STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GREAT LAKES WATER AUTHORITY,
Public Employer-Respondent, MERC Case No. 20-J-1546-CE

-and-

SENIOR WATER SYSTEMS CHEMIST ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Allen Brothers PLLC, by James P. Allen, for Respondent

Jerome D. Goldberg PLLC, by Jerome P. Goldberg, for Charging Party

DECISION AND ORDER

On June 23, 2021, Administrative Law Judge David M. 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: August 13, 2021

[1] MOAHR Hearing Docket No. 20-020584

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

In the Matter of:

GREAT LAKES WATER AUTHORITY,
Respondent-Public Employer,

Case No. 20-J-1546-CE;
Docket No. 20-020584-MERC

-and-

SENIOR WATER SYSTEMS CHEMIST ASSOCIATION,
Charging Party-Labor Organization.

_____/

APPEARANCES:

Allen Brothers PLLC, by James P. Allen, for the Respondent

Jerome D. Goldberg PLLC, by Jerome P. Goldberg, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case arises from an unfair labor practice charge filed by the Senior Water Systems Chemist Association (SWSCA) against the Great Lakes Water Authority (GLWA). Pursuant to §§ 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the case 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 filed on or before December 29, 2020, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge and Background Facts:

The charge was filed on October 5, 2020. Respondent is a regional water authority which came into existence on January 1, 2016. Charging Party represents a bargaining unit consisting of GLWA chemists who are responsible for monitoring wastewater as it is returned to the Detroit River and ensuring that water pumped from the river is properly filtered. In March of 2020, Charging Party and the GLWA began negotiations for a new collective bargaining agreement to replace the contract which was set to expire on June 30, 2020. A tentative agreement was reached on or about July 24, 2020. The charge alleges that

the GLWA violated §§ 10(1)(a) and (e) of PERA by repudiating its obligations under that tentative agreement.

Findings of Fact:

The parties began negotiating a successor collective bargaining agreement on March 2, 2020. Respondent's bargaining team consisted of James Allen, attorney, Karen Darty, Organization Development Manager, Cheryl Yapo, Director of Workspace Relations, Terri Conerway, Organization Chief, and Jordi Kramer, Employee Benefits. Negotiating for Charging Party were attorney Jerome Goldberg, Kuriakose Cheeramvelil, SWSCA President, and Tevin Gripper, Financial Secretary. Cheeramvelil has been employed by Respondent and its predecessor, the City of Detroit (Department of Water & Sewerage), for approximately 39 years and has served on the Union's negotiating team for every contract since 1994.

The emerging Covid-19 crisis in early March of 2020 substantially impacted the party's negotiations, as well as the working conditions for SWSCA members. Because of their work with wastewater, bargaining unit members were at risk of being exposed to the virus and were required to use personal protection equipment (PPE). For safety reasons, the chemists were split into individual groups and assigned to work rotating 12-hour shifts. In recognition of these hardships, Respondent began providing enhancement pay to the chemists in the amount of $1 per hour. The pandemic also resulted in the GLWA suspending negotiations with the SWSCA for several months.

Respondent made its first contract proposal to the Union by email dated June 8, 2020. On June 12, 2020, Goldberg sent Charging Party's response to that proposal to the GLWA, along with a memorandum regarding the issue of arbitration of discrimination claims. At the time, unresolved issues included a sign-on bonus and increases for level advancement, shift premiums and tuition reimbursement. Goldberg expressed hope that the contract could be settled quickly and proposed that the parties begin bargaining remotely. At some point thereafter, bargaining resumed by Zoom. When it became clear that negotiations would not be concluded by the time the current contract expired on June 30, 2020, the Union accepted Respondent's proposal to extend that agreement for a period of thirty-days.

During a bargaining session on July 24, 2020, the GLWA proposed making the $1 per hour COVID-19 pay enhancement a permanent part of the chemists' base compensation in exchange for the Union agreeing to forgo further discussion of the remaining outstanding issues, which included an increase in the shift premium and tuition reimbursement increases. Yapo testified that Respondent's proposal was in recognition of the work that the chemists had performed during the pandemic. The SWSCA bargaining team agreed to the Employer's proposal, thereby tentatively settling the contract.

