STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY,
Public Employer-Respondent,

MERC Case No. C14 G-079
-and- Hearing Docket No. 14-015819

AFSCME COUNCIL 25, LOCAL 3317,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Bruce Campbell, Wayne County Corporation Counsel, and the Allen Law Group, PC by Shaun P. Ayer, for Respondent

Jamil Akhtar, for Charging Party

DECISION AND ORDER

On May 31, 2017, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: August 11, 2017

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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-and-

AFSCME COUNCIL 25, LOCAL 3317,
Charging Party-Labor Organization.
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APPEARANCES:

Wayne County Assistant Corporation Counsel Bruce Campbell, and the Allen Law Group, PC by Shaun P. Ayer, for the Respondent-Public Employer

Jamil Akhtar, for the Charging Party-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 assigned to Administrative Law Judge Travis Calderwood of the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (Commission).

Background and Procedural History:

On July 14, 2014, AFSCME Council 25, Local 3317 ("Charging Party" or the "Union"), filed the present unfair labor practice charge against Wayne County ("Respondent" or "County"). The Union states in its charge:

> The Respondent knew, when it presented its Deficit Elimination Plan to the Board of Commissioners for approval on May 13, 2014, that respondent was committing an unfair labor practice, in that it had purposefully placed itself in a position of not being able to bargain in good faith, with the Charging Party, as the Deficit Elimination Plan, which has yet to be approved by the State Treasurer, would automatically require the County to bargain in a fashion which is commonly known as "boulwarism."

A pre-trial conference was scheduled to be held on August 6, 2014, and an evidentiary hearing was set for August 19, 2014.

On August 4, 2014, Respondent filed a Motion for Summary Disposition. During the pre-hearing conference on August 6, 2014, the parties agreed that Charging Party would file its response by August 14, 2014, and that oral argument would occur in place of the August 19, 2014, evidentiary hearing. On August 14, 2014, Charging Party filed its written response to Respondent's Motion.

Oral argument took place before the undersigned on August 19, 2014. Neither party filed post-hearing briefs. On April 2, 2015, I issued an interim order denying Respondent's motion. An evidentiary hearing was scheduled for May 14, 2015.

On May 6, 2015, Charging Party filed a motion seeking to amend its charge to include allegations of regressive bargaining in connection with the actions taken by Respondent on and after April 20, 2015.

On May 11, 2015, a pre-hearing conference was held with the parties to discuss the upcoming hearing and Charging Party's motion to amend its charge. During that conference, counsel for Charging Party indicated that he would be filing charges on behalf of AFSCME Council 25, Locals 25, 101, 409, 1659, 1862, 2057 and 2926 that would mirror the allegations contained in the proposed amended charge filed in the present charge, Case No. C14 G-079; that charge was filed on May 12, 2015, and docketed as Case No. C15 E-063; Docket No. 15-035160-MERC.

During the evidentiary hearing held on May 14, 2015, for the present charge, C14 G-079, I directed that the proposed amended charges filed by the Union on May 6, 2015, be accepted and bifurcated. The bifurcated charge was docketed as Case No. C14 G-079A; Docket No. 15-037169-MERC and then consolidated with the Case No. C15 E-063. At the close of the hearing, I directed that post-hearing briefs be filed by the parties on or before July 30, 2015.

On June 23, 2015, Respondent filed a motion seeking summary dismissal of Case Nos. C14 G-079A and C15 E-063. Charging Party filed its response on July 14, 2015. Oral argument in those consolidated cases was set for July 28, 2015.

On July 22, 2015, during a conference call to discuss the other pending matters between the parties, the filing date for post-hearing briefs in this matter was extended to August 5, 2015. Also that same day, Governor Snyder declared that a local government financial emergency existed in Wayne County pursuant to the Local Financial Stability and Choice Act, 2012 PA 436 (PA 436).

