

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

INTERURBAN TRANSIT PARTNERSHIP,

Public Employer-Respondent in MERC Case No. C15 H-105/Hearing Docket No. 15-047304,

Charging Party in MERC Case No. CU15 I-025/Hearing Docket No. 15-052496,

-and-

AMALGAMATED TRANSIT UNION LOCAL 836,

Labor Organization-Respondent in MERC Case No. CU15 I-025/Hearing Docket No. 15-052496,

Charging Party in MERC Case No. C15 H-105/Hearing Docket No. 15-047304.

APPEARANCES:

Clark Hill PLC, by Marshall W. Grate and Grant T. Pecor, for the Public Employer

Jacob, Burns, Orlove and Hernandez, by Taylor Muzzy, for the Labor Organization

DECISION AND ORDER

On July 14, 2016, Administrative Law Judge Julia C. Stern (ALJ) issued her Decision and Recommended Order in the above matter finding that Interurban Transit Partnership (Employer), violated § 10(1)(a) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, by banning off-duty employees from leafletting to publicize the parties' contract dispute on the platform of the Employer's Central Station and by threatening two employees with discipline for this activity. The ALJ also found that neither the Union nor the Employer violated its duty to bargain in good faith by the conduct alleged in their charges and recommended that the charge filed by the Employer be dismissed in its entirety, and that all allegations in the charge filed by the Union alleging violations of the duty to bargain also be dismissed. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

The Union filed exceptions and brief in support of exceptions to the ALJ's Decision and Recommended Order and a request for oral argument on August 8, 2016. The Employer filed exceptions and brief in support of exceptions to the ALJ's Decision and Recommended Order on August 8, 2016. The parties filed a joint request for extension of time to file responses to exceptions. Both parties filed their response to exceptions and brief in support on September 19, 2016.

In its exceptions, the Union contends that the ALJ erred in concluding that the Employer did not violate its duty to bargain in good faith. The Union argues that the Employer 1) violated its duty to bargain by proposing to terminate its Retirement Plan and convert the actuarial value of existing benefits into lump sum payments to a defined contribution plan, 2) engaged in bad faith bargaining when its CEO sent a September 1, 2015 memo to employees and when its COO, in September 2015, held eleven meetings with employees to discuss the status of negotiations, and 3) bargained in bad faith by threatening to unilaterally terminate the Retirement Plan and by declaring impasse prior to bargaining to a good faith impasse.

In its exceptions, the Employer contends that the ALJ erred in concluding that the Union did not violate its duty to bargain in good faith. The Employer argues that the union committed unfair labor practices by 1) engaging in dilatory tactics designed to delay fact finding and frustrate the bargaining process, 2) refusing to bargain over changes to the pension plan, and 3) engaging in regressive bargaining and unlawfully insisting on including language which would violate § 10(3) of PERA in the parties' interim successor agreement.

The Employer further maintains that the ALJ erred in concluding that the Employer interfered with the § 9 rights of its employees when it enforced its no solicitation rule by banning employees from leafletting to publicize the parties' contract dispute on the platform of the Employer's Central Station.

The Union has requested oral argument in the matter. The Commission finds that oral argument would not materially assist us in deciding this case. Therefore, the request for oral argument is denied.

We have reviewed the exceptions filed by the parties, and find that neither the Union nor the Employer violated its duty to bargain in good faith by the conduct alleged in their charges. We also find that the Employer did not violate § 10(1)(a) by banning off-duty employees from leafletting to publicize the parties' contract dispute on the platform of the Employer's Central Station or by threatening two employees with discipline for this activity.

Factual Summary:

The Employer provides transportation services, including bus service, for six communities in the Grand Rapids, Michigan area. The Amalgamated Transit Union (ATU or Union) represents a bargaining unit of approximately 320 operators (drivers) and maintenance mechanics employed by the Employer. The Employer and Union were parties to a collective bargaining agreement that covered the period May 7, 2012 through June 30, 2015.

On December 9, 2014, the parties began negotiations for a successor agreement. At the first bargaining session, the Employer presented a lengthy written proposal with twenty-six proposed modifications of the agreement. On January 26, 2015, it added five more for a total of thirty-one.

Between December 9, 2014, and May 19, 2015, the parties held fifteen negotiation sessions, many of which were attended by a state-appointed mediator. The Employer presented written proposals and/or responses to the Union's proposals on January 14, January 15, January 26, January 28, January 29, February 3, February 4, April 8, and May 7, 2015.

The Union presented written proposals or responses to the Employer's proposals on January 26, January 28, January 29, February 3, February 4, April 8, and April 9, 2015. The Union also made an unwritten proposal on May 5. During negotiations, the parties reached tentative agreements on twenty issues and written tentative agreements were executed on January 15, January 26, January 28, January 29, February 3, and February 4. Both parties also withdrew proposals between December 9, 2014, and May 19, 2015. Nonetheless, there were still thirteen issues remaining in dispute.

Consequently, Thomas Gravelle was appointed by the Commission as a fact finder and scheduled fact finding hearings for May 11 and May 12, 2015. At a pre-hearing conference, however, the Union requested a postponement of the hearing because of a schedule conflict and the fact finder postponed the hearing until May 18 and 19. On May 15, the Union's attorney sent an email to the Employer's counsel and requested another postponement of the fact finding "due to receipt of new information as well as a change in the employer's table position." In a subsequent telephone conference with the fact finder, the Union requested a two week postponement. The fact finder agreed, over the Employer's objection, that the hearing would begin on May 19 rather than May 18, and that the Union would be permitted to supplement the record with an actuary report.

On May 16, Fact Finder Gravelle received an email from a new attorney, Joseph Burns, stating that he had just been requested by the Union to handle the fact finding hearing. Burns requested another postponement, so that he could prepare for the hearing. In an email, Gravelle replied that, unless the parties mutually agree to reschedule, the hearing would go forward on May 19. On May 18, Burns then sent Gravelle an email protesting Gravelle's refusal to postpone the hearing. Burns told Gravelle that the Union's officers would be at the hearing on May 19, but would not be making statements or participating in any way without counsel.

ATU Local 836 President RiChard Jackson and Brent Majors, the Union's financial secretary/treasurer, attended the May 19 fact finding hearing, but Attorney Burns did not. Although the Employer participated in the hearing and filed a lengthy post-hearing brief, the Union did not present any evidence or argument at the hearing and did not file a post-hearing brief. Fact Finder Gravelle issued his report on June 26, 2015.

On June 30, 2015, the parties executed an interim successor agreement that remained in effect until August 31, 2015.¹

¹ Because the Employer receives federal funding under the Federal Urban Mass Transit Act (UMTA), 49 U.S.C. 5333(b), Section 13(c) of this Act requires it, as a condition of receiving federal funding, to enter into Protective Agreements to protect the collective bargaining rights of employees. In this case, the parties' September 23, 1993, Section 13(c) Protective Agreement, as amended in 2011, required them, if they have not reached a new contract within seven days of their prior contract's expiration date, to enter into an interim successor agreement of a duration not less than 60 nor more than 120 days. The interim successor agreement must include the terms and conditions of the expired contract in their entirety.

On July 6, 2015, the Employer issued a public statement accepting all of the fact finder's recommendations. The Union, however, issued a lengthy public statement rejecting Gravelle's recommendations for all but two issues on which Gravelle had recommended the Union's position.

Sometime in late July or early August, 2015, two members of the bargaining unit, Local President Jackson and Bus Operator Louis DeShane, accompanied by a non-employee Union organizer, stood on the platform at the Employer's Central Station and distributed leaflets to passengers. The leaflets stated, among other things, that CEO Varga was demanding that "bus drivers, who keep the city moving, including retirees, give up their retirement security." The leaflets also gave a phone number to call and asked the callers to ask for Varga and "tell him to focus on improving service for riders, not robbing workers." Additionally, the leaflets asked recipients to "like" the Union on Facebook. Jackson and DeShane were off-duty when distributing the leaflets and did not identify themselves as employees of the Employer. Neither the off-duty employees nor any other representative of the Union asked for permission to leaflet on the platform.

Later that same day, Jackson received a phone call from Chief Operating Officer (COO) Brian Pouget and was told that he did not have permission to leaflet, that he was to stop, and that any employee participating in the leafletting would be disciplined. Pouget also told Jackson that he was sending Employer Security Manager Mike Wierenga to talk to DeShane and the non-employee organizer at the other end of the platform. After his conversation with Pouget, Jackson left the platform. Wierenga then spoke with DeShane and told him that he was not allowed to distribute the flier and that if he did not stop distributing it, Wierenga would call the police and DeShane would be terminated. DeShane attempted to argue with Wierenga, telling him that he had a right to be there. Wierenga, however, then phoned Pouget, who told him to tell DeShane that he was going to be arrested and fired if he did not stop leafletting. Wierenga did so, and DeShane left the platform.

Between the issuance of the fact finder's report and the hearing in the instant case on September 23 and September 25, 2015, the parties met on August 17, August 18, August 19, and August 31.

Although a state-appointed mediator was present for the August 31 meeting, neither party presented any new proposals and the mediator told the parties that, until there were new proposals, he saw no purpose in scheduling further meetings.

On September 1, 2015, Employer Attorney Pecor sent the Union a letter stating that the parties' negotiations appeared to have completely broken down and that the parties appear to have reached an impasse.

The parties did not meet again to negotiate between August 31, 2015, and the hearing in this case on September 23 and, as of the close of the hearing, the Employer had not unilaterally implemented either of its pension proposals.

The Unfair Labor Practice Charges:

On August 7, 2015, the Union filed a charge in Case No. C15 H-105 alleging that the Employer violated § 10(1)(a) of PERA by threatening employees with discipline for passing out leaflets concerning the contract dispute on the platform at the Employer's Central Station.

On September 4, 2015, the Union amended this charge to allege, among other things, that the Employer violated its duty to bargain by 1) proposing to terminate the Defined Benefit Retirement Plan, 2) declaring impasse prior to the parties having exhausted negotiations and by threatening to unilaterally terminate the pension plan, and 3) communicating directly with unit employees in September 2015.

On September 11, 2015, the Employer filed a charge in Case No. CU15 I-025 against the Union. The Employer alleged, among other things, that the Union bargained in bad faith by 1) engaging in dilatory tactics designed to frustrate the bargaining process, including refusing to participate in fact finding, 2) engaging in regressive bargaining by reinstating proposals it had previously withdrawn and by making new proposals after the fact finder issued his report, 3) evading its bargaining obligation over the pension plan, and 4) unlawfully insisting on negotiating over an illegal subject when it insisted that the extension of the agreement include an unlawful agency shop clause.

Discussion and Conclusions of Law:

A. The Employer did not Violate its Duty to Bargain in Good Faith.

In its exceptions, the Union alleges that the Employer violated its duty to bargain in good faith by proposing to terminate the Defined Benefit Pension Plan and to convert the actuarial value of existing benefits into lump sum payments to be deposited into to a defined contribution plan, in violation of the terms of the Plan and the Internal Revenue Code. According to the Union, the Employer deliberately made a proposal that it knew would be patently unacceptable with the intention of forestalling agreement on a new contract.

As noted by the ALJ, however, the Defined Benefit Pension Plan provides that the Employer and Union may mutually agree to terminate the Plan, and the Employer was merely proposing that they agree to terminate it and effectuate the rollover of accrued benefits upon termination. Nothing in the Plan document clearly precludes the Plan from making eligible rollover distributions to an eligible defined contribution plan in the form of lump sum payments in the event of termination. Moreover, even if the Plan could be interpreted as precluding it, the Employer's contrary interpretation was not unreasonable and the Plan could clearly be amended to permit this. Additionally, the record does not establish that the Employer's proposal to terminate the Plan, or its alternate proposal to freeze it, was made in bad faith. To the contrary, the Employer's proposal appears to be based on financial considerations associated with the unfunded liability of the pension plan. This notwithstanding, although the Employer proposed terminating the Plan on January 26, 2015, the union never challenged the legality of the Employer's proposal during fact finding or at any other time prior to amending the instant charge on September 4, 2015, more than seven months after the proposal was made. We, therefore,

agree with the ALJ that the Employer's proposals to the Union, while perhaps exhibiting a tough bargaining position, were not so patently acceptable as to evidence a fixed intent not to reach an Agreement. *City of Southfield*, 1987 MERC Lab Op 126, 138.

The Union also contends that the Employer engaged in bad faith bargaining when CEO Varga sent a memo to employees on September 1, 2015 and when COO Pouget held eleven meetings with employees to discuss the status of the negotiations in September 2015.

Once a union is designated or selected for the purposes of collective bargaining by a majority of public employees in a unit appropriate for such purposes, that union is the exclusive representative of these employees for purposes of collective bargaining with respect to rates of pay, wages, hours or other conditions of employment. *Huron Sch Dist*, 1990 MERC Lab Op 628, 634; *Pontiac Sch Dist*, 22 MPER 51 (2009). An employer violates the duty to bargain and unlawfully bypasses the union when it confers a benefit upon employees or otherwise changes conditions of employment without going through the employees' exclusive bargaining representative. *Pontiac Sch Bd of Ed*, 1994 MERC Lab Op 366, 374; *Birmingham Bd of Ed*, 1985 MERC Lab Op 755.

Not all communications between an employer and its employees, however, are unlawful. An employer may communicate factual information regarding the status of negotiations or its position at the bargaining table. *MEA v North Dearborn Hts Sch Dist*, 169 Mich App 39, 45-46 (1988); *Jackson Co*, 18 MPER 22 (2005). A union fails to meet its burden of proof regarding direct dealing where the employer communicates with employees for the purpose of providing information relating to planned or actual changes in operations or procedures, the employees are offered nothing and are not requested to make an agreement. *City of Grand Rapids*, 1994 MERC Lab Op 1159; *North Ottawa Comm Hosp*, 1982 MERC Lab Op 555. For example, the Commission has refused to find a direct dealing violation where the employer distributed information to employees describing its plan to reorganize city services and soliciting questions from them concerning the planned changes. *City of Madison Hts*, 1980 MERC Lab Op 146.

In the present case, CEO Varga's September 1, 2015, memo to employees was sent immediately after the parties' interim successor agreement expired and was a response to statements about the Employer's pension proposals made by the Union and union members at an August 27, 2015 Board meeting and in leaflets distributed to the public. The Commission has also held that it will not police "negotiation propaganda" for accuracy since the other party generally has an opportunity to rebut any misstatements. *Warren Consolidated Schs*, 1975 MERC Lab Op 129; *Melvindale-Northern Allen Park Pub Schs*, 1992 MERC Lab Op 400, 407. The information in Varga's September 1 memo accurately reflected the Employer's most recent position on the pension issue, as that position had been conveyed to the Union.

Additionally, although COO Pouget held eleven meetings with employees to discuss the status of negotiations in September 2015, the statements made by Pouget in the September 2015 employee meetings represented the Employer's position on the pension issue, as previously conveyed to the Union, and were neither patently false nor disparaging of the Union. Consequently, neither Varga's September 1, 2015 memo to employees nor the statements made by Pouget in the meetings held with employees in September 2015 constituted direct bargaining

or an attempt to circumvent the bargaining agent. The Employer therefore did not violate its duty to bargain in good faith by bypassing the designated representative and attempting to negotiate directly with employees.

In its exceptions, the Union further alleges that the Employer bargained in bad faith by threatening to unilaterally terminate its Pension Plan and by declaring impasse prior to bargaining to a good faith impasse.

An employer violates Section 10(1)(e) when it takes unilateral action on a mandatory subject of bargaining before the parties reach impasse. *Kalkaska Co Rd Comm*, 29 MPER 64 (2016); *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 Section 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.

In this case, the Employer denies that it declared impasse at any point and also denies that it threatened to unilaterally terminate the Plan. Employer Attorney Pecor's September 1, 2015, letter to the Union stated that the "parties appear to have reached an impasse." Pecor also told the Union that by refusing to consider any resolution "that might involve retirement benefits beyond those of the current plan," the Union had "eliminated potential options that might allow The Rapid² to avoid termination of the existing plan." Varga's letter to the Union dated August 27, 2015, and his September 1, 2015, memo to employees also stated that if the Union did not change its position on terminating and/or freezing the pension, the Employer would "be forced to consider" unilateral termination of the Plan. Pouget made the same point in his September meetings with employees. On this basis, the ALJ correctly found that these communications, taken together, essentially constituted a declaration that the parties had reached impasse and a threat to terminate the Plan if the Union did not change its position on the pension.

² "The Rapid" is another name for Interurban Transit Partnership.

As also noted by the ALJ, however, substantial evidence establishes that the parties were at impasse when these communications were made. On August 31, 2015, the parties were still far apart on the issue of wages. In addition to wages, eight other unresolved issues, including the overriding pension issue, remained and a mediator told the parties that he saw no purpose in scheduling further meetings until there were new proposals.

Although the Union proposed that employees begin contributing to the Plan in proposals made on August 17 and August 19, 2015, these proposals, on the basis of which employees would begin contributing small amounts toward the Plan, did not truly represent a substantial change in the Union's bargaining position. On this basis, the ALJ correctly concluded that, as of August 31, 2015, the parties had reached a good faith impasse in their contract negotiations. Since an employer is legally permitted to implement its last offer once impasse has been reached, its communications were simply an indication of its intent to do so, not a threat to employees in violation of PERA. *Waldron Area Schools* (no exceptions), 1996 MERC Lab Op 441, 447; *St Joseph County District Court* (no exceptions), 1998 MERC Lab Op 406. The Commission, therefore, agrees that it was not a violation of PERA for the Employer to threaten to unilaterally terminate the Plan if the Union did not change its position on terminating or freezing the Plan.

B. The Union did not Violate its Duty to Bargain in Good Faith.

In its exceptions, the Employer alleges that the Union committed an unfair labor practice by engaging in dilatory tactics designed to delay fact finding and frustrate the bargaining process and committed an unfair labor practice when it failed to participate in the fact finding procedure to the maximum extent necessary.

