STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY,
Public Employer-Respondent,

MERC Case No. C13 F-100
-and- Hearing Docket No. 13-004228

WAYNE COUNTY GOVERNMENT BAR ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Schultz and Young, P.C., by Gregory T. Schultz, for Respondent

McKnight, McClow, Canzano, Smith & Radtke, P.C., by Patrick Rorai and David R. Radtke, for Charging Party

DECISION AND ORDER

On April 15, 2016, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: May 26, 2016

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case arises from an unfair labor practice charge filed on June 10, 2013, by the Wayne County Government Bar Association (GBA) against Wayne County. Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the charge was assigned to David M. Peltz, Administrative Law Judge for the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission.

The Unfair Labor Practice Charge and Procedural History:

Charging Party represents a bargaining unit which includes approximately 140 assistant prosecutors employed by the Wayne County Prosecutor's Office. The charge alleges that Respondent repudiated its contractual obligation to reimburse bargaining unit members for certain professional expenses, including student loan payments, seminar fees and the cost of personal digital assistants (PDA) and book purchases.[1] The charge further asserts that the County acted unlawfully by failing or refusing to deduct dues from the

[1] For purposes of collective bargaining, the Wayne County Prosecutor is a co-employer with Wayne County of assistant prosecutors employed in the prosecutor's office. See *St. Clair Prosecutor v AFSCME, Local 1518*, 425 Mich 204, 224 (1986). At no point in this proceeding, however, did the County assert that the presence of the prosecutor is essential to permit the Commission to render complete relief, nor did the Union ever seek to move to join the prosecutor as a necessary party. Thus, this case proceeded without the formal involvement of the prosecutor's office. The prosecutor's chief of finance and administration testified as a witness for Respondent.

paychecks of unit members. According to the charge, the County's conduct constitutes a violation of the duty to bargain set forth in Section 10(1)(e) of PERA.

The County filed an answer to the charge and a motion for summary disposition on November 15, 2013. In its motion, the County asserts that the issue of reimbursements is covered by Article 14 of the parties' collective bargaining agreement and that there are no allegations in the charge which would establish a repudiation of that section of the agreement. According to Respondent, the charge should be dismissed on summary disposition because the parties have a bona fide dispute over the meaning of Article 14 which must be resolved via the grievance procedure set forth in the contract. With respect to the issue of dues deductions, the County argues that it had no obligation to continue to deduct dues from unit members because the collective bargaining agreement between the parties expired.

I convened a pretrial conference on December 20, 2013, at the conclusion of which the parties agreed to adjourn this matter without date so as to facilitate settlement discussions. On September 11, 2014, Charging Party requested that a hearing date be scheduled. The parties appeared before the undersigned on October 14, 2014, and indicated that the issue of dues deductions had been resolved. The Union formally withdrew that allegation on the record that morning. With respect to whether the County violated PERA by failing or refusing to reimburse unit members for professional expenses, I directed the parties to file position statements addressing various questions raised during pre-hearing discussions, including whether this dispute was governed by the Commission's decision in *Plymouth-Canton Community Schools*, 1984 MERC Lab Op 894. The following day, the Union filed a grievance over the issue of reimbursements for professional expenses.

The parties filed their position statements on or before November 14, 2014. On December 22, 2014, I issued an order denying the County's motion for summary disposition on the basis that there were outstanding questions of material fact which warranted an evidentiary hearing. The hearing was held on April 24, 2015, and post-hearing briefs were filed by the parties on or before June 23, 2015.

Findings of Fact:

I. The Collective Bargaining Agreement

The most recent collective bargaining agreement between the County and the GBA covered the period December 1, 2004, through September 30, 2011. Article 36.03 of the 2004-2011 contract states that the agreement "shall continue in effect for successive yearly periods" unless written notice is given by either party at least sixty days prior to September 30, 2011, or any anniversary date thereafter. In the instant case, the Union takes the position that neither party provided the requisite written notice to cancel and that the agreement therefore remains in effect. The County asserts that the agreement expired as of September 30, 2011.