Prior to the start of the July 28, 2015, oral argument in Case Nos. C14 G-079A and C15 E-063, I met with the parties and discussed the recent determination of a financial emergency within the County by the Governor and its potential impact on the three pending charges.

Recognizing that the financial emergency determination would likely result in a consent agreement between the County and the State Treasurer, the parties agreed to adjourn that day's oral argument, as well as the upcoming hearing dates of August 10, 11, 12 and 19, 2015, without date. Furthermore, the parties agreed that post-hearing briefs in the present matter, Case No. C14 G-079 not be filed until some future date yet to be decided. A pre-hearing conference was scheduled for August 31, 2015.

On August 21, 2015, the County and the State Treasure entered into a Consent Agreement pursuant to PA 436. Under the terms of that agreement and consistent with Section 8(11) of Act 436, effective September 20, 2015, the County would no longer be subject to Section 15(1) of PERA for the term of the agreement. The effective import of the Consent Agreement was that the County was under no obligation to bargain in good faith while the agreement remained in effect.

On December 17, 2015, the parties appeared before the undersigned for oral argument over Respondent's motion seeking dismissal of Case Nos. C14 G-079A and C15 E-063. At the onset of that hearing, Charging Party withdrew Case No. C15 E-063. Following extensive arguments made by both parties on the record and with consideration given to the pleadings and filings submitted by the parties, I concluded that summary dismissal of Case No. C14 G-079A was not appropriate and denied Respondent's motion from the bench.[1]

Post hearing briefs in Case No C14 G-079 were filed by the parties the first week of February 2016. On February 17, 2016, Charging Party filed another unfair labor practice charge, Case No. C16 B-015; Docket No. 16-003534-MERC, in which the Union alleged that the County had failed to engage in good faith bargaining from August 21, 2015, through September 20, 2015.

Several telephone conferences were held with the parties during the first three months of 2016 in which the status of the County's finances and Consent Agreement were discussed in connection to the pending cases. Ultimately it was my decision to adjourn Case Nos. C14 G-079A and C16 B-015 without date because of the suspension of the County's duty to bargain under Section 15(1) of PERA by way of the Consent Agreement. I also chose to hold off issuing any decision in Case No. C14 G-079 for the same reason as it was not known when the County would be released from the Consent Agreement or its duty to bargain under Section 15(1) of PERA restored.

On October 18, 2016, the State Treasurer sent a letter to the County which appeared to release the County from the Consent Agreement.

On October 20, 2016, Charging Party's counsel sent my office an email with the October 18, 2016, letter from the State Treasurer attached and requested a conference call to discuss scheduling Case Nos. C14-G-079A and C16 B-015 for hearing. During an October 25, 2016, conference call, the County objected to scheduling the consolidated cases for hearing and asserted that, by the terms of the Consent Agreement, it remained exempt from Section 15(1) of

[1] A written order to that effect was issued on February 17, 2016.

PERA until October 1, 2019, the Treasurer's October 18, 2016, letter notwithstanding.[2] No decision was made at that time on how to proceed.

On October 27, 2016, another telephone conference call was held at which time I directed both parties to provide written position statements as to the issue of whether the County was in fact still exempt from Section 15(1) of PERA.

On November 11, 2016, the County provided, by email, a copy of a November 10, 2016, letter from the Deputy State Treasurer, which clarified that the term of the two-year budget plan it was requiring under the Consent Agreement was for fiscal years 2017 and 2018. Accordingly, the County revised its position such that its duty to bargain under Section 15(1) would be reinstated October 1, 2018, as opposed to October 1, 2019.

On November 22, 2016, the County filed a Position Statement and Motion to Dismiss in Case Nos. C14-G-079A and C16 B-015. The Union filed its Position Statement with my office on November 23, 2016. Emails were exchanged with the parties regarding the timeline in which the Union was to respond to the County's motion.