In an email sent to Cheeramvelil at 4 p.m. that same day, Yapo indicated that a final draft of the "proposed CBA and memoranda" was being circulated internally for review. At the hearing in this matter, Yapo testified that she forwarded a draft of the proposed agreement to members of the GLWA Executive Leadership Team (ELT). According to Yapo, the ELT consisted of Conerway, Kramer, CEO Sue McCormick, compliance officer Bill

Wolfson and general counsel Randal Brown. Yapo testified that none of the members of the ELT expressed any misgivings about the terms of the proposed contract.

Yapo subsequently sent a draft of the tentative agreement to Cheeramvelil. Article 37 of the proposed contract provided, in pertinent part, "This Agreement shall become effective upon the effective date of a Resolution of Approval of GLWA Authority Board of Directors as provided by law and shall remain in full force and effect until 11:59 P.M., June 30, 2020." The agreement to make the $1 per hour pay enhancement permanent was set forth in a Memorandum of Understanding (MOU) attached to the agreement which stated, in part:

> **WHEREAS** the parties have faced unprecedented circumstances amid the COVID-19 pandemic beginning in March 2020 and are continuing to do so;
>
> **WHEREAS** GLWA wishes to recognize the impact of the COVID-19 pandemic on SWSCA members and further recognize their dedication to continually providing water of unquestionable quality to the community;
>
> **NOW, THEREFORE** the Parties, to promote continuous peaceful and harmonious labor relations, agree as follows:
>
> 1. Upon execution of this Memorandum of Understanding, SWSCA operational personnel who have been required to work on-site since March 16, 2020 shall receive a $1 increase to their hourly wage.
>
> 2. The Memorandum of Agreement entered into by the Parties on March 17, 2020 providing for a $1 per hour pay enhancement for personnel required to work on-site is no longer in effect and deemed null and void.
>
> 3. This agreement shall be without precedent and SWSCA agrees not to cite or reference this Memorandum of Agreement in any other matter or proceeding, except as to its enforcement or application.

Cheeramvelil signed and dated each article of the draft agreement, including Article 37 and the pay enhancement MOU, and returned the document to Respondent on or about July 25, 2020. On July 27, 2020, Yapo responded by thanking Cheeramvelil and promising to return a signed copy of the agreement to the Union.

In early August of 2020, members of the SWSCA bargaining unit voted to ratify the tentative agreement. Cheeramvelil notified Respondent of the results of the Union ratification vote by email dated August 3, 2020. The following day, Yapo responded by thanking Cheeramvelil and promising to "take the next steps here." At hearing, Yapo explained that her reference to "the next steps" meant advising the ELT and ensuring that the tentative agreement was placed on the GLWA Board's meeting agenda.

At its meeting on August 12, 2020, the Board voted to reject the tentative agreement. According to Yapo, who attended the meeting, the Board did not specifically seek a recommendation from members of the ELT prior to voting. However, Yapo testified that the

mere fact that the tentative agreement was placed on the meeting agenda in and of itself constituted a recommendation from the bargaining team that the Board approve the contract. It is undisputed that Respondent did not immediately notify the SWSCA of the results of the ratification vote.

Cheeramvelil became concerned when the Union had not received a signed contract back from Yapo. On September 15, 2020, Cheeramvelil sent an email to Yapo regarding various matters, including the addition of the $1 per hour salary enhancement to the base pay rate. Thereafter, Yapo contacted Cheeramvelil by telephone and informed him that the Board had rejected the tentative agreement. The GLWA formally advised the Union of the results of the ratification vote in an email from Conerway to Cheeramvelil dated September 18, 2020. In that email, Conerway wrote:

> As we discussed today, the collective bargaining agreement tentatively agreed upon by the GLWA and SWSCA was not approved by the GLWA Board of Directors. Specifically, the Board did not agree to the Memorandum of Understanding rolling over into base salary the $1 per hour pay adjustment temporarily granted to SWSCA members during Michigan's state of emergency due to the COVID-19 pandemic.
>
> Therefore, GLWA must withdraw the Memorandum of Understanding attached to the tentative agreement you signed on July 26, 2020. If you agree, at the next regularly scheduled Board meeting, GLWA will present the tentative agreement for the Board's approval without the Memorandum of Understanding rolling the $1 pay enhancement into base salary.
>
> Meanwhile, as we discussed also today, GLWA is notifying you that it will continue to pay the $1 per hour pay enhancement to SWSCA members as set forth in the Memorandum of Agreement between GLWA and SWSCA signed on March 17, 2020. The enhanced pay will remain effective until Governor Whitmer's declared State of Emergency in Michigan ends or until the end of GLWA's fiscal year 2021 (June 30, 2021), which ends sooner.

The next day, Goldberg sent the following response to Conerway on behalf of the Union:

> Kuriakos informed me that the GLWA is reneging on the Memorandum of Understanding in the 2020 contract regarding the rollover of [sic] into the base pay of the $1 per hour hardship payment to employees required to work onsite during the Covid 19 emergency. This was actually a proposal from the GLWA negotiating team which was agreed to by the union in exchange for the union dropping some of its demands.
>
> I am prepared to file an Unfair Labor Practice with PERA [sic] for this failure to honor the agreement reached in negotiations. I understand final approval of the contract was subject to approval by the Board, but I believe the law supports a ULP where a contract bargained for and agreed to by the team empowered to negotiate the contract is repudiated by the employer.

It is undisputed that Yapo never informed Cheeramvelil, either during negotiations or after reaching agreement on a successor contract, that there might be a problem getting the agreement approved. In fact, Cheeramvelil contends that he did not read Article 37 of the proposed contract and that he was unaware that ratification by the GLWA board would be required. Cheeramvelil testified that this was the first time in his 24 years of negotiating with the GLWA and its predecessor, the City of Detroit (Department of Water & Sewerage) that a tentative agreement was rejected due to the existence of a contract term first proposed by the Employer.

Yapo testified that she had no discussions with the GLWA Board, either as a whole or with individual members, prior to the meeting at which they rejected the tentative agreement, and that she is not aware of whether any other members of Respondent's bargaining team ever spoke with the Board regarding the status of negotiations. However, Yapo did routinely provide updates to Wolfson and/or McCormick whenever there were significant developments during the negotiations, including Respondent's proposal to make the $1 pay enhancement a permanent part of the base pay for bargaining unit members. Yapo testified that she did not know whether either Wolfson or McCormick ever discussed such matters with members of the Board.

At hearing, Yapo testified regarding changes to the GLWA's financial condition which she claims did not become apparent to Respondent until sometime between late July and early September of 2020. According to Yapo, the GLWA was facing an 8-million-dollar reduction in investment income for the 2021 fiscal year and a projected 7.4 million dollars in liability for employee retirement costs. Yapo also testified that Respondent projected a loss of 5.7-million dollars for the first and second quarters of 2021 due to a decision made by the GLWA at the request of its member partners to refrain from passing along rate increases to end users of the water system. According to Yapo, a moratorium on water shutoffs imposed by the Governor also contributed to that projected loss in revenue.[1] Yapo testified that Respondent had applied for federal and state grants, including funding under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, but that it had not received approval for such funding as of the date of the hearing. According to a press release issued by Respondent on May 1, 2020, the GLWA executed a bond transaction early the prior month which generated $103 million in cashflow savings.

Discussion and Conclusions of Law:

Charging Party contends that the GLWA's rejection of the tentative agreement negotiated by the parties based upon an Employer proposal constituted a breach of the obligation to bargain in good faith under § 10(1)(e) of PERA and a violation of § 10(1)(a) of the Act. Respondent asserts that no bargaining violation occurred because the agreement reached between the parties on July 24, 2020, was tentative and subject to ratification by its governing body.

[1] The moratorium on water shutoffs was implemented pursuant to Executive Order 2020-28 issued on March 30, 2020.

