STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

KALKASKA COUNTY ROAD COMMISSION,
Public Employer-Respondent,

MERC Case No. C13 E-082
-and- Hearing Docket No. 13-003397

UNITED STEELWORKERS LOCAL 8287,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Cohl, Stoker & Toskey, P.C., by Bonnie G. Toskey, for Respondent

Legghio & Israel, P.C., by John G. Adam, for Charging Party

DECISION AND ORDER

On February 5, 2015, Administrative Law Judge Julia C. Stern (ALJ) issued her Decision and Recommended Order in the above matter finding that Respondent violated §10 (1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, by implementing its December 3, 2012 offer and unilaterally altering existing terms and conditions of employment effective April 12, 2013. Although the ALJ concluded that the parties had reached an impasse during bargaining, the ALJ further concluded that a proposal made by Charging Party on March 1, 2013 served to break the impasse and that Respondent implemented its offer after this. The ALJ also found that Respondent unilaterally altered an existing condition of employment without reaching impasse, and violated §10(1)(e) of PERA by employing more than the number of temporary employees permitted under the expired contract. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with §16 of PERA.

After requesting and receiving an extension of time, Respondent filed exceptions and a brief in support of its exceptions to the ALJ's Decision and Recommended Order on April 1, 2015. After being granted an extension of time, Charging Party filed its brief in support of the ALJ's Decision and Recommended Order and cross exceptions on May 18, 2015. After receiving an extension of time, Respondent filed its response to Charging Party's cross exceptions on June 25, 2015.

In its exceptions, Respondent contends that the ALJ erred by concluding that the parties were not at impasse on April 12, 2013, when the Respondent implemented the terms of its December 3, 2012 offer. Respondent also states that the ALJ erred by finding that it failed to satisfy its obligation to bargain in good faith for a reasonable time over the fact finder's recommendation, and by concluding that business necessity did not justify finding that an impasse existed when Respondent implemented its last best offer.

In its cross exceptions, Charging Party argues that the ALJ erred by concluding that Respondent did not violate its duty to bargain in good faith by refusing to recognize temporary employees as part of Charging Party's bargaining unit and by forcing them to sign employment agreements stating that they are non-union members. Charging Party contends that the remainder of the ALJ's findings should be affirmed.

In its response to Charging Party's cross exceptions, Respondent argues that the Agreement excludes temporary and seasonal employees from the bargaining unit and, therefore, it did not violate its duty to bargain in good faith by refusing to recognize these employees as part of the unit.

We have reviewed the exceptions filed by both parties, and find that the parties were at impasse on April 12, 2013, when the Respondent implemented the terms of its December 3, 2012 offer and that the impasse previously established between the parties was not broken by Charging Party's March 1 or April 3, 2013 proposals. We further find Charging Party's exceptions to be without merit.

Factual Summary:

Charging Party United Steelworkers Local 8287 (Local 8287) represents a bargaining unit of Respondent's regular full-time road maintenance and garage employees, including truck drivers/heavy equipment operators and mechanics. The bargaining unit excludes seasonal and temporary employees.

Since 2006, Respondent has experienced shrinking revenues as well as significant increases in the cost of fringe benefits for its employees. Respondent has also experienced substantial increases in the cost of the raw materials needed to maintain the County's roads.

The most recent collective bargaining agreement between the parties was an abbreviated 17-month agreement covering the period January 8, 2011 through May 31, 2012. As a result of Respondent's distressed financial condition, the Agreement froze wages and established a lower wage scale for employees hired after January 1, 2011. Additionally, bargaining unit employees covered by the Michigan Employment Retirement System (MERS) defined benefit B-4 plan were required to pay up to 3% of the required pension contribution and employees hired after July 1, 2011 were placed into a new hybrid pension plan instead of the B-4 plan. Nonetheless, the plan remained significantly underfunded.

The first bargaining session for a successor to the 2011-2012 agreement was held on January 26, 2012, four months prior to the expiration of the agreement. Respondent's bargaining team included Chief Spokesperson Peter Cohl[1], Board President Louis Walter, and Board Member David Gill. Local 8287's Chief Spokesperson was Business Agent Tonya DeVore. During this first

[1] Partner with the law firm of Cohl, Stoker & Toskey.

session, Respondent emphasized that it needed economic relief from Charging Party as a result of the dire straits of its finances and proposed a wage freeze for existing employees as well as a two tier wage schedule for mechanics.

Other changes proposed by Respondent included a provision giving it the right to subcontract bargaining unit work at any time and a provision giving it the unlimited right to use non-unit temporary or seasonal employees except when regular employees were laid off. Additionally, Respondent proposed a health care plan with lower premiums and higher deductibles, a cap on vacation pay, the elimination of one holiday, and an "election of remedies" modification to the grievance procedure.

Subsequent to the January 26 meeting, Respondent provided Charging Party with information regarding the cost of employee benefits, including health insurance rates and Respondent's contribution to the MERS pension plan. The contribution at the time was 39.9% of payroll. Respondent explained that the dramatic increase in unfunded liability in the MERS plan was one of the most, if not the most, critical issues facing the employer.

The next bargaining session was held on April 12, 2012, at which Charging Party made its initial proposal. This proposal included a 3% wage increase for each year of a proposed three year contract, the addition of two floating holidays, and a 20% employee cost share limit on health insurance. During the April 12 session, the parties also discussed the MERS defined benefit B-4 plan's significant unfunded liability but Charging Party did not address the pension issue in its first proposal.

On April 19, 2012, the parties met again and Respondent proposed to modify the existing agreement's pension provision so as to require employees in the B-4 plan to pay an additional 10% toward their retirement costs in order to reduce the plan's unfunded liability. Respondent's proposal provided as follows:

> . . . Employees [in the B-4 plan] will pay for any MERS mandated increase above 37.12% to a maximum of 3% contribution. In addition, commencing June 1, 2012, employees will pay an additional 10% toward their retirement costs. The entire 10% shall be used to reduce the unfunded liability of the retirement cost of the bargaining unit.

Another negotiation session was held on May 17. During this session, Charging Party modified its prior wage proposal from a 3% increase for each year of a three year contract to a 5% increase in the base rate and a 5% increase effective on June 1, 2014. Charging Party also made the following proposal regarding pensions:

> From June 1, 2012 thru December 31, 2014, the employees agree to pay an additional 2% of base pay for the sole purpose of bringing down the liability. Such payments

will be remitted to MERS in addition to any payments included and required in the percentage quoted above.

When the parties were unable to reach agreement by the end of this bargaining session, Charging Party withdrew its proposal.

Subsequent to this, the parties participated in mediation sessions with a Commission-appointed mediator on June 27, July 23, and July 31, 2012. During these sessions, the union maintained that employees should contribute no more than 3% toward their pensions. The Employer continued to argue that employees in the B-4 plan should be required to pay an additional 10% toward their retirement costs.

On August 1, 2012, after the last mediation sessions, both parties petitioned for fact finding and hearings were held on November 2 and December 5, 2012. The Union's Fact Finding petition listed wages, pensions and 12 other issues as unresolved. The Employer's petition listed wages, pensions and 9 other unresolved issues.

During the Fact Finding hearings, Respondent's witness, CPA Sue Sanford, testified that the cost of the MERS B-4 plan would have an effective rate of 56.9% of payroll by 2013 and that the unfunded MERS liability for the USW bargaining unit was more than $4 million.

On December 3, 2012, at the suggestion of the fact finder, Respondent gave Charging Party its "last best offer." Respondent's offer maintained wage freezes for each year of the contract and continued to require employees in the B-4 plan to pay an additional 10% toward their retirement costs. Respondent also maintained its previous positions on the use of temporary and seasonal employees, holiday pay, vacation pay, subcontracting, contract duration, and wages. Respondent, however, proposed a two-year instead of a one-year agreement.

In its Post Hearing Brief submitted to the Fact Finder, the Respondent repeatedly discussed the B-4 plan's significant unfunded liability and argued that implementation of its proposed increase in the employees' pension contributions "unfortunately is necessary due to the economic circumstances of the Kalkaska County Road Commission."

On January 25, 2013, Fact Finder Barry Goldman issued his report and recommendation, in which he recommended a two-year agreement with no wage increase in either year. Goldman also recommended that the parties accept the Respondent's health care plan proposal and Respondent's proposed increase in the employees' pension contributions, stating that:

> Something has to be done about the unfunded liability in this pension plan. Unfortunately there are a limited number of places to look. I recommend adoption of the Employer's proposal.

On all other issues, the Fact Finder adopted Charging Party's positions which was to recommend that the parties retain their current contract language.

During the hearing held before the ALJ, Business Agent DeVore admitted that, by the time she submitted her final argument to the Fact Finder, she was aware, on the basis of her representation of the Steelworkers bargaining unit, that the Employer struggled with filling mechanic positions.

Subsequent to receiving the Fact Finder's recommendations, the parties met on March 1, 2013 and Charging Party's representative, after stating that employees could not pay 13% of the pension costs, proposed a $.75 per hour across-the-board wage cut. Respondent told Charging Party that its position remained the same but that it would take the offer back to Respondent's Board.

Respondent's Attorney Cohl then asked Respondent's finance director/clerk Rebecca Jerry to analyze Charging Party's proposed wage decrease. In her analysis, Jerry initially noted that Respondent's MERS contribution was no longer calculated as a percentage of payroll, and, therefore, that a reduction in the hourly wage would not reduce the required contribution. She also noted that a $.75 decrease in wages would only save Respondent $28,287.16 per year but that the implementation of the 10% increase in employee pension contributions would result in employees contributing approximately $63,189 per year in addition to their 3% contribution.

Respondent's Negotiator Cohl then presented Charging Party's proposal to the Board at its March 11, 2013 meeting, and the Board rejected it. Consequently, Cohl sent Union Negotiator DeVore the following email on March 12 and did not budge from its previous position regarding pensions as adopted by the Fact Finder:

> Thank you for your proposal of March 1, 2013. My client does not believe it would benefit either the Employer or the Union in the short term or long term. Therefore, it has no interest in the Union's proposal.

The parties met again on April 3 and Charging Party Representative DeVore again stated that the employees could not afford a 13% contribution out of their paychecks. DeVore asked Respondent's bargaining team to "consider how we can work on [the unfunded liability] without raping the employees." Respondent's representative informed Charging Party's representative DeVore that, "I can offer our last best offer of December 3. I cannot offer anything else." In response, Charging Party proposed to retain all the language in the previous agreement except for the changes tentatively agreed to on April 19, a wage reduction of $.85 per hour in all classifications, and the addition of the following language to the pension provision:

> The Parties agree to meet during the course of this agreement to explore viable long term solutions to lower the overall MERS Pension liability with the intent that a solution will be negotiated in future agreements.

At the April 3 meeting, DeVore commented that the pension's unfunded liability was built up over a long time period and that it would take both parties working long term to find a solution. She also said that the parties could look at "moving the pension to another type of fund," but that she was not sure if this was feasible because of the unfunded liability.

