STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CAPITOL AREA TRANSPORTATION AUTHORITY,
Public Employer-Respondent,

MERC Case No. 21-E-1120-CE

-and-

AMALGAMATED TRANSIT UNION, LOCAL 1039,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Barnes & Thornburg, LLP, by Grant T. Pecor, for Respondent

Jacobs, Burns, Orlove & Hernandez LLP, by David Huffman-Gottschling and Taylor Muzzy, for Charging Party

DECISION AND ORDER

On October 11, 2022, Administrative Law Judge David Peltz issued his Decision and Recommended Order[1] 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

Tinamarie Pappas, Commission Chair

William F. Young, Commission Member

Issued: November 16, 2022

[1] MOAHR Hearing Docket No. 21-009748

STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CAPITOL AREA TRANSPORTATION AUTHORITY,
Respondent-Public Employer,

Case No. 21-E-1120-CE
-and- Docket No. 21-009748-MERC

AMALGAMATED TRANSIT UNION, LOCAL 1039,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Barnes & Thornburg, LLP, by Grant T. Pecor, for the Respondent

Jacobs, Burns, Orlove & Hernandez LLP, by David Huffman-Gottschling and Taylor Muzzy, for the Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case arises from an unfair labor practice charge filed by the Amalgamated Transit Union (ATU), Local 1039 against the Capitol Area Transportation Authority. Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the charge was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Office of Administrative Hearings and Rules (MOAHR), acting on behalf of the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including the transcript of hearing, exhibits and post-hearing briefs, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge and Background:

Capitol Area Transportation Authority (CATA or Respondent) provides bus service to East Lansing and other nearby cities and townships, as well as Michigan State University and Ingham County. ATU, Local 1039 (the Union or Charging Party) is the exclusive bargaining representative for a unit of nonsupervisory employees of Respondent, including bus operators, mechanics and mechanic helpers. At the time of the hearing in this matter, there were approximately 270 members of Charging Party's bargaining unit, of which at least 252 were bus operators.

The most recent collective bargaining agreement between CATA and the Union expired on November 30, 2019. While the parties attempted to negotiate a successor agreement, the terms of

the expired contract remained in effect pursuant to a series of supplemental agreements entered into by the parties. CATA was required to enter into these so-called "protection agreements" under Section 13(c) of the Urban Mass Transit Act of 1964 (UMTA), now codified at 49 USC § 5333(b), as a condition of receiving transit funds from the federal government.

After more than 70 bargaining sessions over a period of eighteen months and the issuance of a report by a neutral fact finder appointed by the Commission, CATA notified the Union on April 16, 2021, that it was declaring impasse. Thereafter, CATA unilaterally implemented certain terms and conditions of employment, including wage increases and changes to work assignments, overtime distribution, vacation payouts and premium pay.

On May 11, 2021, ATU Local 1039 filed this unfair labor practice charge asserting that CATA had violated Section 10(1)(e) of PERA by prematurely declaring impasse and by presenting false information to employees prior to a vote on a package proposal offered by CATA. The charge further alleged that following the declaration of impasse, CATA engaged in regressive bargaining by offering less favorable terms than in its prior proposal and by withdrawing from a tentative agreement entered into during the negotiations. Finally, the charge asserted that Respondent acted in bad faith by filing a corrective action plan with the State of Michigan which contained terms relating to retiree health care that CATA never actually sought to implement.

An evidentiary hearing was originally scheduled in this matter for June 21, 2021, and June 22, 2021. Those dates were adjourned at the Union's request. Additional hearing dates were rescheduled due to the Covid-19 pandemic. The hearing finally commenced on September 17, 2021, and was completed on September 29, 2021. Post-hearing briefs were filed by the parties on or before November 15, 2021.

Finding of Facts:

I. Pre-Fact Finding Negotiations

Andrew Brieschke is CATA's deputy chief executive officer and was a member of Respondent's bargaining team, including as lead negotiator for a period of time prior to fact finding. Brieschke characterized the early bargaining sessions as fairly productive. Indeed, from the start of negotiations on October 8, 2019, through the end of December of that year, the parties participated in 34 bargaining sessions and reached several tentative agreements.

According to Brieschke, progress began to stall when the bargaining teams reconvened in January of 2020. The parties deadlocked over a number of significant issues, none of which were directly related to CATA's financial position. In fact, Respondent stipulated that the rationale for its bargaining proposals was unrelated to its ability to pay. Rather, CATA's primary intention during negotiations was to address work distribution practices which had resulted in some bus operators earning substantially more than other drivers, an issue which CATA and its witnesses referred to as the "$100,000 operator" problem. Among the issues which Brieschke characterized as being critical for management were the methods for assigning work, the elimination of premium pay and modernizing "antiquated" vacation contract language. CATA was also adamant on

addressing what Brieschke described as Respondent's "exorbitant liability" with respect to retiree health insurance.

In an effort to get movement from the Union on the issues identified above, CATA offered the Union an increase in wages, lump sum bonuses, and a new position description for a maintenance job classification which would have had the effect of increasing the size of the bargaining unit. Additionally, Respondent agreed to implement an AM/PM extra board during the summer months when the workload is reduced due to the fact that Michigan State University is not in session. Extra board operators fill in for regular drivers when they are unavailable.

During a sidebar in late January of 2020, CATA informed the Union that it was going to ask the Commission to appoint a mediator to assist the parties in reaching a successor agreement. According to Brieschke, the Union was initially resistant to the idea of a mediator joining the negotiations, but "ultimately they understood." After the mediator became involved in February of 2020, the parties made progress and some additional tentative agreements were reached. However, negotiations came to a halt in March due to the Covid-19 pandemic.

Bargaining resumed in June of 2020. Brieske described the negotiation sessions which followed as "frustrating" and testified that the parties made very little progress. The parties exchanged proposals at a bargaining session on June 19, 2020, with Respondent describing its offer as a "best offer" package proposal. CATA suggested to Charging Party that it submit its offer to the membership for approval, but the Union declined to do so. Brieschke testified that he believed the negotiations had effectively come to a standstill:

> I can tell you after the proposal was offered to the Union I personally felt like a huge weight was lifted off of our team. We had put a lot of time, a lot of effort into many, many proposals, 121 from our side alone. And that's not to disparage or discount their proposals. They had a number as well. But the sides were just locking up. But it was on the 19th, upon issuance of that proposal, that I thought as the leader we had done everything we could. It was a bit of a relief for me. After that we had petitioned for fact finding.

CATA filed its petition for fact finding on June 26, 2020. Thereafter, attorneys Grant Pecor and Taylor Muzzy became involved in the negotiations on behalf of CATA and the Union respectively. Upon joining Charging Party's bargaining team, Muzzy recognized that the parties were not close to reaching agreement on a successor contract. At hearing, Muzzy testified, "What stood out was the . . . magnitude of the issues that remained and the fact that they were predominantly the Employer's issues. There were hardly any Union issues on the table."

On September 20, 2020, the bargaining teams met for the 68th and final time prior to the start of the fact finding hearing. On that date, Steven Soliz, the newly elected president of ATU, Local 1039, asked Brieschke if CATA had anything new to offer. Brieschke told Soliz that CATA would answer any questions but that the Union already had its final offer. The meeting concluded without any proposals exchanged between the parties.

II. Fact Finding

Kenneth W. Zatkoff was appointed by the Commission as fact finder on August 4, 2020. Zatkoff conducted a scheduling conference on August 19, 2020, during which the parties identified the outstanding issues. Prior to the start of the fact finding hearing, Pecor and Muzzy were able to tentatively resolve several issues, including changes to the grievance procedure, bus operator training incentives and a health insurance spousal carveout. Among the significant issues which remained in dispute were modification of the existing contract language pertaining to the Family Medical Leave Act (FMLA); attendance bonuses; bus assignments, overtime, extra board; vacation pay; insurance; wages; ratification bonus; zipper clause and contract duration.

A hearing was held before the fact finder on October 28, 2020, and October 29, 2020, during which the parties presented evidence regarding the various outstanding issues. Prior to the start of the hearing, CATA presented to the fact finder the same "best offer" package proposal it had previously made to the Union at the bargaining session on June 19, 2020. In its submission to the fact finder, the Union made a proposal containing various modifications to its most recent offer. The Union did not alert either Respondent or the fact finder to the fact that its proposal had been updated and CATA's team did not realize that changes had been made until halfway through the first day of the hearing.