Under Section 9 of PERA, public employees have the legal right to "organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice." Section 10(1)(a) of PERA makes it unlawful for a public employer to interfere with, restrain or coerce public employees in the exercise of rights guaranteed to them under Section 9 of the Act, including the right to "negotiate or bargain collectively with their public employers through representatives of their own free choice." Section 10(1)(e) of the Act prohibits a public employer from refusing to bargain collectively with the representatives of its public employees. 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 Sch*, 1988 MERC Lab Op 86, 89, quoting *Detroit Police Officers Assn v City of Detroit*, 391 Mich 44, 53-54 (1975).

A part of the obligation to bargain in good faith is the duty to send representatives to the table who have the authority to negotiate and reach agreement. *Taylor Pub Sch*, 22 MPER 29 (2008) (no exceptions). However, a public employer is not required to clothe its negotiators with the authority to enter into a binding agreement. *Farwell Pub Sch*, 1985 MERC Lab Op 948, 950. It is well established that to become final under PERA, a tentative collective bargaining agreement must be ratified by formal action of the governing body of a public employer. *River Rouge Bd of Ed*, 1968 MERC Lab Op 724; *North Dearborn Hts Sch Dist*, 1967 MERC Lab Op 673. Except in exceptional circumstances indicating an intent to delay or impede negotiations, a party's repudiation of a tentative agreement short of ratification does not constitute a violation of the duty to bargain in good faith. *Shelby Twp*, 1989 MERC Lab Op 704; FOP, *Saginaw Police Dep't*, 1988 MERC Lab Op 197; *Eau Claire Pub Sch*, 1973 MERC Lab Op 184.

In the instant case, there is no dispute that the parties reached a tentative agreement at the July 24, 2020, negotiation session. The gravamen of the SWSCA's charge appears to be Cheeramvelil's contention that the Union's bargaining team was unaware that ratification of the agreement was required in order for execution of the contract. Given that Cheeramvelil was an experienced Union representative with a long history of participating in contract negotiations with the GLWA and its predecessor, the City of Detroit (Water & Sewerage Department), I find such a claim dubious, at best. In any event, the terms of the agreement reached between the parties explicitly provided that ratification by the board was a requirement. Article 37 of the tentative agreement, which Cheeramvelil himself initialed, states, "This Agreement shall become effective upon the effective date of a Resolution of Approval of GLWA Authority Board of Directors as provided by law and shall remain in full force and effect until 11:59 P.M., June 30, 2020." There is no evidence or even any allegation by the Union of an intent by the GLWA to delay or impede negotiations, nor is there any support in the record for a finding that the Board's rejection of the tentative agreement was motivated by bad faith. Under such circumstances, I find no basis upon which to conclude that Respondent breached its duty to bargain in good faith.

Charging Party asserts that the GLWA should be equitably estopped from denying the existence of a binding collective bargaining agreement because the board rejected the

contract based upon a term proposed by its own bargaining team. However, Respondent presented evidence that the Employer's financial condition had deteriorated since the parties began bargaining a successor contract. For example, Yapo testified credibly that during the summer of 2020, the GLWA realized that it was facing an $8 million reduction in investment income, a projected loss of $ 5.7 million for the first and second quarters of 2021 due to a reduction in service charges, and a projected 7.4 million in liability for employee retirement costs. Although Charging Party questions whether the Employer's finances were as dire as claimed by Respondent, it offered no evidence to contradict Yapo's testimony concerning these specific budgetary concerns. It is not the role of the Commission to second-guess the governing body's decision-making regarding the ramifications of a proposed agreement on the public employer's budget.

The Union further asserts that the Employer may not lawfully rely upon an alleged change in its financial condition to justify its failure to ratify the tentative agreement. In support of this argument, Charging Party references prior decisions in which public employers were found to have violated § 10(1)(e) of PERA by repudiating the terms of collective bargaining agreements due to alleged budgetary issues. *City of Belleville*, 2011 WL 2178653 (Case No's. C09 G-115 & CU09 J-032, issued February 14, 2011) and *Taylor Pub Sch*, supra. Both of the cases cited by the Union, however, involved alleged changes in financial circumstances which occurred following ratification and, therefore, are inapplicable to the question presented here.