On November 28, 2016, Local 3317 filed its last and most recent charge against the County, Case No C16 K-125; Docket No 16-033168-MERC. In this charge, the Union alleges that the County was released from the Consent Agreement on October 18, 2016, and therefore once again subject to Section 15(1) of PERA and that the County had refused to bargain with Charging Party. The Union also alleges that the County imposed modified employment terms on September 23, 2016, which it claims are "worse than the comparable wages, hours and other terms and conditions of employment of County unionized employees." Lastly, Charging Party claims that it is the only union in the County that has had its dues check-off terminated and that said termination was done in retaliation for its insistence on pursuing the charges.

On December 21, 2016, I received notice from the County that it wished its motion to dismiss filed in Case Nos. C14 G-079A and C16 B-015 to apply to Case No. C16 K-125 as well.

On January 13, 2017, I received Local 3317's response to the County's motion. Oral argument was heard on January 20, 2017, in Detroit, Michigan. On February 9, 2017, I issued an interim order encompassing all four pending cases between the parties, including the current matter, Case No. C14 G-079, in which I determined, the terms of the Consent Agreement notwithstanding, that County's duty to bargain was reinstated as of October 18, 2016, the date when the State Treasurer released it from the Consent Agreement.

Simultaneously to the events as described above, the Union, on November 7, 2016, made a written request with the Bureau of Employment Relations, the Commission's administrative staff, for mediation services. That request was docketed as MERC Case No. D16 K-0900.

[2] Section 10, entitled "Term" of the agreement provided that the suspension of the duty to bargain, along with various other terms, would survive the County's release from the agreement and continue in effect until some date in the future which coincided with the County's fiscal year and a two-year budget required under the agreement.

On February 9, 2017, the County filed a Motion to Enforce Commission Order Dismissing Act 312 or in the Alternative, Motion to Dismiss Union's Request for Mediation Pursuant to a Consent Agreement between Wayne County and the State of Michigan and PA 436.[3] Both parties filed additional written arguments with the Commission on, or before, March 15, 2017. Oral argument was set before the Commission at its April 11, 2017, meeting in Detroit, Michigan. Additionally, the Commission requested that the parties address other issues it identified as relevant in writing by April 3, 2017.

On May 12, 2017, the Commission issued its Decision and Order in D16 K-0900 finding that PA 436 and PERA gave the State Treasurer authority to draft a consent agreement where the suspension of the duty to bargain could remain in effect past the agreement's release date. As such the Commission held that the County's duty to bargain was suspended until October 1, 2018, thereby dismissing the Union's request for mediation. The Commission recognized that my February 9, 2017, Interim Order, reached the opposite conclusion as to the duration of the suspension of the duty to bargain but, because my interim order was not a final order as identified under Rule 161(7) of the Commission's Rules, R 423.161(7), 2002 AACS; 2014 AACS, declined to review the order despite requests from the parties to do so. Nonetheless, I believe I am bound to accept as controlling authority the Commission's holding as to the status of the County's duty to bargain.

The preceding notwithstanding, nothing in the Commission's decision that the County's duty to bargain remain suspended until October 1, 2018, precludes the exercise of jurisdiction over the parties as it relates to the present proceeding or the other three unfair labor practice charges currently pending with the exception of the one portion of Case C16 K-125 based on the incorrect assertion that the County's duty to bargain was restored on October 18, 2016. As such, now that there is a date certain on which the County's duty to bargain shall be restored, October 1, 2018, I see no reason why this Decision and Recommended Order should not be issued or the remaining three unfair labor practice charges be scheduled for hearing.