The Union's modified proposal differed from its offer of June 19, 2020, in several respects, including wages for members of the bargaining unit. In its early offer, the Union had proposed wage increases of 5 percent for the first two years of the contract and 4 percent for the final year, plus longevity premiums as high as 7 percent of base wages for employees with 14 years of service and 10 percent for employees with 19 or more years of service. In addition, the Union had proposed maintaining the status quo with respect to retiree health insurance. The modified proposal lowered wage increases for the first two years of the contract from the prior offer to 4 percent for each year of the agreement and removed longevity premiums. The Union also agree to the elimination of retiree health insurance for full-time employees hired after ratification of the new agreement provided that it was replaced with a health care savings plan to which CATA would contribute. Under the Union's modified proposal, the employer would be required to contribute $250 or 5 percent of pay, whichever is greater, per month to the savings plan.

After the conclusion of the hearing, the fact finder gave the parties the opportunity to submit modified proposals before briefs were submitted. CATA did not submit a modified proposal. On November 12, 2021, the Union submitted a proposal in which it accepted CATA's last offer regarding overtime signup lists. Under the existing contract, there were several different voluntary overtime sign up lists for various types of duties. For example, there were separate lists for full-time operators, part-time operators, and extra board assignments. Each day, the distribution of overtime would pick up from where it left off on the list the prior day. The Union accepted CATA's proposal to consolidate the voluntary overtime lists into two lists, one for full-time operators and one for part-time drivers. The Union also accepted CATA's last offer with respect to extra board rotation and the procedure for reassigning leave if a driver cancels his or her bid for vacation time. In addition, the Union modified its offer with respect to FMLA leave to include language addressing combined spousal leave and proposed that FMLA days would not count as

days worked for purposes of the attendance bonus. Finally, the Union proposed a safe driving limit of 14 hours pay time and modified its proposals with respect to spread time, as explained in more detail below.

The parties also reached agreement on certain issues relating to premium pay. As reflected in the Union's post-hearing brief to the fact finder, the parties agreed to a change in overtime scheduling and a mandatory rest period of eight hours, as well as two consecutive days off for employees who are assigned to work on Saturdays and Sundays. The Union also agreed to several of CATA's proposals regarding protection, which covers situations in which a driver who is assigned to the extra board is not selected for a run but instead shows up at a CATA facility and waits for a run to become available due to an unplanned absence or emergency.

The fact finder issued his report on February 12, 2021. The proposals which were before the fact finder and his subsequent conclusions and recommendations are described in detail below:

A. Family and Medical Leave Act

Both parties agreed that the collective bargaining agreement needed to be updated to account for the 2008 amendments to FMLA which addressed circumstances in which a qualifying FMLA leave can be consolidated when both spouses work for the same employer. However, the parties disagreed about what language best complied with the federal statute. The fact finder did not specifically recommend adoption of either party's proposal. Rather, Zatkoff recommended that "language be incorporated into the collective bargaining agreement that mirrors to the fullest extent possible" the language set forth in a fact sheet issued by the Department of Labor, Wage and Hour Division.

Another outstanding issue relating to FMLA leave concerned the use of paid time off. Under the existing agreement, employees had the discretion to utilize their paid time off concurrently with FMLA leave. Respondent proposed to eliminate that option and require employees to use all available paid time off concurrently with FMLA leave. CATA argued that its offer was consistent with the collective bargaining agreements of comparable employers and that implementation of the proposal would earn back the trust of the general public which had been lost due to the excessive amounts of overtime paid in past years. The fact finder agreed with the Union's proposal to maintain the status quo with respect to paid time off.

B. Attendance Bonus

CATA proposed to eliminate the existing $50 monthly attendance bonus provided to full and part-time employees who miss only two regularly scheduled work shifts in a given month and to limit the bonus opportunity to situations in which an absence is approved in advance prior to the activation of the work schedule for that specific day. CATA argued that its proposal would have a direct impact on its efforts to reduce overtime costs. The Union proposed retaining the current language, with the exception of eliminating FMLA leave from the list of absences that count as days worked. The Union also sought to add a new provision which would credit members of the bargaining unit with an annual forty-hour sick bank. The fact finder recommended the

deletion of language allowing FMLA leave from the list of absences that count for purposes of perfect attendance and adoption of the remainder of CATA's proposal.

C. Bus Assignments

CATA proposed eliminating language from the existing contract which required that each operator keep driving the same bus for the entire day. The Union proposed retaining that language, but permitting exceptions to that requirement for Route 1 and any future regional transportation service. According to Soliz, the existing language was important to the Union because it has a direct impact on how runs are assigned and the amount of work hours for which drivers could bid. In addition, Soliz testified that eliminating the provision would have an impact on driver safety. The fact finder concluded that there was no evidence that the safety of the drivers would be jeopardized by the elimination of the bus assignment language and recommended adoption of CATA's proposal.

D. Workweek and Overtime

The standard work week for bargaining unit members is five days within a seven-day period, with each day consisting of eight hours of work. Under the expired agreement, bus drivers received overtime at time-and-a-half when they worked over eight hours in a day and for all hours worked over forty in a week. In addition, drivers were paid time-and-a-half for work performed on the sixth day within a week and double time for work performed on the seventh day. According to the fact finding report, there have been instances in which employees have received time-and-a-half and/or double time on a sixth or seventh day of the workweek even though they received less than forty hours of compensation during their regular scheduled five days.

CATA proposed to streamline the overtime compensation process by paying drivers time-and-a-half for all hours worked after forty hours in a work week. In addition, CATA proposed that certain forms of paid time off (approved vacation, floating holidays, national holidays, jury duty and paid military leave) would count as eight hours worked for purposes of the 40-hour threshold. CATA maintained that the changes it had proposed were necessary to control overtime expenses and to address the public's negative perception of CATA's overtime costs.

According to the fact finding report, the Union opposed any change in the long-standing overtime provisions set forth in the collective bargaining agreement. Nevertheless, in an effort to resolve some of the confusion, the Union offered to add seventh day overtime to the sixth day overtime provisions of the collective bargaining agreement in order to clarify that an employee who is absent during the workweek is not eligible for seventh day overtime. The Union's proposal would also prevent employees from receiving double-time when they are on unpaid leave on the seventh day in a given workweek.

The fact finder recommended that the parties adopt the Union's proposal to maintain the status quo language that employees be paid time-and-a-half for working more than eight hours in a workday and for all hours over forty in a workweek. Regarding the issue of sixth and seventh day overtime, the fact finder suggested a compromise pursuant to which all work performed by bargaining unit members on the sixth day would be paid at time-and-a-half and at double rate for

the seventh day in the workweek. The fact finder also specified which approved days off with pay should be considered as days worked.

E. Overtime Restrictions and Limits

When an operator is absent from work, his or her run is assigned to another bargaining unit member who signed up on the extra work board. This extra work time is added to the operator's normal eight-hour workday. The established practice at the time of the fact finding hearing was to limit the total amount of time an operator could work in a day to 13 hours of pay, a term of employment which CATA sought to maintain. The Union proposed to increase the safe driving limit to 14 hours to increase overtime opportunities for its drivers and create more volunteers for overtime. The fact finder recommended continuation of the 13-hour safe driving limit.

The second issue in dispute concerned the distribution of extra work related to spread time. Some bus operators work split runs, meaning that an operator may be assigned to work a first shift during the morning rush and then wait around for a second shift in the afternoon or evening. During this time, operators must remain in uniform and available for duty. Under the expired contract, the maximum spread time was 20 hours, which CATA offered to reduce to 18 hours. The Union had initially proposed limiting spread time to 14 hours, with that limit reduced to 10 hours if a driver was forced to work. In its proposal to the fact finder, the Union modified its earlier offer to include a spread time limit of 16 hours with no exceptions for mandatory work. The fact finder recommended adoption of CATA's proposal for an 18-hour spread time.