The Commission has consistently stated the importance of mediation and fact finding, indicating that the failure of the parties to utilize these services to the maximum extent necessary may be viewed as indicating a lack of good faith and be contrary to the intent and policies of PERA. *Buchanan Cty Sch 22* MPER 44 (2009); *Crestwood Sch Dist*, 1975 MERC Lab Op 609; *Cass Co Road Comm*, 1984 MERC Lab Op 306.

In the present case, the Employer points out that Local President RiChard Jackson deliberately delayed filing the fact finding petition after promising the Employer he would timely do so. According to the record, the petition filed by Jackson was not received by the Commission until February 25, 2015. Although the parties' Section 13(c) agreement required that a fact finding petition be filed with the Commission five months before the prior contract's expiration date of June 30, 2015, this was a requirement imposed by the Section 13(c) agreement, something over which we do not have jurisdiction, and not by PERA. See *City of Detroit (Fire Dep't)*, 1988 MERC Lab Op 561. Furthermore, if the Employer was dissatisfied with the Union's failure to promptly file the petition, the record does not establish why the Employer could not file the petition itself.

Additionally, neither party actually refused to participate in fact finding in the instant case. Both parties blame the other for the Union's absence, and the ALJ found that the evidence did not support a finding that the Union's request for postponement of the May 19, 2015 fact finding constituted a deliberate attempt to delay the fact finding or a violation of its duty to

bargain in good faith. As noted by the ALJ, the Employer's proposal to terminate or freeze the Pension Plan raised significant and complex issues with which the Union's bargaining team was arguably not prepared to deal. The Union may have better served its interests by hiring counsel with more pension expertise earlier in the negotiations. However, the Union did not realize that its counsel was not up to the task of presenting the Union's case on the pension to the fact finder until Jackson and the Union's counsel began their preparations for the fact finding shortly before the scheduled hearing date. According to Jackson's testimony, after this conversation he realized that the Union needed other counsel, and immediately engaged Burns and his law firm. Nothing in this record indicates that the decision to change counsel was merely a tactic to obtain a postponement of the fact finding hearing. Burns subsequently drafted the public response to the fact finder's recommendation and appeared at the bargaining table, and his law firm represents the Union in this unfair labor practice case. Moreover, if Burns was in fact hired on or about Saturday, May 16, 2015, he could not have prepared adequately for a fact finding with thirteen issues, including a complex pension issue, for a hearing the following Tuesday. On this basis, the ALJ correctly found that it was not a breach of the Union's duty to bargain in good faith for the Union to request that the fact finding hearing be postponed and that the Union's refusal to present evidence or arguments to the fact finder after its request was denied did not constitute a de facto refusal to participate in the fact finding. See *Buchanan Cty Sch 22 MPER 44* (2009).

The Employer also alleges the union committed an unfair labor practice by refusing to bargain over changes to the pension plan. The Employer relies on the line of cases confirming that an employer has a duty to bargain over pension benefits even if the pension plan is administered by an independent board. See e.g., *Detroit Police Officers Ass'n v City of Detroit*, 212 Mich App 383 (1995), *aff'd* 452 Mich 339 (1996).

In this case, however, the Union did not refuse to bargain over changes to the pension, but initially only took the position that termination of the Plan, or amendments to the Plan, required the approval of the joint pension committee. Taking this position did not constitute a refusal to bargain over the pension, especially as the Union also made it clear to the Employer that the Union itself was opposed to terminating the Plan because it believed that retaining the Plan in its current form was the best way to ensure the retirement security of its members. Ultimately, the Union made concessions regarding the pension issue. PERA does not require the parties to reach an agreement. It requires only that an honest, fair, good-faith attempt is made to do so. Hard bargaining regarding a significant issue does not necessarily constitute bargaining in bad faith and is permissible under PERA. *Michigan Federation of Teachers v Lake Michigan College*, 60 Mich App 747, 231 NW2d 538 (1975). The Commission, therefore, agrees with the ALJ that the union did not commit an unfair labor practice by initially refusing to bargain over changes to the pension plan.

In its exceptions, the Employer also contends that the Union engaged in regressive bargaining by reinstating proposals it had previously withdrawn and by making new proposals after fact finding. The Employer provides three examples of alleged regressive bargaining by the Union. Initially, in December 2014, the Employer proposed to modify the grievance procedure of the contract, Article 4.07, to provide that, if the Union did not pursue a grievance in a timely manner, the grievance would be considered withdrawn. The Union, on February 3, 2015, made a counter proposal on the basis of which the Employer's failure to respond in a timely fashion to a

grievance had the effect of automatically granting it. The Union, however, dropped its counterproposal the following day. Subsequent to this, the parties continued to discuss new language for Article 4.07.

On April 8, 2015, the Union made a package proposal that included a reworked Article 4.07 which incorporated some of the language that the Employer had proposed but also provided that the Employer's failure to timely respond to a grievance would automatically grant it. When the Employer rejected the package proposal, however, the Union immediately withdrew the proposal. The Union did not again propose that a failure by the Employer to comply with time limits would result in the automatic granting of the grievance.

The other two examples of alleged regressive bargaining relied upon by the Employer occurred on August 18, 2015 in the new offer that the Union presented after the fact finding award was issued. In its August 18 offer, the Union accepted the fact finder's recommendation that an employee's seniority terminate if the employee was not on an approved leave of absence and his or her certification or licensure was not renewed within 30 days of lapse. However, the proposal added language intended to codify the practice of notifying employees in writing 60 days before expiration that his or her licensure or certification was set to expire. The Union also accepted the fact finder's recommendation that Article 6.09 be modified to provide that assignments be up for bid if their pay time changed by more than one hour per week. However, it added the phrase, "from the top of seniority" to the provision. Although the Employer argued that this totally changed existing practice, there was nothing in the record to indicate whether the parties actually discussed this change or what it meant. Nonetheless, the Union had never accepted any proposal by the Employer regarding the issue, so its proposed modifications were not "regressive."

Making a contract proposal to the other party which is less favorable than a previous proposal is not per se evidence of bad faith bargaining. *Kalamazoo Public Schools*, 1977 MERC Lab Op 771. To the contrary, a party's conduct must be viewed in its totality, to determine whether the allegedly regressive proposals are a tactic to avoid reaching an agreement. *Alba Public Schools*, 1989 MERC Lab Op 823, 827; *City of Springfield*, 1999 MERC Lab Op 399; *Kalamazoo Public Schools*, 1977 MERC Lab Op 771. In the present case, the ALJ properly concluded that in none of the instances relied upon by the Employer did the Union present regressive proposals as a tactic to avoid reaching an agreement.

The Employer further argues, in its exceptions, that the Union unlawfully insisted on including an agency fee provision which would violate § 10(3) of PERA in the parties' interim successor agreement. In *Ionia Public Schools*, 28 MPER 58 (2014), the Commission noted that a party's insistence on including a prohibited subject of bargaining as a condition of reaching a successor agreement constitutes a violation of the duty to bargain in good faith. Unquestionably, it would have been unlawful for the Union to insist that the interim successor agreement contain an agency fee provision. In this case, however, the Union dropped its initial proposal to carry over the agency fee clause in the expiring agreement into the interim successor agreement after

the Employer objected.³ The parties then reached an agreement. Consequently, the ALJ properly found that the Union did not insist that the interim successor agreement include language made unlawful by Section 10(3) of PERA and that the Union did not violate its duty to bargain in good faith merely by presenting the Employer with an initial proposal that did so.

C. The Employer did not Violate Section 10(1)(a) with respect to the Leafletting Issue.

In her Decision and Recommended Order, ALJ Stern found that the Employer unlawfully interfered with its employees' exercise of their § 9 rights in violation of § 10(1)(a) of PERA, by prohibiting them from distributing leaflets concerning the contract dispute on the platform at the Central Station and by threatening them with discipline for doing so.

In interpreting PERA, the Michigan Supreme Court and the Commission look to federal precedent on analogous provisions of the National Labor Relations Act ("NLRA") for guidance. *Grandville Municipal Executive Ass'n v City of Grandville*, 453 Mich 428, 436, 553 NW2d 917 (1996) ("In construing the PERA, this Court frequently looks to the interpretation of analogous provisions of the NLRA by the federal courts"); *Gibraltar School District v Gibraltar MESPA-Transportation*, 443 Mich 326, 335, 505 NW2d 214, (1993) ("We have long recognized that Michigan's public employment relations act is modeled on the NLRA. Although not controlling, we look to federal precedents developed under the NLRA for guidance in our interpretation of the PERA") (internal citations omitted). Section 8(a)(1) of the NLRA makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 USC § 158(a)(1). This language mirrors the language found in § 10(1)(a) of PERA.

In interpreting § 7 and § 8(a)(1) of the National Labor Relations Act (NLRA), it is well settled that "[r]ules prohibiting distribution of literature are presumed valid unless they extend to activities during nonworking time and in nonworking areas." *St John's Hospital*, 222 NLRB 1150 (1976). The National Labor Relations Board (NLRB) has stated that an employer's prohibition against employee distribution in work areas at all times is presumptively valid. *Albert Einstein Medical Center*, 245 NLRB 140, 142 (1979); *Beverly Enterprises-Hawaii, Inc.*, 326 NLRB 335 (1998). Recognizing inherent differences between solicitations and distributions, the Board permits greater restrictions on § 7 distributions than on solicitations. "[S]olicitation, being oral in nature, impinges upon the employer's interests only to the extent that it occurs on working time, whereas distribution of literature, because it carries the potential of littering the employer's premises, raises a hazard to production whether it occurs on working time or nonworking time." *Stoddard-Quirk Mfg Co*, 138 NLRB 615, 619 (1962). Thus, while a no-solicitation rule generally must be limited to working time, a no-distribution rule may properly extend to working areas even on non-working time. *Eastex Inc.*, 215 NLRB 271, 274-275 (1974), *enfd.* 550 F2d 198 (5th Cir 1977), *affd.* 437 US 556 (1978); *Beverly Enterprises-Hawaii, Inc.*, 326 NLRB 335, 336 (1998).

³ On June 26, 2015, the Union offered a second draft interim successor agreement that stated, "The parties agree that nothing in this Interim Successor Agreement shall require employees to pay dues or fees as a condition of working for ITP."

Additionally, the NLRB has repeatedly held that a retail establishment has the privilege of prohibiting all solicitation within the selling areas of the establishment during both working and non-working hours. *May Department Stores Co*, 59 NLRB 976, 981 (1944) (“However, we do see reasonable ground for prohibiting union solicitation at all times on the selling floor. Even though both the solicitor and the person being solicited are on their lunch hour, for example, the solicitation, if carried on the selling floor, where customers are normally present, might conceivably be disruptive of the respondent's business.”); *Bonwit Teller, Inc v Nat'l Labor Relations Bd*, 197 F2d 640, 645 (2d Cir 1952). Similarly, in *Pikeville United Methodist Hospital v United Steelworkers*, 109 F3d 1146, 1157 (6th Cir 1997), the Court of Appeals for the Sixth Circuit found that the employer could prohibit employee hand billing at the front entrance of a hospital because patients were dropped off there and the entrance therefore constituted a “work area.”

In support of her decision, the ALJ relied upon *Marysville Pub Schs*, 1982 MERC Lab Op 513, 521. In *Marysville*, the Commission held that teachers in a public school district were engaged in activity protected by the Act when they posted signs relating to an ongoing bargaining dispute on their cars parked in the school's parking lots. The Commission rejected the Employer's argument that it had the right to prohibit its private property from being used in this manner and held that the employer was required to show special circumstances indicating that the restriction was necessary for the maintenance of safety, efficiency or discipline. The Commission concluded in *Marysville* that the employer had failed to establish that the restriction on the bumper stickers and signs on cars in the parking lot was necessary. It also noted that there was no showing that the employer had ever attempted to prohibit employees from parking cars in the lot that had signs or bumpers stickers relating to other matters, no matter how controversial.

In response to the ALJ's reliance upon *Marysville*, the Employer notes in its brief, that there was no dispute in *Marysville* that the parking lots were not work areas and cites *Huron School Dist*, 1990 MERC Lab Op 628, in which the Commission held that a school district could prohibit teachers from wearing union T-shirts in their classrooms. In *Huron School Dist*, the Commission noted that “[u]nlike *Marysville*, the T-shirts in this case were worn in working areas, the teachers' classrooms, and students were clearly exposed to the message.”

The Employer also argues that it was entitled to bar employees from leafletting on the Central station platform because it has a well-publicized and longstanding policy prohibiting soliciting at the Central Station, on its buses, and at bus stops. This policy is posted at the Central Station and also printed in the Employer's Policies and Procedures Handbook. The Employer asserts that anyone, including members of the public and employees, whether on or off duty, is prohibited by this policy from soliciting on the Central Station platform. The Employer notes that employees may distribute leaflets and solicit in the parking lots located to the north and south of Central Station as well as on the sidewalks located across the street from Central Station on the west side.⁴

A central question presented by this case is whether the Central station platform is a work area or a non-work area. At Page 25 of her Decision, the ALJ notes:

⁴ ATU Representative Agriesti did not dispute this at the hearing but testified that “most of the people there [the parking lots and sidewalks] are unresponsive.”

Central Station is where most of the Employer's customers transfer from one bus line to another. The peak periods are before and after school hours, since the majority of high school students in the City use the Central Station as a transfer point. During those periods, customers line up across the Central Station platform waiting to board buses. Many of the Employer's drivers start and/or end their shifts at the Central Station.

In the present case, the Commission believes that, unlike *Marysville*, the Central Station platform, where many operators start or end their shifts, is a work area and that the Employer has a well-publicized and longstanding policy prohibiting any employee soliciting at the Central Station.

Additionally, activities performed on the platform at the Employer's Central Station are integral to the station's main function and solicitation or distribution, if carried on in this area in which customers are normally present, could conceivably be disruptive of the respondent's business. Consequently, the Commission finds that the platform at Central Station is a work area akin to the selling areas involved in cases interpreting § 7 and § 8(a)(1) of the NLRA. The Employer therefore is privileged to prohibit all solicitation within the area during both working and non-working hours.

In rejecting the Employer's reliance on its policy prohibiting soliciting at the Central Station, the ALJ found that the Employer disparately enforced its no-solicitation policy. Both Local President Jackson and Operator DeShane, testified to a number of instances in which non-employees engaged in "solicitation" on the platform. These non-employees included Jehovah's Witnesses and/or Mormons waiting to get on a bus, supporters of a ballot initiative, political candidates, organizers of the A. Phillip Randolph Voter Registration Drive and Girl Scouts (the record does not make it clear which, if any, of the instances involved distribution of literature). Nonetheless, the testimony of the Union's witnesses did not establish that any management official permitted or even had knowledge of the solicitation. According to the Employer, the instances of solicitation on the platform which the witnesses described, other than a 2008 voter registration drive, took place without the knowledge or approval of the Employer. Furthermore, with respect to the 2008 voter registration drive, Employer Witness Kalczuk testified that voter registration organizers were told that they were "not to go out and ask people if they want to sign up...people need to come to them as opposed to them going out and seeking participants."

Although the ALJ found that the evidence established that the "solicitation was not brought to the attention of Employer CEO Varga, COO Pouget, or External Relations Manager Kalczuk," the ALJ also noted that the Employer has surveillance cameras on the Central Station platform and that these cameras are monitored 24 hours per day by security guards employed by a third party contractor. The Commission, however, does not believe that the existence of the surveillance cameras is sufficient to impute knowledge of the alleged solicitation to the Employer. Operator DeShane, in fact, admitted that he was not certain whether the security cameras would have picked up any solicitation and there is no evidence that the Employer was ever advised that the alleged non-employee solicitation was taking place. The record, therefore,

is not sufficient to establish Employer knowledge or approval of the alleged solicitation or disparate enforcement of the Employer's no-solicitation policy.

Moreover, even if the Employer had knowledge of some of the instances of solicitation alleged by the Union, such knowledge would not bar it from enforcing its facially valid no solicitation policy. In *Hammary Manufacturing Corp.*, 265 NLRB 57, note 4 (1982), the NLRB found an employee no-solicitation rule to be lawful even though that rule, on its face, made an exception for solicitations by the United Way campaign:

The Board and the courts consistently have held that an employer does not violate Sec. 8(a)(1) by permitting a small number of isolated "beneficent acts" as narrow exceptions to a no-solicitation rule. See, e.g., *Serv-Air, Inc. v. N.L.R.B.*, 395 F.2d 557 (10th Cir. 1968), on remand 175 NLRB 801 (1969); *Emerson Electric Co., U.S. Electrical Motors Division*, 187 NLRB 294 (1970).

Similarly, in *Cleveland Real Estate Partners v NLRB*, 95 F3d 457 (6th Cir.1996), the Court held that it was permissible for the owner of a private retail shopping mall to preclude union representatives from distributing handbills directed at shoppers in order to discourage them from patronizing non-union retailers, even though the owner permitted hand billing and solicitation by the Girl Scouts, the Knights of Columbus, political candidates, and school children selling candy, among others. The Court found that "[n]o relevant labor policies are advanced by requiring employers to prohibit charitable solicitations in order to preserve the right to exclude nonemployee distribution of union literature when access to the target audience is otherwise available."

In the instant case, no relevant labor policies are advanced by requiring an employer to prohibit charitable solicitations in order to preserve its right to exclude distribution of union literature. An employer that permits a charitable organization to distribute information or conduct solicitations on its property simply does not implicate the policies of PERA. See *Cleveland Real Estate Partners*. Consequently, even if certain beneficent organizations were allowed to solicit on the Central Station platform in the past, such would not be sufficient to establish unlawful disparate enforcement of the Employer's policy or to preclude the Employer from enforcing the policy. See also *Seng Co*, 210 NLRB 936 (1974).

Consequently, the Commission finds that the ALJ improperly concluded that the Employer interfered with the § 9 rights of its employees and violated § 10(1)(a) of PERA by banning the employees from leafletting to publicize the parties' contract dispute on the platform of the Employer's Central Station and improperly held that the Employer violated § 10(1)(a) of PERA by threatening employees RiChard Jackson and Louis DeShane with discipline for distributing leaflets on the platform in late July or early August 2015.