Findings of Fact:

Charging Party represents a bargaining unit comprised of Sergeants, Lieutenants and Captains employed with the Wayne County Sheriff's Department. The parties were signatories to a collective bargaining agreement in effect from October 1, 2011, through September 30, 2014. Article 38 of the contract set forth the applicable provisions regarding retirement terms agreed to between the parties. Article 38.01(L) provided the following:

[3] Previously in Case No. D14 A-0018, *Wayne County*, 29 MPER 26 (2015), between these same parties, the Commission, on October 16, 2015, dismissed a petition for Act 312 arbitration filed by the Union. The Commission stated:

> [W]e find that the Employers in this matter are subject to a consent agreement under Act 436 that suspended the County' s duty to bargain as of September 20, 2015. The Employers have expressed an unwillingness to bargain or participate in Act 312 arbitration in light of Act 436. As such, as of September 20, 2015, the Employers cannot be required to participate in Act 312 arbitration. Accordingly, the Act 312 arbitration in the case before us must be dismissed as of that date.

> Upon the termination of this Collective Bargaining Agreement on September 30, 2011, the parties may agree to bargain over retirement related issues during the next round of contract negotiations. However, all issues concerning retirement, including but not limited to, any and all provisions outlined in Article 38 of this Agreement, covering the period of October 1, 2008 through September 30, 2011, shall not be subject to Act 312 arbitration until October 1, 2020.

On February 5, 2014, because the County was purportedly operating in a deficit, then County Executive Robert A. Ficano presented a deficit elimination plan (DEP) to the County's Board of Commissioners (Board).[4] That DEP began with the statement that "[a]s with many communities within the State of Michigan, and throughout the country, the Charter County of Wayne has experienced serious financial challenges since 2008." The DEP went on to claim that at the end of its most recent fiscal year, September 30, 2013, the County's General Fund had an accumulated deficit net of $93 million, with projected losses of $30 million and $32 million for the next two years, if no changes were made. As part of the DEP's proposed method of reducing the County's deficit, the County Executive sought the following changes/concessions from certain County employees, including members of Charging Party's bargaining unit:

- Effective October 1, 2014, decreasing the defined benefit plan multiplier from 2.5% to 1.5% of average financial compensation for all years of credited service;

- Effective October 1, 2017, limiting the amount of paid leave used to determine accrued financial benefits within the County's pension plan as well as restricting the use of overtime hours when computing average final compensation;

- Effective October 1, 2014, increasing the employee contributions in defined benefit plans 1, 3, 5 and 6 to 7% of gross wages until October 1, 2017, at which time employee contributions would be reduced to 6% of gross wages;

- Effective October 1, 2014, the contribution rates for defined benefit plan 4 would be 10% for the employer and 4% for the employees;

- Effective October 1, 2014, a 5% wage reduction; and,

- Elimination of Columbus Day and birthdays as holidays.

[4] Section 21(2) of the Glenn Steil State Revenue Sharing Act of 1971, Public Act 140 of 1971, states:

> For a fiscal year of a unit of local government ending on or after October 1, 1980 or any year thereafter, if a local unit of government ends its fiscal year in a deficit condition, the local unit of government shall formulate and file a financial plan within 90 days after the beginning of the fiscal year to correct this condition. Upon request of a local unit of government the department of treasury may assist that local unit in the formulation of the financial plan to correct the deficit condition. The local unit of government shall file the financial plan with the department of treasury for evaluation and certification that the plan ensures that the deficit condition is corrected. Upon certification by the department of treasury, the local unit of government shall institute the plan. An amount equal to 25% of each payment to a local unit of government entitled to payments under this act may be withheld until requirements of this subsection are met.

In addition to the above financial concessions and other proposals impacting current County employees, the DEP also sought significant changes to retiree healthcare benefits. This DEP was never approved by the County Board.[5]

According to testimony provided by County Deputy Chief Financial Officer/Budget Director Kevin G. Haney, included within the DEP presented to the Board for consideration, was the accounting of approximately $84 million from the delinquent tax fund that could be released by the County Treasurer as unrestricted funds, meaning they could be added to the County's general fund.[6] Haney testified that the intent was to use those monies to help pay down the accumulated deficit but that the monies would have no impact on the structural deficit.