Respondent reviewed the Union's April 3 proposal and concluded that it was no different, in any material respect, from the Union's March 1 proposal.[2] Consequently, at its meeting on April 11, 2013, Respondent's Board voted to implement most of its December 3, 2012 last best offer, including a 10% increase in the pension contribution paid by unit employees remaining in the defined benefit pension plan, an "election of remedies" clause and a provision that allowed Respondent to remove language in the expired agreement that limited its use of non-unit temporary and seasonal employees. Respondent implemented its offer on April 12, 2013.

As a result, Charging Party filed the instant unfair labor practice charge.

Discussion and Conclusions of Law:

An employer violates § 10(1)(e) when it takes unilateral action on a mandatory subject of bargaining before the parties reach impasse. *Detroit Police Officers Ass'n v Detroit*, 61 Mich App 487, 490 (1975), *lv den* 395 Mich 756 (1975); *International Ass'n of Firefighters Local 1467, AFL-CIO v Portage*, 134 Mich App 466, 473 (1984). Impasse has been defined as the point at which the parties' positions have so solidified that further bargaining would be futile. *Redford Union School District*, 23 MPER 32 (2010), *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. 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. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 56 (1974). However, simply declaring impasse and asserting the right to implement changes in mandatory subjects of bargaining is not sufficient.

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, whether both parties are aware of where the positions have solidified and business necessity. *Oakland Cmty Coll*, at 277; *Wayne Co (Attorney Unit)*, at 203; *St Joseph County District Court*, 1998 MERC Lab Op 406*; Macomb County Rd Commission* 1979 MERC Lab Op 939. Additionally, the fact the parties have reached a good faith impasse does not terminate the bargaining duty, but only suspends it until circumstances change which break the impasse. *Escanaba Public Schools*, 1990 MERC Lab Op 887, 891; *City of Ishpeming*, 1985 MERC Lab Op 517, 520-521. A substantial change in the bargaining position of one party is necessary to

[2] According to the analysis of Finance Director Rebecca Jerry provided to Charging Party after its April 3 proposal, wages would have to be cut by $1.56 per hour, a reduction substantially in excess of the cuts proposed by Charging Party, to produce the equivalent of a 13% employee pension contribution.

break an existing impasse. *Strange & Lindsey Beverages, Inc.*, 219 NLRB 1200 (1975); *Sharon Hats, Incorporated*, 127 NLRB 947, 956 (1960), enfd. 289 F2d 628 (CA 5, 1961).

In the present case, the ALJ correctly found that the parties in this case had reached a bona fide bargaining impasse by the time of the fact finding hearing. The ALJ, however, erred in concluding that Charging Party's March 1, 2013 proposal served to break the impasse and erred in concluding that Respondent failed to satisfy its obligation to bargain in good faith for a reasonable time over the fact finder's recommendations.

With respect to the solidification of positions, the record indicates that there was no flexibility in the positions of either party with respect to the pension issue and that each party was aware of this. At the time the fact finder issued his report on January 25, 2013 and recommended Respondent's proposed increase in the employees' pension contribution, the parties had participated in four bargaining sessions, three mediation sessions, and two days of fact finding hearings but were unable to reach agreement. At all times in the negotiations, the Employer emphasized that reducing the unfunded liability in the pension obligation was a "deal breaker." At the same time, the Union continued to fail to address the pension issue in any meaningful way and showed no signs that it would do so.

Although Charging Party proposed, on March 1, 2013, an unsolicited $.75 per hour across-the-board wage cut, Charging Party also rejected Respondent's pension proposal and indicated that employees could not pay 13% of pension costs notwithstanding the Fact Finder's recommendation. Respondent unequivocally rejected the March 1, 2013, proposal and sent Charging Party the following email on March 12 clearly stating that it had no interest in the proposal:

> Thank you for your proposal of March 1, 2013. My client does not believe it would benefit either the Employer or the Union in the short term or long term. Therefore, it has no interest in the Union's proposal.

Although Respondent did not explain why Charging Party's proposal would not benefit either the Employer or the Union in the short term or long term, Charging Party should have known its proposal would be unacceptable to Respondent. Rejection of the proposal was obvious in view of the extensive discussions of the pension issue that occurred during negotiations, mediation, and fact finding and in view of the difficulties Respondent was experiencing in attracting and retaining competent employees at the existing wage scale. Given Respondent's clearly expressed position with respect to these issues, especially the pension issue, Charging Party's March 1, 2013 proposal provided no basis for believing that continued bargaining would be fruitful. Nothing that the Union said or did gave the Employer the slightest indication that there would be any movement on the critical issue of pensions.

Nonetheless, on April 3, the parties met again. Charging Party Representative DeVore began the meeting by again stating that the employees could not afford a 13% contribution out of their

paychecks. DeVore asked Respondent's bargaining team to "consider how we can work on [the unfunded liability] without raping the employees."

In response Board President Walter said, "I can offer our last best offer of December 3. I cannot offer anything else."

Subsequent to this, Business Agent DeVore gave Respondent a written proposal in which Charging Party proposed a wage reduction of $.85 per hour in all classifications and the addition of the following language to the pension provision in the current agreement:

> The Parties agree to meet during the course of this agreement to explore viable long term solutions to lower the overall MERS Pension liability with the intent that a solution will be negotiated in future agreements.

At the April 3 meeting, DeVore also noted that the pension's unfunded liability was built up over a long period and that it would take both parties working long term to find a solution. The positions of the parties were thus fixed with respect to the pension issue and had not changed in any significant way since the time of the fact finding hearing.

Although the Commission recognizes that an impasse does not terminate the bargaining duty but only suspends it until circumstances change which break the impasse, the Commission finds that, in this particular case, we do not agree with the ALJ that the impasse was broken by Charging Party's March 1 or April 3, 2013 proposals. The wage cuts offered by Charging Party were never requested by Respondent in any of its bargaining proposals and did not constitute a substantial change in Charging Party's bargaining position. See *City of Ishpeming*, 1985 MERC Lab Op 517. Respondent did not request the wage cuts because it believed that they would have worsened the problems Respondent was already having with attracting and retaining employees under the reduced wage scale provided by the existing agreement.[3]

Significantly, according to the analysis of Finance Director Rebecca Jerry discussed in the ALJ's decision and provided to Charging Party after its April 3 proposal, wages would have to be cut by $1.56 per hour, a reduction substantially in excess of the cuts proposed by Charging Party, to produce the equivalent of a 13% employee pension contribution. The record also establishes that there was no guarantee that any savings resulting from a wage cut would be used to reduce retirement costs. Furthermore, even if Charging Party proposed a wage cut that would produce savings equivalent to the proposed increase in pension contributions, such a wage cut was of no

[3] Respondent's fears were substantiated by its experiences subsequent to implementing its last offer. As noted by the ALJ, three unit employees quit in May 2013. Another three quit in June 2013. In August 2013, one unit member retired. Another unit employee quit in November 2013. Similarly, USW Business Agent Tonya DeVore admitted that she was aware, by virtue of her representation of the Steelworkers, that the Employer struggled with filling mechanic positions and that employees had complained to the Employer about the wage rate.

interest to Respondent. We believe that a concession, the acceptance of which would have been inimical to Respondent's interests and not responsive to the terms of its last best offer, is insufficient to break an impasse. Consequently, the Commission finds that the ALJ erred in concluding that Charging Party's March 1, 2013 proposal served to break the impasse.

With respect to the length of bargaining involved in this dispute, we find that the length of negotiations required before reaching impasse depends on the circumstances, including the business necessities of the Respondent. *Wayne Co (Attorney Unit)*, 1995 MERC Lab Op 199; *St. Joseph County District Court*, 1998 MERC Lab Op 406 (no exceptions). At the time Respondent implemented its last offer, the parties had bargained for more than 14 months. Although the parties had only met twice following receipt of the fact finder's report, we find that the financial exigencies of the Respondent and Charging Party's consistent refusal to address the pension issue or to begin to address the looming and ever-increasing unfunded liability in any meaningful way justified Respondent's declaration of impasse.

Significantly, as noted by the ALJ, from December 2008 to December 2011, Respondent's annual contribution to the MERS B-4 plan rose from 28.04% of payroll to 37.12% of payroll, or from about $229,000 per year to about $263,000 per year. In 2013, the annual contribution was $319,020, 56.90% of payroll. Nonetheless, despite these increases, the plan remained only 44% funded and, in 2012, the plan had an unfunded liability of almost $5 million dollars. As a result, MERS informed Respondent in 2012 that it would have to begin making monthly payments. At the end of 2012, Respondent was paying a monthly flat rate of $24,313. Respondent's required contribution to the B-4 pension was rapidly rising and the imminence of the situation called for Respondent to act urgently.

Respondent's precarious financial condition is also undisputed. In response to its financial difficulties, Respondent had reduced the number of unit employees from a high of twenty-two in 2006 to sixteen by 2012. In 2011, Respondent had such severe cash flow problems that it could not pay its suppliers and had to enter into installment payment agreements. To save money, Respondent laid off eight of the eighteen employees remaining in Charging Party's unit for the summer of 2011. Respondent's financial difficulties continued throughout 2012, and it ended three months of that year with a negative cash balance. At the time it implemented its offer, Respondent had been making a MERS contribution of more than $24,000 per month for months. Under the circumstances, business necessity justified Respondent's declaration of impasse, and we conclude that Respondent satisfied its obligation to bargain in good faith for a reasonable time over the fact finder's recommendations. See *Wayne Co (Attorney Unit)*.

In sum, Respondent wanted and urgently needed a significant increase in employee pension contributions that would allow it to address the B-4 plan's substantial unfunded liability. This was not a new issue, but was an issue discussed throughout the more than 14 months of bargaining. The Union, however, was steadfastly opposed to increasing employee contributions. Both parties maintained strong positions regarding the issue and bargained in good faith with a sincere desire to reach agreement. Nonetheless, after four bargaining sessions, three mediation sessions, two days of

fact finding hearings, and two post fact finding bargaining sessions, progress was insignificant on the critical pension issue. Significantly, each month that there was no agreement on the pension issue was another month that the Employer was required to pay close to $25,000 each month—not an insignificant amount. Even the neutral fact finder appointed by MERC recognized the imminence of the situation, adopting the Employer's proposed increase in employee pension contributions. Fact Finder Goldman noted "something needed to be done regarding the unfunded liability, and there were limited options." Consequently, we are unable to conclude that a continuation of bargaining would have culminated in an agreement. Although other issues had been resolved by the parties, an impasse on a single critical issue may nonetheless produce an overall impasse in bargaining. As noted by the Board in *Taft Broadcasting Co.,* 163 NLRB 475 (1967):

> …an impasse is no less an impasse because the parties were closer to agreement than previously, and a deadlock is still a deadlock whether produced by one or a number of significant and unresolved differences in positions.