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

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **INTERURBAN TRANSIT PARTNERSHIP** 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 promulgate or enforce a rule prohibiting employees, under any and all circumstances, from distributing leaflets or other materials concerning wages, hours or working conditions or ongoing bargaining disputes on the platform of the Employer’s Central Station.

WE WILL NOT threaten employees with discipline for engaging in reasonable and nondisruptive activities to publicize the dispute between the Employer and the Amalgamated Transit Union on the platform of the Central Station.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 9 of PERA.

INTERURBAN TRANSIT PARTNERSHIP

By: _____

Title: _____

Date: _____

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 Nos. C15 H-105 and CU15 I-02

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION**

In the Matter of:

INTERURBAN TRANSIT PARTNERSHIP,

Public Employer-Respondent in Case No. C15 H-105/Docket No. 15-047304-MERC,
Charging Party in Case No. CU15 I-025/Docket No. 15-052496-MERC,

-and-

AMALGAMATED TRANSIT UNION LOCAL 836,

Labor Organization-Respondent in Case No. CU15 I-025/Docket No. 15-052496-MERC,
Charging Party in Case No. C15 H-105/Docket No. 15-047304-MERC.

APPEARANCES:

Clark Hill PLC, by Marshall W. Grate and Grant T. Pecor, for the Public Employer

Jacob, Burns, Orlove and Hernandez, by Taylor Muzzy, for the Labor Organization

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 on September 24 and September 25, 2015, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including post-hearing briefs filed by the parties on November 25, 2015, I make the following findings of fact, conclusions of law, and recommended order.

I. The Unfair Labor Practice Charges and Summary:

The unfair labor practice charge in Case No. C15 H-105/Docket No. 15-047304-MERC was filed by the Amalgamated Transit Union, Local 836 (the Union) against the Interurban Transit Partnership (the Employer) on August 7, 2015. The charge was amended on September 9, 2015.⁵ The Employer provides transportation services, including but not limited to bus service, for six communities in the Grand Rapids, Michigan, area. It is governed by a Board

⁵ On January 16, 2016, the Union filed a second charge against the Employer, Case No. C16 A-004/16-001352-MERC. This charge was heard by me on April 13 and April 14, 2016, and a decision is pending.

made up of representatives of these municipalities. The Union represents a bargaining unit of between 315 and 320 nonsupervisory operators (drivers) and maintenance mechanics employed by the Employer. Since on or about December 9, 2014, the parties have been involved in negotiations for a successor to a collective bargaining agreement that covered the term May 7, 2012, through June 30, 2015. The Employer, as it was mandated to do as a condition of receiving financial assistance from the Federal Transit Administration, agreed to enter into an interim successor agreement for a period of sixty days, but rejected the Union's request for a longer interim agreement. The parties' interim successor agreement expired at midnight on August 31, 2015.

Although there are multiple unresolved issues, the most significant issue in the parties' negotiations is the future of the defined benefit pension plan (the Plan) that currently covers all unit employees. The Union alleges that the Employer violated its duty to bargain, first, by proposing to terminate the Plan and convert the actuarial value of any existing benefits into a lump sum payment to a defined contribution, or Section 457(b) plan, in violation of the terms of the Plan and the Internal Revenue Code. Second, it alleges that the Employer unlawfully engaged in direct bargaining with unit employees by informing them of the amounts each would receive in a lump sum payment to the defined contribution plan under the Employer's proposal. Third, the Union alleges that the Employer violated its duty by refusing to agree to postpone a scheduled fact finding hearing after the Union changed counsel unless the Union waived its right to the interim successor agreement mentioned in the paragraph above. When the Union did not accept this condition, the fact finder refused to postpone the hearing and the hearing was conducted without the Union's participation. Fourth, the Union alleges that the Employer violated its duty to bargain in good faith by declaring impasse prior to the parties having exhausted negotiations and by threatening to unilaterally terminate the pension plan. Fifth, the Union alleges that the Employer's communications with unit employees in September 2015 violated the Employer's duty to bargain in good faith because the Employer threatened in these communications to unilaterally terminate the Plan, because the Employer blatantly misrepresented its position and disparaged the Union, and because the Employer's purpose was to persuade unit employees to pressure the Union to accept the Employer's bargaining position. Sixth, the Union alleges that the Employer unlawfully altered terms and conditions of employment by ceasing dues deductions after the interim successor agreement expired on August 30, 2015.

In addition to its refusal to bargain allegations, the Union alleges that the Employer violated Section 10(1)(a) of PERA by threatening employees with discipline for passing out leaflets concerning the contract dispute on the platform at the Employer's Central Station.

On September 11, 2015, the Employer filed the charge in Case No. CU15 I-025/Docket No. 15-052496-MERC against the Union. The Employer alleges that the Union bargained in bad faith and engaged in surface bargaining by engaging in dilatory tactics designed to frustrate the bargaining process. These tactics include repeated efforts to delay fact finding and refusing to participate in the fact finding when the fact finder denied the Union's request for an adjournment. The Employer also alleges that the Union engaged in regressive bargaining by reinstating proposals it had previously withdrawn and by making new proposals after the fact finder issued his report. The Employer alleges that the Union "evaded its bargaining obligation"

over the pension plan by taking the position that only the Plan trustees, and not the Union itself, could agree to change the Plan. In addition, the Employer alleges that the Union unlawfully insisted on negotiating over an illegal subject when it insisted that the extension of the June 30, 2015, agreement through August 30, 2015, include an unlawful agency shop clause. The Employer also alleges that the Union violated its duty to bargain in good faith by issuing a public statement that included false and disparaging personal attacks against the Employer's chief negotiator.

For reasons set forth in the findings of fact and conclusions of law below, I conclude that the Employer interfered with the rights of its employees under Section 9 of PERA by prohibiting them from distributing leaflets regarding the contract dispute on the platform of the Employer's Central Station and by threatening employees with discipline for engaging in this conduct. I conclude, however, that neither the Employer nor the Union violated its duty to bargain in good faith during these very difficult negotiations.

II. Findings of Fact:

A. UMTA, the Parties' Section 13(c) Protective Agreement, and Impact on Bargaining

Like most other public transit providers, the Employer receives federal funding under the Federal Urban Mass Transit Act (UMTA). Section 13(c) of UMTA, 49 U.S.C. 5333(b), requires public transit providers, as a condition of receiving federal funding under that Act, to enter into so-called Protective Agreements with the unions representing their employees to protect the collective bargaining rights of the employees. Section 13(c) Protective Agreements must include certain terms and must be approved by the U.S. Department of Labor. On September 23, 1993, the Employer and the Union entered into a Section 13(c) Protective Agreement that, among other terms, required them to commence bargaining at least six months before the expiration of their contracts. The 1993 Section 13(c) Agreement also provided that if the parties were unable to negotiate a successor agreement, the parties would utilize the Commission's nonbinding fact finding procedure. The agreement enumerated the factors that the fact finder must consider in making findings of fact and recommendations for resolution of the dispute. The 1993 agreement also required a party, if it rejected all or part of the fact finder's recommendations, to publish its position and reasons for the rejection in the local media, along with the fact finder's findings of fact and recommendations for resolution of the dispute. Finally, the 1993 Section 13(c) Agreement included this language:

The terms and conditions of any expiring collective bargaining agreement between the parties shall remain in place following expiration of such agreement, unless otherwise mutually agreed in writing by the parties, until the effective date of a successor agreement between the parties, or the publication of the fact finder's findings of fact and recommendations, whichever is earlier.

In 2011, the Legislature added a new section, Section 15b, to PERA. Section 15b prohibits a public employer, after the expiration date of a collective bargaining agreement and until a successor collective bargaining agreement is in place, from paying and providing wages and benefits at levels and amounts that are greater than those in effect on the expiration date of

the collective bargaining agreement. “Expiration date” is defined in Section 15b as “the expiration date set forth in a collective bargaining agreement without regard to any agreement of the parties to extend or honor the collective bargaining agreement during pending negotiations for a successor collective bargaining agreement.” Section 15b explicitly requires the employees to pay any increases in the costs of their insurance benefits that occur in the interim between agreements. In response to this legislative change, and at the direction of the U.S. Department of Labor, the parties entered into a supplementary Section 13(c) agreement on November 2, 2011. The amended Section 13(c) agreement now includes this language:

(2) In the event a new collective bargaining agreement is not reached by five (5) months prior to the expiration date, the parties must agree to initiate procedures under applicable State Law and/or governing provisions of the applicable protective arrangement in order to resolve issues over the terms and conditions of employment that have not been settled by collective bargaining.

(3) In the event a new collective bargaining agreement to replace the extant collective bargaining agreement is not reached by mutual agreement through good faith negotiations by the parties and/or the completion of the procedures engaged in pursuant to Paragraph (2) above at least seven (7) days before the expiration of the extant collective bargaining agreement, the parties agree to enter into a successor collective bargaining agreement (“interim successor agreement”) which will include the terms and conditions of the expiring agreement in its entirety for a period of limited duration of at least sixty (60) days, but no more than one hundred twenty days (120), as specified by the parties. The duration of the interim successor agreement shall include sufficient time for the parties to complete negotiations over a new collective bargaining agreement to replace in full the extant collective bargaining agreement and any interim successor agreement. The parties agree to enter into interim successor agreements of limited duration, as necessary, until a new collective bargaining agreement incorporating mutually agreed upon revisions to the terms and conditions of employment contained in the extant agreement, or until a good faith impasse is reached. [Emphasis added].

As noted above, the Department of Labor required the Employer to enter into the 2011 supplementary agreement. The Employer objected to it at the time, and continues to object to it, as denying the Employer the right to exercise its “normal economic powers” after the expiration date of the contract.

The Employer has taken different positions in this proceeding regarding the relationship of the fact finding to its obligation under the amended Section 13(c) agreement to enter into an interim successor agreement. At one point, the Employer asserted that the sixty day period in subsection (3) began to run from the date that the fact finder issued his report and recommendations. The Union’s position is that the Section 13(c) agreement required the parties, because they had not reached a new agreement when their contract expired on June 30, 2015, to enter into an interim successor agreement extending the terms of that contract for at least sixty days from June 30, 2015, and that the date of the issuance of the fact finder’s report did not affect this obligation.

A. The Pension Plan and Plan Document

All employees in the Union's bargaining unit currently receive benefits under a defined benefit pension plan formally known as the "Interurban Transit Partnership and Amalgamated Transit Union Pension Plan." As the Plan document itself recites, the Plan was originally established in 1946 as the "Grand Rapids City Coach Lines, Inc., and Amalgamated Transit Union Pension Plan." Since that time, the Plan has been periodically amended. Effective July 1, 1992, after the Grand Rapids Area Transit Authority became the Plan Sponsor, the name of the Plan was changed to the Grand Rapids Area Transit Authority and Amalgamated Transit Union Pension Plan. The Plan received its current name after the Interurban Transit Partnership became the successor organization to the Grand Rapids Area Transit Authority on October 1, 2000, and became Plan Sponsor and Plan Administrator.

Under the Plan, the monthly retirement benefits of participants are calculated using a formula derived from the participant's years of benefit service multiplied by fixed dollar amounts set out in the Plan; the benefit does not increase with increases in compensation as in some plans. Article 10 of the Plan document provides that benefits under the Plan shall be paid in the form of a Single Life or Joint and 50% Survivor Annuity. Section 10.5 provides an exception for vested accrued benefits that do not exceed \$5,000, which may be made in a lump sum payment. Section 10.6 allows for rollover distributions to an eligible Section 457(b) Plan. Section 10.6 states, "If a Distributee receives an Eligible Rollover Distribution from the Plan, the following rules supersede any other provision in this Article." Per Section 10.6(d)(4), and under the Internal Revenue Code, a distribution in the form of a series of substantially equal periodic payments, e.g. an annuity, is not an eligible rollover distribution. As the Union interprets Article 10, the only type of distribution allowed by the Plan that can be rolled over to another qualified plan are the small lump sum payments of less than \$5,000 allowed under Article 10.5.⁶ Since the vested accrued benefits of most current Plan participants exceed \$5,000, in the event of termination the Employer, according to the Union, would be required by the language of the Plan to purchase annuities for those participants. This, in turn, would result in tax penalties. The Employer interprets Article 10 differently; it does not agree that Article 10 prohibits lump sum distributions over \$5,000 to a 457 Plan in the event the Plan is terminated.

Section 12.1 of the Plan creates a Joint Pension Committee, composed of two members appointed by the Employer and two members appointed by the Union. In the case of deadlock, Section 12.4 allows for the appointment of an impartial chairman to resolve the dispute. If the Employer and Union members of the Joint Pension Committee cannot agree on an impartial chairman, the chairman is to be chosen in the manner as specified in the collective bargaining agreement for choosing an arbitrator.

Section 13.1 states that the Plan Sponsor (the Employer) has established a Trust Fund with a Trustee to hold and invest all contributions to be made under the Plan. "Trustee" is

⁶ The Union does not, if I understand its argument correctly, assert that lump sum distributions made to a qualified Section 457 Plan would violate IRS rules or involve a tax penalty. Rather, it argues that the Plan, in its current form, does not permit such distributions above a certain sum.

defined in Article 2.49 as the “person and/or trust company designated as a trustee by Plan Sponsor pursuant to Article 13.”

Article 14 of the Plan Document is entitled “Plan Funding.” Section 14.1 states that effective July 1, 1984, participants are “neither required nor permitted to make contributions to the Trust Fund.” It also says, “Employer shall establish a funding policy and shall make contributions at least sufficient to meet the minimum requirements of the Code [sic]. In addition, the contributions shall satisfy the requirements of the Collective Bargaining agreement.” Under the expired 2012-2015 collective bargaining agreement, the Employer contributes \$1.00 per each hour worked per employee toward the pension plan.

Section 14.3 states:

The benefits of the Plan shall be provided from the assets of the Trust Fund. There shall be no liability or obligation on the part of the Employer to make any further contribution to Trustee in the event of the termination of the Plan at any time.

Article 16 of the Plan Document is entitled “Plan Amendment, Merger and Termination,” and includes the following language:

16.1 Amendment

Plan Sponsor reserves the right to amend the Plan at any time, without approval of the Union, in order to maintain the status of the Plan as a Qualified Plan. However, Plan Sponsor’s right to amend the Plan is otherwise subject to agreement with the Union . . .

16.3 Termination

The Plan shall terminate when the Collective Bargaining Agreement expires and is not renewed, or upon mutual agreement between the Employer and Union. However, any termination action must comply with the terms of the Plan, and the Trust Fund shall at all times be used only for the exclusive benefit of the Participants. In the event of the merger, consolidation, dissolution of discontinuance of business of Employer, the Plan shall terminate unless the Plan is continued by a successor employer.

If the Plan is terminated, the Accrued Benefit of each Participant as of the date of termination shall be fully vested and nonforfeitable to the extent funded. These benefits shall be paid in accordance with the provisions of Section 16.5. In no event shall a Participant have any recourse for satisfaction of his benefits other than from the Trust Fund (or portion of assets segregated pursuant to Section 16.4) or the PBGC. [Emphasis added]

. . .

16.5. Distribution Upon Termination

The assets of the Trust Fund, or the portion of the assets accounted for separately in accordance with Section 16.4, shall be allocated (after provision is made for the expenses of termination) to provide for the payment of benefits in an order of precedence that parallels those specified in Section 4044 of the Employee Retirement Security Act of 1974, as amended, and the rules and regulations issued by the Pension Benefit Guaranty Corporation.⁷

16.6 Method of Distribution

If the Plan is terminated, benefits shall be distributed to the Participants as soon as administratively feasible after the Internal Revenue Service has made a favorable determination that the Plan's termination does not affect its previously qualified status. Distributions shall be made in the forms described in Article 10 and shall be subject to the distribution rules of Article 10.

B. Bargaining Prior to Fact Finding

1. Wages and Pension

The parties began negotiations for a successor collective bargaining agreement on December 9, 2014. The Employer's chief negotiator was Grant Pecor, and the Union's bargaining team was headed by Union International Vice-President Gary Johnson. At the first session, the Employer presented a lengthy written proposal with twenty-six proposals; on January 26, 2015, it added five more for a total of thirty-one. The Union's proposal was also lengthy. Between December 9, 2014, and the fact finding hearing held on May 19, 2015, the parties held fifteen negotiation sessions, many with a state-appointed mediator. The Employer presented written proposals and/or responses to the Union's proposals on January 14, January 15, January 26, January 28, January 29, February 3, February 4, April 8, and May 7, 2015. The Union presented written proposals or responses to the Employer's proposals on January 15, January 26, January 28, January 29, February 3, February 4, April 8, and April 9, 2015. The Union also made an oral proposal on May 5. The parties reached tentative agreements on twenty issues and written tentative agreements were executed on January 15, January 26, January 28, January 29, February 3, and February 4. Both parties also withdrew proposals between December 9, 2014, and May 19, 2015. As of the date of the fact finding, however, there were still thirteen issues remaining in dispute.

The Employer's January 26, 2015, proposal included a one-time 1.5% wage increase for maintenance employees, plus reimbursement for the cost of obtaining certain certifications. It proposed a wage freeze for full and part-time operators but proposed to extend the 1.5% wage increase to them if the Union agreed to withdraw a pending rostering hours grievance (see Section II(C)(2) below) or waive the remedy. On January 29, 2015, the Employer proposed a 1.75% wage increase for the first year of the contract, a 1.5% increase for the second year, and a 1.5% increase for the third year, with the same terms. On February 3, the Employer raised its

⁷ These give preference to participants currently retired at the time of termination.

offer for the third year from 1.5% to 1.75% in the third year of the contract, and on February 5 raised its offer again to 2% the first year, 1.5% the second year, and 1.75% the third year of the contract.