Since 1991, each of the parties' collective bargaining agreements have included language providing for reimbursement to bargaining unit members for various professional

expenses. This benefit is set forth in Article 14 of the 2004-2011 contract, which is entitled "Professional Seminars." Article 14, Section 1 provides:

> In recognition of the need for continuing professional educational advancement, the Employer agrees to reimburse up to two thousand ($2000) per fiscal year **from funds allocated to the Department of the Prosecuting Attorney** or the Department of Corporation Counsel or other employing department, for each attorney during the term of this agreement as provided below, for the purposes enumerated below.
>
> A. With the prior approval of the department head, attendance at professional conferences, seminars or programs which are designed to contribute to the advancement of attorneys' professional competence in an area relating to their work assignment. The selection of the conference, seminar, or program shall be made by the employee, and the attendance and required travel time to and from the conference, seminar or program shall be considered as time worked and paid at the employee's regular salary rate.
>
> Attendance shall be limited to not more than three (3) such conferences, seminars or programs per calendar year during the term of this Agreement unless otherwise deemed essential to the betterment of the service by the Employer.
>
> B. With prior approval of the department head, purchase of PDA's, legal books, including recognized legal classics and legal periodicals, including, but not limited to ICLE publications, textbooks, and seminar publications and legal CD roms. Approval, processing, and reimbursement will be determined the same as tuition procedures for conferences, seminars and programs.
>
> C. Employees with prior approval of their department head, may use tuition reimbursement to recoup payments made on student loans that the employee obtained to cover law school tuition. Only loan payments made on or after the date the Wayne County Executive executes this collective bargaining agreement will be eligible for reimbursement. [Emphasis supplied.]

Pursuant to Article 14, Section 3 of the agreement, "[r]eimbursement will be made to any employee" who: (1) properly secures prior approval to attend the conference, seminar or program; (2) submits documentation of expenses no later than 60 days after the conclusion of the conference, seminar or program; (3) is on the payroll at the time the application for refund is submitted or, if the employee has been laid off due to a reduction in force and is on a recall list, the employee must have been on the payroll when he or she attended the conference, seminar or program; and (4) has not been nor will be fully paid for the cost of tuition or related expenses by another institution. Pursuant to Article 14, Section 4 of the agreement, applications denied at the department level are "considered disapproved" and shall not be forwarded to the human resources department.

The collective bargaining agreement between the County and the GBA contains various other provisions which set forth employee benefits, but which, unlike Article 14, do not specify what funds may be used to pay for expenses associated with such benefits. For example, Article 24 states that "employees of record who are at or below the grade" shall receive a series of increases in their base wage rate effective the start of the fiscal year in 2005, 2006 and 2007. That same article also contains the following language pertaining to "additional compensation" for GBA members:

> 24.12 Members of the bargaining unit, while performing supervisory or special functions or for exceptional performance, may, at the sole discretion of the Prosecuting Attorney or the Corporation Counsel, as appropriate, receive additional compensation at the rate of $1,800 per year to be prorated and paid with the regular payrolls. The Prosecuting Attorney may designate no more than twenty-one (21) bargaining unit members at any one time to receive this additional pay. The Corporation Counsel may designate no more than seven (7) bargaining unit members at any one time to receive this additional pay. The determination by the appointing authority as to who should receive this additional compensation shall not be subject to the grievance procedure.