See also *California Pacific Medical Center*, 356 NLRB No. 159 (2011). Therefore, Respondent was permitted to make the unilateral changes it made on April 12, 2013, subsequent to the impasse, including the 10% increase in the pension contribution paid by unit employees remaining in the defined benefit pension plan and the removal of language in the expired agreement limiting Respondent's use of non-unit temporary and seasonal employees. *Detroit Police Officers Ass'n v Detroit*, at 56.

Although Charging Party argues that the ALJ erred in concluding that Respondent did not violate its duty to bargain in good faith by refusing to recognize temporary employees as part of Charging Party's bargaining unit, the Commission agrees that the evidence is insufficient to establish that Respondent mislabeled employees whose tenure was indefinite as "temporary" in order to exclude them from the unit. Consequently, Respondent did not violate its duty to bargain by referring to employees hired after April 2013 as temporary employees or by refusing to recognize them as part of Charging Party's bargaining unit.

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case.

ORDER

The unfair labor practice charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: March 22, 2016

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

KALKASKA COUNTY ROAD COMMISSION,
Public Employer-Respondent

Case No. C13 E-082
Docket No. 13-003397-MERC

-and-

UNITED STEELWORKERS LOCAL 8287,
Labor Organization-Charging Party
_____/

APPEARANCES:

Cohl, Stoker & Toskey, P.C., by Bonnie G. Toskey, for Respondent

Legghio & Israel, P.C., by John G. Adams, for Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard in Lansing, Michigan on April 23 and June 16, 2014, before Administrative Law Judge (ALJ) Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on August 20, 2014, I make the following findings of fact, conclusions of law, and recommended order.

I. The Unfair Labor Practice Charge:

United Steelworkers Local 8287 filed this unfair labor practice charge against the Kalkaska County Road Commission on May 15, 2013, and an amended charge on January 16, 2014. Charging Party represents a bargaining unit of regular full-time road maintenance and garage employees of Respondent, including truck drivers/heavy equipment operators and mechanics, but excluding seasonal and temporary employees. In January 2012, the parties began negotiating a successor to their collective bargaining agreement expiring on May 31, 2012. On April 11, 2013, after the parties'

dispute had been submitted to fact finding and the fact finder had made a recommendation, Respondent's Board passed a resolution announcing that, effective April 12, 2013, it was implementing most of its December 3, 2013, "last best offer." Among the proposals that Respondent implemented was a ten percent increase in the pension contribution paid by unit employees remaining in the defined benefit pension plan (more recent hires had been placed in a separate hybrid plan). The proposals that Respondent declared it was implementing also included a proposed "election of remedies" clause and a proposal to remove language in the expired agreement limiting Respondent's use of non-unit temporary and seasonal employees.

The charge, as amended, alleges that Respondent violated its duty to bargain in good faith by implementing its last best offer because the parties were not at impasse on April 12, 2013. Among the facts supporting this conclusion, according to Charging Party, is the fact that Charging Party proposed significant new wage cuts following the fact finder's report in late January 2013 and expressed a willingness to agree to more cuts. Charging Party also asserts that even if the parties were at impasse, the impasse was not the result of good faith bargaining because Respondent took a "take-it-or-leave it" position on most issues during bargaining and unlawfully insisted to impasse on two non-mandatory subjects, the election of remedies clause and its temporary employee proposal. Charging Party also alleges that because these clauses were permissive subjects, Respondent was not entitled to implement them on April 12, 2013, even if the parties were otherwise at impasse on that date. Finally, Charging Party alleges that Respondent violated its duty to bargain on and after June 2013 by mislabeling newly hired full-time employees as temporary and treating them as non-unit employees.

II. Previous Motions for Summary Disposition:

On July 12, 2013, Respondent filed its first motion for summary dismissal of the charge. Respondent asserted that the charge alleging that Respondent unlawfully implemented changes in mandatory subjects should be dismissed because the parties were at impasse when it implemented the changes based on the number of bargaining sessions that had taken place before April 12, 2013 and the fact that the parties had participated in both mediation and fact finding. Charging Party filed a brief in opposition to the motion. I denied the motion on October 18, 2013, finding that whether the parties were at impasse on April 12, 2013, presented genuine issues of material fact requiring an evidentiary hearing.

On January 7, 2014, Charging Party amended the charge to allege that Respondent violated its duty to bargain by insisting on and implementing the two proposals on permissive topics. On January 16, 2014, Respondent filed a motion for summary disposition of this allegation. Respondent argued, first, that this allegation was untimely under §16(a) of PERA because the amended charge was filed more than six months after the two proposals were implemented. Respondent also argued that this allegation should be dismissed because both proposals were mandatory topics.

On April 14, 2014, I issued an interim order denying the motion. As I noted in the interim order, an amended charge that does not relate back to the original charge must be filed within six

months of the date the claim accrues. *City of Detroit*, 25 MPER 68 (2012); *City of Pontiac*, 22 MPER 46 (2009). Under Michigan law, an amendment "relates back" if the claim or defense asserted in the amended pleading arises out of the same conduct or transaction set forth in the original pleading. See MCR 2.118 (D**).** I found that because the allegation in the amended charge arose from the same conduct alleged in the original charge to constitute the unfair labor practice – in this case, Respondent's April 12, 2013, implementation of its last offer – the amended charge related back to the original charge and was not untimely.

I also concluded, for reasons set out in the discussion section below, that the election of remedies clause was a permissive subject of bargaining, while Respondent's proposal to eliminate contractual restrictions on its use of temporary employees was a mandatory subject of bargaining. However, I noted that it had yet to be determined whether the parties had reached impasse when Respondent declared its intention to implement these proposals, and that a hearing had been scheduled to take evidence on that issue.

III. Findings of Fact:

A. Background

Since at least 2006, Respondent has struggled to balance its budget in the face of declining state revenue, significant price increases in the cost of the raw materials needed to repair and maintain the County's roadways, and substantial increases in the cost of fringe benefits for its employees. In response to these financial difficulties, Respondent reduced the number of unit employees by attrition from a high of twenty-two in 2006 to sixteen by 2012. Respondent's problems came to a head in 2011, when it had such severe cash flow problems that it could not pay its suppliers and had to enter into installment payment agreements. To save money, Respondent laid off eight of the eighteen employees in Charging Party's unit for the entire summer of 2011. Respondent's financial difficulties continued throughout 2012, and it ended three months of that year with a negative cash balance.

Prior to July 1, 2011, all unit employees were covered by a Michigan Employment Retirement System (MERS) defined benefit plan, referred to here as the B-4 plan. Respondent also had, and has, substantial retiree health care liabilities for the unit. By 2008, the number of retired employees in the B-4 plan significantly exceeded the number of active employees. Around this time, MERS began increasing Respondent's required annual contribution to the B-4 plan to reduce the plan's unfunded liability, with the object of bringing the plan to eighty percent funded. From December 2008 to December 2011, Respondent's annual contribution to the plan rose from 28.04% of payroll to 37.12% of payroll, or from about $229,000 per year to about $263,000 per year. As discussed below, in 2013 the annual contribution was $319,020. However, despite these increases, the plan remained only 44% funded and in 2012, the plan had an unfunded liability of almost $5 million dollars. In mid-2012, MERS informed Respondent that it would have to begin making monthly payments that, unlike previous contributions, were not based on a percentage of payroll.

In September 2011, the parties entered into a collective bargaining agreement covering the period January 8, 2011 through May 31, 2012. There was considerable discussion during these negotiations about the B-4 plan's unfunded liability. The parties agreed in this contract to require unit employees to pay a portion of the pension contribution. Article XI(7) of the 2011-2012 agreement stated that employees would "pay for any MERS-mandated increase above 37.12% [of gross payroll] to a maximum of 3% contribution."[4] The parties also agreed that all employees hired after July 1, 2011 would be placed into a new hybrid pension plan and that the B-4 plan would be closed.

B. Negotiations for a Successor Agreement

1. First Bargaining Session in January 2012

The parties held their first bargaining session for a successor to the 2011-2012 agreement on January 26, 2012. When negotiations began, Respondent's bargaining team included its counsel, Peter Cohl, as chief spokesperson, Board president Louis Walter, and Board member David Gill, who is a member of the Board's finance committee. Respondent's manager was also part of the team, although several different individuals held this position during the course of negotiations. Gill left the team sometime after the April 2012 meetings. Charging Party's chief spokesperson was Business Agent Tonya DeVore.

At this first session, Respondent provided Charging Party with a comprehensive written proposal. Respondent proposed a one-year agreement. It proposed a wage freeze for existing employees for the duration of the agreement, but a two-tier wage schedule for mechanics with newly-hired mechanics to be paid $2.00 less per hour.

Charging Party was aware of Respondent's financial problems from the previous negotiations, and Respondent began the first bargaining session by emphasizing the dire straits of its finances. Because Respondent considered the fringe benefit costs for this unit, as a percentage of wages, to be excessive, its economic proposals included a number of proposals to reduce fringes. It proposed a health care plan with lower premiums, for both Respondent and the employees, and higher deductibles. Respondent also proposed to cap vacation pay at two weeks; eliminate one holiday; eliminate the third-shift premium; and freeze banked sick leave and replace it with "short term leave" that did not accrue. Cohl testified that Respondent's most significant economic concern was its unfunded pension liability. However, its first proposal did not include any change in the amount of the employees' pension contribution.

DeVore admitted that throughout negotiations Cohl repeatedly emphasized that Respondent needed economic relief from Charging Party, and said that if it could get economic relief "some of the other things in Respondent's proposal would not be an issue." Cohl testified at the unfair labor

4 As indicated above, when the parties entered into this agreement the MERS-mandated contribution was based on a percentage of payroll.

practice hearing that the cost of fringe benefits as compared to wages in this unit was the highest he had ever seen. It is unclear from the record, however, whether Respondent explicitly told Charging Party during the negotiations leading to fact finding that reducing the percentage of labor costs going to fringe benefits was one of Respondent's bargaining goals.

Respondent's January 26, 2012, proposal also included a significant number of non-economic changes. Respondent proposed to eliminate union superseniority for layoff purposes and to provide for layoff by classification. It proposed to replace language setting out the normal hours of work with a statement that Respondent had the right to establish the work schedule and determine the hours of work, including the length of the work week. Respondent also proposed several changes to the grievance and arbitration provisions, including the addition of the following new "election of remedies" language at Article III(7):

> When remedies are available for any complaint and/or grievance of any employee through any administrative or statutory scheme or procedure, in addition to the grievance procedure provided under this contract, and the employee elects to utilize the statutory or administrative remedy, the Union and the affected employee shall not process the complaint through any grievance procedure provided for in this contract. If any employee elects to utilize the grievance procedure provided for in this contract and subsequently, elects to utilize the statutory or administrative remedies, then the grievance shall be deemed to have been withdrawn and the grievance procedure provided for hereunder shall not be applicable and any relief granted shall be forfeited.