F. Extra Board

There were two issues in dispute with respect to the extra board. First, the parties disagreed with respect to the distribution of extra board assignments during the summer months when Michigan State University is not in session. The Union, in its proposal to the fact finder, sought to require that 60 percent of extra board assignments during the summer be restricted to Monday through Friday in order to afford bargaining unit members the opportunity to have their weekends off. CATA sought to create a separate extra board for the summer months with no restrictions on Monday through Friday assignments. Under CATA's proposals, the summer extra board would be split into separate AM and PM boards. Operators would be allowed to bid on both segments but could only be awarded AM or PM work. CATA argued that its proposal would allow for greater flexibility in the scheduling of extra duty work. The fact finder recommended adoption of the contract language proposed by the Employer.

The second issue related to how the AM/PM extra board would operate. CATA sought to modify the collective bargaining agreement to allow it to bundle smaller pieces of work to create a combined run of eight hours or more so that it could create more efficient loads and limit overtime expense. In support of that objective, CATA proposed the implementation of 12 new conditions for the operation of the extra board. The Union argued that many of these conditions, if implemented, would give the Employer too much discretion to change the manner in which extra board work is created and assigned. In addition, the Union opposed the bundling of work. The fact finder recommended that the contract be amended to permit CATA to bundle work but left it to the parties to determine how that bundling is to be accomplished.

G. Vacation Pay

Under the expired contract, the amount of vacation pay a bargaining unit member received was equal to 1/52 of that employee's total straight time, overtime and vacation pay combined for the year. CATA argued that this method of calculation greatly inflated the vacation pay to employees. For that reason, CATA proposed that employees receive vacation pay based on 40 hours pay at their regular rate. In addition, the Employer sought to change when an employee is eligible to receive vacation pay. Under the existing contract, vacation benefits are paid during the pay period following an employee's anniversary date. Instead, CATA proposed that vacation payments should be made during the pay period in which the vacation occurs. The Union opposed any change to the parties' long-standing vacation provision. The fact finder recommended that the current contract language be retained.

H. Health Insurance

Brieschke testified that CATA has outstanding liability for post-employment benefits of approximately $40 million. In an effort to address that existing debt, CATA proposed the elimination of retiree health benefits for employees hired after December 1, 2019. The Union was willing to agree that employees hired after ratification of a new contract would be ineligible to receive retiree healthcare benefits provided that the Employer commit to contribute $250 or five percent of an employee's pay, whichever is greater, to a healthcare savings plan. The fact finder recommended adoption of CATA's proposal to eliminate retiree health care benefits with no healthcare savings plan, but agreed with the Union that the cutoff date should be the date of contract ratification.

The fact finder also addressed a disagreement between CATA and the Union regarding health insurance for active employees. Because CATA is self-insured, employees contribute to their health insurance by paying participation fees rather than premiums. Prior to the fact finding hearing, the parties reached agreement with regard to the participation fees for the 2021-2022 and 2022-2023 plan years. CATA proposed that the parties meet in 2022 to negotiate the participation fee for the final year of its proposed three-year collective bargaining agreement. The Union opposed CATA's offer on the ground it wanted a contract for only two years. The fact finder recommended that the parties reopen negotiations in 2022 for the establishment of insurance participation fees covering the 2023-2024 plan year. The fact finder also recommended adoption of CATA's proposal to include language stating that the agreement may be reopened for the purpose of negotiating alternative insurance coverage and premium contributions if utilization results in rate increases that impact the affordability of the current plans under the Affordable Care Act (ACA).

I. Wages

Respondent offered a three-percent wage increase for each year of its proposed three-year contract. According to the fact finding report, this would have represented larger yearly wage increases than in the expired contract and would constitute the biggest increase offered by CATA since approximately 2007. CATA also proposed a ratification bonus of $1,500 for full-time

employees and $750 for part-time employees, with additional bonuses of $1,000 for full-time employees and $500 for part-time employees effective July 1, 2021, and July 1, 2022. The Union proposed a two-year contract with four percent wage increases on December 1st of 2019, 2020 and 2022. In addition, the Union proposed a bonus of $2,500 for full-time employees and $1,250 for part-time employees upon ratification. The Union agreed with CATA's proposal with respect to subsequent bonuses. The fact finder recommended adoption of CATA's proposal for a three-year contract with a three percent wage increase each year. With respect to the bonuses, the fact finder recommended a compromise ratification bonus of $2,000 for full-time employees and $1,000 for part-time employees, along with the yearly bonuses already agreed to by the parties.

J. Zipper Clause

The expired contract did not include a "zipper clause." Respondent proposed adding language stating that the new contract expresses the complete understanding of the parties with respect to wages, hours, working conditions, hours of work, benefits and conditions of employment, and that such agreement supersedes any past practice not incorporated therein. The Union opposed the addition of a zipper clause and the fact finder recommended maintenance of the status quo.

III. Post Fact-Finding

CATA responded to the fact finding report by letter dated February 19, 2021. The Employer accepted, in part, the fact finder's recommendations and provided its rationale for those portions of the report to which it disagreed. In the letter, CATA specifically rejected the fact finder's recommendations concerning FMLA leave, premium pay, zipper clause, vacation pay, retiree health benefits and all other issues for which Zatkoff found in favor of the Union or recommended compromise language. Respondent noted in the letter that even if both parties were to accept the fact finding report in its entirety, there would still be a need to return to the bargaining table in order to resolve several issues which remained in dispute, including Zatkoff's recommendation that the parties negotiate over how extra board work will be distributed.

In its written response to the fact finding report, submitted on February 22, 2021, the Union likewise accepted only those recommendations relating to issues for which the fact finder found in its favor. Specifically, the Union accepted the fact finder's recommendations concerning FMLA leave, premium pay and vacation pay and the zipper clause, but rejected all of Zatkoff's other recommendations.[1]

The parties met to bargain for the first time following the issuance of the fact finding report on March 9, 2021. For reasons not set forth in the record, a new mediator was assigned to assist

[1] In rejecting the fact finder's recommendation with respect to retiree health care, Respondent asserted that Zatkoff's recommendation to eliminate retiree health benefits for employees hired after the date of ratification would be inconsistent with the commitments it made in a corrective action report which was submitted to the Michigan Department of Treasury in 2019. In that corrective action report, which CATA was required to submit pursuant to MCL 38.2810 because its retiree health plan was underfunded, CATA indicated that it would eliminate that benefit and instead implement a defined contribution plan for retiree healthcare for employees hired on or after December 1, 2019.

the parties in resolving their contract dispute. As a result, much of the session was devoted to familiarizing the mediator with the issues which remained outstanding. Because Charging Party had modified its proposals prior to, during, and after the fact finding hearing, the Union insisted that CATA come forward with a new offer. Pecor, who had recently taken over as Respondent's lead negotiator, told the Union that it already had CATA's proposal and the meeting came to an end without a joint session. There were also no face-to-face discussions at the next bargaining session held on March 17, 2021.

The parties met again on March 22, 2021. At the start of the meeting, CATA informed Charging Party that it would not accept any proposal which mandated a minimum number of extra board assignments for Monday through Friday and that it would reject any proposal for a new sick leave benefit. Despite that admonition, the Union subsequently presented a proposal to the Employer which called for reducing the minimum amount of extra board assignments that must be scheduled during the weekday from 60 percent to 50 percent. The Union agreed to reduce the amount that CATA would be required to contribute to the retiree healthcare saving plans on a monthly basis from its earlier offer of $250 or five percent of an employee's pay to $225 or 4.5 percent, whichever is greater. With respect to FMLA leave, the Union proposed adding language to the contract stating that CATA may require the substitution of unused vacation time after an employee has exhausted his or her short-term disability, with the caveat that an employee may reserve 40 hours of unused vacation time. Finally, the Union reduced its proposal for paid sick leave from 40 hours to 3 days.

According to Brieschke, CATA rejected the Union's new proposal because it did not address the issues that Respondent's bargaining team had previously identified as being "key" for the Employer. Brieschke characterized the Union's offer as "just kind of nibbling around the edges." During the bargaining session, which was being held remotely, Pecor sent an email to Muzzy in which he asserted that it was "a little hard to take" the Union's proposal as having been made in good faith since the Union was already on notice that such changes would not be acceptable to CATA. Muzzy responded with an email asserting that it was Respondent which was acting in bad faith by telling the Union's bargaining team that it "is refusing to make any formal bargaining proposals, and will only make 'supposals' because it wants to maintain its ability to declare impasse." At the hearing in this matter, Brieschke denied that Pecor ever told the Union it did not have to make a proposal and, in fact, the record indicates that CATA presented the Union with a modified offer at the March 22, 2021, bargaining session which consisted of updates to the FMLA language. Although CATA continued to insist that employees be required to utilize available paid time off concurrently with FMLA leave, the Employer agreed to exclude one week of unused vacation time from that requirement. The Employer also proposed that when an employee and his or her spouse both work for CATA, spousal leave would be limited to a combined total of 12 weeks of FMLA leave over the course of a year.