The parties began bargaining over a successor agreement sometime in the beginning of 2014, with the first formal session occurring on March 14, 2014, at which time a state mediator was present. The parties met again on March 27, April 9, April 15, and May 6, 2014, all without a state mediator present. Charging Party's bargaining chair, Sergeant Daniel Connell, testified that the Union's position at the onset of negotiations and throughout bargaining was for a one year contract maintaining the status quo. Testimony provided by witnesses on both sides reveals that at the beginning of negotiations the parties did not agree to any negotiation ground rules in writing but that there was an understanding that "off the record" discussions, or "free-flowing" as parties also called such, was separate from formal bargaining and were simply informal discussions absent from proposals made at the bargaining table. The same witnesses agreed that the general plan for negotiations was for the parties to reach tentative agreement over non-economic issues first and then move on to discussing economic provisions.

During the above referenced bargaining sessions, notes prepared by Connell indicate that through these several meetings the parties engaged in "off the record" discussions as well as "free-flow" on numerous occasions. Additionally, the notes support Connell's claim as to the Union's position regarding a one-year status quo extension, as it appears that the Union made this specific proposal on April 9 and May 6, 2014. On April 15, 2014, the parties agreed to discuss retirement and Article 38 off the record and on May 6, 2014, the parties "free-flowed" on what it would take to open Article 38.

Sometime in the beginning of May the original DEP was revised and once again presented to the County's Board. The revised DEP remained largely unchanged from its earlier version with the exception that the proposed changes to retiree healthcare had been removed and

[5] Counsel for Charging Party has made the claim several times that around the time that the DEP was presented to the Board in February of 2014, he met with the County Director of Labor Relations Kenneth Wilson, Deputy County Executive Jeffrey Collins, and County Executive Chief of Staff June S. Lee, to discuss the DEP. However, Lee, the only person present at the alleged meeting to testify, was unable to recall with any specificity that such a meeting actually took place.

[6] While the mechanics and specifics of such were not made entirely clear at the hearing, Haney testified that at any given moment the County Treasurer has approximately $200 million dollars in a fund designated the Delinquent Tax Revolving Fund (DTRF). According to Haney, after funds have sat in the account for a certain number of years, the Treasurer, an elected official and not under the control of the County Executive's office, releases those funds for use by the County on either a restricted or unrestricted basis. Funds that are deemed unrestricted are placed within the County's general fund.

the plan had been updated to reflect an increase of $10 million dollars in state revenue sharing. At some point in May the Board adopted the revised DEP. As of the May 14, 2015, hearing date the State Treasurer had not approved the County's revised DEP.

During the May 16, 2014, bargaining session the Union once again offered the one-year status quo extension. There was some discussion as to the DEP and the Union's desire to present it to its general membership. More "free-flow" discussions took place, however what was discussed is not readily apparent from the record. Connell testified that he understood the County's position as to economic proposals to be the terms as set forth in the DEP, i.e., changes in pension and a 5% wage reduction among other things.

Two more bargaining sessions occurred on June 3, 2014, and June 5, 2014, at which a state mediator was present at both.

During the June 12, 2014, bargaining session the County, through Wilson, provided the Union with a proposal for a four-year contract with a status quo first year. The second year of the contract proposed no change in base wages, but did decrease the pension multiplier for those exceeding 1.5% to 1.5% as set forth in the DEP, as well as also changed the employee contribution levels for defined benefit plans, of 7% and 4% respectively, essentially mirroring the revised DEP. At the beginning of the third year the unit would enjoy a 2.5% wage increase. Another 2.5% raise would occur at the beginning of the fourth year along with the proposed changes limiting the number of leave hours included with final average compensation and the elimination of overtime hours calculated therein. Additionally this proposal sought to eliminate just birthdays as holiday days as opposed to birthdays and Columbus Day as provided for in the DEP.

The parties met on June 19, June 26, and July 8, 2014, all with a state mediator present.