Article 27 of the agreement concerns mileage reimbursement for employees who use their own vehicles. That section provides, in pertinent part:

> Employees required to use their private vehicles in performance of assigned duties shall be reimbursed for actual trip mileage incurred each month. Employees shall be reimbursed at the following rates which shall be adjusted as of May 1 of each year in accordance with the composite cost for driving 10,000 miles, which is published annually by the American Automobile Association (AAA) in the publication, *Your Driving Costs*.
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> | | |
> |---|---|
> | First 300 miles | AAA published rate less $.06/mile |
> | Next 300 miles | AAA published rate less $.08/mile |
> | Over 600 miles | AAA published rate less $.10/mile |

The collective bargaining agreement contains a four-step grievance procedure for the resolution of disputes between the County and the Union "as to the interpretation or application" of any of the contract's provisions. The grievance procedure, which is set forth in Article 9 of the contract, culminates in final and binding arbitration. Pursuant to Article 9, Section 4, a notice of intent to arbitrate must be filed by the GBA within thirty calendar days of receipt of the County's Step 4 answer.

II. The Reimbursement Process

Any bargaining unit member interested in procuring reimbursement for the cost of attending a seminar, conference or other educational program is required to obtain the approval of management prior to attending the event. The employee begins the process by submitting a reimbursement request form to his or her immediate supervisor. After that, the form is forwarded to the employee's division chief for approval and then returned to the employee for submission to Rosalyn Gibson, Chief of Finance and Administration for the Wayne County Prosecutor's Office. Gibson is considered the "department head" for purposes of the Article 14 reimbursement process. Once Gibson approves the request, it is forwarded to the County's Benefits and Administration Department for processing. The information is entered into the County's computer system and then the funds are disbursed to the employee as part of his or her bi-weekly paycheck issued by the Wayne County Treasurer. The reimbursement process for student loans, PDAs and books is similar, except that preapproval by the employee's immediate supervisor and a division chief is not required.

Members of Charging Party's bargaining unit are not the only County employees eligible to receive reimbursement for educational expenses. Pursuant to similar language in the collective bargaining agreement between Wayne County and the Police Officers Association of Michigan (POAM), detectives can receive up to $1,350 per year to pay for tuition and student loans. Employees in bargaining units represented by the American Federation of State, County and Municipal Employees (AFSCME) and the Government Administrators Association (GAA) are eligible for $1,750 in education reimbursements annually.

III. The Budget and Changes to the Reimbursement Process

The Wayne County Prosecutor's Office is not a self-supported governmental entity. Rather, it is almost entirely dependent on money received from Respondent's general fund. The prosecutor's office begins preparing its budget in March of each year. With the concurrence of the Prosecutor, Gibson compiles a proposed budget which is then presented to the County in the form of a "Departmental Request." The County's Department of Management and Budget reviews that request and then submits its own budget recommendations for the prosecutor's office to the County Commission. Once the budget has been approved by the County Commission, a budget ordinance is adopted into law. The County's fiscal year begins on October 1st of each calendar year.

Prior to 2013, the prosecutor's office operated pursuant to a "lump-sum" budget structure. After receiving its annual budget from the County Commission, Gibson would prepare a breakdown of anticipated expenses by line item or "chart of accounts" and submit that breakdown to the County Commission for approval. Once approved by the County Commission, the prosecutor's office was permitted to exceed expenditures for any particular line item without seeking the approval of the County, provided that the total lump sum of expenditures for that fiscal year did not exceed the overall budget appropriation.

For the fiscal year beginning on October 1, 2011, the prosecutor's office requested a total budget of $34.791 million, of which approximately $23 million was to originate from the County's general fund. The remaining money was to come from grant funds. With respect to reimbursements for professional expenses, the prosecutor's office sought a budget of $403,160 from the general fund. The Department of Management and Budget recommended, and the County Commission approved, a budget of $357,000 for professional expenses, approximately $46,000 less than the prosecutor's office had requested. During that fiscal year, the prosecutor's office's actual expenditures for professional expenditures was $140,396.53. No employee requests for reimbursement were denied in 2012 for budgetary reasons.