The non-economic proposals also included proposals on subcontracting and the use of temporary employees. Respondent proposed to replace Article XV, which limited Respondent's right to subcontract bargaining unit work when it could be done by a unit member, with a provision giving Respondent the right to subcontract bargaining unit work at any time and precluding Charging Party from grieving subcontracting decisions. It also proposed to modify Article VI(2)(b) of the expired contract. The recognition clause of the expired contract excluded temporary and seasonal employees from the bargaining unit. In the 2011-2012 agreement, Article VI(2)(b) read as follows:

> The Employer shall be allowed to use temporary and/or seasonal employees without restrictions so long as it does not lay off employees and then use temporary or seasonal employees. *The maximum number of temporary and/or seasonal employees to be used at the same time shall not exceed 20% of the bargaining unit.* Temporary employees shall not be covered by this Agreement.

Respondent proposed to delete the sentence in italics, giving it an unlimited right to use non-unit temporary or seasonal employees except when regular employees were laid off. In its brief to the fact finder, Respondent explained its rationale as follows:

> [Due to the dire economic circumstances of the Road Commission] . . . if the Employer cannot provide required services with the current number of employees, then it would have to augment the workforce with temporary or seasonal employees in order to protect the public. There simply is not enough money to pay for more regular full-time employees with fringe benefits. This is an essential economic change that it needed in the contract.

2. April 12, 2012, Bargaining Session

The parties met for the second time on April 12. Prior to this meeting, Charging Party requested, and Respondent provided, information about the cost of employee benefits. This included the current health insurance rates and the rates to take effect on June 1, 2012, as well as Respondent's contribution to the MERS plan. The contribution at that time was 39.9% of payroll.

Charging Party's initial proposal, presented at the April 12 meeting, included a three percent wage increase for each year of its proposed three year contract, the addition of two floating holidays, twenty percent employee cost share on health insurance, and an increase in the payment in lieu of insurance to $450.

During the April 12, 2012, meeting there was discussion about the unfunded liability in the B-4 plan. Effective January 1, 2012, Respondent's MERS contribution had risen above 37.12%. Under the terms of the contract, employees in the B-4 plan should have begun making pension contributions amounting to 2.87% of their wages, but Respondent had not started deducting this money from their paychecks. Respondent told Charging Party that it would not attempt to collect contributions back to January, but that the deductions would start immediately.[5] DeVore testified, without contradiction, that she asked Respondent if it "was going to put the 2.87% toward the unfunded liability" and that Respondent said that it was not committing to that. DeVore then said, according to her testimony, "the unit could not keep making concessions and not have Respondent put the money toward the pension." According to Cohl and Gill, DeVore proposed at that meeting that the employees pay an additional ten percent toward the pension to address the unfunded liability. Cohl testified that DeVore made this proposal after returning from a caucus and that Respondent immediately accepted it. However, according to Cohl, by the end of that meeting Charging Party had withdrawn this proposal. DeVore denied proposing any increase in the pension contribution.[6]

3. April 19 and May 17 Bargaining Sessions

The parties met again on April 19 and May 17, 2012. On April 19, Respondent gave Charging Party another written package proposal. In this proposal, leaves of absence were permitted, but only for sickness and limited to 120 days. However, Respondent added a proposal to limit

5 Charging Party filed a grievance over the deductions which it later dropped.

6 I see no need to make a credibility finding on this issue, since Respondent agrees that the proposal, if made, was withdrawn before the end of the same meeting at which it was offered.

holiday pay to eight hours for employees who normally worked 10 hour days. It also stated that it would withdraw its proposal to reduce vacation pay if Charging Party agreed to modify the pension provision so that it read as follows:

> . . . Employees [in the B-4 plan] will pay for any MERS mandated increase above 37.12% to a maximum of 3% contribution. *In addition, commencing June 1, 2012, employees will pay an additional 10% toward their retirement costs. The entire 10% shall be used to reduce the unfunded liability of the retirement cost of the bargaining unit.*

Cohl testified that Respondent proposed ten percent as the amount of the increase because that was what Charging Party had proposed at the previous bargaining session.

The parties apparently discussed both Respondent's election of remedies proposal and its temporary employee proposal at the April 19 session. Although there was no testimony regarding the substance of the discussions on the election of remedies proposal, Charging Party's position on this issue, as summarized in its brief to the fact finder, was as follows. The proposal was unnecessary because there was no problem with frivolous grievances and there had been no arbitration of a grievance since 2006. In addition, the clause waived an employee's right to litigate and/or Charging Party's right to process a meritorious grievance. A grievance belongs to the union and whether to settle a grievance should be the union's choice, and not affected by an employee's decision to seek a remedy in another forum. With respect to Respondent's proposed elimination on the restriction on the use of temporary employees, Charging Party argued that retaining a cap was necessary to ensure that the bargaining unit did not completely erode as unit employees left the bargaining unit through attrition. Charging Party did not tell Respondent, at this meeting or subsequently, that it considered these two proposals to be non-mandatory subjects of bargaining. It also did not refuse to discuss them. As discussed below, during mediation Charging Party offered a counterproposal that retained, but raised, the cap on the number of temporary and seasonal employees that Respondent could use.

On April 19, 2012, the parties reached tentative agreements and signed off on a number of minor provisions, including changes to the grievance procedure, a leave of absence provision and a lower starting wage for new employees. They did not agree on subcontracting, the use of temporary employees, the election of remedies provision, or any economic provision except the lower starting wage for mechanics.

A fourth negotiation session was held on May 17. Charging Party presented a written package proposal in which it modified its previous wage proposal from a three percent increase for each year of the three year contract to a five percent increase in the base upon execution of the agreement, no raise for the second year of the agreement, and five percent on June 1, 2014. Its proposal on pension was to add this language: "From June 1, 2012 thru December 31, 2014, the employees agree to pay an additional 2% of base pay for the sole purpose of bringing down the liability. Such payments will be remitted to MERS in addition to any payments included and required in the percentage quoted above." Charging Party also agreed in its proposal to the new health insurance plan proposed by

Respondent and to a sick bank cap. Charging Party withdrew the package proposal after Respondent rejected it.

4. Events between April 2012 and January 2013 – Mediation, Fact Finding, and Last Best Offer

After the collective bargaining agreement expired on May 31, 2012, employees were notified that the premiums for their health care had increased and, in accord with §15b of PERA, additional sums would be deducted from their paychecks to cover the increases.

The parties participated in mediation sessions with a Commission-appointed mediator on June 27, July 23, and July 31, 2012. During these mediation sessions, Charging Party presented a proposal that included a wage freeze, or 0% increase, for existing employees for the term of the contract, but returned to its original position on the pension, i.e., that the employees' contribution be capped at 3%.[7] During mediation, Charging Party also made a counterproposal on Article IV(2)(b) which retained a limitation on the number of temporary or seasonal employees that Respondent could employ at any one time, but increased the number set forth in the expired contract.

On August 1, 2012, after the last mediation session, both parties petitioned for fact finding. Charging Party's petition listed the following issues as remaining in dispute: election of remedies, superseniority/layoff by classification, use of temporary employees, hours of work/work schedules, pension, holiday pay, vacation, subcontracting, duration (proposed three year agreement), wages, health insurance, and notification of conviction in disciplinary proceedings. Except for duration, wages, and health insurance, Charging Party's position on the issues was to retain the current contract language. Respondent listed these issues: election of remedies, superseniority, temporary employees, hours of work/work schedules, pension, holiday pay, vacation, duration (proposed one year agreement), wages, and health insurance.

Sometime between the filing of the fact finding petition and the fact finding hearing in December 2012, Respondent was notified by MERS that its mandated contribution would no longer be based on a percentage of payroll, and that it would have to begin making a monthly pension contribution of $24,313.

Fact finder Barry Goldman held hearings on November 2 and December 5, 2012. At these hearings and in its post-hearing brief to the fact finder, Respondent presented evidence regarding its financial problems dating back several years. Respondent argued that its per-employee cost for fringe benefits, including pension, was out of line at $137 for every $100 of wages. In support of increasing the amount of employees' pension contribution, Respondent noted that although the MERS contribution amounted to 40% of every dollar in wages paid to employees, the defined benefit plan was still only 44% funded. Among the exhibits Respondent presented to the fact finder and Charging

7 Charging Party's position in the subsequent fact finding was substantially the same - that if employees paid more than 3% to the pension, they should get a wage increase, and if they accepted a wage freeze, their pension contribution should not substantially increase.

Party was a chart showing the steady rise in its annual MERS contribution after 2008 and its increase as a percentage of payroll. According to this chart, Respondent's annual MERS contribution rose by $29,291 from 2011 to 2012 – from $263,358 to $291,756 - and was projected to rise again in 2013 by $27,264 to $319,020. Respondent also gave the fact finder and Charging Party an exhibit showing that the projected required MERS contribution for 2013, including new hires not in the B-4 plan, was 56.90% of payroll.

Charging Party told the fact finder that the parties had reached agreement on the new health care plan proposed by Respondent, although Charging Party was seeking an increase in the opt-out payment. It also took the position that it would accept a wage freeze in exchange for a "moderate" pension contribution, although it did not say what a moderate pension contribution would be.

On December 3, 2012, before testimony had concluded in the fact finding, Respondent gave Charging Party a document entitled "last best offer." The offer maintained Respondent's previous position on the election of remedies, the elimination of superseniority and layoff by classification, the use of temporary and seasonal employees, holiday pay, vacation pay, subcontracting, contract duration, and wages. It modified its work schedule/hours of work proposal to provide it with less than complete discretion to determine the work schedules and hours of work, but more discretion than the expired agreement provided. Respondent continued to propose that employees begin contributing an additional ten percent of their wages, or a total of thirteen percent. However, Respondent modified its pension proposal to move the date on which unit employees would begin contributing thirteen percent from June 1, 2012 to January 1, 2013. In its last best offer, Respondent proposed a two-year instead of a one-year agreement.

Both parties filed briefs with Goldman in January 2013, and he issued his report and recommendation on January 25, 2013. The fact finder recommended a two-year agreement, with no wage increase in either year. He recommended the Respondent's health care plan, with the increase in the opt-out payment which Charging Party sought. He also recommended Respondent's proposed increase in the employees' pension contribution, stating that "something had to be done about the unfunded liability in the plan, and there were a limited number of options." On all other issues, he adopted Charging Party's positions and recommended that the parties retain their current contract language.

5. Negotiations After Fact Finder's Report

In early February 2013, DeVore contacted Respondent and asked for a meeting. The parties met on March 1, 2013. Except as specifically noted below, Respondent's witnesses did not dispute DeVore's testimony regarding what she said at the March 1 and subsequent meeting on April 3. DeVore began the meeting by stating that the employees could not pay thirteen percent of the pension costs. She said, however, that Charging Party recognized that it needed to do something about the pension costs, and, therefore, was proposing a $.75 per hour across-the-board wage cut. According to DeVore, before the meeting she had "crunched the numbers" and, by her calculations, the ten percent pension contribution increase provided Respondent with only $15,000 more per year

total than a $.75 per hour wage cut. According to DeVore, she explained that, as she calculated it, the wage cut would not only produce immediate savings, but would reduce pension liability over the long run since pensions were based on final average compensation and pensions would decrease. DeVore also testified, without contradiction, that she told Respondent's team that she realized that this was a different direction, and asked them to tell her if this was not a direction in which they wanted to go. DeVore testified that Cohl said that Respondent's position remained the same but that he would take the proposal back to the Board. According to DeVore, Respondent's team said absolutely nothing else at that meeting about her proposal.