The next bargaining session was held on March 24, 2021, during which the Union made a package proposal that included an increase in spread time from 16 to 18 hours and new language intended to simplify the distribution of extra work assignments. The Union also agreed to delete the requirement that operators keep the same bus throughout the day, a concession which Soliz described as "absolutely huge." Finally, the Union proposed to change the method by which vacation pay is calculated. Rather than the current practice of calculating vacation pay based upon

1/52 of an employee's total straight time, overtime and vacation pay, the Union proposed that full-time employees would be paid 55 hours of straight time for vacation pay and that part-time employees would be paid 35 hours of straight time. CATA characterized the proposal as regressive and asserted that the language the Union offered regarding vacation pay was actually worse than what was in the current contract. CATA did not make any counteroffer.

The parties met again on April 5, 2021. At the start of the bargaining session, Muzzy stated that the Union wanted CATA's "final offer" and indicated that it was prepared to take whatever was on the table back to its members for a vote. Although CATA initially indicated that the Union already had its proposal, the Employer did present modified language regarding FMLA leave. In addition, the parties drafted and executed tentative agreements which they had previously reached regarding the grievance procedure and operator training incentives. The parties also attempted to finalize contract language pertaining to spousal health care coverage. In an email to Muzzy that same day, Pecor wrote:

> Lastly, I want to reiterate that, although CATA is currently unable to identify modifications to its prior proposals we are open to that possibility to the extent the parties might be able to discuss something to merit such a modification. Indeed, while CATA is emphatic that the issues reflected in its proposals need to be addressed, it remains open to potential modifications that might better address your unions [sic] concerns while still addressing the issues involved.

According to Muzzy, this email was characteristic of Pecor's responses to Charging Party's proposals throughout the entire bargaining process. Muzzy testified that Pecor would typically thank the Union for moving from its prior position and recognize that the changes were significant, but indicate that there was not enough movement for CATA to make a new comprehensive proposal. Both Muzzy and Soliz testified that Pecor frequently told the Union that CATA had some leeway with respect to its demands, but that he never identified the issues regarding which the Employer was willing to make concessions.

IV. Membership Vote and Aftermath

Following the April 5, 2021, bargaining session, the Union scheduled a vote on CATA's last package proposal, including all tentative agreements and its newly modified FMLA offer. Prior to the vote, CATA drafted a "Factsheet" containing information about its proposal. The document, which was posted on the Employer's website, asserted that retiree health and other post-employment benefits were "grossly underfunded by $80 million" and that "[p]ension, other post-employment benefits (OPEB), would continue, along with health care benefits (with some premium shift)." The membership vote, which was held on April 11, 2021, resulted in an overwhelming rejection of CATA's proposal with 176 votes against and only 7 votes in favor of accepting the Employer's offer.

The parties returned to the bargaining table on April 13, 2021, for what would turn out to be the 74th and final negotiation session prior to the declaration of impasse.[2] After some discussion

[2] On that date, there was a demonstration in support of the Union occurring outside the bargaining location. Soliz described the event as an "information picket" and a "community rally."

about the results of the membership vote, the Union asked CATA's bargaining team whether it had anything new to offer. When CATA indicated that it had no new proposal to make, the parties proceeded to caucus separately. Later that day, the Union submitted a new package proposal which, according to Soliz, contained several changes which were directly responsive to the "$100,000 operator" issue. These changes included the elimination of daily overtime; language specifying that sixth and seventh-day overtime would be paid only if the operator was forced to work; a decrease in the safe driving limit to 13 hours paid time as proposed by CATA; acceptance of CATA's proposal regarding the assignment and grouping of overtime with respect to the AM/PM extra board; and elimination of the attendance bonus for employees who miss only two shifts in a month. The Union also agreed to a three-year contract with no change in the insurance fee from the second to the third year of the agreement. With respect to its demand for a health care savings plan for new full-time employees, the Union proposed that CATA contribute the greater of $250 or 4 percent, the latter of which represented a .5 percent reduction from the Union's prior offer.

Regarding compensation for bargaining unit members, the Union's April 13, 2021, package proposal contained substantial increases from its last offer which was submitted as part of the fact finding proceeding in December 2020. In its submission to the fact finder, the Union had proposed wage increases of four percent for each year of the collective bargaining agreement (12 percent over the duration of the contract) along with ratification and other bonuses totaling $4,500 for full-time employees and $2,250 for part-time employees. In its new offer, the Union proposed a 6 percent wage increase retroactive to July 1, 2020, a 5.5 percent wage increase for the first year of the agreement and 5 percent increases for the final two years of the contract (21.5 percent over four years). With respect to ratification and other bonuses, the Union now sought a total of $10,000 for full-time employees and $5,000 for part-time employees throughout the term of the contract. However, the Union agreed to CATA's proposal to delay the timing of the wage increases by six months.

CATA rejected the Union's package proposal. At the hearing in this matter, Brieschke described CATA's position regarding the Union's offer as follows:

> [The Union] had not addressed any of the core issues we needed in terms of premium pay or vacation payouts, work distribution. It did have some elements of prior proposals of nibbling around the edges, things like it deleted the last day of the attendance bonus.
>
> They wanted, if I recall, FMLA back to [the current contract language] . . . And I think there was some modification of the proposal to drive time limits, but nothing addressing the key issues, and management ultimately rejected it.

Soliz testified that Pecor acknowledged that the changes represented "significant movement" but asserted that the Union was continuing to "nip around the edges" and avoiding addressing the "big issues." According to Soliz, Pecor indicated to Charging Party's bargaining team that in order for the parties to reach an agreement, the Union would have to accept CATA's proposals regarding overtime, premium pay and vacation pay. At the hearing, Soliz conceded that the bargaining subjects that CATA was insisting upon where the same topics that Respondent had

been demanding throughout the negotiations, just as the Union had insisted on certain proposals for some time. Soliz also admitted that the elimination of retiree health care was "not an option" for the Union and that he stated as such during an interview he gave regarding the negotiations. However, Soliz, testified that he might consider giving up retiree health care "[i]n the context of a total fair package."

When the parties resumed negotiations after breaking for lunch, Pecor indicated that there were some other options available which might encourage the Union to address some of the Employer's key issues. Pecor suggested ideas such as compensation increases in the form of one-time bonuses, a delay in implementation of CATA's proposals regarding vacation payments and minor changes to Respondent's economic packages. According to Brieschke, the Union rejected these propositions and indicated that it would not agree to the key issues cited by the Employer. After a caucus, the Union informed CATA that it would not be making another proposal that day and instead wanted to focus on an extension to the most recent bridge agreement which was due to expire at midnight on April 15, 2021. Although CATA wanted to continue the negotiations, Charging Party's bargaining team decided to end the session, in part, so that it could examine an arbitration award which Pecor had provided to the Union earlier in the day. Soliz also noted that the Union had "made all the movement for that day that we could" and that it needed to regroup to "figure out what would come next."

The following day, Muzzy sent a letter to Pecor summarizing the Union's prior package proposal and emphasizing its desire to enter into another extension of the bridge agreement. With respect to the status of the negotiations, Muzzy wrote:

> During yesterday's session, the parties had a detailed and substantive discussion about many issues for the first time since the fact finding report was issued. For example, you mentioned for the first time CATA's concern with the current contract language impacting its ability to contract-out the FMLA administration. The parties discussed for the first time the inclusion of guarantee time toward weekly overtime, and you provided a copy of an arbitration award that you said relates to that issue. The parties for the first time discussed the third year of the contract, and discussed participation fees and wages and the possibility of an increased signing bonus.
>
> As I mentioned at the end of the bargaining session, the Union believes that yesterday's discussion was informative and that additional progress is possible at the bargaining table. The Union is considering all the issues that were discussed and is reviewing the arbitration award that you provided. The Union requested to schedule additional bargaining dates, with or without the mediator, but CATA would not commit to schedule any additional dates. I want to reiterate the Union's request that the parties continue bargaining and schedule additional dates to do so.