The Union's January 26 proposal called for an across-the-board increase for both maintenance employees and operators of 6.5% for each year of a three year contract. On January 28, the Union dropped its proposal to 5% per year. On February 3, it agreed to lower it to 3.75% per year and agreed to withdraw the pending rostering grievance, and on February 4, it dropped its offer to 3.5% per year, again with an agreement to withdraw the pending grievance. In its last proposal made before fact finding, an oral proposal presented on May 5, the Union dropped its offer again, to 3.25% per year.

The Employer's January 26, 2015, proposal included this language:

(31) (NEW) Update Article XVIII (Pension) to eliminate current defined benefit plan and replace it with a defined contribution plan.

According to Pecor, the Employer proposal was motivated, in part, by complaints from employees including that they couldn't make contributions to the plan and it wasn't portable. Pecor testified, however, that the primary reasons for the Employer's decision to propose a move to a defined contribution plan was, first, the fact that the Plan's unfunded liabilities had been increasing at a substantial rate over the last three years, and, second, Board members' awareness that their own communities had already moved from defined benefit plans to defined contribution plans that removed from the employer the risk of investment loss. Finally, according to Employer Chief Operating Officer Brian Pouget, the Employer's Board was concerned about a change in accounting rules that now required the Employer to show the Plan's unfunded liability on its balance sheet.

At some point before the fact finding, the Employer gave the Union a copy of the most recent actuarial report for the Plan, which had been prepared as of July 1, 2014, for the Plan year ending June 30, 2015, and the parties discussed that report. According to that report, the unfunded actuarial liability of the Plan increased from \$2,176,515 in 2012-2013 to a projected \$2,662,973 in 2014-2015.⁸ The Employer pointed out that the increase was, in part, attributable to the fact that the 2014-2015 actuarial report was based on a lower assumed investment rate of return. However, it noted that, according to the actuary, actual rates of return has been even lower over the last several years. The report also included an "expected contribution" of \$549,120 for 2014-2015 based on an Employer contribution of \$1.00 times 40 hours per week per active employee. This was, according to the report, below the "low range contribution" which was based on a 30-year payment on the unfunded actuarial liability.⁹ As the Employer

⁸ As Union counsel and witness Joseph Burns pointed out at the hearing, this same report also indicates that the accrued benefit funded ratio of the Plan actually increased over this period from 78.5% to 80.4%. The apparent discrepancy was not raised by the Union until Burns became part of its bargaining team in the summer of 2015, and there is no explanation in the record for the discrepancy.

⁹ As Burns later pointed out, the Employer's actual contributions were regularly above the "expected contribution" because employees normally worked more than the assumed 40 hours per week. Thus, the Employer was paying more into the Plan than the report accounted for. This was another issue not raised by the Union until Burns became part of the bargaining team in the summer of 2015.

interpreted the report, if the Employer continued to contribute at its current rate, the Plan's unfunded liability would continue to grow. Pecor testified without contradiction that the Employer made it clear to the Union in the early stages of their negotiations that the very minimum that the Employer needed was to freeze the current Plan and move to a defined contribution plan so that the Employer's unfunded liability would not increase.

During the bargaining sessions held prior to the fact finding, the Union did not take issue with the Employer's interpretation of the actuarial report. However, it opposed the idea of either terminating the Plan or phasing it out. On February 4, 2015, the Union proposed to increase the Employer's contribution from \$1.00 per hour to \$1.10 per hour in the second year of the contract and to \$1.20 per hour in the third year. On April 8, it gave the Employer a written proposal that listed the pension issue as "Open." However, on April 9, the Union made a package proposal in which it offered to withdraw certain of its proposals in exchange for retaining the current language in the pension provision. Pecor testified, without contradiction, that the Union said at this point that the liabilities of the Plan were the Employer's problem.

On April 8, 2015, the Employer proposed to replace the current Article XVII with the following language:

The Authority agrees to contribute five percent (5%) of each employees' total compensation into employee's account under the Authority's established 457 plan.

The Employer's proposal also stated, "The Authority will convert the actuarial value of any existing benefits into a payment toward each employee's account under the Authority's established 457 plan." The five percent contribution was more, in dollar terms, than the Employer's current contribution to the Plan under the formula set out in the collective bargaining agreement, which was \$1.00 per employee hour worked.

At some point between April 8 and May 5, the Union asserted that the Employer's proposal to terminate the Plan and convert the actuarial value of existing benefits into lump sum payments was inconsistent with the Plan's language. It argued, as discussed in Section II(B) above, that upon termination of the Plan benefits had to be paid in the form of an annuity. It also argued that the Union had no right to agree to amend the Plan, and that only the joint pension committee could amend the Plan's terms.

On May 5, 2015, the Union asked for information on what the lump sum payouts would be for members under the Employer's proposal, the investment options in the 457 plan, and information about the Employer's contribution amounts under the proposal. On May 6, 2015, the parties, at the request of the Union, met with representatives of the firm that prepared the actuarial report and an individual from the firm administering the 457 plan.

On May 7, 2015, the parties' last meeting before the fact finding, the Employer presented a proposal which it labeled its final offer. The proposal contained the following pension language:

Union can take either of two options:

- (a) Terminate current defined benefit plan and replace it with a defined contribution plan. The Authority will convert the actuarial value of any existing benefits into a payment toward each employee's account under the Authority's 457 plan. Replace Article XVIII (Pension) with the following:

Article XVIII (Retirement Benefit)

The Authority agrees to contribute five percent (5%) of each employee's total compensation into employee's account under the Authority established 457 plan.

- (b) Freeze current plan so that no individual gains any additional years of service and replace Article XVIII (Pension) with the following:

Article XVIII (Retirement Benefit)

The Authority agrees to contribute five percent (5%) of each employee's total compensation into employee's account under the Authority established 457 plan.

The record does not indicate whether the parties discussed the Employer's proposal to freeze the Plan during the May 7 meeting.

2. Other Unresolved Bargaining Issues:

This section describes the other issues that remained unresolved at the time of the unfair labor practice hearing in September 2015 and the bargaining that took place on these issues prior to fact finding. First, on December 9, 2014, the Employer proposed to revise Section 4.06 of the contract, entitled "Authority of the Arbitrator" both to add language limiting the authority of the arbitrator and to provide for a bifurcated proceeding when the issue of arbitrability was raised. The Employer dropped its proposal to limit the authority of the arbitrator prior to the fact finding. At the time of the unfair labor practice hearing, the Employer was still proposing bifurcated arbitration proceedings while the Union's position was that the language in Section 4.06 should remain the same as in the expired contract.

Second, the Employer proposed on December 9, 2014, to revise Article 4.07 (Effect of Time Limits). In the 2012-2015 agreement, this section stated that if time limits at any stage of the grievance procedure were not followed, the Union would forfeit its case unless it obtained a time limit waiver. The new language proposed by the Employer eliminated the mention of a waiver and stated instead that a grievance not pursued in a timely fashion would be considered abandoned and withdrawn with prejudice. The proposal also included this sentence, "Grievances which are considered abandoned, withdrawn or settled shall be deemed no longer a grievance under the Grievance Procedure in this Agreement, and no one shall have any power to review the

grievance or issue any finding.” On December 9, the Union proposed to add the following to the current contract language, “The Authority’s failure to respond automatically grants the grievance.” On February 4, 2015, the Union stated in writing that it was dropping its proposal to amend Section 4.07. On April 8, 2015, the Union presented three proposals. Its first proposal on that date, made at 12:20 p.m., reiterated that it had withdrawn its proposal to amend Section 4.07. Forty-minutes later, however, it made a counter proposal on Section 4.07. The Union now proposed that most of Article 4.07 be replaced with new language stating that if either party did not follow the procedures or time periods in the grievance procedure, the grievance would be “resolved against the party in violation,” such that if the Union violated these requirements the grievance would be considered abandoned and if the Employer violated them, the grievance would be considered granted. The Union’s April 8, 2015 counterproposal was not accepted, and the Union’s third proposal, made at 4:30 pm, stated that it was withdrawn. All of the Union’s subsequent proposals were to retain the current contract language. In the Employer’s last proposal before fact finding, on May 7, 2015, the Employer eliminated the sentence stating that no one would have the power to review or make a finding on an abandoned, withdrawn or settled grievance. However, it continued to propose that the Section 4.07 provide that grievances not pursued in a timely fashion be considered abandoned and withdrawn.

Third, the Employer proposed on December 9, 2014, to add a new Section 4.11 to the grievance procedure that prohibited class action grievances unless expressly agreed to by the parties. On January 28, 2015, it modified its proposal to prohibit only class action grievances on disciplinary issues, unless agreed to in writing. This was the Employer’s proposal at the fact finding hearing. The Union consistently opposed the addition of the new section.

Fourth, on December 9, 2014, the Employer proposed to eliminate the requirement, in Section. 6.05 of the contract, that operators receive overtime after working eight hours per day, instead of forty hours per week. The Union rejected the proposal, and as of the date of the fact finding both parties maintained their positions.

Fifth, prior to the beginning of contract negotiations, a dispute had arisen between the parties over the meaning of contract language in Section 6.03 of the 2012-2015 agreement. This section stated, “The Authority guarantees forty hours of pay per workweek to Full-Time Operators with regular schedules provided they have no absences or late arrivals during that work week.” This specific language was new with the 2012-2015 contract. Because of the exigencies of scheduling, operators are frequently scheduled to work less than 40 hours per week. Under the contract language operators were guaranteed at least 40 hours of pay per week even if they were scheduled to work fewer than 40. The Union took the position that if an operator scheduled to work less than 40 hours then picked up extra work during the week, the operator should be paid his guarantee plus overtime for any time worked in excess of his or her scheduled hours. The Employer, however, asserted that under the contract language any premium pay for overtime should be figured into the guarantee. The Union filed a grievance. On December 9, 2014, the Employer proposed to change the language of Section 6.03 to clarify that it had no obligation to pay overtime for extra work under 40 hours per week; the Union insisted on retaining the language as written. As discussed above, in addition to proposing the language change, on January 26, 2015, the Employer made a proposal on wages tied to the Union’s agreement to drop the rostering grievance or waive the remedy. The Employer’s proposal at fact

finding was that the language be changed and the grievance dropped in exchange for the Employer's agreement to extend its wage offer to operators. As of the date of the fact finding, the Union's position was that the language of Section 6.03 should remain the same as in the expired agreement.

Sixth, Section 6.09 of the 2012-2015 contract stated that if the "pay time" of a run was changed by more than fifteen minutes, the run would become open for pick. On December 9, the Employer proposed to change the time from fifteen minutes to one-and-one-half hours. It also proposed, and the parties agreed, to change to a roster system where operators made one selection rather than five individual run selections. On February 3, 2015, the Employer altered its proposal to one-hour-and-fifteen minutes. On May 5, the Union made a counter proposal of forty-five minutes. These were the positions of the parties on the date of the fact finding.

Seventh, on December 9, 2014, the Employer proposed to add a new Section 8.06 (Loss of Seniority) stating that an employee's seniority and employment relationship would terminate for reasons set out in the section. The Employer modified its proposal during the negotiations and in its last proposal, on May 7, 2015, the only portion remaining in dispute was language providing that seniority would terminate for an employee who is not on an approved leave of absence whose certification or licensure is not renewed within 30 days after it lapsed. The Union's position, at the time of fact finding, was that the employees be given 45 rather than 30 days to renew.

Eighth, on December 9, 2014, the Employer proposed to increase the contractual limit in Section 19.02 on its right to employ part-time operators from fifteen percent to twenty-five percent of number of full-time operators. The Union countered on January 26 with a reduction to five percent, and then returned on January 28 to the current contract language. In February, the Employer lowered the limit in its proposal from twenty-five to twenty percent. When the Employer presented the Union with its final offer on May 7, 2015, the Employer proposal was a limit of twenty percent; the Union's position was that the limit remain at fifteen percent.

It was unclear from the record whether a ninth issue, a Union-proposed increase in the personal leave allowance, remained an open issue as of the date of the unfair labor practice hearing. The Employer proposed to retain the existing allowance. On April 9, 2015, the Union offered to withdraw this proposal if the Employer agreed to retain current contract language on days of work, overtime pay, number of part-timers allowed, and pension, but the Union's proposal was not accepted. The fact finder recommended retaining the status quo with respect to personal leave. The Union formally rejected his recommendation but did not raise the issue again in its post-fact finding proposals.

D. Communications with Employees about "Pension Buy-Out Numbers"

As indicated above, on or about May 5, 2015, the Union asked the Employer for information regarding what the lump sum payments would be under the Employer's proposal to terminate the plan. The Employer prepared two different spreadsheets listing the "lump sum

values” of employees’ accrued pension benefits.¹⁰ One spreadsheet, admitted as Employer Exhibit #44, was provided to the Union in a bargaining session on May 5, 2015. The second spreadsheet, admitted as Joint Exhibit #6, was provided to the Union by the Employer sometime between May 6, 2015, when the parties met jointly with the actuary and the Employer realized that some calculations had to be redone, and the date of the fact finding on May 19. Exhibit #6 was provided to the fact finder and admitted into the record at the fact finding hearing. For most of the employees, the lump sum values are the same on both spreadsheets. The principle difference appears to be that Exhibit #6 also includes a “vested lump sum value” for each employee; for some employees, this figure is zero, presumably because they had not yet become vested in the Plan. However, for some employees their accrued lump sum value is higher on Exhibit #44 than on Exhibit #6.

By the summer of 2015, members of the bargaining unit had heard that the Employer was proposing to terminate the Plan and convert the actuarial value of each employee’s benefit into a lump sum payment to a defined contribution plan. On July 31, 2015, Charging Party President RiChard Johnson was approached by an operator who told him that there has been some “scuttlebutt” about the Union providing wrong information on the pension buyout issue.¹¹ The operator told Johnson that Al Wiltse, an Employer human resources manager, had been giving employees different figures from those provided by the Union.

Wiltse and Jackson agree that Jackson called Wiltse and asked him if he was talking to employees about their “buyout numbers.” Jackson testified that Wiltse initially told him that he had talked to one employee, Thomas Hemily, but that he later called Jackson back and told him that he had forgotten that he had also spoken to a second operator, Steve Traudt. They agree that Jackson told him to stop giving out the pension numbers; according to Jackson, he told Wiltse that it was causing a rift in his membership. Jackson also left a voice message for Employer Chief Financial Officer Alan Hartley asking him to direct Wiltse to stop.

Wiltse testified that he provided two employees, Hemily and Traudt, with the accrued lump sum values for their pensions as calculated by the Employer. Wiltse testified he did not give lump sum values to any other unit employees, and there was no evidence to contradict this testimony. According to Wiltse (Traudt did not testify), he spoke to Traudt in late July or early August, which was before he spoke to Hemily. Traudt came to Wiltse’s office asked, “If they buy me out, how much will I get?” Wiltse then showed Traudt his figure from Exhibit #44. Traudt then said, “If that’s my number, I can only imagine what [another driver’s] would be.” Wiltse did not tell Traudt what that other driver’s amount was, but he did say it was generous. Although Wiltse was on the Employer’s bargaining team, he testified at the hearing that he was not sure whether he had ever been told that there was a revised spreadsheet. This appeared to be his explanation for why he did not show Traudt Exhibit #6 which, as indicated above, contained the Employer’s more recent calculations. In Traudt’s case, however, his lump sum values were the same on both Exhibit #6 and Exhibit #44.

¹⁰ It is not clear from the record whether these were the sums that the employees would actually receive in their 457 accounts, or whether the sums would be reduced to reflect the fact that the Plan was not fully funded.

¹¹ It is not clear from the record whether the Union had provided unit members with the information it had received from the Employer in May 2015, and, if so, in what form.

Sometime in August, Thomas Hemily went to the Employer's human resources department to ask about the Employer's proposed pension plan. Hemily told Wiltse that he was about to retire, that he had heard there was going to be a "buyout," and that he needed to have an idea of what he was going to get. Wiltse then showed Hemily his figure from what both agreed was Exhibit #44. Wiltse said, "It's really very generous." Wiltse told Hemily said that the figures were not absolutely rigid and that there could be some changes, but that this would give Hemily an idea.

Hemily was one of the few employees for whom the accrued lump sum value was higher on Exhibit #44 than on Exhibit #6. On Exhibit #44, his accrued lump sum value was approximately \$30,000 more than on Exhibit #6. Again, Wiltse's explanation for showing Hemily the figure from Exhibit #44 instead of the more current Exhibit #6 appears to be that Wiltse did not know that Exhibit #6 existed.

E. The Fact Finding and Fact Finder's Recommendations

As discussed above, the terms of the parties' 1993 Section 13(c) agreement, as amended in 2011, require the parties to initiate fact finding five months prior to expiration of the collective bargaining agreement, which in this case was June 30, 2015. At the hearing, Union President Jackson testified that he agreed to file a fact finding petition, and that he faxed it to the Commission on January 30, 2015. However, the fact finding petition was not time stamped as received by the Commission until February 25, 2015.

Thomas Gravelle was appointed by the Commission as a fact finder. According to a letter to the parties from Gravelle that was admitted into the record, on April 2, 2015, Gravelle scheduled a pre-hearing conference for April 16 and fact finding hearings for May 11 and May 12, 2015. At the April 16 pre-hearing conference, the Union requested a postponement of the hearing date because of a schedule conflict. The fact finder postponed the hearing for one week, or until May 18 and 19. On May 15, the Union's attorney sent an email to the Employer's counsel and chief bargaining representative, Grant Pecor, asking him to agree to a postponement of the fact finding "due to receipt of new information as well as a change in the employer's table position." In a telephone conference with the fact finder that day, the Union requested a two week postponement. The fact finder agreed, over Pecor's objection, that the hearing would begin on May 19 rather than May 18, and that the Union would be permitted to supplement the record with an actuary report which the Union said would take two weeks to obtain. Charging Party President Jackson testified that shortly before May 15, he had a conversation with the Union's counsel about preparations for the fact finding hearing, that after this conversation he lost confidence in the ability of the Union's counsel to handle the hearing, and that he immediately sought advice about hiring new counsel. On May 16, Gravelle and Pecor received an email from a new attorney, Joseph Burns, stating that he had just been asked by the Union to handle the fact finding. Burns requested a postponement so that he could prepare for the hearing, and asked Gravelle to schedule a conference call on Monday or Tuesday (May 16 was Saturday) to discuss alternate dates. Burns testified that he intended to request a two-week postponement, but did not mention a time period in his email. Pecor's email response stated, "This appears to be nothing more than another effort to obtain a forced extension of the parties' agreement." He stated that absent an agreement by the Union to allow the Employer to terminate the parties' agreement at

the conclusion of its initial term (i.e., to waive the requirement in the Section 13(c) agreement that the parties enter into an interim successor agreement), the Employer opposed any delay in the fact finding proceedings. In an email, Gravelle said that unless the parties mutually agreed to reschedule, the hearing would go forward on May 19. On May 18, Burns then sent Gravelle a letter/email protesting Gravelle's refusal to postpone the hearing. Burns told Gravelle that the Union's officers would be at the hearing on May 19 but would not be making statements or participating in any way without counsel.