Cohl testified, and minutes of the meeting taken by Walter indicate, that Respondent told Charging Party that "the Employer's last best offer of December 3, 2012, still stands." Cohl and Walter's minutes also agree that Respondent's team told DeVore that it had "a duty to advise the Board of Charging Party's offer and would do so at the next Board meeting." Cohl testified that he also said something about the economic problems Respondent was having, and that the parties needed to focus on retirement costs, but these comments are not reflected in Walter's minutes. I credit DeVore's testimony that Respondent told Charging Party only that its position remained the same but that it would take the offer back to the Board.

After the March 1 meeting, Cohl asked Rebecca Jerry, Respondent's finance director/clerk, to analyze how much money would be saved by Charging Party's proposed wage decrease. On March 4, Jerry sent Cohl an email with her analysis. In her memo, Jerry pointed out that Respondent's MERS contribution was no longer calculated on a percentage of payroll, and, therefore, reducing the hourly wage would not reduce the required contribution. She also pointed out that the increase in the MERS contribution for 2012 alone was $29,291 per year, while, as she calculated it, a $.75 decrease in wages would save Respondent $28,287.16 per year. According to Jerry's calculations, if the ten percent increase was implemented, employees would be contributing much more, or approximately $63,189 per year over and above their three percent contribution.

Respondent did not provide DeVore with Jerry's analysis of her proposal or discuss it with Charging Party. However, Cohl and Walter discussed Jerry's memo, and Walter told Cohl that he did not believe a wage reduction was the way to go. Cohl presented Charging Party's proposal to the Board as a whole at its March 11, 2013, meeting, and the Board rejected it. On March 12, Cohl sent DeVore this email:

> Thank you for your proposal of March 1, 2013. My client does not believe it would benefit either the Employer or the Union in the short term or long term. Therefore, it has no interest in the Union's proposal.

DeVore testified that she interpreted Cohl's response to mean that Respondent believed the March 1 proposal did not provide enough money. DeVore replied to Cohl on March 19. She stated that she had tried to phone Cohl and was hoping to discuss his response, and that the Union was "willing to work with you on making changes that would be beneficial to us all." DeVore asked Cohl

to set up another meeting. On March 22, Cohl sent her a return email warning her that premiums for the existing health plan would be going up substantially on June 1.

The parties met again on April 3. Cohl was not at this meeting, and Walter spoke for Respondent. According to DeVore, before this meeting she redid her calculations based on an $.85 per hour wage cut, and concluded that a $.85 per hour wage cut would provide Respondent with all but $9,000 of the money that it would get from the additional ten percent pension contribution. DeVore began the meeting by stating again that the employees could not afford the thirteen percent contribution out of their paychecks. She asked Respondent's team to "consider how we can work on [the unfunded liability] without raping the employees." She noted again that if employees took a pay cut pensions would be reduced because pensions were based on final average compensation. DeVore said that she calculated that if Respondent accepted her proposal to reduce wages by $.85 per hour, "we would be within $9,000 of where we needed to be." Both Walter and DeVore agree that Walter said, "I can offer our last best offer of December 3. I cannot offer anything else." He also asked DeVore if she had a written offer and documents showing how she had reached her conclusion that the $.85 wage cut was equivalent to Respondent's pension proposal.

Either at that meeting or shortly thereafter, DeVore gave Respondent a written proposal. Charging Party proposed to retain all the language in the previous agreement except for the changes tentatively agreed to on April 19, a wage reduction of $.85 per hour in all classifications, and the addition of the following language to the pension provision:

> The Parties agree to meet during the course of this agreement to explore viable long term solutions to lower the overall MERS Pension liability with the intent that a solution will be negotiated in future agreements.

At the April 3 meeting, DeVore said that the unfunded liability was built up over a long period and that it would take both parties working long term to find a solution. She also said that the parties could look at "moving the pension to another type of fund," but that she was not sure if this was feasible because of the unfunded liability.

On April 4, DeVore sent an email to Walter and Cohl showing how she had arrived at the conclusion that the $.85 per hour wage cut provided approximately $9,000 less than the thirteen percent contribution. DeVore based her calculations on a MERS-mandated contribution of 37.12% of payroll, despite the fact that, as indicated in an exhibit submitted in the fact finding, Respondent was paying a monthly flat rate of $24,313 per year, or 39.99% of payroll, at the end of 2012. Cohl and Walter gave DeVore's email to Board members before the April 11, 2013, Board meeting. In an email to the members of Respondent's bargaining team, Gill said that DeVore's proposal was "smoke and mirrors," and that "if the workers paid 13% toward their ongoing retirement investment it will allow the Commission to use that portion to pay on the unfunded balance." Gill suggested that DeVore and the bargaining unit needed to be reminded that they had originally proposed the ten percent increase. However, this email was not sent to DeVore. Charging Party did not learn that

Respondent had rejected its April 3 proposal until it was informed that Respondent had implemented its last best offer.

6. Implementation of Last Best Offer

At its meeting on April 11, 2013, Respondent's Board voted to implement the following portions of its December 3, 2012, last best offer effective April 12, 2013:

1. Election of remedies clause
2. Elimination of union superseniority
3. Use of temporary employees
4. Hours of work
5. Pension (as modified by the resolution)
6. Holiday Pay
7. Vacations
8. Subcontracting
9. Duration (modified to two year agreement)
10. Wages – wage freeze
11. Part of Respondent' health insurance proposal only
12. All prior tentative agreements

The pension language was modified by the resolution to strike the last sentence from the Respondent's previous offers. That is, the provision no longer stated, "The additional 10% shall be used to reduce the unfunded liability of the retirement cost of the bargaining unit." The Board also passed a separate motion "to utilize as much savings as practicable from the implementation of the last best offer to the Steelworkers to pay for the retirement unfunded liability of approximately $4 million for the Steelworkers unit," and a motion to instruct Jerry to contact MERS for information about a bridge plan with a lower pension multiplier.

According to DeVore, the amount of money deducted from the paychecks of senior unit employees for pension and health insurance increased from about $200 per month to about $720 per month as a result of the implementation.

On April 15, DeVore wrote a letter to Cohl which asserted that the Board's implementation of part of its last best offer on April 12, 2013, was a violation of law because the parties had not reached impasse. DeVore's letter noted that at their last meeting, Respondent stated it would take Charging Party's April 3 proposal to the Board for consideration, and that she had not received a response. She also stated that Charging Party had made it very clear that the $.85 wage cut was not its final offer, and she attached another proposal, identical to the March and April proposals except that it proposed a $1.00 per hour wage cut. Cohl replied by letter dated April 18 in which he maintained that the parties had reached impasse. He noted that the parties had met twice following receipt of the fact finder's report. He stated that it was clear that at these meetings that Respondent would not accept Charging Party's pension proposals and that Charging Party had also rejected almost all the other proposals contained in Respondent's last offer. The letter stated that

Respondent's position "had solidified and been fixed" since its December 3 offer, and that DeVore was well aware of that fact. Cohl also stated that financial necessity compelled Respondent to implement its offer. Cohl stated, however, that he would nevertheless forward her April 15 offer to his client for consideration by the Board at its April 22 meeting.

Thereafter, Cohl sent DeVore's offer to Jerry for analysis, along with DeVore's April 4 email explaining how she had arrived at the conclusion that an $.85 per hour wage cut provided Respondent with approximately the same benefit as the ten percent increase in the employee pension contribution. In her response to Cohl and Walter, Jerry concluded that wages would have to be cut by $1.56 per hour to produce the equivalent of a thirteen percent employee pension contribution. This memo was provided to DeVore, and the parties later discussed it.

The parties engaged in further discussions in May 2013 and thereafter, up to the date of the hearing, but were not able to resolve their dispute. The record does not include evidence regarding the substance of these discussions.

C. Refusal to Recognize "Temporary" Employees As Part of the Unit

As indicated above, the recognition clause of the parties' 2011-2012 collective bargaining agreement excluded temporary and seasonal employees from the bargaining unit but the agreement prohibited Respondent from laying off unit employees and using temporary or seasonal employees and limited the number of temporary employees Respondent could utilize at any one time to twenty percent of the bargaining unit.

Perhaps because of the limitations on the use of temporary employees, the collective bargaining agreement did not define the terms "temporary" or "seasonal." The record indicates, however, that Respondent did employ temporary employees prior to implementing its last best offer. In April 2013, when Respondent unilaterally implemented changes in terms and conditions of employment, three individuals working as truck drivers were excluded from the unit as temporary employees. Asked to define a "temporary" employee, Board member Walters stated that it was "somebody whose there for a short time and then gone." However, both Walters and Gill agreed that Respondent did not employ temporary employees for longer than one year because, at least as they believed, employers were required by MERS to make pension contributions on behalf of employees after they had worked longer than one year.

In April 2013, there were sixteen employees in the bargaining unit. Twelve of these employees had been hired before June 1, 2011, and were, therefore, included in the B-4 plan. As noted above, consistent with the language of Article VI(2)(b) of the expired contract, Respondent also employed three temporary truck drivers who worked full-time and performed unit work but were not in the bargaining unit. The record does not indicate when these three individuals – Chris Roberts, Shane Raudman and Matthew Borgen – were hired. However, all three were offered and accepted permanent employment sometime between October 13 and November 10, 2013.

In May 2013, three unit employees quit. Another three quit in June 2013. In August 2013, one unit member retired. Another unit employee quit in November 2013.[8] In May 2013, Respondent hired a temporary employee specifically to mow grass for the summer. This employee was laid off at the end of September. In the summer of 2013, it also hired three additional temporary employees, one truck driver, one mechanic, and one individual to work as a mechanic's assistant in the shop. According to Respondent, the mechanic was hired as a temporary employee because he would not agree to work for the starting wage implemented by Respondent in April, and Respondent could not find a qualified mechanic who would. None of these three individuals worked as temporary employees for more than one year. The truck driver, Greg Bradway, was hired as a permanent employee in April 2014. The mechanic, Floyd Oliver, was laid off in May 2014 after he refused an offer of permanent employment. The mechanic's helper, John Reed III, was laid off in February 2014.

All the temporary employees discussed in this section performed work regularly performed by bargaining unit members and worked 40 hours per week. Respondent did not consider them part of the bargaining unit and did not compensate them in accord with the imposed terms. Until June 2014, when Respondent was required by the Affordable Care Act to provide health insurance for the one temporary employee working at that time, the temporary employees did not receive any type of fringe benefit, including health insurance, paid sick or vacation time, or retirement benefits.

The temporary employees hired after April 2013 were required to sign an employment agreement which set out their terms of employment. The agreement did not provide for an end date, but did include the following language:

> Non-union position – no assurance or implication whatsoever of permanent employment.
>
> The parties agree the position accepted is a Temporary/Seasonal Position not covered under the terms of the United Steelworkers Local 8287 Collective Bargaining Agreement.

