an email to Charging Party's president suggesting that they meet, without their counsel, to "carefully go through the LBO to make sure you understand the provisions and to answer any questions you may have." On August 21, Charging Party President Pamela Campbell responded that she would "like to meet to negotiate from the LBO" but needed to talk to her bargaining team. Later that day, she emailed Fagan again, telling him "the meeting will be to negotiate from the June 8 proposal," and suggesting a date. On June 22, Fagan responded:

> My intent was to answer any questions you may have, so as to ensure a clear understanding. Clearly the purpose of the proposed meeting was not to negotiate… If you are interested in meeting for the purpose described above, let me know. Otherwise, I will not proceed with scheduling it.

Discussion and Conclusions of Law:

Respondent took the position that it had no duty to meet and bargain with Charging Party after June 8, 2017, because the parties were at impasse. Respondent argued that since there were material issues of fact with respect to whether the parties had reached impasse on June 8, granting Charging Party's motion would be inappropriate. In other words, Respondent argued that it would be improper for me to find, without an evidentiary hearing, that it violated its duty to bargain by refusing to meet with Charging Party after June 8, 2017, unless Charging Party agreed in advance that it would confine itself to asking questions about the June 8, 2017, LBO. In its supplemental response, Respondent also argued that I should find that the parties had reached impasse because, on the important issue of wages, (1) the parties were more than $20 million apart over the life of the contract; and (2) the parties' positions on wages had become fixed. Respondent cited *Kalkaska Co Rd Comm,* 29 MPER 65 (2016) for the principal that impasse on a single critical issue may produce an overall impasse in bargaining.

The Commission defines a bargaining impasse as the point at which the parties' positions have solidified and further bargaining would be fruitless. *Oakland Cmty College,* 2001 MERC Lab Op 272, 277; *Wayne Co (Attorney Unit),* 1995 MERC Lab Op 199, 203*; City of Ishpeming,* 1985 MERC Lab Op 687; *City of Saginaw,* 1982 MERC Lab Op 727. The National Labor Relations Board (NLRB) explained impasse as follows in *Royal Motor Sales,* 329 NLRB 760, 762 (1999):

> A genuine impasse in negotiations is synonymous with deadlock; the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its … respective positions.

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 Township,* 1974 MERC Lab Op 152, 157; *Mecosta Co Park Comm,* 2001 MEREC Lab Op 28, 32 (no exceptions.) In determining whether the parties have reached a good faith impasse, the Commission looks at a number of factors. These include how long the parties have bargained. *City of Warren,* 1988 MERC Lab Op 761 (one meeting); *Edwardsburg Pub Schs,* 1968 MERC

Lab Op 727 (four meetings); *City of Benton Harbor,* 1996 MERC Lab Op 399 (two years). The primary factors are whether or not there has been a reasonable period of bargaining, whether the parties' positions have become fixed, and whether both parties are aware of where the positions have solidified. *City of Saginaw; Memphis Cmty Schs,* 1998 MERC Lab Op 377 (no exceptions.)

In *Taft Broadcasting Co,* 163 NLRB 475, 478 (1967) enfd. sub nom. *Television Artists AFTRA v NLRB,* 395 F2d 622 (CA DC 1968), the NLRB stated:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

The party asserting impasse bears the burden of establishing that impasse was reached; it must show that both parties, and not just one, were unwilling to compromise. *Oakland Cmty College,* at 277.

In this case, it is Respondent that asserted that the parties had reached impasse and that, therefore, it was not required to meet with Charging Party to bargain over Respondent's June 8 proposal. However, among the many factors important to finding an impasse is whether both parties know the other's positions on the issues and where their positions have become solidified. In this case, Respondent's June 8, 2017 offer contained many proposals that it had not previously put in writing. Clearly, the parties had discussed some, but not all, of the issues covered by these proposals. That is, the June 8, 2017, offer contained proposals over which there had been no bargaining. I find in this case that before reaching a good faith impasse on the contract as a whole, the parties needed to meet, go over the LBO article by article, discuss what, if anything, was new and Respondent's rationale for adding and revising its previous proposals. Charging Party also needed to indicate, by either words or inaction, that it did not accept the offer. As in all good faith bargaining, both parties had to be permitted to express their views regarding the issues on the table and to offer suggestions and/or make counterproposals. I conclude that until the above occurred, the parties cannot be said to have exhausted the bargaining process or the parties to have reached impasse. Since no meeting occurred after Respondent presented its June 8, 2017, proposal, I find that the parties had not reached impasse and, therefore, Respondent had a continuing duty to meet and bargain with Charging Party over the terms of the new contract.

Obviously, Respondent did not have an obligation to make concessions beyond those it had already made in what it announced as its best offer without some substantial movement on Charging Party's part. I conclude, however, that by refusing to meet with Charging Party to discuss the June 8 offer unless Charging Party restricted itself to asking questions about that offer, Respondent violated its duty to bargain in good faith. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Hurley Medical Center, its officers and agents, are hereby ordered to:

1. Cease and desist from refusing to bargain in good faith with the Registered Nurses and Pharmacists Association over the terms of a new collective bargaining agreement.

2. Cease and desist from conditioning its agreement to meet with the above labor organization on the labor organization's agreement to limit itself during those meetings to asking questions about Respondent's June 8, 2017, bargaining proposal.

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

   a. Upon request, meet and bargain with the Registered Nurses and Pharmacists Association until the parties have reached agreement or a good faith impasse on the terms of a new collective bargaining agreement.

   b. Post the attached notice on Respondent's premises in all places where notices to employees in the Registered Nurses and Pharmacist Association's bargaining unit are customarily posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: October 11, 2017

NOTICE TO EMPLOYEES

UPON THE FILING OF AN UNFAIR LABOR PRACTICE CHARGE BY THE REGISTERED NURSES AND PHARMACISTS ASSOCIATION, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND **HURLEY MEDICAL CENTER** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE 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 bargain in good faith with the Registered Nurses and Pharmacists Association over the terms of a new collective bargaining agreement.

WE WILL NOT condition our agreement to meet with the above labor organization on the labor organization's agreement to limit itself during those meetings to asking questions about our June 8, 2017, bargaining proposal.

WE WILL, upon request, meet and bargain with the Registered Nurses and Pharmacists Association until the parties have reached agreement or a good faith impasse on the terms of a new collective bargaining agreement.

HURLEY MEDICAL CENTER

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 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.
Case No. C17 G-066/17-015268-MERC.