Jackson and Brent Majors, the Union's financial secretary/treasurer, attended the May 19 fact finding hearing, but Burns did not. The Union did not present any evidence or argument at the hearing and did not file a post-hearing brief. The Employer filed a lengthy post-hearing brief in which it characterized the Plan as being "on a path to financial ruin due to its ever increasing unfunded liability." The Employer's brief also emphasized the increase in the dollar amount of the unfunded liability over a several year period, including an increase of \$353,003 from 2013-2014 to 2014-2015. The brief included other statements that were, according to Burns' testimony at the unfair labor practice hearing, misleading. For example, the Employer stated in its brief that the "accrued benefit funded ratio" of the Plan in 2014 was 51.8% but did not explain, as did the actuarial report, that this was an estimate of the Plan's liability in the event of a plan termination where each participant elected a lump sum form of distribution. In fact, according to Burns' testimony, the more accurate picture of the Plan's overall health, i.e., its probable ability to meet its future obligations, was the non-termination accrued benefit funded ratio of 80.4%.

Gravelle issued his report on June 26, 2015. Gravelle recommended that the parties adopt the Employer's proposal for bifurcated arbitration hearings when issues of arbitrability were raised. With respect to the Employer's proposal to amend Section 4.07 regarding the effect of a failure to comply with the grievance procedure time limits, Gravelle suggested new language for Article 4.02, 4.03 and 4.04 which he believed would better resolve the dispute. Gravelle also suggested different language for the Employer's proposed new Section 4.11, the "class action" grievance that prohibited disciplinary "class action" grievances without the agreement of the parties but which allowed the Union to request that multiple disciplinary grievances be consolidated for hearing. Gravelle recommended that the rostering grievance be withdrawn and that the Employer's offer of 2%, 1.5% and 1.75% wage increases for all employees be adopted. He recommended that the Employer's proposal to clarify the language of Section 6.03 be adopted, and that its proposal to eliminate overtime payments for days in excess of eight hours be adopted. He recommended that Section 6.09 be revised to provide that if the pay time of a roster was changed by more than one hour, the roster would become open for pick. He recommended that the parties agree to the Employer's proposal to increase the cap on part-time operators from 15% to 20%. He recommended adoption of the Employer's proposal to terminate the seniority of an employee not on an approved leave of absence whose certification or licensure was not renewed within 30 days of lapse, noting that it was the Employer's practice to notify an employee in writing 60 days prior to expiration that his or her certification was about to lapse.

On the pension issue, Gravelle first stated that, as he read the Plan, it could not be changed absent mutual agreement. He did not make a formal recommendation and instead made what he characterized as comments. One was that the Employer's pension contribution was

getting more and more expensive, leaving less money for other employee compensation. Another was that the Union's proposal to increase contributions to \$1.20 per hour meant that Employer contributions would increase by fifty percent since 2009. Gravelle did not mention the Employer's allegedly inaccurate assertion in its brief that the accrued benefit funded ratio of the Plan was 51.8%, but instead noted the increases in the dollar amount of the unfunded accrued liability over the past several years as set forth in the actuarial report. According to Gravelle, stated as a percentage, the Plan's unfunded accrued liability was 26% of the Plan's liability, which he found to be an alarming percentage. Gravelle commented that the Plan did not provide particularly lucrative benefits, and noted that the Employer was proposing to pay more in contributions to the proposed defined contribution plan than it had been paying in contributions to the Plan. He noted that comparable transportation systems also had defined contribution plans. Finally, he noted that the Employer's alternate proposal to freeze the Plan did not provide any additional funding of the Plan going forward, and that without Employer funding it would eventually become insolvent.

F. The Interim Successor Agreement

As discussed above, the parties' Section 13(c) agreement, as amended in 2011, requires the parties, if they have not reached a new contract within seven days of their contract's expiration date, to enter into an interim successor agreement of a duration not less than 60 or more than 120 days. The interim successor agreement is to include the terms and conditions of employment of the expired contract in their entirety.

The collective bargaining agreement that expired on June 30, 2015, was negotiated before the amendments to PERA that added "Right to Work" language to PERA, 2012 PA 349, MCL 423.210. That agreement contained language requiring employees to pay dues or agency fees as a condition of employment. Section 10(3) and 10(3), which was added to PERA by 2012 PA 349, prohibits such agreements, but allows agency fee agreements entered into before the effective date of the 2012 PA 349 to be enforced. The parties here recognized that they were obligated to remove the agency fee requirement from their contract, and in February 2015 reached tentative agreement on language for their new contract to replace the agency shop language in the 2012-2015 agreement.

On June 22, 2015, the Employer emailed the Union a one-page draft interim successor agreement with an expiration date of midnight on August 29, 2015. The draft interim successor agreement stated that the parties agreed that "Article II, Section 2.02 (Agency Shop) shall no longer apply as it would be in violation of Michigan law." The Union responded the next day with its own one-page draft interim successor agreement. The expiration date of the Union's proposed agreement was midnight on October 28, 2015, and its proposed agreement stated that the "terms and conditions of this Interim Successor Agreement will be the same as those of the parties' expiring Collective Bargaining Agreement in place on June 30, 2015." The Employer responded later that day with an email stating that the Employer would not enforce the agency fee clause after June 30, 2015, and "if the Union attempts to do anything that would extend the current agreement beyond that day, the Rapid will pursue an unfair labor practice against the Union," and seek sanctions for attorneys' fees.

On June 26, 2015, the Union offered a second draft interim successor agreement. The second draft, like the first, extended the agreement until midnight on October 28, 2015. However, this draft stated, “The parties agree that nothing in this Interim Successor Agreement shall require employees to pay dues or fees as a condition of working for ITP.” In an exchange of emails that day, the Employer said that it would not agree to any interim agreement longer than sixty days. The Union responded with a proposal to extend the agreement for ninety days, to September 30, 2016, noting that the next scheduled bargaining date was July 24. The Employer replied that the interim agreement should also reflect the fact that employees would no longer be required to maintain membership in the Union. It also reiterated that it would not agree to an interim agreement of longer than sixty days, and noted that it had offered earlier dates for bargaining. The Union responded that the Employer’s proposed language said nothing about not requiring employees to maintain their membership in the Union, and that the Employer’s refusal to extend the agreement beyond sixty days raised the suspicion that the Employer intended only to engage in surface bargaining so that it could proceed to implement changes in terms and conditions. On Sunday, June 28, the Employer responded with another proposed interim successor agreement that stated that the agency shop clause would be replaced with the language that the parties’ had tentatively agreed to for their new contract. The Employer’s email also included the following paragraphs:

As for the duration of any extension agreement, any argument that the ITP is not bargaining in good faith because it refuses to give the Union a longer extension agreement is completely without merit. Indeed, if not for the Union’s prior attempt to extort the agreement by challenging the ITP’s receipt of funding, the ITP would have NO OBLIGATION to extend the parties agreement beyond Tuesday. As such, it should come as no surprise to your Union that the ITP now refuses to enter into anything longer than the minimum agreement required. Indeed, given that the Fact finder issued his Report and Recommendation this past Friday . . . there is a strong argument that the IPT is not even required to offer a successor agreement for as long as it has. However, since the current duration was already offered, the ITP will not revise its offer now.

Nevertheless, I will again STRONGLY urge you to sign and return the attached version of the Interim Successor Agreement as soon as you are able to do so. As it stands currently, the parties will have NO AGREEMENT to arbitrate grievances or for the deduction of dues from employee wages beyond June 30, 2015. As such, if the Union wants to continue agreements in these areas, it needs to enter into an interim successor agreement. Otherwise, its refusal to do so could have a significant impact on its rights going forward.

On June 30, 2015, the parties executed the interim successor agreement as proposed by the Employer on June 28.

G. Bargaining After Issuance of Fact Finder’s Report and Union’s Public Statement

On July 6, 2015, the Employer issued a statement accepting the fact finder’s recommendations in their entirety. With respect to the pension issue, the Employer stated that it

continued to believe that the current pension plan should be amended and replaced with a defined contribution plan. It also stated that it disagreed with Gravelle that the Plan could not be changed absent mutual agreement and that under Section 16.1 of the Plan, the Employer, as Plan Sponsor, had the right to make changes to the Plan without the Union's approval.

On July 6, 2015, the Union issued a lengthy public statement rejecting Gravelle's recommendations for all but the two issues for which Gravelle had recommended the Union's position. In this letter, which was drafted and signed by Burns, the Union said that the Employer's proposal to terminate the Plan violated the Internal Revenue Code because, under Article 10 of the Plan, payments to participants had to be made in the form of annuities which are not "eligible rollover distributions" under either the Code or the terms of the Plan. In addition to explaining its reasons for rejecting each recommendation, the statement severely criticized Gravelle's refusal to postpone the fact finding hearing and his decision to conduct the hearing without the Union's participation. In addition, the Union accused the Employer of refusing to agree to the postponement in order to avoid its obligations under the Section 13(c) agreement and in order to unilaterally implement the terms of a new agreement at the first opportunity. It characterized the behavior of the Employer's counsel, Grant Pecor, in refusing to agree to the postponement as "uncivil, sanctimonious, strategic, and [in] bad faith." It also said that Pecor was "without shame" for accusing the Union of trying to "extort" the Employer by holding it responsible for its obligations under the Section 13(c) agreement, and in turn "extorting" the Union by refusing to agree to postpone the hearing. The Union also said that Pecor was "apparently not concerned whether his disgraceful and unprofessional posturing in emails is in the public's best interest."

In its statement, the Union suggested that the Employer's proposed second pension option, freezing the participants' years of service and directing the Employer contributions into the 457 plan, was likely made only because "the Company finally noticed that it would be a violation of the Internal Revenue Code for the Company to terminate the Plan and make a lump sum payment of the actuarial value into a defined contribution plan." It also noted that the proposal to freeze the Plan was not made until the last bargaining session before fact finding. In the statement, drafted and signed by Burns, the Union explained what it perceived to be misinformation in the Employer's arguments to Gravelle about the pension plan. The Union also asserted that the Employer's proposal to freeze the defined benefit plan was poorly thought out because freezing the Plan would not reduce liabilities already accrued, and the Employer would continue to bear the risk of funding these liabilities.

Between the issuance of the fact finder's report and the hearing in the instant case on September 23 and September 25, 2015, the parties met four times: August 17, August 18, August 19, and August 31.

On August 17, 2015, the Union made a new proposal in which accepted some of Gravelle's recommendations, in addition to those it had accepted on July 6. It rejected Gravelle's recommendations on the effect of failure to follow grievance time limits, on bifurcated arbitration hearings, on class action grievances, on overtime after eight hours, and on

modifications to/clarification of the language of Article 6.03.¹² The Union presented new proposals on Section 6.09 and Section 19.02. For Section 6.09, roster changes, the Union proposed that the roster would be up for pick if its pay time was changed by either more than 20 minutes per day or more than 1 hour per week. On Section 19.02, the number of part-time employees permitted, the Union proposed to allow the Employer to increase the number of part-timers to 20% as it had proposed, but only when there was a minimum of 264 operators with full-time status. The Union continued to propose wage increases of 3.5% per year.

Pecor testified that when the Union refused to accept Gravelle's recommendation in their entirety, the Employer felt free to reject some of the recommendations it had previously accepted. The Employer also presented the Union with a new proposal on August 17. In this proposal, labeled "Revised Final Offer," the Employer withdrew its proposal to allow the award of attorney's fees to the Employer by the arbitrator if a grievance was found to be frivolous, and adopted Gravelle's suggestion that a roster be open for pick if changed by more than one hour. On the pension issue, the Employer continued to offer the Union the options of either terminating the defined benefit plan and replacing it with a defined contribution plan or freezing the current plan so that no employee gained any additional service credits. However, in response to the Union's assertion in its post-fact finding statement that the distribution of lump sum amounts would violated the IRS Code, the Employer substituted, "The impact of the plan termination will be subject to negotiation" for its previous proposal to make lump sum distributions from the terminated Plan into the into the defined contribution plan. The Employer's proposal, for both pension options, continued to be that going forward the Employer would contribute 5% of each employees' total compensation into the defined contribution plan. That is, the Employer did not include in its August 17 proposal any additional funding to reduce the unfunded liabilities of the Plan if the Union agreed to freeze it. According to Pecor's testimony, the Union did not ask about additional funding and the parties did not discuss the issue. On all other issues, the Employer's revised final offer was the same as its May 7, 2015, final offer.

Burns attended the negotiations on August 17 on the Union's behalf. Burns has experience in employee benefits and, as he testified, "provides legal advice to the ATU as to how parties can work through the issues that they perceive stand in the way of having a successful defined benefit plan." At the August 17, 2015 meeting, Burns reiterated the objections he made in the Union's statement rejecting the fact finder's report about the Employer's pension arguments. Burns argued at this meeting that that the Plan was relatively healthy and, if the Employer maintained its current level of contributions, the Plan was on a path to reducing its unfunded liabilities over time. A representative from the firm that prepared the Plan's most recent actuarial report also attended this meeting, and the parties discussed the assumptions used in the actuarial report, including the assumption that 50% of employees would retire with an unreduced pension at age 62, the assumed investment return, and the currency of the mortality tables. They also discussed why the actuary had included plan termination liability values in the report; Burns asserted that he had never seen this in a Plan actuarial report and questioned why it was included. Union told the Employer on August 17 that it was prepared to make a pension

¹² Either at this meeting or shortly thereafter, the parties agreed to arbitrate the pending grievance over the meaning of this language. In November 2015, after the close of the hearing in this case but before the parties' filed their post-hearing briefs, an arbitration award was issued in which the arbitrator agreed with the Employer's interpretation.

proposal to reduce the Plan's unfunded liability, and the Employer said that as long as the proposal reduced the unfunded liability, the Union should go ahead.

Near the end of the day on August 17, the Union made the following oral proposal, which it presented to the Employer the following day in writing:

The Authority's pension contribution shall be increased to \$1.10 for each hour worked per employee effective the first payroll period after ratification/approval of both parties and to \$1.20 for each hour worked per employee effective September 1, 2016. In addition, all employees in full-time status, effective the first payroll period after ratification/approval of both parties, will contribute \$.10 for each hour worked and \$.20 effective September 1, 2015 for each hour worked. The Pension Plan will be amended, subject to the approval of the Pension Committee, to allow for employees contributions in accordance with the Internal Revenue Code including, but not limited to, a provision that employee contributions shall be 100% vested. There shall be no interest paid on any refunded employee contributions.

The parties will, in good faith, direct their representatives to have the Pension Committee arrange for an experience study to be performed by the Plan's actuary before September 15, 2015, at the Plan's expense, which will review the current assumptions relating to 50% of participants electing to retire at age 62 with 15 years of service, to separation rules, and to disability.

The Local agrees to pay for an actuarial study of the impact on the unfunded liability if contributions are increased in accordance with this proposal and of the impact if the unreduced early retirement provision is changed for new hires to age 62 with 20 years of service and for new hires for a (reduced) early retirement at age 62 with 15 years of service.

At the same time, the Union modified its proposal on Section 19.02 proposal to allow the Employer to increase the number of part-timers to 20% if the number of full-time operators reached 250, instead of 264.

Pecor testified, without contradiction, that the Employer told the Union that its proposed employee contributions were not close to being sufficient to address the unfunded liability. The Employer did some rough calculations and told the Union that, assuming that the Employer's contribution remained unchanged, employees would have to contribute between \$.80 and \$1.00 per hour to either stop the unfunded liability from increasing or decrease it. The Employer also refused to pay for the experience study. It told the Union that even if the early retirement assumptions in the current actuarial report overestimated the number of employees retiring at 62, this would be offset by the fact that the assumed expected investment return was still too high.

On August 18, the Union accepted the fact finder's recommendation, with respect to Article 6.09, that rosters be up for pick if their pay time changed by more than 1 hour per week. However, it added the phrase, "from the top of seniority." Pecor testified that he understood that

to mean that if the pay time of a roster changed by more than 1 hour per week, “the entire run selection would be redone.” That is, according to Pecor, when a run or roster was open for pick, only individuals who had not previously selected one would be able to select it. As Pecor understood the Union’s new proposal, any operator would now be able to select the roster, by seniority, triggering a series of new run selections whenever a roster was up for pick.¹³ It was not clear from the record whether this was, in fact, the Union’s intent or whether the parties even discussed the new proposal. The Union also accepted Gravelle’s recommendation that the parties adopt the Employer’s proposal that an employee’s seniority terminate if the employee was not on approved leave of absence and his or her certification or licensure was not renewed within 30 days of lapse. However, it added language codifying the Employer’s practice of notifying employees in writing 60 days before expiration that his or her licensure or certification is set to expire.

On August 19, 2015, the Union revised its August 17 pension proposal to increase the employee contribution to \$.15 per hour worked upon ratification of the agreement and \$.25 per hour worked effective September 1, 2016. The Union also stated that it would pay for an actuarial study of the impact on the unfunded liability of the proposed employee contribution and a change in eligibility for normal retirement for new hires from age 62 with 15 years of service to age 62 with 20 years of service and a change in eligibility for early retirement for new hires to age 60 with fifteen years of service. The Union also proposed to change the vesting requirement from five years to ten years for new hires. Finally, it lowered its wage offer to 3% from 3.5% per year.