Each temporary employee's agreement included a job classification and an hourly wage rate which varied according to classification and individual. Each temporary driver and mechanic was paid an hourly rate that was higher than the starting wage rate for his classification under the implemented terms, but in all cases less than the top rate for his classification in the expired contract.

In September 2013, Respondent hired John Rogers as its new manager. In October, as discussed above, Respondent hired the three employees who had been working as temporary employees prior to April 2013 as permanent employees and they became part of the bargaining unit.

8All eight of the employees who left had been hired before June 1, 2011. By the end of December 2013, therefore, only four employees were paying the thirteen percent contribution to the MERS defined benefit plan.

However, Respondent also hired three more temporary truck drivers/equipment operators and a second temporary mechanic. Rogers testified that the three temporary truck drivers were told when hired that they would be working through the winter and spring months, the winter to plow snow and the spring to get through the pothole season. At the end of May 2014, Respondent laid off one of the drivers, Matthew Schweighart. The other two, Kevin Skinner and Franklin Smith, were made permanent employees in early June 2014. The mechanic, Jason Kamerschen, was still working for Respondent as a nonunit temporary on the date of the hearing on June 23, 2014.

According to Rogers, like the mechanic hired during the summer, Kamerschen was hired as temporary because Respondent could not find a qualified mechanic to work under the imposed terms. Rogers testified that he hired the truck drivers/equipment operators as temporary employees because Respondent was "financially strapped" and could not afford to hire them as permanent employees.

In November and December 2013, Respondent hired six more temporary truck drivers/equipment operators, again telling them that they were being hired for the winter and spring. One was fired after about a week. All of the other five temporary truck drivers left between the beginning of April and the end of May 2014; one was laid off and the other four left to take other jobs.

At the end of December 2013, there were ten bargaining unit employees and twelve temporaries, including the two temporary mechanics. On January 7, 2014, Charging Party sent Respondent a letter stating that it had learned that Respondent had recently hired new employees which Respondent claimed were temporary and excluded from the bargaining unit. The letter requested information, including the names and classification of all persons hired since April 12, 2013, that Respondent claimed were temporary; the hire dates, pay rates and benefits provided to these employees, the shifts they were working; whether they were contributing any monies to MERS; and copies of any agreements the temporary employees had been asked to sign. The letter also asked for an explanation of why Respondent claimed these workers were temporary. Finally, Charging Party asked for the names of all bargaining unit employees who had left employment since April 12, 2013, and the name of the worker who had replaced each employee who left.

Respondent provided a response on January 16. The response stated that as of January 14, 2014, Respondent had twelve temporary employees, of whom three were mechanics (including the mechanic's helper) and nine were truck drivers. All worked 40 hours per week. The letter also stated that as of January 14, 2014, there were ten employees in Charging Party's bargaining unit. According to the letter, one of these employees had notified Respondent that he planned to retire. In response to Charging Party's question about why these employees were classified as temporary, the letter stated the workers "work less than 12 months." Respondent also provided a copy of the agreement temporary employees were asked to sign. On January 16, 2014, after receiving this response, Charging Party amended its charge to allege that Respondent was mislabeling regular employees as "temporary" and unlawfully refusing to recognize them as part of the bargaining unit.

Between January 2014 and the first date of hearing on the unfair labor practice charge in April 2014, two more unit employees retired, and Respondent hired a third temporary mechanic. This mechanic was laid off in May 2014. At the time of the April hearing, there were nine employees in the unit, of whom two had been hired prior to June 1, 2011 and were making contributions to B-4 plan. There were also nine employees, including the three mechanics, classified as temporary but doing unit work. Therefore, on the date of that hearing in April 2014, Respondent had 18 employees doing unit work, versus the 19 it had employed in April 2013. However, three times as many of these employees were classified as temporary in April 2014.

As outlined above, all but one of these temporary employees either left or was made permanent before June 23, 2014, the second day of hearing on this unfair labor practice charge. On that date, there were ten bargaining unit employees and only one temporary employee, the mechanic Respondent had hired the previous October.

Rogers testified that he planned to hire more temporary employees for the winter and spring of 2014-2015. According to Rogers' testimony, it was his expectation that at least some of the temporary employees who had worked during the winter-spring 2013-2014 would be hired again to work in 2014-2015. Rogers also testified that his intention was to continue filling permanent truck driver/equipment operator openings with individuals employed as temporary employees, because this allowed him to assess how these individuals would work out.

IV. Discussion and Conclusions of Law:

A. Respondent's Unilateral Implementation of its Last Best Offer

An employer violates §10(1)(e) when, after its collective bargaining agreement has expired, it takes unilateral action on a mandatory subject of bargaining before the parties reach a good faith bargaining impasse on the terms of a new contract. *Detroit Police Officers Ass'n v Detroit*, 61 Mich App 487, 490 (1975); *International Ass'n of Firefighters Local 1467, AFL-CIO v Portage*, 134 Mich App 466, 473 (1984). Impasse has been described as the situation where "good-faith negotiations have exhausted the prospects of concluding an agreement." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enf'd sub nom. *Television Artists, AFTRA v NLRB*, 395 F2d 622 (CA DC 1968). The Commission has defined impasse as the point at which the positions of the parties have solidified and further bargaining would be useless. *Memphis Comm Schools*, 1999 MERC Lab Op 377, 386; *Wayne County (Attorney Unit)*, 1995 MERC Lab Op 199 *City of Saginaw*, 1982 MERC Lab Op 727.

The determination of whether 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 152,156. In determining whether impasse exists, the Commission looks at a number of different factors, including 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. *Memphis Comm Schools*; *Redford Union Schs*, 23 MPER 32 (2010). Whether a

bargaining impasse exists is a matter of judgment. See also *Taft Broadcasting Co,* at 478, in which the Board held, "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." Because impasse is a defense to a charge of an unlawful unilateral change, an employer asserting impasse bears the burden of establishing that a good faith impasse was reached before it implemented changes in mandatory subjects. *Oakland Cmty College,* 2001 MERC Lab Op 273, 277; *North Star Steel Co,* 305 NLRB 45 (1991); *In Re Calmat Co*, 331 NLRB 1084, 1097 (2000).

Section 25 of the Labor Mediation Act, MCL 423. 25, allows the Commission to appoint a fact finder when, in the course of bargaining, "matters in disagreement … might be more readily settled if the facts involved were determined and publicly known." In *Wayne Co,* 1984 MERC Lab Op 1142, the Commission noted that statutory fact finding is an extension of the bargaining process and held that an employer cannot, consistent with its duty to bargain in good faith, implement its last best offer when fact finding proceedings are pending. In a supplemental decision, *Wayne Co,* 1985 MERC Lab Op 248, the Commission held that an employer must also bargain in good faith for a reasonable time over the substance of the fact finder's report before implementing its last offer. The Commission clarified that this obligation exists even when the parties had reached a bona fide impasse prior to the issuance of the report. The Commission stated, at n 2, that although fact finding may not break an existing impasse, one of the purposes of fact finding is to break a previous impasse. The Commission held in *Wayne Co* that, in most cases, sixty days would constitute a reasonable time for bargaining over the fact finder's decision. However, *Wayne Co* does not stand for the proposition that an employer may unilaterally implement changes in terms and conditions of employment sixty days after the issuance of a fact finder's report regardless of whether the parties are at impasse. The issue before me, I find is not whether the parties reached impasse at any time during their negotiations. Rather, it is whether they were at impasse when Respondent implemented its last best offer on April 12, 2013.[9]

1. Alleged Surface Bargaining

An impasse resulting from one party's bad faith bargaining does not relieve that party from the obligation to bargain. *Warren Education Association*, 1988 MERC Lab Op 761, 767. Charging Party argues that the parties never reached a good faith impasse because Respondent engaged in surface bargaining designed to avoid agreement, as evidenced by its inflexible "take-it-or-leave it" approach to bargaining. It points out that Respondent never modified or withdrew its proposals for (1) a ten percent increase in employees' pension contribution; (2) the unlimited right to subcontract unit work; (3) the unlimited right to use temporary employees; (4) an election of remedy clause; (4) the elimination of union superseniority; (5) the replacement of paid sick time with a different type of leave that did not accrue; (6) a wage freeze for existing employees for the duration of the contract and $2.00 per hour less for new hires; and (7) a reduction in vacation and holiday pay.

9 If the parties were not at impasse on April 12, 2013, but subsequently reached impasse, this would affect the appropriate remedy. However, Respondent did not argue in this case that impasse was reached subsequent to April 12, 2013.

I conclude that the facts here do not establish that Respondent engaged in surface bargaining. In bargaining and to the fact finder, Respondent emphasized what it felt was its precarious financial position. Respondent proposed changes to fringe benefits, including vacation pay, holidays, and the pension contribution, that reduced its fringe benefit costs over the long term. As DeVore testified, Respondent repeatedly said that if it could get economic relief from Charging Party, some items in its proposal "would not be an issue." Charging Party, however, took the position that unit employees had given many concessions in previous contracts and should not be subjected to significant new cuts. Consistent with that argument, prior to and during fact finding, Charging Party was willing to agree to a wage freeze and Respondent's proposed new insurance plan only if the pension contribution remained capped at three percent, and to agree to increase the pension contribution to five percent only if the employees received a wage increase. At the time of the fact finding hearing, the parties remained far apart on economics. If the parties were at impasse prior to fact finding, I conclude, the impasse arose from their differences on economic issues and not as a result of surface bargaining.

2. Insistence to Impasse on Permissive Subjects of Bargaining

A permissive subject of bargaining falls outside of the phrase "wages, hours, and other terms and conditions of employment" as used in §15 of PERA. The parties may bargain by mutual agreement on a permissive subject, but neither side may lawfully insist on bargaining to a point of impasse. *Detroit Police Officers Ass'n v City of Detroit,* 391 Mich. 44, 55, n 6 (1974). Charging Party argues that Respondent unlawfully insisted to impasse on two non-mandatory subjects of bargaining, its proposed election of remedies clause and what Charging Party characterizes as a "sham" provision dealing with the use of temporary employees.

In an interim order on motion for summary disposition which I issued on April 14, 2014, I concluded that the election of remedies clause was a permissive subject of bargaining, and, therefore, Respondent could not insist to impasse on this proposal. As Respondent correctly notes, the Commission has held that election of remedies clauses are enforceable when a union and employer have agreed to include them in a collective bargaining agreement. *Michigan Ass'n of Police,* 25 MPER 73 (2012), citing *City of Grand Rapids v Fraternal Order of Police,* 415 Mich 628 (1982). Unlike provisions on illegal or prohibited subjects, however, contract clauses dealing with permissive topics are enforceable when the parties agree to include them in their collective bargaining agreement.