Next, Charging Party contends that the GLWA should be bound by the terms of the tentative agreement because Yapo and other members of the Employer's negotiating team failed to affirmatively advocate in support of ratification of the agreement. The Commission has recognized that collective bargaining envisions an obligation on the part of those involved in the negotiation process to affirmatively support a contract to which they have tentatively agreed, and that a failure to do so may constitute an unfair labor practice. *City of Springfield*, 1999 MERC Lab Op 399; *Brighton Area Sch*, 22 MPER 88 (2009). In support of its claim that members of the GLWA negotiating team failed to advocate for ratification of the agreement, Charging Party relies on a an "exhibit" attached to its post-hearing brief which is purportedly the minutes of the August 12, 2020, board meeting at which the tentative agreement was rejected. The Union contends that the document contradicts Yapo's testimony that she never discussed the contract negotiations with the board. According to the Union, the minutes establish that there was a private session between members of the bargaining team, including Yapo, and the board just before the governing body voted to reject the tentative agreement. Based upon this "exhibit", the Union hypothesizes that "whatever the negotiators said during this private session prompted Board member Brown to change his vote which led to the contract not being ratified."

The problem with this argument is that Charging Party never sought to introduce the meeting minutes into the record in this matter, nor did the Union request that I take judicial notice of that "exhibit" or seek leave from the undersigned to reopen the record for the inclusion of the document. In fact, the Union did not even so much as acknowledge in its

post-hearing brief that the document attached thereto was not part of the hearing record.[2] It is well established that documents not admitted during the hearing may not be considered as part of the record. *Redford Union Sch Dist*, 23 MPER 32 (2010). Even if the meeting minutes could be properly relied upon for purposes of this decision, Charging Party's argument with respect to what may have occurred in private session is based on nothing more than speculation and conjecture.

Finally, assuming *arguendo* that the record supported a finding that Respondent breached its obligation to bargain in good faith in connection with the ratification vote, there is no basis for ordering the remedy sought by Charging Party in this matter. The SWSCA requests that the Commission order the GLWA to implement the tentative agreement reached on July 24, 2020, specifically the memorandum of understanding regarding the $1 per hour enhancement pay. The Commission has found a public employer to be bound to the terms of a tentative agreement which its governing body never ratified only in a few, very specific, circumstances, such as when members of the employer's negotiating team signed a tentative agreement and then voted against its ratification or when a union relied to its detriment on a misrepresentation of fact concerning the agreement's ratification. See *Redford Twp*, 1982 MERC Lab Op 1078; *City of Coldwater*, 1972 MERC Lab Op 362. No such factors are present in the instant case.

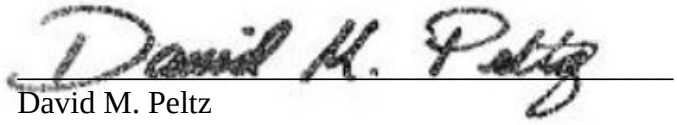
I have carefully considered the remaining arguments set forth by the parties in this matter and conclude that they do not warrant a change in the result. For the reasons set forth above, I recommend that the Commission issue the following order.

[2] In fact, Charging Party improperly relied upon several documents in its brief which were not made part of the record. In addition to the minutes of the board's August 12, 2020, meeting, the Union attached to its brief the minutes from an earlier board meeting and also referenced a newspaper article which I had previously indicated appeared to be inadmissible hearsay. The Union also referenced an excerpt from a document entitled, "Handbook for Municipal Officials" which it claims is published by an advisory organization in Michigan, along with an apparent press release issued by the City of Detroit. I find Charging Party's reliance on non-record materials wholly inappropriate and deeply troubling.

RECOMMENDED ORDER

The unfair labor practice charge filed by the Senior Water Systems Chemist Association against the Great Lakes Water Authority in Case No. 20-J-1546-CE; Docket No. 20-020584-MERC is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



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

Dated: June 23, 2021