Jackson testified that on August 19, the Union asked about the impact of terminating the Plan on employees who were planning to retire soon. According to Jackson, Pecor said that one particular employee would initially lose “25 percent of the value of that benefit.” Pecor did not recall discussing any individual’s particular situation. He did, however, recall going over the termination provisions of the pension plan and “describing how it paid out to the extent funded.” He admitted that that he told the Union that the pro rata portion would be about seventy-five percent.

After the revised final offer the Employer gave the Union on August 17, the Employer did not present another proposal. The parties’ agreed to extend the interim successor agreement, which was set to expire on August 29, through August 31.

On August 27, 2015, Employer Chief Executive Officer Peter Varga and the chairperson of the Employer’s Board, Barbara Holt, sent the Union a letter stating that the Employer did not want to terminate the existing defined benefit plan, but to address the unfunded liability associated with the existing plan. The letter stated, “In this regard, there should be no dispute that the parties’ most recent actuarial report shows that the plan is underfunded by more than \$2.6 million and is growing [sic] exponentially. Last year alone, that unfunded liability increased by more than \$350,000.” The letter said that in light of “the Union’s refusal to consider freezing the plan and/or any requirement for employee contributions to the existing plan at a level sufficient to eliminate the annual increases in unfunded liability means we are out of options that might

¹³ The contract, at Section 7.03, states that runs will be reopened for selection by seniority in April, August, and December each year.

save the existing plan.” The letter said that by refusing to consider options, the Union was making the choice to terminate the Plan, but that the Employer hoped that the Union would recognize that there were other options.

Burns responded with a lengthy letter which stated, among other things, that the unfunded liability was actually \$1.8 million to be paid over 25-30 years and that the funded ratio was over 80% and had been moving up in recent years. Burns also argued that freezing the plan was not an answer because reducing the flow of Employer contributions to the Plan would simply increase its unfunded liabilities over time.

The parties met again with a mediator on August 31. Neither party presented new proposals. The mediator told the parties that until there were new proposals he saw no purpose in scheduling further meetings.

On September 1, 2015, Pecor sent the Union a letter stating that the parties’ negotiations appeared to have completely broken down and that the parties appear to have reached an impasse. Pecor’s letter included the following:

I want to reiterate that the Rapids does not want to terminate the existing defined benefit plan. Rather The Rapids’ proposals are solely intended to address the long term financial impact of the unfunded liability associated with the existing union defined benefit plan and discussions regarding the plan’s termination have always emphasized that this would occur only if the Union did not allow for another option. In this regard, The Rapid’s preferred proposal actually increases the amount it is willing to invest in employee retirement benefits in exchange for the Union’s agreement to move its members to a defined contribution plan similar to those already in existence at other transit agencies throughout the State. Indeed, while my team does not believe employees would be willing to personally contribute sufficient monies to address the current annual growth of the liabilities involved (and, therefore, have not made such a proposal) we have gone so far as to outline strategies that would allow your members to keep their current plan. Despite these efforts, your Union has been unwilling to commit to more than a token contribution which would be woefully inadequate to address the liabilities involved. Moreover, you have completely refused to consider any option that would freeze existing benefits and/or consider any resolution that might involve retirement benefits beyond those of the current plan. As such, you have essentially eliminated potential options that might allow The Rapid to avoid termination of the existing plan.

The parties did not meet again to negotiate between August 31, 2015, and the hearing in this case on September 23.

H. Employer Communications with Employees in September 2015

The Employer’s Board held its regular meeting on August 27, 2015. A substantial number of union-represented employees spoke at this meeting regarding the Employer’s position

on the Plan. On September 1, the Employer Chief Operating Officer, Peter Varga sent a memo to all Union-represented employees which he characterized as an attempt to correct misinformation and misunderstandings. The memo also informed employees of the expiration of the interim successor agreement and that the Employer would no longer be deducting union dues from their paychecks as a result. The memo stated:

I want to again emphasize the no one in management wants or has proposed to terminate any employee's pension unilaterally. However, it is in the long term interests of both the communities we serve and our employees to manage the financial health of the agency to the best of our ability. When the existing pension plan's unfunded liabilities grew by over \$350,000 last year alone, we knew it had to be addressed. As such, the Board asked that we bring the issue to the attention of the Union through the bargaining process.

We prefer to freeze the existing plan and move employees to a different retirement benefit going forward. This would allow employees to keep the benefits you have already earned and earn additional benefits in another plan that offers some real advantages, including the ability to manage your investments directly, give more flexibility in withdrawal options, provide the opportunity to contribute additional funds into your account if you choose to do so, and offer a plan that is portable if you leave the agency prior to retirement.

We proposed increasing the amount we contribute to employee retirement by more than \$150,000 in exchange for this change. Unfortunately, your Union has refused to consider any option that would allow us to address the annual growth in liabilities currently associated with your plan. Without any meaningful give and take on this issue, the only option available to the Board is to consider termination of the plan. Let me be clear: we view this as the absolute last option but we must find a way to bring these costs under control. It is important for you to know that, even under that worst case scenario, employees' retirement benefits would not simply disappear. The plan itself provides direction on how existing funds would be distributed to retirees and employees if it were to terminate.

I also want you to know that the Board, the management team and I recognize that you have earned and deserve a wage increases, and our proposal contains the same increases approved for administrative staff and myself in the next fiscal year. However, until the parties finally reach an agreement, state law prevents us from increasing your wage. While I am personally not happy about this, we have no choice but to follow the law.

Between September 21 and September 23, 2015, the Employer held a series of group meetings for employees to communicate its position on the negotiations. There were eleven meetings in total. On a table at each meeting were copies of the fact finder's report, the Employer's August 17, 2015, written offer, the Union's August 19, 2015, written offer, and a health insurance cost spreadsheet. Each meeting was conducted by Employer Chief Operating Officer Brian Pouget, and at each meeting Pouget read from the same prepared script. The

Employer offered an outline of the script into evidence, and there was no testimony that Pouget departed from the outline at any of the meetings.

According to the script, Pouget told employees that the purpose of the meeting was merely informational, and that since they were represented by a Union the Employer could not bargain with anyone but the Union. Pouget mentioned the fact finding and suggested that employees take a copy of the fact finder's report which was on a table in the meeting room. Pouget told the employees that after the fact finding had been rescheduled twice at the request of the Union, the fact finder refused to reschedule the hearing a third time and that the Union then decided to boycott the hearing.

Pouget said that it was not true that the Employer was not offering a wage increase. Pouget said that the Employer did not want to take away anyone's pension, and that nothing had changed with the pension yet. He said, however, that the Plan was in the process of failing and needed to be revised. Pouget said that many people did not know that even if an employee worked for the Employer for thirty years, that employee would receive just over \$1,000 a month after retiring. He said that despite this, the plan was "around \$ 2.7 million dollars underfunded," and that this was because the Employer and Union had negotiated a contribution that was woefully short of what was actually needed. He said that in the previous year, the Employer had contributed \$1 per hour worked, which meant it paid just about \$550,000 to the Plan. Pouget said that the Employer had reviewed the plan and concluded the Plan was not a good plan, that the employees would not be willing to contribute the almost \$1 per hour it would take to "save this benefit," and that a 401(k) plan would provide better options. Puget stated that while a 401(k) plan shifted the risk to employees, in return for employees assuming some of the risk the Employer was willing to increase its yearly retirement contribution from \$550,000 to \$675,000 per year going forward, with these payments to be made to individual accounts. According to the script, Pouget said that the Employer "never wanted to take away benefits employees and retirees had already earned, but rather, wanted to freeze the plan so that retirees and employees would keep the years of service and benefits they had earned and so that individuals who had not vested would be able to vest even though they would not earn any additional years of service." He said that the Union had refused to agree to freeze the Plan, and instead focused on getting a new actuarial report which would "ignore the problem by changing the math used to determine the liabilities involved." Because the Union would not agree to freeze the Plan, Pouget said, "The only real option The Rapid has to address the growing liabilities associated with the Plan is to allow the Plan to terminate."

Finally, Pouget said that the Employer had not unilaterally ended negotiations, but that the State-appointed mediator told the parties that there was no further point in meeting; that paying dues was no longer required as a condition of employment and that the Employer would not collect dues on behalf of the Union while they were in this dispute; and that there was an increase in health insurance premiums coming in October, and that because there was no contract with the Union the Employer could not increase its contribution and employees would be required to pay 100% of the increase in premiums.

I. Leafletting at the Central Station and Threat to Discipline

The Employer's Central Station includes a two-block long platform surrounded on each side by six bus bays and covered by a canopy. From the photographs entered into the record, the platform appears to be slightly more than three car lengths wide. There is traffic access for buses all the way around the platform. The platform includes benches, a centrally located clock, several small trees and plants, and a kiosk where The Rapid Rules (see below) are posted behind glass. There is no advertising on the platform. Although the Employer has another, smaller hub at a mall in another part of Grand Rapids, Central Station is where most of the Employer's customers transfer from one bus line to another. The peak periods are before and after school hours, since the majority of high school students in the City use the Central Station as a transfer point. During those periods, customers line up across the Central Station platform waiting to board buses. Many of the Employer's drivers start and/or end their shifts at the Central Station.

The Employer employs a security manager, Mike Wierenga, and contracts with a third-party for the services of security guards. There are security cameras on the Central Station platform and other areas, and a security guard employed by the contractor monitors the cameras on a 24-hour basis. About 18 hours per day, another security guard conducts rounds on foot through the administrative offices, the public building, the platform, and the surrounding areas. During the after-school peak period, between two and four guards are stationed on the platform. At other times, and in the summer months, there is no guard stationed on the platform.

Immediately to the west and across a street from the northernmost section of the Central Station platform is a bus terminal. To the immediate south of the bus terminal is the Rapid Central Station itself. The first floor of the building is open to the public with restrooms, concessions and places to purchase tickets. There is also a waiting area and ticket information for Greyhound bus passengers. The Employer's public information and security offices, and the monitors for the security cameras, are also in this building. Further south, but still across the street from the platform, is the Ellsworth Building. The Ellsworth Building houses an employee breakroom and some administrative offices, including the offices of Employer CEO Varga. Varga has no view of the platform from his office.

A sidewalk runs alongside the bus terminal, public building and Ellsworth Building to the west of the platform. Private vehicles are banned from the access road around the perimeter of the platform. To the immediate north and south of the Station, beyond this perimeter area, are parking lots. The lot to the north is a public parking lot, while the one to south is an employee lot. South of the parking lot to the south of the platform is an Amtrak station. Pedestrians access the platform by crossing the access road from these parking lots or from public streets to the north, south and west of the platform. Access from the east is blocked by an expressway. Because the Central Station is a transfer point, some customers merely exit a bus and wait on the platform for another bus.

The Employer's Operations Center is a long city block to the west of the Ellsworth Building, and there are several other businesses along that block. The Operations Center houses the bus garages and maintenance operations. The Central Station platform cannot be seen from the Operations Center. Employer COO Brian Pouget's office is in the Operations Center.

The Employer has promulgated rules of conduct, known as “The Rapid Rules,” which apply to the Central Station, other bus shelters and bus stops, and the buses. The Rapid Rules, which are posted in the kiosk at the Central Station and included in bus schedules distributed to the public, specifically prohibit “loitering, panhandling, or soliciting,” and “panhandling, soliciting, harassing, annoying or intimidating any person.” The Rapid Rules also prohibit possession or use of alcohol or illegal substances, weapons of any kind, and eating, drinking or smoking on Employer buses.

The Employer has an employee handbook entitled “Policies and Procedures Handbook.” The rules in the current handbook were negotiated by the parties in 2008 or 2009 after the Union filed an unfair labor practice charge alleging that the Employer had unilaterally promulgated a previous version of the rules. The current handbook includes a chapter entitled “Customer Relations.” The Rapid Rules are reproduced in this chapter under the heading “Customer Rules,” and the handbook reiterates that the rules of conduct apply at the Rapid Central Station, on any Rapids vehicle or at any Rapid bus shelter or bus stop. The handbook also includes, in the chapter entitled “General Policies,” a policy prohibiting solicitation which reads, “In an effort to assure a productive and harmonious work environment, persons not employed by ITP may not solicit or distribute literature in the workplace at any time or any purpose, without prior approval of the immediate supervisor.” There is no separate policy in the handbook regarding solicitation or distribution by employees. However, the Employer asserts that its policy is to prohibit solicitation or distribution by employees in working areas, and that the platform of the Central Station is a working area for drivers.

Complaints of violations of the Rules occurring on the platform at Central Station are supposed to be reported to Jennifer Kalczuk, the Employer’s External Relations Manager. Kalczuk also receives all requests to hold events or distribute literature at the Central Station. Kalczuk testified that she has received, and denied, requests to distribute materials at Central Station, and she gave as an example a request by McDonald’s to distribute coupons on the platform. Kalczuk testified that she observed a former gubernatorial candidate, Mark Schauer, make a campaign stop on the platform while running for election, but testified that Schauer was gone before she could take any action. Kalczuk also testified that until the leafletting that led to this charge, she was not aware that employees of the Employer had distributed materials of any kind on the buses or at the Central Station at any time in the past. She did acknowledge that in the past an outside group requested, and was given, permission to conduct a voter registration drive on the platform. She also testified that the Employer has permitted blood drives to be conducted at the indoor waiting area at the Central Station.

Charging Party President Jackson testified that he has distributed literature on the platform of the Central Station on several occasions without receiving permission to do so, and observed others distributing literature there. He testified that during the 2012 presidential election, he and between 20 and 30 other individuals, including other employees, donned matching t-shirts, distributed campaign materials on the platform at Central Station, boarded buses and distributed the materials on the buses, and then returned to the Central Station without anyone asking them to stop. Jackson testified that in 2014, the Michigan branch of the A. Philip Randolph Institute, of which Jackson is a trustee, put up a voter registration table on the platform

at the Central Station and urged customers to register to vote. The Institute did not ask for permission to set up their table but, according to Jackson, no one asked them to leave. In 2014, Jackson distributed leaflets for Schauer during Schauer's campaign stop on the Station platform along with between 20 and 30 ATU representatives, wearing ATU t-shirts. As noted above, although Kalczuk observed the incident, Jackson was not told that he had engaged in improper conduct or threatened with discipline for this incident. According to Jackson, during this same election he witnessed other individuals distributing campaign materials for other candidates without anyone telling them to leave. Jackson also testified that in April 2015, the Union engaged in leafletting on the Central Station platform in support of a gas tax initiative that would have included increased funding for public transit. Jackson testified that the Union did not ask permission to leaflet, that security guards were present during the period he himself was leafletting, and that he was not asked or told to stop distributing leaflets. Finally, Jackson testified that tables with Girl Scout cookies for sale had been set up on the platform in the past. Another unit employee, Louis DeShane, testified that he had observed Jehovah's Witnesses passing out literature on the platform and had also seen individuals soliciting signatures for a marijuana ballot initiative. He testified that there were security guards on the platform while the individuals were soliciting signatures for the ballot initiative, but that they did not intervene.

Sometime in late July or early August, 2015, Jackson, DeShane, and a non-employee Union organizer stood on the platform at the Central Station platform and distributed leaflets to passengers about the contract dispute. The leaflet stated among other things, that Varga was demanding that "bus drivers, including retirees, give up their retirement security." It also gave a phone number to call and asked the callers to ask for Varga and "tell him to focus on improving service for riders, not robbing workers." The leaflet also asked the recipients to "like" the Union on Facebook. Jackson and DeShane were off-duty when distributing the leaflets and did not identify themselves as employees of the Employer. The Union did not ask permission to leaflet on the platform.

According to DeShane's testimony, he distributed leaflets on the Central Station platform for about two hours and left without anyone from the Employer speaking to him. It was not clear from the record whether Jackson was also leafletting during that period. Later that same day, DeShane returned to the platform and began leafletting again. During this latter period, DeShane was at one end of the platform and Jackson was at the other. After they had been leafletting for about an hour, Jackson received a phone call from Pouget. Pouget told him that he did not have permission to leaflet, that he was to stop, and that any employee participating in the leafletting would be disciplined. Pouget also told Jackson that he was sending Employer Security Manager Mike Wierenga to talk to DeShane and the non-employee organizer at the other end of the platform. After his conversation with Pouget, Jackson left the platform. DeShane was approached by Wierenga, who told him that he was not allowed to distribute the flier and that if he didn't stop the police would be called and he would be terminated. DeShane attempted to argue with Wierenga, telling him that he had a First Amendment right to be there. Wierenga then phoned Pouget, who told him to tell DeShane that he was going to be arrested and fired if he did not stop leafletting. DeShane then left the platform.

It is not clear from the record whether Jackson distributed leaflets again at the Central Station. DeShane, however, testified that he "snuck in" and leafletted on the platform at the

Central Station on about seven different occasions between early August and mid-September. On some of these occasions, DeShane leafletted for a period and then left. On other occasions, DeShane was told by a security guard that if he didn't leave, the police would be called. After arguing with the guard a bit, DeShane left. No police were called, and neither DeShane nor Jackson were disciplined as a result of their leafletting.

Jackson testified that he also distributed leaflets at the Employer's smaller hub, the Kentwood station, but it was not clear from the record whether this was before, after, or the same day, that he leafletted at the Central Station. Jackson, DeShane, other Union members, and members of the public also distributed the leaflets at other locations in the Grand Rapids area.

III. Discussion and Conclusions of Law:

A. Union's Bad Faith Bargaining Allegations

The Union alleges, first, that the Employer violated its duty to bargain in good faith by proposing to terminate the Plan and convert the actuarial value of existing benefits into lump sum payments to a defined contribution plan, in violation of the terms of the Plan and the Internal Revenue Code. According to the Union, the Employer either knew or should have known that its proposal was at least inconsistent with the terms of the Plan, as the Union took that position early in bargaining. The Union's argument, as I understand it, is that the Employer deliberately put a proposal that it knew to be patently unacceptable, and perhaps unworkable, on the table with the intention of forestalling agreement on a new contract.