Respondent also asserts that numerous Act 312 arbitration panels have recognized election of remedies provisions to be mandatory subjects. As an example, it cites an Act 312 decision, *Ingham County and Ingham Co Sheriff,* 2007 WL 7562035 (2007), in which the arbitration award included an election of remedies clause essentially identical to the clause proposed by Respondent, and points out that an Act 312 panel has the authority to issue awards only on mandatory subjects. However, there is no indication in the *Ingham* decision that the union disputed the arbitrator's jurisdiction to include the election of remedies provision in the award. In any case, it is well established that the Commission, and not an Act 312 panel, has primary jurisdiction to determine whether a subject is a mandatory topic of bargaining. *Jackson Fire Fighters Ass'n, Local 1306, IAFF, AFL-CIO v. City of*

Jackson, 227 Mich App 520, 526 (1998). Whether an election of remedies clause like this one, or any election of remedies clause, is a mandatory subject of bargaining appears to be an issue of first impression for the Commission.

In arguing that Respondent's election of remedies provision was a permissive subject of bargaining because it waived important statutory rights, Charging Party relies on a decision of the National Labor Relations Board (NLRB), *Athey Products Corp,* 303 NLRB 92 (1991). The National Labor Relations Board (NLRB) held in *Athey* that the employer violated its duty to bargain by insisting during contract negotiations on an election of remedies clause that read as follows:

> The Company and the Union mutually agree that a condition precedent to the invocation, processing or arbitration of a grievance is that the Union and/or any employee or employees involved must agree that this grievance and arbitration procedure is the exclusive avenue by which the grievance must be resolved, and should the Union and/or any employee or employees file a charge with any federal or state agency, the Union and/or the employee or employees shall be prohibited from processing or arbitrating any grievance hereunder which is based on the same or similar facts. This prohibition will void any arbitration award in favor of the Union and/or any employee or employees should a grievance be arbitrated and/or an arbitration award be made prior to or after a timely charge is filed with the federal or state agency.

In *Athey,* the Board's ALJ noted that union-employer agreements limiting or barring the exercise of certain statutory rights, including agreements waiving the statutory right to bargain during the life of a contract, had been held lawful. He distinguished these agreements, however, from "employer attempts to limit or bar the exercise of certain other statutory rights, including the rights of individual employees." The ALJ concluded that the employer's proposed election of remedies clause required the union to waive either the statutory right of employees to file and process grievances or employees' statutory rights to file charges with an appropriate Federal or state agency. He also concluded that the election would bar unions from using a forum providing a different remedy for the sole reason that the union's claims were based on similar facts. He concluded that the employer insistence to impasse on this impermissibly broad waiver of employee rights violated its duty to bargain. The NLRB majority affirmed without much discussion, simply noting that it found it unnecessary to decide whether the provision was an illegal or permissive subject. Chairman Stephens, in a concurring opinion, attempted to explain in more detail his reason for agreeing with the majority. He noted that the Board had found an election of remedies provision contained in a collective bargaining agreement to be not per se illegal in *St Joseph Hospital Corp*, 260 NLRB 691 (1982). The Chairman also suggested a possible distinction between an election of remedies clause that merely restricted the union's right to arbitrate, with such a clause being a mandatory subject of bargaining, and an election of remedies clause that also restricted the union's right to demand that the employer engage in the discussion of and bargaining over grievances. He agreed, however, that the election of remedies clause in *Athey* was impermissibly broad and not a mandatory subject of bargaining.

The election of remedies clause proposed by Respondent is not identical to the clause in *Athey*. However, like *Athey*, I find that the clause proposed by Respondent requires the union to either waive the right of the employees it represents to discuss and adjust grievances over contract violations through the contractual grievance procedure or waive the right of these employees to file charges with administrative agencies, including their right to file unfair labor practice charges. It also, like the clause in *Athey*, restricts Charging Party's statutory right to insist that Respondent engage in discussions with it over the resolution of a possible contract violation. I agree with Charging Party and with Chairman Stephens in *Athey* that a broad waiver of this nature is not a mandatory subject of bargaining on which an employer can insist to impasse.

I find, however, that Respondent did not insist to impasse on the non-mandatory election of remedies provision. As stated in *Taft Broadcasting Co*, 274 NLRB 260, 261 (1985), parties are free to make proposals on permissive subjects of bargaining. Although they may not insist to impasse on these proposals, the fact that there are several unresolved items at the point impasse is reached does not necessarily mean that each of the unresolved items caused the impasse. The question, in determining whether a party has unlawfully insisted to impasse on a permissive subject, is whether agreement on mandatory subjects is conditioned on agreement on the nonmandatory topic. For example, in *Union Carbide Corp*., 165 NLRB 254 (1967), the Board held that the inclusion of a nonmandatory subject of bargaining in an employer's package proposals was not a factor in causing the impasse where the union never clearly and expressly refused to bargain about the nonmandatory subject and the parties' disagreement on the overall basic contract resulted in the impasse. Id. at 255. See also *ACF Industries, LLC*, 347 NLRB 1040, 1042 (2006), in which the Board concluded that the employer's insistence on a nonmandatory subject "did not contribute to the impasse in any discernible way." Here, Charging Party rejected Respondent's election of remedies proposal, but did not refuse to discuss it or identify it during negotiations as a nonmandatory topic. As discussed above, there were many unresolved mandatory issues and significant differences between the parties on economic issues. I conclude that the evidence does not establish that Respondent conditioned its agreement on these issues on Charging Party's agreement to the nonmandatory election of remedies clause.

Charging Party also argues that the temporary employee clause, as proposed by Respondent, was a permissive subject of bargaining. Charging Party initially argued that the clause was a permissive subject because it was a proposal to change the scope of the unit. In my April 14, 2014, interim order, however, I rejected that argument. I found that the clause was not a proposal to alter the scope of the existing unit, since temporary and seasonal employees were clearly excluded from the unit under the recognition clause. I concluded that Respondent's proposal to modify Article VI(2)(b) to allow it to use more nonunit temporary employees was a mandatory subject. In its post-hearing brief, Charging Party asserts that Respondent's proposal was "a sham" because Respondent subsequently mislabeled thirteen new employees as temporary in order to avoid recognizing Charging Party as their bargaining agent and compensating them as bargaining unit members.

It is well established that the assignment of bargaining unit work to nonunit employees is a mandatory subject of bargaining under PERA. *Southfield Police Officers Assn v Southfield,* 433 Mich 168 (1989); *Lansing Fire Fighters v Lansing,* 133 Mich App 56 (1984). As the Board has held, because the assignment of work affects terms and conditions of employment, an employer's proposal to alter work assignments is a mandatory subject of bargaining over which the employer may normally insist to impasse, even if the proposal entails transferring work outside the unit. See *Antelope Valley Press*, 311 NLRB 459, 460 (1993).

In *City of Detroit (Dep't of Water & Sewerage),* 1990 MERC Lab Op 34, the Commission sought to reconcile this well established principle with other court decisions, specifically *Local 128, AFSCME v Ishpeming*, 155 Mich App 501 (1986) and *United Teachers of Flint v Flint Sch Dist,* 158 Mich App 138 (1986), holding that an employer has no duty to bargain before reassigning unit work to nonunit employees pursuant to a legitimate reorganization. The Commission held in *City of Detroit* that an employer's decision to reassign unit work to a nonunit position or positions in a reorganization was subject to the duty to bargain only if the decision had a significant adverse impact on the unit and the decision was amenable to resolution through collective bargaining because based on either labor or general enterprise costs. The Commission has never held, however, that either a proposal to permit or a proposal to limit the assignment of work outside the unit was a permissive subject over which a party could not insist to impasse.

Here, the parties had agreed, in their previous contract, to limit Respondent's ability to assign unit work to nonunit temporary employees even when no unit employees were laid off. I conclude that Respondent was entitled to insist to impasse on the removal of this limitation.

3. Status of Bargaining at Time of Implementation

Although impasse is not a prerequisite to fact finding under the statute, parties who fully exhaust mediation and participate in fact finding without reaching agreement generally have reached a bargaining impasse. However, the fact the parties have reached a good faith impasse does not terminate the bargaining duty, but only suspends it until circumstances change which break the impasse. *Escanaba Public Schools*, 1990 MERC Lab Op. 887, 891; *City of Ishpeming,* 1985 MERC Lab Op. 517, 520-521. As Charging Party notes in its brief, a proposal that breaks a bargaining impasse revives the parties' duty to bargaining. *Richmond Electrical Services,* 348 NLRB 1001, 1003-1004 (2006). The fact that the parties may have reached impasse at some earlier point in their negotiations does not justify an employer's unilateral implementation of its "last, best and final" offer if that impasse was subsequently broken and the parties are not at impasse when the employer implements. *Hotel Bel-Air,* 358 NLRB No. 152 (2012). One of the principal purposes of fact finding, as the Commission noted in *Wayne Co,* is to motivate parties to change their positions and break a prior impasse. This is the reason that the Commission requires a reasonable period of bargaining after the issuance of the fact finder's report. As discussed above, I conclude that the parties in this case had reached a bona fide bargaining impasse by the time of the fact finding hearing. The material question, however, is whether this impasse was subsequently broken by Charging Party's

March and April 2013 proposals, and whether the parties were at impasse on April 12, 2013 when Respondent implemented its December 3, 2012, last best offer.

As Respondent correctly notes in its brief, the Commission has held that "a union cannot prevent impasse from being reached by remaining silent or considering the matter to death." *Mecosta County Park Comm,* 2001 MERC Lab Op 28. Clearly, a union also does not prevent impasse by making proposals that it knows will be unacceptable to the employer. It does not prevent impasse merely by stating, without some substantive action, that "it has room to move." See *Saint-Gobain Abrasives, Inc,* 343 NLRB 542 at 559 (2004). The Commission has held that the obligation to bargain over the fact finder's recommendations after fact finding requires the employer to make a serious attempt to meet the union part way, but does not require it to make a concession on any issue. That is, the obligation to bargain over the substantive recommendations of the fact finder does not require a party to adopt the fact finder's recommendations or alter its previous bargaining positions. *Grand Rapids Pub Museum,* 2004 MPER 58 (2004).

Here, Charging Party made a new proposal on March 1, 2013, after the fact finder's report was issued on January 26, 2013. At that meeting, Charging Party proposed that the parties agree to accept all the fact finder's recommendations, including the wage freeze and health insurance changes, except for the pension contribution increase. It proposed, in lieu of the pension contribution increase, an across-the-board wage cut of $.75 per hour. It also proposed that the parties agree to meet during the term of the contract to discuss ways to address the unfunded liability in the B-4 plan. Neither party had previously proposed wage cuts. Insofar as the record discloses, there had been no discussion of wage cuts in the previous negotiations.

At the hearing, Respondent's witnesses offered a number of reasons for its rejection of Charging Party proposal including: (1) that the parties had already reduced the starting wage for mechanics and Respondent did not want to lower the hourly wage any further; and (2) unlike the increased pension contribution, the wage cut would impact new and more recent hires who were not part of the B-4 plan. However, I find nothing in the record that indicates that Charging Party knew or should have known before it made its proposal that an across-the-board wage cut in lieu of the proposed pension contribution would be unacceptable to Respondent.