In a letter to Muzzy dated April 16, 2021, Pecor indicated that Respondent had determined that the parties were at an impasse in the negotiations and declared that it was CATA's intention to implement certain portions of its current proposal, including the three percent wage increase that the Employer had previously offered. In the letter, Pecor wrote:

> The reality is the parties continue to engage in similar discussions regarding the issues at hand and, from CATA's perspective, have been spinning their wheels for months now despite the assistance of State mediators and the State appointed Fact Finder. Indeed, to date, the Union has not indicated any willingness to address the controversial premium pay practices CATA has consistently demanded be included in any final agreement. Moreover, the Union has consistently refused to cap participation in retiree health coverage without an overly expensive replacement. Your union's recent ratification vote and picketing only further confirm the Union's convictions on the unresolved issues preventing the parties from reaching an agreement. Given these indications, it is apparent that the parties have taken positions in direct contradiction to one another and that this deadlock will not be broken absent a significant change in either parties' position. Accordingly, it appears CATA has no choice but to take a new approach to the parties' ongoing negotiations. Needless to say, this requires they decline your request to enter into another bridge agreement.
>
> * * *
>
> In doing so, it is important to note that it is CATA's sincere desire to move this process along in hopes of reaching an overall agreement with your Union sooner than later. In doing so, it is CATA's hope that your team will be able to better envision a possible agreement now that these changes are in place. In doing so, my team would like to see if the parties might be able to resume our discussions on the afternoon of April 20 or on April 22. The mediator has indicated he would be available on both dates. As such, with these changes already in place, I hope your team will join CATA in returning to the table to see if the parties might finally be able to resolve their ongoing negotiations.

Attached to the letter was a document setting forth the specific terms and conditions of employment which CATA planned to impose on Charging Party's members. Brieschke testified that the Employer decided to implement those portions of its last proposal that it felt best and most efficiently addressed the key issues in dispute, including work assignments, overtime distribution, vacation payouts and premium pay. According to Brieschke, CATA did not intend to implement any provisions of the expired contract or the tentative agreements which were unrelated to the "core issues." CATA admits that it was not fully prepared for the implementation and, as a result, problems arose with respect to various issues including payment of step increases, short term disability and vacation pay.

V. Negotiations Following Implementation

The parties resumed contract negotiations on April 22, 2021. At the start of the bargaining session, Pecor informed the Union that the Employer considered implementation to be a change in circumstances and that it was no longer willing to offer the terms set forth in its prior proposal. At hearing, Brieschke explained that because CATA's prior proposal which the Union had rejected was a package intended to encourage resolution, there was no "no longer an incentive for the

Employer to stick with some of the things we had offered in the past." Instead, CATA provided the Union with a comprehensive proposal entitled, "CATA Initial Proposal Post Implementation." The new offer incorporated many of the Employer's previous proposals but also included updates to certain items. Specifically, CATA proposed the following terms and conditions of employment:

1) Sickness Policy: The parties had reached a tentative agreement regarding what an employee must submit to ensure that an absence due to illness would be excused. The old language required the employee to provide a written statement from a medical professional indicating the "nature and extent of the illness." Under the new language proposed by CATA, the documentation must indicate why the individual is unable to perform their duties and relevant medical facts. CATA's new proposal also specified that the documentation required to prove an illness "shall be consistent with that provided under the FMLA certification process."

2) Discipline: The parties had reached a tentative agreement to add language stating that the Union would be provided a list of names and alleged violations prior to the issuance of discipline. CATA withdrew that offer and proposed reverting to the language in the expired collective bargaining agreement.

3) Job Assignments: CATA withdrew its offer for an AM/PM extra board and instead proposed reverting to the language of the expired contract. The Employer also withdrew a tentative agreement regarding board posting which would have required CATA to provide the Union with copies of initial work assignments and reassignments.

4) Mechanic Helper: The expired contract stated, "To become a Mechanic Helper, the employee would have to pass a written qualification test administered by the Authority with a passing score of 70%." For the first time, CATA proposed to change the language to "the employee *or outside applicant*."

5) Employees on Duty: The expired contract required management to assign at least two union employees to each section of the maintenance area for safety purposes. CATA now proposed to change the language to mandate the assignment of "at least two employees."

6) Arbitration: This section had been the subject of a prior tentative agreement. In its new proposal, CATA added language allowing the parties to seek an arbitrator appointed by the Michigan Employment Relations Commission.

7) Health Insurance: CATA struck a provision from the expired contract which limited claims incurred in relation to an auto accident to $1,000 and replaced it with language stating that health insurance "shall be secondary to applicable auto insurance."

8) Wages: CATA changed the effective date of the proposed wage increases.

9) Zipper Clause: CATA changed the language of its previous proposal to state that the parties "specifically acknowledge the protective arrangements required for compliance with 49 USC 5333(b) (i.e. Section 13(c) of the Mass Transit Act) shall continue undisturbed.

After Charging Party expressed dissatisfaction with CATA's proposal, Respondent stated that it might be willing to consider reverting to its pre-impasse proposal if the Union was interested. Brieschke testified, "we said we're willing to revisit any of the areas, including the areas that were changed. Let's talk through it. Let's work out some proposals. And they stayed upset and that [discussion] never materialized."

At the next bargaining session, held on May 12, 2021, the Union presented its own post-implementation package proposal. The Union proposed that all prior tentative agreements reached between the parties be maintained. With respect to FMLA leave, the Union reverted to its earlier proposal which specified that employees could be required to substitute their unused vacation time after they have exhausted their short-term disability benefits, with the understanding that 40 hours of vacation time can be reserved at the individual employee's discretion. The Union reduced the amount that CATA would be required to contribute to its proposed health care savings plan to $200 or four percent of an employee's pay, whichever is greater. The Union clarified that participation fee increases for 2021 would be effective upon contract ratification and proposed an additional year of participation fees with a $2 increase for employees effective March 1, 2024. The proposal contained wage increases less than those in the Union's prior offer, but continued to seek $10,000 in new bonuses, including a new Covid-19 hazard bonus. The Union continued to demand double-time for the seventh day as well as paid sick leave.

CATA rejected the Union's proposal. According to Brieschke, the proposal did not differ substantially from the offer the Union made on April 13, 2021. Although the Union claimed that the hourly wages and other benefits in its offer represented a savings for the Employer, Brieschke testified that it actually reduced the cost of wages and benefits by only one half of a percent. As of the date of the hearing in this matter, no additional bargaining sessions had been held.

Arguments of the Parties:

Charging Party contends that CATA violated its obligation to bargain in good faith under Section 10(1)(e) of PERA by refusing to move from the positions it took prior to the start of the fact finding proceeding, despite substantial movement by the Union on many significant issues. The Union points out that CATA made just two minor proposals after the completion of fact finding and then declared impasse as soon as 60 days had passed from the date that Zatkoff issued his report. According to the Union, these facts establish that CATA did not engage in bargaining with any intention of reaching a successor agreement. As further evidence of bad faith bargaining, the Union asserts that CATA presented false information to employees prior to the membership vote and that the Employer relied on false representations it made to the Department of Treasury as justification for rejecting the fact finder's recommendation concerning retiree health insurance.

Charging Party further argues that CATA violated the Act by prematurely declaring impasse and implementing portions of its last proposal. Charging Party contends that the positions of the parties were not fixed at the time impasse was declared, as evidenced by the fact that the Union made a comprehensive proposal just three days earlier that included concessions on several important issues. In addition, the Union notes that the parties had only recently begun to discuss certain topics for the first time since the issuance of the fact finding report. According to Charging

Party, a valid impasse could not have existed at the time because CATA never made the Union aware of which of its positions, if any, had solidified. Lastly, the Union asserts that CATA's lack of preparedness to actually implement its proposals on April 16, 2021, demonstrates that the Employer did not actually believe that the parties were at impasse at the time.

In addition to asserting that CATA violated PERA by prematurely declaring impasse at the first available opportunity after the 60-day period ended and after the last bridge agreement had expired, Charging Party argues that the Employer acted in bad faith during the negotiations which occurred following implementation. According to the Union, CATA withdrew from several tentative agreements reached by the parties over many months of bargaining, including agreements on issues which the parties stipulated to the fact finder had been resolved. In addition, Charging Party contends that the Employer made new proposals which were regressive in nature. According to the Union, such conduct was intended to forestall the possibility of reaching agreement on a new contract.