On July 23, 2014, the parties met again and a proposal was presented to the Union. It is not clear from the record what changes if any this proposal may have made from the earlier June 12, 2014, proposal. The Union's one-year status quo extension proposal was discussed.

The parties met on August 13, 2014, once again with a state mediator. At some point another proposal was presented to the Union. The new proposal still called for a four-year contract and was identical to the June 12, 2014, proposal except that the Employer had swapped the implementation year for the pension multiplier and limitation of average final compensation hours so that the limitation on leave hours and restriction of overtime hours in calculating average final compensation changes took place at the beginning of the second year, while the reduction in the pension multiplier was to take place in the fourth year.

County Executive Chief of Staff June S. Lee testified that while bargaining was underway, in late May 2014, he received a voicemail from Charging Party's Local President Kal Sabbaugh requesting a meeting. Lee claims he met with Sabbaugh and Matt Gloster, both members of the Union's bargaining team, at a restaurant called Café Roma for lunch on June 13, 2014. Lee stated that the three of them "free flowed" at lunch on what could be done in order to reach a deal.

Lee specifically recalled that he wanted to know what it would take for them to be able to discuss the retirement issue, i.e., the prohibition on arbitrating retirement issues until 2020.

According to Lee, he along with Ken Wilson, met with Sabbaugh and Gloster and Wilson on July 11, 2014, at the Tim Horton's in the Compuware Building in downtown Detroit. Once again Lee claimed the men "free flowed" ideas on how to reach an agreement and specifically discussed wages and the pension modifications.

Lee further testified that there was a third meeting that took place at the same Tim Horton's on July 17, 2014, between himself, Wilson, Sabbaugh, Gloster and a third member of the Union. Lee was originally unable to identify the third man from the Union but quickly concluded that Daniel Connell, who was at that time sitting in the gallery during his testimony, had to have been the third man. Lee went on to testify that the men discussed how the Union was unable to get support for the pension modification with the wage increases as offered by the County. On cross-examination by Charging Party's counsel, Lee admitted that he made no attempt to inform the AFCSME Council 25 Staff Representative, Richard Johnson, or the Union's Chief Negotiator, Attorney Akhtar of the meetings with the Union members. In fact, Lee claims Sabbaugh specifically asked him not tell Akhtar about the meetings. Lee went on to testify during cross-examination that he understood that his discussions with Sabbaugh and others were informal and that if they could come to an understanding that they would "come back to the table, formalize it and get it done."

On rebuttal Connell testified unequivocally that he never met with Lee outside of formal bargaining sessions. Despite this contradiction, with the testimony provided by Lee, it is my finding that Lee's testimony was credible and succinct such that his misidentification of Connell was simply a mistake and that with that exception his testimony should be accepted as true.

Discussion and Conclusion of Law:

Charging Party insists that the County's actions surrounding its negotiation of the parties' successor agreement beginning in early 2014 up through August of that year amounted to bargaining in bad faith in violation of Section 15(1) of PERA. Charging Party's theory of the case is that the County engaged in surface bargaining, presented its proposals as "take it or leave it", engaged in unlawful direct dealing, failed to supply information relevant to its economic conditions, and ultimately acted in such a manner that amounted to "Boulwarism."

Surface Bargaining/Hard Bargaining

The Commission, in determining whether a party has bargained in good faith, examines the totality of the circumstances to decide whether the party has approached the bargaining process with an open mind and a sincere desire to reach an agreement. *Grand Rapids Pub Museum*, 17 MPER P 58 (2004); *City of Springfield*, 1999 MERC Lab Op 399, 403. Conduct recognized as violating the above duty is plentiful and includes, but it is not limited to, the refusal to execute a written contract embodying an agreement between the parties and making unilateral changes prior to impasse. Delaying tactics that may be found to violate the duty include refusing to schedule, canceling, or coming late to bargaining sessions, wasting time

during meetings, and promising, but failing, to provide proposals. *City of Southfield*, 1986 MERC Lab Op 126, 134-135; *Unionville-Sebewaing Area Schs*, 1988 MERC Lab Op 86. Furthermore, while conduct amounting to "hard bargaining" is not unlawful on its face, the Commission has in the past found it appropriate to examine proposals to consider whether certain bargaining demands constitute evidence of bad-faith bargaining. *See Oakland Cmty College*, 15 MPER 33006 (2001).[7]