According to finance director Rebecca Jerry's analysis, the $.75 per hour wage cut Charging Party proposed would not produce as much money, and reduce the unfunded liability in the B-4 plan by as much as, the ten percent increase in employees' pension contribution. I note, however, that even by Jerry's calculations, a $.75 per hour wage cut would provide Respondent with enough - $28,287.16 – to cover the increase in the MERS-mandated contribution for the first year of the two-year contract. While not a solution to the long-term problems of the B-4 plan, Charging Party's March 1, 2013, proposal did represent real movement from its previous position, i.e. wage increases as a condition of "a moderate" increase in the pension contribution. As I concluded above, the issue before me in this case is not whether the parties reached impasse at any time during the course of bargaining, but whether they were at impasse when Respondent unilaterally implemented changes employees existing terms and conditions of employment on April 12, 2013. I conclude that Charging Party's new proposal clearly served to break any impasse that may have existed before that date.

However, Respondent unequivocally rejected the March 1, 2013, proposal. Moreover, nothing in its communications with Charging Party between March 1 and April 11, 2013 suggested that Respondent considered Charging Party's March 1 or April 3 proposals as offering a possible basis for settlement. Respondent argues that these facts demonstrate that the parties were at impasse on April 11, 2013, when it announced that it was implementing its final offer.

One of the factors relied upon in determining impasse is whether both parties are aware of where the positions have solidified. The importance of this factor is obvious; until both parties fully understand the other's "bottom line," and what they must do to reach agreement, negotiations have not been exhausted. Charging Party's March 1 proposal introduced a new issue, an across-the-board wage cut. Respondent provided, at the hearing, a list of reasons why this proposal was unacceptable. These included, but were not limited to, that neither of the wage cuts Charging Party proposed, according to Respondent's calculations, produced as much money as a thirteen percent employee pension contribution, and that Respondent was not willing to accept the fact finder's recommendations on other issues. However, Respondent did not communicate any of these reasons to Charging Party before it implemented its last best offer. Had it done so, and the parties discussed these reasons, the parties might have found themselves at impasse again. Charging Party also might have presented another proposal that satisfied Respondent's needs. In any case, I find, the facts here do not establish that further bargaining would have been useless.

I also find that Respondent failed to satisfy its obligation to bargain in good faith for a reasonable time over the fact finder's recommendations. As the Commission has stated, a party is never required to agree to a particular proposal or make concessions, and a party is never required to accept a fact finder's recommendations. However, fact finding, like mediation, is a dispute mechanism provided for by statute and an integral extension of the bargaining process under PERA. When a fact finder, paid for by the State, has made recommendations for resolving a dispute, both parties are required to make serious efforts to reconcile their differences with the other side. *Oakland Cmty College; City of Dearborn.* What constitutes a "serious effort," of course, depends on the circumstances. However, merely announcing one's intention not to alter one's previous bargaining positions does not qualify, at least where the other party has changed its position or made new proposals in response to the fact finder's recommendations. For example, in *Orion Twp,* 18 MPER 72 (2005), a fact finder recommended that the parties accept the employer's position on all three issues presented to him, wages, pensions, and creation of voluntary employee beneficiary accounts (VEBAs) as an alternative to retiree health care benefits. The parties met and the employer informed the union that it had made its last best offer and intended to implement the fact finder's recommendations. The union then made two new proposals, the addition of a mid-term wage re-opener and additional payments into the VEBA accounts. Respondent's bargaining team told the union that it could not agree without the approval of its Board; at its next meeting, the Board rejected the proposal and instructed its team not to negotiate further and to implement the Board's last offer. Before the changes were implemented, the union requested mediation, but the employer claimed that impasse had been reached and refused to participate. The Commission held that the employer's refusal to meet again or to utilize the assistance of the mediator, based on its unilateral conclusion

that compromise was unlikely, violated its obligation to meet and bargain in good faith over the fact finder's recommendations before implementing its offer. In the instant case, Charging Party responded to the fact finder's recommendations with new proposals. I conclude that Respondent did not satisfy its obligation to meet and bargain over the fact finder's recommendations in this case by rejecting Charging Party's new proposals without explanation or discussion.

Respondent also argues that "business necessity" and financial exigencies justify finding the parties to have been at impasse on April 12, 2013. The Commission has held that business exigencies are a factor to be considered in determining the length of bargaining required to reach a good faith impasse. In *Wayne County (Attorney Unit)*, supra, the Commission found that four bargaining sessions over three months was sufficient for the parties to reach impasse on the issue of a wage freeze that included step increases where the employer consistently demanded a wage freeze for the first year of the contract, the union consistently stated that it would not agree, and the anniversary date on which the employer would have to pay step increases was fast approaching. In the instant case, Respondent's required contribution to the B-4 pension was rapidly rising, and Respondent was anxious to implement the pension contribution increases. However, there was no deadline by which Respondent needed to implement these increases. There was, I conclude, no business necessity to justify finding the parties to have been at impasse on April 12, 2013.

In sum, I find that the parties were not at impasse on April 12, 2013 when Respondent implemented terms of its December 3, 2012 offer. I conclude, therefore, that Respondent violated §10(1)(e) of PERA by implementing its December 3, 2012 offer and unilaterally altering existing terms and conditions of employment effective April 12, 2013.

B. Refusal to Recognize "Temporary" Employees As Part of the Bargaining Unit

Charging Party argues that Respondent violated its duty to bargain by mislabeling new hires after April 2013 as temporary employees and refusing to recognize them as part of Charging Party's bargaining unit.

The Commission classifies as "temporary" only employees who are hired for a specific term or project who have no reasonable expectation of further employment; employees whose tenure is indefinite are not "temporary" even if the employer does not consider them to be permanent. *Wayne Co Cmty College Dist*, 20 MPER 4 (2007). Seasonal employees are temporary employees hired for a specific season. See also *US Aluminum Corp*. 305 NLRB 719 (1991); *Personal Products Corporation*, 114 NLRB 959, 960 (1955) ("temporary employees, who are employed on the eligibility date, and whose tenure of employment remains uncertain, are eligible to vote.) While the parties in this case agreed to exclude "temporary" and "seasonal" employees from the bargaining unit, they did not define those terms. I concluded, therefore, that the definition of "temporary" used by the Commission and Board to determine eligibility to vote in a representation election should be applied here.

I conclude, however, that the evidence on the record does not establish that Respondent mislabeled employees whose tenure was indefinite as "temporary" in order to exclude them from the unit. Board members Gill and Walter testified that Respondent employed temporary employees for a maximum of one year. Rogers testified, without contradiction, that the temporary drivers he hired in the fall of 2013 were told that their employment would continue only through the spring. Respondent business records show that Respondent also hired temporary employees in the summer of 2013. However, according to the business records, as of the close of the hearing in this case in June 2014, Respondent had not employed any individual as temporary for more than one year. That is, even the temporary employees who worked during the summer months were either terminated or offered permanent employment before their one-year anniversary. Although Roger's testimony suggested that at least some of the temporary employees who were terminated would be rehired for the winter and spring of 2014-2015, the record did not establish that any of these employees had a reasonable expectation that they would be reemployed. In addition, while the temporary employees signed an employment contract that included no definite termination date, there was no evidence that any temporary employee had a reasonable expectation that his employment would continue beyond one year. I conclude that Respondent did not violate its duty to bargain in good faith by refusing to recognize the temporary employees as part of Charging Party's bargaining unit.

However, Respondent unquestionably replaced many of the unit employees who left their employment after April 2013 with temporary employees. The reason, at least in part, was the costs, particularly the fringe benefits costs, of employing unit employees. As its brief to the fact finder made clear, Respondent proposed to remove the existing limitation on the number of temporary employees in Article IV(2)(b) at least in part to allow it to hire nonunit employees who were cheaper. As I found above, this proposal was a mandatory subject of bargaining over which it could have lawfully bargained to impasse. However, as Respondent implemented this proposal, and unilaterally altered an existing condition of employment, without reaching impasse, I conclude that Respondent violated §10(1)(e) of PERA by employing more than the number of temporary employees permitted under the expired contract.

In accord with the above findings of fact and conclusions of law, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Kalkaska County Road Commission, its officers and agents, are hereby ordered to:

1. Cease and desist from:

   (a) Refusing to bargain in good faith with United Steelworkers Local 8287, over the wages, hours and terms and conditions of employment of employees in the union's bargaining unit;

(b) Unilaterally imposing its December 3, 2012, last best offer and implementing changes in existing terms and conditions of employment in the absence of a bargaining impasse.

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

(a) Upon request, return to the bargaining table and bargain in good faith with United Steelworkers Local 8287 until either agreement or a good faith impasse is reached on the terms of a contract to succeed the parties' 2011-2012 collective bargaining agreement;

(b) Rescind all changes in terms and conditions of employment unilaterally implemented on April 12, 2013, and restore the status quo as it existed prior to this implementation;

(c) Until the parties reach agreement or a good faith bargaining impasse, limit the number of nonunit temporary and seasonal employees performing bargaining unit work to no more than twenty percent of the bargaining unit;

(d) Make whole unit employees for monetary losses they have suffered as a result of their employer's April 12, 2013, unlawful unilateral changes in terms and conditions of employment, including making them whole for monies deducted from their paychecks and transmitted to MERS in excess of three percent of their wages, plus interest on these monies at the statutory rate of five percent per annum. [10]

(e) Post copies of the attached notice to employees in conspicuous places on the employer's premises, including all locations where notices to employees are customarily posted, for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: February 5, 2015

10 See *Dream Builders Construction,* 19 MPER 22 (2006).

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **KALKASKA COUNTY ROAD COMMISSION** 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 United Steelworkers Local 8287, over the wages, hours and terms and conditions of employment of employees in the Union's bargaining unit.

WE WILL NOT unilaterally impose our "last best offer" and implement changes in existing terms and conditions of employment in the absence of a good faith bargaining impasse.

WE WILL, upon request, return to the bargaining table and bargain in good faith with United Steelworkers Local 8287 until either agreement or a good faith impasse is reached on the terms of a contract to succeed the parties' 2011-2012 collective bargaining agreement.

WE WILL rescind all changes in terms and conditions of employment unilaterally implemented on April 12, 2013, and restore the status quo as it existed prior to this implementation.

WE WILL, until we reach agreement or a good faith bargaining impasse with the union on the terms of a contract, limit the number of nonunit temporary and seasonal employees performing bargaining unit work to no more than twenty percent of the bargaining unit.

WE WILL make whole unit employees for monetary losses they have suffered as a result of our April 12, 2013, unlawful unilateral changes in terms and conditions of employment, including making them whole for monies deducted from their paychecks and transmitted to MERS in excess of three percent of their wages, plus interest on these monies at the statutory rate of five percent per annum.

As a public employer under PERA, we are obligated to bargain in good faith with representatives selected by the majority of our employees with respect to rates of pay, wages, hours of employment, or other conditions of employment.

KALKASKA COUNTY ROAD COMMISSION

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. C13 E-082/13-003397-MERC