Respondent argues that the record does not support the Union's contention that CATA engaged in bad faith bargaining. According to Respondent, a review of its conduct throughout the negotiations establishes that CATA engaged in the bargaining process with an open mind and a sincere desire to reach an agreement. In support of this argument, CATA points out that during the period prior to fact finding, the parties engaged in 70 bargaining sessions, exchanged more than 200 proposals and reached numerous tentative agreements. In fact, Respondent asserts that it updated its proposals at least 121 times prior to the start of fact finding and that it was the Employer which sought to utilize the Commission's dispute resolution services. CATA argues that there is no evidence in the record suggesting that it ever refused to discuss any proposal or that its bargaining demands were inherently designed to avoid reaching an agreement. With respect to its conduct following the issuance of the fact finding report, Respondent concedes that it engaged in hard bargaining but asserts that it was actually the Union which attempted to delay bargaining or otherwise frustrate the progress of the negotiations. In addition, the Employer argues that the duty to bargain in good faith does not obligate a party to adopt the recommendations of the fact finder or alter its bargaining positions.

Turning to the issue of impasse, CATA asserts that the evidence overwhelmingly establishes that the positions of the parties had solidified by April 16, 2021, or earlier, to the extent that further bargaining would have been futile. In support of this contention, Respondent once again refers to the fact that there were numerous bargaining sessions held both before and after Zatkoff made his recommendations. In addition, CATA argues that it engaged in efforts to incorporate some of the fact finder's recommendations into its bargaining proposals. According to Respondent, the record establishes that CATA negotiated in good faith over the substance of the fact finding report for a period of at least 60 days. Respondent contends that the witness testimony establishes that the Union's position had become fixed by the close of the April 13, 2021, bargaining session and that, in fact, a review of the parties' proposals over the months preceding that session confirms that CATA and the Union had actually been at impasse for some time. While conceding that the Union made a number of proposals before and after fact finding, Respondent argues that those proposals never addressed the core issues which CATA had identified as being a necessary component of any successor contract. In fact, CATA argues that the record shows that the parties were actually moving further apart as of the date of the Union's final pre-impasse

proposal and that the concessions contained in that proposal were offset by "poison pills" in other areas such that they cannot be deemed to represent a substantial change in the Union's position.

With respect to Charging Party's claim that CATA engaged in regressive bargaining following its declaration of impasse, Respondent does not dispute that it returned to the bargaining table and presented a proposal that contained new offers and modifications of previous tentative agreements. However, Respondent argues that these facts do not establish a violation of its bargaining duty. Respondent contends that the declaration of impasse and subsequent implementation was a change in circumstances which justified the modification of its bargaining positions and that its bargaining team told the Union that it would be willing to revisit all or some of its pre-impasse proposal if the Union was interested. In addition, the Employer asserts that the changes were permissible because its prior offer was a package proposal which the Union had rejected.

Finally, Respondent asserts that a violation of the duty to bargain in good faith cannot be established by virtue of the "Factsheet" which it published prior to the membership vote. CATA argues that there was no testimony presented regarding the distribution or utilization of that document and no evidence which would establish that the representations set forth therein were actually false. Respondent contends that even if there were inaccuracies or misrepresentations contained in the Factsheet, they could not form the basis of violation of the Act given the fact that a public employer has an undisputed right to communicate with employees as long as it does so in a non-coercive manner and without engaging in direct dealing.

Discussion and Conclusions of Law:

Charging Party contends that CATA violated its duty to bargain in good faith under PERA. Section 15 of the Act, MCL 423.215(1), requires that a public employer bargain collectively with the representatives designated or selected by the majority of the public employees in a unit appropriate for collective bargaining. The duty to bargain collectively is a "mutual obligation of the employer and representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment." *Id*. The duty to bargain in good faith includes more than merely showing up for a single bargaining session. Good faith bargaining requires that the employer meet with the union and listen to and discuss its proposals regardless of whether or not the employer believes that an agreement could ultimately be reached. *Midland Pub Sch*, 20 MPER 32 (2007) (no exceptions); *Gibraltar School District*, 1993 MERC Lab Op 493, 499-500.

However, this obligation does not "compel either party to agree to a proposal or make a concession." MCL 423.215(1). In essence, the requirement of good faith bargaining is simply that the parties manifest such an attitude and conduct that will be conducive to reaching an agreement. *Police Officers Ass'n v Detroit*, 391 Mich 44, 54 (1974). In determining whether a party has violated its statutory duty to bargain in good faith, the totality of the party's conduct must be examined to determine "whether it has actively engaged in the bargaining process with an open mind and a sincere desire to reach an agreement." See e.g. *Unionville-Sebewaing Area Schools*, 1988 MERC Lab Op 86, 89, quoting *Police Officers Ass'n v Detroit* at 53-54. Conduct that may lead to a finding of surface bargaining includes, but is not limited to, the refusal to execute a written

contract embodying an agreement between the parties, engaging in negotiations directly with individual employees and, as discussed in more detail below, making unilateral changes prior to impasse. Delaying tactics that may be found to violate the duty include refusing to schedule, cancelling, 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, supra*. See also *Celex Corp*, 322 NLRB 977 (1997); *Radisson Plaza Minneapolis and Hotel Employees and Restaurant Employees Union, Local 17 of St. Paul/Minneapolis and Vicinity, AFL-CIO*, 307 NLRB 94, 96 (1992).

In assessing whether a party has fulfilled its bargaining obligation, the Commission has always been mindful of the language of Section 15, which states that agreement or concessions cannot be compelled. *Ida Pub Schs*, 1996 MERC Lab Op 211, 215; *Center Line Pub Schs*, 1976 MERC Lab Op 729, 733; *Lake Michigan College*, 1974 MERC Lab Op 219 aff'd *Lake Michigan Federation of Teachers v Lake Michigan College*, 60 Mich App 747 (1975). However, "unusually harsh, vindictive or unreasonable proposals" that are clearly designed to frustrate agreement on a collective bargaining agreement may be, along with other conduct by an employer manifesting bad faith, evidence of surface bargaining. *Alpena Regional Medical Ctr*, 23 MPER 11 (no exceptions), quoting *Reichold Chemicals*, 288 NLRB 69 (1988), aff'd in pertinent part 906 F2d 719 (CA DC 1990). For example, in *Oakland Cmty College*, 2001 MERC Lab Op 273, the Commission found that the conduct of the employer during the entire course of bargaining indicated the lack of an open mind and a sincere desire to reach an agreement. Although the Commission examined specific proposals, it did so only to evaluate whether, in the context of the entire bargaining process, they were intended to frustrate the negotiations. The finding of a bargaining violation was based, in part, on the fact that the employer's proposals included provisions which would have given it almost total control over working conditions, including an extremely broad management rights clause and language giving it the unrestricted right to reorganize, subcontract and determine wage adjustments. The Commission concluded that these proposals, in combination, were designed to undermine the status and authority of the union and deny it an effective voice in determining terms and conditions of employment.

There is no allegation that CATA presented unusually harsh, vindicative or unreasonable proposals to the Union during the course of the bargaining process as was the case in *Oakland Cmty College*, 2001 MERC Lab Op 273, at least not prior to Respondent's post-implementation offer which is discussed in more detail below. There is no indication in the record of anti-union animus on the part of CATA or the members of its bargaining team, nor is there any evidence that Respondent intentionally attempted to delay the negotiations. Rather, the premise of the unfair labor practice charge is the Union's contention that CATA violated its obligation to bargain in good faith by refusing to move any substantial manner from any of the positions it took prior to the commencement of the fact finding proceeding. Indeed, although Charging Party stipulated to the admission of various documents originating from throughout the entire bargaining process, the Union took the position at hearing that evidence relating to the negotiation sessions which occurred prior to the start of the fact finding proceedings was not relevant to its charge. This argument ignores the well-established principle that the determination of whether a party has bargained in good faith requires an examination of the totality of the circumstances. *Unionville-Sebewaing Area Schs, supra*. See also *City of Springfield*, 1999 MERC Lab Op 399, 403; *Kalamazoo Pub Schs*, 1977 MERC Lab Op 771, 776. While an employer's conduct after fact finding is relevant to a

surface bargaining determination and is certainly pertinent to the issue of whether CATA lawfully declared impasse, the parties' entire course of behavior must be examined in order to determine whether there is merit to the Union's surface bargaining allegation.