Charging Party claims that the County's DEP served as the basis for an intractable position from which the County could not bargain in good faith, i.e., the County tied its own hands. Furthermore, Charging Party insists that the County's continual inclusion of pension changes in its package proposals were made in bad faith in light of the Article 38 language that, according to Charging Party, removed any obligation to bargain pension issues.

Ignoring for a moment the pension and Article 38 issue, I am not of the opinion that the County placed itself into an intractable position by approving the DEP in May of 2014 and bargaining from that position, or that its proposals were proffered in a manner as characterized by Charging Party, i.e., "take it or leave it." First, the proposals set forth by the County do not mirror the DEP to the extent as argued by Charging Party; one major difference is the absence of a 5% wage cut as sought by the DEP as opposed to the maintaining of the status quo for the first two years of the proposals and 2.5% wage increases in years three and four. Furthermore, while the movement between the various County proposals, does not appear great, it must be observed that the record shows the County was essentially bargaining against itself as Charging Party never made any formal proposal other than its continued insistence for a one-year status quo extension. No testimony or evidence was introduced to show that the County adopted a fixed position which it refused to budge. As such it is my finding that the Union failed to establish that the County did not come to the bargaining table with an open mind and a sincere desire to reach an agreement or that the County's conduct throughout negotiations violated the duty to bargain in good faith under PERA.

Additionally, I find that the County's continual placement of pension changes in its proposals in spite of the Article 38 language is not indicative of bad-faith bargaining. While the Union seemingly has a very good argument that it is under no obligation to bargain over pension changes by nature of Article 38, the plain language of that clause provides that the parties "may agree" to bargain over such and not that the parties were precluded from doing so. Testimony provided at the hearing establishes that the County attempted to bargain changes to the pension and in exchange offered a wage increase – an increase that was not contained within the DEP. At no point during the hearing did any witness testify that the Union said it was not going to bargain over pension changes; on the contrary Connell's notes establish that the parties discussed pensions on several occasions during the many bargaining sessions, albeit not as part of the formal negotiations.

[7] In *Oakland Cmty College*, the Commission held that the employer had engaged in surface bargaining based, in part, on the employer's insistence on multiple proposals that would have effectively required the union to forfeit its role as the exclusive bargaining agent. These included a proposal to give the college chancellor complete discretion in making merit wage adjustments and a proposal to create employee participation committees that would replace the union in dealing with the employer over terms and conditions of employment during the term of the contract.

Direct Dealing

Our Commission has held that PERA prohibits an employer whose employees are represented by a labor organization from dealing directly with employees or groups of employees. *City of Detroit (Fire Dept),* 1991 MERC Lab Op 443, 448. An employer who negotiates or attempts to negotiate directly with employees over changes in terms and conditions of employment violates its duty to bargain in good faith because such efforts seriously undermine the authority of the bargaining representative. *West Bloomfield Twp*, 25 MPER 78 (2012). Criteria developed by the National Labor Relations Board (NLRB) to determine whether an employer unlawfully engaged in dealing are: (1) the employer communicated directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) the communication with employees was to the exclusion of the union. See *Permanente Medical Group, Inc*, 332 NLRB 1143, 1144 (2000). The NLRB has noted that in any case involving an allegation of direct dealing, the inquiry must focus on whether the employer's direct communication with its employees is likely to "erode the union's position as exclusive representative." *City of Detroit (Housing Commission),* 2002 MERC Lab Op 368, 376 (no exceptions), citing *Modern Merchandising*, 284 NLRB 1377, 1379 (1987).