Beginning with FY 2013, the County mandated that the prosecutor's office change to a "line item" budget structure. Gibson testified credibly that under this structure, the prosecutor's office is no longer permitted to exceed expenditures for any line item without first obtaining the approval of the Department of Management and Budget and the County Commission. If the prosecutor's office exceeds its budget for any individual line item during a given fiscal year, a mandated deficit reduction plan is imposed upon the prosecutor's office pursuant to which its representatives must appear before the County Commission and explain the reasons for the line item deficit and set forth a corrective plan of action. In addition, individual employees of the prosecutor's office may be subject to civil liability for knowingly and willfully going over the budget for an individual line item. Penalties for violations of the budget consist of a $500 fine, along with the actual cost incurred by the County as a result of the deficit.

During the 2013 fiscal year, the County was operating under a state mandated deficit reduction plan pursuant to which the prosecutor's office was required to closely monitor its expenditures each month. For that fiscal year, the prosecutor's office requested a total budget of $34.6 million. The County Commission approved a budget of 25.6 million, approximately $9 million below the requested amount.[2] For the professional expenses line item, the prosecutor's office once again requested a budget of $403,160, but was approved for only $123.290. By May of 2013, the prosecutor's office had spent $123.289.57 on the reimbursement of professional expenses. Upon discovering that the budget for professional expenses was essentially depleted, Gibson, in consultation with the Prosecutor, discontinued the approval of professional expense reimbursements for the remainder of the fiscal year for all employees of the prosecutor's office, including members of Charging Party's bargaining unit. Toward the end of FY 2013, Gibson began receiving reimbursement requests for seminars and other events which were scheduled to occur in 2014. She took no action on those requests.

For FY 2014, the prosecutor's office requested a line item budget of $403,160 for professional expense reimbursements, but was authorized by the County Commission to spend only $82,031 for that purpose. The prosecutor's office then sought a $6 million variance, which was the difference between the total budget requested by the prosecutor's office in 2014 and the amount actually approved by the County Commission. That request was denied.

[2] Based, in part, upon that action, the prosecutor's office filed a lawsuit against the County which was eventually settled in 2015.

When the 2014 fiscal year began on October 1, 2013, Gibson was concerned that there would be an immediate onslaught of reimbursement requests and that there would be no money left to compensate employees for expenses associated with training sessions which would be necessary later in the year. She took those concerns to the Prosecutor and together they devised a plan to prioritize the reimbursement requests for employees in all eligible bargaining units, including the GBA. Under this plan, reimbursement requests for tuition and student loan payments were given highest priority. With respect to student loans, the prosecutor's office decided to reimburse employees only for the minimum amount due on the loan up to $2,000; reimbursement requests intended to compensate employees for paying the interest on student loans were, for the first time, denied outright. Reimbursement requests for mandatory training were given secondary priority by the prosecutor's office, followed by reimbursement requests for non-essential training sessions and all other requests.

At some point during the 2014 fiscal year, the actual expenditures for professional reimbursements surpassed the amount budgeted for that line item. This happened because Gibson had approved certain reimbursement requests before she realized that the funds for that line item had been exhausted and she decided to honor those approvals. In total, the prosecutor's office went over budget for reimbursements by $8,600. At that point, reimbursements were suspended for the remainder of the fiscal year. Gibson testified that she could theoretically have requested a budget adjustment to use money from another part of the budget to fund additional reimbursements. In fact, during that fiscal year, the line item budget for court filing fees had a surplus of $33,352.40. However, the County decided to use that money to fund the salaries and wages line item which was also over budget.

The prosecutor's office ended up in deficit with respect to its entire budget at the conclusion of the 2014 fiscal year and, as a result, lost staff. The County mandated that the prosecutor's office make up the shortfall, including the $8,600 overage for the professional reimbursement line item, by implementing a deficit reduction plan. The deficit reduction plan was sent to Respondent and incorporated into the County's overall correction plan which was still awaiting the Governor's approval at the time of the hearing in this matter. Pursuant to that deficit reduction plan, the prosecutor's office would be required to pay back the overage amount within five years. The County Commission also threatened Gibson personally with the imposition of civil liability for going over budget; however, no penalties were actually levied because, according to Gibson, her actions were not wilful.