I conclude that the evidence as a whole does not support a finding that Respondent approached the negotiations without an open mind and a sincere desire to reach agreement. The record establishes that bargaining commenced on October 8, 2019, and continued for a period of approximately a year and a half, including a three-month pause due to the Covid-19 pandemic. During that time, the parties participated in more than 70 bargaining sessions and reached agreement on numerous issues, including changes to the grievance procedure, bus operator training incentives and a health insurance spousal carveout. Although Respondent never moved from its initial position on various issues, including elimination of retiree health care, it did not maintain a fixed position on all issues and made concessions on various matters including larger wage increases, lump sum bonuses and a new position description which would have the effect of increasing the size of the bargaining unit. In fact, Zatkoff determined that Respondent's wage proposal offered would constitute the largest since approximately 2007.

That CATA did not counter every offer presented by the Union does not establish that it engaged in surface bargaining, particularly given the large number of complex issues which remained in dispute and how far apart the parties were with respect to those issues. Notably, it was Respondent which took the initiative in seeking to invoke the dispute resolution procedures available under PERA. The record establishes that it was CATA which requested that the Commission assign a mediator to assist the parties in the negotiations, despite reluctance from the Union's bargaining team to engage the assistance of a neutral third-party. Similarly, it was CATA, and not the Union, which made the decision to file for fact finding. That Respondent did not file its petition until after 67 bargaining sessions had been held undermines Charging Party's assertion that it was CATA's intention to rush through the negotiation process so that it could declare impasse as soon as it was legally entitled to do so.

With respect to bargaining which occurred between the issuance of the fact finding report and the declaration of impasse, there is nothing in the record which would demonstrate that Respondent violated its bargaining obligation under PERA. It is well established that the parties must bargain for a reasonable period of time over the substance of the fact finding report which, in most cases, is 60 days after the issuance of the report. *Wayne Co*, 1984 MERC Lab Op. 1142, and *Wayne Co*, 1985 MERC Lab Op 244, 250, aff'd, 152 Mich App 87 (1986). The parties must make a serious effort to reconcile their differences; simply meeting and discussing the fact finder's report may not, depending on the circumstances, be sufficient to satisfy the bargaining obligation. *Oakland Cmty Coll*, supra; *City of Dearborn*, 1972 MERC Lab Op. 749, 759. However, the obligation to bargain over the fact finder's recommendations does not require a party to adopt those recommendations or make a concession on any particular position. *Wayne County*, 1988 MERC Lab Op 7; *Dearborn* at 758. To that end, the Commission has held that an employer's failure to make concessions or new proposals following the issuance of a fact finding report does not, absent other evidence of bad faith, establish a violation of Section 10(1)(e). *Grand Rapids Pub Museum*, 17 MPER 58 (2004).

In *Grand Rapids Pub Museum*, the parties met and bargained 10 times and engaged in mediation. Two of the major issues in dispute were agency shop and seniority. After the tenth mediation session, the union filed a petition for fact finding. Although not all of the recommendations contained in the fact finding report were favorable to the union, the union expressed to the employer its willingness to accept the report and reach an agreement. At their first meeting following the issuance of the report, the employer maintained its position on most issues, including agency shop and seniority, offered some concessions in other areas, and changed its position with respect to issues which had previously been the subject of lengthy bargaining, including overtime and benefits. The parties met two additional times. At the final meeting, the Union made a package proposal in which it agreed to accept the employer's offer on a substantial number of issues. After the employer rejected that proposal, the Union filed an unfair labor practice charge alleging that the employer engaged in surface bargaining and had not satisfied its obligation to bargain in good faith over the substance of the fact finding report. In dismissing the charge, a majority of the Commission held:

> In the instant case, after examining the bargaining process as a whole, we are unable to find any conduct by the Employer that would demonstrate unwillingness to meet and bargain or that exhibits bad faith. We agree with the Employer that this case is more akin to *Lake Michigan Fed of Teachers v Lake Michigan Coll, 60 Mich App 747 (1975)*. In *Lake Michigan College*, the union requested mediation after the parties met sixteen times, but bargaining proved unsuccessful. After fact finding took place, the union was willing to accept the fact finder's recommendation but the employer rejected it. 60 Mich App 750. Based on the record as a whole, the ALJ found that the employer had merely engaged in hard bargaining, and had not violated its duty to bargain in good faith. *Id* at 751. The Commission affirmed, holding that the employer had fulfilled its duty to bargain, and that its conduct was permissible in light of the fact that PERA does not compel agreement on a proposal or require the making of a concession. In affirming the Commission, the Court of Appeals noted that "many bargaining sessions were held" and stated that "the fruitfulness of these meetings from the [union's] point of view is not controlling." *Id* at 753. The Court also stated that to compel a party to agree to a proposal was contrary to the express terms of Section 15.
>
> Here the Employer met and bargained with the Union before and after fact finding. Like the Union, the Employer maintained its position on agency shop and seniority proposals, but it also made concessions in other areas. The Employer advanced reasons for its position, in some instances relying on the unique character of museums and the broad range of classifications/skills in the bargaining unit, which included both professional and non-professional employees. We find that the Employer's reasons were not so illogical as to warrant an inference that they were intended to frustrate bargaining or evince intent not to reach agreement. See *Hickinbotham Bros Ltd*, 254 NLRB 96, 102-103 (1981).

Based on the record as a whole, I find that CATA's conduct presents an even less compelling case for finding a bargaining violation than that of the employer in *Grand Rapids Pub Museum*. As noted, Charging Party and Respondent had already bargained for approximately a

year and a half and had engaged in almost 70 bargaining sessions by the time the fact finder issued his report on February 12, 2021, including numerous sessions with a neutral mediator present. With respect to the fact finder's recommendations, both parties rejected those portions of the report which did not align with their respective proposals. In its February 19, 2021, letter, CATA provided the Union with its rationale for disagreeing with Zatkoff's recommendations. Thereafter, six additional bargaining sessions were held. The Union presented several proposals during those meetings, each of which Respondent soundly rejected. CATA maintained its position on most issues, though it did make some concessions regarding FMLA leave before declaring impasse. While the record overwhelmingly establishes that CATA engaged in hard bargaining throughout the negotiation process, to find a bargaining violation on these facts would be contrary to Section 15 of PERA and the precedent cited above.

In so holding, I note that there is no evidence that Respondent committed any other bargaining misconduct prior to its declaration of impasse. Charging Party's arguments concerning CATA's alleged failure to abide by assurances it made to the Michigan Department of Treasury in 2019 cannot establish a violation of PERA, as the Commission has no jurisdiction to enforce corrective action plans. To the extent that Respondent relied upon statements set forth in the corrective action report in its submissions to the fact finder, the union had ample opportunity to bring any alleged misrepresentations to light. Likewise, I find no merit to the Union's assertion that CATA committed an unfair labor practice by misrepresenting the extent to which its retiree healthcare plan was underfunded in the "Factsheet" which it published prior to the membership vote, as such conduct cannot be the basis for finding a PERA violation. The Commission has held that it will not police "negotiation propaganda" for accuracy since the other party generally has an opportunity to rebut any misstatements. *Alpena Regional Medical Center*, 23 MPER 11 (2010); *Warren Consolidated Schs*, 1975 MERC Lab Op 129; *Melvindale-Northern Allen Park Pub Schs*, 1992 MERC Lab Op 400, 407. Based on the totality of the circumstances, I conclude that Respondent did not engage in surface bargaining or otherwise act in bad faith with respect to its pre-implementation conduct.