Here the only evidence offered that could give rise to a direct dealing claim is the testimony provided by County Executive Chief of Staff Lee. Lee's testimony, other than the mistaken identity of a third man, was not challenged or contradicted by the Union. Lee testified that he met with members of the Union's bargaining team outside of bargaining sessions at their request and not his. Ignoring that the individuals Lee claims to have met with were not merely employees but rather were two members of the Union's bargaining team, with one being the local president, given the Union's strident presentation of "off the record" and "free flow" conversations as being outside the realm of formal bargaining and Lee's unrefuted claims of engaging in just such talk, the Union did not, in my opinion, establish that the County violated PERA.

Refusal to Supply Information

Charging Party argues that the County either failed or refused to supply financial information in support of its bargaining position, i.e., financial distress. However, Charging Party did not articulate with any specificity information that it requested which was not provided. Further, while Charging Party attempts to make an issue of the County Treasurer and the County's DTRF, there is no cognizable connection between such and the claim that the County withheld information requested by the Charging Party. On the contrary, the record clearly shows that the DEP specifically accounted for more than $82 million dollars released by the Treasurer, with said funds being used to pay down the accumulated deficit. Charging Party did not establish that there were additional funds "hidden" by the County or Treasurer, or that the County failed to provide information requested of it.

Boulwarism

"Boulwarism" refers to a style of bargaining in which an employer (1) presents a "take-it-or-leave-it" proposal, (2) engages in direct dealing with workers thereby bypassing union leadership, and (3) refuses to supply information relevant to its proposal. See *NLRB v General Electric*, 418 F2d 736 (2nd Cir 1969).

The earliest instance that the Commission was presented with a bargaining charge alleging "Boulwarism" occurred in *Bangor Township Board of Education*, 1984 MERC Lab Op 274 (no exceptions). In that case, the ALJ concluded, while noting that the employer had in deed insisted on the need for a wage freeze, the record nonetheless indicated that the employer did not refuse to discuss other issues and in fact was "open to compromise on such issues as the length of the freeze." Additionally the ALJ took notice that although there were "scattered individual efforts by various administrators to persuade certain employees of the seriousness of the financial situation" together with two letters summarizing the employer's position, those actions taken as a whole did not satisfy the bypassing element of "Boulwarism."

In *North Dearborn Heights School District*, 1986 MERC Lab Op 980, a case addressing bargaining issues involving the annexation of one school district by another district, the Commission was once again faced with a "Boulwarism" bargaining charge. The Commission stated that "Boulwarism" involves "the taking of a fixed position at the bargaining table coupled with a campaign of communication aimed at persuading employees to the employer's position." Here, the Commission determined that the "direct bargaining" complained of by the charging party was merely the employers' communication of its position and not a violation of PERA either as an element of "Boulwarism" or otherwise.

The next and last time "Boulwarism" was raised in the context of an unfair labor practice proceeding occurred in *Ferris State University*, 11 MPER 29050 (1998) (no exceptions). There, the ALJ found that a memorandum provided to charging party's members by the employer had "merely set forth the parties' table positions, reported on the status of bargaining, and provided information" and therefore did not satisfy the second element necessary to establish Boulwarism.

Whether I analyze Charging Party's claim of "Boulwarism" with three elements as established by the NLRB or with only two elements as recognized by the Commission, for the reasons as explained in the preceding sections, I reach the same conclusion; Charging Party failed to establish a violation.

Conclusion:

In looking at the County's conduct and actions as developed with the record in the present proceeding it is the opinion of the undersigned that the County did not violate its statutory duty to bargain in good faith as alleged by Charging Party herein. I have considered all other arguments as set forth by the parties and conclude such does not change the outcome. As such I recommend that the Commission issue the following order:

Recommended Order

The unfair labor practice charge levied by AFSCME Council 25, Local 3317 against the County of Wayne is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: May 31, 2017