For the 2015 fiscal year, the prosecutor's office requested a line item budget of $473,750 for professional expense reimbursements. The budget which was ultimately approved by the County Commission for that purpose was $56,000. As of April 17, 2015, one week prior to the date of the hearing in this matter, the prosecutor's office had spent $24,134.24 on professional expense reimbursements. For FY 2015, the prosecutor's office reverted back to the "first come, first served" reimbursement policy which was implemented in 2013. Pursuant to that policy, reimbursement requests for professional expenses will be approved until the funds budgeted for that line item have been exhausted.

Discussion and Conclusions of Law:

Under Section 15 of the Act, public employers and labor organizations have a duty to bargain in good faith over "wages, hours and other terms and conditions of employment." Such issues are mandatory subjects of bargaining. MCL 423.215(1); *Detroit Police Officers Ass' n v Detroit*, 391 Mich 44, 54-55 (1974). A party violates PERA if, before bargaining, it unilaterally alters or modifies a term or condition of employment, unless that party has fulfilled its statutory obligation or has been freed from it. *Port Huron Education Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 317 (1996); *Detroit Bd of Education*, 2000 MERC Lab Op 375, 377. A party can fulfill its obligation under Section 15 of PERA by bargaining about a subject and memorializing the resolution of that subject in the collective bargaining agreement. Under such circumstances, the matter is "covered by" the agreement. *Port Huron* at 318; *St Clair Cnty ISD*, 2005 MERC Lab Op 55, 61-62. As the Michigan Supreme Court stated in *Port Huron* at 327, "Once the employer has fulfilled its duty to bargain, it has a right to rely on the agreement as the statement of its obligations on any topic 'covered by' the agreement." At the same time, bargaining unit members have a right to rely upon the terms and conditions in the contract and to expect that they will continue unchanged. *Detroit Bd of Ed*. See also *Wayne Cnty Comm Coll*, 20 MPER 59 (2007). The employer's duty to maintain the status quo pending satisfaction of its bargaining obligation continues even after the expiration of a collective bargaining agreement. *Local 1467 IAFF v City of Portage*, 134 Mich App 466 (1984); *Detroit Police Officers Ass'n v Detroit*, 61 App 487 (1975).

The Commission's role in disputes involving alleged contract breaches is limited. *Genesee Twp*, 23 MPER 90 (2010) (no exceptions). Where there is a collective bargaining agreement covering the subject matter of the dispute which has provisions reasonably relied on for the action in question, and the contract also has a grievance procedure with final and binding arbitration, the contract controls and no PERA issue is present. *Macomb County v AFSCME Council 25, Locals 411 and 893*, 494 Mich 65 (2013). An alleged breach of contract will constitute a violation of PERA only if a repudiation can be demonstrated. See e.g., *City of Detroit (Transp Dept)*, 1984 MERC Lab Op 937, aff'd 150 Mich App 605 (1985); *Jonesville Bd of Ed*, 1980 MERC Lab Op 891, 900-901. A finding of repudiation cannot be based on an insubstantial or isolated breach of contract. *Oakland Cnty Sheriff*, 1983 MERC Lab Op 538, 542. Repudiation exists when (1) the contract breach is substantial, and (2) no bona fide dispute over interpretation of the contract is involved. *Plymouth-Canton Comm Sch*, 1984 MERC Lab Op 894, 897. The Commission will find a repudiation only when the actions of a party amount to a rewriting of the contract or a complete disregard for the contract as written. *Central Michigan Univ*, 1997 MERC Lab Op 501, 507; *Cass City Pub Sch*, 1980 MERC Lab Op 956, 960.