I also find that the record does not support Charging Party's assertion that CATA prematurely declared impasse. An employer violates Section 10(1)(e) of PERA when it takes unilateral action on a mandatory subject of bargaining before the parties have reached a legitimate impasse in negotiations. *Detroit Police Officers Ass'n v Detroit*, 61 Mich App 487, 490 (1975); *Internat'l 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 positions of the parties have so solidified that further bargaining would be futile. *Redford Union Sch Dist*, 23 MPER 32 (2010); *Oakland Cmty Coll*; *Wayne Co (Attorney Unit)*, 1995 MERC Lab Op 199, 203; *City of Saginaw*, 1982 MERC Lab Op 727. Once the parties have reached impasse, the employer is usually free under Section 10(1)(e) to take unilateral action as long as the terms and conditions of employment which it implements are "reasonably comprehended" within the employer's pre-impasse proposals. *Escanaba Area Pub Sch*, 1990 MERC lab Op 887; *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 56 (1974). See also *Taft Broadcasting Co, WDAF AM-FM TV*, 163 NLRB 475 (1967), enf'd sub nom *Television Artists AFTRA v NLRB*, 395 F2d 622 (CA DC 1968).

One party's declaration that impasse has been reached is not determinative. *St Ignace Area Sch*, 1983 MERC Lab Op 1042; *Munson Medical Ctr*, 1971 MERC Lab Op 1092-1100-1102 (no

exceptions). Rather, the determination of whether a bona fide impasse exists is made on a case-by-case basis, taking into account the totality of the circumstances and the entire course of 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 the amount of time spent in bargaining, whether the positions of the parties have become fixed, the contemporaneous understanding of the parties as to the state of the negotiations, the importance of the issue or issues as to which there is disagreement, whether the parties have utilized mediation and fact finding and business necessity. *Oakland Cmty Coll*; *City of Benton Harbor*, 1996 MERC Lab Op 399, 406; St *Joseph Co Dist Ct*, 1998 MERC Lab Op 406; *Cass Co Rd Comm*, 1984 MERC Lab Op 306; *Macomb Co Rd Comm*, 1979 MERC Lab Op 939; *Crestwood Sch Dist*, 1975 MERC Lab Op 609. See also *Taft*, 164 NLRB at 478.

In the instant case, Charging Party asserts that a bona fide impasse did not exist because the positions of the parties were not fixed at the time CATA announced that it would be implementing portions of its last offer. There can be no dispute that Charging Party's April 13, 2021, proposal contained concessions on a number of issues. For the first time, the Union agreed to several of CATA's proposals, including paying employees time-and-a-half for all hours worked over 40 hours in a week instead of daily overtime, elimination of the requirement that an operator keep the same bus each day, reducing the safe driving limit to 13 hours, limiting sixth and seventh day overtime to situations in which an employee has been forced to work, deleting the attendance bonus for employees who miss only two shifts in a month and agreeing to a three year contract. At the same time, however, the Union withdrew some of its prior concessions and continued to hold firm on a number of issues which the Employer had identified as crucial, including its demand that CATA implement a retiree healthcare savings plan. Moreover, the Union proposed an increase in wages and bonuses which not only deviated significantly from each of its prior offers but also resulted in a major widening of the chasm between the parties on the issue of compensation. Charging Party proposed an increase in wages of 21.5 percent over the term of the contract, which was almost ten percent higher than the proposal which it had made earlier to the fact finder. The Union also increased the bonuses it was seeking by more than $5,000 for each full-time employee and $2,750 for each part-time employee over the term of the contract. A union does not prevent impasse by making proposals that it knows would be unacceptable to the employer. *Saint-Gobain Abrasives, Inc*, 343 NLRB 542, 559 (2004).

At the time Respondent implemented its last offer, the parties had bargained for more than 16 months and had exchanged dozens of proposals. As noted, a total of 73 bargaining sessions had been held prior to implementation by CATA, including approximately two dozen meetings with the assistance of a mediator. The parties participated in a two-day fact-finding hearing, following which both Charging Party and CATA rejected all of the recommendations which did not align with their respective positions. Less than a week before Respondent declared impasse, Charging Party held a membership vote on CATA's last offer which resulted in an almost unanimous rejection of the terms and conditions of employment offered by Respondent. Although the parties had resolved a number of issues and the Union continued to make some concessions, the parties were still far apart on wages and bonuses, as well as a number of the issues that CATA had identified as significant since the start of the negotiations. Had the Union made the concessions contained within its April 13, 2021, offer earlier in the course of the negotiations, a different conclusion might result. Under these specific circumstances, however, I am unable to conclude

that a continuation of bargaining would have culminated in an agreement. As noted by the Commission, "an impasse is no less an impasse because the parties were closer to agreement than previously, and a deadlock is still a deadlock whether produced by one or a number of significant and unresolved differences in positions." *Kalkaska Co Rd Comm*, 29 MPER 65, quoting *Taft,* 163 NLRB at 478. See also *South Redford Sch Dist*, 1988 MERC Lab Op 447.

The final issue is whether Respondent violated Section 10(1)(e) of PERA with respect to its post-implementation conduct. It is well established that an employer may unilaterally impose changes in terms and conditions of employment after the parties have reached a bona fide impasse in negotiations. *Wayne County*, 1988 MERC Lab Op 7. This includes any changes "reasonably comprehended" within the employer's pre-impasse proposals. However, even the existence of a bona fide impasse does not permanently terminate the collective bargaining obligation. *Escanaba Area Pub Sch*, 1990 MERC Lab Op 887; *City of Highland Park*, 1993 MERC Lab OP 71; *Cass Co. Road Comm*, 1983 MERC Lab Op. 378. Rather, the duty to bargain is merely suspended until circumstances change which break the impasse. *Escanaba*; *City of Ishpeming*, 1985 MERC Lab Op 517, 520-521. The Commission has held that even lawful changes implemented after impasse do not have the status of a collective bargaining agreement and do not act to foreclose bargaining over these issues for a set period, as is the case when the parties voluntarily enter into a collective bargaining agreement with a fixed term. *Escanaba*; *Wayne County* at 15, fn 2

In the instant case, Charging Party argues that CATA engaged in regressive bargaining after implementation by proposing less favorable terms than in its prior proposals and by unilaterally withdrawing from tentative agreements entered into during the course of the negotiations. 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. *Clare-Gladwin ISD*, 1987 MERC Lab Op 637; *Kalamazoo Public Schools*, 1977 MERC Lab Op 771. Even alteration of an arguably tentative agreed upon piece of contract language does not, standing alone, state a viable claim. *Waldron Area Sch*, 1997 MERC Lab Op 256. 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. As ALJ Nora Lynch noted in *Hart Pub Sch*, 1989 MERC Lab Op 961 (no exceptions), "Charging Party and employee organizations generally should disabuse themselves of the notion that an employer's offer on compensation, hours, or working conditions that is novel or even on first glimpse regressive is per se a refusal to bargain in good faith."

In the instant case, CATA presented a new package proposal to the Union after lengthy negotiations had failed to bring about an agreement and impasse had been declared. Some of the new terms and conditions of employment presented by Respondent on April 22, 2022, represented essentially minor tweaks to the language of the expired contract or the tentative agreements previously reached between the parties, such as the addition of a reference to Section 13(c) agreements in the zipper clause. Other proposed changes were more substantive. Whether or not these changes were "regressive," as characterized by the Union, the fact that a party may modify its position, or offer less, over the course of long bargaining does not constitute bad faith. See *Waldron Area Schs*; *Alba Pub Schs*. Because CATA's prior offer was a package proposal, I conclude that Respondent's withdrawal of some of the terms set forth therein was not indicative

of bad faith, particularly where, as here, Respondent's bargaining team informed the Union at the time that it would be open to revisiting its prior proposal. Compare *Springfield*, supra, in which the Commission found a violation when the employer made a proposal after almost a year of bargaining which eliminated major elements of the prior tentative agreements and substantially altered the language of the expired contract.[3] Based on the totality of the circumstances, I conclude that the April 22, 2021, package proposal does not demonstrate an intention on the part of Respondent to scuttle the negotiations or avoid reaching a good faith agreement.

I have carefully considered the remaining arguments set forth by the parties in this matter and find that they do not warrant a change in the result. For the reasons set forth above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charge filed by the Amalgamated Transit Union (ATU), Local 1039 against the Capitol Area Transportation Authority in Case No. 21-E-1120-CE; Docket No. 21-009748-MERC is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

David M. Peltz
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated: October 11, 2022

[3] It should also be noted that CATA was not alone in making allegedly "regressive" proposals of this nature. The record establishes in its last package proposal before impasse was declared, the Union, without explanation, withdrew its compromise proposal regarding the calculation of vacation pay and instead sought to revert to the language of the expired agreement.