I find, however, that by putting its proposal to terminate the Plan on the bargaining table, the Employer was clearly proposing that the parties agree, as part of their contract negotiations, to terminate the Plan. Section 16.3 of the Plan document provides that the Employer and Union may mutually agree to terminate the Plan, and the Employer was simply proposing that they agree to terminate. The Employer was also proposing, as I understand it, that the parties, or the members of the joint pension committee appointed by them, agree to amend the Plan as necessary to effectuate the rollover of accrued benefits upon termination. I note that the Union has not persuaded me that the Plan document, as written, clearly precludes the Plan from making eligible rollover distributions to an eligible 457 plan in the form of lump sum payments in the event of termination. Even if the Plan in fact precludes it, the Employer's contrary interpretation was not unreasonable. In any case, the Plan could clearly be amended to permit this, which was what the Employer proposed. It was only after the Union proved unwilling to agree to terminate the Plan that the issue of whether the Employer could unilaterally terminate the Plan was raised. Nothing in the record leads me to conclude that the Employer's proposal to terminate the Plan, or its alternate proposal to freeze it, was made in bad faith.

The Union also argues that the Employer engaged in unlawful direct dealing with unit members over its pension proposal by providing unit employees with their "pension buyout numbers." This refers to the fact that Employer Human Resources Representative Wiltse admittedly provided two bargaining unit members, Thomas Hemily and Steve Traudt, with the "lump sum values," which represented the amounts, or approximate amounts, that would be deposited into their 457 accounts in the event the Plan was terminated. The Union also asserts

that the statements made by Varga in his September 1, 2015, letter and by Pouget in his meetings with employees in September constituted unlawful direct bargaining.

An employer violates its duty to bargain in good faith when it bypasses the designated representative and attempt to negotiate directly with employees. The violation is premised on the theory that direct bargaining between an employer and its employees seriously undermines the authority of the union. *City of Dearborn*, 1986 MERC Lab Op 538, 541. An employer may not give to employees offers which have not been made to the bargaining agent in negotiations. *St. Clair County*, 1979 MERC Lab Op 541; *Birmingham Board of Education*, 1985 MERC Lab Op 755; *City of Pontiac (Police Dept)*, 1975 MERC Lab Op 861. As the National Labor Relations Board (NLRB) put it in a notable old case, *General Electric Co*, 150 NLRB 192 (1964), an employer's obligation is "to deal with the employees through the union, not with the union through the employees."

However, it is well established under Commission law that, under normal circumstances, an employer's communication to employees of bargaining proposals that have already been presented at the bargaining table does not constitute unlawful direct bargaining or circumvention of the lawful bargaining agent. This is the case even if the employer also asks its employees to give favorable consideration to its bargaining positions. *Grand Haven Schs*, 1973 MERC Lab Op 1; *Gull Lake Cmty Schs*, 1977 MERC Lab Op 716; *Garden City Pub Schs*, 1977 MERC Lab Op 600. In addition, the Commission has also held that it will not police "negotiation propaganda" for accuracy since the other party generally has an opportunity to rebut any misstatements. *Warren Consolidated Schs*, 1975 MERC Lab Op 129; *Melvindale-Northern Allen Park Pub Schs*, 1992 MERC Lab Op 400, 407.

In *General Electric*, the employer's bargaining tactics included taking a fixed position at the bargaining table and mounting a campaign to disparage and undermine the union, to persuade the employees to put pressure on the union to accept the employer's position, and to convince employees that the employer, rather than the union, was the true protector of their interests. *General Electric*, at 194. However, as the administrative law judge noted in *Bangor Twp Bd of Ed*, 1984 MERC Lab Op 274 (1984), the NLRB's conclusion that the employer violated its duty to bargain was based on the totality of the employer's conduct and not simply on the fact that it communicated its bargaining position to the employees. In *Jackson Co*, 18 MPER 22 (2005), cited by the Union in its brief, the Commission found that the employer bargained in bad faith when, after the union had rejected its last offer, the employer sent each unit member a letter that: (1) contained a personalized calculation of how much the unit member would receive in increased wages and retroactive pay under the employer's last offer, information that the employer had not provided to the union at the bargaining table; (2) disparaged the union's decision to invoke its statutory right to Act 312 interest arbitration, characterizing it as a waste of time and money and suggesting that the outcome would not be significantly different than if the union were to accept the employer's last offer. Cf. *Ferris State University*, 1998 MERC Lab Op 227 (no exceptions), in which a Commission ALJ held that the Employer did not engage in unlawful direct bargaining by sending out seventeen communications to bargaining unit members over a series of several months that provided information on the employer's proposal, reported on the status of bargaining, and responded to assertions made by the union in its own communications with its members. In both these cases, the Commission considered the totality

of the circumstances in determining whether the employer had crossed the line of permissible communication.

In this case, the Employer had previously provided the Union with the personalized information that Wiltse gave to Hemily and Traudt. The record established that the document Wiltse used to provide them with payout figures had been superseded by another document. In Hemily's case, the figure Wiltse gave him was higher than the figure in the Employer's most recent calculations. However, there was no evidence that Wiltse deliberately provided Hemily with inaccurate information, or that providing one unit member, out of approximately 320, with inaccurate information had any effect on the negotiations. In addition, both Hemily and Traudt came to Wiltse to ask for the information. There was no evidence that any Employer representative approached unit employees with offers to show them their accrued lump sum value amounts. Finally, despite the fact that Wiltse used the term "pension buyout" in conversations with the two men, there was no indication that Wiltse deliberately misled them about the effect of Employer's proposal, i.e., that the Employer proposed to give employees this money in the form of a check rather than a rollover into a 457 account. I conclude that Wiltse did not engage in unlawful direct bargaining with unit employees or attempt to circumvent the Union when he provided Hemily and Traudt with their "pension buyout" figures under the circumstances of this case.

Varga's September 1, 2015, memo to employees was sent immediately after the parties' interim successor agreement expired. This memo was clearly a response to statements about the Employer's pension proposals made by the Union and union members at the August 27, 2015, Board meeting and in leaflets distributed to the public. The Union argues that Varga's memo contained blatant misrepresentations, disparaged the Union, and attempted to persuade the employees to accept the Employer's pension proposal. According to the Union, Varga's claim that "no one in management wants or has proposed to terminate any employee's pension unilaterally," is a blatant misrepresentation of the Employer's proposal, since the Employer had proposed since the beginning of negotiations to terminate the Plan, and since Pecor had told the Union at the bargaining table that the Employer might have no choice but to terminate the Plan. Varga's statement treads a fine line between truth and falsehood; the Employer had certainly proposed to terminate the Plan, and it had also threatened to at least try and terminate the Plan unilaterally if the Union continued to take the position that Plan should be maintained in its current form. However, it is at least arguable that the Employer's proposal to transfer sums representing the employees' accrued benefits to a 457 plan was not "terminating their pension." Moreover, at least technically, the Employer had not "proposed" to unilaterally terminate the Plan. As noted above, the Commission does not generally police "negotiation propaganda," but leaves it to the parties themselves to correct misstatements made by the other.

I agree with the Union that, in explaining the Employer's position on the pension issue and the reasons for that position, Varga's memo also attempts to persuade employees that they should accept the Employer's pension proposal. However, an employer has a constitutional right to communicate with employees in a noncoercive manner as long as it does not engage in individual bargaining on mandatory subjects. *MEA v North Dearborn Heights Sch Dist*, 169 Mich App 39, 46 (1988). In this case, the information in Varga's September 1 memo accurately reflected the Employer's most recent position on the pension, as conveyed to the Union. This included the Employer's position that if the Union did not present a proposal which the

Employer considered adequate to address the growth in the Plan's unfunded liabilities, the Employer would "consider" termination of the Plan. The Union, of course, is correct when it notes that Varga's memo does not inform employees that a defined contribution plan would require them to assume all the risk of investment loss and does not tell employees that the Union had proposed instituting employee contributions, as well as increasing the Employer contribution, to address the Plan's unfunded liabilities. However, the Employer, in communicating the reasons for its position, was not required to explain the rationale for the Union's position. Finally, I disagree with the Union that the September 1 memo disparaged the Union when it asserted that the Union "had refused to consider any option that would allow us to address the annual growth in liabilities." As discussed below, while the Union disagreed, it was the Employer's stated position at the bargaining table that the Union's August 2015 pension proposals – which included a small employee contribution - would not have any significant effect on the Plan's unfunded liabilities.

In September 2015, Pouget held eleven meetings with employees to discuss the status of the negotiations. In each of these meetings, Pouget read from a script. The Union asserts that Pouget misrepresented the Employer's position when he said that the Employer "does not want to take away anyone's pension," and misrepresented the facts when he told the employees that the Plan "was in the process of failing." It claims that Pouget's statement that "the only real option the Rapid has to address the growing liabilities associated with the Plan is to allow the Plan to terminate," was both false and coercive. It maintains that Pouget disparaged the Union by accusing it of "not sharing our commitment to finding a fix to the growing unfunded liabilities involved," and by characterizing the Union's request that the parties obtain a new actuarial report as "trying to ignore the problem by changing the math used to determine the liabilities involved." Finally, the Union asserts that in these meetings, Pouget mentioned a proposal that it never made to the Union, i.e., that it would be willing to consider maintaining the Plan if employees contributed between \$.80 and \$1.00 per hour.

According to the record, Pouget's statement that the Employer did not "want to take away anyone's pension" was consistent with its last statement to the Union, which was that it preferred to freeze the Plan rather than terminate it. Whether the Plan was "in the process of failing" was an issue which the parties discussed at the August 17, 2015, meeting. It appears from the record here that the parties never reached agreement on whether the Plan's unfunded liabilities were increasing or decreasing, not to mention what it meant for the Plan to be "in the process of failing." The parties also disagreed in these meetings about whether a new actuarial report using different assumptions would significantly decrease the amount of the Plan's unfunded liabilities. While "changing the math" might not have fully described the parties' dispute over the usefulness of a new report, it was not wholly inaccurate. Pecor also testified, without contradiction, that in the August meetings the parties discussed what amount of employee contribution the Employer would consider adequate to address the Plan's unfunded liabilities, and that the Employer provided the \$.80 to \$1.00 per hour figure. According to Pecor, the Employer did not put a formal proposal on the table because, as Pouget said at the employee meetings, it considered this an unrealistic amount for employees to contribute. From the Employer's point of view, as it had previously told the Union, the Union had not made a proposal which "fixed" the problem of what it saw as the growing unfunded liabilities of the Plan. I find that the statements made by Pouget in the September 2015 employee meetings represented the Employer's position on the pension issues, as previously conveyed to the Union,

and were neither patently false nor disparaging to the Union. I conclude that neither Varga's September 1, 2015 memo to employees nor the statements made by Pouget in the meetings held with employees in September 2015 constituted lawful communications with the Employer's employees regarding the status of negotiations and the Employer's bargaining positions. I conclude that these communications did not amount to direct bargaining or an attempt to circumvent the bargaining agent.

The Union also alleges that the Employer violated its duty to bargain in good faith by ceasing dues deductions upon the expiration of the parties' interim agreement on August 31, 2015. The law is well settled that under Section 15 of PERA, a public employer may not take unilateral action on mandatory subjects prior to reaching an impasse in negotiations. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55. (1974). However, dues deduction is a well-established exception to this rule. The Commission has held that an employer may legally discontinue dues deduction after the expiration of the collective bargaining agreement, whether or not the parties are at impasse. *Waldron Area Schs*, 1997 MERC Lab Op 256, 261; *Gibraltar Sch Dist v Gibraltar MESPA-Transp*, 443 Mich 326 (1993). This exception was originally based on the NLRB's holding in *Bethlehem Steel*, 136 NLRB 1500 (1962). In *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015), and earlier in *WKYC-TV, Inc*, 359 NLRB No. 30 (2012), the NLRB overruled *Bethlehem Steel*, finding that a coherent explanation for the rule had never been provided. The NLRB's current position is that dues checkoff arrangements, like other terms and conditions of employment, survive the expiration of the parties' collective bargaining agreement. The Union argues that the Commission should overrule its own precedent and follow *Lincoln Lutheran* in this case. Federal precedent under the National Labor Relations Act (NLRA) is given weight in interpreting PERA, especially where PERA's language is identical to that of the NLRA. However, the Commission has held that it is not bound to follow "every turn and twist" of NLRB case law. *Kent County*, 21 MPER 61 (2008); *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 537. Until the Commission decides to follow the NLRB in repudiating its previous precedent, I am bound by that precedent. I conclude, therefore, that the Employer did not violate its duty to bargain by ceasing dues deduction after the expiration of the parties' interim successor agreement.

The Union's remaining allegations of bad faith bargaining are discussed in Sections III (C) and III (D) below.

B. Employer's Bad Faith Bargaining Allegations

The Employer alleges that the Union engaged in dilatory tactics designed to frustrate the bargaining process. More specifically, it asserts that the Union sought to delay fact finding and thereby force the Employer to enter into an interim successor agreement after the expiration of the contract, in accord with the Section 13(c) agreement. Among its claims is that Charging Party President RiChard Jackson deliberately delayed filing the fact finding petition after promising the Employer he would undertake this task. According to Commission records, the petition filed by Jackson was not received by the Commission until February 25, 2015. The parties' Section 13(c) agreement required that a fact finding petition be filed with the Commission if a new collective bargaining agreement was not reached by five months before the old contract's expiration date of June 30, 2015. However, if the parties were in fact required to file a fact finding petition before January 30, 2015, this was a requirement imposed by the Section 13(c)

agreement and not by PERA. I see no need to make a finding in this case as to whether Jackson, as he testified, actually faxed the fact finding petition to the Commission on January 30, 2015.

The Employer also alleges that the Union “evaded its bargaining obligation by hiding behind the joint pension committee.” That is, the Union took the position, at least during the pre-fact finding negotiations, that only the joint committee could amend the Plan. The Employer relies on the well-established line of cases confirming that an employer has a duty to bargain over pension benefits even if the pension plan is administered by an independent board. See e.g., *Detroit Police Officers Ass’n v City of Detroit*, 212 Mich App 383 (1995), *aff’d* 452 Mich 339 (1996). In this case, however, the Union did not refuse to bargain over changes to the pension, but merely took the position that termination of the Plan, or amendments to the Plan document, required the approval of the joint pension committee. Taking this position did not constitute a refusal to bargain over the pension, especially as the Union also made it clear to the Employer at the bargaining table that the Union itself was opposed to terminating the Plan because it believed that retaining the Plan in its current form was the best way to ensure the retirement security of its members.

The Employer alleges that the Union engaged in regressive bargaining by reinstating proposals it had previously withdrawn and by making new proposals after fact finding. Making a contract proposal which is less favorable to the other party than the previous proposal is not per se evidence of bad faith bargaining. *Kalamazoo Public Schools*, 1977 MERC Lab Op 771. A party's conduct must be viewed in its totality, to determine whether the allegedly regressive proposals are a tactic to avoid reaching a good faith agreement. *Alba Public Schools*, 1989 MERC Lab Op 823, 827; *City of Springfield*, 1999 MERC Lab Op 399. The Employer cites three examples of alleged regressive bargaining by the Union. First, in December 2014, the Employer proposed to modify Article 4.07 of the contract to make it clear that if the Union did not pursue a grievance in a timely manner, the grievance would be considered withdrawn. The Union, on February 3, 2015, made a counter proposal under which the Employer’s failure to respond in a timely fashion to a grievance had the effect of automatically granting it. However, the Union dropped its counterproposal the following day. The parties, however, continued to discuss new language for Article 4.07. On April 8, 2015, the Union made a package proposal that included a reworked Article 4.07 which incorporated some of the language that the Employer had proposed but also provided that the Employer’s failure to timely respond to a grievance would automatically grant it. When the Employer rejected the package proposal, however, the Union immediately withdrew the proposal. The Union did not again propose that a failure by the Employer to comply with time limits result in the automatic granting of the grievance.

The other two instances of alleged regressive bargaining occurred on August 18, 2015, in the new offer the Union presented after the fact finding award issued. In that offer, the Union accepted the fact finder’s recommendation that an employee’s seniority terminate if the employee was not on an approved leave of absence and his or her certification or licensure was not renewed within 30 days of lapse. However, it added language codifying the Employer’s practice of notifying employees in writing 60 days before expiration that his or her licensure or certification was set to expire. The Union also accepted the fact finder’s recommendation that Article 6.09 be modified to provide that rosters be up for pick if their pay time changed by more than one hour per week. However, it added the phrase, “from the top of seniority” to the provision. Pecor testified that this totally changed existing practice, but there was nothing in the

record to indicate whether the parties actually discussed this change or what it meant. In any case, the Union had never accepted either Employer proposal, so its proposed modifications were not “regressive.” I conclude that in none of these instances did the Union present regressive proposals as a tactic to avoid reaching a good faith agreement.

The Employer also alleges that the Union unlawfully insisted on including language which would violate Section 10(3) of PERA in the parties’ interim successor agreement. I agree with the Employer that it would have been unlawful for the Union to insist that the interim successor agreement contain an agency fee provision, even though the parties’ Section 13(c) agreement seemed, on its face, to require that that all provisions from the expired agreement carry over into the interim agreement. In this case, however, the Union dropped its initial proposal to carry over the agency fee clause in the expiring agreement into the interim successor agreement after the Employer objected. The parties then squabbled over how to appropriately convey in the interim agreement that employees would no longer be required to pay union dues or fees and, more significantly, over the length of the interim successor agreement. I find that the Union did not insist that the interim successor agreement include language made unlawful by Section 10(3) of PERA and that it did not violate its duty to bargain in good faith merely by presenting the Employer with an initial proposal that did so.

The Employer’s remaining allegations of bad faith bargaining are discussed in Section III(C) below.