In the instant case, the alleged contract repudiation was Respondent's decision to deny professional expense reimbursement requests based upon budgetary constraints. The parties' collective bargaining agreement contains a grievance procedure culminating in final and binding arbitration. Article 14 of the agreement explicitly covers the issue of reimbursements for professional expenses. That provision states that "the Employer agrees to reimburse up to two thousand ($2000) per fiscal year *from funds allocated to the Department of the Prosecuting Attorney* . . . ." (emphasis supplied). Respondent asserts that this language specifically makes reimbursements subject to the allocation of money

from the County to the prosecutor's office. Based upon Article 14 of the contract, the County asserts that it has satisfied its bargaining obligation under Section 10(1)(e) of PERA and that the Union is improperly attempting to convert a routine dispute over the meaning of the contract into a PERA claim. Although the Union disagrees with Respondent's interpretation of the collective bargaining agreement, I find that Respondent has articulated a facially credible explanation in support of its claimed right to deny reimbursement requests for budgetary reasons and that the parties, therefore, have a bona fide dispute over the interpretation of their contract.

Ordinarily, a deficit in funding does not justify unilateral action by an employer. See e.g. *Wayne County Bd of Commissioners (WCBA)*, 1985 MERC Lab Op 1037. In the instant case, however, the parties' contract delineates a specific source of funding for professional expense reimbursements. The County's position that this language acts as a limitation on its obligation to reimburse Charging Party's members cannot be described as spurious. To the contrary, the fact that other provisions of the contract set forth employee benefits without specifying a funding source strongly suggests that Respondent's interpretation of Article 14 has merit. For example, Article 27 of the agreement requires the County to reimburse employees for the use of their private vehicles without reference to any funding source or other limitation. When interpreting a contract, every word, phrase and clause is to be given effect so as to avoid an interpretation that would render any part of the agreement nugatory or surplusage. *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 694 (2012). For these reasons, I conclude that a bona fide dispute exists over interpretation of the contract language. Given that the parties' contract provides for final and binding arbitration of such disputes, the record does not a support a finding that the County repudiated the terms of its collective bargaining agreement with Charging Party or otherwise violated its obligation under Section 10(1)(e) of PERA by unilaterally discontinuing reimbursements for professional expenses.

Prior to the hearing, there was some discussion about whether the Commission has jurisdiction to decide this case regardless of whether there exists a bona fide dispute over interpretation of Article 14 of the parties' contract. In *Plymouth-Canton Community Schools*, the Commission held that it will consider an ordinary breach of contract claim even without a showing of repudiation where no contractual procedure exists for final and binding arbitration. It is well-established that there is no statutory duty to arbitrate grievances after the expiration of a collective bargaining agreement, except when the dispute involves rights which "accrue or vest" during the term of the contract. *Gibraltar SD v MESPA*, 443 Mich 326 (1993). See also *Ottawa Co v Jaklinski*, 423 Mich 1 (1985).

In the instant case, the parties disagree over whether the contract was in effect at the time of the events giving rise to this dispute. Respondent contends that the contract expired on or about September 30, 2011. In contrast, the GBA has consistently taken the contrary position that the County failed to take the necessary steps to terminate the agreement and that the contract, therefore, remained in effect at the time of the hearing in this matter. Yet, despite the Union's insistence that the contract still governs the terms and conditions of employment for its members, it is undisputed that the GBA did not file a grievance over the professional reimbursement issue until October 15, 2014, the day after

the parties first appeared before the undersigned for hearing. [3] I find that it would be inappropriate to apply *Plymouth-Canton* and allow a party to seek relief from the Commission for an ordinary contract breach under these circumstances.

I have carefully considered all other arguments set forth by the parties in this matter and conclude that they do not warrant a change in the result. Accordingly, I recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

The unfair labor practice charge filed by the Wayne County Government Bar Association against Wayne County in Case No. C13 F-100; Docket No. 13-004228-MERC is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: April 15, 2016

[3] Respondent has since stipulated that it would agree to arbitration of the reimbursement grievance, but that it would not waive the right to assert that the filing of the grievance was untimely under the contract.