C. Allegations Relating to the Fact Finding

On May 19, 2015, a fact finding hearing took place at which only the Employer presented evidence. Only the Employer presented the fact finder with a post-hearing brief. As a result, the fact finder made his findings of fact and recommendations based solely on evidence and arguments presented by the Employer. This was unfortunate. Fact finding is not a judicial or quasi-judicial proceeding, as a fact finder’s recommendations are not binding. Rather, fact finding is a mechanism built into the statute for assisting the parties in voluntarily resolving contract disputes. A one-sided fact finding, in which only one party participates, cannot serve its statutory purpose. As the Commission stated in *Cass Co Rd Commission*, 1984 MERC Lab Op 306, 309:

Contrary to Respondent’s assertion in this case, it is apparent that a harm was done to Charging Party by Respondent’s refusal to participate in the statutory procedure for resolving their bargaining impasse. The purpose of Commission-ordered fact finding, as set out in Section 25 of the Labor Mediation Act, [MCL 423.25] is to determine and make public the facts involved in the bargaining dispute. The unstated hope of this section is that public pressure, once the facts are made known, will assist in achieving a just settlement of this dispute. Obviously, a factfinder’s report produced with the cooperation of only one of the parties cannot be the sort of document contemplated by Section 25. The legal harm done to Charging Party in this case was not that it was unable to achieve its collective bargaining goals, but that Respondent’s refusal to comply with the dictates of PERA sent it in pursuit of an essentially meaningless factfinder’s report.

The Commission concluded that the respondent employer had violated its duty to bargain by refusing to participate in the fact finding. It also ordered the employer to reimburse the union for costs incurred in the fact finding and to reimburse the State of Michigan for the fees it paid to the fact finder.

As the record here indicates, in the summer and early fall of 2015, the Union accused the Employer of attempting to rob unit members of their retirement security by threatening to terminate what the Union claimed was a viable and basically healthy pension plan, while the Employer argued to its employees and to members of the public that the liabilities of Plan were growing wildly out of control and the Plan “was in the process of failing.” Since the Union’s arguments about the health of the Plan were not presented to the fact finder, he was not able to make findings with respect to them. As the summer of 2015 progressed without resolution of the pension issue, therefore, worried and confused bargaining unit members and their public supporters could not turn to the fact finder’s report to help them judge the parties’ competing claims.

Neither party here actually refused to participate in fact finding. Both parties blame the other for the Union’s absence. The Union alleges that the Employer violated its duty to bargain by refusing to agree to postpone the fact finding hearing after it was informed that the Union had changed counsel, and by conditioning its agreement to a postponement on the Union’s waiving its right under the Section 13(c) agreement to an interim successor agreement. At the time of the scheduled fact finding, the parties had made no progress on the important issue of the pension, and it was not unreasonable for the Employer to assume that the parties either had or would reach impasse based on their inability to agree over this issue. The Employer also took the position that any delay in holding the fact finding hearing would affect the Employer’s obligation to enter into an interim successor agreement under the Section 13(c) agreement. As I read the Section 13(c) agreement, unless the parties reached agreement on a new contract within seven days of June 30, 2015, an outcome that appeared unlikely in mid-May 2015, the Employer had an obligation to enter into a 60-day interim successor agreement after the contract expired regardless of when the fact finder issued his report. However, any employer subject to PERA is required to delay implementing its last best offer during the pendency of a fact finding proceeding and while the parties engage in a reasonable period of bargaining over the fact finder’s recommendations. Therefore, any delay in fact finding can also delay the date on which an employer can lawfully impose its last best offer. It was, therefore, in the Employer’s interests to have the fact finding concluded as soon as possible. I find, that the Employer’s duty to bargain in good faith did not require the Employer to agree to adjourn the fact finding hearing.

I also find that the evidence does not support a finding that the Union’s request for postponement of the May 19, 2015, fact finding constituted a deliberate attempt to delay the fact finding or a violation of its duty to bargain in good faith. The Employer’s proposal to terminate or freeze the Plan clearly raised significant and complex issues with which the Union’s bargaining team was not prepared to deal. The Union probably would have better served its interests by hiring counsel with more pension expertise earlier in the negotiations. However, according to Jackson’s testimony, the Union did not realize that its counsel was not up to the task of presenting the Union’s case on the pension to the fact finder until Jackson and the Union’s counsel reviewed their preparations for the fact finding shortly before the scheduled hearing date. According to Jackson’s testimony, which I see no reason to discredit, after this conversation he

realized that the Union needed other counsel, and immediately engaged Burns and his law firm. Nothing in this record indicates that the decision to change counsel was merely a tactic to get the fact finding hearing postponed; Burns subsequently drafted the public response to the fact finder's recommendation and appeared at the bargaining table, and his law firm represents the Union in this unfair labor practice case. Moreover, if Burns was in fact hired on or about Saturday, May 16, 2015, he could not have prepared adequately for a fact finding with thirteen issues, including a complex pension issue, for a hearing the following Tuesday. I find that it was not a breach of the Union's duty to bargain in good faith for the Union to request that the fact finding hearing be postponed. I also find that the Union's refusal to present evidence or arguments to the fact finder after its request was denied under these circumstances did not constitute a de facto refusal to participate in the fact finding.

I also reject the Employer's argument that the Union violated its duty to bargain in good faith when Burns attacked Pecor's refusal to agree to postpone the fact finding in the Union's July 6, 2015, public statement. In the public statement, Burns sought to explain why the Union had not presented evidence at the fact finding hearing, and he placed the blame (at least in part) on Pecor for refusing to agree to the Union's postponement request. While Burns strongly criticized Pecor in this letter, his criticism was in part a response to Pecor's earlier accusation that Burns' request to postpone the hearing was made in bad faith. I find that Burns' statements were not evidence that the Union did not intend to bargain in good faith toward an agreement.

D. Impasse and the Employer's Threats to Implement

The Union alleges that the Employer bargained in bad faith by threatening to unilaterally terminate the Plan and declaring impasse prior to bargaining to a good faith impasse. The Employer denies that it declared impasse at any point and also denies that it threatened to unilaterally terminate the Plan. Pecor's September 1, 2015, letter to the Union stated that the "parties appear to have reached an impasse." Pecor also told the Union that by refusing to consider any resolution "that might involve retirement benefits beyond those of the current plan," the Union had "eliminated potential options that might allow The Rapid to avoid termination of the existing plan." Varga and Holt's letter to the Union dated August 27, 2015, and Varga's September 1, 2015, memo to employees also stated that if the Union did not change its position on terminating and/or freezing the pension, the Employer would "be forced to consider" unilateral termination of the Plan; Pouget made the same point in his September meetings with employees. I agree with the Union that these communications, taken together, constituted a declaration that the parties had reached impasse and a threat to terminate the Plan if the Union did not change its position on the pension.

The Commission defines impasse as the point at which positions of the parties have solidified and further bargaining would be useless. *Kalkaska Co Rd Comm*, 29 MPER 64 (2016); *Redford Union Sch Dist*, 23 MPER 32 (2010); *Memphis Comm Schools*, 1999 MERC Lab Op 377, 386; *Wayne County (Attorney Unit)*, 1995 MERC Lab Op 199. 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, and business necessity. *Oakland Co Cmty College*, 2001 MERC Lab Op 273, 277. A single issue may be of such overriding importance that it justifies an overall finding of impasse on all of the bargaining issues. That is, impasse on a single critical issue may create a complete breakdown in the entire negotiations. *In Re Calmat Co*, 331 NLRB 1084, 1097 (2000).

The fact that 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 Schs*, 1990 MERC Lab Op 887, 889; *City of Ishpeming*, 1985 MERC Lab Op 517, 520-521. A substantial change in the bargaining position of one party is necessary to break an existing impasse. *Kalkaska Co Rd Comm; Sharon Hats, Inc*, 127 NLRB 947, 956 (1960), enf'd 289 F2d 628 (CA 5, 1961).

On August 31, 2015, the parties were still far apart on wages. There were also at least eight other unresolved issues, in addition to the pension, which remained unresolved and on which the parties had made no progress in their post-fact finding negotiations. The issue of overriding importance, however, was the pension. On August 17, 2015, the Union proposed, for the first time, that employees contribute to the Plan. On August 19, 2015, it made another proposal which increased the employee contribution to \$.15 per hour worked upon ratification of the agreement and \$.25 per hour worked later in the agreement. Both proposals also included an increase in the Employer's contribution, first from \$1.00 per hour to \$1.10 per hour, and then, later in the contract, to \$1.20 per hour. The Employer told the Union that its proposed employee contributions were not close to being sufficient to address the unfunded liability and that *assuming the Employer's contributions remained unchanged*, employees would have to contribute between \$.80 and \$ 1.00 per hour to reduce the unfunded liability to the Employer's satisfaction. In the parties' previous discussion of the pension issue, the Employer had emphasized that it was willing to pay somewhat more than it was currently paying toward its employees' retirement, but only in exchange for moving toward shifting the risk of investment loss to the employees themselves, i.e., in exchange for either terminating the defined contribution plan or freezing it so it would eventually disappear. By informing the Union that its members would have to contribute between \$.80 and \$1.00 per hour, the Employer was simply reiterating its previous position that it would not contribute more to the Plan simply for the purpose of reducing its unfunded liability. Because the Union understood the Employer's position, its proposal that employees begin contributing small amounts toward the Plan did not truly represent a substantial change in the Union's bargaining position. I conclude that as of August 31, 2015, the parties had reached a good faith impasse in their contract negotiations.

Since the Employer would not have violated its duty to bargain in good faith by unilaterally implementing either of its pension proposals, I find that it was not a violation of PERA for the Employer to threaten to unilaterally terminate the Plan if the Union did not change its position on terminating or freezing the Plan. Whether the Plan document, as opposed to PERA, prohibited the Employer from unilaterally terminating the Plan is not a question for the Commission.

E. Threats to Discipline Employees for Leafletting

Both parties discuss the threats made to Jackson and DeShane as alleged violations of Section 10(1)(c) of PERA in their briefs. However, neither employee was disciplined for his conduct. Since no adverse employment action was taken against Jackson and DeShane, the charge does not allege a violation of Section 10(1)(c). Rather, the question is whether Respondent unlawfully interfered with its employees exercise of their Section 9 rights, in violation of Section 10(1)(a) of PERA, by prohibiting them from distributing leaflets concerning the contract dispute on the platform at the Central Station and threatening them with discipline for doing so. Proof of anti-union animus is not required to prove a violation of Section 10(1)(a). *Keego Harbor*, 28 MPER 24 (2014). It is the chilling effect of a threat, and not its subjective intent, that constitutes the violation of violates PERA. *Michigan State Univ*, 26 MPER 36 (2012) (no exceptions).

Section 9 protects the right of public employees, when acting in concert, to express and communicate their views on terms and conditions of employment as long as this expression is not designed to and does not interfere with the full, faithful, and proper performance of the duties of their employment. *Marysville Pub Schs*, 1982 MERC Lab Op 513, 521. In *Marysville*, the Commission held that teachers in a public school district were engaged in activity protected by the Act when they posted signs relating to an ongoing bargaining dispute on their cars parked in the schools' parking lots. The Commission rejected the Employer's argument that it had the right to prohibit its private property from being used in this manner, and held that the Employer was required to show special circumstances indicating that the restriction was necessary for the maintenance of safety, efficiency or discipline. The Commission quoted *Firestone Tire and Rubber Co*, 238 NLRB 1323 (1978), as follows:

In an unbroken lines of decisions, this Board and the Supreme Court have stated that where an employee exercises his Section 7 rights while legally on the employer's property pursuant to the employment relation, the balance to be struck is not vis-à-vis the employer's property rights, but only vis-à-vis the employer's managerial rights. The difference is one of substances, since in the latter situation Respondent's managerial rights prevail only where it can show that the restriction is necessary to maintain production or discipline or otherwise prevent the disruption of Respondent's operations.

The Commission concluded in *Marysville* that the Employer had failed to establish that the restriction on the bumper stickers and signs on cars in the parking lot was necessary. It also noted that that there was no showing that the Employer had ever attempted to prohibit employees from parking cars in the lot that had signs or bumpers stickers relating to other matters, no matter how controversial.

As the Employer notes in its brief, there was no dispute in *Marysville* that the parking lots were not work areas, and no contention that the signs disrupted the employees' teaching. It contrasts *Marysville* with *Huron School Dist*, 1990 MERC Lab Op 628, where the Commission held that a school district could prohibit teachers from wearing union t-shirts in their classrooms.

According to the Employer, the Central Station platform, where many operators start or end their shifts, constitutes a working area for the operators. The Employer also argues that distribution of materials on the platform raises legitimate safety concerns because it has the potential to distract customers waiting on the platform and the operators who must focus on the safe operation of their vehicles as they maneuver around other vehicles and pedestrians while pulling their buses in and out of the bus bays.

Although operators may cross the platform to get to or leave their buses, I am not persuaded by the Employer's argument that the platform is a work area. Operators drive the Employer's buses in and out of the bus bays along the edge of the platform. There is no evidence in the record that operators have any work responsibilities, or spend any significant amount of work time, on the platform itself. An operator's normal job responsibilities include determining what to pay attention to outside the bus when it is in movement. It is the operator's responsibility to ignore irrelevant activities that distract him or her from the safe operation of his or her vehicle. This, of course, includes the distributions of leaflets to the public, whether the distribution is taking place on the platform, on the public sidewalk to the west of the access road around the platform, or in the parking lots past which the operators must maneuver their buses to exit the Station. The Employer states in its brief that it would have no objection to peaceful leafletting on this sidewalk, or in the parking lots directly to the north and south of the access road, but there is no evidence that leafletting in these areas would be any less of a distraction to the operators than leafletting on the platform. Moreover, because the Central station platform is a transfer point, many bus customers never walk past these areas.

I also note that there were only three individuals leafletting on the Central Station platform on the day in late July or early August 2015 when the Employer threatened to discipline Jackson and DeShane. As indicated above, the platform is about two blocks long and about three car lengths wide. Obviously, the presence of a large number of leafletters on the platform, particularly in heavy traffic periods, could create congestion that interfered with flow of customers moving around the platform. The Employer, therefore, could legitimately have limited the number of leafletters it allowed on the platform and/or directed the leafletters to leave if a disruption occurred. However, there was no testimony that the leafletting by Jackson and DeShane and the non-employee union organizer on the day in question disrupted normal activity on the platform. I am not persuaded that the Employer's complete ban on leafletting by its employees on the Central Station platform was necessary to maintain production or discipline or prevent disruption of the Employer's operations.

The Employer also argues that it was entitled to bar employees from leafletting on the Central station platform because it has a well-publicized policy prohibiting soliciting at the Central Station, on its buses, and at bus stops. This policy is posted at the Central Station, and also printed in the Employer's Policies and Procedures Handbook. The Employer asserts that anyone, including members of the public and employees whether on or off duty, are prohibited by this policy from soliciting on the Central Station platform.

However, there is significant evidence that the Employer disparately enforced its no-solicitation policy in this case to bar employees from distributing union-related leaflets on the Central station platform. Jackson and DeShane both testified to a number of instances within the

three year period prior to the incident in which non-employees, or a combination of off-duty employees and non-employees, engaged in solicitation activities on the platform. The Employer emphasizes the fact that, with one possible exception, the instances of solicitation on the platform which the witnesses described took place without the knowledge or approval of the Employer. What the evidence actually indicates, however, is that this solicitation was not brought to the attention of Employer CEO Varga, COO Pouget, or External Relations Manager Kalczuk. The Employer has surveillance cameras on the Central Station platform and these cameras are monitored 24 hours per day. Moreover, according to the testimony, some of the solicitation took place during periods when security guards were stationed on the platform. It appears that the Employer did not instruct the security guards monitoring the cameras or stationed on the platform to remove all solicitors from the platform. If this is what occurred, it seriously undermines the Employer's argument that any form of soliciting or leafletting on the platform raises legitimate safety concerns.

I conclude that the Employer interfered with the Section 9 rights of its employees and violated Section 10(1)(a) of PERA by banning them from leafletting to publicize the parties' contract dispute on the platform of the Employer's Central Station. I also find that the Employer violated Section 10(1)(a) of PERA by threatening employees RiChard Jackson and Louis DeShane with discipline for distributing leaflets on the platform in late July or early August 2015. As discussed above, I conclude that the Employer could lawfully have imposed reasonable restrictions on the number of leafletters allowed on the platform at any one time to avoid undue congestion and interference with the movement of customers on the platform. However, this is not what the Employer did in this case.

In summary, in accord with the findings of fact and conclusion of law set forth above, I conclude that neither the Union nor the Employer violated its duty to bargain in good faith by the conduct alleged in their charges. I also find, as set forth above, that on August 31, 2015, the parties had reached a good faith bargaining impasse over the terms of their contract. This impasse resulted in large part from the fact that the parties had reached a deadlock over a critical issue in their negotiations, whether the existing pension plan would be terminated, frozen, or maintained in its current form. I recommend, therefore, that the charge filed by the Employer be dismissed in its entirety, and that all allegations in the charge filed by the Union alleging violations of the duty to bargain and/or direct bargaining also be dismissed. I conclude, however, that the Employer violated Section 10(1)(a) by banning off-duty employees from leafletting to publicize the parties' contract dispute on the platform of the Employer's Central Station and by threatening two employees with discipline for this activity. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Interurban Transit Partnership, its officers and agents, are hereby ordered to:

1. Cease and desist from:
 - a. Promulgating or enforcing a rule prohibiting employees, under any and all circumstances, from distributing leaflets or other materials concerning wages, hours or working conditions or ongoing bargaining disputes on the platform of the Employer's Central Station.
 - b. Threatening employees with discipline for engaging in reasonable and nondisruptive activities to publicize the dispute between the Employer and the Amalgamated Transit Union on the platform of the Central Station.
 - c. In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 9 of PERA.
2. Post copies of the attached notice to employees at all places on the Employer's premises where notices to employees are customarily posted for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: July 14, 2016